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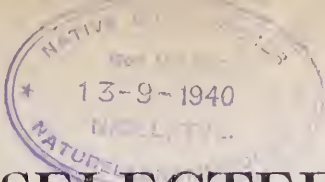
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SELECTED DECISIONS OF THE
NATIVE APPEAL COURT

CAPE & O.F.S. DIVISIONS

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SELECTED DECISIONS
OF THE
NATIVE APPEAL
COURT

(CAPE AND O.F.S.)
1939.



Volume 11.
(Index.)



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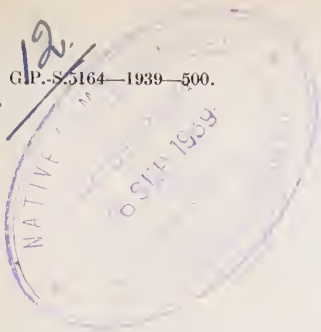
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SELECTED DECISIONS
OF THE
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(CAPE AND O.F.S.)
1939.



Volume 11.
(Part 1.)



111

THE
LIFE OF
SAMUEL JOHNSON
BY
JAMES BOSWELL

CASE No. 1.

GWEGWE MPOTULO vs. TOLI MDZANTSI.

BUTTERWORTH: 18th January, 1939. Before A. G. McLoughlin, Esq., President, Messrs L. M. Shepstone and H. F. Marsberg, Members of the Court.

Native Appeal Cases—Defamation—Presumption of malice rebutted when statement made on a privileged occasion.

Appeal from the Court of Native Commissioner, Tsomo.
(Case No. 73 of 1938.)

Marsberg (Member):

Plaintiff sued Defendant for damages for defamation on allegations which may be summarised thus:—

That at the Charge Office in Tsomo and in the presence of the Public Prosecutor and other persons in the course of an inquiry, about certain horses which one of those present had reported to the police as missing or stolen, the Defendant made a false, malicious and defamatory statement of and concerning the Plaintiff.

After hearing the evidence offered by both parties the Native Commissioner entered a judgment of absolution from the instance.

The appeal was noted on the ground that—

- (a) the Native Commissioner held that the statement complained of was made by Defendant and that it was in the circumstances defamatory.
- (b) that being so there was no onus on the Plaintiff to establish the falsity of the statement as "the burden of proving the truth of the defamatory words lies upon him who uttered them" (*Graham vs. Ker* 1XJ 185).
- (c) the Defendant made no attempts whatever to prove the truth of the statement made by him and instead of the decree of absolution there should have been judgment for the Plaintiff.

The allegations in the summons clearly indicate that the occasion on which the alleged statement was made was a privileged one. The presumption of malice arising from the defamatory nature, if any, of the words would be rebutted and it then became incumbent on the Plaintiff to prove express malice, that is to say, actual ill-feeling or malice in the popular and general sense (*Maasdorp Vol. IV: Page 115: 1917 Edition*). The burden of proof, was, therefore, on the Plaintiff, not the Defendant as suggested in the grounds of appeal. The Native Commissioner was of opinion that the statement was made without malice and was made merely to assist the police in tracing the horses. This Court is satisfied that the Native Commissioner had ample grounds for arriving at that conclusion and is therefore not prepared to disturb his judgment.

The appeal is dismissed with costs.

Shepstone, Member: I concur.

McLoughlin, President: I concur for the reasons set out by my brother Marsberg and on the authorities cited in my judgment in *Wm. Matsomoto vs. Simon Mqubuli* 1938 N.A.C. (Transvaal and Natal) heard at Pretoria on the 21st June, 1938.

For Appellant: Mr. S. Mahoud, Butterworth.

For Respondent: Mr. L. D. Dold, Tsomo.

CASE No. 2.

1948 (N.E.D) 5.

MAZAMISA SIDONDI vs. HENRY SIDONDI.

BUTTERWORTH: 20th January, 1939. Before A. G. McLoughlin, Esq., President, Messrs. L. M. Shepstone and H. F. Marsberg, Members of the Court.

Native Appeal Cases—Title Deeds issued under Proclamation No. 227 of 1898 in respect of quitrent allotments—Error in transposition of allottees' names—Chief Magistrate of Transkeian Territories authorised to rectify error in Title Deeds—Section 2 of Proclamation No. 196 of 1920.

Appeal from the Court of Native Commissioner, Nqamakwe. (Case No. 158 of 1938.)

McLoughlin, P. (delivering the judgment of the Court):

The history of the present action is set out fully by the Native Commissioner in a written judgment delivered by him; the relevant portion being the following:—

“On 22nd October, 1906, title was issued in terms of Proclamation No. 227 of 1898, in respect of Lot No. 188 in Hlobo Location, Nqamakwe, to one April Sidondi. The Lot is 9 odd morgen in extent and the quitrent payable thereon is 27s. per annum.

April died in 1924 when the land was transferred to and the title deed registered in the name of his son Mazamisa, who is the Defendant in this action.

On the 5th November, 1906, title was also issued in terms of the same Proclamation in respect of Lot No. 189 in the location to one Gadini Sidondi. This lot is 5 morgen odd in extent and the annual quitrent is 15s. Gadini died in 1936, when the land was transferred to and the title deed registered in the name of his son Henry, who is Plaintiff in this action.

Plaintiff's contention is that the two lands referred to above have been registered in the names of the wrong parties, that is to say, that Lot 188, which is now registered in Defendant's name, should originally have been registered in his (Plaintiff's) father's name, and that Lot No. 189, which is now registered in Plaintiff's name, should originally have been registered in Defendant's father's name, and he now sues for an order of Court directing Defendant to do all things necessary to amend the title deeds and to rectify the error.

He bases his claim on the fact that a genuine mistake common to both parties, was made at the time of the issue of the deeds of grant, in that his father, Gadini, was at that time in occupation of, and has since then continuously and until his death used the lot in respect of which title was issued to Defendant's father; and vice versa, that Defendant's father, April, was at that time in occupation of and continuously used until his death, the lot in respect of which title was issued to Plaintiff's father. Further, that since the death of their respective parents, the plots continued to be used in the same way by their successors in title and that it was not until last year, upon a resurvey of the district, that it was discovered that the title held by Plaintiff referred to the land used by Defendant, and similarly, the title held by Defendant referred to the land used by Plaintiff.

The land used by Plaintiff is the larger of the two lands, and the quitrent payable thereon is 27s. per annum; Plaintiff, however, has actually been paying only 15s. per annum, while Defendant has been paying the larger amount.

Plaintiff therefore tenders Defendant the difference between the two amounts as from the date upon which Defendant obtained transfer.

Defendant's contention is that the title deeds were correctly issued and while admitting that he (Defendant) has been using the lot registered in Plaintiff's name, and Plaintiff that of the one registered in his (Defendant's) name, he contends that this has occurred under a misapprehension of facts and therefore contests Plaintiff's right to the lot claimed by him."

In the Native Commissioner's Court the contest centred on the contention that the mistake was one caused merely by the parties themselves occupying the wrong lands, and not that an error occurred in the issue of the titles to the lands.

This argument was repeated and relied on in this Court. That it is specious, is clearly shown by the evidence both for Plaintiff and for Defendant. Until the error was discovered both parties thought they were occupying the correct lands, in other words the lands applied for by them and actually allotted. It is clear that Gadini did apply for a land in his own right and that title was issued in his name. As Mcunukelwa, the great son of April says: "The first I knew that there was something wrong with these lands was last year when the surveyor raised the matter. . . . Up till then I thought the correct people were plowing the correct lands". I agree with the contention that it was always thought that big land was registered in Gadini's name. His earlier remark that "I complained to my father and asked why he had the land registered in his name" can refer only to registration in Gadini's name, for at that time, as he says, he (Mcunukelwa) thought it was so registered. The evidence of the witness Isaac is thus fully corroborated that Gadini applied for and was allotted the bigger land now in dispute, although his title actually refers to the smaller land.

This Court is satisfied that the Crown intended to, and through its officers, actually did allot to Gadini the plot he occupied, and similarly gave April the smaller lot.

The error in transposing the names resulted in the title deeds being made out to the wrong persons. The position that has arisen is similar to that mentioned in the case *Saayman vs. Le Grange* (Buch. 1897 p. 10) where a transfer deed, by mistake of the transferor, varied from the terms of the deed of sale of the land, was ordered to be rectified at the suit of the transferee more than 40 years after

transfer, upon clear proof that the occupation had always been in terms of the deed of sale and not of the transfer deed, and that the mistake had only been discovered within the period of prescription. [Quoted in Clayton *vs.* Metropolitan Railway (1893, 10 S.C. at page 303).]

In speaking of the effect of a deed of transfer the learned Chief Justice (de Villiers) remarked in Clayton's case "What effect, then, does our law give to a duly registered transfer of land? The registration is a judicial act by virtue of which the full ownership passes from the transferor to the transferee." at page 302. Continuing after referring to the effect of a clean title deed he adds "If the transfer has been induced by the fraud of one of the parties the Court will, by way of *restitutio in integrum*, set it aside altogether. So the Court may, under certain circumstances, set it aside, or, if need be, vary it on the ground of *justus error*." at page 303.

The Courts undoubtedly have power to order the correction of errors in title deeds as the cases—In *re* Cronje's Estate 1907 (28) N.L.R. 183, *Ex Parte* Kotze 1928 E.D.L. 463 and van der Bijl *vs.* van der Bijl 16 S.C. 338—show.

The Plaintiff has approached the Native Commissioner's Court for relief. That Court has made an order in terms corresponding to Plaintiff's prayer including an alternative award of £50 based on the difference in value between the two lots. It appears to this Court that the inclusion of this item in the order is not justified on any rule of law or procedure, nor indeed is it necessary if, as the cases quoted show, the Court has the power to order rectification of the title deeds.

The addition of the award in the alternative to an order for specific performance is thus an anomaly in the circumstances. Indeed the form of the order of the Native Commissioner is open to question if specific performance is intended, for the correct course is apparently the setting aside by the Court of both titles on the ground of *justus error*, and leaving the matter to be adjusted by administrative action.

In van der Bijl *vs.* van der Bijl 16 S.C. at page 349 de Villiers C. J. however remarked that this course, while in accordance with Dutch Law, has not been followed in the Colony where "it has been the invariable practice for the Plaintiff, where the Defendant claims title under an instrument, to obtain direct relief by asking for a rectification of the instrument.

This relief is founded upon the same broad principle of equity as, according to Voet (4.1.1.) constitutes the foundation of *restitutio in integrum*. If, through a mistake for which the Plaintiff is not blameable, the instrument does not carry out the true agreement, the Defendant cannot claim the benefit of the instrument and at the same time object to its being rectified in such manner as to carry out the agreement.¹⁷

We are not dealing in the present case with an action based on an agreement between the parties directly, but this Court is constrained to view the position in this light, for unquestionably there was an application by the Plaintiff's predecessor in title to have and to hold the lot in question, and by Defendant's predecessor similarly for the other lot.

They all thought they had got what they asked for, and what was offered. It is only the transposition of the names in the title deeds, that has resulted in the error, which has only now recently been discovered.

In these circumstances the appeal must fail, but this Court will vary the order of the Native Commissioner to read: "The Court orders that the Plaintiff pay into Court for Defendant the difference between the quitrent payable on Lots Nos. 188 and 189 as from 19th February 1924 to date.

It is ordered that thereafter the error in the title deeds be rectified. The Chief Magistrate of the Transkeian Territories in the capacity conferred on him by Section 2 of Proclamation No. 196 of 1920, is hereby authorised to substitute the name of the Plaintiff for that of the Defendant on the title deeds of Lot No. 188 in Location 12, District of Nqamakwe, and to amend all other records accordingly, on presentation to him by the Native Commissioner of the said title deeds now filed of record in this case.

The said Chief Magistrate of the Transkeian Territories is further authorised simultaneously to substitute the name of Defendant for that of Plaintiff on the title deeds of Lot No. 189 in Location 12, District of Nqamakwe, and to amend all other records accordingly.

Defendant to pay costs in the Native Commissioner's Court".

Subject to this alteration in the Native Commissioner's judgment, the appeal is dismissed with costs.

For Appellant: Mr. L. W. Harvey, Nqamakwe.

For Respondent: Mr. A. J. C. Kockott, Nqamakwe.

CASE No. 3.

MAGQAGQANA LUGEBU vs. ROBERT MBONDWANA.

BUTTERWORTH: 20th January, 1939. Before A. G. McLoughlin, Esq., President, Messrs. L. M. Shepstone and H. F. Marsberg, Members of the Court.

Native Appeal Cases—Liability of head of kraal to account for dowry paid in respect of females at his kraal—Onus of proof.

Appeal from the Court of Native Commissioner, Tsomo.
(Case No. 77 of 1938.)

McLoughlin, P. (delivering the judgment of the Court):

In this matter the Plaintiff sued the Defendant for delivery of certain 6 head of cattle or their value £30 and 30 sheep or their value £15, and for an account of the increase of the sheep.

The Native Commissioner gave judgment of absolution against which Plaintiff now appeals on the grounds:—

That the Native Commissioner erred in holding the summons was directed against the Defendant in his personal capacity and not as heir of his late father, and as such liable to account for the dowry stock received by the deceased.

The facts, which are to some extent common cause, are that the late Loliwe, father of Defendant, during his lifetime received at the kraal certain stock as dowry for the daughters of a woman Nofayile, whom he had given in marriage to the late father of Plaintiff, Nofayile being then resident at Loliwe's kraal as a widow.

Plaintiff alleges in his particulars of claim that this stock and their increase are in possession of the Defendant. Because the evidence regarding this allegation is admittedly defective, the Native Commissioner at the close of Plaintiff's case absolved the Defendant from the instance.

The Plaintiff has rightly attacked this ruling, for the decision in *Rannwana vs. Siyotulo* 1937 N.A.C. (C. & O.) page 172, clearly indicates firstly, that such a claim must be heard under Native Law, and secondly, that by Native Law the head of a kraal is the proper person to account for dowry paid at his kraal in respect of females whose rights vest in another. He cannot avail himself of the defence that the girl's mother has disposed of such stock.

Clearly then the onus is transferred to the Defendant when once the Plaintiff has proved that dowry had been paid for his girls to the Defendant's father or at his kraal.

It avails the Defendant but little to shield himself behind a technical defence that he has not been specifically sued in his capacity as heir to his late father's estate. He admits the allegations in the summons that he is the heir of the late Loliwe. The summons, in the opinion of this Court, sets out sufficiently adequately both the cause of action and the grounds on which Defendant's liability is based. The case is not one based on the allegation of present possession, but on the effect produced by the ruling in *Rannwana's* case which is entirely consonant with Native Law, that the heir steps into his father's position, and as such answers for him, subject to such modifications as decisions of this Court have recognised.

The Defendant has given no evidence and he has thus not accounted for the stock received by his predecessor in title, i.e. he has not rebutted the Plaintiff's case.

Accordingly the appeal will be allowed with costs, and the judgment of the Native Commissioner set aside. The record is returned for such further evidence as the Defendant may tender, and for a new judgment.

For Appellant: Mr. S. Mahoud, Butterworth.

For Respondent: Mr. L. D. Dold, Tsomo.

CASE No. 4.

HOHA vs. SAMANI MTWESI.

KOKSTAD: 30th January, 1939. Before A. G. McLoughlin, Esq., President, Messrs. F. C. Pinkerton and J. P. Cowan, Members of the Court.

Native Appeal Cases—Dowry under Basuto Custom—Father not liable to provide dowry for second wife of son unless by specific agreement.

Appeal from the Court of Native Commissioner,
Mount Fletcher.

(Case No. 538 of 1938.)

McLoughlin, P. (delivering the judgment of the Court):

In this case Plaintiff sued Defendant for a balance of dowry under Basuto custom.

The Native Commissioner gave judgment for Plaintiff against which Defendant now appeals on the grounds:—

1. That there is no proof of a valid marriage having been contracted.

2. That there is no proof that the Defendant held himself liable for the dowry—a third ground is put forward as a modification of this ground.

As it is common cause—

(1) that the Defendant did not marry the woman for himself, but that she was for his son;

(2) that his son had already been provided with a wife; the first ground of appeal is not decisive and need not detain the Court in view of its finding on the second ground, i.e., that there is no proof of a specific agreement that the Defendant held himself liable for the payment of the dowry for a second wife for his son.

The evidence on this point is meagre and vague. There is much evidence of negotiation for a marriage and there is evidence of payment of 5 head of cattle, the girl having been rendered pregnant by the Defendant's son. But nowhere is it specifically stated when and how the Defendant undertook liability. There is the bald statement of the Plaintiff himself, that Defendant did so agree, but this is qualified in the next sentence by his statement that he, Plaintiff, relied on the whole of his evidence—i.e. not on any specific agreement.

There is no corroboration of the Plaintiff's statement that there was such a marked departure from Native practice, which this Court has always required to be clearly proved.

It does not avail Plaintiff to indicate inconsistencies in Defendant's evidence, for that does not establish the proof he lacks of a specific agreement, and in the absence of such evidence he must fail.

The Defendant has not made out a conclusive case to the contrary, and in these circumstances this Court, while allowing the appeal with costs, will alter the Native Commissioner's judgment to one of absolution from the instance with costs.

For Appellant: Messrs. Berning & Zietsman, Kokstad.

For Respondent: Messrs. Elliot & Walker, Kokstad.

CASE No. 5.

FANINI RAWUZELA vs. JOSEPH MALIEHE.

KOKSTAD: 30th January, 1939. Before A. G. McLoughlin, Esq., President, Messrs. F. C. Pinkerton and J. P. Cowan, Members of the Court.

Native Appeal Cases—Onus of proof—Presumption of ownership arising from possession.

Appeal from the Court of Native Commissioner, Matatiele.
(Case No. 119/37.)

Pinkerton (Member):

The Plaintiff's claim is for the return of a young bay stallion with blaze, off hind foot white, and white left front foot, which he alleges has been taken possession of by Defendant.

Defendant denies having possessed himself of a stallion belonging to Plaintiff.

The Native Commissioner gave judgment for Plaintiff with costs, and against this judgment the Defendant has appealed on the following grounds:—

1. That the judgment is against the weight of evidence.
2. That the magistrate was wrong in holding that the Plaintiff had discharged the onus of proving that the horse in question was his property.

It appears from the evidence that in December, 1935, Plaintiff introduced certain horses and mules from Basutoland into Mzongwana's Location, Matatiele. One of these horses apparently strayed and Plaintiff went back to Basutoland and found what he believed to be the same animal. This horse was claimed at the port of entry on behalf of Defendant by one Sefo. As he had no pass for its removal Plaintiff, on the instructions of the constable at the "gate", handed over the animal to Sefo, but made his claim of ownership to Headman Baleni.

For some unknown reason, Baleni failed to settle the matter and Plaintiff was obliged to take action in the Court of the Native Commissioner.

The case hinges on the question of the identification of the stallion. The permit issued to Plaintiff on the 26th September, 1937, throws no light on the matter as the only animal which might relate to the stray horse is merely described as "a foal" without giving any distinguishing marks.

The Plaintiff states that he bred the stallion and that it followed its mother at the "gate" and again when the case was before the Headman. He has brought no witnesses and relies on the behaviour of the animal as incontestable proof that it is the foal of his mare. It is within the knowledge of this Court that foals do at times follow other horses in no way related to them, and for this reason is of opinion that the foal having so acted in this way is not conclusive evidence of ownership.

In giving evidence on behalf of Defendant Sub-headman Qoli is emphatic that the horse in question belongs to Defendant. He says he knows its mother—a brown mare—and that he has known it since it was a foal. He draws attention to a cracked hoof which he says was the result of an accident when it was being trained.

Defendant corroborates Qoli and says he bred the horse in dispute and that when it was being trained it cracked its hoof. The Native Commissioner adjourned the Court to inspect the animal and found an indistinct mark of a crack in the front hoof.

In the opinion of this Court the Plaintiff has failed to prove his case beyond reasonable doubt, and the appeal is allowed accordingly, and the judgment of the Native Commissioner is altered to one for Defendant with costs.

Cowan (Member):

I concur.

McLoughlin, P.:

The Assistant Native Commissioner has been at pains to discuss aspects of this case which are based on inadmissible evidence and on conjecture. The broad issue is the fact found in his reasons and established by the evidence that the horse in dispute has been in the peaceful possession of Defendant for some time. The strong presumption of ownership arising from this possession cannot lightly be disturbed by a mere balance of probabilities or of credibility.

Plaintiff must show conclusively that he has a better right than the Defendant and in this he has failed conspicuously. He has at most shown that he lost a similar horse but he has failed to prove that the horse he claims is the one he lost and he has not described one of its essential marks which the Defendant accounts for.

I accordingly agree with the decision of the Court that judgment shall be for Defendant with costs.

For Appellant: Messrs. Berning & Zietsman, Kokstad.

For Respondent: Messrs. Elliot & Walker, Kokstad.

CASE No. 6.

MTINJELWA MBULAWA vs. MAXESIBE MENZIWE.

PORT ST. JOHNS: 7th February, 1939. Before A. G. McLoughlin, Esq., President, Messrs. H. M. Nourse and M. Adams, Members of the Court.

Native Appeal Cases—Practice and Procedure—Rule 9 (1) published under Government Notice No. 2254 of 1928—Service of notice of appeal—Production of affidavits on appeal permitted in certain circumstances—Substantial prejudice, Section 15 of Act No. 38 of 1927—Finality to litigation and substantial justice notwithstanding technicalities—Enquiry in deceased Native Estate, Section 3 of Government Notice No. 1664 of 1929.

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

(Case No. 96/37.)

McLoughlin, P. (delivering the judgment of the Court):

This matter is an appeal from the decision of the Native Commissioner in "an Enquiry as to heir to Estate late Menziwe Mbulawa".

The judgment was "Court declares Maxesibe to be the heir of the late Menziwe Mbulawa".

The Native Commissioner's record of the proceedings encased in form U.D.J. 23, has the usual Civil case serial number and the parties are shown as Maxesibe Menziwe, Plaintiff vs. Mtinjelwa Mbulawa, Defendant. Nature of claim "Enquiry as to heir in Estate late Menziwe Mbulawa". There is no summons or notice convening the enquiry. Nor is it indicated under what authority the enquiry is held.

The so-called Defendant has appealed against the Native Commissioner's finding on the following grounds:—

"(1) That the Native Commissioner had no jurisdiction to try an action in the Native Commissioner's Court between the Plaintiff and Defendant without the necessary pleadings being filed by the parties to the action.



- (2) That, although Section 3, sub-sections (3), (4) and (5) of the Regulations published under Government Notice No. 1664 of 1929, framed under Act No. 38 of 1927, authorises a Native Commissioner to hold enquiries for the purpose of settling any dispute as to heirs in Native Estates without the formality of pleadings, the said Regulations do not authorise or permit a Native Commissioner to deal with such matters by way of civil proceedings instituted in the Native Commissioner's Court without pleadings.
- (3) That the said judgment is wholly against the weight of evidence and the probabilities disclosed by the evidence.
- (4) That, it having been established in evidence that the said Magxiyana did have an adulterine child by one Ntlafunga during the subsistence of her marriage to the late Menziwe, it having been stated in writing by the said Plaintiff that the said Magxiyana only had three children of her marriage to the late Menziwe and taking into account the apparent age (34 years) of the Plaintiff the onus of proof shifted from Defendant to Plaintiff, who then had to establish that he was in fact the legitimate son and heir of the late Menziwe and he has not discharged such onus.
- (5) That the Native Commissioner placed too much reliance on the evidence of Takayo Sirala and Gqwira Nqukumbana, the latter being in no way an impartial witness and it being obvious from the present age of the former that he must have been a mere child in 1904.
- (6) That the Native Commissioner permitted certain hearsay evidence to be adduced which must have had a prejudicial effect on the mind of the Native Commissioner.
- (7) That Defendant, through ignorance of Court procedure, neglected to cross-examine certain of Plaintiff's witnesses and he therefore prays that, in the event of the Native Appeal Court not sustaining his appeal, the matter be remitted to the Native Commissioner for the purpose of giving Defendant a further opportunity of cross-examining the witnesses in question."

At the hearing of the appeal objection to the hearing of the appeal was lodged by the Respondent on the ground that "Notice of Appeal" had not been served upon Respondent as is required in terms of Section 9 (1) of the Rules of the Native Appeal Court and further that Section 9 (2) of the same rules has not been complied with. See Rules dated 21st December, 1928, No. 2254.

Appellant submitted affidavits, one by the Interpreter Clerk of appellant's attorney testifying that on 25th October, 1938, the day on which the appeal was noted, he posted under registered cover a Notice of Appeal addressed to the Defendant. That on the same day he met Defendant (Respondent) in town and took him to the Post Office where he asked the Postmaster to deliver the registered letter to the Respondent. That on the Postmaster producing the registered letter for delivery to Respondent the latter refused to receive it. The Postmaster confirms this statement by affidavit.



Objection to the production of the affidavits was overruled, the Court intimating that no other course was open to ascertain the position. While it could not take evidence or have the evidence of a Native Commissioner's Court supplemented by affidavit, it is obvious that there may be occasions like the present instance where it is essential to verify steps taken to carry out the rules in noting an appeal. This can be done only by affidavit with a corresponding right of reply, both sets of affidavit to be kept at a minimum in length and in number.

Proceeding next to consideration of the objection against the noting of the appeal in this Court, reliance is placed by Counsel for Respondent on the ruling in *Qina vs. Qina*, 1938 N.A.C. (C. & O.) p. 92, (P.H. R. 92), but the facts in this case are readily distinguishable from those in *Qina's* case. Here there was an attempt to effect personal service in the presence of a witness and that was frustrated by the act of Respondent himself: more than this the rules do not require.

In any event, however, the position is one governed by the spirit of the proviso to Section 15 of the Native Administration Act, 1927. That proviso deals more directly with proceedings in the Native Commissioner's Court in connection with the trial of a case, but the injunction of the legislature is a clear lead to this Court not to sacrifice substance for form, subject always to the test laid down in the proviso, of substantial prejudice to either side.

The principle involved is set out in *Cele vs. Kwela* 1938 N.A.C. (T. & N.) (Durban 19th July, 1938), "This Court recognises and adopts the maxim affirmed in *Cairn's* case (*Cairn's Executors vs. Gaarn* 1912 A.D. p. 189) that it is in the interests of the State that there should be finality to litigation, but as a final Court of appeal, this Court must in the spirit of Section 15 of Act No. 38 of 1927, guard against barring its doors on technical grounds to any litigant who has suffered an injustice which he cannot redress in any other way, and which, in the opinion of the Court, he has not acquiesced in or condoned".

In *Sikakane vs. Zulu* 1938 N.A.C. (T. & N.) Dundee (5th August, 1938) the Court reaffirmed these principles in the following terms:—

"As the final Court within reach of Native litigants it was required in the spirit of Section 15 of Act No. 38 of 1927 to ensure that substantial justice be done notwithstanding technicalities and in the exercise of this wide discretion it has given relief in circumstances where other Appeal Courts with less latitude would have hesitated to ignore technicalities.

The guiding factor is the question of substantial prejudice to either side."

Apart therefore from the actual facts as disclosed, especially in the affidavits, that Defendant (Respondent) frustrated the attempt to comply with the rules, he has shown no substantial prejudice as having resulted from the alleged failure to comply with the letter of the law. The objection was accordingly overruled and the hearing proceeded with.

On the merits there is no sound reason for disturbing the finding of the Native Commissioner, no prejudice has been shown to have resulted from the form of the proceedings.

True it is that the Native Commissioner should indicate his authority for holding the enquiry and especially quote the section under which he acts. No objection was lodged *in limine* to the proceedings in the Native Commissioner's Court and the Respondent cannot now complain on this score.

Grounds 1 and 2 have thus no substance.

Ground 7 is refuted by reference to the record, which shows that Defendant examined other witnesses at great length and his plea of ignorance of Court procedure is pure imagination.

Grounds 3, 4, and 5 deal with the weight of evidence. It is sufficient to discharge the onus on Plaintiff, to prove that he is the son of the wife of the deceased born during the subsistence of the union.

It then becomes the duty of the party attacking his legitimacy to rebut the presumption—a very strong presumption—that the father is the person demonstrated by the nuptials.

Defendant has failed to discharge this heavy onus and in the circumstances the finding of the Native Commissioner is correct.

Ntliziyombi vs. Ntliziyombi 1937 N.A.C. Cape & O.F.S., p. 233.

The Appeal is accordingly dismissed with costs.

For Appellant: Mr. J. Bouchet, Port St. Johns.

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

CASE No. 7.

STIMELA JACA vs. MAYICIKE SANANA.

PORT ST. JOHNS: 7th February, 1939. Before A. G. McLoughlin, Esq., President, Messrs. H. M. Nourse and M. Adams, Members of the Court.

Native Appeal Cases—Adultery—Ntlonze—Law allows husband certain latitude in dealing with adulterer caught red-handed.

Appeal from the Court of Native Commissioner, Flagstaff.

(Case No. 33 of 1938.)

McLoughlin, P. (delivering the judgment of the Court):

Plaintiff claimed 3 head of cattle or their value as and for damages for adultery by Defendant with Plaintiff's wife.

Defendant denied the adultery and counterclaimed for £15 as general damages for an alleged assault under cover of the charge of adultery and £1 for the value of certain articles taken from him by Plaintiff at the time. He asked for costs on the higher scale owing to the criminal nature of the behaviour of Plaintiff.

The Native Commissioner gave judgment for Plaintiff as prayed with costs on claim in Convention.

On the Counterclaim he gave judgment for Defendant for £1 and ordered Defendant to pay the costs of the Counterclaim.



“ Claim for £1 value of articles, dismissed, articles to be handed back to Defendant.”

Defendant appealed against these judgments on the following grounds:—

- (1) That the judgment in convention was against the weight of evidence and wrong in law having regard more particularly to the evidential and other factors and circumstances of the record. (These are set out in detail at some length.)
- (2) On claim in convention Appellant repeats the foregoing grounds and he also attacks the order as to costs.

Plaintiff cross-appealed against the judgment awarding £1 as damages for the assault on the ground mainly that the assault was of a minor nature and was justified by custom where an adulterer was caught in the act.

The facts as set out by Plaintiff are that Plaintiff's wife had for some time been away from him at her people's kraal, that on the day in question Plaintiff with his elder brother Nonkosi and a neighbour Zifunele approached the kraal of his wife's people and saw his wife coming out of a hut with a man. Following up they caught them in the act of adultery. Defendant, who was the man with the woman ran off and was hotly pursued. He was overtaken in Noziwendu's land where he was struck a blow or two and his blanket taken from him as ntonze. Defendant admitting, the Plaintiff left him on advice of Noziwendu and took the blanket to the headman. He, Plaintiff, had meanwhile found other articles of the Defendant on the spot where the adultery took place.

Defendant's version is an admission of the encounter with Plaintiff and his party while he was on a journey to another kraal. Defendant alleges that Nonkosi questioned him saying “ Why do you assault our young men when they go to the shop?” That thereupon Nonkosi struck him and he ran away. His assailants chased him overtaking him in the lands. There Nonkosi struck his finger nail off. Plaintiff threw a stone at him and struck him with a stick on the knee.

His evidence as recorded reads “ Nobody at the land accused me at the land, they took my belongings saying they had caught me with Plaintiff's wife. Nonkosi spoke. I said they did not charge me because I asked where their wife was. I never admitted anything. They took my belongings forcibly. . . . I saw the woman at the land about dinner time. Zifunele brought her. He went and fetched her when we were having dispute in the land. They said “ We have caught you ” and she denied it. She asked what things they had. . . . I did not go to the headman that day—my knee was swollen. . . . Plaintiff's wife was brought to the land because we were disputing. She was not brought because I was charged for adultery ”.

He admits he did not report the assault to the Police nor issue demand for damages. Later in his evidence he repeats to the Court: “ They were definite in their allegations of adultery ”.

Plaintiff's wife is called as a witness by Defendant, being hostile to Plaintiff. She emphatically denies that the matter of adultery was talked on the lands. She says “ I heard of the adultery for first time at Headman's ”. “ Nothing was said in land about adultery. There was no quarrel.”

Defendant's witness Noziwendu states:—

“ I saw three people chasing him (Defendant) they came up to him. Plaintiff, Nonkosi and Zifunele. I spoke saying “ what is it ? ” They said “ we caught him with a woman ”.

Now this version is nearer that of Plaintiff than Defendant's who denied at first that there was talk about adultery in the land though he reluctantly had to admit that it was discussed and that the woman was fetched in connection therewith. It becomes extremely significant then that the woman herself adopts the attitude she does in attempting to make out she was not taken to the land for that purpose. The inference is very strong that she is attempting to shield Defendant. In the face of that position then the discrepancies in Plaintiff's version fade into insignificance. There is general corroboration on fact and probability that the affair happened as Plaintiff relates and not according to Defendant's version. For these reasons we find no fault with the Native Commissioner's judgment and the appeal on this point must fail.

Having established the fact of the adultery, any mishandling received by the Defendant cannot form the subject of complaint when it is not of a serious or grievous nature, for Native Custom, as also the olden Common Law allowed a husband very wide latitude in dealing with an adulterer caught red handed. [See *Dumalisile vs. Mqanango*, 1931 N.A.C. (C. & O.F.S.) p. 8.] The injuries enumerated by Defendant are of a very minor nature and in the circumstances the cross-appeal must succeed. The question of costs falls away.

The appeal will accordingly be dismissed with costs. The cross-appeal is allowed with costs and the judgment of the Native Commissioner altered to one for Defendant in re-convention with costs.

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

For Respondent: Mr. F. C. W. Stanford, Flagstaff.

CASE No. 8.

**MSINEKELWA SOMTITSI and ANOTHER vs. MTSHOPI
RABIYA.**

CASE No. 8.

PORT ST. JOHNS: 8th February, 1939. Before A. G. McLoughlin, Esq., President, Messrs. H. M. Nourse and M. Adams, Members of the Court.

Native Appeal Cases—Practice and procedure—Conditions precedent to raising of new point for first time on appeal—In Native law husband is only person entitled to receive damages for adultery—Dissolution of marriage without claiming damages amounts to condonation of offence and right of action lapses—Native Commissioner's order as to costs corrected.

Appeal from the Court of Native Commissioner.

Port St. Johns.

(Case No. 4 of 1938.)

McLoughlin, P. (delivering the judgment of the Court):

In the Native Commissioner's Court Mtshopi sued Msinekewla and his father as kraalhead for damages for adultery with Mtshopi's wife. The Native Commissioner gave judgment for Mtshopi. Defendants now appeal against this judgment on the grounds:—

(1) Weight of evidence.

- (2) On law in that the Native Commissioner erred in holding that it was not competent under Pondo Custom for a guardian of a female to claim damages for adultery of his ward during the subsistence of her marriage by Custom to another man when her husband has dissolved his marriage without taking action against the adulterer.
- (3) That the terms of the judgment are incompetent in as much as the order is one creating liability severally against each Defendant instead of jointly and severally against both, the one paying the other to be absolved.

Exception was raised *in limine* to the hearing of the last ground on the authority of the ruling in *Rhodes vs. Carrol* 1935, N.A.C. (C. & O.F.S.) p. 14 and other previous decisions.

The exception was overruled on the authorities relied on in *Ximba vs. Ximba* 1938 N.A.C. (T. & N.) p. 76.

The rule in regard to the raising of a new point on appeal is set out in the decisions of the Appellate Division in *Shidiack vs. Union Government* 1912 A.D. at p. 656; *Marks Ltd. vs. Laughton*, 1920 A.D. at p. 22; *van Pletzen vs. Henning* 1913 A.D. at p. 96, setting out the ruling on the same point in *Cole vs. Union Government* 1910 A.D. 263.

“ Summarised the rule is that the new point raised on appeal covered by the pleadings and if it does not depend upon facts incompletely investigated, and *not waived* or abandoned and if its consideration on appeal involves no unfairness to the party against whom it is directed, then it might be relied on by either of the parties even though raised for the first time at the appeal stage.

In the presence of these conditions a refusal by a Court of Appeal to give effect to a point of law fatal to one or other of the contentions of the parties would amount to the confirmation by it of a decision clearly wrong.

The situation created by express abandonment or clear waiver was not dealt with in *Cole's* case but the subsequent decisions in *Shidiack's* case and that of *Marks'* bear out the qualification of the rule that such waiver or abandonment precludes the Appellant from being heard on that point on appeal.

As indicated earlier in this judgment, the bearing of Section 15 of Act No. 38 of 1927 further strengthens the position of Respondent in this case as no substantial prejudice has been shown.”

(*Ximba vs. Ximba* loc. cit.)

In the present case there was no possibility of the Appellant raising the matter *in limine*, for until the Native Commissioner delivered his judgment he was not in a position to know that the Native Commissioner would not give the usual legal judgment.

On this ground alone the exception must fail. As it stands the judgment is illegal according to Native Custom and this Court must of its own motion proceed to correct it, if need be.

Ground 2 of the appeal is decisive as it goes to show the probability or improbability of the contention of the Defendants that the payment made by Mtshopi in respect of the woman could in the circumstances be regarded as a fine.

In Native Law the husband is the only person entitled to receive damages for adultery. In exceptional cases the father may exact payment on his behalf if the daughter is under his immediate control at the time of the delict but he does so only as agent for the husband.



If the husband proceeds to dissolve the marriage without claiming damages he condones the offence, as he may in Custom and the right is not transmitted to the father. It is a right in *personam* and not *in rem* arising from the contract or its dissolution.

The point was submitted to the Pondo Assessors who state:—

Tantsi: "According to Custom after restoration of cattle, the husband can't claim damages. He gets the child.

The case dies if he does not sue.

If the father has returned all the cattle to the husband he can claim from the husband, i.e. for deduction for the child.

The girl's father can call upon the adulterer to pay dowry for his daughter and not for the child that is born. He can sue the adulterer for dowry after he has restored the first dowry.

The father has no right to sue for the stomach. The only person who has a right to sue is the husband who has now taken his cattle back.

If the adulterer refuses to pay, her father can sue him for payment and to teleka".

The statement of Custom by the Native Assessors, is in accordance with the statement made in *Rolobile vs. Matandala* 2 N.A.C. 126 and is what this Court understands to be Native Custom, that the right of action lapses on dissolution of the marriage.

Hence it follows that it was extremely improbable in the face of the evidence that the affair before the headman was an action for damages. The conclusion to be drawn from the affair is that the woman's father perhaps reluctantly did consent to the marriage by accepting dowry from the Plaintiff and it is a reasonable inference to draw from his remarks and his conduct that he expected payment as for a marriage.

Even if there be some doubt on this point, it is cleared when the father admits that he received two further head which in the circumstances this Court cannot but regard as having been for dowry.

But the point need not be further explored for the facts fully support the Native Commissioner's finding that the payments made were in respect of a marriage.

It is clearly established that—

- (1) the dowry for the first husband was refunded before payment was made by the second husband Mtshopi. The father admitted that the girl wanted to marry Plaintiff. Plaintiff offered marriage and it is significant that the case before Headman was for 8 head of cattle.

The father's attitude is most inconsistent in proceeding to ascertain if payment had been made to Headman;



- (2) the woman admits in her evidence that she was twalaed and that she was the wife of Mtshopi, although she contradicts herself considerably and shows clear bias in attempting to disown the status;
- (3) the evidence regarding the second pregnancy is inconclusive for the Defendants. It is an improbable story. The foetus does not vanish into the air. At the age postulated by the witness the foetus was larger than a mere worm and according to the decisions of the N.A.C. in *Notatsala vs. Zenani* 1 N.A.C. 209 and *Meunu vs. Gumede* 1938 N.A.C. (T. & N.) p. 6, it is a person and the foetus must be exhibited to the seducer's people to establish the claim for pregnancy. If as contended for Defendant it vanished, there is no damage, for liability is incurred for a pregnancy only and not for mere seduction, as this was a second instance.

But the evidence is self destructive for the woman states:—
 “When the two head of cattle were paid I was in my third month of pregnancy—the pregnancy disappeared in the fourth month.”

“I felt the *child* moving about in my womb, I thought I was pregnant because the stomach was moving.” Movement does not take place in the third or fourth month of pregnancy and the statement is thus incredible. It is true that Mtshopi admits the woman was pregnant when he left his home and his whole conduct is corroborative of his view. But that does not detract from the improbability of the version put up by the Defendants' witnesses. Indeed the fact that Mtshopi acted as he avers is strongly corroborative of his contention that he had married the woman and was seeking the child born of that union.

Once the evidence of the defence on this point is destroyed there remains only one conclusion to draw from the facts.

That conclusion was drawn by the Native Commissioner on the facts, that the payments were made as dowry at a time when the woman was free to re-marry and in the circumstances this Court must dismiss grounds 1 and 2 of the appeal which includes ground 3 of the Notice of Appeal.

The objection raised in ground 4 is valid. It involves however more a matter of correction of the basic judgment rather than a reversal of the judgment and in the circumstances it will suffice to order the amendment of the Native Commissioner's judgment.

[See *van der Schyf vs. Loots* 1938 A.D. p. 145 followed in *Mhlala vs. Mohlala* 1938 N.A.C. (T. & N.) Pretoria 22nd June, 1938.]

The appeal is accordingly dismissed with costs but the judgment of the Native Commissioner is corrected by adding the words, “jointly and severally the one paying the other to be absolved”.

For Appellant: Mr. J. Bouchet, Port St. Johns.

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



CASE No. 9.

MODIKAYI MFAZWE vs. DLAYEDWA MODIKAYI.

PORT ST. JOHNS: 9th February, 1939. Before A. G. McLoughlin, Esq., President, Messrs. H. M. Nourse and M. Adams, Members of the Court.

Native Appeal Cases—Practice and Procedure—Section 15 of Act No. 38 of 1927—Predominance of justice over technicalities—Section 99 (1) of Proclamation 145 of 1923—New defence may be raised for first time on appeal—A Native Minor's earnings accrue to his father—Attempt to break down Native social system reprobated.

Appeal from the Court of Native Commissioner, Flagstaff.
(Case No. 25/1938.)

McLoughlin, P. (delivering the judgment of the Court):

In this case Plaintiff sued his father for delivery of 4 horses or their value.

The Native Commissioner gave judgment for Plaintiff and dismissed a Counter-claim for 2 horses.

In view of the technical issues involved in this case, the summons and pleadings are set out in full as also the grounds of appeal:—

(1) *Particulars of Claim.*

Plaintiff's claim is against Defendant for delivery of 4 horses or for payment of their value £32.

Particulars:—

1. The Defendant and the Plaintiff are father and son and until recently resided at the same kraal in Bota's Location.
2. The Defendant recently, without cause, drove the Plaintiff away from his kraal and Plaintiff is now residing at another kraal in Bota's Location.
3. While at Defendant's kraal, the Plaintiff was the owner and was in lawful possession of certain 4 horses, which the Defendant now wrongfully and unlawfully refuses to allow Plaintiff to remove from his kraal and has wrongfully possessed himself of the said horses and refuses to give them up after demand.

Wherefore Plaintiff prays that Defendant may be adjudged to deliver to him the said four horses or to pay their value £32, for alternative relief and costs of suit.

Application for Further Particulars.

The Defendant applies for the following further particulars:—

The full description of the four horses claimed by the Plaintiff—giving age, sex and colour and any distinctive marks by which the horses can be identified as the Defendant has thirteen horses at his kraal.



Does the Plaintiff allege that he acquired the horses from the Defendant by purchase or otherwise? And if so give details of such alleged purchase.

If the Plaintiff does not allege that he acquired the horses from the Defendant, then how, when and from whom does he allege he acquired them, and how does he allege that Defendant became possessed of them.

Further Particulars.

In answer to Defendant's request for further particulars, Plaintiff replies as follows:—

1. The description of the 4 horses claimed are:—

- (1) A yellowish mare (Gqwaqa) with small white spots on chest, Skeyi right ear.
- (2) Its stallion foal, same colour, same earmarks, with white star.
- (3) A dark-brown gelding, white socks hind legs, white sock left front leg, white star, skeyi right ear.
- (4) A dark-brown stallion, white star, blackish colour above hind and front hoofs.

Defendant is unable to give the ages of these horses with any exactitude. He estimates the age of No. (1) as about 13 years, No. (2) is still suckling, No. (3) is round about 7 years, No. 4 is about 3 years old.

2. Plaintiff does not allege that he acquired the horses by purchase from Defendant. He alleges that he acquired the horses by purchase of two mares through the agency of the Defendant, namely No. (1) above and black mare, the latter not being in question in this case. Nos. (2) and (4) are the progeny of the yellowish mare No. (1) and No. (3) is the progeny of the black mare.

Defendant objects to giving any further information, which is not necessary or reasonably required as Defendant had and has sufficient information to enable him to know the case he has to meet.

Defendant's Plea.

1. Defendant admits Para. 1 of the particulars on the summons.
2. Defendant admits Para. 2 save that he denies that he drove the Plaintiff from his kraal and says Plaintiff left of his own free will.
3. Defendant denies Para. 3 and says that the horses claimed by the Plaintiff (as described in the further particulars) are his (Defendant's) own property and Plaintiff has not and never has had any right to them. Defendant denies that he has ever purchased any horses as agent for the Plaintiff.

Wherefore the Defendant pleads not indebted and prays that Plaintiff's claim may be dismissed and judgment entered for Defendant with costs.

Claim in Reconvention.

The Defendant (Plaintiff in reconvention) claims from the Plaintiff (Defendant in reconvention) delivery of two horses, viz.: 1 bay filly (skey mark on right ear), and 1 dark-brown stallion (skey mark on right ear and white on hind legs) or payment of their value at £8 each (£16) and costs.

Particulars:—

1. The above described horses are the property of the Plaintiff in reconvention and were in his possession at his kraal up to about the last week in February last.
2. During the last week of February the Defendant, who up to then had been living at the kraal of the Plaintiff in reconvention, left the said kraal during the absence



of the Plaintiff in reconvention and took with him without the knowledge or consent of the Plaintiff in reconvention the said two horses.

3. On demand for re-delivery of the horses the Defendant in reconvention refuses to re-deliver them to the Plaintiff in reconvention.

Plea to Counterclaim

Plaintiff, now Defendant in reconvention, pleads to the claim of the Defendant, now Plaintiff in reconvention, as follows:—

1. He denies paragraph 1 of the claim and states that the horses described are his own lawful property.
2. Save that he admits that he has been living at the kraal of Plaintiff until recently, the Defendant in reconvention denies paragraph 2 of the claim. He states that when he left the former's kraal, he did remove the stallion described in the claim, but denies he removed the filly which was not at the kraal of the Plaintiff in reconvention.
3. Defendant in reconvention denies paragraph 3 of the claim but admits that he now refuses to deliver the horses to Plaintiff in reconvention.

Wherefore Defendant in reconvention prays for judgment in his favour with costs.

Grounds of Appeal.

That the evidence adduced clearly indicates that the Plaintiff did not have control of the horses in question while he was living at the Defendant's kraal but on the contrary it was his attempt to exercise control without the authority of the Defendant that caused the estrangement between the parties and their subsequent parting.

That according to Native Law and Custom the earnings of a minor are the property of the kraal head at which the minor resides.

In the case before the Court the Plaintiff alleged in his evidence (and the Court has accepted his evidence as true) that the two original mares purchased by the Defendant were purchased by Defendant with monies earned by the Plaintiff and handed by the latter to the Defendant, and it is further admitted on record that at the time the Plaintiff earned such monies he was a minor residing at the kraal of his father (the Defendant): It is therefore contended that the ownership in the two mares vested in the Defendant from the moment of purchase thereof and the progeny thereof also vests in the Defendant: This defence was placed before the Court immediately the Plaintiff disclosed in his evidence the real ground on which he claimed ownership in the horses claimed in the summons—there was nothing in the "further particulars" supplied to show that the Plaintiff claimed on the ground that the monies disbursed by the Defendant in the purchase of the mares was derived from the Plaintiff's earnings while a minor living at the Defendant's kraal. It is submitted that there is no ground for the Native Commissioner's "conclusion" that the original mares or either of them were donated by the Defendant to the Plaintiff. This basis of claim is not alleged by the Plaintiff either in his pleadings or in evidence.

In regard to the Native Commissioner's ruling that the Plaintiff should succeed "On the ground of equity and natural justice" it is contended that there is nothing repugnant to equity or justice in the Native Custom herein relied on more especially when the Native Custom of "kraal head responsibility" for the torts of inmates of the kraal is accepted and recognised



For all or any of which reasons it is contended that judgment should have been entered for the Defendant on the Claim in Convention and for the Plaintiff in Reconvention on the Claim in Reconvention.

At the close of Plaintiff's case Defendant's attorney asked for judgment on the ground that it was proved that the Plaintiff was a minor whose earnings were handed over to his father, Defendant.

The Court intimated that Defendant could not raise that point at that stage not having pleaded it specially. The Court ruled that the defence should have been raised *ab origine* quoting *S. Langa vs. Konkota* 5, N.A.C. 115.

In his reasons the Native Commissioner remarks:—

- (3) "Lastly on the ground of equity and natural justice the Court could not deprive a son, driven away by his father, of his earnings. (*Vide Nobulawa vs. Joyi*, 5 N.A.C. 159). Moreover, Defendant claimed the horses on the ground of *purchase* with the proceeds of his beer baskets and wool sold, and stated in evidence that he did not look upon his son's earnings as his (p. 19). The Defendant's attorney cannot thereafter be heard to claim on an alleged principle of Native Law and Custom which his client unequivocally disclaimed, and which he had failed to plead when he should have done so."

It has become a tradition in these Territories to observe a standard of perfection in pleading and procedure based on the practice of Magistrates' Courts; with changes in that practice from time to time the local practice has kept step.

I for one prize the degree of perfection attained generally in the Territories in pursuit of that ideal, and am wholly in sympathy with all efforts to maintain the high prevailing standard.

Nevertheless, the rules framed for Native Commissioner's Courts, contemplate a less exacting system, the key note of which is the predominance of justice over technicalities, and this Court is expressly enjoined by the Legislature to observe that spirit in dealing with cases brought before it. Section 15 of Act No. 38 of 1927 in its proviso reads:—

"Provided that no judgment or proceeding shall, by reason of any irregularity or defect in the record or proceedings, be reversed or set aside unless it appears to the Court of Appeal that substantial prejudice has resulted therefrom."

In plain language then this Court is told to do justice even where there has been positive irregularity which does not cause substantial prejudice.

Without in any way straining this principle, it behoves this Court especially to guard against any attempt to further technicalities, especially those resulting merely in delaying a case (dilatatory exceptions and so forth) if in the circumstances no substantial prejudice has resulted.

Dealing with the present case in the light of this exposition of guiding principle this Court finds that the Native Commissioner erred in refusing to consider the application by the Defendant's Attorney to decide the case on the question of minor's earnings.

It is a matter of pure Native Law which does not need to be specially pleaded. And unless it can be shown that the Defendant waived his legal rights before or during the case he is entitled to rely on any principle of law in his favour. Indeed the case of *Sim vs. Cape Dairies, Ltd.*, 1924 A.D. 167, is an injunction to a Court to take cognisance of legal principles *suo motu*. Where the rules require specific pleading it may be expected that the rules will be observed but pleading is adjective law which differs in this respect from substantive law, whose principles are axiomatic.



Sec. 99 (1) of Proclamation 145 of 1923 gives the Native Commissioner very wide powers to amend pleadings and the cases quoted in Buekle & Jones, 2nd Edition, at p. 181, especially indicate that, subject to the safeguard of preventing prejudice to the other side, such amendment can be made at any time before judgment.

Notwithstanding the position thus arising this Court, following the practice of the Appellate Division, will allow a new defence to be raised for the first time in appeal subject to the conditions set out in the case *Ximba vs. Ximba*, 1938 N.A.C. T. & N., p. 76. where the authorities are cited.

See also *Msinekelwa Somtitsi & Another vs. Mtshopi Rabiya* heard at Port St. John's on 7th February, 1939.

Thus it is still permissible to discuss the effect of the aspect of Native Law involved that a minor's earnings accrue to his kraalhead in Native Law. That principle is basic in Native Law especially so in among the South Eastern Bantu, the Nguni tribes, which include the people of Zululand, Natal and the Cape.

To make doubly sure the following Pondo Assessors were consulted:—

Nobulongwe Masipula, Gazula Manuntu, Madlanya Tantsi, Barnabas Sirogo and Nongonwana Jiyajiya.

Their replies appended, clearly confirm the general principles. A minor's earnings accrue to his father. What is bought therewith becomes the property of the father. The father may earmark stock for such minor. He retains dominion in such stock and the minor has no claim should the father subsequently dispose of such stock.

These ideas are perfectly consonant with basic Native Law.

The Native Commissioner has endeavoured to subvert these principles on the plea of equity on reasoning which avoids the issue involved in the present case. There is no proof on record that it is "a practice fast becoming obsolete and which, carried to its logical conclusions, leads to an absurdity". Native law stands today more strongly entrenched in the legal system recognised by this Court than ever it did before, for the reasons I have set out in *Ruth Matsheng vs. Nicholas Dhlamini* (1937 N.A.C. T. & N. 89). Any change due to obsolescence or other reasons must come from the legislature and not from the bench.

This Court fails to see any inequity in a system of law which entitles a kraal head to the earnings of a minor who owes his very being to the care, protection and nurture he has received at the hands of that kraal head and its inmates during his tender years, plus a lobola exceeding the minor's possible contributions in the short period between attaining working age and his marriage. Native Law, however, goes deeper than this, regarding the family as a collective unit with joint responsibility and assets, so much so that the minor is entitled to a lobola from the kraal inmate in addition to other benefits received as a juvenile. Any attempt by a Native Commissioner to break down the Native system in a fatuous effort to introduce the European system of individualism is to be regretted as a retrograde step strongly opposed by the Natives themselves as appears from frequent debates on the subject in the Bunga and elsewhere. The Native system is a complete whole. Tampering with one aspect involves repercussions in various directions invariably destructive of their social system. To emancipate the minor would involve loss of that valuable asset in Native Law of Communal support, especially in the provision of a wife and in other directions, which in their present stage of advancement as a mass especially in Pondoland, would be most detrimental.



The remarks of Welsh, P. in *Dumalithshona vs. Mqaji*, 5 N.A.C. at p. 169 may well be recalled here as they were in Matsbeng's case at P. 93.

"In the opinion of this Court the statement of the Native Assessors is consistent with basic principles of Native Law and Custom which have long been recognised and followed by this Court; and though it may be contended that these principles do not reach the ethical standards which more civilised peoples have attained, this Court, which was established in order to preserve and give judicial recognition and effect to Native Law and Custom, feels that it would not be justified in reversing in the name of good morals, policy, justice or equity a long and weighty line of precedents unless it were satisfied that the Custom falls unequivocally within that category.

To jettison Native Law and Custom in the circumstances disclosed would necessarily involve consequential issues such as the status of widows, their dowries (lobola), guardianship of their daughters and claims to the latter's dowries with the effects on the social life of the people entirely out of keeping with their habits, Customs and desires.

Until the proper authorities are satisfied that the time has arrived when various widely recognised Customs which are practised daily by the Native tribes of these Territories, e.g., Polygamy, ukutwala, ukungena, etc., which admittedly fall short of civilised standards, should be abrogated, this Court is of opinion that it should not interfere in the matters of broad policy which is the prerogative of the executive, and that it would, therefore, not be justified in setting aside a Custom which has long since become crystallized into Law."

The Native Commissioner makes two assertions in his reasons for judgment which the evidence does not support.

"The principle of Native Law can only apply while a minor son is an inmate of his father's kraal but not when such minor has been driven away by his father."

He implies that the Plaintiff was driven away during minority which is not the case.

Nor was he a major when the second horse was acquired as the Native Commissioner states. On p. 17 the Native Commissioner has recorded that Plaintiff's Attorney "accepts the statement , that Plaintiff was a minor when the horses were bought". Plaintiff's own evidence leaves him under 21 at that time.

Further analysis of the evidence shows clearly that even on the facts the case is against the Plaintiff.

Briefly, the facts are that on two occasions Plaintiff went to the mines and sugar estates while still a minor and on his return he handed portion of his earnings in two amounts of £6 to his father to buy him a horse in each instance. Defendant, the father, did indeed buy horses. Plaintiff does not know from whom his father bought the horses. Plaintiff indicates that his father has 4 horses of his own at his kraal; they all bear an earmark skey on right ear. Those demanded by him are similarly earmarked. The son was duly married while still living with his father who contributed towards his son's dowry. He, the Plaintiff, alleges that he dealt in some of the progeny of the original horses. Recently the son and father quarrelled and separated. The action for delivery of these 4 horses followed as well as a counterclaim for 2 other animals admittedly in Plaintiff's possession and admittedly progeny of the original animals. Plaintiff is the youngest



son of the family. The father disputes the son's allegations that the horses were bought with his earnings. The facts accord very fully with the Custom set out by the Assessors. The horses do not bear a special earmark of Plaintiff's but his father's own general mark. This is a most damaging piece of evidence provided by the Plaintiff himself that he is not owner of the animals. The probabilities are against him also. He does not know from whom the animals were bought which clearly shows that he was not interested in the disposal of the money he had handed to Defendant.

Plaintiff's subsequent dealings in the progeny cannot constitute him owner if originally they were bought by his father for himself. Plaintiff must show that there was an allocation to him thereafter by earmarking or otherwise which he has not done.

The evidence of the witness Monoko indicates the desire of Defendant to "reward" his son but he does not say that there was a gift. He merely confirms the fact that the earnings were handed over and that the money became the property of the father who considered it desirable to "reward" Plaintiff. There is no question of a definite mandate to purchase but merely an act of grace according to custom.

The position thus is that there is proof—abundant proof—that by Native Custom the horses belonged to Defendant at the time of acquisition. They cannot become converted in ownership to that of the minor merely by the fact of expulsion—indeed there is evidence that his father aided him in obtaining a wife and it was only subsequently that the dispute arose which led to the separation of the parties, a normal process even in the absence of a quarrel.

The appeal must therefore be allowed with costs and judgment entered for Defendant with costs in the Native Commissioner's Court.

On the counterclaim the Defendant in reconvention admits that these horses were removed from the kraal of Plaintiff in reconvention. At that kraal they would be in possession of the Plaintiff in reconvention. It is alleged by Defendant in reconvention that they are progeny of the horses forming subject of the claim in convention. In these circumstances, although there is dispute as to actual date of removal of the filly, the onus is on Defendant in reconvention to show a better right and he has failed for reasons set out in the main case.

The appeal in the Counterclaim is allowed with costs and the judgment of the Native Commissioner altered to one for Plaintiff in reconvention with costs.

ADDENDUM.

Per Adams (Memher):

I concur in the judgment delivered by the learned President, with the exception of the following words appearing in line 4, page 9, "as appears from frequent debates on the subject in the Bunga and elsewhere".

I feel that the Court of Appeal has no right to take Judicial cognisance of these debates and they cannot be quoted in "reasons".



OPINIONS OF THE NATIVE ASSESSORS.

Per Nongonwana Jiyajiya :

According to Pondo Custom an unmarried son is under his father's control.

Whatever he earns is under his father's control—even if his father has eaten his earnings he cannot say anything—until he is given a wife.

Even if such a son dies away on the mines his father would inherit.

If property is bought with the money it is the property of the father.

He, the son, would get something after he has been given a wife—he would get something from the stock purchased with his earnings.

When a father provides for his son he provides the dowry from the father's stock and that which was purchased from son's earnings.

He is given what is left. If the father refuses he is mistaken. He should release all the stock.

If no stock is bought his father would give a dowry. The money becomes property of father.

A son goes to work and father remains behind.

Per Barnabas Siroqo.

The position is same with regard to stock. If bought with earnings and father consumes them the son has no claim on the father.

This is what the sons are trying to avoid, they send the money to someone else.

He is only entitled to what is left over. The father has merely used them for kraal property.

There must be a distinct mark distinguishing such stock. The son is assigned a mark and the stock is marked with his mark.

Stock so marked are the only stock the son can claim after marriage.

If father earmarks with own mark son will raise question and matter will be adjusted.

If the father refuses, a younger son may sue, but he will get nothing for he has no claim as his father has eaten the stock

Per Madlanya Tantsi.

If father earmarks for himself, son has no claim. Son would get his father to earmark stock for him. If his father has not done so during lifetime he has no right of action against his father as he is still under his control.

Per Nongonwana Jiyajiya.

Unless the youngest son brings up matter that stock is earmarked by his father with father's mark, he cannot get such stock after father's death: that will belong to the father.

Money handed over becomes property of the father.



The son gets all remaining stock bearing son's earmark after marriage.

By Mr. Stanford.

The son may sue his father for the stock bearing his earmark.

Nongonwana Jiyajiya.

According to Custom kraal stock have earmarks for different huts.

There is not a kraal where the stock is not earmarked. If a kraal has no earmark all that stock belongs to Great House and is inherited by Great son.

Re horses. It is true they do not earmark generally.

There must be proof of buying for so and so from his moneys if stock is claimed as having become property of son when the kraal does not earmark horses.

For Appellant: Mr. J. V. Kottich, Lusikisiki.

For Respondent: Mr. F. C. W. Stanford, Flagstaff.

CASE No. 10.

MALUQUMBENI NTLAKALA vs. MAQINGA NGALO.

PORT ST. JOHNS: 9th February, 1939. Before A. G. McLoughlin, Esq., President, Messrs. H. M. Nourse and M. Adams, Members of the Court.

Native Appeal Cases—Ownership of beast paid as dowry and subsequently nqomaed—Busa Custom.

Appeal from the Court of Native Commissioner, Flagstaff.
(Case No. 51 of 1937.)

Adams (Member) delivering the Judgment of the Court:

The Plaintiff asks for (1) a declaration of rights to 7 head of cattle and (2) delivery of 7 head of cattle or payment of their value, £35.

It is common cause that the late Ngalo had three wives, that Plaintiff is the son and heir of the Third House in which there were three daughters, Nomakoloni, Noziyanga and Menyizwa. The Great House having paid the dowry for the third wife is entitled to the dowry received for Nomakoloni. It is admitted that this girl and Noziyanga have married and that dowry has been paid for them.

The Plaintiff contends that the animals now in dispute are an original beast, a heifer, paid by Zibolele as dowry for Noziyanga together with its progeny, making a total of 7 animals. He states that the heifer was nqomaed during his minority by his mother Mamdimakude to Defendant and that this took place after the death of his father Ngalo.

Defendant denies that the original beast was dowry for Noziyanga or that it was nqomaed to her by Mamdimakude, but contends that it was part of dowry paid for Nomakoloni



and therefore belongs to Lilelo, heir to the Great House and her full brother; further, that it was nqomaed to her son Mvulo by Ngalo during his lifetime.

In support of his case the Plaintiff has called 7 witnesses, but this Court intends to deal with four only.

Maqinga states that Noziyanga was married to Zibolele and that he paid, amongst other animals, a certain heifer with white udder, that Ngalo then died and that his mother Mamdimakude and widow of Ngalo subsequently nqomaed this heifer to Defendant, that it has increased and the total now numbers seven animals.

Mamdimakude confirms the Plaintiff's story in detail, as might be expected, but it is significant that she started the action whilst Plaintiff was away at work at the mines and soon after she had heard that the Defendant had transferred some of the cattle to Lilelo, heir to the Great House.

Nomqane is a brother of the late Ngalo and owing to his family position he is a witness whose testimony must be taken as of considerable value. He also supports Plaintiff fully, though he in no way stands to benefit by the issue. He was present at the nqoma and is able to describe the beast. Next there is the evidence of Zonwayi, described as a half-brother of Plaintiff and Defendant; he supports the Plaintiff's story. Finally there is the evidence of Zibonele, husband of Noziyanga, who knows nothing about the nqoma but is able to state definitely that the heifer he paid as dowry for Noziyanga was seen by him at the Defendant's kraal after the death of Ngalo and that it continued there over a period of years.

To rebut this strong evidence, the Defendant alleges in her plea that *she* busaed from Ngalo and was nqomaed the original heifer by him. In her evidence she states "I never busaed the animal . . . the beast was nqomaed to Mvulo", her son.

Lilelo supports this story and states that he was present when Ngalo nqomaed the heifer to Mvulo and that there was no busa but that without any preliminary talk about the matter and in the course of a friendly conversation, Ngalo suddenly exclaimed "I nqoma your son Mvulo a heifer". Both Defendant and Lilelo allege that the woman (Defendant) was present.

Dlokovana, the son of Lilelo states that he was present when the nqoma took place but that no woman was there and that Defendant was not present but that Mvulo was.

Mvulo who was admittedly a youth of tender years at that time, states that the nqoma was made to him personally.

This Court considers that the Assistant Native Commissioner was fully justified in his finding that the original beast was paid as dowry for Noziyanga and that it was nqomaed by Mamdimakude to Defendant.

The judgment as it stands however, is vague.

The Appeal is dismissed with costs but the judgment of the Assistant Native Commissioner is clarified to read "Judgment for Plaintiff for the restoration of seven head of nqoma cattle claimed or their value £35 with costs."

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

For Respondent: Mr. F. C. W. Stanford, Flagstaff.



CASE No. 11.

MGONOMFANA MAKOKA vs. MALANGENI NKOSANA.

UMTATA: 16th February, 1939. Before A. G. McLoughlin, Esq., President, Messrs. W. J. G. Mears and E. F. Owen, Members of the Court.

Native Appeal Cases—Onus of proof—Claim to estate stock.

Appeal from the Court of Native Commissioner, Qumbu.
(Case No. 125 of 1937.)

McLoughlin, P. (delivering the judgment of the Court):

In this case Plaintiff sued Defendant for delivery of certain 20 cattle, 40 sheep and a certain plough, yokes and chain or their value £107, alleging such property to be estate property of the late Feni, and that Plaintiff is his lawful heir.

Defendant's plea is as follows:—

- “ 1. Defendant denies liability for the Plaintiff's claim and denies that he is in possession of property belonging to the estate of the late Feni.
2. Defendant states that Feni died many years ago and control of his property was taken by one Ndlame his heir. That on the death of Ndlame the Plaintiff took possession of such property as was left at his death.”

The Assistant Native Commissioner gave judgment as follows:—

- “ (i) Cattle: For Plaintiff for 9 head of cattle.
 - (ii) Sheep: Absolution from the instance.
 - (iii) Balance of claim: For Defendant.
- Each party to pay own costs.”

Defendant has noted an appeal against that portion of the judgment awarding 9 head of cattle or their value £40 to the Plaintiff, on the grounds:—

- “ (1) that in as much as Plaintiff's claim is for specific cattle due to him as heir of one Feni, who died some 25 years ago, the onus of proving that the cattle now claimed by him belonged to the late Feni or were the progeny of such cattle, is on the Plaintiff who failed to discharge such onus of proof;
- (2) that Plaintiff failed to substantiate his contention that the cattle claimed by him bore the earmark of the late Feni and that same was recently tampered with by Defendant. To the contrary it was proved by evidence and by the production of the cattle for inspection that certain of the cattle claimed, and for which judgment was given in favour of the Plaintiff, never at any time bore the earmark of the late Feni;



(3) that the judgment is entirely against the weight of evidence, the proved facts and probabilities of the case."

Plaintiff noted a cross-appeal against that portion of the judgment dismissing Plaintiff's claim for 20 sheep or their value £20, on the grounds:—

"That the judgment is against the weight of evidence and probabilities of the case; that the Assistant Native Commissioner erred in accepting the Plaintiff's [*sic.*] case which was supported by several impartial witnesses who proved conclusively that Defendant had admitted his liability to the estate of the late Feni to the extent of 20 sheep."

The appeal attacks only the judgment in regard to the award of 9 head of cattle to Plaintiff.

Appellant contends that there is no proof on record that there was any stock of the estate with the Defendant. The onus of proof is on the Plaintiff for he claims specific cattle—not a debate of account of the administration of the estates of the late Feni and Ndlame. He must satisfy the Court that there was stock belonging to the estate in possession of Defendant and he must connect the stock now claimed with the original estate stock. The contention of Respondent that once it is established that Defendant had some estate stock at the death of Vonxa, the widow of Feni, the onus fell on Defendant to account for them, is untenable.

The evidence in support of the allegation that there was such estate stock at Vonxa's death 10 years ago is unconvincing. Notwithstanding the fact that Plaintiff was a major when Vonxa died; that he has lived within a very short distance of Defendant all the time; that Defendant has dealt with the stock now claimed as his own; neither Plaintiff nor his witnesses can give any positive information about the stock. The whole case for Plaintiff rests on an alleged admission by the Defendant at a family meeting that the stock in question was estate stock. Actually though 40 head of sheep were claimed, Plaintiff and his witnesses state Defendant contested this and said there were only 20 sheep in the estate.

All Plaintiff's witnesses admit that they did not keep a close tally of the stock at Defendant's kraal. They state in general terms that the stock there was estate stock.

Plaintiff himself says "I do not know how many cattle and sheep Feni left when he died. All I know is that as I grew up there was stock at my grandmother's kraal which I knew would be mine".

His uncle Zipate says "I don't watch Defendant's kraal".

Gofoti says "I don't know how many cattle there were when Ndlame died. When Vonxo died there were 15 cattle. I don't know what increase there has been since then or how many deaths there have been".

Gandela says "I always understood that there were estate stock in existence at Feni's kraal, that they were never touched. I cannot describe the progeny of Feni's stock. I don't know whether there are sheep at Defendant's kraal. I haven't seen sheep there".

Obviously these witnesses on their own showing are unable to give any reliable evidence regarding either the original estate cattle if any or their increase. As stated the case appears to rest on the assumption that at the meeting of relatives Defendant tacitly agreed that the stock was estate stock.

This Court is unable to come to the conclusion that this fact has been proved. The probabilities are strongly against Plaintiff's version. Plaintiff has given no satisfactory reason for not taking over custody of the stock on Vonxa's death. It is clear he has been a close neighbour of Defendant all along, that he married at least 6 years ago. The indifference of plaintiff and his uncles to the stock can leave the impression only that they possessed no right in them as they showed no interest in the stock.

The conclusion is unavoidable that the Plaintiff's case is not substantiated. If, as he claims, he did control the stock, his reasons for not having custody are most unconvincing and the probability arises, as Defendant contends, that he exhausted the estate stock before bringing this claim, which in the circumstances cannot be regarded as being made in good faith. That impression of bad faith receives support from Plaintiff himself when he says that the meeting was called to ascertain why Defendant tampered with the earmarks. Yet he repeats later, "the earmarks were tampered with since I claimed the cattle. They were changed since we had a talk about them and I claimed them".

Zipate becomes hopelessly entangled over the same matter and he ultimately admits that there was no tampering with the earmarks after strenuously contending that the whole affair started over the alleged tampering with the earmarks by Defendant.

It seems improbable that Defendant would admit the stock to be estate stock in view of his consistent attitude as stated by Plaintiff, that the stock was *not* estate stock but his own. There is one beast admitted to bear an earmark like that of Feni, but Defendant has explained his possession and there is no tangible evidence by Plaintiff to connect this beast with the estate. Hence this piece of evidence is not as conclusive as it appears and the Court cannot build on it.

This Court can come to no other conclusion than that the Plaintiff has failed to establish his claim to the cattle. The appeal must succeed with costs, and the judgment of the Native Commissioner will be altered to one absolving the Defendant from the instance with costs in respect of the cattle claimed.

The cross-appeal regarding the sheep must fail largely on the reasoning set out above, but more especially for the reason that Plaintiff admits that he recovered 15 sheep which his father had placed with Vonxa for her support. The inference is strong that there were no other sheep in the estate which could supply that need. The alleged admission cannot be accepted as proof of existence of sheep in the estate. The witnesses clearly do not know or contend that they do know definitely that there were such sheep.

In the circumstances the cross-appeal must be dismissed with costs.

For Appellant: Mr. Q. Hemming, Umtata.

For Respondent: Mr. C. G. W. Muggleston, Umtata.



CASE NO. 12.

QOKOYI MBANGA vs. BAKAQANA SIKOLAKE.

UMTATA: 16th February, 1939. Before A. G. McLoughlin, Esq., President, Messrs. W. J. G. Mears and E. F. Owen, Members of the Court. Reserved judgement delivered at Kingwilliamstown on 18th April, 1939.

Native Appeal Cases—Essentials of Native marriage—Father of girl under an obligation to disclose any defects in daughter—Twala and subsequent rejection of girl on grounds of her sickness—Proclamation No. 189 of 1922.

Appeal from the Court of the Native Commissioner, Umtata.

(Case No. 829/37.)

Owen (member) delivering the judgment of the Majority Court:

Plaintiff claims the return from Defendant of 9 cattle which he paid to him as dowry for his daughter. The dowry was accepted and a beast was slaughtered by Defendant. Thereafter by arrangement with Defendant, the Plaintiff had the girl "twalaed" and taken to his kraal. Plaintiff saw her for the first time two days after her arrival. He found her sick and the next day had her examined by a doctor who discovered that she was suffering from tuberculosis in an advanced stage, and that she had obviously been sick for many months. The day following the Plaintiff sent a messenger to report to the girl's father, and to request that another girl be substituted. The Defendant promised to come but took no action for several weeks during which time the girl remained at Plaintiff's kraal. Later she was fetched to Defendant's kraal where she died. Her death took place about four months after the "twala". Plaintiff seeks to recover his dowry alleging that there was no ceremony owing to the girl's illness and that no marriage was entered into. He states in his evidence: "The marriage was not complete until the 'duli' party came".

The essentials of a native marriage are—

- (1) consent of the contracting parties;
- (2) payment of the dowry;
- (3) delivery of the bride.

Anything more than this is purely optional. The second and third essentials were admittedly carried out. As to the first, Plaintiff does not aver in his summons that he was not a consenting party and actually all his evidence goes to show that but for her illness the girl's status of wife at his kraal would never have been questioned.

To determine that a valid marriage was concluded however it is necessary to show that Plaintiff was in fact a consenting party.

No express words or formula are observed among natives to indicate the bridegroom's consent. The consent is invariably indicated by conduct. Here the action of Plaintiff in paying dowry, "twalaing" the girl and having her taken to his kraal is clearly capable of no other construction than that of tacit consent. Nothing more was required by Native Law to indicate his consent, and his subsequent discovery of the girl's illness cannot alter the position. To hold otherwise would amount to saying there could be some sort of qualified consent, or consent "subject to approval", a conception entirely foreign to the essential elements of marriage.



The native assessors to whom the case was referred stated that under Native Custom the father of the girl is under an obligation to disclose any defects in his daughter. The effect of failure to make this disclosure was not stated.

Assuming the assessors' statement to be sound the Defendant's failure to make the disclosure required of him cannot in my opinion impair the validity of the marriage. In other words consent once given in the only way known to natives, that is by conduct, cannot be revoked. Other remedies under Native Custom in such a case would apply, and but for the provisions of Proclamation No. 189 of 1922 it is unlikely that an action in this form would ever have been taken.

There seems little doubt that this is an attempt to circumvent the effects of Proclamation No. 189 of 1922 and in my opinion it must fail.

Mears (member): I concur.

McLoughlin, P. (dissenting):

This case is an appeal from the decision of the Native Commissioner who absolved the Defendant in a claim for restoration of certain cattle.

The position is set out very clearly by the Native Commissioner in his reasons for judgment from which the following excerpt is taken:—

“ Bakaqana, the original. . . . The only question is whether there was a valid marriage between Plaintiff and Madosini.”

