UNION OF SOUTH AFRICA.

SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(CAPE AND O.F.S.).

1935.

(OFFICIAL)

VOL. 7.

6121

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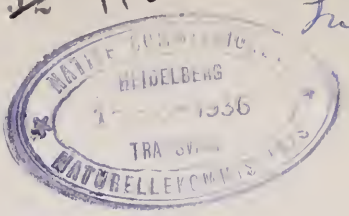

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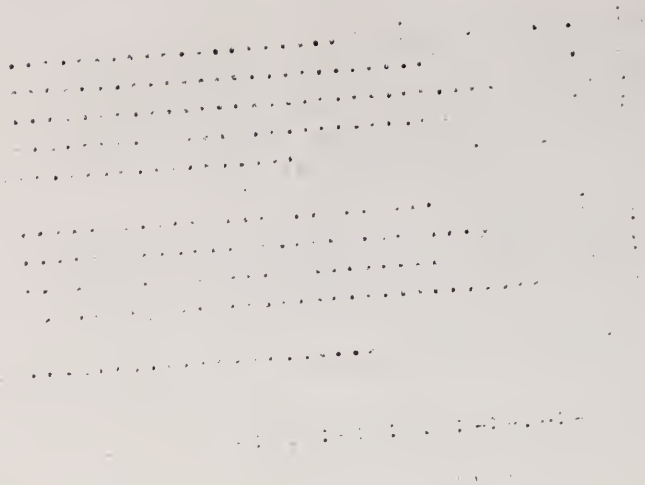

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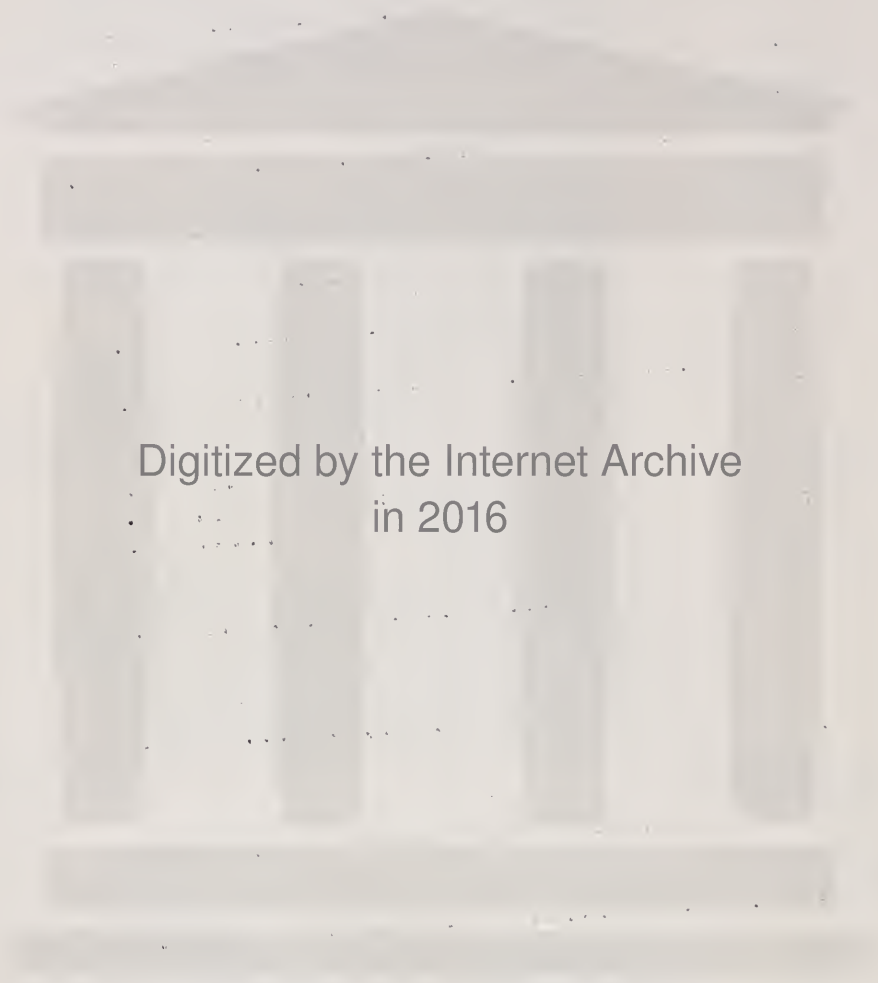

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-S E L E C T E D D E C I S I O N S-

of the

NATIVE APPEAL COURT

(Cape and Orange Free State Provinces)

-:-:-:-:-

-VOLUME VII-

Case No.1.

-IRVINE DYASI vs FANNY DYASI.-

BUTTERWORTH: 15th February, 1935. Before R.D.H.Barry Esquire, President and Messrs W.H.P. Freemantle and J.W.Sleigh members of the N.A.C.

Surveyed allotment, Ejectment of heir from by widowed mother disallowed; widow's rights in kraal site and Arable allotment: Interpretation of Section 9(1) of Proclamation No. 142 of 1910 as amended.

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

In this case the Plaintiff claimed as against the Defendant:-

(1) An order of ejectment from Lot No.183, Cegcuana Location A, Butterworth and removal of a certain square house erected by him on the said allotment and the return to the Plaintiff of the title-deed of the allotment.

(2) Damages in the sum of £20 as and for trespass by having built the house in question on the lot, depriving her of her food supply and mealie crop, the dispossession of two oxen before and since she left the allotment and his ejectment of the Plaintiff by order and duress from the allotment.

(3) The restoration of 21 bags of mealies or their value £19:19:0 and

(4) The restoration of the two oxen referred to in (2).

The pleadings contain a great deal of detail and it is unnecessary to here set them out - more especially as certain of the claims have been disallowed and no cross-appeal has been noted.

Judgment.../

Judgment was entered in the Court below in the following terms:-

(1) Defendant is ordered to remove from the allotment within thirty days from the date of this judgment, to hand over the deed of grant of the allotment to the Plaintiff, but is not ordered to remove any building from the lot.

(2) Defendant is absolved in regard to the claim for damages.

(3) Defendant is ordered to restore to the Plaintiff certain nine bags of mealies or pay their value at the rate of 18/- per bag.

(4) Defendant is absolved in regard to the two cattle.

(5) Defendant must pay the costs of suit. Plaintiff is declared a necessary witness.

Against this judgment the Defendant has appealed on the following grounds:-

(1) The judgment is against the weight of evidence and contrary to law.

(2) The Plaintiff's action is based upon a right to the use and occupation of Lot 189 to the complete exclusion of the Defendant and all other members of the family of the late Booi Dyasi and this claim and contention is wrong in law as it is contrary to the meaning and intention of Proclamation 227 of 1898 as amended.

(3) That the Magistrate erred in his interpretation of Proclamation 227 of 1898 and in holding that Native custom does not apply to the use and occupation of allotments thereunder.

(4) He erred in holding that Lot 189 was granted as an arable allotment and in his interpretation of Section 4 of Proclamation 227 of 1898. Proclamation 227 of 1898 was clearly intended to confirm existing holdings in appropriate cases and to provide for future allotments.

Having regard to the admitted fact that Lot 189 was occupied as a building allotment prior to and at the time of survey, and has so been occupied to this date, there is a presumption of law that it was so confirmed and granted as a building allotment under Section 4.

(5) That the form of title deed in respect of grants is part of Proclamation 227 of 1898 and in construing the meaning and intent the whole Proclamation must be looked to and if this be done

the.../

the intention to apply the Native custom is clear and definite.

(6) The title deed contains a condition that it is "subject to all such duties and regulations as either are already or shall in furure be established with regard to such lands" and this condition covers the provisions of the subsequent amending Proclamations including Proclamations Nos. 142 of 1910 and No. 58 of 1920.

(7) That in interpreting a statute regard must be had to the general intention of the Proclamation; and the interpretation placed upon it must give effect to that intention and be a reasonable interpretation, whereas the interpretation placed upon Proclamation 227 of 1898 and amending Proclamations by the Assistant Native Commissioner is a complete negation of the interpretation accepted upon for nearly 40 years and would create administrative chaos through the length and breadth of the Territories and be completely subversive of accepted Native custom and family life.

(8) That Plaintiff having failed to prove grounds for ejecting the Defendant, her action in respect of his ejectment from Lot No. 189 must fail.

(9) That Plaintiff having without just or reasonable cause vacated the lot in question she has no right of action against the Defendant in respect thereof and her claim must fail.

(10) Plaintiff has by her petty conduct and her malicious prosecution of the Defendant on a criminal charge of trespass, herself been guilty of breaches of Native custom and family life which are inconsistent with her duty in the use and occupation of Lot 189.

(11) That Defendant in keeping the title deed upon Lot 189 has not been guilty of any act or omission entitling the Plaintiff to a judgment in respect of the said Deed and such judgment is wrong in law and fact.

(12) That there is no evidence to justify the judgment in respect of the 9 bags of mealies which at all material times were and are upon the allotment for the use of the Plaintiff whilst properly residing thereon. She has no right in law to remove these mealies from the allotment.

(13) That Proclamation 110 of 1879 specially preserves the application of Native custom in all suits between Natives.

(14) That the judgment in the case of Mavayeni vs Mavayeni is an authority for the legal contentions of the Defendant insofar as lot 189 is concerned and

the.../

the Assistant Native Commissioner was bound to follow that decision which is neither weakened nor overruled in any respect by the judgment in the case of Pakkies vs Pakkies which dealt solely with an open transfer deed of land held at one time by European and not containing the restrictive conditions imposed by Proclamation 227 of 1898 as amended by subsequent Proclamation above quoted.

The matter at issue is further narrowed down by the fact that the status of the respective parties is not in dispute and by reason too of the agreement of the parties as recorded at the last hearing, by which the Defendant was to deliver to the Plaintiff nine bags of mealies. The appeal in respect of this portion of the judgment has not been pressed and calls for no comments.

The crisp point for decision is, therefore, whether in law and fact the Plaintiff is entitled to have the Defendant ejected from the allotment and to be placed in possession of the title deed thereof.

From the evidence it would appear that the following facts were established:-

In 1873 the late Booi Dyasi married his first wife, Ida. She bore him three sons, the eldest being Irvine the Defendant in this action. Between 1898 and 1900 Ida died. In 1903 Booy married his second wife, the Plaintiff, by Christian rites.

Prior to survey of the Butterworth district Booy occupied a piece of land for both arable and residential purposes under communal tenure as confirmed by Section 43 of Proclamation 110 of 1879. This land was surveyed for him in 1902 and became Lot No.189 in Location No.2 called Cegcuana (later known as Location No.3 called Cegcuana A) Butterworth district. Title, which was issued to him on 29th June 1903, was granted under the provisions of Proclamation No.227 of 1898.

At the time of Plaintiff's marriage to Booy the latter was living on Lot 189 with the children of his first wife. Between 1904 and 1908 he left Lot 189 and established a new kraal on the commonage for himself and the Plaintiff. This kraal was known as Nzondelelo, and here he died in 1911. Meanwhile the family of Booy's first marriage continued to live on Lot 189 whereon had been erected huts and a cottage. After Booy's death Plaintiff continued to live at Nzondelelo kraal until 1919, when owing to the huts being rendered uninhabitable by Richard, Defendant's youngest brother, Plaintiff returned to Lot 189 with the consent and approval of the Defendant. She lived there until 8th November 1933 when owing to bickerings and quarrels between her and Defendant she considered her continued occupation of Lot 189 impossible and intolerable and followed Defendant's younger brother Alfred to his kraal, Alfred having left Lot 189 the previous day. The Assistant Native Commissioner

found .../

Commissioner found that Defendant's interference with Plaintiff's legal rights justified her in leaving the kraal and that by so doing she did not forfeit her rights under Section 9(1) of Proclamation 142 of 1910.

In 1927 the cottage on Lot 189 had fallen into disrepair and Defendant with Plaintiff's tacit approval built a new house on Lot 189, costing £1200. This house was regarded as Defendant's home although he never lived there continuously, his employment as a teacher and Minister of religion having kept him in other districts. The house was occupied by Alfred, the next senior member of Booy's family during Defendant's absence.

In July 1933 Defendant was granted one year's furlough by his church and resumed his occupation of the house on Lot 189. Defendant was not satisfied with Alfred's conduct of the kraal affairs and requested him to establish his own kraal on a site previously allotted to him.

For the purpose of building a stock kraal on his own site Alfred removed some natural scrub bush from Lot 189 with the permission of the Plaintiff but without that of the Defendant who remonstrated with Plaintiff about this. Later Defendant suggested that Plaintiff should vacate the hut which she was occupying and live with him in the house but this she refused to do.

In October 1933 Plaintiff made arrangements without consulting Defendant, for the threshing of the 1933 mealie crop from Lot 189. This threshing Defendant prevented. At the same time he possessed himself of the key of a store hut wherein were stored mealies belonging to himself, Alfred and Plaintiff. The consequence of this act was that Alfred and Plaintiff refrained from asking Defendant for the key to obtain mealies for their daily wants and resorted to borrowing mealies from neighbours.

Defendant is the owner of Garden Lot 190 which adjoins Lot 189. The Assistant Native Commissioner found the latter to be an "arable allotment."

The Assistant Native Commissioner upheld Plaintiff's contention that she was entitled to the use and occupation of Lot 189 during her widowhood and during her residence at her late husband's kraal to the exclusion of the Defendant and of anyone else, on the ground that Section 9(1) of Proclamation 142 of 1910 gives her the right of legal possession and the right of usufruct in the Lot and that if she has the possession then she has the same possession to which her late husband was entitled, i.e. the exclusive possession of a grantee of freehold or perpetual quitrent property.

As Plaintiff's case is based almost entirely on the rights conferred on her by Section 9(1) of Proclamation 142 of 1910 as amended a correct and proper appreciation of the meaning of the words "The use and occupation" in this section will dispose of all the grounds of appeal.

Maasdorp.../

Maasdorp (Institutes Vol. 2, 3rd Ed. p.14) defines possession as "the physical detention of a corporeal thing by a person, whether with or without any claim of right, with the intention of holding it as his own" and further on, page 15, states "The intention must also absolutely be to hold the thing for one's self and not for another, for a lessee, a person who has a thing on loan, or a depository, cannot in strict law be said to possess, or, if he possesses at all, he possesses not for himself but in the name of the owner." Now since the ownership of the lot is in the deceased estate of which Defendant is the legal representative that mental state which is essential to constitute possession must have been absent in the Plaintiff.

Her use and occupation of her deceased husband's immovable property is with the permission of the Crown which has in clause XV of the conditions of title reserved to itself the right to burden the title, and therefore her possession does not conform to Maasdorp's definition.

Nor has the Plaintiff the right of usufruct. A usufructuary may inter alia dispose of his life interest in the usufruct (Institutes Vol. 2, 3rd Ed. page 177) and such a right has not as far as this Court is aware been admitted by a Court of law. On the contrary Mr. C.J.Warner, President, in the case Luke vs Luke (4 N.A.C. 133) stated "The term usufruct has no equivalent in Native law, and it "is to be regretted that it was ever imported into the "reported judgments of this Court."

Section 9(1) of Proclamation 142 of 1910 further provides that the widow may exercise her right "subject to the obligations imposed by the conditions of title." The section is silent concerning the rights conferred by the title. Plaintiff's right to the use of the land flows not from the deed of grant but from the wording of the section referred to above. Under this section she is entitled to the use and occupation of the immovable property belonging to her deceased husband. Clearly there are many things which may be used or occupied by more than one person. The contention therefore that section 9 (1) of Proclamation 142 of 1910 confers on her rights equivalent to the rights of possession and of usufruct is erroneous. If this was the intention the legislature would have so expressed itself in words which would have a well-known legal meaning and which would leave no room for doubt.

As the extent of the rights which the legislature desired to confer on the widow is in doubt, it is incumbent on the Court to ascertain the intention of the legislature and in doing so it is entitled to look to the general intention of the Proclamation, the evilsought to be remedied, the laws and customs which existed prior to its promulgation and the meaning consistently placed on the words by those entrusted with the administration of the measure (Rex vs. Detody, 1926 A.D. at page 202, and Denkel vs. Union Government, 1929 A.D., 150).

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In the case of class legislation a Court will investigate the special and peculiar needs of the particular class of person legislated for, study the history of the class in its relation to the object of the legislation and analyse previous legislative enactments leading to the one under review in order to apply the law in the spirit and intention of the legislature.

Having considered the legal implications and the historic sanctions and social structural code of the special class legislated for, this Court finds itself in complete agreement with the dictum expressed in the case of Mavayeni vs. Mavayeni (5 N.A.C. 93) to the effect that one of the objects in framing Proclamation 142 of 1910 was to rectify certain anomalies which had arisen in consequence of marriages between Natives by civil rites and to codify and give effect to certain features of Native custom in so far as these were not inconsistent with civilised methods. If the Court is correct in its estimate of the real objects of Proclamation 142 of 1910 as amended and if it is guided in addition by the general principles that serve as a lead in giving to a statute concerning a particular class of person its intended application, then this Court is of opinion that the real object of the legislature has been to entrench the rights of widows and safeguard these women from exploitation and ejection from their husband's kraals by heirs who, many of them, lack any sense of responsibility and who are quick to dissipate their inheritances regardless of the obligations to maintain the family of the deceased.

To take a contrary view would be subversive of one of the fundamental props supporting the Native social structure. She could refuse to allow him access to his home and he could even be refused permission to repair estate property in which he has a potential interest. It is altogether wide of probability that the legislature could ever have intended that these revolutionary results were to flow from the later Proclamations referred to, because, not alone would it be destructive of sound and wholesome Native law but it would be a negation of the principle of individual tenure in the form it has been deliberately grafted on to and modified by Native law and custom - as a reading of the various Proclamations affecting individual tenure at once reveals.

As already stated a widow has no usufructuary rights under Native law to her husband's estate property.

The respective rights of widows and heirs, as gathered from numerous decided cases, from Proclamations still in force and from the practice observed in unsurveyed districts, to the use of arable land and the occupation of kraal sites under communal tenure are fortunately fairly well-known. In unsurveyed districts a Native is entitled to a separate kraal site and a separate land for every polygamous household he establishes, and any unreasonable interference with the land could be resisted by the wife and the heir in her house, even against the husband (see Konayili Tshobo & ano. vs. Soja Tshobo, 4 N.A.C. 140). Upon the death of the husband each widow and her children will continue to use the land and kraal site obtained for

her.../

her use, as long as she lives at the kraal established for her, but this right of use does not confer on her the right to eject her heir (Luke vs.Luke, 4 N.A.C. 133). He, if a major, is regarded as the kraalhead and her rights are subservient to his. He usually cultivates the land for the common use of his mother's family. He is by Native law the Administrator of his father's estate and the guardian of his minor children whom he is bound to maintain. All the widow could claim is support for herself and her children from the land and the kraal property and to be consulted by the heir in regard to kraal affairs (Sekeleni vs. Sekeleni & ano., 21 S.C. 118). In case of dispute between widow and heir, the decision rests with the heir (Luke vs Luke supra). It is only where the heir abuses his trust that he can be ejected from the kraal.

With the promulgation of Proclamation 227 of 1898 with its principle of "one man one land" the whole system of land tenure was altered and friction between the heir in the great house and the widow in one of the minor houses was inevitable.

Before assigning a meaning to the words in question it is necessary to examine Proclamation 227 of 1898 and the relative amendments thereof in relation to the land in question.

Lot 189 was granted under and subject to the provisions of Proclamation 227 of 1898 and the title deed issued is substantially in accordance with the form prescribed by Schedule "A" of the Proclamation. The deed of grant is subject to such special servitudes as may be found to be necessary (section 5). The legislature had power to [illegible] and actually did impose further restrictions on deeds with retrospective effect (Section 2 of Proclamation 16 of 1905 and Section 3 of Proclamation 196 of 1920). Under the Proclamation in its original form the Defendant would have been entitled in terms of section 23 to the transfer to him of the deed of grant immediately on his father's death. It is only in cases where there is no son or male descendants of sons that the Governor may permit the daughters and widows to use the immovable property.

Section 23 was amended by Proclamation 16 of 1905. Section 1 thereof conferred on widows the right of use and occupation of their deceased husband's immovable property and denied the heir the right to obtain immediate transfer of the lot into his name. This Proclamation not only restored Native custom as it existed prior to survey but goes further and confers the right of use and occupation to widows who would not have the right under Native custom, e.g. the right hand wife would not have had the right of use and occupation of the kraal and land belonging to the great wife. The object the legislature had in view in thus restricting the heir's right is not indicated, but the evil sought to be remedied is abundantly clear.

Proclamation 142 of 1910 in its turn repealed section 23 of Proclamation 227 of 1898 as amended. It modifies the effect of Proclamation 16 of 1905 by conferring

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the right of use and occupation only on certain widows, and then only while residing at their husband's kraals.

Section 8(2) provides that all the immovable property belonging to the deceased person and held by him under title granted under the provisions of Proclamation 227 of 1898 devolves upon his heir subject to the burden imposed by section 9(1) which entitles the widow to the "use and occupation" of the allotment "subject also to the obligations imposed by the conditions of the title."

Now Section 9(1) does undoubtedly restore Native law and custom as it imposes a servitude on the land akin to usus and is therefore a derogation from the right of the heir to claim immediate transfer, and for this reason the words conferring the right on the widow must be strictly construed and in favour of the upholding of rights (Joosub vs Immigrants' Appeal Board, 1920 C.P.D. 109). Further as the actual words used in the section afford no guidance as to the extent and scope of the rights the legislature intended the widow to exercise the Court will conclude that an equitable and not an inequitable result was intended (Borcherds N.O.vs. Rhodesia Chrome & Asbestos Co. Ltd., 1930 A.D. 112).

Bearing all these principles of the construction of statutes in mind it is clear that the legislature intended that certain widows should have the same rights as they had before survey but with this important addition: that in case of disagreement between widow and heir, the widow's rights to the use of arable land and the occupation of sites held under title should be paramount. To hold that less is intended would render the section nugatory.

The Assistant Native Commissioner has found that Lot 189 was granted as an arable allotment, but that a portion of it is used for residential purposes.

Plaintiff's exclusive right to cultivate the arable portion of the lot cannot be disputed in view of the finding that she did not forfeit her right by leaving the residential portion. In order to exercise her right of cultivation to the fullest it naturally follows that she is entitled to use such huts as she may reasonably require for storing her crops, but she is not entitled to the custody of the title deed as such custody is not necessary to enable her to exercise her right.

With regard to Plaintiff's claim to eject Defendant from the premises on the allotment, it has already been decided (Mavayeni vs Mavayeni, 5 N.A.C. 91) that a widow cannot eject the heir from her deceased husband's building lot. Without deciding whether this decision applies to kraals built on an arable allotment, it is clear that she is estopped from demanding the demolition of the square house since the building was erected with her knowledge and it has remained there for a year and a day without Plaintiff or the administration raising any objections (Maasdorp's Institutes Vol. 2, 3rd Ed. page 234 and Frank & Co. vs Duveen, 1919 C.P.D. 299.), and the mere fact that the house and huts have been erected on land that was granted for arable

purposes.../

purposes does not affect the question.

The record discloses that before survey the Plaintiff's husband resided on the land in question and his family has continued to do so ever since. The building has always been regarded as the Defendant's home and it follows that he cannot be ejected therefrom. If there is any irregularity in the use of the allotment for both residential and arable purposes then the administrative machinery provided in Proclamation 40 of 1930 can be invoked with the object of rectifying it.

The result is that the appeal will be allowed and the relative portion of the judgment of the Court below altered to read as follows:-

> "The claims for the order of ejectment of the Defendant "from the allotment, the removal of the house and the "delivery of the title deed of the allotment to the "Plaintiff are disallowed, but subject to the proviso "that while the Appellant is not ejected from the "allotment the Respondent's right to the arable "portion of the allotment is to be exclusive so long "as she complies with Section 9(1) of Proclamation 142 "of 1910 as amended by Proclamation 58 of 1920."

Coming to the question of costs, while each of the parties has succeeded in establishing substantial rights in the allotment and has in inverse ratio failed to establish their contentions the Court is of opinion that each party should pay its own costs, both in this Court and in the Court below.

CASE NO 2.

JERRY MAGENGELELE vs. MAHONO BAM.

BUTTERWORTH: 14th February, 1935, before R.D.H.Barry Esquire, President and Messrs. A.T.Owen and J.W.Bleigh, members of the N.A.C.

Great House heir succeeds to Right Hand House estate in the absence of issue of that house: also inherits personal estate of deceased widow of Right Hand House: No Qadi Houses.

(Appeal from the Court of Native Commissioner: Tsomo.)

The Plaintiff (Appellant) being heir to his late father Magengelele claimed from his maternal step-uncle the delivery of six cattle, eighteen sheep, twenty-two goats with increase (if any) or their value - which property he alleged was in the possession of the Defendant who refused to deliver them to him. The Defendant admitted that the Plaintiff was heir to Magengelele but denied that he had in his possession any of the latter's estate assets.

It appears that Magengelele had two wives, Nomonti the great wife and Nosentyi the right hand wife. Nosentyi died during 1933 leaving no issue. The Plaintiff is the son of the great wife and is consequently the heir in

both.../

both the great and the right hand houses of his late father.

It is not in dispute that Magengelele rejected his great wife and married Nosentyi. He died prior to Rinderpest. At the time of Nomonti's rejection the Plaintiff was a very young child and he states he was too young to remember when the separation took place. He did not accompany his mother but went to live with his grandfather. When he was about ten years of age he accompanied his grandfather who went to live in the Butterworth district. He alleges when his father died he owned five cattle, twenty-five sheep and twenty-nine goats but later he says he cannot remember how many he was possessed of when he died, but adds that they were taken to a kraal Nosentyi had set up for herself close to her brother's (the Defendant).

