SELECTED DECISIONS OF THE NATIVE APPEAL COURT

✦

(Southern Division)

1950

✦

Volume I

(Part XII)

NOTE.—Volume I, Part XII (Cases Nos. 110 to 111) already issued should be renumbered Part XIII.

THE GOVERNMENT PRINTER, PRETORIA.
1950

G.P.-S.4193—1950-1—500

CASE No. 99.

FRED NDYIKE *v.* IDUTYWA CATTLE DIPPING COMMITTEE.

BUTTERWORTH: 10th May, 1950. Before J. W. Sleigh, Esq, President; Wilkins and Marais, Members of the Court (Southern Division).

Native Appeal Case—Practice and Procedure—Committee having characteristics of a universitas*—Contract—Constitution of Committee not binding on stock owners who took no part in its election—If stock owner avail himself of dipping facilities he is impliedly bound to pay prescribe fees—Leave to appeal to Appellate Division—Consent refused—Applicant nothing to gain if appeal successful—Other points raised not arguable.*

Appeal from the Court of the Native Commissioner, Idutywa. Sleigh (President), delivering the judgment of the Court:—

The respondent committee (herein referred to as the committee) obtained judgment against appellant for the sum of £4. 6s., being arrear dipping fees for the year 1949 at 2s. per head for 43 head of cattle. Against this judgment appellant appeals.

The committee was formed about 30 years ago for the purpose of providing dipping facilities for the cattle owners in the rural area of the district of Idutywa. A copy of its printed constitution forms part of the record. According to this the committee consists of 7 members and a chairman and is styled the Idutywa Cattle Dipping Committee. It is elected by the district councillors and the people of the 4 electoral areas of the district of Idutywa. To finance its activities it has power to levy dipping fees to be paid by all persons owning or possessing cattle within the district of Idutywa, excluding owners who "have" their stock on Idutywa Municipal Commonage (Rule 8). The committee may alter the tariff of fees [Rule 8 (*a*)], and the fees so prescribed are payable at the office of the committee upon a date to be fixed by the committee (Rule 9). Rule 10 gives the committee power to deny dipping facilities to stock owners who are in arrear in the payment of their fees; Rule 11 empowers the committee to appoint officers for the carrying out of its business; Rule 12 provides that the committee shall open a banking account and empowers the chairman and treasurer to operate on this account; Rule 13 gives the committee power to allocate its funds and it may set aside funds by way of pension or gratuity (presumably for its employees); Rule 14 provides that no action at law may be instituted without a resolution of the committee authorising such action; and by Rule 15 the committee accepts liability for the injury or loss of any stock dipped at its tanks where such loss or injury is due to the negligence of its servants.

The uncontradicted evidence is to the effect that at a joint meeting of the committee and representatives of stock owners held on 10th August, 1948, a resolution was unanimously approved in the following terms "that this meeting should accept 2s. per head from January, 1949, and report to stock owners that the committee suggested 2s. per head per annum to cover up all the work". At a meeting of the committee of 27th October, 1948, it was resolved that a fee of 2s. per head per annum be charged for 1949. The stock owners were advised of this increase of fees which were payable on the 1st January, 1949. Appellant was in 1949 the owner of 43 head of cattle and dipped his cattle during that year at Mnunyu tank, which is under the control of the committee. On 8th April, 1949, a large number of stock owners, including appellant, had not paid their dipping fees. The committee then resolved to sue the defaulting stock owners for arrear fees and as a result this action was instituted.

Paragraph 4 of the notice of appeal says that the Native Commissioner "erred in holding that the resolution of the 10th August, 1948, was a valid resolution, that in fact no valid resolution was passed on the said date by plaintiff committee". The meeting of this date was not a committee meeting but a combined meeting of the committee and stock owners and had, therefore, no power to impose a levy. Thus the Native Commissioner erred in holding that the committee imposed a levy on the 10th August, 1948. It is nevertheless clear that at the meeting of the 27th October, 1948, a fee of 2s. was validly levied by the committee for the year 1949.

As the facts are not contradicted and as there is no evidence that the resolution of 27th October, 1948, was rescinded the first ground of appeal, namely, that the judgment is against the weight of evidence and the fourth ground of appeal must fail.

The second ground of appeal is as follows:—

> "That the Magistrate's judgment is wrong in law in that the plaintiff committee is not a person in law and has no *locus standi in judicio* to make claim and sue for any dipping fees whatsoever."

In Morrison *v.* Standard Building Society (1932 A.D. 229), *Wessels, J. A.,* pointed out that in Roman Law it was not all voluntary associations which were forbidden by law or which require the sanction of the State. Some associations for a useful purpose were not only permitted but were even privileged. He referred to *Voet* who states that unless a corporation has State sanction it has no *locus standi in judicio,* but pointed out that *Voet* erred, and came to the conclusion "that *Gregorowski, J.,* was right when he held in the case of Committee of the Johannesburg Public Library *v.* Spence (5 Off. Rep. 54) that an association of individuals does not always require the special sanction of the State in order to enable it to hold property and to sue in its corporate name in our Courts. In order to determine whether an association of individuals is a corporate body which can sue in its own name, the Court has to consider the nature and objects of the association as well as its constitution, and if these show that it possesses the characteristics of a corporation or a *universitas* then it can sue in its own name. . . . . Whether it can or can not (sue) depends entirely upon the nature of the association, its constitution, its objects and its activities."

The committee is not a statutory body, but a voluntary association brought into being for the purpose of providing dipping facilities to stock owners.

I gather from the balance sheet put in that the members of the committee receive no remuneration other than attendance and travelling fees. It is not a profit making concern, but it is expected to balance its accounts, hence it's power to alter the tariff of fees. It is not clear whether the dipping tanks are owned by the committee. There is evidence that the construction of additional tanks is financed by the committee but the tanks do not figure as assets in the balance sheet put in. Be that as it may, it is clear that for many years the committee has operated these tanks, if not with the express sanction of the State, at least in collaboration with and the approval of the State Department of Agriculture through the latter's officials. It has entered into contracts with suppliers of dipping materials and with its employees, operated a banking account, owns a scotch cart and other property, entered into loan transactions, created a provident fund for its employees, and accepted responsibility for the negligence of its servants. Furthermore, the committee exists as such quite apart from the individuals who compose it, for these may change from day to day; and, in my opinion, one member of the committee is not the agent of the others and his acts cannot bind his fellow members. The committee thus has all the characteristics of a *universitas;* its very existence is dependant upon its

powers to levy and collect dipping fees and it follows that it must have power to recover unpaid fees by legal action. I, therefore, come to the conclusion that the committee is a juristic person and has *locus standi in judicio* to enforce contracts entered into by it; and in view of the provisions of Rule 6 (5) of Order VII of Proclamation No. 145 of 1923, as amended, it has power to sue in its own name, and it is unnecessary that all its members be joined. The second ground of appeal, therefore, also fails.

The third and fifth grounds of appeal may conveniently be taken together. They are, briefly, that the Native Commissioner erred in holding (1) that the constitution of the committee is binding upon appellant, and (2) that there was an implied contract between the committee and appellant.

There is no evidence that appellant took part in the election of the committee. It cannot, therefore, be said that he is in any way bound by its composition or its constitution in the sense that he can be compelled to dip in the committee's tanks or to pay the prescribed fees if he declined to avail himself of the facilities provided by the committee. But the evidence indicates that appellant has been a stock owner of some years standing; he must have paid the levy for those years and was, therefore, aware that the services were not rendered free. Apart from this there is the uncontradicted evidence that all stock owners were advised of the levy of 2s. for 1949. It follows that by making use of the dipping facilities provided by the committee, he agreed by necessary implication to pay the fees prescribed by the committee in terms of its constitution (see South African Railways and Harbours *v.* National Bank of South Africa, Ltd. 1934 A.D. at pp. 715-6).

The sixth ground of appeal is that the Native Commissioner erred in holding that the reasonableness of the rate levied was irrevalent to the issue. The Native Commissioner did not rule that the question of unreasonableness was irrevalent to the issue. He held in effect that it was not for the committee to prove reasonableness, but even if this onus was on the committee there is evidence on record to show that although it may be that the expenses incurred by it on salaries for office staff were extravagent, the increase of fees was to a large extent forced on the committee by normal increase in salaries and wages and cost of living allowances. On the other hand there was no corresponding increase in revenue due to the fact that there was a decrease in the number of cattle dipped and in respect of which the levy was payable. Although the fee of 2s. per head is high, having regard to similar fees paid in other districts in the Transkei, it cannot be said to be unreasonable and grossly excessive for the facilities provided. This ground of appeal also fails.

The appeal is dismissed with costs.

Wilkens and Marais (Members): We concur.

For Appellant: Mr. Sparks, Butterworth.

For Respondent: Mr. Shelver, Idutywa.

POSTEA.

BUTTERWORTH: 21st June, 1950.

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

This is an application for the Court's consent in terms of Section 18 of Act No. 38 of 1927 to appeal to the Appellate Division. The points on which applicant desires a decision from the Appellate Division are the following:—

(i) (*a*) That the Native Appeal Court erred in holding that respondent possess the characteristics of a corporation or *universitas* and can sue in its own name by virtue of Rule 6 (5) of Order VII of Proclamation No. 145 of 1923, as amended.

(*b*) That the above Honourable Court erred in holding that respondent has *locus standi in judicio* to make claim and sue for dipping fees.

(ii) (*a*) That the above Honourable Court erred in holding that in the circumstances set out in the record the constitution of respondent is binding upon and efficacious against the appellant.

(*b*) That the above Honourable Court erred in holding that there was an implied contract between respondent and appellant whereby appellant agreed to pay the dipping fees prescribed by respondent in terms of its constitution.

(iii) That the above Honourable Court erred in not holding that the onus of proving the reasonableness of the fee levied was upon the respondent, and that the respondent failed to discharge this said onus.

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

The main consideration which should influence this Court in granting or withholding its consent were indicated in the case Maqubela *v.* Gola [1949 1 N.A.C. (S) 119.]

