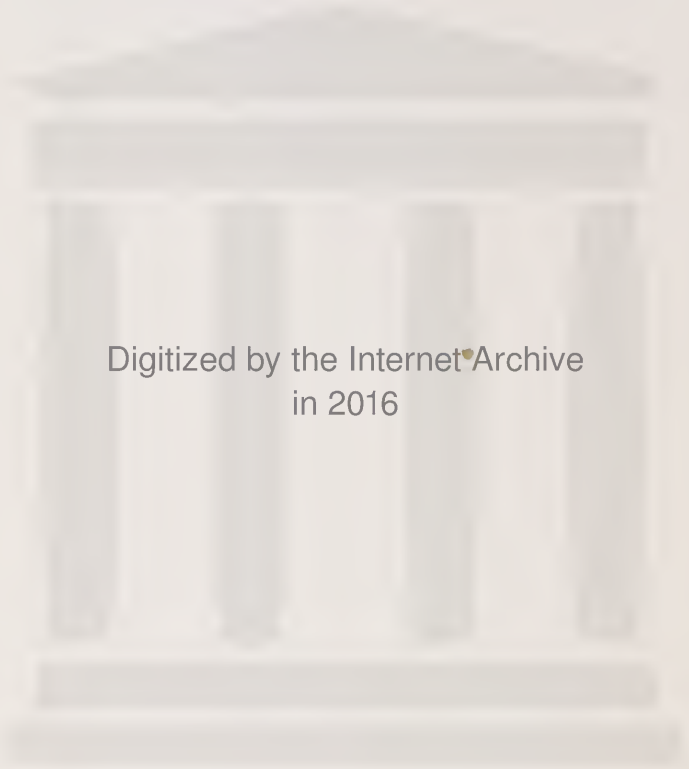

NATIVE APPEAL COURT RECORDS.

A SELECTION OF CASES, 1912-1917.

COMPILED BY

R. MEAKER.

CAPE TOWN:
CAPE TIMES LIMITED.

1919.

INDEX OF CASES.

PAGE

M.

SUBJECT INDEX.

Q.

R.

S.

T.

PAGE

U.

W.

X.

NATIVE APPEAL COURT RECORDS.

Butterworth. 15 July, 1915. W. T. Brownlee, C.M.

Nqayi Klaas vs. Xhelo Ntsangani.

(Willowvale. No. 173/1915.)

Abakweta: (White Boys) Lodge—Provision by Owner for Instruction of Inmates.

Xhelo sued Nqayi for a goat or its value being consideration for his services as "Mbongi" for his boy Mpikwa in connection with the latter's circumcision ceremonies and as agreed upon by defendant.

Magistrate gave judgment for Plaintiff.

Defendant appealed.

Pres.:—In this case this Court is not satisfied that a contract between the parties has been clearly proved, and in putting the matter of custom to the Native Assessors they state that it is the duty of the owner of the "white-boys" lodge to provide four things:—1, A milk sack; 2, roast meat; 3, a hide for a drum; 4, the pay of bard or "imbongi"; and that it is not the custom of the fathers of the individual boys to pay the "imbongi" anything, though they may do so if they wish.

The only evidence for the Plaintiff is that of the Plaintiff himself and that of the Headman Tobingunya, who admits that he was the owner of the "white-boys" lodge, and both these witnesses say that it is not in accordance with custom that the "Mbongi" should be paid by the Chief. This Court cannot accept such evidence.

The appeal is allowed with costs and the judgment is altered to judgment for Defendant with costs.

Umtata. 23 November, 1915. W. T. Brownlee, C.M.

Hantashe and Ndleleni vs. Laliso Dide.

(Libode, No. 124/1915.)

Abduction—Fine—Pondo Custom—Bopa.

Claim 1 beast or £5 damages for abduction.

Judgment was given accordingly.

Defendant appealed.

Pres.:—It is argued in appeal in this case that the Magistrate has committed the irregularity of deciding the case without having heard any evidence. In view of the fact that all allegations of fact contained in the summons are admitted, this Court cannot see what evidence was necessary. It is argued that evidence should have been led on clause four of the summons, but as this clause contains no allegation of fact but an allegation of liability under Native custom it was not, in the opinion of this Court, necessary to hear evidence, and all that was necessary was to apply Native custom, a statement of which was made by the Native Assessors called.

It very often happens that a Native marriage is brought about by means of the abduction of a girl and in fact Native custom regards this as the object for which a girl is abducted. Should the abductor offer marriage and pay dowry the matter is usually amicably arranged. Should he however not offer marriage he is offering an affront to the girl and her family, and this affront must under Pondo custom be remedied or bound up, hence the term "bopa" used.

In this case the abduction is admitted, the kraal head responsibility is admitted and the failure to offer marriage and to pay dowry is admitted. And under the circumstances the Plaintiff is clearly entitled to some *solatium* for the wounded dignity of his daughter and himself.

The appeal is dismissed with costs.

(See *Vodenge* vs. *Xontani*, I.N.A.C. 186).

Umtata. 28 March, 1916. J. B. Moffat, C.M.

Latshwati vs. Maduna.

(Ngqeleni. No. 333/1915.)

Abduction—No Damages where Woman Recovered Intact—Pondo Custom.

The Magistrate found that the Defendant had not abducted the girl for the purpose of marriage or motive of lust but was merely acting as the Agent of Pokolo. He held that the Defendant had committed a tort and gave judgment for one head or £5 damages for abduction and costs.

Pres.:—At the request of the Appellant's attorney the question of whether in a case of abduction where the woman is recovered intact there can be any claim for damages for the abduction the Assessors state:—"That under such circumstances the father or guardian would have no claim for damages against the abductor."

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

Butterworth. 25 March, 1912. A. H. Stanford, C.M.

Gantweni vs. Mimi.

(Kentani. No. 102/1911.)

Adultery—Action by Heir—When Permissible—Litis contestatio

Claim 3 head or £15 damages for adultery.

Plea:—Denial of adultery and marriage.

The Magistrate was not satisfied that the marriage had been proved and gave absolution from the instance with costs.

Plaintiff appealed.

Pres.:—This case, though an action for damages for adultery, is unusual in many of its aspects, the cattle said to have been paid as dowry not having been removed from the husband's kraal, but as the woman's brother Bonyana supports the Appellant and says that although for certain reasons the cattle were not removed there was a marriage, and further, the marriage having been reported to the Headman and a garden allotted for his wife the Court holds that the marriage is proved.

There may be some doubt as to whether the husband had access to his wife during the period he says he was absent, but apart from this there is strong evidence in proof of the adultery, the catch of which is the charge of pregnancy and the husband was entitled to damages for adultery if not for the higher damages allowed when pregnancy results.

Then there arises the question whether an action of this nature on the death of the husband can be prosecuted by his heir.

The Native Assessors on being consulted state that such an action if not commenced by the husband ends with his death, but that they are in doubt in a case where he dies during the progress of the suit.

In the present action, however, it is admitted that Dumezweni, eldest son and heir of Gantweni, was by consent of parties substituted for his father.

Adultery having been proved, the appeal is allowed with costs and judgment in the Magistrate's Court altered to judgment for Plaintiff for two head of cattle or £10 and costs.

Butterworth. July, 1913. A. H. Stanford, C.M.

Madlanya vs. Matshini and Hlangu.

(Willowvale. No. 13/1913.)

Adultery—Collusion—Husband Cannot Recover Damages.

Claim 3 head or £15 damages for adultery and pregnancy.

Defendant pleaded denial.

The Magistrate was not satisfied with the evidence led and gave judgment for Defendant with costs.

Plaintiff appealed.

Pres.:—This is an action for damages for pregnancy, but the evidence shews that during the whole time the adulterous intercourse was taking place the appellant and his wife were occupying the same hut. He has not given evidence himself but his wife says they were not cohabiting as she was nursing a child. The Court cannot believe this and must hold that the child born is that of her husband. The wife further states that her intimacy with the Respondent has extended over a period of seven years, and she also says that her husband knew of it. If this is so there is collusion on his part and he cannot recover damages.

The appeal is dismissed with costs.

Butterworth. 17 November, 1913. A. H. Stanford, C.M.

Dubani Tiki and Tiki Mkangelwa vs. Sofonqo Myilwa.

(Nqamakwe. No. 11/13.)

Adultery—Damages Higher where Married Woman Abducted.

Claim for 4 head of cattle, or £20 for adultery and abduction of Plaintiff's wife.

Plea:—Defendant denied the Plaintiff's claim.

The Magistrate gave judgment as prayed and Defendant appealed.

Pres.:—The question as to whether a beast is payable for the carrying off a married woman, as in the case of the abduction of a girl, having been put to the Native Assessors, they state in the case of a married woman there is no separate liability, but the husband is entitled to heavier damages for the adultery. In the present case, while denying the abduction, the Appellant admits that the Respondent's wife was for some days at his kraal, and that when she came she stated that she had come there to be his wife. He also admits that previous to her marriage with Respondent he had carried her off and seduced her. Her presence at his kraal under these circumstances leads to a strong presumption that adultery has been committed, which he has not rebutted; moreover, he failed to report her presence to her father or the Headman. Under such conditions the amount of damages allowed by the Magistrate is not unreasonable.

The appeal is dismissed with costs.

Flagstaff. 30 August, 1917. J. B. Moffat, C.M.

T. Magudumana vs. P. Sibaca.

(Bizana. No. 57/1917.)

Adultery—Marriage by Christian Rites—Damages—Colonial Law.

Plaintiff sues Defendant for 3 head of cattle or £15 damages for adultery alleged to have been committed by Defendant with

Plaintiff's wife. Plaintiff and his wife were married according to Colonial law. Application was made by Defendant's Attorney for the case to be heard under Colonial law. The application was refused by the Magistrate who decided that the case was to be heard under Native custom and gave judgment for Plaintiff as prayed. On appeal the Defendant's Attorney contended that the parties having been married according to Colonial law, that law should be applied in trying the case. The Appeal Court ruled that Colonial law should have been applied and that the Magistrate was wrong in trying the case under Native law.

Pres.:—The two grounds of appeal are, firstly, that there was a separation at the time of the act of adultery and that there was a reconciliation before action was taken wherefore Plaintiff has suffered no damages, and secondly, that as there is a presumption of collusion which has not been rebutted Plaintiff is not entitled to damages.

The Magistrate has found correctly, in the opinion of this Court, that the separation was only temporary and no collusion has been proved. According to the authorities on the point the Plaintiff is entitled to damages. It is urged on behalf of Defendant that if he is entitled to damages at all they should be only nominal. This Court cannot agree with this contention and considers that the Plaintiff is entitled to damages ordinarily awarded amongst Natives.

The Magistrate's judgment is upheld and the appeal is dismissed with costs.

Butterworth. 25 March, 1912. A. H. Stanford, C.M.

Alfred Benliti vs. Ntame Mgwadleka.

(Tsomo. 112/1912.)

Adultery—Damages—Marriage by Christian Rites—Neglect of Wife.

Claim for £50 damages for adultery. Defendant admitted having lived for the past 5 years with Plaintiff's wife by whom he had had two children, but contended that as plaintiff had married the woman Lydia according to Colonial law at St. Mark's about 12 years ago and had paid no dowry for her he was not entitled to damages. That Plaintiff had ejected the woman Lydia from his kraal about 7 years ago by reason of her adultery with some other man and since that date she had lived with Defendant as his wife. The action was adjudicated upon according to the principles of Colonial law. The Magistrate gave judgment for plaintiff for £10 and costs. Plaintiff appealed on the ground that the amount awarded was insufficient and Defendant Cross-Appealed.

Pres.:—The Appellant (Respondent in the Cross-Appeal) was married to his wife Lydia under Colonial law and not by Native custom. He has not instituted an action for divorce but is claiming damages against the Respondent (Appellant in the cross-appeal) for adultery with his wife Lydia, which

adultery is not denied. The evidence discloses that some six years ago the Appellant on returning home from work after an absence of three years found his wife pregnant by one Oliver. He then and there drove her away and from that time has made no effort until very recently to get her back. The breach therefore between the spouses was caused by the adultery committed by the wife with Oliver—which breach has never been healed. The woman for the past four years has lived openly with the Respondent and has had two children by him, this must have been within the knowledge of the Appellant, but he has taken no action until recently when he went and demanded the return of his wife, but his object clearly appears to have been for the purpose of claiming damages against the adulterer.

Leading Roman-Dutch law authorities lay down the principle that a man who commits adultery with a married woman inflicts an injury on the husband, but the same authorities also state that a man cannot benefit by repeated acts of immorality on the part of his wife, and the trend of decisions in the Higher Courts is to withhold damages even in cases where divorce is asked for and obtained, and especially so in cases where the treatment of the wife by the husband before the adultery has been harsh and cruel. The present action differs greatly from that of *Mlotana* vs. *James Rundwana* (Henkel, page 92). In that case the husband forgave his wife, and his action for damages was more in the nature of a preventive measure against further attempts on his wife's fidelity by the adulterer but in the present case the husband drove away his wife six years ago for her adultery with Oliver, and has never since been reconciled with her.

Under these conditions the Court is of opinion that the Appellant was not entitled to damages. The cross-appeal is allowed with costs, the judgment in the Magistrate's Court being altered to a judgment for Defendant with costs.

The appeal is dismissed with costs.

Kokstad. 4 December, 1912. W. T. Brownlee, A.C.M.

Mapekulu vs. Steti Zeka.

(Matatiele. No. 47/1912.)

Adultery—Damages for—Marriage not Dissolved by Judgment of Court until Dowry Returned.

Claim 3 head or £15 damages for adultery with Plaintiff's wife Nohanisi in December, 1911.

Defendant denied committing adultery while Nohanisi was Plaintiff's wife, but stated he had married her and paid dowry for her to her father Mvulela before he had connection with her. He further admitted that Nohanisi was Plaintiff's wife, but that the marriage had been dissolved. The Magistrate gave judgment for Plaintiff as prayed and Defendant appealed

Pres.:—In this case the claim is one for damages for adultery and the defence is that the marriage between the Plaintiff and the woman Nohanisi has been dissolved and that the Defendant has married Nohanisi, and the point to be decided is whether or not the marriage had been dissolved. Various decided cases have been cited in argument in this appeal and the case of most importance is that of *Ndlanya* vs. *Mahashe* (N.A.C., 112), in which it was held that when a man enters an action for the return of his wife and gets a judgment for the return of his wife or of the dowry, if the woman does not comply with the order to return the marriage is dissolved. And the Court has to decide in the light of this judgment whether or not the judgment given in the case of *Steti* vs. *Mvuleli* heard in this Court in April last can be said to have dissolved the marriage between Plaintiff and Nohanisi. Due emphasis must be given to each word in the decision of *Ndlanya* vs. *Mahashe*, and if the proper significance be given to each part the judgment will be as follows: "for the return of the woman or for the return of dowry." If then the judgment be such that the judgment creditor may recover his wife, or failing the recovery of his wife may recover his cattle, the order is a complete dissolution of the marriage. In the case of *Steti* vs. *Mvuleli*, however, though the application was for the recovery of Plaintiff's wife and alternatively for the return of Plaintiff's dowry cattle, the Defendant resisted the alternative claim and the judgment, which it may be said gave effect to Defendant's own tender, was for the return of Plaintiff's wife to him, and nothing was said in regard to the return of cattle. No period was specified within which the Plaintiff's wife should return to him and under that judgment the Plaintiff could not have sued out a writ of execution to recover his cattle. The effect of that judgment therefore was to keep the marriage standing rather than to dissolve it, and whereas the father of the woman Nohanisi had the opportunity afforded him of dissolving the marriage he opposed the dissolution and secured an order which kept the marriage alive, or to use the Native expression "kept the house standing".

The light in which the woman's father himself regarded the situation is disclosed by his defence in the latter case between Plaintiff and himself, for had the judgment in the former case dissolved the marriage he would at once have pleaded "*lis finita*," but this he did not do and defended the case upon its merits and raised issues which were not raised in the first case. In various cases it has been held in this Court that the two essentials of a Native marriage are the payment of cattle to the father of the bride by the bridegroom, and the delivery of the bride to the bridegroom by the father. The converse holds good that to mark a dissolution of marriage there must be in addition to the return of the woman to her father the return of the dowry or a portion of it to the bridegroom, and in the case of dissolution in a Court the order for return of dowry would be equivalent to the return of it for the order would place the bridegroom in the position to recover it. In the present case there has been no order to return dowry, there

has been no return of dowry, and the Plaintiff's application for the return of dowry was resisted, and the marriage is therefore not dissolved and Nohanisi could not contract a marriage with Defendant and their intercourse was unlawful and the Plaintiff is entitled to succeed.

The appeal is dismissed with costs.

Flagstaff. 29 August, 1912. A. H. Stanford, C.M.

Bob Mbele vs. Mbi Tshobo.

(Bizana. No. 183/1912.)

Adultery—Damages not Claimable where Marriage by Christian Rites and both Spouses Living in Adultery.

Claim for £25 as damages for adultery and pregnancy. It was admitted that marriage was by Christian rites.

Defendant pleaded: 1. That Plaintiff had ill-treated his wife and was twice convicted of assaulting her whereupon she left him.

2. That Plaintiff shortly after the marriage eloped with another woman and has had children by her.

From the evidence it appeared that Plaintiff and his wife became estranged at Tsolo and the woman left her husband and came to Bizana where she had been living for some years with defendant. Plaintiff continued to live in adultery with another woman at Tsolo.

The Magistrate gave judgment for Plaintiff as prayed, and Defendant appealed.

Pres.:—Both parties to this suit are loose livers. Respondent both before and at the time his wife finally left him was living in adultery with a woman named Janet by whom he admits having had two children. Under such circumstances he can have no claim for damages against Appellant for committing adultery with his wife.

The appeal is allowed with costs, the Magistrate's judgment being altered to judgment for Defendant with costs.

Kokstad. 22 August, 1912. A. H. Stanford, C.M.

Mxinwa vs. Tayi.

(Mount Ayliff. No. 36/1912.)

Adultery—Damages not Claimable where Woman Finally Rejects Husband and Marries another Man.

Claim for 3 head of cattle as damages for adultery.

The Magistrate gave judgment for 3 head or £15 and costs.

Defendant appealed.

Pres.:—The evidence shews that some years ago Respondent's wife left him with intention not to return, and later she was given in marriage by her brother to the Appellant. Respondent then sued Appellant and obtained a judgment for three cattle as damages for adultery. Immediately after the judgment the woman left the Court with her second husband and has remained with him ever since.

Later respondent went to the woman's brother and demanded the return of his wife and was tendered a return of the dowry which he refused and after a lapse of over a year brought another action against Appellant for damages for adultery. It is beyond doubt that the woman Mamhleke will never return to the Respondent and that his proper course is to claim the recovery of his dowry. In the Territory of East Griqualand it has been repeatedly held that when a woman leaves her husband finally, the husband's only course is to recover the dowry paid for her. It is obvious in such a case as this that the first husband cannot go on claiming damages for the adultery from the man to whom the woman is now married.

The appeal is allowed with costs, the Magistrate's judgment altered to judgment for Defendant with costs.

Umtata. 31 July, 1912. W. T. Brownlee, A.C.M.

Mvelo Ngovuza vs. Rasini Xelo.

(Umtata. No. 192/1912.)

Adultery—Damages—Plaintiff may Sue for Money only instead of Cattle.

Claim for £25 damages for pregnancy.

Application was made by Defendant's Attorney for judgment to be so worded as to give Defendant the option of discharging his liability by delivering five head of cattle.

Magistrate gave judgment for £25 and costs.

Defendant appealed.

Pres.:—In this case the appeal is on the point of the omission of the Court below to give a judgment allowing the Defendant the alternative of settling this case by payment of cattle and on the point of the refusal of Plaintiff to accept cattle.

The obvious reply to this is that the claim is one for money and that the case all through has been dealt with on the basis of money, and that the judgment is for money and that therefore the Plaintiff is entitled to demand a settlement in money.

It is desired, however, that the case be decided upon the underlying principles as to whether it is competent or not in native cases of this kind, where under Native custom the claim is made for, and settled in cattle, to claim money and for the Court to give judg-

ment in money, and the Court therefore considers it desirable to decide the point upon the principle indicated and not on the highly technical issues disclosed by the verbiology of the summons.

In former times the only currency known among Natives was cattle and so all their business transactions were dealt with on the basis of cattle payments; cattle were paid for dowry and cattle paid also in settlement of cases of adultery or seduction and this was almost the only method in which payment was made, and when Magistrates' Courts were first established in these Territories the practice of claiming settlement in cattle and giving judgment in terms of cattle was continued. By this time, however, a slight modification had crept in together with the acquisition of sheep by Natives and dowries were at times partly paid in sheep; these sheep had, however, generally been obtained by means of barter for cattle and so when sheep were paid it was always arranged that so many sheep should represent one beast and the fiction was kept up of computing in cattle the amount of dowry paid. The next change came when Colonial laws with regard to the collection of revenue by means of stamp duty was introduced into these Territories and when in framing a summons the value of the item claimed had to be stated to enable Court officials to assess the stamp duty to be paid and it then became the practice to place a value upon cattle claimed in dowry and other cases, but this valuation was entirely for revenue purposes and not for the purpose of having it decided that cattle of a stated value should be received, and cattle continued to be the accepted basis of settlement in Native cases and the old Native custom continued thus to be observed. The last and the most significant change came after rinderpest denuded the Native Territories of cattle in 1897 and it was found to operate very harshly upon Natives, because of the paucity of cattle possessed, and because of the greatly enhanced value of the cattle that had survived the plague—to insist upon the settlement of all cases on the basis of a cattle computation. Various circumstances arose. For instance cattle which had been paid as dowry prior to rinderpest were manifestly of very much less value then than cattle after rinderpest. Similarly a man who suffered no greater damages after rinderpest by reason of the offence of adultery with his wife than he should have suffered for the same offence prior to rinderpest would yet get three or four times the value of damages after rinderpest by the receipt of three head of cattle as damages for adultery that he would have got by the payment of the same number of cattle prior to rinderpest and the privilege was thus conceded to Defendants in adultery cases of making settlement in money, and the practice then came in of allowing them to pay the money value which originally had been mentioned in the summons only for revenue purposes.

A time has now arrived when the country is once more visited by plague and cattle are at the present moment of very little value, in some cases not worth more than their hides, and it would be a manifest injustice to insist upon a Plaintiff accepting, as a settlement of a *tort* against him cattle which are of very little value if

of any value at all and as the Courts made a concession in rinderpest times with the view of relieving Defendants from what was recognised as being inequitable and burdensome so now the same principles should be held to be applicable to Plaintiffs and they should not be prevented from claiming settlement on a cash basis, and they should be relieved of the obligation of accepting cattle which might be of no real value whatever.

The appeal is dismissed with costs.

It must, however, be understood that in these remarks this Court is referring only to cases in which the claim is one for damages for seduction or adultery and that the matter of claims in connection with dowry is not dealt with at all, as the two classes of claims stand on an entirely different footing, the former being actions founded on the commission of a *tort* and which in the nature of things must be brought on without delay, while the latter are matters arising out of contracts and may, at any rate under Native custom, be " hung up " indefinitely.

Umtata. 24 July, 1913. A. H. Stanford, C.M.

Bolani Mbali vs. Luhaya Badizo.

(Engcobo. No. 94/1913.)

Adultery Damages—Action and Judgment for either Money or Cattle.

Claim for 3 head of cattle or £15 damages for adultery.

Defendant pleaded a tender of 3 head of cattle prior to issue of summons.

Judgment was given in terms of the tender.

Plaintiff appealed.

Pres.:—The Appellant in his summons sued the Respondent for three head of cattle or their value £15. It must be inferred as he and Respondent are both living in the same location that he knew of the existing conditions as to East Coast Fever, and it is admitted that before summons was issued a tender of cattle which in ordinary circumstances would have been a satisfactory tender was made and rejected.

Under Native custom all claims of this nature are made in cattle and formerly dowry could be paid in stock only, but of late years changes have come about and money is frequently paid but always as so much—usually £5—representing a beast. Had the Appellant sued for £15 only the Court is of opinion that the Magistrate in the existing conditions of East Coast Fever in his district would have been justified in giving a money judgment, but as his judgment is in terms of the summons under which, and by Native custom, the Respondent had the option of paying in cattle, the appeal must be dismissed with costs.

Umtata. 28 November, 1912. A. H. Stanford, C.M.

Mpaipeli Nqwiliso vs. Notshweleka.

(Ngqeleni. No. 315/1912.)

Adultery—Damages—Scale of—Chief.

Claim for 10 head or £50 damages for adultery.
The Magistrate gave judgment for 6 head or £30.
Plaintiff appealed.

Pres.:—In the case of *Maxaka* vs. *Dlezi* in a similar action the Court awarded ten cattle or £50 as damages. The Appellant in the present case is a son of the late Pondo Chief Nqwiliso and a brother of Maxaka's and under Native custom is entitled to damages on a higher scale than the amount allowed, which is such as would be given to minor chiefs of clans.

The appeal is allowed with costs and the Magistrate's judgment altered to judgment for plaintiff in convention for ten cattle or £50 and costs, the remainder of the judgment remaining as at present. If cattle are tendered they are subject to the approval of the Magistrate or any person appointed by him for the purpose.

Umtata. 17 March, 1915. W. Power Leary, A.C.M.

Ntlupeko and Sinqenqana vs. Nqina
and
Nqina vs. Ntlupeko and Sinqenqana.

(Ngqeleni. No. 46/1914.)

Adultery—Damages—Scale of—Pondo Chiefs.

Claim for 18 head of cattle or their value £90 for seduction and pregnancy.

The Magistrate gave judgment for 7 head or £35.

Pres.:—No appearance for Appellants. Appeal dismissed with with costs.

Cross-Appeal:—Judgment: The cross-appeal is on the number of cattle awarded as damages. Plaintiff claims that he is a Chief and entitled to damages on a higher scale than the ordinary Native. The matter having been put to the Pondo Assessors:—

Maxaka states: The damages awarded are insufficient for a man of Plaintiff's rank. Before the Government took over the country a man of his rank would be entitled to 40 and 50 head of cattle; we don't know now what we are entitled to. When a Chief's daughter was made pregnant the relations of the seducer all had to pay. Jiyajiya comes after Mqina.

Neither of these men would reclaim dowry if their wives left them. A daughter is more important than a wife and more would be claimed for her.

In the case of *Jikajika* vs. *Dubulekwele* Plaintiff sued for 9 head of cattle for adultery with his wife and was awarded that number. Jikajika is a younger brother of the present Plaintiff and is said to be a man of importance in the tribe by reason of being a Councillor of the Chief—whereas Plaintiff in this case occupies no official position and the Magistrate in his reasons for judgment says: "He is not a man who would pay a higher dowry for a wife than an ordinary Pondo. The scale of dowry paid would not be determined by the status of the husband but by that of the woman's people and perhaps her personal appearance. The fact that plaintiff would not claim return of dowry if deserted by wife removes him from the scale of ordinary petty Chief."

The cross-appeal is allowed with costs and the judgment of the Court below altered to one for 10 head of cattle or £50 and costs.

The seduction in this case is aggravated by reason of the Defendant not returning the girl to her father with the usual *bopa* fee when they found they were not in a position to marry her, *i.e.*, pay dowry for her.

Butterworth. 19 July, 1916. J. B. Moffat, C.M

Ntsilana vs. Mgcina Nopenya.

(Willowvale. No. 62/1916.)

Adultery—Damages—Scale of—Willowvale District.

Claim for 3 head of cattle for adultery.

The Magistrate gave judgment for 1 head of cattle or £5.

Plaintiff appealed.

Pres.:—It is clear that in the Willowvale District it has been the established custom for many years to award damages for one head of cattle for adultery without pregnancy. In one case from that district which came before this Court a judgment for three head was upheld. In that case, however, there had been previous adultery and this Court while stating that the usual award in the Willowvale Court was one head it considered that under the special circumstances of the case three head should be awarded In the case of *Sobaliso* vs. *Fanca* heard in this Court on 1st March, 1910, a similar question was raised in regard to an award for adultery in Fingoland Districts. The Court then stated that no special reasons had been advanced for a departure in that case from the well-established custom, and that so far as the Court was aware no movement had been made by the Fingo tribe generally in favour of increased damages being awarded.

The position in this case is the same. The Gcaleka's in the Willowvale District have not, as far as this Court is aware, made any representations on the subject.

The appeal is therefore dismissed with costs.

Umtata. 24 July, 1912. W. T. Brownlee, A.C.M.

Cxoyi vs. Mdeka.

(Elliotdale. No. 46/1912.)

Adultery—Damages where Woman away for four years and Plaintiff attempted to get her back repeatedly.

Claim by Plaintiff for 5 head of cattle or £25 damages for adultery and pregnancy.

The Magistrate gave judgment for 3 head of cattle or £15.

Defendant appealed and Plaintiff cross-appealed.

Pres.:—This Court sees no reason to interfere with the decision of the Court below in so far as the Defendant's appeal is concerned. The Magistrate had found on the evidence that Defendant had caused the pregnancy of Plaintiff's wife and there is ample evidence to support this finding. The cross-appeal is brought by the Plaintiff on the point of the amount of damages awarded him and the Magistrate in the Court below has apparently decided not to allow the full amount usually awarded in cases of this kind because the Plaintiff allowed his wife to remain away from his care for four years.

This Court is however of opinion that in this respect the Magistrate has erred. It is clear from the evidence that the woman is hostile to her husband the Plaintiff and it is further clear from the evidence of both Plaintiff and his witness Nkonzo that Plaintiff repeatedly endeavoured to get her to return to him and that she refused to do so. And under all the circumstances this Court is of opinion that he should have received full damages.

The appeal is dismissed with costs and the cross-appeal is allowed with costs and the judgment of the Court below is altered to judgment for Plaintiff for five head of cattle or £25 and costs of suit.

Umtata. 27 November, 1912. W. T. Brownlee, A.C.M.

Mdindwa Makomo vs. Mgcese Hetshani.

(Libode. No. 159/1912.)

Adultery—Handing Beast to Headman tantamount to Admission —Pondo Custom.

Claim for 5 head or £25 damages for adultery and pregnancy.

Defendant denied plaintiff's claim.

The Magistrate gave absolution from the instance with costs.

Plaintiff appealed.

Pres.:—In this case this Court is of opinion that the handing of the beast to the headman is tantamount to an admission by the

Defendant of improper intimacy with Plaintiff's wife and the Plaintiff is therefore entitled to succeed in his action. The Native Assessors moreover state that it is not in accordance with Pondo custom for the deposit of a beast to be made, pending the birth of the child, in the case of a married woman.

The appeal is allowed with costs and the judgment of the Court below altered to judgment for Plaintiff for three head of cattle and costs of suit. If the animal paid to the headman is still in his possession this animal to count as one. In view of the fact that the Plaintiff has been living with the woman this Court is of opinion that he is not entitled to receive more than ordinary damages for adultery.

Umtata. 3 August, 1912. W. T. Brownlee, A.C.M.

Mandyimba vs. Ntshclo.

(Ngqeleni. No. 77/1912.)

Adultery and Pregnancy—Damages—Amount Claimable for—And further Act of Adultery before Action Instituted.

Claim for 8 head of cattle or £40 by reason of the following:—

1. That in reaping season 1911 Defendant committed adultery and caused the pregnancy of Plaintiff's wife and thereby Plaintiff suffered damages to the extent of five head of cattle or £25.
2. That in January, 1912, Defendant again committed adultery with Plaintiff's wife in which he suffered damage to the further extent of three head or £15.

Magistrate gave judgment for 5 head of cattle or £25.

Defendant appealed and Plaintiff cross-appealed.

Pres.:—The appeal here is against the decision of the Magistrate on the question of the marriage between Plaintiff and the woman Manjwayela and this Court sees no reason for interfering with the decision of the Court below on this point.