The Appellant (Plaintiff) attacks the judgment on the grounds—

- (1) “ that the judgment is against the weight of evidence and probabilities of the case;
- (2) that the judgment is in conflict with the Native Custom appertaining to cases of Native Customary Unions, the contracting and validity thereof, and the rights, remedies and consequences arising therefrom;
- (3) that the uncontradicted evidence on record, accepted by the Court, proves lack of knowledge on part of Plaintiff of the state of the woman's health when he paid dowry for her and that her health was exceedingly bad and her prospect of living practically nil, thus rendering her entirely unfit to embrace or undertake the duties of a wife;
- (4) that it also proves immediate report thereof to Defendant and rejection and refusal by Plaintiff to accept the woman and that there was consummation of the alleged marriage or union and no intercourse between the parties and no acceptance nor performance of any duties by the woman as a wife;
- (5) that even if the usual essentials of a Native marriage or union are present, the circumstances and facts of this case nullify the conclusion drawn by the Native Commissioner, that a marriage took place or existed;
- (6) that the very absence of the usual (even if not essential) later ceremonies and observances support Plaintiff's contention both as to fact and custom;
- (7) that as the case stood on the uncontradicted evidence adduced by Plaintiff, he had established a case upon which, in the absence of rebuttal, he would be entitled to succeed;



- (8) that in view of the evidence, custom and circumstances the Additional Native Commissioner erred in granting the application for absolution".

The single issue before this Court is the question whether or not there was a completed marriage disclosed by the facts.

If this Court is to deal with the problem by a hard and fast application of the rule relied on by the Native Commissioner, the reply can be no other than his; for the cattle passed and the woman was handed over and on the authorities quoted there was a marriage.

The reduction of law and custom into tabloid form brings about a delightful simplicity which is beset with complexity in its application to abnormal circumstances, for the tabloid is not a simple pill but a concentration of various ingredients which analysis brings out.

So also with the simple formula which has been accepted very widely, that a Native marriage is complete on the passing of cattle and the transfer of the woman.

The formula was evolved to distinguish between the essential and the non-essential features of the ceremonies and ritual which are observed in a Native marriage. These are set out at some length in the judgment relied on by the Native Commissioner, *Sila vs. Masuku* 1937 N.A.C. (T. & N.) 121. These various ceremonies serve a dual purpose, viz. to establish publicly the contraction of the marriage; secondly to indicate publicly that the parties voluntarily enter into the contract and assume their new status with their full consent, expressed or implied.

Admitting that under the old Native custom the consents of the bride and bridegroom were assumed in all cases and overridden especially in the case of a dissenting bride, our Courts cannot and will not for one moment disregard the absence of consent on the part of an unwilling bride, *Mdleni vs. Pezani* 4 N.A.C. 212, see also *Mpangalala vs. Njijiva* 5 N.A.C. 14.

If then it be conceded that there can be no marriage unless the bride consents thereto, it becomes apparent that the formula in its bald form does involve the question of consent of the parties affected by the contract, including the bridegroom. *Sofika vs. Gova* 1 N.A.C. 7.

In the vast majority of cases the consent of the bridegroom is taken for granted as he or his people usually initiate any proceedings leading up to a marriage, especially as the Zulu custom of *ukugana* is not followed by the Tembus outside the Chief's family.

In most cases the girl is seen and accepted by the suitor before the cattle are paid over. The *twala* custom properly practised, especially safeguards both parties, for the girl may be *twalaed*, with or without consent of her guardian, and returned intact without incurring any liability under Tembu custom. Throughout their scheme of custom the Tembus safeguard the bridegroom in regard to the acceptance of the girl.

The Assessors, who were consulted, state positively that "The custom is that if a girl is sickly her father usually says she is sick and cannot give her in marriage.

If instead of revealing the fact, it seems clear there was no girl given and the cattle ought to be restored. Every ailment, however small, should be disclosed.



If she be twalaed, they would not have twalaed her if the father had said 'No! this child of mine is sickly, I cannot give her in marriage'.

When chronic illness is discovered the suitor sends to the father to find out why he did not disclose the chronic complaint, saying his daughter admits having been ill for a long time. He sends for the girl's father".

The disclosure of defects by the bride's father is described by Hunter and Krige: "Reaction to Conquest" at p. 218, "Social system of the Zulu" at p. 142, 143.

The idea of a guarantee of physical fitness for marriage permeates the customs of most, if not all Bantu tribes, whose systems are devised to adjust anomalies.

The very facility of adjustment on a basis of a completed contract has served to obscure the aspect under discussion that adjustment can and does take place on the basis of a failure of the marriage. Cases occur where a young man has twalaed a girl who is not wanted by his family. She can be sent back and if cattle have been paid they are returned in whole or in part according to circumstances, although no marriage has taken place owing to lack of consent on the part of the family elders. Similarly no Court will force a young man into marriage whose elders cause a girl to be twalaed for him in his absence with or without the passing of cattle in anticipation of a marriage.

The passing of the cattle must be as dowry and not by way of engagement cattle, a practice that has become very common where Christian marriages are contemplated. All these considerations point to one conclusion, that the formula must be further qualified in favour of the bridegroom as well as the bride.

It must thus be established that the cattle which passed, passed as dowry, and that they passed with the full consent of the payer and/or the bridegroom to the union. That consent may be and is invariably implied or indicated by the conduct of the bridegroom. Where, however, as in the present case evidence has been led to show a case of conduct entirely inconsistent with consent to the union by the groom the *prima facie* evidence led by the Plaintiff (groom) must be rebutted before legal protection by way of absolution or a judgment.

The fact of the bride's death has tended to obscure the principles involved, for the cattle are not reclaimed on that ground, which Proclamation No. 189 of 1922 forbids, but on the ground that there was no marriage. There is no actual circumvention of the law in the proceedings in this light.

It becomes unnecessary further to explore the attractive enquiry into Native marriage ceremonies and ritual and their effect as a diagnosis of mental states, nor to indicate how the modern tendency to omit customary practices in connection with marriage ceremonies, especially in the practice of ukutwala, increases the difficulties of the Courts in deciding when a marriage has been completed as in the present instance: the principle is clear that consents underlie bare formula of passing of cattle and handing over of the woman.

Coming to view the evidence in the light of these principles, we find the evidence of Plaintiff and his witnesses that Plaintiff had not seen the girl before the twala. He is a widower and has perhaps lost the fastidiousness of youth. Be that as it may, his conduct from the moment he saw the



girl was that of a man who had not consented to the contract. He had her medically examined, an action which at first blush counts against him but the assessors maintain that this is no criterion! He immediately notified her father of her condition and asked to have her replaced. A delay ensued owing to dilatoriness on the part of her father and she was eventually taken away by the latter to die. Now the Assessors say it suffices to notify the father in such circumstances and that there is no duty cast upon the suitor to return the girl bodily to her father.

In all these accounts of the happenings the Plaintiff's evidence stands uncontradicted by the Defendant, and the Native Commissioner erred in giving an absolution at the close of Plaintiff's case. It may be that the Defendant can controvert the Plaintiff; that he can show Plaintiff well knew the condition of the girl yet agreed to have her.

The appeal will be allowed with costs and the judgment of the Native Commissioner set aside.

The record is returned for such evidence as the Defendant may desire to tender and for a new judgment, in the light of the principles set out herein applied to the evidence finally recorded.

For Appellant: Mr. C. G. W. Muggleston, Umtata.

For Respondent: Mr. T. Gray Hughes, Umtata.

UMTATA CASE No. 829 OF 1937.

Questions put to and answers by Native Assessors:

Per *Walaza Qotoyi*: The custom is that if a girl is sickly her father usually says she is sick and he cannot give her in marriage.

If, instead of revealing the fact, it seems clear there was no girl given in marriage and the cattle ought to be restored. Every ailment, however small, should be disclosed.

If she be twalaed they would not have twalaed her if the father had said: "No this child of mine is sickly I cannot give her in marriage".

If the sickness be not evident, in olden days where a woman died soon, the custom was to divide the dowry because both sides are in tears.

By *Mr. Owen*: The duty of the man who marries is to look at her face and see if she is nice.

According to our custom there is no courtship—and a man marries a girl he has not seen.

If a man courts, the girl runs away. It is her father's duty to disclose her defects.

The trial is in case of a person who is not a virgin. Her people are sent for and she is taken back.

Assessors are unanimous about the opinion that it is father's duty to disclose defects in his daughter.

When chronic illness is discovered, suitor sends to father to find out why he did not disclose the chronic complaint saying his daughter admits having been ill for a long time.

He sends for the girl's father.



Per *Henry Makamba*: The Xosa custom is that if all formalities have been observed a marriage has been consummated. If amasi ceremony is completed she is a wife at the kraal.

My personal opinion is that everything is complete; she can't be sent back.

In such a case the husband's people go to the wife's people and discuss matter and get another girl.

Per *Henry Makamba*: The question put to us is how far and when can a groom reject the bride.

By custom there is no definitely stipulated time, the question being that she has only recently arrived at the kraal. She has not done much for the family yet. She has not done anything yet to connect friendship.

Even if it were a stranger, the kraal head should take the sick person.

He has to take his wife.

It is custom to call in a doctor when some one is dangerously ill at *my kraal*.

[Kriger "Social System of Zulus" at p. 142/3. The father of the girl addresses the groom's party on wedding day: "Here is my child, treat her well for me. If she takes ill, let me know; if she troubles you rebuke her as you will your own child; if she errs report her to me. If you cannot agree with her, return her to me. Her only ailments that I know of are these (naming them all), e.g., headache, etc." per Mahlobo.]

CASE No. 13.

TYUKA XANASE vs. MTONYANA TUNCE.

UMTATA: 16th February, 1939. Before A. G. McLoughlin, Esq., President, Messrs. W. J. G. Mears and E. F. Owen, Members of the Court.

Native Appeal Cases—Dowry—Rights of husband to recover from father-in-law cattle received as second dowry—Action for damages for adultery, plus return of wife or restoration of dowry.

Appeal from the Court of Native Commissioner, Engeobo.
(Case No. 118/38.)

McLoughlin, P. (delivering the judgment of the Court):

Plaintiff sued his father-in-law for payment to him of seven head of cattle being the number of cattle paid by Plaintiff as dowry for the daughter of Defendant.

The claim is preferred because the Defendant had since given the girl in marriage to another man during the subsistence of the first union.

Defendant relied on a plea of rejection in that in 1935 Plaintiff had sought to annul the marriage on the ground of stuprum but had failed.

Plaintiff succeeded in his action on the maxim that it was contrary to Custom for a man to hold two dowries.



The judgment is attacked on appeal on the weight of evidence and probabilities, and secondly on the issue of repudiation relied on in the Native Commissioner's Court.

The principles involved in these circumstances are indicated by the statement of the assessors in the case *Sicepe vs. Nyawozake* 5 N.A.C. p. 17, that where a second dowry has been received by a father-in-law, the husband has a right of action for payment to him by the father-in-law of such number of the cattle of the second dowry as would correspond to a claim for damages.

In *Tsotsa vs. Mbulali* 4 N.A.C. p. 20, the assessors stated that in the ordinary course under Native Law a plaintiff should first sue for the cattle paid to the father-in-law (i.e. by the second husband), and then take proceedings for the return of his wife or for the restoration of his dowry.

If he sues for the return of the dowry he thereby repudiates his wife, and that in itself would on the authorities debar him from claiming restoration of his dowry, unless he can show sufficient cause to justify his action, *Mangaliso vs. Fakade* 5 N.A.C. p. 5.

There is otherwise no precedent known to this Court where a husband is permitted in these Territories to sue directly for restoration of dowry without claiming the return of his wife or dissolution of the marriage for good cause shown, *Qweni vs. Mhlalo* 3 N.A.C. 179.

The Plaintiff's second action in the present case has been misconceived on a misunderstanding of the maxim "a man cannot hold two dowries for the same woman".

It must be remembered that the so-called second marriage does not dissolve the first marriage. All that follows on an attempt to contract a second marriage during the subsistence of a customary Native union is to give rise to an action for damages for adultery, plus the return of the wife or restoration of the dowry.

The appeal will be allowed with costs, and the judgment of the Native Commissioner altered to one dismissing the case with costs.

For Appellant: Mr. Q. Hemming, Umtata.

For Respondent: Mr. C. H. A. Becton, Umtata.

CASE No. 14.

RASHU YANA vs. NKONZO TSHWELE.

UMTATA: 17th February, 1939. Before A. G. McLoughlin, Esq., President, Messrs. W. J. G. Mears and E. F. Owen, Members of the Court.

Native Appeal Cases—Damages for incestuous adultery—No fine payable under Tembu Custom—Cleansing beast provided by adulterer is slaughtered.

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

(Case No. 235/37.)

McLoughlin, P. (delivering the judgment of the Court):

In the Native Commissioner's Court Plaintiff sued Defendant for 4 head of cattle or their value £20 as damages for adultery.



The Native Commissioner gave judgment for Plaintiff as prayed with costs.

Defendant has appealed against this judgment on the grounds that:—

- (1) Defendant's *prima facie* case was not rebutted.
- (2) The judgment was against the weight of the evidence.
- (3) Plaintiff must prove the amount of damages due.

The facts are that Plaintiff and Defendant are sons of brothers. Defendant admits having caused the pregnancy of Plaintiff's wife. The parties are Tembus.

Defendant paid one beast to Plaintiff after judgment had been given for Plaintiff in the Headman's Court for 5 head as a fine.

Defendant contends, as set out in his plea, that this beast was accepted in full settlement. He also attempts to set up the defence that in Tembu custom no fine is payable, but that one beast is due as a cleansing beast which he has paid.

He was called upon in the Native Commissioner's Court to lead the evidence, and at the close of his case judgment was given for Plaintiff without any evidence from the latter.

The point in issue being novel, the Native assessors were consulted. They replied as follows:—

Per Walaza Qotoyi (Engcobo):

According to Tembu custom, if a man has committed an act as described (incest) a beast is taken and slaughtered. A piece of meat a yard long is taken and when roasted, the guilty parties are stripped, the *isidhla* is taken off the man, and the parties are made to sit at each end of the piece of meat and eat it in the presence of spectators, who come to see the people have committed incest.

The act is done to cleanse the defilement.

The beast is paid by the adulterer. No other payment is made. He is not made to pay a fine. He is not regarded as an adulterer but as a person who has practised witchcraft. No fine is paid at all. The beast is slaughtered: it must be slaughtered.

Candilanga Makaula (Umtata) supports this statement.

Per Zwelibanzi Majeke (Qumbu):

According to Fingo custom when incest has been committed we call it adultery, because this woman has been married to the kraal. The adulterer is fined 3 head of cattle or five head if pregnancy follows.

No cleansing beast is taken. Incest takes place only where the cohabitation is between brother and sister.

In the case of incest between brother and sister, the former is made to pay a beast which is slaughtered. A number of people are collected and remonstrate with the offenders. No fine is paid.

Per Henry Makamba (Tsolo):

Our Pondomisi custom is similar to that mentioned by the others, except in the case of cousins the man is fined, for the woman is a wife married to the kraal.



Incest takes place only between relatives by blood and not by marriage. If there is incest among relatives the offender pays a beast to be killed. He does not pay a fine.

Vululwandle Zwelake (Mqanduli) concurs in the statement of the other Tembu assessors.

Per Walaza Qotoyi:

The case we refer to is a catch in the act. If the relatives are satisfied, they will forcibly take a beast if the adultery is denied.

The cleansing beast is not called a fine; it is a cleansing beast for incest.

The rest of the meat is eaten by all the assembled people. There is no ceremonial killing of the beast.

The same thing happens if male and female cousins have intercourse. In Bhele custom that is incest.

It is apparent from a passage in Maclean's Compendium that this statement of custom is in accordance with early Tembu custom as set out by J. C. Warner writing in 1856. He states: "Incest: Misdemeanours which would come under this head with us, are not punishable by Kaffir Law; but they have a far more powerful preventative in their superstitious fears which teach them to dread that some supernatural evil will befall the parties committing such acts; they lose caste as it were, and are considered in the light of sorcerers; hence such crimes are seldom committed", p. 65.

The underlying principle is that the Native family is a unit possessing property in common. Hence it would be absurd for the group to pay itself damages for the misdeeds of one of its members. The idea is fully consonant with Native legal conceptions and is sound.

As the custom does not offend public policy or justice this Court cannot but accept it as a valid Native custom and enforce it.

Accordingly the Plaintiff must fail in his action.

The appeal is allowed with costs, and the judgment of the Native Commissioner is altered to one for Defendant, with costs.

For Appellant: Mr. C. H. A. Beeton, Umtata.

For Respondent: Mr. T. Gray Hughes, Umtata.

CASE No. 15.

NTLIKITI GAGILANGA vs. DODWANA BOOI.

UMTATA: 17th February, 1939. Before A. G. McLoughlin, Esq., President, Messrs. W. J. G. Mears and E. F. Owen, Members of the Court.

Native Appeal Cases—Damages for seduction—Twala—Girl given in marriage by people at kraal—No action by proper guardian lies against bridegroom taking girl after paying dowry.

Appeal from the Court of Native Commissioner, Cofimvaba. (Case No. 192 of 1938.)



McLoughlin, P. (delivering the judgment of the Court):

In the Native Commissioner's Court Plaintiff sued for payment of 5 head of cattle or their value as damages for seduction, averring in his summons:—

1. That during or about the month of May last, first-named Defendant wrongfully and unlawfully abducted Plaintiff's daughter from his kraal and took her to his home in Sentile's Location in this district, where he seduced her as a result whereof she is pregnant.
2. That by reason of the tort set out above Plaintiff has suffered damages in 5 head of cattle or their value £20.
3. That first-named Defendant resides at and is an inmate of the kraal of second-named Defendant, who is liable for his torts according to Native Law and Custom.
4. That Defendants fail and neglect to pay the damages suffered by Plaintiff.

Defendants pleaded as follows:—

1. They admit the allegations in paragraph 3 of the summons contained, but do deny all and every the remaining allegations as not being founded on fact.
2. They deny that Plaintiff has any right to have and maintain the present action, inasmuch as the said girl, Nondabula, is the lawful property of one Shoco Jara, and Plaintiff has no claim whatsoever thereto.
3. They do further plead and say that, in the absence of Shoco Jara, Defendant No. 1 made proposals of marriage with the said girl to one Notyestile and Sonyekezo Jara: that his offer of marriage was accepted and that he paid 6 head of cattle on account of dowry by word of mouth to them, and was permitted to twala the said girl; that he did duly twala the said girl, who thereafter resided with him as his wife, until she was taken away from his kraal.
4. By reason of the facts set forth in the last preceding paragraph, Defendants do say that the said girl is the lawful wife of Defendant No. 1.

The evidence centred on the plea of want of *locus standi* of the Plaintiff. It was attempted to establish that Plaintiff had never married the mother of the girl.

There is a dispute whether Plaintiff paid a beast after twalaing the said mother, and whether that beast if paid is not a twala beast.

The reply of the assessors to the first question put by the Court is however conclusive and it becomes unnecessary to discuss the question of *locus standi*.

Question 1.

A man sees a girl at a kraal and he enters into negotiations with the people of that kraal for a marriage. He takes the girl after paying dowry. Can he be sued in an action for seduction by another man who claims to be the proper guardian of the girl and entitled to her dowry?

Answer per Henry Makamba speaking for all the assessors.

Our custom is this, that if the groom has asked the people of the kraal where she was seen and she is given in marriage, no action can be taken against the bridegroom for taking the girl, but action must be taken against the people who handed her over.



It is not the duty of the suitor to enquire into the rights of the people of a kraal. The people of the kraal must tell him.

The custom is reasonable and there appears to be no valid reason for not following it.

The appeal will accordingly be allowed with costs, and the judgment of the Native Commissioner altered to one for Defendant with costs.

For Appellant: Mr. C. G. W. Muggleston, Umtata.

For Respondent: Mr. Q. Hemming, Umtata.

CASE No. 16.

1942 (T & N) 81.

ALDEN QINA vs. HENRY QINA.

UMTATA: 17th February, 1939. Before A. G. McLoughlin, Esq., President, Messrs. W. J. G. Mears and E. F. Owen, Member of the Court.

Native Appeal Cases—Practice and procedure—Condonation of irregularity in noting appeal—Proriso to Section 15 of Act No. 38 of 1927—Guiding factor is question of substantial prejudice—As final Court within reach of Native litigants Appeal Court must take liberal view and guard against barring its doors on technical grounds.

Appeal from the Court of Native Commissioner, Umtata.
(Case No. 633/37.)

McLoughlin, P. (delivering the judgment of the Court):

This matter is an application for condonation of an irregularity in noting an appeal, following leave granted at the last session of this Court at Umtata.

At that session objection to the hearing of the appeal was upheld and the case struck off the roll for lack of compliance with the Rules.

Notwithstanding this ruling the Court granted a request couched in the following terms "Mr. G. Hemming, for Appellant, asks that the Court should add to the judgment that leave is granted to make application at the next session of the Court for condonation of the irregularity".

Mr. Q. Hemming opposes.

In view of the fact that no prejudice was sustained by the respondent the application is granted and the following words added to the judgment:—

"Leave is granted to appellant to apply at the next session of this Court at Umtata for condonation of the irregularity in noting the appeal and, if such application is granted, that the appeal should be heard at the same session."

The effect of this application is virtually to reinstate the case on the roll for submission of the present application for condonation. The point mooted in argument that there was no formal reinstatement of the case is thus of little consequence and need not be considered.

The matter now before this Court is the simple application for condonation of the irregularity in noting the appeal.



The proceedings are nevertheless anomalous for it amounts to a reconsideration of the original position.

Be that as it may this Court heard argument on the application. It transpired that this Division of the Native Appeal Court has hitherto inclined to a strict and literal interpretation of the Rules, an attitude dating back to Proclamation No. 145 of 1923 which introduced greater precision in procedure with a corresponding increase in formality. It serves no useful purpose to enumerate the various decisions indicating the practice which unquestionably was in keeping with both the letter and the spirit of the Proclamation.

The change introduced by Section 15 of the Native Administration Act No. 38 of 1927 was apparently not recognised, for the Court continued along the old lines as, with all due deference to the Court, the present case illustrates. The doctrine of substantial prejudice does appear to have received passing attention from time to time as is noticeable in the terms of grant of indulgence in this case, and the reference thereto in the case *Maweni Jaji vs. Ngongwana Msolo*, 1937 N.A.C. Cape and O.F.S. p. 136.

The Natal Division of this Court as successor to the Natal Native High Court continued the practice of that Court whose rules included the parent principle incorporated in the proviso to Section 15. In *Mpondo Dhladhla vs. Canuka Ntuli*, 1937 N.A.C. (T. & N.) p. 54 the Court entrenched the practice basing its finding not only on the proviso but on the actual practice of the Appellate Division.

The guiding principles are set out by the Appellate Division in a series of cases commencing with Cairns' Executors *vs. Gaarn* 1912 A.D. where Luns C.J. sets out the following ruling at p. 184 "With regard to the expression 'sufficient cause', I do not think it can be properly taken to mean merely sufficient cause for the delay. It seems to me to be used in a wider sense, as covering any cause sufficient to justify the Court in granting relief from the operation of the earlier rule. Cases might conceivably arise so special in their circumstances that, in spite of the abnormal delay, the Court would feel bound to assist the applicant. But on the other hand the length of the delay and its cause must always be important (in many cases the most important) elements to be considered in arriving at a conclusion. It would be quite impossible to frame an exhaustive definition of what would constitute sufficient cause to justify the grant of indulgence. Any attempt to do so would merely hamper the exercise of a discretion which the rules have purposely made very extensive, and which it is highly desirable not to abridge. All that can be said is that the applicant must show, in the words of Cotton, L.J. (*in re Manchester Economic Society*, 24 Ch.D., at p. 498), 'Something which entitles him to ask for the indulgence of the Court'. What that something is must be decided upon the circumstances of each particular application."

In *Steyn vs. Snyder* 1913 A.D. at p. 70 Lord de Villiers C.J. remarked "I confess that if the petitioner was likely to be left entirely without remedy I am not clear that some relief should not be granted".

In *Bezuidenhout vs. Neoweni and Others* 1927 A.D. p. 530 Solomon C.J. remarked "this (showing sufficient cause) can be done by giving a satisfactory explanation for the delay, but even in the absence of such explanation the Court is entitled to take all the circumstances into consideration in order to decide whether relief shall be granted". . . .

"There may be and there have been cases where there has been no satisfactory explanation of failure to comply with the rules, but there have been circumstances justifying the Court in granting relief."



James C.J. in *Liquidators Myburgh Kone & Co., Ltd., vs. Standard Bank, Ltd.*, 1924 A.D. at p. 231 used a similar expression:—

“The cause of the delay and the excuse though necessarily factors to be considered, are not decisive. The merits of the appeal may in some case be very important” and on this basis leave was granted in *Sampson vs. Union and Rhodesia Wholesale, Ltd.*, 1929 A.D. 181 where Wessels J.A. said, “There has not been such excessive delay under all the circumstances of this case as to justify us in cutting off from him all hope of having his appeal heard in this Court.

The case itself we think a fit one to bring before this Court, The delay ought therefore to be condoned”.

Much the same spirit pervades the decision and practice of the Cape Provincial Division as set out in *Read vs. Freer* 1920 C.P.D. at p. 253 by Kotze J., “That I think is the underlying principle in all the authorities which we have been referred to, that is that the Court will take a liberal view of the matter”. In *Burger vs. Miller* 1932 C.P.D. at p. 174 the position was summarised in these terms “The principles governing the exercise of that discretion were considered by the full Bench in the case of *Read vs. Freer* (1920 C.P.D. 250), and the principle was there laid down. That case decides that the Court’s discretion is not to be limited by any rigid rules, but it will decide upon the facts of each case whether it will exercise its discretion or not. There must however be some reason why it should. There may for instance be an excuse for the irregularity and if there is then the Court would as a rule accede to the application, but even in those cases where there is no excuse, where the irregularity has been caused by a mistake or an oversight on the part of the Appellant’s attorney, the Court will nevertheless look at all the circumstances of the case in order to decide whether or not to exercise its discretion in the applicant’s favour”.

That case decided that where irregularity in noting an appeal was not one causing any real prejudice to the respondent but was merely one of form and not of substance (a security bond not properly completed), leave was granted to extend the time for noting the appeal subject to payment of costs by the applicant. The question of costs of opposition was dealt with and on the merits respondent’s costs of appearance were withheld from him.

The adaptation of these principles in the light of the proviso to Section 15 of the Act is shown in a number of cases heard in the Transvaal and Natal Division of this Court. Mpondo’s case has already been mentioned. In *Alfred Fynn vs. Francis Fynn* (1937 N.A.C., T. & N., p. 99) it was ruled that the indulgence was granted if just cause was shown for the delay in noting an appeal, i.e. that the Applicant was prevented by causes beyond his control from noting his appeal in time, or that the record disclosed a manifest injustice causing substantial prejudice which had not been condoned or acquiesced in by the Applicant.

In *Ntengo Cele vs. Buzula Kwela*, 1938 N.A.C., T & N. (Durban, 19th July, 1938), where considerable delay was involved the Court remarked:—

“While in this case the Court has taken a broad view of all the circumstances of the case in confirming the Native Commissioner’s condonation of the late noting of an appeal after a long delay, it must emphasize the fact that delay in



itself is subject in all cases to the rule laid down in Dblamini's case [1934 N.A.C. (T. & N.) p. 21] and this Court must be satisfied in each case that such delay has not caused a state of affairs which, in terms of Section 15 of Act No. 38 of 1927, can be said to result in substantial prejudice to the other side in the light of all the circumstances of the case.

This Court recognises and adopts the maxim affirmed in Cairn's case (*Cairn's Executors vs. Gaarn*, 1912 A.D. p. 189) that it is in the interests of the State that there should be finality to litigation but as a final Court of Appeal, this Court must in the spirit of Section 15 of Act No. 38 of 1927, guard against barring its doors on technical grounds to any litigant who has suffered an injustice which he cannot redress in any other way and which in the opinion of the Court he has not acquiesced in or condoned. The time factor is important but is not necessarily a conclusive element in the consideration of applications for condonation, as the present case illustrates."

And finally in a later case *Xdnuu Sikakane vs. Cikazckile Zulu* (1938 N.A.C., T. & N., Dundee, Aug., 1938), the Court again reiterating the underlying principles remarked:—

"This Court following the practice of the Appellate Division looks beyond the affidavits and ascertains from a *prima facie* inspection of the record whether there has been gross miscarriage of justice on a decision which it is sought to question after the statutory period. See *Mpondo vs. Canuka*, 1937 N.A.C. (T. & N.), p. 54. In *Ntengo vs. Buzulu* heard at Durban (on 19th July, 1938), this Court in dealing with a similar application made after considerable delay reiterated its view that as the final Court within reach of Native litigants it was required in the spirit of Section 15 of Act No. 38 of 1927 to ensure that substantial justice be done notwithstanding technicalities and in the exercise of this wide discretion it was given relief in circumstances where other Courts with less latitude would have hesitated to ignore technicalities.

The guiding factor is the question of substantial prejudice to either side."

In considering whether to continue the past practice of this Division or to give effect to the spirit of Section 15 of the Act as has been done in the other Division, this Court must be guided by the fact that its decisions are subject to appeal to the Appellate Division in special circumstances.

For this reason alone it follows naturally that the local practice must give way to the more liberal and more authoritative principles adopted by the Appellate Division when so entirely in accord with the spirit of the proviso to Section 15 of the Act.

The present application in all directions falls short of these requirements. The reason for failure to comply with the rules might, on the authority of Burger's case above-quoted, be accepted as pardonable, for it is unjust to punish a litigant for the laches of his legal representative who can be dealt with through his Society, but the merits do not justify such indulgence. Only two items in the judgment carry finality for the order regarding the award of 6 head of cattle to Plaintiff is coupled with an order of absolution regarding the balance of the claim and thus the Applicant has other redress.

(1) The claim for damages.

Herein the Applicant is fortunate in obtaining any judgment at all for he claimed, but did not prove, his loss. He seems to have attempted a claim for general punitive damages to which he is not entitled. In argument Counsel for Applicant indicated that a sum of 25s. at most is claimed in excess of that awarded, a difference not justifying interference by this Court in the circumstances.

(2) The question of costs.

The Native Commissioner has exercised a wise discretion in apportioning the costs and this Court is unable to disagree with him.

For these reasons the appeal must be dismissed with costs.

For Appellant: Mr. C. G. W. Muggleston, Umtata.

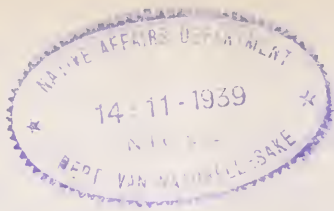
For Respondent: Mr. Q. Hemming, Umtata.







G. 13.



SELECTED DECISIONS
OF THE
NATIVE APPEAL
COURT

(CAPE AND O.F.S.)

1939.

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1939.

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CASE No. 17.

PAMPAM DLULA vs. GUNYATI NCANYWA.

KINGWILLIAMSTOWN: 3rd April, 1939. Before A. G. McLoughlin, Esq., President, Messrs. J. J. Yates and J. A. Kelly, Members of the Court (Cape and Orange Free State Provinces).

Native Appeal Cases—Adultery—Inadequate evidence—Contrary to custom for natives to have connection in presence of children—Native Commissioner should not blindly accept headman's finding—Not customary to carry away beer from general beer drink—Ungidi custom.

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

(Case No. 54/38.)

McLoughlin, P. (delivering the judgment of the Court):

The Appellant was sued in the Native Commissioner's Court for damages for adultery. Judgment was given against him and he has appealed on the ground of credibility.

Plaintiff alleged that during his absence his wife became pregnant. She named Defendant, who repudiated the charge.

Plaintiff sued before the headman who gave judgment in Plaintiff's favour. The matter went on appeal to the neighbouring headman who gave an open verdict.

In the Native Commissioner's Court Plaintiff produced the evidence of himself, the first headman, his, Plaintiff's, wife and daughter and a woman Nomageleka *alias* Nokadeni and a man July.

Plaintiff's case teems with improbabilities and it appears on Plaintiff's own showing that his witnesses in the Native Commissioner's Court gave evidence which they did not disclose before the headman.

Plaintiff himself says that Nomajodi and Nomageleka, the alleged gobetweens, merely deposed before the headman that they were gobetweens. As Plaintiff puts it: "That is all they spoke" (p. 3). Yet before the Native Commissioner Nomajodi denied saying anything before the headman and Nomageleka gives a full and vivid account of seeing the parties in the act, not once as Plaintiff's wife avers, but at least thrice (pp. 5, 8). Nowiniti the wife gives a version of the one instance which does not ring true for she states: "We covered our heads when she entered. She asked us to open the door". How she entered is not explained.

The daughter Nomane, whose age is not disclosed, is alleged to have been actually in the hut during cohabitation between her mother and Defendant. She was not produced at the headman's Court and it is most significant that the headman says: "I asked if all the witnesses were here and they said all the evidence was there". When it is remembered that it is contrary to Custom for parents to have connection in the presence of their children it becomes the more significant that this child's evidence was produced only in the Native Commissioner's Court, where it apparently was accepted more readily than would have been the result in the headman's Court. The opinion of the native assessors corroborates this view.

The Native Commissioner has apparently entirely missed the significance of the improbabilities and the contradictions, or rather elaborations of the witnesses in his Court.

The Native Commissioner comments on the evidence in his reasons in a very stulted manner which does not carry much weight. He remarks for instance that he, the headman, "was satisfied that adultery had been committed". The headman himself said he gave judgment solely on the evidence of Nomajodi who, in the Native Commissioner's Court, gave evidence for Defendant.

Now even at its best the evidence of Nomajodi, if Plaintiff's version is to be accepted, amounted to no more than a statement that she was gobetween. Neither she nor Nomagealeka before the headman testified to any act of adultery committed by the Defendant and Plaintiff's wife. Indeed Plaintiff admits this. It appears therefore that the headman, if Plaintiff's version is correct, relied on inadequate evidence of the adultery and the Native Commissioner has erred in taking into consideration the finding of the headman.

He must deal with the evidence presented to him. That evidence has been augmented very considerably and the effect created is that it is false—especially that of Nomagealeka and the daughter Nomane. Doubtless there may have been opportunity for adultery and adultery may have actually taken place, but Plaintiff has failed to establish adequate proof to outweigh the strenuous denial of Defendant.

In the circumstances the appeal must succeed with costs and the judgment of the Native Commissioner will be altered to one absolving the Defendant from the instance with costs.

In regard to that portion of the judgment dealing with the counterclaim, it appears that Defendant in reconvention admitted liability for 2s. but paid into Court a sum of 5s. There is no evidence by either party regarding this item and in the circumstances the Native Commissioner's judgment for 2s. is correct.

On the 3rd April, 1939, the attached questions were put to and answers received from the following Native Assessors representing the Tembu of the Cape:—

1. Joseph Nyoka, from Cofimvaba District.
2. Vice Qelo, from Lady Frere District.
3. Valelo Mhlontlo, from Lady Frere District.

QUESTION 1.

Is it customary for a man and his wife to have connection in presence of any one else?

ANSWER.

It is not customary.

QUESTION 2.

In presence of children?

ANSWER.

Not when the children are of understanding age.

Per Joseph Nyoka.—Not children who have understanding and can give evidence.

QUESTION 3.

An adulteror?

ANSWER.

An adulteror would not do so in presence. The children would inform their father of the happening.

Per Vice Qelo.—A sensible man would wait till the children are asleep. A thief might do it but it is not customary.

Per Joseph Nyoka.—A sensible woman will wait till the children are asleep or the man may take the woman out and effect his purpose.

The custom is that they should go out and leave the children in the hut. They might go into the kitchen hut.

QUESTION 4.

Per Mr. Yates.—A sensible man would wait you say? Would a sensible man go in even if the children are asleep in view of danger of children waking up.

ANSWER.

Per Vice Qelo.—A thief can do anything but custom requires them to go out and not wait for children to be asleep.

QUESTION 5.

The custom is to leave the children in the hut and for the adults to go out.

ANSWER.

Yes.

QUESTION 6.

Is beer carried away from an ordinary beer drink?

ANSWER.

Per Vice Qelo.—An Umgidi custom allows a guest to take away beer given to him.

Per Joseph Nyoka.—A man who is unable to attend may ask for some to be sent for him.

He can do so if he gets permission from the host and the guests.

If it is a general beer drink nobody can carry beer away.

Per Valelo Mhlontlo.—If the three of us have been served together, and if I want some beer to take home I can ask consent of my companions and then I go to owner of the kraal and if I get permission I will call my wife to carry the beer away. Even in a general beer gathering this can be done.

By Mr. Yates.—A neighbouring woman may be asked—if you are on good terms with her.

Per Vice Qelo.—The difference between an Umgidi and any other: In an Umgidi a locality is allotted a clay pot. That is shared among themselves.

Per Joseph Nyoka.—An Umgidi beer is like this, people of different kraals brew to help the owner. Some bring it to his kraal, some is left at brewer's kraal but the host controls the beer even if left at brewer's place.

If any beer is left the beer may not be taken away by the brewer, except under conditions mentioned.

Even if it is still at the brewer's kraal latter may not open store hut without permission of the host.

By Mr. Kelly.

Per Valelo Mhlontlo.—A lame man must follow the usual custom.

For Appellant: Mr. R. H. Randell, Kingwilliamstown.

For Respondent: Messrs. Hutton & Cook, Kingwilliamstown.



CASE No. 18.

ABRAHAM MGOLOMBANE vs. RIENNETT
MGOLOMBANE.

UMTATA: 8th May, 1939. Before A. G. McLoughlin, Esq.,
President, Native Divorce Court (Cape and O.F.S.
Provinces).

Reserved judgment delivered at Kingwilliamstown
on 19th June, 1939.)

Native Divorce Cases.—Adultery—Corroboration of evidence of act of adultery not necessary except in respect of Plaintiff's evidence—Very clear evidence required—Amendment of summons to introduce new instance of adultery will not be allowed without notification to Defendant.

McLoughlin, P.:

Plaintiff in this case is suing his wife for a decree of divorce on the ground of adultery.

In his summons Plaintiff alleges that "Since about April, or May, 1938, the Defendant has been and is still living in adultery with another man whose name is to the Plaintiff unknown by whom she has had a child during or about February, 1939, at East London".

Defendant was in default.

Plaintiff's evidence was heard on 8th May, 1939, from which it appeared that he had merely heard about the birth of a child to her at East London. He stated that she had left him 6 years ago and that she had had 2 illegitimate children.

The case was postponed till 11.5.39 for production of the marriage certificate and further evidence.

On resumption Counsel for Plaintiff obtained leave to amend the summons to add an allegation "that the Defendant committed adultery in or about the year 1935, at Umtata with Tshukane".

Plaintiff gave further evidence that during the adjournment he saw his wife in Umtata carrying a coloured child which was not his. That it was about 3 months old—a baby in arms. He did not see his wife suckle the child. That he questioned the woman who said "You have nothing to do with that. This is my child".

A witness Flora Mbalo testified that she had in April, 1938, been to Defendant's room when a coloured man arrived to ask for Defendant—that Defendant had told her the man was her sweetheart. That on a Sunday the man came again and they all three went to Church, that thereafter she left them near Larters'.

This evidence is totally inadequate to support the allegation in the summons of living together with a man in East London and having a child by him. In regard to the husband's statement this Court must receive the evidence with caution for reasons set out more fully in *Kunene vs. Kunene* 1937, N.A.C. (T. & N.) p. 115. For the reasons there given this Court is unable to hold that this act of adultery has been proved.

The other instance rests on the evidence of one witness, Dora Mgolombane, who is a step-sister of Plaintiff. She states that in 1935, she went to Defendant's room in Umtata where latter was in service, " I went to her room at Lowrys'. I saw a man sleeping in her bed. It was Tyukana. Reinnett (i.e. Defendant) came from inside to open for me. It was about half past 9 at night. They had been sleeping together ".

There is no corroboration of this evidence.

There is apparently no rule of evidence in the Courts of this country requiring corroboration of evidence of an act of adultery except that of the Plaintiff or his wife; the object being to preclude collusion.

A divorce case differs from an ordinary civil action in that restitution *in integrum* is not possible if perchance an error has crept into the case. Consequently the Courts have required very clear evidence of the alleged offence. Especially is this necessary in dealing with Native cases as the requirements of Native Custom show.

In viewing the circumstances of the present case this Court has great hesitation in accepting the evidence presented.

As has already been stated the evidence in support of the original allegation in the summons, is so nebulous and so evidently perfunctory that the Court is led to scrutinise carefully the evidence and the circumstances of the amended charge.

Now those circumstances call for the comment that this second incident was not relied on in the original summons and has been added almost as an after thought; that the incident (if true) took place several years ago and that the delay has not been explained; and finally there is the relationship between the witness and Plaintiff which makes the omission of this incident from the original case more inexplicable.

It must be remembered, moreover, that this second charge was not brought to the knowledge of the Defendant. It becomes more necessary in the circumstances to have a clear case. Indeed this case has brought to light the danger of granting an amendment introducing new instances of adultery without knowledge of the Defendant. This practice must be modified in future to require notification to a Defendant. (See *Klaase vs. Klaase* 7 S.C. 157.)

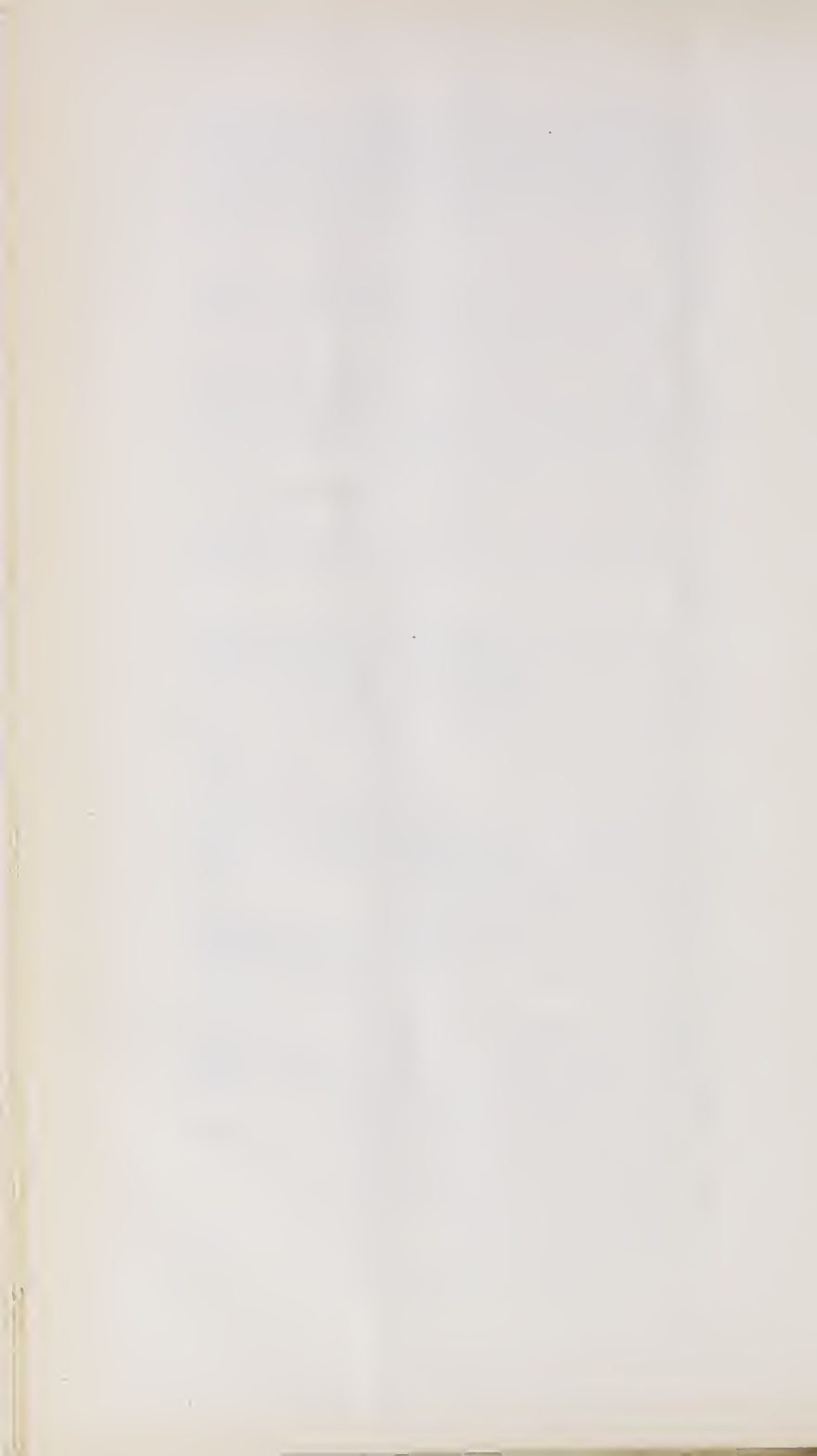
Meanwhile in the present case, having granted leave to introduce a new ground the Court must honour that position but in doing so, it cannot overlook the danger resulting, and must, as indicated, view the evidence with circumspection.

Making due allowance for all these considerations, the Court still feels hesitant in acting on the unsupported evidence as the case stands. It is entitled to ask that the evidence presented will leave no room for doubt. There should be no difficulty in presenting such evidence in the present case if Plaintiff's allegations are true.

In all the circumstances of this case the Court must absolve the Defendant from the instance with costs.

For Plaintiff: Mr. Quex Hemming, Umtata.

For Defendant: In default.



REGINALD DADA vs. SARAH DADA.

KOKSTAD: 15th May, 1939. Before A. G. McLoughlin, Esq.,
President, Native Divorce Court (Cape and O.F.S.
Provinces).

(Reserved judgment delivered at Port St. Johns
on 27th May, 1939.)

Native Divorce Cases.—Nullity on ground of pre-marital infidelity—Interpretation of alleged admissions in Defendant's letters—Onus on Plaintiff to rebut strong presumption in favour of legitimacy by strong, distinct, satisfactory and conclusive proof—Child born 230 days after intercourse between parents.

McLoughlin, P. :

In this action Plaintiff sues Defendant for a decree of nullity of a marriage entered into between them on the 8th July, 1937.

Plaintiff avers in his summons that on the 28th February, 1938, the Defendant gave birth to a child whereof he denies being the father:

that "on the 28th February, 1938, Defendant wrote a letter to Plaintiff wherein she advised Plaintiff that prior to her marriage with him she had committed [*sic.*] carnal connection with some one in Capetown where she at that time was working";

that on receipt of this letter he immediately ordered her to leave his kraal;

and that he was ignorant of Defendant's stuprum prior to the said marriage.

Defendant admits in her plea that the child was born on the 23rd February, 1938 (not 28th February, 1938, as alleged by Plaintiff) but she states Plaintiff is the father of that child.

She admits "having written Plaintiff a letter dated 28th February, 1938, but denies the correctness of the interpretation placed thereon by the Plaintiff".

The sole witness for Plaintiff is the Plaintiff himself, whose evidence is to the effect that he did not know of his wife's pregnancy when he married her; that he received news of the birth of the child by letter from his wife, which letter he identified and put in. He replied to that letter and received a second letter, both being put in as exhibits and strongly relied upon by Counsel for Plaintiff. In the Plaintiff's view the case depends entirely on the letters, which he interprets as an admission of pre-marital infidelity.

His evidence elaborated in cross-examination is as follows:—"It is true we first cohabited the day after the marriage. We stayed together for one week when we cohabited. I returned from Healdtown in December. On 10th December. I went back to Healdtown on 26th January, 1939. During that time I had intercourse with my wife. It was then apparent that she was pregnant. I did not ask her about the pregnancy. I never questioned her about it for it did not occur to me. I thought I had caused it. The first intimation I heard of the birth was the letter. That convinced me she had had intercourse with some one else. She says so in the letter. That someone else was in



love with her. She is asking for forgiveness. I don't know what was wrong. I admit to be in love is not necessarily an implication that you have intercourse . . . I left just about three weeks before the child was born. We had intercourse. We had it until some days before I left."

There is no word in his evidence to impeach the virginity of the Defendant at the time of their first intercourse. Nor is there anything besides the letters to prove that Defendant had been intimate with another man.

Defendant's evidence is an admission of the birth of the child on the 23rd February, 1938. She states emphatically that the father of the child is Plaintiff, Reginald Dada. She admits they first cohabited on the 9th July, 1937. She claims that she had her changes in June. She denied that she had intercourse with any other man. She states that the first letter was written on instructions of her husband's people, who held a family council over the unexpectedly early birth of a child.

Regarding the letters she says "I did not wish to convey in either letter that I had had intercourse with any other man. I did say I had met with temptations. I mean the man I loved. I did not fall into temptation besides falling into love with him". She had said earlier in her evidence. "It is true someone in Capetown wanted to be engaged with me. I had no intercourse with him".

In cross-examination she stated: "I don't know about the child being full sized. It was the first child I had. I can't say more than that it was a small child. My sin was that I was in love with a man in Capetown. I never had any connection with him. I was in love with him when I left Capetown. I was in love with him when I married Plaintiff. I was in love with him also.

By love I don't mean having connection; by 'Ububi' in the letter 'B' I meant that I had loved another man".

Defendant was her sole witness.

Now the legal aspect is very clear cut:—

- (1) The onus is on the Plaintiff to prove his case conclusively and not by a mere balance of evidence.
- (2) To succeed Plaintiff must rebut the strong presumption in favour of legitimacy, coupled with the presumption in favour of virginity of the Defendant at the time of marriage.
- (3) Bound up with both these presumptions is the question of the duration of the period of gestation, which has so perturbed the parties in their ignorance of its limits.

The presumption of legitimacy based on the maxim "*Pater est quem nuptiae demonstrant*" is a rebuttable presumption, but in the words of Lord Lyndhurst in *Morris vs. Morris* 5 Cl & F. 163, quoted with approval by Kotze, J.P., in *Fitzgerald vs. Green* 1911 E.D.L. p. 425, and followed in *Gabergas vs. Gabergas* 1921 E.D.L. 279:

"The presumption in law that a child born in wedlock is the child of the husband, is not lightly to be repelled. It is not to be broken in upon or shaken by a mere balance of probability; the evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive."

Now, as was pointed out by Kotze, J.P., in *Fitzgerald's* case (above-quoted) there is no physiological reason why a child born 230 days after marriage and intercourse between its parents should not be the child of that union. Medical evidence as set out in *Taylor on Medical Jurisprudence*, 9th Edition, pages 43 to 50, makes the possibility clear. The Plaintiff has adduced no evidence to upset the possibility

that the child was a 230 day child. The onus of disproving this fact is on him.

There being no evidential value in this fact, it becomes necessary for Plaintiff to show by other proof that he was not the father of the child.

As already indicated Plaintiff relies solely on the admissions contained in the letters.

The first letter was written soon after the birth of the child. It is to be expected that the girl would be both physically and mentally weakened by the affair as, indeed, she alleges, and the confession, if any, must be taken with the utmost caution when, as has not been contradicted, it appears that pressure was brought to bear on her to confess her "sin".

But that confession is not so clear or so outright that it amounts to "strong, distinct, satisfactory and conclusive proof". We are left to surmise her reference to having fallen into temptation with the suitor in Capetown that she had intercourse with him, which she repeatedly denied in her evidence and which denial Plaintiff has in no way shaken. He has not even attempted to show that the girl was not a virgin when he first had intercourse with her.

Reading the letters in the most adverse light to the Defendant, it is difficult to find anything that can be taken as a definite and conclusive proof of guilt. The Court has been at pains to have the letters translated by two Court interpreters and has itself collated the translations with the originals. That version which best reflects the sense of the original is followed; those passages most relevant to the enquiry are quoted.

In the letter of the 28th February, 1938, Defendant says: "Simanga sento nasi namhla ke noko ndibona ityala liwepezu kwam . . . kuba xa nabazali besiti soze lento ibaxolise kuba akungeti kwakuvakele ukuba ndigcagile ze kanti ndo wlelwa zinyanga. Ndiraxiwe ke nokuba ndinga sure ngalipi ilizwe ke kodwa iyonke lonto ityala likum."

"Ubukude nam lonke elixesha ndikwelinye ilizwe izihendo zandifikele kwako umntu ofuna ukundifrisa ukwabiko ndlela yakugqita nongani ke yayingeyengomntu u rough ke kodwa ngelizwi alitetayo kum xa kunjenjenje namhla sendikumbule lona ndixakwe ke yilendawo yokokuba okoko ndisukayo ikaya de ndibuye zange ndigqitwe nyanga".

[Translation: "A strange thing is this to-day, I see a case has fallen upon me".]

"For they (i.e. the parents) contend that how could I give birth in less than the ordinary period of gestation as it was known that I had run away (i.e. with a man)."

"I am in a difficulty as I do not know by what word I could be sure of, but of course taking all that as a whole the onus is on me."

"All this time you have been far away from me and I have been in another country and temptations came upon me. There was a man who offered marriage to me, but there was no way of proceeding any further, though he was not a 'rough' [*sic.*] person, but when things are like this I remember a word he said to me, but the only point that is puzzling me is that ever since I left home I never missed a single month."

In the second letter dated 18th April, 1938, she says: "Enye into eyandiqinisa mpela okokuba nene ndibuye ndimsulwa e Kapa u Lawu wabala neti kanye ezinyanga ndimi ngazo. But iyonke lonto ayinditetelelinto."

"kungeko namfuneko yake kakade kwelityala umntu onetyala ndim."

[Translation: "One other thing which assures me that I had nothing when I left Capetown (that I returned pure from Capetown—Lawu also counted the months and agreed with me, but all that does not absolve (does not speak anything for me).]

"of course there is no need for the child in this action—I am the person answerable."

As already stated there is nothing in these passages to interpret as a full confession of pre-marital intercourse with another man, and there are no other passages more incriminating than these.

Making full allowance for an under-current of suspicion in the letters arising from the reliance of the girl, not on pre-marital innocence and the legitimacy of her child, but on subsidiary proof that she had had her changes in June, her emphatic denial in evidence of intercourse has not been rebutted. There remains considerable doubt regarding the pre-marital lapse, proof of which must be strong, distinct, satisfactory and conclusive, which cannot be said of the evidence adduced and relied on by Plaintiff.

In these circumstances the Court must hold that he has failed to discharge the onus which rests heavily on him.

The Defendant will be absolved from the instance with costs.

For Plaintiff: Mr. V. Gordon, Mount Fletcher.

For Defendant: Messrs. Elliot & Walker, Kokstad.

CASE No. 20.

HOBE MKATALI vs. MACAYISA MJWACU and TWO OTHERS.

PORT ST. JOHNS: 25th May, 1939, Before A. G. McLoughlin, Esq., President, and Messrs. H. M. Nourse and M. W. Hartley, Members of the Court (Cape and O.F.S. Provinces).

Native Appeal Cases—Action for damages for assault—Native custom allows wide latitude in handling of adulterer caught in the act—Alternative practices, taking of Nttonze from adulterer and his detention pending release by relatives—No liability arises from detention.

Appeal from the Court of Native Commissioner, Bizana.

(Case No. 278/38.)

McLoughlin, P. (delivering the judgment of the Court):

In this case the appeal is directed only against that portion of the Native Commissioner's judgment absolving Defendants Nos. 1, 2 and 6 from the instance.

The judgment is attacked on the following grounds:—

"Whereas the Native Commissioner found that the multiple injuries inflicted on the Plaintiff as disclosed by the medical testimony led to the presumption that the Plaintiff was assaulted by more than two people, the bare denial of Defendants Nos. 1, 2 and 6, that they took an active part in the said assault is not sufficient to rebut such presumption in view of the Plaintiff's evidence and the Defendants' admission that they set out together with a common purpose and were acting in concert and their

admission that they together took the Plaintiff to the kraal of Busekana and there kept him under restraint.

alternatively

If it is accepted as a fact that only the Defendants Nos. 3 and 5 actually physically assaulted the Plaintiff as it is admitted that the five Defendants (Nos. 1, 2, 3, 5 and 6) were acting in concert and with a common purpose it is submitted that they are all in law jointly and severally liable for the assault on the Plaintiff and his subsequent wrongful detention and imprisonment.

For either or both of the above grounds it is submitted that judgment should have been entered against all the five Defendants (Nos. 1, 2, 3, 5 and 6) jointly and severally for the amount awarded with costs."

On the evidence placed before the Native Commissioner both grounds of appeal are baseless. The medical evidence even if accepted at its face value, does not support any presumption, which can be only one of fact at best, that the injuries were inflicted by more than one assailant. Stripped of its technical phraseology, the medical evidence amounts to no more than that the Plaintiff had had a beating such as one native normally inflicts on another in an affray or in a matter of this sort. A bone or two is perhaps broken and a head cracked, but there are no injuries which obviously required the co-operation of more than one assailant. Taken at its very best value, the evidence of the Plaintiff is to the effect that Nos. 2 and 3 Defendants came to him accompanied by the other 7 Defendants. Nos. 2 and 3 struck him on the head. Then *all* the other Defendants set on him and struck him. No. 1 broke his little finger. He became unconscious.

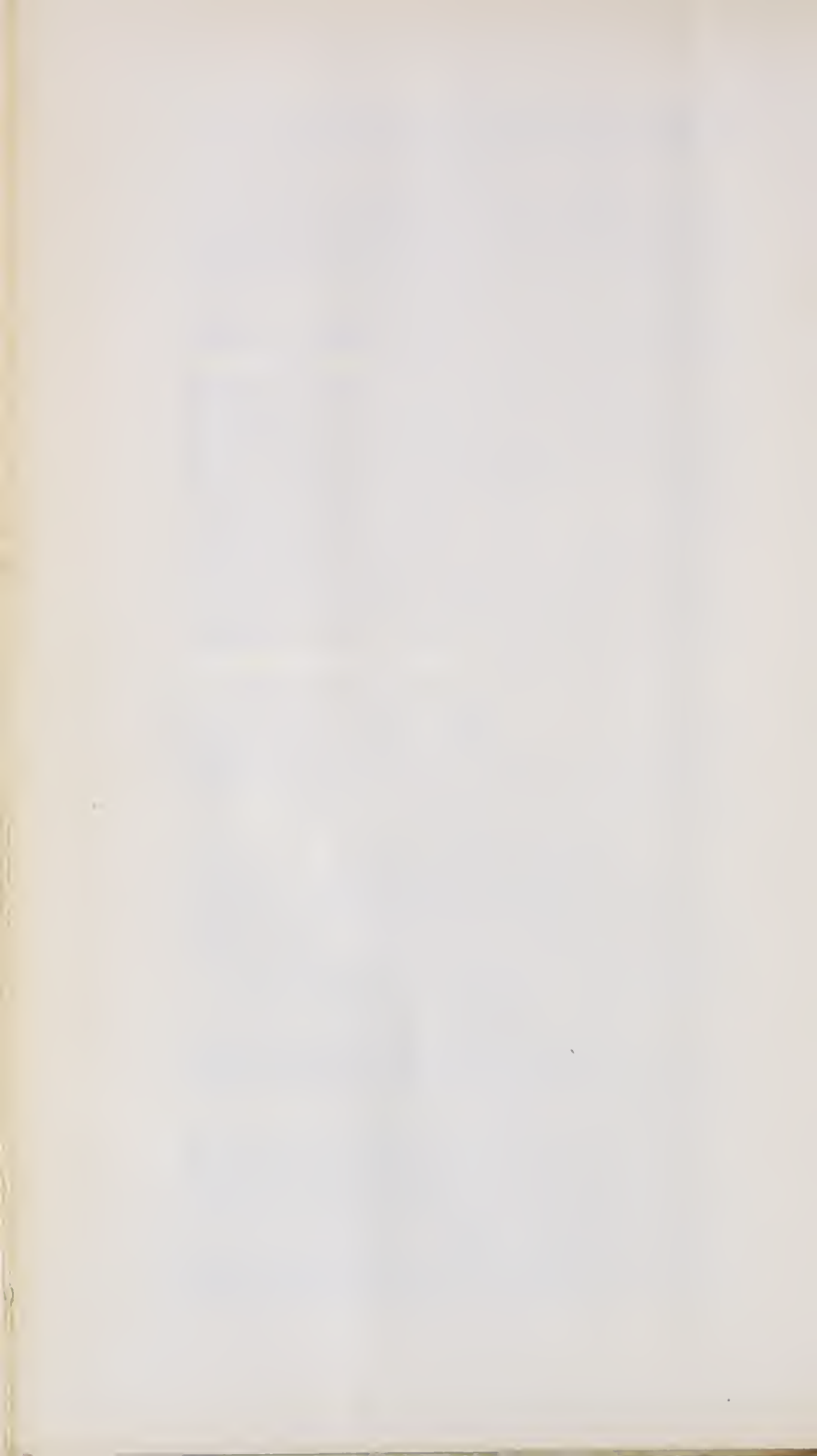
This evidence is found by the Native Commissioner to be false. In both the civil and criminal cases, the charge against Nos. 4, 7, 8 and 9 failed. They were not there at all. If, as is contended in argument, he remained conscious until after the blows on the hand, his version is so evidently incorrect that no reliance whatever can be placed on it. If, on the other hand, he became dazed after the blows on the head, as is possible, his recollection of events must in any case be very imperfect.

The only evidence of any real value to the Plaintiff is that of some of the Defendants, that Nos. 3 and 5 were "beating" Plaintiff when they intervened. Even this is not conclusive, for No. 3 states Plaintiff first struck him with his sjambok. Be that as it may, the denial of the other Defendants that they struck Plaintiff, cannot be lightly set aside, for their version of the affair is consonant with what appears to be probable and what is authorised by custom. Moreover admission by one co-defendant does not bind the other. See cases quoted by Scoble p. 119.

It is the duty of members of a family to protect their females, and custom allows very wide latitude in such cases. Our own laws originally allowed the killing of an adulterer caught in the act. Any rough handling that Native custom permits in such circumstances never gave rise to an action for damages.

Under Native law the right to claim damages for an assault vested in the Chief—not in the individual concerned. Notwithstanding this right, the chief formerly rarely interposed in instances where a man was assaulted in the act of adultery, for he was regarded as a thief, not entitled to much consideration, unless the avenger overstepped the mark and impaired his fighting capacity.

This Court in *Dumalisile vs. Mqananango* 1931 N.A.C. (C. & O.) at page 9, and in *Jaca vs. Sanana*, heard at Port St. Johns in February, 1939, affirmed the Native view



of these matters, that any mishandling received by a person caught in adultery cannot form the subject of complaint, when it is not of a serious or grievous nature.

There can be no question of liability arising from concerted action for a common purpose if that purpose be legal. There is no proof that the Defendants acted in concert to assault the Plaintiff. At most they acted in concert to apprehend him in accordance with their custom. The Plaintiff has failed to prove that they acted illegally.

The three Defendants are thus not liable for the assault on the Plaintiff, and the appeal fails.

The replies of the Native Assessors make it clear that there is no liability arising from detention, and on this ground also the appeal must fail.

There has been no cross appeal by Nos. 3 and 5 especially in regard to the quantum of damages awarded, which otherwise would have evoked trenchant criticism. The Court especially reserves its views on this subject.

The appeal is dismissed with costs.

OPINIONS OF THE NATIVE ASSESSORS.

There are two practices regarding the catching of an adulterer.

(1) Something is taken from the adulterer on the spot of the adultery as intlonze. He asks for pardon and is released.

(2) There is the Pondo custom which allows the adulterer to be detained where he has been taken to pending release by his relatives.

If one beast is tendered for his release it is sufficient to show that intlonze has been taken from him and he is then released.

It is not sufficient merely to promise payment. There must be an actual payment. For he may turn round and say he paid because he was being killed.

The capturer takes the adulterer to a kraal where there are a number of people.

For Appellant: Mr. J. V. Kottich, Lusikisiki.

For Respondent: Mr. Claud Stanford, Lusikisiki.



CASE No. 21.

HENRY NQAMBI vs. REGINA NQAMBI.

PORT ST. JOHNS: 25th May, 1939. Before A. G. McLoughlin, Esq., President, and Messrs. H. M. Nourse and M. W. Hartley, Members of the Court (Cape and O.F.S. Provinces).

Native Appeal Cases—Dissolution of Native customary union—Right of wife to sue husband unaided—She can compel dowry-holder to refund some of her dowry to obtain dissolution—Unwilling dowry-holder may be joined with husband—Union also dissolved on husband's accusation against wife of witchcraft, or ordering her to leave his kraal with her belongings.

Appeal from the Court of Native Commissioner, Bizana.

(Case No. 228/38.)

McLoughlin, P. (delivering the judgment of the Court):

This appeal deals with the question of the dissolution of a Native customary Union at the instance of the wife suing her husband unaided.

The summons reads as follows:—

- “(1) Plaintiff is the wife of Defendant by a Native customary union.
- (2) In or about the year 1932 the Defendant wrongfully and unlawfully deserted the Plaintiff and, although so demanded to do, has made no attempt to contribute to her support and maintenance.
- (3) Defendant's actions towards Plaintiff constitute a repudiation and abandonment of her as his wife entitling the Plaintiff to a dissolution of the said union.”

The Defendant (the husband) pleaded:—

- “(1) The Plaintiff deserted from his kraal and notwithstanding demand for her return she refuses to return to the Defendant's kraal.
- (2) Defendant is now and always has been ready and willing to receive the Plaintiff back at his kraal.”

To this Plaintiff replied stating in her replication:—

- “(1) Plaintiff denies paragraph 1 of the Plea in toto and says that at the time of the marriage Defendant occupied a kraal in the Bizana District; thereafter Defendant disposed of such kraal and instructed Plaintiff to return to her people, himself removing to the Flagstaff District (about the year 1932) where Defendant has since resided at the kraal of a concubine.
- (2) After Defendant's removal as aforesaid Plaintiff has approached him in regard to establishing a new kraal for her and providing for her but Defendant has sedulously neglected so to do.
- (3) Plaintiff avers that such conduct on Defendant's part constitute a deliberate repudiation and abandonment of her as Defendant's wife, and that Plaintiff has no kraal to which he is prepared to invite her back.”



It is common cause that the spouses first lived in the Bizana District, at the kraal of Defendant's people and that Defendant subsequently erected a kraal in Mdingiswana's location in that District where Plaintiff resided while Defendant worked in Flagstaff as a deputy messenger. He had apparently moved there in 1932. In 1933 in the absence of Plaintiff he removed his child and some possessions to Flagstaff. The wife complained to the Native Commissioner but it appears that thereafter, in December, 1933, he came with oxen in yoke as she says: "He said he had come to remove me and take me back to Sigwinta's Location to another kraal. He suggested that he would see my people and ask them to keep me at their kraal until after the scuffling season . . . I then went to my people's kraal. Defendant removed all the belongings from his kraal and abandoned it".

"He has never since approached me to get me from my people. Since I have been with my people I did not make any efforts to get him to support me as I have (had) already been to the office and his people. I came to the office during July, 1933. . . . My visits to the office were made whilst I was still at my husband's kraal." *Inter alia* she stated that she made no complaint at the office nor did she attempt to get into touch with her husband whilst at her people's kraal. That her husband neither sought her out there nor contributed to her support then. That he never asked her to come to him at Flagstaff and that she went to work in 1937.

"By his action he has abandoned me and by reason of this I claim that the marriage should be dissolved. I am not willing to go to live with him at Flagstaff."

The dowry-holder, her brother, gave evidence for her to corroborate her allegation that she had been at his kraal for a number of years and that nothing was done to reconcile the parties. He stated he had no objection to the woman returning to her husband.

The Defendant controverts the Plaintiff's account of the events. He maintains that she deserted him and that he gave up his kraal; that he tried to get her to come to him; that he went 4 times. "She said to me each time she wanted me to build a hut at Samson's kraal. She said she would only live with me if I built at her brother's kraal. I am still willing to have her as a wife at my kraal." He admits he has not troubled to get his wife back within the last 4 years.

He has had his own kraal at Flagstaff for 4 years.

The Native Commissioner gave judgment as follows:—

"Application for order of dissolution of marriage granted with costs."

The judgment is attacked on appeal on the grounds broadly:—

That Plaintiff has no cause of action as the evidence shows that she is the deserter and that she refuses to return to her husband.

As no case of like nature appears to have been reported from Pondoland the Native Assessors, Nobulongwe Masipula, Barnabas Siroqo, Lumaya Langa, Nongonwana Jiyajiya and Mxotyelwa Ndzumo were consulted: their replies are appended.

In summary they set out the Pondo Native Law to be as follows:—

In Pondoland a Native customary union is dissolved by the return of some portion of the dowry cattle, on desertion of the wife, or at the option of the wife and her dowry-holder.



The union is dissolved, with forfeiture of the dowry when a husband accuses his wife of witchcraft; or when he orders her to leave his kraal with her belongings. He need assign no cause for his action but he loses all claim to restoration of any of the dowry. The Assessors set out the practice which this Court accepts as good law.

The Native Assessors are emphatic in their view that Native Law does not give a wife the right to dissolve the union without the restoration of some of the dowry.

They contend that a wife can compel a dowry-holder to "keta" (i.e. refund) some of her dowry to obtain dissolution by complaint to the Chief who will order the restoration to dissolve the union.

This view conflicts with what this Court has, hitherto, regarded as an equitable right of the wife to dissolve the marriage at her option in the same manner as is apparently permitted the husband.

The decisions of the Court to this effect are clearly actuated by misplaced sentiment which entirely ignores the basic principles of a Native union, that there are not two but at least three contracting parties, and that the basis of the union is not the mere consent of the spouses, as in our law, but it is the dowry (ikazi) which forms the bond. The Courts have consistently recognised this principle in dealing with a husband's action for dissolution of a customary union by requiring him to sue the dowry-holder for the return of a deserting wife, or in default for restoration of the dowry. The wife is never sued directly or personally for a divorce.

Any practice which allows a woman to sue her husband on the basis of a bilateral consensual contract, for dissolution of a customary union is thus obviously in conflict with sound Native Law and Custom. It is not, as is stressed in the decisions, a matter of majority in the woman for that alone does not create a right to sue in all and every cause even among Europeans; nor is it a question of reciprocal rights for the husband, though apparently acting capriciously in driving away a wife, does so with the safeguard of knowledge of the resulting forfeiture of his dowry cattle. A wife acting alone is not subject to even this restraint if allowed to sue without the dowry-holder.

In this respect Native Custom wisely retains an important stabilising effect in Native marriage and social conditions as does the Common Law in European communities. There is thus no question here of any conflict of Native custom with public policy to justify abandonment of the Native system.

Nor can it be contended that it is inequitable to require a wife to join her dowry-holder in any action for dissolution. An unwilling dowry-holder can be brought before the Court either singly or in conjunction with the husband, when, on good cause shown, she may obtain an order of Court for dissolution of her marriage by restoration of some portion of her dowry, or should the circumstances justify that course in Native Law, with an order of forfeiture of the dowry by the husband, the costs of the action being awarded against the husband or dowry-holder or both, according to the demerits of their defence or opposition to the action.

The right of the wife, unaided, to sue the husband only has not been questioned either here or in the Court below, but on the facts, alone, the Plaintiff (the wife) must fail in her action.

In the view of the Court she is the defaulting party. Not only is she at her people's kraal by arrangement but she refused and still refuses to return to her husband who is willing to receive her. She cannot demand that he build a kraal for her where she wishes for both in Native



as well as in Common Law it is the duty of the wife to be where her husband is. Thus her action is contrary to custom and her husband is safeguarded against either an unwanted divorce or loss of his dowry.

The Native Assessors to whom the facts were referred are unanimous in their opinion that the woman cannot succeed in the circumstances having no cause of complaint.

The appeal is accordingly allowed with costs and the judgment of the Native Commissioner is altered to one absolving the Defendant from the instance with costs.

OPINIONS OF NATIVE ASSESSORS.

Per Nobulongwe Masipula.—Pondo Custom is that if a woman wants to divorce her husband she must return the dowry paid by her husband for there is no case among Pondos which allows a girl to sue for divorce without returning the dowry.

Per Barnabas Sirogo.—The last speaker has spoken truth. Pondo Custom does not allow a girl to sue for dissolution of marriage.

If she rejects her husband she dresses in short skirts and she picks up a stick and goes to the cattle fold at her father's kraal and drives the cattle of her dowry and hands them over to her husband. That finishes the case.

Per Lumaya Langa.—Speaking for all the Assessors states that applies to both East and West Pondoland.

When a woman is smelt out no cattle pass. She is cleansed when she returns to her people's kraal and she remarries.

Per Nongomwana Jiyajiya.—When a woman is smelt out she goes to report to the headman of the location where she lives with her husband. The headman collects the people of the kraal of her husband and if before the headman they confirm the smelling out she is allowed to return to her people's kraal as a divorced woman.

If that is not done the girl errs in going straight to her people.

When a woman has quarrelled with her husband he, the husband, can bind up his wife's things and order her to leave with them.

She must first go to report to the headman before going to her people.

It is the same as smelling out and no cattle are returnable.

Per Lumaya Langa.—If the husband has neglected his wife the cattle must be returned.

A woman bundled out must report to the Magistrate to ascertain the truth.

Per Barnabas Sirogo.—Sometimes you may doubt our custom. You have mentioned smelling out and driving out.

In olden days the woman smelt out was killed. In spite of all that he would still follow her up and pay dowry and that would be as though there was a remarriage. A woman who has been driven away must take you before the Court and sue you before the headman. You must make it clear that you are driving away those cattle, i.e. the lobolo.

If you do not take these steps she remains your wife.

If she has also not done so, i.e. take you before the Court, she remains your wife if she keeps that within her heart.



Per Nobulongwe Masipula.—After hearing facts; there has been no repudiation. She was taken to her own people by her husband and it was their duty to take action for burying her. They would complain about the burden and say you have thrown away your wife. To-day the husband says come to me I have established a kraal, come to me. She can't maintain an action without ketaing. She has her own people and she herself is property.

Per Lumaya Langa.—They should go to headman and then to office to have marriage dissolved. If he still wants his wife he will say he still wants her back and then a dispute will result. Then there will be a passing of dowry cattle.

The argument centres on the cattle and it has nothing to do with the wife.

If the people do not move she must go to the Chief who will order the cattle to be ketaed.

Her people will be taken to the Magistrate by the Chief who will order the dowry to be returned.

For Appellant: Mr. J. V. Kottich, Lusikisiki.

For Respondent: Mr. Claud Stanford, Lusikisiki.

CASE No. 22.

AUGUST TETANI vs. DIKO TETANI.

UMTATA: 1st June, 1939. Before A. G. McLoughlin, Esq., President, and Messrs. E. F. Owen and R. Wronsky, Members of the Court (Cape and O.F.S. Provinces).

(Reserved judgment delivered at Kingwilliamstown, on 20th June, 1939.)

Native Appeal Cases—Claim to estate property—Objection to locus standi of Plaintiff—Effect of marriage by Christian rites in Tembuland—Section 30 of Proclamation 140 of 1885 and Section 8 (1) of Proclamation 142 of 1910—Issue of marriage and property of spouses brought under Common Law—Succession—Provisions of Section 19 of Proclamation 227 of 1898 never applied to Tembuland.

Appeal from the Court of Native Commissioner, Mqanduli.

