

Damage to Property in Natal.

The question of damage to property is governed in Natal law in Natal by sections 134, 135 + 136 of the Code.

Section 134 provides that "the destruction of crops by cattle or other stock will found an action for damages against the owner or person having the custody & control of such stock, unless such damages have been caused by the contributory negligence of the owner of the crops."

Section 135 provides that "when by reason of negligence on the part of any person in starting or failing properly to control a grass fire loss is sustained by any other person, an action for damages lies against the person responsible for such fire."

Section 136 provides that "Trespass on cultivated land does not found an action for damages unless the trespass is accompanied by special damage."

Comment.

It will be observed from these sections that injury to property ~~alone~~ gives rise to an action for damages only in certain circumstances in Natal Law in Natal.

- ① The owner of the property must actually have sustained some loss as a result of such injury.
- ② The injury must not be due to the contributory negligence of the plaintiff.
- ③ Even in the case of trespass, ^{unless} actual loss i.e. special damage can be proved no action for damages will lie.

Contributory Negligence

The question of contributory negligence was discussed in the case of Melondo vs Melondo (1940) N.A.S. (T+V) 8. The court held that the maxim ipso res ipsa loquitur could be applied to the reading of section 134, making it unnecessary for the plaintiff to prove ^{special} negligence on the part of the defendant. On the question of contributory negligence the Court held that a great deal depended on the custom followed in regard

to cultivation in the area concerned. Thus where it is customary in the area for people to leave "refuse" from carting their meales home until such time as the whole field has been ~~not~~ reaped, that fact should be known to all persons living in the locality, thus making it incumbent on them to exercise special precautions in order to prevent their cattle from trespassing. If ~~they~~^{any one} fails to do this, ~~they~~^{he} will not be able to put forward the defence of contributory negligence to an action for damages. As was further pointed out in Solomon v Babane (1917) N.H.C. "there is no obligation of or the part of the allottee (of land) to have his arable land fenced in Native Reserves & Locations & the omission to do so is not contributory negligence. On the contrary there is an obligation on the part of every stock owner to have them properly herded. It is only where someone's crops alone are affected that the individual takes steps: a ditch or fence is required to ~~prevent the stock from trespassing~~ it.

Procedure in cases of damage to crops.

As far as Natives living in community are concerned, there are certain recognized customary steps to be taken in cases of damage to cultivated crops. On ascertaining that damage has been done to his crops, the owner of the crops should at once notify the owner of the stock of known in order to enable him to examine the crops and assess the damage done. Failing a satisfactory settlement, the elder of the tribe in that locality or some tribal official are called in to assess the amount of damage. Should the defendant deny that the stock is his or to be identified with the amount of damage claimed, the plaintiff institutes an action before the headman or the chief. If the name of the stock is unknown, the matter is reported to the chief or his officials and steps are taken to have the stock impounded, in which case the damages are included in the pound fees claimed. An omission to take the recognized steps for obtaining redress may not only deprive the owner of the crops of his right to damages, ~~that~~ but may render him civilly liable for any expenses incurred by the owner of the stock (Stifford pp 124, 125; Domboti v Hlobo (1930) N.A.C. (C.S.O) 36; Arizi v Mungakanyaha (1937) N.A.C. (C.S.O) 137.

Wrongful
impounding

In the case of *Proxi v. Menyakanjako* (1937) N.A.C. (C+O) 137 the question of damages for wrongful impounding was discussed. The court said "The native custom that the proprietor (of the arable land) shall take the trespassing stock or notify the trespasser to its owner, when known, & the said owner being in the same or an adjoining location or immediate neighbourhood, shall continue to be in force in the native locations aforesaid; provided that if such owner shall refuse to pay the damages claimable under the preceding clause, the said proprietor shall may impound the said stock". In other words where the owner of the trespassing stock is known, impounding may only take place where he refuses to pay the damages claimed, either verbally or by conduct

Among the Tribes among Cape S. E. Bantu Tribes

Under ancient native custom among the Cape South-Eastern Bantu Tribes, trespass or injury done to cultivated lands or standing crops by livestock was not actionable, but as the women who had charge of the cultivated ~~land~~ fields had the right, sanctioned by immemorial usage, to drive the animals thus trespassing into the gardens of their owners, trespasses of this kind were of frequent recurrence. This singular custom was, it is believed, one of the few instances in which Native law permitted or rather permitted retaliation. (Comment: The principle of reciprocity is at work here). The rule was that the owner of the crops must look after his arable land and prevent the neighbour's stock trespassing upon it, & conversely the owner of the animals must take all possible precautions to guard his neighbour's cultivated field. The reason assigned for this custom was that, all having cattle and gardens, all are alike liable to trespass or be trespassed upon.