It is improbable that in the natural course Magengelele would have exactly the same number of animals when the Plaintiff accompanied his grandfather to Butterworth but that is what he states was the case.

During 1932 Nosentyi was removed to a leper institution and the Plaintiff states he went to the Defendant to claim possession of his half mother's estate, that Defendant admitted he had six cattle, eighteen sheep and twenty-two goats but could not hand these over without Nosentyi's authority. The Plaintiff on proceeding to Emjanyana Institution found that Nosentyi had died and on reporting this to the Defendant the latter took up the position that his sister was never married to Magengelele but was merely a concubine. This evidence receives confirmation by Tshemese Magengelele who accompanied Plaintiff on the visits mentioned. Thereafter Headman Ndima accompanied the Plaintiff to the Defendant but the latter adopted a third course and refused to discuss the matter.

The Headman states that he knows Nosentyi had estate stock though not how many but he told the Court that, in his official capacity, he went with the Police to remove Nosentyi to Emjanyana and that in the Defendant's presence she stated that she had six cattle, nineteen sheep and twenty-two goats as well as a land - the land was to be left in Defendant's charge and Defendant agreed to look after the stock. This evidence receives corroboration by the witness F.Starr Mini, a clerk and Interpreter in the office of the Magistrate, who testifies to the fact that when Nosentyi had gone to Emjanyana Institution the Defendant and Headman came to the office and that on the Defendant being instructed to take charge of Nosentyi's stock he said he had already taken charge of cattle, sheep and goats. The Defendant himself was too old to give his evidence but on his behalf Gola Bam and Magaula Bam appeared and contended that what estate Mangaliso Magengelele had was taken away by the deceased's brothers. They admit that Nosentyi was given a heifer by the Defendant and that she earned stock. Magaula concluded by stating that at the time of her death Nosentyi was

possessed.../

possessed of six cattle being the progeny of the heifer given to her by the Defendant, together with eighteen sheep and twenty-two goats which she earned as a herbalist and/or bought with the proceeds of grain sold.

The Judicial Officer took the view that as the evidence did not disclose how many, if any, of these animals formed part of the estate of Mangaliso Magengelele and that as Nosentyi was a widow any property earned by her would have been her own property and therefore not heritable by the heir of her late husband. He accordingly granted an absolution order.

This Court finds itself unable to support the Judicial Officer. The Defendant's own witnesses testify that the late Nosentyi owned the numbers and varieties of stock claimed and it is immaterial in law to the case whether the property claimed formed part of the late Mangaliso Magengelele's estate at the time of his death or whether they are the proceeds of Nosentyi's earnings, as the Plaintiff is, in the circumstances of the case, heir to the estates of both his father's houses and also to the property of the widow of the right hand house.

The appeal is allowed with costs and the judgment in the Court below is altered to one for Plaintiff as prayed with costs of suit.

CASE NO:3.

RHODES MANTANGA vs. CARROL MANTANGA.

BUTTERWORTH: 14th February, 1935. Before R.D.H. Barry Esquire, President and Messrs. E.F.Owen and J.W.Sleigh members of the N.A.C.

Heir, a major, entitled to estate property disposed of by uncle during heir's absence and without his consent or knowledge notwithstanding alleged ratification by meeting of family members; Judgment amended although appeal dismissed with costs.

(Appeal from the Court of Native Commissioner: Tsomo.)

In this case the Plaintiff, who is heir to his late father Kopolo, claimed from the Defendant, his uncle, the sum of £24 the value of six cattle, and certain amounts alleged to have been loaned to the Defendant. Judgment was entered for the cattle and £4 but the appeal noted is only in respect of the cattle.

The Plaintiff alleges that the Defendant wrongfully and unlawfully paid certain six cattle, Plaintiff's property, as dowry for his (Defendant's) wife - without the Plaintiff's consent. The defence is that after the death of his father his mother contributed the six cattle towards his dowry, that of these, five were from the estate of his father (Plaintiff's grandfather) and one beast from the estate of the Plaintiff's late father (Defendant's eldest brother). He contends that he is not liable to replace these as the cattle were contributed after a meeting of the family

held to consider the matter and the Plaintiff is bound by the meeting and that the cattle would be either a gift to him or would only be returnable from the dowry to be received by the Defendant on the marriage of his eldest daughter (if any).

Against a judgment for the Plaintiff for the cattle an appeal is noted on the following grounds:-

(1) The cause of action alleged in the summons is that the Defendant paid the 6 head of cattle as dowry, whereas it is clear that the Defendant did not make this payment; the payment was made by the mother of the Defendant after consul-:tation with all the male members of the Mantanga family in other words the usual native custom was followed where dowry is being paid for a son whose father is dead; the Plaintiff has therefore failed to prove his cause of act-:ion.

(2) The payment of the 6 head of cattle having been made as above set forth by the Mantanga family, acting on behalf of the Plaintiff, as long ago as 1927/28, and the Plaintiff having been informed of the payment he must be held to have ratified the acts of the family; he is therefore now estopped from querying the payment.

(3) In any event the payment of 6 head of cattle having been made by the family bona fide, carrying out what they evidently thought Defendant's father would have done had he been alive, the Plaintiff if he is entitled to recover from Defendant must wait to be repaid from the dowry to be received by the Defendant from the first daughter of his marriage.

It is common cause that the Plaintiff is heir not only to his father's estate but also to that of his grand-father Makati and it is not in dispute that of the six cattle paid as dowry for Defendant's wife five formed part of Makati's estate and one belonged to the estate Mopolo.

The attitude now taken up by the Defendant in clause one of his notice of appeal is altogether untenable for at the time the cattle were paid the Plaintiff, a circumcised man, was away at the mines and he was not made aware of the fact that his inheritance was being paid as dowry for his uncle.

It is alleged that a family meeting was held when it was arranged that these cattle should be paid and that therefore the Plaintiff must be held bound by the decision of the meeting. Further, the Defendant attempts to shift responsibility from himself to his mother, the widow of Makati, but he has overlooked the fact that he was in charge of the kraals and stock of both Mopolo and Makati when he paid out the cattle as dowry for his own wife - without the knowledge and consent of the heir - also that he was present and took part in the alleged meeting.

On.../

On the death of a man his estate devolves upon his heir and neither his widow nor his mother has the right to dissipate any portion of his inheritance as was done in this case.

As regards the second ground of appeal the Defendant has therein raised a new defence not pleaded in response to the summons and this Court is of opinion that this defence being one mainly of fact it cannot be raised at the present stage - more especially as it is conceivable that the Plaintiff may be prejudiced if the contrary course is adopted.

The Judicial Officer entered judgment inter alia for six cattle or their value £24 whereas in the summons the Plaintiff claimed only the value of the cattle - seeing that the Defendant has disposed of them for his own purposes. This is not an action based on Native law in which damages are being claimed so that the Plaintiff whose cattle have been dissipated is, in the circumstances, entitled to claim the value of the animals in question.

While it is necessary therefore to amend the judgment in this respect this Court is of opinion that it should not be constrained to depart from the usual rule by which a successful party is entitled to have costs awarded to him.

The appeal is dismissed with costs but the judgment of the Court below will be amended by the deletion of the words "Six head of cattle or their value",

CASE NO:4.

SIGAQA SANTYISI N.O. vs. ROSOTYENI MSINDA .

BUTTERWORTH: 14th February, 1935. Before R.L.V. Harry Esquire, President and Messrs. L.P.Owen and J.W.Sleigh members of the N.A.C.

Heir's liability for debts of deceased parent without proof that he inherited estate.

(Appeal from the Court of Native Commissioner:Willowvale.)

In this case the Plaintiff claimed from the Defendant (the latter in his capacity of guardian of a minor named Jongile Mangcoyi) the sum of £8 plus interest thereon at 6% per annum - alleging that in January 1932 he handed to the minor's late father Mangcoyi Santyisi the sum of £4 with which to acquire cattle for him (Plaintiff). He avers that the deceased with Plaintiff's consent used this money for his own purposes undertaking to make it good by delivering cattle of his own but that this has not been done.

The Defendant admitted that Mangcoyi Santyisi was handed £4 with which to purchase a beast for Plaintiff, that this beast was bought and that it died from natural causes.

Thereafter the Plaintiff reduced his claim to one for £4 and abandoned his claim for interest.

C.../

No evidence was recorded but as the Defendant alleged that Mangcoyi Santyisi died without leaving any estate whatever and that his heir inherited nothing the latter was only liable for the deceased's debts (save obligations arising out of Native custom) to the extent that he has benefitted from the deceased's estate.

After arguments on the point as to whether the guardian is liable whether or not deceased died leaving property, the Court below held the Defendant to be so liable, and against a judgment for £4 and costs Defendant has appealed on the ground that as the cause of action is not an obligation arising purely or entirely out of Native custom the Assistant Native Commissioner erred in his conclusion that the heir was liable whether he inherited the property or not.

Two defences were pleaded, viz:- (a) That a mandate undertaken by the Defendant's father had been discharged and (b) that this case being one to be determined in accordance with common law principles, the Defendant is not liable to reimburse the Plaintiff for money handed to his (Defendant's) father - seeing that the Defendant has inherited no estate.

The record has not been prepared with the precision required because it was left to this Court to infer that the first defence had been abandoned. This inference was confirmed as correct by the Appellant before this Court so that only the second defence remains to be dealt with.

Again, the record does not definitely disclose whether, if the ruling put up to this Court is reversed, the Plaintiff still proposes to lead evidence to establish that the Defendant did in fact inherit estate from his late father, and the Court has had to rely on the Appellant' Attorney to clarify the position. He advises that as he understood the position in the trial Court the Plaintiff has not abandoned the right.

This case cannot be deemed to be one arising purely out of Native law and custom. If the principles of Native law were applied it would be opposed to natural justice for it would render an heir liable to refund to the Plaintiff money handed to his late father for a specified purpose - which although not given effect to cannot under common law impose on the heir any legal obligation to repay, without proof that he inherited estate from his father.

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

-CASE NO: 5. -

MPAULI XALA vs KAFILE XALA.

KOKSTAD: 26th February, 1935. Before R.D.H. Barry Esquire, President, and Messrs. T.F.C.Trollip and G.F.Kenyon, members of the N.A.C.

Emancipation of minor, Interlocutory Order.

(Appeal.../

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

In order to appreciate the significance and implications of this case it becomes necessary to set out in detail the pleadings and objections taken both in this Court and the Court below.

The Plaintiff (Respondent) sued the Defendant, in his capacity of eldest son and heir to the estate of the late Bangani Kala, for four cattle and one horse, alleging that Bangani Kala obtained from him the animals in question upon a promise that upon his receiving dowry in respect of any of his daughters he would deliver to the Plaintiff 4 cattle and one horse to replace those he had received. The Plaintiff goes on to allege that before any of the daughters got married Bangani died but since his demise two of the girls were given in marriage and their dowries have been received by the Defendant.

Before pleading, the Defendant objected to the Summons on the ground that he (Defendant) is a minor - he having been born during the latter part of the Great War and just before the Influenza epidemic in 1918.

At the conclusion of the evidence tendered by the Defendant the Assistant Native Commissioner overruled the objection with costs.

Thereupon the Defendant appealed against the whole ruling on the grounds:-

(1) That the only evidence on record shows that the Defendant is a minor and consequently it should have been accepted by the Presiding Officer.

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

(3) That the judgment is wrong and bad in law and contrary to Native Law and custom.

(4) That the Magistrate's reasons for judgment are contradictory and are alternative findings on the same facts, which is not tenable in law.

In this Court the Respondent objected in limine to the hearing of that portion of the appeal which is against the judgment overruling the Appellant's objection in the Court below, on the ground that that order, apart from the order as to costs, is purely interlocutory and therefore not appealable.

It is to be observed that the order as to costs does not form the subject of objection and the reason for this is apparent in the light of numerous decisions of the Higher Courts holding that an order for costs accompanying an interim order of the nature of the one in question is final and definitive and therefore appealable.

The practical effect is that whether the objection taken in this Court is allowed or refused the Court has still to consider the objection noted in the trial Court.

It.../

It should here be stated that Defendant's heirship to the late Bangani Xala is not challenged so that the main point for decision is whether he has locus standi in judicio to be sued unassisted.

After consideration of the evidence and numerous authorities this Court has come to the conclusion that the order given in the Court below is not interlocutory and is therefore appealable.

In his reasons for judgment the Judicial Officer places on record the following conclusions:-

- Facts found not proved.-

1. That the Defendant was under 21 years of age.

- Facts found proved.-

2. That the Defendant was in any case emancipated.

3. That in any event the defect (if any) in the summons was cured.

A review of the evidence discloses that it is inconclusive as to the actual date of the Defendant's birth but it does satisfy this Court that the Defendant must be regarded as fully emancipated from tutelage. Under Native law and during the Defendant's minority his paternal uncle Poni Xala would have been his guardian but the evidence goes to show that Poni arranged for the Defendant's early circumcision with the definite intention that he (Defendant) should take charge of the estate. The Defendant has all along lived in the kraal of the late Bangani and apart from Poni, he has disposed on his own responsibility of estate property; he has received dowries for his sisters (and this has not been denied) and he appears to have conducted the affairs of his late father's kraal on his own responsibility although generally in consultation with his uncle. The mere fact that Poni has been consulted does not, in the opinion of this Court, alter the Defendant's status.

The principles enunciated in the cases of Amboker vs. African Meat Company (1927 C.P.D. 328) and Pleat vs van Staden (1921 C.P.D. 91) apply in the present case. In the former it is laid down that if a minor is allowed by his parents to engage in business on behalf of another he may be tacitly emancipated but merely to that extent. A minor is tacitly emancipated when he is allowed to carry on business on his own behalf, but he is only emancipated to the extent of contracts in connection with that particular business. In the latter case it was held that the tacit emancipation of a minor is a question of fact but the presumption against emancipation is considerably stronger in the case of a minor if his father survives and he is living with him than in the case of a minor who is under the legal control of a testamentary tutor.

The circumstances of the present appeal present a far stronger case for . coming to the conclusion that the Defendant is emancipated than those arising in the two cases quoted. In this case the Defendant's father is dead and the Defendant is in charge of the kraal and affairs as his guardian took definite steps to place him in that position.

Poni's.../

Poni's evidence is vacillating and self contradictory in the extreme for while he says he objects to being joined as co-Defendant and contends that he himself should be sued he nevertheless tells the Court that he took the Defendant to be circumcised in order to make him a man so that he could look after the affairs of the kraal and that after the circumcision the Defendant has in fact been looking after the affairs of the kraal although he comes to him for advice and then goes off and acts on his own responsibility.

This state of affairs has continued for some years and when, in addition, regard is had to the well-known and well-recognised rules governing native social life the Court considers that although the Defendant's uncle has been consulted by his nephew in connection with the management of the kraal and estate matters, the Defendant was definitely released and recognised as released from tutelage.

Having come to this conclusion it is unnecessary to discuss further the questions as to whether the Defendant is or is not of the age of twenty-one years and whether if there is any relevant defect in the summons if it has been cured.

The finding of the Court that the Defendant has been emancipated also serves to dispose of the objection to the hearing of the appeal.

By common consent arguments in this Court were directed to the merits of the appeal as a decision on the merits would serve to dispose of both the objections in this Court and in the trial Court, consequently the costs in respect of both are indistinguishable.

The result is that the objection to the hearing of the appeal is disallowed, the appeal is dismissed with costs and the case returned to the Court below for trial on the merits.

-CASE NO: 6.-

ANOCH SUGUNI & ANO vs. MAGWADA.A.

PORT ST. JOHN'S. 5th March, 1935. Before R.D.I. [illegible] Esquire, President, and Messrs. N.[illegible]gle and F.A.Linnington, members of the N.A.C.

Marriage by Christian rites: Damages for adultery claimable even if husband and wife resume co-habitation, but damages not claimable on recognised scale as in case of customary union: Measure of damages for assault on Co-Respondent.

(Appeal from the Court of Native Commissioner:Ngqeleni.)

The Plaintiff in convention in this case got judgment for three cattle or their value as and for damages for adultery by the Defendant with his wife - to whom he was married by Christian rites. The Defendant in turn was awarded £5 on a counterclaim for £50 as damages for assault.

Against both these awards the Defendant has

appealed.../

appealed on the following grounds:-

(1) That the claim is made according to Native custom while the evidence reveals that Plaintiff's marriage is by Colonial Law. That the Court erred in not upholding Defendant's contention that as the claim then stood before the Court the Plaintiff could not succeed and further that the award of 3 cattle or £9 is on the face of it wrong. The Plaintiff could only sue for damages according to Colonial Law and was bound to allege and prove his damage which was not done.

(2) That the judgment for Plaintiff in convention was on the merits against the weight of evidence and probabilities of the case being
(a) Meagre in the extreme
(b) improbable
(c) resting greatly on the evidence of a woman who was on her own admission untruthful.

(3) That the damages awarded on the counterclaim were entirely inadequate even if adultery had been committed, which is denied. Furthermore Plaintiff having exercised a right to claim damages for the alleged tort cannot also use it as a mitigating circumstance.

In the opinion of this Court the Native Commissioner was justified, on the evidence, in coming to the conclusion that the adultery had been proved.

It has been laid down by decisions of the Superior Courts and this Court too that it is not incompetent for an aggrieved husband who is married to his wife by Christian rites to be awarded damages for adultery even if he resumes cohabitation with his wife after the commission of the offence by her and her paramour and even if a claim for dissolution of the marriage does not accompany the claim. Under Native law the same principle has always been recognised but with this exception that the measure of damages among commoners, as distinct from claims by Chiefs, has been regulated by scale.

In the present case the summons alleges that the Plaintiff is married to his wife <u>according to law</u> and the plea is to the effect that the Defendant admits that a customary union exists between Plaintiff and his wife Sinnah. It is unfortunate that there is on record no replication to clarify that portion of the issue but the Court is satisfied that what was intended to be conveyed is that the marriage was by Christian rites as all the evidence goes to show that that form of marriage formed the basis of the claim and the Defendant must have been well aware of the fact seeing that his intimacy with the Plaintiff's wife had formed the subject of an inquiry by the Church authorities and the Defendant, in evidence, admits that he attended this meeting and denied the charge of being unduly intimate with the woman Sinnah.

It follows then that the Plaintiff having married his wife by Christian rites his case must be governed by common law principles and it is therefore not competent for him to come to Court and claim a measure of damages in accordance.../

accordance with the scale recognised in cases in which merely a customary union has been entered into. In claim-:ing the measure of damages he did the Plaintiff clearly misled the Defendant into the belief that notwithstanding the known fact that Plaintiff was married by Christian rites he was claiming the usual measure awarded in cases under Native law and custom. There has been no loss of consor-:tium and the element of contumelia has not been seriously explored.

A reading of the record satisfies this Court that what was intended by the Claimant was to be awarded damages in accordance with native law and custom and although the Defendant must have been aware that the Plaintiff was married by Christian rites he (Defendant) resisted the action on the justifiable assumption that the claim that was being preferred against him was one based on Native law and con-:sequently he took no exception in limine to the summons.

For these reasons this Court is of opinion that the claim in its present form should not have been admitted.

As regards the award of £5 on the claim in re-convention it is difficult to be guided entirely by previous decisions as the injuries inflicted upon the claimants vary as also do the surrounding circumstances.

In the present case it appears that at the time of the assault the Plaintiff in reconvention was beaten and received eight blows on his head causing wounds varying from one to three inches in length. The left ulna was fractured, the left hand was swollen and brused, he sustain-:ed a fractured metatarsal right hand, the right shoulder was bruised as was also the right ankle and foot. He was taken to Hospital unconscious and the medical evidence shows that he was discharged after being in hospital for about one and a half months. All the wounds are healed but it is stated that he is still suffering from giddiness, headaches, stiffness and pains of his left forearm, right hand, right shoulder and foot. The surgeon is of opinion that the stifness, weakness and pain in the limbs might be permanent and that the injuries to the head might result in permanent giddiness, headaches or even mental affection and fits. The permanency of the effects of the assault is merely problematical and it seems just as possible to assume that recovery may be complete.

The doctor who attended the Plaintiff in reconven-:tion did not give evidence and consequently he could not be questioned and cross-examined. By consent of the parties a certificate by him containing substantially the facts as recited was put in of record in the case. It is unfortun-:ate that the medical practitioner was not a witness as his certificate suggests that he may quite possibly have been guided to his conclusions by statements made to him by the Claimant as to the effects of the thrashing he received.

On the other hand it has to be borne in mind that the Defendant has for a long time been interfering with the wife of the Defendant in reconvention. He received a solemn warning by the church authorities to refrain from being unduly friendly and intimate with Magqadaza's wife but almost immediately afterwards he was caught in the act of adultery. The Defendant in reconvention states that he hit

the.../

the Plaintiff who came at him and he then knocked him down and beat him while he was on the ground. The Plaintiff in reconvention has largely to thank himself for his injuries in the circumstances disclosed and the award of £5 is not considered to be inadequate.

In the case of S. Hasni vs. B. Dumezweni & Ano. (4 N.A.C. 6) a similar award was made although the circumstances in that case seem to be of a more aggravated character than the present one. In that case the assault took place about 500 yards from where the injured man was caught committing adultery and as he was stabbed through his neck with an assegai which entered close to the vertebrae and the exit was in front of the nexk.

Taking into consideration the provocation and all the other circumstances the Court is not prepared to say that the sum awarded is unreasonably low.

The result of the appeal is that

On the claim in convention

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

On the claim in reconvention.

The appeal is dismissed with costs.

CASE NO: 7.

MTSUBO GCINA vs. MAXESIBE NTENGO.

PORT ST. JOHN'S. 6th March, 1935. Before R.D.H. Barry Esquire, President, and Messrs. P.A. Linnington and V.Addison, members of the N.A.C.

Customary union, consent of girl's father material; absence of usual formalities; Pondo case.

In this case the Plaintiff (Respondent) alleging that he married the Defendant's daughter Mandibani - paying twelve cattle as dowry - claimed the restoration of his wife or the dowry paid - on the ground that his wife had deserted him without good cause and refused to return to him.

The Defendant denied that the Plaintiff was married to his daughter and stated that he had seduced and caused her pregnancy on two occasions, that he paid five cattle for the first offence and only four in respect of the second - leaving one still due for which he counter-:claimed. In his reply to the counterclaim the Defendant in reconvention contended that even if it was held that there was no marriage the payment of four cattle for the second pregnancy was sufficient.

The Assistant Native Commissioner found that a marriage had been entered into and that the Plaintiff had paid, in all, ten cattle. He accordingly entered judgment for the Plaintiff in convention and for the restoration of his wife or ten cattle or £30 and on the claim in reconven-:tion.../

reconvention judgment for the Defendant in reconvention.

This Court sees no reason to differ from the finding that the Plaintiff has paid an equivalent of ten cattle to the Defendant but it finds itself unable to confirm the Judicial Officer's decision that a customary union had in fact been entered into by the Plaintiff with the Defendant's daughter.

It is common cause that for causing the first seduction and pregnancy of the girl the Plaintiff paid five cattle. Thereafter he again had relations with the girl and carried her off to his kraal. She was followed up by the Defendant's Messengers who demanded payment and they were handed fifteen sheep and one horse which stock they drove off but left the girl. The Plaintiff thereafter left for the mines and soon after that the Defendant demanded more cattle and as these were not forthcoming he took the girl back.

On Plaintiff's return he paid two more cattle and he states he paid these as dowry and that they were accepted as such but the Defendant denies that this was so maintaining that the attitude he took up was that if and when the Plaintiff had paid the damages for the second pregnancy he would consider the question of marriage. On this point the Plaintiff in evidence states that when he paid the last two cattle the woman was not handed to him but ran back to him and also that when this payment was made the Defendant stated he was taking them for damages and that he was told by Defendant to bring another beast as damages. Whatever the Plaintiff may say as to his intention that the stock latterly paid were to be regarded as dowry it is perfectly clear from his own evidence that the Defendant did not accept them as dowry and even after they were paid the girl was not handed to the Plaintiff but ran back to him surreptitiously. It is significant too that the first child born of the illicit union and for which a full fine has been paid is with the Plaintiff but the second child is in the Defendant's custody.

The girl herself admits that her father never consented to her marriage to the Defendant and the evidence goes to show that she kept going backwards and forwards from her father's kraal to where Plaintiff lived.

Apart from these considerations the record reveals that the usual formalities of a native marriage have not been observed. There was no duli party, no sacrificies were made and no wedding outfit supplied.

It is quite apparent that the Defendant never consented to the alleged marriage and for all these reasons this Court is not prepared to sustain the finding, in this respect, of the court below.

Having come to the conclusion that the Plaintiff has paid the Defendant the equivalent of ten head of cattle the judgment on the claim in reconvention is not disturbed.

The result is that:-

On the claim in convention.

The.../

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

On the claim in reconvention.

The appeal is dismissed with costs.

-CASE NO: 8.-

CIMELA BODOZA vs. VICTOR POTO N.O.

PORT ST. JOHN'S: 6th March, 1935. Before R.D.H. Barry Esquire, President, and Messrs F.A. Linnington and V. Addison, members of the N.A.C.

Lapsed Summons: Refusal of Clerk to tax Defendant's Bill of costs sustained as also refusal by the Court to grant application for order on Plaintiff to pay costs: Order XXXII Rule 10 of Proclamation No.145 of 1923 discussed.

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

In this case it is not necessary to review the grounds of action and proceedings other than the point at issue.