Jwayela says there was no marriage but that the payment made by Plaintiff was by way of fine and not as dowry. He further says that the woman was thrice got with child, once by Plaintiff, once by a Libode man and once by Defendant, that Plaintiff paid a fine and that he demanded a fine from the Libode man, who ran away, but he made no demand on defendant. This is significant and the fact that Plaintiff only of three men who were intimate with the woman paid for her indicates marriage.

Manjwayela says that no fine was demanded from Plaintiff but that he voluntarily paid a beast as fine. This voluntary payment savours more of dowry than of fine. Plaintiff got a field for Manjwayela and paid hut tax for her, this seems to point to marriage.

The cross-appeal is on the point of the amount of damages awarded and Plaintiff argues that he is entitled to separate

damages for affiliation and separate for the subsequent catch. It does not appear however that at the time when he made the catch he had already instituted any claim for damages for affiliation and this Court is of opinion that under the circumstances the Magistrate in the Court below was right in regarding the whole charge as one.

The appeal and the cross-appeal are each dismissed with costs.

Umtata. 30 July, 1914. W. T. Brownlee, A.C.M.

Bubu Mlungwana vs. Bokileni Tonyela.

(Elliotdale. No. 86/1913.)

Adultery—Damages for Affiliation is not Allowed where Husband had Access to Wife.

Claim for 5 head of cattle or £25 as damages for adultery and pregnancy.

The Magistrate gave judgment as prayed.

Defendant appealed.

Pres.:—The Magistrate in the Court below does not seem to have given sufficient consideration to the fact the Plaintiff himself had access to his wife Nolayiti during the whole of the time during which the Defendant is said to have carried on improper relations with her, and seems to have been influenced to a great extent by the circumstances alleged by Plaintiff and his wife that because of her indisposition he did not have intercourse with her.

This Court is, however, of opinion that if Plaintiff's wife was so ill as not to be able to permit his marital rights, the same reason would prevent her admitting the unlawful overtures of the Defendant, and in putting the matter to the Native Assessors, they state that in accordance with Native custom the advances are usually made by the husband, and the wife would not ordinarily refuse them. If her suckling child were ill she might on this account refuse and even in the case of a weaned child, if small and grievously ill, she might refuse, but in the case of a full grown child—such as the "child" in the present instance is shown to be —the child's illness would not be a reason for the woman to refuse her husband his marital rights. They say also that even indisposition on the part of the woman does not prevent the husband from seeking his marital rights, and if she were to refuse them and at the same time cohabit with another man it might be regarded as a repudiation of her husband. Further they state that where a case of affiliation is brought before the Native Courts and it is shewn that the husband had access to his wife during the time of alleged adultery the Courts would not grant him damages unless he proved satisfactorily that he had not had intercourse with his wife. This Court is aware that a married Native man is not sup-

posed to cohabit with his wife during the period she is suckling her child, but this custom is not suggested here, and the view of the Native Assessors before it and in view of the fact that Plaintiff had access to his wife this Court is of opinion that it is more than probable that the child is plaintiff's own and that he should not succeed in this action.

The appeal is allowed with costs and the judgment in the Magistrate's Court is altered to judgment for Defendant with costs.

Umtata. 27 November, 1915. W. Power Leary, A.C.M.

Mbonjane Koyo vs. Mhlakaza Sokapase.

(Engcobo. No. 320/1915.)

1. *Adultery and Pregnancy—Proof of Pregnancy Fails—Damages Awarded for Adultery.*
2. *Practice—Damages can be Awarded for Adultery on Action for Pregnancy.*
3. *Child—Presumption that Husband is Father—Access to Wife.*

The facts are fully set forth in the Appeal Court's judgment.

Pres.:—In this case Plaintiff sues Defendant for 5 head of cattle or their value £25 damages for adultery and pregnancy. Defendant denied the adultery and pregnancy. The Court found the adultery proved, but as the Plaintiff had access to his wife declined to hold Defendant responsible for the pregnancy.

The reasons for judgment are very meagre and do not assist this Court to any extent, the presiding Magistrate should have gone more fully into the matter and stated why in the face of the evidence this conclusion was arrived at. The probabilities of the case are against the finding of the trial Court. It is well known that after the death of a child for a certain period natives do not cohabit with their wives nor do they during lactation. The Plaintiff in his evidence states that he went to work in German South West Africa, that his wife was suckling a child and five days before he left the child died and that he had no connection with his wife, and on his return two weeks before this action was brought he found his wife pregnant.

The woman in her evidence says Defendant caused her pregnancy and corroborates her husband in regard to the death of the child which was still sucking and that her husband had not cohabited with her. At the hearing of the case she stated she was five months pregnant. Further evidence was led to prove the adultery which the Magistrate believed.

One of the witnesses for the defence says the Plaintiff left six weeks after the death of the child, and says: "I knew that child, it was able to walk." In cross-examination she says the child had been weaned for six weeks.

The certificate referred to in Plaintiff's evidence has not been put in, this might have been of service in assisting this Court to arrive at a conclusion.

The probabilities in this case are against the Magistrate's finding. Cohabitation during lactation and shortly after the death of a child is foreign to Native custom. The presumption in law is however in his favour. The husband if he had access to his wife is presumed to be the father of the child; this has to be rebutted by strong evidence.

The case being put to the Native Assessors they state: "If a man is charged with adultery causing pregnancy he cannot, if absolved from the pregnancy, be found liable for adultery. If in an action based on the pregnancy of a wife the pregnancy is not proved the Defendant cannot be made liable for adultery."

This Court is of opinion that the adultery has been proved and that the Defendant is therefore liable, and following Native custom as laid down in Maclean's Compendium, Warner and Brownlee's Notes on Adultery from which it is clear there is no fixed rate of damages for this offence, each case being decided on the merits.

The Magistrate's finding for Plaintiff for 3 head of cattle or £15 and costs, will not be disturbed. (See *Dikileni Tonyela* vs. *Gubu Mlungwana*.)

The appeal is dismissed with costs.

Umtata. 24 November, 1916. C. J. Warner, A.C.M.

Faltenjwa Ngesi vs. Sipaji Ntula.

(Engcobo. No. 293/1916.)

1. Adultery—Damages Awarded Where Claimed for Pregnancy.
2. Practice—In Action for Pregnancy Damages Awarded for Adultery.

The facts of the case are fully set forth in the President's judgment.

Pres.:—Plaintiff sued Defendant for 5 head of cattle or £25 damages for adultery and pregnancy.

At an early stage of Plaintiff's case the claim for pregnancy was withdrawn or abandoned; and Plaintiff, through his Attorney, elected to proceed with the claim for damages for adultery alone.

The appeal is brought on two grounds:—

First:—That the judgment is against the weight of evidence, and

Secondly:—That Defendant having been absolved from pregnancy cannot under Native law and custom be held liable for the adultery.

As regards the first ground there is sufficient legal evidence to support the Magistrate's finding and the Court sees no reason to disturb the judgment on this ground. In respect of the second ground of appeal the circumstances of this case are very similar to the case of *Mbonjane Koyo* vs. *Mhlakaza Sokapase*—appeal from the Resident Magistrate of Engcobo, and heard in this Court on the 27th November, 1915—with this difference: that in the case referred to the claim for pregnancy was pressed to the end of Plaintiff's case, while in the present case the claim for pregnancy was abandoned at an early stage and the case proceeded with as an ordinary claim for damages for adultery.

The Native Assessors in this case, as in the case of *Koyo* vs. *Sokapase*, state that damages for adultery cannot be granted in a claim for causing pregnancy of Plaintiff's wife. This Court, however, in the latter case overruled this opinion, and dismissed the appeal, holding that the adultery had been proved and that Defendant was liable.

This Court is not prepared to depart from this ruling especially in view of the fact that the claim for pregnancy was withdrawn early in the Plaintiff's case and only the claim for damages for adultery remained to be adjudicated upon.

The appeal is dismissed with costs.

Umtata. 29 March, 1916. J. B. Moffat, C.M.

Matikialne and Another vs. Mtefo.

(Port St. Johns. 11/1915.)

Adultery—Damages may be Awarded for Adultery when Action Instituted for Adultery with Pregnancy.

Claim 5 head or £25 damages for pregnancy.

Judgment: 3 head or £15 damages for adultery.

Pres.:—At the request of the Appellants' Attorney the question of whether in a case for damages for pregnancy Native law and custom allows a judgment for damages for adultery where adultery is proved but pregnancy is not, was put to the Pondo Assessors who state:—

> "If a man has sued for pregnancy and there is no proof of pregnancy we say to him as you have not proved pregnancy your case is done. If you have a claim for adultery you must bring another case with evidence of adultery."

In regard to the first point raised in argument, viz.: that the evidence is not sufficient to justify the Magistrate's judgment in awarding damages for adultery the Magistrate was satisfied from the evidence that adultery was proved. The Plaintiff's claim for damages for pregnancy failed completely on production of the

passport showing that the Defendant was employed at Johannesburg from the 29th of June, 1914, to the 4th of February, 1915, and could not be the father of a child born about May or June, 1915.

Three witnesses for the Plaintiff state that they found the Defendant and the Plaintiff's wife lying under one blanket and that the Defendant admitted the adultery before the Chief Ndevu to whom he was taken. Defendant and Plaintiff's wife both deny adultery and deny that Defendant was brought before Chief Ndevu.

Ndevu, who was called by the Court, states that the parties were brought before him and that the Defendant admitted the adultery.

The evidence of Defendant and the Plaintiff's wife cannot be accepted and the Court is satisfied that the Magistrate was justified in finding that the Defendant committed adultery with the Plaintiff's wife.

On the second point raised, viz.: of giving judgment for adultery on a claim for pregnancy according to the Assessors, the claim for damages for pregnancy would be dismissed and the Plaintiff would be entitled to bring a fresh action for adultery. In this case the Court is satisfied that adultery has been proved. To follow the Native custom as stated by the Assessors would only involve additional expense in bringing a second action to deal with a point that has been sufficiently proved in this case.

The appeal is dismissed with costs.

Flagstaff. 15 April, 1912. W. T. Brownlee, A.C.M.

Comfi vs. Mdenduluka.

(Bizana. No. 48/1912.)

Adultery—Continuous Acts—Native Custom.

Claim 3 head or £15 damages for adultery with Plaintiff's wife, one Macagi.

Plea:—Defendant admitted that judgment was given against him at the Court, and stated further that he (Defendant) entered into a *bona fide* marriage with the said Macagi—that the said Macagi before the hearing of the last case notified her unwillingness to return to Plaintiff, that as Plaintiff had already been awarded damages he has no further claim, and Defendant prayed that Plaintiff's summons be dismissed with costs. The Magistrate's reasons: In June last Plaintiff sued Defendant and got judgment for 2 head or £9. Since that judgment the woman has continued to live with Defendant who paid dowry to her people, and the present case was brought as a subsequent act of adultery. It was obvious from the first that the woman had no intention of returning to Plaintiff and has lived with Defendant ever since. Plaintiff's only remedy was one for the restoration of his dowry. Judgment was entered for Defendant with costs.

Plaintiff appealed.

Pres.:—In the opinion of this Court the Magistrate in the Court below has erred in his decision and this Court cannot concur in the view that this has been a continuous cohabitation and that the Plaintiff therefore has no claim to further damages. One of the objects in awarding damages to an injured husband is to deter the adulterer from further acts of adultery and in this case, whereas in the first instance it may have been said that the Defendant was not aware that the woman was a married woman and that on that account exemplary damages should not be given against him, yet in the present instance his acts have been committed with a full knowledge of the young woman's status, and in the opinion of this Court the Plaintiff is entitled to the highest amount of damages that custom will permit, and that an injured husband may institute a separate action for subsequent acts of adultery was laid down in the case of *Mondli* vs. *Buza* (Henkel, page 160), and also in a case heard recently before this Court at Umtata. In the latter case two separate claims were brought in one summons for two separate acts of adultery and the point at issue having been laid before the Native Assessors they stated that under Native custom where a man has been caught in adultery and a definite charge laid against him and a fine demanded and he thereafter commits another act of adultery a separate claim may be made upon him for damages even though he has not paid for the first.

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

Flagstaff. 29 August, 1912. A. H. Stanford, C.M.

Comfi vs. Mdenduluka.

(Bizana. No. 216/1912.)

Adultery—Repeated Acts—Damages where Wife Refuses to Return —Dissolution.

The Plaintiff claimed 10 head or £50 damages for adultery and pregnancy.

The Magistrate gave judgment for the Defendant with costs.

Pres.:—On the 23rd June, 1911, the Appellant got judgment against the Respondent for two head of cattle as damages for adultery. On the 2nd February, 1912, he again obtained judgment for five cattle as damages for adultery. On the 1st July Appellant entered another action—the one now before the Court —against Respondent, claiming damages for adultery with the same woman.

The evidence in these cases shows that the woman Macagi left her husband with the full determination not to return to him, has never done so, but has continued to live with the Respondent,

who also paid dowry for her, and it is clear that she never will return to him, notwithstanding the judgments which have been given against the Respondent, and it would be contrary to public morality and good policy to allow the Appellant to make his wife's continued immorality merely a cause for gain. Moreover, he has the remedy under Native custom of claiming the return of the dowry he paid, which is the course he should have pursued. The case of *Mondli* vs. *Buza* is distinguishable from the present action. In that case the woman was living with her husband at the time the acts of adultery were committed, and had no intention of leaving him.

The appeal is dismissed with costs.

Kokstad. 28 August, 1916. J. B. Moffat, C.M.

Sofoniah vs. Ketshane.

(Qumbu. No. 194/1916.)

Adultery—Refusal by Wife or her Father to Disclose Name of Adulterer.

Plaintiff sued defendant for £25 damages for pregnancy of his wife, Nomakutshana, by reason of the following facts:—

1. Plaintiff went to work at Johannesburg and his wife returned to her father's (Defendant's) kraal, and whilst there became pregnant.

2. That defendant and Nomakutshana refused to disclose the name of the Adulterer. Defendant, before pleading, took exception on the ground that Plaintiff's summons disclosed no cause of action either under Colonial law or Native custom. The Magistrate overruled the exception, and Defendant appealed.

Pres.:—Exception was taken in the Court below that the summons does not disclose any cause of action either under Colonial law or Native custom.

In the case of *Mhlangaba* vs. *Dyalveni* (p. 139, Henkel II.) it was held that no such action as this case alleges lies under Native law and custom.

The exception was wrongly overruled. The appeal is allowed with costs and the Magistrate's judgment will be altered to exception allowed and summons dismissed with costs.

Umtata. 24 November, 1916. C. J. Warner, A.C.M.

Mangaliso Qwesha vs. Maqinga Mqanjelwa.

(St. Marks. No. 141/1916.)

Adultery—Refusal to Disclose Adulterer's Name.

Pres.:—Respondent (Plaintiff in the Court below) sued Appellant (Defendant) for five head of cattle or £25, the amount of damages usually allowed in Native adultery cases—by reason

of Appellant and his daughter, Respondent's alleged wife, refusing to disclose the name of the man by whom she was pregnant.

Exception was taken that the summons disclosed no cause of action. The Magistrate in the Court below, relying on the case of *Ndabeni* vs. *Mangoza* (Henkel II., page 48), overruled the exception, and it is against this overruling that the appeal is brought.

In the case quoted the Native Assessors stated that the injured husband may, when he has released the woman, demand the damages usually paid for adultery and pregnancy from the father of the woman. But in the later case of *Mahlungulu* v. *Dyalvani* (II., Henkel, page 139), where the principle at issue was the same, the President of the Court ruled that no such action lies under Native law and custom. This Court concurs in this ruling.

The appeal is allowed with costs, and the ruling in the Court below altered to exception allowed and the summons dismissed with costs.

Kokstad. 24 August, 1914. W. Power Leary, A.C.M.

Dick Nyengane vs. Nodange.

(Matatiele. No. 337/1913.)

Adultery—Refusal to Disclose Adulterer's Name—Woman under Teleka—Dissolution.

Claim:—(1) For dissolution of marriage or return of dowry of 10 head paid as dowry and restoration of certain female child. (2) Three head of cattle as and for damages for adultery (and delivery of the child born) for failing to disclose the name of the Adulterer.

Defendant admitted first claim but denied that there was any refusal to disclose the cause of the woman's pregnancy, and pleaded that Plaintiff was himself the cause of her pregnancy. The Magistrate found that the woman had become pregnant at Defendant's kraal and that he (Defendant) had failed to report her pregnancy. The Magistrate gave judgment for Plaintiff for 11 head of cattle, two being deducted for the two children born.

Defendant appealed.

Pres.:—In this case Plaintiff sues for the dissolution of the marriage existing between him and one Nowaiti, daughter of Defendant; delivery of a certain female child, the issue of such marriage; the return of 10 head of cattle, being dowry paid by the said Plaintiff to the said Defendant; and payment of 3 head of cattle as and for damages for adultery and delivery of the child born of such adultery. Judgment was entered for Plaintiff as prayed with costs of suit, excepting that dowry cattle to be returned will be 8 head instead of 10, 2 being deducted for children born. From the evidence it would appear the woman was

telekaed three years ago and remained at her father's kraal. She was not whilst there visited by her husband, as is usual in such cases, who contented himself by sending messengers. Eventually he sued for the return, and Defendant pleaded that he had telekaed her for payment of further dowry, which plea was upheld by the Court. Thereafter Plaintiff tendered a further beast as dowry, which beast was refused, but subsequently accepted upon summons being issued for the return of the said Nowaiti, who was thereafter returned to Plaintiff, and upon her return she was discovered to be pregnant. That upon application to the said Nowaiti and the said Defendant to disclose the name of the Adulterer they refused. This is denied by Defendant and his daughter, who alleges Plaintiff is the father of the child. The appeal is on the judgment for 3 head of cattle for adultery, and the Magistrate relies on the cases quoted in his reasons for judgment (*Dledle* vs. *Nongabada*, Henkel, 1910-1911, page 23; and *Ndabeni* vs. *Mangunza*, Henkel, 1910-1911, page 48). Henkel I., page 112, *Ndlanya* vs. *Mhashe*, deals with cases of this kind. In this case the question to be considered is, did the woman return to her husband? There appears to have been no intention on the part of the husband to have his wife back, he failed to pay teleka beast until he discovered the non-payment barred him from recovering his dowry, he then paid the beast, and when his wife was returned sent her away in consequence of her pregnancy. See President's remarks in case *Mhlangaba* vs. *Dyalvani* (Henkel II., page 139).

The case having been put to the Native Assessors (Mcisana, Bumbulwana, Ntebe and Lukuni), they state:—

1. Where a girl is telekaed and becomes pregnant whilst at her father's kraal, if she does not disclose the name of the Adulterer the father is liable.

2. There is no action for damages for adultery against the father if restoration of the dowry is demanded and dissolution of the marriage claimed.

The appeal is allowed with costs and the Magistrate's judgment altered to one for plaintiff for 8 head of cattle and the two children and costs.

Flagstaff. 10 December, 1917. J. B. Moffat, C.M.

Magilwana vs. Mazinyase.

(Bizana. No. 183/1917.)

Adultery—Refusing to Disclose Name of Adulterer—Father not Liable for.

Pres.:—The Native Assessors are asked whether, under Pondo custom, in case a woman and her father refuse to disclose to the woman's husband the name of the person who has committed adultery with the woman while at her father's kraal, the father is liable to the husband for damages.

The Assessors reply that the father is not responsible.

This is in agreement with a previous decision of the Native Appeal Court, referring to cases of Natives generally, and supports the Magistrate's judgment.

The appeal is dismissed with costs.

Kokstad. 13 May, 1913. W. T. Brownlee, A.C.M.

Tsoanyane and Sikayi vs. Motsamai.

(Matatiele. No. 41/1912.)

Adultery—Separate Acts of—Fine for.

Claim for 6 head of cattle or £30 damages for adultery.

The Magistrate gave judgment as prayed.

Defendants appealed.

Pres.:—The only point seriously urged in this appeal is that of the number of cattle allowed the Plaintiff. The point, however, of the amount of damages to be allowed for successive acts of adultery has been decided in the case of *Mondli* vs. *Buza* (I.N.A.C., 160), and the custom as laid down by Native experts is this:—Should a husband make a catch and institute proceedings and then, after such proceedings have been taken, again catch the adulterer with his wife, he may make separate claims. If, however, upon the occasion of the first catch he took no action and raised proceedings only after the subsequent catch, he is allowed to make only one claim.

The Magistrate in the Court below has found upon the evidence that the plaintiff in this case took action immediately after the first act of adultery complained of, and in the opinion of this Court he has rightly allowed the larger amount of damages.

The appeal is dismissed with costs.

Flagstaff. 30 April, 1913. W. T. Brownlee, A.C.M.

Mankonyane vs. Magulana.

(Bizana. No. 428/1912.)

Adultery—Woman Cannot Re-marry till Previous Marriage Annulled—Liability for Damages—Neglect.

Claim for 5 head or £25 damages for adultery and pregnancy of Masengela.

The Magistrate dismissed the summons on the following grounds:—

1. Plaintiff married Masengela about 1889 or 1890.

2. That after that Masengela was "telekaed" and that for nine years she remained at her guardian's kraal.

That she married defendant, who paid 3 head of cattle as dowry, prior to 1904, and has lived with him ever since. Plaintiff knew of this but did not bring his action for nine or ten years. Plaintiff paid 4 head of cattle during rinderpest, but the Magistrate held that they were paid not as "teleka" but to release his child.

Plaintiff appealed.

Pres.:—In this case the respondent does not strenuously oppose the appeal being allowed, but confines his argument to the point of extenuation of damages.

In the opinion of this Court the Magistrate in the Court below has erred in not awarding damages. It is quite clear that a woman may not remarry while a previous marriage is in existence, and in this case the evidence shows that the marriage between Plaintiff and the woman Masengela was never annulled, and Plaintiff is therefore entitled to damages.

It is further clear, however, that after Plaintiff paid further cattle for her at the time of rinderpest, he took no further action to ensure her return to him, and in view of this neglect, in the opinion of this Court, he is not entitled to heavy damages, and only light damages will be awarded.

The appeal is allowed with costs, and the judgment of the Court below altered to judgment for Plaintiff for 3 head of cattle or their value, £15, and costs of suit.

Flagstaff. 22 August, 1916. J. B. Moffat, C.M.

Tsibiyana vs. Nyangeni.

(Lusikisiki. No. 168/1916.)

Allotment of Daughter to Minor Sons—Father's Rights.

Claim for 3 head of cattle or £15, being cattle paid as dowry for one Nomagini.

Plaintiff stated that he was the youngest son of the late Xoki and Defendant was the eldest and heir to the late Xoki.

That the late Xoki allotted to him (Plaintiff) the said Nomagini and that he was entitled to any dowry paid for her and could sue for it. Defendant pleaded that such an allotment would be contrary to custom, and also denied that any such allotment had been made.

The Magistrate found for Plaintiff, and Defendant appealed.

Pres.:—The facts of the case were put to the Pondo Assessors, who reply as follows:—

"The father, being the parent of the family, can do anything he likes with his daughters, and can allot them to any sons he chooses. All daughters except the eldest can be allotted by the father to any of his sons that he chooses."

The allotment of the youngest daughter to the youngest son as claimed in this case being in accordance with Pondo custom as stated by the Assessors, the Magistrate was right in giving judgment for the Plaintiff.

The appeal is dismissed with costs.

Butterworth. 1916. J. B. Moffat, C.M.

Xego Mlola vs. Maqabuka.

(Idutywa. No. 339/1915.)

I. Appeal—To be Noted within Prescribed Period.

Pres.:– Judgment was given in this case on 21st December, 1915, and appeal lodged on 5th January, 1916.

Objection was taken to the hearing of the appeal on the ground that notice of appeal was not filed within the prescribed period.

The objection was allowed with costs.

[Note.—In cases of this nature the usual practice is by petition for leave to appeal.]

Butterworth. 10 August, 1915. W. T. Brownlee, C.M.

Ndunduzana Sivanjana vs. Matanjana Sivanjana.

(Nqamakwe. No. 182/1914.)

Apportionment of Property—Removal of Great House—"Qadi."

The Appeal Court judgment sets out the facts in this case.

Pres.:—The parties to this suit are the sons of the late Sivanjana. The Plaintiff is the second son of the Great House, and the Defendant is the son and heir of the "Qadi" of the Great House, and Plaintiff sues on behalf of a minor named Mate, the heir of the late Bidi, or Billy, the eldest son and heir of the Great House, in connection with certain property, which he says belongs to the estate of the Great House of the late Sivanjana and is thus the inheritance of Mate. The defence is that the property belongs to the estate of the "Qadi" House.

It appears that prior to 1897 both wives of the late Sivanjana occupied one kraal in the Nqamakwe District, and that soon after 1897 Bidi, the son of the Great House, removed to Tina with his mother and the stock of the Great House, and there established a kraal, at which his mother lived till the time of her death. Sivanjana meanwhile lived at the old kraal, which used to be the great kraal, with his "Qadi" wife, and died there, and that before his death the hut of the Great Wife was allowed to fall.

After the departure of Bidi, Sivanjana acquired certain property, and it is this property that is now in dispute, and the defence set up is that seeing that Sivanjana has acquired this property while living with the "Qadi" wife and after the Great House had moved and established itself a kraal elsewhere, the property must appertain to the "Qadi" House.

The matter has been put to the Native Assessors, and they all agree that a Native polygamist has the power, even after his kraals have separated and even should he be living with a "Qadi" wife, to apportion property acquired after such separation in such manner as he may deem fit, and they further agree that each House should have its own ear mark. There is, however, a difference of opinion as to what would occur should such property not be specially assigned and earmarked, two of the Assessors holding that it would in that case be the inheritance of the House in which the man was living and where it was acquired, and the other two holding that no matter where the man lived such unassigned property is the inheritance of the Great House, one of the Assessors going further and saying that the body itself of the father is the inheritance of the son of the Great House.

In the opinion of this Court the statement of the latter two Assessors is the right one.

The evidence, however, goes to show that the property acquired bears the carmark of the Great House, and in the opinion of this Court the finding of the trial Court, that it is the property of the Great House, cannot be disturbed.

The appeal is dismissed with costs.

Kokstad. 26 August, 1915. W. T. Brownlee, A.C.M.

John Magadla vs. Robert Magadla.

(Qumbu. No. 105/1915.)

Apportionment to Son—Cannot be Enforced—Revocation by Father.

The facts of case are set out in the judgment of the Appeal Court:—

Pres.:—The facts of this case are these:—The Defendant apportioned to the Plaintiff, who is the second son of the Great House, a certain cow, being dowry paid for a daughter of the Right Hand House, and there has been a quarrel between the parties, and Plaintiff wishes to compel the Defendant to deliver the cattle which the Defendant had apportioned to him. The Defendant refuses to deliver and says he has revoked the gift.

This Court, while not wishing to offer any opinion as to the powers of a father to revoke an apportionment of this particular nature, is yet of opinion that the plaintiff is not entitled to enforce at law a claim such as that which he has raised. The father, in making an apportionment of this nature, had no intention of divesting himself of the dominium in the cow in question, but merely intended to create an estate for his son, which the son would inherit upon the father's death, and it often happens that a father does finally hand over such apportioned cattle during his own lifetime. Still he cannot be compelled to

do so. This principle was laid down in the case of *Paliso* vs. *Matanga Nojoko* (not reported—tried in the Court of the Resident Magistrate of Qumbu), and decided upon appeal by the Chief Magistrate of East Griqualand, before the establishment of the Native Appeal Court.

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

Butterworth. 21 November, 1917. J. B. Moffat, C.M.

T. Mabusela vs. Mbangela.

(Tsomo. No. 133/1917.)

Assault—Conviction—Damages.

Plaintiff claimed £25 damages for assault.

The Defendant pleaded that Plaintiff was the aggressor and that therefore he was not liable, although convicted of the assault.

The Magistrate found that the plaintiff was the aggressor, and gave judgment for the Defendant with costs.

Plaintiff appealed.

Pres.:—This is a claim for damages for injuries caused to Plaintiff by Defendant in the course of a fight, which the evidence shows was begun by the Plaintiff. Defendant was prosecuted in the Magistrate's Court for assault and was convicted by the Magistrate, who, in giving his reasons in this case, points out that the evidence given in this case is fuller than that given in the criminal case.

The appeal is brought on the ground that the Defendant, having been convicted of assault, is liable for damages. This does not necessarily follow. However, in this case the Plaintiff was the aggressor and cannot now come forward and claim damages for injuries suffered as a consequence of his own action in beginning the fight.

The appeal is dismissed with costs.

Umtata. 26 July, 1912. W. T. Brownlee, A.C.M.

Selina Tyesi vs. Sipango Nameka.

(Engcobo. No. 190/1912.)

Assault—Damages—Amount of.

Claim of £100 damages for assault, in which Plaintiff's leg was broken.

Judgment was for £15 and costs.

Defendant appealed.

Pres.:—Appeal dismissed.

The Court was of opinion that the damages awarded were by no means heavy.

Umtata. 2 March, 1914. W. T. Brownlee, A.C.M.

Zanghuza vs. Monelo, Gwede and Cetywayo.

(Engcobo. No. 480/1913.)

Assault—Damages—Award in Criminal Case—No Bar to Civil Action.

Claim for £100 damages for assault.

Defendants denied Plaintiff's claim and pleaded that if they did strike Plaintiff (which Gwede and Cetywayo deny) that they did so under provocation and self-defence; that on the 17th December, 1913, they were convicted in this Court (Magistrate's Court, Engcobo) and each fined £7 10s. for the alleged assault, which fines were paid, and £2 10s. was awarded out of such fines to Plaintiff as compensation, and such compensation was ample for any injury inflicted on Plaintiff.

Judgment was given for defendants.

Plaintiff appealed.

Pres.:—In the opinion of this Court the judgment of the Court below cannot stand.

If the evidence in the criminal case is to be believed it is clear that a very serious assault has been committed by the Defendants upon the Plaintiff. The Magistrate in the Court below, however, has decided the case quite apart from the evidence in the criminal case, and has come to the conclusion that upon the evidence before him that the Defendants Nos. 2 and 3 took no part in the assault upon the Plaintiff, and that the whole assault was committed by Defendant No. 1, and that Plaintiff himself was as much, if not more to blame than the Defendant No. 1. This view is quite contrary to the view of the Magistrate who tried the criminal case, and in the opinion of this Court the Magistrate in the Court below has erred in not taking cognizance of the verdict and sentence, which, incidentally, has been confirmed by a Judge of the Supreme Court—for, while in view of the decisions in the cases of *Maclay* vs. *De Villiers* (C.T.R., 1913) and *Gagela* vs. *Ganca* (21, E.D.C., 351), this Court is not prepared to say that the evidence in the criminal case should have been admitted, still, since the case was admitted for reference, the Magistrate should have taken cognizance of the conviction and sentence.

A reference to the evidence in the criminal case discloses the fact that there is evidence of a very serious assault having been committed, and it seems quite clear to this Court that the Plaintiff was under the impression that this evidence had been admitted, but, unfortunately, he was not represented in the Court below, and so was not in a position to ensure the production of the evidence that was adduced in the criminal case, and the Magistrate, with the information before him that evidence was available, ought not to have given a final decision against the Plaintiff.

This Court is averse, as a general rule, to persons who appear as complainants in cases of assault subsequently bringing a civil action for damages, more especially as it is in the discretion of

the Court trying assault cases to make liberal compensation out of fines to injured complainants, yet in view of the case of *Gagela* vs. *Ganca* referred to, and in view of the fact that there is evidence available which would go to show that the Plaintiff was very severely treated, and that the Magistrate who tried the criminal case was satisfied that a serious assault was committed by all three of the Defendants, this Court is of opinion that this is a case in which such an action is justified.