(Case No. 310/37.)

McLoughlin, P. (delivering the judgment of the Court):

In the Native Commissioner's Court of Mqanduli Plaintiff claimed a declaration of right and delivery of certain property. His particulars of claim are set out *in extenso* to show the effect of a proposed amendment which forms part of the subject matter of the appeal:—

“Particulars of Claim:

- (1) Plaintiff is the eldest son and heir of the late Mdutyulwa Tetani who was in turn the eldest son and heir of the late Tetani.
- (2) That the late Tetani died about year 1924 or 1925.
- (3) That the Plaintiff's father, Mdutyulwa, died about the year 1927.



- (4) That the late Tetani was married to one Nokasi, first of all by Native Custom, by which union the said Mduyulwa and 3 other sons were born.

Thereafter Tetani married the said Nokasi by Christian rites but no children were born to her thereafter.

- (5) That the said Nokasi died about May, 1937.
- (6) That the estate of the late Tetani to which the Plaintiff is entitled by Native Law and Custom, he being the heir, consists *inter alia* of the following movable property:—

68	Head of cattle or value	£204	0	0
115	Sheep or value	57	10	0
4	Horses or value	28	0	0
55	Bags of mealies or value	27	10	0
7	Bags of beans or value	7	0	0
1	Plow with 3 yokes and chains or value	5	6	0
2	Bedsteads or value	2	5	0
2	Tables or value	1	5	0
8	Assegais or value	0	8	0
		£333	4	0

- (7) That the Defendant is in possession of the foregoing property and lays claim thereto and he neglects and refuses to deliver the said property to Plaintiff or to recognise the Plaintiff's claim thereto.

Wherefor Plaintiff prays for judgment.

- (a) Declaring him to be the grandson and heir of the late Tetani, and
- (b) For delivery to Plaintiff of the Estate movable property as detailed in paragraph 6 hereof with costs of suit."

Defendant objected to the summons "On the grounds that the Plaintiff has no *locus standi in judicio* by reason of the fact that the said late Tetani and the late Nokasi were married in community of property during the year 1899, and that therefor, the Plaintiff has no action as sole heir in the Estate of the late Tetani or the said late Nokasi. His action should have been brought in his capacity as the Executor in the Estate of the late Tetani and the said late Nokasi for delivery of the assets for the purpose of distribution amongst the children of the said late Tetani and the said late Nokasi". And he pleaded over on the merits.

An application to strike out the objection was withdrawn.

No evidence was led but a marriage certificate was put in by consent fixing the date of the relevant marriage as the 28th March, 1899, and the place as Xora, Tembuland.

Argument followed at length and judgment was reserved by the Native Commissioner. An entry appears on the record immediately after this "Mr. Hemming intimates that in event of objection being upheld he intends to make application for amendment of summons".

On resumption the Native Commissioner delivered his ruling that Plaintiff had no *locus standi in judicio*. Whereupon application was made for amendment of summons in terms of notice of application dated the same day.

The other side objected and the application to amend was "disallowed" and the summons thereupon dismissed with costs.

The amendment sought reads as follows:—

- "(1) In the description of Plaintiff to add after his name the following words 'in his personal capacity and in his capacity as Executor of the Estates of the late Tetani and the late Nokasi'.



- (2) To amend paragraph 6 by inserting between word 'heir' and the comma the following words 'and Executor of the Estate of the late Tetani and the late Nokasi'."

Plaintiff, now Appellant, attacks the judgment on the grounds:—

- "(1) That the objection is bad in law and should have been dismissed with costs in as much as *ex facie* the claim is for stock due to Plaintiff under Native Custom and in the possession of Defendant and as such property was not subject to the Common Law and therefore the intervention of an Executor was not necessary.
- (2) That assuming but not admitting that the action should have been brought by Appellant in his capacity as Executor, the amendment applied for should have been allowed."

Appellant's Counsel was frustrated in an attempt to attack the judgment on the ground of irregularity, relying on *Malan vs. van Rooyen*, 1928 O.P.D. P.H. L.I. he being unable to establish substantial prejudice as required by the proviso to Section 15 of Act 38 of 1927. Whether the objection to the summons was by way of objection or exception was a mere matter of form and in the circumstances a technicality which the Appeal Court was enjoined by the proviso to disregard in the absence of substantial prejudice.

The complaint regarding the refusal to allow the amendment is equally devoid of substance for the Native Commissioner's ruling on the objection was a final and definite sentence which terminated the proceedings, the words subsequently added "Summons dismissed with costs" are what Voet terms "all such matters as are necessary consequences of the judgment" 42.1.27. These matters may be added to a judgment subsequently but subject to this proviso a final judgment cannot be recalled or altered after it has been pronounced. (Voet 22.1.27). for having pronounced the final judgment the presiding officer is *functus officio* in so far as that case or matter is concerned.

But apart from this difficulty which entirely precludes the reception of an amendment after judgment has been pronounced, the actual effect of the desired amendment is such that the claim and cause of action remains the same, viz., that the Plaintiff still seeks to establish his claim to the property in his personal right as sole heir. He does not intend to vary his capacity which, as the Court has ruled, lends him no judicial standing. On this ground the appeal must fail.

Turning now to the main point in dispute, this Court must find whether Common Law or Native Law rules of succession should apply in the circumstances disclosed.

The parents of Plaintiff married by Christian rites, without any ante-nuptial contract on the 28th March, 1899, at Xora, in Tembuland. It is not disclosed in the record where the husband was domiciled at the time of the marriage but Counsel in argument accepted the position that the parties were domiciled in Tembuland at the time of the marriage.

A marriage by Christian rites contracted by a Native domiciled in Tembuland in 1899, would involve the consequences detailed in Section 30 of Proclamation 140 of 1885 (Tembuland Annexation Proclamation), viz., that "any marriage celebrated . . . according to the rites of the Christian religion . . . shall be taken to be in all respects as valid and binding, and to have the same effect upon the parties to the same and their issue and property as a marriage contracted under the marriage laws of the Cape Colony".



This law was largely modified by Proclamation 142 of 1910 but that Proclamation, especially as amended, did not affect vested rights arising from any marriage contracted prior to its promulgation. Nor indeed does the later enactment in Act 38 of 1927, which likewise protects vested rights.

There appears to be no room for doubt that the effect of Section 30, in bringing both the issue of the marriage and the property of the spouses under the Common Law, includes succession under that system of law. That was the view adopted by van der Riet, A. J. P., in *Makalima vs. Nosanti* 1925 E.D.L. 82 at page 88. See also *Makalima vs. Mapini* 1892 E.D.C. 3 & *Moruri vs. Moruri* 1905, Kokstad, Scymour p. 169. This right of succession by Common Law is undoubtedly protected by the later enactments. Notwithstanding the contention, explored in *Makalima's* case (*supra*), that property in a hut of a woman married by Native Custom is "property allotted to and or accruing to that 'house' under Native Law, it would seem that the decision in *Makalima's* case that such property does not fall to be distributed in accordance with the provisions of Section 8 (1) of Proclamation 142 of 1910—and the corresponding Section in Act 38 of 1927, is correct. The issue of the Native union would, by Common Law, become legitimate when their parents subsequently married by Christian rites. They would thereupon acquire the right of intestate succession under Common Law and that right is not touched by later enactments.

Counsel for Appellant relied strongly on the decision in *Majwambe vs. Majwambe* 4 N.A.C. 123, an appeal from the Magistrate of Idutywa heard at Butterworth on 10th July, 1919. With the utmost respect for the Court deciding that case, this Court is at a loss in ascertaining the ground on which it was held that succession in the instance under consideration was subject to Native Law and not the Common Law since that marriage was admittedly a Christian marriage in community of property entered into in the Cape Colony and carrying with it the Common Law consequences. (See *Tindazi vs. C.M.* 1892 E.D.C. p. 183). It is probable that the President of the Court had in view the provisions of Section 19 of Proclamation 227 of 1898. Indeed it is clear from the decision in *Dingiswayo vs. Dingiswayo* 4. N.A.C. 124 that *Majwambe's* case was so decided.

But the special provisions of Section 19 of Proclamation 227 of 1898 were never applied to Tembuland and these cases are therefore not in point.

In a more recent case, *Titus vs. Titus* 1934 N.A.C. (C. & O.) p. 61, from Tembuland, this Court accepted the position to be that succession by Common Law followed on a Christian marriage in terms of the Annexation Proclamation and that the moiety of an estate due to the children was to be distributed equally among all the children of the marriage.

This course was followed in *Mdlozini vs. Mdlozini* 1927 (v) N.A.C. p. 196 in respect of the estate of the first wife deceased prior to promulgation of Proclamation 142 of 1910. That case came from East Griqualand where Proclamation 227 of 1898 did not apply as is the case in Tembuland.

No other cases were mentioned in argument nor has the Court after diligent search been able to find any other relevant decisions.

The result is thus that this Court finds in favour of the Respondent's contention that the Common Law rules of succession must apply. The appeal is dismissed with costs.

For Appellant: Messrs. Hemming & Hemming, Umtata.

For Respondent: Messrs. Gush, Muggleston & Heathcote, Umtata.

CASE No. 23.

NTLANGANISO BUHLUNGU vs. HLAMVANA SIGOGO.

UMTATA: 1st June, 1939. Before A. G. McLoughlin, Esq., President, and Messrs. E. F. Owen and R. Wronsky, Members of the Court (Cape and O.F.S. Provinces).

Native Appeal Cases—Practice and procedure—Order VIII, Rule 3 of Proclamation No. 145 of 1923—No evidence taken nor judgment given on counterclaim—Effect of abandonment by Defendant of judgment of absolution from the instance—Clerk of the Court should enter judgment for Plaintiff in terms of his summons—Proceedings on appeal automatically terminated—Application for costs on appeal refused.

Appeal from the Court of Native Commissioner, Tsolo.
(Case No. 213/38.)

McLoughlin, P. (delivering the judgment of the Court):

In the Native Commissioner's Court Plaintiff (now Appellant) sued for the delivery of 47 head of cattle with their increase. Defendant denied liability and counterclaimed for 9 head of cattle or their value.

The Native Commissioner gave judgment of absolution with costs on the claim in convention, and overlooked the counterclaim in respect of which no evidence was taken nor a judgment given.

Plaintiff appealed against the judgment of absolution which he attacked *inter alia* on the ground that it was irregular, not having been given *pari passu* with a judgment on the counterclaim in terms of Order VIII, Rule 3 of the Courts' Proclamation 145 of 1923. He did not raise any question regarding the presence or absence of the judgment on the counterclaim, and that matter is not before the Court.

In a letter dated 29th May, 1939, the Magistrate of the district concerned advised the Registrar of this Court "that the Defendant has abandoned the judgment of absolution from the instance with costs given therein". Today, this 1st day of June, 1939, Appellant's Counsel appears to conduct the appeal in this Court.

He admitted having been notified of the abandonment but contended that he had of necessity to appear to take judgment for costs of appeal, these not having been tendered in the notice of abandonment.

The Court demurred at the proceedings, holding that the appeal had lapsed by reason of the abandonment, which resulted in a judgment having to be entered by the Clerk of the Court for the Plaintiff in terms of his summons in respect of the part abandoned, as directed in Section 76 (3) of Proclamation 145 of 1923, which applies by virtue of Proclamation 299 of 1928, to the exclusion of Section 7 (4) of Government Notice No. 2254 of 1928 (Rules for Native Appeal Courts). Proclamation 145 of 1923 contains an important variation from the parent Act 32 of 1917, with Section 83 of which Section 7 of Government Notice 2254 of 1928 corresponds, in the addition of the words "*with costs to date of abandonment*".

Section 76 (4) of Proclamation 145 of 1923 directs that the "judgment so entered (by the Clerk of the Court) shall have the same effect in all respects as if it had been the



judgment originally pronounced by the Court in the action or matter ”.

This entirely disposes of the submission of Counsel for Appellant that a definite order of the Appeal Court is requisite to enable a bill of costs to be taxed for the appeal costs incurred to the date of abandonment.

In any event this Court would, in the absence of the specific provisions of Proclamation 145 of 1923, have adopted the procedure followed by the Eastern Districts Local Division of the Supreme Court in *Silverstein vs. Davidson* (1923 E.D.L. p. 158) where a similar application was made.

The abandonment and its consequences automatically terminate the proceedings on appeal as it covers the only point attacked on appeal. Nothing further is therefore required from this Court.

The application for an order for costs is refused.

For Appellant: Messrs. Hemming & Hemming, Umtata.

For Respondent: In default.

CASE No. 24.

MAJOR KULATI vs. DJMALISILE TIYO BONKOLO,
 assisted by **LUMSDEN BONKOLO.**

UMTATA: 1st June, 1939. Before A. G. McLoughlin, Esq.,
 President, and Messrs. E. F. Owen and R. Wronsky,
 Members of the Court (Cape and O.F.S. Provinces).

Native Appeal Cases—Return of dowry—Practice and procedure—Special plea in bar—Onus of proving special plea is on Defendant—Case remitted to Native Commissioner to give a decision on the evidence adduced.

Appeal from the Court of Native Commissioner, Cala.
 (Case No. 72/38.)

McLoughlin, P. (delivering the judgment of the Court):

In this case Plaintiff sues for restoration of certain cattle or their value paid by his late brother as dowry for the sister of Defendant, the said brother having died before celebration of the projected marriage.

Defendant objected to the hearing, pleading specially that “owing to the failure of the deceased, Johnson Kulati, to complete and consummate the marriage within a reasonable time, the Plaintiff is now barred from bringing and maintaining this action for the return of the dowry cattle”, and he pleaded over on the merits.

By consent it was decided to defer ruling on the special plea until *all* the evidence had been heard. Evidence was then led by both sides covering the special plea and the main issues. The Native Commissioner ruled at the conclusion that *Plaintiff* had not satisfied him that the deceased was not responsible for the delay in celebrating the union, and that consequently he could give no decision, and accordingly absolved the Defendant from the instance with costs.



The Native Commissioner has clearly erred in placing an onus on the Plaintiff. The onus of proving the special plea is on the Defendant, and if there is any doubt in the matter, it is the Defendant who must suffer, not the Plaintiff. In actual fact the ground relied on by Defendant is invalid, for mere delay in proceeding with the celebration of a projected marriage is not sound reason for depriving the heir of the deceased bridegroom of the cattle paid in advance. The engagement remained in force, as indeed the intended bride and the Defendant himself admits in their evidence and letter. Thus it is very apparent that not only must the special plea fail, but the Defendant must account for the cattle actually paid over.

The Court was prepared to dispose of this aspect summarily, but on the submission of both Counsel, it was decided to remit the case to the Native Commissioner to find on the evidence actually on record what number of cattle had passed, and to ascertain the number due to Plaintiff after allowance for losses accruing to the Plaintiff. An application for the admission of further evidence, made by Appellant's Counsel, was refused.

The judgment of this Court is therefore in the following terms:—

The appeal is upheld with costs, and the Native Commissioner's judgment is altered to one dismissing the special plea. The case is returned to the Native Commissioner to decide from the evidence on record the number of cattle paid as dowry, and to ascertain how many died as a loss to the payer and to give judgment for the return of the balance to the payer.

Costs in the Native Commissioner's Court to abide the issue.

For Appellant: Mr. Quex Hemming, Umtata.

For Respondent: Messrs. Gush, Muggleston & Heathcote, Umtata.

CASE No. 25.

JOHN PIKA vs. NKANYANA KAPASE.

BUTTERWORTH: 5th June, 1939. Before A. G. McLoughlin, Esq., President, and Messrs. K. D. Morgan and A. G. Strachan. Members of the Court (Cape and O.F.S. Provinces).

Native Appeal Cases—Adultery—Presumption of legitimacy—Possibility of approach by husband—Challenge by Defendant to await child's birth for test of resemblance not an admission of intercourse.

Appeal from the Court of Native Commissioner, Mqanduli.
(Case No. 10/39.)

McLoughlin, P. (delivering the judgment of the Court):

In this case Plaintiff sued Defendant for five head of cattle or their value £20, as damages for adultery which he alleged the Defendant committed with his wife, Notumelo, during or about the months of July and August, 1938.



The Native Commissioner gave judgment for Plaintiff, against which Defendant now appeals on the ground that the judgment was against the weight of evidence.

At the outset the Plaintiff in this case is faced with a grave difficulty, in that on the evidence of his witness (his wife), the first intercourse between Defendant and herself took place on the very day she left Plaintiff's kraal. There is thus absolutely no indication in the state of pregnancy of the woman that the husband, himself, did not cause it a day or two or even a week before she left. In addition to this, there remained the possibility of approach between husband and wife during the whole period of her absence at her people's kraal. The presumption of legitimacy operating strongly, as it does, destroys what in Native eyes would be the "nilonze" in the case, viz. the stomach.

Not only this, but Plaintiff's reaction to his discovery of the pregnancy is contrary to custom, for he would not have left the matter untouched at the woman's people's kraal, nor would he attempt to have intercourse with her in her "impurity", if indeed, he knew she was pregnant by another man.

Moreover, the evidence contains discrepancies which are not easily got over, nor have they been satisfactorily explained to this Court.

They all go to show that the case is one, so contrary to custom as to be improbable.

This Court does not attach, as did the Native Commissioner, the significance to the challenge of Defendant to await the child's birth for a test of resemblance, for that is by no means an uncommon practice among Natives. The Defendant in the circumstances had every reason to suspect that the husband himself was responsible for her condition and he nowhere admits having had intercourse with the woman. The Native Commissioner was thus not justified in holding that the challenge was an admission of intercourse.

Accordingly the appeal will be allowed with costs, and the judgment of the Native Commissioner altered to one for Defendant, with costs.

For Appellant: Mr. W. E. Warner, Idutywa.

For Respondent: Mr. F. Mayn Ellis, Idutywa.

CASE No. 26.

GIBSON MKUNQANA and 12 OTHERS vs. SIKOLAKE DUMKE.

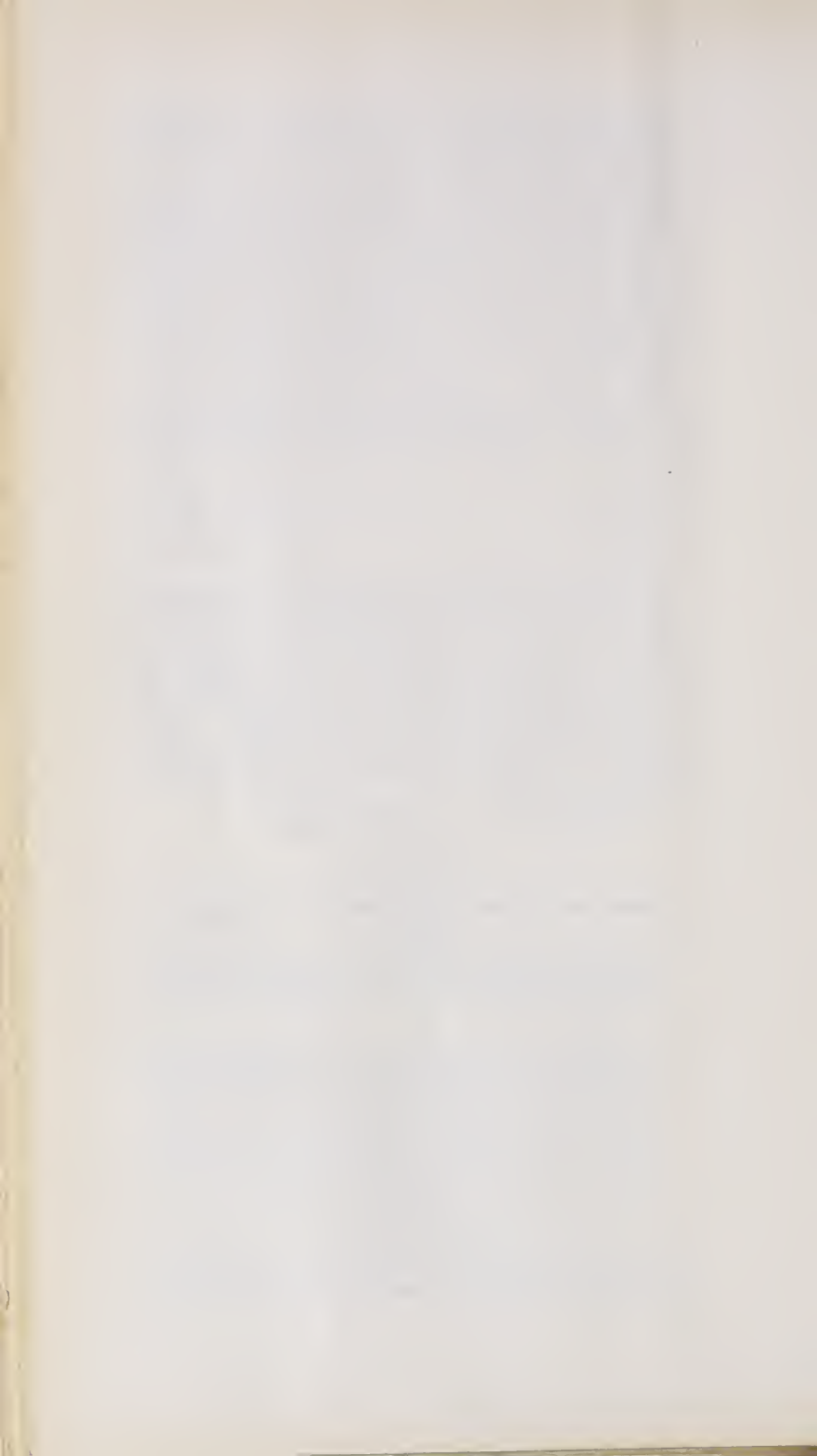
BUTTERWORTH: 6th June, 1939. Before A. G. McLoughlin, Esq., President, and Messrs. J. T. Boast and A. G. Strachan, Members of the Court (Cape and O.F.S. Provinces).

Native Appeal Cases—Application for condonation of late noting of appeal—Delay within control of applicants but argument on merits of appeal allowed, to ascertain whether gross miscarriage of justice—In pure Native Law action for personal injury vests in Chief and not in individual injured—But right of action available to Native under Common Law—Wide discretion allowed trial Court in estimating amount of damages for injuria.

Appeal from the Court of Native Commissioner, Kentani.
(Case No. 195/37.)

McLoughlin, P. (delivering the judgment of the Court):

This is an application for condonation of the late noting of an appeal.



The supporting affidavits allege that the "leader" in the legal proceedings (which are directed against him and twelve others) became ill and was unable to attend to his affairs. Moreover a misunderstanding resulted in miscalculating the period available for noting the appeal. Applicant maintains he had a good cause on the merits of the case.

This Court rejects the explanation given for the delay as it was a matter entirely within the control of the applicants. There were 13 of them and the illness of one cannot be pleaded as extenuating circumstances.

But, applying the principles set out in the case of *Alden Qina vs. Henry Qina* heard at Umtata on the 17th February, 1939, this Court allowed argument to be heard on the merits of the case to ascertain whether there had been a gross miscarriage of justice.

The Appellants seek to attack both the facts and the quantum of the damages awarded, viz., £30 for "trespass, assault and violence committed on the person, dependents and property of the Plaintiff."

The facts briefly are that on the night of the 14th October, 1937, the Plaintiff and his family had retired to sleep when the thirteen Defendants appeared and threatened to burn him out, assaulted him when he came out of the hut, chasing him into some palm scrub where he was stoned and finally driven out when the scrub was set alight by his assailants. Eventually they desisted from attacking him and he returned to the kraal of one Sonamzi, naked and distracted and finally to his own kraal. He received certain injuries in the course of the attack, and, as a direct result apparently of the incident, he has removed from the location, demolishing and abandoning his newly erected huts and his lands there.

The Defendants do not deny the main facts of the incident but they contended that they went to the Plaintiff's kraal where they had reason to believe two witchdoctors were being harboured. They deny that they threatened to burn or to injure the Plaintiff. They allege that when the person emerged from the hut they thought it was one of the witchdoctors whom they desired to arrest and take before the headman and that they chased this man in that belief, absolutely denying that they used sticks, stones, bricks or assegais and they especially deny that they assaulted the Plaintiff.

On the facts there is no question of the truth of the Plaintiff's version that his kraal was invaded, that he was chased, that missiles were thrown at him and that he was burnt out from the patch of scrub in which he sheltered. The evidence of the headman makes this abundantly clear and for reasons which will be discussed more fully at a later stage in this judgment, the evidence of the Defendants themselves leads one to the irresistible conclusion that the probabilities strongly support the facts.

The grounds of appeal attack the Native Commissioner's judgment as being vague in as much as he has made no mention nor has he disclosed for what the amount of damages was awarded and thus he erred. They especially dispute that the damages could cover the cost of the removal of the Plaintiff's kraal and they allege that the damages in any case are excessive there being no evidence established of any damage suffered by the Plaintiff as a result of the Defendants' action except possible nominal damage through slight injuries received by the Plaintiff during his flight and then finally that there is no evidence to support the finding of the Native Commissioner.

In regard to the last item, there is ample evidence to support the Native Commissioner's finding and nothing further need be said on this point.

The question of damages dealt with in the first three items can conveniently be discussed as a whole.

In pure Native Law, no action lies at the suit of an individual who has been injured in his person for the action is one which can be instituted only by the Chief of the injured person, it being a case of blood; but this Court, and, for that matter, other Courts in the Union administering Native Law, has conceded a right of action to an injured person in his own right. The matter has not been raised on appeal and it can thus be dismissed without further remark beyond stating that in conceding such right of action, the Court must of necessity regard the Common Law, rather than Native Law, as its basis.

Voet in 4§.10.1 defines injury as "a wrongful act committed in contempt of a free man by another who thereby with evil intention impairs either his person, his dignity or his reputation" (M. de Villiers' translation, Law of Injuries, p. 17) that "the rights here referred to (i.e. the possession of an unimpaired person, dignity and reputation) are absolute and primordial rights; they are not created by, nor dependent for their being upon, any contract; every person is bound to respect them; and they are capable of being enforced by external compulsion. Every person has an inborn right to the tranquil enjoyment of his peace of mind, secure against aggression upon his person, against the impairment of that character for moral and social worth to which he may rightly lay claim and of that respect and esteem of his fellow-men of which he is deserving and against degrading and humiliating treatment; and there is a corresponding obligation incumbent on all others to refrain from assailing that to which he has such right. The Law recognises the absolute character of this right, so far as it is well founded and has not been lost or forfeited in the eye of the Law itself and it takes this right under its protection against aggression by others. This it does by allowing a claim for reparation at the instance of the injured person in an action of injury (*actio injuriarum*) as against any person who has made himself intentionally guilty of such aggression and, if needs be, by other modes of external compulsion. It must be clearly understood, and it will be more fully explained later on that in an action of injury such as we have to do with in the present title compensation is sought not for patrimonial or material loss, that is to say, loss to or in respect of property, business or prospective gains caused to one person through the act of another. The interests that are impaired by an injury are purely ethical; and the reparation claimed in the action is on account of that pain of mind which is naturally felt by any one who has been the object of vexatious personal aggression on the part of another or who has been humiliated by becoming the object of that feeling of repulsion which is naturally entertained by others towards a person who bears an evil reputation or is otherwise obnoxious, or of that disrespect which is evidenced by exposing another to contempt, ridicule, dislike, disfavour or disesteem, or, in general, of any forms of aggression of which mention has previously been made" (*ibid.* pp. 24, 25.)

In this case, on their own showing, the Defendants, acting jointly, proceeded at night time to the kraal of the Plaintiff (Respondent). Their admitted objective was the "invasion" of the kraal to capture or expel certain two witchdoctors, whom they allege the Plaintiff employed to injure the Defendants by supernatural means.

These men had committed no crime or offence for which they could be arrested without warrant by the Defendants and it is admitted that they acted without consultation with or knowledge of the headman of the location or of the nearby sub-headman.



Their objective was thus illegal. One at least of the Defendants knew beforehand that the witchdoctors were not at that kraal, a fact now clearly established by the evidence. There is absolutely no proof that the Plaintiff did employ or intended to employ them against the Defendants.

There is the probability that the Defendants' version is false and that the real objective was the actual assault on the Plaintiff and his ultimate expulsion from the locality, but accepting the Defendants' version, they acted illegally and it avails them nothing to shield themselves behind the plea that they acted in mistake of the facts that it was the Plaintiff and not one of the alleged witchdoctors that they assaulted.

It is no defence to a deliberate act of unwarranted invasion of another's property and assault on him to plead that the Defendants *bona fide* and reasonably believed that they had a right to interfere if, in fact, no such right existed. "*Ignorantia juris neminem excusat.*" See M. de Villiers at p. 195, "*Maleficia distinguit affectus non eventus*". The intention of the mind with which an act is done and not the mere result of the act determines the character of the act. See the case of William Matsomotso vs. Simon Mqubuli 1938 N.A.C. (T. & N.) page 103 at page 108.

The mistake here is not merely whether the person assaulted was the Plaintiff or a witchdoctor, but the mistaken idea that the Defendants had a right to assault anyone in the circumstances, or otherwise to act as they did.

I am, however, of the opinion that this defence is an impudent prevarication. It is clear from the evidence of Sonamzi that one of the Defendants knew the doctors had not gone to the Plaintiff's kraal. They admittedly did not act in good faith, as they failed to approach the native officials, who were at hand.

It is admitted that there was animosity between the principal Defendant and the Plaintiff over the premature withdrawal of his sons from the kweta hut, which gave rise to an action then pending in the Headman's Court. It is an unjustified assumption on the part of that Defendant to suspect that the Plaintiff was employing the witchdoctors to harm him. What occasion was there for the aggression other than the admitted animosity avowed by the Defendants: "I was angry" (when he took away his boys from the kweta hut) "he had no right to take them away" (page 25). "They were too excited. I was excited too" (See evidence of Gibson on page 22). He continues: "I did not go inside the hut to search for Nhlonzi because I feared the other Defendants would kill the man they chased into the bush".

No one troubled to find out if the second witchdoctor was in the kraal.

I am of the opinion therefore, that the offensive was deliberately aimed against the Plaintiff.

In these Territories, Law and Order is stabilised and any man who has cause for complaint has at hand a ready remedy either by way of Police protection or by recourse to the Courts.

As indicated in the opening extract from M. de Villiers' learned work, this Court must speak in no uncertain voice in protecting and upholding the rights of Natives in their persons and property. The remarks of Innes, J. A., in



Whittaker *vs.* Roos and Bateman, 1912, A.D. at page 125, are apposite:

“A deliberate aggression upon personal dignity and personal liberty is not a trivial matter. The interference with the Plaintiff's rights in the present instance was productive of much hardship and indignity; and the cumulative effect of the experience which they were wrongly compelled to undergo, must have been keenly felt.”

The Code especially safeguards the sanctity of kraal privacy to the extent of using force adequate to the occasion and had the Plaintiff in the circumstances injured anyone of the invaders, he would have been held blameless. In contrast then, the act of the Defendants cannot but be stigmatised as one meriting the grave displeasure of any Court. Nor can it be minimised in the light of the absence of serious physical injury to the Plaintiff. The injury is the mental disturbance which, as Sonamzi testified, was extreme.

If, as it would further appear, the direct result of the affair was the abandonment of his kraal and rights, then the extent of the injury is magnified. No other intervening cause for this latter action has been disclosed and it is a fair conclusion to draw from the evidence that the act of the Defendants was the direct cause.

Even without this further aggravation of the injury the harm done to the “person, dignity and reputation” of the Plaintiff (as defined in the opening remarks in this judgment) is so grave that it constituted *injuria*, which can be classed as “Atrox” and the damages awarded are not so disproportionate that this Court will interfere. Indeed the Court must recognize the principles set out by the Appellate Division in *Salzmann vs. Homes* (1934 A.D. at page 480). “The wide discretion allowed to a trial judge in this regard (i.e. in estimating the amount of damages) will not be lightly interfered with on appeal. But if the amount awarded is palpably excessive, and is clearly disproportionate to the circumstances of the case, then the Court will not hesitate to cut it down. As already pointed out the judge is entitled by our law to take into account all the circumstances of the case.”

That the Native Commissioner has done. It was not necessary for the Native Commissioner to detail the amounts awarded in the action for *injuria* for he has not included any patrimonial loss in the award.

He clearly says in his reasons for judgment that the removal of the Plaintiff from the location was an indication of the effect produced by the act of aggression of the Defendants “thus becoming a factor for consideration in the assessment of the amounts of general damages suffered by the Plaintiff”.

In this view he is perfectly correct for the consequences of an act of aggression are indeed merely aggravating circumstances which the Court may take into consideration in assessing the extent of the mental disturbance caused thereby. He has dealt with the case as an *injuria* and he has awarded damages which, exclusive of patrimonial loss, are not “palpably excessive”.

In the circumstances, the applicant has failed to disclose any ground for interfering with the Native Commissioner's judgment.

The application is refused with costs.

For Appellants: Mr. F. J. Swan, Kentani.

For Respondent: Mr. H. Neethling, Kentani.

SDELO MRWITSHI vs. NJINANA MADUBELA.

BUTTERWORTH: 6th June, 1939. Before A. G. McLoughlin, Esq., President, and Messrs. J. T. Boast and K. D. Morgan, Members of the Court (Cape and O.F.S. Provinces).

Native Appeal Cases—Adultery—In the absence of a catch onus is on husband to prove that he could not physically have been the author of his wife's condition—Such proof must be satisfactory and conclusive—Contrary to custom to commit adultery in presence of children—Blanket discarded by newly circumcised man may be given to sister or other near relative, or to "metssha".

Appeal from the Court of Native Commissioner, Tsomo.

(Case No. 3/39.)

McLoughlin, P. (delivering the judgment of the Court):

The Plaintiff's case is beset with difficulties which in my opinion he has not overcome.

To establish adultery in this type of case, Plaintiff must prove that he could not possibly have been the cause of his wife's pregnancy himself, for until he does so, the presumption operates in favour of legitimacy. In the absence of a catch in the act, when some token is taken to identify the adulteror, Native law accepts the stomach as "ntlonze". But Native law, like ours, holds the husband answerable for the stomach till he proves that he could not physically have been the author of his wife's condition.

There must be clear proof. In this Plaintiff has very greatly weakened his case by his own remark "I left no one in charge of my kraal when I went to work as I was not far away". This is most significant. He was in an adjoining district, and he has certainly not established conclusive proof that it was physically impossible for him to be the father of the second child.

It is well here to recall the legal position herein as set out briefly by Scoble on page 23, "Such evidence (i.e. proof to rebut legitimacy) must be satisfactory and conclusive and must not depend upon a mere balance of probabilities", *Lonw vs. Lonw*, 1933, C.P.D. 407; *Fitzgerald vs. Green*, 1911, E.D.L. 433. etc. Native law is equally exacting in its requirements.

On this unstable foundation Plaintiff has built an equally unstable structure. His main basis of action in the original case was the possession by his wife of Defendant's blanket. This was supplemented by his daughter's evidence. His wife was then hostile, and did not give evidence. In the present case she has given evidence for her husband to spite the Defendant.

Now the evidential value of the blanket in the circumstances is slight. The woman is related to Defendant's mother. There is nothing contrary to custom in her receiving the blanket. Indeed the manner in which she got it was so open as to preclude any suspicion of illicit intimacy between Defendant and herself.

The Native assessors confirm the contention that the blanket can be given to a near relative as in this case, for the relationship precludes immorality, and its possession therefore is no criterion of guilt.

It is evident from the Plaintiff's evidence that although his wife evaded his enquiry by saying a "doctor" was responsible for her condition, she frankly disclosed the source of the blanket as being a gift from Defendant.

The probability in favour of innocence is heightened by the contradictory and improbable account of the actual intercourse.

Firstly it is contrary to custom to commit adultery in the presence of children. See the remarks of the Native assessors in the case of Pampam Dlula *vs.* Gunyati heard at King-williamstown on the 3rd April, 1939, which the assessors have corroborated in this case—"While cases may occur where an adulterer will sleep with his paramour in the presence of children, it is unusual for him to do so as the children may go out and spread the news about the kraal".

The story is itself open to objection that the wife says the children did not see them in the act (i.e. they were asleep when the intercourse took place) whereas the girl says her mother and Defendant went to bed together before she fell asleep. They shared a mat but not their blankets. The story becomes more improbable when the relationship of the parties is considered. Moreover, there is no word of any go-between or of previous meetings. The whole version is too blatantly improbable to be credible. How the woman reconciles her statement, on which the Native Commissioner relies, that Defendant had broken his promise to look after her if she kept their intimacy secret, with the publicity she testified to, is a mystery.

The Plaintiff has failed in his action and judgment must be given against him. He has already had an absolute and in the circumstances no good purpose will be served by keeping the case open longer.

The appeal is accordingly allowed with costs, and the judgment of the Native Commissioner is altered to one for Defendant, with costs.

OPINIONS OF NATIVE ASSESSORS.

On the question of discarded blanket of a young newly circumcised man.

The blanket is left when the young man goes to work. It can be given to a sister or to a relative such as a sister's child.

Per Headman Soya Stata.—In the circumstances of this case there can be no immorality between a sister and the young man.

All Agree.—All agree that a young man may leave the blanket with a metsha, i.e. an unmarried girl. It is not a "metsha" if he has intercourse with a married woman.

The blanket is not given to a married woman with whom he is having immoral relations.

Per J. Z. Makongolo.—I think it does occur that an adulterer can sleep with the paramour in the presence of children, but it is not usual for him to do so in the hut where the children are sleeping for the children might go out and spread the news about the kraal.

For Appellant: Mr. S. Mahoud, Butterworth.

For Respondent: Mr. L. D. Dold, Tsomo.

CASE No. 28.

NGXAKENI MNCEDI vs. NOQUZANA XELO.

BUTTERWORTH: 7th June, 1939. Before A. G. McLoughlin, Esq., President, and Messrs. K. D. Morgan and A. G. Strachan, Members of the Court (Cape and O.F.S. Provinces).

Native Appeal Cases—Three forms of action for recovery of property, vindicatory, possessory and spoliatory—Vindicatory action available to true owner illegally deprived of possession—Possessory action available to any person with legal right of possession—Spoliatory remedy is based on forcible, fraudulent or clandestine deprivation of possession of property.

Appeal from the Court of Native Commissioner, Idutywa.
(Case No. 302/38.)

McLoughlin, P. (delivering the judgment of the Court):

In the Native Commissioner's Court Plaintiff sued Defendant for delivery to him of certain 11 head of cattle or to pay him their value, alleging in his particulars of claim "That the Defendant has wrongfully and unlawfully possessed himself of the said cattle the property of the Plaintiff which he unjustly detains and refuses to restore to the Plaintiff".

Defendant resisted the action pleading ownership in himself of 10 head and in a third party in regard to the 11th beast. Defendant counterclaimed for certain other stock in Plaintiff's possession but beyond the reaction of certain pieces of evidence herein on Plaintiff's credibility this part of the case falls away there being no appeal against the decision.

The Native Commissioner gave judgment for Plaintiff for cattle 6 and 7 and absolved Defendant in regard to the balance.

Against this judgment Plaintiff now appeals on the following grounds:—

- "(1) That the Court erred in refusing to allow the amendment applied for as the Defendant would not have been prejudiced thereby more especially as it was within the power of the Court to grant a postponement at the expense of the Plaintiff.
- (2) That the Court should have allowed the amendment and on such amended summons, the Court should have given judgment for the Plaintiff for the cattle known as Nos. 3, 8, 9 and 10, as the evidence disclosed the fact that the said cattle were taken from the lawful and peaceful possession and control of the Plaintiff.
- (3) That the judgment of absolution regarding the cattle known as Nos. 1, 2, 4 and 5 was against the weight of evidence."

During the trial Plaintiff had made application for leave to amend his summons by inserting after the words "the property" the words "or in his lawful possession and under his control". The application was opposed and refused.

To appreciate fully the issues in this appeal it is essential to review the legal bearings of the case.

There are nowadays available three forms of action for the recovery of property: the vindicatory, the possessory and the spoliatory.

The first action is the *rei vindicatio*, available to the true owner who has been deprived illegally of this possession, which he seeks to recover from the present detainer, or damages from such detainer who has fraudulently disposed of it.

In order to sue by this action i.e. *rei vindicatio* the Plaintiff must at the time of the action, have a right of ownership actually vested in him. . . . The main question in such a suit is the proof of the Plaintiff's title; Voet 6.1.4.

In an action *rei vindicatio* a claimant must prove ownership; and proof of prior bare possession is not sufficient. (Judelman vs. Colonial Government 18 CTR 1019.)

Those who have never attained the full ownership of a thing have no right to vindicate the same, whether the ownership is to be acquired for themselves or in a representative capacity. Voet 6.1.20.

If proof of ownership is not given Plaintiff cannot succeed. Ownership is proved by showing that Plaintiff is the lawful possessor of the property, and by proving the cause or title by virtue whereof the dominium passed to him.

Voet 6.1.24.

See Nathan Section 593.

The possessory action is the old *Actio Publiciana* in its modern modified form, which is available to any person who has a legal right of possession on just grounds, although he may not be vested with full ownership. The possession must be juristic, i.e. it must be detention of a thing with the intention of holding it for oneself, and not merely the bare detention of a thing in the name of another. Kemp vs. Roper 2 A.C. 143 and Voet 43.16.3.

The remedy is intended to protect those persons who would otherwise have become full owners of the property but for some flaw or defect in the proceedings. By a fiction of law such persons are regarded as being owners and are allowed the action on equitable grounds.

The action lies against any possessor, whether *bona fide* or *mala fide*, who holds by an inferior title to that of the Plaintiff, or who has relinquished his possession by fraudulent means, or has joined in the action as if he were in possession. If, however, a possessor holds the subject of the action by a title which is not inferior, but equal to, that of the Plaintiff, the Plaintiff will not succeed in recovering possession, in accordance with the maxim *in pari causa melior est conditio possidentis*.

Voet 6.2.6-8. Nathan Sections 609, 610.

The spoliatory remedy is based on the forcible, fraudulent or clandestine removal and deprivation of the property of a person who hitherto has had free and undisturbed possession. (See however *Mcotama vs. Ncume* 10 J 207 where it was held that violence is not necessary to constitute spoliation.) The proceedings may be by way of action or by application or interdict but in either event the claimant need not set out his title to the property beyond the fact of possession for the maxim *Spoliatus ante omnia restituendus est* applies Voet 43.17. 6 and 7. See Nathan 652. *Maasdorp* 11 Edn. V p. 11.

Two cases are of interest in considering the effect of these principles.

In *Ncume vs. Kula* 19 E.D.C. 338 it was held that a Defendant is entitled in a vindicatory action to succeed, if

he can show that the ownership of the property claimed resides in some other person than the Plaintiff, although such defence would not avail him in a possessory action.

In an earlier case *Kemp vs. Roper* 2 Buch A.C. 141 de Villiers C.J. remarked "The doctrine that bare physical possession is a good title against a wrong doer would only apply in the so called possessory suits and not in an action for the vindication of an article. Nor would the doctrine apply even in possessory suits unless the wrong doing amounts to what is termed spoliation. If the Defendant, having lawfully acquired physical possession of the article, detains it *bona fide* in the assertion of a legal right, the bare previous possession of the Plaintiff would not be enough, there must have been actual retention of the thing with the object of keeping it for oneself".

Some confusion of thought has resulted from the reliance placed by Appellant's Counsel on the decision in *Geldenhuy's vs. Keller* 1912 C.P.D. 623 where an agistor was allowed to recover stock spoliated from his care. The decision in that case appears to be based on rights of a bailee in English law, where mere physical control gives legal possession, unless the apparent possessor holds only as agent or servant of another. (Morice English and Roman Dutch law p. 70.)

Roman and Roman Dutch law is more exacting, requiring in addition to mere detention an intention to hold in ones own right—an *animus domini*. (See Savigny Possession Section 9; Holland Jurisprudence 10th Edn. pp. 188 to 195). Roman Law extended to certain holders lacking the *animus domini* a derivative "possession" entitling them to the same rights as a "possessor" in the full legal sense. They included an "emphyteuta", a pledge holder, the "precario tenens" and the "sequester" (i.e. stake holder).

Moreover certain remedies, including *actio furti*, were conferred upon persons having only "possessio naturalis" because of some interest beyond that of bare possession. See Savigny Section 42 also Morice p. 72. The exact basis and nature of the exceptions is a matter of controversy among modern writers, as it has been through the ages, and it will not assist in solving our case to attempt to summarise the different views [See Sohm Institutes (Ledlies' translation 3rd Edn. Sec. 67) and the other authorities above-quoted].

It suffices to show that even in *Geldenhuy's* case the Court required the element of responsibility as the basis of the action and excluded that possession which entailed no liability for loss: moreover the whole cause of action arose from a "spoliation" when admittedly nothing more than bare detention need be shown. It is significant, to revert to the remarks of de Villiers, C. J., above quoted, in *Roper's* case, that full juristic possession is necessary except in the spoliatory action.

Both English and Roman Law exclude the agent or servant from the term "possessor" and the right to recover even by interdiction unless specially empowered to do so, and that, be it noted, in the principal's name.

Nathan Sec. 650 Morice (above quoted). *Maasdorp* 11 4th Edn. p. 29 relying on Voet 43.16.3.

See also Nathan Sec. 568 relying on *Stewart vs. De Mayar* 2 E.D.C. 220 and Voet 42.2.8.

Coming to the present case, we find that the first group of cattle, viz., Nos. 3, 8, 9 and 10, admittedly are cattle which do not belong to Plaintiff and by law, on the authorities above quoted, he has no cause of action to vindicate them as owner, nor can he succeed, suing in his own right or name, in a possessory action.

He clearly has not alleged spoliation, nor, indeed does he rely on that cause of action.

His possession in a possessory action is untenable for other reasons which follow in discussion of the second group of cattle.

Regarding this group comprising cattle Nos. 1, 2, 4 and 5 Plaintiff (Appellant) contends on appeal that he has proved satisfactorily that he is the owner of these cattle, and the judgment should have been in his favour on this basis.

He maintains alternatively that if he were allowed the amendment sought, he should in any case be restored his possession of these cattle.

The Court, after hearing very full argument and after a subsequent very careful comparison and analysis of the evidence comes to the conclusion that the Native Commissioner has correctly decided to absolve the Defendant in respect of the 2nd group of cattle.

In regard to the one beast, No. 2, which the Defendant admits was originally the property of the Plaintiff, but which he contends was subsequently contributed for dowry purposes, this Court finds that the objection that such replacement must await the receipt of dowry for the 1st daughter of the marriage is invalid.

Therefore there is no improbability in the version of the Defendant.

The onus in this matter ultimately rests on the Plaintiff, for he admits that the beast is registered in the Defendant's name, and though this fact is not conclusive proof in itself of Defendant's ownership, it is nevertheless confirmation of his version, which Plaintiff must rebut.

In the other instances of cattle in this group, the onus is on the Plaintiff and the same condition applies that these cattle being registered in the Defendant's name, confirms his (Defendant's) version.

Indeed in regard to the cattle 4 and 5 he is further strengthened by the seller himself. Therefore we hold that he must fail in a claim based on ownership.

Coming to the alternative we find the admitted position in this case to be that the Defendant is in physical possession of the cattle and that they are registered in his name.

He accounts for this position by saying that these cattle had been kept at a kraal jointly occupied by the parties in the initial stages. That subsequently movement took place from this kraal on the establishment by him of his own kraal and that he took the cattle to that kraal legitimately.

There is considerable vagueness on this question of the occupation of the kraals and of their separation, but whatever the real sequence of events may have been, the Plaintiff gives an explanation which this Court must hold him to be bound by. He states that "the cattle were in my possession last year but dipped in the name of the Defendant" and he immediately qualifies this statement in the cross-examination following "I had debts and took the cattle and hid them and went to go and work off these debts. By having the cattle registered in Defendant's name I was doing so to hide the cattle away from creditors."

It is obvious that to "hide" the cattle successfully, it does not suffice merely to register them in this manner but that they should also be at the kraal occupied by the person in whose name they are registered.

This alone would account for the Defendant's possession of the cattle. They are therefore on the Plaintiff's own showing in Defendant's possession with the knowledge and consent of the Plaintiff, and there can be no question of the Defendant wrongfully and unlawfully dispossessing Plaintiff of this stock by any subsequent action.

We are therefore not to view this matter from the angle presented by the Plaintiff that he has been disturbed in his possession of this stock i.e. such possession as would entitle him in law either on the authorities hitherto accepted as final, or under the modification of the decision in Geldenhuys' case (*Geldenhuys vs. Keller* 1912. C.P.D. 622) for in either event he cannot maintain that he was the last legal possessor or holder of the stock, or that this can form the basis of his action. He lacks that element of detention in possession, whether juristic or natural or derivative as postulated in Geldenhuys' case of a responsibility for restoration, for he had, be it repeated, divested himself of that element in favour of the Defendant.

His motives for doing so, if his version be accepted, lays him open to attack from another angle, for an act done in fraud of creditors is *turpis causa*, and he can be met with the *par delictum* defence.

It is unnecessary however to press the argument thus far, for it is clear that he cannot succeed as a possessor in the circumstances of this case.

He has failed in the action based on ownership and he cannot succeed on the alternative action even were the amendment granted, for he is not relying on spoliation.

The appeal thus fails on all grounds.

For Appellant: Mr. W. E. Warner, Idutywa.

For Respondent: Mr. F. Mayn Ellis, Idutywa.

CASE No. 29.

NTLWATI MKENAZO vs. DWAYI DUMALISILE.

BUTTERWORTH: 9th June, 1939. Before A. G. McLoughlin, Esq., President, and Messrs. K. D. Morgan and A. G. Strachan, Members of the Court (Cape and O.F.S. Provinces).

Native Appeal Cases—Negotiorum gestio—Purchase of mealies on credit for widow—Gestor entitled to recover minimum credit cost on short terms—Head of family obliged by custom to support individuals comprising family unit.

Appeal from the Court of Native Commissioner,
Willowvale.

(Case No. 239/38.)

Morgan, Member (delivering the judgment of the Court):

The claim in this case was for reimbursement of expenses amounting to £14, 2s. 5d. which the Plaintiff claims he had incurred as a matter of urgent necessity in the administration of the Defendant's affairs whilst the latter was absent from his kraal.

Judgment was entered for the Plaintiff, Dwayi Dumalisile, as prayed with costs, and against this judgment an appeal has been noted by Defendant, Ntlwati Mkenazo.

The facts are as stated in the summons, which reads as follows:—

"(1) Defendant is the eldest son and heir of his father, the late Mkenazo Dumalisile, and has inherited his said father's estate.

- (2) As heir of his late father Defendant is responsible under Native Law for the proper maintenance of his mother Nonile (or Nonayili) who resides at the kraal of the late Mkeuzo together with the Defendant and his family.
- (3) On or about 1st February, 1937, at the request of the said Nonile, at a time when mealies were scarce and during the Defendant's absence at work, the Plaintiff acted as surety for the said Nonile at the store of J. Lindemann of Bojeni to enable her to obtain three bags of mealies. Three bags of mealies were duly supplied and delivered to the said Nonile at the Defendant's kraal and were used for the maintenance of Nonile and the Defendant's family, the purchase price thereof payable to J. Lindemann being the sum of £6 if paid after the expiry of six months from the date of sale.
- (4) The purchase price was not paid by Nonile and summons was issued in this Court on the 30th August last against the said Nonile and the Plaintiff as surety and co-principal debtor (Case No. 185/1938). The claim was contested by the said Nonile but judgment was given against both Defendants as prayed with costs. Warrant of execution was issued and Nonile failing, Plaintiff was obliged to pay the amount of judgment debt and costs including costs of execution, a total sum of £14. 2s. 5d. to avoid attachment of his own property. By reason of his responsibility as aforesaid the Defendant is liable under Native Law for payment of the aforesaid amount to reimburse the Plaintiff.
- (5) The Defendant now unlawfully refuses to reimburse to Plaintiff the said amount.

Wherefore Plaintiff prays that Defendant be adjudged to pay Plaintiff the said sum of £14. 2s. 5d. with costs of suit."

The Defendant's plea was as follows:—

- "(1) That Defendant admits paragraphs 1 and 2 of Plaintiff's summons and states that he has at all times rendered necessary and adequate support to his mother the said Nonile.
- (2) That Defendant admits that Plaintiff purchased three bags of mealies as alleged in paragraph 3 of Plaintiff's summons but denies that the said bags were delivered to the kraal of Defendant, or that they were necessary for the support of the said Nonile or Defendant's family, or that it was necessary to purchase same on credit at the increased price thereby involved.
- (3) That Defendant admits paragraph 4 of Plaintiff's summons but denies that he is responsible for the costs incurred and puts Plaintiff to the proof thereof.
- (4) That Defendant specifically denies that Plaintiff or the said Nonile, were at any time authorised either by agreement or by law, to pledge Defendant's credit, and Defendant further denies that the said Nonile was at any time compelled by necessity to obtain credit on her own behalf for food or otherwise.

Wherefore Defendant prays that Plaintiff's summons may be dismissed with costs."

It is common cause that Defendant is the heir of his late father and is head of the kraal, and that his widowed mother, Nonayile, resides at that kraal; and that she is entitled to support from the estate to which he is heir.

The grounds of appeal relied upon by Defendant are, firstly, that at the date of purchase of the mealies at the store of J. Lindemann Nonayile was actually in possession of sufficient means of support; secondly, that if the Court finds otherwise, the Plaintiff was negligent as a negotiorum gestor in not exercising that degree of diligence which was expected of him as such, in that he allowed judgment to be taken against Nonayile and himself by J. Lindemann instead of saving these unnecessary costs.

It is contended by the Defendant that the utmost Plaintiff is entitled to recover is the minimum purchase price of the mealies.

Nonayile in giving evidence in the case of J. Lindemann *vs.* herself and Plaintiff, stated "I spoke to Dwayi and asked him for some food, saying, my children were hungry".

It is fitting to remark here that this action by J. Lindemann was contested by Nonayile and not by her co-principal debtor, Dwayi, who, notwithstanding his liability as co-principal debtor and co-principal Defendant in the action, has made no effort to settle the debt.

Moreover there is nothing on record, either in the first or the present case, to show that he took any steps to inform his principal of the transaction. Nor does he appear to have taken any steps to force his principal to meet this obligation or to do so himself within the six months during which the minimum liability operated.

The Court is satisfied on the evidence disclosed that justification existed for the step taken by Dwayi as a negotiorum gestor.

On the first ground the appeal must therefore fail.

In dealing with the second ground of appeal, we view the case in the light of a negotiorum gestio. The authorities indicate that the gestor is bound to use the utmost diligence in conducting the affair undertaken by him and to safeguard scrupulously the interests of his principal. Having incurred the debt in the place of his principal, it was his duty, immediately, to have the debt discharged most advantageously for his absent principal. In this instance both as a matter of normal practice under Native Custom and by the precedent established in the case of the transaction at Matthews' store he should have notified the Appellant by post of the debt and required its adjustment.

Failing response from his principal, he is bound himself to meet that debt to avoid non-beneficial expense to his principal.

So far from giving effect to these requirements and acting in good faith in the interests of the absent principal, he has allowed the matter to reach the stage of an action directed against himself as co-principal debtor, in which action he actually gives evidence for the Plaintiff, showing, if anything, an utter lack of good faith.

His principal is bound by the minimum liability incurrable in the circumstances, viz., the minimum price for a credit sale on short terms, for we feel that the gestor is entitled to claim an opportunity to notify his principal in order to protect himself from unnecessary risk of ultimate personal liability for the debt.

The appeal is allowed with costs and the judgment of the Native Commissioner is altered to read: "for Plaintiff for £4. 10s. with costs".

Supplementary judgment by the President :

I desire to set out more particularly the legal aspect of our judgment to avoid misunderstanding of the principles underlying the judgment.

The facts are set out by my brother Morgau and need not be repeated beyond stressing the point that at the time of the event the progenitor of the family was still alive—Dumalisile—and that in Native Law he would be regarded as the focal point of the units, as the general manager of its affairs, as it were, and under obligation by Custom to support the individuals comprising the unit with reciprocal obligation on their part to contribute to the common exchequer. Our Common Law conception of individualism finds little or no place in the Native system of law and this case clearly illustrates the evils resulting from an attempt to combine the two systems.

It is with the utmost reluctance that I concede any right of action whatever to the Plaintiff in this case for it is apparent that the whole affair has been used as a retaliatory measure against the Defendant on account of his unreasonable challenge of the Plaintiff's status.

In Native Custom the head of the family, i.e. Dumalisile, for whom Plaintiff deputed, would have dealt with the situation in the manner most economical and advantageous to the interests of the family and necessarily to those of the hut or house concerned. There would in no circumstances have been a transaction in the name of the woman—a widow in one of the houses of the family. That is an anomaly, and it must be clearly understood that in Native Law the transaction cannot bind either the house or the heir of the house to which the woman belongs, without ratification by the head, tacit or express.

The Common Law rules of the supply of necessaries to a wife do not apply for Native Law makes provision for such eventualities and that Law must be observed by a woman in need.

I distinguish the present case entirely on the pleadings and the circumstances.

After admitting his status and responsibility for maintenance of the woman Nonayile, his mother, the Defendant pleads "Defendant admits that Plaintiff purchased three bags of mealies as alleged in paragraph 3 of Plaintiff's summons, but denies that the said bags were delivered to the kraal of Defendant". He adds however "or that they were necessary for the support of the said Nonayile or Defendant's family, or that it was necessary to purchase same on credit at the increased price thereby involved".

If it be remembered that in Lindemann's case the dispute centred on a total denial of the transaction there, and that now that transaction is admitted and it is sought to escape liability on subsidiary grounds, the effect of the plea becomes apparent.

The subsidiary grounds are refuted by the evidence of Nonayile herself, viz., that she needed mealies and that she approached Plaintiff for them.

It is true that by Custom Plaintiff should have helped with mealies from the family store if any were available, but he maintains he had none. He evades the fact of the existence of mealies at Dumalisile's kraal but, on the other hand Defendant has not established proof that there were mealies at that kraal available to feed Nonayile.

Thus I am forced to the conclusion that Plaintiff acted in the best interests of the Defendant in the circumstances and that Defendant must recompense Plaintiff, as indeed he

did on a previous occasion. It matters little that that was a cash transaction, he availed himself of Plaintiff's offices as indeed he did in the present case.

It remains then to discuss the extent of Defendant's liability. That depends entirely on the law applicable to a *negotiorum gestor*, for Native Law has nothing exactly similar and we are forced to draw on the Common Law principles for solution of the problem.

As indicated, I accept the position to be as follows:—

- (a) That there was urgent necessity;
- (b) that a credit purchase on the shortest terms was justified;
- (c) that it was useful beneficial expenditure for the principal.

But on the authorities, the Plaintiff is entitled to claim only what he ought to have expended. Wessels on Contract Sec. 3614 quoting Digest 3, 5, 24/25.

Dealing with this aspect, Wessels says in Sec. 3620: "In order to determine whether the expenditure was necessary or useful, we must place ourselves in the position of the *negotiorum gestor* at the moment when he incurred the expenses. If the expenditure was justified at that moment it can be recovered even though later events have rendered it useless to the dominus.

But if the gestor pays a creditor of a dominus more than is in fact due to him the *actio contraria* (for reimbursement) will not lie for the difference; nor will it lie if a debt is paid which it was not to the interest of the *dominus* to pay. Wessels *ibid* Sec. 3616 and authorities there quoted.

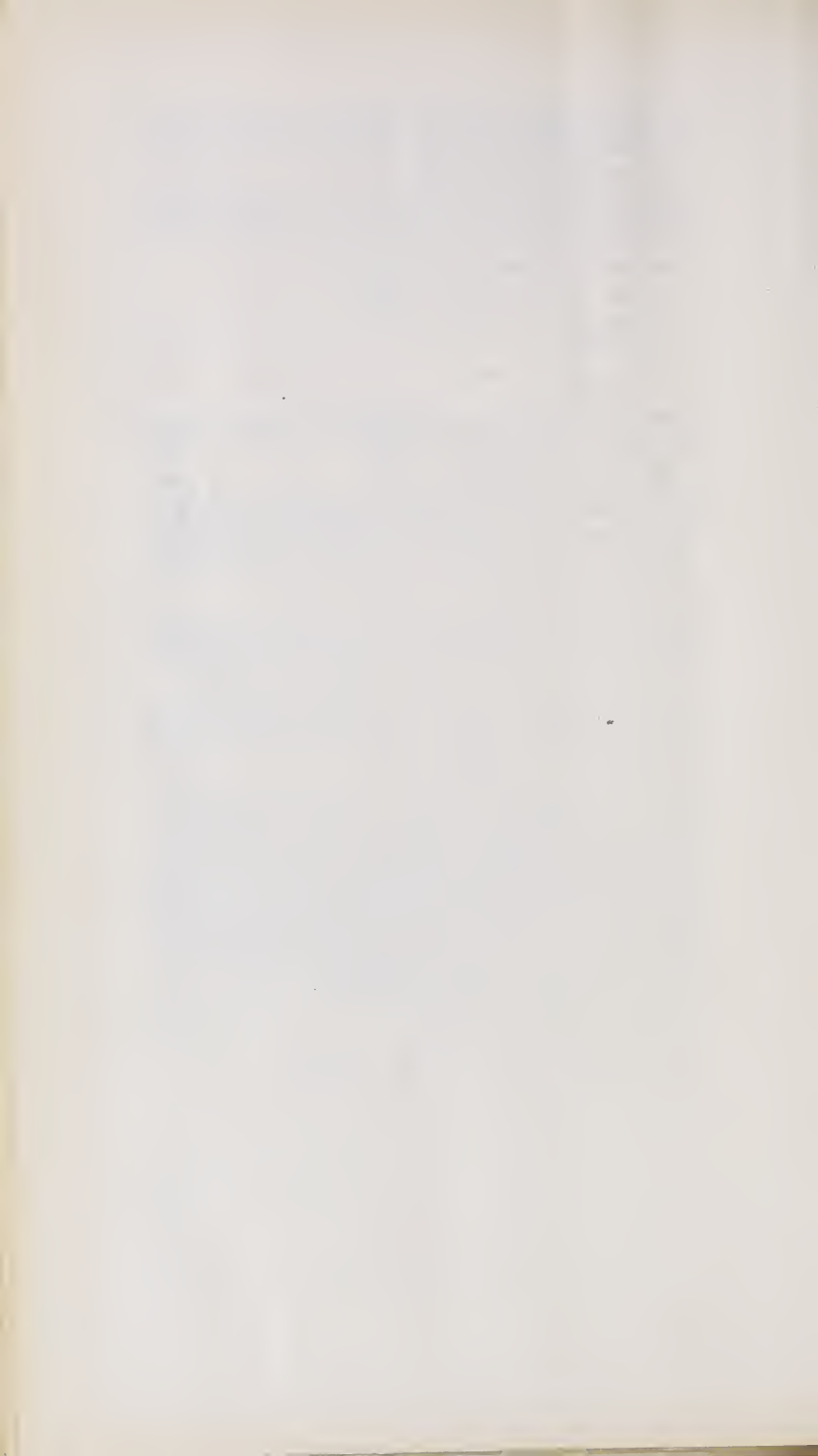
In addition to recovering these minimum expenses Wessels on the authority of Pothier *Negotiorum Gester* Sec. 228 states: "the gestor can demand that the *dominus* (principal) release him from any obligation he was obliged to enter into for the latter". Sec. 3628, *Loc. cit.*

This is the crux of Plaintiff's failure in establishing his claim for the costs subsequently incurred. We have already indicated that Plaintiff has adduced no tittle of evidence to show that he advised Defendant of the deal; that he demanded adjustment of the debt at the original amount, most favourable to Defendant, or that he sought to be released from his liability. On the contrary he has, as co-principal debtor and Co-Defendant, actually supported the creditor and Plaintiff in the action enforcing the debt, and in these circumstances the Defendant must be protected from the expenses thus incurred notwithstanding the probability that he was standing by during the action.

The nett result is the judgment of the Court for the minimum credit cost on short terms.

For Appellant: Mr. J. L. Wigley, Willowvale.

For Respondent: Mr. W. E. Warner, Idutywa.

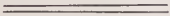


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SELECTED DECISIONS
OF THE
NATIVE APPEAL
COURT
(CAPE AND O.F.S.)
1939.



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SETHA MOTEKOANE vs. PRISCILLA MOTEKOANE.

KOKSTAD: 15th May, 1939. Before A. G. McLoughlin, Esq., President, Native Divorce Court (Cape and Orange Free State Provinces). Reserved judgment delivered at Mafeking on 29th June, 1939.

Native Divorce Cases—Nullity on ground of ante-marital unchastity—Onus on Defendant to establish condonation—Importance of general conduct of parties acting in accordance with Native Customs—Uberrima fides aspect of marriage contract.

McLoughlin, P.:

In this matter Plaintiff sues his wife for a declaration of nullity of a marriage entered into between them on 14th February, 1938.

Plaintiff alleges in his declaration that "on the night of the 14th February, 1938 (i.e. the night of the marriage) after the conclusion of the said marriage, Plaintiff discovered that the said Defendant was pregnant with child whereupon he at once drove Defendant away from his home and she went to reside with her father where she still resides".

He denies that he is the cause of her pregnancy.

Defendant's plea is an admission of her condition at the time of the marriage but she states she confessed to Plaintiff after the marriage; that he condoned her lapse; and that he had connection with her thereafter.

She denies that she was driven away. She states that it was agreed that she should return to her parents until the child was born; that only after the birth of the child did Plaintiff deny the condonation.

By leave of the Court Defendant amended her plea during the hearing to read "before" and not "after" the marriage.

The case is one of some difficulty by reason of the fact that the parties are Natives and that they think and act as Natives. In interpreting their thoughts and actions this Court must view the position in this setting, for it would arrive at a wrong interpretation if it attempted to ascribe to the parties any motive resulting from their conception of morals, ethics or social standards or behaviour which would actuate Europeans placed in like circumstances.

In view of the plea, the Court ruled that the onus of proof rested on the Defendant to establish the alleged condonation.

Her evidence disclosed that she had previously been seduced and rendered pregnant by the Plaintiff, giving birth to a child. Damages were demanded but apparently not paid. Then Plaintiff asked for her in marriage. Several years passed and during Plaintiff's absence at the mines she was rendered pregnant by another man. Plaintiff returned from the mines in December, 1937. Defendant confessed to him. They were married on 14th February, 1938. After the ceremony Defendant went to her father's place and Plaintiff to his, and she says "he did not come to me again". But she says Plaintiff

came to her father's kraal again on the 15th and she went to Plaintiff's place on the 16th. There she slept with Plaintiff. She stayed there six days. They had intercourse. At that time Plaintiff knew she was pregnant. After she had been there six days Plaintiff asked her to go home to give birth, and then return leaving the child with her people. She gave birth on 13th June, 1938. Plaintiff did not come to fetch her. Summons was issued on 17th September, 1938.

The lucidity of this account was disturbed immediately in cross examination, when Defendant admitted that her Aunt Martha was called, she (Defendant) states because "I refused to tell who rendered me pregnant". She admits that thereafter she, Martha and Defendant's mother were together. She denies that it was only then that she confessed for the first time. "That day" she says "I went to my people, I went with Martha. From then till now I have not been near Plaintiff's father's kraal".

She qualified her statement in answer to the Court by saying she went the day after Martha came.

The nett effect of Defendant's evidence is that notwithstanding her alleged "confession" it was necessary to call in her Aunt to ascertain who the author of her condition was—not whether she was pregnant or not. It seems most improbable that Martha was required for this purpose and not for an inspection to ascertain her condition which would be the function of the women by Custom, while it would be the function of the men folk of her family to ascertain and disclose the name of the seducer or undertake liability for the damage. This is the most disconcerting feature of Defendant's case.

Defendant's father, who was her only other witness, is extremely vague about the matter. He merely says his daughter left his kraal the day after the feast. She returned after five or six days. Then he heard by letter from Plaintiff's father. He could not say if his daughter came back with Martha.

The letter referred to, reads as follows:—

"We are still protected, Mokwena, by the assistance of the Honourable.

Now I understand that you wish to know what we Bafokeng say; we are customarily paid with six cattle, the woman then returns when God relieves her. She returns without the child. That child is yours, that is all."

Now this letter, read in the light of the evidence given for Plaintiff, does tend to give substance to the Defendant's version, notwithstanding the deduction drawn from the Martha incident, which has other bearings as analysis of Plaintiff's own evidence will disclose. Plaintiff's first witness—his father—states that the Defendant came to his kraal after the ceremony. Next day Plaintiff reported to him. He sent his wife to call Defendant's aunt. These women questioned Defendant. In consequence he, the Plaintiff's father, sent report to Defendant's home. He sent a letter. He adds "my son sent Priscilla (i.e. Defendant) away to her home. In cross examination he stated "He (i.e. Plaintiff) was not agreeable that she should return after giving birth. I was agreeable but my son was against it. I was paying the dowry. My son did not fall in with my views . . . I wrote a letter telling him his daughter was pregnant. I wrote another letter besides that telling him I was persuading my son to take his wife back". He goes on to say after admitting that he wrote the letter already quoted in this judgment. "By 'we' I mean myself. I had been persuading my son, I wrote it before I had discussed

with my son. I did it as head of the kraal without my son's consent". Earlier in his evidence he had said that he, the father, was paying the dowry for his son.

The husband's (Plaintiff's) version of the affair is partly a denial that the woman told him of her pregnancy before the date of the marriage. "She did not tell me anything. I did not cohabit with her that night for I saw that the stomach was big. She was undressed. I questioned her. I asked if she were pregnant. She denied it. I did not cohabit with her." He specifically denies having condoned the pregnancy.

If the matter were to rest here there can be little doubt but that the Plaintiff must succeed, for the probabilities are against the Defendant. But there are the other features which seem to the Court to dominate the case, for the Defendant is entitled to rely on the general conduct of the Plaintiff and his privy, the father, on the maxim *acta non verba* "deeds speak louder than words" to show that there has been condonation even if not in the exact manner she relates.

The relevant evidence given by the father has already been discussed.

The Plaintiff's own evidence corroborates and augments the impression gained from the father that there was a condonation on conditions which are perfectly in accord with their customs and social standards.

Firstly, Plaintiff says in his cross examination "when the woman got married I did not notice she was pregnant.

I questioned her before the marriage.

I was suspicious then that she was pregnant, because she had a bad character. I was prepared to marry her as I loved her. I expected she would change" . . . Here alone the Defendant has ample measure of confirmation of her allegation that her lapse had been condoned and that Plaintiff entered into the marriage with knowledge of her condition. Plaintiff has not attempted to explain away these admissions beyond replying to his Counsel in re-examination. "If I knew she was pregnant I would not have married (her)." That attempt completely fails to destroy the admission that he was not only suspicious but questioned her. More than this he goes on to say "I rendered her pregnant in 1934. I asked my father to pay dowry. He asked for her in marriage. I will comply with my father's wishes. My father was prepared that the girl should return to her people's kraal to give birth and then come back. I was prepared to comply with the wish".

Their whole course of conduct subsequently is in accord with this attitude on the part of Plaintiff and his family. Not only did negotiations ensue, as the letter confirms, but the Plaintiff let the matter rest until some time after the birth of the child. It helps him but little to say, in qualification of these admissions, that he is not prepared to accept the woman, for he cannot now resile from the condonation, tacit or express, that has been so clearly established.

The Court has been at pains to ascertain the legal bearings of the case for it appeared at first blush that the Plaintiff was entitled to great consideration on the basis of good faith. But the authorities which have been followed by the Appellate Division are those which do not stress the *uberrima fides* aspect of the contract but rather the practical view. The authorities have, conveniently, been fully discussed by Wessels J. A. in *Stander vs. Stander*, 1929, A.D. 349. He comes to the conclusion that there is no cause of action based on

sexual defilement prior to the marriage unless the woman be gravid at the time of the marriage, unbeknown to the husband. The reason for the relief is stated as follows:—

“To allow the marriage to stand would foist upon the innocent husband another man’s child, which would be regarded as his and which he would have to acknowledge as his, because of our law ‘*pater est quem nuptiae demonstrant*’.”

“In the Old Roman Dutch Law this was a serious position, for such a child would have been entitled to his legitimate portion, and thus would reduce the share of the testator’s legitimate children. There is therefore good reason for the decision of *Horak vs. Horak*”, at page 355.

It would be invidious for this Court to question these reasons, but with the utmost deference, they do not appear fully to set out the true principles underlying the action, especially when it is remembered that unchastity in itself is accepted as a good ground for breach of promise to marry. (See the authorities quoted by Wessels on Contract Sec. 1061), especially Kersteman, *Woordenboek* at page 561, quoting Voet 23.1.15.

But we are dealing here with a case *sui generis*. Firstly the parties are Natives of a tribe where ample provision is made by Custom for this very type of case, as the letter indicates; and secondly, the Plaintiff himself was responsible for the defloration of the woman and he is entitled to no consideration based on *uberrima fides* even if the opinions of those older authorities, numbering many legal luminaries who advocate those principles, be accepted, though this was not done in *Stander’s* case.

Actually this Court cannot escape the conclusion that the Plaintiff knew what he was about; that either in deference to his father, according to their custom, or because of his avowed love for the girl, he was prepared to have her as a wife; that he and his family adopted the course indicated by Custom of letting the girl give birth and return without the child; and that now for some undisclosed reason Plaintiff seeks to adopt an attitude of injured innocence and attempts to escape from an inconvenient tie.

For the reasons set out above, this Court cannot aid him. The marriage is valid and judgment must be for Defendant with costs.

For Plaintiff: Mr. V. Gordon, Mount Fletcher.

For Defendant: Messrs. Elliot and Walker, Kokstad.

CASE No. 31.

**ELLIOT NTLWATI DUMALISILE vs. DWAYI
DUMALISILE.**

BUTTERWORTH: 7th June, 1939. Before A. G. McLoughlin, Esq., President, Messrs. K. D. Morgau and A. G. Strachan, Members of the Court (Cape and Orange Free State Provinces).

Native Appeal Cases—Succession to Chieftainship of Royal House of the Galeka—Onus on Plaintiff to prove his assertion that he is heir—Traditional practice of Chiefs

of Gcaleka Royal House to marry Great wife from Tembu Royal House—Right of Chief to appoint Great wife—Contribution by tribesmen towards her Lobola—Approval of appointment by presence of Paramount Chief at ceremony.

Appeal from the Court of Native Commissioner, Willowvale.

(Case No. 186/38.)

McLoughlin, P. (delivering the judgment of the Court):

Before the Native Commissioner Plaintiff claimed a declaration of right as heir to the late Chief Dumalisile, and for an account and delivery of the property of the late Chief.

His declaration sets out:—

1. Plaintiff is the eldest son of the late Mkenazo Dumalisile who died in 1936. The said late Mkenazo Dumalisile was the eldest son of the first wife of the said late Chief Dumalisile. Wherefore by Native Custom Plaintiff is the heir of the said late Chief Dumalisile.
2. Defendant is the son of one of the minor wives of the said late Chief Dumalisile who died on the 31st May, 1938.
3. Defendant has, by word and deed, publicly declared himself to be the heir according to Native Custom of the said late Chief Dumalisile and has thereby usurped the rights of Plaintiff.
4. Defendant has possessed himself of the property of the said late Chief Dumalisile including an ox wagon of the value of £35 and sundry cattle received as dowry.
5. Plaintiff has consistently claimed his rights as heir aforesaid but Defendant refuses to acknowledge same.