It is common cause that by virtue of Rule 10 of Order XXXII the summons has lapsed automatically. Thereafter the Defendant submitted a bill of costs which the Clerk of the Court refused to tax on the ground that there was no order of Court upon which to tax it and furthermore there was no provision under Order XXXII Rule 10 for taxation.

The Defendant then made application to the Court below for an order on the Plaintiff to pay the Defendant's costs and this application was in turn refused and it is against this decision that the Appellant (Defendant) now appeals on the grounds that

(1) That the setting down for trial or applying for dismissal of a summons for want of prosecution are mere privileges and powers granted to a Defendant, optional to a Defendant and not being compulsory.

(2) That the effect of the lapsing of a summons is no bar to a Defendant's application for costs.

(3) That apart from its constitution and rules a Native Commissioner's Court has inherent jurisdiction at Common law to award costs to a Defendant on a lapsed Summons.

(4) That the Assistant Native Commissioner erred in his ruling of law.

(5) That apart from the provision of the proclamation (145 of 1923) applicant has a common law right to apply for costs and this could be done by application or Summons.

While.../

While a Court of Native Commissioner has power in certain circumstances to rescind or vary any judgment granted by it it is difficult to see how this can be urged as has been done in support of the proposition by the Appellant that a Court of Native Commissioner has inherent power to award costs to a Defendant on a lapsed Summons.

The Summons has lapsed automatically and there was no judgment or order of Court upon which the Clerk could tax the Defendant's bill of costs and as the case has lapsed it is no longer before the Court.

The Defendant has been dilatory in that he did not avail himself of the power of "set down" conferred upon him by Rule I of order XVII and Rule 3 of order XVIII but allowed the Summons to lapse automatically. In these circumstances the proper course now is to proceed by way of action if the Appellant is so advised.

The Native Commissioner's Court is bound by specific provisions of the law bringing it into existence and this Court is not aware of any provision having been made in law or of any authorities laying down a contrary view. The ancillary powers necessary to enable a Court of Native Commissioner to order payment of costs on a lapsed summons can hardly be inferred for if the legislature has abstained from making any provision in that direction it appears that it acted deliberately.

Nor can it be contended that an application by a Defendant for an order of costs where the summons has lapsed is on the same footing as a withdrawal of a summons for in the latter contingency special provision is made in Order XVIII enabling a party to apply to Court within a stipulated period, for an order on the party withdrawing to pay the applicant's costs.

It seems fair to conclude therefore that the omission to make similar provision for the payment of costs on a lapsed summons has been deliberate.

For these reasons the appeal is dismissed with costs.

CASE NO:9.

ZINJANI DZIKI vs. BIFU MBIZO.

PORT ST. JOHN'S: 5th March, 1935. Before R.D.H. Barry, Esquire, President and Messrs. P.A. Linnington and V. Addison, members of the N.A.C.

Condonation of late noting of appeal against judgment of a Chief's Court refused. Ignorance of rules.

(Appeal from the Court of Native Commissioner: Libode.)

In the Native Commissioner's Court an application for condonation of a breach of rule 5 Government

Notice.../

Notice No. 2255 of 1928 as amended by Government Notice No. 1312 of 1931 was refused by the Assistant Native Commissioner sitting as a Court of Appeal from the judgment of the Court of Chief Victor Poto. The judgment of the Court below was in the following terms:- "Application for late condonation of appeal refused."

From the record it appears that judgment was delivered in the Chief's Court on the 4th September 1934 and the appeal was noted fifty nine days later.

The relative rule requires an appeal against a judgment of the Chief's Court to be noted within thirty days from the date of the pronouncement of the judgment.

The appeal to this Court is noted on the grounds that the Appellant has a good defence, that he is illiterate and did not have the assistance of an Attorney, that he was ignorant of the requirements of the rule in question, and that he was ill for some time after the judgment was given.

The Assistant Native Commissioner is satisfied that the Applicant was ill for a time but the period of his illness is altogether indefinite. Considerable doubt is thrown on his bona fides as there is evidence showing that not long after the Chief's judgment he was going about and also attending beer drinks. His plea of ignorance of the rules is not one which in the circumstances should be encouraged, He is in much the same position as the majority of Natives and although he was clearly aware of the fact that he had the right of appeal he never took the trouble to enquire or have enquiries made as to the manner of noting his appeal. The object of placing a time limit in which appeals can be noted is to ensure finality and the Courts will not lightly condone breaches of the rule.

In the opinion of the Court no good and sufficient cause has been given for the Appellant's failure to note his appeal timeously and the appeal to this Court is accordingly dismissed with costs.

In dismissing the appeal with costs the Court will alter the judgment in the Court below to read as follows:- "The application for condonation of the late noting of the appeal is refused with costs."

CASE NO:10

LUFELE YAMAPI vs. ZWELINDABA MISELO & ANO.

UMTATA: 14th March, 1935. Before R.D.H. Barry Esquire President, and Messrs. E.G. Lonsdale and F.N. Doran, members of the N.A.C.

Damages for adultery: Admittedly no proof of act; Promise or agreement to pay: dismissal of Summons wrongly ordered on ground that damages not claimable in absence of proof of adultery and even if there was agreement to pay. Appeal allowed but costs in both Courts to abide issue; case returned for hearing.

(Appeal.../

(Appeal from the Court of Native Commissioner: Mqanduli.)

This is an action in which the Plaintiff claimed damages for the alleged commission of adultery with his wife.

In paragraph (1) of the particulars of the claim it is stated that the Plaintiff's claim is based upon an agreement to pay damages as claimed, but later, in the record, the Plaintiff's Attorney refers to the agreement as an alleged admission and promise.

This alleged agreement was specifically denied by the Defendant as also the imputation of adultery.

The Plaintiff's Attorney in the Court below intimated that he had no evidence of proof of the adultery on the date alleged. He seems to have realised that unless he could prove some specific act of adultery he could not succeed. He thereupon proceeded to action basing his claim for damages on an alleged admission of liability by the Defendant but, in his plea, the Defendant denied ever making any such admission.

No evidence was led but in the course of hearing the Plaintiff's Attorney applied to the Court to first give a legal ruling on the point as to whether, in the absence of proof of adultery, the Plaintiff would be entitled to succeed on the Defendant's admission and promise to pay.

In the course of argument he admitted that he had no evidence of proof of the adultery whereupon the Defendant's Attorney applied for the dismissal of the Summons on the grounds that it disclosed no cause of action. This request was granted and it is against the ruling of the Judicial Officer that the Plaintiff now appeals on the following grounds:-

(1) That upon the facts alleged in Summons and "admission and agreement to pay" there is a clear cause of action which is neither immoral nor illegal nor contrary to public policy.

(2) The admission of Plaintiff's Attorney that no intercourse on that day could be proved does not affect the position as the cause of action is based upon a contract or agreement to pay (and not upon a tort).

(3) That it is a question of evidence whether such contract was made, and the Magistrate erred in dismissing the Summons without hearing such evidence.

(4) That this is a case in which European (Colonial) law must be applied, and an "agreement to pay" is "justa causa" and therefore sufficient consider-:ation to support a contract under this law.

At the outset it must be made clear that the claim for damages is based entirely upon Native Law and custom and not

upon.../

upon common law principles. Notwithstanding the fact that the Plaintiff has taken action under Native Law, in his fourth ground of appeal he states that the point at issue must be governed by Common law.

The record is very abbreviated but on perusing it this Court is satisfied that what Plaintiff's Attorney intended to convey was whether in view of the fact that he was unable to adduce evidence in proof of the specific act of adultery alleged he would be entitled to succeed in his claim should he be able to establish the allegation that Defendant had admitted liability and promised to pay. He apparently did not intimate to the Court that he had no evidence of proof of the admission but the contrary is rather suggested, for he asked that a ruling should first be given so as to avoid the taking of evidence unnecessarily. As pointed out the Native Commissioner dismissed the Summons on the Defendant's application that in the absence of proof of adultery the summons disclosed no cause of action, basing his decision on the fact that in promising to pay damages there was an absence of consideration and that this would constitute a good defence and he states further that he was induced to dismiss the summons in view of the fact that even if the alleged admission was made it would be insufficient to establish an action for damages seeing that it has been laid down (Raji versus Silongalonga 4 N.A.C. 12) that the mere admission of adultery is insufficient to establish an action for damages and that proof of the commission of the act of adultery must be forthcoming. The Native Commissioner has therefore dealt with the point raised.

The Plaintiff's and the Defendant's applications are inextricably interwoven and the ruling given in the Court below served to dispose of both.

This Court finds itself unable to support the Judicial Officer for not alone is it not prepared to subscribe to the real reason given by him for disallowing the Plaintiff's application, viz. that in the alleged agreement there is an absence of consideration, this Court hesitates to lay down that a claim based on an admission of liability to pay damages is in all circumstances untenable in a case such as this which is based on Native Law.

To lay such a universal rule as has in effect been done in the Court below, and without any knowledge of the circumstances under which the alleged admission was made might result in grave injustice to a bona fide Plaintiff.

In support of his ruling the Judicial Officer seems to have relied very largely on the judgment in the case of Raji versus Silongalonga (supra), construing that judgment as laying down that the mere admission of adultery is insufficient to establish an action for damages and that proof of the commission of the specific act of adultery must be forthcoming.

A careful perusal of the judgment in question does not lead this Court to the same conclusions as come to by the Native Commissioner, for in that case evidence of the adultery was led as also evidence of the fact that at a beer drink the Defendant admitted that the Plaintiff's wife was his metsha.

This.../

This evidence was construed as corroboration of the evidence of the Plaintiff's wife and that of a go-between. The Appeal Court however took in view that the admission, if made, did not constitute a catch and from the rest of the wording of the judgment it is by no means clear that the Court then laid down unequivocally that an admission of adultery did not constitute a good cause of action in the absence of proof of a specific act of misconduct.

The reasons for his judgment both in respect of the question of "consideration" and the interpretation of the judgment in Raji's case cannot be supported.

The conduct of the case in the Court below leaves much much to be desired. The Plaintiff's Attorney proceeded to apply for a ruling on the broad issue as to whether in the absence of proof of adultery an admission of liability would constitute a good cause of action. He led no evidence whatever and the Judicial Officer proceeded to give a qualified ruling for reasons with which this Court is not in accord.

In the opinion of this Court the whole question of the alleged admission should have been explored before any ruling could rightly have been given thereon and the Plaintiff's Attorney must be held mainly responsible for the failure to place the Court in possession of all the necessary facts surrounding the making of the alleged admission, so as to enable the Court below to deal with the point raised in all its aspects.

For these reasons the appeal will be allowed, the ruling of the Native Commissioner set aside, and the case returned to the Court below for further hearing.

For the reasons already given the Court will order that the costs of appeal are to abide the issue.

CASE NO:11.

PETER DIAMOND vs. TSHAKA SIWISA.

KING WILLIAM'S TOWN. 11th April, 1935. Before R.D.H.Barry Esquire, and Messrs. F.C.Pinkerton and C.P. Alport members of the N.A.C.

Sale of land: Vacua possessio: Warranty, Eviction of tenants.

(Appeal from the Court of Native Commissioner: PORT ELIZABETH.)

In this case the Plaintiff (Respondent) claimed from the Defendant the sum of £63 alleging that the Defendant had failed to deliver "vacua possessio" of certain property in terms of a contract of sale entered into, the failure by the Defendant to execute in Plaintiff's favour the cession of a certain judgment obtained by the Defendant against John Zwide Siwisa and for pecuniary loss actually sustained by loss of rentals, costs of a judgment Plaintiff got against Sarah and other costs and expenses.

According to the particulars of the claim the Plaintiff states that in April 1934 he obtained transfer from the Defendant of certain land with buildings thereon, situate in Korsten, Port Elizabeth, and that in terms of the agreement the sale entered into on the 2nd March 1934 "vacua possessio" of the said property was to be given by the said Defendant to the Plaintiff on the 2nd March 1934 and the rentals in respect of the property were to accrue to the Plaintiff from the first of that month - the Defendant undertaking to notify the occupiers of the transfer to Plaintiff of the property and advising the Plaintiff that the rentals amounted to £3 per mensem. The Plaintiff has failed to obtain "vacua possessio". It is alleged that the Defendant got judgment against one John Zwide Siwisa for £5 damages and for ejectment and costs and that as part of the agreement of sale Defendant was to cede to Plaintiff this judgment - which he has failed to do and having so failed to cede the judgment and give "vacua possessio" the Plaintiff caused summons to be issued against Sarah Siwisa, the present occupier, for ejectment and damages in the sum of £21. Judgment was given in terms of the prayer - the costs amounting to £2:9:2. On a writ being issued and executed against Sarah Siwisa the Messenger made a return of nulla bona.

In his plea the Defendant admits the transfer of the premises to Plaintiff but he denies giving any of the undertakings alleged beyond signing a certain document at the request of Mr. Attorney Wolk purporting to enable the Master of the Supreme Court (?) to register the transfer in favour of the Plaintiff. He states that Mr. Wolk obtained the property and attached the same in execution. The Defendant specifically denies having had any dealings or interview with Plaintiff or even Mr. Wolk as regards the estimation of the rentals, or to be responsible for the vacation by the tenants. He states that since 1930 to March 1934 he (Defendant) never collected any rentals, consequently he could not have made the alleged promises to Plaintiff. The Defendant categorically denies that he ever undertook to cede to Plaintiff the judgment he got against John Zwide Siwisa. He admits that in September the Plaintiff called upon him to sign the cession and give Plaintiff possession of the property but that he ignored the demand. As regards the action against his sister, Sarah

Siwisa.../

Siwisa, the Defendant states he heard of a letter of demand being issued against her but he denies being a party or having connived with Sarah to refuse to quit and deliver possession of the house. The Defendant denied that he knew anything about the action instituted against Sarah, that it did not concern him. He accordingly repudiated any liability in the premises.

Against a judgment for Plaintiff for £7:10:0 as damages for failure by Defendant to deliver "vacua possessio" of the property on the due date, £5 pecuniary fees in respect of rental and £2:9:2 being costs of the judgment against Sarah Siwisa, the Defendant has appealed on the following grounds:-

(1) That the judgment is against the weight of evidence and is not supported thereby.

(2) That the Plaintiff admitted that he never entered into any agreement with Defendant and that the only agreement he knew of was between himself and Mr. Attorney Wolk.

(3) That no deed of sale signed by the Defendant was produced nor any document purporting to give Plaintiff vacua possessio.

(4) That the property was attached in execution by Mr. Wolk, was later released by him (Wolk) and sold by private treaty to Plaintiff, Wolk acting for both parties.

(5) That the purchase price was paid by Plaintiff to Wolk and never came into Defendant's possession.

At the outset it is evident that the Plaintiff has not correctly appreciated the true import of the doctrine of "vacua possessio". He seems to have assumed that it meant the handing over to him of the premises in a vacant state and free of occupation by any tenants. From the limited authorities available to the Court "vacua possessio" amounts to a warranty of title and a guarantee against eviction and these warranties have in no sense been lacking so far as the present transaction is concerned.

It is clear from the Plaintiff's summons that he has based his claim on the terms of an alleged agreement of sale but the record discloses that no such agreement was ever entered into as the Defendant resolutely refused to sign any such document or cession of a judgment obtained by him, several years prior to the sale, against a tenant. Mr. Attorney Wolk at one stage acted for both parties and as the Defendant owed him certain money he authorised Wolk to sell the property, reimburse himself out of the proceeds and then to hand him (Defendant) any balance remaining over. To this end he supplied Mr. Wolk with a power of attorney to pass transfer. Beyond this power the Defendant signed no document, had no discussions or dealings with the Plaintiff and, except for the Plaintiff's bare allegation, there is not a shred of evidence to show that the Defendant gave any of the undertakings as is averred by the Plaintiff in his summons.

The record discloses that from a date long before the transaction between the present parties trouble was

experienced.../

experienced with the tenants of the property and the Plaintiff after employing Messrs. Volk and Weinronk transferred his affairs in this connection to Messrs. Chabaud, Oosthuizen & Hazell and from them in turn to Mr. Attorney Spilkin.

The Plaintiff transferred his affairs from Messrs. Volk and Weinronk to Messrs. Chabaud, Oosthuizen & Hazell about six months before these proceedings were commenced and a letter written by the former firm to the latter at a time when the present proceedings were not contemplated is illuminating. In the course of this communication the following passages occur:-

> "With regard to the placing in possession, we advised "Diamond at the time, and repeatedly since, that the "property belonged to him as and from the 1st March, "and that all rents were his as from that date. We "also advised Siwisa thereof, and Siwisa has not "collected the rents since that period.
>
> "We told Diamond that he should see the "tenants and make arrangements in connection with the "rates and occupation. At the same time we advised "him that he might find it easier to take occupation "and arrange about the rents, natives being what they "are, if he could exhibit to the tenants his Title "Deeds."

It is clear then that the position was fully explained to the Plaintiff and he was aware of all the circumstances in regard to the property he had acquired from the Defendant. It is therefore idle on his part, at this stage, to endeavour to hold the Defendant responsible, under an agreement that was in fact never entered into, for rentals that accrued since he acquired the property and which the Defendant never collected nor received. As already pointed out there is also no evidence of any agreement to cede to the Plaintiff the judgment referred to.

For these reasons the Court is of opinion that the appeal must be allowed with costs and the judgment of the Court below altered to one for Defendant with costs of suit.

- CASE NO 12.-

WILLIAM XOXO vs. TITUS XO.C.

KING WILLIAM'S TOWN. 11th April, 1935. Before R.D.R. Barry Esquire and Messrs. F.C. Pinkerton and C.P. Albert members of the N.A.C.

Estates: Enquiry under section 3(3) of Government Notice No. 1664 of 1929: Land not falling within definition of sub-section 2 of section 23 of Act 38 of 1927 cannot form subject of enquiry: Similarly property in joint estate of spouses married in community of property: Jurisdiction of Native Commissioner limited.

(Appeal from the Court of Native Commissioner: FORT BEAUFORT.)

In this matter the Assistant Native Commissioner held an inquiry under the provisions of Section 3(3) of Government Notice No. 1664 of 1929, in regard to the

administration.../

administration of the estate of the late Thomas Qoqo, as the members of the deceased'd family failed to agree among themselves on the subject.

From the record it appears that one Piet Qoqo was married to one Netjie by whom he had the following sons:- Thomas, William and John. Piet and his wife Netjie are dead as also Thomas Qoqo and John Qoqo.

Thomas was married by Christian rites and in community of property to Elsie Thom Mtsatse by whom he had the following children, viz:- Titus, Nora, Cronje, Gilbert and Fikile.

The dispute centres round Titus Qoqo, the eldest son of Thomas Qoqo, on the one hand and his only surviving uncle William - who claims to be the head of the Qoqo family, on the other.

According to the inventory lodged with the Assistant Native Commissioner the estate consists of stock and household effects valued at £43:15:0 and certain two pieces of land situate in Korsten, Port Elizabeth - which is not land as described in sub-section 2 of section 23 of Act 38 of 1927. This land is valued at £235. From the two title-deeds put in of record these two properties were acquired in 1903 and 1905 respectively and they were registered in the name of Thomas Qoqo. The titles are free and unencumbered so far as the other members of the Qoqo family are concerned but William Qoqo, purporting to act on behalf of all the members of the Qoqo family, contends that these properties were acquired by contributions and the earnings of himself, Thomas and John and that they were bought for the benefit of the family. The title-deeds are entirely silent in this regard.

In this Court an objection and exception was taken in limine on the ground that this Court has no jurisdiction as the property left by the late Thomas Qoqo does not fall within the purview of sub-sections 1 and 2 of section 23 of Act No. 38 of 1927, nor within the purview of section 2 (d) or sub-sections 2, 3, 4 and 5 of section 3 of the Regulations framed under the provisions of sub-section 10 of section 23 of Act No. 38 of 1927 published in Government Notice No. 1664 dated the 20th September 1929. The objection was rounded off by an application for the dismissal of the appeal with costs.

In the course of argument it was pointed out by the Court that what was probably intended by the excipient was not that this Court had no jurisdiction to hear the appeal but that the Assistant Native Commissioner had no authority to hold the inquiry he did. Both parties concurred in this view and it was on that basis that the exception was dealt with.

Sub-section (3) of section 3 of Government Notice No. 1664 of 1929 empowers a Native Commissioner, in the event of a dispute or question concerning the administration or distribution of any property as is referred to in sub-section 2 of the Government Notice, to hold an inquiry and determine the issue. The subject matters of the disputes capable of such investigation are circumscribed by sub-section (2).

According.../

According to this sub-section as read in conjunction with sub-section 2 of section 23 of Act 38 of 1927 the only immovable property that can form the subject of such an inquiry is land in a location held in individual tenure upon quitrent conditions, by a Native, which shall devolve upon his death upon one male person to be determined in accordance with the prescribed tables of succession.

The land in question does not fall under this definition nor can any property forming part of this estate and as described in sub-section 1 of section 23 of the Act become the subject of an inquiry such as the one in question seeing that it constitutes the joint estate of two Natives married in community of property (see section 2(b) of Government Notice No.1664 of 1929). It is clear too that the estate property referred to in this case is not covered by section 2 (d) of the Regulations.

Such being the case the Assistant Native Commissioner has misconstrued the provisions of sub-section (3) of section 3 of the Government Notice as to give him the power to conduct the inquiry. The result is that all the proceedings by the Assistant Native Commissioner, as of record, are ultra vires of the law and must be set aside.

In the opinion of the Court not only the Assistant Native Commissioner but also the parties who had the benefit of legal assistance went wrong and the latter cannot evade responsibility for the holding of the inquiry. It was instigated by the Appellant and as regards the Respondents they submitted themselves to the inquiry and took no objection to the proceedings.

The objection in its correct form as above indicated is allowed with costs and the whole of the proceedings at the inquiry by the Assistant Native Commissioner are set aside with no order as to the costs in respect of the inquiry.

CASE NO:13.

NGCONGOLO vs. MZAYIFANI.

BUTTERWORTH: 17th July, 1935. Before H.G. Scott Esquire and Messrs. F.J. Kockott and J.W.Sleigh members of the N.A.C.

Principal and Surety - Surety cannot sue Principal for payment to himself of debt which he has not discharged even though judgment obtained against him by Creditor - Action should be to compel Principal to release Surety or pay Creditor the amount of the debt.

(Appeal from the Court of Native Commissioner: IDUTYWA.)

In the Court below Plaintiff (Appellant) sued the Defendant (Respondent) for the sum of £8 and in his particulars of claim as amended stated:-

> "That during the year 1924 the said Plaintiff stood "as Surety and co-principal debtor for the said "Defendant to Mr. Arthur Rayment, then trading at "the Mfula in the Willowvale District for the "purchase price of a heifer sold to him for the sum "of £10. That the Defendant paid the sum of £2 "leaving a balance due of £8. That having failed "to pay the said sum the said Arthur Rayment took "action and recovered judgment against the Plaintiff "for the said sum. Defendant is therefore now "liable to the Plaintiff for the said sum of £8."

Defendant in his request for further particulars asked whether the Plaintiff had paid to Mr. Rayment the £8 which he was now claiming. The reply was in the negative and Defendant thereupon filed a preliminary plea as follows:-

> "Defendant pleads specially:-
>
> "1. That the present action is premature, in that "Plaintiff has not paid to Mr. Arthur Rayment the "amount of £8 which he now claims from the Defendant: "that the mere fact that a judgment was obtained "against the present Plaintiff by the said Arthur "Rayment is not proof of payment but is merely a "confirmation of the debt due by the said Plaintiff "to the said A.Rayment.
>
> "2. That the present Plaintiff is estopped by matter "of record from alleging that he was a Surety to "Arthur Rayment for the Defendant, in that the "present Plaintiff when sued by the said A. Rayment "(Case No. 270/1926) was sued as Principal Debtor "for an amount which he now (in Case 3 of 1935) "alleges included the sum claimed from present "Defendant;
> "that the present Plaintiff, then Defendant in Case "No. 270/1926 consented to judgment in that case as "a Principal Debtor.
>
> "3. That cession of action should firstly have been "given to the present Plaintiff by Arthur Rayment to

enable.../

enable him to sue the Defendant, and if cession of action has been given, such fact should have been averred in the particulars of claim in Case No. 3 of 1935; and further, prior to suing, notice of such cession of action should have been given to the Defendant, but such notice has not been given. That therefore the Summons is bad in Law."

The Plaintiff's replication was as follows:-

"1. He joins issue on the Defendant's contention that "the action is premature, the fact that judgment has "been given against him gives rise to a cause of action "by him against Defendant.

"2. He states that when the debt was incurred he stood "Surety and co-principal debtor for the due payment of "the same, that this justified the said Arthur Rayment "in taking action against him without first excussing "the Defendant, that he therefore had no alternative "but to admit his liability as a Principal Debtor, he "denies that this can act as an estoppel to prevent "his taking action against the Defendant.

"3. He denies that cession of action was necessary to "enable him to recover from the Defendant."

No evidence was taken and the Summons was dismiss-:ed on paragraphs (1) and (3) of the special plea.

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

(1) That the Native Commissioner erred in holding that the action was premature, that judgment having been obtained against him by Arthur Rayment he was justified in taking action against the Principal Debtor without paying the amount of claim.

(2) That the Court erred in holding that the Surety could not take action against the Principal Debtor, after judgment had been obtained against him, the Surety, without cession of action.

In support of the first ground of appeal reliance was placed on various authorities to show that a Surety could recover from his Principal, even before he had himself actually paid, namely, amongst other things, where judgment has been obtained against him for the debt.