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

Umtata. 2 August, 1912. A. H. Stanford, C.M.

Mtyawazo Cqogqa vs. Cetywayo.

(Libode. No. 209/1911.)

Assault—Damages for—Death of Plaintiff after Litis Contestatio.

Claim of £100 damages for assault.

Plaintiff in his summons, which was issued on 9th September, 1911, claimed the sum of £100 for assault on 28th February, 1911.

Pleadings were filed on 21st September, 1911, and the case set down for hearing on 12th October, 1911. It was further postponed to 9th November, 1911. On that date Plaintiff had the case postponed owing to his serious illness. On the 17th February, 1912, the Resident Magistrate took Plaintiff's evidence on Commission under Proclamation 332/1905, when Plaintiff was still seriously ill, and died some days later. Application was made by Plaintiff's attorney for the substitution of one "Mpolo" (Plaintiff's heir) as Plaintiff.

Judgment was given for Plaintiff for £25 and costs.

Defendant appealed.

Pres.:—The appeal in this case is brought upon three special grounds.

1st. That this being a personal action it was not competent to substitute Mpolo as plaintiff, as the case had not yet reached the stage of *litis contestatio* at the time of the death of Mtyawazo.

2nd. That the substitution of Mpolo has not been formally granted by the Magistrate and that the proceedings are irregular.

3rd. Upon the evidence.

Upon the grounds of *litis contestatio*, this Court is of opinion that this stage of the proceedings had been reached at the time of Plaintiff Mtyawazo's death. There was a clear ground of action stated in the summons, there were distinct issues raised in the plea, and it was quite possible at that stage to have gone on with the case and accepted evidence upon the summons and pleadings, and the case was ripe for hearing. The only reported case which this Court has been able to find is that of *Executors of*

Meyer vs. *Gericke* (Foord's Reports, 1880, page 14), from the judgment in which the following extracts are made:—"The question which the Court has to decide is, therefore, further narrowed to this single point: At what stage of the action does the *litis contestatio* take effect? Broadly stated, the answer must be that it takes effect as soon as the case is ripe for hearing. . . ." "The *litis contestatio* took place directly the Magistrate began to hear the case." . . . "In Holland the mode of procedure was far more cumbrous and the difficulty of marking the exact time when *litis contestatio* took place was proportionately greater than under the Roman system. In summary cases (such as actions for a decree of civil imprisonment, or for a decree of perpetual silence) there was not much difficulty, for as soon as the Defendant had objected to Plaintiff's claim the *litis contestatio* was held to have taken effect. . . ."

On the point of the omission of the Magistrate to rule upon the application to substitute Mpolo as Plaintiff there has been an irregularity here, and the Magistrate should have ruled formally upon this point. His omission to do so is not, however, in the opinion of this Court so serious an irregularity as to warrant this Court in setting aside the proceedings.

Upon the point of evidence, however, this Court is of opinion that the Magistrate in the Court below has not paid sufficient attention to the evidence of the district surgeon. It is necessary to prove beyond all possibility of doubt that the cause of death was produced by the blow struck by the Defendant. This blow, it is clear, was struck on the eyebrow, and the doctor says:—"There is no evidence of scar on eyebrow having caused injury, that is necrosis of the cheek and lower part of the face. There must have been an injury to the bone underneath the eye. *The injury that caused the necrosis must have been inflicted under* the eye." In the face of this evidence this Court is of opinion that the plaintiff has failed to show that the cause of death is traceable to the blow struck by the Defendant, and the appeal is allowed with costs, and the judgment of the Court below is altered to judgment of absolution from the instance with costs of suit. The question whether it is competent under Native custom, where a criminal action has been instituted and a conviction for assault has been obtained, to institute civil proceedings for damages was raised in argument, and in this connection it is pointed out that no criminal action is instituted under Native custom, but all prosecutions are instituted under either statute or common law. It is further pointed out that the Respondent's attorney has no *locus standi* in this case, as Mpolo has furnished him with no power of attorney, and the powers granted by Mtyawazo expired with his death.

Flagstaff. 10 December, 1912. W. T. Brownlee, A.C.M.

Tukuse vs. Zombini.

(Bizana. 277/1912.)

"Bopa" Fee—Pondo Custom.

Claim by Plaintiff for 7 goats and increase paid as part dowry for Defendant's daughter Loloni.

1. Plaintiff stated that a marriage had been arranged between Plaintiff's son and Defendant's daughter which marriage was to take place on the return of Plaintiff's son from the Mines during that year.

2. That Defendant had married his daughter to one Solipongo. Defendant admitted receipt of 7 goats from Plaintiff but stated they were paid as fine for the abduction of his daughter.

The Magistrate gave judgment for Defendant and Plaintiff appealed.

Pres.:—The cases of *Gxonono* vs. *Skuni* (1.N.A.C., 154) and *Ramba* vs. *Pumani Dwe* (1.N.A.C. 161) are cited in support of the contention that it is not customary to pay an elopement fee and this Court is entirely in accord with the decisions there given that there is no payment of a fee for an elopement. It is quite a common practice for Natives to "twala" or carry off a young woman with the view to marriage and for this carrying off there is no fee or fine should it be with the view to marriage. Should, however, the young man seduce the girl he must pay a fine or should he fail to offer marriage or should he fail to pay dowry it is an affront to the girl and her friends and must be bound up or paid for and a beast is then paid to "bopa" or bind up the injured dignity of the girl and her friends.

In this case it is clear no dowry was paid. The Plaintiff says a horse was demanded and yet though he himself had a horse it was not paid, and the 7 goats paid must be regarded as paid to "bopa" or bind up the affront offered to Plaintiff in the failure to pay dowry after his daughter had been carried off.

The appeal is dismissed with costs.

Flagstaff. April, 1912. W. T. Brownlee, A.C.M.

Sigodwana vs. Zibi and Another.

(Tabankulu. No. 18/1912.)

"Bopa" Fee—Pondo Custom—One Beast.

Claim for 3 head or £15 damages for adultery.

Plea denial of Plaintiff's marriage and of the adultery.

Magistrate gave judgment for Defendant with costs.

Pres.:—In this case the Magistrate does not appear to have given sufficient weight to the admitted facts. It is admitted that

Plaintiff paid 2 head of cattle to the father of the woman and it is also admitted that when the woman's father sent messengers for her they accepted payment of cattle and left the girl with the Plaintiff. The woman's father it is true states that the 2 cattle were paid as "bopa," but it is quite unusual for more than 1 beast to be paid as "bopa" and it is also contrary to custom that when "bopa" is paid the girl should be left with the man and she is only left with him when he offers marriage and pays cattle as dowry. In the opinion of this Court the Plaintiff is to be believed when he says the cattle were paid as dowry and not as "bopa". We have therefore the essentials to a marriage under Native custom that is the payment of cattle by the suitor and the delivery to him of the woman. It is also a significant fact that the woman's father while denying that any report was made to him of the whereabouts of his daughter by the Plaintiff does not tell of any search made by him for her and yet he was able to send his messengers direct to the Plaintiff's kraal to demand her return. This Courts views his evidence with a great deal of suspicion. In the opinion of this Court there was a marriage between Plaintiff and the woman Maramza, and he is therefore entitled to claim damages from Defendant for illicit intercourse with Maramza with whom the Defendant could contract no lawful union as long as her marriage to Plaintiff subsisted.

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

Kokstad. 27 August, 1913. A. H. Stanford, C.M.

Elias Mpongo vs. Mandlala and Rolobile.

(Matatiele. No. 355/1912.)

Breast Beast—Property of Mother-in-Law and not Executable for Her Husband's Debts—Basuto and Hlubi Custom.

Pres.:—The matter in dispute having been submitted to the Native Assessors, they state that according to Basuto and Hlubi custom, when a girl is married, it is customary for the bridegroom to include in the dowry a breast beast. This becomes the property of his mother-in-law, and is not executable for debts due by her husband.

An Mqobo or Nqutu beast, which is the same thing, under different names, is always the woman's beast given by the bridegroom to his mother-in-law. It is usually slaughtered to provide her with a robe, but if she prefers she may keep it. Such an animal cannot be attached for the husband's debts.

The Magistrate's judgment being in accordance with Native custom the appeal is dismissed with costs.

Butterworth. 26 March, 1912. A. H. Stanford, C.M.

Mkwenkwana vs. Teyisi.

(Willowvale. No. 278/1911.)

Calabash Cattle—Gcaleka Custom.

The President's judgment fully discloses the facts in this case.

Pres.:—The Appellant in this case is the grandson of Sakati and son of Mdunyelwa, Sakati's son of the Great House. Respondent is Sakati's son of the Great House.

Appellant claims certain cattle which he says are the increase of a black cow with white flanks, one of the dowry paid to Sakati for his daughter Sojelwa, that when Sakati distributed this dowry he gave the cow in question to his second son Mdunyelwa as a calabash beast.

This is denied by Respondent and by his mother Nolonti the Great Wife of Salati, mother and grandmother of Respondent and Appellant respectively and mother of the girl Sojelwa. Under Native custom the calabash beast is an animal given from the dowry of a daughter to the girl's mother who has the right to it and its progeny during her lifetime and under Gcaleka custom is heritable by her second son, but an animal under that name is never given directly to a son. It is evident therefore that Appellant is mistaken when he asserts a calabash beast was given to his father. During the lifetime of Sakati Respondent established his own kraal but Mdunyelwa continued to live at his father's kraal both before and for a considerable time after his death, his mother living with him but later built his own kraal close by.

Owing to their youth Appellant and most of his witnesses can have no personal knowledge of the events they relate. On the other hand the old woman Nolonti and her son, Respondent, strongly assert that there was no calabash beast and that Mdunyelwa was given a red heifer with white flank as his share of Sojelwa's dowry.

The Magistrate has found that Appellant has failed to prove his claim and this Court concurs in his finding. The appeal is dismissed with costs.

Flagstaff. 19 August, 1913. A. H. Stanford, C.M.

Nogonomfana vs. Ngane.

(Bizana. No. 177/1913.)

Cattle—Deaths of must be Reported whether under "Xqoma" or "Isisa".

The facts are fully set forth in the President's judgment.

Pres.:—The Respondent and his witnesses say that the cow was in healthy condition on the morning when it was inspanned, yet

that when it died about midday, on being opened and examined, it was found to be suffering from East Coast fever. It is admitted that this animal had been inoculated against East Coast fever some considerable time before with others and that it and an ox were the only survivors. This would render it highly improbable that it would be susceptible to East Coast fever, but apart from this it is impossible that an animal apparently healthy in the morning would succumb to East Coast fever by midday and consequently the Respondent and his witnesses are untruthful in their statements.

Another important point in support of the Plaintiff's case is the fact that the Defendant did not take the hide of his animal to the owner in accordance with custom, while he admits that he did so with the skins of the other cattle belonging to Plaintiff which died in his possession. He tries to cover this by stating that there is a difference in the custom applying in cases of "Nqoma" and "Isisa".

That in the former the person "nqomaed" retains the hide. On this being put to the Native Assessors they state there is no difference in the custom; that in either case the deaths of the animals must be reported and the hides taken to the owner of the cattle. In the opinion of this Court the retention of the hide by the Respondent shows that he had agreed to replace the animal.

The appeal is allowed with costs, the judgment in the Magistrate's Court being altered to judgment for the Plaintiff for one inoculated beast or £10. If an animal is tendered it is to be subject to the approval of the Magistrate, the Defendant to pay costs of suit.

Umtata. 24 July, 1916. C. J. Warner, A.C.M.

Solani Maqolo vs. Mandumba Mpesheya.

(Mqanduli. No. 101/1916.)

Cattle—Valuation of—Ukufakwa Custom.

Claim for 1 beast or its value £15 owed by Defendant under custom of ukufakwa.

The Magistrate gave judgment for 1 beast or its value £12 and costs.

Defendant appealed on the question of the value of the beast.

Pres.:—Plaintiff in the Court below delivered certain stock to Defendant in consideration of receiving one beast from the dowry of Defendant's daughter on her marriage. This was in 1909 when the market price of cattle as assessed in Magistrates' Courts in the Territories was £5 a head.

Defendant's daughter was married last year and 3 head of immune cattle obtained as dowry for her. Plaintiff claimed one of these cattle and admits a tender of £5 made by Defendant. The Magistrate gave judgment for one beast or its value £12.

It was argued on appeal that as the agreement was for delivery of a beast, a tender of money was not in accordance with the agreement but in view of Plaintiff's claim for a beast of £15, the argument cannot be sustained.

As no specific beast was promised to the Plaintiff, this Court considers that he cannot claim more than the market value of a beast at the time the agreement was entered into.

The appeal is allowed with costs, and judgment in the Court below altered to judgment for Plaintiff for one beast or £5, Defendant to pay costs up to date of tender of £5. Plaintiff to pay subsequent costs.

Umtata. 25 July, 1913. A. H. Stanford, C.M.

Bango vs. Mpetshu.

(Engcobo. 143/1913.)

Child—Abandonment—Maintenance.

The facts in this case are not material.

Pres.:—The case having been submitted to the Assessors, they state that they know of no instance of a child being given away on account of the death of the mother, but that in such a case the person bringing up the child is entitled to more than 1 beast.

Butterworth. 15 July, 1912. W. T. Brownlee, A.C.M.

Madolo vs. Sanzekela.

(Idutywa. 18/1912.)

I. Child—Declaration of Rights in—Born after Re-marriage of Divorcee.

II. Posthumous Child—Woman's Father's Rights—Re-marriage.

Claim for a certain girl born during the subsistence of the marriage of Defendant's daughter with Plaintiff.

Defendant pleaded that at the time of the marriage of his daughter to Plaintiff she was pregnant by the former husband, and it was understood between the parties that the child, of which the woman Nofama was then pregnant, was to remain the property of the said Defendant. That at the time of Plaintiff's marriage with Nofama (Defendant's daughter) she was already preg-

nant by her former husband, Qiniwe, which was known to Plaintiff, which marriage had been dissolved and the dowry restored.

The Magistrate found that Defendant's daughter had been married to Qiniwe and the marriage had been dissolved and dowry returned.

The Plaintiff then married the woman, who was pregnant at the time and gave birth after marriage.

That the child belonged to Plaintiff.

Defendant appealed.

At the first hearing of the appeal the following judgment was given by the President of the Appeal Court:—

Pres.:—The Appellant alleges in this Court that when the marriage negotiations were entered into between himself and the Respondent it was specially agreed between them that the child of which his daughter was then pregnant should belong to the Appellant. In view of this statement the case is returned to the Magistrate to take such further evidence as either party to the suit may wish to adduce, and permission be granted to Appellant to amend his plea.

The Appellant to pay costs so far incurred.

The further evidence was accordingly taken and the case returned.

Postea: 12th November, 1912.

Judgment:—In cases where a man marries a girl who is at the time with child it is in accordance with custom that the child when born should be the property of the woman's husband, but should this custom be varied in any way it is necessary that this variation should be established by the clearest proof.

In this case the Court is of opinion that such variation has been proved. It is admitted that the amount of dowry to be paid for the Defendant's daughter was 9 head of cattle and Defendant says that when the marriage was arranged it was stipulated that the child when born should belong to him. This is denied by the plaintiff and after careful perusal of the evidence this Court is of opinion that Defendant is to believed and that there was an agreement entered into. This seems to be proved by the fact that when Defendant refused to deliver the child to Plaintiff the Plaintiff at once tendered payment of 2 cattle which he says were for the child and to be in addition to the 9 head of cattle to be paid for Defendant's daughter, and by the fact that when these cattle were tendered Defendant refused them and that when they were left at his kraal by Plaintiff Defendant at once sent Komani to tell Plaintiff to remove them.

The action of the Plaintiff is a tacit admission that the child was not included in the contract of marriage in respect of which the 9 head of cattle were to be paid and that he himself regarded the child as something outside the marriage contract. This Court is of opinion that the statement of the Defendant must be accepted and that the Plaintiff is not entitled to succeed in his action.

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

Umtata. 31 July, 1914. W. T. Brownlee, A.C.M.

Lenkebe Ntsendwana vs. Vangana Maseti.

(St. Mark's. No. 15/1914.)

Children—Abandonment of Claim to—Deductions from Dowry on Dissolution of Marriage.

Claim for delivery of 2 minor children born of the marriage between Defendant's daughter and Plaintiff.

Defendant pleaded by way of estoppel a certain contract made and entered into between the parties by which Plaintiff relinquished his claim to the children by reason of the defendant returning excess dowry on the dissolution of the marriage existing between Defendant's daughter and the said Plaintiff.

The Magistrate gave judgment for Defendant with costs and Plaintiff appealed.

Pres.:—In this case it is argued for the Appellant first that the defence being founded on a notarial deed must be dealt with under the common law, and that under the common law the alleged agreement is *contra bonos mores*: and second that in the event of this argument failing, the document does not set forth the true agreement entered into by the parties.

In the opinion of this Court, however, both contentions must fail, for in the first place the notarial deed in which the defence relies is not in conflict with Native custom and is in fact merely the written record of an agreement under Native custom entered into by the parties and the Plaintiff's reply that such an agreement is *contra bonos mores* and against public policy and would flavour of slavery is in the opinion of this Court quite untenable for the adoption of children is known not only to Native custom but to the common law.

Under Native custom, the right in children is conveyed to a father only by means of the payment of cattle by him to the father of the woman; if there is no such payment then he has no right in the children; and in the event of a dissolution of marriage the father of the woman while being made to return the dowry paid for his daughter is yet allowed to retain 1 beast in respect of each child born. In this case it is alleged 5 head of cattle were paid and 4 children born; these children with the wedding outfit would extinguish all the dowry paid except the beast which the woman's father would have to pay out to mark the dissolution. In this case the father has under the terms of the agreement paid back 3 head, that is 2 more than he was under any obligation to pay. The Plaintiff by accepting the return of his dowry and not allowing the retention by the Defendant of any cattle was thereby himself under Native custom abandoning his claim to the children.

As regards the second point, in the opinion of this Court the Plaintiff must be bound by his signature, he admits that he signed

a document and it is for him to prove that the document put in by the defence is not the document he signed, and this he has entirely failed to do.

The appeal is dismissed with costs.

Authorities cited: I Nathan, p. 112; Van Zyl, p. 294; *Sehela* vs. *Ncanda,* Umtata Appeal Court, 1901 (not reported); Van Zyl, p. 19.

Umtata. 7 March, 1913. W. T. Brownlee, A.C.M.

Robo vs. Mdweshu and Quba.

(Ngqeleni. No. 429/1912.)

Circumcision—Pondo Custom—Practised by Nqanda Tribe Living in Western Pondoland.

Claim for £25 damages for adultery and pregnancy of Plaintiff's wife.

Defendants denied Plaintiff's marriage and the adultery and pregnancy.

The Magistrate found for Plaintiff as prayed.

Defendants appealed.

Pres.:—In this case among other points a very strong point is made of the fact that the Plaintiff was at the time of the alleged marriage between himself and Nofikile an uncircumcised boy, and that as he is a member of the Nqanda clan which practises the rite of circumcision—see *Vikilahle* vs. *Zuluaiteti* (I.N.A.C.R., p. 77)—it is not competent for him to contract any marriage until he be circumcised, and at the request of the Appellant's attorney the matter being put to the Chief Dalinyebo and the Headman Koyi two of the Tembu Assessors they state that under Tembu custom no uncircumcised boy may marry and should a boy seduce a girl and then offer marriage, and should the girl's friends consent the marriage is deferred until the boy shall have been properly circumcised. The Court, however, later put the case to the Pondo Assessors and they state that though circumcision was at one time practised universally among the Pondos yet in deference to the late Chief Mqikela who owing to physical infirmity could not circumcise, the custom was dropped and though the Nqanda clan after their return from Tembuland into Pondoland wished to carry on the custom they were told that the custom had been discontinued in Pondoland and that anyone practising it would be fined. The custom was nevertheless secretly carried out by individuals among the Nqanda who went to Tembuland for the purpose, but when these people were discovered they were invariably fined. Subsequent to Annexation, however, the custom was once more openly practised. They further state that even among the Nqanda should a girl and her friends consent to her marriage with an uncircumcised male that is a matter which con-

cerns themselves alone, and the want of circumcision would be no bar to the marriage. In view of the foregoing this Court can find no reason for interfering with the judgment of the Court below which decided that there was a marriage. The fact that only one beast was paid is not sufficient to justify this Court in holding that there was no marriage as very many marriages especially in Pondoland have been made upon the payment of only 1 beast. The evidence of marriage is very strong. Plaintiff alleges marriage, Nofikile says he is her husband and her brother Mqanduli says they are man and wife and this statement on the part of Mqanduli is directly against the interest of his father and himself.

The appeal is dismissed with costs.

Kokstad. 4 April, 1917. J. B. Moffat, C.M.

L. Tafeni vs. S. Booi.

(Mount Fletcher. No. 43/1916.)

Conflict—Tribal Customs—Tembus Residing in Basuto Location.

Pres.:—In regard to the second ground of appeal which was raised when this case was last before this Court, in the case of *Fatsena* vs. *Daniel* (I., Henkel, page 1) directed that the case of a Tembu brought up in a Basuto location was to be dealt with according to Basuto custom. In the present case the parties are Tembus, who have lived in a Basuto location for seventeen years, and the marriage was arranged in a location in which Basuto custom prevails.

The Court adheres to the decision already given that the case must be dealt with under Basuto custom.

The Magistrate does not say definitely that he found that dowry of 15 cattle and one horse was proved to have been arranged, but this Court infers from his statement of reasons that he found this proved.

There is sufficient evidence to justify such a finding.

The appeal is dismissed with costs.

Dissenting Judgment by E. G. Lonsdale, R.M., Matatiele.

Section 23 of Proclamation 112 of 1879 provides that where parties of a suit are natives it may be dealt with according to Native law, and in case of there being any conflict of law by reason of the parties being natives subject to different laws the suit or proceeding shall be dealt with according to the laws applicable to the Defendant.

The location or neighbourhood of the parties is not material, but the case must be decided according to the customs of the tribe to which the parties belong. Of course the parties may contract themselves out of their tribal customs and follow those

of the majority of their neighbours, and where this has been done or where such a state of affairs may reasonably be inferred from the surrounding circumstances, then an attempt by one of the parties to place himself in a better position by pleading for the observance of his own particular tribal custom would not be permitted.

The observance of their particular customs not being prohibited to natives of a particular tribe when residing in locations mainly occupied by natives of a different tribe clearly have the right to demand their recognition, and it is a matter of evidence for the Court to decide the intention of the parties in regard to the custom governing the transaction.

In the case in question both parties are Tembus. They both say Tembu law and custom was to govern the marriage arrangements, and the Court must, in my opinion, decide the issue between them according to Tembu custom and not merely because the location in which they reside is mainly occupied by Basutos, according to Basuto custom.

Kokstad. 6 December, 1916. J. B. Moffat, C.M.

Jubela, assisted by Mtisilana vs. Stoni Dlulisa.

(Mount Frere. No. 226/1916.)

Costs—Absolution Judgment—Payment of, before Issue of Fresh Summons.

The facts of the case are fully disclosed in the President's judgment.

Pres.:—A judgment of absolution from the instance was given on the 9th October, 1916, in a case between the parties to this case.

On the same day Plaintiff issued a fresh summons, which was served on Defendant on the 10th October. On that day the Plaintiff paid Defendant's costs in the first case.

On 16th October, at the hearing of the case, exception was taken on behalf of the Defendant that the summons had been issued before costs in the first case had been paid.

The Rule of Court is explicit in requiring costs in a first case to be paid before commencement of the new action.

The case of *Makubalo* vs. *Mkuya*, heard in the Eastern Districts Court, quoted on behalf of Respondent, arose out of a criminal action and not from the same cause as that dealt with in the second case.

In this case the defendant was not prejudiced by the non-compliance with the strict letter of the rule. In face of the terms of the rule this Court must, however, hold, reluctantly under the circumstances of the case, that the exception should have been allowed by the Magistrate.

The appeal is accordingly allowed with costs, and the Magistrate's judgment will be altered to exception upheld with costs.

Umtata. 22nd November, 1915. W. Power Leary, A.C.M.

Koboko and Sishwala vs. Joseph Novakade.

(Ngqeleni. 175/1915.)

Costs in Spoor Law Cases.

Claim of £2 for two goats in kid under the Spoor Law.

The Magistrate gave judgment as prayed with costs, and Defendant appealed.

Pres.:—This Court is of opinion the Magistrate's finding on the facts is supported by the evidence.

The value of the goats—two she-goats heavy with kid—is not excessive.

On the question of costs, the reading of section 202 of Act 24 of 1886 is, *inter alia*, "or by the costs of search or other endeavour to recover the same," and following the case of *Sigidi* vs. *Mqezana* (11, N.A.C., page 94), the Magistrate very properly awarded the successful parties their costs.

The appeal is dismissed with costs.

Kokstad. 5 December, 1917. J. B. Moffat, C.M.

Mokwinihi vs. Tsera and Mamalawu.

(Matatiele. No. 211/1917.)

I. Costs—Magistrate's Discretion.

II. Practice—Costs—Magistrate's Discretion.

The facts of the case are fully set forth in the President's judgment.

Pres.:—The Plaintiff took possession of a waggon, a horse and heifer, belonging to the estate of his late father, Tapole. The second Defendant, widow of the late Tapole, applied to the Supreme Court, which ordered the Respondent in that action, Plaintiff in this case, to restore the waggon and stock to the Petitioner, Defendant in this case, and gave the Respondent in that action leave to bring an action in the Resident Magistrate's Court to claim the waggon and stock.

The appellant has brought the action and has succeeded on his claim for the horse, but has failed in regard to the waggon and the heifer.

The Magistrate has given judgment for Plaintiff for the horse, and made no order as to costs

The first ground of appeal is that the weight of evidence is in Appellant's favour and that he should have had a judgment for the waggon and heifer claimed. This, and the second ground as to the late Tapole's right to make a certain bequest, however, were not pressed in this Court, where the argument was confined to

the appeal against the judgment in so far as it made no order as to costs.

The Magistrate refused to order Defendant to pay Plaintiff's costs, on the ground that throughout the Plaintiff has acted in a most vexatious manner, as a result of which the Defendant has been put to considerable expense and trouble in vindicating her rights over the property in the estate.

Whatever the circumstances leading up to this case may be, the position after the interdict proceedings was that the Defendant was in possession of a waggon, a horse and heifer. The Plaintiff alleged that these were his property and sued for their recovery. The Magistrate has held that he is entitled to the horse. The Defendant had possession of the horse, and the only means the Plaintiff had of recovering it was the action before the Magistrate.

There is no doubt that the whole of the trouble arising out of the administration of the estate leading up to this case has been caused by the Plaintiff himself. In this particular claim he has only succeeded to a small extent. Under all the circumstances of the case the Court does not feel justified in saying that the Magistrate exercised his discretion unreasonably in refusing to make defendant pay Plaintiff's costs.

The appeal in regard to the order as to payment of the costs of the interdict proceedings in the Supreme Court has not been pressed.

The appeal is dismissed with costs.

Dissenting Judgment by Walter Carmichael, R.M., Tsolo.

As stated in the President's judgment, the argument on appeal in this case was confined to the question whether the Court below was justified in refusing the plaintiff's prayer for costs in an action in which he succeeded in gaining one out of three articles of property claimed by him.

It is clear from the cases quoted, notably those of *Brickman's Trustee* vs. *Transvaal Warehouse Co., Ltd.* (1904, T.S., 548) and *May* vs. *Graham* (16, C.D.I., 51), that where a Plaintiff succeeds in only a portion of his claim no exception can be made to the general rule of costs to the successful party unless there was misconduct on his part or some other special circumstances. In this case it is sought to ground the exception made on the fact that previously he took possession of the property in dispute and had to be restrained by interdict; also that he might have secured his rights by the exercise of patience.

The proceedings in the case show that the Supreme Court told the Plaintiff that he had mistaken his remedy and directed him as to the proper course to follow. He followed that course, brought his case, and succeeded in a portion of his claim. He was rightly mulcted for the costs of the interdict proceedings, but to extend his punishment to the later case, in which he puts himself right, seems scarcely in accord with justice and less calculated to deter than to encourage lawlessness. The Plaintiff may have been inconsiderate in pressing his claim, but he had a

legal right to do so, and the defendant should have accepted the position without forcing him into litigation.

I agree that a Court of Appeal should be slow to overrule the exercise of a Magistrate's discretion, even where it may think that sitting as a Court of first instance on the record it would have arrived at a different decision. But where, as in this case, the Magistrate's reasons for judgment show him to have been guided by considerations irrelevant to the point at issue, it cannot, in my view, evade the responsibility of deciding for itself between the parties.

On these grounds I am of the opinion that costs in the Court below should have been awarded to the Plaintiff.

Flagstaff. 28 August, 1912. A. H. Stanford, C.M.

Nomahasa, assisted by her Father, Mjiji vs. Mazotsho.

(Bizana. No. 169/1912.)

Costs—Successful Plaintiff Entitled to.

Claim for dissolution of marriage on the ground of ill-treatment. Defendant denied the allegation of cruelty.

Magistrate's judgment:—The Court declared the marriage dissolved on the return of 3 head of cattle or £15 to Defendant as Plaintiff had failed to prove the cruelty to Defendant. Costs are granted to Defendant.

Plaintiff appealed.

Pres.:—The Court is of opinion that the Respondent has committed assaults on his wife but that these assaults have not been of such a serious nature as to justify forfeiture of return of dowry. The Magistrate's judgment as to the number of cattle to be returned will remain undisturbed; but the Magistrate has erred on the question of costs, the Plaintiff in the Court below having succeeded in the prayer for the dissolution of the marriage was entitled to costs.

The appeal is allowed on this point with costs, the Magistrate's judgment being altered to include costs of suit in favour of the Plaintiff.

Umtata. 25 July, 1912. W. T. Brownlee, A.C.M.

Melani Tom v. Sidelo.

(Engcobo. No. 188/1912.)

I. Damages—Assault—Procedure—Plaintiff to Prove Allegations in Summons.

II. Procedure—Damages for Assault—Plaintiff to Prove Allegations in Summons.

The Plaintiff sued the Defendant for £25 as damages for assault, alleging specially that one of his fingers had been broken by Defendant.

The Defendant pleaded that Plaintiff had assaulted him with a knife and that he had thereupon struck Plaintiff two blows with a stick, but denied that Plaintiff had suffered any serious injury.

The Magistrate gave judgment for Plaintiff for £3 and costs.

The Plaintiff appealed.

Pres.:—In this case the appeal is on the point of the amount of damages awarded and in view of the decision in the case of *Gagela* vs. *Ganca* heard by Mr. Justice Sheil in the Circuit Court at Cala and reported in the *Cape Times* of the 29th April, 1907, it would seem that the amount awarded the Plaintiff should his finger have been broken, is very small. The Magistrate in the Court below is however not satisfied upon the evidence that the Plaintiff has proved that he has suffered any particular damages and this Court is of opinion that before it would be justified in interfering with the award of the Court below the clearest evidence of injury should be adduced.

The case is therefore remitted to the Court below for the Plaintiff to produce medical evidence of the nature of the injury he has sustained. Records to be returned to this Court at its next sitting. Order as to costs held over.

Dissenting Judgment by W. T. Welsh, R.M., Mqanduli.