We accept the position that if it could be held that the dipping rate for 1949 was not due, it would be a matter of great importance affecting a large number of stock owners, but the legality of the imposition of the stock rate levy is a point which has not been taken in this application.

In regard to the points taken, ground (i), namely, whether the dipping committee is a *universitas* and has the power to sue as a corporate body, is fairly arguable. But applicant has nothing to gain (apart from costs) if his appeal on this point is successful, because a judgment in his favour on this point will not debar the United Transkeian Territories General Council, which has taken over all the assets and liabilities of the now defunct dipping committee as from 1st March, 1950, from issuing a warrant of attachment in terms of Section 52 of Proclamation No. 191 of 1932, as amended, for the recovery of the dipping fees claimed in this action. [In this connection see Abramowitz *v.* Jacquet and Jacquet, 1950 (1) P.H. F.35.] If this were the only point taken, it would appear that consent to appeal to the Appellate Division would not prevent the United Transkeian Territories General Council from proceeding in terms of the section quoted.

As to ground (ii) (*a*), this Court did not hold that the constitution of the committee is binding on applicant; and the point raised in paragraph (ii) (*b*) is not arguable for the reasons given in the judgment of this Court.

In regard to ground (iii) this Court held that on the evidence before it the levy imposed was not unreasonable or grossly excessive for the facilities provided.

The fourth ground is vague in that it does not indicate in which respect the judgment is against the weight of evidence. This ground has not been pressed before this Court and, in any case, cannot be successfully urged since the evidence laid before the trial Court was not contradicted.

The application is consequently refused with costs.

For Applicant: Mr. Sparks, Butterworth.

For Respondent: Mr. Shelver, Idutywa.

CASE No. 100.

HUBERT MANAKAZA *v.* **BASSIE MHAGA.**

BUTTERWORTH: 10th May, 1950. Before J. W. Sleigh, Esq., President; Wilkins and Marais, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Seduction and pregnancy—Practice and Procedure—Letters corroborate woman's story as to paternity—Absolution at close of plaintiff's case rightly refused—Paternity, proof of—Case must be decided on the balance of evidence and probabilities—Woman's evidence requires corroboration—If no admission of intercourse woman must prove her case and man need merely rebut the evidence—Proof of seduction and pregnancy in Roman-Dutch Law and Native Law distinguished—Child—Great weight given to woman's statement fixing paternity—Onus—Admission of intercourse at or about time woman conceived throws heavy onus on man of proving that he is not the father—Admission of intercourse at any other time throws no special onus on man—If woman's statement as to paternity palpably false absolution judgment at close of plantiff's case may be justified.

Appeal from the Court of the Native Commissioner, Willowvale.

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

This is an appeal against a judgment for plaintiff as prayed with costs in an action in which plaintiff claimed from defendant six head of cattle or their value, £30, being five head as fine for the seduction and pregnancy of plaintiff's daughter, Priscilla, and one beast as fine for abduction.

Priscilla states that she first met defendant in January, 1948, and he became her sweetheart. In September, 1948, when she was teaching at Beecham Wood, in the district of Willowvale, he seduced her and in October she missed her periods. She informed defendant. From 4th November, 1948, she taught at Dae, a branch of the Msendo school where defendant was a teacher. He continued to visit her and she again informed him when she missed her periods in November. About March or April she wrote to him that she was pregnant. She states that defendant then suggested that she go to East London for her confinement, but when she declined he secretly took her to his aunt in Xilinxa location, Nqamakwe district, where she gave birth to twins on 16th June, 1949.

In support of her evidence she produced two letters which she says she received from defendant. In the first, which is dated 4th November, 1948, he invited her to go to a concert and ends in words which are translated as follows: "I long for you very much as you know how I love you, my dear, in so much that I want to spent every night with you." In the second letter dated 11th April, 1949, he wrote (translation): "as you refuse to go to East London, I should then take you to my aunt to give birth there at hers, and please don't let anybody know it unless you want to put me in trouble."

It appears that application was made for absolution judgment at the close of plaintiff's case. This was refused and one of the grounds of appeal is that the Assistant Native Commissioner erred in refusing this application.

The Assistant Native Commissioner states in his reasons that Priscilla gave her evidence in a very satisfactory manner, and we can find nothing in her recorded evidence to induce us to come to a different conclusion. It cannot be said that her story is such an utter fabrication that no reasonable man could be imagined as ready to accept it [Ndongeni *v.* Ngodwana, 1 N.A.C. (S) 93], nor has her evidence as to paternity been denied on oath [Komani *v.* Tyesi, 1 N.A.C. (S) 77]. The application for absolution judgment was, therefore, rightly refused.

Another ground of appeal is that Priscilla's evidence is not corroborated as is required by law. If defendant had written the two letters produced by her, they fully corroborate her story, because these letters, especially the one dated 11th April, 1949, are quite inconsistent with his innocence. There can be

no doubt that the Native Commissioner's finding that defendant wrote these letters is correct. Priscilla's evidence that she gave birth at the kraal of defendant's aunt in Nqamakwe district stands uncontradicted, and it is inconceivable that she would have selected for her confinement the kraal of defendant's aunt, who was apparently a stranger to her, if he had not made the necessary arrangements as was proposed in the letter.

As to the merits of the case, defendant admits that he had intercourse with Priscilla on 9th December, 1948, and his letter of 4th November supports her testimony that he also had intercourse with her in November, but since she says that she conceived in September and as plaintiff is claiming damages for pregnancy and not for simple seduction, the question arises whether, in view of defendant's admission of intimacy, there is an onus on him to prove that it was impossible for him to be the child's father. The Native Commissioner said in his reasons that he realised that there was no onus on defendant other than to rebut plaintiff's case. He obviously relies on what I said in Piliso *v.* Gcwabe [1 N.A.C. (S) 123]. In that case the man admitted intercourse in November, 1947, and the woman stated that she menstruated on 14th December and conceived as a result of intimacy on 24th December. I said that as there was no admission of intercourse when the woman conceived, the only onus on the man was to rebut the evidence of carnal intercourse at the time she says she conceived. Without further qualification this statement is misleading.

In that case the Court's attention was drawn to Nojantsholo *v.* Nkosana & Ano. [1941 N.A.C. (C. & O.) 81] in which it was held *inter alia* that, under Common Law, if carnal connection is *established,* or, under Native Law, if intercourse is *proved* the testimony of the woman as to paternity is preferred to that of the man. In Piliso's case I was more concerned with the question as to what was meant by the words "established" and "proved". A seduction case is a civil case. It must therefore be decided on the balance of evidence and probabilities, but with the special rule that the woman's evidence requires corroboration. The process of balancing takes place after all the evidence has been led. If there is no admission of sexual intercourse then the woman must prove her case and the man need merely rebut the evidence for the plaintiff. If the Court, after weighing the evidence and the probabilities, comes to the conclusion that intercourse is established and that the woman's evidence is corroborated, it will be necessary to decide, from the evidence already adduced, whether the man is in fact the father of the child. There is no question of giving the man a further opportunity of proving by further evidence that it was impossible for him to be the father of the child. All the Roman-Dutch authorities I have consulted speak of where cohabitation is admitted, not where it is established by evidence, although the ultimate effect may be the same.

In Piliso's case there was an admission of intimacy but prior to the date on which the girl said she conceived. In saying that in such circumstances the defendant need merely rebut the evidence of intimacy at the time she conceived I was expressing the Native Law on the point and had in mind the decision in Rossouw *v.* Chetty (1939 E.D.L.D. 277) which did not follow Stander *v.* MacDonald (reported in part in 1935 A.D. 325), and which appeared to be in harmony with Native Law. But since the latter case is often quoted in this Court it is necessary to state briefly what that case decides.

In that case *van der Heever, J.,* in tracing the history of our law, points out that Roman-Dutch authorities drew a clear distinction between a claim for damages for seduction and a claim for lying-in expenses and maintenance of the child; the former was granted in favour of the woman, the latter for the benefit of the child; and that both were derived from the Canon Law. He quotes *Grotius* (*Inleyd:* 3.35.8) as follows: "Maer het byslapen by hem zijnde bekent, werd een vrouwmensch gelooft

in 't aenwijzen van de vader, alwaer 't zoo dat zij bij meer anderen waere beslapen." He states that this indicates that what was required was proof of intercourse not proof of impregnation, and that the question of actual as against presumptive paternity did not arise. In support thereof he quotes *van Leeuwen* (*Rooms-Hollands Recht* 4.37.6) as follows: "Al bekende hij alleenlijk haar een maand of een jaar voor die verlossing beslapen te hebben." The learned Judge points out that according to *Voet* the woman was entitled to a provisional order for lying-in expenses and maintenance of the child even if she were a loose (onsedelike) woman and even if the admitted intercourse took place two years or one or two months before the birth of the child; but the learned Judge states that in the principal case the man could, however, escape liability if he could show that it was impossible for him to have been the father, for example, by proof of impotency or prior pregnancy (vorige swankerskap). In a more recent case [Rex *v.* Pie, 1948 (3) S.A.L.R. 1117] the same learned Judge adds blood test and absence during the period of gestation (uitlandig gedurende die dragtyd) as further examples. Finally, he states that the development of the Canon Law in Holland in regard to seduction and maintenance took the course stated by Puchta as follows: "Daarom het die ouere en die jongste praktyk die bestaande verpligting van die buitenegtelike vader tot alimentering onder 'n ander gesigspunt gebring. Hierdie gesigspunt beskou slegs die verpligting van die moeder, *quae semper certa est,* as een wat op verwantskap steun; naas haar . . . stel dit die aanspreeklikheid van die persoon wat die moeder beslaap het. Die ongeoorloofde handeling is dus die oorsaak van verbintenis en die dader moet vir die moontlike gevolge daarvan instaan . . . die *exceptio plurium constupratorum* het die gevolg van hierdie delikt nie op nie; solidêre aanspreeklikheid ontstaan daarenteen."