But that he cannot sue for the payment to himself of the debt, which he has not discharged, is clear from the judgment in the case of Van der Walt's Trustees vs. Van Coller (1911 T.P.D. 1173).

In that case one Van Coller signed a promisory note for £153:15:0 in favour of the Transvaal Government which was endorsed by the late Van der Walt as Surety and Co-Principal Debtor, which promisory note was, as between Van Coller and Van der Walt, due by the former and against payment of which Van Coller had indemnified Van der Walt.

Van Coller.../

Van Coller did not pay the promisory note and the Government claimed against the Estate of Van der Walt in insolvency and was awarded £25:3:9 in reduction and by way of dividend.

Van der Walt's Trustees thereupon sued Van Coller for (a) a refund of the £25:3:9 and (b) an order compelling Defendant immediately to pay to the Government or to them in trust to be rendered to the Government the sum of £153:15:0 less £25:3:9 in order to free them from the aforesaid claim by the Government and by way of carrying out his promise of indemnity to the late Van der Walt.

The matter first went before Wessels J. in chambers, Defendant being in default, who granted judgment for the £25:3:9 but refused judgment for the unpaid balance of the note.

Plaintiffs appealed and in giving judgment de Villiers J.P. said:- "It was recognised by the learned "Judge in the Court below that, although as a general rule, "a Surety cannot proceed against the Principal Debtor before "he has himself paid, there are certain exceptions in this "rule. Voet (46,1, 34) lays down the law as follows:- 'Vice "Versa the Surety may sometimes recover from the Principal " 'Debtor the amount he undertook to be Surety for, although " 'he has himself not yet paid it. At least he might call " 'upon the Principal to pay the Creditor, for instance, if " 'there was an agreement to that effect, or when the Surety /been " 'had already/condemned to pay, or if it be proved that the " 'Debtor had started to dissipate his goods in such a manner " 'that the Surety has just cause for fear."

It was held that a proof of debt in an insolvent estate must be considered as equivalent to a judgment and the judgment then proceeded:- "The only difficulty the Court "has had is with regard to the particular form the order "should take. The Plaintiffs claim either payment to the "Government or payment to themselves in trust for the "Government. But there is no authority for the latter. "Faber on the Code (Bk 4 tit. 26 def.26) states the law as "follows:- 'It sometimes happens that a Surety has the " 'actio mandati before he has paid, that is, when he has " 'been condemned or (which is practically the same) if he is " 'held to be condemned, as is the case with a person bound " 'under an instrument authentic and guaranteed (guarantijia- " 'tum) which has the force of judgment and condemnation as " 'in this case. It must be, however, observed that in this " 'and other similar cases the Surety could not claim payment " 'to himself, but for his release or that the Creditor be " 'paid and satisfied from the goods of the Debtor. This is " 'also the view adopted by Gail bk.2 obs. 29)."

The Court then made the following order: "The Defendant is ordered to obatin the release of the Plaintiffs within one month from date, failing which the Defendant is ordered to discharge his liability to the Government."

It will be seen therefore that in the case quoted the Court held that a Surety and co-principal debtor could not sue his principal to pay to himself the amount of

a debt.../

a debt for which he had stood as Surety and which he had not discharged but what he could do was to sue him either to pay the original Creditor or release him from his liability.

Applying the principles laid down in the case quoted to the present case this Court is of opinion that the Plaintiff was not entitled to succeed on the Summons in its present form, and that the appeal on this ground must fail.

In view of the conclusion at which this Court has arrived on the first ground of appeal there is no necessity to deal with the second ground.

The appeal is dismissed with costs.

CASE NO:14.

JAMES MBOTSHELWA vs. HOWARD MABANDLA.

BUTTERWORTH: 17th July 1935. Before H.G. Scott Esquire and Messrs. F.J. Kockott and J.W.Sleigh members of the N.A.C.

Land - Succession to - Illegitimate child of woman married by Christian rites cannot succeed to land to which her deceased husband would have succeeded had he lived - Illegitimate son of customary union entitled to succeed to his mother's land in absence of legitimate male issue - Appeal - Irregularity in noting - Condonation - Extension of time.

(Appeal from the Court of Native Commissioner. TSOMO.)

This was an inquiry held in terms of Section 3 (3) of Government Notice No.1664 of 20th September 1929, to determine the heir to Garden Lot No. 537 in Location No. 8, Mbulu, Tsomo district.

The Assistant Native Commissioner gave his decision on the 18th December 1934, declaring Howard Mabandla to be entitled to succeed to this lot, but the appeal was not noted until the 27th February 1935, some seven weeks after the time fixed by the rules for noting an appeal had expired and the Appellant has now made applica-:tion for condonation of the irregularity on the ground that while he was not satisfied with this finding he being an ignorant native who was not legally represented was unaware of the fact that he was entitled to appeal against the finding under Section 3 (3) of Government Notice No. 1664 of 1929,) honestly believing that as it was not a Civil case he had no right of appeal, that on the 18th February 1935 he was informed at the Native Commissioner's office that the Chief Magistrate of the Transkeian Territories in his capacity as Registrar of Deeds had refused to transfer the said Garden Lot in favour of Howard Mabandla as he considered that there was a valid objection thereto; that thereupon he consulted an Attorney who informed him that he could have appealed against the aforesaid finding but that the time for doing so had expired; that he thereupon

immediately.../

immediately instructed his Attorney to note an appeal and apply for a condonation of the irregularity.

In submitting the application to this Court the Appellant's Attorney drew attention to the case of O.Xuba vs. P. Xuba (1930 N.A.C. 34) in which the circumstances were almost identical with those in the present case where this Court refused to condone the late noting of the appeal. In the case quoted, however, the Appellant had instructed his Attorneys before the time for noting an appeal had expired and this Court considered that no good cause had been shown for granting indulgence. In the present case, however, the Appellant only became aware of his rights after the prescribed period had expired and immediately took steps to bring the matter before the Court.

In these circumstances the late noting of the appeal is condoned and permission granted to proceed with the appeal - costs of the application to be paid by the Applicant.

The facts of the case, which are not disputed, are as follows:-

The Garden Lot in question is registered in the name of Nomenti Mpolweni, the Right Hand wife by customary union of Mpolweni, who absconded many years ago and has never returned. The eldest son of this customary union was one King, who married one Elia by Christian rites, and died in 1918 leaving no male issue. Some five years after his death Elia gave birth to an illegitimate child, Howard Mabandla, one of the Claimants.

James Mbotshelwa, the other Claimant, was born about six years after Mpolweni absconded but he was brought up at his kraal and always recognised as his son.

In the case of Robbie Mgadi vs. Nkundleni Mgadi (4 N.A.C. 150) the Appeal Court stated:- "All the more recent authorities to which the Court has been referred "show that no married woman produces a bastard and that to "bastardize a child it is necessary for his mother's husband "to repudiate him."

This dictum, of course, referred to the case where there was a marriage by customary union and not where there had been a Christian marriage.

In the present case Howard Mabandla, being an illegitimate son born to a woman who had been married by Christian rites, clearly was not entitled to succeed.

As James Mbotshelwa was never repudiated he must be regarded as a son of his mother's house and, in the absence of legitimate male issue of her eldest son, is entitled to succeed to the Lot registered in her name.

The appeal is allowed with costs, the Assistant Native Commissioner's finding is set aside and it is declared that James Mbotshelwa is entitled to succeed to Garden Lot No. 537 in Location No.8, Mbulu, Tsomo district.

CASE. .../

CASE NO:15.

MAPONDO NDLELA vs. MBOVU QWABE.

BUTTERWORTH: 17th July 1935. Before H.G. Scott Esquire and Messrs. F.J. Kockott and J.M. Sleigh members of the N.A.C.

Vindicatory action - Right of owner to recover from person in physical possession who alleges ownership lies in third party - Rule 1 Order XXV of Proclamation No.145 of 1928 - Damages - Remoteness.

(Appeal from the Court of Native Commissioner: KENTANI.)

In this case Plaintiff (Respondent) claimed from Defendant (Appellant) the return of one heifer or its value £5 and £6 damages. He alleged that the heifer was his own property having been paid to him as dowry, that it was lost or stolen or strayed and was subsequently found in possession of the Defendant who refused to deliver it to him on the ground that it belonged to one Mazaleni Lusawana. The claim for damages was based on the trouble and expense to which Plaintiff was put in searching for and proving his ownership to the beast in question.

The Defendant failed to enter an appearance and default judgment was entered against him on the 24th April 1934, and a warrant of execution issued. Application to rescind the default judgment and set aside the warrant of execution was made on the 16th May 1934 and granted. Attached to the application for rescission was a plea to which Plaintiff objected as being no answer to the Summons. Thereupon Defendant on 7th June 1934 filed a further plea. Plaintiff was not satisfied with this plea and called upon Defendant to plead specifically on certain points. Defendant then filed a further plea, withdrawing that dated 7th June 1934, in which he alleged:-

(1). That he was in possession of the heifer not on his own behalf but on that of Mazaleni Lusawana in whom the legal possession was.

(2). That the legal position of Defendant was that of agent to Mazaleni Lusawana as principal.

(3). That as agent for Mazaleni and being in a position of trust in regard to the heifer it was not possible for him to release the beast on his own responsibility except under penalty of having to reimburse Mazaleni without as agent being allowed in law to deny his title and that he had always referred Plaintiff to his principal.

(4). That as agent he could not be sued in place of his disclosed principal.

(5). That he never maintained that the heifer was the property of Mazaleni but merely that he was

holding.../

holding it as agent for Mazaleni.

(6). That the proper parties were not before the Court to decide the ownership of the heifer and that he could not be expected to prove Mazaleni's title to it.

(7). That as he had been placed in charge of the heifer and having infor.ed Plaintiff on whose behalf he held there was nothing wrongful or tortious in his conduct.

(8). That Mazaleni Lusawana who had been absent at work in East London was back in the district of Kentani of which fact Plaintiff was informed.

(9). None of the damages claimed in the Summons are recoverable at Law.

The Plaintiff filed an exception to this plea on the ground that it did not disclose a ground of defence to the action in that the action was a vindicatory one and the plea furnished no reply to the averments in the Summons and the conclusions of Law detailed in the plea were erroneous. The exception was upheld and Defendant ordered to file an amended plea by the 2nd July 1934, which he did in the following terms:-

The Defendant pleads as follows:-

(1) That the heifer in question is the property of one Mazaleni Lusawana who placed Defendant in charge of it.

(2) That in that capacity of trust the Defendant refused and still refuses to hand the beast to the Plaintiff on his own responsibility and without a judgment of a competent Court as to the ownership of that beast.

(3) The Defendant admits the value placed on the beast.

(4) The Defendant does not deny the various things which the Plaintiff avers he has done to prove the ownership of the beast; but the Defendant says these are not consequential to his attitude;

(a) When the Plaintiff lost his beast he naturally had to search for it and the Defendant was not the Plaintiff's herd to be chargeable for the costs of search;

(b) The attendance at the Defendant's kraal and the claiming of the beast are only natural consequences of the Plaintiff ever allowing his beast to stray and his claiming a wrong beast as his own;

(c) Witness expenses are only payable on a bill of costs after the issue has been decided by the Court.

(5) The Defendant submits to the Court that the

Plaintiff.../

Plaintiff can claim witness expenses according to tariff in the same way as the Defendant is entitled to claim his costs at the termination of the case and final determination as to the ownership of the beast in question.

The case thereupon went to trial and, after hearing considerable evidence, the Native Commissioner found that the heifer in question belonged to the Plaintiff and ordered its return or payment of its value £5 and further granted damages in the sum of £2.

Against this judgment an appeal has been noted. As the grounds of appeal are merely a repetition of the averments made in the Defendant's plea there is no necessity to detail them.

The Native Commissioner, after hearing evidence at great length, found that the heifer in question was the property of the Plaintiff, and in the opinion of this Court, his finding is supported by the evidence.

Before this Court it was strenuously contended that the Defendant was in the position of a depository who was not the possessor, in a legal sense, of the animal, and that as he had indicated the person who had placed it with him the Plaintiff had no right of action against him but should have proceeded against Mazaleni Lusawana who claimed to be the owner.

In the opinion of this Court the action is clearly a vindicatory action and not a possessory action.

Maasdorp in his Institutes of Cape Law (Vol. 2 page 91) states:- "The form of action for the recovery of "ownership was under the Roman Law called 'vindicatio rei' "which was an action in rem, that is aimed at the recovery "of the thing itself which is in the possession of another, "whether such possession was rightfully or wrongfully "acquired, together with all its accretions and fruits and "compensation in damages for any loss sustained by the "owner through having been deprived of it. The Plaintiff's "ownership in the thing is of the very essence of such an "action and will have to be both alleged and proved and the "claim may therefore be met that the ownership is not in the "Plaintiff but in a third party."

But where a defence that the property is in a third party is alleged it must necessarily also be proved and if the Defendant fails to prove this the Plaintiff must succeed. That a vindicatory action lies against a person who is merely in physical possession of a thing, as opposed to legal possession, is clear from the decisions in the cases of Kemp vs. Roper N.O. (Buchanan's Appeal Court Cases 1885-86 p. 141) and Ncunu vs. Kula (19 E.D. Court Reports p.338).

In the present case the Defendant pleaded that the ownership lay in Mazaleni Lusawana but failed to prove the allegation and in the opinion of this Court he was rightly ordered to return the heifer in question or pay its value.

The.../

The Defendant, if he desired to relieve himself of responsibility, could have followed the procedure laid down by Order 25 Rule (1) of Proclamation No. 145 of 1923, under which he could have taken out an Interpleader summons calling upon the Claimants to appear and state the nature and particulars of their claims and either maintain or relinquish them. As he did not do so he cannot now com-:plain because judgment has been given against him in an action which he was not called upon to defend.

In addition to ordering the return of the heifer the Native Commissioner also awarded £2 damages but he does not state on what grounds he bases his award. The claim for damages in the Summons is based on the trouble and expense to which Plaintiff was put in proving his ownership and lodging his claim. In every case in which a Plaintiff makes a claim which is disputed he has to go to the trouble and expense of obtaining witnesses to support his claim and in lodging his claim and the Defendant is put to similar trouble. If damages were granted on such grounds it would open the door to similar claims being made in every contest-:ed case which came before the Courts.

In the opinion of this Court the damages claimed were too remote and should not have been awarded.

The result will be that the judgment in the Court below will be amended to read "Judgment for Plaintiff for the return of the heifer or its value £5 and for Defendant in respect of the claim for damages. Defendant to pay costs."

As the Appellant has succeeded in obtaining a substantial variation of the judgment he will be allowed the costs of appeal.

CASE NO:16.

RAFANA MBANGI vs. NJAJI MAVIYO.

PORT ST. JOHN'S. 7th August, 1935. Before H.G. Scott Esquire and Messrs. E.F.Owen and P.A. Linington members of the N.A.C.

Practice - Irregularity - Magistrate's reasons on appeal form part of record but not evidence - Judicial Officer giving decision on facts without hearing evidence of both parties - Proceedings set aside - Agreement not binding on person not party thereto.

(Appeal from the Court of Native Commissioner: TABANKULU)

The Plaintiff (Respondent) claimed from Defendant (Appellant) (a) the return of his wife or return of the dowry paid for her less the usual deductions for the children born of the marriage and (b) custody of the four surviving children and in his particulars of claim stated:-

Both parties are Pondos, Defendant being of the Manci Clan.

(2) In or about the month of November 1921 Plaintiff married one Mankanti (or Ntaminani) the daughter of

Defendant.../

Defendant by Native Law and Custom and paid 12 head of cattle to Defendant as dowry and which marriage still subsists. (vide Rafana Mbangi vs. Njaji No.15 of 1924, Native Commissioner's Court Tabankulu, which went on appeal to Native Appeal Court Lusikisiki).

(3) Four children were born of the said marriage, the eldest of which died in infancy and was buried at the Defendant's kraal.

(4) About two years ago Plaintiff went to work in Johannesburg leaving the said Mankanti and his three surviving children at his kraal. On his return he found that Mankanti had deserted to Defendant's kraal with the three children, where she and the children still are despite repeated requests to return to Plaintiff and where the said Mankanti has been delivered of a female illegitimate child.

Wherefore Plaintiff prays for judgment for the return of Mankanti together with her four children, failing which refund of dowry paid less deduction for five children born of the marriage and custody of the four surviving children, with costs of suit.

The plea was as follows:-

(1) Admits para. (1) of Summons.
(2) Denies para. (2) of Summons as far as marriage is alleged and payment of 12 head as dowry. Admits case No.15 of 1924 was sent to appeal but appeal was withdrawn and says said judgment was novated and made null and void by agreement between Plaintiff's father and Defendant dated 9th August 1924 and to which agreement Plaintiff consented which agreement Defendant prays may be considered as inserted herein and is attached hereto.

(3) Admits para. (3) of Summons.
(4) Denies that Mankanti with her three children ever went to Plaintiff's kraal and says that Mankanti and her children remained at his Defendant's kraal and that the Defendant gave Mankanti in marriage to Mosha 3 years ago with Plaintiff's full knowledge and said female child is not illegitimate.

The Plaintiff filed the following replication:-

(1) Admits appeal in case No. 15 of 1924 was withdrawn but denies that it was withdrawn for the reasons stated in paragraph (2) of Defendant's plea; also denies all knowledge of an agreement dated 9th August 1924 and puts Defendant to the proof thereof.

(2) Denies paragraph (4) of Defendant's plea and states that his marriage with Mankanti has never been dissolved.

According to the Ac-ting Native Commissioner's reasons for judgment the record of case No. 15 of 1924 was put in by consent but no note appears anywhere on the record to this effect. As however this is not challenged

by.../

by either of the parties on appeal this Court is prepared to regard the record as having been duly admitted. In that case Rafana Mbangi (present Defendant) sued Njaji Maviyo (present Plaintiff) for fourteen head of cattle as damages for the seduction and pregnancy of his daughter, Ntabinani, on two occasions. Njaji pleaded that the woman was his wife and that he had paid Rafana six head of cattle as dowry. He admitted owing a further four head as balance of dowry. The Magistrate who tried the case stated in his reasons for judgment:- "The Court found that the woman did live with Defendant for a considerable time and marriage must be presumed. Judgment was therefore entered for Defendant." He did not, however, enter judgment for Defendant but merely granted absolution from the instance which seems to indicate that he was not satisfied that a marriage had been proved. Be that as it may Rafana noted an appeal to the Native Appeal Court sitting at Lubikisiki but this was withdrawn as the result, it is alleged, of an agreement between Maviyo (father of Njaji) and Rafana the terms of which, shortly, were as follows:-

> "In consideration of the said Rafana withdrawing his "appeal against the said judgment Maviyo father of "Njaji agreed to pay to Rafana a chestnut filly to "cover costs in the case and ten head of cattle to "settle Rafana's claim for damages for the seduction "and pregnancy by Njaji of Rafana's daughter Taminani" ("presumably the same girl as that referred to in the "case.)

The appeal was duly withdrawn and nothing further happened until the present action was instituted ten years later.

At the commencement of the present case evidence was led on behalf of Rafana (Defendant) presumably merely to prove the agreement and on behalf of Njaji (Plaintiff) to disprove it but the Acting Assistant Native Commissioner allowed evidence to be given on the merits on the case but without hearing all the witnesses for both parties, thereby making confusion worse confounded.

At this stage the following note appears on the record:-

> "Court holds that agreement has no bearing on case. "Mr. Holmes addresses and pleads res judicata as "regards the marriage and quotes Ord. 29 Sec. 1 (ii) "in support that the reasons for judgment in previous "case form part of the record and go to show that a "marriage was proved. Mr. Dyason replies that they "do not apply as matter was decided as absolution "from the instance. Court rules that marriage "does subsist between the parties."

Thereafter further evidence on the merits was led and the Acting Assistant Native Commissioner entered judgment for the Plaintiff for the return of his wife or the dowry paid for her consisting of seven head of cattle less five head for the children born, and, while recognising the Plaintiff's claim to the children refused to make an order removing them from the care of their mother.

Against.../

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

"The Assistant Native Commissioner was wrong in "holding that the agreement between Maviyo and Rafana "had no bearing on the case as it was the crux of the "case before him was the very strongest evidence for "Defendant and was binding on both parties inasmuch as "Maviyo was head of Plaintiff's kraal and Plaintiff "was living at Maviyo's kraal at the time of the "alleged seductions and pregnancies and of the signing "of the agreement consequently Plaintiff was bound by "Maviyo's actions in signing the agreement. It is "true that neither Harry Sibaca nor Defendant's Attorney "could positively swear that Plaintiff was present "when the agreement was signed owing to the long lapse "of time since the hearing of the case No:15 of 1924 "but the positive evidence of Madizana - and the "probability that Plaintiff would be present on such an "occasion go to show that he was present and consented "to the agreement.

"The finding of the Assistant Native "Commissioner that there was a marriage was wrong as he "was influenced by the reasons given by the Assistant "Magistrate in Case No. 15 of 1924 such reasons being "in conflict with the judgment of absolution from the "instance in that case and he could only find on that "point after having all the evidence of Defendant and "his witnesses who had not been called when he so "found, also bearing in mind the absolution judgment "and the fact that an appeal had been lodged against "the judgment in case 15 of 1924. See reasons for "appeal in that case.

"The finding of the Assistant Native Commission- ":er in Case No. 205/1934 shows conclusively that he "did not believe Plaintiff and his witnesses as regards "the number of dowry alleged to have been paid by "Plaintiff and his witnesses thus discrediting the "whole of Plaintiff's case whereas Defendant and his "witnesses conclusively prove that the necessary "Pondo customs to constitute a marriage were not com- ":plied with - to wit - (1) Consent of father of his "daughter to the alleged marriage (2) living of alleged "wife with alleged husband as his wife and (3) payment "of dowry - N.A.C. Reports Vol. 1 p. 99 Maxayi vs. "Fukani.

"It is significant that no reason is given by "Plaintiff as to why Defendant should state that he had "not given his consent but Plaintiff does state that "Defendant was displeased with him - Plaintiff - and "ordered him not to come to his - Defendant's - kraal. "This apparently because Plaintiff had not paid fines "for successive pregnancies by him of Defendant's "daughter on the sly and Defendant being of royal "blood was indignant."

In regard to the first ground of appeal this Court is of opinion that the Acting Assistant Native

Commissioner.../

Commissioner was correct in holding that the agreement between Maviyo and Rafana had no bearing on this case.

An attempt was made to prove that Njaji was present when the agreement was signed, which he denied, and this Court is of opinion that he was not present otherwise it is inconceivable that the Attorney who drew up the document would have ommitted to obtain his signature esp-:ecially in view of the fact that he was a married man with his own kraal and that the father was not a party to the suit. Maviyo for purposes of his own may have made the arrangement with Rafana without consulting his son and the probability is that he did so otherwise it is impossible to explain why a man, who had been sued for damages for seduct-:ion and pregnancy and had successfully resisted the claim on the plea that the woman concerned was his wife, should suddenly turn round, throw away all the advantage he had gained and admit to the very thing which he had previously denied.

Apart from these considerations it is clear from the document itself that Njaji was not a party to it and he cannot be bound by it.

The appeal on this ground must fail.

Coming to the second ground of appeal it is clear from the reasons for judgment given by the Acting Assistant Native Commissioner that he based his decision in regard to the marriage entirely on the reasons for judgment by the Acting Magistrate who tried case No. 15 of 1924 and not on the evidence led before him. Apart from that he gave a finding on the question of marriage which was really the crux of the case before he had heard all the evidence of both parties. In doing this he committed a gross irregular-:ity and it was a mere farce thereafter to hear further evidence as he had already made up his mind on the main question in the case. It is true that a Magistrate's reasons for judgment in a case on appeal form part of the record, but it is of no evidential value and does not relieve a Judicial Officer of the duty to found his judgment on the evidence as led before him.

The irregularity in the present case was seriously prejudicial to the Defendant and this Court is of opinion that the judgment cannot stand.

The appeal is allowed with costs. The proceed-:ings in the Court below after the close of the pleadings are set aside and the case returned to the Court below to be tried de novo before another Judicial Officer.

CASE NO:17.

THOMAS KWEZA vs. ALFRED KWEZA

UMTATA. 14th August, 1935. Before H.G. Scott Esquire and Messrs. R.Fyfe King and A.G. McLoughlin members of the N.A.C.

Practice.../

Practice - Claim against agent for dowry received - Counterclaim for wedding expenses incurred and for cattle lent to Claimant's father - Set off - Costs - "Bottle" Custom.

(Appeal and Cross-Appeal from the Court of Native Commissioner: ENGCOBO.)

In the Court below Plaintiff claimed from Defendant eight head of cattle and seventeen sheep or their value £32 alleging that he was the eldest son and heir of the late Vungama Kweza, that Defendant had wrongfully and unlawfully given his (Plaintiff's) sister Nontsikelelo in marriage to one Alec Mbotshelwa and received the stock mentioned as dowry for her, which, notwithstanding demand, he refused to hand over.

Defendant in his plea admitted giving the girl in marriage and receiving eight cattle and fifteen sheep as dowry for her, but states that Plaintiff authorised and directed him to arrange for her marriage and that he incurr-:ed an expenditure of four head of cattle or £12 for wedding outfit and expenses and says further that he lent the late Vungama Kweza six head of cattle to make up the dowry for Plaintiff's mother, that Nontsikelelo is the eldest daughter of Vungama and he (Defendant) is entitled to reimburse himself from her dowry for these cattle as well as for the wedding expenses and he counterclaims for ten head of cattle or £30 their value.