Request was made for further particulars on points which Plaintiff in his reply stigmatised rightly as matters for plea and evidence.

Eventually Defendant pleaded:—

1. Defendant admits the first paragraph of Plaintiff's summons with the exception of the last sentence thereof from the word "wherefore" to the end of the said paragraph, which allegation he denies.
2. Defendant denies that he is the son of one of the minor wives of the late Dumalisile.
3. Defendant admits that he has declared himself to be the heir of the Great House of the late Dumalisile but denies that by so doing he has usurped such position.
4. Defendant admits that he has exercised the control of the property belonging to the estate of the Great House of the late Dumalisile.
5. Defendant denies that Plaintiff has consistently claimed rights as heir of the Great House of Dumalisile but in any case Defendant refuses to acknowledge such claim.
6. Receipt of a letter of demand claiming "A/C of Estate property in possession and delivery thereof" "Acknowledgment of client as heir of the said late Chief Dumalisile" dated the 17th August, 1938, is admitted.

Defendant pleads further as follows:—

The late Dumalisile was the eldest son of the Great House of the late Ncapayi who was the eldest son and heir of the Right Hand House of the late Chief Hintsu, the heir to whose Great House was his eldest son Kreli

(Rili). The said Dumalisile was therefore a Chief of the Royal House of Hintsá, Paramount Chief to the Gcaleka tribe.

The said late Dumalisile first married the mother of Mkenazo who was the daughter of a commoner. He then married the mother of the Defendant who was the daughter of the Tembu Chief Mgudlwa in respect of whom he paid 50 cattle as dowry. The said marriage took place in the lifetime of Paramount Chief Kreli who officiated in the ceremony and declared the status of the said wife as being that of Great wife of the said Dumalisile, which status was accepted by the said Dumalisile.

Later the said Dumalisile married other wives, including the daughter of Tembu Chief Matanzima who was given the status of wife of the Right Hand House, and thereupon fixed the status of his several wives, the first wife and mother of Mkenazo being given the status of Qadi to the Right Hand House. Being a Chief of the Royal Blood the said Dumalisile possessed the power under Native Laws and Customs to fix the status of his various wives.

The Defendant is the eldest son and heir of the late Chief Dumalisile by the wife of his Great House by virtue of the status given to his mother, the daughter of Chief Mgudlwa.

Plaintiff admitted in a replication:—

1. That Plaintiff admits that the genealogy of the late Dumalisile as set forth in the first paragraph of further pleadings following the sixth paragraph of Defendant's plea.
2. That Plaintiff admits that the mother of the Defendant was the daughter of the Tembu Chief Mgudlwa and the second wife to be married by the late Dumalisile but denies that she was appointed the Great wife of the late Dumalisile and puts Defendant to the proof thereof. Plaintiff further denies that the manner of the appointment of the Great wife as alleged was valid or in accordance with Native Law and Custom as practised by the Gcaleka's.
3. That Plaintiff admits the allegation contained in the last paragraph but one of Defendant's plea that the late Dumalisile later married other wives including the daughter of the Tembu Chief Matanzima but denies that she was given the status of the Right Hand wife or that the status of the remaining wives was fixed and denies that the manner and time as alleged of fixing the status of the said wives was valid or in accordance with Native Law and Custom as practised by the Gcaleka's and puts Defendant to the proof thereof.

The case went to trial and evidence was led to substantiate the allegations in Defendant's plea.

The Native Commissioner gave judgment for Defendant against which Plaintiff has appealed on the grounds:—

- (a) That the weight of evidence is against the finding of the Native Commissioner in as much as the onus is upon Defendant and which onus Defendant has sought to discharge by evidence which is contradictory and hearsay and not the best evidence.
- (b) That the manner of the appointment of the Great wife as alleged and stated in the evidence is not valid according to Native Law and Custom.

In his written judgment, the Native Commissioner has dealt very fully and very ably with the evidence adduced in the case. He found the following facts proved:—

1. It is common cause that the late Dumalisile was a Chief of the Royal House of the Gcalekas being the eldest son of the Great House of the late Ncapayi, the eldest son and heir of the Right Hand House of the late Chief Hintsa, father of Rili.
2. That Nowaka was the daughter of Chief Mgudlwa and was married to Dumalisile as his second wife in sequence.
3. That this wife was given the status of Head wife by Chief Rili with the approval of the tribe and publicly declared.
4. That a dowry of 50 head of cattle was paid by the tribe.
5. That Dwayi is the eldest son of Nowaka of the Great House so declared.
6. That Plaintiff is the guardian of Nohagisi, first wife of Dumalisile.
7. That the circumcision ceremony of Dwayi was made so widely known and held in such a manner as to indicate that he was the heir to Dumalisile.

These findings are attacked on appeal but they are so amply and so adequately supported by the evidence that no good purpose will be served by entering into a detailed analysis of the evidence. Suffice it to say that notwithstanding the ruling of the Native Commissioner that the onus was on Defendant the actual legal position is that it is the Plaintiff who must prove his assertion that he is heir and not for Defendant to prove his denial and traverse of Plaintiff's claim.

The matter was not raised on appeal and need not detain the Court.

The first ground of appeal has no substance and this Court has been shown no valid reason for reversing the Native Commissioner's judgment on the facts.

The second ground of appeal attacks the manner of the appointment as alleged by the Defendant and on its face is of greater weight than the first ground.

Counsel's main submission was that it was contrary to Custom to make definite and fixed appointments of Great wives of Chiefs at the time of their marriage, especially at the beginning of a Chief's career for with age and increasing status neighbouring Chiefs of greater and greater rank send their daughters to him as wives. Thus the woman of higher rank would not be married until late in a Chief's lifetime. And it is assumed that such woman must, of course, become the Chief wife.

The submission may be true of some Bantu tribes, for example the Zulu, and cases are known of delay in appointing a Chief wife for this very reason but the contention that such custom applies in the present case is based on fallacy.

Firstly, this is not a case of some petty Chief whose prestige is dependent on his own effort. The parties are of the Royal House of the Gcaleka in its Right Hand. At the time of these events the Gcaleka were still independent and though suffering some eclipse from their own suicidal folly of the cattle slaughter, they still were in apogee and held, in the eyes of the natives of all tribes, a prestige and social position of the very highest. Moreover, it had become traditional practice for the Chiefs to draw their great wives from the Tembu tribe, just as the converse obtained.

When therefore the Right Hand son married a daughter of the Tembu Royal House, her appointment as Great wife was entirely in accordance with tribal precedent. That appointment would have been valid had it been made without the participation of the Paramount Chief of the tribe, for in those days individual Chiefs and men of rank had the right to appoint their great wives—a custom which is conceded by counsel, for his case must rest on such a right, subsequently exercised.

Furthermore, it is common cause that the tribesmen contributed the lobola or part of it and finally it is not seriously contended by Plaintiff that the Paramount Sarili did not, indeed, approve of the appointment, for by his presence at the ceremony he confirmed the appointment and gave his royal blessing.

It became apparent during the course of Counsel's address that his submissions were based on an entire misconception of Galeka Law and Custom. No single precedent could be quoted by counsel from the history of the tribe to show that his contention had any base in fact. Nor has Plaintiff, on whom lies the onus, brought any evidence which casts doubt on the actual events described by Defendant, or on the subsequent conduct of the parties which would enable this Court to question the Defendant's status. On the contrary Plaintiff's own witnesses, where their evidence is of any value, have merely corroborated Defendant's version.

How the Plaintiff can hope to succeed in attempting now to disturb this position passes understanding, for the status then conferred was honoured and accepted by every one until the recently advanced claim. That claim, in the circumstances, cannot but be regarded as a brazenly impudent attempt to upset this long-established status, in which his father and predecessor in title acquiesced throughout his lifetime.

In view of the actualities in this case it becomes unnecessary to enter upon a full discussion of the theory and practice of the Chieftainship among the Galeka and of the method of appointment. The Native Commissioner has correctly emphasized the main features, viz., the participation by the clansmen in payment of lobola, the selection of a suitable woman, and here especially from a particular tribe; and finally the approval of the Paramount.

All these things were done. Accordingly the appeal must fail.

For Appellant: Mr. J. L. Wigley, Willowvale.

For Respondent: Mr. W. E. Warner, Idutywa.

CASE No. 32.

JOSEPH MBANI vs. REGINA MBANI.

KINGWILLIAMSTOWN: 9th August, 1939. Before A. G. McLoughlin, Esq., President, Native Divorce Court (Cape and O.F.S. Provinces).

Native Divorce Cases—Marriage by Christian Rites—Action for Restitution of Conjugal Rights failing which a decree

of divorce on the ground of malicious desertion—where wife telekaed for non-payment of dowry, such abandonment of husband is not “malicious desertion”.

McLoughlin, P. :

Plaintiff sued Defendant for restitution of conjugal rights failing which for divorce on the ground of malicious desertion.

Defendant admitted leaving Plaintiff because he would not pay his lobolo. She was now with her people awaiting adjustment of the matter of lobolo.

In his evidence Plaintiff stated that his mother was living with him, the only son, at East London, and his wife was not on good terms with her.

He originally paid one beast on account of dowry. Defendant's brother came and demanded more dowry. Plaintiff offered £2. 10s. which sum was refused, the amount demanded being £5, and thereafter Defendant was telekaed.

Plaintiff made no attempt to meet the demand of Defendant's people for dowry and did not putuma her. Instead he went to the Native Affairs Department, East London, and the summons instituting this action was issued.

Plaintiff's only other witness was his mother, who corroborated his evidence to the effect that Defendant's brother came demanding £5 on account of lobolo, refused the £2. 10s. offered, and thereafter took away the Defendant with her belongings.

Analysis of Brouwer's definition of malicious desertion (de jure Connubiorum. Lib. 2 Cap 18 N. 12) followed in Webber vs. Webber 1915 A.D. p. 239, makes it clear that the Defendant cannot be regarded as a malicious deserter.

He says “*Malitiosus desertor est, qui nulla justa aut necessaria causa coactus, ex animi quadam levitate et malitia, vel impatientia freni conjugalis, uxoris et liberorum curam abjicit, eos deserit, et oberrat sine animo redeundi*”.

A malicious deserter is one who, constrained by no just or necessary cause, but owing to a disposition approaching fickleness and illwill, or through impatience of the marriage tie, casts off the care of wife and children, forsakes them, and wanders about with no intention of returning”.

Now it may be contended that non-payment of lobolo is not a just cause for detaining a wife under the teleka custom, because of the Civil or Christian marriage. For by analogy non payment of “dos” to the bride's parents gave rise to no cause of divorce, for by Civil law, marriage is begun in and rests on consensus not wealth, and is constituted without the dowry. *Multo minus conceditur divortium xxx vel dos promissa ab uxoris parentibus non solvitur; animum non opibus initur et nititur conjugium, et sine dote consistit*”

Brouwer de Jure Connub. 11 Cap ult. A .23.

But the definition of malicious desertion, given by Brouwer in the above extract and repeated by him in the last chapter of his book, dealing with the position obtaining in Holland, emphasises the fact that there is no desertion if one spouse leaves the other for just or necessary cause and not with evil or idle purpose or impatience of the marriage tie, forsaking the other spouse and the family with no intention of returning.

In the present case non-payment of lobolo is a matter which goes deeper than mere question of wealth. It is a matter directly affecting the dignity of the female spouse. In Native society it would incur odium and there is here rather analogy with the principle involved in such cases as *Duncan vs. Duncan* 1937 A.D. 310 and *Theron vs. Theron* 1924 A.D. 244 where the conduct and the unreasonable attitude of the husband is responsible for making cohabitation *ondragelijk*. It is difficult to convey to a European mind not versed in Native Custom the reaction of the wife on this question of lobolo or its absence. To the Native the position is perfectly clear and the wife is, in their system, justly detained for non-payment.

This Court though basing its practice on that of the Supreme Court, must have regard to Native mentality, if not Native Custom, in dealing with the human factor.

This aspect was fully discussed in *Gama vs. Gama* 1937 N.A.C. (T. & N.) page 77.

In the present case the wife has not left her husband, home and family with an evil intent of abandoning them and never returning—she is ready and willing to return as soon as Plaintiff makes it possible for her to do so with dignity.

Following the ruling in *Gama vs. Gama* the Court absolved the Defendant from the instance with costs.

CASE No. 33.

NDUVA LABASE vs. MGIDI MHLATI.

KINGWILLIAMSTOWN: 18th August, 1939. Before A. G. McLoughlin, Esq., President, Messrs. J. J. Yates and M. L. C. Liefeldt, Members of the Court (Cape and Orange Free State Provinces).

Native Appeal Cases—Isondlo—Liability of father of children—Omnia Praesumuntur contra spoliatorem—Costs on separate and distinct claims.

Appeal from the Court of Native Commissioner,
Kingwilliamstown.

(Case No. 9/39.)

McLoughlin, P. (delivering the judgment of the Court):

In the Native Commissioner's Court Plaintiff claimed twelve head of cattle or their value £60: (a) three head being balance of dowry in respect of his sister Nomisisi; (b) four head being dowry of Ntombi illegitimate daughter of Nomisisi and collected by Defendant; (c) five head of cattle as and for sondlo for Defendant's family of five children.

The Native Commissioner gave judgment as follows:—

Claim (a) For Defendant with costs.

Claim (b) For Defendant with costs.

Claim (c) Absolution from the instance with costs.

Plaintiff now appeals on the ground that the judgment is against the weight of evidence in respect—

- (a) of clause (c) of the judgment;
- (b) the division of costs in sections (a), (b) and (c) of the judgment, as the evidence was not separated.

In view of Defendant's own evidence that he took his wife and family from the possession of the Plaintiff or his agent, who resisted the taking, the Defendant has placed himself in the position of a spoliator, and becomes subject to the rules of evidence and law set out in Scoble, page 37. "The rule *omnia praesuntuntur contra spoliatorem* in general means that where a person has deliberately taken the law into his own hands and deprived another of any particular thing he is liable to find that the Court is presuming everything against him.

Where a party bespoils another of anything the rule is that the Plaintiff, in a spoliation action, having proved (a) possession and (b) dispossession, the Court will presume that the Defendant was in the wrong and the whole burden of proof is thereupon thrown upon him to justify his action".

In the circumstances the Court will presume against the Defendant that Plaintiff did support the five children and that Defendant is liable by custom to reimburse Plaintiff for all five children.

The question of costs is subject to the rules set out in Anders & Elson on Costs at page 12, *inter alia*, that, where there are several different issues or claims, the parties successful on each issue are entitled to costs respectively incurred thereon. The claims are separate and distinct and it should be an easy matter to tax each as a distinct claim.

The result is that the appeal is allowed with costs on ground (a) i.e. the claim (c) for Isondlo.

The judgment of the Native Commissioner on this claim is altered to one for Plaintiff as prayed with costs, and the appeal is dismissed with costs on ground (b) i.e. on the order of costs in claims (a) and (b).

For Appellant: Mr. R. H. Randell, Kingwilliamstown.

For Respondent: Mr. H. C. Anderson, Kingwilliamstown.

CASE No. 34.

NTSOYI PAMBANISO vs. NCITO WILLEM.

KINGWILLIAMSTOWN: 17th August, 1939. Before A. G. McLoughlin, Esq., President, Messrs. J. J. Yates and M. L. C. Liefeldt, Members of the Court (Cape and Orange Free State Provinces).

Native Appeal Cases—Practice and procedure—Elementary requirements—Summons must set out names of parties and valid cause of action—Judgment must be certain in its terms, and in conformity with claim if justified by evidence adduced—Attempt to raise new point on appeal by affidavits setting out minority of one Defendant and

locus standi of other—Two conflicting statements by witness destroy his evidence—Proceedings set aside and case returned for re-hearing—No order as to costs.

Appeal from the Court of Native Commissioner, Sterkspruit.

(Case No. 3/39.)

McLoughlin, P. (delivering the judgment of the Court):

Notwithstanding the simple procedure prescribed by the rules for Native Commissioners' Courts in the Union, there are certain elementary requirements which are essential to enable a valid judgment to be given.

The summons, though simple, must yet set out in clear terms the names of the parties sought to be made liable and must indicate why and how in law they are to be held liable, i.e. it must set out a valid cause of action. Voet 2.13.4.

Thereupon the Native Commissioner must give a judgment in conformity with the Plaintiff's claim as set out in the summons, if justified by the evidence adduced.

That judgment must be certain in its terms. It must disclose without extraneous explanation who is held liable and the extent of that liability. (See Voet 42.1.19.)

How far the proceedings in the present case fall short of these elementary requirements is disclosed by a mere inspection of the summons, which reads as follows:—

“ To (1) Ntsotyi Pambaniso, (2) Maboyisana Pambaniso, of Pelandaba Location.

You are hereby required to appear . . . to answer the claim of Ncito Willem, Pelandaba Location, as follows:—

Ten (10) head of cattle or their value £50, being for seduction and pregnancy of Plaintiff's daughter—Wanana—by Defendant No. 2.

- (1) Defendant No. 1 is the elder brother, kraalhead and guardian of Defendant No. 2.
- (2) During or about October, 1938, Defendant No. 2 seduced and rendered pregnant the daughter of Plaintiff.
- (3) The Defendants, deny liability and despite numerous demands by Plaintiff for the liquidation of the above claim, they either refuse or neglect to pay.’

The judgment thereon is as follows:—

For Plaintiff for five head of cattle or their value £25, with costs.

The judgment is obviously ambiguous, for it is not clear whether both or one or other of the Defendants is being held liable.

Indeed it is difficult to ascertain what the Plaintiff actually seeks in his summons. The citation of the first Defendant may be intended either for the purpose of assisting the second Defendant as a minor, or it may be an abortive attempt to hold the first Defendant liable as kraalhead of No. 2. We are asked to reverse the judgment against No. 1 and to hold that it is invalid against No. 2. The question of minority and lack of *locus standi* is hinted at on the grounds of appeal and affidavits accompany these grounds apparently intended for the information of the Court.

Such affidavits are valueless, for the Court cannot accept them as additional evidence. The point intended to be raised now on appeal was not dealt with in, nor is it covered by the evidence or the proceedings and cannot now be considered by this Court.

But, this Court is faced with the difficulty of interpreting the judgment for it appears from the Native Commissioner's reasons that he intended the judgment to be joint and several against both Defendants, notwithstanding the ambiguity of the summons.

The whole proceedings are so confused as to result in a position similar to that in the case *Msinango vs. Sitole* 1938, N.A.C. (T. & N.) page 261, and it seems to this Court that to attempt to dissect the judgment and to formulate a new judgment can result only in further complications for be it repeated it is not clear from the summons what the Plaintiff actually wants.

In the circumstances there appears to be only one course open to this Court and that is to set aside all the proceedings from the time of issue of the summons and to return the case for re-hearing when Plaintiff can patch up his summons to disclose what he seeks, if leave be granted, or withdraw it and start afresh.

As all the parties are equally responsible for the state of affairs that has arisen, it seems desirable to make no order as to costs.

It is ordered that the appeal be and it is hereby allowed and the judgment and all proceedings subsequent to the issue of summons be set aside. The case is returned for re-hearing and for a fresh judgment. No order as to costs in both Courts.

As a rider for the guidance of the Native Commissioner this Court is constrained to draw attention to the fact that proof that a witness has made two conflicting statements merely destroys the evidence given by that witness in the case, and does not establish the contradictory evidence given elsewhere.

Attention is also drawn to the requirements of proof in seduction cases set out in *Catherine Majola vs. Philemon Maseka* 1937 N.A.C. (T. & N.) page 67, following *Le Roux vs. Neethling*, 9 S.C. 247. See also *Mpawu vs. Lebano* 1938 N.A.C. (T. & N.) page 121.

For Appellant: Mr. R. H. Randell, Kingwilliamstown.

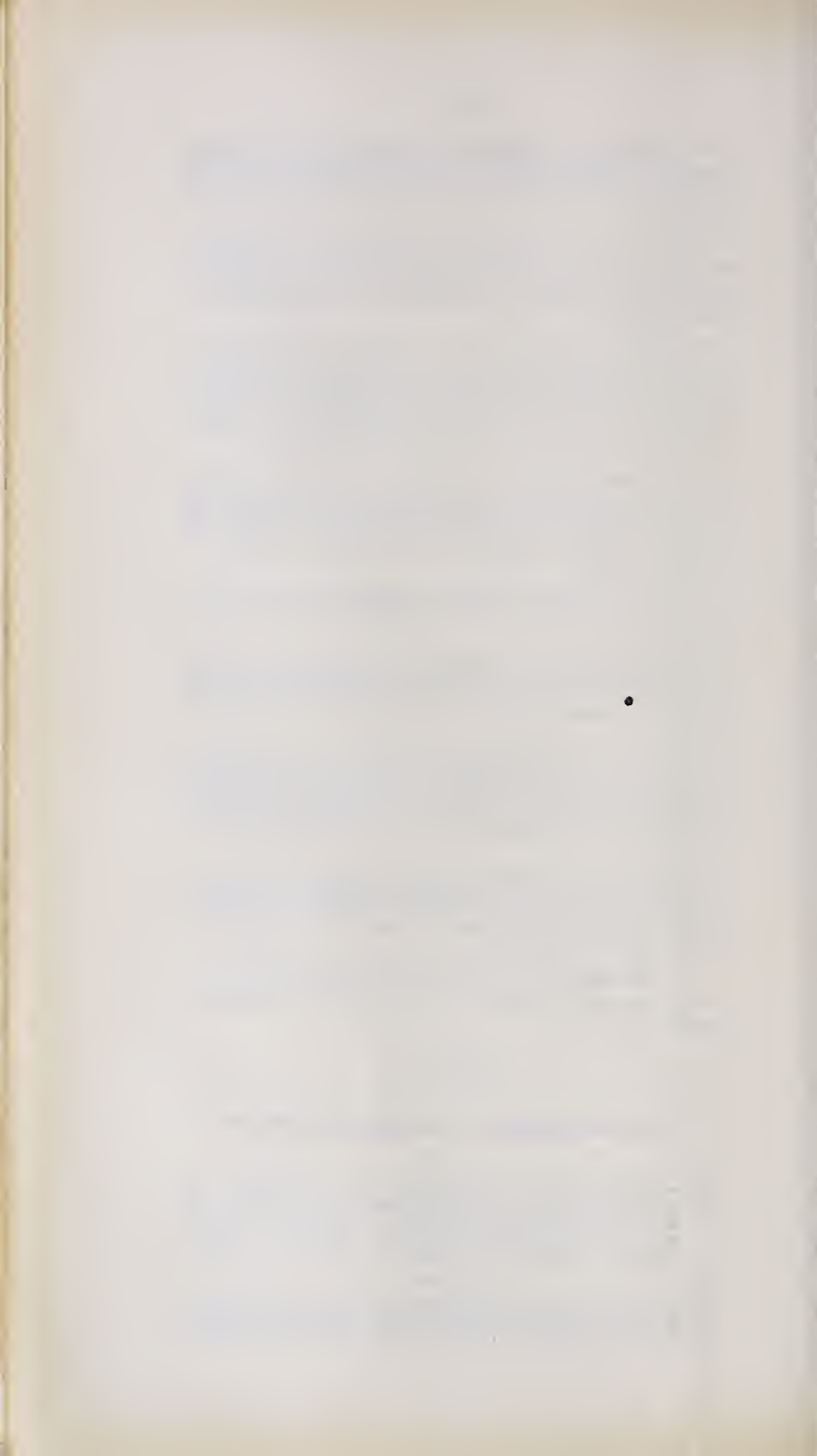
For Respondent: Mr. H. C. H. Anderson, Kingwilliamstown.

CASE No. 35.

PERE NGXABALAZA vs. NTSOKOLO NJOVANE.

KINGWILLIAMSTOWN: 17th August, 1939. Before A. G. McLoughlin, Esq., President, Messrs. J. J. Yates and M. L. C. Liefeldt, Members of the Court (Cape and Orange Free State Provinces). Reserved judgment delivered on 23rd August, 1939.

Native Appeal Cases—Seduction—Tembu Custom followed in Glen Grey District—Isihewula beast paid for seduction without pregnancy of virgin—Fine of five head of cattle



for seduction followed by pregnancy—No fine for second pregnancy by same man—Fine of three head where second pregnancy caused by another man—Optional for seducer to pay Sibebeso fee—Fine for first pregnancy merges into dowry if marriage follows.

Appeal from the Court of Native Commissioner, Lady Frere.
(Case No. 6/1939.)

McLoughlin, P. (delivering the judgment of the Court):

In the Native Commissioner's Court Plaintiff sued Defendant for restoration of his wife or her lobolo, adding, during the hearing, a claim for restoration of two children.

Against a judgment for Plaintiff for six head of cattle or their value and the return of two children, the Defendant has appealed on the ground that the judgment is against the weight of evidence.

Briefly the facts as deposed by Plaintiff are that some eight or more years ago Plaintiff seduced Defendant's daughter, rendering her pregnant. For this he paid four head of cattle. The Defendant demanded a fine of five head but Plaintiff offered to marry the girl. They went before the Headman who sent them home to talk the matter of a marriage. Thereupon Plaintiff paid two more cattle and another lot of two head making in all eight head. Thereafter the girl was brought to him and she remained there for five months. He went away to work for nine months and on his return found the girl missing. He putumaed her from her people. She stayed with him another eight months and then by agreement returned to her people, Plaintiff going to the Rand.

A second child was born to the girl but it is not clear from Plaintiff's evidence when that happened. Defendant's version, however, shows that on the demand for damages for the first seduction the father of the Plaintiff handed Plaintiff over to Defendant on the principle of the old Roman surrender of a son or slave causing damage—*noxae deditio*. Defendant detained him to work on the mines and earn five head of cattle.

The youth was, however, released by his elder brother on payment of five head of cattle, after five weeks.

Three years after the birth of the first child the girl was again rendered pregnant by Plaintiff. Report was made to Plaintiff's people and then the girl disappeared. She was found at Pango's kraal, brother-in-law of Plaintiff. Pango went to Defendant's kraal and paid a cow and calf. Defendant says he was not satisfied whereupon Pango paid five sheep making two beasts, maintaining that Plaintiff had thus paid seven head for two seductions. Defendant denies that Plaintiff offered marriage and denies that his daughter lived with Plaintiff for any period. He has since married the girl away to another man.

He states "there was no dispute at the Headman's second meeting about payment of a fine for the second stomach".

Defendant's wife admits that the girl "did go and live with the Plaintiff but not for a week. He abducted her".



It appears from the headman's evidence that before him Defendant admitted that he had received eight head of cattle. "He said he divided five head as seduction for the first time and three were for marriage to be added on to the five. . . . Defendant's daughter has lived with Plaintiff and she is his wife".

The parties are Tembus of the Glen Grey District. Defendant admits he follows Tembu custom. He endeavoured to show that by Tembu custom, as practiced in Glen Grey District, he was entitled to a fine for a second pregnancy of his daughter by the same man and he called two ex officials to prove the custom. As the custom described by them was unknown to the Court, Native Assessors were called from Glen Grey and the adjoining district of St. Marks occupied by the same section of the Tembu tribe, who had removed there from Glen Grey in 1865.

Their statements are annexed. From them it appears that there is no fine for a second pregnancy, which indeed is Tembu Custom as known to the Court and affirmed by Native Assessors in *Zidlele vs. Matshamba* 1, N.A.C. 263.

The Native Assessors were less concise regarding the fate of the first payment declaring that it was not merged in the dowry if a marriage followed. But they made it clear that in that event preferential treatment was given the young man in the matter of dowry. In other words in actual practice there is a merger, which would accord with the finding in *Meyi vs. Mgengwana* 4, N.A.C. 67 and *Mampondo vs. Maqunyana* 4, N.A.C. 67, which, as far as this Court is aware, is the present day practice among the Natives.

It is apparent, however, from the Assessors' replies that the Defendant's whole case is utterly contrary to custom and that he is attempting to cast dust in the eyes of the Court to save himself from refunding even the three head which he must know could not be treated as a fine.

That being so, the Court can place very little reliance on his version especially when he is refuted by the headman.

If anything, the version of Plaintiff is the more acceptable. Plaintiff makes it clear that the marriage was discussed when the first payment was made. It is true that it would be contrary to custom for him to be surrendered to work off a lobolo, but that does not preclude an agreement to pay lobolo when the five head were paid. His action in going to the mines thereafter lends colour to the contention.

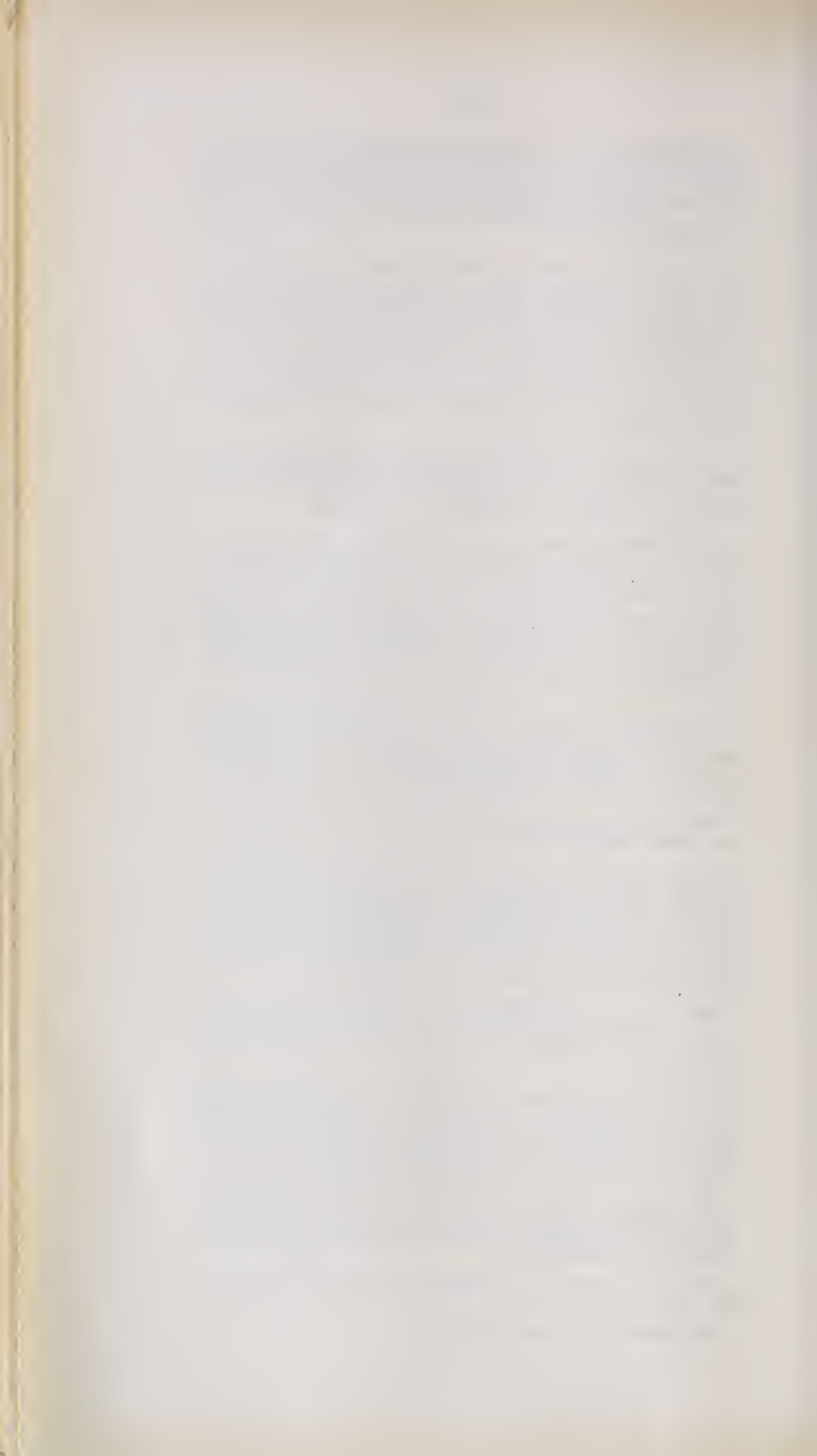
There can be no doubt about the additional stock having been paid as lobolo and not as fine. There is no liability for a fine and the headman's evidence is fully in accord with custom.

This evidence receives corroboration from an unexpected quarter, viz. the use of a married name for the girl. The Defendant's witnesses tried to disown or discredit the fact, but it is clear that the name was used and is in itself an important corroboration of Plaintiff's version.

This Court, on careful consideration of the case, has come to the conclusion that Plaintiff has succeeded in proving the necessary facts to entitle him to the judgment he got from the Native Commissioner.

We have been shown no adequate cause for reversing that finding.

The appeal is dismissed with costs.



QUESTIONS PUT TO AND ANSWERS BY THE NATIVE ASSESSORS.

1. What custom is followed in the District of Glen Grey in regard to payment of damages for seduction?

2. What is the number of cattle paid for seduction of a virgin, not followed by pregnancy?

3. What number if pregnancy ensues?

4. What number is paid if the same girl is again rendered pregnant by the same man?

5. By another man?

6. Is payment made for any subsequent pregnancies?

7. Is it customary to convert the first fine into dowry if the girl is again rendered pregnant by the same man?

Per Chief Valelo Mhlonthlo:

1. Practice in Glen Grey is:

2. When a virgin is seduced without pregnancy one beast is paid and is called, Isihewula or Nqutu.

3. If the isihewula beast has been paid and thereafter it be found that the girl is pregnant he has to pay an additional 5 head of cattle.

4. According to custom there is no fine paid if the same man renders the girl pregnant a second time.

The father of the girl may ask the young man to give him something.

5. If the girl having had a child is rendered pregnant by some one other than the man who caused her first pregnancy, three head will be paid as a fine.

6. No further fines are paid for further pregnancies. Those children belong to the girl's father.

7. If the young man did not say at first he wanted to marry the girl he will pay the fine, and on the second occasion he will start afresh to pay dowry.

Per Matoti: Unless the father tells the young man to take the girl away and not render her pregnant at the father's kraal.

By All: The five head first paid is not counted as dowry. If he pays say three head they will be dowry.

He starts afresh not counting the five head.

Assessors say there is no difference in practice between the Natives on either side of the Kei.

Per Matoti: The thing is that a father quarrels with his daughter if she becomes pregnant a second time but if a young man thereafter wants to marry the girl he will not demand a full dowry. But if the young man says I am marrying the girl, and if they agree the same thing that Chief Valelo mentioned would happen.

In Glen Grey we practice the customs in Glen Grey that the Tembu practice.

In Reply to Mr. Yates: All say. The young man must pay a full dowry unless an arrangement is made.

Per Joseph Nyoka: If the man says he is marrying the girl they can accept three head and they are counted in the dowry.

If she has been damaged, they don't pay a full dowry. We can accept even six head or less.

Assessors repeat there are five head paid in addition to the isihewula.

By Mr. Liefeldt: If the father discovers the pregnancy first.

In that case only five head is paid, not the isihewula. If it is discovered after payment of a isihewula that the girl is pregnant a full fine is demanded.

We are clear that if pregnancy is first discovered then only five head is paid.

By President:

If the young man who first seduced the girl subsequently wants to marry her he is given consideration in regard to number to be paid as lobolo.

But another young man subsequently rendering the girl pregnant would not get the same consideration.

By Mr. Randell: What is full dowry?

Per Joseph Nyoka: A full dowry is one that is not finished on 1st day—but we go up to 10 head. Often pay three head, then a few more, and when he has paid 10 we say it is a full dowry.

When 10 head has been paid then father can ask him for more.

If he has paid 10 he is not playing, he wants to marry.

Our custom is that a man has never finished paying. Even from the son of the woman dowry can be demanded.

If the girl has run away they merely agree to marry. The young man says I will pay what I have.

If in complying with father's wish to be paid something the young man pays, that is dowry.

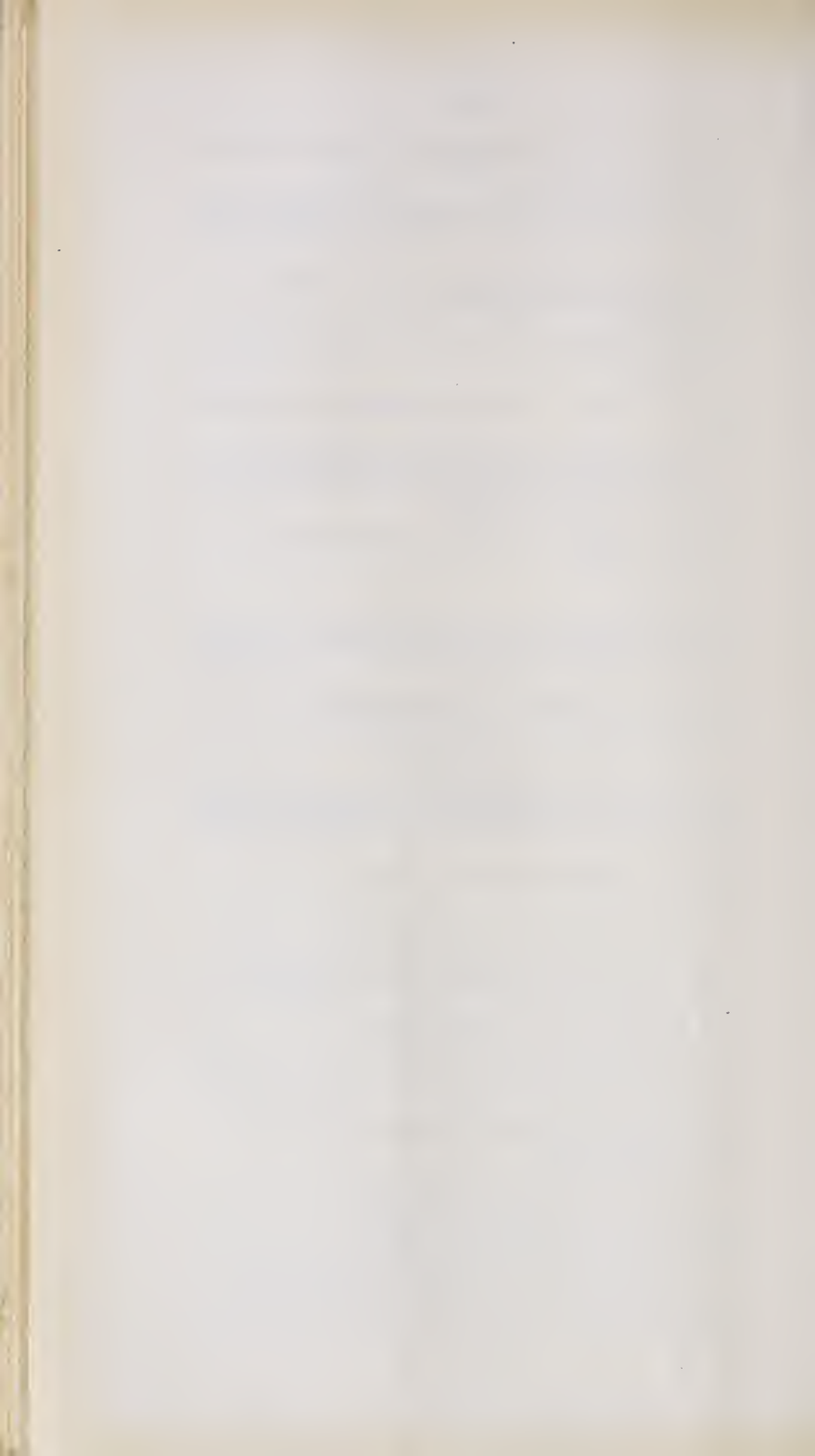
The father can't demand anything unless the young man wants to marry the girl.

Otherwise he must leave the young man.

If he pays, it is Sibebeso—it is a Nyoba fee. He is not forced to pay. He can pay if he wants.

For Appellant: Mr. R. H. Randell, Kingwilliamstown.

For Respondent: Mr. H. C. H. Anderson, Kingwilliamstown.



CASE No. 36.

DAVID and MOSHI MATINISI vs. MALIKATI SAWUKA.

KINGWILLIAMSTOWN: 17th August, 1939. Before A. G. McLoughlin, Esq., President, Messrs. J. J. Yates and M. L. C. Liefeldt, Members of the Court (Cape and Orange Free State Provinces).

Native Appeal Cases—Seduction—Attempt to raise question of locus standi for first time on appeal—Section 11 of Act No. 38 of 1927—No warrant for conclusion that Xosa law must prevail in Port Elizabeth—In Native Law acceptance of part payment taken as full settlement unless publicly made known that payment accepted as instalment—Ambiguity of Section 11 (2) of Native Administration Act, 1927.

Appeal from Court of Native Commissioner, Port Elizabeth.
(Case No. 74 of 1938.)

McLoughlin, P. (delivering the judgment of the Court):

This case is an appeal from the decision of the Native Commissioner awarding one beast to the Plaintiff in an action wherein Plaintiff claimed two head being balance of three head due owing to seduction of his daughter by Defendant No. 1.

Defendants have attacked the judgment on the grounds:

- (1) That the evidence does not support the Native Commissioner's finding that No. 2 is kraal head of No. 1 and thus liable for his misdeeds.
- (2) An attack apparently on Plaintiff's *locus standi* though it is not clear just what is meant by this ground.
- (3) That by reason of Plaintiff's tribal custom (i.e. Tembu) no damages are claimable for a second seduction.
- (4) Credibility.

To follow the argument based on these grounds it is necessary to summarize the evidence.

Briefly Plaintiff is a Tembu—Defendants are Gaikas. It is common cause that the girl—the unmarried daughter of Plaintiff has had at least one child prior to that which is the subject of this action. It is alleged by Defendants but denied by Plaintiff that she had had a second child prior to the present instance. Defendants admit the fact that first Defendant caused the present pregnancy.

It is common cause that one beast was paid in respect of that pregnancy but the parties dispute the finality of the payment.

The approach to the solution of this case is by way of the third ground of appeal that no cause of action is disclosed and thence, to the matter raised in the fourth ground that the Native Commissioner has erred in accepting Plaintiff's evidence that the girl in this case has had only two and not three children.



The second ground was not raised in the Court below. There is no evidence on record to enable the matter to be decided now, thus it cannot be raised in this Court for the first time, being indeed abandoned by Counsel in Court.

It appears to have been decided by the Native Commissioner that Xosa custom should be applied in this case. The body of the record contains the following note in connection with an application for absolution made at the close of Plaintiff's case.

"The question of what tribe Plaintiff belongs to has never been raised before in this Court and in Port Elizabeth district ordinary Xosa custom has prevailed and such a defence should be raised by way of exception and not during trial."

In his reasons the Native Commissioner refers to a new defence that was raised during the trial that there was no liability as this was a third pregnancy—this evidently following on a decision to apply Xosa custom, but it is not made clear that such was decided.

However, this Court will deal firstly with the position arising from the above extract.

There is no warrant whatever for holding that Xosa custom must prevail at Port Elizabeth. That area was never under Xosa control nor is it inhabited exclusively by Xosa. It is a purely European area in which numbers of Native peoples of various tribes have established themselves as servants or tenants, or as residents in the urban area. The rule if any is that mentioned in Section 11 of the Act (No. 38 of 1927) that "where the parties to a suit reside in areas where different Native laws are in operation, the Native law, if any, to be applied by the Court shall be that prevailing in the place of residence of the Defendant."

Accepting for the purpose of this case that the Defendant would be liable under the custom of his tribe, viz. Xosa, the question of identity of the girl Tandiwe with Nongalipi becomes pivotal. It rests with the Defendant to prove that identity, for it is he who attacks the position.

But from the evidence adduced, it is evident that the Native Commissioner has erred in holding that the identity of the girl in this case has not been established with the girl Nongalipi.

The Defendant has produced evidence which cannot be lightly brushed aside merely on the ground of demeanour of the witnesses which the Native Commissioner has not qualified by the instances on which he bases his impressions. His contention that no fine would be paid if indeed Defendants knew that the girl had really had three children is met by a greater improbability, viz., that the Plaintiff and his witnesses who gave evidence in the original case in which Nongalipi was involved stated Nongalipi was his daughter. That in essence is the present Defendants' contention and it seems to the Court a most difficult position for Plaintiff to extricate himself from. There is no question of Nongalipi being or having been another daughter. It is explicitly stated she was a niece.

Defendant has established a strong *prima facie* case that there was identity between the two women. A long postponement ensued during which it was possible for Plaintiff to seek and produce evidence in support of his contention that the girl Nongalipi died in hospital in a pregnant state at a time when Tandiwe was said to be pregnant. Official records should be available to substantiate this fact. Instead of this conclusive proof, evidence is led of three women who contradict each other in details relating to the alleged death of Nongalipi.



This evidence is totally inadequate to rebut the evidence adduced by Defendants, and Plaintiff must fail.

Plaintiff must, however, fail on another ground, namely that in Native Custom, acceptance of part payment is taken as a full settlement of a claim unless it be made evident publicly by the recipient that he is taking an instalment only. This he must do by report to some one in authority—at least by making it publicly known.

Plaintiff has not done so in this case and he must be held to have waived any balance which may have been claimable otherwise.

No capital can be made of this payment as an admission of liability. It is not recoverable if paid in mistake of law but such a payment does not make the payer liable for any balance which is not claimable in law.

The appeal must be allowed with costs and the judgment of the Native Commissioner altered to one for the Defendants with costs.

Rider by President:

Section 11 is ambiguous as it is not clear whether the Legislature had in mind the instance where the parties lived in the same area but come from different tribal areas with different laws, or the instance where they are in different areas each with a different system of law or custom, e.g. A. lives in Bulwer, Natal, where lobola is limited to 10 head—B. in the Basuto territory in Mount Fletcher, say where the lobola is 20 head, C. in Bizana where the lobola is not paid.

B. marries A.'s daughter while she resides at C.'s kraal.

A. brings an action against B. for balance of dowry, say at another centre, Bizana, Matatiele, Bulwer or Capetown where the parties then reside.

This is but one instance. Take another: B. seduces C.'s daughter at A.'s kraal. The daughter has thrice previously been rendered pregnant.

While, therefore, we have taken the most exacting basis for our decision in this case, we have not been required to interpret Section 11, nor have we done so. I for one desire to reserve my decision on its true meaning. It is apparent that the principle, if any, to be deduced from the literal reading of the Section must be applied with the utmost circumspection.

For Appellant: Mr. R. H. Randell, Kingwilliamstown.

For Respondent: In default.

CASE No. 37.

JOHN NXELEWE vs. MOYA MAPUNZI.

KINGWILLIAMSTOWN: 17th August, 1939. Before A. G. McLoughlin, Esq., President, Messrs. M. L. C. Liefeldt and J. A. Kelly, Members of the Court (Cape and Orange Free State Provinces).

Native Appeal Cases—Presumption of death—Mere fact of Native absenting himself for long period without com-



municating with relatives not sufficient to warrant conclusion that death must be presumed—Inheritance in Xosa law is through father's side.

Appeal from the Court of Native Commissioner,
Kingwilliamstown.

(Case No. 22/39.)

McLoughlin, P. (delivering the judgment of the Court):

Plaintiff is the son of Mudewe whose sister Nombi married Nobekwa. Their daughter Noncamazana bore two children by Defendant. The Plaintiff seeks custody of these children or alternatively claims payment of dowry from Defendant.

Defendant alleges and Plaintiff admits that there was a brother of Noncamazana.

Plaintiff was called upon to show *locus standi* by proving the deaths of Nobekwa and Ndabeni.

The Native Commissioner ruled that the evidence adduced was inadequate and absolved the Defendant.

This Court will follow the decision in *re Beaglehole*, 1908, T.S. 49, where Innes C. J. held "I am satisfied that it was not a hard and fast rule of the Roman-Dutch law that the Court was bound to presume death after the lapse of any fixed period of years . . . The matter is entirely one for the judge. In coming to a conclusion the judge should take into consideration the age of the absent person at the date of disappearance, his position in life, his occupation, whether he was exposed to any special risk or danger, and so on; and taking all these circumstances into consideration, he should deal with each case upon its merits . . . I am not bound to follow the English, but the Roman-Dutch rule".

The remarks of De Waal J. in *Ex parte Russel* 1926 W.L.D. 118, are particularly apposite in respect of Natives who are known to absent themselves for long periods without communicating with their relatives:

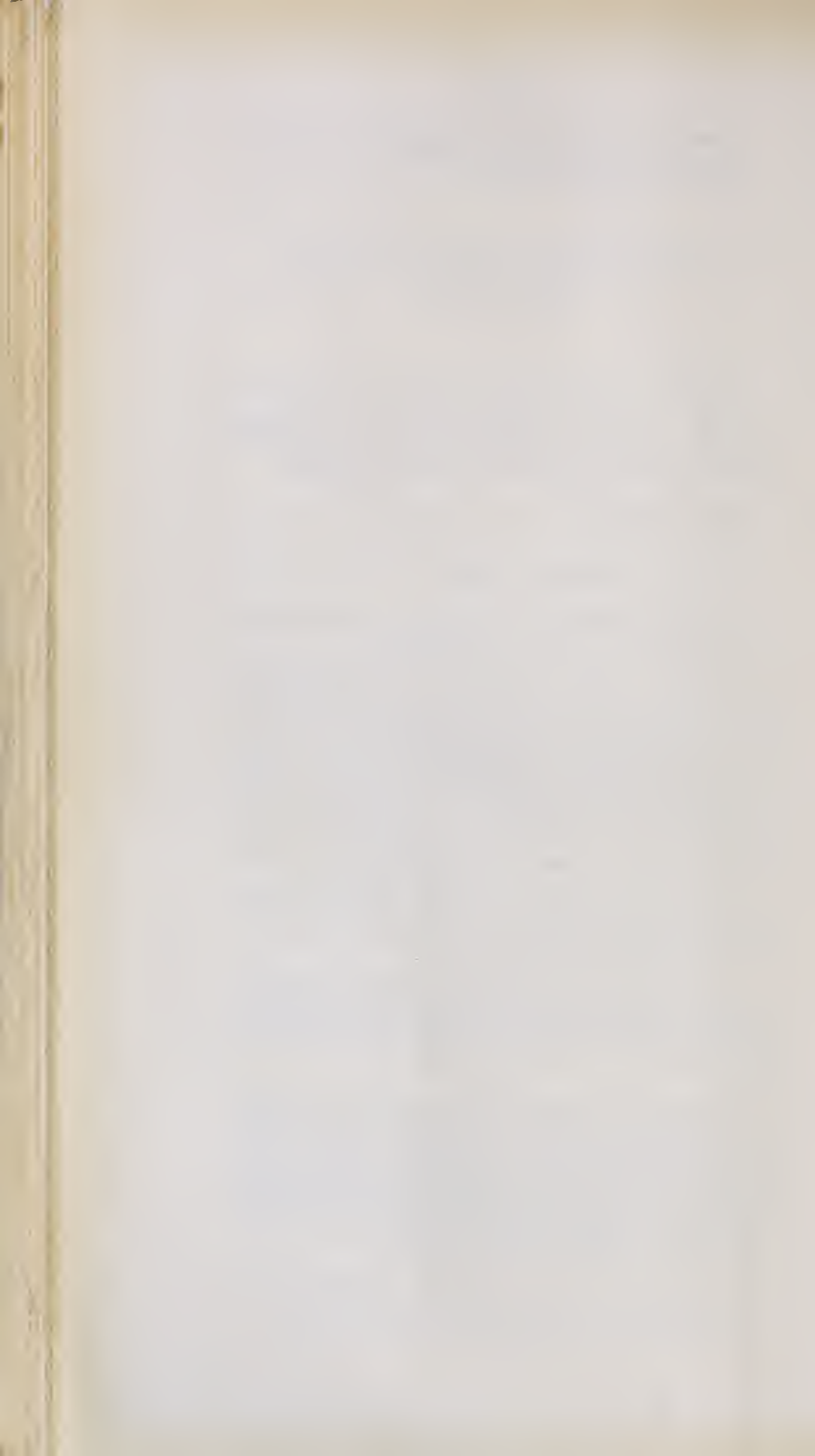
"In the absence of any evidence to indicate that the person presumed to be dead was engaged in an occupation that endangered life, the mere fact of his not having been heard of for a number of years is not sufficient to authorise the Court to come to the conclusion that his death must be presumed".

In dismissing the appeal on the ground that the evidence adduced was inadequate to support a presumption of death, the Court intimates that it was unaware of any authority which permitted a member of the mother's family to inherit in default of male heirs on the father's side and referred to Maclean, page 120, where Brownlee states the law then extant among Xosa in the very area where this case originated.

While not deciding the point, the Court feels it to be its duty to draw attention to the legal position.

For Appellant: Mr. C. R. Atherstone, Kingwilliamstown.

For Respondent: Mr. R. H. Randell, Kingwilliamstown.



GOODWIN TITUS MYOLI vs. HENRY SKENJANA.

KINGWILLIAMSTOWN: 18th August, 1939. Before A. G. McLoughlin, Esq., President, Messrs. J. J. Yates and M. L. C. Liefeldt, Members of the Court (Cape and Orange Free State Provinces). Reserved judgment delivered on 31st August, 1939.

Native Appeal Cases—Damages for adultery—Credibility of witnesses—Appeal Court has power to set aside trial Court's findings of fact—Probabilities to be considered—Quantum of proof under Common and Native Law in adultery cases—Same clear proof required as in Criminal cases—Onus of proof—Plaintiff cannot succeed on mere balance of probability.

Appeal from the Court of Native Commissioner, Stutterheim.
(Case No. 14/39.)

McLoughlin, P. (delivering the judgment of the Majority Court):

In this case Plaintiff in the Native Commissioner's Court sued for damages in the sum of £150, sustained by Defendant's adultery with Plaintiff's wife. Judgment was given for Plaintiff for £25. Defendant has appealed on the ground that the finding was against the weight of evidence.

At the outset, it is necessary to indicate that the claim is framed as one under the Common Law, but the Native Commissioner has correctly dealt with it under Native Law as he implies in his reasons for the amount of damages awarded.

Adultery is not one of the incidents flowing from a marriage which bind the parties only or their issue. Adultery is a delict committed by a person who is not a party to the marriage contract and who is not bound by its terms. If the wife can commit adultery only in a Christian way when married in Church, obviously the husband must be restricted to the same rule when indulging in illicit intercourse with the wife of a heathen partner in a customary union.

But, whether Common Law rules of evidence are applied or Native, the human factor remains the same and the reactions will be those of a native living in a native society, but in the present instance subject also to any religious or administrative sanction which would follow on discovery of the delict.

In the present case, it seems to me that in weighing the evidence, full allowance must be made for probabilities and improbabilities.

Now the Plaintiff's version is that during his absence at Capetown at work his wife became pregnant. He has testified that he could not have been the father of the child, and as the Defendant has not attempted to rebut this allegation it must be accepted as proved.



Plaintiff himself knows nothing of the cause of the pregnancy.

He has, however, called a native woman Notenzi Nqumba, his wife Jane, and her children, Macdonald a boy of 15 years, Titus a boy of 11 years, another girl of 11 adopted daughter of one Robert Skenjana whose relationship to the Plaintiff is not disclosed. He also called Cecelia, his cousin aged 18 years, and in addition Goliath Mangqangoza, another cousin, Skulpad Matangana, an ancient neighbour doing odd jobs for Plaintiff's family.

The wife Jane having given the fullest account of the affair, it will perhaps be advisable to analyse her version for comparing the statements of the other witnesses.

She says Defendant visited her very often and slept in her hut with her, having connection. Her husband had left in March, 1936. In March, 1937, she discovered she was pregnant. She told Defendant who continued visiting her and having intercourse. Then her husband wrote to say he was returning. She left for Port Elizabeth on the advice of her relatives.

If they advised her to go away then it seems strange that she should get money from Defendant, as she says, especially in the manner alleged, viz., that Defendant gave it to her father to give to her as he was afraid she might sue him if he gave it to her personally. The father has not been called to explain this matter. Defendant apparently dealt with the matter as a purely business transaction, which more than accounts for the fact that the money was given to the father and not to Jane.

She went and gave birth on 16th November, 1937, and returned to Emgwali in January, 1938, Plaintiff having remitted money for her return. From July to September Defendant paid her 10s. a month but, as she says she never received any letters from him, it is not clear how he transmitted the money.

Coming now to the evidence of intimacy we find an almost entire lack of concise or tangible facts. There is nothing definite in regard to any single instance of intercourse, not even the first occasion. Everything is generalised. An attempt is made to introduce the woman Notenzi Nquma as a go-between, but this piece of evidence is most unconvincing for she admittedly knew of no intimacy.

Jane's (the wife) version is as follows: "He (Defendant) slept at my place very often. He slept in my hut with me. He often had connection with me . . . When Defendant slept with me, my children were in the hut . . . they all slept in the hut when Defendant was there . . . I never got into bed with Defendant in front of visitors—only children" (p. 12). She attempts to particularise one occasion: she states: "She (meaning Notenzi Nquma) brought a message from Defendant one night. He was at my home that night—all of us went out. Defendant left and Notenzi and I went into the kitchen and there she gave me a message. I went out. Before Defendant left he called Notenzi. When I went out I met Defendant and he said he was coming that night. It was late then. Defendant went home and I went to my hut. When I went into the hut Defendant came in also. No! I undressed and went to bed and then Defendant came in."

No date is mentioned but Notenzi was there in scoffling time, which might be December or January or even later according to the season.



Notenzi states she was there 2 years ago (giving evidence on 13th December, 1938, so it would appear). "During my stay Defendant visited Jane . . . Defendant visited Jane every day I was there. He used to leave after supper . . . I have left him in Jane's hut while I went to my hut to sleep. I once saw him leaving Jane's hut in the morning. I had seen him arrive the night before and had left him in Jane's hut when I went to bed."

In cross examination she elaborated this statement. "I know he stayed one night—from supper time till next morning. Jane also saw him. Only Jane, Defendant and I were there that night. The children were in the hut. That night I went to bed after supper as usual . . . I left Defendant and Jane together. Defendant came to the kitchen where I was sleeping. Late in the night Defendant told me to call Jane as he was going home. Defendant said he was afraid of the children who were in Jane's hut. I called Jane and when she came I went to sleep leaving them outside. Next morning I saw the two of them outside. I saw them standing outside. It was before sunrise. I don't know where he came from, I don't know where he slept. . . . I am sure Defendant asked me to call Jane outside. Next morning I saw them standing talking. I did not tell Mama I saw Defendant walking away."

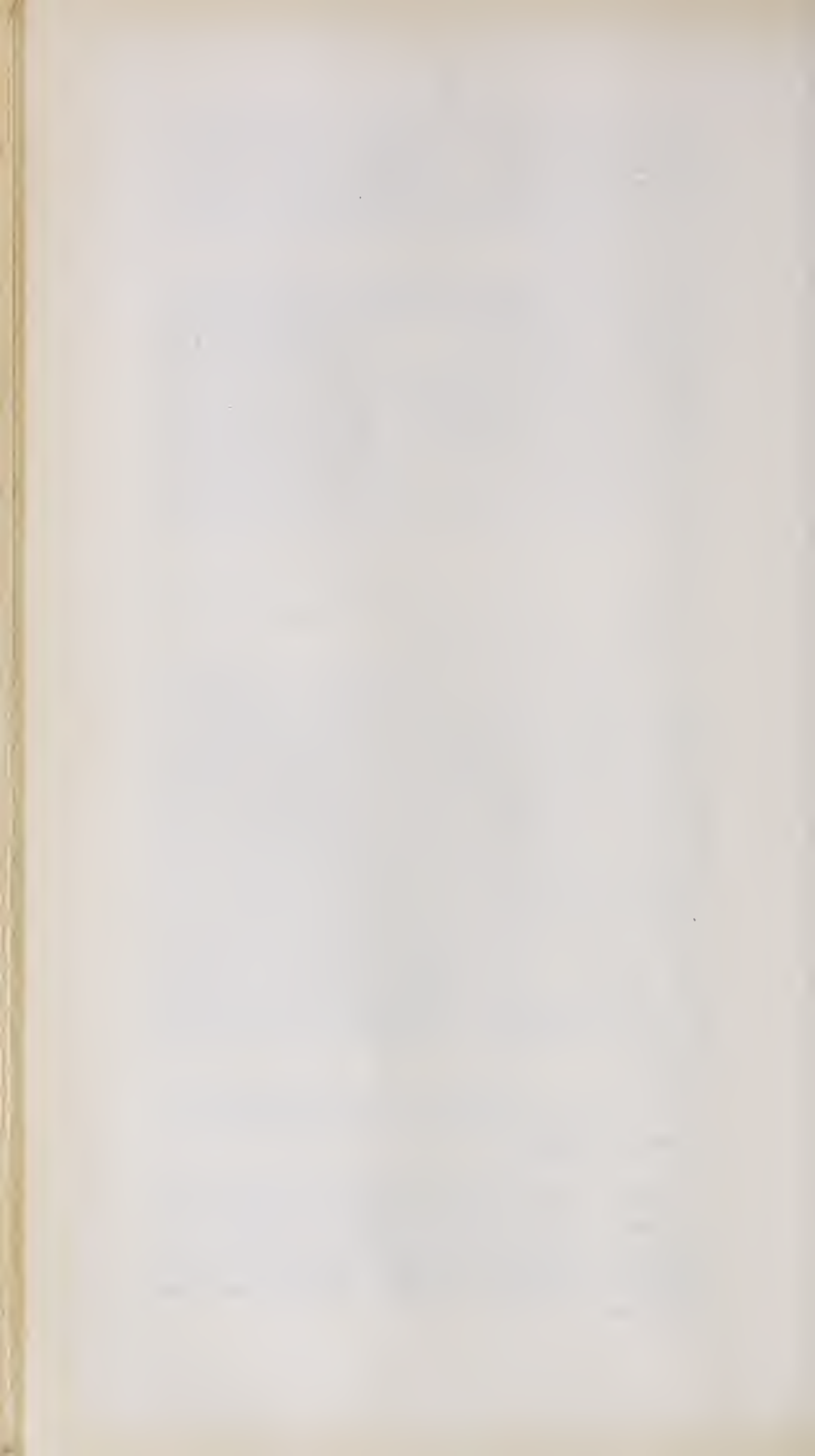
This is the only evidence of a specific occasion. It does not ring true.

If Jane's version is correct, then all went out together and there was no need to call her out.

If Notenzi's version is correct then Jane is wrong in saying "Defendant left and Notenzi and I went into the kitchen and she then gave me a message". Firstly the allegation about calling Jane from her hut because of fear of the children is shown to be false. Secondly Notenzi's statement that Defendant returned late in the night must also be false for from Jane's account it was after she and Notenzi had gone to the kitchen together after Defendant had left. Actually it is questionable whether either witness has told the truth because Notenzi gave another version to the Minister. "One day he did not go home. He stayed until late hours, then he and I left the house in which we were all sitting. I was going to sleep in a neighbouring hut, he I supposed was leaving for his own home. When we were outside he asked me to go into the house from which we were coming out, again and ask Mrs. Skenjana to come out to him. I did so. I then walked in and slept in my hut. Early next morning I saw Goodwin Myoli going towards his home direction". Jane's stumbling version of his return and entry into the hut is in keeping with this falsehood, as also the contradiction of Notenzi of her evidence before the Minister Mama whose record clearly shows that she said Defendant was walking away when she saw him in the morning.

When to these inconsistencies is added the admitted fact that Notenzi admits coaching by Jane in her evidence, it becomes wholly impossible to accept, much less to build on, this piece of evidence.

Notenzi is not an ordinary go-between, for Jane admits and repeats that Notenzi knew nothing about her affairs with Defendant. It passes understanding that in spite of the frequency of the visits, Notenzi should be in ignorance of this intimacy. One can come to only one conclusion on this allegation of ignorance and that is that there was no intimacy, for the other evidence of immoral visits rings equally false.



Jane's statement that she never got into bed with Defendant in front of visitors—only children, is false for she adds immediately afterwards that Cecelia—who was a visitor—and thus not merely a child, was sleeping in the same hut and when Defendant visited Jane (page 12).

In Jane's evidence in chief she said "Cecelia used the same hut as I did when Defendant was in bed with me". Jane leaves the impression that she was a child calling her a "big girl" but she is 18 years old. Jane states "The children saw what went on. It was not a nice thing to do but Defendant promised he would not come until the children were asleep. Defendant came to visit me while the children were awake when he was drunk. Sometimes sober, sometimes drunk", later she added "When Defendant came to my room I have known the children to be awake. I can't say if they were asleep or not when he got into the bed. I thought they were asleep. I am ashamed to know they were not asleep", directly contradicting her first evidence that Defendant came while they were awake when he was in liquor, and her own statement that she knew they were awake. She obviously cannot reconcile the improbability with the fact.

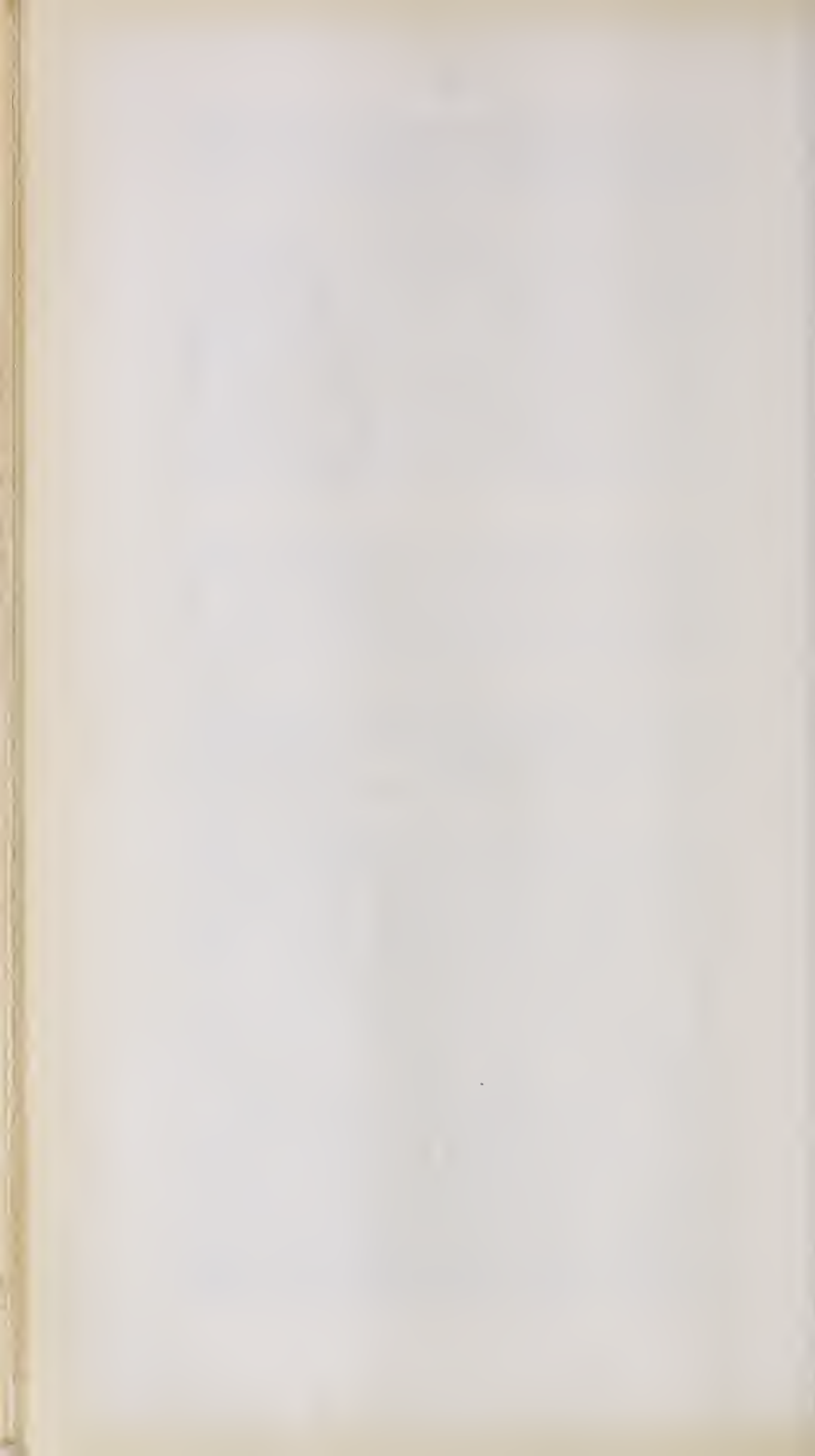
Cecelia was there "after" the June holidays in 1937. She was there only for 3 days, yet although she was such a dangerous witness Defendant "slept with Jane all three nights I was there". She leaves nothing to chance. He came in the dark. Presumably to identify him she says "Once I saw him leaving. It was early morning". By itself that statement might pass but the next sentence completely destroys its value "Other days I saw him leave also".

By the time she had completed her version one wonders why she was so diffident in saying "Once I saw him leave". She has not explained how she could see that Defendant was naked when he got into bed for the boy Macdonald says "it was dark by the double bed". "It was dark and I could not see properly." Cecelia, of course, has it that the door was open while he undressed and that Jane shut it then.

I must confess complete inability to reconcile the evidence of Cecelia with that of Macdonald. Cecelia says "I saw him leaving going out of the door. Jane went outside with him every morning. I can't say if the other children were awake or not. I did not hear them talking. I looked through the window because I wanted to see him. I did not hear the other children move while Defendant was leaving. They were quiet. . . . *There were four children in the hut. Ndoli, Titus, and Macdonald and two young children*". "When I saw her (Jane) in the morning *she was fully dressed*".

She adds that they, meaning Jane and Defendant, made no noise but she woke up each time just as they were leaving.

Macdonald says "While Cecelia was with us I did not see Defendant arrive but one morning very early I saw him leaving the hut with Jane. Cecelia was in the hut. *I was outside.* Jane and Defendant were under a blanket. It was Jane's blanket. Defendant was dressed in overcoat and cap and *Jane had a petticoat on*". "I did not go back into the hut." Unfortunately for Plaintiff's case, Skulpad Mategana destroys completely any tittle of value this evidence might have had. He says "I live next door to Plaintiff's. . . . I know Cecelia. I saw her at Jane's. I saw Defendant at Jane's early in the morning while Cecelia was at Jane's kraal. I saw him sitting in the hut. Cecelia was sitting there also dressed. There were other children there, they were awake. That day Defendant left when the sun was up". Then follows the crowning piece of evidence



“While Cecelia was at Jane’s I saw Defendant at Jane’s at least six times—on six different days”. Cecelia having the Court to believe she was there for only three days.

Similarly I cannot reconcile the evidence of Macdonald with that of Titus and Nodoli. Speaking of Defendant he says “He went away and returned when we were asleep. There was a dog that barked at him and *Jane used to get up and come back* with Defendant into the hut” under cross-examination he added “Then the dog would bark and *Jane would go out and return with Defendant*. He did not knock. *Every time the dog barked Jane went out*. Defendant did not come every night. The dog barked at anyone. *She used to go out* and if it was not Defendant she came back. She did not go out every time the dog barked”. He adds that the barking of the dog woke them and that he knew Titus was awake for the latter spoke to him, as Jane and Defendant were coming in.

Titus says “Sometimes Defendant came later at night but we were still awake. He just walked in and went straight to the bed. *My mother never went and met him*”.

Nodoli’s version is that “Defendant opened the door himself (i.e. when he came back at night time when the light was out). *Jane never met him*. She was on the bed The dog barking used to wake me and *then someone opened the door* and then I saw Defendant come in. *I never saw Jane meet him at the door*”.

These inconsistencies are so glaring that no useful purpose would be served by analysing all the other discrepancies in the evidence of these witnesses. These are not mere errors of observation. They go to the root of the Plaintiff’s case as other inconsistencies show.

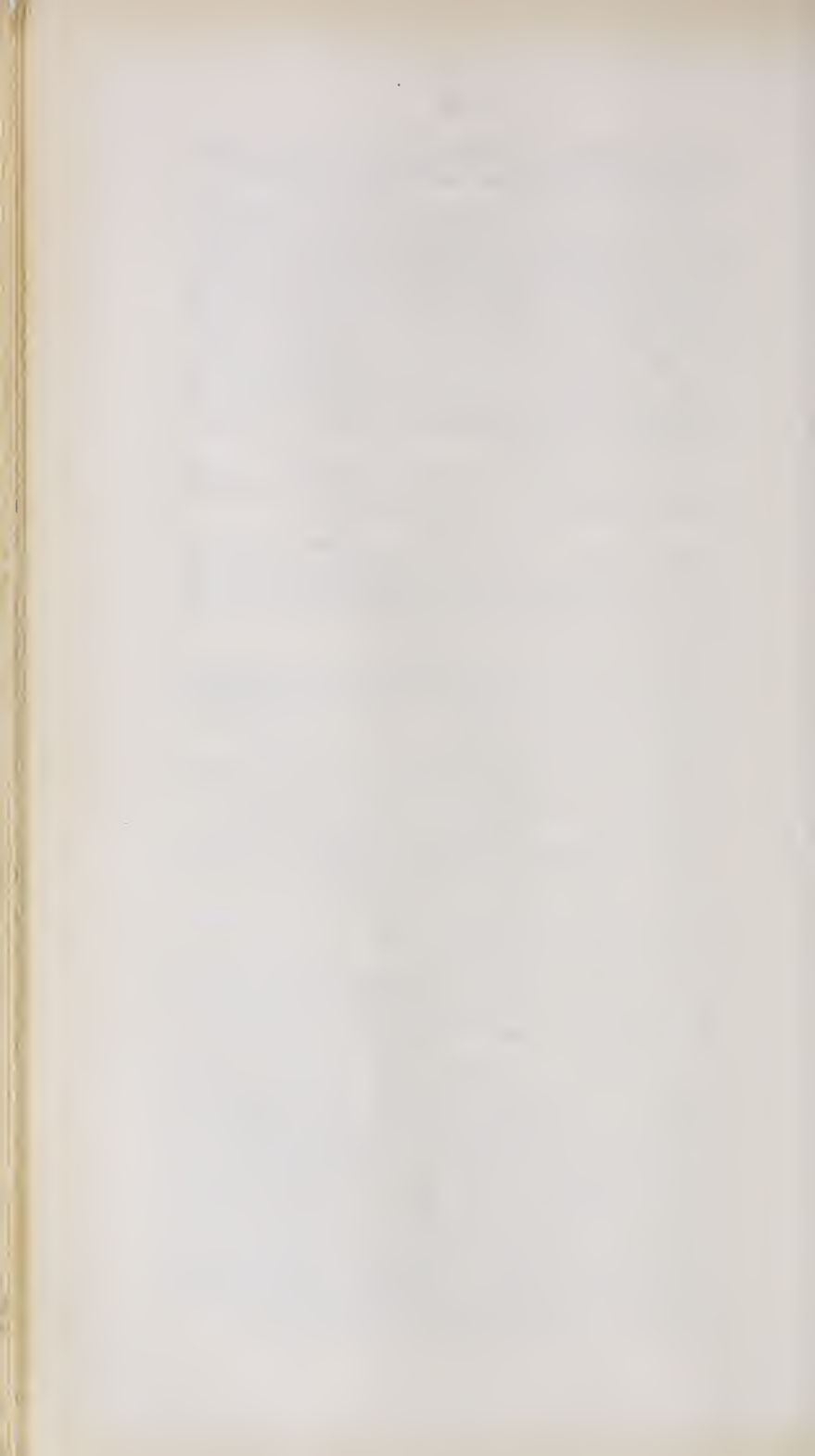
Following another line of enquiry we find the evidence regarding the discovery and notification of the pregnancy and the reactions thereto, equally inconsistent and nebulous.