MacDonald admitted that he was intimate with Stander when she conceived but as she falsely stated that she was a virgin at the time of the intercourse it was contended that her evidence in naming the father should not be believed. The learned Judge in giving judgment for lying-in expenses and for maintenance said: "Luidens ons regsvoorskrifte soos ek hulle verstaan, is dit dus onnodig on na te gaan of eiseres geloofwaardig is by die aanwysing van die vader. Verweerder kan die regsgevolge van sy erkende byslaap ontduik slegs deur bewys van die onmoontlikheid daarvan dat die kind van hom ontvang is."

An appeal by MacDonald to the Appellate Division was dismissed on the merits of the case, that Court finding it unnecessary to consider the authorities reviewed by the trial Judge, but it did draw attention to the fact that Counsel were unable to refer to Roman-Dutch authorities in support of the rule that the woman's oath as to the paternity of the child should not be accepted, if the Court is of the opinion that she is generally not worthy of belief. All Stander's case therefore decides is that where a man admits intercourse with a woman within one year of the birth of her child and the woman names him as the father, he is the presumptive father and, as such, is liable for the expense incurred in connection with the birth and for the maintenance of the child unless he can prove that it was impossible for him to have been the father.

Native Law takes a more realistic view of the question. It lays down separate scales of damages for seduction unaccompanied by pregnancy and seduction accompanied by pregnancy, or, more correctly, just pregnancy. In Native Law, as in Roman Law, the only person who can maintain the action is the woman's guardian who is responsible for the confinement. The child's welfare is not considered at all. If the fine is paid then, among most tribes, the child belongs to its father who is responsible for its maintenance; if the fine is not paid or not paid in full the responsibility for maintenance rests with its mother's guardian. Among some tribes the fine is payable in respect of the first

pregnancy only and the amount of the fine remains the same whether the pregnancy terminates in a miscarriage or in the birth of twins. This shows that the welfare of illegitimate children in paternity cases has no place in Native Law.

Natives believe that birth takes place in the tenth month after conception. They place great reliance on this. Thus in a recent case which came before this Court the woman when reporting the birth of the child indicated that she had carried it for eleven months, to this the man retorted, "then you must be a horse". Our Courts have, however, accepted the view that the period of gestation may exceed or fall short of the recognised 280 days. If the man admits that he was sweethearting with the woman *about the time* she conceived, then he is presumed to be the father and will be held liable. The man can, however, escape liability if he can prove by satisfactory evidence that he is not the father, or that the woman was having intercourse with other men at the same time, in which case, in Chiefs' Courts, the case will be postponed until the birth of the child when it is examined and the case goes against the man to whom it bears resemblance (Sontundu *v.* Damane & Ano., 3 N.A.C. 261). Our Courts, however, realise that resemblance is an unsatisfactory means of identifying the father for the reason that one person may notice a resemblance where another can find none. Therefore, when it is shown that the woman has been carrying on with more than one man at the time she conceived our Courts give great weight to her statement fixing the paternity of the child, because apart from the fact that she is in the best position to say who is the father, it will be necessary after its birth to take the child to his kraal for the usual ceremonies and it is considered a disgrace for a girl to bastardize her child by naming the wrong person. Her evidence naming the father will, however, lose much of its weight if her evidence on material points are found to be deliberately false, likewise if she fails to report her pregnancy to the kraal of the man within a reasonable time, for her false evidence or her failure to report, as the case may be, gives rise to the suspicion that she is shielding her true lover.

Having regard to the fact that the fine claimed is one for *pregnancy*, the onus in the first place rests on the plaintiff to prove that intercourse took place at a time when the defendant could have been the father. An admission by defendant of intercourse at that time casts the heavy onus upon him of proving that it was impossible for him to be the father. On the other hand an admission by the defendant of intercourse at a time when, having regard to the possible period of gestation, it was impossible for him to be the father amounts to a denial of intercourse which resulted in the pregnancy. The Court must then determine whether or not the defendant, in fact, had intercourse with the woman at or about the time she says she conceived and naturally the onus is on the plaintiff to prove the affirmative. The woman's evidence to this effect does not cast a special onus on the defendant to prove that he could not have been the father. He can escape liability by merely rebutting her evidence. If her evidence is so palpably false that no reasonable person would possibly believe her story, then defendant, notwithstanding his admission, may even be entitled to an absolution judgment at the close of the plaintiff's case. But it should not be overlooked that the admission is itself corroborative of the woman's testimony that they were lovers. Therefore, the evidence in rebuttal should be sufficiently strong to satisfy the Court that the evidence and the preponderance of probability favour him.

In the present case Priscilla says that defendant rendered her pregnant in September when she was teaching at Beecham Wood. Defendant denies this. He admits intercourse with her at a time when she was already pregnant. He, however, also denies having written the letters produced and that he took her to his aunt's kraal in Nqamakwe, statements which the Native Commissioner rightly found to be false. In the circumstances he was also justified in rejecting defendant's denial of intercourse in September.

Defendant states that prior to September Priscilla had been going out with another man. This she denies and it has not been established.

We are satisfied that the judgment is correct.

The appeal is dismissed with costs.

For Appellant: Mr. Wigley, Willowvale.

For Respondent: Mr. Dold, Willowvale.

CASE No. 101.

TSOTSWANA *v.* MHEKU TOTONCI.

PORT ST. JOHNS: 25th May, 1950. Before J. W. Sleigh, Esq., President, Wilbraham and Grant, Members of the Court (Southern Division).

Native Appeal Case—Damages for loss of animal which died after litis contestatio*—Practice and Procedure—Court not entitled to rely on own knowledge of value of meat—Damages—Death due to natural causes onus on defendant to prove* (1) *that beast would have died if in possession of plaintiff and* (2) *that he had taken every care of it—Measure base not on value of benefits enjoyed by defendants but on loss suffered by plaintiff.*

Appeal from the Court of the Native Commissioner, Ngqeleni. Sleigh (President), delivering the judgment of the Court:—

The facts in this case are that defendant purchased a certain heifer from Zwelibe and sold it to his brother Mpotso who paid it to plaintiff as a fine. While it was in plantiff's possession it was spoliated by defendant. Plaintiff sued defendant for the return of the beast. It died before judgment was given. The cause of the death was gall-sickness. The hide was sold for 10s. and the meat was consumed at the kraal of defendant who was at the mines. The action was then withdrawn and plaintiff issued a fresh summons claiming £7. 10s. as damages. Plaintiff did not receive the proceeds of the sale of the hide nor any part of the meat.

The Assistant Native Commissioner awarded plaintiff the sum of £5 being 10s. the value of the hide and £4. 10s. the value of the meat. From this judgment defendant appeals on the following grounds:—

1. That as the dun and white heifer in question died from natural causes plaintiff would not be entitled to damages unless specially proved.
2. That as the beast died in the absence of the defendant at the mines, the latter could not be held responsible for the value of the meat and the amount of damages awarded is therefore excessive.

There is no evidence of the value of the meat and the Native Commissioner was not entitled to rely on his own knowledge of the price of similar meat on the open market. But the question arises whether plaintiff was not entitled in any case to the full value of the beast which plaintiff says in his evidence is £7. 10s.

Voet (6.1.34) says "But if a possessor has, without fraud or fault, lost possession through pure accident; if this has happened before *litis contestatio*, neither *bona fide* nor *mala fide* possessor is liable, but only a thief or robber, whenever he has not tendered restitution of the thing to the owner. But if after *litis contestatio;* it is clear that a *mala fide* possessor who is a robber, is not less liable after than before it, but if he is a *mala fide* possessor, but not a thief, he ought only to make good the loss of the thing, if it would not have been a loss to the owner in the same manner, had it been in his possession" (see also *Nathan's Common Law of South Africa,* Vol. III, pp. 1723-4). In Momsen *v.* Mostert (1

S.C. 185) it was held that the defendant was not liable for the loss of an animal which died from natural causes after the defendant had wrongfully refused to give up certain cattle which were grazing gratuitously on his farm. From the report available it is not clear whether the beast died before or after *litis contestatio*. But it is clear from the decisions in Whittle *v.* Butler (6 E.D.C. 209) and Jersipe *v.* William Hart (7 E.D.C. 85) that a defendant would be liable in any case where the death of the animals was due to his negligence, and that the burden of proof that the property would equally have perished if in the possession of the plaintiff will be upon the defendant, and he will be bound to show in addition that he has taken every care of it. If he fails to discharge this onus he will be liable for the full value.

In the present case there is no evidence that gall-sickness is as prevalent in the area in which plaintiff resides as in the area in which defendant resides. (They do not dip at the same tank), nor is there any evidence that defendant or his agents treated the animal for the disease. Defendant has therefore not discharged the onus resting upon him and he is therefore liable to pay the full value of the beast as claimed in the summons and proved in the evidence. The fact that defendant derived no benefit from the carcass makes no difference to his liability for the full value of the beast because the measure of damage is based not on the value of the benefits enjoyed by him but on the loss suffered by plaintiff.

There is no cross-appeal against the amount awarded. Since the beast was sold to Mpotso shortly before the spoliation for £5, the amount awarded is not considered excessive.

The appeal is dismissed with costs.

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

For Respondent: Mr. C. Stanford, Lusikisiki.

CASE No. 102.

MEYI MKANZELA *v.* MBALEKWA RONA.

PORT ST. JOHNS: 26th May, 1950. Before J. W. Sleight, Esq., President; Wilbraham and Grant, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Heir—Institution of illegitimate son—Essentials (1) *that son belongs to farther,* (2) *institution must not have the effect of disinheriting legitimate male issue,* (3) *institution must be performed in consultation with father's male relatives at family meeting—Fine—If full fine not paid but child released kraal forfeits its right to child but may claim balance.*

Appeal from the Court of the Native Commissioner, Flagstaff.

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

Plaintiff (now respondent), alleging that he is the lawful guardian of his sister, Matunzi, and entitled to her dowry, sued appellant for the delivery of the balance of her dowry paid by appellant by description. Appellant pleaded specially that one, Rose, is the guardian of the girl and that respondent is the illegitimate son of Rona and is not entitled to the dowry.