In his plea to the counterclaim Plaintiff (Defendant in reconvention) denies authorising/(Plaintiff in reconvention) to incur any wedding expenses and denies liability for those expenses. In regard to the claim for the six head of cattle he admits that Defendant (Plaintiff in reconvention) supplied one beast, not six, to Vungama to pay dowry but says Defendant has never claimed this beast and tenders delivery of it against delivery of the dowry paid for Nontsikelelo.

The Acting Assistant Native Commissioner entered the following judgment:- "For Plaintiff in original claim for delivery of eight head of horned cattle and 15 sheep or their value £31:1:2. For Plaintiff in counterclaim for 4 head of cattle or their value £12 in respect of wedding expenses and outfit and for 1 beast or its value £3 in respect of the dowry beast advanced to Vungama. Defendant to pay costs in original claim and Defendant in reconvention to pay costs in counterclaim."

Against this judgment Defendant in convention appeals against that portion of the judgment awarding Plaintiff in convention 8 cattle and 15 sheep or their value £31:1:2 and costs and, as Plaintiff in convention, against that part of the judgment awarding him only five head of cattle instead of ten and gives the following grounds of appeal:-

(1) That Plaintiff in convention having claimed that Defendant in convention wrongfully and unlawfully

gave.../

gave Nontsikelelo in marriage, and it being proved that Defendant in convention did not do so, but acted with the consent and authority of Plaintiff in convention, and the other contentions in the plea of Defendant in convention being entitled to be upheld, the Court should have found that the claim of Plaintiff in convention was extinguished and erred in awarding him costs.

(2) That the Court erred in awarding Plaintiff in reconvention only 5 head of cattle or £15 their value, instead of 10 head of cattle or £30 their value, to which Plaintiff in reconvention established his claim.

(3) That those portions of the judgment above referred to are against the weight of evidence and the probabilities of the case and are bad in law.

The Plaintiff in convention (Defendant in reconvention) cross-appeals against that part of the judgment awarding costs against him on the claim in reconvention on the following ground:-

(1) That the Court erred in awarding costs to Plaintiff in reconvention whose claim was contingent upon that of Plaintiff in convention, and could only be brought against Defendant in reconvention when and after Defendant in reconvention had obtained possession of the stock as set out in the claim in convention, and that at most the claim of Plaintiff in reconvention could only operate as a set off against the claim of Plaintiff in convention.

The Acting Assistant Native Commissioner has found that Plaintiff (in convention) authorised Defendant (in convention) to arrange Nontsikelelo's marriage, to receive her dowry on his behalf and to incur the necessary expenses in connection with the marriage and awarded him the very liberal allowance of four head of cattle in respect of these expenses. No appeal against this award has been noted and no comment need, therefore, be made in regard thereto.

Defendant in convention also avers that he lent the late Vungama six head of cattle to pay dowry for his wife, the mother of Plaintiff and Nontsikelelo, and that he is entitled to reimburse himself out of Nontsikelelo's dowry in respect of these cattle and for the wedding expenses which he alleges he incurred and he thus lays claim to the whole of the dowry paid. The claim for wedding expenses has been dealt with above. In so far as the claim for the six head of cattle is concerned the Acting Assistant Native Commissioner was not satisfied in the absence of corroborative evidence that Plaintiff in reconvention had proved his claim and awarded him only one beast which Defendant in reconvention admited was due and tendered payment in his reply to the counterclaim.

The only evidence in regard to these cattle is that of Plaintiff in reconvention and his two sons, Lubben and Sofoniah. This loan of cattle is alleged to have been made some 24 years ago and it is somewhat remarkable that Thomas Kweza should not have taken steps to have his claim acknowledged at any rate after Vungama's death.

AS.../

As far as the record shows he makes no mention of the loan until the meeting in respect of Nontsikelelo's wedding takes place and it is very doubtful whether at that meeting he specified the number of cattle he had advanced.

Matters connected with the payment of dowry are always well known not only to the members of the family but also to the neighbours and it is very significant that Plaintiff in reconvention should call only his two sons to testify on this point, one of whom was very young at the time of Vungama's marriage and certainly would not have been called in consultation. This Court is of opinion that the Acting Assistant Native Commissioner rightly regarded this evidence with suspicion and is not prepared to disturb his finding. The appeal on this ground must therefore fail.

The first ground of appeal and the Cross-Appeal are in regard to the order made in the Court below as to costs and it will be convenient to deal with them together. There was a claim in convention for eight head of cattle and 17 sheep or their value £32. Then there was a plea that this claim was extinguished by a set-off of ten head of cattle or their value £30, being the amount due for wedding expenses and cattle lent and then there was a claim in reconvention for the same cattle.

The Defendant, instead of keeping his counter-claim separate and distinct, confused it with that of Plaintiff by setting it up in his plea by way of compen-:sation, his defence being that the Plaintiff's claim, the correctness of which he did not dispute, had been extinguish :ed by his own and that consequently the Plaintiff was not entitled to the judgment of the Court and he then counter-claims for the same cattle. The result of his plea, therefore, was that the Acting Assistant Native Commissioner could not give judgment upon the Plaintiff's claim, though its correctness was not disputed, without hearing evidence upon the claim in reconvention. For he had to determine, in the first place, whether it was of such a nature as to be capable of compensation, and, if so, secondly, what was the amount to which the Defendant was entitled.

It is quite clear that the Defendant's claims were not of such a nature as to be capable of compensation and that they were separate and distinct from that of Plaintiff and rightly formed the subject of a counterclaim.

The position in this case is almost exactly similar to that in the case of Fripp vs. Gibbon & Co. (1913 A.D. 354) in which the Magistrate in the Court below having found that on a consideration of the whole case there was a substantial balance due to Plaintiff had ordered Defendant to pay all the costs of the action, even though he had been successful to a very considerable extent in his counterclaim, and his order was upheld on appeal.

It will be seen from this case that where a Judicial Officer has exercised a judicial discretion in awarding costs the Court of appeal will not interfere

notwithstanding.../

notwith-standing that the general rule had not been observed that the costs in each claim should follow the result.

In the present case this Court is of opinion that the Acting Assistant Native Commissioner has exercised a judicial discretion in following the general rule.

The appeal and cross-appeal on the question of costs must therefore fail.

It is admitted that Defendant actually received in respect of Nontsikelelo's dowry eight head of cattle and seventeen sheep. Defendant claims that two of the sheep were given to him as a present and one of his witnesses stated "Of the seventeen sheep paid as part of the dowry two sheep represented the bottle to be given to the father of the girl."

As the Court was unacquainted with any such alleged custom it put the following questions to the Native Assessors:-

(1) Is there such a custom?
(2) What is the Native custom in regard to presents made to the parent of a girl about to be married?

(3) In the event of the father of the girl being dead to whom would such present be payable? Would it go to the heir or to the head of the kraal at which the girl lives?

The Native Assessors furnished the following replies :-

(1) According to Xosa custom the matter of the bottle is not a custom and is one in which a person may do as he likes.

(2) This is not a custom but a young man carries with him a bottle of brandy so that he may have a chat with the girl's father. Sometimes it is difficult to get a permit to get liquor so he pays 10/-. He cannot be called upon to pay it as it is not a custom.

(3) If the girl's father is dead that bottle of brandy is given to his heir with whom the young man will speak. It is not a custom. It cannot be the case that two sheep could have been paid for the bottle but must have been paid as dowry.

It would appear that the two sheep, which Defendant claims to have been paid to him as a gift, really formed portion of the dowry and should have been awarded to Plaintiff.

Even if they were paid as the "bottle" this is not a custom which this Court would be prepared to recognise as it is contrary to public policy.

The Plaintiff has, however, accepted the decision of the Court below and has failed to include it in his cross-

appeal.../

appeal and in the circumstances this Court does not feel justified in interfering with that portion of the judgment.

The result is that the appeal and cross-appeal are dismissed with costs.

CASE NO:18.

NOLAM GQALANA vs. QUMTU GQALANA.

UMTATA. 17th August, 1935. Before H.G. Scott Esquire and Messrs. R.Fyfe King and A.G. McLoughlin members of the N.A.C.

Claim against widow for delivery of Estate stock wrongfully removed - Counterclaim for removal of guardian and allotment of separate kraal to widow - Costs out of Estate.

(Appeal from the Court of Native Commissioner:MQANDULI).

Plaintiff, the eldest son and heir of the late Gqalana in his Great House, claims from Defendant, wife of the Qadi of the late Gqalana's Great House, who has no sur-:viving male issue, the restoration of nine head of cattle and ten sheep or their collective value £32, on the ground that she wrongfully and unlawfully removed the said stock, being estate stock, from the kraal of the late Gqalana and out of the possession of Plaintiff.

Defendant denies the Plaintiff's right to the possession and control of the estate stock on the ground that he has illtreated her and driven her from his kraal and has spent for his own purposes the dowries of two of Defendant's daughters and now seeks to obtain unfettered control of the last remaining dowry. She admits removing the stock in question but avers that she was justified in doing so for the protection of herself and her legal rights. She denies that the ten sheep are estate property and avers that they are the progeny of stock given her by her peeple about 1908.

In reconvention Defendant (Plaintiff in recon-vention) claims the removal of Plaintiff (Defendant in recon-vention) from his position as guardian and the appointment of some person in his stead and further prays the Court to appoint some place where she may reside with her stock free from the interference and control of Defendant in reconvention

On the claim in convention the Assistant Native Commissioner gave the following judgment:-

> "For Defendant for 10 sheep. It is further ordered "that Plaintiff shall, within one month from the "date hereof, assemble all his adult relatives of "Tyalibongo's ward in the presence of the Headman "for the purpose of appointing some place, other than "Plaintiff's kraal, at which Defendant may reside "with the estate cattle herein, under the supervision "of a male adult relative of Plaintiff, but subject "to Plaintiff's control. Upon failure of Plaintiff "to comply with this order, Defendant may reside with "Estate cattle with her own relatives.
>
> "For Plaintiff for restoration of 9 head of cattle or "their value £27, subject to his having complied "with the order in regard to Defendant, with costs "of suit" and dismissed the counterclaim..../

counterclaim.

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

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

(2) That the evidence establishes a failure on the part of the Plaintiff to observe the require-:ments of Native Law in relation to the relative positions of the parties.

(3) That the evidence and the probabilities establish a definite illtreatment and a driving away.

(4) That the order of the Acting Native Commissioner leaving the selection of a kraal to the Plaintiff's relatives is in the circumstances tantamount to allowing Plaintiff to adjudicate upon his own case. The Acting Native Commission-:er having found that there is sufficient cause to separate the parties should have selected the place himself, and should in all the circum-:stances have sanctioned the widow returning to the kraal at which she lived after her husband's death.

(5) That the Acting Native Commissioner has not used a judicial discretion in awarding costs in favour of the Plaintiff.

(6) Judgment should have been entered in favour of the Plaintiff in reconvention on her claim in reconvention with costs in reconvention.

The onus being on Defendant she proceeded to give evidence of illtreatment and maladministration by Plaintiff and cites the following instances:-

(1) That on the death of the late Gqalana Plaintiff accused her of being the cause of his death and drove her away.

(2) That Plaintiff took her property without consulting her.

(3) That the dowries of three of her daughters who were married while she was living in Mqanduli were taken by Plaintiff and used by him to pay dowries for his wives.

(4) That if the cattle (estate stock) trespassed on his lands he made her pay damages.

(5) That he took away her land.

In regard to point No.1 the only witness called to support Defendant is her brother Mfanta and his evidence is hearsay. He states that when Defendant returned to her own people she reported that she had been driven away by her husband, not, it will be noticed, by Plaintiff.

Her .../

Her evidence in regard to the second ground of complaint is entirely unsupported and is not credible in view of the fact that she has never, as far as the record shows, made any complaint in regard to the disposal of stock by Plaintiff

In regard to the third ground of complaint she is also unsupported. Her own evidence on this point however is quite inconsistent for she says "All my daughters got married while in Mqanduli location. I had their dowries. My own son died and Qumtu became interested in me again and persuaded me to come to his kraal. I went to live at late husband's kraal for about 8 years. Stock from daughters' dowries went with me to husband's. Had six cattle and 40 sheep and goats." Later she says "Dowries of three daughters married at Mqanduli location were taken by Plaintiff. He has paid these away as dowries for his wives." It is clear that these two statements cannot be reconciled for in the first she says she got the dowries of her daughters and only took with her to Umtata six head of cattle whereas in the second she says that Plaintiff took all the dowries of the three daughters married in Mqanduli, She does not attempt to explain how many cattle were paid as dowry for each daughter nor how Plaintiff, who resides in a different district, got hold of these dowries. Furthermore her statement that Plaintiff took all the dowries is evidently an exaggeration seeing that she was still in possession of six cattle from these dowries when she removed to Plaintiff's kraal in Umtata. The fact that she returned willingly to Plaintiff shows that she had no real grievance against him up to that time.

The complaint in regard to the Plaintiff demanding damages from Defendant when her cattle trespassed in his lands is also unsupported.

The complaint about the land is also unsubstantiat-:ed and it is significant that the sub-headman made no mention of this in his evidence.

In the opinion of this Court Defendant has not shown such illtreatment and maladministration on the part of Plaintiff as would justify an order removing him from his guardianship, and placing the estate stock with her free from interference and control by him.

The correct perspective in this case is obtained when viewed from the standpoint that up to the time of the death of Defendant's son her house was established as a separate unit in the Mqanduli district with the knowledge and consent of the Plaintiff. Certain stock was left with that house by the Plaintiff himself for the use of that house. It was at his instance that this state of affairs was interr-:upted and now when, through disagreements which have arisen comparatively recently, it becomes necessary to restore the status quo this Court sees no reason why the Defendant should not be allowed to revert to the position she occupied originally, viz. that she should return to the Ngadi House kraal in the Mqanduli district, and that the stock formerly held there for her support be restored to that kraal subject to such supervision as Plaintiff may deem necessary. The

Defendant.../

Defendant will not be allowed to dispose of stock belonging to her house as distinct from those held in her own right as the dominium in the house property vests in the heir (Plaintiff). The heir on the other hand has no right to remove the house stock to his own kraal against the widow's wishes. If he is not prepared to live at the late owner's kraal (here Defendant's late son) he must place someone else there (Thomas Zibuti vs. Noyenki 6 N.A.C. 21).

This Court agrees with the judgment of the Assistant Native Commissioner dismissing the counterclaim and also with his judgment awarding the sheep to Defendant in her own right for the reasons given by him.

The Assistant Native Commissioner has, in effect, refused to grant the claim for the restoration of the remaining estate stock as prayed but has made an order leaving the stock in Defendant's possession under Plaintiff's control and, only subject to this, has made an order for the restor-:ation of nine head of cattle to Plaintiff, a somewhat contradictory ruling.

This Court feels that justice will be done by varying the judgment to read:-

> "For the restoration by Defendant of the nine head
> "of estate cattle to the kraal formerly occupied by
> "her in the Mqanduli district, if available, or to
> "some kraal mutually agreed upon between the parties,
> "failing which to some kraal to be selected by the
> "Native Commissioner, Mqanduli."

On the question of costs this Court feels that while on the one hand the Defendant has not acted in accord-:ance with custom in summarily removing the stock from Plaintiff's kraal yet Plaintiff in not entirely free from responsibility for the situation which has arisen.

Although Defendant failed on the counterclaim she succeeded on the main claim in getting judgment for a portion of the stock wrongly claimed by Plaintiff as his own; she obtained what is virtually an order dismissing the claim of Plaintiff for restoration to him of the balance of the stock claimed.

In all the circumstances of the case it would be unjust to make her pay the costs from the stock held in her own right, viz:- the sheep.

Subject to the variation in the judgment mentioned above the appeal is dismissed with costs but it is ordered that the costs in this Court and in the Court below be borne by the estate.

CASE NO:19.

KOLI MGADENI vs. NKOWANA GWIBINKOMO.

UMTATA. 17th August 1935. Before H.G.Scott Esquire and Messrs. R.Fyfe King and A.G. McLoughlin members of the N.A.C.

Marriage -"Tainted blood" - Right of father to repudiate son's marriage on ground of - Cannot do so after son's death where marriage recognized during his lifetime - Grandson may bring.../

bring action to be declared heir during his grandfather's lifetime - Twala - Tembu and Pondomise custom.

(Appeal from the Court of Native Commissioner:MQANDULI.)

The Plaintiff(now Respondent) claims a declar-:ation of rights declaring him to be the legitimate son of the late Gqibinkomo and as such the heir to the Defendant (Appellant) and in his particulars of claim states:-

(1) That Plaintiff is a minor and is assisted in this action by his mother and legal guardian Nogenile Gqibinkomo.

(2) That the said Nogenile entered into a customary union with the eldest son and heir of the Great House of Defendant, one Gqibinkomo, and the latter paid as dowry 9 head of cattle to Mzamo Sompa, the father of the said Nogenile.

(3) That Plaintiff is the eldest son and heir of the union between the late Gqibinkomo Koli and the said Nogenile.

(4) That Plaintiff is also the heir of the said Koli Mgadeni.

(5) That the said Koli Mgadeni denies that Plaintiff is his heir through his eldest son Gqibinkomo and asserts that Plaintiff is an illegitimate child and that his late son Gqibinkomo had no legitimate issue.

Defendant's plea is as follows:-

(1) That he admits paragraphs (1) and (5) of the particulars of claim.

(2) That he denies paragraphs (2), (3) and (4) of the said particulars except that he admits that Plaintiff is a natural son of the said Nogenile by the late Gqibinkomo and that the latter was the son and heir to the Defendant Great House.

(3) The Defendant further pleads that if the said late Gqibinkomo did enter into a customary union with the said Nogenile it was without his, Defendant's knowledge or consent and would have been against his wish and that, therefore, he, Defendant, is not compelled in accordance with Native law and custom to recognise the said union.

The Acting Native Commissioner entered judgment for the Plaintiff as prayed and Defendant has appealed on the following grounds:-

(a) That the judgment is against the probabilities of the circumstances surrounding the question at issue and the weight of the evidence adduced to the effect that there was no customary union entered into between the late Gqibinkomo and Nogenile and that the cattle paid to the said

Mzamo.../

Mzamo Sompa were paid as fines.

(b) Should the Appeal Court hold that the said customary union has been established the Appellant will submit, further, that such union was entered into without his consent and against his wish.

That he had valid reasons for objecting to such union and that he is therefore not compelled to recognise such union as conferring rights upon Respondent of inheriting the Appellant's estate and that Native law and custom permit him to object to his estate being inherited by "tainted" blood.

There is ample evidence on the record to support the Acting Native Commissioner's finding that there was a marriage between the late Gqibinkomo and Nogenile and that Plaintiff is the eldest son and heir of Gqibinkomo and as such the heir of Defendant.

At the request of the Appellant's Attorney the following summary of the facts of this case and certain questions based thereon were put to the Native Assessors, Viz:- Samuel Pantshwa, Mqanduli; Longden Sotyato, Engcobo; E.C.Bam, Tsolo, Jongilizwe Tyali, Elliotdale; and Candilanga Makaula, Umtata:-

"Koli's son Gqibinkomo wanted to marry Mzamo's daughter.
"Koli objected to the marriage because he objected to the "family in that

"(1). Mzamo (girl's father) had metshaed with Koli's "sister Xalekazi.
"(2). Mzamo (Girl's father) married Koli's daughter-in- "law.
"(3). Mzamo's son eloped with Koli's cousin.
"(4). Mzamo's son thereafter metshaed with Koli's "daughter. He was fined.
"(5). He again committed adultery and was fined in Court.
"(6). Mzamo's son (Sopezu) committed adultery with Koli's "wife.
"(7). Sopezu committed adultery with another wife of "Koli's.

"Koli objected to the girl for above reasons as her "blood would spoil his estate.
"Notwithstanding this the son married the girl in "opposition to Koli's wishes and lived with her at Koli's "kraal till his death, and had four children including a "son named Nkonwana a boy about seven years old now.
"Koli paid Gqibinkomo's taxes even after he got married "and paid for land used by his wife.
"Koli had woman struck off the tax registers two years "after Gqibinkomo's death and now refuses to recognise "her or her children or any heritable rights of her son "Nkonwana.
"Koli has waived all claim to cattle paid for the woman "or any claim to her daughters and objects to Nkonwana

"inheriting.../

"inheriting his (Koli's) estate.
"Nkonwana now sues to be declared the heir and
"grandson of Koli.
"In these circumstances
"(1) Can he bring an action to be declared heir while
"his grandfather is alive.
"(2) Is Koli compelled to recognise him as heir to his
(Koli's)estate in view of the above facts and his
(objection to the marriage.
"(3) If he had a genuine objection to the marriage
"what action should have been taken at the time or
"during Gqibinkomo's lifetime to give expression to
"his objection?
"(4) What is the Tembu custom with regard to the
"payment of 'twala' cattle?"

The Assessors gave the following replies:-

(1) Yes. We say that the grandson has a right to bring an action to be declared heir although his grandfather is still alive. It is according to Native Custom that if there is a dispute and one considers he has a claim he may bring an action before the Chief so that the dispute may be settled.

(2) We consider that Koli is obliged to recognise Nkonwana as his heir. The seven reasons including the objection of Koli to Gqibinkomo marrying the girl in question - we don't see that these reasons can oust Nkonwana from his heirship because his mother was married and dowry paid for her like any other woman. Koli cannot now take up the attitude that his grandson cannot be his heir.

(3) If Koli was definitely refusing he should not have paid dowry for Mzamo's daughter or allowed her to go through the marriage ceremony. The father of a young man if he refuses to allow him to marry a girl usually goes and gets another girl for him and brings her to his son and says "Here is the girl I want you to marry because I do not wish to have any relationship with the family to which you are proposing to marry into."

During Gqibinkomo's lifetime there is nothing Koli could have done because Gqibinkomo had already married the girl. Koli could not have taken steps to disinherit Gqibinkomo because the girl had already been married and he had recognised her.

Our opinion is based on the assumption that there was a marriage.

(4) According to Tembu custom there is only one beast payable for twala irrespective of the number of times a girl has been twalaed. Among the Pondomise no beast is payable for twala. If as a result of the twala the girl became pregnant five head would be payable in addition to the twala beast.

If one twala beast were paid and then subsequently six were paid this would show that the latter were dowry and not damages for seduction.

This Court is in entire agreement with the opinion expressed by the Native Assessors.

The appeal is dismissed with costs.

CASE NO. 20.

MAKI MZIBA vs. STKADE MCQOBOKA.

BUTTERWORTH: 28th October 1936, before H.G. Scott, Esquire, President, and Messrs. C. Ross Norton and W.M. de Villiers, Members of the N.A.C.

Engagement Cattle: Return of on rejection of bridegroom by bride: Allegation that cattle paid as damages for forcible abduction and seduction. Illegal contract must be proved and cannot be assumed. Whether parties in pari delicto. A person who hands over property in pursuance of an illegal agreement can only recover if he proves that he acted under duress and the other party failed to carry out his part of the agreement.
Twala: Retention of abduction beast out of dowry when marriage not completed and dowry returnable.

(Appeal from the Court of Native Commissioner Mqanakwe.)

In the Court below the plaintiff (respondent and cross-appellant) claimed from defendant (appellant and cross-respondent) three head of cattle or their value £15 and costs of suit and in his particulars of claim states that he became engaged to defendant's daughter, Lawukazi, about December 1934, and paid four head of cattle on account of dowry, one of which strayed back to his kraal, thereafter he abducted the said Lawukazi and after she had been restored to defendant's kraal the latter notified him that Lawukazi was rejecting him.

The plea admits that three head of cattle were paid but states that they were paid as aggrieved damages for the forcible abduction and seduction of Lawukazi.

The Native Commissioner entered judgment for the plaintiff for the return of three head of cattle or £15 but made no order as to costs, not on the grounds set out in the summons but on the ground of equity and public policy, as it was alleged that plaintiff had raped defendant's daughter.

Against this judgment the defendant has appealed on the following grounds:-

(a) That the judgment of the Native Commissioner is inconsistent with law, and, alternatively,

(b) That the principle adopted should only apply in regard to the third beast paid over to appellant by respondent, in so much as two head of cattle (one as fine for abduction and one as fine for seduction) were justly due to appellant according to Native custom and were willingly paid.

and the plaintiff has cross-appealed on the following grounds:-

(1) That the finding of the Native Commissioner was against the weight of evidence and the probabilities

(2) That, as the defendant set up a defence in his evidence which amounts to compounding a felony for which he was primarily responsible, the onus of proof shifted by upon him to prove his allegations...

allegations beyond doubt, which the plaintiff claims he has failed to do.

(3) In order to succeed in his defence it is necessary for the Defendant to prove that the girl Lawukazi was in fact raped by the plaintiff, which, as a result of his own admitted illegal conduct, he has made it impossible to substantiate beyond all doubt.

(4) Under these circumstances the Court should have entered judgment in favour of the plaintiff in terms of the prayer in his summons contained.

The Native Commissioner does not find any facts proved but in the course of his reasons for judgment states:-

"If this were an ordinary case the Court would have "given an absolution judgment, but assuming that the "defence evidence is true (and I am asked to believe it) "the following facts are established:- (1) That de- "fendant knew that a serious criminal offence had been "committed and by threats of a criminal prosecution "forced payment from plaintiff. (2) That by accept- "ing payment and abstaining from prosecution defen- "dant has compounded a crime. (3) That plaintiff "was not in pari delicto.
"Under these circumstances it became necessary to de- "termine whether defendant should be allowed to re- "tain the cattle".

and then proceeds to discuss the position of the parties to an illegal contract and comes to the conclusion that in this case the plaintiff is not in pari delicto and ordered the cattle to be returned to him but made no order as to costs presumably on the ground that the plaintiff, while not equally at fault, was a party to the contract which he held to be illegal.