Jane’s version is “I discovered I was pregnant in March, 1937. I told Defendant I had become pregnant. He continued visiting me and having connection with me.

Then my husband wrote and said he was coming back. I told Defendant this. Soon after this I left for Port Elizabeth. My relatives advised this.”

Now the child was born on 16th November, 1937, and in the normal period of gestation, would have been conceived on or about the 9th of February, 1937, so that the stoppage of menses should be a sign in March, 1937, as she avers.

She elaborates her evidence at the rehearing “When I knew I was pregnant with this child I did report to my relatives. It was about two months when I reported. I reported. I was not pressed, I am sure of that. My relatives did visit me. *I called them to report* I was pregnant. I told them Defendant was responsible. I mentioned no other name. I told Mama that. I did not mention Richard Nkomo until I copied Defendant’s letter written out for me. I never mentioned Richard Nkomo to Mama. I told Mama Richard Nkomo’s name only came up when I copied Defendant’s letter. When my people visited me I did not try and hide Defendant. I told them Defendant had seduced me”. At a later stage she added “I did tell Godwana that a man from Capetown had made me pregnant. Defendant told me to say so. I was trying to hide Defendant. I never told any one else a man from Capetown was responsible”.



Now apart from the evident self-contradictions in her account, it is perfectly obvious that she has not told the truth.

Letter "H" is dated 12/8/37 and "F" 30/8/37.

It would have been perfectly futile to attempt to shield Defendant by writing the letters at that belated hour if she had from the commencement disclosed his name as the author of her condition.

Actually the evidence shows that there is something sinister in this matter. Goliath Mangqongoza states: "Jane sent for me and that's why I went about this business. I went three times. The first time she mentioned Defendant, she did so quite freely. I advised her to leave and the second and third time I went to see if she had left. *The first time she mentioned only Defendant's name*".

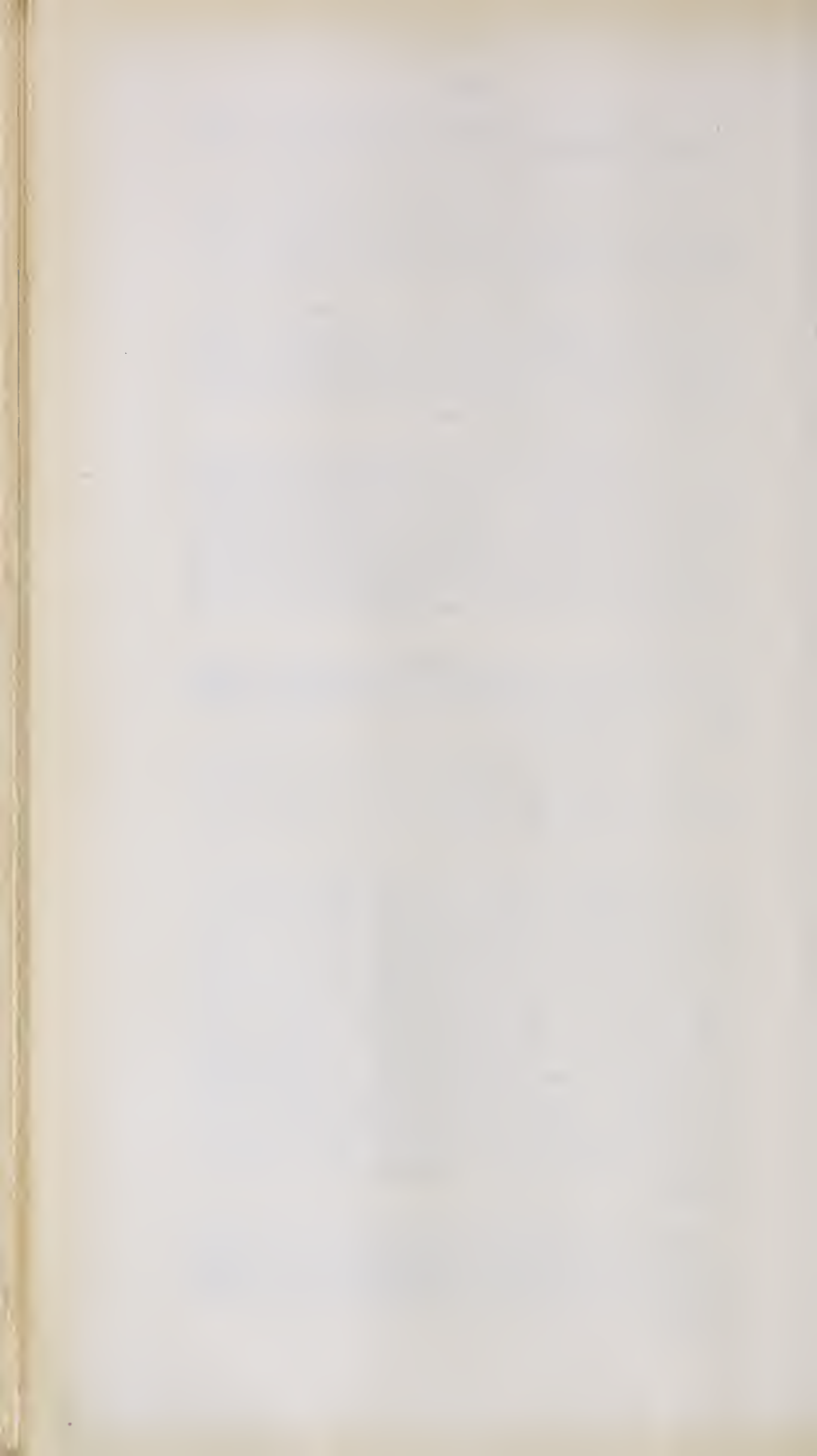
This he contradicts almost immediately afterwards when led into a trap regarding the enquiry before Rev. Mama. He says "I was present at the enquiry at Engwali. I know what Jane told Rev. Mama. She mentioned no other name other than that of Defendant. I am quite sure. She did say that Defendant had said she should say it was Richard Nkomo who had made her pregnant. At the enquiry Defendant produced a letter from Jane saying Richard Nkomo was the man. That's how his name came up. *The first time Jane told us Defendant had told her to blame Richard Nkomo was on the first visit*".

Then follows the most remarkable piece of evidence "Jane made her report to us about end of September or October 1937. She was big with child. This was first time I noticed this . . . The first visit was towards end of September 1937. The next shortly after".

Obviously again the discrepancy amounts to proof that Jane or the witness has not told the truth. The other participant in the family council John Tutu *alias* Danster, Jane's father, was not called by Plaintiff.

It is enlightening to compare at this stage Jane's statement at the Minister's enquiry "I told Goodwin (Defendant) that I was pregnant by him. That was in March, 1937 . . . at this juncture I was noticed by my husband's kraal people. My uncle by marriage enquired into the matter. At first I told them falsehood as Goodwin had strongly enticed me not to disclose his name . . . At this stage I brought the matter to my uncles by marriage who wished to know who had committed this sin with me and in reply I mentioned Richard Nkomo's name . . . My uncles insisted on asking me to tell the truth". It appears that the letter "H" was not produced until later when Defendant had cross examined her at some length. Jane refused to answer a question whether she had told J. Tutu that she had been put in the family way by a traveller. From the Rev. Mama's evidence it would appear that the enquiry was almost Gilbertian but, though the Court cannot draw on it for fact it does serve as a measure of the accuracy of statements made by the same witnesses in the present case, to show their insincerity or falsehood.

Summarising the foregoing results we find that the witnesses contradict each other on the main points on which Plaintiff's case rests. They have shown by inconsistencies that their evidence cannot be taken as a truthful account of something that actually happened but was differently observed by each witness.



The Native Commissioner has unfortunately not gone into detail in analysing the evidence nor has he helped the Court to evaluate the credibility of the witnesses by commenting on demeanour. It does not help to say that all the witnesses gave their evidence in a straight forward way if their statements are diametrically opposed to each other, as has been shown. The Native Commissioner does not say why he has accepted the one version and rejected the other or even which of the conflicting versions of particular witnesses, who have contradicted themselves as well as each other, he has accepted.

It has been stressed that the decision in this case rests on credibility and that this Court is not in as good a position as the Native Commissioner was to judge the issue.

In regard to those details of a case which may be called evanescent, the trial Court is undoubtedly placed in a better position than the Appeal Court. This is fully recognised in *Parkes vs. Parkes*, 1921 A.D., where Innes, C.J., remarked "Now the manner in which a witness gives his evidence is often an important factor in determining the weight of the evidence. His candour, or evasion, his readiness or reluctance, and his whole demeanour are important elements in estimating his credibility", at page 75.

Where a trial Court has indicated the existence of these elements and disclosed the reasons for findings based thereon, the Appeal Court will hesitate long before disturbing those findings. But, as the learned Chief Justice continues in his judgment "the test must be applied with care and not pressed too far; for valuable though it may be, its application is full of difficulty. Still a conclusion as to credibility by a skilled and experienced judge is not to be lightly set aside".

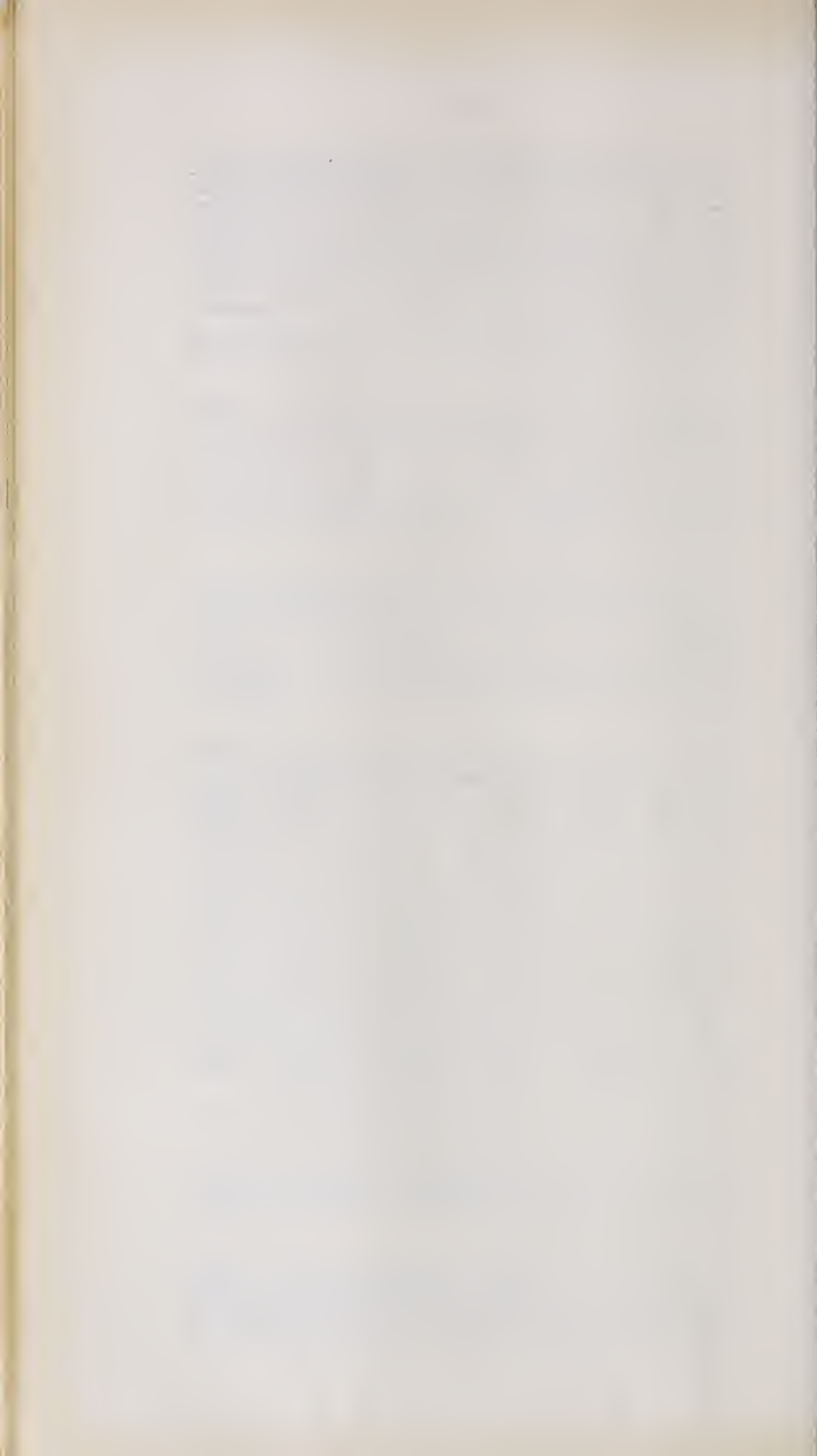
He then goes on to stress the fact that "a Court of Appeal has the power to set it aside, and will not hesitate to do so when it is satisfied from other circumstances that the trial Court has reached a wrong conclusion. Now in some cases such other circumstances lie ready to hand; admitted written documents, contemporaneous declarations, and similar matters often afford valuable material for checking the estimate of credibility formed by a trial Court". At page 75.

"The Court of Appeal must reconsider the materials before the judge . . . The Court must then make up its mind, not disregarding the judgment appealed from, but carefully weighing and considering it, and not shrinking from overruling it if on full consideration the Court comes to the conclusion that it is wrong . . . There may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and those circumstances may warrant the Court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen"—Innes, J. A., in *Pieters vs. Solomon*, 1911 A.D., page 135.

These remarks refer to judgments supported by very full reasons exploring all aspects of the case.

They apply with greater force in the present instance where there is an absence of fullness in the reasons and a lack of analysis of the evidence of individual witnesses and comparison of the different versions given by those witnesses and others on the same side.

Indeed, in this respect, the present case has much in common with the case *Gates vs. Gates*, 1939 A.D. 150. There also evidence of one witness was relied on as being an entirely independent witness—yet the Appeal Court reversed the decision, the judge remarking "But this passage from the judgment suggests that a number of rather unusual features



in this case, both in its broad general aspect and in the details of the evidence of Thomas and Mrs. Pedlar, were not present in his mind when he decided to accept Mrs. Pedlar's evidence.

On the general aspect of the case the Court is bound to consider the probability of the story told by these witnesses in relation to the known facts, and when it directs its attention to that question this story appears improbable", at page 153.

So much for credibility. There remains the greater factor of the quantum of proof.

The Courts require clear proof of adultery, both under the Common Law and under the Native system. The latter is indeed most exacting in its requirements of proof—which the present case entirely lacks. There has been no catch and none of the native customs have been observed in connection with this incident.

But the Common Law is equally exacting for, as Scoble remarks, page 168, *Law of Evidence*, charges of adultery are construed with the same strictness as is applied in criminal cases. He relies on *Kleinwort vs. Kleinwort* (1927, A.D. 124), but that case does not go as far as his statement.

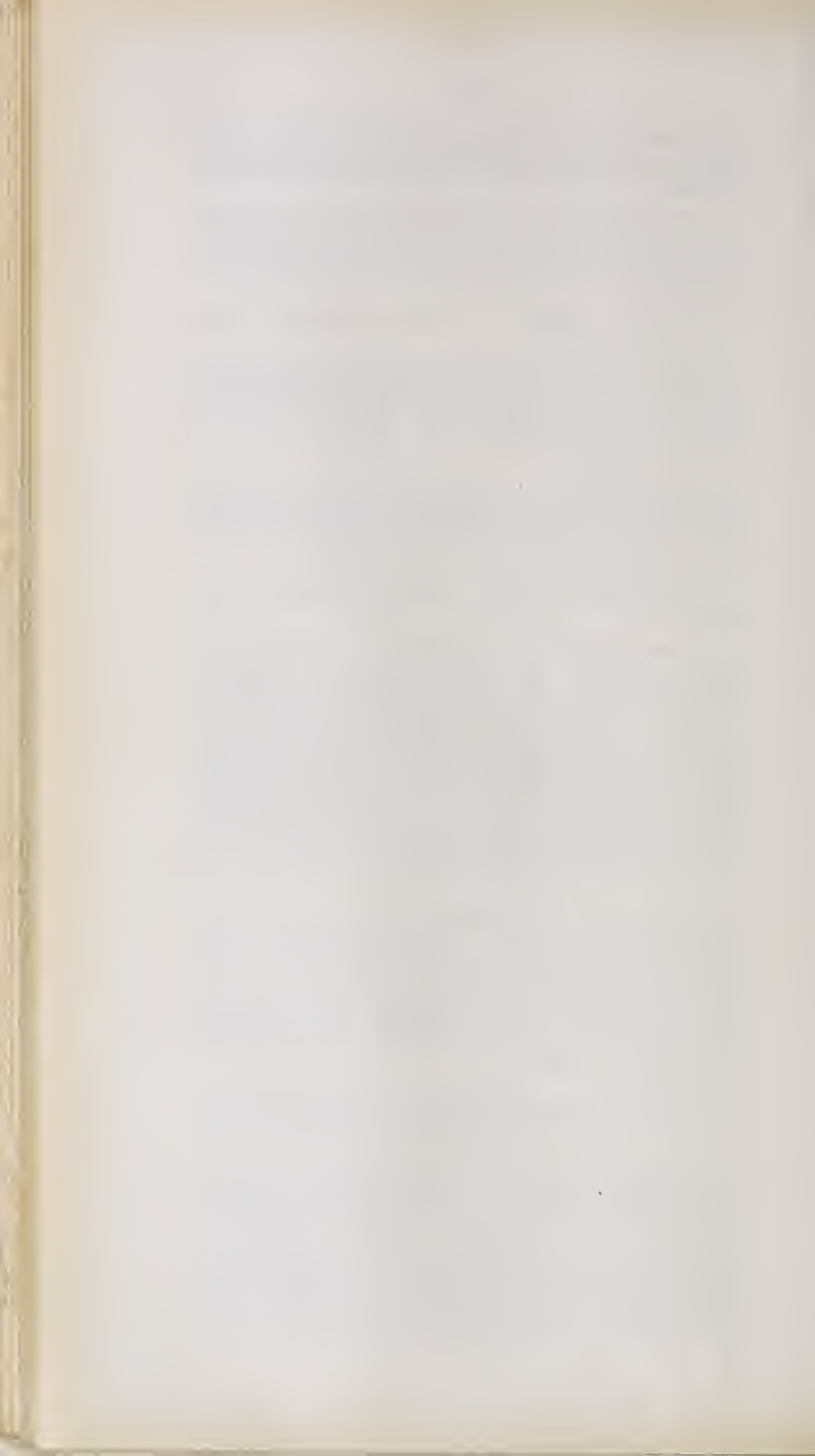
The question was, however, directly considered in *Gates vs. Gates*, 1939 A.D., page 150, where Watermayer, J.A., stated:

"It was suggested in argument that in divorce cases a higher standard of proof was required than in other civil cases and reference was made to the case of *Steytler vs. Steytler* (17 C.T.R. 925), in which de Villiers, C.J., said at p. 929: 'Now, it appears to me that in a case of this kind proof of adultery should be conclusive. The effects upon a spouse against whom adultery is proved are of a very serious nature, and I have always considered in these cases that the Court should require the same clear proof as in criminal cases, as the honour of a woman is at stake, and not only the honour of a woman, but the honour of the man with whom adultery is charged. The Court which has to consider the case has to be perfectly clear that there can be no doubt whatever that the offence has been committed'."

Now in a civil case the party, on whom the burden of proof (in the sense of what Wigmore calls the risk of non-persuasion) lies, is required to satisfy the Court that the balance of probabilities is in his favour, but the law does not attempt to lay down a standard by which to measure the degree of certainty of conviction which must exist in the Court's mind in order to be satisfied. In criminal cases, doubtless, satisfaction beyond reasonable doubt is required, but attempts to define with precision what is meant by that usually lead to confusion.

Nor does the law, save in exceptional cases such as perjury, require a minimum volume of testimony. All that it requires is testimony such as carries conviction to the reasonable mind.

It is true that in certain cases more especially in those in which charges of criminal or immoral conduct are made, it has repeatedly been said that such charges must be proved by the "clearest" evidence or "clear and satisfactory" evidence or "clear and convincing" evidence, or some similar phrase. There is not, however, in truth any variation in the standard of proof required in such cases. The requirement is still proof sufficient to carry conviction to a reasonable mind, but the reasonable mind is not so easily convinced in such cases because in a civilised community there are moral and



legal sanctions against immoral and criminal conduct and consequently, probabilities against such conduct are stronger than they are against conduct which is not immoral or criminal", at pages. 154/5.

In Kleinwort's case Innes, C.J., remarked " Direct evidence of misconduct is not always necessary, because misconduct may be inferred. The parties may be found in such a compromising position that any reasonable man would draw the inference that adultery had been committed. Or opportunity may be sufficient, coupled with such other factors as the evidence of a guilty attachment, or of a mutual passion, of such a nature as to satisfy a reasonable man that the parties had taken advantage of the opportunity of indulging their passion. But the evidence must be strong enough to warrant the inference, not merely that adultery might have taken place, but that it actually did take place".

Now apart from generalisations, there is nothing concise or tangible in the evidence to show even that adultery might have taken place in the circumstances revealed, far less that it did take place. The whole case is strained and the contradictions are more than mere errors of observation of fact and they leave a very grave doubt as to the truth of the facts.

That doubt is strengthened by the very improbability of the story given by these witnesses. Two sets of Native Assessors have stressed the improbability of the adulterer committing the offence in the presence of children. Pampam Dlula *vs.* Gunyati Mconywa, 1939 N.A.C. (C. and O.F.S.) heard at Kingwilliamstown on 3/4/39 and Sdelo Mrwitshi *vs.* Njinana Madubela, 1939 N.A.C. (C. and O.F.S.) heard at Butterworth on 6/6/39. Remembering the official position of the Defendant it would be sheer imbecility on his part to act so openly as these witnesses aver. There was every need for secrecy, for the letter would avail but little if these witnesses were there to testify to his presence and doings there.

In Parkes *vs.* Parkes, 1921 A.D., at page 76, Innes, C.J., remarked " Some of the incidents deposed to were so extraordinary, or displayed, if true, such reckless disregard not only of caution, but of decency, as to render it improbable that the parties concerned would commit them. *The most unchallenged and clearest testimony would be required to establish them*".

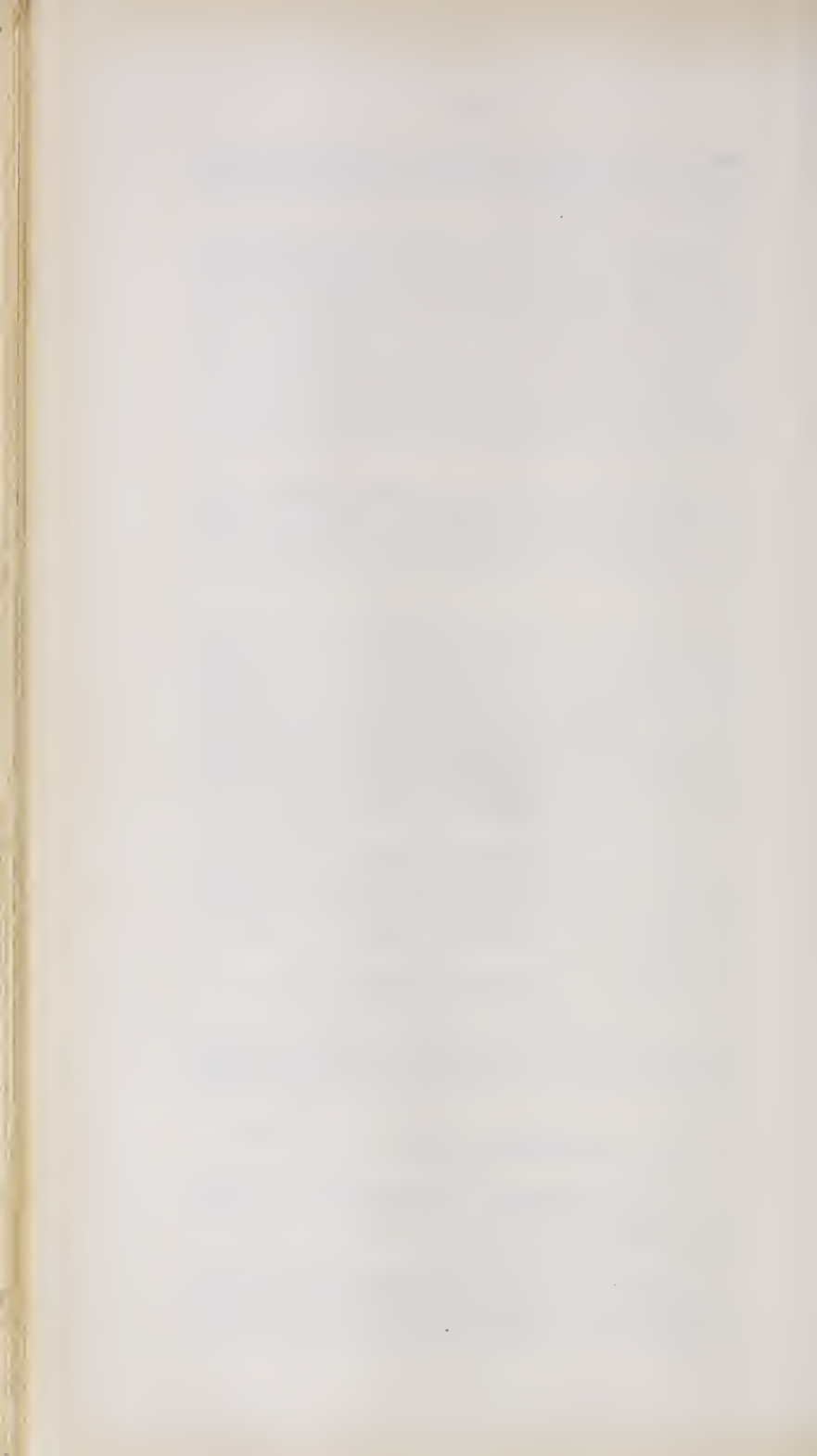
The evidence for Plaintiff falls far short of these requirements as the foregoing analysis clearly demonstrates.

It must be remembered, moreover, that the onus is on Plaintiff. While there is room for possible guilt on the part of Defendant, that guilt must be proved by Plaintiff and he cannot succeed if there is merely a balance of probability.

Here the improbability is so great as to outweigh the probability and Plaintiff must fail.

I am alive to the imperfection in the defence. It is common cause that Defendant did visit the kraal in the Plaintiff's absence, that he was intimate at that kraal; that he took his ease on the bed and stayed late.

But he was not the only man who attended the beer parties at that kraal, for it is admitted by Plaintiff's witnesses that a number of men, young and old, frequented the place—admittedly contrary to Native etiquette, and that some slept there.



Moreover, the possession by the Defendant of the exculpatory letters is in itself a matter of suspicion of guilt. But I am not prepared to hold that they are proof of *guilt*. That proof has not been established and while I am not prepared entirely to exonerate Defendant by a full judgment in his favour, I do feel he is entitled to an absolution.

Yates (Member). I concur.

Liefeldt (Member), dissenting.

With all due respect to the learned President and my brother Yates and after a careful consideration of the written judgment prepared by the President which I have had the advantage of reading, I regret that I find myself unable to agree with their decision in this matter.

This being an appeal on facts, in my view they have failed to give due consideration to the findings of the Native Commissioner who had the great advantage of seeing and hearing the witness on whose evidence his findings are based. The facts that Plaintiff is married by Christian Rites to his wife Jane; that he was away in Capetown from March, 1936, to December, 1937, and did not have access to his wife during that time and that his wife, Jane, gave birth to a male child on the 16th November, 1937, are not disputed. The Native Commissioner found the following further facts proved:—

- (a) That Defendant was in the habit of visiting Plaintiff's hut very frequently even in Plaintiff's absence.
- (b) That Defendant was a great friend of Plaintiff and his wife.
- (c) That Defendant was in the habit of staying late at Plaintiff's hut when Plaintiff was away.
- (d) That Defendant on several occasions during the period in question stayed on after all other visitors had left.
- (e) That Defendant was seen leaving Jane Skenjana's hut in the very early morning.
- (f) That Defendant was seen getting into bed with Jane Skenjana on numerous occasions.
- (g) That Defendant committed adultery with Jane Skenjana.

Defendant denies committing adultery with Plaintiff's wife Jane but admits that he was a frequent visitor to Plaintiff's kraal. *Inter alia* he states:—

"I remember Plaintiff leaving for Capetown. He wrote me from Capetown to see about his sheep and about other business. He wrote frequently . . . After receiving these letters I visited his house often. I am a teacher and farm on my own. I leave school at 2.30 p.m. and usually visited Jane in the afternoon. Sometimes straight from school and sometimes after having dinner. I never left and returned. I have been there often in the evening and have stayed late and then went home. I have sat on the bed. I have lounged on the bed in the presence of the children. I have never been in bed with Jane . . . Sometimes I went early to wake young boys to fetch sheep to castrate. I am related to Plaintiff and his wife . . . During Plaintiff's absence I attended beer drinks at Jane's kraal . . . Goliath and others have left leaving me behind sometimes. This was at beer drinks at Jane's hut. I was still visiting Jane up to September, 1937. By that time I could see Jane was pregnant. Plaintiff had asked how his family was. I wrote the letter produced. I did not mention that she was pregnant because I did not think it was my business to do so . . . I was at the house almost daily."



All the facts found by the Native Commissioner to have been proved, with the exception of (f) and (g), are therefore, admitted. Defendant's reply to the allegation that he was seen getting into bed with Jane is a bare denial.

This Court is asked to say that the Native Commissioner was wrong in holding that this fact had been proved and it is therefore, necessary to consider the evidence on this point.

Jane Skenjana states:—

“ While Plaintiff was away Defendant visited me very often. He slept in my hut with me. He often had connection with me. I became pregnant. Defendant was the cause. I discovered I was pregnant in March, 1937. I told Defendant I had become pregnant. He continued visiting me and having connection with me. Then my husband wrote and said he was coming back. I told Defendant this. Soon after this I left for Port Elizabeth When Defendant slept with me, my children were in the hut. The eldest child is MacDonald, 13 years, Titus, 9 years and Bansie, 7 years. These all slept in the hut when Defendant was there. I slept in a double bed . . . I know Ndoli Skenjana, the adopted daughter of Robert Skenjana. When Defendant visited me, she was staying with me. I know Cecelia Masela. She is a big girl. She stayed with me at intervals while my husband was away. While she was with me Defendant visited me. Cecelia used the same hut as I did when Defendant was in bed with me. Cecelia slept on a separate bed. The children slept on the floor. Mlamli aged about 3 years slept with me . . . Before I left for Port Elizabeth, Defendant asked me to write to his wife saying it was not true he had put me in a family way. I wrote the letter. Defendant said he had seen the letter I wrote but it was not to his satisfaction and he would write out what I was to say and I must copy that in my own handwriting. I did so.” (These two letters were produced at the trial and are repeated here.)—Exhibit “ G ”.

“ My dear Maltshaba,

Auntie I received your letter, it found us all well. I am the only one busy looking for grass. So that the old man can start building. Nothing has yet been done Maltshaba, although we have already got the lots. We are preparing for the building to be started. I am still well, tho' not satisfactorily, I notice that the inmates of my hut are still reluctant to question me, but there was some one else who came here one day, asking who had caused me to become pregnant. I said you won't know him. He is someone I was in love with in Capetown. I saw him here in Stutterheim when I went to sell the wool. I realized Maltshaba that he had been sent; he said Oh! Macisana I don't know where you will go in your present condition, because your existence has been continually poor. The person is Nala Ngódwana. He said these things Maltshaba. I have no news, I'll write when I have news. Your children are still very well. Father sends his love. He says he hopes you enjoy the best of health, there. He says he had bread when you were here last, has not tasted it since. Good byc maan. Best of health. I am, Sgd. Jane Skenjana.” Exhibit “ H ”.

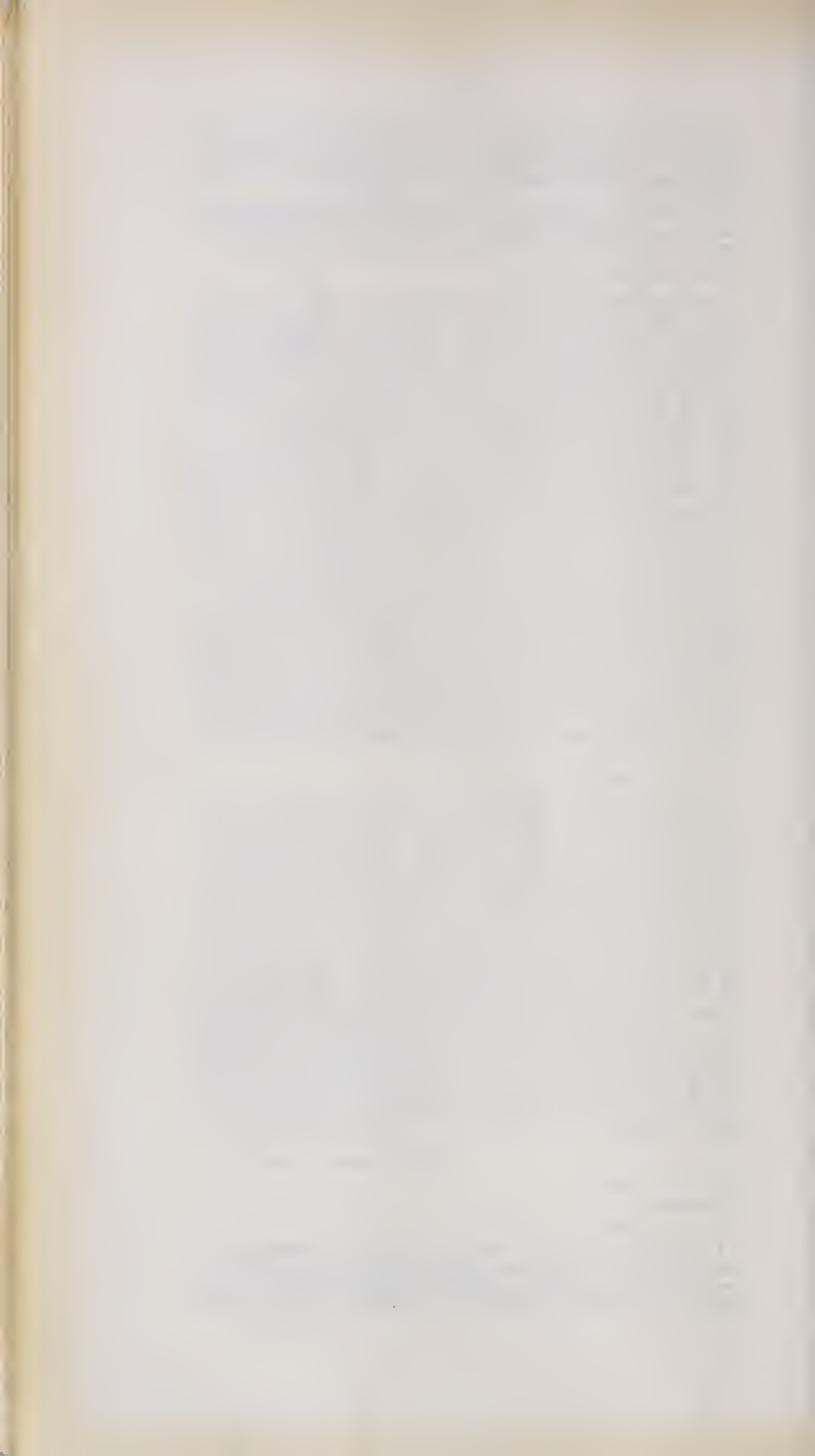
P.O. Emgwali, 18/8/37.

Mrs. A. G. Myoli,

Emgwali.

“ My dear Swaar,

I am still well except that I am lonely. I presume you have noticed that I am pregnant. My reason for writing to you is because people do not know who has caused me to be pregnant. The other party and I are the only ones who know.



I realize that they are spreading certain rumours, even about me. I am sure the rumours have already come to your notice, as teacher Goodwin is in the habit of coming here during the day to see us, sometimes being sent by his swaar, they think that I have something to do with him. This is not the case. You and I being friends, they think this is due to the fact that I have something to do with your husband, and that we are not friends because we are fond of each other. People do this when they want to separate the people. I am writing to warn you not to take notice of the rumours you hear from people. I am pregnant due to intercourse with a man in Capetown. He is a traveller. Now travelling in a motor car with samples. His name is Richard Nkomo; he comes very seldom, so that he cannot be seen by anybody, because I am the wife of someone now due to bad luck and on account of this happening I am sorry about it, but this being so I cannot help it. I am telling you this in order that people can't interfere and cause trouble between other people. I must stop swaar with regards and best wishes.

Sgd. Jane Skenjana."

"He said I must not say it was he who had put me in a family way. I must say it was Richard Nkomo. I did so to please Defendant. I was protecting him. . . . When I knew I was pregnant with this child I did report to my relatives. . . . I told them Defendant was responsible. . . . The children saw what went on. It is not a nice thing to do but Defendant promised he would not come until the children were asleep. Defendant came to visit me while children were awake when he was drunk. Sometimes sober and sometimes drunk.

Notenzi Nqumba is not related to me. . . . She slept in the kitchen. I don't know if she knew what was going on. She brought a message from Defendant one night. . . . I went out. Before Defendant left he called Notenzi. . . . It is possible Notenzi saw Defendant and me outside in very early morning. Defendant was leaving—I was seeing him off. It was before sunrise.

When Defendant came to my room I have known the children to be awake. I can't say if they were asleep or not when he got into bed. I thought they were asleep. I am ashamed to know they were not asleep."

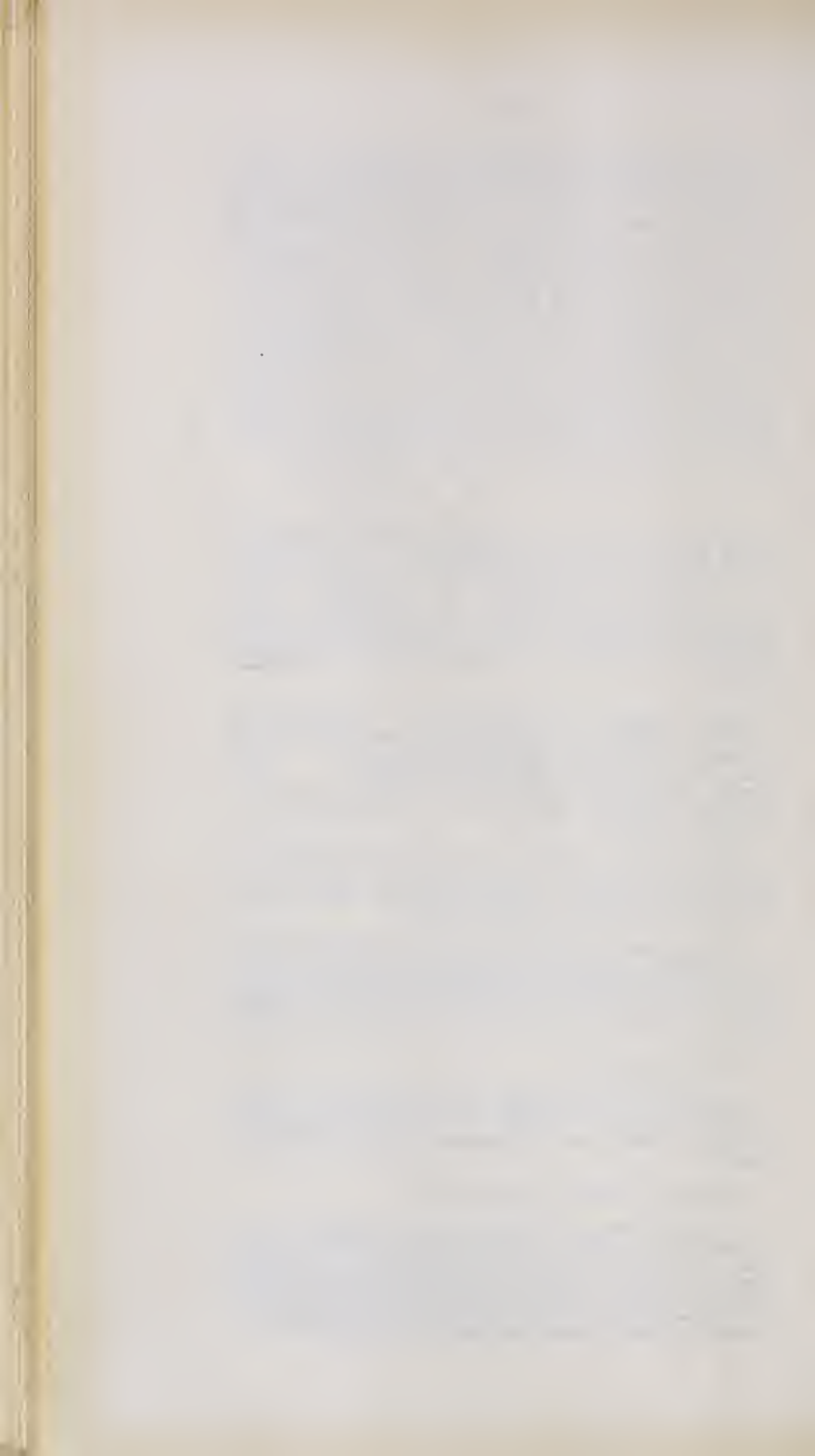
The three children, MacDonald, Titus and Nodoli, the girl Cecilia Masela and the woman Nontenzi Nqumba all corroborate Jane's statement as to Defendant having slept in her hut. All three the children testify to having seen Defendant enter the hut after they had retired, and get into Jane's bed.

Cecelia Masela states:—

"During my stay Defendant came to Jane's hut. He was there all three days I was there. . . . He slept on Jane's bed with Jane. When Jane and Defendant went to bed the light was out."

The woman *Nontenzi Nqumba* states:—

"I stayed with her for 5 weeks. During my stay Defendant visited Jane. Defendant visited Jane every day while I was there. He used to leave after supper. I did not sleep in same hut as Jane. I have left him in Jane's hut when I went to my hut to sleep. I once saw him leaving Jane's hut in the morning. I had seen him arrive the night before and had left him in Jane's hut when I went to bed. . . .



I know he stayed one night from supper time to next morning. . . . That night I went to bed after supper as usual. . . . I left Defendant and Jane together. Defendant came to the kitchen where I was sleeping. Late in the night Defendant told me to call Jane as he was going home. Defendant said he was afraid of the children who were in Jane's hut. I called Jane and when she came I went to sleep leaving them outside. Next morning I saw the two of them outside. . . . It was before sunrise. . . ."

One *Goliath Mangqongoza* states:—

"I am a cousin of Plaintiff. . . . Jane sent me a message and I went to see her with John Ntutu. She made a report to me and mentioned Defendant's name."

Skulpad Matanga another witness called by Plaintiff states:—

"I was at Plaintiff's kraal very often in charge of Plaintiff's stock. Sometimes I stayed until the evening. I have left Defendant there when I left. I left him in the hut. Jane was present in the same hut. After having left him there at night I have sometimes seen Defendant leaving in the morning when I got to Plaintiff's kraal. I have found him in the same hut I left him in the day before. That would be about sunrise. . . . I have not seen Defendant in bed with Jane."

The proceedings of the Departmental enquiry held by the Rev. Mama into the complaint of Henry Skenjana against Goodwin Myoli were put in. Most of the witnesses called in this case gave evidence at the enquiry and their statements were substantially the same as at the trial.

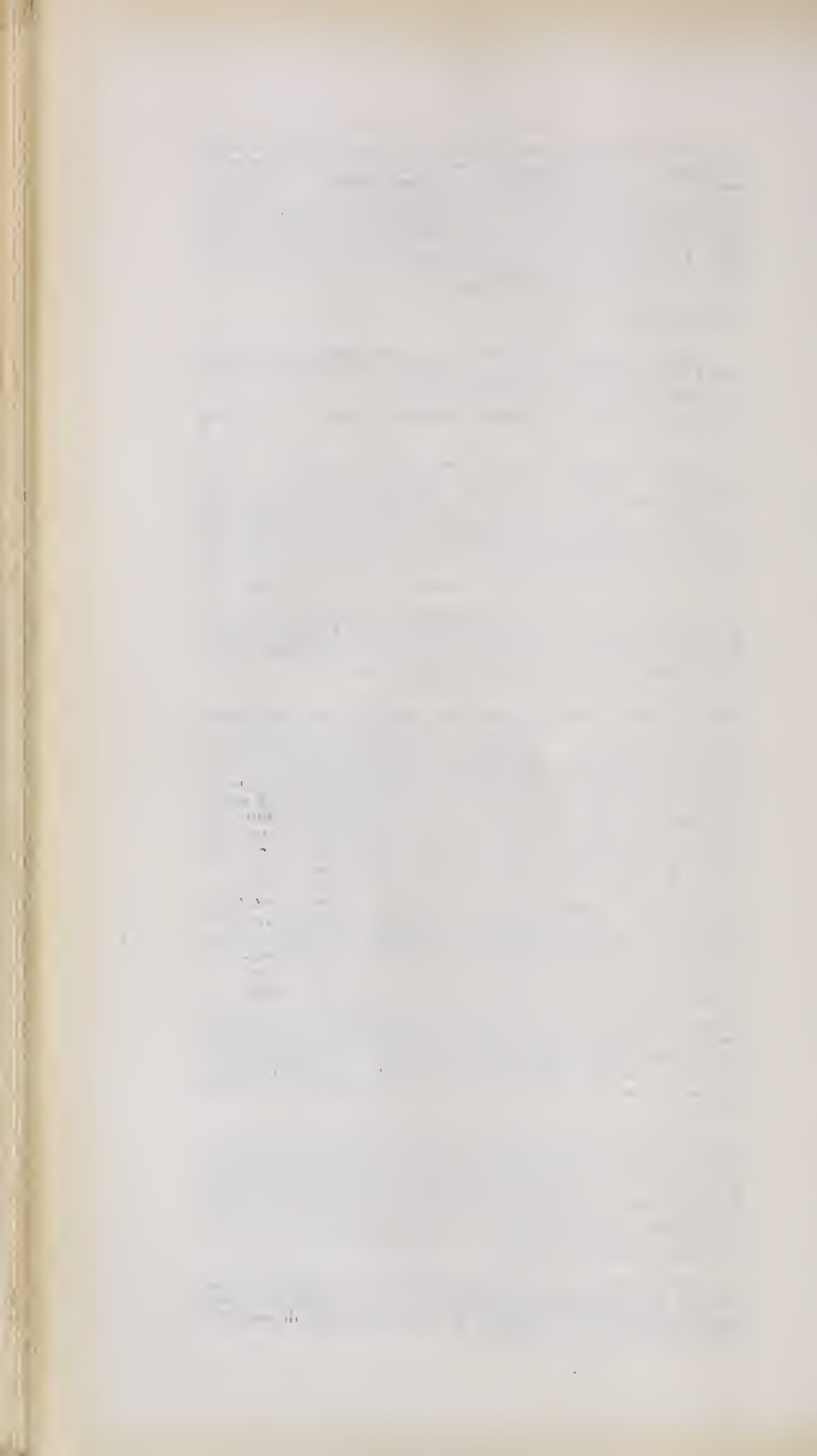
Rev. Holford Mama, who was called by the Defendant states, *inter alia*: "Acting on Defendant's instructions I convened a meeting to enquire into a complaint. Jane Skenjana was pregnant and an enquiry was held by me. . . . Jane maintained all through that Defendant was the father of her child. She said Defendant had pleaded with her not to give away his name so she wrote the two letters "G" and "H" to Defendant's wife. Cecilia, MacDonald, Titus and Ndoli gave evidence at the enquiry. They were only questioned by Defendant. They all told the same story."

The Native Commissioner, in his lengthy reasons for judgment, makes the following observations in regard to this evidence: "Nontenzi Nqumba, an apparently impartial witness, gave evidence that (here he repeats the substance of the statement already recorded).

Jane certainly did not come out of the case with an enhanced reputation and had her evidence been uncorroborated, the Court would have viewed it with suspicion, but in addition to the witnesses mentioned Cecilia Masela, Plaintiff's two children MacDonald and Titus and Ndoli gave evidence that they had often seen Defendant get into bed with her.

It is admitted that there are discrepancies in the evidence given by the last mentioned witnesses, but they are not of a serious nature and certainly not such as to make the Court believe that they were not speaking the truth. In view of the fact that they state Defendant slept in Jane's bed with Jane on numerous occasions it is very probable that even the apparent discrepancies may be correct as they may not be referring to the same night.

All these witnesses gave their evidence in a straight forward manner and although subjected to a most vigorous cross-examination were not shaken on any material point and the Court accepted their evidence.



In his address Defendant's attorney made a point that it was unlikely that Defendant got into bed in front of the children. But Jane has stated she thought the children were asleep when Defendant got into bed with her.

It is admitted Defendant was a frequent visitor and a very good friend of Jane and had ample opportunity for committing adultery.

The Court found the corroborative evidence overwhelming. . . . The Court found no reason to disbelieve any of these witnesses and in the circumstances gave judgment for Plaintiff."

It was urged before this Court that the Native Commissioner erred in accepting the evidence for the Plaintiff as it was highly improbable that Defendant would have had intercourse with the woman Jane in the presence of her family and in support of this contention reference was made to the case of *P. Dhula vs. G. Ncanywa* reported in (P.H. 1939, R. 44) and heard before this Court on the 3rd April last.

It was further stated that Defendant who is a teacher was not likely to risk the loss of his appointment by such conduct. It was submitted that the children who gave evidence for the Plaintiff had been schooled in their statements as the discrepancies proved.

Now it has been repeatedly laid down that a Court of Appeal will not readily set aside the finding of a trial Court where the finding is one purely of fact. In *Peters & Co. vs. Salomon* (1911 A.D. 135), which is one of the leading cases on this point, Lord de Villiers, C.J. stated:—

"Now the question of overruling in Appeal a decision on facts depending on the credibility of witnesses was considered by the Transvaal Supreme Court in *Acutt vs. Seta Prospecting Co.* (1907 T.S., p. 799), and some remarks made by *Lindley, M. R.* in *Coghlan vs. Cumberland* (1 Ch. D. 1898, p. 704), there quoted with approval, are so much in point that I propose to repeat them. 'Where, as in this case,' said the Master of the Rolls, 'the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to re-hear the case, and the Court must reconsider the materials before the Judge with such other materials as it may have decided to admit. *The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from over-ruling it if on full consideration the Court comes to the conclusion that it is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the Judge, the Court is sensible of the great advantage which he has had in hearing and seeing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, the Court of Appeal always is and must be guided by the impression made on the Judge who saw the witnesses.*'"

In *Transvaal Milling Co., Ltd. vs. R. Murray* (1920 A.D. 294) where in an action upon a contract of sale the Witwatersrand Local Division had given judgment for the Plaintiff and this finding was based substantially upon the credibility of witnesses, the Appellate Division refused to interfere on appeal with the decision of the Trial Court.

Again in *Parkes vs. Parkes* (1921 A.D. 69) "Upon an issue depending upon oral evidence the opinion of the trial judge is not lightly to be set aside on appeal though a Court of Appeal has power so to set it aside, and will do so when



it is satisfied from other circumstances such as admitted facts, written documents, contemporaneous declarations and similar matters that the trial judge has reached a wrong decision."

"Where, however, the opinion of a trial judge as to credibility of witnesses on a charge of misconduct against a wife was attacked solely on the ground of general probability the Appellate Division refused to disturb the finding".

In *Powell and wife vs. Streatham Manor Nursing Home* (1935 A.C. 249) Lord Sankey said, "It is perfectly true that an appeal is by way of re-hearing, but it must not be forgotten that the Court of Appeal does not re-hear the witnesses. It only reads the evidence and re-hears the Counsel. Neither is it a re-seeing Court . . . On an appeal against a judgment of a judge sitting alone the Court of Appeal will not set aside the judgment unless the appellant satisfies the Court that the judge was wrong and that his decision ought to have been the other way. Where there is a conflict of evidence the Court of Appeal will have special regard to the fact that the judge saw the witnesses."

In all these cases the Court of Appeal refused to interfere with the findings of the trial Court. There are, however, other cases of appeal on facts where the judgment of the Court below was reversed but in most of these there were *other circumstances* which satisfied the Court of Appeal that a wrong decision had been reached. In *Kleinwort vs. Kleinwort* (1927 A.D. 123) it was held that as the circumstances did not justify the *inference* that adultery had actually taken place, the wife was entitled to a decree of divorce."

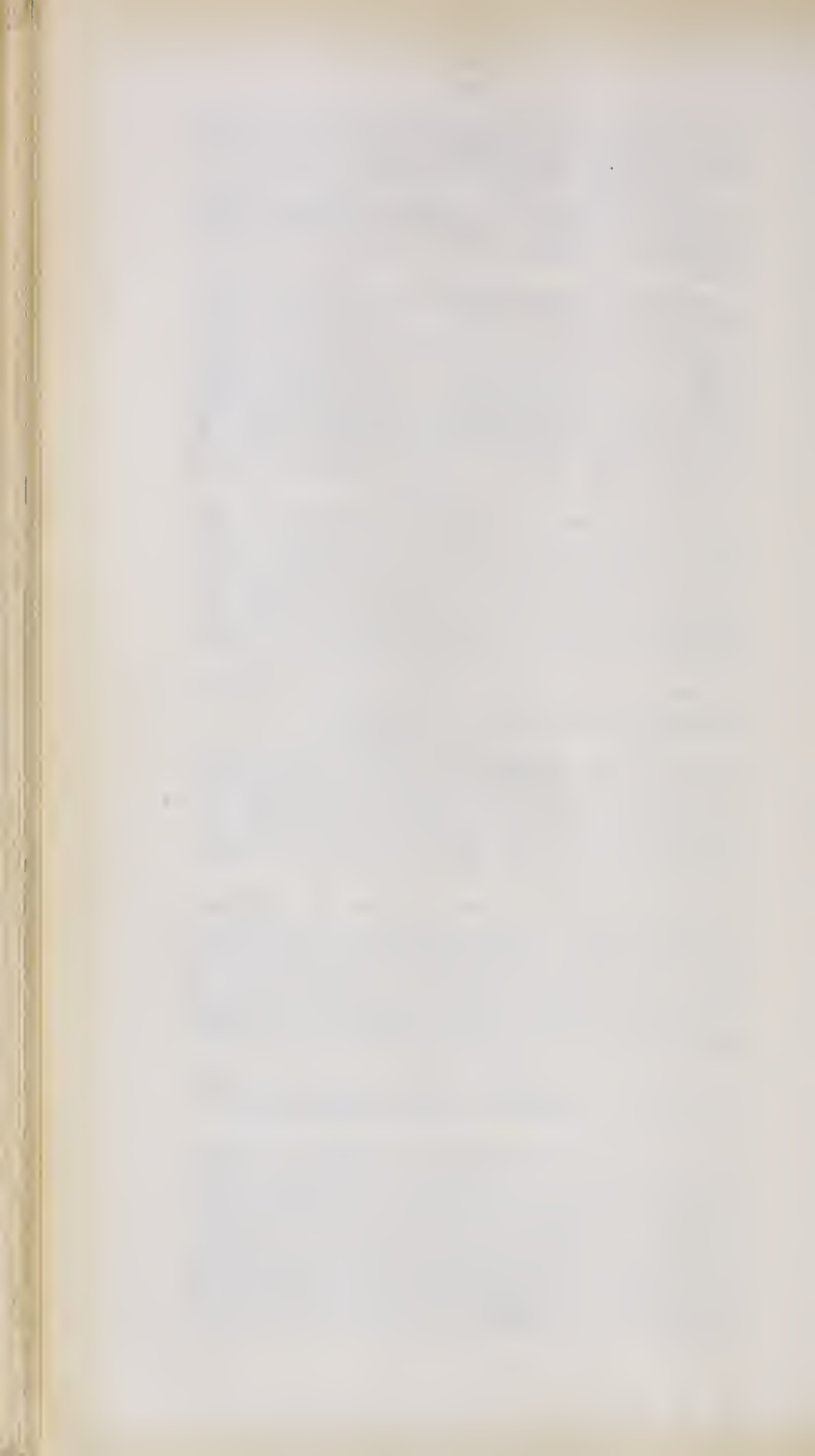
Again in *Estate Kaluza vs. Brauer* (1926 A.D. 243) the decision was reversed as it was held that the *onus* which rested upon Plaintiff had not been discharged.

In *Forbes vs. Golach and Cohen* (1917 A.D. 559) the trial Court, whilst finding that the credibility of the witnesses on either side had not been impeached, gave judgment for Plaintiff on the ground that Defendant had failed to prove a conspiracy on the part of Plaintiff and his witnesses. The Court of Appeal held that there was no *onus* cast upon the Defendant to *prove a conspiracy* and altered the judgment to one of absolution.

In the present case the Native Commissioner has drawn no inference that he was not entitled to draw, there is no conflict of evidence in the sense that one set of witnesses has told one story and another set another story, as Defendant's reply to the allegation of adultery is a bare denial, nor is there any question of adultery not having been proved as there can be no clearer proof of adultery than the conception and birth of a child to a woman during a period when her husband has not got access to her.

This Court must therefore consider whether the story told by Plaintiff's witnesses that Defendant was the cause of the adultery is so improbable as not to be worthy of belief.

It is true that under normal circumstances intercourse would not take place in the presence of others. But in the present case can it be said that the circumstances were normal? Defendant is related to Plaintiff and is a frequent visitor to his kraal. His presence at the kraal and his association with Plaintiff's wife would raise no suspicion. Nor would his sitting or lounging on her bed in the presence of the children, which he admits. It is well within the bounds of possibility that he would be still sitting or lounging on the bed when the children, the eldest of whom is only 13, retired early to bed on the floor. Thereafter it would only be



a short step for him to get into bed with Jane once he was satisfied that the children were asleep. In the circumstances in which he visited the kraal, his association with Jane in her own hut was less likely to give rise to suspicion than a clandestine meeting with her in the veld. Further there is evidence of much indulgence in beer at the kraal. Defendant would not be so discreet in his actions when under the influence of liquor. The case of *P. Dlula vs. G. Ncanywa* (supra) differs from this one as in that case the Court was influenced not only by the improbabilities but also by the inadequacy of the evidence of adultery. In this case there is no inadequacy of evidence of the adultery. The witnesses Cecilia, MacDonald, Titus and Nodoli testify to seeing Defendant in bed with Plaintiff's wife, and there is an abundance of other circumstantial evidence to prove his sleeping in the hut.

In the case of *Estate Kaluza vs. Brauer* (supra) Wessels J.A. stated: "At the same time a case cannot always be decided only by its probabilities, the human element is an all important factor, for men do sometimes act imprudently and contrary to what one would expect."

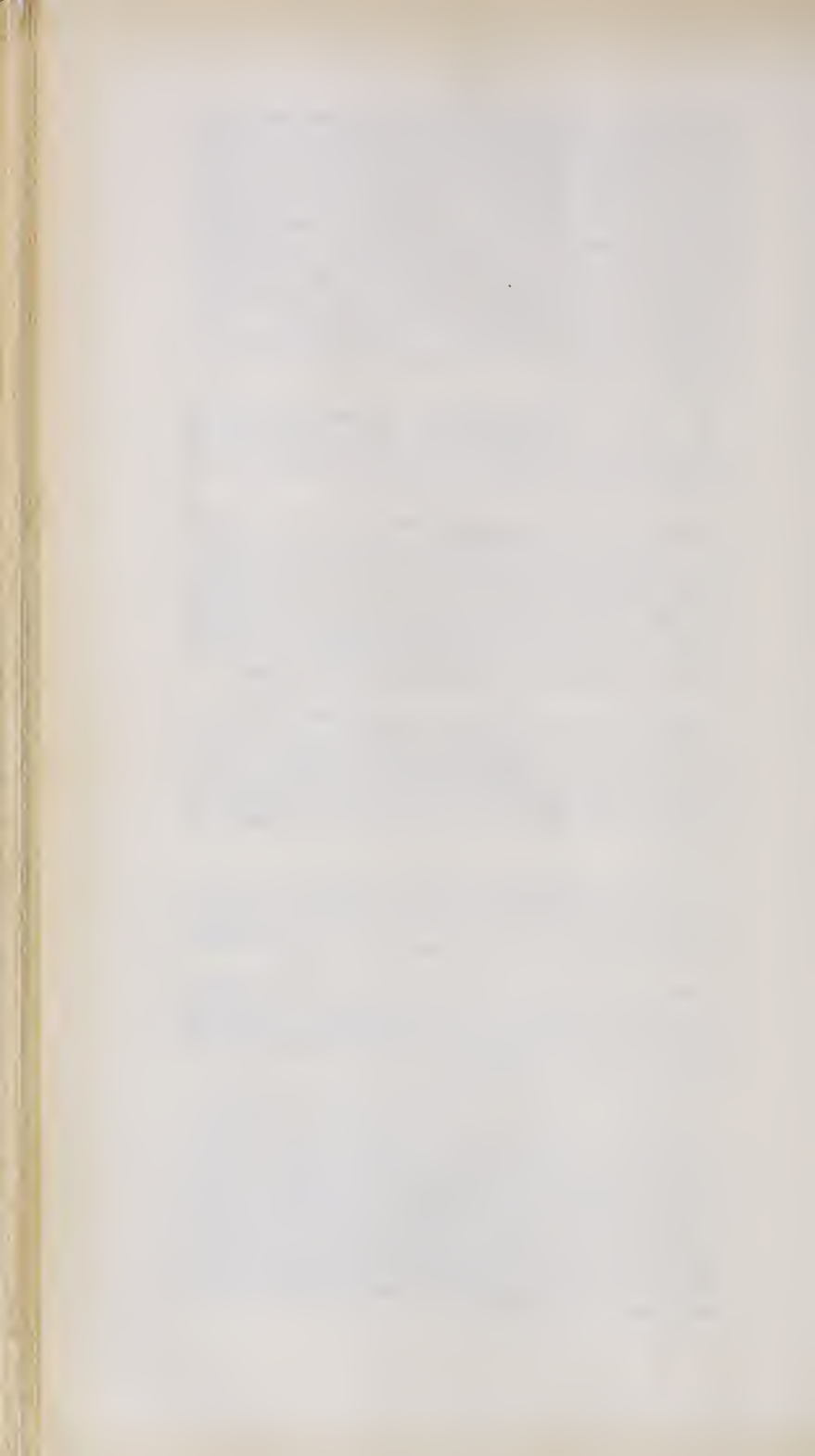
The suggestion that Defendant being a teacher, would not risk the loss of his employment by committing adultery, is not one that will bear close examination as it cannot be argued that teachers any more than any other class of persons holding positions of importance, are free from this besetting sin. One must look not at the class but to the individual. A reference to the Native Appeal Court reports will show that it is by no means unusual for Native teachers to be concerned in cases of this nature. There is no evidence in this case that the Defendant is a man of high moral standing.

Attention has been drawn to certain discrepancies in the evidence of the children who gave evidence. These discrepancies received the consideration of the Native Commissioner who did not regard them as of sufficient importance to cause him to believe that the witnesses were not telling the truth. He had the advantage of seeing and hearing the witnesses and was in a better position than this Court is in to judge their credibility.

In a case of this nature where the evidence does not refer to an isolated incident but covers a period of over a year, and having regard to the age of the witnesses and the length of time that has elapsed, it would be remarkable if there were not discrepancies in the testimony of the various witnesses.

Too much importance cannot be placed on the variations between the statements made at the enquiry and the evidence given before the Court as the circumstances under which the two sets of statements were made were entirely different. What is worthy of note is that substantially the same story has been told at both places.

Defendant's attorney has not attempted to explain the reason for the writing of the two letters by Jane to Defendant's wife in which she is at pains to explain that the Defendant is not responsible for her condition. These letters, although produced by the Defendant in an attempt to prove that the mythical Richard Nkomo was the adulterer, have had a boomerang effect. There appears to be no other reasonable explanation for them than that given by Jane, namely, that she wrote them at the request of the Defendant, with whom she was in love, so as to shield him. When these letters were written, i.e. in August, it was no longer possible to hide the fact that she was pregnant.



In my opinion this case rests entirely on credibility. The Plaintiff has brought a host of witnesses who give direct and strong circumstantial evidence. Their testimony has been accepted by the Native Commissioner who is an experienced officer. The letters produced by Defendant afford strong support for the Plaintiff's case, and the improbabilities are not such as to justify this Court in brushing aside all the evidence which the Court below has accepted.

Following the authorities which have been quoted, this Court should refuse to disturb the finding of the trial Court.

For Appellant: R. Joyner, Kingwilliamstown.

For Respondent: Mr. B. C. Ross, Kingwilliamstown.

CASE No. 39.

JIM SAMBU vs. SARAH SAMBU.

PORT ELIZABETH: 5th September, 1939. Before A. G. McLoughlin, Esq., President, Native Divorce Court (Cape and Orange Free State Provinces).

Native Divorce Cases—Practice and Procedure—Applications for contribution towards costs—To be dealt with on motion supported by affidavits setting out means of applicant and of respondent.

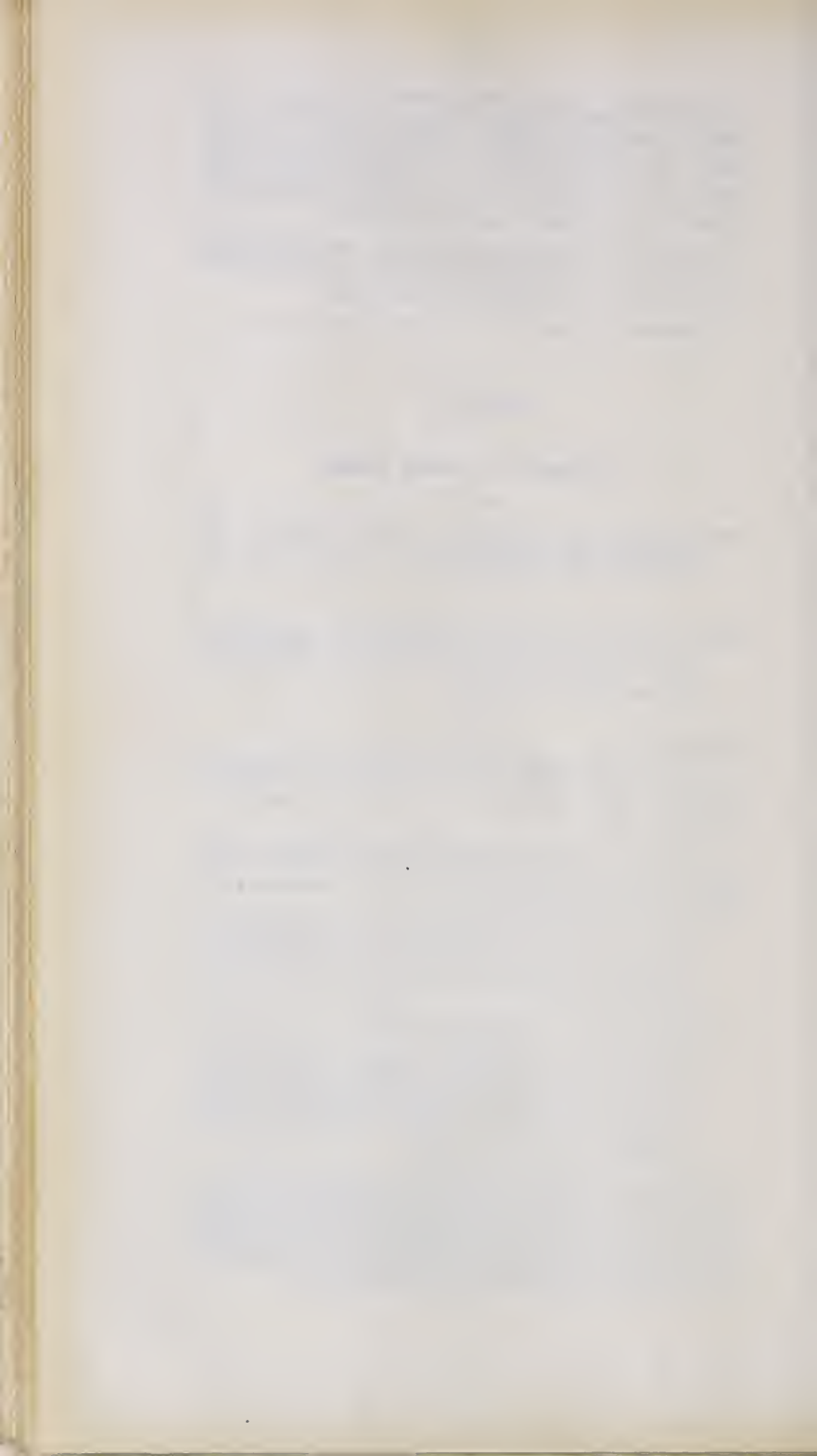
McLoughlin, P.:

It appears that doubt exists regarding the practice of this Court in making orders for contributions by litigants in Divorce actions towards the costs of the prosecution or defence of cases.

Whatever may have been the assumed or accepted practice in the past, the Court now requires that the matter be dealt with on motion; and that the application be supported by an affidavit or affidavits setting out:—

- (1) The cause of action or defence. This information will be available in the declaration of the summons, or in the plea which should accompany the application. Unless the applicant can show probable cause no order will be made.
- (2) The means, if any, of the applicant. This must be clearly and fully disclosed.
- (3) The means, if any, of the respondent. No order will be made if the respondent is not in a position to comply with the order. Respondent's replying affidavits should be kept at minimum length. If there be serious difference the Court may order that the issue be decided by *viva voce* evidence.

The Court has found a tendency to make orders for contributions as a matter of form. That practice must cease. In dealing with natives it is essential to maintain the authority of the Court. Unless, then, the Court can enforce its orders, which it can do only if the respondent is shown to have means, there is grave danger that disobedience of its orders for contributions will bring the Court into disrepute.



The case *Mlete vs. Mlete*, 1939 N.A.C. (C. & O.) sets out the practice to be followed in enforcing orders.

The Court will make no orders for maintenance *pendente lite* as that is a matter within the jurisdiction of the lower Courts and thus outside the jurisdiction of the Native Divorce Court.

In most instances, moreover, it will be found that Native custom operates, when lobolo has passed and provision exists under custom for maintenance of the wife and her family.

CASE No. 40.

CHARLIE NGUBENI vs. ALFRED NGUBENI.

KROONSTAD: 22nd September, 1939. Before A. G. McLoughlin, Esq., President, Messrs. G. B. Cunningham and F. C. W. Geard, Members of the Court (Cape and Orange Free State Provinces).

Native Appeal Cases—Possessory interdict and action—Section 23 (1) of Act No. 38 of 1927—House property cannot be devised by will—Father prevented by law and custom from disinheriting eldest son except in prescribed manner and on good cause shown—Application of maxim spoliatus ante omnia restituendus—Very good cause must be shown for granting of costs on higher scale.

Appeal from the Court of Native Commissioner, Harrismith.
(Case No. 6/39.)

McLoughlin, P. (delivering the judgment of the Court).

This action commenced with a summons claiming restoration to Plaintiff of certain cattle. The original claim reads as follows:—

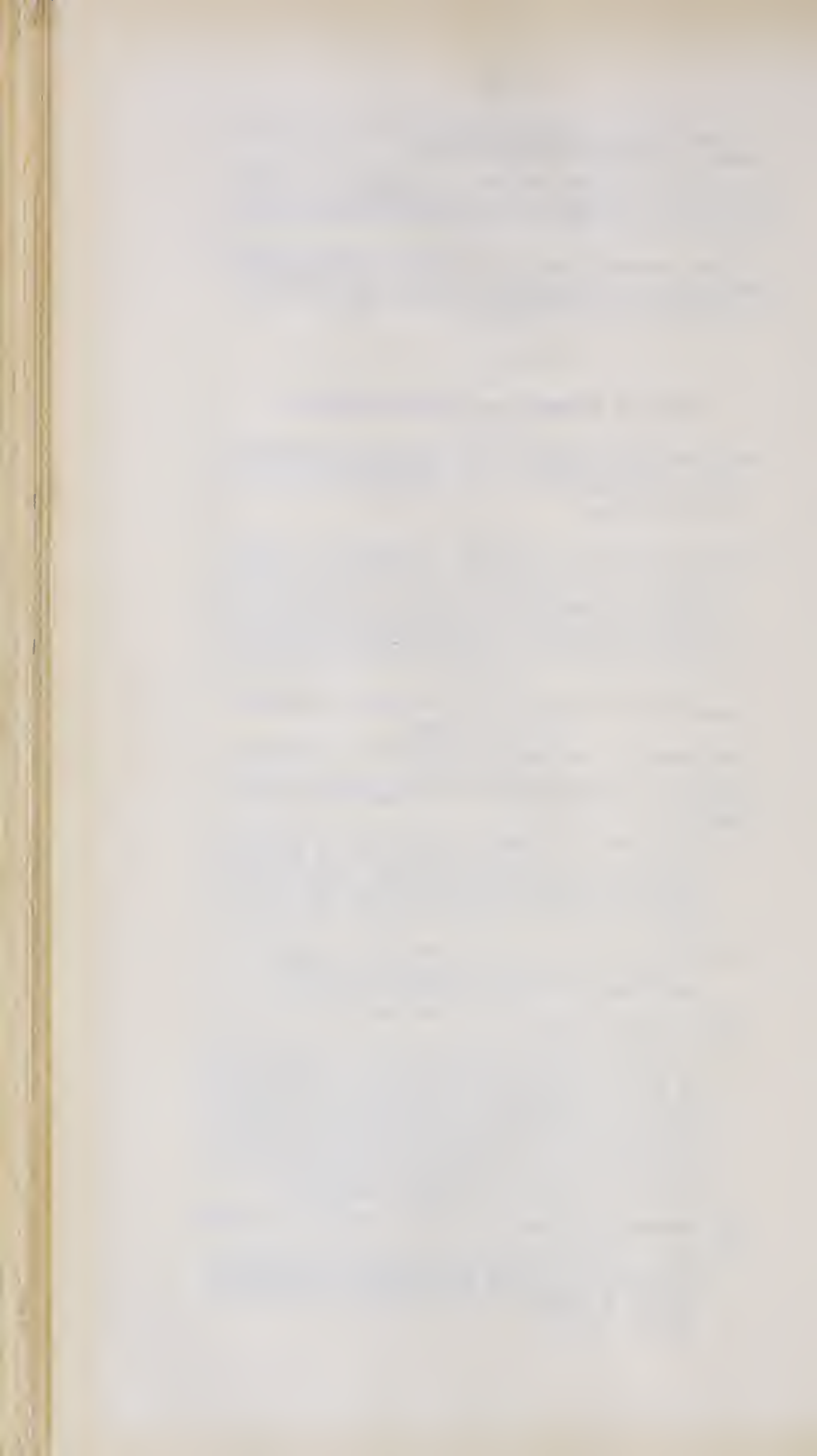
- “(a) The return of certain 3 oxen and 2 cows which you wrongfully and unlawfully removed out of the lawful possession of one Willem Ngubeni near Aberfeldy, District Harrismith on or about 3rd May, 1939, of which cattle Plaintiff is the custodian pending winding up of estate.
- (2) the taxed costs of certain proceedings instituted by Plaintiff in this Court to interdict and restrain you from disposing of the said cattle *pendente lite*.”