In my opinion the appeal should be dismissed with costs. The Plaintiff alleges, but has entirely failed to prove, that his finger was broken, and the Magistrate found that he had not in any way proved that a serious assault had been committed upon him. Though the Defendant was clearly wrong in seizing hold of his horses by the reim it must be observed that Plaintiff also acted illegally in refusing to release them upon the tender to him of the trespass fees which were due. There is a conflict of evidence as to whether Defendant struck Plaintiff when, before or after the latter drew his knife, but even assuming that the Plaintiff's version is substantially correct what had transpired was sufficient to cause defendant some annoyance or irritation. It is foreign to Native custom for them to recover damages for assault, and I therefore consider that in such cases only nominal damages should ordinarily be awarded. In this case the Plaintiff should certainly have called medical evidence in support of his claim; his summons alleges a serious injury, which required to be fully established and he should have adduced the best available evidence. It was not incumbent on the Defendant to produce negative proof, nor was it the duty of the Court to call such evidence. The Magistrate states a crooked finger was exhibited, and he, apparently, was not satisfied that it was broken or even seriously injured, nor is there any other corroboration of the Plaintiff's evidence. It is true there is no evidence to controvert his statement, but in such a matter of opinion he might very easily be mistaken. The unsupported testimony of the person claiming heavy damages on a point which is peculiarly the province of experts is not sufficient, and the non-production of such evidence is in itself suspicious. If the case is

now remitted for medical evidence and the finger is found to have been broken, the Defendant will probably be mulct in all the additional costs, including the costs of this appeal, which would have been avoided had the Plaintiff in the first instance called medical evidence as he should have done, and for which omission the Defendant is in no way responsible. I think the appeal should fail.

Postea.

Umtata. 18 November, 1912. A. H. Stanford, C.M.

Melani Tom vs. Sidelo.

Pres.: At the last sitting of the Appeal Court the case was returned to the Magistrate to give the Appellant an opportunity of producing medical evidence as to the nature of the injuries he had received, of this he has not availed himself, and although the medical man might not now be able to say whether the finger had been broken or not, he could have stated whether the injury sustained was of such a nature as to prevent or hinder the appellant in carrying on his ordinary avocations.

In the absence of such evidence it is not possible for this Court to vary the judgment of the Magistrate.

The appeal is dismissed with costs.

Umtata. 30 March, 1916. J. B. Moffat, C.M.

N. Makeleni vs. C. Ndlebe.

(Engcobo. No. 8/1916.)

Damages—Injuries Caused on Commonage by Cow with Vicious Propensities.

Action by Plaintiff for recovery of damages sustained through the death of a cow caused by its having been gored or poked on the common grazing ground by a cow belonging to Defendant which was known to be vicious, the Defendant having been previously informed that the cow had goring or poking propensities.

The Magistrate following Native custom as laid down by the Pondo Assessors in the case of *Hlanga* vs. *Mkutshwa* (2 N.A.C. 46) gave judgment for Defendant with costs.

Pres.:—The question of whether this case should be dealt with under ordinary Colonial law or under Native law has been raised. Section 22 of Proclamation 140 of 1885 provides that all such suits. . . . . where the parties are Natives . . . . may be dealt with according to Native law.

Cases for which there is no provision in Native law have been dealt with by this Court under the Colonial law but unless a definite request has been made at the trial that the case should be

tried under Colonial law where both laws are applicable, the practice has been to deal with the case under Native law.

No such application was made in this case and in his reasons the Magistrate indicates that he dealt with it under Native law.

The Tembu Assessors are asked to state whether damages would be allowed against the owner of a cow, which is admittedly vicious but has not so far as is known actually killed another animal, for injury by such cow to other animals on the common pasture lands.

The Assessors state that there is no case in which damages have ever been awarded under such circumstances. If a cow is vicious the owner is told to cut off the tips of the horns. In a case in the Mqanduli district a man had a bull which poked horses. The owner was told to cut off the tips of its horns. He neglected to do so and was held liable for damages subsequently done by it. It is the duty of a man owning a vicious cow to cut off the tips of its horns without being asked to do so.

The Magistrate accepts the facts generally as alleged by the Plaintiff.

The facts are: (1) That the Plaintiff's cow died from the effects of injury inflicted by the Defendant's cow; (2) that this cow was known to be vicious; (3) that Defendant had previously been warned to cut off the tips of the cow's horns.

The Tembu Assessors have stated that a man neglecting to carry out the usual practice of cutting off the tips of the horns of a vicious animal when requested to do so, is held liable for damages. In accordance with this rule the Defendant in this case is liable for damages.

The appeal is accordingly allowed with costs and the Magistrate's judgment will be altered to judgment for Plaintiff as prayed with costs.

Umtata. 12 March, 1912. W. T. Brownlee, A.C.M.

Mhlakazi vs. Matshotyana and Soganga.

(Umtata. No. 476/1911.)

I. Damages—Money Paid to Messengers—Joint Liability.
II. Agent—Liability—Messengers Sent to Collect.

Claim £20 in respect of money received by the Defendants from one Bozine while acting as Agents for Plaintiff, which amount was a recovery for damages awarded to Plaintiff in an action against Bozine for causing the pregnancy of his (Plaintiff's) wife.

Judgment for Plaintiff as prayed.

Defendants appealed.

Pres.:—In this case it is quite clear from the evidence that the man Bozine paid to the Defendants the money now claimed from them and the only point to be decided is whether the Appellant Matshotyana is or is not liable for the delivery of it or any portion of it to Plaintiff.

The question has been raised whether this case should have been tried under common law or under Native custom, and this Court is satisfied that it has been dealt with under Native custom and that this custom has been properly applied. It is further clear that the two Defendants were joint Messengers of the Plaintiff and would be jointly responsible to him for the delivery to the Plaintiff of whatever was paid to them and it cannot be held that because the money in question was put into the hand of the Defendant Soganga the Defendant Matshotyana is not liable for its production. He was present when it was handed to Soganga and must be held to have received it equally with Soganga.

The appeal is dismissed with costs.

Umtata. 7 March, 1913. W. T. Brownlee, A.C.M.

Mqakama vs. Sam Ngcongolo.

(Port St. Johns. No. 121/1912.)

Defamation—Action only under Common Law.

Claim for £50 damages for slander.

Defendant excepted to Plaintiff's summons that according to Native custom no action for slander lies and in this case both parties are Natives.

The Magistrate upheld the exception and dismissed the summons.

Plaintiff appealed.

Pres.:—The case of *Nkwana* vs. *Nonqanaba* (I.N.A.C.R. 79) decided that under Native custom there is no action on the part of the individual for slander.

In the same case however it was decided that cases of this nature may be heard under the common law, the exception therefore in the opinion of this Court, has been wrongly sustained. The words themselves complained of are actionable even though the Plaintiff may have sustained no material damages and the case should have been gone into.

The appeal is allowed with costs and the ruling on the exception set aside and the case remitted to the Court below to be tried upon the merits.

Flagstaff. 15 April, 1912. W. T. Brownlee, A.C.M.

Nomtitinya vs. Emma Mqa-ka.

(Bizana. No. 35/1912.)

Defamation—Common Law.

Claim for £25 damages for defamation by reason of the use of the following words: "You are a prostitute and a whore, a liar, and you will never go to heaven."

Plea:—Denial.

Magistrate found for Plaintiff and entered judgment for £1 and costs, holding that no special damages had been proved.

Defendant appealed.

Pres.:—The Magistrate in the Court below was quite within his rights in applying the common law in this case and there is sufficient evidence to support his finding that the words complained of were used. It seems however to be quite clear that the words used, though actionable, were made use of during a quarrel between the parties, and after the Plaintiff had called the Defendant a murderer, and in the opinion of this Court the Plaintiff is not under the circumstances entitled to receive damages. See words used in Bisset & Smith *Digest*, Vol. I., Col. 742 (*Herschenssohn* vs. *Cohen*).

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

Butterworth. 15 July, 1912. W. T. Brownlee, A.C.M.

H. Siyongwana vs. E. Ciyo.

(Nqamakwe. No. 106/1912.)

Defamation—Pleadings—Damages.

Plaintiff, formerly a School Teacher,

Claimed £500 damages for defamation.

The words complained of were "Henry Siyongwana has twice put Meddie Shosha in the family way."

That by reason of these words Plaintiff was dismissed as a school teacher.

Defendant pleaded:—

1. Privilege.

2. No malice and that the representations were made to the Superintendent Missionary *bona fide* and upon reasonable and probable cause.

3. That the words were true and for the public benefit.

The Magistrate found there was no evidence to prove that the defamatory words were true, and certainly none to prove they were *bona fide* and upon reasonable and probable cause.

Judgment was entered for Plaintiff for £100 and costs.

Defendant appealed.

Pres.:—In this case the use of the words complained of is not denied, but the defendant pleads privilege, absence of malice, and truth, and it therefore lies upon him to prove the truth of the words used that they were used on a privileged occasion and that they were used without malice, and this Court can find no reason for disagreeing with the findings of the Magistrate in the Court below on the various points raised. It seems quite clear to this Court that the words were used with the intention of injuring Plaintiff and not as Defendant says with a view to putting an end to a scandal. Had the Defendant complained to Mr. Barrett

immediately he became aware of what he says was going on between Defendant and Meddie it might have been held that his action was *bona fide*, but he admits himself that though he knew for a number of years what was going on he took no action until recently, and he explains his conduct by saying that it was not until he became a Christian that he considered it necessary to take action, and that he became a Christian only recently. A reference to the evidence of Defendant's wife, however, shows that he was a church member from the time of their marriage, which was apparently in 1907, and in view of this, the statement of the Defendant cannot be believed, and this Court agrees with the Court below in the opinion that defendant's action was prompted by the annoyance which he felt at the adverse evidence given by the plaintiff in the case in which defendant prosecuted Mbono and that this action was taken with the view of injuring plaintiff.

The amount of damages allowed in the case seems to be high, but nothing was urged upon this point upon appeal, and this Court does not see any reason for interfering with the judicial discretion of the Court below upon it.

The appeal is dismissed with costs.

Butterworth. 11 March, 1915. W. T. Brownlee, C.M.

Mfanekiso vs. Magqabaza and Mfanekiso vs. Nohempe.

(Idutywa. 266/1914.)

Disherison of Heirs—Death-bed Dispositions of Property—Custom.

These cases are actions instituted by the several Respondents in appeal to enforce a disposition of property of the Great House by Maramncwa on his death-bed.

The Magistrate gave judgment for Plaintiff to enforce the disposition.

Defendant appealed.

Pres.:—In these cases the parties are the members of the family of the late Maramncwa Stokwe. The Defendant is his eldest son in the Great House. The Plaintiff Magqabaza is a younger son in that house, and the Plaintiff Nohempe is the widow of Maramncwa in his Right Hand House, and sues in the interest of her minor son.

Magqabaza claims from Defendant a cow and calf, which he alleges were given to him by the late Maramncwa when on his death-bed, and a horse which had been given to him some time previously.

Nohempe sues for certain horses, the progeny of a filly allocated to her house on the occasion of her marriage, and for a sheep, the property of her house, which she says the Defendant improperly made use of on the occasion of the mourning for her husband and in connection with the mourning of one of Maramncwa's daughters.

The appeal in respect to the claim by Nohempe is on the general merits of the case, and the appeal in respect of the claim made by Magqabaza is on the merits in so far as the horse is concerned, and in so far as the cattle are concerned is that the Defendant had been accused of procuring the death of his father and that his father was in consequence practically disinheriting him, if not wholly, yet in part, and in support of the appeal the provisions of section 11 of Proclamation No. 142 of 1910 are cited, and it is argued that this disherison has been improperly carried into effect.

The various points at issue have been placed before the Native Assessors, and they state:—

1. It is custom for a man about to die who has children to call his brothers and children to give out his dying words, so that his orphans may not dispute. The custom has been followed here by Maramncwa giving portions to his children who have none. The position of Mfanekiso was recognised by the gift to him of 4 head of cattle. The deceased followed the custom so as to prevent dispute.

2. Regarding the sheep. Defendant had the right to kill this sheep. He is the head of the kraal, and it was for the purposes of mourning and not for his own private purposes.

3. If the horse was given and increased it is the property of the Right Hand House.

4. It is not quite in accordance with custom that the eldest son should not be present at the disposition of the property, but in this case it cannot be said that he was not present, for he was at the kraal and was with the chiefs, and the four men came and published what had been delivered to them by the dying man and Mfanekiso responded, and his response was listened to and taken to his father.

5. It is unusual that a man on his death-bed should refer to bequests made by him on previous occasions.

With this statement this Court finds no reason to disagree, except that the President of the Court does not agree with item 5, and says it is not an unknown thing for a man making his last disposition to mention that he has already made such and such a disposition and then go on to make others.

It is not disputed that Maramncwa did collect the family and make dispositions, and indeed the evidence proves this conclusively. It is equally clear, however, that the Defendant Mfanekiso had been charged with the crime of causing his father's mortal illness, and it is clear to this Court that in his actions the old man Maramncwa was influenced in his mind and in his actions by this fact, and was giving away property to the detriment of Defendant, which he had not up to that moment thought of doing, and was thus virtually in part disinheriting him.

Had there been no imputations of witchcraft this Court would have considered the disposition of property made a good and lawful one, but in view of the imputations of witchcraft this Court cannot look upon the act of the dead man as other than an attempt to partly disinherit his son, and when the cause is

considered it is found to be quite inadequate and inadmissible. It is a cause which might bulk largely in the mind of the Native and even in the mind of the Native Assessors, but it is one which no Court could recognise, and had Maramnewa applied to any Court to disinherit his son because of witchcraft no Court would have complied with such a request.

Under the circumstances this Court is of opinion that in the case of Plaintiff Magqubaza Defendant should succeed in so far as the cow and calf are concerned, and in his case the appeal is allowed with costs, and the judgment of the Court below altered to judgment for Plaintiff for one horse or value, £20, and costs.

In the case of Nohempe the matter is one of credibility of evidence in so far as the horses are concerned, and this Court finds no reason to disturb the decision of the Court below in respect of these horses.

With regard to the sheep, however, this Court is of opinion that the appeal must succeed, and in this case, then, also the appeal is allowed with costs, and the judgment of the Court below is amended by striking out the item of 15/-.

Kokstad. 22 August, 1912. A. H. Stanford, C.M.

Mangalelwa Kwati and Others vs. Mbaba Pumza.

(Mount Ayliff. No. 51/1912.)

Dogs—Damages for Killing—Value of.

Claim of £2 10s. damages for a dog killed by Defendants.

Defendant pleaded that Plaintiff's dogs attacked a small puppy at their kraal. That Plaintiff failed to keep his dogs under proper control, and that the death of his dog was due to his own negligence.

The Magistrate gave judgment for 5s. and costs.

Defendants appealed and Plaintiff cross-appealed.

Pres.:—The evidence shows that the "Culpa" in this case was with the Appellants. They took their dogs to Respondent's kraal, and on leaving left one of them there, as a natural result it was attacked and worried by the dogs of the kraal, and in attempting to rescue their own animal they were not justified in killing the Respondent's dog.

The Magistrate, having found that the dog was the Plaintiff's property, should have awarded reasonable damages, bearing in mind that the value of a dog from the Native point of view is totally different from the estimate a European has of the average Kaffir dog.

The appeal is dismissed with costs, and the cross-appeal allowed with costs, the Magistrate's judgment being altered to judgment for the Plaintiff for £1 and costs of suit.

Umtata. 25 November, 1912. W. T. Brownlee, A.C.M.

Joel Ngwenze vs. Motomani Mananga.

(Umtata. No. 301/1912.)

I. Dogs—Damages for Poisoning of.

II. Poison—Responsibility—Dogs.

Claim of £1, value of certain bitch, the property of Plaintiff, which had died from the effects of eating poison laid by Defendant.

Judgment for Defendant.

Plaintiff appealed.

Pres.:—The Defendant admits that he put down poison on his land and practically admits also that the death of Plaintiff's dog was due to the poison so put down by him. He, however, relies upon the fact that his standing crops were being damaged by some unknown dog and that he set poison to rid himself of this nuisance, for his defence. In the opinion of this Court, however, the Defendant must fail.

He might have succeeded in his defence had he been able to show that it was the Plaintiff's dog that was destroying his crops, that the dog was killed while in the act of such destruction, and that there was no other way of preventing this destruction, and this, in the opinion of this Court, he has failed to do.

The fact that Plaintiff's dog went to Defendant's land and there found the poison that Defendant had put down is not sufficient proof that this dog was the trespasser, and does not in itself justify the inference that the dog had gone there for the purpose of eating the Defendant's mealies, for though instances do occasionally occur where dogs through stress of hunger feed by stealth upon growing mealies, yet this is the exception and not the rule, and is indeed contrary to the nature of dogs generally, and some further proof is required than the mere fact of the poisoning of this dog to show that it was the trespasser.

Moreover, on the occasion when the dog was poisoned it had accompanied the son of the Plaintiff, who had gone to that neighbourhood to herd cattle, and so it is impossible to assume, even supposing this dog to have been the trespasser, that it went there on this occasion with the intention of trespassing, and it is quite reasonable to infer that, having arrived in the neighbourhood of the Defendant's lands it was attracted by the scent of the "ntsipo," or Kafir beer malt, in which the poison was mixed, and that it was this scent and this only that attracted the dog there. Indeed, the only evidence on this point—that of Mvoti—states that this is what actually occurred. The Pound Regulations (section 22, Proclamation 387 of 1893) justify any landowner in destroying dogs should they be found in enclosed land in which there are game or animals, but in this case there is no allegation that the land was fenced or that there were any animals or game

kept in it, and in the opinion of this Court, if the Defendant elected to resort to the dangerous practice of setting poison in his land in a communally occupied location he did so at his own risk and is liable for damages for the killing of the Plaintiff's dog.

The only evidence as to the value of the dog in question is that of the Plaintiff, and while the sum of £1 seems large for an ordinary Kafir dog, yet Plaintiff says it was a sporting dog and had two puppies, one of which died, and in the absence of any evidence to the contrary this Court cannot consider this value excessive.

The appeal is allowed with costs, and the judgment of the Court altered to judgment for Plaintiff as prayed with costs.

Butterworth. 4 March, 1913. A. H. Stanford, C.M.

Mangaliso vs. Kampeni.

(Willowvale. No. 253/1912.)

Dogs—Damages—Person in Control Responsible.

The facts are fully set forth in the President's judgment.

Pres.:—It would appear from the evidence that the Appellant went from his kraal to the village of Idutywa, leaving his dogs at home. During his absence these animals were fetched by a third person and set on to Respondent's pig, which had trespassed in her garden. This was an act which Appellant was unable to foresee or to prevent. There was consequently no negligence on his part, which, from some of the cases given in the Digest of South African Law by Bisset and Smith, would appear to be essential in an action of this nature. No evidence was led as to the value of the pig, but the Magistrate without this gave judgment for £3, which would in most instances be excessive for an ordinary pig such as are usually owned by Natives.

In the opinion of this Court the proper person to be proceeded against was the individual responsible for setting the dogs on to the pig.

The appeal is allowed with costs and the Magistrate's judgment altered to absolution from the instance with costs.

Kokstad. 18 December, 1913. W. Power Leary, A.C.M.

Mbomba Zombile vs. Simanga Katana.

(Mount Fletcher. No. 153/1913.)

I. Dowry—Agreement to Pay—Proof—Ukuteleka Custom in Basuto Location.

II. Ukuteleka Custom in Basuto Location—Dowry—Agreement to Pay.

The facts of the case are sufficiently disclosed in the President's judgment.

Pres.:—In this case the Plaintiff is suing for balance of dowry on an alleged agreement to pay. This is denied by the Defendant, and the Magistrate in his reasons for judgment very properly remarks "that in cases of this kind the agreement to pay dowry must be proved absolutely." Where the custom of ukuteleka obtains no action of this nature can be maintained. The remedy is to teleka the woman. The Pondomise practice this custom, and though residence in a Basuto location and district where dowry is fixed and ukuteleka not practised might modify or vary the custom, it is probable where the parties are both Pondomise that they would follow their own customs in matters of this sort.

The appeal is dismissed with costs.

The cross-appeal is for the dissolution of marriage and return to appellant of such portion of the dowry as may be meet and just. No sufficient cause has been shown for this marriage to be dissolved. The parties admit that they quarrel and that they are fond of each other, and they are actually living together at present. This Court sees no reason to disturb the Magistrate's finding.

The cross-appeal is dismissed with costs.

Kokstad. 8 December, 1915. W. Power Leary, A.C.M.

Elias Mti vs. Mvacane and Maliwa.

(Matatiele. No. 116/1914.)

Dowry—Amount Payable—Hlubi Custom—Presumptions.

Claim for 25 head of cattle, 1 horse, and Mqobo beast for dowry, or alternatively payment of 6 head of cattle for seduction and two pregnancies and delivery of Eliza Mti and her one child.

The Magistrate gave judgment for 25 cattle, 1 horse, and one Mqobo beast, or £135, for dowry, the one paying, the other to be absolved.

Pres.:—This is an action wherein Elias Mti sues Mvacane and Maliwa for (1) 25 head of cattle, 1 horse, and 1 Mqobo beast as and for dowry, or in the alternative the payment of 6 head of cattle as and for fine for seduction and two pregnancies and delivery of his sister Mti and her one child.

First Defendant admits liability for second Defendant's costs, but denies liability for his dowry, except under express agreement or contract, the parties being Ama-Hlubi. He denies that he every contracted or agreed to pay the dowry alleged in the summons, nor does the summons allege any such agreement or contract.

Denies liability for 6 head of cattle for seduction and two pregnancies, and tenders 3 head of cattle for the seduction and one beast for the further pregnancy, 4 head in all. The summons and plea were both amended.

From the evidence it appears Defendant (2) is the son of Defendant (1), and that he is not living on the same kraal as his father, that Defendant (2) was not a married man, and carried

off the girl, Eliza Mti, with the intention of marrying her some three years ago, that the Defendant (1) was informed of this, and promised Defendant (2) he would pay dowry for him, but has never done so, and has evaded arranging for the payment of the dowry. The girl Eliza has resided for at least three years with Defendant (2) as his wife, and has been twice pregnant by him.

The Magistrate was not satisfied on the evidence that first Defendant had promised to pay dowry.

The case was put to the Native Assessors.

Mapolisa, a Hlubi, states:—"If the son was publicly disinherited the father is not liable; if not, the father is liable. The dowry is 25 to 26 head of cattle and a horse. If the father does not want to pay he sends to the father of the girl and asks him to come and fetch his daughter. If the father pays attention he comes and fetches his daughter; if not, he brings an action for the dowry."

Mabele, a Zulu:—"If the father is not willing to pay he is not compelled to pay; he only pays a fine. If the father says: 'I do not want the woman,' he can't be compelled to pay dowry. He must decide immediately the woman is brought to his kraal and send to say he does not want the girl."

Lukuni, a Xesibe:—"According to custom no woman would stay five years at the kraal without being married. If a girl is brought to the kraal and the father is not willing to marry the girl he sends to her people to take her away. I support what Mapolisa says."

Ngetu, a Baca:—"If a girl is carried away and the father does not want her he sends her back with a beast; if he wants her he reports the girl is at his kraal and that a marriage is proposed."

If the son lives apart from his father with his mother and is unmarried, the kraal is still his father's. The Assessors belong to various tribes and have each given the custom of his tribe. It would seem that in all the duty of the father is to act promptly and not allow years to pass before denying liability to pay dowry.

The parties in this case are Hlubi, and it must be decided on Hlubi custom, which has been expounded by Headman Mapolisa.

The decision in the Court below has been based on Hlubi custom.

The Respondent on the evidence and on custom must succeed.

The appeal is dismissed with costs.

Kokstad. 25 April, 1915. W. Power Leary, A.C.M.

John Mpingwani vs. Mciteki.

(Matatiele. No. 429/1914.)

Dowry—Converted into Fine for Seduction and Pregnancy if Man Dies before Marriage Consummated.

Pres.:—The Defendant is sued for the restoration of five head of cattle which were paid on account of dowry for his daughter by

the Plaintiff's son, Ngcongolo, who is now dead, two increase of the cattle, and £4 alleged to be a loan.

It is admitted in evidence that the cattle were paid as dowry. Before the marriage was consummated the prospective bridegroom died. He had, however, misconducted himself with the girl, and caused her pregnancy on two occasions. Defendant pleads that under the circumstances of the case Plaintiff is not entitled to recover any of the dowry cattle or increase according to Hlubi custom, which is applicable in this case.

The custom is very clearly given in the evidence of Headman Ntebe, that cattle paid on account of dowry are retained as fine for pregnancy if the girl is made pregnant before being handed over and the man dies.

It is argued that the pleas should have clearly set forth that Defendant claimed to retain the cattle on those grounds.

Paragraph 4 of the pleas very clearly set out the grounds on which Defendant claims these cattle; that according to custom under the circumstances Plaintiff is not entitled to recover.

The pleas might have been clearer—they are, however, sufficiently explicit.

The appeal is dismissed with costs.

Kokstad. 3 April, 1912. W. T. Brownlee, A.C.M.

Fosi vs. Sixolo and Lewu.

(Umzimkulu. No. 169/1911.)

I. Dowry—Damages—Husband Assaulted Wife who Died of Injuries.

II. Damages—Amount Claimable by Father where Daughter Killed by Husband.

Plaintiff sued Defendants for 21 head of cattle or £105, being balance of dowry due, or alternately 21 head or £105 as damages by reason of the following facts:—

1. That 1st Defendant was son of 2nd Defendant, the latter being responsible for the torts of the former.

2. That about four years ago 1st Defendant married Plaintiff's daughter Nomatobana, and the dowry fixed at 26 head of cattle, which defendant agreed to pay, and of which 5 cattle were paid.

3. That 1st Defendant assaulted Nomatobana, and she died from the injuries received, and that 1st Defendant was tried and convicted of culpable homicide in 1908, and sentenced to a term of imprisonment.

Defendant No. 1 pleaded as follows:—

1. That he was the son of 2nd Defendant.

2. That Nomatobana had been previously married and had borne one child to one of the previous husbands. That consequently

a much smaller dowry was payable for her, 26 head being excessive.

3. Admitted assaulting Nomatobana but under provocation and without intent. Admitted he was convicted and served 1½ years' imprisonment

4. Admitted paying 5 head and that such was all that Plaintiff has any right to claim.

5. That Plaintiff has no *locus standi* for suing Defendant, either under Native or Colonial law, as even a husband has no claim for damages for the loss of a wife.

No. 2 Defendant denied that he was No. 1's guardian and had agreed to pay 26 head of cattle as dowry.

The Magistrate gave judgment for 10 head of cattle or £50 against Defendant No. 1 and costs.

Absolution from the instance with costs against No. 2.

Appeal noted by Defendant No. 1.

Pres.:—The particulars of this case having been put to the Native Assessors they state that under their original custom, in cases where a man killed his wife and her father demanded dowry for her after her death, the husband was directed to lift up her head, *i.e.*, to make her alive by payment of dowry, and if he had paid no dowry he could be made to pay as much as 10 head of cattle: when he had already paid dowry he would pay less than 10.

In the case now before the Court the Defendant has already paid five head of cattle, and in view of the foregoing statement of custom this Court is of opinion that the judgment should not be for more than 5 head of cattle.

The appeal is allowed with costs, and the judgment of the Court below is altered to judgment for plaintiff for 5 head of cattle or £25 and costs of suit.

Flagstaff. 11 April, 1917. J. B. Moffat, C.M.

Myolwa vs. Ngalombini Dliseka.

(Tabankulu. No. 161/1916.)

Dowry—Death of Husband Shortly after Marriage—Deductions—Services of Woman.

The facts of the case are fully set forth in the judgment of the Court.

Pres.:—The Court consulted the Pondo Assessors who state that in a case in which the husband dies within a short period after the marriage the dowry paid for the wife must be returned less 1 beast for the services of the woman. They state that where a marriage lasts for a few months only it is looked upon as a courtship only, and not as a marriage.

The Magistrate's judgment is for the return of the woman or the dowry. Following the decision of the Eastern Districts Court, the order for the return of the woman cannot be upheld.

On the alternative order for the return of the whole of the dowry a deduction of 1 beast should have been allowed.

The appeal is allowed with costs and the Magistrate's judgment will be altered to judgment for the plaintiff for the return of 5 head of cattle and 1 horse or their value £30 and costs.

Kokstad. 28 August, 1913. A. H. Stanford, C.M.

Xolikati and Coco vs. Sam Mbela.

(Mount Frere. No. 130/1913.)

Dowry—Death from Child-birth—Return of—East Griqualand.

The Plaintiff claimed for the return of his dowry of 9 head of cattle, 1 horse and £4.

The Defendant contended that as his daughter had died from child-birth, no dowry was returnable.

The Magistrate found that Plaintiff's wife died from natural causes and not from child-birth and gave judgment for Plaintiff as prayed less 1 beast or its value £5.

Defendant appealed.

Pres.:—The evidence shows that the Respondent's wife gave birth to a child and according to the evidence of the Appellants' witnesses death was due to this cause. All are agreed that she died 6 days after the birth but in cross-examination as to other events which took place about that time get a little confused in the dates. As Natives always have difficulties in questions of time and date the Court attaches no importance to these discrepancies. The witnesses for the Respondent try to show that death was due to other causes but admit that the woman died in the same month as the birth took place.

This Court has no hesitation on the evidence in overruling the Magistrate's finding as to the cause of death. The question having been put to the Native Assessors they state that with the East Griqualand tribes where a woman dies on the birth of the first child the husband usually asks the father for another daughter for whom, if given, a much lesser dowry will be paid, but if the father refuses, some portion of the dowry must be returned. This is in accordance with numerous other cases decided in this Court in which the dowry has practically been halved between the husband and father of the woman. The Magistrate has clearly erred in not following these precedents and in ordering the restoration of the whole dowry less 1 beast.

The appeal is allowed with costs and judgment in the Magistrate's Court altered to judgment for plaintiff for 5 cattle or £25 and costs. If cattle are tendered they are to be subject to the Magistrate's approval.

Flagstaff. 23 April, 1914. W. T. Brownlee, A.C.M.

Mtobeni vs. Sotshezi.

(Bizana. No. 54/1914.)

Dowry—Death of Wife without Issue—Deductions—Pondo Custom.

The Plaintiff claimed 10 head of cattle or £50 return of dowry paid for Defendant's daughter who died in the third year of her marriage with Plaintiff having borne no children.

The Magistrate gave judgment for 7 head or £35.

Defendant appealed.

Pres.:—In the opinion of this Court the Magistrate in the Court below has not given sufficient consideration to the case for the Defendant and this Court is further of opinion that the principles laid down by the Native Assessors and by this Court in the case of *Ndabu* vs. *Kutu* (I.N.A.C.R., 84) should apply and that the dowry should be divided. It is true that in the case of *Mfuzana* vs. *Wezi* the Native Assessors stated that under Pondo custom if a woman died of natural causes either at her husband's or her father's kraal having had no children, if such death occur shortly after marriage, the greater portion of the dowry is paid out and this it is argued supports the decision of the Magistrate in the Court below. This Court, however, is of opinion that it would be greatly straining the statement of customs made to hold that such a large proportion of the dowry as has here been given up should be awarded the husband, and in the opinion of this Court the statement of custom must be held to mean that in cases such as the one now before the Court the dowry should be divided as nearly equally as possible.

In this case practically the whole of the dowry paid by the Plaintiff has been returned to him and after deducting 1 for wedding outfit the Defendant has been allowed to retain only 1 beast to console him for the death of his daughter. This Court is of opinion that he should have been allowed to retain at least 5.

The appeal is allowed with costs and the judgment of the Court below is altered to judgment for Plaintiff with costs for 5 head of cattle or value £25.

Kokstad. 5 April, 1916. J. B. Moffat, C.M.

Sodwele vs. Dlulane.

(Mount Frere. No. 190/1915.)

Dowry—Death of Wife within a Year without Issue—Return of —Baca Custom.

Pres.:—The following question is put to the Baca Assessors:—"A man marries and within 1 year his wife dies from natural causes leaving no issue. In such a case can the man claim the whole of the dowry he paid for his wife?"

Reply:—"According to Baca custom all the dowry is returned."