If the evidence established the fact that payment was forced from plaintiff under threat of a criminal prosecution he might have been able to recover but only if the defendant had failed to abide by his part of the contract by reporting the crime to the police after undertaking not to do so.

This is clear from the case of Wells & another vs. du Preez (23 S.C. 284) quoted by the Native Commissioner in support of his statement that Plaintiff in the present case was not in pari delicto. In that case the plaintiff, a person who had stolen two heifers, the property of Wells was induced by Wells and his attorney, one van der Pool, to deliver a horse and an ox to Wells, being led by van der Pool and Wells to believe that in consideration of such delivery he would not be prosecuted for the theft. Wells, however, subsequently laid a complaint whereon the thief was prosecuted, convicted and imprisoned. After serving his sentence he sued Wells and van der Pool for the proceeds of the horse and ox which had meantime been sold by van der Pool as auctioneer. The Court held that he was entitled to recover the proceeds on the ground that there had been a total failure of the consideration upon which the delivery was made and further, that the persons to whom the property was delivered were in a position to exercise and did exercise such strong pressure in order to obtain delivery that it could not be said that the deliverees were in pari delicto.

In the case of Katz vs. Levy (1914 W.L.D. 88) the Court said:-

"An exception is recognised in English Law, to the rule....

"rule that parties to a fraudulent agreement cannot "sue upon it: that the less guilty party may recover. "Assuming that this exception is in force in the Roman "Dutch Law, it applies only where there has been op- "pression or extortion and does not cover the case of "a voluntary purchaser."

On the authority of these cases it appears that a plaintiff who had handed over property in pursuance of an illegal agreement could only recover if it were proved that he had acted under duress and if the other party had failed to carry out his part of the agreement.

In the course of his reasons for judgment the Native Commissioner says

"It is common cause that the three head of cattle were "paid and if they were not paid as dowry they must "have been paid as fine and if this is so the only "possible conclusion one can come to is that the twele "was an aggravated one, namely accompanied by seduc- "tion and assault. Otherwise the number of cattle "paid cannot be justified.
"If this is the case there can be no doubt that the "cattle were paid under threat of a criminal prosecu- "tion."

and he then quotes certain extracts from the evidence of defendant and his witnesses to support the finding that there was such a threat. But, in the opinion of this Court, that evidence does not support that conclusion for it goes no further than to indicate the intention of defendant to prosecute if plaintiff did not pay. In fact defendant definitely says "I did not threaten him with criminal prosecution." Consequently there is no evidence to show that plaintiff paid over the cattle under compulsion and if he did not he would not be entitled to recover them.

We are of opinion, too, that the Native Commissioner erred in holding that an illegal contract had been concluded in the absence of positive evidence to that effect. In giving judgment in the case of Estate Fuchs vs. D'Assonville, (O.P.D. 21/3/35, Justice Circular for March 1935 para. 152; Vol. 25 Prentice-Hall (1935) L.4) Krause J. said:

"In Scott vs. Brown, Doering McNab & Co. (1892) 2 Q.
B. "B. 724 Lindley J. says:- Ex turpi causa non oritur "actio. No Court ought to enforce an illegal con- "tract or to allow itself to be made the instrument for "enforcing obligations arising out of a contract or "transaction which is illegal, if the illegality is "duly brought to the notice of the Court, and if the "person invoking the aid of the Court is himself im- "plicated in the illegality. It does not matter "whether the defendant has pleaded the illegality or "whether he has not. If the evidence adduced by the "plaintiff proves the illegality the Court ought not "to assist him.' In the same case at page 734 Smith "L.J. says:- 'Now, how does the law stand upon the "subject? If a plaintiff cannot maintain his cause "of action without showing, as part of such cause of "action, that he has been guilty of illegality, then "the Court will not assist him in his cause of action. "This was decided in Taylor vs. Chester (1869) L.R. "4 Q.B. 309 where the illegality was pleaded, and "also in Begbie vs. Phospate Sewage Co. (1876) 1. Q. "B.D. 679 when it was not pleaded, but, the fraud "being apparent, the Court would not interfere.'
"In the present case, the alleged illegality was....

"was neither pleaded nor was there any reliable evi-
"dence to prove it.... Furthermore there is no evi-
"dence on record of such a convincing nature, as
"would entitle the Court, either ex mero motu or at
"the request of the defendants, to deal with the mat-
"ter.... The onus would have been on the defendants
"had the special defence been timeously pleaded, and
"not on the plaintiff."

It is clear therefore that the Court is not entitled, either of its own motion or on pleading, to assume that an illegal contract exists unless there is convincing evidence on the record to prove it. It has already been stated that the evidence does not show that plaintiff paid over the cattle under duress and we are, therefore, of opinion that the Native Commissioner erred in entering judgment for plaintiff for the reasons given by him. But that does not end the matter. It is still necessary to find out which of the parties is telling the truth.

The Native Commissioner states that there was nothing in the demeanour of the witnesses which would lead him to believe or disbelieve any particular set and this Court is therefore in as good a position to assess the weight and value of the evidence as he was.

The plaintiff's witnesses speak to an engagement to marry between plaintiff and defendant's daughter, Lawukazi, and the payment of four head of cattle on account of dowry, one of which strayed back to plaintiff's kraal and is not included in the claim. After the payment of these cattle plaintiff twalaed Lawukazi and took her to Goduka's kraal (the kraal of his mother's people) in the Tsomo district. This was on a Friday. He says that he did not have connection with her at this kraal and is supported by her in this statement. Zenzile, plaintiff's brother, then went to Goduka's kraal and fetched plaintiff and Lawukazi and took them to his own kraal. This was on the Saturday. On the Sunday defendant arrived and demanded his daughter and was very annoyed but did not demand a fine. Defendant took his daughter away and subsequently Zenzile sent messengers to him to advise him that the bridegroom's party was coming. These messengers allege that defendant told them that his daughter was rejecting plaintiff. It is as a result of this rejection that this action is brought. The Native Commissioner point out certain discrepancies in the evidence of plaintiff's witnesses but finds that these are of minor importance and that it would be absurd to take serious notice of them. In commenting on the plaintiff's case he says:-

"Further there can be no doubt that plaintiff de-
"sired to marry Lawukazi, otherwise he would not
"have remained at Goduka's kraal, and. if this is so,
"marriage would have been proposed at Zenzile's
"kraal when defendant came to fetch the girl. The
"most satisfactory explanation why this was not
"done is that the marriage had already been agreed to!

This Court agrees with this reasoning.

Now at the close of plaintiff's case he had undoubtedly put up a very strong prima facie case and had there been no further evidence called any reasonable person would have entered judgment in his favour.

But the defendant proceeds to lead evidence in support of his plea during the course of which it is alleged that Lawukazi was forcibly abducted, assaulted and raped

by plaintiff. Now it is worthy of note and is significant that not one of the plaintiff's witnesses was asked a single question in cross-examination in regard to the allexed rape.
An examination of the evidence of the witnesses for the defence discloses discrepancies and improbabilities which must cast serious doubt on their credibility.

Maki, the defendant, says his daughter was twalaed on a Friday in December and Sikade (plaintiff) reported this to him. Mirian says she made the report to Maki but he makes no reference to this in his evidence. As a result of the report he says he sent two men to Zenzile's kraal but they returned without the girl. He then went with Ciliso but found the girl was not at Zenzile's so, on information received, he went to Goduka's kraal where he found her in a hut with a woman, two girls and two young men. Lawukazi says there was only Sikade and another young man and children in the hut, no one else. Defendant then says he found plaintiff outside the hut and drove him and Lawukazi together back to Nqamakwe district. He says that Lawukazi told him then that she had been seduced not that she had been raped. He says also "I found Noellie and Makwenkwe at Zenzile's kraal. I left Lawukazi with them". Is it possible to believe that the father of a girl who had reported that she had been violently raped would leave her at the kraal of the brother of the man who had raped her? We think not. Defendant goes on to say that he told Makwenkwe to take her to Mirian's kraal. He says it was on the Sunday whereas both Lawukazi and Mirian say it was on Saturday. He says Swelanto refused to have the girl examined by the women whereas Lawukazi says she heard him suggesting to the women in her hut to examine her but they refused, but she said just previously "Zenzile's people refused to examine me." These two statements are contradictory. Defendant goes on to say that the doctor examined Lawukazi for seduction, which is untrue, as the doctor never examined her private parts.

The next witness is Mirian Qoboka who says she saw the plaintiff and five other young men "twala" Lawukazi and take her to Sikade's home. When she went to them they threatened to assault her. At sunset she went to Zenzile's kraal and asked what they were doing and he then told her Lawukazi had been twalaed. She told him he should advise defendant and he asked her to go and report to defendant. She did so on the Saturday. It seems extremely improbable that Zenzile would have sent a woman to report a "twala". She says on the Saturday afternoon Lawukazi came to her kraal crying and had injuries on her left shoulder and below the breast. She also says Lawukazi slept at Zenzile's kraal that night. Again one asks would she have done this had she been raped?

Lawukazi states that she was twalaed by plaintiff and other young men and when they got to the Tsomo river they caught hold of her and raped her. They held her down and Sikade had connection with her and they also assaulted her with sticks. She says when her father came to Goduka's kraal she told him she had been raped and assaulted. This is at variance with her father's evidence, for he merely says she told him she had been seduced.

The next witness, Mcoteli Maki, says that Lawukazi was brought to the doctor because she was raped and assaulted. If this is so then why was the doctor not asked to examine her for rape? He goes on to say "We brought her to the doctor because the cattle were being demanded".

Realising....

Realising, apparently, that this was a very damaging statement he tries to qualify it by saying "We had already seen the doctor when we got the demand," but it is probable that his first statement is correct for the cattle would most likely have been demanded at the kraal before an attorney was consulted. In this connection it is of some significance that the girl was brought to the doctor on the day the plaintiff came to consult his attorney. Kabalemfene also makes a significant statement when he says "My father decided to take the girl to the doctor. When he (presumably plaintiff) claimed the cattle were paid as dowry." The District Surgeon states that the girl never complained of having been raped and consequently he did not examine her private parts. His interpreter says that neither defendant nor Lawukazi said she had been raped and that there was no question even of seduction. He says there were a few marks behind her head and some below her left breast but that they looked like scratch marks and were not like marks caused by sticks.

The Native Commissioner brushes aside the evidence of Ngwatya by saying he is lying because he says he knew nothing about the engagement, twala or rape. Even if he is this does not strengthen the defendant's case on whose behalf he was called.

We have come to the conclusion that the defence set up that the girl was raped is false and that there is no satisfactory evidence even that she was seduced. None of the people who are alleged to have examined her and found that she had been deflowered were called and there is no evidence on record, apart from the girl's own statement, of her defloration. We do not believe her when she says she was raped at the Tsomo river and she, herself, says she was not seduced at Goduka's kraal. In our opinion the plaintiff has proved that there was an engagement to marry, that he paid over four head of cattle on account of dowry, one of which strayed back to Zenzile's kraal, and that defendant's daughter rejected him without just cause and he is therefore entitled to the return of his cattle. The appellant, however, claims that he is entitled to two head of cattle (one as fine for abduction and one as fine for seduction), and that these were willingly paid. This Court has found that it was not proved that any seduction took place and the only question to decide, therefore, is whether appellant is entitled to one beast for the "twala".

In the case of Ngadayi Mgqambela vs. Soroli Jafta (4 N.A.C. 102) the Native assessors made the following statement of Fingo custom in regard to "twala":-

> "When dowry has been paid for a girl who is subse-
> "quently abducted no abduction beast out of that
> "dowry can be retained by her guardian in the event
> "of the marriage not taking place and the dowry be-
> "ing returnable."

In view of this statement of custom it would appear that, in the circumstances of this case, the defendant is not entitled to retain a beast on account of the abduction of his daughter.

The appeal is dismissed. The cross-appeal is allowed and the judgment in the Court below altered to one for plaintiff as prayed with costs. Costs of appeal to be borne by appellant.

CASE NO. 21.

GIDWELL KESA vs. SAUL & DUBULA NDABA.

KOKSTAD: 5th November 1935, before H.G. Scott, Esquire, President, and R. Welsh and J. Addison, Members of the N.A.C.

Native Customary Union: Where prospective husband refuses to proceed with the union the father of girl may retain any cattle paid on account of dowry but cannot claim balance of dowry - Hlubi custom.

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

In this case the plaintiff claims:-

A. Delivery of 17 head of dowry cattle, to include replacement of three dead animals, or payment of their value £5 each, plaintiff tendering performance of his and his daughter's obligations under the marriage and dowry contract hereinafter referred to.
Alternatively

B. Delivery of 17 head of cattle or value £5 each as damages (this claim being made in the event of second defendant's failing to marry plaintiff's daughter Debora within a time to be fixed by the Court).

In his particulars of claim plaintiff states that second defendant seduced and rendered pregnant his daughter Debora, and that both defendants are jointly and severally liable to him in damages, that thereafter second defendant agreed to marry Debora and both defendants contracted and became liable to pay dowry of 21 head of cattle and a horse, such dowry being fixed by agreement and/or custom; that defendants paid eight head of cattle(including one horse) on account of dowry, leaving a balance of fourteen head, which balance is, by reason of three head of the cattle paid having died, now increased to 17, defendants being liable to replace the dead animals; that the plaintiff has tendered and still tenders his daughter in marriage and to perform his side of the dowry contract but defendants have failed and/or refused to perform their part and to pay the balance of dowry and plaintiff is entitled to the order claimed in paragraph A. above.

The summons is inartistically drawn and it is not easy to gather from it what plaintiff really is claiming but if regard is had to the final statement in the particulars of claim then what he is really asking is for an order on defendants to pay the balance of the dowry they had contracted to pay.

Paragraph B. of the summons is vague as it is not stated what the damages are for; whether for seduction and pregnancy or for breach of promise of marriage and it is somewhat surprising that exception was not taken to it,

but....

but the defendants' attorney evidently accepted that the claim was for damages for seduction for the plea states that the defendants were prepared to allow plaintiff to keep the 8 head of cattle already paid as a fine for the seduction and pregnancy which was admitted. The plea goes on to say that five head of cattle have been accepted as the full fine amongst Basutos and Hlubis by an agreement dated 6th April 1927, signed by the attorneys at Matatiele and finally that as no marriage has taken place and Debora has never lived with second defendant as his wife balance of dowry is not payable.

In regard to the agreement referred to in the plea it is only necessary to say that the parties to this case who were not a party to it cannot be bound thereby.

The only witness called was the plaintiff whose case was then closed and the defendant's attorney intimated that he was calling no evidence. The Additional Assistant Native Commissioner thereupon entered the following judgment:-

"Judgment for defendants with costs. In terms of "defendants' plea, cattle paid over the plaintiff "awarded the latter as and for seduction damages".

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

"1. That allegations in the summons - including the "fact that the cattle received by plaintiff were paid "and received on account of dowry - are either admitted on the pleadings or proved by plaintiff's unrebutted evidence of record.

"2. By reason of their own breach of contract to marry "and pay a fixed dowry, defendants cannot avoid judgment for payment of the balance of dowry (including "the dead cattle they are liable to replace) against "tender of marriage by plaintiff. ALTERNATIVELY

"3. By reason of defendants' breach of contract to "marry Debora, the dowry cattle paid on account as "such ipso jure became plaintiff's property - the "same being forfeited to plaintiff by such breach.

"4. But defendant Dubula having seduced and rendered "pregnant Debora prior to the engagement to marry, "plaintiff is entitled to damages therefor and nothing "has been paid on account of such damages.

"5. Plaintiff is entitled to further damages for "breach of contract to marry - in addition to those "forfeited - as also to have the cattle already paid "which have died replaced.

"6. In respect of the claims for damages set forth "in para. 4 and 5 above plaintiff is entitled to "damages, viz. 17 head of cattle."

Before this Court it was argued that the defendants having entered into a specific contract to pay a certain number of cattle as dowry the case was taken out of the realm of Native law and custom and the defendants should be compelled to carry out their contract irrespective of whether or not the marriage had taken place. This Court does not consider it necessary to deal with the case from that aspect for it is of opinion that no such specific contract as contended for was either alleged or proved.

The....

The relevant paragraph of the particulars of claim merely states:-

> "3. Second defendant, after the wrongful action in "clause 2 set forth, agreed to marry Debora and both "defendants jointly and severally contracted and be- "came liable to pay plaintiff 21 head of cattle and "1 horse as dowry - <u>such being fixed by agreement "and/or custom</u>"

and the plaintiff in his evidence merely says "The dowry was fixed according to Hlubi custom." It is evident, therefore, that, while the summons speaks of a contract, what really happened was that dowry was fixed in accordance with the ordinary Native custom and the case must be dealt with under that custom.

The following questions were put to the Native Assessors (Chief Jeremiah Moshesh, Chief Mbizweni Jojo, Headman Willie Jozana, Headman Sonquishe Mehlomakulu and Headman Lebitso Morai):-

1. Where a marriage has been agreed upon and a certain number of cattle paid on account of cattle paid on account of dowry can the father of the girl sue for the balance of dowry even though no marriage takes place?

2. Defendant seduced and rendered pregnant the plaintiff's daughter and thereafter agreed to marry her and paid eight head of cattle on account of dowry. The defendant refused to marry the girl and therefore, in accordance with custom, the cattle already paid would be forfeited. Is the plaintiff entitled in addition to these cattle to claim further cattle as damages for seduction and pregnancy?

3. If so, what additional number can he claim?

4. Does not the fact that he agreed to let his daughter marry defendant after he became aware of her pregnancy andand the acceptance by him of part dowry without mentioning damages for seduction dispose of any claim for such damages on the marriage falling through?

5. What number of cattle is payable under Hlubi custom as damages for seduction and pregnancy?

They replied as follows:-

"Hlubis are of two kinds - Hlubis proper and those "who have adopted Basuto custom. The dowry of the Hlubis "proper is 20 head of cattle, an mqoba beast and a horse. "Those that have adopted Basuto custom are the same only "differ in that they pay small stock (ten sheep or goats) "in addition to the other stock. Sometimes a man may ask "for 22 or 23 head of cattle but that is not a custom. "As in this case where the father of the girl knew that "his daughter was pregnant but said nothing at the time "when the marriage was arranged we look upon that girl "as a virgin and those cattle were paid as dowry for a "virgin. As the young man refused to take the girl we "look upon that as a divorce and as he cannot give any "reasons for doing so he forfeits all the cattle paid.

"The cattle, the girl and the child she bore be- "long to the father of the girl. The father cannot now "claim for any more cattle from the father of the boy "either by way of damages or by way of balance of dowry "because there was no beast slaughtered to celebrate this

union.....

"union and the cattle paid are looked upon as damages.
"Six head of cattle are payable under Hlubi cus-
"tom for seduction whether or not followed by pregnancy.
"The father of the girl cannot sue for balance of
"dowry where the marriage has not taken place".

This Court is in agreement with this statement of custom which is also in accord with previous decisions of the Appeal Court.

The appeal is dismissed with costs.

CASE NO. 22.

FRANCES PAKKIES vs. ABEL PAKKIES.

KOKSTAD: 5th November 1935, before H.G. Scott, Esquire, President, and Messrs. R. Welsh and J. Addison, Members of the N.A.C.

Appeal: Late noting: condonation refused.

(Appeal from the Court of Native Commissioner: Mount Ayliff).

This was an administrative enquiry by the Native Commissioner Mount Ayliff on an application by Frances Pakkies for the removal of Abel Pakkies from his position as guardian of her minor son, Mnyatsi, and of the estate of her late husband, held under section 3 subsection 3 of Government Notice No. 1664 of 1929.

The finding was delivered on the 15th August 1935 and the appeal against that finding was not noted until the 7th September 1935, two days after the period laid down in rule 6 of Government Notice No. 2254 of 1928 which governs appeals from any finding by a Native Commissioner in regard to any dispute or question referred to in subsection 3 of section 3 of Government Notice 1664 of 1929.

Application is now made for a condonation of the irregularity on the ground that although the Native Commissioner was called upon on 21st August 1935 for a written judgment in terms of rule 3(1) of Government Notice No. 2254 of 1928 such judgment was not received by appellant's attorney until approximately 4 pm. on 2nd September 1935, that on the 3rd September 1935 applicant instructed her attorney to note an appeal, that her attorney was absent from office on business the whole of the next day and it was only on the 6th September 1935 that applicant signed the power of attorney authorising the noting and prosecution of the appeal.

It is pointed out that the application itself does.....

does not comply with rule 19 of Government Notice No. 2254 of 1928 in that it was filed after the session had commenced and not at least one clear day prior thereto. In this instance the Court is prepared to overlook the irregularity but intimates that, in future, it will insist on a strict compliance with the rules.

The applicant, while blaming the delay on the part of the Native Commissioner for her failure to comply with the rules, has offered no explanation of her own delay of six days in consulting her attorney, nor is an explanation offered for her not signing the power of attorney on the 3rd September 1935, when she authorised the noting of the appeal instead of waiting until the 6th idem to do so. In the opinion of this Court good and sufficient cause has not been shown for granting the indulgence sought. Moreover a perusal of the record leads the Court to the conclusion that on the facts disclosed the appeal on the merits would not succeed.

The application is accordingly refused with costs and the case is struck off the roll.

CASE NO. 23.

LUPONDO MBULWANA vs. MADONDILE NGQINDEVU.

PORT ST. JOHN'S: 12th November 1935, before H.G. Scott, Esquire, President, and Messrs. E.F. Owen and P.A. Linington, Members of the N.A.C.

Adultery, Damages: Voluntary tender by defendant of cattle in satisfaction of headman's judgment held to be admission of liability (notwithstanding his denial of the adultery).
Pondo custom: Deposit of cattle pending birth of child: Only done in case of unmarried woman.

(Appeal from the Court of Native Commissioner: Ngqeleni).

The plaintiff sued defendant for five head of cattle or their value £15 as damages for adultery and pregnancy.

In his particulars of claim plaintiff alleges that on various occasions, but more particularly between June 1933 and January 1934 defendant committed adultery with and rendered pregnant his wife Manjanyana and that after judgment had been given against him by Headman Stanford defendant tendered and delivered five head of cattle which plaintiff rejected as being unsuitable and defendant, despite demand, refuses to deliver reasonable cattle.

In his plea defendant denies the adultery but admits that under compulsion of the headman's judgment he delivered to the headman five head of cattle, the amount of the judgment, but with the proviso that such cattle

should....

should be retained by the headman until the plaintiff's wife should have given birth as that would prove that he was not the father of the child and that subsequently the headman returned the cattle to defendant.

The Native Commissioner entered judgment for defendant and against this judgment an appeal has been noted on the ground that it is against the weight of evidence and that the tender of five head of cattle by defendant must be taken as having been made in settlement of the judgment and as an admission of liability as such payment of cattle on terms as set out by defendant is not in accord with Native Custom or alternatively that if it be held that plaintiff had not proved his case the judgment should have been one of absolution from the instance.

Apart from the pregnancy the only evidence of adultery is that of Manjanyana and Masitofu, plaintiff's second wife, and had it not been for the evidence of the tender by defendant of cattle as a result of the headman's judgment this Court would have had no hesitation in accepting the Native Commissioner's finding that the adultery had not been proved. The defendant pleaded that the tender was made under compulsion of the judgment and that the cattle were delivered under certain conditions. In regard to the plea of compulsion it is sufficient to say that the evidence shows that he delivered the cattle voluntarily and in fact he does not say anything about compulsion in his own evidence. It may be accepted therefore that the offer was made voluntarily. It is well known amongst the Natives generally that a headman has no power to enforce his judgments and it is an almost daily occurrence that defendants have judgment given against them by headmen and take no notice of it if they are dissatisfied.

In regard to the plea that the cattle were delivered subject to their retention by the headman until the child was born; this is denied by plaintiff and Mgoboka, the sub-headman, to whom defendant says he made the application for postponement until the birth of the child. Defendant has called no witnesses in support of his statement although he says four persons were present when he made the application. We see no reason to disbelieve plaintiff and Mgoboka.

The facts of this case having been put to the Native Assessors they expressed the following opinion:-

> "Judgment was given and the defendant voluntarily "paid without being forced to do so.
>
> "A person who says he first wants to see the "child says so only in the case of a girl and not "when it is a married woman. In the case of a "married woman when a man pays he admits that he "is the father of the child.
>
> "Among Pondos it is not the custom to make a "deposit of cattle pending the birth of the child."

In the opinion of this Court the fact that defendant voluntarily paid five head of cattle as a result of the headman's judgment must be regarded as an admission on his part of intimacy with plaintiff's wife and of the paternity of the child.

The appeal will be allowed with costs and the judgment in the Court below altered to one for plaintiff as prayed with costs.

CASE...

CASE NO. 24.

NKUMBI RASMENI vs. WAPI RASMENI.

UMTATA: 20th November 1935, before H.G. Scott, Esquire, President, and Messrs. H.M. Nourse and E.W. Wilkins, Members of the N.A.C.

Native Customary Unions: Ranking of Wives: Status cannot be changed after marriage.

(Appeal from the Court of Native Commissioner: Engcobo).

This was an enquiry in regard to the re-allotment of Garden Lot No. 5 in Location 52, Gqobonco Junction, Engcobo district.

It is common cause that the late Rasmeni had four wives married in the following order:- (1) Elizabeth, (2) Nomonti, (3) Kiliwe and (4) Nojenti. Elizabeth and Nomonti had no sons and Nojenti had one son Totozeli born some twenty years after Rasmeni's death. Kiliwe had four sons, Nkumbi, Wapi, Zayedwa and another who died while still a minor. Zayedwa is also dead.