In his evidence respondent admitted that he was the illegitimate son of the late Rona but stated that he was instituted as heir of Rona by the latter's father, Nkwane, and that he was also the heir of Nkwane. The Native Commissioner upheld this contention. Appellant now appeals on the following grounds:—

"That the judgment is wrong in law in that the alleged institution by the late Nkwane of his grandson, the plaintiff, who is admittedly an illegitimate son of Nkwane's eldest son and heir Rona, is entirely contrary to Native Custom which holds that a legitimate heir cannot be ousted by an illegitimate son; that at the time of the alleged institution by Nkwane of the plaintiff as his own heir and, through him as the heir of Rona, the said Nkwane had legitimate male issue in the person of his second son Rose Nkwane and the said Rose was at that time the lawful heir of Nkwane and Rona and the institution of the plaintiff as his heir amounted to a disinherison of the said Rose without lawful grounds and without the formalities required to effect a lawful disinherison.

It is, therefore, respectfully submitted that the Native Commissioner should have ruled that the alleged institution, if made, was invalid *ab initio* and should have granted judgment for the defendant with costs of suit."

It is common cause that the late Nkwane had three sons and three daughters. The sons are, in order of age, Rona, Rose and Konakodwa. Rona, who predeceased his father and who died without leaving any male issue, had two daughters, one of whom is the girl Matunzi. Respondent is the illegitimate son of Rona by an unmarried woman.

Respondent states that his mother was Mapungwatsha; that after Rona's death when he (respondent) was already married, Nkwane sent Konakodwa to fetch him; that Nkwane paid three cattle as fine for his mother's pregnancy and one beast as *isondlo* to Manyeni, his mother's sister and promised to pay the balance of the fine; that at a family meeting called by Nkwane the latter declared (referring to respondent): "There is my son, the son of Rona. I am introducing him to the Matunzi clan. I am now appointing him as my heir", and that Rose was present and raised no objection. He states that the fine was paid to Manyeni because his mother had no male relatives.

It is clear from the evidence that respondent lived at Nkwane's kraal and that after the latter's death exercised the rights of his heir without question for about 16 years. Later Mazulu, the widow of Rona, established her own kraal and respondent is now living with her.

Rose, who still lives at Nkwane's kraal, denied that respondent was instituted as heir or that he ever lived at Nkwane's kraal, but he cannot deny that respondent exercised the rights of the heir and admits that on one occasion when Nkwane was sued he informed respondent's attorney that Nkwane was dead and that respondent was his heir.

The evidence, therefore, supports the Native Commissioner's finding that respondent was instituted as heir of Rona. Respondent and Konakodwa say that the former was also appointed heir of Nkwane, but this is denied by Mazulu and Matunzi, although they seem to infer that by being the heir of Nkwane's eldest son he also became heir of Nkwane upon the latter's death. This is also the conclusion of the Native Commissioner. It is, however, unnecessary for the purposes of this case to decide whether the appointment of respondent had this effect, because it is not disputed that Matunzi's dowry never formed part of Nkwane's estate as the dowry was received after respondent had been instituted Rona's heir. The only point for decision is therefore whether such institution is valid. In other words whether Nkwane could validly appoint respondent the heir of Rona thus ousting Rose from inheriting Rona's estate.

It is established Native Law that a man may institute as his heir his illegitimate son by a *dikazi* or a spinster (see Xoliwe *v.* Dabula, 4 N.A.C. 148, and *Hunter's Reaction to Conquest*, p. 120). But the right to institute an heir is subject to certain limitations. The first essential is that the son must belong to the father. That is, he must have acquired the son by payment of a full fine and *isondlo* to the guardian of the mother, or at least a fine which the guardian has accepted in full settlement of his claim. If the fine is not paid in full the son would not belong to the father's family (Mpeti *v.* Nkumando, 2 N.A.C. 43). Secondly, a father may not appoint as his heir his illegitimate child when he has legitimate issue. In other words the institution of the illegitimate child as heir must not have the effect of disinheriting his legitimate male issue. [Mbulawa *v.* Manziwa, 1936 N.A.C. (C. & O.) 76] *Hunter* (*Supra loc. cit.*) says that he cannot adopt another person and so disinherit his brother or brother's son on whom his estate would otherwise have devolved, but this does not agree with the previous decisions of this Court (see Majiki *v.* Sigodwana, 5 N.A.C. 67). And thirdly, the institution of the heir must be performed in consultation with the father's male relatives and with due formality at a family meeting. (Colis *v.* Matshawana, 1 N.A.C. 47). Where the father has died without leaving male issue, it is competent, according to Pondo Custom, for his heir to pay the fine and *isondlo* for the illegitimate child and institute him heir of the deceased. It is not competent for another relative to do so. In other words, a man may disinherit himself, but he cannot be disinherited by someone else [Gobidolo *v.* Gobidolo, 1941 N.A.C. (C. & O.) 7].

Now, in the present case the full fine has not been paid nor was payment made to Mafungwatsha's guardian, but it appears from the annexed opinion of the Native Assessors (it must not be assumed that we agree with the opinion in its entirety) that payment of fine, as in the payment of dowry, is made at the kraal where the mother of the child lived and if that kraal releases the child on payment of *isondlo* and part of the fine only, that kraal forfeits its right to the child but may claim the balance of the fine. The first essential for the institution of an illegitimate child as heir is, therefore, present in this case, as also the second and third essentials because the institution did not have the effect of ousting Rona's legitimate male issue (since he had none surviving him) and the appointment was made by Nkwane who was at the time of the institution, Rona's heir. The Native Commissioner was therefore correct in holding that respondent is Rona's heir.

The appeal is dismissed with costs.

OPINION OF THE NATIVE ASSESSORS.

Names of Assessors: L. Mvinjelwa (Port St. Johns), M. Cetywayo (Lusikisiki), N. Masipula (Flagstaff), K. Paraffin (Ngqeleni) and T. Mangala (Libode).

Question: Dyantyi has three sons in his great house, Simanga, Mbuti and Siti. The eldest who predeceased him had an illegitimate son by a dikazi and one son by his own wife. His legitimate son predeceased him. Dyantyi now decides to pay a fine for the illegitimate grandson. Would this grandson be the heir of Simanga or Dyantyi, or of both?

Answer (per Tolikana Mangala): As Dyantyi took him as heir to Simanga, then the grandson will be the heir of both estates. All agree.

Question: What is the position of Mbuti?

Answer (per Tolikana Mangala): He must submit to the grandson because the latter was made heir by Dyantyi and therefore takes the place of his late father Simanga. Mbuti and Siti are now his younger brothers.

Answer (per Nobulongwe Masipula): That is entirely according to custom. Others agree.

Question: In a previous case it was held that a man cannot introduce an illegitimate heir if he has legitimate issue. Could Dyantyi institute his own illegitimate son as his heir.

Answer (per Tolikana Mangala): No; as he has his own sons.

Question: Is it necessary that a full fine for an illegitimate son be paid before he is instituted heir?

Answer (per Tolikana Mangala): Yes, if his mother's people demand the full fine.

Answer (per Mdabuka): Institution is in order even if there is a balance, provided that the mother's people agree to release him. They can always claim the balance later. All agree.

Question: Is it in order if the release is agreed to by a woman, there being no man then available representing her father?

Answer (per Tolikana Mangala): Yes, because the release is regarded as having been given not by her but by her kraal, to which her guardian will refer when he comes.

Question (per Mr. Stanford): Is it necessary to hold a family meeting to instal an illegitimate son as heir if there is no legitimate issue?

Answer (per Tolikana Mangala): Yes. Others agree.

Question (per Mr. Birkett): Could Dyantyi institute an illegitimate son as heir without any meeting of the family?

Answer (per Tolikana Mangala): No; there must be a meeting first. Others agree.

Question: Is it necessary to report the institution of an illegitimate heir to the headman or chief?

Answer (per Tolikana Mangala): No. but a wise man would do so.

Answer (per Mdabuka): I agree, and in addition he would also report it to the Magistrate's Office. Other agree.

For Appellant: Mr. C. Stanford, Lusikisiki.

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

CASE No. 103.

ELLIOTT MANQOME *v.* **WENATI TOLE.**

KOKSTAD: 7th June, 1950. Before J. W. Sleigh, Esq., President; Warner and Wakeford, Members of the Court (Southern Division).

Native Appeal Case—Practice and Procedure—An order dismissing a summons is equivalent to an absolution judgment.

Appeal from the Court of the Native Commissioner, Umzimkulu.

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

In a vindicatory action plaintiff claims from defendant delivery of a certain bay mare or payment of its value, £15.

The defence is that the mare belongs to defendant's brother, Samson, who inherited it from his late father, Toli. The onus is therefore clearly on plaintiff to prove ownership.

The Assistant Native Commissioner dismissed plaintiff's summons with costs. From this judgment defendant appeals.

There is nothing to choose between the versions of the contesting parties. Plaintiff's evidence is to the effect that a mare and a bay gelding, his property, were running at the kraal of Julius Dlamini on a farm in Harding district; on the farmer ordering Julius to remove the horses plaintiff directed that they be sent to

Toli, his father-in-law, and defendant and one Gibson went to fetch them; thereafter the mare had a chestnut colt at Toli's kraal; later plaintiff removed the gelding leaving the mare and colt with Toli; when he went to fetch these horses after Toli's death defendant claimed a second horse as dowry; he then paid the bay gelding, removed the colt and left the mare with defendant who stated that he had obtained grazing for it on Mangeni's farm; and later when he went to fetch the mare defendant claimed that it had been paid as dowry. This evidence is supported by Julius who says that two lads from Toli's kraal came to fetch the mare and the bay gelding, and by Bangukosi who says that he paid the gelding as dowry to Toli on behalf of plaintiff and denies that he also paid the mare.