When, however, the owner of the cattle saw that there was danger of their trespassing on a cultivated garden & took no steps to prevent such trespass, the owner of the garden was entitled to compensation from the owner of the stock for the damage done to his crops.

Another custom which militated against such trespasses was that which gave the owner of the cultivated field the right to thrash the head boys in charge of the animals when they were negligent in the performance of their duty. Should the owner of the cultivated field, on the other hand, beat or ill-treat trespassing stock, the owner of the injured animals was entitled to compensation from the owner of the crops for such injury to his stock.

Among these tribes, as indeed among the Bantu tribes "gardens were not enclosed by hedges or fences, and they were very irregular in outline, or also were the different cultivated plots within them for the eyes of the women were indifferent as to straight rows of plants. If the crops were damaged by cattle at night the owner of the cattle was required by law to make good the loss, because he should have seen that his herds were either confined in a fold

or guarded on pasture so distant that they could do no harm. But if the damage was done in the day time there was no redress, because some member of the family of the owner of the pasture was then supposed to be watching it.

The Common and Statutory laws in operation in the several provinces of the Union of South Africa now apply to all Native trespass cases, except where special regulations are in force applicable only to Natives. For Natal see section 136 of the Code; for the Transvaal Territories Proclamation No 70 of 1937 (see Whittfield p. 421.)

Lawful
Occupation

In Khalata v Roojan (1945) N.A.C. (C10) 2 it was pointed out that in order that an individual should succeed in a claim for damages for trespass, the onus is upon him to show that he was in lawful occupation of the land in question. Thus the land must have been allotted to him by the Native Commissioner, not merely by the headman. As was pointed out in Khanda v Ngoloni (1938) N.A.C. (C10) 8 "it is the permission of the Native Commissioner which renders the occupation lawful and not entry in a register or the grant of a certificate of occupation... The failure to obtain a certificate naturally makes it difficult to prove one's right to occupy, but it does not render the occupation unlawful." "It would be unreasonable to subject a person who has done all that is in his power to comply with the law, to penalties and disabilities merely because the officers charged with certain duties had failed to carry out these duties."

Wife's right
to impound
trespassing stock

The question as to whether a woman can act on behalf of her husband in impounding trespassing stock was dealt with in the case of Mgona v Ndibongo 1937 N.A.C. (C10) 226 in which the Court said "That a woman has the right to impound stocks found trespassing on her husband's land seems to have been accepted in Moussie v Ngogengelale 5 N.A.C. 174. We are of the opinion that the Native Commissioner used therefore in the interpretation he placed upon the word 'occupier' and that the defendant acted within her rights in impounding the cattle."

Owner must be informed of impounding of animals.

In the case of Quoboti v Hobo (1930) N.A.C. (C.S.O) 36. It was laid down that the onus is on the plaintiff to prove that defendant knew when he found the animals trespassing that they were plaintiff's. If the defendant was bona fide in his statement that he did not know the owner of the stock, then he is entitled to impound them, but normally a person finding trespassing stock is expected to make inquiries as to the ownership of the stock. This is in order to prevent the irritation that would naturally be caused by the removal of a man's stock for what might be a very trifling trespass to a distance from his kraal thereby depriving him and his family of ^{its} use for perhaps several days; also in order that he might know as early as possible that his stock had committed trespass and thereby ^{be} afforded an opportunity of paying the amount laid down in the regulations. (Sikati v Sinambu (N.A.C. 4))

Bugiso custom.

The Bugiso custom permits of the grazing of livestock in agricultural lands in communally occupied areas among the South Eastern District of the Cape after the crops have been reaped. In terms of Proc. 29 of 1911 this custom is regulated in that Bugiso can only take place after a date fixed by the headman after a meeting with the trespassers. But in surveyed areas in terms of Proc. 22 of 1913 an action for damages lies for a trespass on an arable allotment in a location held in individual tenure upon quietent conditions by a Native, even if such land be unfenced, and accordingly the Bugiso custom does not apply to such agricultural lands. (Velosi v Qangule 4 N.A.C. 355.)