Nomonti was the registered holder of the garden lot in dispute and Wapi claims to be entitled to inherit this land by virtue of the fact that he was put into her house by Rasmeni but the evidence as to this is very weak, consisting merely of that of Wapi himself and Mbabani Mapo and they are contradicted by Sitelo Yekiso who was called on behalf of claimant (Wapi).

An extract from a book kept by the late Chief Mlilo Dalasile was put in from which it appears that on the 7th November 1910 certain men including Bokleni (also known as George Dalasile) and Sitelo (the witness mentioned above) were sent by the late Chief Langa to Rasmeni's kraal to give the wives of Rasmeni their status and to establish his kraal aright. According to this document they selected from what was stated to be the Right-hand House, the wife of this house being described as a daughter from the Gcaleka clan, four children (1) Nkumbi, (2) Zayedwa, (3) Nontlekisa, and (4) Nonini and put them into the Great House leaving Wapi (claimant) and two girls in that house. It is clear that the woman referred to here is Kiliwe and not Nomonti as contended by Wapi and consequently his assertion that he was put into the house of Nomonti is not borne out by the facts.

The facts of the case were put to the Native assessors who expressed the following opinion:-

"The wives would take their rank in accordance with
"the order of their marriage and accordingly Elizabeth
"would be the great wife, Nomonti the right-hand wife,
"Kiliwe the qadi of the great house and Nojenti the
"qadi of the right-hand house. There was no necessity
"to call a meeting because Nkumbi would naturally be
"heir of the great house as there were no children in
"that house. The holding of the meeting does not
mean.....

"mean anything regarding the status of the wives as there "is nothing to show that Rasmeni was a chief. It is not "customary to marry a seed-bearer to the Great House be-"fore a Right-hand wife is married unless the wife in the "first-mentioned house is dead. As Nomonti had a land "this would show she was a wife and not merely a seed-"raiser. Totozeli would have no right to succeed to Ras-"meni's estate as there was already an heir to Rasmeni's "estate, Nkumbi, the heir to the Great House, would also "inherit the estate of the Right-hand House. Totozeli "would not oust Nkumbi."

This Court is in agreement with the opinion of the Native assessors in regard to the status of the wives and the heirship of the Great House but is not prepared on the meagre evidence in regard to where Totozeli was born to say whether or not he could succeed. His mother, Nojenti, says in evidence that she is not laying claim to Nomonti's land and if Totozeli's rights, whatever they may be, have been properly waived then, of course, his position needs no further consideration. We are satisfied that Wapi's claim to succeed to Nomonti's land on the ground that he was put into her house is not borne out by the evidence.

The appeal will be allowed with costs and the finding of the Native Commissioner set aside, and it is declared that Wapi is not entitled to succeed to the land in question.

CASE NO. 25.

ELIJAH NGALO NGXEKANA vs. AUGUST NGALO NGXEKANA.

UMTATA: 20th November 1935, before H.G. Scott, Esquire, President, and Messrs. H.M. Nourse and E.W. Wilkins, Members of the N.A.C.

Christian Marriage: Child born during subsistence of: Legitimacy: presumptions: Onus of proof.

(Appeal from the Court of Native Commissioner: Umtata).

In this case, which was an appeal from the Court of the Chief Regent David Dalindyebo to the Court of the Native Commissioner Umtata, the plaintiff claimed a declaration that he is the eldest son and heir of the late Ngalo; an order that defendant be ejected from the kraal of the late Ngalo; an order for the delivery of any estate property in defendant's possession and an order upon him to make good any estate property wrongfully and unlawfully sold or disposed of by him in any way.

In his plea defendant alleges that plaintiff is the illegitimate offspring of adulterous intercourse between the late Ngalo's wife and a man named Bili Nyangwa and consequently is not Ngalo's heir but that he, defendant, as the eldest surviving legitimate son of the late Ngalo is his heir and entitled to all the movable property

in.....

in his estate and denies that plaintiff is entitled to an order of ejectment against him.

The Additional Native Commissioner entered a judgment of absolution from the instance and against this an appeal and cross-appeal have been noted.

The grounds of appeal are

1. That the judgment is against the weight of evidence and the presumptions of law and is contrary to law.

2. That once the plaintiff established the fact that he was born during the wedlock of his parents and had been recognised as the eldest son and heir of his father for 60 years the presumption against illegitimacy and the maxim "Pater est quem nuptiae demonstrant" transfers the onus of proving illegitimacy to the defendant who asserts it.

3. That the defendant having failed to discharge that onus, judgment must be entered in favour of the plaintiff.

4. That the effect of the absolution judgment is to leave the plaintiff's position undefined and uncertain.

5. That the evidence of Gangata was not accepted by the Magistrate, and in fact is so open to suspicion and criticism that it could not be accepted, as against the presumptions of law and the strong evidence, both negative and positive, operating in favour of the plaintiff.

6. It is evident the judgment of absolution was entered in order to give the defendant an opportunity to corroborate Gangata's statement and that being the case the Magistrate erred in entering a judgment of absolution and should in law have entered a judgment in favour of the plaintiff confirming the position held and recognised for upwards of 60 years.

The cross-appeal is only in regard to the weight of evidence.

There are certain facts which are not in dispute and these are that about 1866 the late Ngalo entered into a customary union with one Noseyi @ Nellie and had by her a number of children, first two girls, then plaintiff and after him defendant and then other brothers and sisters. Subsequently Ngalo turned Christian, married Noseyi by Christian rites and had his children baptised. A baptismal certificate was put in which shows that plaintiff was baptised on the 23rd October 1881, he being then six years old, as the son of Paulus and Nellie, Paulus being another name of Ngalo's. They were at the time living at Tynira in the district of Nqamakwe but later removed to the Umtata district bringing the family, including plaintiff, with them. Ngalo died in 1934 at the age of 91, nearly sixty years after the plaintiff was born, and during the whole of his lifetime treated plaintiff as his son, provided him with a wife and paid dowry for him.

It is clear that the plaintiff was born during the subsistence of the marriage between Ngalo and Nosayi, and the presumption that he is legitimate is exceedingly strong and the evidence required to rebut that presumption must be clear and convincing and without suspicion.

Nosayi...

Nosayi, the mother of plaintiff and defendant, says that Ngalo went away to work, was away one year and during his absence Bili Nyangwa rendered her pregnant. Her statement as to the length of time Ngalo was away stands quite alone and is not substantiated in any way, and it would be unsafe to accept it unreservedly in such an important matter. She goes on to say that when her husband returned from work she was seven months pregnant, that her stomach was taken to Bili Nyanga who paid the fine demanded and the matter ended there. She says the witnesses are all dead except Nomantyi, wife of Ngalo's brother, but this witness is not called to corroborate her. She made no mention whatever of Gangata either in the Chief's Court or in the Native Commissioner's Court, although Gangata says she knew about him at the time the case was before the Chief, and this fact is of considerable significance when it is remembered that he is the man upon whom the defendant's case depended so largely, and who is produced only at a very late stage in the proceedings in the Native Commissioner's Court. Noyasi says that her lapse with Bili Nyanga was kept secret until after Ngalo's death and the people knew nothing about it. It is difficult to believe this when a claim for damages is alleged to have been made and met and when Gangata states that the matter of this pregnancy actually came before a headman at Nqamakwe at which he made a public statement in regard to it. About 1911 a quarrel took place between the plaintiff and defendant over some oxen and Ngalo then instructed plaintiff to set up his own kraal and this is brought forward as evidence of disinherison. It is a very common practice amongst Natives for a father to order any of his sons to set up an establishment for himself and such an order does not in any way necessarily imply that he is thereby disinheriting his son (Mkeqo cs. Matikita, 1 N.A.C. 242). Defendant alleges that on this occasion a meeting was called by Ngalo at which Nosayi was present and that Ngalo then stated that plaintiff had been brought to his kraal by his wife and that Bili Nyanga was his father. Nosayi does not support this for she makes no mention of any such statement having been made and, if her evidence is to be believed, it could not have been made as, according to her her lapse was kept secret until after Ngalo's death.

The only other witness called to support the allegation that plaintiff is illegitimate is Gangata Nganyauza. If his evidence is to be believed he took quite a prominent part in the proceedings regarding Nosayi's pregnancy for he was present when her stomach was brought to his brother Bili and he actually drove out of the kraal the cattle that were paid as fine and moreover made a public statement before the headman at Nqamakwe on the subject of this pregnancy and yet, as already pointed out, no mention whatever is made of him until the case had practically been concluded before the Native Commissioner. In these circumstances his evidence cannot but be regarded with suspicion, and it is clear that the Additional Native Commissioner did so regard it. But although he was not satisfied as to the bona fides of this witness he nevertheless entered an open judgment and states:- "It leaves plaintiff as head of the kraal and gives him an opportunity of attacking the evidence of Gangata. On the other hand it affords defendant a chance to obtain evidence establishing the bona fides of this important witness."

It cannot be contested that the onus of proving

illegitimacy.....

illegitimacy rested upon defendant and if he did not discharge that onus plaintiff must succeed, and cannot be called upon to prove a negative. Either Gangata's evidence is true or it is not. If the Court felt that there was any doubt in the matter the benefit of that doubt should be given to the person whose admittedly very strong position was being assailed.

In the opinion of this Court the defendant has not discharged the onus which rested upon him.

From the evidence it seems that defendant has his own kraal and is not residing at Ngalo's kraal and that plaintiff is in possession of the estate stock and there is no evidence that defendant has sold or disposed of any of the estate stock. It is unnecessary, therefore, to make any order in regard to paragraphs (c), (d) and (e) of plaintiff's claim.

The appeal is allowed with costs and the judgment in the Court below altered to Judgment for plaintiff declaring him to be the eldest son and heir of the late Ngalo and entitled to the control and management of the estate, with costs of suit.
The cross-appeal is dismissed with costs.

1936 (T.N) 84.

CASE NO. 26.

HAWULELE QOKU vs. ZELE GCINA.

UMTATA: 20th November 1935, before H.G. Scott, Esquire, President, and Messrs. H.M. Nourse and L.W. Wilkins, Members of the N.A.C.

Native Commissioner's Jurisdiction: Procedure: Transfer of action from one Court to another: Sec. 1(3) Act 38/1927: Proclamation 299/1928: Applicability of Sec. 35(1) Proclamation 145/1923 to Courts of Native Commissioners in Transkei.

(Appeal from the Court of Native Commissioner: Umtata).

In this case summons was issued in the Court of the Native Commissioner Idutywa by the plaintiff residing in Mqanduli district against the defendant residing in Idutywa district. A plea and reply to the plea were filed and thereafter a document in the following terms was also filed:-

> "We the undersigned hereby agree in terms of Section "35(1) of Proclamation 145 of 1923 to the transfer of "this action for trial to the Court of the Native "Commissioner at Umtata."

This was signed by plaintiff's attorney and by the defendant and the Assistant Native Commissioner Idutywa thereupon ordered that the action be transferred to the Court of the Native Commissioner at Umtata for trial.

On....

On the action coming before the Additional Native Commissioner at Umtata he, of his own motion, raised the question of jurisdiction, but did not decide it. He was transferred and the matter thereupon came before the Acting Additional Native Commissioner, who held that the Court of the Native Commissioner at Umtata had no jurisdiction to hear the action and ordered it to be struck off the roll but made no order as to costs.

Against this order an appeal has been noted on the following grounds:-

1. That the parties to the action having consented to the transfer thereof from the Court of the Native Commissioner for the district of Idutywa at Idutywa to the Court of the Native Commissioner for the district of Umtata at Umtata for trial by that Court and the latter Court being a Court competent to adjudicate upon the subject matter of the said Court, the decision of the latter Court that it had no jurisdiction to try and determine the said suit and its action in striking it off the Civil Roll of the said Court without adjudicating upon the claim therein is contrary to law inasmuch as it was incumbent on the Court of the Native Commissioner for the district of Umtata to try and determine the action between the parties according to the issues raised by the pleadings.

2. That subject to the operation of the words "Mutatis Mutandis" in Government Notice No. 299 of 1928 the procedure and rules in the Court of Native Commissioners in the Transkeian Territories is that provided by Proclamation No. 145 of 1923.

3. That if it had been the intention of the Law Giver to exclude the operation of the provisions of section 35 (1) of Proclamation 145 of 1923 as part of the procedure and rules of the Courts of Native Commissioners in the Transkeian Territories, clear and unambiguous language to that effect would have been used in Government Notice No. 299 of 1928.

4. That apart from the provisions of section 35(1) of Proclamation No. 145 of 1923 it is submitted that defendant had a right to consent and submit to the jurisdiction of the Native Commissioner's Court for the district of Umtata at Umtata for the trial and determination of the dispute between the parties, inasmuch as the subject matter thereof does not fall within the provisions of subsections 1(a), (b), (c), (d) and (e) of Section 10 of Act 38 of 1927.

5. That it is submitted with respect that the Acting Additional Native Commissioner for the district of Umtata erred in not following the decision of the Native Appeal Court (Cape and Orange Free State Provinces) in the case of Sibango Ncansana vs. Tshetshiza Silo decided at Butterworth in October 1932.

6. That the decisions of the Native Appeal Court (Transvaal & Natal Provinces) are not apposite to the question raised by this appeal inasmuch as the regulations in respect of Courts of Native Commissioners elsewhere than in the Transkeian Territories are those published in Government Notice No. 2253 of the 21st December 1928, which differ very materially from the procedure and rules provided by Proclamation 145 of 1923.

7. That the action having been postponed previously for trial.....

trial it fell to be dealt with on its merits and it is submitted, with respect, that the Acting Additional Native Commissioner erred in raising "mero motu" the question of the Court's jurisdiction to hear and determine it.

It appears to us that the crisp point for decision in this case is whether section 35(1) of Proclamation No. 145 of 1923 is merely a matter of procedure or whether it is something more.

The subsection mentioned reads as follows:-

> "An action or proceeding may, with the consent of all "parties thereto, or upon the application of any "party thereto, and upon its being made to appear "that the trial of such action or proceeding in the "Court wherein summons has been issued may result in "undue expense or inconvenience to such party, be "transferred by such Court to any other Court."

If the subsection had dealt merely with the transfer by consent there would have been no difficulty in holding that it laid down procedure only and would therefore be applicable to the Courts of Native Commissioner in the Transkeian Territories for the choosing of a form is a matter of procedure and not jurisdiction. But the subsection goes further and permits the transfer of an action even in opposition to the wishes of one of the parties. For instance a plaintiff might make application for the removal on the grounds set out in the subsection and the defendant might oppose the application but in spite of that the application might be granted and the defendant thus forced into a Court which, ordinarily, has no jurisdiction over him. Could that defendant, in the Court of the Native Commissioner to which the action was transferred take the objection that he was not a resident of his district and therefore not subject to his jurisdiction? If he could take the objection it is conceivable that it might be upheld and the result would be to create a deadlock, a position which the legislature could never have contemplated. If he could not take that objection it follows that the Native Commissioner of the Court to which the action had been transferred would be bound to try it and the defendant forced to submit to his jurisdiction and to that extent that portion of the subsection might be repugnant to section 10(3) of Act 38 of 1927 and therefore not applicable to Courts of Native Commissioner. But does it necessarily follow that because one portion of the sub-section is applicable the whole of it is applicable?

Section 36 of Act 38 of 1927 reads:-

> "The laws mentioned in the Schedule to this Act, and "so much of any other law as may be repugnant to or "inconsistent with the provisions of this Act, are "hereby repealed."

The Schedule to the Act does not contain any reference to Proclamation No. 145 of 1923 so that it is only where its provisions are repugnant to or inconsistent with the Act that they are repealed in so far as Native Commissioner's Courts are concerned. It does not, we think, necessarily follow that because one part of the law is repugnant or inconsistent that the whole of it is repealed. If the part which is not inconsistent can be clearly separated from that which is inconsistent the latter only would fall way and the former would still apply. If this were not so it would mean that if subsection one of section

35 of Proclamation 145 of 1923 were held to be repugnant to Act 38 of 1927 as a consequence the remainder of the section would be repealed and, for example, subsection (3) of that section, which provides for the transfer of an action from a periodical court to the main court of the district and vice versa, a matter purely of procedure, would automatically be repealed although it is in no way inconsistent with Act 38 of 1927 and this could not have been intended. If then a section of a law contains several subsections and it is held that certain of those subsections are repealed because they are repugnant to or inconsistent with another act and that others are not repealed because they are not, then, logically the same reasoning must be applied to a subsection, part of which is repugnant or inconsistent and part of which is not, and it is possible to hold that only the repugnant or inconsistent part is repealed and that the other portion remains in force. This brings us to the consideration as to whether any portion of subsection one of section 35 of Proclamation 145/1923 can be held to apply to Courts of Native Commissioner.

Now this subsection provides, inter alia, that an action or proceeding may with the consent of all parties thereto be transferred by the Court to any other Court and the act of transferring the action would be merely one of procedure and would so apply by virtue of Proclamation No. 299 of 1928 which provides that the procedure and rules of Magistrate's Courts as contained in Proclamation No. 145/1923 and any amendment thereof shall be deemed, mutatis mutandis, to be regulations made under subsection (4) of section 10 of the Native Administration Act, 1927, in respect of the Courts of Native Commissioner in the Transkeian Territories. It was been contended that only the rules and orders contained in the second Schedule to Proclamation 145/1923 are applicable and that the body of the Proclamation is not. But this contention, we consider, is not sound for if it had been intended that only the rules in the second Schedule should apply that intention would have been clearly expressed. Section 10(4) empowers the Governor-General to make regulations in respect of Courts of Native Commissioners and the regulations he has prescribed are those contained in Proclamation 145/1923, whether contained in the body of the Proclamation or in the second Schedule thereof, and consequently all those which are not repugnant to or inconsistent with Act 38 of 1927 are in force. Any other interpretation of Proclamation 145 of 1923 would mean that the Governor-General had failed to do what he clearly intended and that is to provide regulations for the conduct of judicial business in the Native Commissioners' Courts.

It has further been contended that under Section 10 (3) of Act 38 of 1927 a Native Commissioner has jurisdiction only over persons resident within the area of his jurisdiction, and that the parties cannot by consent confer jurisdiction upon him. A statute should be construed in conformity with the common law rather than against it unless it is clearly intended to alter the common law (Johannesburg Municipality vs. Cohen's Trustees, 1909 T.S. 811). If an inherent right exists at common law any statute tending to take away that right should not be so construed unless that intention is clearly expressed. In the case of Sibango Ngansana vs. Tsatsoane 1931 N.A.C. (Cape & O.F.S.) 50) this Court decided that where a defendant, resident in one district, was sued in another district and appeared and pleaded to the summons without taking objection to the jurisdiction of the Court to try the action that Court has jurisdiction notwithstanding the proviso to section 10(3) of Act No. 38 of 1927

because....

because under Common Law a person had the inherent right to submit himself to the jurisdiction of any Court.

The Acting Additional Native Commissioner distinguishes the present case from that cited above on the ground that the action is one which has been transferred to his Court and not one in which the summons was originally issued in his Court. We are of opinion, however, that the underlying principle is the same provided the parties are properly brought before his Court and the subject matter of the action is within his jurisdiction.

In the case of Koos Phaka vs. Elphius Mohali and another (1930-31 N.A.C. (N.& T.), 45), upon which the Acting Additional Native Commissioner Umtata relied in arriving at his decision and in which the circumstances were precisely the same as the case now under consideration, the Court in giving judgment said:-

> "It has been pointed out several times already by "this Court that a Native Commissioner derives his "jurisdiction as to persons and things from section "10 of the Act, read with the Proclamation prescrib- "ing the local limits within which he shall have "jurisdiction. In regard to persons residing out- "side the local limits he clearly has no jurisdic- "tion."

The decision of the Court was not based on the fact that no provision existed in the regulations for Courts of Native Commissioner for the transfer of an action from one Court to another and that, therefore, the parties were not properly before the Court, but on the ground that Section 10 of the Act restricted the jurisdiction of a Native Commissioner to persons residing within the local limits of his district. It will be seen, therefore, that the point decided by the Natal and Transvaal Division of the Native Appeal Court was in effect identical with that decided by this Court in the case of S. Ncansana vs. T. Silo (supra) and that the decisions of the two Courts are in conflict.

Under Act 20 of 1856 which regulated Magistrates' Courts in the Cape of Good Hope prior to the passing of Act 32 of 1917 the civil jurisdiction of Resident Magistrates, in so far as persons were concerned, was confined to cases "brought or instituted against any person residing within the district for which such Resident Magistrate shall have been appointed." The jurisdiction under that Act was limited in exactly the same way as the jurisdiction of Native Commissioners is limited by Act 38 of 1927 and consequently any decisions of the Superior Courts in regard to questions of jurisdiction over persons under Act 20 of 1856 would be applicable to similar questions arising under Act 38 of 1927.

In the case of Oxland vs. Key (15 S.C. 315) De Villiers C.J. in the course of his judgment stated:- "The "cases in which the question of jurisdiction has been "hitherto raised have been those in which the defendant "and not the plaintiff has objected to the competence of "the inferior court. In the case of Riversdale Division- "al Council vs. Pienaar (3 Juta p. 252) it was pointed out "that the parties to a suit cannot confer on an inferior "Court - as a Court - a jurisdiction over matters in re- "spect of which the law gives it no jurisdiction. It was "not intended to decide that the parties cannot agree to "refer the dispute to the Magistrate as an arbitrator and "to be bound by his decision. The term 'arbitrator' may

not.....

"not be used by the parties, but where it is manifest "from their conduct that they wish the Magistrate to final- "ly decide the dispute and bind them both by his decision "there is no reason in law why he should not undertake the "arbitration. It is quite competent, therefore, for the "applicant to argue, as he has argued, that if it is mani- "fest from the proceedings in the Court of the Magistrate "of Kokstad, that the parties intended to refer the dis- "pute to the final determination of the Magistrate, the "Bishop had no right of appeal to the Chief Magistrate. "Such a reference would have been a proceeding extra "cursum curiae, from which no appeal would lie to a high- "er Court.

"In the Riversdale Divisional Council case, a "distinction was drawn between want of jurisdiction in "respect of the parties to a suit and want of jurisdiction "in respect of the subject matter of a suit. The distinc- "tion was fully recognised by the old text-writers and was "elaborately discussed by Vinnius in his dissertation on "Jurisdiction (chapter II). He goes further than most "writers in admitting extension of jurisdiction in respect "of the subject matter; but this Court has repeatedly held "that the jurisdiction of Magistrates, as such, cannot be "extended by the parties to matters not included within "it by statute.

"A different practice, however, prevails where the "defect in jurisdiction arises from a personal privilege "of the parties. A person cannot in the ordinary course "be sued in the Court of a Magistrate in whose district he "does not reside; but if he has expressly or tacitly sub- "mitted to the jurisdiction he cannot, in civil cases at "all events, object to the exercise of such jurisdiction. "Upon this point our practice is in accord with that of "the Roman Law as well as that of the Dutch Law (see Voet "2,1,35; Vinnius de Jurisd. ll. 4 to 11).

"What evidence, then, is there of a prorogation "of the Magistrate's jurisdiction in the present case? "The plaintiff himself, who now seeks to take advantage of "the lack of jurisdiction, invoked that jurisdiction by "suing the defendant in the Court of a district in which "the defendant was not residing. The defendant took no "exception, and does not now object to the Magistrate's "want of jurisdiction. Clearly then the jurisdiction was "properly exercised and cannot now be objected to by the "plaintiff.

"If the jurisdiction was properly exercised, the "judgment stands on exactly the same footing as if both "parties had resided in the district (c.f. Vinnius de Jurisd. "ll, 127). There was a right of appeal to the Chief Magis- "trate, and of this right the defendant availed himself."

In the case of Ackermann vs. Union Government (1915 C.P.D. at p. 250) Juta J.P. said:- "It is clear "from the cases which have been cited, especially the "case of Oxland vs. Key (15 S.C. 315) where the exception "was taken that no consent could confer jurisdiction upon "the Magistrate, that the Court has held that where the "objection is one in regard to the person such person can "consent and can confer jurisdiction."

It was laid down in the case of Smith vs. Pedersen Ltd. (1925 C.P.D. 323) also that parties can agree before the issue of summons that an action may be tried in a Court other than that of the district in which the defendant resides.

In all these cases a sharp distinction was drawn with regard to jurisdiction in respect of subject matter and jurisdiction in respect of persons and it was held

in....

in Oxland vs. Key and Ackerman vs. Union Govt. that notwithstanding the limited jurisdiction conferred by Act 20 of 1856 jurisdiction over persons could be conferred either tacitly or expressly.

For these reasons we feel ourselves contrained, with respect, to differ from the decision in Phaka's case.

It was argued before this Court on behalf of the respondent that if section 35(1) did not apply to Native Commissioners' Courts there was no authority for the transfer of an action from one Court to another and consequently, in the present case, the parties were not properly before the Court at Umtata. In dealing with transfers of actions Voet (Vol. 1 Bk. II Tit. I 181)says:- "I know that there is a contract as it were in judicio "'that the lawsuit should be finished there where it was "begun' but this must not be taken in any other sense "than that the plaintiff should not be able to transfer "the suit to any other forum without the consent of the "defendant, and that without the consent of the plaintiff "the defendant should not desire it after the contesta- "tion of the suit. But as, with the consent of both, "the judge could be departed from before whom the lawsuit "was begun, and another judge be gone to declare the law "concerning the same cause not yet terminated by the sen- "tence of the first judge, to do so is neither interdict- "ed by the laws, nor do I consider it foreign to the "reason for the law."