Defendant states that the mare was paid as dowry on behalf of plaintiff in autumn 1942 by Ndleleni Dhlamini, brother of Julius. This is supported by his witnesses, Fongweni and Mosa. They state that the first increase of the mare was a chestnut colt which was subsequently exchanged for the bay gelding and that on this occasion plaintiff was accompanied by Bangukosi.

At the trial plaintiff's Attorney produced a letter said to have been written by Samson's son, presumably Gibson. This letter is, of course, not admissable as evidence, but it does show that Gibson was prepared to support plaintiff's case. Plaintiff should therefore have obtained his evidence, by interrogatories, if necessary.

Defendant does not claim ownership of the horse. He says that it belongs to Samson, the heir of his father. As defendant is in possession of the animal and holding it on behalf of Samson, there is an onus on plaintiff to prove his case. In our opinion he has failed to do so. The correct judgment should therefore have been one of absolution from the instance.

One of the grounds of appeal is that the judgment dismissing the summons is incompetent. In terms of Section 38 of Proclamation No. 145 of 1923, the Court may, as the result of the *trial,* give judgment either (*a*) for plaintiff, or (*b*) for defendant, or (*c*) absolution judgment. In this case there has been a trial. The Assistant Native Commissioner should, therefore, not have dismissed the summons even if the plea contained a prayer to that effect. But in Ndudane *v.* Maqwali [1937 N.A.C. (C. & O.) 200] it was held that an order dismissing the summons is equivalent to an absolution judgment. In Miller *v.* Larter (1941 E.D.L.D. 98) it was doubted whether this was invariably the case, but in Becker *v.* Wertheim, Becker and Leveson [1943 (1) P.H. F.34] the Appellate Division held that it was. Plaintiff (appellant) is, therefore, not prejudiced by the form in which the judgment is worded.

It appears from the Native Commissioner's reasons that he intended to give judgment for defendant. The judgment as pronounced and recorded does not give effect to his intention. There is no cross-appeal and we would, therefore, not be justified in altering the judgment so as to give effect to his intention. In any case the evidence, in our opinion, does not support a full judgment for defendant.

Counsel for appellant (plaintiff) submits that appellant was obliged to come to this Court to have the judgment altered, and applies for costs of appeal. We do not agree. As we have pointed out, the judgment, as it stands, amounts to one of absolution from the instance, consequently a plea of *res judicata* to a fresh summons, brought on the same cause of action, would not be successful.

The appeal is dismissed with costs but the judgment of the Court below is altered to one of absolution from the instance with costs.

For Appellant: Mr. F. Zietsman, Kokstad.

For Respondent: Mr. Elliot, Kokstad.

CASE No. 104.

ALBERTINA MHLAULI *v.* MICAH MHLAULI.

KOKSTAD: 7th June, 1950. Before J. W. Sleigh, Esq., President.

Native Divorce Case—Divorce on ground of desertion—Service of restitution order—Will not be dispensed with even if defendant knew exact purport thereof.

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

Plaintiff's wife sued defendant for divorce on the ground of adultery. Defendant denied the adultery and counterclaimed for divorce on the ground of malicious desertion. Judgment was entered for defendant on the claim in convention and the Court granted a rule *nisi* calling upon defendant in reconvention to restore conjugal rights.

Attempts were made to serve the restitution order at a certain address in Johannesburg but she could not be found, the Messenger stating in his return that she was not known at that address. Mr. Eagle on behalf of the husband now asks the Court to grant a decree of divorce and submits that, although the order was not served, the wife was present when the order was granted, knew its purport and has failed to comply with it. He relies on the decision in Whittaker *v.* Whittaker (1940 E.D.L.D. 292) and Jones *v.* Jones (1943 C.P.D. 309).

The circumstances in these cases were exceptional. In the first case a defective rule *nisi* was served on the defendant. In answer thereto he offered to receive his wife at a certain address. The rule was amended and attempts were then made to serve it at the address given and also at his business address, but he could not be found and had left no address. It was also clear that his offer to receive his wife was not genuine and that he was evading service. In the circumstances the Court granted a final order.

In the second case there was no proof of service but it was clear from certain telegrams received from defendant and her Attorneys that she knew the exact purport and had in fact thereafter acted upon it by offering to restore conjugal rights which offer the Court found was not *bona fide*. It was, therefore, really a case in which the Court dispensed with proof of service.

In the present case it is admitted that the rule was not served and there is no evidence that the wife is evading service. On the contrary, the evidence is to the effect that she is not known at the address at which service was to be made. The contention that service could be dispensed with where a defendant knows the exact purport of the order, cannot be entertained because in that case the rules of Court would surely have said so.

The application to make the rule absolute is, therefore, refused, but the dates will be extended.

For Plaintiff in reconvention: Mr. Eagle, Kokstad.

For Defendant in reconvention: In default.

CASE No. 105.

SELINA FARO *v.* LOUIS ZIETSMAN FARO.

KOKSTAD: 8th June, 1950. Before J. W. Sleigh, Esq., President; Warner and Wakeford, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Estate—Must devolve according to Native Law and Custom—Estate of widow who resided at her husband's kraal devolve on his heirs—Succession—A disinherited heir is not debarred from succeeding to

estate of heir of his father—Custom—Court will not give judicial approval to a custom which is contrary to principles of natural justice—Basuto Custom—Custom as practised in Basutoland to be applied with caution in Cape—Estate property—The widow or daughters of the deceased can never succeed.

Appeal from the Court of the Native Commissioner, Matatiele.

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

This is an appeal against a judgment by the Additional Assistant Native Commissioner upholding an exception to the summons that it discloses no cause of action.

It is unnecessary to set out the pleadings in detail. The material facts as disclosed therein are as follows:—

The late Moso Faro married two wives according to Native Custom. The first was Amelia Mika (herein referred to as Mika) and the second was Mosebetsi, the mother of defendant. Mika had only one son, Seftin, the husband of plaintiff and father of her daughter, Amelia. Seftin died in April, 1944, and Moso in October, 1944. The latter left a will in which he bequethed the bulk of his estate to Amelia and the sum of £190 to his wife Mika. This amount was deposited in her name in the Post Office Savings Bank and the balance standing to her credit at the time of the action was £154. 3s. 4d. Mika has died and defendant was appointed, in terms of Section 4 of Government Notice No. 1664 of 1929, to represent the estate. Moso, during his lifetime, disinherited defendant. After Moso's death defendant claimed to be his heir and sued his executor and Amelia for the estate. After a plea had been filed, in which present defendant's rights were denied, the parties in that case agreed to a judgment by consent being entered in favour of defendant (plaintiff in that action) for £750, and defendant signed a document in which he renounced all rights to the estate of Moso and Seftin. The material part of the document is in the following terms:—

1. Judgment for plaintiff for £750 in full and final settlement of all claims of every kind and nature whatsoever which plaintiff and his mother, Mosebetsi Cecilia Faro, and their heirs, executors, administrators and assigns have now or may in future have against the estate of the late Moso Faro, against the executor of such estate, against the executors of the estate of the late Seftin Faro and against the heirs, legatees and beneficiaries of both of the said estates.
2. Plaintiff and his heirs, executors, administrators and assigns renounce in perpetuity and abandon all claims, if any, of guardianship and rights of ownership and administratorship including rights to administer or concern himself in any matter whatsoever, in the possession, control and administration of the estates of the late Moso Faro and Seftin Faro as claimed in the summons in this action or otherwise—whether under native law and custom or otherwise—and also any claims of tutorship and also any claims of guardianship and tutorship of any nature and description whatsoever over and in respect of Mika Amelia Faro, the widow of the late Moso Faro in his great house, over the widow of the late Seftin Faro and over any one or more of her daughters by Seftin Faro and over their issue.

Plaintiff in the present case alleges that defendant is in possession of the assets in Mika's estate, that in the circumstances disclosed in the pleadings he is not her heir and that she (herself) is heiress or alternatively her daughter Amelia. She claims the sum of £154. 3s. 4d. either for herself or alternatively in her capacity as mother and guardian, for her minor daughter Amelia.

During the hearing of the exception an application by plaintiff's attorney for permission to call expert evidence on Basuto custom was refused.

The grounds of appeal may be summarised as follows:—

1. Defendant, having renounced all claims to guardianship of the inmates of the great house of his father, is debarred by Basuto custom from inheriting the estates of such inmates.
2. Alternatively, having renounced his heirship to his father's estate, he is debarred by Basuto custom from claiming any portion of such estate which had devolved on other members of the family.
3. That under Basuto custom females can inherit an estate under certain circumstances.
4. That the Native Commissioner erred in refusing to allow expert evidence on Basuto law of inheritance to be called. Alternatively, the Native Commissioner himself should have consulted expert opinion on the point, and should not have dismissed the action without proper inquiry into Basuto law of inheritance.
5. In Basuto custom disherison of any heir by his father has the same effect as if he had disinherited himself by repudiation, and, unless he is reinstated, he loses the same rights.

Since Mika died intestate her estate must devolve according to Native Law and Custom [see Section 2 (*e*) of Government Notice No. 1664 of 1929, as amended]; and as the parties are Basutos the Native Law applicable in this case is Basuto custom. Moreover, since Mika belonged to Moso's family, lived and died at his kraal and was never repudiated by her husband, her estate must devolve on Moso's heir according to Native Custom.

We do not agree with the contentions raised in the first, second and fifth grounds of appeal. The document in which defendant renounced the guardianship over Mika must be strictly interpreted. Defendant has not renounced his right to her estate and there is no authority for the proposition that, by renouncing guardianship, he is debarred by Basuto custom from inheriting her estate.

The contention in the second ground of appeal was rejected in Tiba *v.* Soviyo [1944 N.A.C. (C. & O.) 90] and is not supported by the majority of the native assessors in the present case. Assessor Joseph Moshesh seeks to draw a distinction between succession to the estate of the heir of the father who disinherited his son and succession to the estate of their heir of such heir. We know of no authority in support of this opinion. If the alleged custom does exist, there is no proof of its immemorial origin and its uniform observance and, in any event, we are not prepared to give it judicial approval, because it would be contrary to the principles of natural justice to deprive a disinherited heir from succeeding to an estate in respect of which he has not been disinherited [see Section 11 (1) of Act No. 38 of 1927].