Umtata. 29 July, 1916. J. B. Moffat, C.M.

Mpikwa vs. Mfeketo.

(Umtata. No. 505/1916.)

Dowry—Death of Woman—Miscarriage—Deductions.

In this case the Plaintiff claimed 6 head of cattle paid on account of a marriage to be entered into between him and Defendant's daughter. The Defendant pleaded that a marriage had taken place and the woman died of miscarriage and he was therefore not responsible for the return of any dowry paid.

The Magistrate found that there was a miscarriage but was not satisfied in regard to the death of the woman through a miscarriage and gave judgment for half the dowry paid.

Defendant appealed.

Pres.:—The Plaintiff claimed that there was no marriage. The evidence of Defendant's witnesses, however, clearly proved that there was a marriage and the Magistrate found accordingly.

On the question of miscarriage the Magistrate found that this had not been proved.

The evidence of Defendant's witnesses is in the opinion of this Court sufficient to prove that there was a miscarriage. As their evidence was accepted in regard to the marriage there is no reason why it should not be accepted in regard to the miscarriage. The Plaintiff and the woman had been married about 5 or 6 months and the Court is satisfied that her death was due to miscarriage.

The appeal is allowed with costs and the Magistrate's judgment will be altered to judgment for Defendant with costs.

Umtata. 1 December, 1915. W. T. Brownlee, C.M.

Cege Mavuso vs. Mhlambiso Dwenga.

(Umtata. No. 550/1915.)

Dowry—Deductions—General Principles—Death of Wife.

Claim for return of 8 head or £40 paid as dowry and costs.

The Magistrate gave judgment for 2 head or £10.

Pres.:—No definite ruling has been laid down in any case of this nature and though many of them have been decided in this Court, yet in each case the decision has to a large extent been founded upon the merits. The general principle being that if a woman die shortly after marriage, without having produced children the husband may demand the return of the dowry paid by him or at least a portion of it except in cases where the woman has died in child-birth.

The particulars of this case having been put to the Native Assessors they state:—

"That the two principal elements to be considered are the length of time a woman has lived with her husband and the number of children she has borne.

"If she has lived with him only a short time and has had no children or only one child the husband has a claim for the return of dowry.

"If she has had many children no dowry is returnable.

"If she has lived with her husband for many years even though there is no child no dowry is returnable."

They further state that in this case the number of children born and the number of years (4 or 5) the woman has lived with her husband are sufficient to preclude the repayment to Plaintiff of any of his dowry.

With this opinion and statement of custom before it this Court is of opinion that the Magistrate in the Court below has erred in his decision and the appeal is allowed with costs and the judgment is altered to judgment for Defendant with costs.

Flagstaff. 1 & 2 September, 1915. W. T. Brownlee, C.M.

Deku vs. Nyangolo.

(Tabankulu. No. 16/1915.)

Dowry—Deduction for Wedding Outfit—Services of Woman.

Plaintiff sued for delivery and custody of his child and return of dowry, 11 head, or value £33.

The Magistrate gave judgment in favour of Plaintiff which declared Plaintiff guardian of his child Nomahobe (aged 4 approxi-

mately) but Defendant was allowed the custody of the child for another 5 years as the child was too young to be separated from its mother.

Judgment was further entered for Plaintiff for 9 head of cattle at £3 less 1 at £3 for the child, less £10 for marriage expenses plus costs to date of tender. Costs for Defendant subsequent to tender.

Plaintiff appealed against this decision.

Pres.:—The appeal in this case is upon four distinct questions:—

1. The question of the declaration of rights in respect to the child Nomahobe.

2. The question of the number of cattle found to have been paid as dowry.

3. The question of the number of cattle allowed as deduction in respect of wedding outfit.

4. The question of costs.

As regards the first question this Court is of opinion that the Magistrate in the Court below has erred for in its opinion the Plaintiff was entitled to something more than a mere declaration of rights.

The circumstances in this connection are as follows:—In 1914 the Plaintiff raised an action on precisely the same grounds as those set forth in the summons in the case now before the Court. In the case in 1914 the Defendant admitted his liability and tendered the Plaintiff his wife and child and the Plaintiff accepted the tender and in view of the fact that a tender had been made before summons the Plaintiff agreed to pay costs. Judgment was entered in terms of the tender and consent and the woman and child were delivered to the Plaintiff who thus obtained actual material possession. A short while later the woman absconded from the Plaintiff and took with her the child, and the Plaintiff has thus been compelled to renew the claims by way of fresh action, and in the opinion of this Court he is now entitled to the actual delivery to him of the child and the Magistrate is wrong in ordering that the child shall be detained by the Defendant for the period of 5 years. Such an order is entirely to the prejudice of the Plaintiff, it may give rise to all sorts of unnecessary litigation, and he may find himself involved in a claim by the Defendant for maintenance, and in any case the Plaintiff ought to have the custody of the child, who is quite old enough to be removed from her mother, so that he may nourish and maintain her in the knowledge that he is her father and so he may be able to draw to himself her filial affections while she is still of a tender and impressionable age.

In respect of the second question this Court does not see how it can interfere with the finding of the trial Court. The Magistrate had had the witnesses before him: there is evidence for the Plaintiff that 11 cattle and 1 horse were paid and there is evidence for the Defendant that only 8 and 1 horse were paid. The Magistrate has believed the evidence for the Defendant on this point

and it has not been shown to this Court that the Magistrate has erred.

On the question of deductions for outfit it has been the practice of this Court to allow only 1 beast in this connection and until it can be shown that there is any good and sufficient reasons for the allowance of more, this Court cannot agree with an allowance of what amounts practically to 3 head of cattle. There is an item, however, upon which the Magistrate has given no decision and that is the services of the woman, and while reducing the amount allowed for wedding outfit to 1 beast or value of £3, this Court will allow the Defendant a deduction for the services of the woman of 1 beast or value £3. The deductions thus allowed to the Defendant will be 1 beast for the child, 1 beast for the outfit, and 1 beast for the services.

These deductions from a total of 9 head granted to the Plaintiff will leave a balance of 6 head valued at £18.

In respect of the question of costs the Plaintiff ought to have succeeded. He has succeeded in his claim and the tender made to him was not a complete or unconditional tender. The tender was that of declaration of rights in the child, and this has already been held in the consideration of question 1, to be an insufficient tender.

The appeal is allowed with costs and the judgment of the Court below is altered to judgment for Plaintiff for 6 head of cattle or value £18 and the delivery to him of his child Nomahobe and costs of suit.

Butterworth. 7 November, 1916. J. B. Moffat, C.M.

Ntwanani vs. Robert Tuba.

(Idutywa. No. 194/1916.)

Dowry—Deductions—Wedding Outfit or Woman's Services not Allowed—Transkei.

Claim for return of wife or 8 head of dowry paid.

It was admitted that 8 head of cattle were paid as dowry, but the number of children born was disputed.

The Magistrate held that four children were born and gave judgment for 4 head of cattle.

Defendant appealed.

Pres.:—The first point to be decided is the number of children. The woman herself says she had five children. As stated by the Magistrate, the evidence on this point is conflicting. To clear up the doubt the Court sent the Interpreter to inspect the graves. The result of his inspection confirms the woman's evidence that one was buried at Plaintiff's kraal and four at her parents' kraal. So the Court accepts her statement that there were five children. The question as to deductions allowed in the Transkei in cases of

restoration of dowry on dissolution of marriage was put to the Native Assessors, who replied:—"There is no deduction allowed in the Transkei either for the woman's services or for the wedding outfit provided for her."

The claim for such deduction cannot therefore be allowed.

The appeal is allowed with costs, and the Magistrate's judgment is altered to judgment for Plaintiff for 3 head of cattle or their value, £5 each, with costs.

Umtata. 1 August, 1912. W. T. Brownlee, A.C.M.

Mehlomane Njikazi vs. Mnikina Ngawu.

(Umtata. No. 270/1912.)

I. Dowry—Dissolution of Marriage—Beast Must Pass to Mark.

II. Marriage—Dissolution—Beast to Pass to Mark.

Claim for restoration of wife or 6 head of cattle paid as dowry.

The Defendant admitted that 11 children were born of the marriage and six head of cattle paid as dowry, and tendered £3 and costs, as Plaintiff's wife refused to return to her husband.

Judgment for restoration of Plaintiff's wife or payment of one beast or value, £5, to mark dissolution of marriage.

Defendant appealed.

Pres.:—The appeal in this case is brought by the Defendant upon the amount allowed as value of the animal to be paid back by Defendant to Plaintiff to mark dissolution of the marriage. This Court, however, considers that no good ground has been disclosed in support of the appeal. It is necessary that a beast should pass from the Defendant to the Plaintiff to mark the dissolution of the marriage, and in the opinion of this Court the Magistrate in the Court below has not improperly exercised his discretion in fixing the alternative value of the beast for which judgment has been given at £5.

The appeal is dismissed with costs.

Umtata. 26 July, 1912. W. T. Brownlee, A.C.M.

Ntsentselele vs. Rangana.

(Engcobo. No. 170/1912.)

Dowry—Dissolution of Marriage on Desertion of Wife—Illness of Wife.

The Plaintiff in his summons stated:—

1. That he had married Defendant's daughter under Native custom in December, 1911, and paid 9 head of cattle as dowry.

2. That his wife deserted him without just cause in December, 1911, and returned to the Defendant's kraal.

Defendant admitted paragraph (1), but denied that his daughter had deserted Plaintiff or that he was detaining her, but stated she was ill and unable to move.

The Magistrate held that Plaintiff's wife had deserted him without just cause and gave judgment for 8 head of cattle or £60.

Pres.:—This case having been placed before the Native Assessors, they state that under Tembu custom a married woman becoming ill should be doctored by her husband, even if only recently married. There are cases when she is doctored by her father, but this is done by consent and out of the father's generosity. We know of no case where such treatment is supplied by her father as an obligation. Should the father be requested to supply this treatment a general request is made by the husband. The woman also may make such a request, and there are instances where she makes this request without the knowledge of her husband, but these instances are not in accordance with custom. Where a woman leaves her husband immediately after the duli party is gone she is followed up, and if upon being brought back to her husband she again leaves frequently it is proof that she is rejecting her husband. If the girl secretly leaves her husband the day after the duli and her husband at once follows her she must be given him, as when she left she was not ill.

In view of the foregoing statement of custom, this Court sees no reason to disturb the decision of the Court below. It appears then from the evidence that the woman left her husband immediately after the duli party and that he followed her up the same day, and in the opinion of this Court, if she was well enough to travel from her husband's kraal she was well enough to travel back.

The appeal is dismissed with costs.

The value placed by the Court below upon the cattle to be returned seems to be high in view of present prices, but it is optional to Defendant to settle this case by delivery of cattle. This Court sees no reason to interfere upon this point.

Umtata. 4 March, 1913. W. T. Brownlee, A.C.M.

Madolo Mnxaku vs. Liwani Madolo.

(Engcobo. No. 69/1913.)

Dowry—Father Entitled to Dowry of Eldest Daughter of Son for whom He has Paid Dowry.

Claim by Plaintiff for the following reasons for 6 head of cattle paid as dowry for Defendant's eldest daughter:—

1. Defendant was Plaintiff's eldest son of the Great House, but (Defendant) resides in his own kraal.

2. That Plaintiff paid dowry for Defendant's wife according to Native custom. That thereafter, in due course, there was born to Defendant's wife a female child, Nondisa, who was the eldest daughter of Defendant.

3. During last year Defendant married this eldest daughter and received dowry for her.

4. That according to Native custom the said Nondisa, Defendant's eldest daughter, was Plaintiff's property.

Defendant denies that according to Tembu custom the Plaintiff was entitled to the dowry of the said Nondisa.

The Magistrate gave judgment for Plaintiff, and further for any dowry which may be paid for Nondisa.

Defendant appealed.

Pres.:—The point at issue having been submitted to the Native Assessors, they state that "Cases such as this do not come into Court, and they are settled between the parties. It is, however, the custom that the dowry of the eldest daughter of a son, even an eldest son, should go to the father if he had paid dowry for his son's wife, but they are nevertheless regarded as the inheritance of the eldest son. The son is entitled to a portion of them, but the apportioning is in the hands of the father, who will pay out cattle to such persons as have claims in the dowry."

And in view of this statement of Tembu custom this Court agrees with the decision of the Court below, and the appeal is dismissed with costs.

Butterworth. 16 November, 1915. C. J. Warner, A.C.M.

J. Madolo vs. S. Mjonono.

(Willowvale. No. 335/1915.)

Dowry—Father Entitled to Repayment by Son from the Dowry of First Daughter to be Married.

This was an interpleader action for 3 head of cattle.

The Magistrate gave judgment for Plaintiff for the release of the cow and costs of suit. The two oxen were declared executable, with costs.

Plaintiff appealed.

Pres.:—The facts of this case are that Johannes Madolo obtained certain cattle as dowry for his second daughter. His eldest daughter had died, having never been married. A judgment was obtained against Ranayi and Madolo, brother and father of Johannes Madolo, and three head of cattle were attached in satisfaction of this judgment. The Court below found that one of these cattle was not executable, but that the remaining two were executable on the ground that they were obtained as dowry for the second daughter of Johannes Madolo, and under Native custom must be regarded as the property of Madolo, to replace the cattle he paid as dowry for the wife of his son Johannes.

The appeal is on this point alone, and this Court will not go into any other question arising out of the record. The matter is put to the Native Assessors, who state as Native law and custom:—"When the first daughter of the son dies before marriage and a second daughter is born to the son, she is in the place of the deceased daughter, because if the son had a son the grandfather would not look to him. He looks to the daughter to replace the cattle he paid as dowry for his son's wife."

This Court sees no reason to dissent from this opinion, and the appeal is dismissed with costs.

Butterworth. 18 November, 1913. A. H. Stanford, C.M.

Fetumane Mngengo vs. Ntulutyana Goniwe.

(Willowvale. No. 186/1913.)

Dowry—Gcaleka Custom—Fines for Seduction Merge into Dowry.

The facts of the case are immaterial.

Pres.:—It is common cause that six cattle were paid. Respondent says all as dowry. Appellant, three for seduction and three as dowry. If this contention is correct it is immaterial, as under Gcaleka custom, where marriage follows on seduction, all payments rank as dowry.

The woman alleges that her husband drove her away, but there is not sufficient proof of this, especially as it is common practice for women who do not wish to return to their husbands to say this. It is quite clear that no violence was done to her.

On the question of any allowance for wedding outfit, as the Appellant says his sister did not have any outfit he could not expect any allowance for it, although the Respondent says the woman did have an outfit.

The appeal is dismissed with costs.

Kokstad. 21 August, 1912. A. H. Stanford, C.M.

Edward and Mashasha vs. Msingileli.

(Matatiele.)

Dowry—Marriage by Christian Rites—Promise Made to Pay Before—Not Enforceable.

The facts are fully set forth in the President's judgment.

Pres.:—This is an action brought in the Court of the Magistrate of Matatiele by the Respondent, in which he prays for a judgment to enforce the payment of dowry under a promise alleged to have been made by the Appellants prior to the celebration of the

marriage entered into between the first named Appellant, Edward, and the Respondent's daughter, Rosa, which marriage was celebrated according to Christian rites.

In the opinion of this Court, the marriage having been entered into under the ordinary law of the Cape Colony, Native custom can no longer be applied to compel payment of dowry, a custom which only obtains amongst the Basuto tribe and one or two others which have adopted the Basuto custom, and any agreement previously entered into under Native custom becomes cancelled, the Court following the decision in the case of *Manqana* vs. *Ntintili* (Henkel, 218).

In the case of *Sihulu* vs. *Ntshaba* (Henkel, 62), the conditions are not the same, as in that case, subsequent to the celebration of the marriage by Christian rites, a written agreement was entered into between the parties, under which the father of the bridegroom undertook to pay 10 cattle as dowry to the father of the bride. As this contract was entered into subsequent to the marriage the Court held that the contract could be enforced.

The appeal is allowed with costs, the Magistrate's ruling set aside, the exception taken being allowed with costs.

Kokstad. 28 August, 1913. A. H. Stanford, C.M.

Nozozo and Joni vs. Mahlala.

(Matatiele. No. 136/1912.)

Dowry—Marriage by Christian Rites—Agreement can be Enforced.

The facts of the case are fully set forth in the President's judgment.

Pres.:—In the present action the summons alleges an agreement between the parties that the Appellants should pay to the Respondent, in consideration of a marriage according to Christian rites to be entered into between the second Appellant Jonny and Annie, daughter of the Respondent, a dowry of 25 head of cattle and 1 horse which is now sued for, the marriage having been celebrated.

To this claim the Appellants by their attorney pleaded what is practically a plea in bar "that the summons discloses no ground of action, since no antenuptial contract to pay dowry under Native law such as is alleged in the summons, can be sued upon after a marriage under Colonial law". The Magistrate was asked by both parties to give a ruling on this plea and he held that such a contract could be sued upon and from this ruling the present appeal has been noted.

In the cases of *Hebe* vs. *Mdonela Mba* heard in the E.D. Court in August, 1897, and *Piet* vs. *Goneso* heard in the same Court in November, 1902, it was held that agreements to pay dowry in con-

sideration of marriages to be entered into under Colonial law are not opposed to good morals or public policy, and therefore can be enforced, and this opinion is also supported in the views expressed by the presiding Judges in the case of *Msingeleli* vs. *Edward and Mahasha* recently heard in the Supreme Court on review from this Court.

In view of these decisions the ruling of the Magistrate must be sustained and the appeal dismissed with costs.

Butterworth. 21 March, 1916. J. B. Moffat, C.M.

Nyakumbi Magadla vs. Joel Nombewu.

(Willowvale. 1915.)

Dowry—Marriage by Christian Rites—Payment not Enforceable under Native Custom.

Claim for 5 head of cattle or £75 in respect of dowry promised by Defendant to Plaintiff on the marriage of his daughter Nellie. Defendant married the said Nellie by Christian rites and Plaintiff sued for fulfilment of Defendant's promise.

Exception was taken to Plaintiff's summons on the ground that no cause of action had been disclosed.

The Magistrate upheld the exception and dismissed the summons.

Pres.:—A marriage under Christian rites having taken place no action can be taken for the recovery of dowry under Native custom.

The Magistrate was right in upholding the exception. The appeal must therefore be dismissed with costs.

Kokstad. 5 December, 1917. J. B. Moffat, C.M.

C. Comani vs. D. Baqwa.

(Matatiele. No. 242/1917.)

I. Dowry—Marriage by Christian Rites—Recovery of on Wife being Divorced for Adultery.

II. Christian Marriage—Recovery of Dowry on Wife being Divorced for Adultery.

The facts of the case are fully disclosed in the President's judgment.

Pres.:—Plaintiff sues for return of dowry paid by him to Defendant whose daughter he married according to Christian rites. This marriage has been dissolved by the Court of the Chief Magistrate on the ground that the wife had committed adultery.

Exception to the summons was taken in the Magistrate's Court on the ground that it disclosed no cause of action inasmuch as the dowry was paid under Native law and custom and that adultery on the part of a wife does not entail the return of dowry under Native law and custom. The Magistrate upheld the exception holding that the dissolution of the Christian marriage has nothing to do with the question of the return of dowry and that the Plaintiff should rely on purely Native custom and sue for restoration of his wife failing which return of dowry paid, which practically leaves him without a remedy.

In this Court it has been argued, on behalf of respondent, that neither the Magistrate's Court nor this Court has any jurisdiction to deal with any case arising out of a Christian marriage, and quotes section 6, sub-section (2), of Proclamation No. 142 of 1910.

The point to be decided on this argument is whether a contract to pay dowry can be held to arise out of a Christian marriage. Such a contract is no part of a Christian marriage, and is entered into under an entirely separate law from the law governing such marriage, it must be dealt with quite apart from a Christian marriage, and cannot for the purposes of the section quoted be regarded as arising out of the Christian marriage. It is a contract made under Native law and custom, and as such should be dealt with under Native law, and is therefore cognisable by the Magistrate's Court and this Court.

In this case it is alleged that the woman committed adultery with one Luswazi, deserted the Plaintiff, and thereafter cohabited with Luswazi. If her conduct has been such as would entitle the Plaintiff to the return of his dowry under Native custom no difficulty would present itself.

A man whose marriage is dissolved through no fault of his is entitled to return of his dowry.

In this case the marriage has been dissolved on the ground that the wife has misconducted herself. Even if it were held that her conduct would not under Native law and custom entitle the husband to the return of the dowry paid it would be repugnant to justice and equity to say that a woman and her father, who was a party to the contract, should be allowed to benefit by the woman's misconduct.

The marriage has been dissolved on the ground of the woman's misconduct, and the husband is entitled to claim from the Defendant the dowry he paid under a contract, a condition of which was that the woman should be faithful to her husband.

The appeal is allowed with costs, and the case is returned to the Magistrate to be tried on its merits.

Dissenting Judgment by Walter Carmichael, R.M., Tsolo.

In this case the Plaintiff, having married the Defendant's daughter according to the forms of European marriage and thereafter having divorced her for adultery, sues the Defendant for return of dowry.

Exception has been taken to the summons on two grounds:— (1) That the Magistrate's Court has no jurisdiction to entertain the case, and (2) that no ground of action is disclosed.

The first exception was not taken in the Court below, but as it is of a fundamental nature and affects the jurisdiction of this Court as well as the Magistrate's, it is proper that it should be taken cognisance of. It bases itself on the contention that while section 6 (1) of Union Proclamation No. 142 of 1910 confers exclusive jurisdiction upon the Magistrate's (and Native Appeal) Courts in cases connected with marriage according to Native custom, section 6 (2) confers exclusive jurisdiction upon the Chief Magistrate's (and Superior) Courts in cases connected with marriage according to European forms, and that as the marriage in this case was of the second order, only the Chief Magistrate's Court can hear the complaint.

Section 6 of the Proclamation reads as follows:—

(1) Subject to the provisions of sections 2 and 3 and 11 of this Proclamation, all questions relating to any marriage according to Native custom and all questions of divorce or separation arising out of any such marriage shall be tried and determined in accordance with Native law by any Resident Magistrate, in whose Court such question may properly be brought, subject to appeal to the Native Appeal Court.

(2) Subject to the provisions of sections 4 and 5 of this Proclamation all such questions relating to or arising out of any marriage contracted according to the law of the Colony or out of any Native registered marriage shall be decided according to the law of the Colony in the Court of the Chief Magistrate, subject to appeal to any superior court having jurisdiction, or in any such last-mentioned Court.

The crux here lies in the interpretation of the words "all such questions relating to or arising out of any marriage contracted according to the law of the Colony." The majority judgment fastens on the words "arising out of any marriage," and holds that lobola does not "arise" out of a Christian marriage; but the actual phrase used is "relating to or arising out of," and if the question of a lobola payment made because of, in respect of, and conditionally upon a marriage is held to be unrelated to that marriage, the significance of the word "relation" becomes reduced almost to a vanishing point. However, to admit a wider meaning to the phrase does not necessarily dispose of the point at issue in the sense of the Respondent's contention. Sub-section (1) relegates to the Resident Magistrate in respect of a Native-custom marriage, first "all questions relating" thereto, and secondly "all questions of divorce or separation arising" therefrom, and sub-section (2) relegates to the Chief Magistrate and the Superior Courts in respect of a European custom marriage "all such questions relating to or arising out of" it. The pronominal "all such," while not free from ambiguity, I take to signify all of certain recently specified questions, viz., "divorce or separation"—not the more

remote and comprehensive first clause—" all questions " which indeed would be more clearly signified, if meant without the word " such " at all. If this reading is correct the Resident Magistrate's general jurisdiction under Proclamation No. 112 of 1879 is ousted only in respect of divorce and separation suits.

Such an interpretation is borne out by the context. The questions relegated to the Chief Magistrate and Superior Courts are to be decided " according to the law of the Colony " as defined in section 1 (*c*). But the institution of Lobola is unknown to the law of the Colony and cannot be adjudicated upon under it, and as marriages of Natives according to the law of the Colony do not in general involve community of property (*vide* section 5 of the Proclamation), many questions " relating to " such marriage could not be dealt with under Roman-Dutch law. Only if the jurisdiction is confined to divorce and separation can a reference to such law bear any rational meaning.

Lastly, if the language of a piece of legislation is ambiguous, it is permissible and sometimes useful to look to its history and object. Section 23 of Proclamation No. 112 of 1879 gave Magistrates of East Griqualand general jurisdiction in all civil suits, section 33 of the same Proclamation prescribed that " all questions of divorce or separation arising " from Native custom marriage should be tried by Magistrates under Native law, and section 32 that " all questions of divorce or separation arising " from European custom marriage should be tried by the Chief Magistrate under European law. Incidentally it may be mentioned that it was decided in the case of *Clegg* vs. *Greene* (11 S.C.R. 352) that the last quoted section did not oust a Magistrate's jurisdiction to hear a suit for damages for adultery of one of the parties to a European marriage.

Section 9, Act No. 35 of 1904, abolished the Court of the Chief Magistrate. Section 11, Act No. 29 of 1906 provided that notwithstanding the former Act, " the Chief Magistrate . . . . shall . . . . have jurisdiction to hear and decide suits of divorce and separation as provided by " the above quoted Proclamation. So that when the time came to consolidate the various Proclamations relating to Native marriage and inheritance and the jurisdiction of Courts, the position was that the Chief Magistrate's was a divorce Court for persons married according to European forms and nothing more. It is reasonable to suppose that if it had been then intended to transfer additional subjects of jurisdiction from Resident to Chief Magistrate and Superior Courts the intention would have been expressed in emphatic and unmistakable language. None such is to be found in the Proclamation.

On these grounds I concur in the view that the Resident Magistrate and on appeal, this Court have jurisdiction in the present case. I now come to the question whether the summons discloses any ground of action.

It alleges that during the subsistence of the Plaintiff's marriage with the Defendant's daughter " by Christian rites," she committed adultery with one Thomas Luswazi, deserted the Plaintiff, and thereafter cohabited with the said Luswazi in the district of Mount

Currie, that the Plaintiff divorced her in the Chief Magistrate's Court, and now "by reason of the dissolution of the said marriage is entitled to the return of the dowry." To this the Defendant, now the Respondent, pleads that "the dowry was paid under Native law and custom, and that adultery on the part of a wife does not entail the return of dowry under Native law and custom." Here, agreeing at the outset with the dictum in the majority judgment of this Court that "the dowry transaction was a contract under Native law and custom and as such should be dealt with under Native law and custom." I am forced to apply this test as well to the summons as to the Proclamation. One cannot, it seems to me, hold at once that the question is resolvable under Native law and that it is to be construed in terms of a separate European marriage contract. At this stage, indeed, the majority judgment prepares itself to jettison Native law in the name of "justice and equity," if not "public policy and good morals"—the more usual formula for such occasions. Such a course raises very debatable questions; whatever one's personal opinion may be, one cannot overlook the fact to a large portion of the ecclesiastical world divorce from a Christian marriage is itself an immoral proceeding, the heinousness of which would be aggravated by an attempt to profit therefrom by recovering dowry. Moreover there is much to be said for the view that a woman is less vagrant of instinct than a man and that a husband has only himself to blame if he loses the affections of his wife. But it is well nigh impossible for a Court of Justice to resolve such delicate and complicated issues; the only safe course appears to me to adhere strictly to the law and judge of the claim by the nature and intention of the Native dowry contract without endeavouring to import into it ethical ideas foreign thereto.

Now, before deciding whether the circumstances set forth in the summons would in Native law justify the husband in dissolving the marriage and at the same time claiming return of dowry, I should have preferred to have had the case put to the Native Assessors. Had the Appellant chosen a different ground this course would doubtless have been taken, but he based his arguments exclusively on the nature of the marriage contract, and the implication throughout was that this furnished his only standing room. Two cases have been consulted by the Court, viz.: *Jakalase* vs. *Nobongo* (I.N.A.C. 203), and *Ngawane* vs. *Makuzeni* (I.N.A.C. 220).

In the first, the Plaintiff's wife had committed adultery and deserted him; he did not wish her back, and sued for dissolution of marriage and return of dowry. It was held that "in ordinary circumstances under Native custom, adultery on the part of the wife is not sufficient ground for obtaining a dissolution of the marriage and return of the dowry. The evidence shows clearly that it is the husband who is repudiating the wife, and under such circumstances he is not entitled to the return of the dowry." In the second case, it was held there were exceptions to the general rule, such as "where after remonstrance the wife is guilty of repeated

acts of adultery or when a wife who becomes pregnant by another man refuses to divulge his name or obstructs the husband in an action against the adulterer for damages." The bare record in the present case furnishes no such extreme instance.

There is nothing to show that the Appellant remonstrated with his wife or called upon her to return to her duty; all we know is that he closed the door on any possible amendment on her part.

I am therefore forced to the conclusion that under Native law the dowry would not be returnable, and am of the opinion that the Magistrate's judgment should be upheld and the appeal dismissed with costs.

Butterworth. 16 July, 1917. C. J. Warner, A.C.M.

Luto Njengaye vs. Ben Mbola.

(Willowvale. No. 66/1917.)

Dowry—Native Marriage and Subsequent Marriage of Parties by Colonial Law—Agreement to Pay.

The facts of the case are fully disclosed in the judgment of the Appeal Court.

Pres.:—The facts in this case are not disputed and it appears that Plaintiff's sister who married Defendant according to Native customs some fourteen years ago wished to enter into a Christian marriage with her husband. Plaintiff and Defendant agreed to this on condition that Defendant should pay two more head of cattle as dowry. The dowry paid at that time and the additional dowry promised were then registered by the parties. Plaintiff now sues for the additional two head of cattle promised. Defendant relies on the Native custom that payment of dowry cannot be sued for, and that no time fixed upon when dowry should be paid.

As regards the first this Court holds that Native law does not contemplate Christian marriages and that a payment of dowry in a case of a Christian marriage cannot be enforced under the custom "ukuteleka." Plaintiff's only remedy is to sue for the payment of dowry agreed to be paid in consideration of a Christian marriage (*a*).

As regards the second objection the agreement to pay the cattle sued for was made two years ago and the Court considers that sufficient time has elapsed in which Defendant might reasonably be expected to fulfil his obligations.

The appeal is allowed with costs and judgment in the Court below altered to judgment for Plaintiff for two head of cattle or £10 and costs.

(*a*) See case of *Sihuka* vs. *Ntshaba* (I. Henkel, page 62).

Flagstaff. 11 December, 1912. W. T. Brownlee, A.C.M.

Mtshangana vs. Mtini and Mtezu.

(Bizana. No. 310/1912.)

Dowry—Non-registration no Bar to Proof of Marriage in Adultery Action.

Plaintiff claimed 5 head of cattle or £25 damages for adultery committed with his wife about September, 1912. Defendant excepted to the summons as follows:—

1. That the alleged marriage between Plaintiff and the woman Lamani purported to have been registered on 4th October, 1912.
2. That Plaintiff had no right of action to any tort committed prior to the 4th October, 1912.

The Magistrate overruled the exception.

Defendant then pleaded that the woman was living with him but came there of her own accord.

Judgment was given for Plaintiff for 3 head or £15 and Defendants appealed.

Pres.:—In the opinion of this Court the Magistrate in the Court below was right in dismissing the exception raised. The Registration of dowry provided for under section 13 of Proclamation No. 142 of 1910 is intended to provide the means of easy proof of the number of dowry cattle paid in a Native marriage and further provides that dowry shall not be capable of proof unless registered. This section however does not in any way interfere with the proof of marriage and a marriage may be proved even though there may have been no registration of dowry, and the fact that dowry in this instance was registered only in the month of November is not in itself inconsistent with the fact that a marriage was contracted three months earlier. Furthermore there is no question of payment of dowry or return of dowry as between the Plaintiff and Defendant and while the failure to register dowry might have been a bar to proof by Plaintiff of the number of dowry paid by him in an action against the woman's father for return of dowry it can be no bar to any action he may bring against any person guilty of adultery with a woman whom he can prove to be his wife and whose marriage to him is capable of proof notwithstanding the provisions of Proclamation No. 142 of 1910.