On the day summons was issued the Plaintiff applied for an interim interdict, alleging:—

“Application is hereby made for a rule *nisi* calling upon the Respondent to show cause on a date to be fixed by this Honourable Court why the Respondent should not be interdicted from disposing of, alienating or otherwise dealing with certain three oxen and two cows mentioned in Applicant's supporting affidavit, pending the decision by this Honourable Court of an action of the said cattle. Applicant further applies that the rule may operate as an interim interdict.”

He supported the application by an affidavit in which *inter alia* he deposed:—

- “3. That I am the owner of certain cattle which were running at the farm of Mr. Poultney near Aberfeldy, District Harrismith, and in charge of my brother William Ngubeni.”



An order was granted as prayed, reading as follows:—

“ It is ordered—

- (1) that a rule *nisi* be and is hereby granted calling upon the above-named Respondent, Charlie Ngubeni of Makong's School, Witzieshoek, District Harrismith, to show cause, if any, to this Court on the 12th day of July, 1939, at 11.30 o'clock in the forenoon or as soon thereafter as the matter can be heard, why he should not be interdicted and restrained from disposing of, alienating or in any way dealing with certain three oxen and two cows, the property of Applicant, pending the decision of an action to be brought by the Applicant against the said Respondent for the return of the said cattle;
- (2) that the said action be commenced within seven days;
- (3) that the rule operate as an interim interdict.”

On the return day of this interdict and the day of hearing, Defendant contested Plaintiff's claim on the ground that Plaintiff was not owner of the stock in question, and Defendant objected to an order for costs of the interdict.

The Native Commissioner ordered Plaintiff to lead in the case proper. A mass of confused evidence resulted, from which it eventually appeared that Plaintiff claimed to be owner of the stock in question by virtue of a will which made him heir to his father's chief house, notwithstanding the existence of an elder brother in the same house, who was thereby disinherited and deposed from his position as the chief son.

There is reference to stock bought by the father with moneys contributed by the Plaintiff during the former's lifetime, but it is not clear whether the stock in dispute are contended to be such stock, nor is it clear whether the stock was bought for Plaintiff himself or for the house to which he was attached. Nor is it clear whether, at the time of the contribution, Plaintiff was a minor, or had been emancipated by his father.

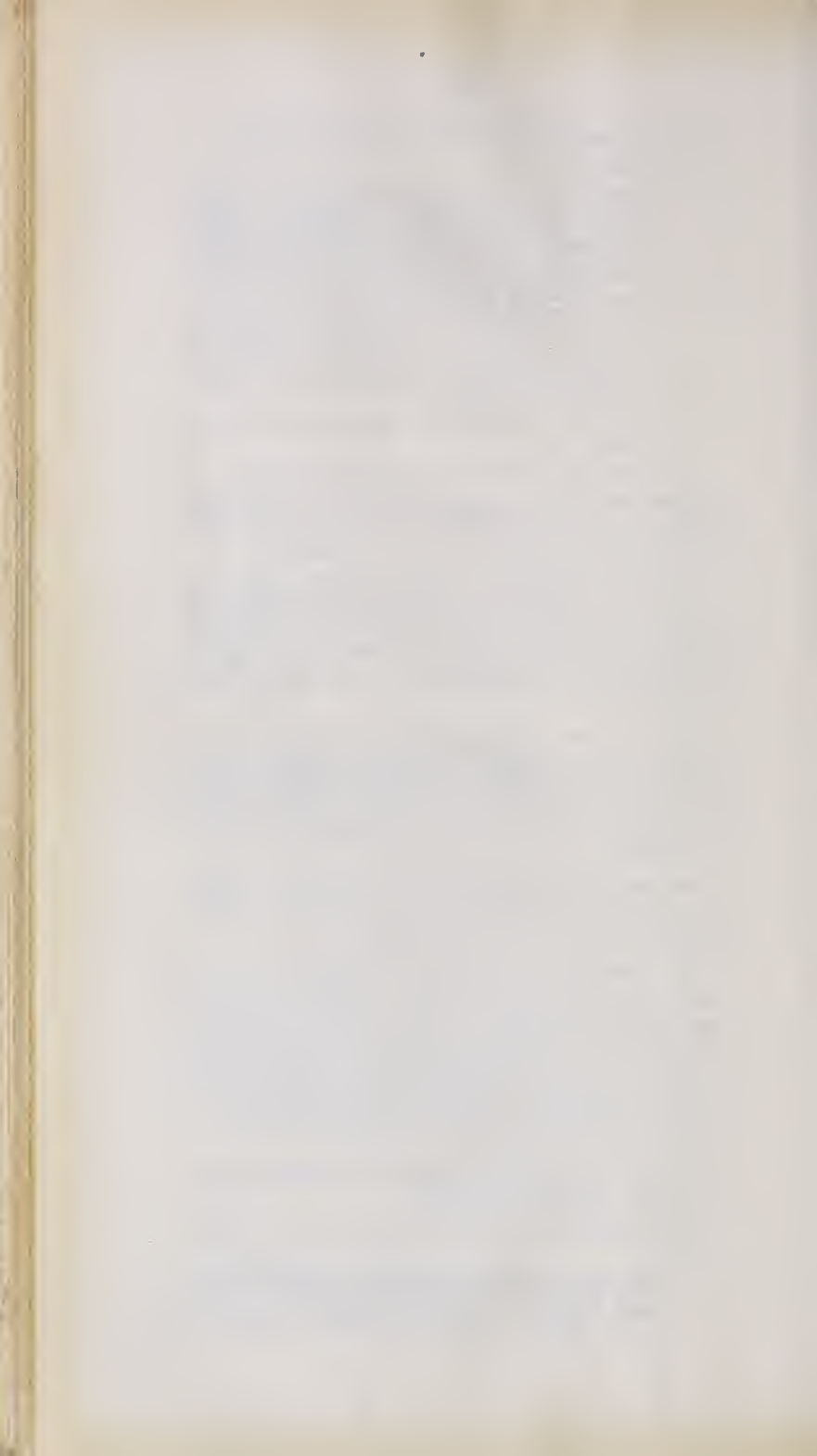
The problem is further complicated by absence of information regarding the tribe of the parties. The name is Nguni, and they most probably belong to one of the Nguni tribes, practising Zulu or Xosa, i.e. Transkeian law.

The Defendant has challenged the allegation that the cattle are property of the Great House in any event. Notwithstanding all these various difficulties, which are increased by the absence of power to devise house property, or of disinheriting an heir by will, the Native Commissioner at the close of Plaintiff's case, allowed an amendment of the summons to read:— “ Plaintiff, who is custodian of cattle pending winding up of the estate, should the Court find that estate must be wound up before he becomes owner.” The Native Commissioner refused to grant an application for absolution from the instance at this stage.

After hearing evidence for Defendant the Native Commissioner gave judgment for Plaintiff with costs. The counter-claim was withdrawn at this stage.

The Defendant now attacks this judgment on the following grounds:—

- “ 1. The Native Commissioner erred in allowing the amendment of the summons, reading as follows: ‘ of which cattle Plaintiff is the custodian pending winding up of the estate ’ to replace the words: ‘ which cattle



belong to Plaintiff', after Plaintiff had closed his case, and after Defendant's application for absolution from the instance.

2. The Native Commissioner erred in refusing Defendant's application for absolution from the instance.
3. The Plaintiff, on whom the burden of proof lay, has not proved his case, and the finding of the Court is against the weight of the evidence, both oral and documentary, and the judgment is wrong in law."

In this Court *in limine* counsel for Respondent admitted that all the stock in question belonged to one or other house of the late father of the parties. Secondly that in these circumstances the will did not touch the problem before the Court. Counsel for Respondent submitted that the action, notwithstanding its dual form, was in fact a possessory action. This was contested by Appellant's counsel, who relied on the amendments, and contended that the Plaintiff based his claim on ownership, and that the action was one *rei vindicatio*.

The first ground of appeal must succeed on two grounds. Firstly that at the time of the application for an absolution judgment, the Plaintiff had clearly failed to prove that he was owner. The amendment of the summons was not made until after the refusal of the application.

In any event the Native Commissioner was in error, for the Plaintiff had failed to show that the stock claimed was stock not falling within sub-section (1) of Section 23 of the Native Administration Act of 1927, and thus devisable by will. As has already been indicated, the law denies a father the right to devise house property by will. i.e. he cannot disinherit the heir by primogeniture in this manner.

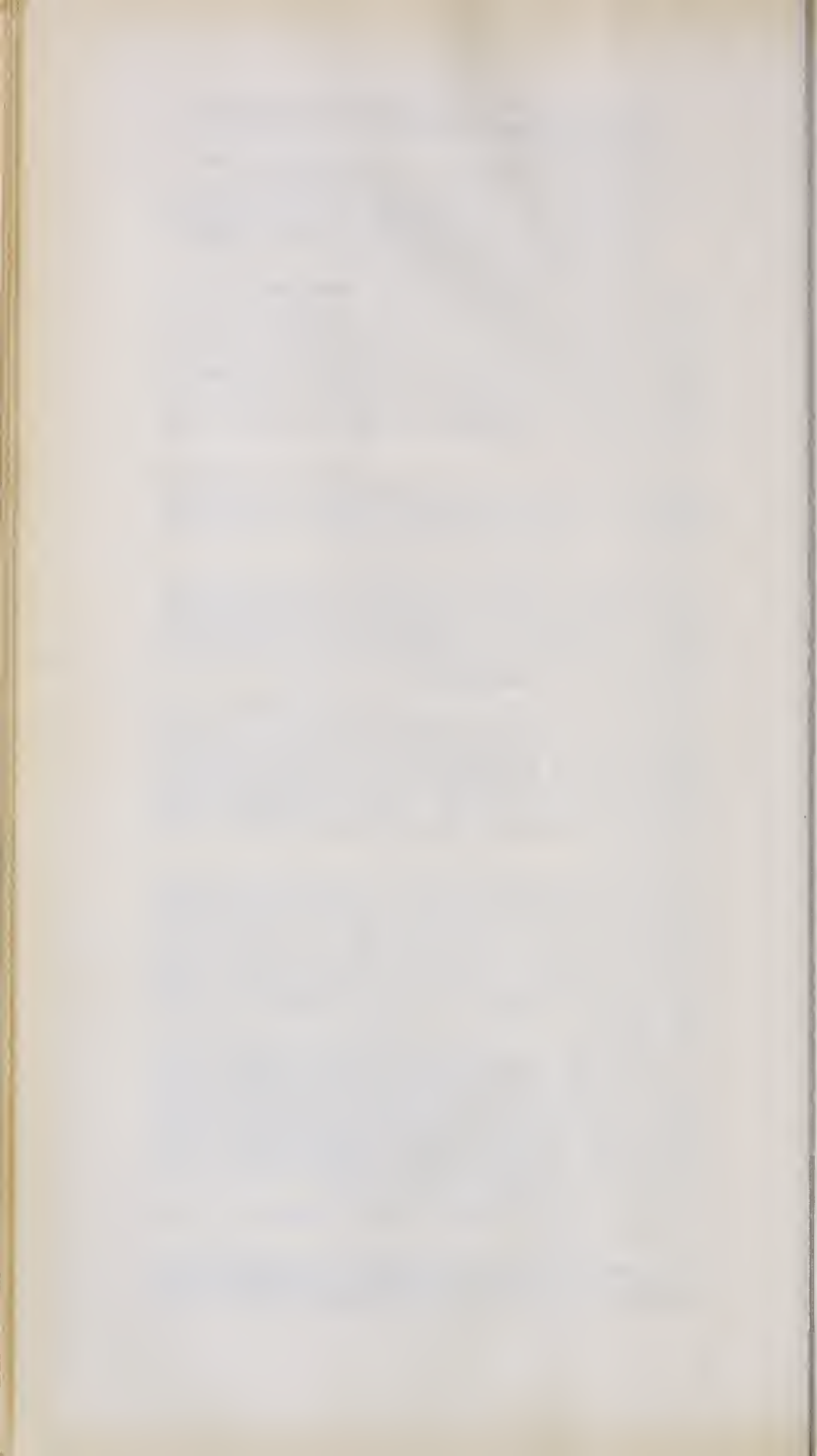
Moreover, the eldest son, and not the Plaintiff, is the person in whom the estate vests in normal cases. If the will be relied on, and it appears that the stock is not house property, then the estate, in terms of Government Notice No. 1664 of 1928, must be administered by the Master, and letters of administration are required. There is no question of a right vested in some one other than the Great Son to hold or deal with estate stock other than house property in such eventualities.

In regard to stock other than house property, i.e. kraal property, the father is prevented by custom and by law from disinheriting his eldest son in the chief house except in the prescribed manner on good cause shown. That does not appear to be the case. The Court cannot rely on an attempt to show acquiescence of the great son to confer a right, wrongly usurped by the second son, unless it can be shown that there is full knowledge of the right alleged to have been waived—and a deliberate abandonment of the right with that knowledge.

Without going into the merits of Plaintiff's version regarding the alleged exchange of stock and other evidence bearing thereon, it suffices to show that Plaintiff has failed to establish proof of the elementary fact that he was in possession of the stock, for there is evidence which cannot be lightly ignored, that the stock was stock normally accruing to the second house, being lobolo cattle, and that they were in the possession of the Defendant or his privy.

The case ultimately hinges on this fact and must be decided on this point alone.

The issue in this case thus becomes extremely simple, the Plaintiff claims by action a restitution of stock spoliated from his peaceful possession. All he is required to do is to show



that at the time of the disturbance he was peacefully in possession of the stock. The ground of ownership does not enter into the discussion, for the maxim *spoliatus ante omnia restituendus est* applies. There is but one defence to the action, and that is to show that as against the alleged spoliator the Plaintiff was actually holding by virtue of a similar act.

The first question then to be decided is whether Plaintiff was in peaceful possession.

It would appear that 4 of the cattle in dispute are ear-marked with the mark of the minor house, i.e. Defendant's house. As far as can be gathered from the diffuse and confused evidence on record, they were received as lobolo for a daughter of the minor house, and it is contended by Plaintiff that they became his property at the time of Solomon's marriage—Solomon being a younger brother of Defendant.

It is admitted by the Plaintiff and his witness William that (1) their father in his lifetime received the lobolo cattle of Lena, a daughter of the minor house.

(2) That at the time of the father's death, there remained 8 head of these cattle.

(3) That these cattle belonged to the Defendant after the death of the father.

Willem then goes on to relate:—"There had been an exchange of cattle between *Solomon* and Alfred at the time of Solomon's lobolo, and four head of cattle which Charlie, i.e. Defendant, took were marked on left ear and two on right ear. The four head marked on left ear originally belonged to Charlie's house, but they became Alfred's by virtue of the exchange which took place at time of Solomon's lobolo."

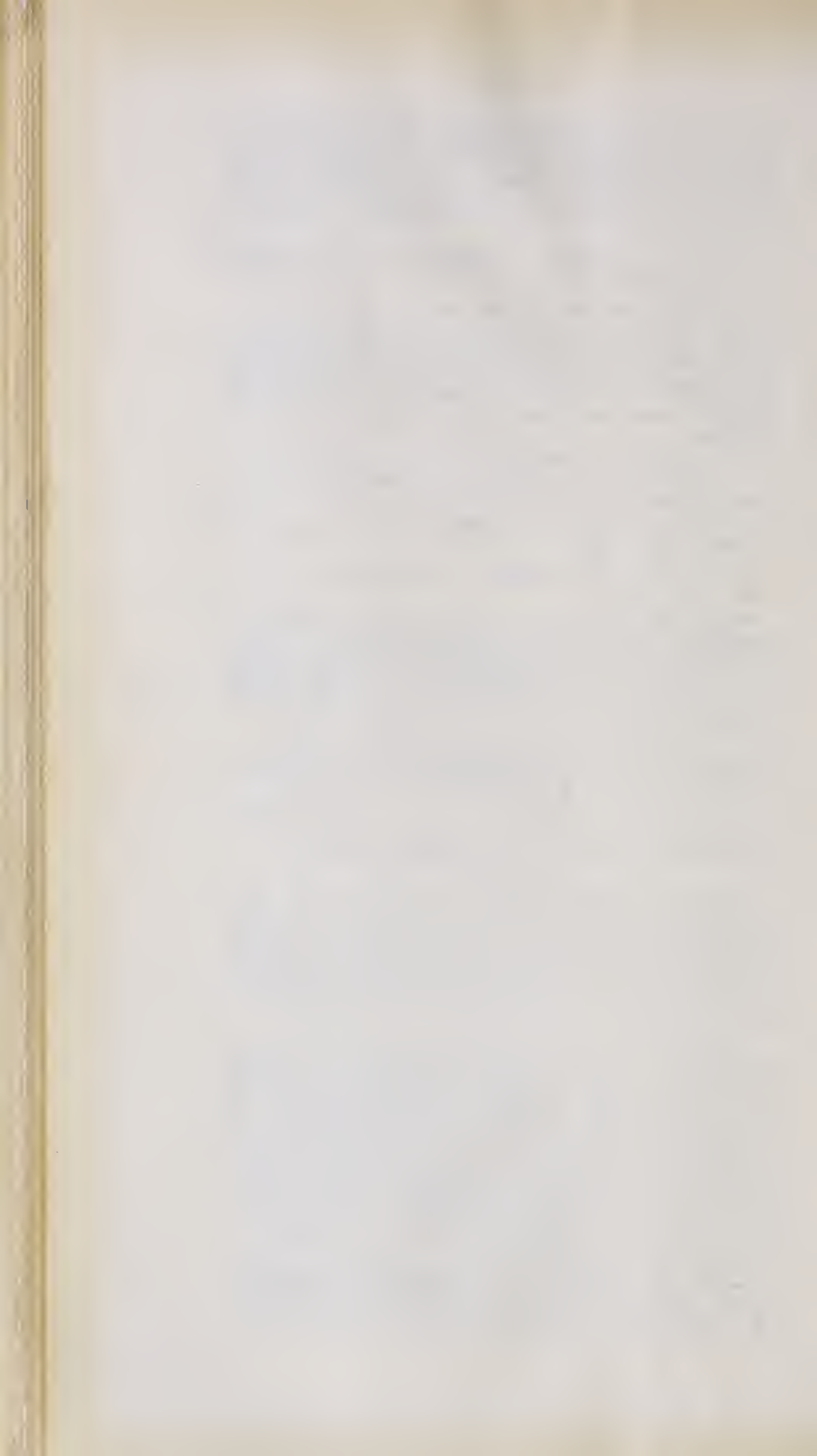
The only further light he can cast on the problem is his statement that: "They got the balance over and above the 8 head from Alfred *who lent them to Charlie's house.*"

He was reiterating his statement that: "The 8 head of cattle still left (at the time of the father's death) with the second kraal were paid as lobolo for Solomon's wife."

That is the theme of Plaintiff's own evidence, as far as it is possible to ascertain what he really does mean to say. After corroborating Willem's account of Lena's lobolo and admitting that they belonged to the second house, he states "I paid 15 head in all (i.e. lobolo for Solomon), some money represented cattle and 13 head were actually paid and the other two in money. The 13 head of cattle came from me—8 the lobolo cattle for Lena, and we sold two horses belonging to the petty house and they made up for four cattle."

Plaintiff then proceeds completely to confuse the issue in attempting to explain how, notwithstanding this simple transaction, he came to possess 4 of the lobolo cattle of Lena, which admittedly belonged to the minor house, i.e. to Defendant as its heir. On the face of it Plaintiff is not to be believed for he first avers that the 8 head of Lena's lobolo "constituted the whole of the assets of the second house." Being tripped up in regard to the horses he added "when I said the only assets (of the second house) were 8 cattle, I referred to cattle only". He stumbles in explaining the transaction of the alleged exchange and ends by saying "I made a mistake—we exchanged one horse for a cow and calf".

Finally he was led into a trap in cross-examination in accounting for possession by the second house of horses by saying "The petty house reaped mealies they gave for horses on F. Welsh's farm. *They had used their oxen* for cultivation



of lands. They used 14 oxen for ploughing purposes that I know of". Then he adds "*When I said they had no other cattle than 8, I referred to lobolo*". His attempt to explain away the 14 head does not ring true after the foregoing.

There is little doubt in this Court's mind that this witness is not worthy of credence after the equivocation and contradictions set out. His whole version is summarised in the words "*as far as I can remember I exchanged four of Lena's cattle for 4 of mine*".

Throughout all the proceedings Defendant was absent. He was owner by virtue of Section 23 (1) of Act No. 38 of 1927, and Plaintiff, if he did in fact obtain possession of the stock in question, could in the circumstances have done so only by fraud, stealth or precario—if not by theft, and he is holding on the one basis which nullifies the rule *spoliatus ante omnia*.

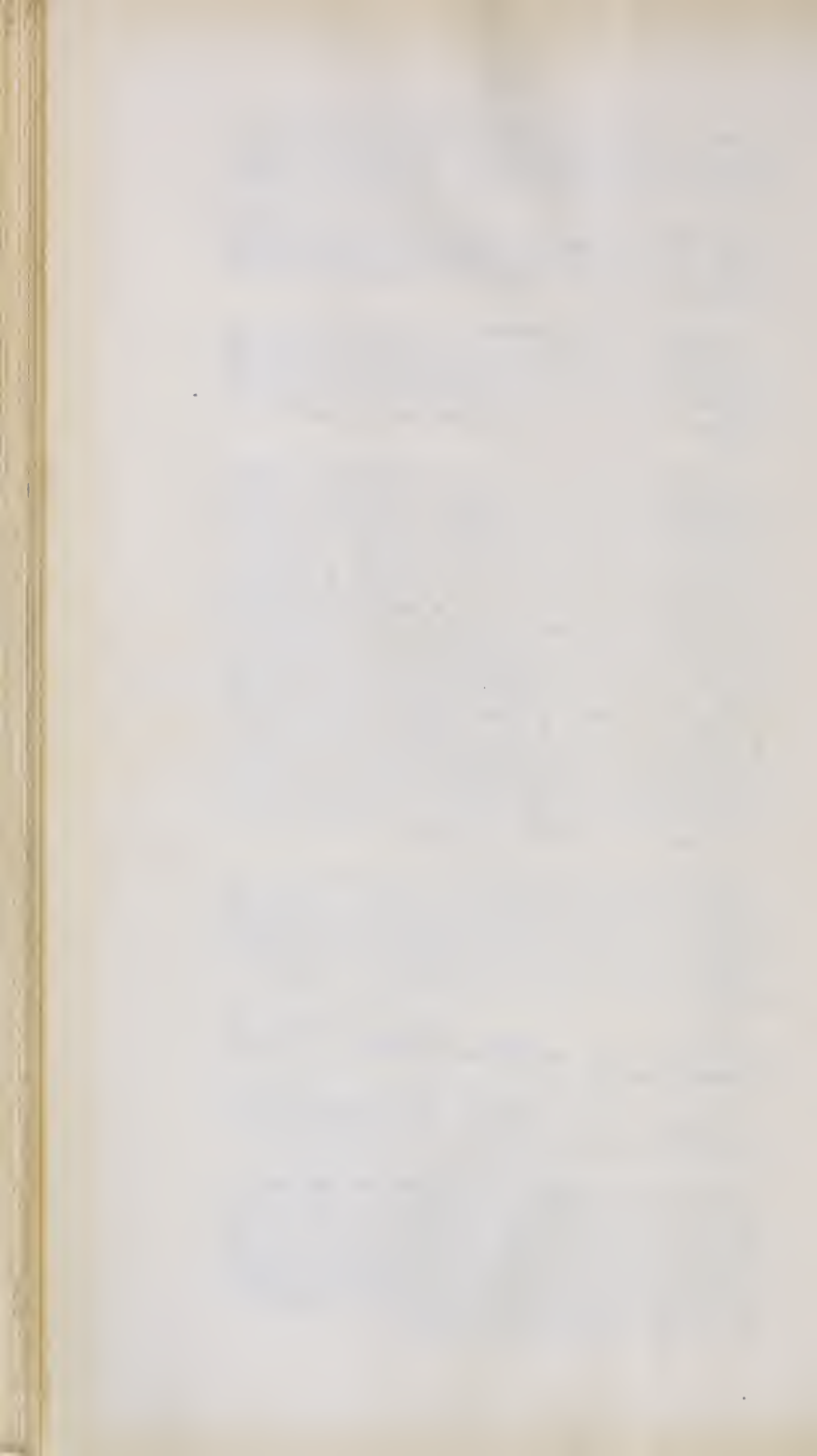
Indeed the Defendant's case is more than half won already. The evidence presented for Defendant is largely corroborated by Plaintiff's own attempt to deny the existence of the stock belonging to the second house. According to Solomon the Plaintiff's account of the exchange is false. Being false, he could not have obtained peaceful possession of the stock. Solomon avers that the house was in possession of more stock than Plaintiff will admit. He took the cattle of that house to Poultney's farm. From there he removed them openly on a permit from the owner of the farm, as Plaintiff's witness admits. There is some discrepancy regarding earmarks but this does not help the Plaintiff, who has failed on the question of the four head admittedly property of the second house. The other two head are alleged by Willem to bear the great house marks, although Solomon denies this, saying all 6 had the earmark of the petty house. That is not the decisive factor, however, as was indicated in the beginning of this judgment. If it be true that possession in the 4 head was in Defendant through Solomon, then the Court must accept the evidence that the other two head, which were with the 4 head, were in the same possession, as Plaintiff has failed to distinguish this aspect of the case.

That being so, Plaintiff must fail in his action based on peaceful possession, and that is all his claim refers to. If he claims on the basis of ownership, he has a sea of trouble ahead, for he must show full ownership, which he will find difficult in view of the provision of Section 23 of Act No. 38 of 1927 and its regulations. House property cannot be devised by will. The heir cannot be disinherited by caprice of a testator.

But this is not the basis of Plaintiff's claim for the restoration of stock wrongfully and unlawfully removed from his lawful possession.

The appeal is allowed with costs, and the judgment of the Native Commissioner is altered to one absolving the Defendant from the instance with costs on the normal scale.

It was not contemplated by the legislature that costs on the higher scale should be given merely by consent of the parties or otherwise, for the whole object of the new procedure was to reduce costs, not to increase them. Very good cause must be shown to justify an increase from the standard minimum allowance, cause which is not apparent on the face of the present record. The simple issue has been confused by a mass of matter, which a clear reading of statutory provisions makes irrelevant and redundant.



As the summons stood, the sole issue was proof of peaceful possession by the Plaintiff or his agent. That issue involved mere questions of fact, the leading of which did not justify an increased allowance. No other justification appears on the record.

It should be noted that our decision does not involve a declaration of ownership in any of the stock.

For Appellant: Mr. S. R. Hill, Kroonstad.

For Respondent: Mr. J. W. Loubseher, Kroonstad.

CASE No. 41.

1947 (T+N) 118.

MARAK MOTLOUNG vs. ISAK MOTSOENENG.

KROONSTAD: 22nd September, 1939. Before A. G. McLoughlin, Esq., President, Messrs. G. B. Cunningham and F. C. W. Geard, Members of the Court (Cape and Orange Free State Provinces).

Native Appeal Cases—Practice of Native Tribes inhabiting Orange Free State—Fines payable for seduction and pregnancy—Liability of father for delicts of his son.

Appeal from the Court of Native Commissioner, Reitz.

(Case No. 2/39.)

McLoughlin, P. (delivering the judgment of the Court):

The case in the Native Commissioner's Court was a claim for 5 head of cattle or their value as damages for seduction and pregnancy.

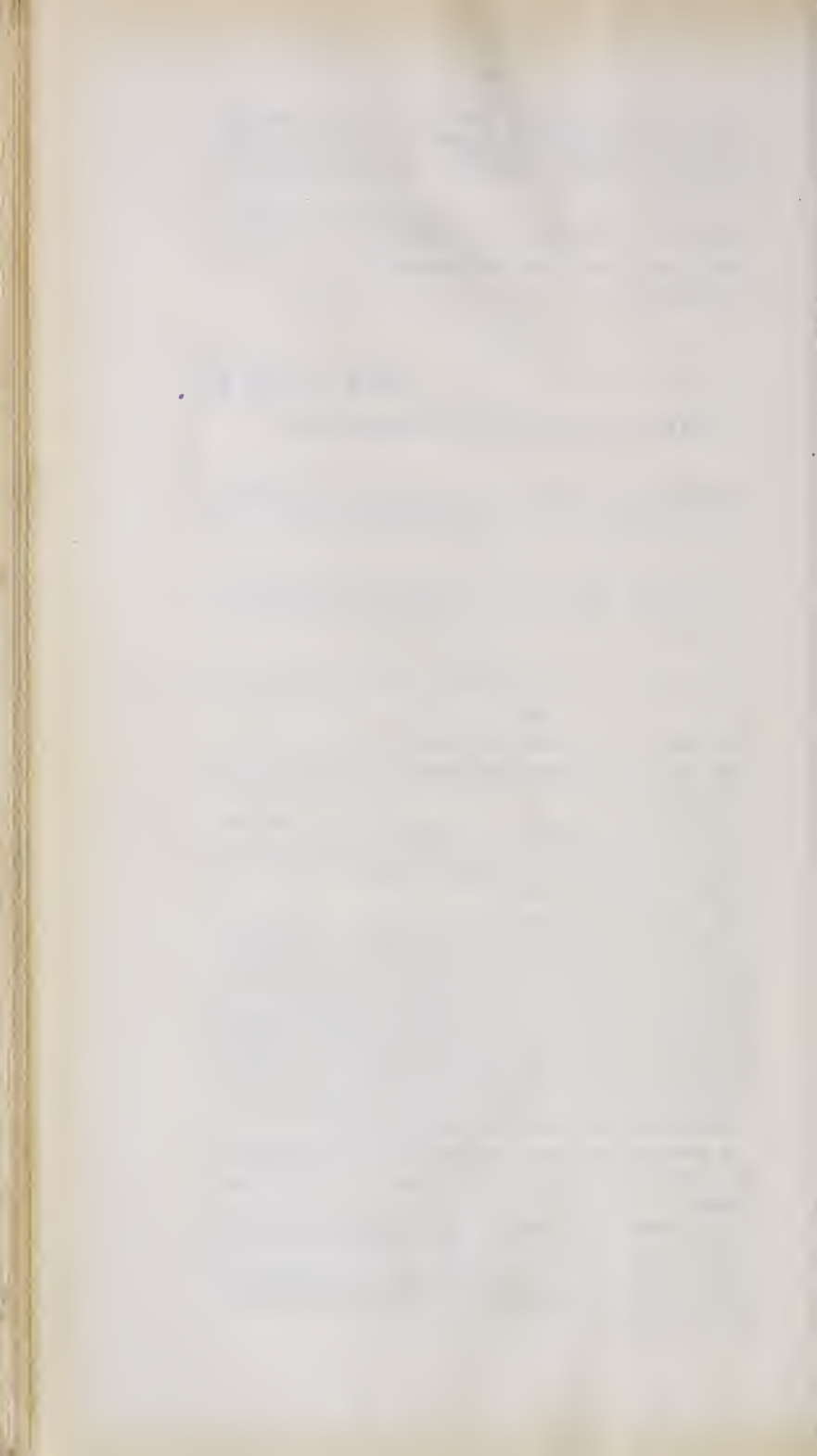
The Native Commissioner gave judgment for Defendant with costs, which judgment is attacked on appeal as being against the weight of evidence, especially that the Court erred in its finding that the girl was not a virgin when seduced by Defendant's son.

The case presents several unusual features. The first is the fact that Defendant alone has been sued. Beyond a statement that he is father of the seducer, no allegation is made as to the reason for his liability. The summons goes on to aver "That the said Fanjan Motsoeneng (the seducer) now refuses to marry the said Madikletla Motloung. That Defendant's son (Fanjan) having seduced Plaintiff's daughter Madikletla, and Fanjan now refusing to marry Madikletla, according to Native custom, Plaintiff is entitled to five head of cattle or payment of the value thereof, viz., £25 as damages according to Native custom. Defendant now, notwithstanding demand, refuses or neglects to deliver the five head of cattle, or pay the value thereof, viz., £25".

It would appear further that the boy was at the time of the alleged seduction an "impubes", hence incapable of procreating and thus presumably not the cause of the girl's condition.

The practice of the Native tribes inhabiting the Orange Free State is set out in the replies of the Native assessors, annexed hereto.

In the present case the matter of the girl's virginity has bearing on the credibility only, and does not debar Plaintiff from succeeding.



It does not become necessary to decide the question of the extent of a father's liability for the torts of an absent son. While the statement given by the assessors undoubtedly reflects pure Native law, it is a matter for consideration whether, in view of European contact and ideas of ownership, there has not resulted some change which will require modification of the original custom. A decision on this point can await a proper case.

The case for Appellant fails on the issue of fact.

The Native Commissioner has dealt with the salient portions of the evidence, and has clearly shown that the Plaintiff's witnesses cannot be believed for the reasons he has clearly set out.

The girl is the pivotal witness, for hers is the only direct evidence of the intercourse. Her evidence is so inconsistent that we have no shadow of doubt that her version is a fabrication.

There remains only the alleged confession of the boy. The Native Commissioner has accepted the evidence of Paul, who was the chief actor in this episode. There is the admission of Defendant that they went before their master, and that there the Plaintiff remarked that the boy had admitted—the while the Defendant remained silent. But that silence is not proof of an admission by the Defendant of the truth of Plaintiff's allegation. The Native Commissioner has rightly come to the conclusion that the very fact of the visit to the master is an indication that there had been no admission, and certainly no agreement to marry as appears from the conflicting evidence of Plaintiff's witnesses. There was certainly no admission before the master of liability on the part of the Defendant on which an action can be based. That is not relied on in the summons.

The matter is one of credibility. The Native Commissioner in his reasons has indicated that he has given due weight to all aspects of the case, and there is nothing in the record itself which would justify this Court in coming to a different conclusion.

It becomes unnecessary to enter into a discussion of the question of "impuberty".

The appeal is dismissed with costs.

OPINIONS OF THE NATIVE ASSESSORS.

Questions put to and replies received from the following Native Assessors representing the tribes inhabiting the Orange Free State:—

Chief Charles Mopeli, Sub-Chief Rantsane Mopeli from Witzi's Hock, and I. T. Makgothi, B. Motuba and John Botsime from Thaba 'Nehu.

Questions.

1. What fine is payable for defloration of a Native female in the Orange Free State—

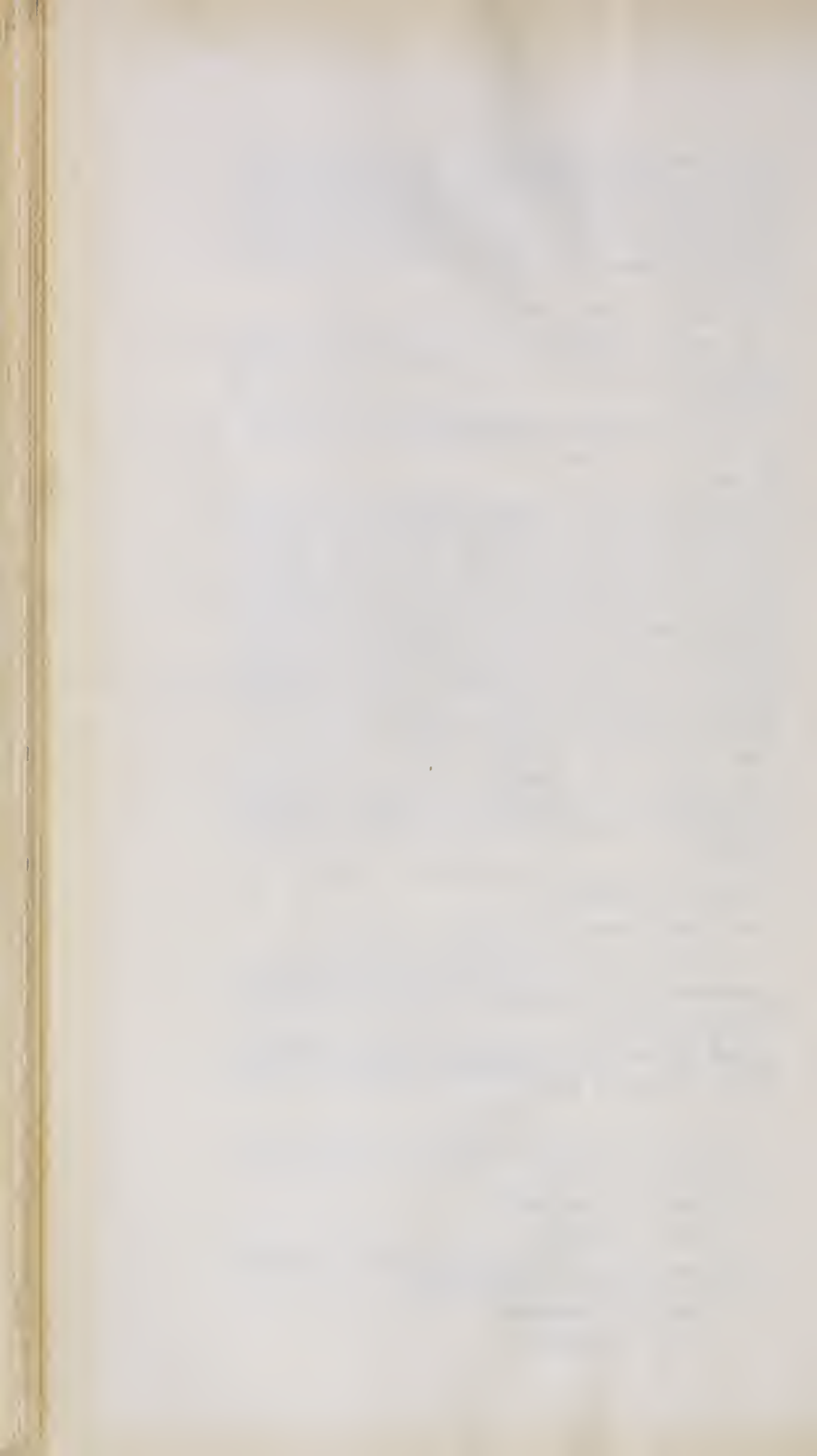
(a) if there be no pregnancy?

2. If there be pregnancy?

3. Is any fine due for intercourse with a girl who has already been deflowered by another man—

if there is no pregnancy?

if there is pregnancy?



(a) Is fine payable if the girl has a second or more children?

4. Is a father liable for the delicts or wrongdoings of his son—

(a) when he resides with the father?

(b) when he lives at another kraal or is away at work?

Is the kraal head liable for grown up sons, staying at the kraal—

(a) if married?

(b) if single?

Assessors' Replies.

Per I. G. Makgothi from Thaba 'Nchu.

1. (a) On the first point where a girl is found sleeping with a man, that man is to pay 2 head of cattle. I speak of an intact girl.

(b) If she is rendered pregnant, then 4 head is paid.

2. (a) Where a girl has been previously spoilt, if a man is found sleeping with her, he must pay 2 head.

Nothing is demanded if she is found for the third time.

(b) If the girl is pregnant only two head is paid.

3. No fine is paid if she is made pregnant on third occasion.

4. A father is responsible for his son's wrongs if he is not married, if he is staying with his father or is away at work. If he is away at work, people must consult his father and say the son has done wrong. The son has to be called to answer the case. Both appear before the lekgotla, father and son.

A father ceases to be liable when his son marries.

The son must be taken to Court.

Per Chief Charles Mopeli, for Witzieshoek, Basuto Tribe.

Custom as Practised in the Reserve.

1. (a) A fine is imposed of three head of cattle or £9 on the father of the man who sleeps with a girl even if she is not pregnant. If pregnant only 3 head are still paid.

2. The same fines are paid if the girl is not intact.

3. No fines are paid for a third offence, even if she is pregnant.

4. The father's liability for the sons' wrongdoing stops after dowry has been paid for the son.

It does not matter where the son is, the father is responsible.

By Mr. Cunningham:

Per Mopeli:

It used to be custom to wait for the birth of the child in case of dispute, but we do not wait now.

For Appellant: Mr. Kleinschmidt, Kroonstad.

For Respondent: Mr. S. R. Hill, Kroonstad.

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SELECTED DECISIONS
OF THE
NATIVE APPEAL
COURT

(CAPE AND O.F.S.)

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CASE No. 42.

NDIMANGELE SOMDAKA vs. PASI FAMBAZA.

UMTATA: 4th October, 1939. Before A. G. McLoughlin, Esq., President, Messrs. W. J. G. Mears and E. F. Owen, Members of the Court (Cape and Orange Free State Provinces).

Native Appeal Cases—Damages for adultery—In appeals on credibility Judicial Officers should set out their opinions of value of evidence, with reasons for accepting or rejecting it—Finding must be based on evidence adduced and not on extraneous inferences.

Appeal from the Court of the Native Commissioner, Qumbu.
(Case No. 45/39).

Mears (Member) (delivering the judgment of the Court):

In this case Plaintiff—now Respondent—sued Defendant—now Appellant—for five head of cattle or £15 for damages for adultery with his wife Manciti.

The Assistant Native Commissioner gave judgment as prayed and against this decision the appeal is brought.

In the opinion of this Court there is not sufficient evidence to support the finding.

There is no evidence of a catch or “ntlonze”, and the evidence adduced was meagre and inconclusive. The Native Commissioner’s reasons for judgment are of no assistance to this Court in evaluating the evidence.

In cases of this nature which depend upon the credibility of witnesses, judicial officers should set out in some detail their opinion of the value of the evidence, and their reasons for accepting or rejecting it.

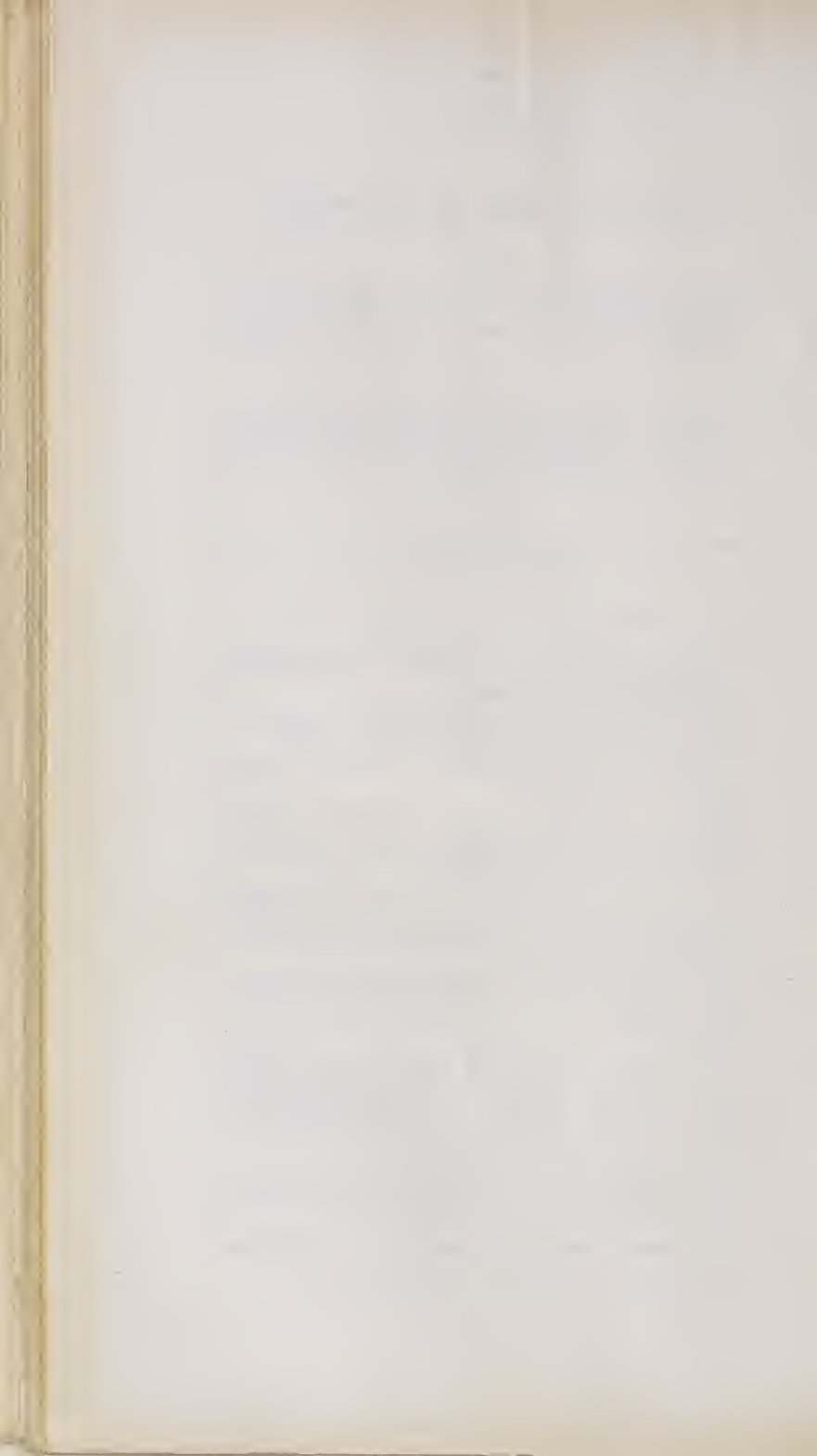
The reasons for judgment contain references to the woman Mantsiza, and inferences are drawn from the fact that she failed to appear at the trial to give evidence for the Defendant.

A judicial officer must base his finding upon the evidence adduced before him, and he is not entitled to import inferences and base findings of fact upon the conduct of persons not called as witnesses. In this instance the unwarranted conclusions have greatly influenced the Native Commissioner in reaching his decision.

The appeal is accordingly allowed with costs, and the judgment of the Court below is set aside and altered to one of absolute from the instance, with costs.

For Appellant: Messrs. Gush, Muggleston and Heathcote, Umtata.

For Respondent: Mr. Quex Hemming, Umtata.



CASE No. 43.

**BANGINDAWO MBALI, duly represented vs.
SIBENZANA NQADA.**

UMTATA: 4th October, 1939. Before A. G. McLoughlin, Esq.,
President, Messrs. W. J. G. Mears and E. F. Owen,
Members of the Court (Cape and Orange Free State
Provinces).

*Native Appeal Cases—interpleader action—Basis of onus of
proof is not residence at a kraal but presumption of
ownership arising from possession.*

Appeal from the Court of the Native Commissioner, Umtata.
(Case No. 666/39.)

McLoughlin, P. (delivering the judgment of the Court):

This is an interpleader action, wherein Appellant issued summons against Respondent in the Native Commissioner's Court to have it determined and declared whether certain six head of cattle, attached by the Messenger of the Court by virtue of a warrant of execution issued in an action wherein the Respondent obtained judgment against one Makalane Gabuza, are or are not his property, the said cattle being claimed by the Appellant as being his property and not liable to execution.

The Native Commissioner declared the cattle executable, with costs.

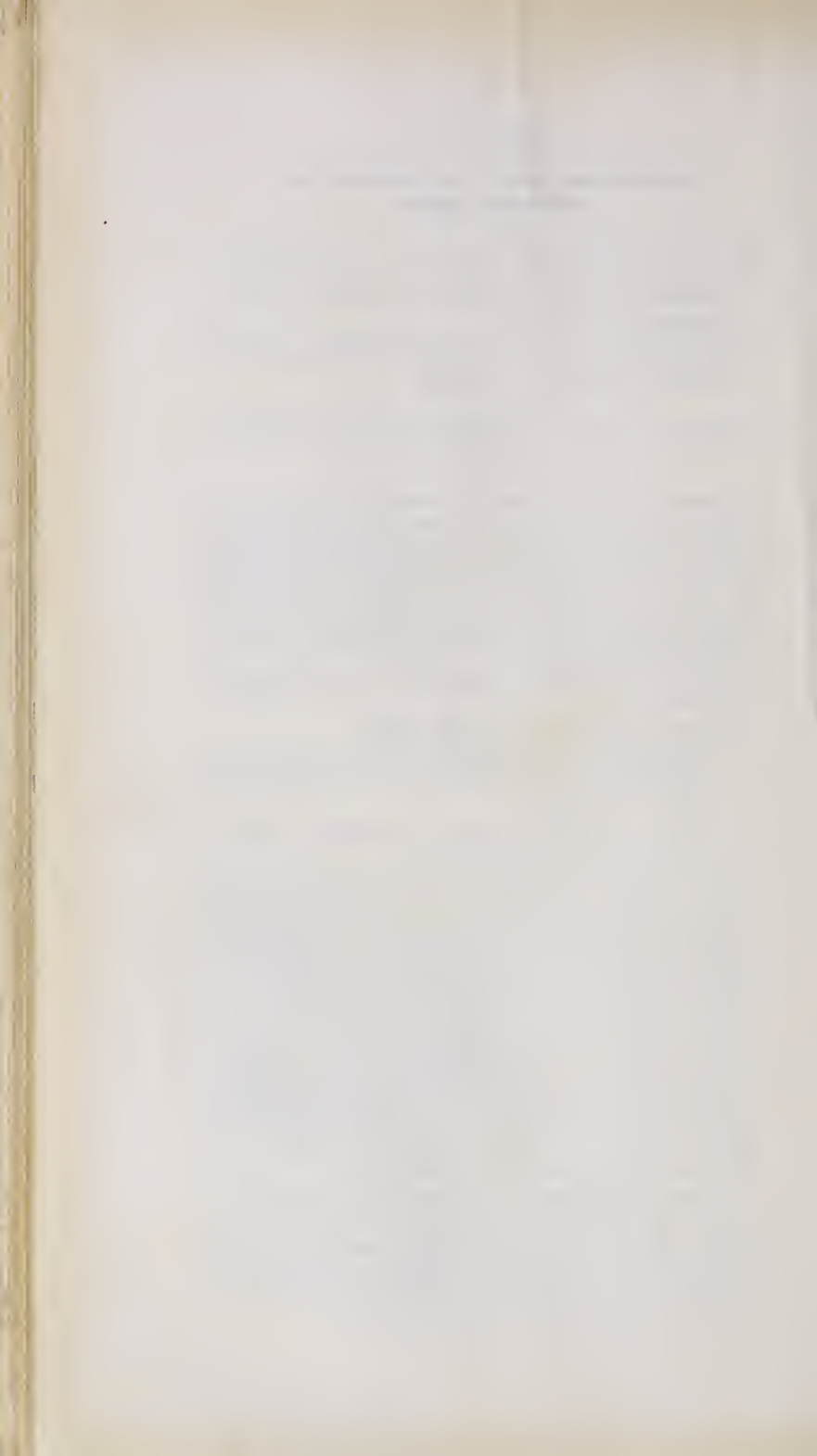
The appeal is based on two main grounds:

1. That the onus of proof rested upon the Defendant, Sibenzana Nqada who failed to discharge same, and the Magistrate erred in holding that the onus rested upon the Plaintiff.
2. That the judgment is against the weight of evidence and the probabilities of the case.

Now the record does not clearly disclose the information, but it is common cause that a preliminary discussion took place regarding the burden of proof, whereupon, before evidence of any kind was led, the Native Commissioner ruled that the onus was on the claimant. In his reasons the Native Commissioner says, "As the cattle were attached at the kraal common to the late Mbali and Makalane, the judgment debtor, I held that the onus was on the claimant to prove that the cattle were his and not Makalane's".

The evidence thereafter adduced by the claimant shows that the cattle were in the possession, not of the debtor, but of the mother of Plaintiff, Notshizile, widow of Gabuza, having previously been registered in the name of her husband's mother, Mofayili. The husband Mbali was apparently heir to Gabuza, and Plaintiff is heir of the deceased Mbali. There is no evidence of any sort indicating possession in the debtor at any time relevant to the case, who is the unmarried younger brother of the late Mbali.

The basis of the distribution of the onus of proof in interpleader cases is not residence at a kraal, but the presumption of ownership arising from possession. Where, as in the present case, the debtor and claimant reside at the same kraal, this fact becomes the only criterion. On the evidence as it stands now, the claimant has made out a *prima facie* case of possession, which the execution creditor has not rebutted, having called no evidence whatever.



The Native Commissioner has thus clearly erred in his ruling at the very commencement of the case, and the appeal must be allowed on the first ground. The judgment of the Native Commissioner and the ruling regarding the onus and all subsequent proceedings are set aside and the case is remitted for re-hearing of the question of possession at the time of attachment, and for a ruling on the question of the onus resulting therefrom, and trial of the case to a conclusion.

The ruling of the Native Commissioner regarding the onus has undoubtedly created a situation in which the parties were placed in a false position in regard to the nature of the evidence to be led, for if the onus be on the execution creditor, he is required by the ruling in Hulombe's case (*Hulombe vs. Jussob* 1927 T.P.D. 1008), merely to destroy the claimant's claim, whereas the claimant has on the contrary to prove conclusively that he is owner of the stock.

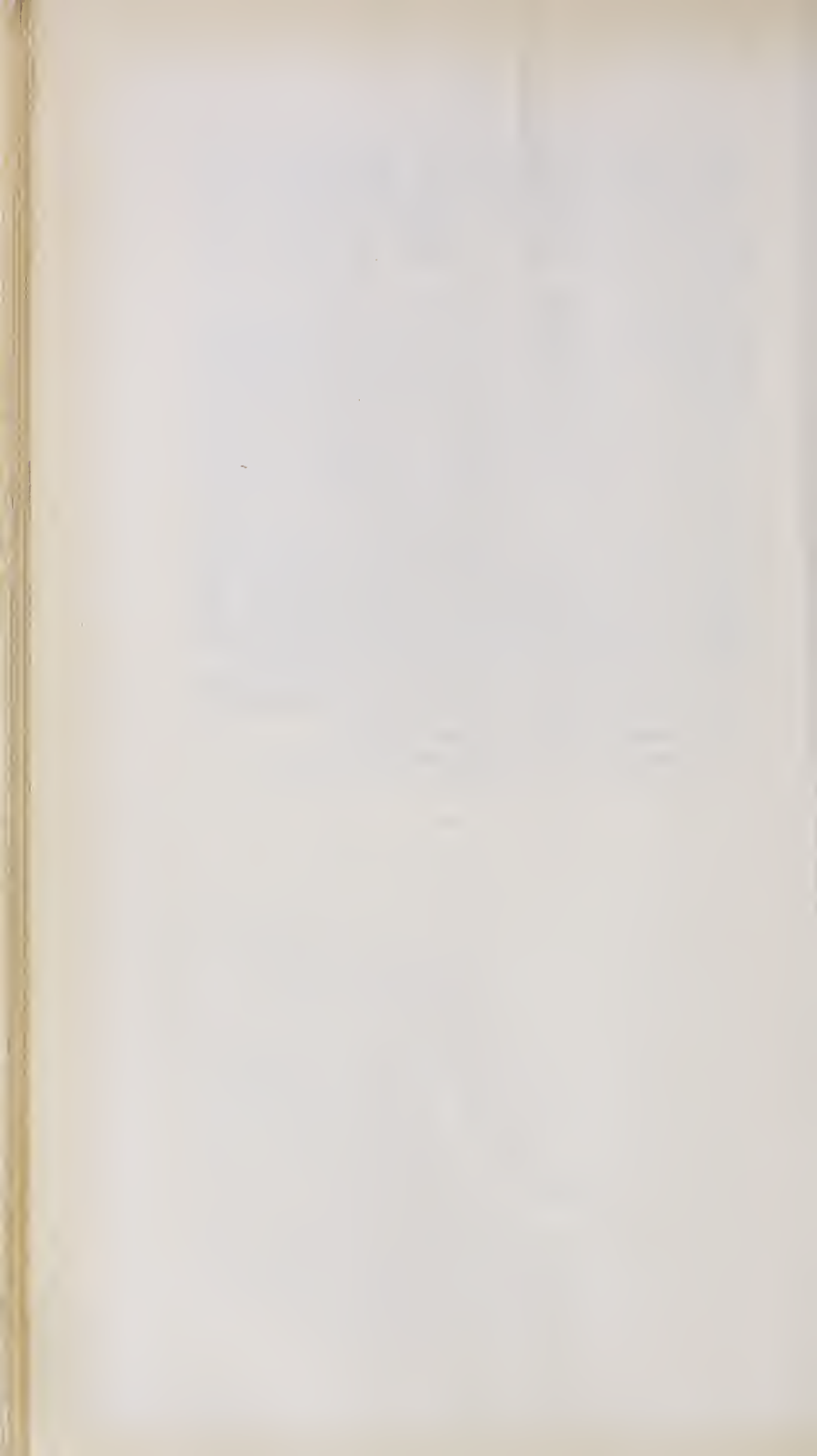
Not having heard the Respondent's version of the matter of possession, as neither the Court nor the parties considered this aspect of the case, the Native Commissioner was not able to give a ruling on the question of the onus of proof.

While, therefore, the Native Commissioner's ruling did to some extent lull the Respondent (i.e. the execution creditor) into a sense of security, which induced him to refrain from calling any evidence whatever in rebuttal, this Court feels that this omission has resulted mainly from the submissions of the Respondent in the lower Court, and that he is responsible for the necessity for sending the case back to the Native Commissioner to ascertain what evidence, if any, is adducible by him on the issue of possession.

In the circumstances this Court must hold, as it does, that the costs of appeal must be borne by the Respondent.

For Appellant: Mr. E. A. Ensor, Umtata.

For Respondent: Mr. T. Gray Hughes, Umtata.



CASE No. 44.

MTOMBO AUGUST vs. LILY TSEANA.

UMTATA: 4th October, 1939. Before A. G. McLoughlin, Esq., President, Messrs. W. J. G. Mears and E. F. Owen, Members of the Court (Cape and Orange Free State Provinces). Reserved judgment delivered on 12th October, 1939.

Native Appeal Cases—Technical objection to hearing of Appeal—Notice of Appeal, Rule 9 of G.N. No. 2254 of 1928—Appeal is properly noted when steps required by Rule 8 read with Rules 6 and 10 have been taken—Distinction between noting of appeal and service of notice of appeal—Ngoma—Distinction between legal and intentional fraud—Native Commissioner's attempt to abbreviate evidence by omission of pronouns source of danger—Evidence should be properly recorded to avoid possible miscarriage of justice.

Appeal from the Court of the Native Commissioner, Qumbu.
(Case No. 8/39.)

McLoughlin P. (delivering the judgment of the Court):

In this case Counsel for Respondent raised a preliminary objection to the hearing of the appeal in the following terms:—

“ Respondent objects ‘ *in limine* ’ to the hearing of the appeal on the ground that Appellant has failed to comply with Rule 9 (1) and (2) of the Native Appeal Court Rules issued under G.N. No. 2254 dated 21st December, 1928, and under authority of sub-section (5) of Section 13 of Act No. 38 of 1927 inasmuch as the Notice of Appeal was neither served upon the Respondent or his attorneys personally by Appellant in the presence of a witness nor was it served by the Messenger of the Court. *That the Appeal is, therefore, not properly noted as by law required.*

Wherefore Respondent prays that the Appeal be struck off the roll with costs.”

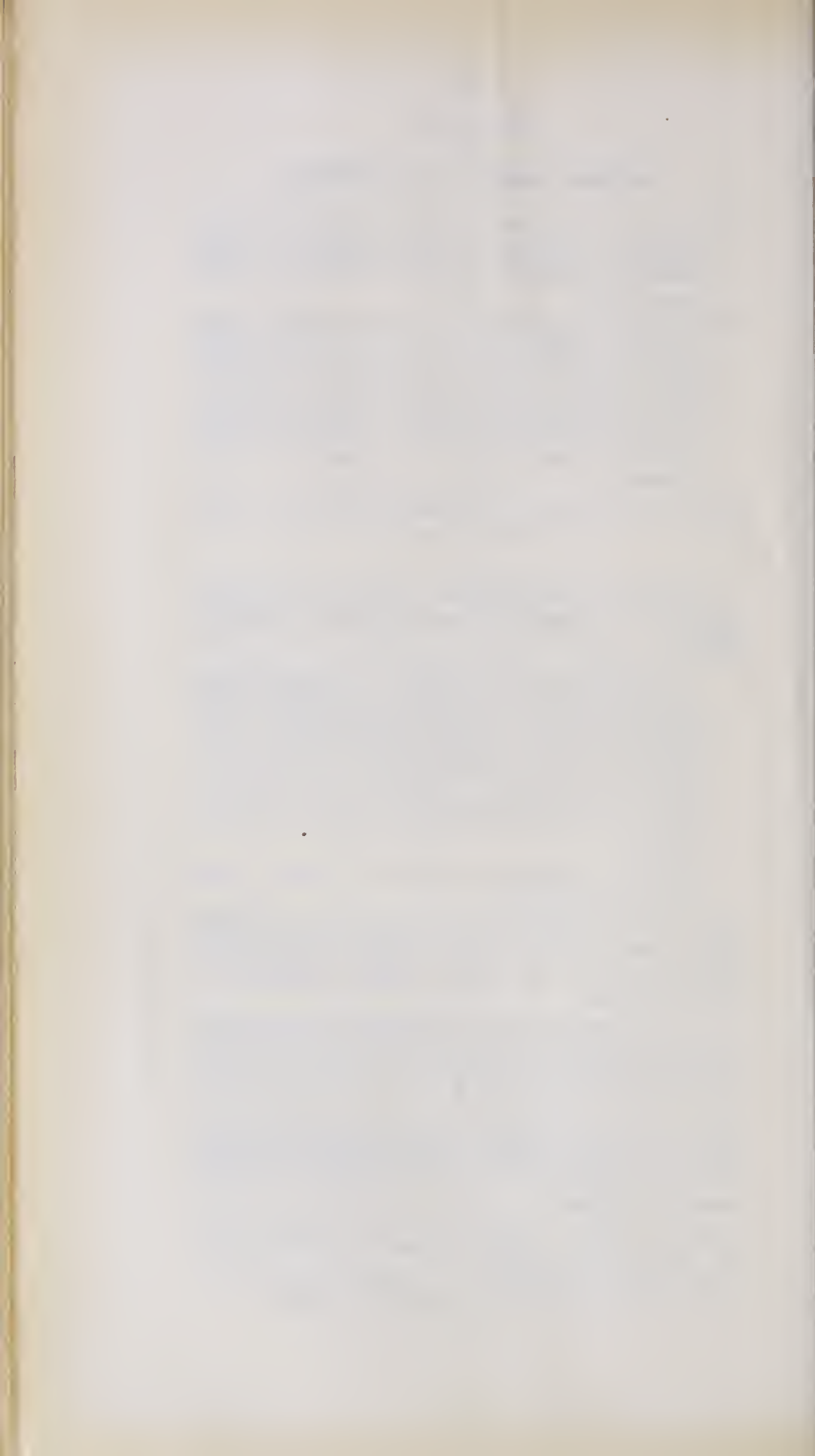
As the Notice of Objection is dated the 3rd day of October, 1939, and the hearing was on the 4th, it is questionable whether such notice is in itself a compliance with the rules, which require a “ clear ” day's notice. In view of the decision reached by the Court, it becomes unnecessary to pursue this enquiry.

Both from argument and in the conclusion of the objection it is apparent that Counsel for Respondent is labouring under a misapprehension that the procedure under Rule 9 is part and parcel of the process of “ noting ” an appeal, as set out in Rule 8 read with Rules 6 and 10.

That is not so. An appeal is properly noted when the steps required by Section 8 read with Sections 6 and 10 have been taken, and it then becomes necessary to ensure the presence of the Respondent at the hearing. The analogy with the issue of a summons and the hearing of the ordinary case of first instance is complete.

In either instance defects in service do not invalidate the basis of the action, i.e. in the one case the summons, and in the other, the noted appeal.

The objection, therefore, is not properly framed as an objection invalidating the “ noting of the appeal ”.



But even if it be accepted as intended to inhibit the hearing of a properly noted appeal, the objection is not well taken, for it rests entirely on purely technical grounds, and it cannot prevail against the injunction of the legislature contained in the proviso to Section 15 of the Native Administration Act, No. 38 of 1927, in the absence of proof of substantial prejudice.

The facts as set out in the supporting affidavits are that the appeal was noted on the 14th of July, 1939. The last available day for noting was the 15th of that month. The 16th was a Sunday. The Appellant's attorney notified Respondent's attorney of record by letter transmitted through the post, which letter reached the addressee at Umtata on the 17th.

Not only was notice of the noting of the appeal thus "forthwith" communicated to the Respondent, but on the 22nd of August his attorney of record signed on his behalf a notice of hearing of the appeal issued under Rules 16 and 18.

This Court interprets the Rules (Rule 9) to mean that an appeal may be noted within twenty-one days as set out in Rule 6 and that "after the noting of the appeal, etc." means what it says, i.e. after an appeal has been noted even at the last available moment, service shall be made "forthwith", i.e. in such an extreme example—after the 21st day provided it be made forthwith.

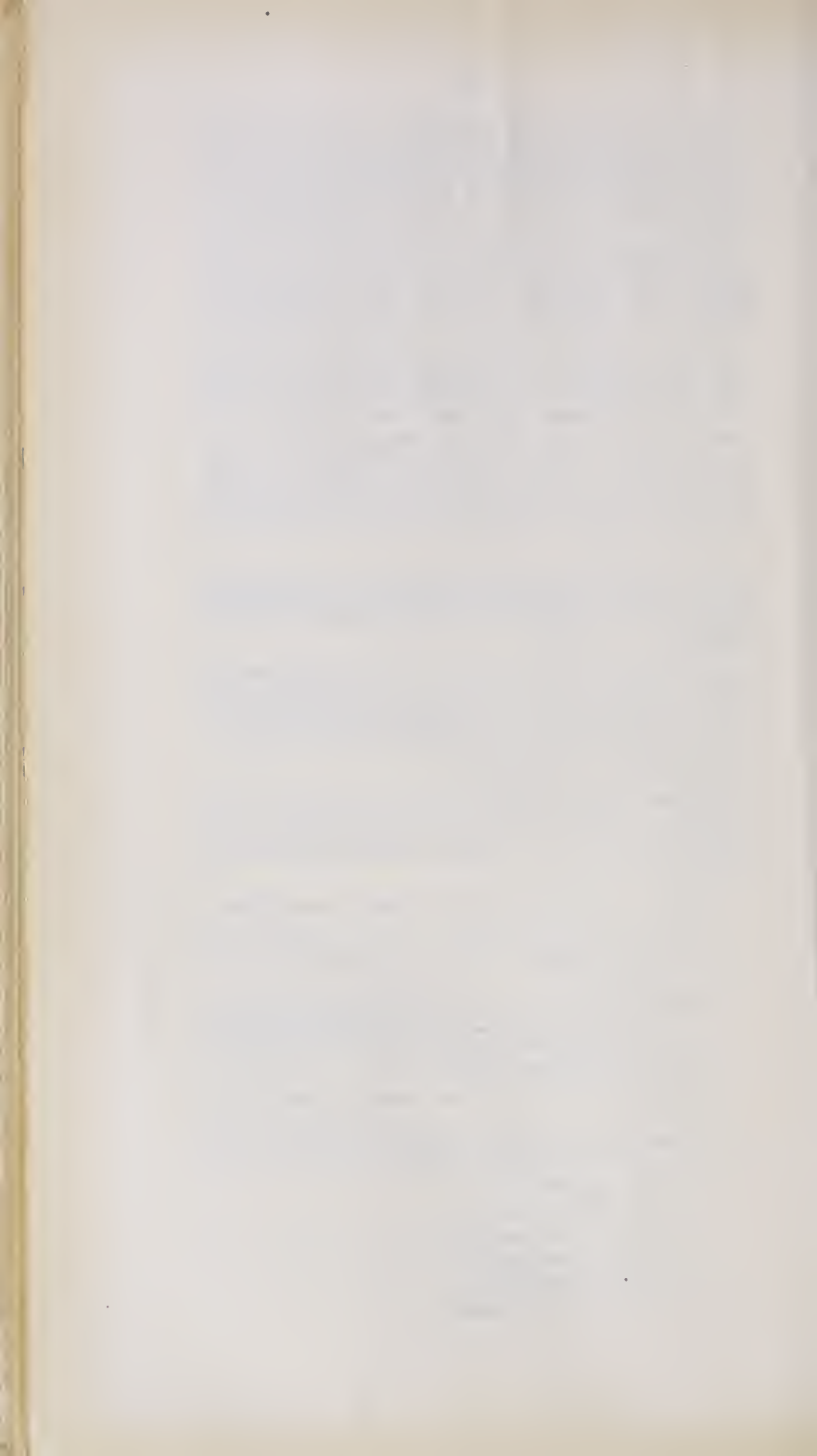
In the circumstances this Court was at a loss to gather what prejudice could have been sustained by Respondent. Indeed Counsel for Respondent frankly confessed that there was none but that he relied solely on the failure to observe the strict letter of the Rule.

This Court was at pains to set out in the cases *Mfazwe vs. Modikayi* 1939, N.A.C. (C. and O.) p. 18 and *Qina vs. Qina* *ibid.*, p. 41, the predominance of justice over technicalities, where the irregularity is one not causing substantial prejudice.

There being no prejudice in the present instance, the objection must fail and be overruled.

Proceeding with the hearing of the appeal it appeared that Plaintiff, an unmarried Basuto woman over the age of 21 years, sued Defendant for delivery of certain sheep. The claim is involved and is best shown by quoting the declaration in extenso:—

- " (3) That during the year 1916 Plaintiff nqomaed Defendant 9 ewes and 1 hamel.
- (4) That in August, 1925, these nqomaed sheep had increased to 34.
- (5) That from year to year the Defendant reported to Plaintiff that the stock had made satisfactory increase.
- (6) That in July, 1938, Plaintiff called upon Defendant to deliver her nqomaed stock to her.
- (7) That Defendant thereupon handed to her 55 ewe sheep.
- (8) That upon examination of those sheep they were found to be of the following age:—
 - (a) 15 were 1938 lambs;
 - (b) 13 were 1937 lambs;
 - (c) 11 were 1936 (two tooth);
 - (d) 8 were 4 tooth sheep;
 - (e) 4 were 6 tooth sheep;
 - (f) 4 only were full mouthed.



- (9) That Plaintiff called upon Defendant to account for their position and to explain the absence of an adequate number of full grown sheep, but he was unable to offer and did not offer any explanation.
- (10) That upon being taken before the headman, Defendant was unable to explain such absence and offered to pay a beast for forgiveness which Plaintiff declined to accept.
- (11) That Defendant at no time made any report to her of the death or loss of any sheep.
- (12) That Plaintiff estimates that there should be available to her from the said nqomaed at least 50 additional sheep and that Plaintiff prays:—
 1. for an account from the Defendant of the said nqoma up to July, 1938;
 2. For delivery to her of 50 sheep or such number as may be found to be due, or payment of their value £37. 10s. and costs: alternatively the Plaintiff repeats the allegations contained in the foregoing particulars and avers that through the maladministration, neglect and/or fraud of the Defendant in respect of the said nqoma she has suffered loss and damage in respect of the said nqoma in the sum of £37. 10s. for which she claims judgment with costs of suit."

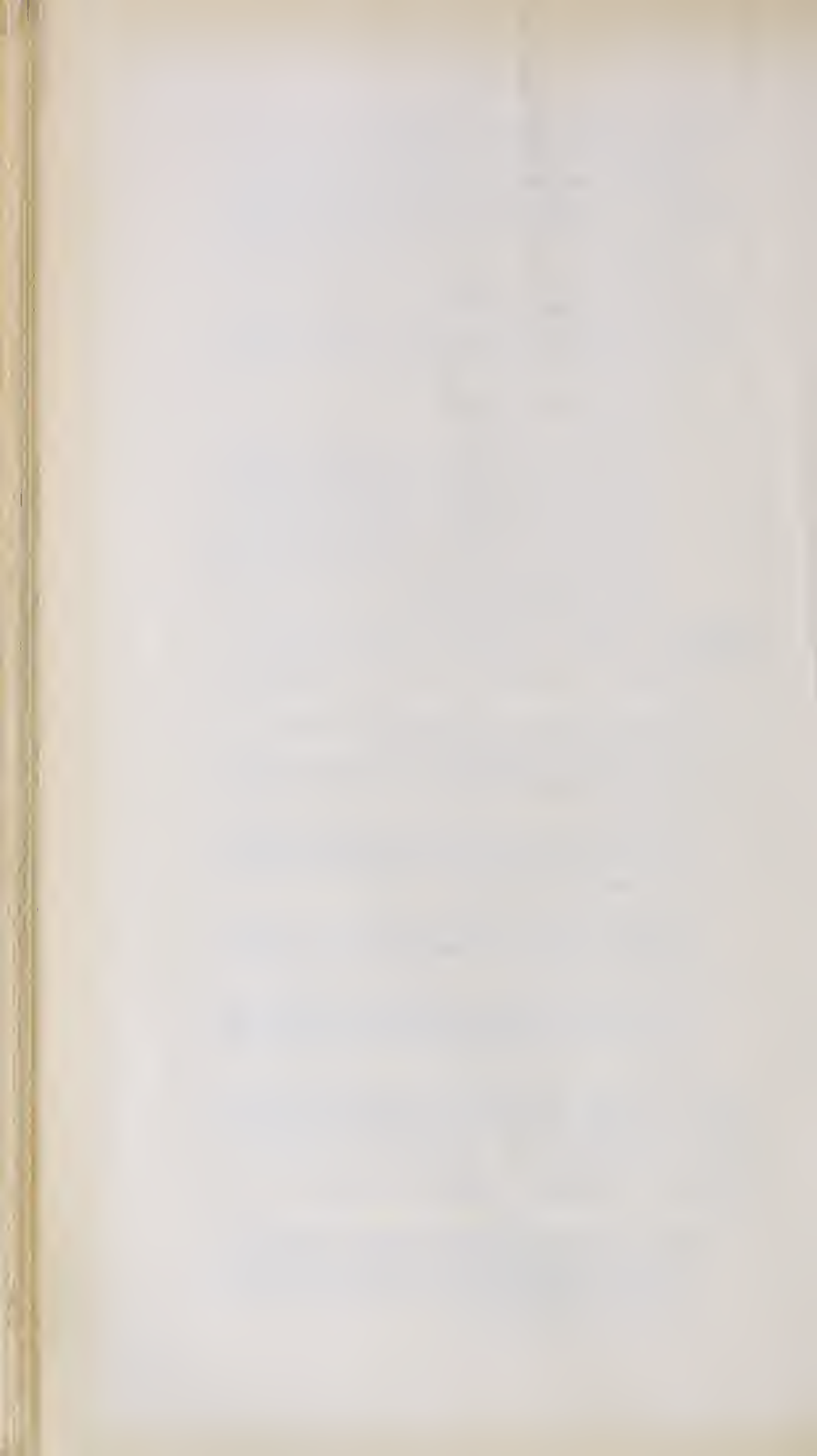
Defendant objected to the *locus standi* of Plaintiff but subsequently withdrew this objection. He pleaded over:—

- " (3) He denies the allegations contained in paragraphs 3 to 12.
- (4) He denies that he ever received any sheep from Plaintiff under the custom of nqoma.
- (5) He admits that Plaintiff's late father kept his sheep at his Defendant's kraal but not under the custom of nqoma.
- (6) He states that he is a close neighbour of the Plaintiff, who lives at her late father's kraal and that Plaintiff's late father, from time to time, removed such sheep as he required for his use.
- (7) That about the month of June, 1938, there were in his possession 55 sheep belonging to the late father of Plaintiff and these were removed and taken possession of by his son Silas.
- (8) He states that he has not in any way disposed of any of the sheep belonging to Plaintiff's late father and says that the number removed from the kraal as afore-said represent the number in his possession at the time."