It is not appreciated what is meant by the fifth ground of appeal and counsel for plaintiff has not been able to enlighten us. We know of no instance in which an heir has disinherited himself by repudiation of his father's family. It is competent for a man to be adopted into another family by agreement, in which case he cannot succeed under Native Custom to the estate of any member of his natural father's family and no member of such family can succeed to his estate; but the disherison by a father of his son does not have this effect. Such disherison affects only the right of the disinherited son to succeed to his father's estate and does not affect his right to succeed to other members of the family.

In this case the question for decision is not whether defendant has a good cause of action but whether plaintiff or her daughter can claim the right of succession to Mika's estate. The submission on behalf of plaintiff seems to be that if defendant, who is the heir according to Native Custom of Moso and Mika, is

eliminated, then plaintiff or her daughter would succeed to Mika's estate. Assuming for the moment that defendant cannot succeed, it remains to be considered whether plaintiff or her daughter has any right of inheritance to the estate.

This Court is well aware that in Basutoland according to the laws of Lerotholi, a widow is said to succeed to the estate of a deceased husband if he died leaving daughters only. We must exercise great caution in applying the customs of Basutoland to natives belonging to the same stock inhabiting the Transkeian Territories, because the Basutos in Matatiele and Mount Fletcher districts have been living in contact with other Bantu tribes for many years, with the result that the customs of these tribes have influenced their customs in the same way that their customs have influenced those of other tribes. But, even in Basutoland, a widow can use the estate property only in conformity with the wishes of her deceased husband's people (*Whitfield's S.A. Law*, 2nd edition, p. 361). It is thus clear that she has merely the use of the estate while she resides at her late husband's kraal. There is, therefore, no substantial difference between the custom as practised in Basutoland and that in the Cape Province. Although in the Cape Province a widow has certain limited rights to her husband's estate property, she does not acquire the ownership thereof (Letoao *v.* Letoao, 4 N.A.C. 158). This vests in the heir, that is, the nearest male relative of the deceased. Now, plaintiff is not the widow of Mika nor of Moso and consequently she cannot succeed to Mika's estate.

In so far as Amelia is concerned, it is true that she is Moso's testamentary heir but her right of inheritance is strictly limited to the property left to her in Moso's will. According to Native Law as practised in the Transkeian Territories, a daughter or a grand-daughter can never succeed to an estate. This is abundantly clear from the decided cases quoted in *Whitfield's S.A. Native Law*, 2nd edition, p. 337. (See also *Seymour's Native Law of South Africa*, page 123, and the annexed opinion of the native assessors in the present case.) It will thus be seen that, according to Basuto custom, Amelia cannot succeed to Mika's estate. The Native Commissioner was, therefore, correct in refusing to hear expert evidence because he was bound to reject such evidence if it were in conflict with the recognised custom.

It follows that if plaintiff or Amelia cannot succed to Mika's estate, the summons as it stands does not disclose a cause of action.

The appeal is consequently dismissed with costs.

OPINION OF THE NATIVE ASSESSORS.

Names of the Assessors: Joseph Moshesh (Matatiele), Doda Sipika (Matatiele), Bishop Ntlabati (Umzimkulu), Khorong Lebenya (Mount Fletcher) and Enoch Zibi (Mount Fletcher).

Question: A man has three sons and disinherits the eldest for sufficient reasons. He dies and the second son inherits his estate. The second son then dies without leaving male issue. Who would succeed?

Answer [per Joseph Moshesh (Basuto)]: If the eldest son has a son, such son would have a better right than the third brother. If the eldest son has no male issue, the third brother would inherit. The eldest brother would succeed to the estate of the third brother because the latter did not disinherit him. The second son inherits direct from his father. The eldest son cannot succeed the second son because he was disinherited by his father and the property came from the father. The third son received the inheritance from the second son and not from the father so the eldest son can succeed to his estate.

Answer [per Khorong Lebenya (Basuto)]: I do not quite agree. The eldest son cannot be disinherited unless he is insane, in which case some one would be appointed to represent him. If a man commits a serious wrong against his father he would be punished and may be required to leave the kraal, but he would inherit his father's estate on his death.

Answer [per Enoch Zibi (Hlubi)]: I have never heard of such a case

Answer [per Doda Sipika (Hlubi)]: Among the Hlubis I have never heard of a case of the eldest son being disinherited.

Answer [per Bishop Ntlabati (Hlangwini)]: The disinherited son would succeed to his father on his death.

Question: The widow in the first house acquired property. She dies, leaving only daughters in her house. There is a son in the second house. Who inherits her property?

Answer [per Doda Sipika (Hlubi)]: The son in the second house.

Answer [per Khorong Lebenya (Basuto)]: The son in the second house takes the stock and supports the daughters of the first house until they are married. They are his children and he receives their dowries. A daughter cannot succeed.

Answer [per Joseph Moshesh (Basuto)]: If a man dies, leaving daughters only and no male relatives, the Chief appoints someone to look after them. The Chief receives dowry for the daughters and uses it to obtain a wife for the person appointed to look after the daughters so that this person can raise an heir to the deceased.

All agree that daughters cannot inherit.

For Appellant: Mr. Eagle.

For Respondent: Mr. Walker.

CASE No. 106.

KABINYANGA BITYA *v.* MAPEPENI KABINYANGA.

KOKSTAD: 9th June, 1950. Before J. W. Sleigh, Esq., President; Warner and Wakeford, Members of the Court (Southern Division).

Native Appeal Case—Practice and Procedure—Default judgment —Distinction between default judgment entered by judicial officer at trial and default judgment entered by Clerk of the Court—Trial—There must be a trial in the sense that the Court must decide whether the claim is just—Default—If defendant is in default at trial plaintiff must establish his case if onus is on him—Additional claim separate and distinct from original not ripe for trial in absence of plea—Trial of such claim should be postponed to enable plaintiff to serve notice in terms of Rule 3, *Order IX.*

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

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

By summons dated 3rd February, 1949, appellant (defendant in the Court below) was sued by respondent, his customary wife, for the return of a certain heifer valued at £12. Appearance was entered and on 15th February notice was given by respondent that, on the day of the trial, application would be made to amend the summons so as to include an additional claim for an ox, valued at £12, alleged to have been spoliated by appellant on 8th February. On 17th February appellant pleaded to the summons as it stood and the case was set down for trial on 2nd June. On this date appellant and his Attorney were in default, but, by arrangement, the hearing was postponed to 15th September. On this date they were again in default. The application to amend the summons was then made and granted, and on application by respondent's Attorney for default judgment, the Native Commissioner, without hearing evidence, entered judgment "for plaintiff by default for 2 head of cattle or value, £10, and costs".

An application for rescission of the default judgment was refused and an appeal against this judgment was dismissed on the ground that appellant was in wilful default. Appellant now appeals to this Court to review the original judgment on the ground of gross irregularities in the proceedings. The grounds are:—

1. That the claim for the red ox was never properly before the Court.
2. That defendant having entered appearanceese to defend the action and having filed a plea therein it was not competent for the Native Commissioner who tried the case to grant judgment by default in favour of the plaintiff without first hearing evidence on behalf of the plaintiff to discharge the onus of proof, which was placed upon her by the pleadings filed in the action; therefore the said judgment was and is grossly irregular, incompetent of the trial Court *a quo* and bad in law.

The notice of appeal which is dated 14th February, 1950, is, of course, noted late, and application is now made for extension of time.

In the appeal against the trial Court's refusal to rescind the judgment, appellant relied, *inter alia,* on the irregularities complained of in the present appeal. This Court pointed out that Section 36 of Proclamation No. 145 of 1923 does not empower a trial Court to recall its own judgment on the ground of some irregularity in the proceedings. That is a matter which should be brought by way of appeal to this Court for review. In applying to this Court now for extension of time in which to note the appeal, appellant states that he misconceived his remedy when applying for rescission of the judgment. That is not quite correct. As the judgment was given in his absence he could apply either to the trial Court for rescission in terms of the rules or, alternatively, appeal to this Court on the ground of gross irregularity in the proceedings, in which case the reason for the default is irrelevant. The questions for decision would then be as to whether the irregularity did exist and, if so, whether it had resulted in substantial prejudice to the appellant.

Now, it is clear that appellant has all along complained of the alleged irregularities. He has not raised the point now for the first time. Moreover, this Court has repeatedly held that a litigant must first exhaust his remedies in the Court below (see also *Jones and Buckle,* 5th Edition, p. 215) and this is what appellant has done. This Court will, therefore, grant his application and hear the appeal.

In entering the default judgment the Native Commissioner purported to act under Rule 4 (2) of Order XXXII of Proclamation No. 145 of 1923 which reads: "If a defendant or respondent does not so appear (appear at the time appointed for the trial of the action or the hearing of the application), a judgment against him (not exceeding the relief claimed) may be given with costs".

It is clear that the rule applies only when an action or application has been set down for trial or hearing. The judgment can be entered, therefore, only by a judicial officer authorised to try cases, and his judgment is not a "default judgment" which may be entered by the Clerk of the Court in terms of Order IX. The word "default" in the judgment merely serves to indicate that the judgment was entered in the absence of defendant. There is a clear distinction between such a judgment and a "default judgment" in terms of Order IX. The latter judgment may be entered by the Clerk of the Court (and in certain circumstances by a judicial officer) where the defendant failed to enter appearance or was in default with his plea after peremptory notice. If a defendant is so in default and the plaintiff has lodged an application for default judgment, the Clerk of the Court or the judicial officer, as the case may be, may grant the application even if the defendant is present. The default refers to his failure to comply with the rules and not to default in person.