On the point of the marriage itself the Magistrate in the Court below is satisfied upon the evidence that Plaintiff married the woman Lumani and this Court agrees with the Magistrate in this conclusion. The most important evidence on this point is that of the woman Lumani herself who is manifestly hostile to Plaintiff and who yet states that she married him. It is true that she states that she was coerced into the marriage, and though under the provisions of section 29 of Proclamation No. 140 of 1885 no woman

may be compelled to marry against her will, there is no evidence that she was compelled and the marriage between her and Plaintiff must be regarded as a valid marriage and Plaintiff is therefore entitled to claim and to recover damages against any person having intercourse with his wife.

The Defendants admit that Defendant No. 1 has cohabited with the woman. This cohabitation is unlawful and the Defendants are liable in damages. The point of the order regarding the horse paid to the woman's father is not referred to in appeal and so is not dealt with.

The appeal is dismissed with costs.

Flagstaff. 11 December, 1912. W. T. Brownlee, A.C.M.

Matswelana vs. Pungatshe.

(Bizana. No. 243/1912.)

Dowry—Not Returnable on Widow's Re-marriage if Children were Born.

Claim by Matswelana heir to his late father Maqwelane for the return of 7 head of cattle or £35 in respect of dowry paid by his late father for his mother who has re-married since her husband's death.

The Magistrate gave judgment for 2 head of cattle or £10 and costs.

Defendant appealed.

Pres.:—The question of the return of the dowry in the event of the re-marriage of a widow has been decided in the cases of *Mdodana* vs. *Ndawuse* (I.N.A.C. 35), *Goro* vs. *Fredi Njiva* (I.N.A.C. 188), and *Teweleni* vs. *Nyila* (I.N.A.C. 256), in each of which it was held that where a widow has borne children to her first husband no dowry is returnable upon her contracting a subsequent marriage. In the last case it is true that the further opinion is given by the Native Assessors that where there has been only one child and the dowry has been large the heir of the first husband may ask for some of it back and a portion may be returned, and this Court has then to decide as to the number of children born of the marriage between Mayoyo and Mandadana and as to the dowry paid. The number of children must be held to be two. Mandadana was pregnant when Mayoyo married her and this child was born in wedlock and under ordinary circumstances would be the child of Mayoyo. A child was born to him also after his death. It is true these two children died but this is the fault of neither Defendant nor of Mandadana. She has performed one of the main duties of a wife and has produced children. Then as to the dowry, this was by no means large, and in the opinion of

this Court and in view of the decisions referred to Plaintiff is not entitled to succeed in his action.

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

Kokstad. 1 September, 1916. J. B. Moffat, C.M.

Noliya Zandile vs. Nomzwembe.

(Matatiele. No. 237/1916.)

Dowry—Number Payable—Hlangwini Custom.

Claim for 9 head of cattle or £45 being balance of dowry due by Defendant for Plaintiff's sister whom he had married according to Native custom.

Defendant excepted as follows:—

1. That the summons alleged no special agreement or contract for the payment of dowry.
2. That in the absence of such contract there was no recognised Hlangwini custom fixing dowry at 26 head.

The Magistrate overruled the exception.

Defendant appealed.

Pres.:—The parties in this case are Hlangwini. Exception to the summons was taken in the Court below on the ground that no contract for payment of dowry is alleged.

Plaintiff's case on the exception was that under Hlangwini custom dowry to be paid is fixed at twenty-six head. A Sub-Headman was called and gave evidence in support of this statement.

This Court has, however, held that among the Hlangwini, dowry is not fixed by custom.

The Exception taken in the Court below should have been upheld.

The appeal is allowed with costs and the Magistrate's ruling is altered to Exception allowed and Summons dismissed with costs.

Umtata. 10 March, 1913. W. T. Brownlee, A.C.M.

Danti v. Mbuzo.

(Ngqeleni. No. 497/1912.)

Dowry—Original Cattle when in Existence should be Specifically Claimed.

The facts of the case are immaterial.

Pres.:—Under Native custom a husband obtaining judgment upon the dissolution of his marriage, for the return of dowry is

entitled to claim the delivery to him of any of the original cattle paid by him as dowry should they be still in existence and in this case had the Plaintiff when he obtained judgment against Mbuzo in the original action pointed out to the Court that the particular cow in question then existed he might have obtained an order of the Court for the delivery of this beast to him but so far as this Court is able to form any opinion after a perusal of the writ which has been put in, it appears that the Plaintiff accepted in that case a judgment which not only did not specify any particular cattle, and was couched in general terms, but which also provided an alternative which enabled the Defendant to settle by way of cash payment and in the opinion of this Court the Defendant is entitled under the terms of this judgment to elect his mode of settlement of the alternative claims made upon him.

The appeal is dismissed with costs.

Umtata. November, 1915. W. T. Brownlee, A.C.M.

Tyozo vs. Mtshula.

(Ngqeleni. No. 247/1915.)

Dowry—Ownership on Dissolution of Marriage—When Paid by Father for Son.

Interpleader Action in which the cattle were declared not executable.

Pres.:—This appeal is against the ruling of the Magistrate in the trial Court that cattle paid as dowry for a son by a father on dissolution of the marriage became the personal property of the son. At the request of the Appellant's attorney the point was put to the Native Assessors—Pondo.

Jiyajiya states:—"The cattle in such a case are the father's. If I pay dowry for my son I take a beast from each of my wives' huts, when these are paid they are paid in the name of the father. On their being returned on dissolution of the marriage, the cattle return to the huts from which they came; if another wife is married these cattle are again paid, not necessarily the same cattle but cattle from these huts."

The point having been put to the Tembu Assessors,

Silimela states:—In cases of this nature when a father has paid dowry for his son and the marriage is dissolved before the birth of a child, the returned cattle are the property of the father. The son on remarrying cannot of right claim the identical cattle contributed for the first marriage to pay as dowry for the second wife. If there is a child and the son contributes towards the dowry, on return of the cattle they go to the father. They are only nominally the son's. If the father dies before the cattle are returned they belong to the heirs.

The appeal is allowed with costs and the judgment of the Court is set aside and the case returned to be dealt with on the merits, each party to call such further evidence as they deem necessary for their case.

Butterworth. 9 July, 1913. A. H. Stanford, C.M.

Mbulali Manxoyi vs. Mqotswana and Nonkonxa.

(Willowvale. No. 98/1913.)

Dowry—Payment to Messengers—Liability.

Claim 1 beast 19 goats and £6 dowry received for and on behalf of Plaintiff by Defendant.

The Magistrate gave judgment for Plaintiff as prayed and Defendant appealed.

Pres.:—The evidence conclusively shows that the Appellant and one Philip were employed as her messengers by the Respondent Nonkonxa to give her niece in marriage and to recover the dowry from one Maxwele who had carried off the girl.

The Appellant received one ox nineteen goats and £6, but instead of at once taking this property to his employer as by Native custom he was bound to do, and asking for his reward, he retained possession of it demanding to be paid a beast for his services. As a result a number of the stock died in his possession but it is doubtful whether the ox died or not, as he describes the animal which died as a black ox while his wife and his witness Tafeni say that it was a red ox which died. The Appellant having failed to carry out the obligation upon him to deliver the stock to Respondents is liable for the loss which has occurred.

The appeal is dismissed with costs.

Flagstaff. 28 August, 1913. A. H. Stanford, C.M.

Ngcatsha vs. Telepula.

(Tabankulu. No. 90/1913.)

Dowry Proclamation—District of Registration—Marriage not Celebrated.

The facts of the case are fully set forth in the President's judgment.

Pres.:—The intention of section 13 of Proclamation 142 of 1910 was to prevent a Plaintiff maintaining an action for the recovery of dowry paid by him unless such payment had been registered, but there is nothing in the Proclamation which in any way limits the person sued for return of such dowry in his defence.

Furthermore in this case it is shown that the payment of the animals now claimed was made in the Tabankulu district, therefore in terms of the Proclamation registration should have been effected in that district. It is also shewn that the Respondent was not a resident in the district of Libode and consequently was not under the jurisdiction of that Court, therefore the registration effected at Libode is invalid.

The certificate and evidence however show that no marriage took place but the stock was paid on account of dowry for an intended marriage which was never celebrated. This being so registration was not necessary and there is nothing to prevent the action being maintained in the same manner as if the Proclamation had not been passed. In construing what was intended by section 13 the whole of the Proclamation must be taken into consideration, and section 2 provides that the Proclamation shall apply to every marriage celebrated after the date of the promulgation thereof between parties both of whom are Natives.

The appeal is dismissed with costs and the case returned to the Magistrate to be proceeded with in the ordinary course.

Umtata. 21 July, 1913. A. H. Stanford, C.M.

Cxinini Lumnkwana vs. Nomtishi Wani.

(Elliotdale. No. 174/1912.)

Dowry—Proclamation 142 *of* 1910—*Intended only to Apply to Recovery of.*

Claim for 5 head of cattle or £25 damages for adultery and pregnancy of Plaintiff's wife by Defendant.

Defendant pleaded marriage.

The Magistrate gave judgment as prayed.

Pres.:—It is abundantly clear that the Appellant eloped with the Respondent's wife well knowing her to be a married woman. No attempt was made to pay dowry until three years later. Respondent's dowry has not been returned so the marriage between him and the woman Nowisile still subsists and the Appellant is in the position of an ordinary adulterer.

The non-registration of the payment of dowry in no way invalidates a marriage in other respects legally contracted under Native custom. The provisions of section 13, Proclamation 142 of 1910, were intended to apply only to actions for the recovery of dowry brought by the husband and against the person to whom dowry had been paid, or his heir. The Magistrate was in error in disallowing the evidence tendered on this point as it was not an action for the recovery of dowry.

The appeal is dismissed with costs.

Umtata. 27 November, 1913. W. T. Brownlee, A.C.M.

Kepu Nondabula vs. Mgquba.

(Libode. No. 66/1913.)

Dowry—Proclamation No. 142/1910—*Registration of.*

Pres.:—In this case the appeal is from the order of the Magistrate in the Court below giving permission to the Appellant, the Plaintiff in the original case, to make registration of dowry and the order being not quite clear, by consent of parties a telegram was sent to the Magistrate of Libode who heard the application, and by consent copy of the telegram and the reply thereto are put in. The reply makes it quite clear that the order of the Resident Magistrate of Libode was a general one authorising the Applicant to have registration made and not an order for the registration of any specific number or description of dowry and in the opinion of this Court the appeal is premature.

The appeal is on the ground that no registration may now be made but this Court is of opinion that the provisions of Proclamation No. 213 of 1913, under which these matters are regulated, permits of registration being made. Sub-section 5 of section 13 of the Proclamation makes it possible for any party to a payment of dowry, should such dowry not have been registered within one month of payment, to make application for the registration of such dowry, and at the same time to furnish particulars of such dowry, the Magistrate shall thereupon call upon the parties to attend at the office of the Resident Magistrate within one month for the purpose of the registration, and to make declaration as to the payment, and in the event of such order not being complied with the Magistrate may upon being satisfied of the accuracy of the information supplied him, register the dowry.

It is clear then that though the period within which dowry may be registered without any application is limited to one month after payment and that the period of enquiry must be within one month of application, yet the period within which application may be made, upon the failure to register within one month, is not limited, and the Applicant in this instance was not limited in the time within which he might make his application and the Magistrate was right in permitting him to make registration and the appeal is dismissed with costs.

The parties will now have to satisfy the Magistrate of the proper amount of dowry to be registered. In the opinion of this Court the Appellant did not raise a proper exception in the original case. Sub-section 1 of section 13 of the Proclamation was never intended to prevent parties in dowry cases from prosecuting actions in such cases, but was intended to assist parties in such actions by providing them with a sure and certain means of proving dowry, and the only thing which this sub-section is intended to prevent is the proof of dowry by any other means than from the register. The

proper course then for the Appellant's Attorney (the Defendant in the original case) to have followed would have been to have pleaded to the merits and then when the Plaintiff attempted to prove dowry otherwise than by the register to have objected to such evidence and his objection must have been allowed. In this case the exception to the whole proceedings has led the Plaintiff to withdraw his case so that as far as the present application is concerned the position is that there is no claim before the Court for the return of the dowry.

Kokstad. 3 April, 1912. W. T. Brownlee, A.C.M.

Majuzwana vs. Ngxoto.

(Qumbu. No. 228/1911.)

Dowry—Registration of—Marriage not Consummated.—Section 13, *Proclamation* 142/1910 *not applicable.*

Pres.:—In this case the Magistrate in the Court below has decided upon the evidence that the cattle claimed by the Plaintiffs were paid on account of dowry in connection with a projected marriage and not as fine and with this finding this Court sees no reason to disagree. The Magistrate holds however that because these cattle have not been registered under the provisions of section 13 of Proclamation 142 of 1910 and because it is not competent for the Plaintiffs to prove the payment otherwise than by a certified copy of the register the Plaintiffs are not entitled to succeed in this action, and it then becomes necessary to decide what is to be regarded as dowry within the meaning of the Proclamation referred to.

In the case of *Peacock* vs. *Ben Bango* (C.T. Law Reports) and in various other cases since decided it was laid down that the *dominium* in cattle paid on account of dowry does not pass to the father of the woman until the marriage is consummated, and in the opinion of this Court the cattle paid cannot be regarded as being in the true sense dowry until this event happens. A reference also to the form in which dowry cattle must be registered shows that the register requires the name of the husband and the wife to be recorded and also the date when the marriage took place and that the declaration regarding the cattle paid makes special reference to the "above marriage."

It would seem then that the Proclamation contemplates the registration when, or after, a marriage takes place and it seems unreasonable to expect that a registry should be made on each separate occasion of payment of dowry prior to marriage.

In the opinion of this Court the Proclamation referred to cannot apply to cases such as that now under consideration and the Plaintiffs ought to succeed in their action, and the appeal is

allowed with costs and the judgment of the Court below is altered to judgment for Plaintiffs for four head of cattle and costs.

It was suggested in the Court below that the Proclamation is *ultra vires*, but in the opinion of this Court it is not *ultra vires*.

Flagstaff. 1 September, 1914. W. T. Brownlee, A.C.M.

Ngceke vs. Lusotsho.

(Tabankulu. No. 101/1914.)

Dowry—Procedure—Registration.

Action by Plaintiff against Defendant to show cause why certain 6 head of cattle paid as dowry for Defendant's daughter should not be registered.

Whereupon Plaintiff stated:—

1. That about three years ago he married Defendant's daughter and paid 6 head of cattle for her.
2. That he caused a notice to be issued from the Resident Magistrate's Court on 28th May, 1914, calling upon Defendant to appear on 28th June, 1914, to register the said dowry.
3. That Defendant appeared and disputed that the said dowry had been paid.

Defendant excepted to Plaintiff's summons on the ground that it was contrary to law and to the provisions of Proclamation 142/1910 as amended by Proclamation 213/1913.

The Magistrate dismissed the exception and Defendant appealed.

Pres.:—The appeal in this case is against the ruling in the Court below upon the exception taken by the Defendant, but in support of the appeal nothing has been advanced in argument to show the particulars in respect of which it is considered the summons is contrary to law and before the appeal could succeed this should be done.

In the opinion of this Court the Plaintiff has a good ground of action.

Sub-section 3 of section 1 of Proclamation No. 213 of 1913, gives any party to the payment of dowry the undoubted right of giving notice to the other party at any time after the expiry of one month subsequent to the payment of dowry to have such dowry registered, and prescribes the proceedure to be followed in the event of the failure of such other party to have the dowry registered. The period within which the one party may give notice and the other party to make a declaration for registration is not defined or limited, the only period limited being that within

which, after notice, declaration must be made for the purpose of registration. The sub-section then goes on to provide for the procedure to be followed in the event of the failure of such other party to appear for the purpose of making such declaration.

Sub-section 6 provides for the procedure to be followed in the case of the appearance of both parties in response to the notice issued by the Magistrate under the provisions of section 3. Nothing is said as to what shall be done in the event of the parties agreeing as to the registration and as to the number of dowry to be registered, and indeed it would seem to be quite unnecessary to make provision for such a contingency. This section however provides that should there be any dispute as to the terms of payment, *i.e.*, as to the number of dowry paid, the Magistrate shall register such payment, if any, as may be admitted by the party receiving, and no more, " And it shall thereupon be competent for the party alleging additional payment to summon the other party to show cause why such additional payment should not be registered."

The appeal in this case relies very largely upon the use of the word additional, and it is argued that it is only when additional dowry, in the sense of a second or third instalment, is paid, that the party paying dowry may sue the party to whom dowry is paid to show cause. In the opinion of this Court, however, the word " additional " will not bear the construction which it is here sought to place upon it, and the intention of the Proclamation seems to be quite clear, namely, that if the parties agree in part but not in whole, then the part upon which they are in agreement shall be registered, but the part on which they are not in agreement, that is the additional part, may not be registered and must be the subject of an action at law.

For example, the payer says he has paid in dowry six head, the payee admits the payment of only three, then the Magistrate will have to register three and the payer will have to resort to action at law to compel the payee to register the additional three.

It is argued that in the event of the payee admitting none, none will have to be registered, and that there can be nothing additional to none, for it will not be additional but will be the whole. This contention may be ingenious but it is not well founded, for surely what will apply to the part will in these matters equally apply to the whole, and if the part may be registered—that is, the additional part which makes up the whole—surely the whole also may equally be registered.

In this case the payer has issued notice to the payee and the payer has appeared with the payee before the Magistrate, there has been a dispute between the parties, and the only course now open to the payer is to sue the payee to show cause why the disputed number of cattle should not be registered. In the opinion of this Court, as has already been stated, the payer, the Plaintiff in this case, is proceeding in accordance with the provisions of sub-section 6 in his claim, and the appeal is dismissed with costs.

Umtata. 17 March, 1915. W. Power Leary, A.C.M.

Mabeni vs. Jekemani.

(Libode. No. 66/1914.)

Dowry—Procedure—Registration of.

Pres.:—In this case Plaintiff is sueing for the restoration of his wife or return of dowry—fifteen head of cattle or their value £150 and the sum of £10 10s. It is alleged in the summons that there was one child born of the marriage. Defendant in his plea admits the marriage, but says only five head of cattle were paid, not fifteen as alleged, denies payment of £10 10s., admits the birth of the child.

Admits that the woman has left Plaintiff and pleads specially that she was smelt out and accused of witchcraft by the Plaintiff and left Plaintiff's kraal in fear of her life or of serious bodily injury by reason whereof Plaintiff is not now entitled to demand her return.

The defendant was then called to prove his plea and when being cross-examined by Plaintiff's Attorney an objection was raised by Defendant's Attorney to any evidence being led to prove the payment of £10 10s. as dowry as stated in paragraph 2 of the summons owing to this alleged payment not having been registered in accordance with law.

Plaintiff's Attorney contended that the objection should have been taken by way of exception to the jurisdiction of the Court and that the Defendant in pleading to the summons and leading evidence that no further dowry had been paid waived his objection and cannot bar cross-examination on his own evidence.

The objection was upheld and against that ruling this appeal has been brought.

The Magistrate's reasons are very brief. The objection of Defendant's Attorney was upheld in view of the terms of section 13 (1) of Proclamation 142 of 1910.

Section 13 (1) of the Proclamation as amended by Proclamation 213 reads: "No payments of dowry under Native custom which may be made at any date subsequent to the 31st of December, 1910, shall be capable of proof in any legal suit or proceeding unless such payment shall have been declared and registered."

Section 2 of the Proclamation reads: "The provisions of this Proclamation shall apply to every marriage contracted after the date of the promulgation thereof." The Proclamation came into force on the 1st of January, 1911. It is argued that section 2 should be read with section 13 and that does not make it necessary to register dowries paid in respect of marriages contracted before the 31st of December, 1910, and that the Magistrate was wrong in his ruling. It is also argued that an irregularity was committed by the objection being upheld and that legal evidence was rejected. In the opinion of this Court section 2 of the Procla

mation does not enact that dowries paid after the promulgation in respect of marriage contracted prior to that date were exempt from registration, there is no ambiguity in the wording of section 13 of the Proclamation; it is clear the intention was that all dowries paid subsequent to that date are not capable of proof unless registered.

Dealing first with the provisions of Proclamation No. 142 of 1910 as amended by Proclamation No. 213 of 1913, and following the decision in the case of *Kepu Nondabula* vs. *Mgquba* the objection was rightly taken no evidence was capable of being led to prove payment of dowry which was paid subsequent to the 31st of December, 1910. There was no irregularity in the Magistrate upholding this objection. It would have been irregular for the Magistrate to admit inadmissible evidence and evidence as to payment of dowry other than as directed by the Proclamation referred to is clearly inadmissible. The question as to whether an appeal is permissible at this stage of the proceedings and a ruling of this nature has been discussed and Proclamation 140 of 1885 referred to. The clause referring to appeals in that Proclamation has been superseded and is no longer in force. Proclamation 391 of 1894 enacts that the Court may reverse or alter the judgment as justice shall require.

The ruling of the Magistrate was not a definite sentence and therefore the appeal was premature. The procedure laid down in the case of *Kepu Nondabula* vs. *Mgquba* heard before this Court in November, 1913, on appeal from Libode which has already been referred to should have been followed—where it was laid down that "The proper course then for the Appellant's Attorney (Defendant in the original case) to have followed would have been to have pleaded to the merits and then when the Plaintiffs attempted to prove dowry otherwise than by the register to have objected to such evidence and his objection must have been allowed." The objection in the present case was rightly taken and very properly upheld.

It was competent for Plaintiff at this stage to have registered the payment of £10 10s. as dowry. There is no time limit and dowry may be registered at any time after it has been paid. Should one of the parties refuse to register, proceedings may be taken under section 13, sub-sections (3) and (6), of the Proclamation.

A case heard in Kokstad in December, 1912, has been referred to in the arguments. In that case there was no marriage and cattle were paid or handed over for an intended marriage, quite a different thing from a consummated marriage in respect of which additional dowry is being paid.

True, subsequent to that case the Proclamation was amended. This was in order that neither Magistrate nor practitioner should have any doubt on the point. The appeal is dismissed with costs.

Mr. Guthrie dissents.

Dissenting Judgment (Mr. Guthrie, R.M., Port St. John's.).

"This ruling (*i.e.*, refusal to allow evidence of unregistered dowry) finally debarred Plaintiff from claiming this particular por-

tion of the dowry and it would therefore seem that an appeal on the ruling was in order.

" Section 2 of Proclamation 142 of 1910 indicates that the registration of dowry is only necessary if a marriage took place, and provided such marriage was celebrated after the date of promulgation of this Proclamation. This seems to be in accordance with the Kokstad case. . . Section 13 appears to be governed by section 2 and would apply only to dowry of marriages subsequent to the Proclamation.

" The preamble of the Proclamation would seem to support the idea that the Proclamation itself was only intended to deal with questions arising out of marriage and the results of marriages and not with every payment of dowry."

Flagstaff. 31 August, 1915. W. T. Brownlee, C.M.

Qiti vs. Ntlakala.

(Bizana. No. 74/1915.)

Dowry—Recovery by Heir—Pondo Custom—No Deductions—When Children Born of Marriage.

Qiti sued Ntlakala for the return of the dowry paid by his deceased father and in his summons alleged:

1st. That he was the eldest son and heir of the late Mjwayeli.

2nd. That about eight years ago the said Mjwayeli married one Deliwe the daughter of Defendant and paid Defendant 10 head of cattle as dowry for her.

3rd. That the said Deliwe lived with the said Mjwayeli until his decease, when she returned to the Defendant's kraal.

4th. That there was only one child born of the marriage between the said Deliwe and the said Mjwayeli.

5th. That the said Defendant has now given the said Deliwe in marriage to another man, from whom he has received a second dowry.

Defendant in his plea admitted the above facts but states that at the time of Mjwayeli's death she was accused of causing his death and was " smelt " out by the Plaintiff and the other wives of the deceased, driven away from the kraal and warned never to return thereto and that by reason of this the Defendant became absolved from all liability for the return of any dowry paid by Mjwayeli for the woman.

Defendant subsequently applied to have his plea amended by the addition of a new paragraph: " *That he denied liability for return of cattle in that his daughter Deliwe gave birth to a child to Mjwayeli and that therefore he is not liable to restore any cattle.*"

This was taken in the nature of an exception with the concurrence of the Plaintiff's Attorney.

The Magistrate upheld this exception and dismissed the summons.

Pres.:—The question raised in this appeal having been placed before the Native Assessors they state that under Pondo custom, the person who is entitled to claim for the recovery of dowry is the husband of the woman. And in such a case the husband claims back his cattle so as to "make a breast" (*i.e.* "provide sustenance" for his son) and that it is contrary to Pondo custom for the heirs of a deceased husband to demand the return of the dowry paid by him, for by so doing they deprive the child of a mother and destroy all friendship and put an end to the possibility of the woman ever remembering and returning to her son. Further that the birth of one child is sufficient to extinguish dowry of nine or even ten head of cattle, and it is quite a common practice not to demand the return of dowry even when there have been no children should the woman have lived for a long time with her husband. In either case she has fulfilled her duty.

In view of this statement of custom this Court is of opinion that the exception—which is really a plea in bar—was rightly upheld, and the appeal is dismissed with costs.

Flagstaff. 12 December, 1912. W. T. Brownlee, A.C.M.

Tshuze vs. Qobosha.

(Bizana. No. 246/1912.)

Dowry—Rejection of Husband—Woman's Services.

Claim for return of wife or restoration of dowry paid, viz., 5 head or £25.

The Magistrate found four head were paid as dowry and the fifth was paid as a fine for elopement. That four head had been tendered to Plaintiff who refused them and that these cattle had since died of East Coast fever and therefore plaintiff had no claim and gave judgment for Defendant with costs.

Plaintiff appealed.

Pres.:—In this case the Plaintiff says he paid five head of cattle as dowry and the Defendant admits that four head of cattle and a horse were paid but he says that only the cattle were paid as dowry and that the horse was paid as an elopement fee, and the Magistrate appears to have believed the Defendant. This contention of the Defendant is, however, both against the weight of evidence and contrary to custom, for in the first place the fact that the horse and the cattle were all paid in one day points to the conclusion that they were all paid as dowry, and in the second place the payment of an elopement fee is not in accordance with custom. This principle is laid down clearly in the cases of *Gxonono* vs. *Skuni*

(1 N.A.C., 154) and *Ramba* vs. *Pumani Dwe* (1 N.A.C., 161), and also in the case of *Tukuse* vs. *Zombini* heard at this sitting of this Court.

To carry off or "twala" a girl does not in itself constitute an offence for which a fee or fine must be paid, for it is a very common practice to elope with or to use the Native term to "twala" or carry off a girl with a view to marriage and should marriage be offered and dowry paid no fine is exacted for the elopement. Should, however, the young man not offer marriage or should he fail to pay dowry this is an affront and must be paid for to "bopa" or bind up the injury to the girl and her friends.

In the case now before the Court it is clear that the Plaintiff carried off the girl with the view to marriage for he sent to Defendant to tell him he was not to search for his daughter as she was with Plaintiff. It is also clear that Plaintiff offered marriage and was accepted as a suitor and paid dowry. This Court is satisfied that all the stock paid was paid as dowry, and the Plaintiff was therefore entitled to the return of all dowry paid by him upon the woman rejecting him, since no children have been born of the marriage. This Court is therefore of opinion that the Defendant's tender of four cattle was not a sufficient tender and that the Plaintiff was justified in refusing it.

The appeal is allowed with costs and the judgment of the Court below is altered to judgment for Plaintiff for five head of cattle or £25 and costs. Cattle if offered to be subject to the approval of the Magistrate or his representative.

The point of the allowance of a beast for the services of the woman has been raised in appeal but this point was not raised in the Court below and in any case this Court is of opinion that the Defendant is not entitled to any deduction on this ground for the woman was with the Plaintiff for less than two months.

The question of "Nqutu" has also been raised but there is no evidence that any of the cattle paid were paid as "Nqutu".

Kokstad. 27 August, 1915. W. T. Brownlee, C.M.

Mandela vs. Christian Mini.

(Matatiele. No. 116/1915.)

Dowry—Rejection of Wife to Avoid Further Payment—Hlubi Custom.

This was an action brought by Christian Mini against Mandela (both Hlubi's) for payment of 21 head of cattle being the balance of dowry to be paid according to Hlubi custom for his sister, *i.e.*, 25 head less 4 head paid on account at the time of the marriage

20 years ago. Defendant in his plea stated that in March, 1914 he rejected the woman Nobulawu (the sister of Plaintiff) and that he duly notified Plaintiff of the fact. He stated further that having rejected the woman Nobulawu he thereby forfeited any dowry he paid to the Plaintiff and the marriage between the parties came to an end. He therefore denied liability for dowry claimed or any portion thereof. In his evidence in support of this plea Defendant stated that before summons was issued Plaintiff brought the matter before the headman and he (Defendant) then rejected the woman as he could not get on with her and could not pay dowry for her. He returned her with her children. The woman had had seven children (three dead). The woman was at his kraal when Plaintiff brought action for dowry. He had previously driven her away but she came back. He had never definitely told Plaintiff that he had rejected the woman though he had complained of her conduct.

On the special plea being overruled the Defendant's attorney admitted that only four head were paid and stated that she was at the disposal of Plaintiff who could take her into his possession. Plaintiff's Attorney thereupon asked for judgment as prayed. Defendant's Attorney objected and maintained that the rejection of the woman freed Defendant from liability for the promised dowry.

Judgment was entered for Plaintiff as prayed with costs.

Defendant appealed.

Pres. —This case is quite a novel one and is, so far as this Court is aware, without precedent, and after carefully considering all the circumstances this Court is of opinion that there are no grounds upon which this Court can interfere with the decision of the Court below. Had the Plaintiff's sister been still living with the Defendant there is no question that the Plaintiff would be entitled to sue for and recover the dowry for his sister, the parties being Hlubi and Hlubi dowry being fixed and admitted by Defendant to be twenty-five cattle and one horse and the only point which this Court has to decide is whether the Defendant can, by the expedient of casting off his wife without due cause, divest himself of the liability to pay dowry for her.

In this case it is clear that the Defendant is casting off his wife with this object and without cause and after dowry had been demanded from him, and in the opinion of this Court the Plaintiff is under all the circumstances entitled to recover the dowry which he would clearly have been entitled to receive under ordinary circumstances.

The appeal is dismissed with costs.

Umtata. 23 November, 1912. A. H. Stanford, C.M. .

Jacob Kuke vs. Enoch Majambe.

(Port St. John's. No. 76/1912.)

Dowry—Restoration on Woman Failing to Marry—Cattle Returnable with Increase—Pondo Custom.

Plaintiff claimed the restoration of 1 black cow, 1 black heifer and £1 10s. on the following grounds:—

1. That about September, 1910, Plaintiff became engaged to Defendant's daughter and paid 1 black cow and £1 10s. as dowry.

2. That since the black cow was paid she has had progeny, viz., a black heifer.

3. That subsequently Defendant's daughter wrote to Plaintiff breaking off the engagement.

Defendant admitted the engagement and that it was broken off by his daughter. Defendant further admitted the payment of the black cow and that such cow had progeny of a black heifer. That the heifer died while a calf and the cow from East Coast Fever.

Denied the £1 10s.

The Magistrate gave judgment for Defendant.

Plaintiff appealed.