After hearing evidence which will be analysed at a later stage in this judgment, the Native Commissioner decided in favour of Plaintiff for £25 "being damages sustained by reason of Defendant's gross negligence in his custody of the sheep of the Plaintiff".

Plaintiff has appealed against this decision on the grounds:—

- " (1) That Plaintiff failed to prove that the original sheep placed with Defendant by Plaintiff's late father was 'nqoma' stock or that the Defendant during the period such stock was in his care, in any way misused or disposed of such stock."



Grounds 2, 3, 4 and 5 are merely repetitions of the first ground and elaboration thereof.

His 6th ground that the judgment is against the weight of evidence and the probabilities covers even the first ground.

What Defendant contends in summary is—

- (1) that Plaintiff failed to prove that there was a nqoma.
- (2) that he denies that in any way he misused or disposed of any such stock;
- (3) that there is no corroboration of Plaintiff's allegation of such misuse or of negligence;
- (4) that there is a total absence of evidence that Defendant at any time had 50 sheep additional to the number delivered to Plaintiff.

In reply to the argument of Appellant's Counsel on these lines, Counsel for Respondent submitted that he based his action on the patent fraud disclosed by the facts. These showed, so he alleged, that Defendant must have made away with a considerable number of sheep.

Great emphasis was laid on the fact that the disproportion of mature stock to young in the flock of 55 sheep eventually recovered, was so great as to give rise to an irrefutable presumption of wrongful dealings in the stock.

Now Voet indicates that the authorities distinguished between legal fraud, i.e. "that which was in the act itself a legal fraud, and which consisted in considerable (*immodica*) injury and damage, even without, if we regard the outset of the question, any accompanying design of causing such loss and detriment, in which case the act itself is said to contain the fraud.

Secondly, intentional fraud, in which the direct intention of injuring is all along present." Voet IV.3.1.

Fraud is not presumed in either case. It must be proved. Voet IV.3.2. Sampson's translation page 40.

But in any case no presumption such as is relied on by Respondent's Counsel can arise if—

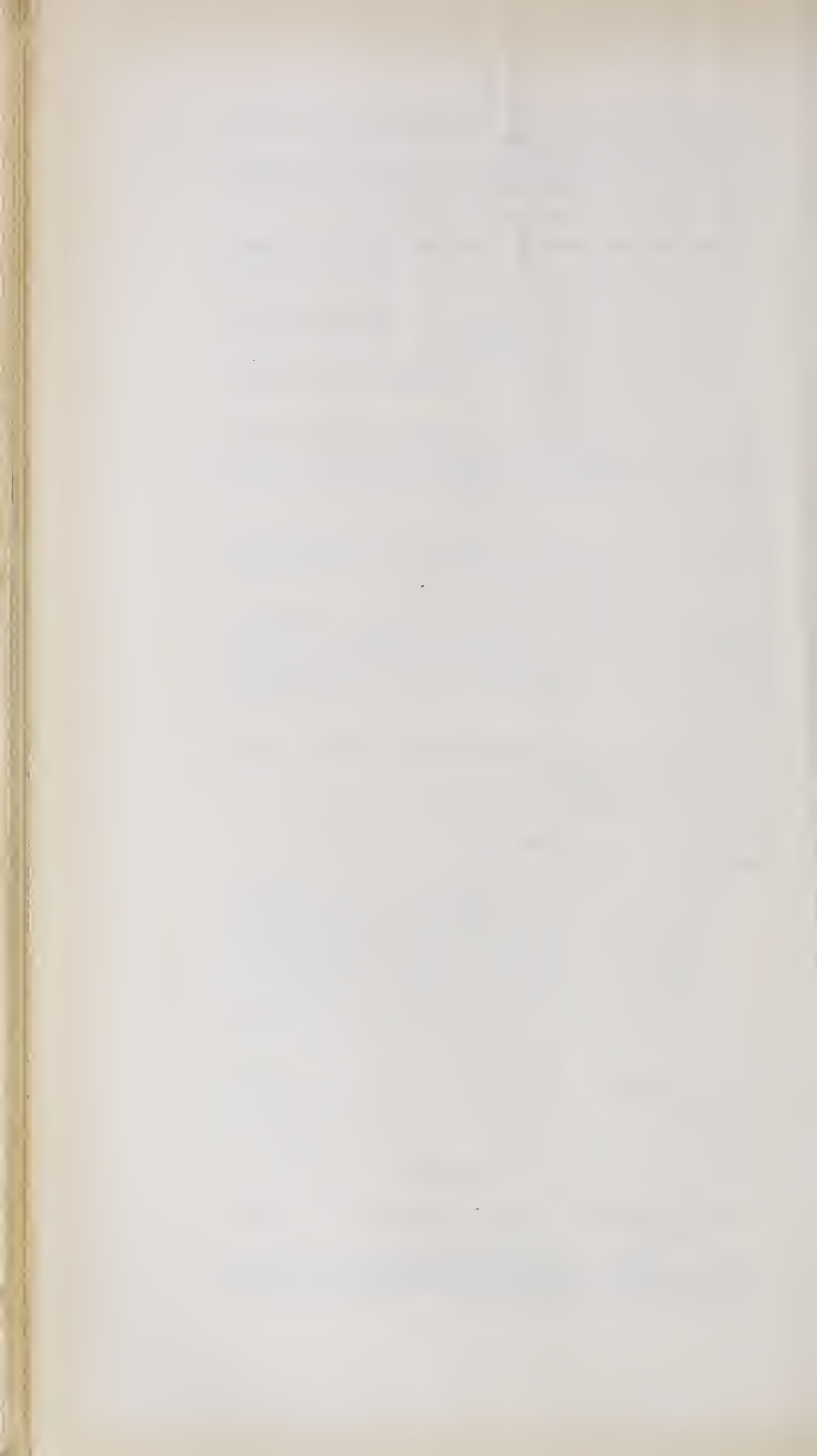
- (1) there be nothing inherently impossible in the composition of the flock as it stood when taken over, viz., it can be shown that all the lambs of each successive lambing season had mothers still present in the flock—at any rate as far back as 1935 since when only 2 head are admitted by Defendant to have died. Prior to 1935 there may have been and probably were other losses;
- (2) there be no proof whatever that there were other sheep not accounted for.

In other words the Court cannot deal with the matter on the basis of hypothetical increases.

Actually there are two main aspects of the case to be considered:—

1. Was there a nqoma to Defendant? If so, by whom was it made?
2. Has Defendant satisfactorily accounted for the sheep so nqomaed?

If the finding on the second head is in the affirmative it becomes necessary to ascertain whether Plaintiff has established a case for damages.



To follow the evidence it is necessary to know that the parties are related and neighbours to each other. Plaintiff admits that the sheep "ran before her eyes and the eyes of her father and Silas all day". Silas is her brother and agent in recovering the stock actually handed over.

It is clear, too, that Plaintiff's father had a sheep fold and that he kept sheep there, and that until his death in 1937, the Plaintiff lived with her father. Subsequently she lived with her brother near by.

Coming to the nqoma the following evidence is disclosed by Plaintiff and her witnesses.

Plaintiff states "about 30 years ago placed certain stock with Defendant", viz. 9 ewes and one hamel sheep. The evidence is presumably intended to read "I" placed, but the omission of the pronoun may mean that someone else placed the stock there. The danger resulting from the numerous other examples of such material omissions in the record is the subject of special comment at the end of this judgment.

In cross-examination Plaintiff states "My father sent *his* sheep to Defendant when he saw he was getting blind. My father kept sheep at his own kraal. My father sent sheep to Defendant which he had bought. My father kept 50-60 sheep at his kraal. Defendant asked to *look after* sheep which had been bought as they strayed back. *These sheep had my earmark.* All my sheep bear my earmark." In cross-examination she repudiated the date of the alleged nqoma as 1922 given in a letter sent at her instance, and maintained that it was in 1916, i.e. 23 years ago that the nqoma was made.

There is no corroboration of Plaintiff's version beyond an inference to be drawn from the evidence of the witnesses who went to Defendant in 1925 to get back certain sheep then with the latter.

It was submitted that there is other evidence that Plaintiff nqomaed the sheep, but that rests on the opening remarks in her evidence in chief, which were obviously qualified in her later reference just quoted where she clearly connects those sheep with the flock since recovered.

Defendant contradicts Plaintiff's allegation that *she* nqomaed the sheep to him. His version is that Plaintiff's late father gave him (Defendant) sheep to look after—9 sheep—many years ago. He denies they were nqoma sheep. "I was asked (he says) to look after sheep as the Plaintiff's father was old and he was afraid to have them as sheep bought." That version is corroborated by Plaintiff's own evidence already quoted. In so far as Plaintiff's claim is based on a nqoma by her before 1925 she must fail.

However, it is alleged by Plaintiff and her witnesses that in 1925 when certain sheep were demanded (apparently by Plaintiff or for her) some 34 then in existence were left with Defendant. Plaintiff says: "When I wanted to remove sheep then Defendant wanted to keep sheep to help him educate his children and I agreed to leave the sheep there." Her brother Silas confirms this account. After relating how he went to fetch sheep, he states "Following day Defendant came to sister's (Plaintiff's) kraal and requested that sheep remain his kraal until children educated. Plaintiff agreed." Although these two witnesses aver there were then 34 sheep which number is relied on as being an accurate number then in existence, both Silas and the witness Kenana say the sheep were not all at Defendant's kraal when they came. Kenana says, "We did not see them all. We left them as Defendant said they were not all there." Silas deposes to the same effect, p. 10.



That is all the evidence for Plaintiff on this aspect of the case. Here again the conclusion obtrudes itself that this is not a *nqoma* as usually understood, for here the sheep could not have assisted Defendant in educating his children if held under *nqoma* as he would not be entitled to sell either their wool or the sheep themselves, and at most he could expect only a small reward for his services.

As between Plaintiff and Defendant the position arising in 1925 is no more than a continuation of the original arrangement. There was no novation, even on Plaintiff's own showing, while on the other hand Defendant does not admit that any change took place in the agreement whereby he held the sheep. He merely admits that Silas and Kunana came to fetch the sheep *some time ago*, and all that Plaintiff says is that she agreed "to leave the sheep there".

Assuming, however, that Plaintiff can proceed with her action on the basis that Defendant by withdrawing his objection to her *locus standi*, has by inference admitted her right to sue (which by no means follows), we find the following evidence dealing with the subsequent increases:—"After 1925 I did not go to Defendant's kraal to see Defendant. I did see sheep—this was between 1936-37. I went to see sheep before that in 1929. There were some sheep in Defendant's kraal. Defendant told me that all sheep were not there then. About 1937, my father having died, *was looking after my father's stock*, and noticed that sheep were all young sheep. Saw no mothers. . . . In consequence of information received I decided to get my sheep back. In July, 1938, I sent my brother Silas to get those sheep. He returned with 55 sheep of which 15 were 1938 lambs. . . . Of 55 sheep only 4 were full grown. Very dissatisfied and asked for an explanation. . . .

In my opinion when Defendant returned sheep to me in 1938 there should have been 36 full-grown sheep and above four such returned to me. Time has passed since then and those sheep have increased. I claim therefore 50 sheep as a reasonable estimate of what are due to me."

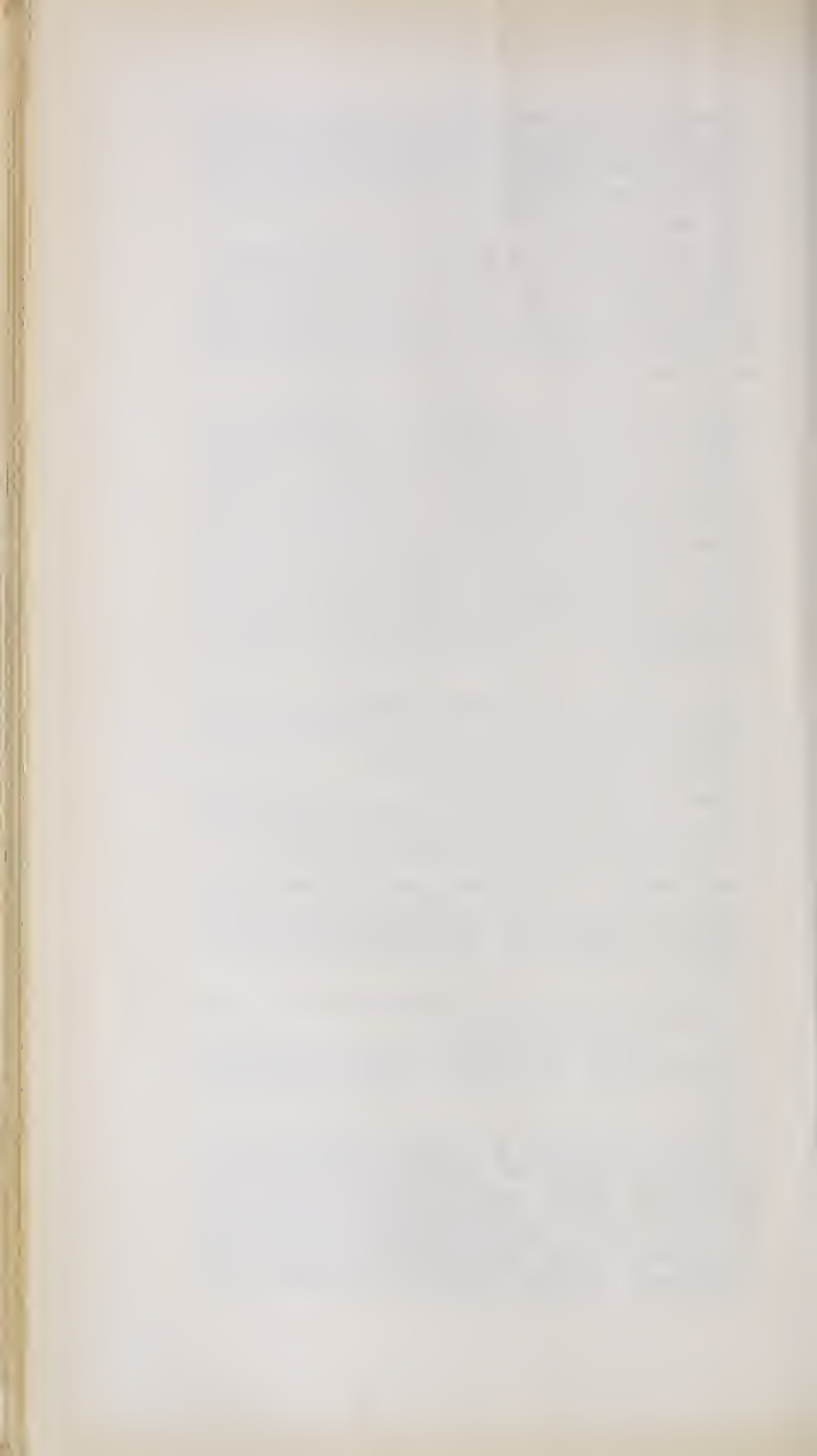
Now this is the only direct evidence on which Plaintiff bases her claim. She admits in her evidence "All my sheep bear my earmark. All sheep bearing my earmark which were at Defendant's kraal have been handed over to me."

She contends "I want an explanation from Defendant of missing sheep *as no mothers of these sheep*." The words "there are" were probably omitted from the record. She continues "Defendant said, when asked where mothers of sheep were, he did not know. *Defendant* was surprised I am not satisfied."

Yet in her opening remark in cross-examination she said "Defendant told me my sheep died."

Before analysing the Plaintiff's evidence bearing on her conduct in this case, it is necessary to see what Defendant has done to comply with the claim for "an account of the said *nqoma*".

His plea, set out above *in extenso*, denies that he received any stock from Plaintiff. His evidence is that he dealt with Plaintiff's father and that impression is strengthened by Plaintiff's own evidence, see page 8 of typed evidence already quoted above, and especially by her conduct. Defendant says he received the sheep from Plaintiff's father and he thought the sheep belonged to Plaintiff's father and subsequently to his children. "As he wanted some so Plaintiff's father moved sheep." Some died. "Told him about deaths and took skins and head and carcass to him."



Now Plaintiff seeks to deny these reports, but she has herself established Defendant's case by showing that she kept no tally of the sheep which depastured before her eyes for years. She contends that Defendant made no reports to her either of increase or decrease. The reports would be made to the father and this tends to confirm Defendant's version.

There is no evidence from Plaintiff, on whom lies the onus of proving that there was increase, yet it is common cause that there were young stock, indeed the complaint is the unnatural proportion of young stock.

It is common cause that all the young stock bore an earmark claimed by Plaintiff as hers. In the absence of any evidence to contradict the Defendant's account and denial of other stock, or of disposing of any of them, it becomes the duty of Plaintiff to establish proof of fraud, for that is what the action amounts to.

She herself says "Defendant has been looking after these sheep under my eyes for a good many years. There has never been a suggestion before of Defendant selling or disposing of my sheep." Her brother Silas also says in the cryptic truncation of the record "No suspicion of disposition of or wrongful selling of sheep by Defendant."

The Court is asked to assume that there is such grave suspicion aroused by what is termed the absence of an adequate proportion of full grown sheep as to amount to proof that there were such sheep, but this does not follow. There is no evidence that any of the lambs had no mothers in the flock. Thus nothing can be based on this fact. Indeed, it is on record that there were then a sufficient number of sheep capable of lambing more than the 15 lambs in the flock.

There is no precedent in Native Law for assuming that there arises a presumption against the Defendant in the circumstances. That is a fact which Plaintiff must establish after the explanation given by Defendant. Plaintiff has not rebutted that explanation. She has in my opinion rather helped to clear Defendant by her own absence of interest in her stock, if indeed, as is common cause, they ran before her eyes. On the contrary, to a presumption of *mala fides* or fraud the Plaintiff has clearly stated, there was no suspicion of wrongful disposal of her stock.

Both by Native Law and Common Law she must fail. Native Law is clearly set out in the Native Appeal Court Reports which reflects the custom of *nqoma* practised by the Nguni Bantu. The Basutu practise the custom in the same way in principle, for no Native would so entirely trust another as to leave him in undisputed control without any attempt to keep tally, especially when the stock is sheep and those sheep are depastured before the very eyes of the owner.

The only concrete proposition arising from the evidence is the fact that between 1925, when the number of sheep was 34, and 1938, when there remained only 4 sheep that might reasonably be regarded as the remainder of the original flock, there was a decrease of 30 sheep for which Defendant should account.

From 1916 until his death about 1936, the Defendant dealt with the late father of Plaintiff, with her knowledge and consent. That would have been entirely according to custom, as Defendant avers.

Now the Defendant is emphatic that until the old man's death he, Defendant, did account to the old man for the stock. There is nothing to contradict this statement and there is thus no ground for holding that he did not so account. Indeed one is constrained to repeat the Plaintiff's own

words that there was no suspicion of misconduct on the part of Defendant during all this time, and it is evident that she remained satisfied, for no action was taken until recently to terminate the arrangement.

If, as has been indicated, the special agreement between the parties, or their original privies was not a *ngoma*, then the Defendant's position becomes even stronger, for he would be under no omms to render as accurate an account as under the *ngoma* custom. There is in any event nothing on which to base a presumption of legal fraud. There is no evidence of theft, and thus in either event Plaintiff must fail.

The appeal is allowed with costs including costs arising from the objection, and the judgment of the Native Commissioner is altered to one for Defendant with costs.

In this case the Native Commissioner has attempted to abbreviate the evidence by omitting pronouns of which one instance has already been mentioned in this judgment. He has omitted auxiliary verbs as for example: "Defendant asked to look after sheep"—when all the evidence indicated that the word "was" is omitted.

The evidence is further mangled until it becomes a series of meaningless words. For example: "I earmarked made no objection but took sheep to Plaintiff and earmarked large number were young." "*Sheep controlled and have to explain removal of sheep.*" "*Sheep that area graze together sometimes and sometimes dont. When together by bunches of sheep.*"

The record does not become either the lower Court or this. It is a source of danger which may easily result in a miscarriage of justice, and this Court must for its own protection as well as that of litigants, require the records to be properly recorded to avoid all ambiguity in the evidence or the subsequent reconstruction of the text by guess work.

For Appellant: Mr. Quex Hemming, Umtata.

For Respondent: Mr. G. Hemming, Umtata.

CASE No. 45.

CITIBUNGA MPANA vs. DLANGAMANDLA ZENZILE.

UMTATA: 5th October, 1939. Before A. G. McLoughlin, Esq., President, Messrs. W. J. G. Mears and E. F. Owen, Members of the Court (Cape and Orange Free State Provinces).

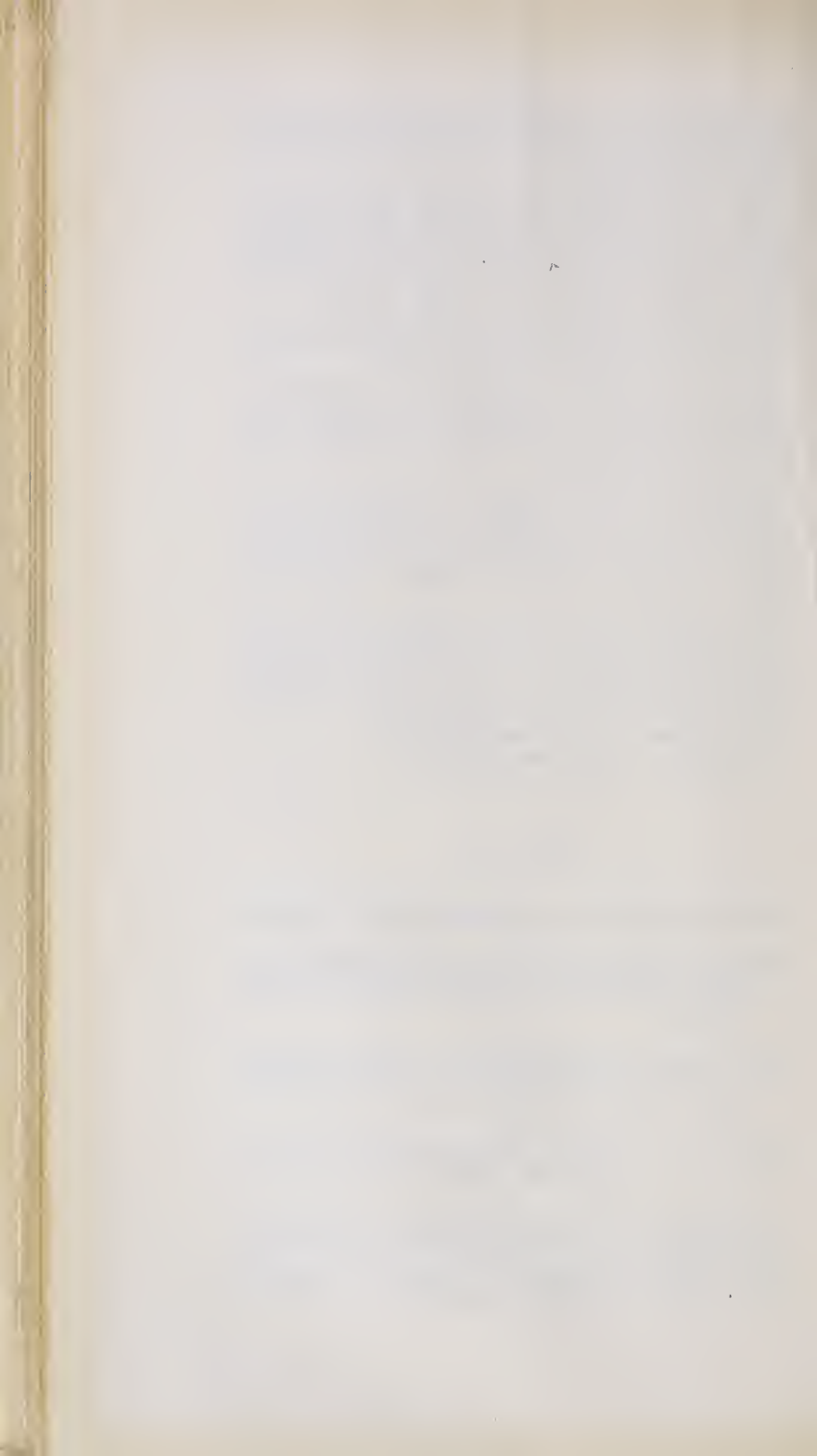
Native Appeal Cases—Practice and procedure—Neither party can insist on postponement of hearing if public interest detrimentally affected thereby.

Appeal from the Court of Native Commissioner, Umtata
(Case No. 1039/38.)

McLoughlin, P. (delivering the judgment of the Court):

This action was one for recovery of a beast or its value and sundry articles.

The Native Commissioner gave judgment for Plaintiff which is attacked on Appeal on the ground



“ 1. That the Magistrate should have allowed a postponement to enable the Defendant to produce the necessary and important evidence of the men Gekana Hlebe and Matshabeni Xayimpi.

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

As it appears from the record that the Native Commissioner postponed the case from 2nd March, 1939 to 6th April, 1939 to enable the Defendant to subpoena his witnesses the objection set out on the first ground of appeal falls away, there being no intimation whatever from Defendant to show why he did not subpoena his witnesses. The matter was thus one entirely within his control and he cannot complain of prejudice resulting therefrom.

The question of postponement was dealt with in the case *Molifi vs. Ntuli* 1937 N.A.C. (T. & N.) p. 137.

Neither party can insist on a postponement if thereby the public interest is detrimentally affected. Any other ground would be subject to the matter of prejudice which is absent for the reason already stated.

Though not directly included in the first ground, it appeared during the course of argument that the Defendant felt aggrieved that he was unable—apparently owing to delay by his attorney—to obtain a copy of the record of a case heard in 1897 in which was involved the question of the legitimacy of the Plaintiff.

(Be it remembered that it is contended by Defendant that Plaintiff is the son of his mother and another father—not the subsequent husband of his mother whom Plaintiff avers is his father and through whom he claims.)

This document has subsequently been obtained. It was, however, not seen by the Court but as far as could be gathered, it was not of such a nature as to settle the dispute without further ado. Indeed what was claimed was that it would place Defendant in a better position to elucidate facts which he was unable to bring out properly at the trial without the aid of the information disclosed in the former case.

The relevant principles underlying this aspect of the case were discussed at length in *Dhladhla vs. Ntuli*, 1937 N.A.C. (T. & N.) at p. 54 and need not be repeated. In addition to the authorities therein assembled the cases *Coleman vs. Dunbar*, 1933 A.D. at p. 161 and *Oosthuizen vs. Stanley*, 1938 A.D. p. 333 have bearing on the problem, but they tend merely to confirm the principles already mentioned.

By the rules thus set out the Defendant must fail, for his new evidence is not conclusive and he has not shown prejudice outside of his control.

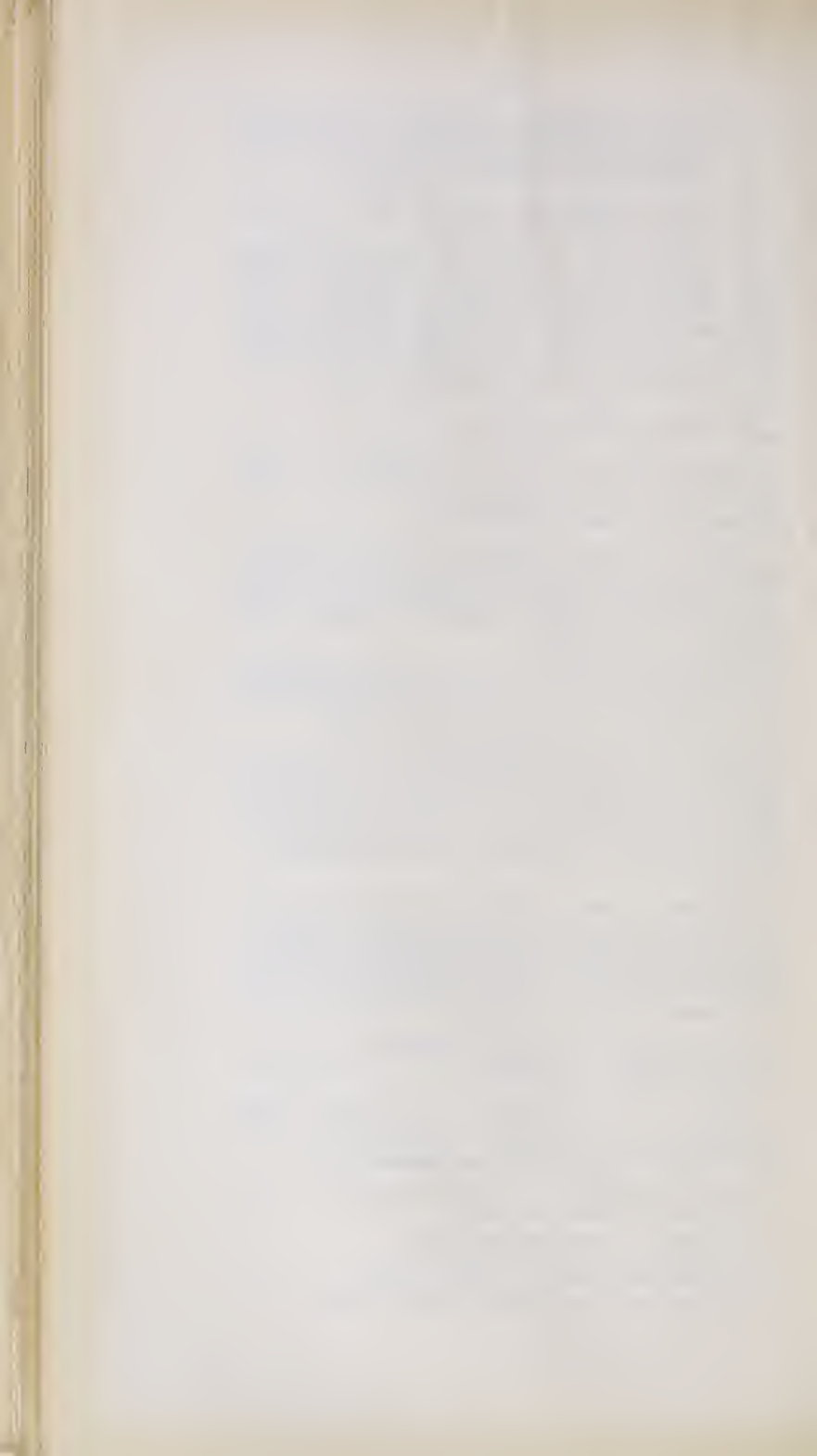
There is a very substantial case on the merits strongly supported by important members of the family who would not lightly allow an imposter the rights and privileges which were accorded to the Plaintiff as a legitimate son.

Herein see the case *Lize vs. Bushula Mabalima* 2 N.A.C. p. 180 which is directly in point.

The appeal was dismissed with costs.

For Appellant: Mr. E. A. Ensor, Umtata.

For Respondent: Mr. T. Gray Hughes, Umtata.



LOBI XIMBA & ANO vs. MQQIBELO MANKUNTWANE.

UMTATA: 5th October, 1939. Before A. G. McLoughlin, Esq.,
President, Messrs. W. J. G. Mears and E. F. Owen,
Members of the Court (Cape and Orange Free State
Provinces).

Native Appeal Cases—Strong disapproval of inelegant framing of grounds of appeal—Father may place his child in custody of some one other than nearest relative—Father cannot displace natural guardian in control of property.

Appeal from the Court of the Native Commissioner, Mqanduli.
(Case No. 50/39.)

McLoughlin, P. (delivering the judgment of the Court):

In the Native Commissioner's Court Plaintiff sued Defendant for delivery of certain 6 head of cattle or their value setting out in his summons:—

1. That he is the only son and heir of the late Ximba Hlakanyane in his Qadi to the Great House, and that by reason of there being no male issue in the Great House, Plaintiff is accordingly heir to the Estate of the late Ximba in his Great House and Qadi House thereof.
2. That there being no close male adult relative to Plaintiff living, Plaintiff is assisted in this action by Wilson Nonkonyana, under whose charge and guardianship he was placed by his father before his demise.
3. That as heir to the Great House Plaintiff is "eater of the dowry" of one Nongubula, daughter of Ximba in his said Great House.
4. That the Defendant received three head of cattle as further dowry for the said Nongubula and that these three head of cattle have now increased to six head.
5. That despite demand Defendant refuses or neglects to deliver to Plaintiff the said certain 6 head of cattle.

The summons is headed Lobi Ximba a minor, assisted as far as need be by his guardian, Wilson Nonkonyana, ward 15, Mqanduli.

Defendant pleaded as follows:—

1. He admits (a) that Plaintiff is the heir to the whole of the late Ximba's estate (par. 1 of Particulars), (b) Paragraph 3 thereof and (c) that he refuses to hand over the 6 head of cattle (par. 6) claimed, at present.
- (2) He denies paragraph 2 and states that one Hlalapi Kuxu of Stanford's Ward, Ngqeleni District, a cousin of the late Ximba on the male side is the Plaintiff's guardian.

As, however, the Plaintiff is aware that the said Hlalapi neither could nor would sanction the Plaintiff's bringing the present action and as the Defendant is also desirous of having this matter judicially settled he consents to the said Wilson Nonkonyana acting as guardian with reference to the present action subject to the proviso that if the Plaintiff be unsuccessful therein the said Wilson Nonkonyana be joined in any order as to costs, on the grounds that it was not incumbent upon the said Wilson Nonkonyana to interfere in the matter.

3. He denies paragraph 4 and states—

- (a) that he has received certain 3 head of cattle as further dowry for the said Nongubula;
- (b) that these cattle have now increased to 6 head;
- (c) that he is retaining possession of them and is justified in so doing for reasons set forth in his claim in Reconvention to which, to save repetition, he begs to refer the Court.

Defendant counterclaimed for certain 6 head of cattle being liabilities by the late father of Plaintiff in convention, as follows:—

3. That the said late Ximba incurred the following liabilities with the Defendant:—

A loan of £5 made by the late Mankuntyana to the late Ximba which the latter promised to refund by means of one head of cattle.

Wedding outfit for the said Nogubulu was supplied by the said late Mankuntywana for which he was promised a second beast by the said late Ximba.

Two head of cattle were contributed by the Plaintiff's mother (Nomatye) which the said late Ximba also agreed would be replaced by a further two head of cattle.

Defendant paid certain "medical" expenses on account of the said Nogubulu and provided an "ukutombisa" and an "ubulunga" beast respectively for her. For these the said late Ximba also agreed to repay a further two head of cattle.

4. That though the said late Ximba admitted a general liability in respect of the above six head of cattle it was agreed between him and the Defendant that the latter would look in particular to the dowry to be paid for the said Nogubulu for a refund.
5. That the late Ximba gave the said Nogubulu in Customary Union and received 4 head of cattle on account of dowry for her but he failed to repay the Defendant.
6. That about 7 years ago, and after the death of the late Ximba, the Defendant, acting with the consent and approval of the Plaintiff's guardian Hlalapi Kuxu, collected a further 3 head of cattle as dowry for the said Nogubulu.
7. That the Defendant and the said Hlalapi Kuxu agreed that the Defendant should retain the said 3 cattle and any increase thereof until such time as the estate late Ximba should be in a position to settle the Defendant's claim for 6 head of cattle as set forth in paragraph 3 hereof.

8. That the Plaintiff, as son and heir of the late Ximba, is responsible for the said payment.

After hearing evidence the Native Commissioner gave the following judgments:

“On the claim in convention.

Judgment for Defendant with costs. The Court orders that William Nonkonyana be joined in the order as to costs.

On the claim in reconvention.

Judgment for Defendant in reconvention with costs.”

Plaintiff appealed on the judgment in convention. His notice of appeal is couched in the form of argument. It is most diffuse and inartistic and consists mainly of argument. But from the welter of contentions it appears that the Plaintiff attacked the decision of the Native Commissioner on the ground that he erred in holding that as the man Wilson had admitted he was not the legal (i.e. natural guardian), judgment had to be given for Defendant, the man Wilson having no *locus standi* to control the estate.

That the Defendant had waived his objection to the lack of standing of Wilson in the case.

That on the facts Plaintiff should succeed, the Native Commissioner having found for him on the facts.

The Court expressed its strong disapproval of the very inelegant framing of the grounds of appeal, and directed that this should be conveyed to the practitioner concerned.

The cross appeal is succinct—that the judgment was against the weight of the evidence.

At the hearing the Court intimated that it appeared that the case involved consideration of the following issues:—

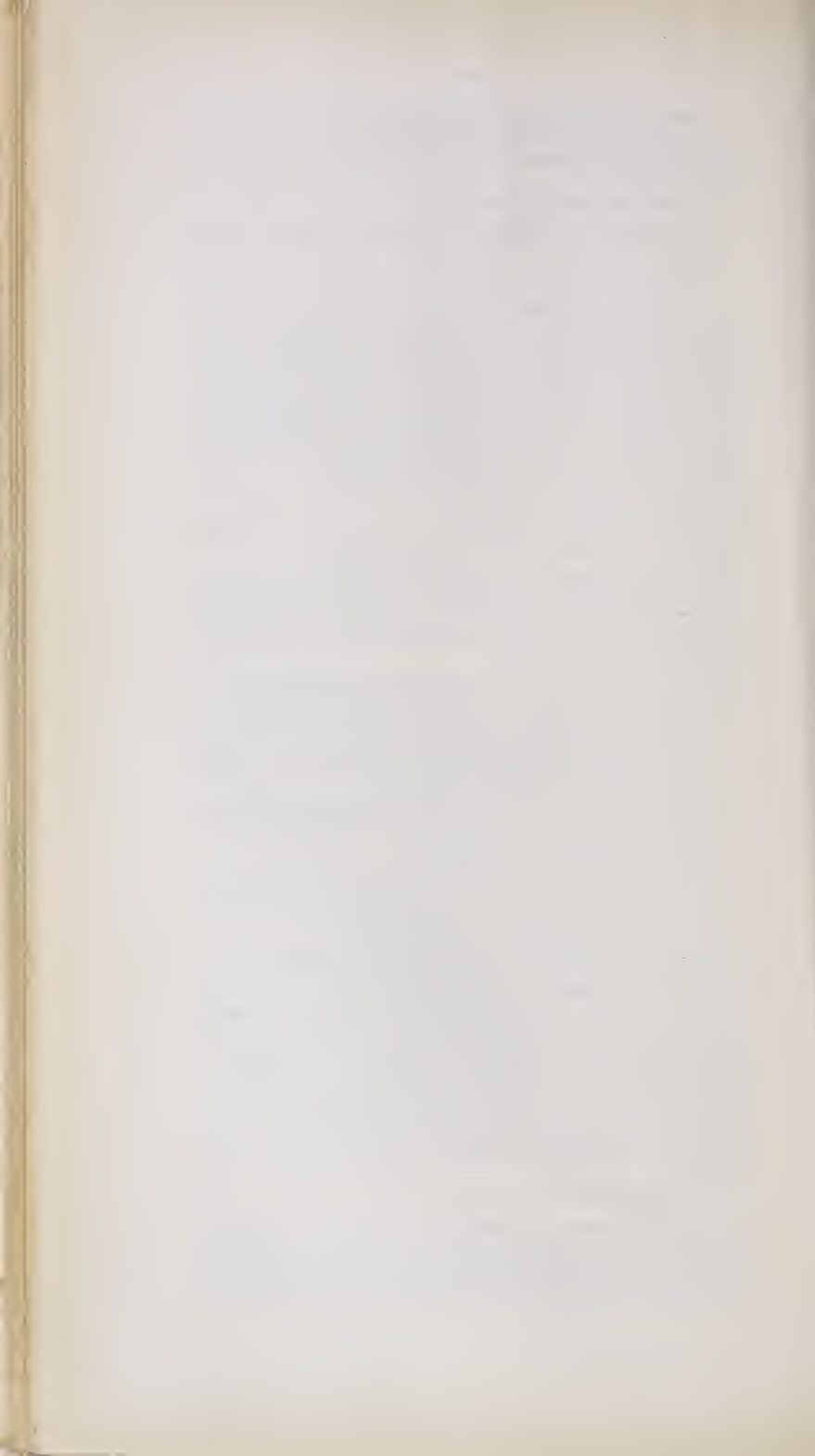
- (1) It being common cause that the stock claimed by Plaintiff was estate stock, the question to decide was whether the Defendant could interpose a *jus tertii* by contending that he held possession of the stock by leave of the natural guardian.
- (2) That involved the question whether the man Wilson had been constituted a testamentary guardian and was *de facto* guardian as contrasted with the position of Hlalapi, the natural guardian.
- (3) Whether there was in law a right so to appoint a person as guardian to the exclusion of the natural guardian and thus create a legal guardianship in some person other than the person born to that post.

Having heard Counsel for Appellant in regard to the exercise of control over the estate by Wilson, it was admitted that Wilson did not have control of the estate at any time.

It appeared that in evidence Wilson Nonkonyana himself deposed that “Ximba handed this boy (Plaintiff) to my mother-in-law. After accepting this child I took my mother-in-law to my kraal.” Ximba then sent for him being ill. Wilson relates “Ximba said as he was ill and if he died, I should look after his child and bring him up.” “I am guardian of the boy.” In cross-examination he said “I am well aware that, legally, Hlalapi is the guardian. I have never seen a meeting of Ximba’s relatives held to displace Hlalapi.”

The Native Assessors were then consulted and their replies are appended.

From these replies and Wilson’s own evidence, it became clear that Wilson had no *locus standi* whatever in regard to the estate, and that he could not establish a claim in the summons to have control as against Hlalapi, the natural guardian, by whose leave Defendant held the stock claimed.



Accordingly the appeal had to be dismissed, as it was. The result followed that as the Defendants in reconvention had no status in the estate, no valid and binding judgment could be given against them, as representing the estate, in a counterclaim for payment of debts due by the estate.

Hence the Court, while dismissing the appeal, ordered that the Native Commissioner's judgment be corrected to a dismissal of the counterclaim, to avoid any question of *res judicata* should there be a further action between the same parties.

If, as is alleged, the natural guardian is abusing his trust, it is always open to apply to the Court for his deposition as has been done in the past, but very good grounds must be shown for such deposition, and the Court would then have to appoint a guardian.

OPINIONS OF THE NATIVE ASSESSORS.

(Walaza Qotoyi, Candilanga Makawula, Enoch Madolo,
Mateyise Songca and Headman Vululwandle.)

Questions put:

In Native Law

Can a father in his lifetime place the custody of his child with some one other than the natural guardian?

Has such person control of the estate property while in charge of the child?

What is the manner of appointment?

Replies:

Walaza Qotoyi replies:

1. A man may place his child for custody with some one other than his nearest relative.
2. The property can be looked after only by his younger brothers i.e. the natural guardian.
3. Sometimes the father does not consult anyone in placing the child with another. He merely consults his wife.

Sometimes the taking away of the child is due to bad health or to avoid the danger of witchcraft.

The assessors are emphatic that the father cannot displace the natural guardian (his younger brothers) in the control of the property.

By Mr. Owen: Does the man looking after a minor heir not have the use of any property of the estate to maintain the heir?

The Assessors reply: The father has to pay isondhlo.

By Court:

In case of need, cannot the guardian use estate property?

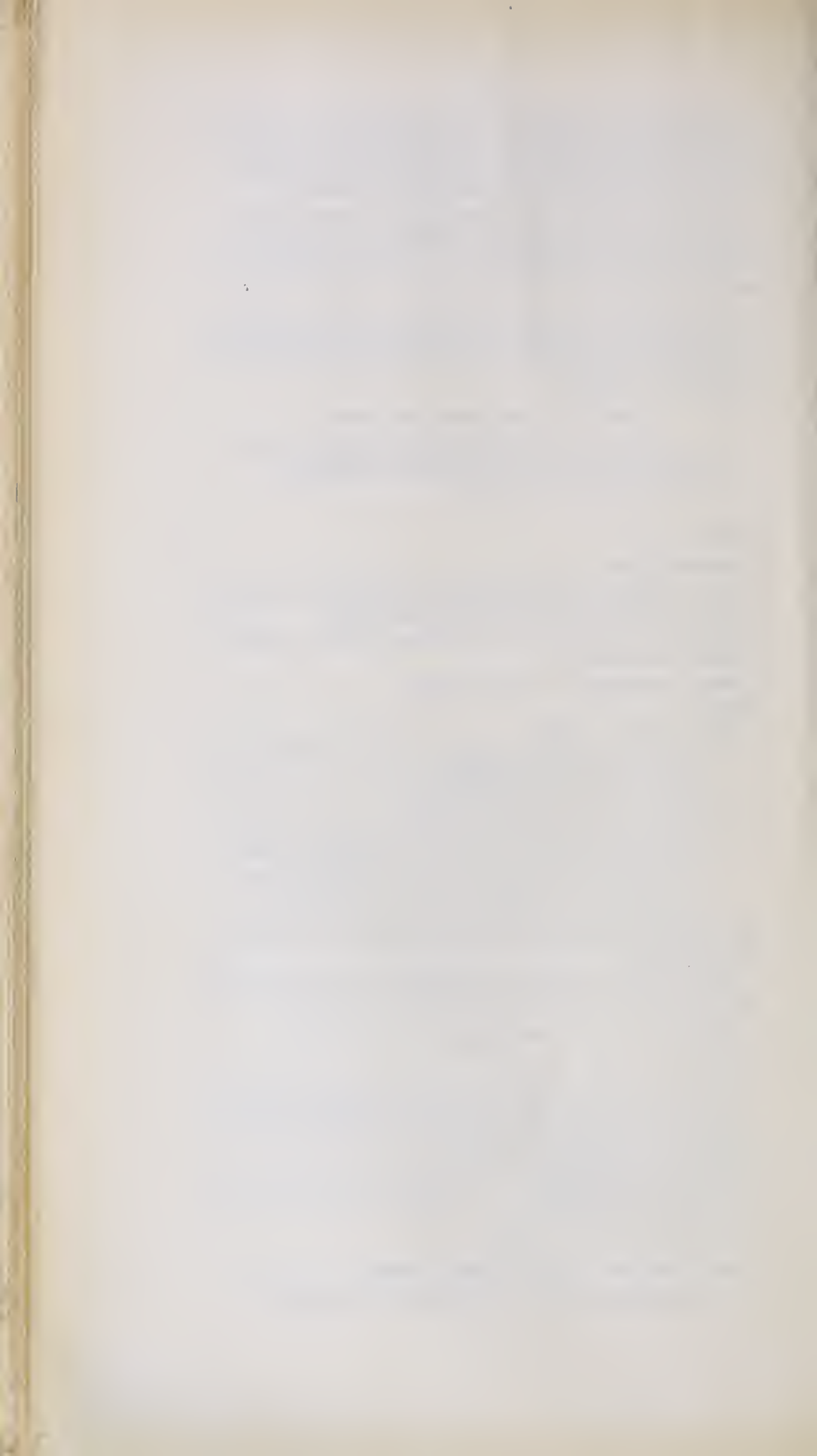
The Assessors reply: The man who has custody must go to the natural guardians of the heir and tell them what he requires for the support of the child.

If the Natural guardian is untrustworthy and the rights of the heir are endangered, it becomes a family matter and the relatives are consulted.

All agree to the last reply.

For Appellants: Mr. R. Knoph, Umtata.

For Respondent: Mr. C. E. Gordon Trow, Mqanduli.



KOYIYA SANDLANA vs. SIHELEGU MDIBANISO.

UMTATA: 6th October, 1939. Before A. G. McLoughlin, Esq., President, Messrs. W. J. G. Mears and E. F. Owen, Members of the Court (Cape and Orange Free State Provinces).

Native Appeal Cases—Native Law does not allow kraalhead to use property of married adult inmates without repayment—Evidence of a witness must be assessed on what happens inside, not outside Court.

Appeal from the Court of the Native Commissioner, Umtata.
(Case No. 175/39.)

McLoughlin, P. (delivering the judgment of the Court):

In the Native Commissioner's Court the action was based on the following particulars of claim:—

“ Plaintiff claims from the Defendant a black cow and her calf, a red heifer and 2 hamels or their value of this livestock £17. 10s.

That during the year 1936 the Plaintiff exchanged his horse with the Defendant for certain two cows and their respective calves and 10 sheep. That Defendant has handed over one cow and calf and 10 sheep in respect of the said exchange, but neglects to hand over a certain black cow and her red heifer calf appertaining thereto which are Plaintiff's property and now number three cattle, the said black cow having had another calf since the said transaction.

That thereafter Defendant's mother, at his, Defendant's special instance and request and on his, Defendant's, behalf, disposed of 2 hamels, Plaintiff's property, in Defendant's possession, custody and control, the value of £1. 5s. each and Defendant, who is liable to the Plaintiff for the said 2 hamels neglects to pay Plaintiff £2. 10s., their value.”

Defendant pleaded—

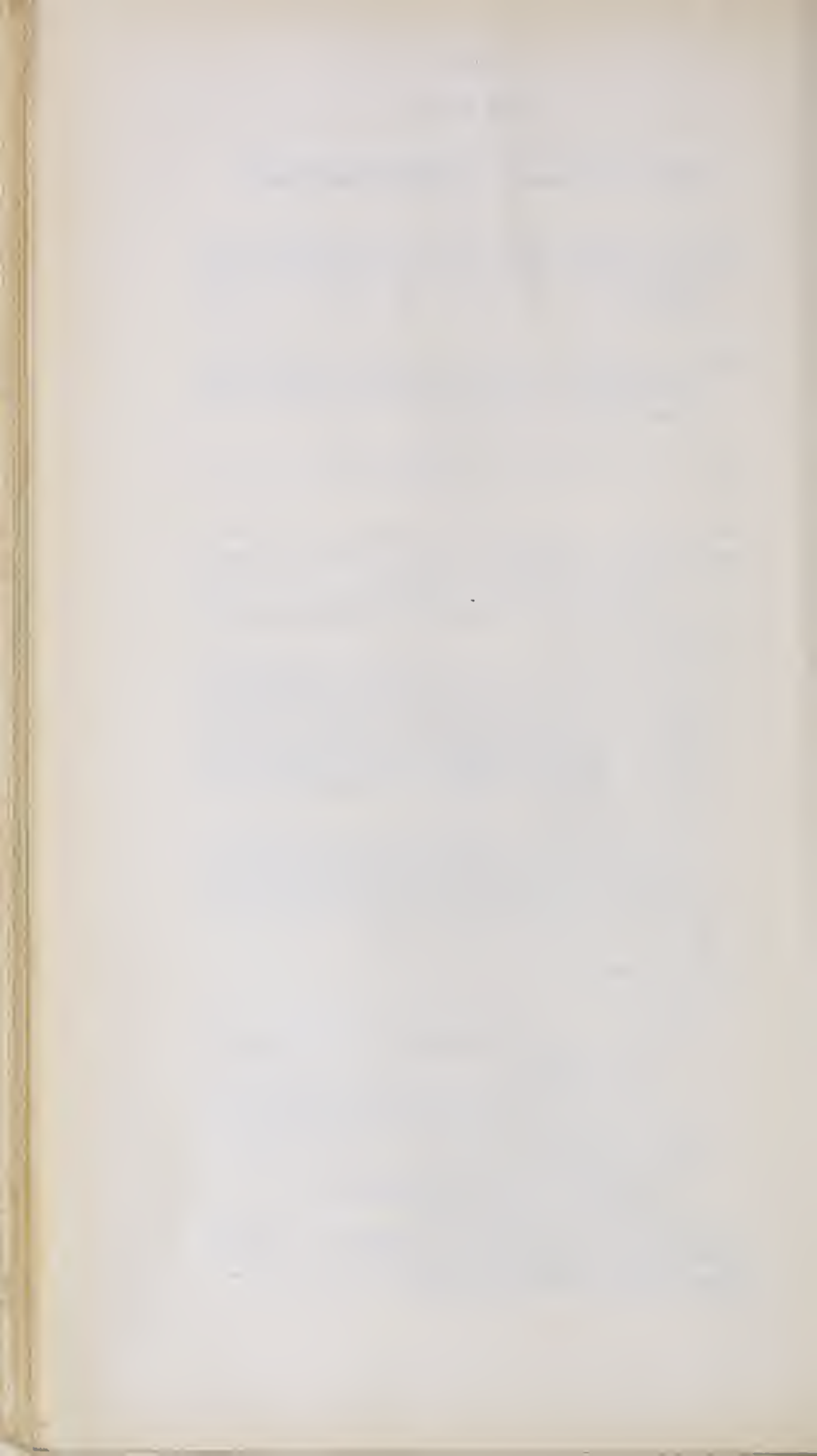
“ Defendant denies the claim for the 3 cattle and says thereon:—

- (1) He denies that the exchange of the horse was for 2 cows and calves and 10 sheep and puts Plaintiff to proof thereof.
- (2) He says thereon that the exchange was for 1 cow and calf, and 10 sheep which he has paid Plaintiff.

Defendant denies any liability to Plaintiff for the 2 hamels, whereupon he says:—

- (1) He denies all the allegations set out in the summons and puts Plaintiff to proof thereof, and
- (2) any liability in the matter.”

The Native Commissioner gave judgment for Plaintiff for restoration of the 3 head of cattle (claimed) and for 2 sheep, or their collective value £11. 4s.



This judgment is attacked on appeal on the grounds—

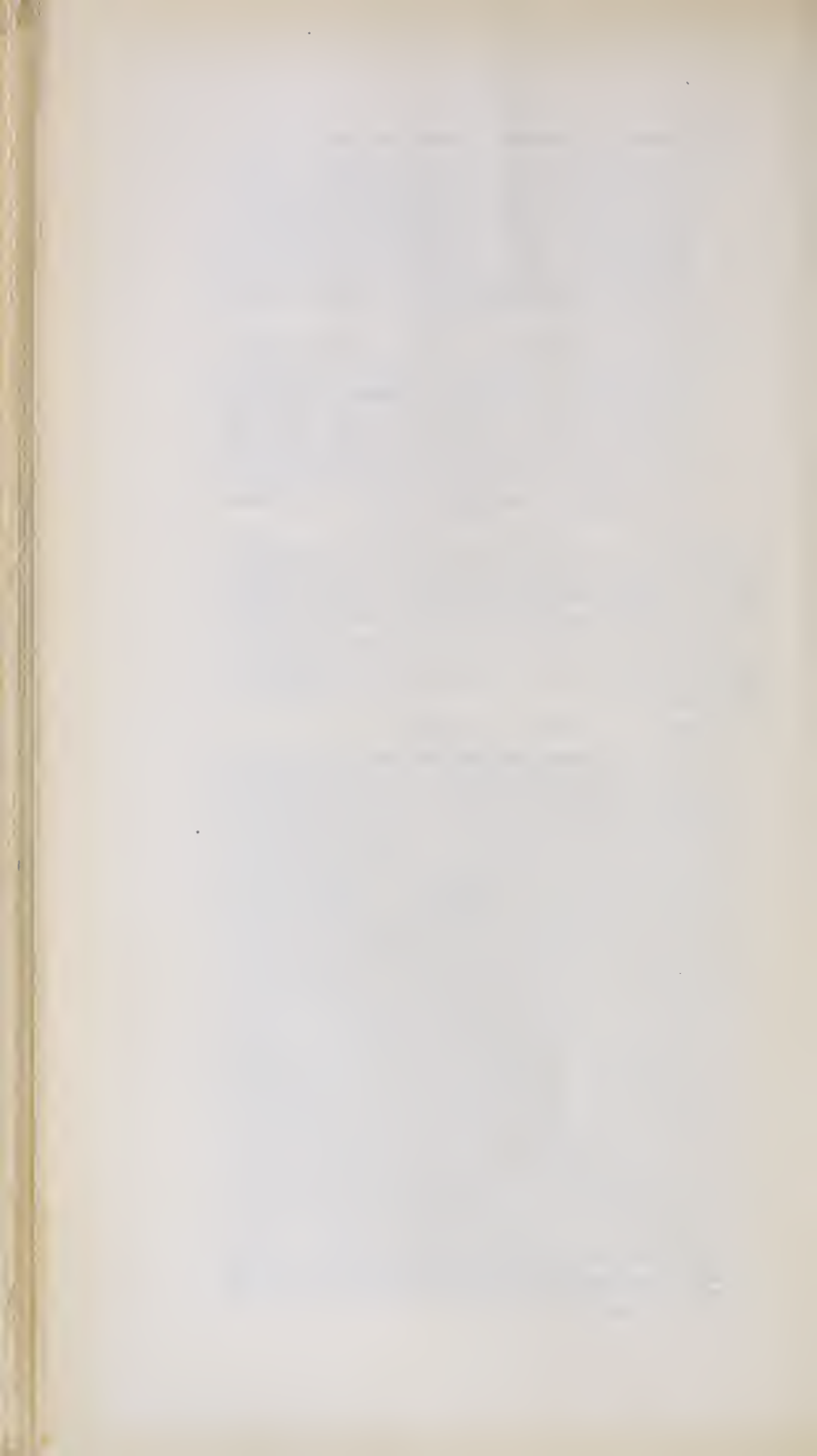
- “(1) As to claim for the cattle that the judgment is against the weight of evidence and probabilities of the case. That the Court failed to give judicial cognisance to the numerous important discrepancies relating to the alleged transaction of exchange for 5 cattle nor the improbability of such an extravagant price being paid for a very ordinary horse at any time but especially in circumstances where parties are related and situated as in this instance.
- (2) That as to the sheep, the evidence adduced by Plaintiff does not conform to his summons which was not amended and consequently neither was the plea. That, however, the evidence led without objection by both parties shows the position herein and that according to Native Custom, where the relationship is as in this case and the parties were all of one family and kraal, Plaintiff would have no legal action for the return of the sheep used in the circumstances set out but could only prefer a request to Defendant (head of kraal) for reimbursement.”

In the matter of the claim for the two sheep, the Appellant is completely out of Court. The sheep were used for a purpose whereby he benefitted and there is no custom in Native Law which allows the kraal head to use the property of a married adult inmate in this manner without repayment.

The claim for the cattle based on the horse transaction is entirely different. To follow this aspect of the case it is necessary to quote in some detail the evidence adduced by both sides.

Plaintiffs' own evidence is as follows:—

“At the beginning of the ploughing season, 4 years ago, I had a chestnut gelding. It was in its 3rd year. Defendant wanted to buy the gelding. I refused, but he persisted and offered to pay me yellow cow with its red bull calf and a black cow with its black heifer calf and 10 sheep. The yellow cow and its calf were at Defendant's and the black cow and calf were at Dwapi's kraal. When he offered me this stock I told him I would refer the matter to my grandfather. I went to see my grandfather, Mayile. He advised me to accept the offer. I then went to Defendant and accepted his offer. Thereafter I and Defendant went to Mayile's kraal to confirm the agreement. Mayile is now dead but Mhlohlela and Gawani were present when the sale was confirmed. Mayile questioned Defendant and he enumerated the same stock which I have described. Mayile sent Mhlehlela to inspect the stock and the stock were pointed out to him by Defendant and I told him that the sheep had already been earmarked. I earmarked the sheep after I had consulted Mayile. The day the cattle were pointed out to Mhlehlela they were brought from the veld with the other stock. Defendant then transferred the yellow cow and calf to my name and proposed to transfer the black cow and its calf when Dwapi returned from the mines. Dwapi returned from the mines about 2 years ago. I then went to see Defendant about transferring these cattle to me also, but he kept putting me off. I went to see him 4 times. The 4th time he wanted to know what beast I was referring to. I then brought an action before the Headman, but Defendant did not attend. Last Xmas month I sent him a demand for the black cow and its 2 calves—one born since. These cattle are still with Dwapi.



I know Siqwati but not by the name of Ompi. He was present at Mayile's kraal on Defendant side."

Mhlohela testified to the proceedings before Mayile. On cross examination by the Court he said, "I do not remember any one else coming with Plaintiff and Defendant. Ngamani is here to-day. I do not know Siqwati. He did not come with the Defendant".

Ngamani, who was also present at Mayile's states:—

"Defendant came with another person. I do not know who he was. These men talked about Plaintiff's horse, a chestnut gelding. It was a beautiful horse in its 3rd year. Defendant wanted to buy it. Plaintiff was not willing to sell it. Defendant offered 4 cattle and 10 sheep. The cattle were a black cow with a red heifer calf and a yellow cow with a red bull calf. Mayile told Mhlohela to go and inspect the cattle."

In cross examination he stated, "I have told exactly what happened at Mayile's kraal".

Defendant's account is as follows:—

"Before Plaintiff went to Capetown he tried to sell another horse. He took it to Elliotdale. He did not get a purchaser. When he returned from Capetown he offered me the horse for sale. I said I did not want the other horse but wanted the chestnut gelding. I agreed to buy this horse for two cattle and ten sheep. This transaction took place at our kraal. Siqwati was present. He just happened to be present. It was the day Plaintiff arrived from Elliotdale with his horses. Ngamani, Mayile and Mhlohela were not present. It is not true that Mhlohela came to inspect cattle at my kraal. I paid ten sheep and offered him the black cow and its red heifer calf at Dwapi's kraal. Plaintiff refused these. He said the cow was thin and the calf was of short-horn breed. I then paid him a yellow cow with its red bull calf. He accepted these and that completed the transaction. After this he remained at my kraal for some years and made no claim against me. Recently he left my kraal and only then he demanded the cattle and sheep. When he first demanded the cow and calf I told him to return the cow and calf he had accepted and take the black cow and its calf. No one would have given 5 cattle for this horse. Three was more than it was worth. Plaintiff complained to the Headman recently. I did not attend because I was afraid of being arrested on the C.I. decree. I deny that I owe Plaintiff anything."

On cross examination, he said, "Plaintiff could have referred the matter to Mayile. It is not true that the transaction took place at Mayile's kraal. I do not know why Plaintiff now claims the cattle. Dwapi was at the mines when transaction took place. Plaintiff demanded the cattle long after Dwapi returned. He suddenly made this claim. The cow and calf and another bull calf are still at Dwapi's kraal. I do not know when the C.I. decree was granted against me."

Plaintiff's version is inharmonious.

It there was an acceptance the subsequent proceedings he indicates do not appear to be in consonance with that concluded transaction, for undoubtedly there was such conclusion for he earmarked the sheep before the meeting at Mayile's when Mhlohela was sent to inspect the cattle.

The very fact that the vendor was to inspect is in itself an indication that there was no concluded transaction at that stage, yet the sheep were already earmarked.



There is no indication when the deal was finally concluded. There is none of actual delivery of the 2nd cow and calf by Defendant to Plaintiff.

Actually very grave doubt arises when Mhohlela contradicts directly the evidence of Plaintiff that Siquwati was present and this contradiction cannot lightly be brushed aside. We comment hereon in dealing with the Native Commissioner's reasons.

Then there is the amazing version of the doings before Mayile, given by the witness Ngamane, that there the whole proceedings were re-enacted, the unwillingness of Plaintiff to sell is emphasized, when on the Plaintiff's own showing they were there to confirm a deal already agreed upon.

Apart from this discord there is the evidence of value which is so obviously exaggerated that this Court would require better evidence to satisfy it that the horse was abnormally valuable. In the absence of such evidence the value of the equivalent of 3 head of cattle is a very fair one in the times and circumstances. Indeed the witness, Masebensa says, "the horse was worth two cattle". As he is Plaintiff's witness the Defendant is entitled to hold Plaintiff to this estimate.

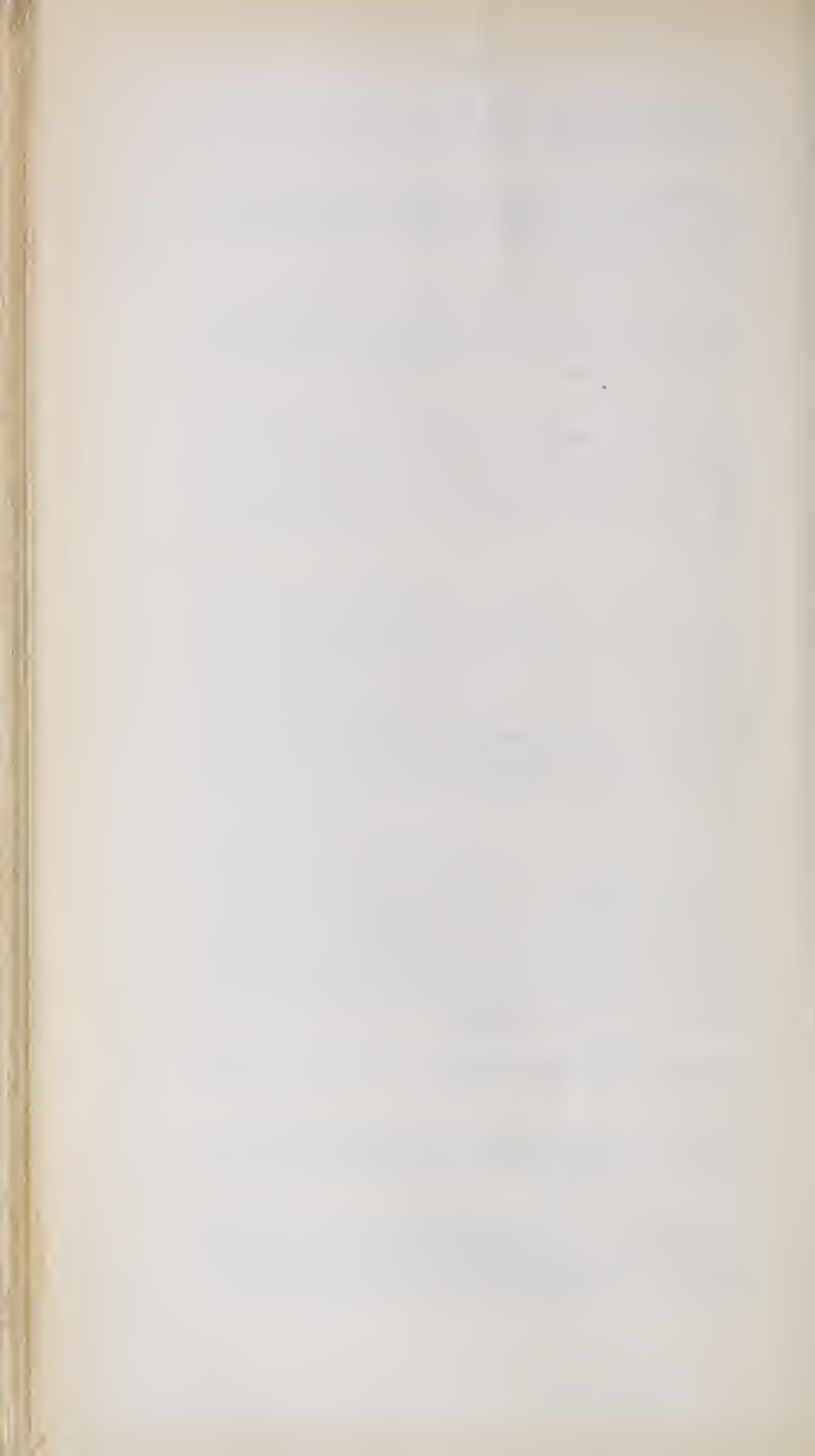
We come then to compare the Defendant's version that actually a cow and calf and 10 sheep were offered and accepted—this would be the first acceptance Plaintiff relates in his evidence. That thereafter there arose a difficulty in regard to these cattle and that then another cow and calf were substituted and accepted. This would account for the ear-marking of the sheep before the alleged meeting at Mayile's. This is not inconsistent with the subsequent proceedings if Plaintiff's version be accepted, i.e. that the matter would be again placed before Mayile, who might send a messenger to view the cattle, and that would account for the complete absence of evidence of delivery of the other two head now claimed. Indeed it accounts for the whole sequence of events.

It is not easy to find any direct motive for the institution of a false claim, but clearly the parties were at arms length over the sheep that had been misappropriated for Defendant's use, and his attitude in the matter seems to have aroused the ire of Plaintiff, who then revived the former transaction in a distorted version and based a claim thereon. That he was obsessed with this idea is to be deduced from his summons and his first evidence wherein he speaks of the sheep as being portion of those given in exchange for the horse. Only later in his evidence does he disclose the fact that they had been used before the horse transaction.

In argument the Native Commissioner's reasons were hotly attacked by Appellant's counsel.

It appears from the record that the case came on for hearing on the 12th May, 1939. Postponement was granted to 5th June, 1939, at the instance of Defendant's attorney whose client was absent.

On 5th June, 1939, another postponement was asked for by Defendant's attorney owing to the incarceration of his client for civil imprisonment. It then appeared that Defendant had been arrested near Umtata on the 12th May, 1939.



There is little doubt that the Native Commissioner has over emphasized the effect of the conduct of the Defendant in not appearing in Court on the 12th. Defendant had other reasons for not appearing in public, and the Native Commissioner is not justified in importing into the case a failure to appear to give evidence as proof that the "Defendant's whole attitude right through the case was shifty", and then to say "He is a witness in whom no reliance can be placed" and then to add "I disbelieved his version of the transaction" when he eventually gave evidence. That evidence must be assessed by what happens inside the Court, not outside.

The Native Commissioner has not attached proper significance to the inconsistencies and discrepancies in the Plaintiff's case as his reasons indicate. The exorbitant price must be established by good evidence; one of the Plaintiff's witnesses gives 2 head as a fair price, and it is difficult to escape an impression of exaggeration in the glowing descriptions of a native horse with no pedigree (so the Court was informed). At the best of times the equivalent of five head of cattle is an extremely high price for a horse. The circumstances related in the present case tend to support the Defendant's version rather than the Plaintiff's.

On the claim for the cattle the appeal will accordingly be allowed with costs, and the judgment of the Native Commissioner altered to one absolving the Defendant from the instance with costs.

On the claim for the two sheep, the appeal is dismissed with costs.

For Appellant: Messrs. Gush, Muggleston and Heathcote, Umtata.

For Respondent: Mr. Quex Hemming, Umtata.

CASE No. 48.

SHEPHARD DYANTYI vs. SIHLALO DADASE.

UMTATA: 6th October, 1939. Before A. G. McLoughlin, Esq., President, Messrs. W. J. G. Mears and E. F. Owen, Members of the Court (Cape and Orange Free State Provinces).

Native Appeal Cases—Adultery—Version of events in accordance with Native Custom—When lover is accepted according to rules of the game not usual for wife to hide fact from women folk of kraal.

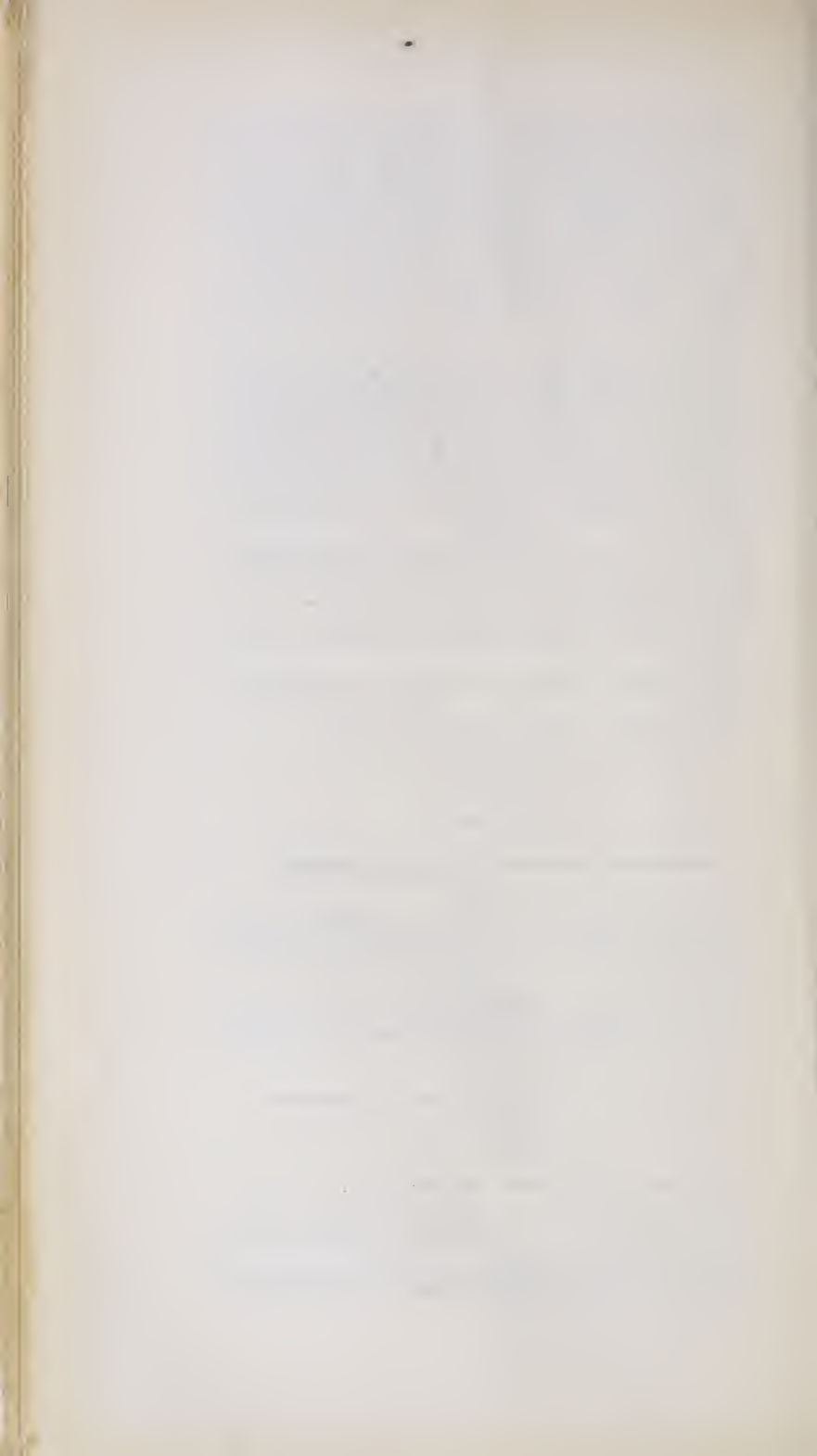
Appeal from the Court of the Native Commissioner,
Engcobo.

(Case No. 411/38.)

McLoughlin, P. (delivering the judgment of the Court):

This is an adultery case in which an absolution judgment by a Native Commissioner is attacked on appeal, on the merits of the case.

Starting off with the known fact that the woman gave birth on 10th September, 1938, her date of conception would be about 3rd December, 1937.



Now all the witnesses testify that the woman was pregnant before she left her husband's kraal to go to her people's kraal in a nearby location. Much has been made of apparent discrepancies but it does appear that if the seasons are taken as a guide, that scoffing coincides with the Xmas and New Year period of the year on the occasion in question.

On this basis the divergent accounts lose much of their significance and there is nothing to induce this Court to reject the evidence as being impossible, or improbable, or inherently incredible.