The Native Commissioner held that there was no obligation on him to take any evidence, because Rule 4 (2) of Order XXXII does not specifically provide for this to be done. If he were correct he should have entered judgment in terms of the prayer, that is for two specific cattle or their value at £12 each, and not for two head of cattle or £10. The latter judgment could be justified only on the ground that there was no evidence to identify the cattle and prove their value, and that means that respondent has not proved his case.

The Native Commissioner held that his judgment was provisional in nature and could be rescinded by the Court *a quo*. He relies on the decision in Meth *v.* Meth (1917 E.D.L.D. 110). That case was an action for the sum of £239 being the balance of an account, and was tried under the procedure prescribed by the Resident Magistrates' Court Act of 1856. Prior to the return date (the date the defendant was summoned to appear) defendant's Attorney wrote to the Clerk of the Court enclosing a power of attorney to defend and requesting that the hearing be set down for a convenient date. On the return day defendant and his Attorney were in default. The Magistrate refused to consider the power of attorney and the request for postponement, and entered provisional judgment. An application to the Superior Court for review of the proceedings was dismissed, the Court holding that the proceedings were not irregular. That case is not in point. Under the procedure prescribed by Act No. 20 of 1856 a defendant was summond to appear in Court, not to enter appearance with the Clerk of the Court. The rules insisted on appearance and if the defendant were in default the judicial officer might enter provisional judgment against him without taking any evidence, if the claim was for a debt or a liquidated amount only, otherwise the Magistrate was obliged to hear evidence (see Rule 28 as amended by Rule 414). This procedure corresponds to the procedure prescribed by Order IX of Proclamation No. 145 of 1923.

If we have to look for guidance to decisions on procedure under the 1856 Act, the case of Mtshaxa *v.* Sutton Bros. (1920 E.D.L.D. 95) is more to the point. In that case Sutton Bros. sued for £31. 7s. 6d. goods sold and cash lent and for delivery of 20 ewes. On the return day defendant appeared in person and delivered a plea. The case was postponed and at the resumed hearing defendant was in default. The Magistrate then, on application, entered a final judgment without hearing evidence. In allowing an appeal against this judgment the Appeal Court held that, notwithstanding that the claim for £31. 7s. 6d. was a debt, the Magistrate could not give a final judgment without calling evidence.

But one is liable to be misled by trying to reconcile the procedure under the 1856 Act with the present procedure, because they are dissimilar. Under the Proclamation, provisions are made for entering appearance, for delivery of a plea and for setting down the case for trial. It is only on the trial day that the judicial officer, normally, takes a hand in the proceedings. He has before him the claim and the defence to the claim, and he is required to adjudicate in the dispute. After he has heard the evidence, which may be tendered by either party, and after hearing argument, he is required by Section 38 of the Proclamation to give judgment for plaintiff, or for defendant, or a judgment of absolution from the instance. In any event there must be a trial in the sense that the Court must decide whether the claim is just or not. It seems clear that there must be a trial even if the defendant is in default, because the case had been set down for that purpose. In our judgment, therefore, Rule 4 of Order XXXII must be read with Rule 5 of Order XVII and Section 38. If, on the trial day, the defendant is in default and, from the pleadings, it appears that the onus of proof is on the plaintiff then, if it is necessary for the latter to establish his case by evidence, he must adduce it, or, at any rate, hand in documents to substantiate his

claim. If the onus is on the defendant, a judgment may be entered against him without calling evidence. This was decided in Mlandu and Others *v.* Mpupu [1947 N.A.C. (C. & O.) at p. 55). It was, therefore, irregular to enter judgment for respondent for the heifer without requiring her to adduce evidence that it belongs to her house and that appellant was abusing his position as head of the family [see the cases cited in Sijila *v.* Masumba, 1940 N.A.C. (C. & O.), at p. 46].

The claim for the ox is on a different footing. We accept the affidavit of Mr. Holmes (respondent's Attorney of record) that appellant well knew that application would be made for the amendment of the summons on the day of the trial; but that was only an intimation to him (appellant) that it was the intention to apply for amendment. The notice was not, as the Native Commissioner held, an additional summons for a beast, to which he had to enter appearance. Only after the application had been granted did the claim for the ox form part of the summons to which he had already entered appearance. Appellant was then in the same position as a defendant who has received a summons and has entered appearance, but has not delivered a plea. This claim, being separate and distinct from the claim for the heifer, was thus not ripe for trial. The Native Commissioner should, therefore, have postponed the hearing of this claim *sine die* so as to enable respondent to serve on appellant a notice in terms of Rule 3, Order IX, and proceed further in terms of that Order. (In this connection see van der Post *v.* Magistrate Rehoboth and Brauer, 4 P.H. L.5.)

In regard to the heifer the judgment is not supported by any evidence, and in regard to the ox appellant has not been given a final opportunity to deliver a plea. It follows, therefore, that he has suffered substantial prejudice as a result of the irregularities.

The appeal is allowed with costs, the judgment of 15th September, 1949, is set aside and the record is returned to the Court below for further hearing.

For Appellant: Mr. Elliot, Kokstad.

For Respondent. Mr. F. Zietsman, Kokstad.

CASE No. 107.

JOSIAH NGCWAYI *v.* **JANNETT NGCWAYI.**

UMTATA: 15th June, 1950. Before J. W. Sleigh, Esq., President; Balk and Midgley, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Native Estate Enquiry—Marriage by Christian rites does not create a "house"—Heir—Death of, will not be presumed in the absence of evidence—Judgment set aside—Neither claimant entitled to succeed—Costs—No Order, both parties substantially unsuccessful.

Appeal from the Court of the Native Commissioner, Engcobo.

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

This is an inquiry in terms of Section 3 (3) of Government Notice No. 1664 of 1929 to determine the person entitled to succeed to the estate of the late Jane Ngcwayi who died at Johannesburg some years ago. Counsel for the parties accept that Jane never married.

It is common cause that she was the daughter of the great house of the late Ntozini Ngcwayi who married three wives. The first one was married according to Native Custom. It is said that she was driven away and that Ntozini then married Noleyi according to Christian rites, and after her death he married Nosem according to Christian rites.

There are two claimants to the property in the estate of the late Jane, namely, Josiah Ngcwayi the eldest son of Noleyi and Jannett Ngcwayi who is the eldest son of Nosem.

The Native Commissioner held that Josiah and Jannett are the heirs in the right-hand house and the *qadi* to the great house of the late Ntozini respectively and declared Jannett to be his heir in the great house. From this ruling Josiah appeals.

The appeal was noted late and application is now made for condonation. The application is not opposed and, as the applicant has shown good cause, the Court will grant the application and hear the appeal.

The Native Commissioner's decision is obviously wrong. A marriage by Christian rites does not create a "house". A woman so married is in the eyes of the law her husband's only wife. Her status is independent of any of her husband's houses or other wives. Her eldest son succeeds to such property as was acquired by her husband during the subsistence of the marriage. The fact that Ntozini regarded Noleyi and Nosem as his right-hand wife and the *qadi* to his great wife respectively does not make them such in law. In this connection see the decision in the case Tonjeni *v.* Tonjeni [1947 N.A.C. (C. & O. 8] in which the circumstances were somewhat similar and in which the question of succession was also in dispute.

It is not disputed that Jane had an illegitimate son, Ndzima, who absconded before 1921, but we need not concern ourselves with him as he cannot, in Native Law, succeed to Jane's estate to the exclusion of her legitimate heirs, that is, her brothers and half-brothers [Ndema *v.* Ndema, 1936 N.A.C. (C. & O.) 15].

Josiah states, and this evidence is not disputed, that Ntozini's first wife had four children, namely, Tomoso who died without leaving any male issue, Jane and another boy and girl whose names are not known and who, Josiah says, were driven away with the first wife. There is no evidence that this boy was an adulterine child, nor is there evidence that he is dead and, if he is dead, whether he left any male issue. Josiah's evidence of the existence of this boy and that he was driven away is based merely on hearsay and repute, but even if he were driven away the Court cannot infer from this that Ntozini rejected and disinherited him on sufficient grounds. In the absence of evidence that this boy had died without male issue the Court must presume that he is alive and he is undoubtedly Jane's heir according to Native Custom.

On the evidence before us neither of the claimants is entitled to the property which, we assume, falls within the purview of sub-section (3) of Section 23 of Act No. 38 of 1927. The appeal consequently fails but the judgment must be set aside because Jannett also is not entitled to the property.

The appeal is dismissed but the ruling of the Native Commissioner is set aside and the inquiry is returned to him for such further action as may be deemed necessary. There will be no order as to costs of the appeal because the parties have both failed to establish their claims.

Since Josiah is virtually the head of the family and would be next in line of succession, particularly if it is true that his mother was first married according to Native Custom, his appointment to administer the estate on behalf of the absconding heir may well be considered.

For Appellant: Mr. Airey, Umtata.

For Respondent: Mr. Hughes, Umtata.

CASE No. 108.

MAKAMBATI NTSALI & ANO. *v.* NGWENZE NDYALVAN.

UMTATA: 15th June, 1950. Before J. W. Sleigh, Esq., President; Balk and Midgley, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Seduction and Pregnancy —Failure to report birth of child not fatal to plaintiff's case —Object of reporting birth—Unless child is still-born death need not be reported.

Appeal from the Court of the Native Commissioner, Cofimvaba

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

Plaintiff obtained judgment in the duly constituted Court of Chief K. D. Matanzima for five head of cattle as fine for the seduction and pregnancy of his daughter, Noyena. Appellants (inmate and kraalhead) appealed to the Native Commissioner's Court which upheld the Chief's judgment and entered a judgment for plaintiff (now respondent) for five head of cattle or their value, £40. The matter now comes on appeal to this Court. The grounds of appeal are (1) that the judgment is against the weight of evidence and the probabilities and (2) that plaintiff's failure to report the pregnancy timeously and to report the birth and death of the child is fatal to the case.