The provision contained in various Acts of Parliament (c.f. sec. 44 of the Charter of Justice (Cape), Act 21/1864 (Cape), Act 35/1896 (Cape) and sec. 113 of the South Africa Act 1909) for the transfer of a trial from one Superior Court to another would appear merely to incorporate in the statute law what was previously the common law. Similar provision is made in regard to inferior courts in the Transkeian Territories by section 35(1) of Proclamation 145/1923, which confers the necessary authority and provides the machinery i.e. procedure for effecting the transfer. That the mere transfer of the action does not confer jurisdiction is clear for if the subject matter of the action were beyond the jurisdiction neither the consent of the parties nor the transfer could give jurisdiction.

We are of opinion, therefore, in the circumstances of this case, where both parties had consented to the removal of the trial, that the Native Commissioner at Idutywa had the authority to transfer the action to the Court of the Native Commissioner at Umtata and that the latter Court had jurisdiction to hear it. We do not decide what the position would be where one party makes application for the removal of a trial and the other party objects. That point is left open for consideration should occasion arise.

The appeal is allowed with costs, the ruling of the Acting Additional Native Commissioner is set aside and the case returned for hearing on its merits.

CASE NO. 27.

AMELIA TYOKOM vs. BEN GQOLODA.

KING WILLIAM'S TOWN: 11th December 1935, before H.C. Scott Esquire, and Messrs. C.J.N. Lever and H.B. Myburgh, Members of the N.A.C.

(Appeal....

(Appeal from the Court of Native Commissioner East London).

Contract of sale: Risk and Profit in thing sold pass to purchaser on completion of contract; supplementary to written contract: admissibility. Parol evidence

The facts in this case are briefly that on the 27th September 1933 the parties entered into an agreement whereby certain buildings and erections on site No. 239, Church Street, East Bank Location and also the right, title and interest in the lease of the said site from the Municipality of East London were sold by Ben Gqoloda (respondent) to Amelia Tyokom (appellant) for the sum of £95, of which £45 was to be paid in cash on signature of the agreement and the balance (£50) was represented by certain pieces of land in the Pirie location King Williams Town district to be transferred to respondent by appellant. Transfer of the site was to be effected immediately upon payment of the sum of £45. The costs and charges of drawing the agreement amounting to £1. 13. 6 were to be borne by the parties in equal shares. The pieces of land in the Pirie location were duly transferred to respondent but the sum of £45 was not paid and in consequence a further agreement was entered into on the 15th January 1934 by which it was agreed that the purchase price should be increased to £100 and the amount to be paid in cash to £50 which was to be paid in instalments of £5 per month from 28th February 1934 to respondent's attorneys, transfer of the site No. 239 was acknowledged by appellant and she also agreed to pay the costs of the agreements amounting to £2. 16. 6.

It was further agreed that until the purchase price was paid in full appellant should not transfer the site out of her name or that of her nominee and that in the event of her failing to pay any instalment on due date the respondent should be entitled to

(a) take action for the balance due,

(b) to sell the house No. 239 by public auction or by private treaty.

There was a further clause in the later agreement as originally drawn up entitling the respondent, on failure of appellant to pay any instalment, to resume possession and ownership of the said hut Site whereupon the agreement was to be regarded as cancelled and all instalments paid were to be treated as rent and forfeited to respondent. This clause was however deleted before the agreement was signed.

The respondent alleged that appellant paid only £26. 15. 0 of the purchase price leaving a balance of £13. 5. 0 and had not paid the £2. 16. 6 cost of the two agreements and sued her in the Court below for these sums, a total of £16. 1. 6.

Appellant in her plea denied that she had failed to pay the balance of purchase price and costs of the agreements and filed a counterclaim in which she alleged (1) that between October 1933 and February 1934 the sum of £35. 15. 0 being rentals in respect of the site in question to which she was entitled were paid in error by the tenants to respondent's wife as his agent, (2) that during the period June 1934 to September 1934 she paid to respondent's agents the sum of £21 (3) that during March 1935 she paid to respondent's agents the sum of £16. 15 0.

The. . .

The total of the amounts mentioned in these paragraphs of the counterclaim was £78.10.0. Deducting from this the amount of her liability to respondent, namely £58.13.6 left a balance of £19.16.6 for which she asks for judgment.

In his plea to the counterclaim respondent admitted payment of the sums of £5 and £15.15.0 and in respect of the amount of items collected, £35.15.0, stated that the allegations in regard thereto were inadmissible in that they refer to prior transactions which purported to vary the terms of the written agreement of the 16th January 1934 and tended to introduce parol evidence at variance with the terms of that agreement.

It will be seen therefore that the sole dispute between the parties is as to who was entitled to the rents of the property for the period October 1933 to February 1934. It was pointed out during the course of the argument in this Court that the evidence did not clearly show that the amount of rentals paid was £35.15.0 as one of appellant's witnesses stated that the amount was £38.15.0. Mr. Cook, appellant's attorney, intimated that he was prepared to accept the latter amount as being correct.

The Assistant Native Commissioner entered judgment in favour of respondent for £19.16.6 and costs and dismissed the counterclaim. Against this judgment an appeal has been noted.

Contracts for sale are treated as executed and complete as soon as the parties have agreed on the thing sold and the price to be paid, though the title may not yet have been conveyed to the purchaser (Voet Vol. III 3rd Edition p. 511). Immediately after the conclusion of a sale by the contract of the parties the risk and profit of the thing sold, whether it be sold on credit or not, pass to the purchaser, although the thing has not been delivered nor the price paid, unless the contrary be the case unless something to the contrary has been stipulated (Maasdorp Vol. III 2nd Edition p. 60 et seq.).

It is clear, therefore, that immediately upon the nature of the agreement on the 16th September 1933 the risk and profit in the property sold passed to the appellant and among the profits to which she was entitled were the rentals of the property sold and the respondent in the course of his evidence in an interpleader suit in regard to this property, stated that after the firm agreement I gave her (meaning appellant) occupation and she had the benefit of the rents." The Assistant Native Commissioner has found as a fact that the rentals for the site in question were actually paid to respondent while in her capacity as his agent. The amount therefore must be regarded as having been paid to him.

We are of opinion that the contention that arose in regard to the fact as to who was entitled to the rents. The two agreements in regard to the sale of this property are silent on this point and as the law is that on completion of a sale the risk and profits in the thing sold passes to the purchaser it was quite competent to lead evidence to arrive at the amount which has been paid in rents and this evidence cannot be regarded in any way as tending to vary the written document. There was no question as to any portion of the purchase price having been paid with regard to the rents and even if there had been it would be merely collateral and if it was not inconsistent with the written contract parol evidence to prove it would be admissible (Peter vs. Thomas, 1906 T.S. 240).

We are of opinion therefore that the Assistant Native Commissioner erred in holding that the rentals in respect of the property sold belonged to respondent until transfer was given. In any case he was clearly wrong in awarding him the rents for the whole period October 1933 to February 1934 seeing that transfer was passed on the 15th January 1934.

We have come to the conclusion that the appellant was entitled to the rentals as from the date of the signature of the first agreement which her attorney in this Court agrees should be computed at £32.15.0. To this must be added the sums of £21 and £15.15.0 referred to previously making a total of £69.10.0 paid to or received by respondent in respect of the property. Deducting from this the sum of £52.16.6 admittedly due by appellant to respondent leaves a balance of £16.12.6 in favour of appellant.

The appeal will be allowed with costs and the judgment in the Court below in regard to the claim in respect of the hut site altered to "On the claim in convention for defendant. On the claim in reconvention for plaintiff in reconvention for £16.13.6. Plaintiff in convention to pay costs."

In addition to the above claim respondent also claimed from appellant the sum of £4.10.0 in respect of the sale of a scale to her. On this the Assistant Native Commissioner entered judgment of absolution from the instance with costs. There has been no appeal in respect of this portion of the judgment and it will, therefore, not be affected by the judgment of this Court.

CASE NO. 28.

STANFORD MBAMBA vs. SIWELI DWAYA.

KING WILLIAMS TOWN: 11th December 1935, before H.G. Scott, President, and Messrs. C.J. Lever and E.S. Myburgh, Members of the N.A.C.

Native Appeal Court: Practice: Where appeal on the facts allegation that judgment is against the weight of evidence without specifying details held to be sufficient.

(Appeal from the Court of Native Commissioner MIDDLEDRIFT).

In this case Respondent's Attorney objected, in limine, to the hearing of the appeal on the ground "that the grounds of appeal did not conform to Rule 10(b) of the Native Appeal Court Rules framed under Act 38 of 1927 in respect that they did not state clearly and specifically the grounds upon which the appeal is based."

The grounds of appeal are as follows:-

(1) The judgment in favour of the Defendant was against the weight of evidence as there was ample evidence produced to prove the allegations in Plaintiff's Summons.

(2) The whole of the judgment is appealed against.

(3) Generally.

It was argued before this Court that merely to say that...

that the judgment is against the weight of evidence is not a sufficient compliance with the rules, and in support the case of Ngikilitye Ngukumbu vs. Sigwebe Qala (4 N.A.C. 243) was quoted. The case mentioned was heard in 1921.

In Order XXX Rule 2 of Act 32 of 1917 it is laid down that a notice of appeal shall state the grounds of appeal clearly and specifically. Rule 10(b) of Government Notice No. 2254 of 1928 (Rules for Native Appeal Courts) is in precisely similar terms and consequently any decisions of the Superior Courts in regard to Rule 2 (4) (b) of Order XXX would apply to Rule 10 (b) of Government Notice No. 2254 of 1928.

In the case of Pretorius vs. Glas (1923 T.P.D.156) it was held that on a notice of appeal stating that the judgment was against the weight of evidence the Appellant was entitled to attack one particular item of the judgment on the ground that that item, or part thereof was against the weight of evidence.

In the case of Estate Ludike vs. McLoughlin(1929 T.P.D. 317) a notice of appeal by Plaintiff against a judgment of a Magistrate stated that "The judgment is against the weight of evidence and is bad in law in that the Magistrate erred in holding that the evidence led by the Plaintiff was inadmissible and was therefore not entitled to grant absolution from the instance with costs." It was held that the words "The judgment is against the weight of evidence" comprised a separate ground from that contained in the subsequent words and were not in any way qualified thereby and that Appellant was entitled thereunder to argue that on the admissible evidence on the record the judgment was against the weight of evidence.

In the case of Rex vs. Deutbarn (1930 O.P.D. 198) it was held that a ground of appeal that "the judgment was against the weight of evidence" merely means that on material issues of fact on which there was a conflict of evidence the Magistrate's finding was against the weight of evidence. With that limitation of its meaning such a notice of appeal may, the Court was "inclined to think" be considered to satisfy the requirements of Order XXX Rule 2 (4) (b) of the second schedule to Act 32 of 1917.

In the case of Muller vs. Haeklander (1932 S.W.A. 80) it was held that where a ground of appeal against a decision of a Magistrate's Court is that the decision is against the weight of evidence such ground covers a contention that certain evidence has been wrongly admitted in the lower Court.

A consideration of these later decisions of the Superior Courts leads us to the conclusion that where the appeal is on the facts it is sufficient to say that the judgment is against the weight of evidence without specifying in detail in what respects it is against the weight of evidence.

The objection is overruled with costs.

CASE NO. 39.

ADOLPHUS KOM vs. DINAH KOM.

KING WILLIAM'S TOWN: 11th December 1935, before H.G.Scott Esquire, President, and Messrs. C.J. N. Lever and L.B. Lyburgh, Members.

Native....

Native Appeal Court: Practice: Late noting of appeal: "Interpretation of Rule 3, Government Notice 2254/1928". Meaning of "within 21 days after date of judgment."

(Appeal from the Court of Native Commissioner: PORT ELIZABETH.)

In this case judgment was delivered on 14th August 1935 and appeal was not noted until 5th September 1935, a period of 22 days after judgment had been entered. It thus appears that the time allowed by the rules during which an appeal shall be noted has been exceeded.

It was argued before this Court by the appellant's attorney that in view of the fact that the rule lays down that "an appeal from any judgment of a Court of a Native Commissioner shall be noted within 21 days after the date of such judgment" and in view of the provisions of section 5 of Act No. 5 of 1910 (the Interpretation Act) not only should the day of judgment be excluded but also the day following. If this contention is correct then the period of twenty-one days would commence to run from the 16th August and the appeal would thus have been timeously noted.

We have to consider, therefore, the meaning of the words "after the date of judgment" and in so doing we have been guided by the decisions of the Superior Courts on this point. Reference to the case of National Bank of S.A. Ltd. vs. Leon Levson Studios Ltd. (1913 A.D. at page 220), and the cases therein cited, shows that where the time within which anything has to be done is expressly said to run from or after a certain date, the date referred to is not to be included in the calculation of the time. In the case of Malagudi vs. Snyman (1913 T.P.D.137) it was held that an appeal is not properly noted unless notice of appeal is given and security found within 21 days of the judgment. Similarly in Weiss & Rohe vs. Oehl (1921 S.W.A. 85) it was held that the period for appealing against a garnishee order runs from the date of the order.

From the foregoing it seems clear that the Courts have interpreted the words "after", "from" and "of" as being synonymous, and furthermore that the Interpretation Act of 1910 (section 5) merely sets out in statutory form the manner long established by the Courts of computing time by excluding the day on which the event occurred. This method of computing the time within which an appeal shall be noted has been consistently followed by this Court since its inception and we see not reason for departing from it.

We are therefore of opinion that the appeal has been noted one day late and it will accordingly be struck off the roll with costs.

CASE NO. 80.

MSHIWA vs. MTEMZANA.

KING WILLIAM'S TOWN: 17th December 1935, before H.G. Scott Esquire, President, N.A.C.

Native Appeal Court: Costs: Review of taxation: Fee for conducting case allowed where appeal withdrawn before hearing.

In this matter there was no appearance on behalf of appellant.....

appellant before this Court, his attorney having intimated on the telephone that he was withdrawing the appeal, and it was accordingly struck off the roll with costs. On respondent's attorney presenting his Bill of Costs for taxation the Taxing Officer disallowed an item of £2.2.0 for "conducting the case in Court" on the ground that as there had been no argument before this Court it could not be said that the respondent's attorney had "conducted the case in Court." A strict reading of the language contained in Table "B" of Government Notice No. 2254 might lead to this conclusion but I do not think that this was the intention of the legislature.

When an attorney is briefed to appear or appeal he must necessarily do a great deal of work in preparing to argue the case, and it would be a distinct hardship if, merely because the party who was responsible for bringing the case before the Court abandoned the appeal at the last moment, the respondent should be made to bear the costs of his attorney's appearance. To take a case which might well happen. Suppose an appeal was actually argued on behalf of the appellant and the Court did not consider it necessary to call on the respondent to reply. In such a case the respondent's attorney would not have conducted the case in Court on a strict interpretation of the words used in the tariff and yet it cannot, in my opinion, be argued that he would not be entitled to the fee laid down.

Each case must be taken on its merits and, in my opinion, in the circumstances of this case the fee for conducting the case should have been allowed.

The Taxing Officer's decision is set aside and it is ordered that the item of £2.2.0 be restored to the Bill of Costs.

CASE NO. 31.

NGWEKANA vs. NGWEKANA.

KING WILLIAM'S TOWN: 19th December 1935. before A.D. Scott, Esquire, President N.A.C.

Native Appeal Court: Costs: Review of taxation: Appeal and Cross Appeal.

In this case an appeal and cross-appeal were noted. The appeal was allowed with costs and the cross-appeal was dismissed with costs.

The appellant's attorney presented to the Taxing Officer a bill of costs which included a fee of £2. 2. 0 for conducting the appeal and £1. 1. 0 local attorney's fee and which was duly taxed and allowed. The same attorneys, acting for cross-respondent presented a bill in respect of the cross-appeal which included a further charge of £2. 2. 0 for defending the cross-appeal and £1. 1. 0 local attorney's charges and the usual charges in connection with drawing and stamping of Bill of Costs. The Taxing Officer disallowed the whole bill on the ground that no costs were allowed on cross-appeal and his ruling has been brought on review by cross-respondent.

It is contended that upon receipt of a notice of Cross-Appeal, the cross respondent must go further than his own appeal would necessitate for he must direct his attention...

attention to the grounds of the Cross-Appeal and examine the record from that point of view as well as from the point of view of his own grounds of appeal.

It may well be that the noting of a Cross-Appeal may entail additional work and research on the cross-respondent's attorney for which the Court might consider he should receive additional remuneration but this is not one of those cases. The Cross-Appeal was merely on the facts on which the appeal was largely based.

Therefore in order to argue the appeal the appellant's attorney had to study the record from the point of view of the evidence and the noting of the cross-appeal did not cause any additional work on his part. As pointed out by cross-appellant's attorney the appeal and Cross-Appeal was dealt with as one and there was one set of arguments only. In these circumstances I do not consider that two sets of fees should be allowed.

The application submitted by Cross-Respondent's attorney is dismissed and the Taxing Officer's ruling confirmed.

(1) JA[illegible] SILO vs HEADMAN VELISO
(2) EDMUND DYUBELE vs HEADMAN VELISO

Umtata. 16th. march, 1934. Before [illegible] Esquire. Acting President and Messrs, F.J. KOCKOTT and [illegible], members of the N.A.C.

inter grazing - Proclamation No 333 of 1931 - Interpretation of Sections 1 and 2.

(Appeals from the Court of the Native Commissioner, [illegible]: Heard as one)

These two actions arise out of the same set of circumstances and the trial was joined.

In each case each Plaintiff (now appellant) in the Court below sued for £10 damages for wrongful and unlawful seizure, removal, detention, driving, overdriving and abandonment of cattle by Defendant (now Respondent).

It was alleged that Defendant wrongfully caused the cattle in question to be detained at Silwana's kraal and that the next day the cattle were, also on Defendant's instructions, driven towards the pound and that they were subsequently abandoned. That as a result of reckless overdriving a beast belonging to Dyubele, the firstnamed Plaintiff died and that the cattle of both Plaintiffs suffered in consequence.

The seizure of the cattle was common cause, but Defendant pleaded that the cattle were lawfully impounded as they were grazing upon an area reserved for winter grazing and that they were lawfully seized. The Defendant further pleaded that he offered to release the cattle but that Plaintiffs declined to accept them. That he thereupon ordered the Plaintiffs' cattle to be driven to the pound. That the later, on return from the Bityi Police Station agreed to accept the cattle and that they thereupon took possession of the cattle.

In joining issue Plaintiffs deny that the area upon which their cattle were grazing had been reserved for winter grazing.

The Native Commissioner in the Court below framed and had to decide two questions:
(1) The interpretation of Section 2 of Proclamation [illegible] of 1931;
(2) the question of damages.

As it will appear at a later stage, this Court is only called upon to decide upon the Native Commissioner's interpretation of Section 2 of the Proclamation, as in its opinion the question it has to decide involves only Section 1. The Native Commissioner found that the provisions of Section 2 were merely directory and not peremptory and that proceedings taken under Section 2 were not vitiated by the absence of a report to the Native Commissioner. The Native Commissioner also found on a question of fact that a proclamation of the commonage in question had been carried out in terms of Section 1 of the Proclamation; that the cattle had been lawfully been impounded lawfully and that Plaintiffs were not entitled to any damages, and gave judgment for Defendant accordingly.

Against this judgment the Plaintiffs appeal on the grounds:
(1) That the judgment is against the weight of the evidence and the probabilities of the case.

(2) That in as much as Proclamation 333 of 1931, Sections 1 and 2, lays down the procedure necessary for the legal reservation of portions of the commonage in Native locations for winter grazing, the trial Court erred in holding that the reservation was complete and legally binding on Plaintiffs in the absence of compliance by the Defendant with the imperative provisions of Section 2 aforesaid

(3) That the trial Court erred in holding that the requirements entailed by Section 2 were inserted for administrative purposes only, and that Section 2 should be disregarded and ignored when testing the validity of any reservation made in terms of Section 1.

(4) That the provisions of Section 2 of the Proclamation in question are peremptory in their nature and until the requirements thereof had been complied with an alleged reservation purported to have been made in terms of Section 1 has no legal force or effect.

(5) That the Proclamation being of a penal nature, in that it imposes disabilities on the stock owners, its provisions should be strictly construed.

(6) That by reason of the alleged reservation being incomplete and legally of no force or effect, the trial Court erred in not ~~holding~~ awarding damages for seizure, driving of the cattle to the Bityi Police Station and their detention, since such seizure, driving and detention would be wrongful and unlawful.

As already stated it was common cause that the cattle in question had been grazing upon certain ground from which they were seized. The Respondent alleged that this area was reserved for winter grazingand had been so reserved for three years, and that during the year 1932 the area had been reserved again, that is for the third time. Now the proclamation requires that annually in the month of September or October the headman shall summon a meeting of the taxpayers of his location and after discussion fix and declare which prtion of the commonage shall be reserved for winter grazing and also the period for which such reservation shall continue. It is therefore clear that two decisions are necessary.

(1) the area to be reserved must be fixed and
(2) the period during which such area shall be reserved shall also be fixed.

It would appear from the arguments advanced before this Court that in the Court below the term reservation was regarded in a somewhat loose sense without due regard to the fact that no/ there is in law/reservation in terms of Section 1 until the second requisite has been fulfilled. It was argued that the Appellants could not raise the question whether a period had been fixed. Whether this aspect was discussed or not in the Court below is of no concren to this Court which can be guided only by the pleadings and evidence. The Appellants specifically pleaded that there had been no "reservation" in the Court below. In such pleading they pleaded, inter alia, in effect that no period had been fixed. The first ground of appeal gives the right to discuss any matter of evidence adduced or failure to adduce material and necessary evidence (Aaron Ngubeye vs Mpiyokne Bolokoolola, 1933 A. D. 76).

As regards the period of time there is not a title of evidence and on this ground alone the respondent failed in the Court below to discharge the onus placed upon him.

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As regards any meeting formally called Appellants deny any knowledge and they are supported by their sub-headman Hegeni. Now a sub-headman is an Officer who holds his position at the pleasure of the headman and this Court finds it difficult to beliieve that such an Officer would lightly incur the displeasure of the headman to whom alone he can look for a continuation of his favours. The evidence for the Respondent on this point is most unsatisfactory. The Respondent himself says he confirmed the reservation made by Silwana. This statement is not explained and this Court can only accept it as it appears ex facie that Silwana made the reservation and that the Respondent confirmed it. Section 1 of the Proclamation requires that the headman of the location shall summon a meeting. No person other than the headman may do so. The headman admits that the reservation was not reported to the Native Commissioner in terms of Section 2 of the Proclamation and while this Court is not required to give a ruling on the question raised in the Court below as to whether the requirements of this Section are peremptory or merely directory it can nevertheless find in the basence of a report confirmation of the Appellants' contention that there was no reservation. If action of any nature had been taken it was taken in a very loose manner and not in terms of the Proclamation. The Respondent and Silwana say the reservation was made during ploughing season while the witness Mbalesi says it was during scoffling season. The onus to prove a lawful reservation in terms of Section 1 of the Proclamation was upon the Respondent and in the opinion of this Court he has failed to discharge this onus. It will also appear in dealing with the conduct of the Appellants that they acted in accordance with such a genuine belief that no limitation had been placed upon their rights to graze cattle upon the area from which they were impounded.

It was common cause that the cattle had been impounded, but at an early stage in the proceedings there is divergence of evidence. The Respondent says that on the first day he told Silwana to release the cattle and that he (Silwana) and the Appellants left his kraal and he thought the matter was finished. He further alleges that on the next day also he offered to release the cattle but Appellants merely rode away. The Appellants throughout deny any such offers by the Respondent to release their cattle. The Court below had to decide therefore on a material point in connection with a very early stage in the proceedings. An Appeal Court is always loath to disturb the findings of a trial Court which had the advantage of having the witnesses in person before it, but it is compelled to do so when the presumption is irresistibly in a contrary direction. In the opinion of this Court it is unheard of, or at least of vary a rare occurrence, for a Native to fail to avail himself of the opportunity to regain possession of his cattle. To him there can hardly be a greater deprivation or infringement of rights than for his cattle to sleep in the kraal of another person, and rather than allow this he will forego any right of action he may possess. Moreover, in the opinion of this Court the Appellants' action was in keeping with their contention that there was no reservation and it must come to the conclusion that the Native Commissioner in the Court below erred in believing the Respondent. It therefore follows that the impounding was not only unlawful but that the Appellants did not at this early stage have an opportunity of recovering their cattle without the payment of trespass fees, and that the Respondent was liable for all the consequences which followed from the wrongful impounding and driving of the cattle.

It.....

It is not necessary for this Court to enquire too closely into the subsequent proceedings. The Respondent had placed himself in the position of one committing a tort and his liability extended to ordinary or slight negligence. As regards the death of the ox owned by the Appellant Dyubele, it is a factor in favour of appellants' contention that this beast was castrated in August that operations of this kind are commonly performed during cold weather. What actual distance the cattle were driven and in what time they were driven need not concern this Court, and would not have concerned the Court below had it come to the conclusion that the Appellants had suffered injuria. There is in the opinion of this Court no evidence that any action of the Appellants was responsible for the damage nor even contributory thereto. The fact remains a beast actually died and the allegation of over-driving is therefore supported by a fact which is not in dispute.

What amount of damages a Court should award for injuria is never an easy matter to decide, but on the other hand damages in such cases are never awarded with mathematical precision. There is no mathematical rule for computing such damages. In the opinion of this Court £5 in each case will be an equitable award.

The appeals are allowed with costs and the judgment in the Court below will be altered in each case to one of judgment for Plaintiff for £5 and costs, the costs of appearance to be apportioned between the two cases. The appearance costs in this Court to be similarly apportioned.