Pres:—The case having been submitted to the Native Assessors they state the Pondo custom is: When cattle are paid as dowry on account of a marriage to be contracted and the girl refuses the man then the cattle are returnable together with their increase; if the cattle are dead, and the girl has never been given to the intended husband the father or guardian must replace such animals. If the girl had been handed over to the suitor the case would be regarded as falling under the ordinary marriage custom and the increase would not be returnable. It would thus seem that there is a considerable difference on this point between Pondo custom and that obtaining in the Tembu, Fingo and Gcaleka tribes. The views expressed however are not opposed to equity as at common law the person breaking a contract is usually liable in damages.

The appeal is allowed with costs, and judgment in the Magistrate's Court altered to judgment for Plaintiff for two head of cattle or £10 and costs. If cattle are tendered in settlement of the judgment they are subject to the approval of the Magistrate or any person deputed by him for the purpose.

Umtata. 25 July, 1912. W. T. Brownlee, A.C.M.

Ntame vs. Mbede.

(Engcobo. No. 74/1912.)

1. *Dowry—Restoration—No Deduction for Child Born during Woman's Second Marriage.*
2. *Child—Posthumous—Issue of Second Marriage.*
3. *Native Custom and Common or Statutory Law—Conflict of—Latter Prevails.*

Action for restoration of stepmother or dowry paid, 8 head of cattle and 20 sheep, or value £75.

The summons stated:—

1. Plaintiff was heir to the late Mangali.

2. That his father late Mangali married Defendant's daughter about four years ago.

3. That Mangali died about three years ago and his wife returned to Defendant's kraal.

4. That during present month (February, 1912) Defendant remarried her to one Ntsuntsu and received 7 head of cattle as dowry. Defendant admitted the marriage and the payment of 5 head of cattle and 10 sheep as dowry. Admitted the re-marriage to Ntsuntsu and that one child was born of the first marriage and that the woman was again pregnant at the time of her second marriage. Defendant tendered 3 head of cattle deducting one for the child, one for present pregnancy and one for wedding outfit.

Judgment for 3 head of cattle or £22 10s. and costs.

Plaintiff appealed.

Pres.:—In this case the appeal is upon the point of the beast allowed to the Defendant in the Court below in respect of the unborn child of whom the woman Nolayini (Defendant's daughter) was said to be pregnant at the time the case was heard in the Court below and on this point this Court is of opinion that the decision of the Court below should not stand. In the case of *Rafu* vs. *Madolo* (N.A.C.R. 200) the decision which was founded almost entirely upon the decision in the case of *Mbono* vs. *Manxiweni* (6 E.D.C. 62) laid it down that the widow of a Native marriage is free to contract a second marriage and in various other decisions of this Court it has been decided that where such a second marriage is contracted the only remedy possessed by the representatives of the first husband is to recover the dowry paid for the woman by her first husband. The case has been put to the Native Assessors and they state under Native custom a marriage holds good as long as the cattle paid for the woman are not returned and that until they are returned she cannot contract a second valid marriage and the children born of her are the property of the estate of her late husband. But while this Court sees no reason to differ from this statement of Native custom it is

yet of opinion that where Native custom comes into conflict with the common law or statutory law the former must give way, and in the opinion of this Court this case must be decided on the lines of the decisions in the two cases above referred to. It appears that the woman Nolayini was at the time of the hearing in the Court below eight months gone with child and was then married to a man named Ntsuntsu and so far as the Court could come to a conclusion the father of the child to be born is Ntsuntsu, and the woman being free to marry Ntsuntsu it seems to follow that the child if born during the subsistence of the marriage would be the child of Ntsuntsu and that the Plaintiff would not be in a position to establish any claim as against Ntsuntsu for the possession of this child.

The position as it presents itself to this Court is this that under all the circumstances this child if born has not been born during the subsistence of any marriage of the woman Nolayini with Plaintiff's father and that he would therefore not be entitled to claim this child and he should therefore not be condemned to forfeit a beast in respect of this child.

The appeal is allowed with costs and the judgment of the Court below is altered to judgment for Plaintiff for four head of cattle and costs, deductions being allowed in respect of only the outfit and the one child born prior to the marriage of the woman with Ntsuntsu.

The question of the value placed upon the cattle need not be gone into as it is competent for the Defendant to satisfy the decision of the Court below by delivery of cattle.

Flagstaff. 30 August, 1915. W. T. Brownlee, C.M.

Nyangweni Mxabaniso vs. Njisane.

(Flagstaff. No. 38/1915.)

Dowry—Return of, by Chief—Pondo Custom.

This is an action in which the Plaintiff claims the return to him of his wife Maludeke, the daughter of the Defendant, who it is stated has returned to the Defendant and now refuses to return to the Plaintiff or alternatively of the dowry paid for her.

The marriage and payment of dowry are admitted and the Defendant relies for a *defence upon the alleged Pondo custom under which a Pondo chief is not liable for the return of dowry paid for his daughter.*

Pres.:—Various cases have been cited on both sides in argument and it would seem that such a custom as that alleged by the defence did actually exist in Pondoland. This custom, however,

is in the opinion of this Court "contra bonos mores" *and inequitable and contrary to all principles of justice, and this Court has endeavoured to establish the principle that even conceding the point of the existence of such a custom it is applicable only in the cases of Chiefs of high rank and position and is even then more a matter of might than of right; and once more conceding the existence of such a custom this Court is of opinion that the Defendant in this case is not of such rank as to justify the Court in applying the custom in his case.*

The Defendant's daughter has returned to her father and no reason has been advanced why she should not return to her husband and it is conceivable that an avaricious father might very easily enrich himself by receiving one dowry after another for his daughter were this custom to be supported.

The appeal is allowed with costs and the judgment of the Court below altered to judgment for the Plaintiff with costs for the return of his wife within one month from date, or alternatively for the return of fifteen head of cattle and one horse valued at £80.

Authorities cited:—*Welapi* vs. *Mbango* (1 Henkel, p. 2); *Matwa* vs. *Marexe* (1 Henkel, p. 277); *Maquela* vs. *Siyoyo* (2 Henkel, p. 78); *Matapela* vs. *Magquzumana* (unreported), heard in this Court in April 1910.

Kokstad. 6 December, 1916. J. B. Moffat, C.M.

Mzatu vs. Tom Ntlonganiso.

(Mount Frere. No. 159/1916.)

Dowry—Return of, when Wife Dies without Issue—Baca Custom.

Claim for the return of all the dowry paid by reason of the Defendant's daughter dying one year and four months after marriage without issue.

The Defendant pleaded that Plaintiff's wife had died in the fifth year after the marriage and that ten sheep had been paid.

The Magistrate found for Plaintiff as prayed.

Pres.:—The Defendant appeals on the ground that the Magistrate has not taken into consideration:—

(*a*) *The duration of the marriage.* On this point Headman Nohi stated that according to Baca custom if a woman lived with her husband six or ten years and died without children the whole of the dowry is returnable.

There is a question in this case as to whether the marriage existed for one or five years. Whichever is correct the dowry is returnable according to the custom as stated. The Magistrate accepted the Plaintiff's allegation that it lasted one or two years.

(*b*) *Elopement.* No authority has been brought forward in

support of this and the Court does not see that the fact that there had been elopement prior to marriage can affect in any way Plaintiff's claim for return of dowry.

(*c*) *The illness and treatment of the woman by Defendant at his kraal for some months.* The Defendant had the use of the dowry cattle and no sufficient ground has been shown for any allowance being made under this head.

(*d*) *Allowance for outfit.* This point was not raised in the Court below and there is no evidence that an outfit was provided. The probability is that there having been an elopement no outfit was provided. Moreover such an allowance would not be in accordance with Baca custom.

The Court agrees with the decision of the Magistrate.

The appeal is dismissed with costs.

Kokstad. 21 August, 1912. A. H. Stanford, C.M.

Mliza Mbelo vs. Mpofu.

(Umzimkulu. No. 182/1911.)

Dowry—Return of, when Wife Killed by Lightning.

Claim for restoration of 10 head of cattle or £80 as dowry paid the Defendant by Plaintiff for his daughter one Elizabeth. That in the fourth year of Plaintiff's marriage with Elizabeth, she was struck dead by lightning without having borne any children to Plaintiff. That Defendant thereupon promised to replace Elizabeth with another sister which he had failed to do.

Defendant admitted marriage, dowry and death of Elizabeth by lightning and that she had had no children. Defendant denied that he promised to replace Elizabeth with another sister and stated that she was past child-bearing age.

The Magistrate found for Plaintiff for four head or £18 10s. and costs.

Defendant appealed.

Pres.:—The case having been submitted to the Native Assessors they state when the death of the wife is caused by lightning it is regarded as an accident, and dowry is returnable as in ordinary cases where death results from disease.

The second defence set up that the woman was past the age of child-bearing when married is not supported by the evidence, as according to the Appellant's own showing, she could not have been more than 36 years of age at the time the marriage took place.

The appeal is dismissed with costs.

Kokstad. 2 May, 1914. W. T. Brownlee, A.C.M.

Mangwane vs. Nontana and Mqubu.

(Mount Ayliff. No. 42/1914.)

1. *Earnings—Married Woman—Right of Action.*
2. *Kraal Head Responsibility—Assault.*

Claim by Mangwane for £250 damages for assault in which she lost the use of her left eye.

Defendant's exception:—

1. That Plaintiff was a woman married according to Native custom and could not sue unassisted by her husband or guardian.

2. That further as a Native woman married according to Native custom she cannot possess property and therefore has no *locus standi.*

3. That an action for damages for assault does not lie under Native custom. And in the event of the Court deciding to try the said action under Colonial law then the second named Defendant further excepts to the summons on the ground that no cause of action against him was disclosed as the summons only alleges liability under Native custom and further that under Colonial law a guardian was not liable for the *torts* committed by his ward.

The Magistrate decided to try the case according to Native law and upheld the exception and dismissed the summons with costs.

Plaintiff appealed.

Pres.:—With regard to the first exception, while it has been held that a married woman must be assisted by her guardian in any action she wishes to raise, it has yet been held in this Court that a married woman may sue even though unassisted by her husband or guardian, if it be shown that such guardian refuses to assist her. No evidence has been taken upon this point and in the opinion of this Court the exception should not have been allowed until evidence had been taken.

This Court is further of opinion that the second exception also was wrongly allowed. The contention that a Native woman may not hold property might be a good one in the mouth of her husband or guardian, but is not one which the Defendants could raise in the present case: and there are cases in which a woman may hold property even against her guardian, such as that in which a female herbalist may receive and hold fees for her services.

It is true that it has been held that no action lies under Native custom for damages arising out of an assault, but in this case the Plaintiff applied for the hearing of the action under the common law and in the opinion of this Court the Magistrate has not exercised a judicial discretion in deciding to try the case under Native law.

Section 23 of Proclamation 112 of 1879 lays it down that in all suits the common law shall apply except in where both parties are Natives in which case Native law may be applied. It is signifi-

cant that with regard to the common law the word used is directory and with regard to Native custom the word used is merely permissive and seeing that it is only under the common law that a Native may seek redress by means of a civil action in a case of assault the Magistrate has erred in deciding upon a cause which has precluded the Plaintiff from the only remedy available to her for an injury committed upon her person. Furthermore, she being the injured party it is fitting that she should have resort to the only law which will give relief to herself personally. And in so far as the first Defendant is concerned, the appeal is allowed with costs, and the ruling of the Court below on the exception is set aside, and the case is remitted to the Court below to be tried upon its merits.

As regards the remaining exception, it is admitted by the Appellant that there can be no action against the second Defendant, and in the case of *Mdodana and Another* vs. *Nokulela* it was held that the Magistrate was wrong in holding the second Appellant, as head of the kraal, liable for damages awarded against the first Appellant for assault.

The appeal, therefore, in so far as the second Defendant is concerned is dismissed with costs.

Butterworth. 3 March, 1913. A. H. Stanford, C.M.

Empi Mate vs. John Mba.

(Kentani. 482/1912.)

Earnings—Unmarried Woman if of Age must Sue.

Claim by Plaintiff for 6 head of cattle or £30 earned by Plaintiff's ward one Lizzie who resided until recently at Defendant's kraal.

Defendant excepted to the summons that Lizzie who was of age was the proper person to bring the action.

The Magistrate upheld the exception and dismissed the summons.

Pres.:—The exception taken in the Court below is that the girl Lizzie, the actual owner of the original cow, is of age and the proper person to sue. The plea put in is a denial that the girl Lizzie is of age, but her own evidence shows that in 1905 she was employed as teacher when she earned the money with which the cow was purchased. The Court cannot believe that at the age of 13 or 14 she could occupy such a responsible position. Moreover according to the description she gives of herself at the time of rinderpest (1897) she must now be a woman of about 27 years of age and the Magistrate finds from her appearance that she is over 21.

In this Court in argument a fresh defence is set up. It is urged that if she is now of age, at the time she earned it the property

was that of her legal guardian and therefore he is entitled to sue. Even if this were so it is not the defence set up in the Magistrate's Court, and as the guardian failed to exact his claim during the minority of the girl it ceased on her attaining majority.

The appeal is dismissed with costs.

Umtata. 28 November, 1913. A. H. Stanford, C.M.

Moti Ngqekete vs. Asikuku Note.

(Ngqeleni. No. 271/1913.)

Elopement—Divorced Woman—Father's Rights.

The facts are immaterial in this case.

Pres.:—The question having been put to the Native Assessors, they state that where a girl has been given in marriage, and the marriage is dissolved and she returns to her father, she is no longer regarded as a girl but is called a "Buyakazi".

Ordinarily a father would have a claim for damages if a man carried off a daughter of this description, if, after carrying her off he refused to marry her when the father's messengers arrived; but in the present case as the woman of her own accord left the man and thus broke off the prospective marriage the father has no claim for damages. The present case, however, was clearly for damages for pregnancy, and when it was shown the Respondent's daughter was not pregnant, the claim under the summons was disposed off.

The appeal is allowed with costs and the Magistrate's judgment altered to judgment for the Defendant with costs.

Kokstad. 4 December, 1917. J. B. Moffat, C.M.

Cetywayo vs. Ntontiya.

(Mount Frere. No. 101/1917.)

Elopement Fee—Native Custom—Conflict of.

Pres.:—The appeal is brought on the ground that the facts and probabilities do not support the Magistrate's judgment and that the contention that there was an elopement as alleged is not supported by Native custom. It has been argued on behalf of the appellant that as no fee is claimable for elopement the alleged payment could only have been paid on account of dowry. In the case of *Gxonono* vs. *Skuni* (I. Henkel, 154) this Court expressed the opinion that there is no such thing as elopement fee. This was also laid down in a Mount Frere case, *Robo* vs. *Siqwayi* (II.

Henkel, 123). In a case from Ngqeleni heard at Umtata in March, 1916, the Pondo Assessors said that in a case of abduction where the woman is recovered intact the father or guardian would have no claim for damages against the abductor.

The Native Assessors at this Court having been asked whether an elopement fee is payable under Native custom replied "Yes".

This is in conflict with the opinions expressed by this Court and by the Pondo Assessors in the cases referred to above.

In this case the Plaintiff claims return of a heifer which he says he paid as dowry in respect of a marriage which did not take place. The Magistrate finds that it was not paid as dowry but was paid as fine for carrying the girl off. The evidence supports this. Whether a fine for elopement is actually claimable or not, there is no doubt it is often paid. In this case the beast was paid as a fine and not as a dowry. Plaintiff cannot therefore succeed in an action for its recovery on the ground that he paid it as dowry. Although a claim against him for fine might not have been enforceable he paid it and cannot now recover it as dowry. The Magistrate's judgment is upheld.

The appeal is dismissed with costs.

Flagstaff. 30 August, 1915. W. T. Brownlee, C.M.

Nicholas Tanyana vs. Mgqobozi Tshwane.

(Flagstaff. 22/1915.)

Engagement Cattle—Death of, Falls on Suitor.

Plaintiff sued for 8 head of cattle paid as dowry for Defendant's daughter who had since been married to another man.

Defendant in his plea admitted the above but stated that when the marriage was broken off he sent for Plaintiff to remove the cattle which he neglected to do leaving them at Defendant's where they subsequently died of East Coast fever. Defendant sold the hides and tendered their value to Plaintiff. This tender he refused. He further pleaded that as the proposed marriage was not consummated the *dominium* in the stock did not pass to him and the loss was Plaintiff's.

Plaintiff in replication denied the tender of cattle and neglect in removal and states that the deaths were not reported to him.

The Magistrate found on the evidence that the cattle died of East Coast fever, that their deaths were reported and that the value of the hides was tendered and gave judgment for the value so tendered. Plaintiff to pay costs.

Plaintiff appealed.

Pres.: In this case the two main grounds of appeal are, first that it had not been proved that any report was ever made to Plaintiff of the alleged death of the cattle claimed, and second that there is no proof of any tender of these cattle to the Plaintiff.

With regard to the first point this Court is aware of the Native custom that the death, prior to marriage, of any cattle must be reported to the person paying them. This is because, prior to marriage, cattle paid as dowry die to the person paying them, and it is necessary that there should be no question as to the existence of these cattle. In this particular case it is not an incredible statement to make that cattle have died when it is remembered that East Coast fever broke out soon after payment and was rife in the district where Defendant lived, and this Court cannot say that the Magistrate has erred in believing the Defendant on this point, the testimony on the subject of the hides is strongly in favour of the Defendant's case. As regards the point of tender there is evidence to support this and there is also evidence in support of the contention that Defendant endeavoured to return the cattle to Plaintiff after tender had been made, notably that of Sergt. Nopeka whom the Magistrate believed.

The appeal is dismissed with costs.

Umtata. March, 1915. W. Power Leary, A.C.M.

Mdini Matyesini vs. Ntampu Dulo.

(St. Marks. 115/1914.)

Engagement Cattle—Rights in, when Espousals Broken Off—Liability for Losses.

The facts are fully set forth in the judgment.

Pres.:—This is an appeal by the defendant in a case where he has been adjudged to return five head of cattle and their increase—whilst in his possession—two head, which were paid to him in respect of a marriage intended to be contracted between the son of the Plaintiff and the niece of the Defendant. Defendant contended that his daughter was rejected and the dowry was therefore not returnable. The facts as stated in the Magistrate's reasons for judgment are admitted.

The case having been put to the Native Assessors, Chief Dalindyebo states:—"These cattle are returnable, but not with increase; only the original number should be returned, as these were dowry cattle.

"The Tembu custom does not require the reporting of the death of a beast paid on account of dowry."

When the return of these cattle was first demanded there were five of the original cattle and one increase. Since then there has been another increase and all but two of the cattle have died of East Coast Fever. No report was made by the Defendant to Plaintiff, but the Plaintiff was aware the cattle died.

In the case of *M. Mxaki* vs. *S. Feni*, heard in this Court on the 20th November, 1912, the point was put before the Native Assessors, and they stated that under Tembu custom, should the

Plaintiff have neglected when the proper time arrived to demand the delivery of his beast and it then died the loss would be upon him, but should he have demanded it and the Defendant failed or refused to deliver it the loss would be upon the Defendant, and he would be made to "vusa," or "make alive," the dead animal.

In the present action the Defendant had the opportunity to return the cattle before they died of East Coast Fever, and failed to do so upon demand; he cannot now be absolved by reason of their death.

The Court is not in accord with the Assessors on the question of the increase. In the case of *Mfuleni Bidli* vs. *Mills* (19, E.D.C., 93-102) we find the following passage in the judgment:— "De Villiers, C.J., in concurring in the view of the Native custom taken by the Court of the Chief Magistrate, said that three very experienced Magistrates had held 'that when cattle were paid as dowry on account of a marriage to be contracted, until that marriage had been contracted the ownership did not pass and that if any died before marriage the intended husband bore the loss, and if any of them had progeny he was entitled to the increase. (*Peacock* vs. *Ben Mango*, 19, S.C., page 323)."

The ruling of the Superior Courts in their judgments has been followed consistently. It must be borne in mind that the Native Law Commission took evidence on the Native laws and customs throughout the Cape Colony and Native Territories, and quite a number of decisions have been based on the evidence taken, supplemented by the valuable assistance of Assessors, such as the Chief Dalindyebo.

Following the decision in the case of *Dyomfana* vs. *Klassie* (N.A.C., 296), the appeal is dismissed with costs.

Flagstaff. 10 December, 1912. W. T. Brownlee, A.C.M.

Conyolo Nolangeni vs. Catingana.

(Flagstaff. 194/1912.)

Estates—Administration of, and Liability to Heir.

The facts of the case are fully set forth in the President's judgment.

Pres.:—In this case it seems to be quite evident that the Defendant has disposed of a large number of estate cattle, and in the opinion of this Court he should make them good.

In his evidence the Defendant admits (1) that he killed one beast for the Chief Matobela; (2) that he killed one beast for his one daughter Ntombi; (3) that he killed one for Qopiso's wedding; (4) that he paid one beast as dowry for Samuel's wife; (5) that he paid one beast as maintenance for his own child; (6) that he paid one beast for Mkuqulwa as dowry; (7) that he sold one beast for the purpose of paying a debt owing by Qopiso; (8) that he

paid one beast as dowry on behalf of his younger brother Tyendani; (9) that he exchanged one for goats; and (10) that he paid one beast to a doctor for cleansing the Plaintiff's kraal—in all ten head; and of these ten head the only three which it can be said were disposed of for the benefit or in the interests of the Plaintiff are the beast killed for Matobela, which was killed apparently with the consent of Plaintiff; the beast exchanged for goats, the remaining proceeds of which were handed to Plaintiff; and the horse paid for the cleansing of Plaintiff's kraal. The other seven heads have been disposed of in the interests of the Defendant himself and of his brothers, and can in no way be said to have been disposed of in the interests of the Plaintiff.

It is urged that the various services to which these animals were devoted are services which the Plaintiff himself would have had to perform had he himself been dealing with the property of the kraal and with the inmates of that kraal, and while this Court is quite prepared to admit that there is every probability that the Plaintiff would have helped his uncles in their various needs, yet none of them could have compelled him to perform any of these services for them which the Defendant says he has performed. The Defendant was administering a trust, and this trust should have been administered in the interests of the Plaintiff, and the interests of the Plaintiff have been sacrificed to the advantage of the Defendant himself and his brothers.

This Court will not order him to replace the three animals made use of for the benefit of Plaintiff and his kraal, but is of opinion that Defendant should be made to restore the other seven estate cattle which he has improperly disposed of.

The appeal is allowed with costs, and the judgment of the Court below is altered to judgment for Plaintiff for seven head of cattle or £35 and costs of suit. Cattle if tendered to be subject to the approval of the Magistrate or his proper representative.

Butterworth. 18 July, 1916. J. B. Moffat, C.M.

K. T. Solontsi vs. X. T. Solontsi.

(Nqamakwe. 47/1916.)

Estate—Administration of Will.

Claim by Plaintiff as heir to certain stock in his late father's estate, under Native Law and custom.

Defendant excepted to Plaintiff's claim on the ground that the action should have been instituted by the executor of the estate of his late father.

The Magistrate upheld the exception, and Plaintiff appealed.

Pres.:—There is nothing on record to show whether the late Tayisi Solontsi was an allotment holder under Proclamation No. 227 of 1898 or not. Whether he was an allotment holder or not

is, however, immaterial. He has left a will, and his estate should be dealt with under the ordinary Colonial law. The arguments have been based on the assumption that his property is subject to the provisions of sections 19 and 20 of Proclamation 227 of 1898. It is presumed, therefore, that he is an allotment holder. Section 19 provides that if the holder of a title under that Proclamation dies leaving a legally executed will his property, save and except the allotment of other immovable property, shall be administered according to the law of the Colony. The reference in section 20 to "such property" is to the immovable held under the Proclamation No. 227. This is made quite clear by Proclamation No. 101 of 1911. While, therefore, if in this case the late Tayisi Solontsi was an allotment holder under Proclamation 227 of 1898, that allotment would be dealt with according to Native law and custom under section 20. Having left a will his property other than the allotment should be dealt with under the ordinary law of the Colony relating to testate succession, and before the property can be dealt with letters of administration are required by an executor.

The fact that the Master of the Supreme Court has not issued such letters does not justify this Court in holding that the estate can be dealt with otherwise than as provided for by law.

The Magistrate's judgment is upheld, and the appeal is dismissed with costs.

Kokstad. 16 May, 1913. W. T. Brownlee, A.C.M.

W. Ntlola vs. M. Maqasha (In Appeal).

M. Maqasha vs. W. Ntlola (In Cross-Appeal).

(Matatiele. No. 292/1912.)

Estate Property—Dissipation of by Guardian—Increase of Belongs to Estate.

The President's judgment discloses fully the facts of the case.

Pres.:—In this case the Plaintiff is the grandson and heir of the late Ntlola, and the Defendant is a younger son of the late Ntlola and the uncle and guardian of the Plaintiff, and the Plaintiff is suing for estate property disposed of by the Defendant, the property in question being one beast left by the late Ntlola and seven cattle and three horses paid as dowry for Xiyosa, the only daughter of Ntlola, and the increase of certain of the horses.

The Defendant admits the number of stock alleged in the summons, but states that he has disposed of it in various ways for the benefit and in the interests of the family. He says he paid three head of cattle and two horses as dowry for his younger brother Paul, the uncle of Plaintiff, that he paid one beast to Delport in respect of a certain tort, one to Warren for a debt incurred by Ntlola, one to Falane for a debt, one to Mpoahlela

for a debt, and one horse was sold in order to provide a wedding outfit for Xiyose. He also says that the remaining beast was paid to himself to replace a beast that he paid as dowry on behalf of Paul.

The Court below has found that Defendant has wrongfully dissipated the estate of the late Ntlola and has given judgment against Defendant for the four cattle and two horses paid as dowry for Paul, has approved of the payments made to Delport and Warren, and of the horse sold to provide wedding outfit, does not consider that sufficient proof has been adduced in the matter of the two cattle said to have been paid to Falane and Mbonzene, and has given a judgment of absolution in regard to them, and the Magistrate further considered that the disposal of the horse for the wedding outfit of Xiyose was justifiable, and further holds that the Plaintiff is not entitled to recover the progeny of the horse obtained by Defendant by trade.

The appeal is brought by the Defendant on the point of the four head of cattle and two horses allowed the Plaintiff, and the Plaintiff cross-appeals on the point of the progeny.

On the first point this Court sees no reason to disagree with the Magistrate in the Court below, for while the Defendant as guardian might be justified in liquidating all just and lawful debts owing by the estate, he has, in the opinion of this Court, no right to dissipate the whole of the estate as he has done, to the benefit of a younger son, and to the injury of the heir of the estate. The young man Paul may have a claim upon the head of the family for the provision for him of a wife, but such claim after all is a moral one, and one which he could not enforce at law, and the Defendant therefore has exceeded his powers in disposing of the estate property as he has done for the sole benefit of Paul. The Defendant says that one of these cattle—the one which he traded—was paid to him in return for a beast paid by him as dowry for Paul, and in the opinion of this Court, even were this the case Defendant has no right to dispose of estate property to recoup himself for contributions to Paul's wife dowry made by himself, and he must look to Paul himself to replace this.

With regard to the cattle disposed of to Delport and Warren and the horse disposed of for a wedding outfit for Xiyose, these would seem to have been properly disposed of, and with reference to them and the other two cattle there is no appeal, and they need not be dealt with here.

With regard to the cross-appeal this Court is of opinion that the Magistrate has erred. From III., Maasdorp, 282-283, it appears that property accruing as the result of trade by the Defendant with estate property accrues to the estate and not to the Defendant, who must be regarded as an agent. The Plaintiff is therefore entitled to recover the progeny of the mare obtained by trade with the property of the estate.

The appeal is dismissed with costs, and the cross-appeal is allowed with costs. As, however, the animal used in trade is one of these for which Plaintiff has already obtained judgment, an

amendment will be made in respect of the number of cattle allowed.

The judgment of the Court below will be altered to judgment for plaintiff with costs for three head of cattle and six horses or value £65, absolution in respect of the two cattle alleged to have been paid to Falana and Mbonzene: cattle and two horses dowry £5 each and the remaining horses £10 each.

Umtata. 9 March, 1914. W. T. Brownlee, A.C.M.

Sipala vs. Maqolo.

(Umtata. No. 435/1913.)

Evidence—Commission—Hearsay—Magistrate's Powers.

The facts of the case are immaterial.

Pres.:—The appeal in this case is brought really by way of review, and the Appellant's attorney argues that the Magistrate in the Court below has committed a gross irregularity in sending a constable to make inquiries and in acting upon the conclusion arrived at by the constable in question.

The Respondent's attorney desires it to be put on record that the sending out of the constable was by consent of parties, and desires that the Magistrate who tried this case in the Court below should be heard upon this point. This Court, however, does not consider it necessary to hear the Magistrate, for whether it was or was not by consent that the constable was sent out, no consent can cure an irregularity which in effect has permitted that this case should be decided by the constable Rexe.

There was no necessity for the Court to send this constable, for the records show that at the first hearing of this case, though the Magistrate in the Court below was satisfied that the Plaintiff was entitled to something yet he could not make up his mind what was the exact amount which the Plaintiff might recover, and he accordingly gave judgment of absolution. When the case came on the second time neither party adduced any further evidence, and the Magistrate might quite well have refused to give any judgment other than the first, and it is not part of the duties of the Court to provide evidence for either of the parties before it.

There could have been no objection to sending out a constable to make an inspection—*in situ*—of any admitted object, and to give evidence thereon, but in this case the constable has in fact been granted a commission of inquiry, and has proceeded to inquire into and decide upon disputed points, as, for instance, when he says: "We went to Defendant's kraal and asked Defendant to open his kraal in order that Plaintiff should point out his earmarks. After a lot of talk Defendant opened the kraal and Plaintiff pointed out the earmark, but we found two skeys

instead of one in the right ear. As regards the second skey Plaintiff was borne out by several men of that locality that Defendant has added the second skey seven years ago." And again: "We then went to Tshemese's kraal, where we found nine sheep, which I was informed Defendant had taken there." Then again with regard to certain stock found at the kraals of Fatu, Mkwambi and Mqolora, he says: "These people admitted having received this stock from defendant."

Had Rexe confined himself to giving evidence that he had seen certain stock bearing a particular earmark, no exception could have been taken to it, but so far from this being the case he has on very many instances instituted inquiries and has decided at least on cases of disputed earmarks, the first one alluded to, and has in many other cases decided whether stock does or does not belong to the Plaintiff.

That the Magistrate has decided this case upon the evidence of Rexe, and that he has been guided to his decision by the conclusion arrived at by Rexe is clear from the concluding portion of his remarks, and in the opinion of this Court this is such an irregularity as entitles the Appellant to succeed.

The Magistrate of any Court in the Territories is lawfully empowered to issue a commission to any qualified person to take the evidence of any witness who is prevented by infirmity or other good cause from attending Court, but the Magistrate is not empowered to delegate to anyone else the duty of arriving at conclusions on evidence, nor may the Magistrate himself, as has been done in this case, arrive at any conclusions, save upon legal evidence adduced before him.

The appeal is allowed with costs, and all the proceedings subsequent to the pleadings are set aside and the case is remitted to the Court below to be heard upon its merits.

Umtata. 20 November, 1912. W. T. Brownlee, A.C.M.

Mbumba Noxeke vs. Sihota Feni.

(Mqanduli. No 371/1912.)

Exchange or Barter—Delivery at Proper Time——Loss on Person in Default—Tembu Custom.

Plaintiff in his summons claimed one beast or its value, £5, upon the following grounds:—

1. That about 1908 Plaintiff gave Defendant a certain young black bull in exchange for a certain yellow bull calf.
2. That it was agreed that the yellow calf should remain with Defendant until weaned.
3. That the said yellow calf was now a young ox.

4. That when the yellow bull calf was weaned Plaintiff frequently demanded delivery, which Defendant neglected or refused to make delivery.