The girl's story is that first appellant proposed to her and she accepted him before he went to work. He returned towards the end of 1948 and she met him at the New Year dance at Dabula's kraal and also at the dances at the kraals of Dina, Naki and Sikafu. Nonokazi and Samson corroborate her evidence as to her meeting appellant at these kraals and he admits that he attended these dances. Samson says further that he saw appellant and the girl lying under one blanket at Naki's kraal. This evidence which the Native Commissioner accepted, establishes that appellant and Noyena were sweethearts.

Noyena says that first appellant seduced her at the beginning of green mealie season at Naki's kraal and had sexual intercourse with her again a week later at Sikafu's kraal, and that she did not see her periods thereafter. When the pregnancy was reported in August, 1949, she stated that she was five months pregnant. The child was born in December.

First appellant states that the dance at Sikafu's kraal was in May, but the headman, to whom the proposed dance was reported as is required by law, says that it was in April and in our opinion his evidence must be accepted. Since Noyena maintains that she was rendered pregnant at Naki's kraal it is necessary to determine when the dance at this kraal took place.

Noyena and Nonokazi assert that there was an interval of one week between the dances at Naki's and Sikafu's kraals, but Samson says that there was a long interval. On the other hand appellant says that the dance was in January, and he and his witnesses say that when the pregnancy was reported Noyena stated that she was rendered pregnant at Naki's kraal during the New Year month. Although Makaula, one of the messengers, and Noyena deny that she made this statement, her own witness, Mbawusi, says she did, and the probabilities are that she did make this statement because it was as a result of the conflicting statements, viz., that she was rendered pregnant in January and was five months pregnant in August, that appellants denied responsibility. But it is clear that she is quite uneducated and has no idea what a month signifies. This is borne out by the undisputed fact that she maintained long before the birth of the child, viz., in August, 1949, that she became pregnant during green

mealie season, and was five months pregnant. Having regard to the normal period of gestation she must have conceived at the beginning of green mealie season, that is, in March or April. We, therefore, accept the evidence that the dance at Naki's kraal was held shortly before the one at Sikafu's kraal.

It has thus been established that appellant was Noyena's sweetheart and that he was meeting her at the time she conceived. Noyena's identification of the father of her child must therefor be preferred to his denial and it is for him to clear himself [Dalisie *v.* Dungulu and Another, 1940 N.A.C. (C. & O.), at p. 86]. He says that at Dina's kraal Noyena went out with Gubecu. He has brought no evidence to support his statement but even if this is true, which we doubt, it does not assist him in view of the opinion of the Native Assessors in Sontundu *v.* Damane & Another 3 N.A.C., 261. The evidence, therefore, supports the conclusion that first appellant is the father of Noyena's child.

In regard to the second ground of appeal, respondent admits that there was a delay of two months in reporting the pregnancy to appellants, but he explains that he was ill. In the circumstances the delay was not unreasonable.

Respondent also admits that he did not report the birth and the death of the child. The object of reporting the birth is to give the alleged father an opportunity of examining the child and of fixing the time of conception. Respondent attempts to excuse himself by saying that appellants were disputing paternity. That is all the more reason why the birth should have been reported, but the failure to report is by no means fatal to respondent's case. If there had been proof that the child had been born at some other time or that it was born prematurely, non-report would have raised a strong suspicion that the woman's previous statement of the date of conception was false and that she was trying to mislead the Court. But in the present case it is not disputed that the child was born in December.

Another object of reporting the birth is to give the alleged father an opportunity of examining the child to ascertain whether it resembles him, but this Court has repeatedly declined to place reliance on evidence of resemblance [see e.g., Boyana *v.* Dyamani, 1946 N.A.C. (C. & O.) 74].

Although it is generally done, it is not necessary in seduction cases to report the death of the child unless the child is still-born.

The appeal consequently fails and is dismissed with costs.

For Respondent: Mr. Chisholm, Umtata.

For Respondent: Mr. Chisholmn, Umtata.

CASE No. 109.

DYWI QOLO *v.* KEKANA NTSHINI.

UMTATA: 15th June, 1950. Before J. W. Sleigh, Esq., President; Balk and Midgley, Members of the Court (Southern Division).

Native Appeal Case—Native Custom—Native Estate—A widow entitled to be supported out of estate of deceased husband—Cannot dispose of assets without consent of heir—Where she is "keeper" of kraal has implied authority to dispose of assets of little value—In emergency, and heir's consent unobtainable, can sell stock in consultation with a senior relative of heir.

Appeal from the Court of the Native Commissioner, Umtata.

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

This is a vindicatory action in which plaintiff, a minor, seeks to recover from defendant a certain yellow heifer or payment of its value, £15.

The Acting Additional Native Commissioner entered judgment for plaintiff for the return of the beast or payment of its value, £12. Against this judgment defendant has appealed.

It is common cause that the heifer belonged to the right-hand house of the late Ntsini in which house plaintiff is the heir. Defendant, however, maintains that he purchased it from Nodumasi, the right-hand wife of Ntsini and the mother of plaintiff, with the concurrence of plaintiff's guardian, Gilimfane, for the sum of £12. The onus was, therefore, clearly upon defendant to prove that he obtained a valid title to the beast.

It is not disputed that the right-hand house stock of the late Ntsini was registered in the name of Gilimfane, heir in Ntsini's great house, that during plaintiff's absence at the mines Nodumasi demanded and the Paramount Chief ordered that the stock be transferred to the name of Nodumasi, and that this was done in the presence of the Chief's messengers. Nodumasi states that she knew that she had to pay the Chief's messengers the equivalent of a beast as their fee and consequently sold the heifer in order to pay the messengers. She, as well as defendant and his son, says that the £12 was paid to Gilimfane who actually handed the £5 to the messengers. Gilimfane denies this. He says that no money was handed to him and that he did not pay the messengers who, he knew, expected payment. He denies that he was consulted or approved of the sale of the beast. He further states that he always supported Nodumasi and that there was no necessity to sell the beast.

The Native Commissioner accepts Gilimfane's testimony and, in view of the discrepancies in the evidence for the defence, we are not prepared to say that the Native Commissioner's finding on the facts is wrong. The only question for decision is whether Nodumasi had the right to dispose of the beast without the consent of the guardian of the plaintiff.

In Native Law a widow is entitled to be supported out of the estate of her deceased husband. As a rule the heir, in whom the ownership of the estate property vests, will provide the support and the widow has no right to dispose of any assets without his consent. But where she is left in charge of the kraal during the absence of the heir, as so often happens these days, she is in the same position as the "keeper" of the kraal. She has implied authority to dispose of assets of little value such as hides, skins, wool, mealies and other agricultural products to meet the day to day requirements of her household. In the case of an emergency, especially where it is necessary for the protection and preservation of the heir's property, and the heir's consent cannot be obtained, she is also entitled to sell stock but in that case she should consult a senior relative of the heir or, if none is available, then some person in authority in the location. These principles appear from the decisions in reported cases and the annexed opinions expressed by the Native Assessors in the present case.

Now, it is clear that Nodumasi was adequately supported. In fact she did not sell the beast because she lacked support. But, having sued Gilimfane in the authorised Court of the Chief, she was obliged to pay the Chief's messengers the recognised fee of a beast or its equivalent of £5 for executing the Chief's judgment. If she had not paid, the messengers would have attached a beast. She, therefore, acted prudently in disposing of a beast but she should have obtained the consent of plaintiff's guardian and if he disapproved, as was likely, she should have consulted some other senior relative of her husband. She has not done so and she could not, therefore, legally dispose of the beast so as to pass ownership to the purchaser. It seems that defendant realised this; hence his defence that Gilimfane was a party to the sale. He has not proved this and consequently the ownership in the beast never vested in him. Plaintiff is, therefore, entitled to recover the beast.

One of the grounds of the appeal is that the value placed on the beast is too high. This ground was abandoned, but in any case, as the beast is in existence, defendant has the option of delivering the beast if he considers that it is not worth £12.

The appeal is dismissed with costs.

OPINION OF NATIVE ASSESSORS.

Names of Assessors: C. Mamanga (Qumbu), T. Poswayo (Engcobo), H. Makamba (Tsolo), J. Ngcwabe (Cofimvaba) and J. Zwelendawo (Umtata).

Question: Can a woman who has been left in charge of her husband's kraal without the appointment of an "eye" sell his cattle to meet an emergency, such as the payment of a fine imposed on her for failing to eradicate noxious weeds?

Answer (per John Ngcwabe): She should consult the relatives of her husband and get permission from them to sell a beast. Such permission binds her husband. Without such permission she may not sell.

All the others agree.

Question: If there is no relative of her husband in the location, could she obtain the permission in question from her Chief or the headman of her location?

Answer (per Thomas Poswayo): No. The Chief or headman could not give permission.

Answer (per Henry Makamba): As a fine of the nature mentioned would be in respect of her husband's land, I consider that the woman would be entitled to sell the beast even without the permission of her husband.

Answer (per John Ngcwabe): According to our custom it would be in order if she consulted the Chief or headman. The reason why a woman is not permitted to sell her husband's stock without permission is that she could then sell all his stock for the benefit of her lovers.

Other Assessors agree.

Question: Could the woman consult close neighbours and friends of her husband?

Answer: (per John Ngcwabe): The woman should not consult neighbours or friends. The headman is the right person to give the necessary authority.

Question: Does it often happen that a man goes away and leaves his wife in charge of his kraal?

Answer (per John Ngcwabe): Yes, often.

Question: Can a woman sell wool, skins, hides, eggs, fowls and pigs for the support of her kraal during her husband's absence without consulting his relatives?

Answer (per John Ngcwabe): Yes, that is her privilege.

All the other Assessors agree.

Question: Is a wife nowadays left in sole charge of her husband's kraal or does the latter specially authorise some male relative to look after his affairs?

Answer (per Thomas Poswayo): It does happen that a woman is left alone in charge of her husband's kraal these days.

For Appellant: Mr. Muggleston, Umtata.

For Respondent: Mr. Airey, Umtata.

SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(Southern Division)
1950.

Volume I
(Part XII)

The Government Printer, Pretoria.
1950.

G.P.-S.4199—1950-1—500.