Viewed from another angle, we find nothing in the Plaintiff's account to question. The version rings absolutely true. There is no single incident that this Court can stigmatise as being contrary to custom, or even as being a fabrication. Indeed, the very witness whose statement is questioned by the Native Commissioner, has the stamp of truth. She might have elaborated her account and immediately rendered it open to question. But in the form it now stands it is a plain unvarnished account of acts such as are usual among the natives.

There remains then only the discrepancy arising from the wife's statement that she was for months with her people and that she returned when in her 8th month of pregnancy, i.e. that she did not leave Plaintiff's kraal till the end of March. Thus she could not have been at the places of meeting testified to by the witnesses, at the times stated.

But as the wife has not said herself when she actually left, this Court feels that it cannot allow this apparent inconsistency to nullify the otherwise clear and strong evidence for the Plaintiff, as the inconsistency does not destroy that evidence.

That evidence establishes proof of intimacy between Defendant and Plaintiff's wife at a time when she was clearly still at her husband's place and that renders Defendant liable. It is not as if the Defendant has pleaded an alibi for the woman states that Defendant continued to visit her at her people's place and there is nothing impossible in this.

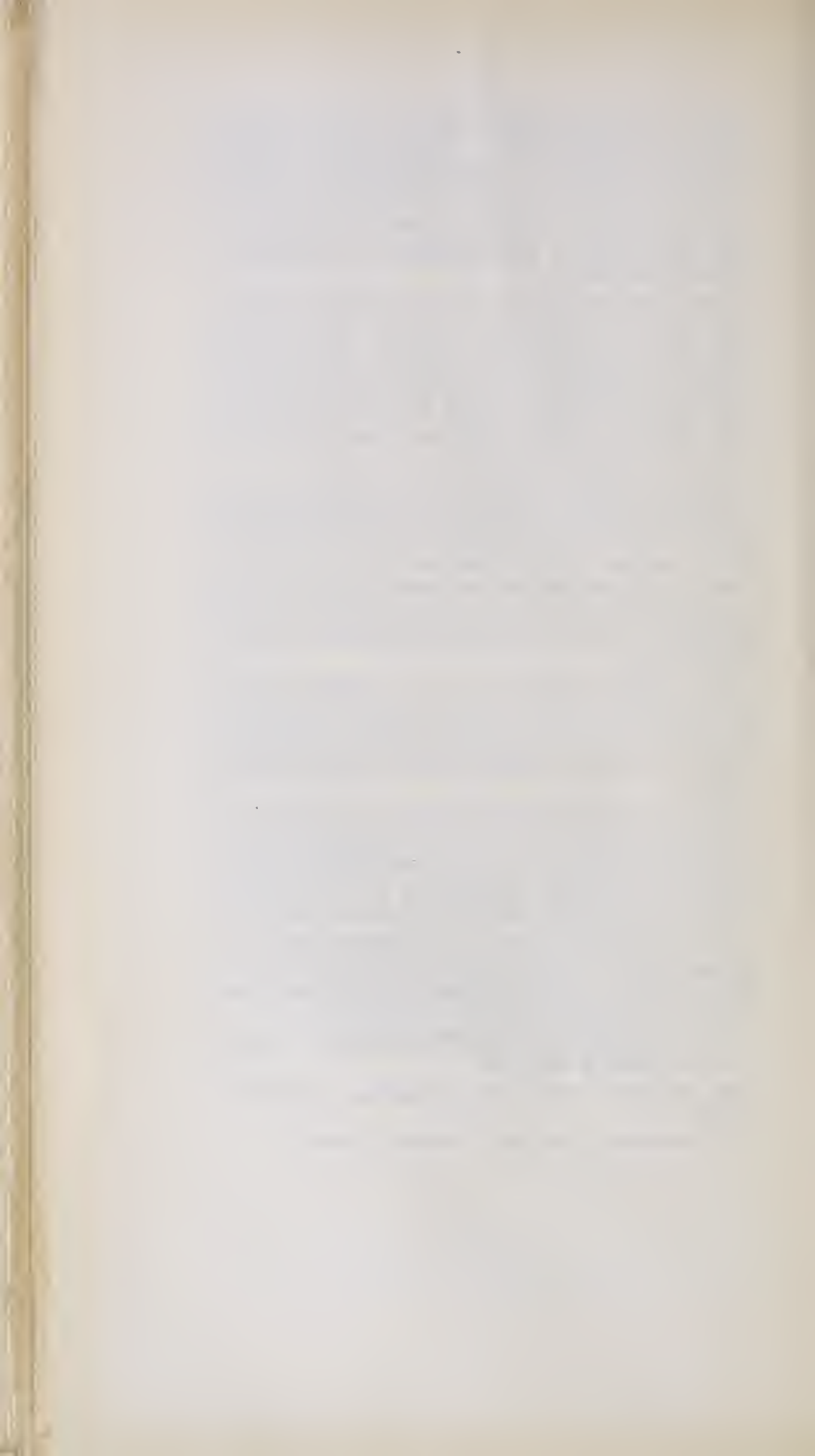
The Native Commissioner has indicated in his reasons that he does not understand native habits in these matters when he describes Nowinile as "a very unsatisfactory witness", and quotes in support of this finding the very piece of evidence that this Court finds the most credible in the case. Likewise he is mistaken in saying that it is "inconceivable that a wife will let her mother-in-law into the secret".

It is not an unusual thing. What happens is that once a lover is accepted (having been duly introduced by a go-between) there is nothing to hide from the women folk of the kraal who have a more than passing interest in these affairs which are run according to well established rules.

In all the circumstances this Court must uphold the appeal with costs and alter the Native Commissioner's judgment to one for Plaintiff with costs.

For Appellant: Messrs. Gush, Muggleston & Heathcote, Umtata.

For Respondent: Mr. Quex Hemming, Umtata.



CASE No. 49.

MATOTOBA MATANGANA vs. MABANDLA MATANGANA.

KOKSTAD: 16th October, 1939. Before A. G. McLoughlin, Esq., President, Messrs. F. C. Pinkerton and G. I. Kenyon, Members of the Court (Cape and Orange Free State Provinces).

Native Appeal Cases—Importance in appeals on credibility of Native Commissioner setting out his impressions of demeanour of witnesses—Probabilities of case and analysis of the evidence—Pooling of funds and purchase for a pool contrary to Native practice.

Appeal from the Court of Native Commissioner, Matatiele.
(Case No. 406/37.)

McLoughlin, P. (delivering the judgment of the Court):

The case is entirely one of credibility in which the Native Commissioner's finding would have been decisive and final had he set out his impression of the credibility of the witnesses based on their demeanour in the witness box; the probabilities of the case and supported the whole by an analysis of the evidence.

The task placed on this Court is difficult as it must reconstruct the trial from the record without the help of the valuable ingredient—demeanour.

Taken at its face value the position regarding the second beast is that there is clear, connected and consistent evidence of purchase and sale for Plaintiff who took delivery. That is not challenged by the other side but they contend purchase was for a pool—and subsequent division passed this beast on to Bhunga and that it was wrongly sold or exchanged to/with Makosonke.

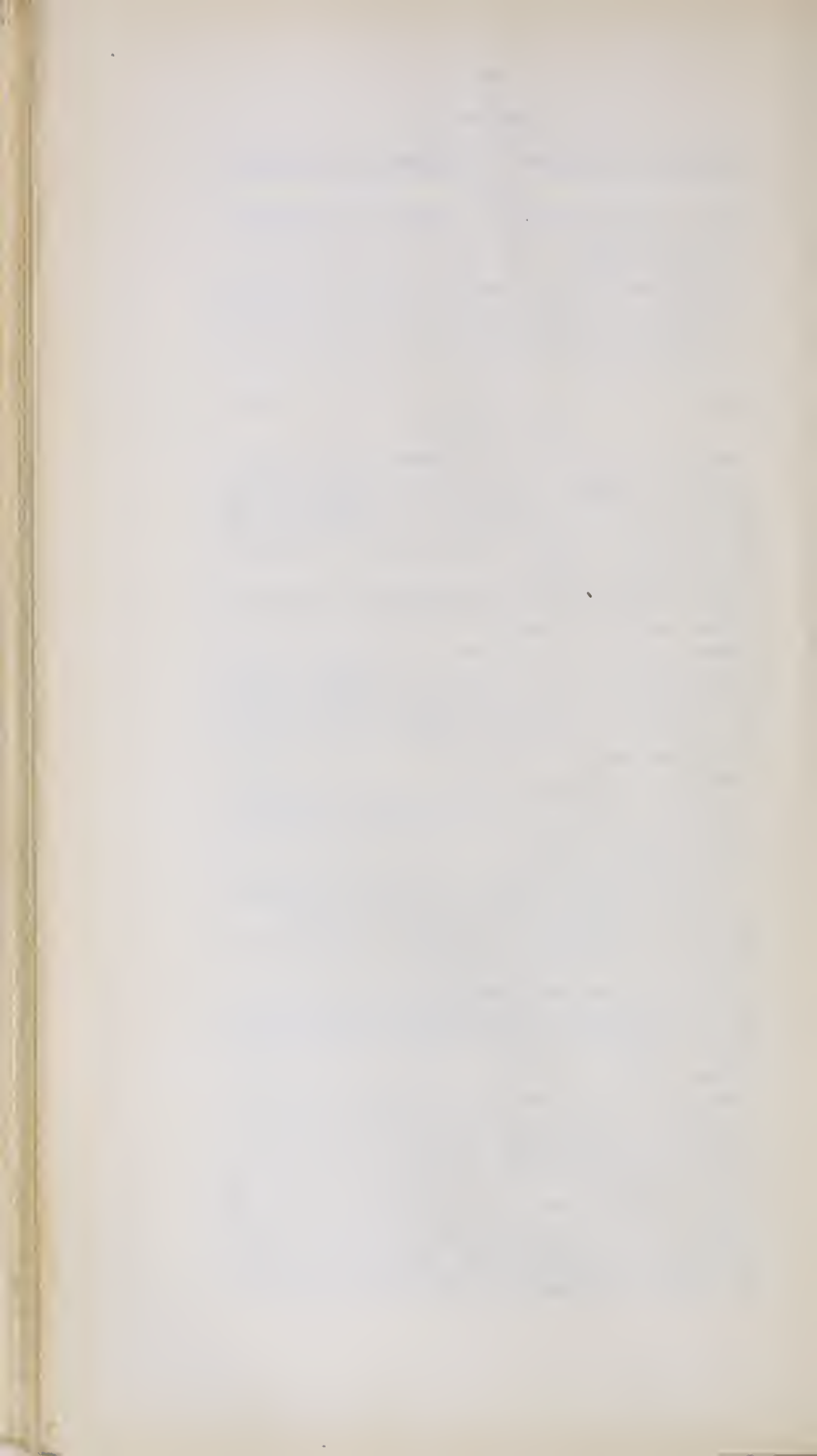
Pooling of funds and purchase for a pool is very highly improbable as being contrary to Native habits and practice.

In addition the evidence for Defendant is inconsistent, one set alleging that there was a sale and the other that there had been an exchange.

The Native Commissioner has stigmatised the evidence of Ariel on the earmarks as being "so extremely unsatisfactory . . . that I had the gravest doubts of ownership" . . . Now there is nothing in the record to substantiate this finding. The probabilities in our opinion are in favour of Plaintiff's version and he must succeed.

In regard to the third beast, it is common cause that there was a sale, but it is contended by Defendant that the sale was cancelled by him because the money he received was not Plaintiff's but Bhunga's and that he, Defendant, repaid the money to Bhunga's widow thereby terminating the deal.

The onus is on Defendant to establish proof of cancellation of the sale. The facts appear to be against him in that notwithstanding the cancellation, the beast is still registered in the name of the Plaintiff. Moreover, the return of the money cannot in the circumstances end the sale. For that which is purchased by some one else with my money does not become my property, i.e. ownership in money itself ceases when taken by another. Nor can I recover from the recipient the actual money so taken and paid over. Unless Defendant can show that Plaintiff agreed to cancel the sale and authorised Respondent on this basis the sale stands and Plaintiff is entitled to an order declaring that he is



entitled to delivery to him of the beast on payment of the balance of £2 still due thereon. We have the greatest difficulty in reconciling Plaintiff's evidence on the question of the amount actually paid and in the circumstances must hold that he is liable for a balance of £2.

The appeal is allowed with costs and the judgment of the Native Commissioner is altered to one for Plaintiff as prayed with costs.

For Appellant: Mr. W. Zietsman, Kokstad.

For Respondent: Mr. G. D. Elliott, Kokstad.

CASE No. 50.

LESALA NTSEKI vs. MONTOETSANA NTSEKI.

KOKSTAD: 16th October, 1939. Before A. G. McLoughlin, Esq., President, Messrs. F. C. Pinkerton and G. I. Kenyon, Members of the Court (Cape and Orange Free State Provinces).

Native Appeal Cases—Interpleader claim in respect of stock attached under writ issued against estate of which Claimant is heir and executor.

Appeal from the Court of Native Commissioner, Matatiele.
(Case No. 161/39.)

McLoughlin, P. (delivering the judgment of the Court):

In the Native Commissioner's Court, Claimant, now Respondent on appeal, claimed certain two horses attached under a writ issued against an estate of which he is heir and executor.

Respondent, the execution creditor, pleaded:—

“Defendant pleads specially that Plaintiff is estopped from claiming the stock in as much as he himself offered them for attachment and instructed or told the Messenger of the Court to attach for the debt—and this was done.

Wherefore Defendant prays for judgment with costs.

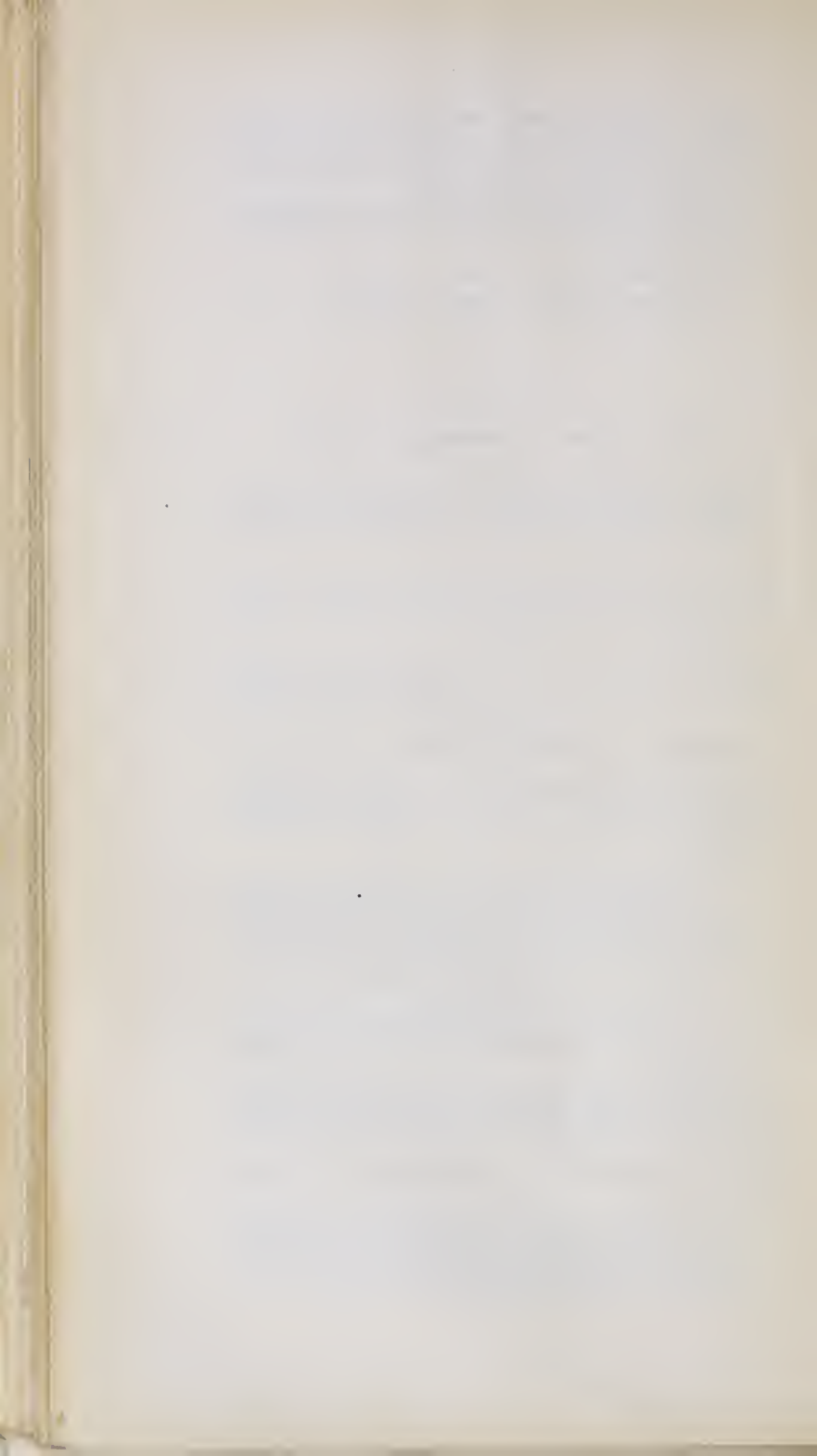
Alternatively

Should the above plea be dismissed but not otherwise Defendant pleads that he denies the stock are Plaintiff's property.”

The alternative plea was withdrawn. Thereupon the Native Commissioner, holding that this amounted to an admission of ownership in the Claimant personally, closed the proceedings.

Appellant seeks a reversal of this ruling on the ground that:—

“It is submitted that the plea filed was one which could rightly be raised in that on the pleadings the horses were executable if the facts in the plea were proved, and an opportunity of proving the facts should have been afforded the Defendant.”



The writ was not with the record, but was put in by consent in the Appeal Court. That writ bears the following endorsement:—

“ I certify that on the 5th day of April, 1939, I proceeded to the residence of the within named Defendant's kraal, demanded from the heir in Est. of the late Ntseki and there Montoetsana pointed out to me 1 bay gelding which I attached and then told me to write down the bay which was then on Mr. Horrace Barton's farm which I did.

(Sgd.)

Messenger of the Court,

Matatiele.”

Now it appears that the Native Commissioner has overlooked the fact that the withdrawal of the alternative plea did not establish proof of ownership. There remains the first portion of the plea, which must be decided by evidence.

The appeal will accordingly be allowed with costs.

The ruling of the Native Commissioner is set aside and the case is returned for hearing to a completion.

For Appellant: Mr. W. Zietsman, Kokstad.

For Respondent: Mr. W. G. D. Elliot, Kokstad.

CASE No. 51.

COBILE MAFUTA vs. QWALANA RATSHWA.

PORT ST. JOHNS: 25th October, 1939. Before A. G. McLoughlin, Esq., President, Messrs. H. M. Nourse and M. Adams, Members of the Court (Cape and Orange Free State Provinces).

Native Appeal Cases—Strong presumption in favour of legitimacy must be rebutted by clear and convincing evidence and not by a mere balance of probabilities.

Appeal from the Court of Native Commissioner, Bizana.

(Case No. 86/39.)

McLoughlin, P. (delivering the judgment of the Court):

The very strong presumption in favour of legitimacy must be rebutted by clear and convincing evidence, and not by a mere balance of probabilities.

The evidence in support of the contention that Sitya and not the woman's husband was the actual father of the child she bore after the marriage is inadequate to overcome the presumption of legitimacy. It would be quite insufficient to render Sitya liable in an action for adultery; although he claims to have paid the equivalent of one head, that payment was never supplemented during the long period that has elapsed since the alleged seduction, and is explicable equally well as a nyoba fee.

The appeal is therefore allowed with costs, and the judgment of the Native Commissioner is altered to one for Plaintiff as prayed, with costs.

For Appellant: Mr. C. Stanford, Lusikisiki.

For Respondent: Mr. J. V. Kottich, Lusikisiki.

NOTUTELA MDONTSANE vs. MZANI MDONTSANE.

PORT ST. JOHNS: 25th October, 1939. Before A. G. McLoughlin, Esq., President, Messrs. H. M. Nourse and M. Adams, Members of the Court (Cape and Orange Free State Provinces).

Native Appeal Cases—Dowry provided by Great House for second wife—Great House provides beast for Mjadu feast of daughter of second house—Two head of cattle refunded to Great House from dowry of daughter of Second House—A Minor House gives out a girl to Great House, irrespective of provision of beast for Mgubo feast.

Appeal from the Court of Native Commissioner, Lusikisiki.
(Case No. 62/39.)

McLoughlin, P. (delivering the judgment of the Court):

The sole question for decision which has been submitted to the Court was whether reimbursement of dowry provided by the Great House for a minor wife (4th wife) takes place from that of a second daughter of such wife in the event of the death of the eldest daughter prior to her marriage.

The question was submitted to the Native assessors whose replies are appended.

The principle there set out is recognised and followed by the Court throughout the Transkeian Territories and beyond, vide the undermentioned cases:—

John Bomela *vs.* Isaac Bomela 4 N.A.C. 71 (Tsolo).

Mdikana Mbuncase *vs.* Nishe Neke 4 N.A.C. 72 (Willowvale).

Gilbert Tungana *vs.* Buller Tungana 4 N.A.C. 70 (Idutywa).

Gwanduntutu *vs.* Nota ka Delihetela 4 N.A.C. 146 (Bizana), though this case does not distinguish between the second and other houses.

Mdlomzane *vs.* David and Zikali 2 N.A.C. 124 (Mount Frere).

Gomololo *vs.* Gomololo 2 N.A.C. 111 (Umtata).
Brownlee P. there sets up at p. 112 the basis of the custom.

Mkwintshi *vs.* Mkomidhli 1919 N.H.C. 24 (Zululand) taken on appeal to Appellate Division.

It is based on the rule that property of one house used for the benefit of another house must be refunded. The distinction raised by the assessors in respect of the second (Kohlo) house does not come up for decision.

The appeal was dismissed with costs.

OPINIONS OF THE NATIVE ASSESSORS.*Questions.*

1. If cattle are taken from the Great House to lobola a wife for the Right Hand House, how is that repaid?
2. What happens if there be no daughter?
3. What happens if the first daughter dies?

Replies.

Per Tolikana Mangala.

If a man has a wife and marries another wife with cattle from the house of the first wife; when a daughter is born to the second wife, and when she reaches the age of puberty and njadu is performed, a beast is provided by the Great House for that purpose, otherwise no cattle would be forthcoming from the second house to the first house.

Per Barnabas Sirogo.

The matter of repayment is not discussed on the day of the marriage.

Per Tolikana Mangala.

No cattle are paid to the first house unless a beast has been paid by the first house to provide for the mgubo feast of the girl of the second house. Only then cattle pass from the second house to the first, and then only two head are paid from the dowry of the girl.

The third and fourth houses give out a girl. No girl is given out from the Right Hand House.

That is irrespective of an mgubo.

If the eldest daughter dies, the dowry of the second daughter is repaid, even if it is very young, and if there is no daughter at all, the daughter of the son of that house will provide dowry to repay the first house.

If the first daughter of a Right Hand House dies after her puberty when the Great House has killed a beast for her, the above procedure of substitution is followed.

The rule regarding the Right Hand House is an old custom which was followed by our fathers.

Per Lunaya Langa.

When the other tribes speak of a Right Hand House, we speak of the second house. The house is the same as the right hand house, it is just a difference in name.

For Appellant: Mr. C. Stanford, Lusikisiki.

For Respondent: Mr. J. V. Kottieh, Lusikisiki.

CASE No. 53.

**MADADA MAFETSHULA and ANO. vs. MANITSHI
BATATENI.**

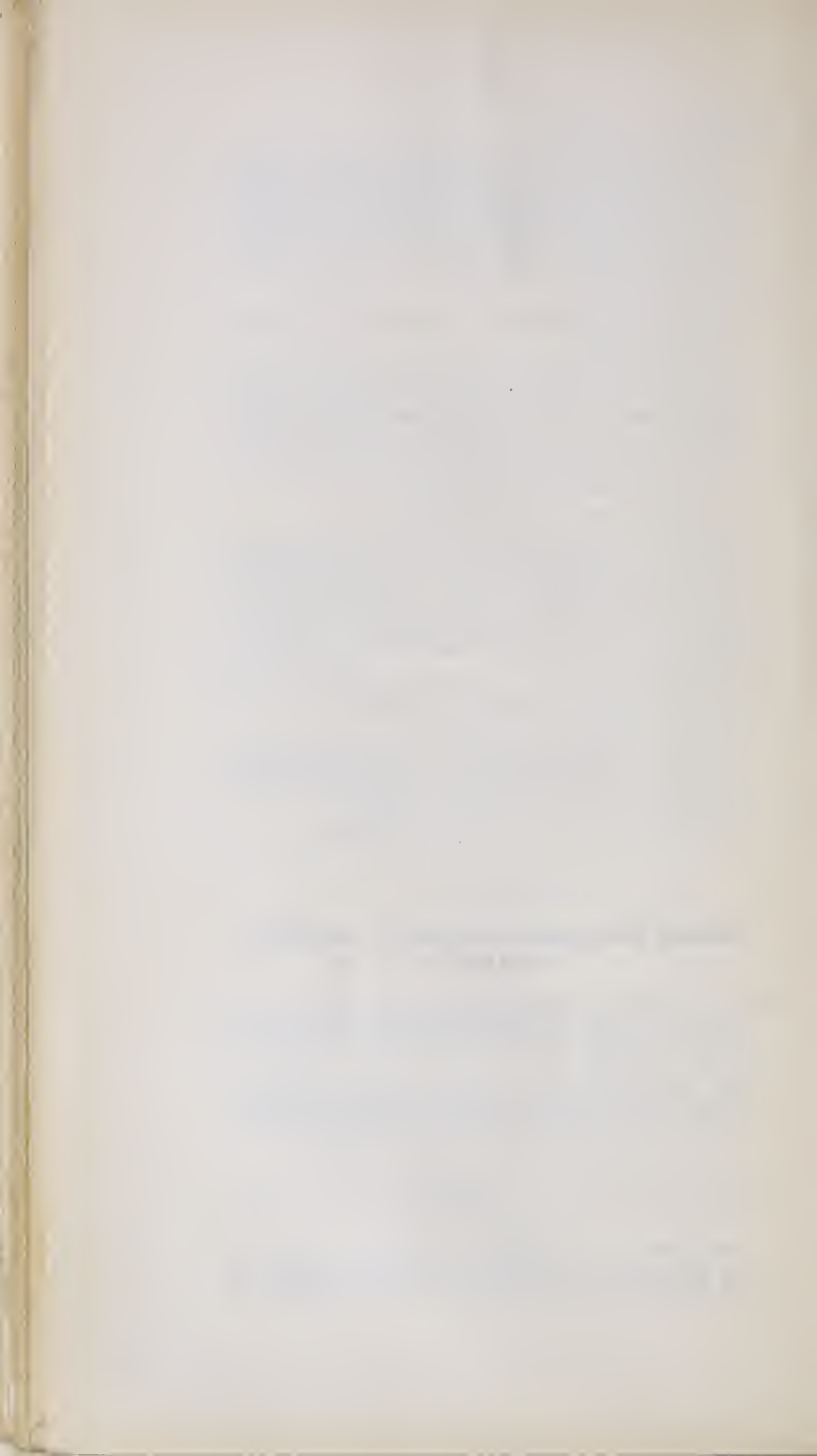
PORT ST. JOHNS: 25th October, 1939. Before A. G. McLoughlin, Esq., President, Messrs. H. M. Nourse and M. Adams, Members of the Court (Cape and Orange Free State Provinces).

Native Appeal Cases—Damages for adultery and infection with venereal disease—No Ntlonze or prompt action taken against alleged adulterer—Alleged unauthorised payment of four head of cattle not an admission of liability.

Appeal from the Court of Native Commissioner, Ngqeleni.
(Case No. 278/38.)

McLoughlin, P. (delivering the judgment of the Court):

The Plaintiff's case rests firstly on an alleged catch by the uncle Nobelemtweni, who states he found Plaintiff's wife



missing at night time from a beer drink which they attended. He searched for her and eventually found her with first Defendant. Although he says she admitted she was sleeping with the Defendant, he took no notice, nor did he take any action beyond telling her to go home.

No objection has been called, and no judgment in favour of the Plaintiff can be based on such evidence as this.

Plaintiff relies secondly on the alleged fact that he discovered his wife to be suffering from syphilis, on his return from the mines. He has put in a medical certificate that he himself is suffering from the disease, but that proof does not connect the Defendant with the infection.

The Plaintiff finally alleges that a payment of 4 head of cattle was made by and on behalf of Defendant No. 2, for the first Defendant, and he has called a trader who advanced the cattle for this purpose to corroborate the evidence.

The father denies authorising the payment, and it is abundantly clear that the first Defendant took no part whatever in this transaction. For this reason the payment cannot be imputed to him as an admission of liability. There must be clear proof if he is to be held liable on this ground that he authorised the payment, and thereby admitted liability, especially as Defendant No. 1 has denied liability throughout the case.

The appeal will accordingly be allowed with costs, and the judgment of the Native Commissioner is altered to one absolving the Defendant from the instance, with costs.

For Appellant: Mr. J. V. Kottich, Lusikisiki.

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

CASE No. 54.

LUDIYA SIGWACA vs. QUBELO SIGWACA.

PORT ST. JOHNS: 25th October, 1939. Before A. G. McLoughlin, Esq., President, Messrs. H. M. Nourse and M. Adams, Members of the Court (Cape and Orange Free State Provinces).

*Native Appeal Cases—Apportionment of daughters to sons—
First and last born daughters are not allotted to sons but
their dowries are reserved for father.*

Appeal from the Court of Native Commissioner, Flagstaff.

(Case No. 173/38.)

McLoughlin, P. (delivering the judgment of the Court):

The evidence in this case is very confusing and contradictory. The onus is on Defendant, as he claims to have been allotted a girl, whose dowry otherwise would have gone to Plaintiff.



It is best in reconstructing the case to start with Plaintiff's version of the separation of the kraals. He says Defendant left without any dowry property, and that he took action when, after demanding further dowry, he found that stock had been paid to Defendant.

Plaintiff is corroborated by Sigabu in his contention that Defendant removed no dowry stock, for Sigabu says that the grey mare which is said to be part of Mayalo's dowry had been sold by Qubelo, though Qubelo says it is still alive. Plaintiff maintains it was sold by his father in the latter's lifetime.

Mayalo and Sigabu contradict each other regarding the stock alleged to have been removed. The former says "out of 5 cattle he took 2 when he left Sigwaca's kraal, I mean a grey mare and a cow". Sigabu says "after Sigwaca's death Qubelo took two cattle and a horse". Whether he is confusing this fact with the next is not clear, for he says "Qubelo, Defendant, demanded dowry from me since Sigwaca's death. I paid him one horse and two cattle. I paid them 3 or 4 years ago". In passing contrast Qubelo who says the payment was made 2 or 3 years ago.

Qubelo says "after my father's death, I established my own kraal. Took grey mare then. At my own kraal I had 2 increase. All three horses died." Previously he had said "Dowry was paid for Manyalo before his (Sigwaca's) death, viz. 4 horses and a beast, a cow. Three of four horses died in my father's lifetime. 4th horse, a grey mare is alive."

Sigabu also says "of the 4 horses paid first 3 died and one sold by Qubelo. Yet he stated earlier in his evidence "last horse was a mare. It has had one foal. It died." The "it" is presumably the mare.

This confusion becomes worse when comparing the statements of Mayalo and Defendant regarding the relative date of the alleged allotment. Manyalo says "I remember when Qubelo was sued for adultery. . . . I was already married then. . . . At that time allotments had not yet been made".

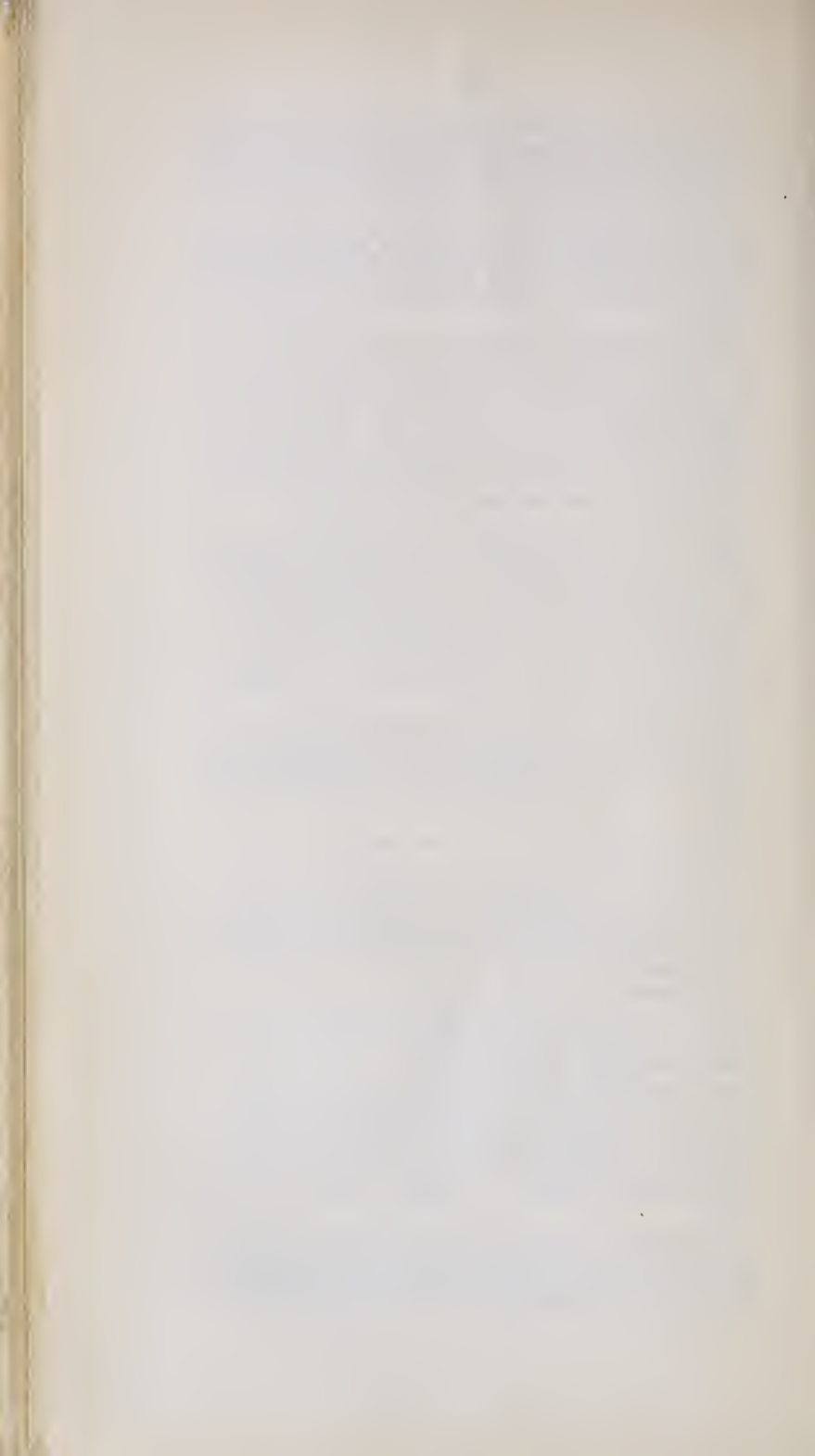
Qubelo says "Apportionment was made before Mayalo before her marriage".

It would seem that Defendant has antedated the allotment to give point to the statement "I killed the cow for the girl in question" meaning the only cow which was included in the woman's dowry and which he maintains increased to two head. Why a cow should be killed for the girl after the marriage, has not been made clear—nor the reason for the extravagance.

These divergences are not pointless when coupled with such differences as those disclosed in Mdeni's evidence, which cannot be imputed solely to a defective memory, if in other respects Defendant's case breaks down.

The Court is led to the conclusion that there is much to be said for the accuracy of the Plaintiff's version that the horse attached was actually a portion of the girl's dowry and that it was repudiated by Defendant at that time, rightly or wrongly; that Defendant did not remove the stock he alleges when he separated from his elder brother, and that there is nothing abnormal in Plaintiff's attitude in the matter.

In other words, the whole story of the allotment becomes suspect, for it does appear from the opinion of the assessors that the allotment of the youngest daughter is a most unusual thing in Native custom, and that when it is attempted, their Courts will not give effect to it.



We are not prepared to say that such an allotment cannot be recognised by this Court if established by very clear proof, but that proof must be conclusive and must not rest on confused and doubtful evidence as in this case.

Accordingly as the onus is on Defendant, and as we feel he has failed to discharge that onus, the appeal will be allowed with costs, and judgment will be entered for Plaintiff as prayed with costs in the lower Court.

c.f. Mkuba vs. Situzula V, N.A.C. 26.

OPINIONS OF NATIVE ASSESSORS.

Apportionment.

5 sons.

5 daughters.

Per Tolikana Mangala.

I wish to point out that the first born daughter and the last born daughter are never allotted as they are their father's daughters.

The second daughter is allotted to the first born son. In doing that the fifth son is joined to No. 1 son as being bound to him.

The third daughter is allotted to the second son, and he is joined with the fourth son, because the 4th son goes with the second son when the sons are classified.

The 4th daughter is allotted to the 3rd son, the last to be allotted.

If the father is alive and makes the allotment, and cattle have been designated, the son gets the cattle that are still to be found.

By Mr. Nourse:

Per Mxotyelwa Ndzumo: The practice is done according to custom that the first born daughter and last born belong to their father. The only man to get anything from them after his death is the heir.

Per Lumaya Langa: The eldest daughter's dowry is used to help his sons when they marry their wives.

The dowry of the last born daughter is for maintenance of the father during his lifetime. Even with regard to the other daughters, it is not as if he has nothing from them.

The allotment takes place only after the father's death.

Per Tolikana Mangala: Another reason for first daughter's dowry is that the cattle used to replace the dowry paid for her mother.

The last born daughter is not allotted. Let me say we are your sons, I am the eldest son. I am allotted a girl and the others, all our debts numbered as we are, go into your pocket even before, and then we are allotted the daughters to have our own cattle. Now you (the father) remain by yourself, and it is necessary that you should not be left stranded. That would be squeezing everything.

If the father has handed over the cattle of an allotted girl to a son, he has no right to retake them, unless he had not had anything from that dowry. He can with the consent of the son get back the stock.

Per Lumaya Langa: Though not in accordance with custom the last born daughter is sometimes allotted to one of the sons. When a man makes an allotment, he calls the men of the family.

Per Nobulongwe Masipula: As last speaker says, the younger daughter is sometimes allotted, but when there is a case the allotment is declared irregular (unlawful) as it is not in accord with custom to allot the last daughter.

For Appellant: Mr. C. Stanford, Lusikisiki.

For Respondent: Mr. F. C. W. Stanford, Flagstaff.

CASE No. 55.

**JACKSON MATITITI vs. MGWAZA DUTSHANI
and ORS.**

PORT ST. JOHNS: 25th October, 1939. Before A. G. McLoughlin, Esq., President, Messrs. H. M. Nourse and M. Adams, Members of the Court (Cape and Orange Free State Provinces). Reserved judgment delivered at Kingwilliamstown on 20.11.39.

Native Appeal Cases—Objection to offensive tone and form of Notice of Appeal raised suo motu by Appeal Court—Hearing of appeal proceeded with on withdrawal by Counsel of offensive portions—Special plea of misjoinder—Onus of proof on Defendant to justify claim to stock against heir to estate—Contrary to Native Custom to apportion cattle to daughter or to wife.

Appeal from the Court of Native Commissioner, Flagstaff.

(Case No. 20/38.)

McLoughlin, P. (delivering the judgment of the Court):

The Plaintiff claimed against the three Defendants jointly and severally (1) "delivery of 17 head of cattle belonging to the Plaintiff; (2) alternative relief in such form and measure as may seem meet and expedient to the Court"; with costs.

His particulars of claim set out:—

"(1) (a) Plaintiff is resident in Sikatele's Location, Flagstaff as is first Defendant, Mgwaza Dutshani; and the 2nd and 3rd Defendants—being mother and son respectively—are living at Kiliyoni's kraal, Sipaxeni Location, Flagstaff; the 2nd Defendant—Mamzila Matititi—being also the mother of Plaintiff.

(b) Plaintiff is the eldest son and heir of the deceased Matititi, who died in or about August, 1931—when his estate consisting of the cattle herein claimed 'inter alia' devolved upon the Plaintiff, who has the sole and exclusive right to and control thereof inclusive of possessory rights.

(c) The Defendant No. 2 with her son No. 3 has of her own motion abandoned her late husband's kraal and location; and neither is now concerned as of right in the control of the estate cattle referred to and the subject of this suit.

(d) These cattle represent (a) a red and white hornless heifer, sisaed by the late Matititi prior to his death to the Defendant No. 1, which has increased to 9 head—plus (b) 5 head of cattle subsequently sent to Defendant No. 1 by the direction of Plaintiff and accepted by Defendant No. 1 for improved pasturage facilities as a purely temporary measure of relief and not under sisa, and these cattle have since increased to 8 in number, making 17 in all under heads (a) and (b) supra; apart from other cattle belonging to one Bedayi a ward of Plaintiff; which form the subject of a separate claim.

(e) In or about the month of August, 1937, in the absence of Plaintiff at work, the Defendants Nos. 2 and 3 with the connivance, assistance and/or consent of Defendant No. 1 and against the wish or authority of Plaintiff removed the cattle claimed from No. 1 Defendant's kraal to Kiliyoni's kraal, Sipaxeni, and Plaintiff claims their restoration with costs as below scheduled."

To this Defendant pleaded:—

- “ 1. Paragraph (a) of the summons is admitted.
2. As to paragraph (b) Defendants admit that Plaintiff is the eldest son and heir of the late Matititi who they say died during or about 1929. The remaining allegations in this paragraph are denied and Plaintiff is put to the proof of such allegations.
3. As to paragraph (c) Defendants Nos. 2 and 3 admit that they have removed from the late Matititi's kraal. They do not claim any right or control in estate cattle and repeat their denial that the cattle referred to are estate cattle.
4. As to paragraph (d) Defendants admit the ngoma of the red and white hornless heifer but say such ngoma was made to Babula, the son of Defendant No. 1. They further admit that this beast increased to 9 head of cattle of which one died leaving 8, of which 1 was apportioned by Defendant No. 3 to the said Babula, leaving 7, which cattle belong to Defendant No. 3 inasmuch as the red hornless heifer was apportioned to him before it had any increase by the late Matititi, who likewise apportioned one beast each to Plaintiff's other brothers, Bedayi and Ntili. Of the 5 cattle referred to, which were placed with the said Babula at the instance of Defendant No. 3, 3 belonged to the said Bedayi, being his apportioned beast and two cattle acquired by him. These three cattle increased to 6 of which two died leaving 4. The remaining 2 of the said 5 head of cattle belonged to Ntili and increased to 4 head. Defendants deny that Plaintiff has any right whatever to these cattle.
5. As to paragraph (e) Defendants admit that during or about spring last year, the third Defendant removed the 15 head of cattle referred to in paragraph 4 hereof to the kraal where he is now living, from the possession of the said Babula. Defendants repeat their denial that Plaintiff had any rights or concern in the removal of the said cattle or that there was any obligation to inform him of their removal.

Defendants plead specially to the summons that the 1st and 2nd Defendants have been wrongly joined in this action. Defendants Nos. 1 and 2 plead that they had nothing whatever to do with the removal of the said cattle, and are in no way responsible to Plaintiff, even if the cattle belonged to Plaintiff as is denied."

The question of onus appears to have been considered at the outset of the case, for a note appears on record that Plaintiff's attorney reserved the question of onus.

Plaintiff led and after hearing considerable evidence judgment was entered for Defendants with costs. There was no ruling on record regarding the special plea of non joinder.

Plaintiff attacked the judgment on the following grounds:—

- “ 1. The presiding judicial officer has entirely ignored the incidence of onus of proof in respect of the alleged family apportionment whereon the case for the defence rested as set out in the pleadings.

2. Moreover in this regard he has entirely disregarded the legal duty cast upon the defence to substantiate such an apportionment—admittedly made according to defence evidence—in the absence of the principal son and heir—beyond reasonable doubt.
3. The judicial officer on the contrary has not attached due weight, or indeed any weight at all, to the failure of the defence to call the evidence of either Job or Fleddi Nako or Defendant No. 1 himself on the family apportionment issue all three of whom by virtue of seniority and close relationship and interest filled the principal roles at the relevant family gatherings according to the case for the defence itself.

Beyond admitting the hostility of these very vital witnesses to the Defence case—the judgment has ignored the evidential significance of such hostility or sought to depreciate it by reasoning which is irrational and unintelligible and never advanced in the defence argument.

Then in regard to the judicial observations concerning the witness Babula, the judicial officer has in effect treated him as a witness for Plaintiff in the sense of his being called by the Plaintiff—whereas he was a defence witness; and the thinly veiled innuendo concerning Babula's motives travelling outside the record as it does is wholly fantastic and out of place; and indeed carries its own condemnation.

Then on page 5 of the judgment in reference to the evidence of Babula—the observation: 'if this is true, it is strange that Jackson never mentioned the fact'—betrays an utter ignorance of evidence rules, or the judicial officer had improperly treated Babula as a party to the suit.

4. Again on page 5 of the reasons for judgment in dealing with the acknowledged hostility of the party Mangwaza, the judicial officer has improperly and irrelevantly and grossly irregularly discredited—on the vital factual issue in the case—the Plaintiff's case, with corresponding credit to the case of Mgwaza himself and his associates in the action, by his the judicial officer's own avowed suspicion and mistrust of the same Mgwaza.

The consequent inherent lack of any exercise of a reasonable judicial discretion as disclosed by the foregoing observation is aggravated and emphasised by the following circumstances, namely:—

- (a) The avowed refusal at the close of the defence case by the attorney for the defence at the invitation of the Plaintiff's attorney to facilitate the calling of Mgwaza by the Plaintiff by way of professional courtesy and the waiver of professional privilege, this invitation being made as the record should show as soon as Defendant's case was closed, with the assurance that Mgwaza had not been interviewed by Plaintiffs' attorney; and
 - (b) the fact that a considerable part of the address in argument on the case by the defence attorney—if not indeed his main argument in point of time taken—was directed to the defence of Mgwaza's attitude and conduct throughout.
5. In regard to the failure of the defence to call either or both Job and Fleddi Nako, the only explanation offered by the defence attorney was in his own words that 'it was not necessary to call the whole location';



and in this connection special attention is respectfully directed to the admissions of their hostility by their brother Kilian Nako; through the acceptance of whose evidence by the Court there is tacit acknowledgement of their hostility even assuming no express finding has been or will be made in this respect by the judicial officer.

6. Alternatively to the acceptance of the foregoing grounds as sufficient—as is claimed—to entitle Appellant to a reversal of the judgment as a whole as against all Respondents; then it is urged that at least to the extent of such insufficiency the judgment be altered to one of absolution from the instance; coupled with such appropriate order as to costs as to the Appellate Court may seem meet.
7. In regard to Bedayi's and Ntili's cattle—by virtue of his heirship Plaintiff is entitled to at least their custody and control; and an order accordingly was competent on the claims made.
8. The Court has failed to appreciate the significance of Mandoyeni's dowry having passed to Plaintiff and the main source of the cattle in issue being one of such dowry. The purport of the judicial observations or deductions in this regard at the foot of reasons, page 5, is not intelligible; and the unqualified belief expressed in the concluding paragraph of the reasons is largely a contradiction of the judicial officer's earlier observations.
9. Generally the judgment is against the weight of the evidence of record and the natural and reasonable inferences evidentially implicit therein; and discloses a lack of judicial appreciation of the evidence values; and forgetfulness of the judicial officer's own severe criticisms of the witnesses Kilian Nako and Mandoyeni, in particular, when testifying."

In limine this Court of its own motion objected to the tone and form of the notice of appeal, offending the standard of courtesy of the Court, and attacking the judicial officer in the conduct of the case in the lower Court by way of appeal instead of review.

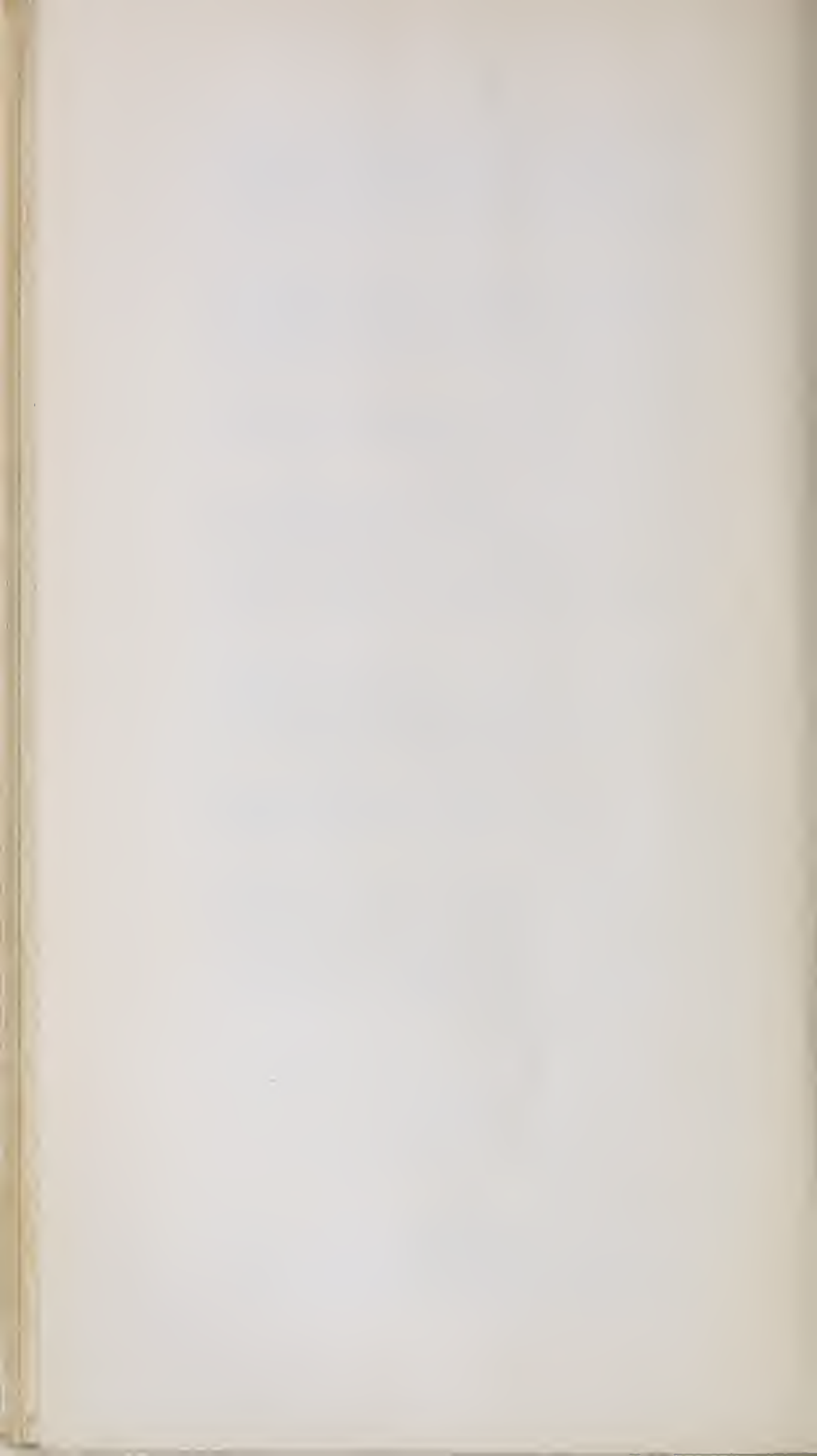
Counsel for Appellant assured this Court that Plaintiff's attorney had the fullest regard and respect for the judicial officer, and that there was no intention whatever on the part of that practitioner to offend that officer. Appellant's counsel made amends, and with leave of the Court withdrew the portions of the notice of appeal to which exception could be taken, and substituted a new paragraph 4 for paragraphs 4 to 9: "that the judgment was against the weight of the evidence and the probabilities".

All words after "whereas he was a defence witness" in paragraph 3 are struck out.

On this basis the Court allowed the hearing of the appeal to proceed, accepting as it did the assurance of Counsel for Appellant that no malice was involved.

The case involves enquiry into the following questions:—

- (1) The matter of the special plea of misjoinder.
- (2) The question of ooms.
- (3) The aspects of the case concerning—
 - (a) the direct claim of Defendant to hold certain of the cattle by virtue of an allotment;
 - (b) the interposition by Defendant of Bedayi's rights;
 - (c) and those of Ntili.



- (4) The form of the ultimate order of the Court to protect the rights of absentee owners.

The plea of misjoinder is governed by the principles set out in *Williams vs. Rhodes Fruit Farms 1917 C.P.D.* at p. 9, "To lay the foundation of an action it is not sufficient to prove that disputes have arisen in the past or that the Plaintiff's rights have been questioned by the Defendant. Something must have actually been done by the Defendant to interfere with the enjoyment by the Plaintiff of his rights". The Chief Justice went on to say: "the mere denial of a right is not an interference with that right." That string of cases has definitely decided that there must be some actual interference with a right claimed by the Plaintiff in order to enable him to come to Court to obtain relief.

"The main principle is that the Court does not decide mere academic disputes but only concrete disputes, where rights have actually been infringed and not merely threatened." (*ibid.*)

As regards the first Defendant, Magwaza, it is common cause that he handed the stock over to the third Defendant. By this overt act he renders himself liable if it should appear that Plaintiff's rights have been infringed by the removal of the stock claimed. Plaintiff bases his action not on contract but on delict. Actually No. 3 Defendant's evidence clearly shows that he dealt with No. 1 as principal, though ostensibly on behalf of his son. Defendant says "I gave one (beast) to Magwaza". p. 18.

The position of the woman Mamzila, the second Defendant, differs from that of the first Defendant, for there is no proof of any overt act by her either in removing the cattle or in detaining them against the will of the Plaintiff.

While therefore upholding the special plea in her case, it seems to this Court that she has led the Plaintiff by her plea to believe that she was contesting the case on the merits. Whether this was done intentionally or inadvertently, the form of the plea is such as to support that impression. She actually received a full judgment in her favour instead of a dismissal of the summons on the plea. That was not abandoned on appeal, and Plaintiff has had to come to this Court to have it set aside. Accordingly we feel that she should not receive any costs either in this Court or in the Court below.

Proceeding now to the second head of our enquiry, it appears that once it is established that the stock in question formed part of the estate of the late father and head of the family, whose heir is the Plaintiff, the onus is on the Defendant to justify his claim to the stock and their removal from the custody of the person in whose charge they were placed by the deceased.

Coming to the merits: the Defendant's case rests on an alleged allotment of the progenitors of the herd to him by his late father, Matititi.

The old man died, it would appear, some 8 years ago, though various periods are mentioned by witnesses—some saying 10 years ago. The exact date is immaterial—suffice it to say 8 years ago. Plaintiff, the eldest son and heir, was away at the time. He returned after the old man's death: how long after is not clearly disclosed. The most direct evidence is given by Mandoyi, but her version is confused. She says that "He (Jackson) the Plaintiff, took a beast, which she claims as having been apportioned to her, soon after his return from the mines, shortly after he heard of the apportionment". But she speaks of two visits to the mines, and of increase of this beast while he was away at the mines, for she adds, "Plaintiff took the cattle a long time after my father's death. I think it is 5 years". She states

Plaintiff sued Nomandla for the cattle which had been taken there after apportionment. "That was year before last." He got judgment for the stock.

This fact gives a clue to the whole case, for it will be remembered that the dispute between the parties arose two years ago, when in 1937 the cattle in question were removed from the control of Magwaza.

It is common cause that the mother of the herd, a red and white heifer received by Matititi as dowry for Nomandozi, was placed at Magwaza's kraal in the lifetime of Matititi, and there they remained and increased till removed by No. 3 Defendant after the dispute had arisen between No. 2 and Plaintiff over Nomandoyi's claim.

It would seem that, at some date subsequent to the death of the father, certain other five head of cattle were also placed with Mandoyi at the instance of or with the consent of Plaintiff. Defendant and his witnesses dispute that Plaintiff was responsible for the movement, but they give no reason why they should be in control and not Plaintiff. His version is the more probable. He says he was in gaol at the time, and his mother No. 2 Defendant, came to say that Madlange, with whom the stock was, wanted to get rid of them. That thereupon Plaintiff suggested they be taken to No. 1 Defendant, which was done.

There is little doubt that the whole case for Defendants has been distorted to cover the action of No. 3 Defendant, possibly acting in collusion with his mother, in attempting to oust Plaintiff from his inheritance. On no other ground is the conduct of No. 3 Defendant to be explained, that he waited these many years before taking over the stock which became his on the death of the old man. The excuse that he had no cattle fold holds no water, for even now they are at his kraal, but are folded at Kilian's. The coincidence in sequence of events following on the dispute over the cattle claimed by or for Nomandoyi is too marked to pass without comment.

Viewed against this background, the alleged apportionments show up in their true light.

It is most unusual and indeed entirely contrary to Native custom to apportion any cattle to a daughter, especially a married daughter, and particularly one of the cattle of her own dowry.

It is equally foreign to Native custom to apportion any stock whatever to the wife.

There is, moreover, no sense whatever in making an apportionment *in extremis* to the very person who becomes the heir to the estate, for all residue goes naturally and by law to him.

The account does not ring true, for while there is an alleged apportionment to him of a horse, saddle and bridle, and the only girl in the family, certain stock are specifically excluded from the apportionment.

The inference is strong that it is something newly invented to cover the spoliation of the Plaintiff's property. It is on a footing with the claim to control the alleged property of the minor Ntili, whose property must remain with the natural guardian until the lad becomes of age.

The Defendants cannot resist the claim of Plaintiff on the basis of a mandate from a minor.

Bedayi's alleged stock, even if the Defendant's version be accepted, is derived from the very apportionment which Defendant No. 3 relies on. The proof of such allotment failing, and it being common cause that the stock originally were estate stock, which the Court now finds have been

wrongly removed from the control of the Plaintiff, they must be restored to him, leaving any claim by Bedayi to be enforced by way of action.

The number of cattle involved appears to be only 15 head. Plaintiff has not shown that there were more, and he is not entitled to a judgment for more.

Moreover, the Plaintiff is in the position of a Defendant in regard to the onus of proof, which is on the Defendant. Consequently in respect of the cattle alleged to belong to Bedayi and Ntili, our judgment will be one virtually of absolution, so that there can be no question of *res judicata* should either of them prefer a claim against Plaintiff at a later stage. His prayer for alternative relief enables the Court to draw this distinction.

In so far as Defendant No. 3 is concerned, the judgment is a full and final judgment.

The appeal will accordingly be allowed with costs against Nos. 1 and 3 Defendants, and the judgment of the Native Commissioner will be altered to read:—

“For Plaintiff for the return of 15 head of cattle with costs, the judgment being against Nos. 1 and 3 Defendants jointly and severally, the one paying the other to be absolved. The summons against No. 2 Defendant is dismissed, with no order as to costs.”

Case No. 20/38.

OPINIONS OF THE NATIVE ASSESSORS.

Per Lumaya Langa: A nqoma can be made in that manner, i.e. to a minor living with his father.

His father answers for the beast. If the father is still alive, he answers for the beast if anything happens to it.

The father of the boy is dealt with when the nqoma is recovered.

If the boy is still a minor, then his father is sued if anything happens to the nqoma.

When he becomes a man, the boy will answer as he now holds the cattle.

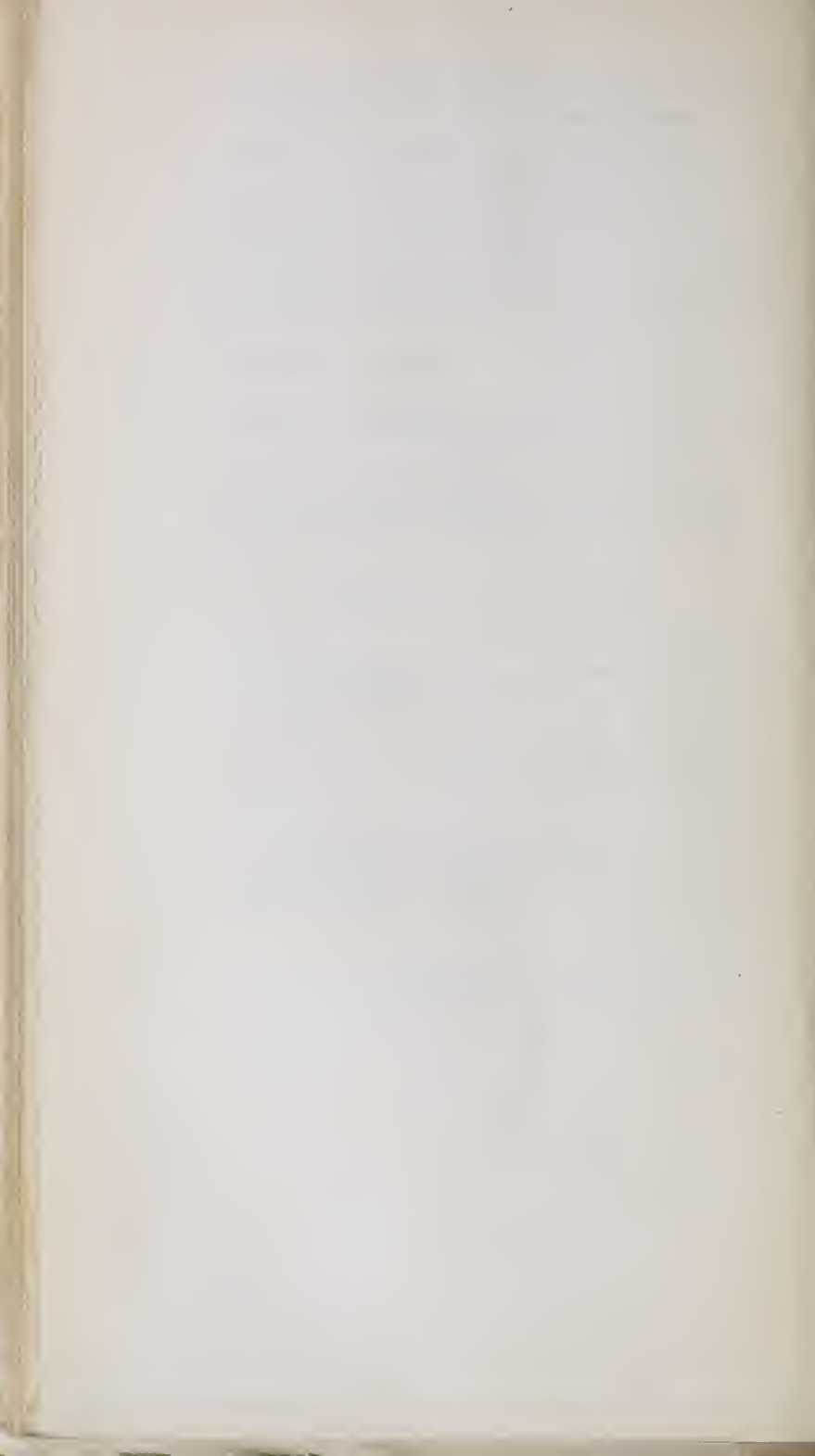
If the boy is at the uncle's kraal, the uncle answers for the cattle. It is based on kraal head responsibility.

Per Barnabas Sirogo: If a wife has a nqoma, the husband is sued. It is on the same basis as the instance above mentioned.

NOTE.—But see 3 N.A.C. 206.

For Appellant: Mr. H. A. Payn, Flagstaff.

For Respondent: Mr. F. C. W. Stanford, Flagstaff.



GWADISO MTYOTYO vs. KUTA MAKEBENZI.

BUTTERWORTH: 9th November, 1939. Before A. G. McLoughlin, Esq., President, Messrs. L. M. Shepstone and H. F. Marsberg, Members of the Court (Cape and Orange Free State Provinces).

Native Appeal Cases—Damages under Lex Aquilia for causing death of beast—Native Custom—Owner of beast must state his suspicions to person suspected before Headman and men—If wrongdoer called upon to rusa beast, carcass is left with him.

Appeal from the Court of Native Commissioner, Nqamakwe.
(Case No. 119/39.)

McLoughlin, P. (delivering the judgment of the Court):

This case must be decided on the basis of the facts as set out by the Defendant. The Plaintiff's version is misleading, if not actually untrue, for while he alleges, in his summons (paragraph 4), that "on the 28th June, 1939, Plaintiff went to Defendant at his kraal to release his cattle, but Defendant informed him that he had left or abandoned the said cattle in the veld," he states in his evidence "The next day (i.e. the 28th June, 1939) I proceeded to the pound in this village but I did not find any cattle there . . . When I came to the village, I did not know where the cattle in question were. I came to the village because Defendant had said that I would find my cattle in the pound, if I did not release them with him. Defendant illegally impounded my cattle."

Nowhere in Plaintiff's evidence is it revealed that he actually went to the Defendant either on the Wednesday, i.e. 28th, or at any other time. His statement in the summons, however, is borne out by Defendant himself, who says, "About sundown on Wednesday evening, Plaintiff arrived and said he was looking for his cattle. I said I had nothing to do with them. . . . When Plaintiff saw me on Wednesday, he only told me he was looking for lost cattle."

Plaintiff admits that he received a report on Tuesday the 27th from Mzimeli about the cattle. The boy Kwekweza also reported to him. Plaintiff says, "I could not go on Tuesday evening because I got the message late." The kraal of Plaintiff is about two to 2½ miles from that of Defendant. The moon was full on the 1st July. His reason for not going or sending belies any question of detention of the cattle by Defendant for impounding. Plaintiff's conduct the next day belies the evidence of his witnesses. If Plaintiff did know of the detention as alleged and relied on, then his normal reaction would be to approach Defendant, who lived quite close to him, for release of the stock. Instead of doing that, he apparently went direct to the village some 12 miles away, and not until late in the afternoon, if Defendant's version be accepted, as it must, did Plaintiff go to Defendant, when on Plaintiff's own showing, he already knew that the beast was dead in the location, and that it was his beast. Nor does his subsequent conduct bear out his contention. Knowing that his beast had died, it was his duty to call the Defendant to be present at the post mortem examination, and to leave the "damage" with him in accordance with Native custom, demanding that Defendant "vusa" his beast, if he were to be held responsible for its death. The opinion of the Native assessors is appended.

This Court has not succeeded in ascertaining the real motive of Plaintiff and his party in acting as they did, nor why there should have been such ignorance regarding the identity of the dead beast.

Although Plaintiff says he was not present at the skinning, Mbuyiselo says "I was present when beast was skinned. Jeremiah Xiwa was there . . . Jeremiah was assisting Plaintiff". Jeremiah says, "We found the owner when the beast was *about* to be skinned. Plaintiff actually came to me. He came to my kraal".

The cause of death is uncertain. A blood smear was taken but the result of the examination is not known.

The Plaintiff's witnesses refer to weals on the back of the beast, and they speak of the *meat* being "all full of blood" or "red with blood". Yet Jeremiah says, "The *skin* was red with blood, and there were weals on the back of the skin. The flesh was not examined. *There was nothing abnormal in the flesh*".

Although in midwinter, the witnesses aver that the "beast was in a state of decomposition"—only one day after death.

These statements have been analysed to show the very unstable foundation on which Plaintiff's case rests.

He cannot succeed on the contention set out in his evidence, "I hold Defendant responsible because the beast died in his hands, even if it had died a natural death. I cannot say that it did not die a natural death."

To succeed Plaintiff must show that it died in the possession of Defendant, and that it did not die of natural causes, in which event the onus would fall on Defendant to clear himself. Alternatively, Plaintiff should prove a direct act of the Defendant or his agent causing the death of the beast, as is normally required to establish proof under the *lex Aquilia*: in other words, Plaintiff must prove negligence on the part of Defendant, direct or implied.

The evidence connecting the *death* of the beast with the Defendant's actions is too remote to satisfy these requirements. All that evidence of the Plaintiff's witnesses relating to the driving of the beast, even if accepted, does not establish any act of negligence on the part of Defendant, nor does it prove that the beast was kept by the Defendant, for as already shown, the evidence and the Plaintiff's conduct are too inconsistent for the evidence to be true.

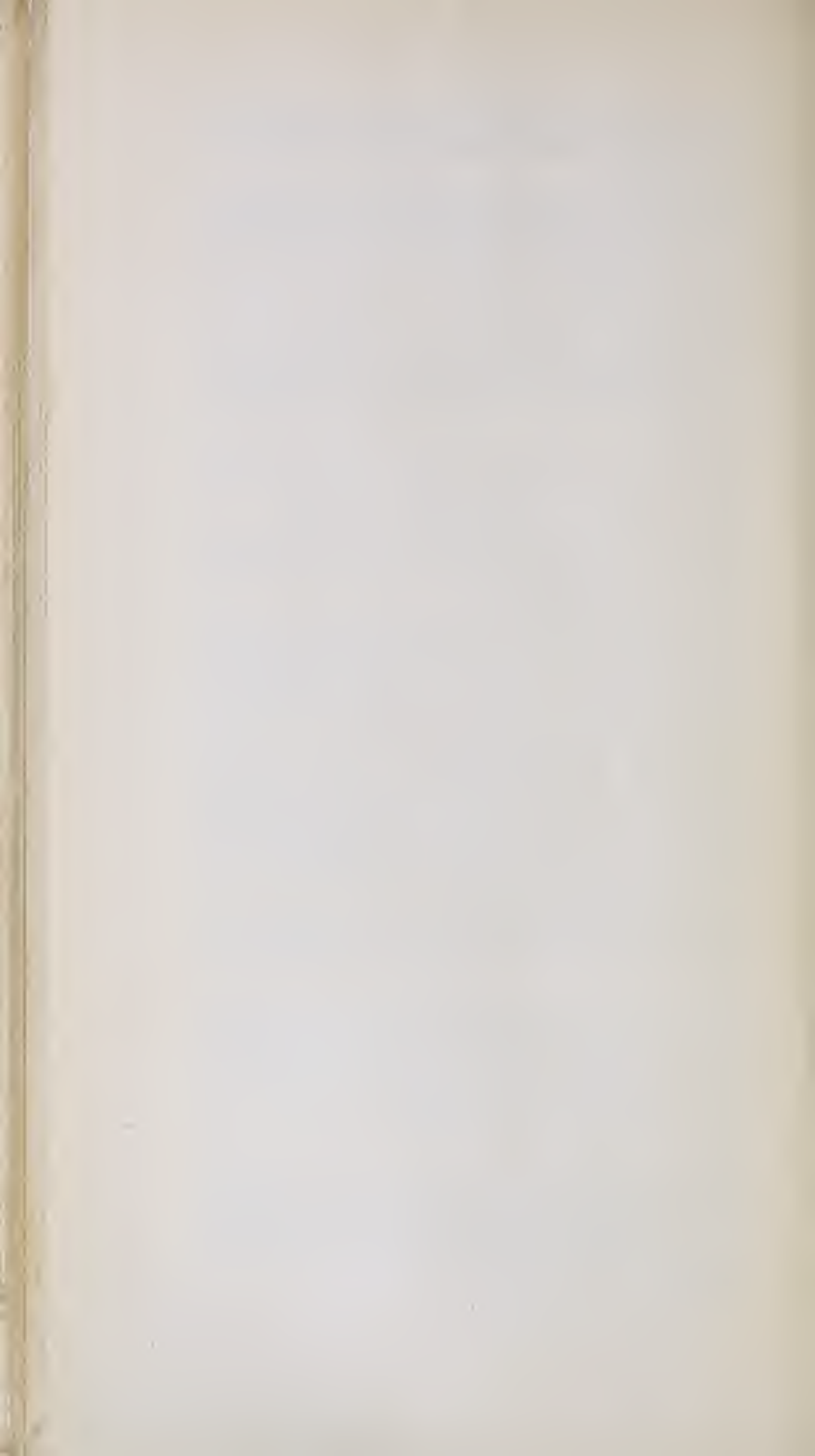
There remains then only the question of the effect of the admission in Defendant's evidence that he ordered his boy to drive out two cattle from his land, and told him to "drive them away right to the grazing ground about a mile away".

He denies that the boy struck the cow. The boy himself says, "I drove them a long way until my father told me to leave them". He says the cow did not give trouble when he drove it. He was not questioned as to the manner in which he drove the animals. There is nothing then in Defendant's evidence on which this Court can base a finding that the cattle were driven furiously or negligently.

The area appears to be well populated, and evidence should have been available if, in deed, there had been any furious driving.

This Court is of the opinion in all the circumstances that Plaintiff has failed to prove his case. The Native Commissioner has entered a judgment dismissing the case, which is not a correct judgment as he was not dealing with a plea in bar, nor an exception or objection. The correct judgment will be entered as one absolving the Defendant from the instance, with costs.

The appeal is dismissed with costs.



OPINIONS OF THE NATIVE ASSESSORS.

Question.

A beast is found dead on the commonage. What is the duty of the owner in regard to bringing the matter to the knowledge of the person suspected of causing its death?

Reply, per J. K. Finca.

It is proper that the owner of the beast ought to go to the man whom he suspects, and call the man as well as the headman and go to the beast, when the owner has to state his suspicions. He must do that before he can claim.

The beast cannot be touched unless the suspected man has been called.

Even if there be no external marks, he cannot touch the beast.

If the wrongdoer is called upon to "vusa" the beast, the men present and the wrongdoer decided it is proper that the carcass be left to the wrongdoer to dispose of.

For Appellant: Mr. L. W. Harvey, Nqamakwe.

For Respondent: Mr. A. J. C. Kockott, Nqamakwe.

 CASE No. 57.

**MANQOTYANA MBAYIMBAYI vs. MOSHANI
NHLANGANISO.**

PORT ST. JOHNS: 24th October, 1939. Before A. G. McLoughlin, Esq., President, Messrs. H. M. Nourse and M. Adams, Members of the Court (Cape and Orange Free State Provinces).

Native Appeal Cases—Adultery—Version contrary to all known rules of the game too improbable to be true.

Appeal from the Court of Native Commissioner, Ngqeleni.
(Case No. 202/38.)

McLoughlin, P. (delivering the judgment of the Court):

The Plaintiff's version of this case rests on the incidents at Sikanisi's kraal, where it is alleged that in the daytime the Defendant openly met the Plaintiff's wife by appointment, and then conveniently was provided with accommodation by the owner of the kraal for the purpose of committing adultery. The owner's concern for their safety, when the husband appeared on the scene to retrieve a forgotten umbrella, is in keeping with the rest of this most unusual incident, which is completely contrary to all the known rules of the game.

The version is too improbable to be true, as, indeed, the divergent accounts of the wife and Sikanisi about the dress of the Defendant clearly indicate.

The account given by the woman Tyebani is not in itself sufficient to support a judgment in favour of Plaintiff, a course which in any event would be hazardous in the face of the improbability of the other incident relied on, and the contradictory evidence thereof.

The appeal is accordingly allowed with costs, and the judgment of the Native Commissioner is altered to one of absolute from the instance, with costs.

For Appellant: Mr. L. C. Miller, Ngqeleni.

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