Defendant pleaded:—

1. Admitted receiving a certain black bull calf about 1908.

2. That he tendered Plaintiff a red bull tolly about March, 1911.

3. That about May, 1911, Plaintiff instituted his present action against Defendant, which action, through his (Plaintiff's) default had been dismissed on 3rd July, 1911.

4. That plaintiff had allowed thirteen months to elapse before instituting this case, and that during that interim both the calf tendered and the one claimed have died of natural causes.

5. That the only benefit Defendant derived from either beast was the sum of 5s. each for their hides, *i.e.*, the red bull and yellow ox.

6. That Defendant tendered Plaintiff 5s. before issue of summons.

The Magistrate gave judgment for 5s. as tendered.

Plaintiff appealed.

Pres.:—This case is one brought entirely under Native custom and should be decided in accordance with Native custom, and under this the Plaintiff would be entitled, should he establish his contention, to succeed in his action without bringing a special action for damages.

The points at issue were laid before the Native Assessors, and they state that under Tembu custom, should the Plaintiff have neglected, when the proper time arrived, to demand the delivery of his beast, and it then died, the loss would be upon him, but should he have demanded it and the Defendant refused or failed to deliver it, the loss would be upon the Defendant, and he would be made to "Vusa," or "make alive," the dead animal, and that furthermore where there has been a specific purchase of a particular animal the purchaser is entitled to decline to accept the substitution of another animal for the one purchased.

It is quite clear that the Plaintiff, when he consented to forego any action for damages, was under the impression that he could under the summons as it then stood, recover the value of his animal, which he certainly would be able to do on the claim as it stood were the case being heard before a Native Chief, and this being so, this Court is of opinion that the Plaintiff is entitled to prove his claim under the present summons and recover the value of his animal should he prove it, and under ordinary circumstances this Court would give judgment now for Plaintiff but for the fact that in its opinion the Defendant's admission is a qualified one, and in view of this fact this Court is of opinion that the Defendant should not be bound by it.

The appeal is allowed, and the judgment and all the proceedings after the plea filed on 6th September set aside, and the case is remitted to the Court below to be tried on its merits.

Costs of this appeal to abide the issue.

Kokstad. 1st September, 1916. J. B. Moffat, C.M.

Chinchi vs. Diamond.

(Matatiele. No. 17/1915.)

Execution—Property of Major Son not Attachable for Father's Debts.

Interpleader action.

The Magistrate declared the cattle executable, and Plaintiff appealed.

Pres.:—The fact that the cattle attached are the property of the claimant is not questioned.

When this case was before this Court in April last this Court held that the claimant was over 21 years of age. Being a major, under the provisions of the Proclamation 112 of 1879 his property is not executable to meet a judgment obtained against his father.

The appeal is allowed with costs, and the Magistrate's judgment will be altered to property declared not executable, Respondent to pay costs.

Butterworth. 26 March, 1912. A. H. Stanford, C.M.

Qaula vs. Coniwe.

(Idutywa. 32/1912.)

Fraud—Judgment Obtained by, Set Aside.

Claim:—Application to have the judgment obtained by Defendant, then Plaintiff in the Idutywa Magistrate's Court, against Plaintiff then Defendant for 3 head of cattle or £15 set aside on the grounds that it was obtained by fraud.

Exception:—Defendant excepts to Plaintiff's summons on the grounds that the Court was asked to set aside its own final judgment which it has not the jurisdiction to do.

The Magistrate sustained the exception and refused the application with costs.

Applicant appealed.

Pres.:—This is an application by summons in the Court of the Resident Magistrate of Idutywa calling upon the Defendant to show cause why a certain judgment obtained by him on the 20th of June last should not be set aside and altered to a judgment for Defendant (now Plaintiff) on the grounds that the said judgment was obtained by means of fraud. Defendant in the Court below excepted that the Court had no jurisdiction to set aside its own final judgment, which exception was sustained by the Magistrate and it is against this ruling that the present appeal has been

brought. In argument the Appellant cites the judgment of the Eastern Districts Court in the case of *Peel* vs. *The National Bank of South Africa, Limited* (E.D. Court Reports, 1908). Respondent quotes the decision of this Court in the case of *Yangayi* vs. *Ndasana* heard in this Court on 26th March, 1908, which was an action brought to try to obtain the opening of a provisional judgment which had become final on the grounds that the Defendant in that case was out of the country when the case was heard and that he had no opportunity of defending himself and also that the judgment had been obtained by fraudulent misrepresentation. This Court in the absence of any decisions by the Supreme Court of the Cape Colony on the point in question decided that the Magistrate did not have jurisdiction to re-open the case, but since then in the case of *Peel* vs. *The National Bank of South Africa, Limited*, the Eastern Districts Court has dealt with this question and decided that in a case in which it is alleged that judgment was obtained by fraud the remedy should be sought in the Court upon which the alleged fraud was practised. In view of this decision by a Division of the Supreme Court the appeal must be allowed with costs, the Magistrate's ruling on the exception set aside and the case returned to him to be dealt with on its merits.

Umtata. 5 March, 1914. W. T. Brownlee, A.C.M.

Bandulwana vs. Manisi Nofala.

(St. Mark's. No. 236/1913.)

Gifts—Son-in-Law to Mother-in-Law.

The facts are immaterial in this case.

Pres.:—The appeal in this case is upon the matter of the sum of £2 admitted by Defendant to have passed between Plaintiff and himself, and on this point only.

The various points involved in the decision on this case having been put to the Native Assessors, they state that it is quite a common occurrence for a son-in-law to make a present of money—of even greater amounts than £2—and of other articles, to his mother-in-law, and that such gifts are not returnable in the event of dowry being returned. They further state, however, that in a case such as the present where the son-in-law's wife has been impounded under the custom of "ukuteleka" and more dowry has been paid it is improbable that the son-in-law would make gifts and it is more reasonable to expect that gifts would be made by him when his wife should be restored to him.

Dissenting Judgment by F. Brownlee, R.M., Libode.

I dissent from the judgment in this case on the grounds that it is admitted that Plaintiff paid £2 to Defendant's wife in Defen-

dant's absence which payment the woman reported to her husband, that under the circumstances disclosed it is highly improbable that Plaintiff would at that stage make a considerable present in money to his wife's people, that the Headman found the payment of £2 to be part dowry and that Defendant by sending Dial with six cattle acquiesced in the Headman's finding. The probabilities therefore, in my opinion, strongly support the contention that the £2 was part dowry and was accepted as such.

Umtata. 29 March, 1916. J. B. Moffat, C.M.

Kanana Bọko vs. Mamana Majovu.

(Engcobo. 1916.)

Great and Qadi Houses—Dowry Repayment on Return of Daughter.

The facts of the case are immaterial.

Pres.:—The following case is put to the Tembu Assessors:—"A man has a Great House and a Qadi House of the Great House. The daughter of the Qadi House marries. Her father dies. The woman leaves her husband and goes home to the Qadi House. Is the man to go to the heir of the Great House for recovery of the dowry or to the heir of the Qadi House?"

The Assessors say:—"The first daughter of the Qadi House belongs to the Great House. Other daughters belong to the Qadi House. If in this case the woman is the first daughter she belongs to the heir of the Great House and he is the person who should be sued."

Respondent appears in person and states that Nomanise is the younger daughter of the Qadi House. The elder daughter was married before Nomanise. Respondent is informed by the Court that he should have sued the heir of the Qadi House or as he is a minor he should have sued the Defendant as guardian of Swelindawo.

The appeal will be allowed with costs and the judgment of the Magistrate will be altered to absolution from the instance with costs.

Umtata. 29 November, 1915. W. T. Brownlee, C.M.

Elijah Ngogodo vs. Holi Nqwili.

(Mqanduli. No. 140/1915.)

Great and Right-hand Houses—Liability for Debts of Estate.

Action by Holi Nqwili against Elijah Ngogodo for delivery of 1 beast or value £10.

The Plaintiff says:—

1. That Defendant was son of the late Ngogodo by a marriage according to Christian rites prior to annexation and that he was the heir according to Native law and custom of the Right-hand House of the said Ngogodo.

2. That Defendant was in possession of the estate of the late Ngogodo.

3. That in 1907 Plaintiff lent the late Ngogodo the sum of £10 for which he was to receive a beast, which beast had been demanded prior to Ngogodo's death but without success.

It was common cause that there was no property in Ngogodo's estate at his death except girls.

Pres.:—The particulars of this case having been put to the Native Assessors they make the following statement of custom:—

(1) If when a father dies he leave debts the payment of these debts is demanded from the heir of the Great House and not from the heir of the Right-hand House.

(2) The property of the Right-hand House might be held liable for a man's debts during his lifetime for then all property of all his houses is still his.

(3) In the case now before the Court, the eldest son should be sued.

(4) If it is clearly established that the sister in question appertains to the Great House or that there are cattle of the Great House in possession of the son of the Right-hand House, then the Right-hand House would be liable for the debts.

(5) If the £10 borrowed by the father had been applied to the uses of the Right-hand House then the Right-hand House upon this being satisfactorily proved would be liable for the debt.

In the absence of definite information upon the foregoing points it is impossible to say whether the Defendant is or is not liable for the debt in question. The case is therefore remitted to the trial Court for the evidence to be fully gone into, and to enable the trial Court to give a fresh judgment upon the evidence adduced the judgment is set aside. Costs of this appeal to abide the issue.

Umtata. 30 March, 1916. J. B. Moffat, C.M.

This Court at its last sitting submitted the points involved to the Native Assessors, whose statement of the law was against the Appellant subject to certain points being cleared up.

The Court accepted the law as laid down by the Assessors and referred the case back to the Magistrate for evidence on these points and for a fresh judgment.

The case has been referred to the Magistrate who states that the Appellant is unable to prove that the debt was incurred for the benefit of the Right-hand House of which Defendant is the heir. The Magistrate has now given judgment for Defendant with costs which is in accord with the law as laid down by the Native Assessors.

This Court will not disturb that judgment.

The appeal is accordingly dismissed with costs.

Kokstad. 28 August, 1913. A. H. Stanford, C.M.

Ntabankulu Mhlonhlo vs. Charles Mhlonhlo.

(Qumbu. No. 54/1913.)

Heir—Institution by Chief—Disinherison—Reasonable Cause.

The facts of the case are fully disclosed in the President's judgment.

Pres.:—The issues to be decided in this case are: 1st, was the woman Mamaya married as a seed-bearer to Mhlonhlo's great wife Marili, and 2nd whether if Ntabankulu was not the heir Mhlonhlo had the right to institute his heir. On the first question the circumstances conclusively prove that Mamaya was not married as a seed-bearer. The cattle paid as dowry were paid by the Pondomise tribe to procure a great wife for Matiwane, Mhlonhlo's father. That marriage did not come off, as Matiwane was killed before it could be celebrated, and the woman in question, Tose, married another man. Afterwards, no doubt, the tribe and Mhlonhlo considered they had a claim on account of the payment of these cattle, and negotiations were opened, and Mamaya was sent to Mhlonhlo as a wife. At this time he already had a great wife, Marili, daughter of the Gcaleka Chief Kreli, who was still a young woman and bearing children. This being so, there was no necessity at the time for a seed-bearer, who is never instituted until the woman to be assisted has ceased to bear children.

It is true that at the time Mamaya arrived Marili had recently died, but if she was to be seed-bearer it was all the more reason why she would have at once been instituted into that house publicly at a meeting of the tribe. Instead of this she was taken to the Sizinda House. The reason for this is obvious. The cattle had been paid by Matimane and she therefore went to his house—the Sizinda House. If Mamaya had been so instituted in the Great House her son would from his birth have been acknowledged by the tribe as the heir, and there would have been no necessity for Mhlonhlo to hold any meeting for the appointment of an heir. It is not in dispute that when the time for the circumcision of Respondent arrived Mhlonhlo carried out this rite with all the acts and ceremonies applying in the case of the principal heir of the Chief. Although at the time an exile in Basutoland he reported to his tribe and invited the sons of his leading Chiefs and Councillors to undergo the rite with his son. He also reported to Mtshazi, the Chief of the other section of the Pondomise tribe, and it is beyond doubt that he at that time regarded and treated Respondent as his principal son and heir, whereas for the circumcision of Appellant none of his witnesses except one even know if it ever took place, yet at the time he arrived at manhood Mhlonhlo's condition was unchanged, thus Appellant received for that rite only the treatment accorded to a junior son. On the second issue it is clear under Native custom that an heir cannot

be disinherited without reasonable cause such as serious misconduct or unfitness for the position. At the meeting Mhlonhlo made no allegations of such a nature against the Respondent, but tried to do so on the representation that Appellant had always been the heir, which the Court finds was not the case. His nomination of Appellant as his heir cannot deprive Respondent of his rights as heir to Mhlonhlo's Great House.

The appeal is dismissed with costs.

Umtata. 21 July, 1915. W. T. Brownlee, C.M.

Ncukutwana vs. Mdluluza.

(Libode. No. 34/1915.)

Herbalists—Family Secrets—Ownership of Earnings.

Plaintiff, the grandson and heir of one Ngapi, sued his uncle for £5, earned by means of the use of certain drugs, the secret of which was handed down to defendant by Ngapi on the understanding that the drugs were to be used for the benefit of the latter's family.

Defendant admitted the above facts, but stated that the contract between Ngapi and himself being illegal cannot be enforced.

The Magistrate gave judgment for Defendant.

Pres.:—In this case the Plaintiff claims for the sum of £5, which the Plaintiff says the Defendant has earned by means of the use of certain drugs, the secret of which was handed down to Defendant by Plaintiff's grandfather, Ngapi, the father of Defendant, on the understanding that such drugs were to be used for the benefit of Ngapi's family.

The Defendant admits the allegations of the Plaintiff as to the arrangement between Defendant and the late Ngapi as to the secret of the drugs of the latter and their use, and also that Defendant did obtain the £5 in the manner stated by Plaintiff. The Defendant, however, contends that in view of the Medical and Pharmacy Act, the so-called contract between Ngapi and Defendant is an illegal contract and cannot be enforced by the Plaintiff.

In the first place, in the opinion of this Court, it would be by no means an easy matter for Plaintiff to prove the means by which the Defendant had effected any reputed cure. This point has, however, been cleared away by the Defendant's admission and also by a statement of custom made by the Native Assessors, before whom the matter was placed. These state that it is a well recognised Pondo custom that a man who has knowledge of and skill in drugs should bequeath the secret of them to his great son. Should the person so entrusted with the family secrets wish to divest himself of responsibility, he must carefully pass on the secret to the proper person—the great son or his heir—and must

then, should he still wish to practice the use of drugs, acquire in public the knowledge of drugs other than those which he had used previously. The Native Assessors further cited various instances in which this custom had been carried into effect in Pondoland.

With the foregoing statement and with the Defendant's admission before it, this Court could come to no other conclusion than that Defendant obtained a family secret from the late Ngapi, that this secret was to be used for the benefit of Ngapi's heirs, and that the £5 earned by Defendant from Mbangi was earned by means of Ngapi's drugs.

On the question of the legality of the alleged contract, the Defendant relies upon the judgment in the case of *Tombela Kwebu* vs. *Gxobongwana Dlamatye*, heard at the Umtata Appeal Court in March, 1914, and also upon the authority of Maasdorp upon contracts. The case now before the Court differs, however, from the case cited, for in the latter the parties to the suit were themselves the parties to the unlawful contract, which one of them sought to enforce, while in the former, the Plaintiff is not a party to the unlawful contract, and the contract in so far as it concerns Defendant and the man Mbangi has been completed, and Plaintiff, a third party, now seeks to obtain from Defendant what Defendant had already received, and in view of the decisions in the cases of *Wilson* vs. *O'Halloran* (I., Bisset and Smith, p. 986), *Lambert* vs. *Rayfield* (IV., Bisset and Smith, p. 144), and *Silke* vs. *Good* (V., Bisset and Smith, p. 121) this Court is of opinion that a third party cannot be prevented from receiving property due to him even supposing such property to have been the proceeds of an unlawful contract between others where such contract has been completed.

This Court then is of opinion that the Plaintiff should have succeeded, and the appeal is allowed with costs, and the judgment of the trial Court is altered to judgment for Plaintiff for £5 and costs of suit.

Umtata. 3 March, 1914. W. T. Brownlee, A.C.M.

Tombela Kwebu vs. Gxobongwana Dlamatye.

(Mqanduli. No. 579/1913.)

Herbalists—Fees not Recoverable.

Claim for one red heifer or £30 promised by Defendant to Plaintiff (a herbalist) for services rendered in curing Defendant's children.

Defendant pleaded that Plaintiff was not a duly licensed practitioner and therefore could not recover his fees.

The Magistrate dismissed the summons, and Plaintiff appealed.

Pres.:—The appeal in this case is upon the ruling of the Court below upon clause (*c*) of the second paragraph of Defendant's

plea, and it is argued for Appellant that a very clear line of division must be drawn between the acts of Plaintiff and the acts of Defendant in this matter, and that though the Defendant may have been guilty of unlawful acts in medically attending the Plaintiff's children, yet there is nothing unlawful in his action in receiving payment for his services; and it is further argued that the only act of the Defendant to which the Plaintiff has become a party is that of the paying and receiving of a fee or pledge, which it is argued is not an unlawful act.

Various authorities have been cited on both sides, and after giving these and the provisions of sections 33, 35 and 60 of Act 34 of 1891 very careful consideration, this Court is of opinion that it is unable to take the view that Plaintiff is less a participator in an illegal act than the Defendant. This Court is of opinion that the provisions of section 35 of the Act are applicable to the present case, and that under these provisions the Defendant is prohibited, under a penalty, from practising as a herbalist unless he be registered under the provisions of the Act; and although no penalty is specially provided for the receipt of a fee, yet this Court is unable to take the view, that the act of medically treating the children of Plaintiff and the act of receiving a fee therefor are separate and distinct acts which have no connection with one another, and that the Plaintiff has taken part only in the latter. In the opinion of this Court not only has the Defendant committed an unlawful act in medically treating the Plaintiff's children, but also the Plaintiff himself has been a party to that act. For it was he who induced the Defendant to perform the act, and the passing of a beast to the Defendant, whether by way of pledge or by way of fee has been simply in continuation of the unlawful act in which they have each participated: and in the opinion of this Court, therefore, the decision of the Magistrate in the Court below is right. The appeal is dismissed with costs.

Kokstad. 1915. W. Power Leary, A.C.M.

Mafingeni vs. Tafeni.

(Mount Frere. No. 44/1915.)

Illegitimate Child—Disherison of—Public Act—Procedure.

Pres.:—In this case Plaintiff sues Defendant for 14 head of cattle or their value, £140, which he claims as heir to one Kalo. It is stated in the evidence that the late Kalo disinherited Plaintiff before his death on the ground of illegitimacy.

The case being put to the Native Assessors, they state:—If a father sees a son is illegitimate and calls the men of his family together and publicly disinherits him, he is justified in doing so.

The relatives of the deceased are the people who would know the parentage of the Plaintiff.

An illegitimate child is known from childhood, and grows up in that knowledge and that of the neighbours, and there is no need to disinherit as he is publicly known.

Mapolisa states:—According to Hlubi custom the father is competent, if he took another man's wife, to say "This is not my own child," though he has brought him up as such. He would do all necessary things for him, the illegitimate son might remain in the kraal for the rest of his life or establish his own kraal, and if it were a female make all arrangements for her marriage. The heir is the son who is known to his father as his own child. It is not necessary for the father to bring evidence, his word that the son is illegitimate is sufficient. He would have to adduce proof only in case the woman was a girl when he married her, not a dikazi.

A son may be disinherited by his father for cause shown. In this case the Plaintiff is said to be illegitimate. Illegitimacy would be a good reason to disinherit. Evidence has by interrogatories been obtained from the brother and relatives of the deceased. These are all emphatic that Plaintiff is the heir. The son of the Right Hand House only testifies as to what took place before the Headman. It was the duty of the deceased to prove to the Headman that Plaintiff was illegitimate. He came into the district as his son, lived and grew up with him as such, and all things such as the marriage of a wife for him were done which a father does for a son, and he should have adduced some evidence in support of his assertion that plaintiff was illegitimate. The Court, while appreciating the value of Mapolisa's statement of the Hlubi custom, is of opinion it does not apply in this case. There is ample evidence on the record in proof of the legitimacy of the Plaintiff. The reason given before the Headman was, therefore, not a good one, who does not appear to have been satisfied by it.

The appeal is dismissed with costs.

Umtata. 3 March, 1913. W. T. Brownlee, A.C.M.

Mbini Tokwe vs. Ngunze Mkencele.

(St. Marks. No. 128/1912.)

Illegitimate Child—Married Woman—Natural Father cannot Adopt as Heir.

Claim for declaration of rights and restoration of estate property.

Plaintiff stated:—

1. He was son of the late Tokwe and was, previous to the death of Tokwe, placed as heir to the said Tokwe in the house of one Nongcingane according to Native ways and means, and that he was brought up and maintained by the said Tokwe to that end and purpose.

2. That Defendant was the father of the late Tokwe.
3. That Tokwe married Nongcingane, and had no male issue.

Defendant's plea:—

1. Denied Plaintiff's claim to a declaration of rights and restoration of estate property.

2. That Plaintiff was a child born of one Sesweni, wife of Ngqakayi, in adultery committed with her by Tokwe (Defendant's son), and thereby he (the Plaintiff) could never be the heir of the said Tokwe, save by special institution and with the full knowledge and approval of the said Ngqakayi, and that such institution never took place.

The Magistrate found for Plaintiff, and Defendant appealed.

Pres.:—The various points at issue in this case having been put to the Native Assessors, they make the following statement:—

According to our custom it is unknown that the illegitimate son of a married woman should be adopted by his natural father and instituted as his heir, for his wife, even when she becomes a widow, if still having children, is bearing such children for her last husband, provided her marriage is not dissolved by return of dowry, and may produce a boy, and such boy would oust any adopted heir. What we know is that if a man seduce an unmarried woman or a woman whose marriage has been dissolved and has a son by her he may get the child upon payment of cattle, and such child is of inferior rank to his own children. Claims in cases such as this, if brought before our Courts are dismissed when the facts are disclosed.

The late Tokwe had no right to adopt Mbini, as he is alleged to have done, but as there is no other son of Tokwe we leave the matter of the property that Mbini has possessed himself of in the hands of the Court.

The adoption of any child must be publicly performed, otherwise it is not valid.

In view of the foregoing statement of custom, this Court is of opinion that Plaintiff is not entitled to a declaration of rights, and the appeal is allowed with costs, and the judgment of the Court below is altered to judgment of absolution from the instance with costs.

Umtata. 19 November, 1913 W. T. Brownlee, A.C.M.

Mbudelwa Madlongo vs. Mnyulu Nandi.

(St. Marks. No. 67/1913.)

Illegitimate Child—No Married Woman Produces a Bastard—Rights of Succession.

Pres.:—Under Tembu custom no married woman produces a bastard, and the only person who can bastardise a married woman's son is her husband. According to Tembu custom also all children born to a widow as long as she remains a widow are the property

of her late husband's kraal, and any sons so born are regarded as being the younger brothers of the son born by her to her husband. They may not, so long as there are sons of the late husband, inherit; but in default of these they may inherit.

Umtata. 8 August, 1912. W. T. Brownlee, A.C.M.

Tonono vs. Qobo.

(Port St. John's. No. 40/1912.)

Illegitimate Child—Repudiation by Husband—Property of Wife's Father.

The President's judgment sufficiently discloses the point at issue.

Pres.:—The facts in this case having been placed before the Native Assessors, they state that there are cases in which a husband by reason of jealousy repudiates the illegitimate child of his wife, and in such cases the child becomes the property of his wife's father, unless a fine should have been paid, and should the husband's heir after his death claim such child. The only thing that would bar his claim would be the fact that the fine had been paid. He would, however, have to pay cattle for this child, and the number to be paid is not fixed. Should the husband, after the repudiation of the child, release his wife by the payment of cattle, such payment would not entitle him to recover the child, who must be paid for separately. They also say that an important point in this case, and one that would furnish a guide to a decision is that of the person to whom the dowry was paid in respect of the repudiated child. The Magistrate in the Court below has decided upon the evidence that there was a repudiation of Botshelwa (wife's illegitimate child), and this Court is not in a position to say he has erred in his findings upon points of fact, and the appeal is dismissed with costs. As, however, there are many issues involved in this case, upon all of which a definite ruling should be given, and which this Court is not in a position to decide upon, the judgment of the Court below is altered to judgment of absolution from the instance with costs.

Flagstaff. 20 April, 1913. W. T. Brownlee, A.C.M.

Zibulale vs. Mtshisazwe.

(Tabankulu. No. 180/1913.)

Illegitimate Child—Right of Inheritance—Pondo Custom.

Pres.:—The first point to be decided in this case is whether Defendant is or is not the son of Gungqa, and this point has been decided in the affirmative by the Magistrate in the Court below,

who holds that he is the son of Ntontololo, and in view of the evidence this Court sees no reasons to interfere with this finding of the Court below. The next point to be decided is whether, under Pondo custom, a son born by a woman after her husband's death to a stranger may or may not inherit property in her house, and this question, being put to the Native Assessors, they state that under Pondo custom, when a man has many wives and the great wife has no son, but one or other of the minor wives has a son, such son will inherit, and the illegitimate son may not inherit, but will hold the position of only a younger brother, and only the "son of the blood" may inherit.

The Court, therefore, sees no reason for disturbing the judgment of the Court below, and the appeal is dismissed with costs.

Umtata. 24 July, 1912. W. T. Brownlee, A.C.M.

Ovolo vs. Tshemese.

(Engcobo. No. 226/1912.)

Illegitimate Child—Subsequent Marriage Legitimates.

The President's judgment fully discloses the fact of the case.

Pres.:—This case is different from that of *Nowata* vs. *April* (N.A.C.R., 98) in that in the latter case the illegitimate child was not the child of the man who subsequently married the child's mother, but the child of some other man, while in the case now under consideration the illegitimate child is the child of the Plaintiff's own body, and the question being placed before the Chief Dalindyebo, and the other Native Assessors, he states that in cases where a man gets an unmarried woman with child and subsequently marries the woman, the child is his, and, if a male child, would be his heir, even though born before the marriage, and no payment of cattle would be necessary to establish the husband's claim to this child. Should, however, the marriage not take place until some time after the birth of the child and the child have in the meanwhile lived with his grandparents, the husband would have to pay a beast for the "Isondhlo," or maintenance, of the child, and the child may be impounded to enforce this payment. In this case the claim is based upon an alleged agreement, and the Magistrate in the Court below is not satisfied that the Plaintiff has proved his case, and has given a judgment of absolution, and this Court can find no reason for interfering with the decision of the Court below upon points of fact, more especially as there is important evidence still available, namely, that of Sondala, the man who is alleged by both parties to have conducted part of the preliminary arrangements of the marriage. A further question submitted to the Chief Dalindyebo is this:—"In cases of this nature at what period is the payment for the child made? Is it made when the dowry for the woman is com-

pleted or is it made while this is still being paid?" And the Chief's reply is as follows:—"It is very seldom that the whole of the dowry for a woman is paid in one lump, and payment goes by instalments extending over many years, and for this reason it is necessary to avoid dispute that the beast to be paid for the child should, in cases where dowry is paid by instalments, be paid before the dowry for the woman is complete."

The appeal is dismissed with costs.

Kokstad. 5 December, 1916. J. B. Moffat, C.M.

Nyete Kolopene vs. Setini Ngukumani.

(Matatiele. No. 43/1916.)

Illegitimate Child—Subsequent Payment of Dowry Legitimises Child.

Pres.:—The custom as stated by the Native Assessors is that payment of dowry subsequent to birth of a child legitimises the child, and she therefore becomes the property of the father. The Assessors stated that the woman's father could have insisted on payment of a fine before accepting the dowry. According to the evidence, he took no action to recover a fine, but retained the girl in his possession. The Assessors state that retention of the child only entitles the woman's father to payment of "isondhlo."

The parties are Tembus. Evidence was not given as to Tembu custom, though it was apparently intended to call such evidence.

The custom of other tribes, as stated by the majority of the Assessors, is that the child belongs to her father, as held by the Magistrate, whose decision this Court will not interfere with.

The appeal is dismissed with costs.

Umtata. 4 August, 1914. W. T. Brownlee, A.C.M.

James Luhleko vs. Piyose Langeni.

(Mqanduli. No. 190/1914.)

Illegitimate Children—Born prior to Civil Marriage—Husband not Natural Father.

The facts of the case are fully dealt with in the judgment.

Pres.:—In this case the Magistrate in the Court below has found upon the evidence that the Plaintiff is not the father of the child Ruth, but that Ruth is the offspring of an illicit intercourse between Plaintiff's wife Selina and a man named Charles Mvumyiswa, and that she was born prior to Plaintiff's marriage with Selina, and this Court can find no reason for interfering with these conclusions on points of fact.

Had Ruth been plaintiff's child he would have been very careful to visit her from time to time and to contribute to her maintenance and education, and he would have seen to it that she was duly informed of the fact that he was her father, but he has done none of these things, and his neglect justifies the presumption under Native custom that he has no paternal right in the child.

Had Plaintiff been the natural father of Ruth his subsequent legal marriage with her mother might have conferred on him certain rights in Ruth. No right whatever would be conferred on him by a native marriage *per se*, and if he is not the natural father of Ruth then no marriage, either under common or Native law can *per se* confer upon him any rights in Ruth.

A point is made on appeal of the baptism of Ruth, but the baptismal register has not been produced, and in any case the baptism does not prove anything, and in the face of the very strong evidence for the defence, and evidence which the Magistrate believes, this Court is of opinion that the Magistrate's decision is right.

The appeal is dismissed with costs.

Butterworth. 8 March, 1915. W. T. Brownlee, C.M.

Simono vs. Ngxenga.

(Kentani. No. 259/1914.)

Illegitimate Children of Widow—Claim of Legitimisation by Second Husband.

Pres.:—In this case the Plaintiff says he is the heir of the late Mdunyelwa, who died in 1901, and son of his wife Nohofolo, the daughter of Mpali, and that after his father's death his mother returned to the kraal of her father, Mpali, and there had two illegitimate daughters, Noshumi and Cebetu, aged about 12 and 9 years respectively: that subsequently to the birth of these children Mpali returned the dowry paid by the late Mdunyelwa, and in doing so retained four head of cattle, two being in respect of the two girls Noshumi and Cebetu; and that Plaintiff handed two cattle to Mpali for the support of the two children who remained with their mother. Plaintiff states further that Defendant has now the custody of the two children, and refuses to deliver them to Plaintiff, who claims that they are the property of his late father and therefore his.

The Defendant admits all the facts alleged by Plaintiff except those as to the return of the dowry, which he says he is not in a position to admit or deny. He says, however, that after the birth of the two children in question he married the woman Nohofolo and paid dowry for her, and that the two children then became his property.

The Magistrate in the trial Court has decided in favour of Defendant, and appears to have been to a certain extent guided

to his decision by the fact that Plaintiff says he left with his father-in-law certain two head of cattle for the support of the two children, and this statement he says he cannot accept.

The point to be decided is whether under Native custom the children in question are the property of the late Mdunyelwa and his heirs, or whether they became the property of the Defendant upon his subsequently marrying their mother, and in the opinion of this Court they are the property of the estate of the late Mdunyelwa.

Under Native custom a married woman gets no bastard, and the only person who may bastardise a woman's children is her husband, and this principle under Native custom applies to children after a man's death as long as the dowry paid by him for his wife remains with her father. It is true that Native custom has been to a certain extent modified by decisions in the Higher Courts, which have recognised the full right of a native widow to remarry, but in this case the marriage of Defendant to the widow occurred only after the birth of the two children.

It is argued that this marriage has legitimised the two children and that they are therefore the property of Defendant, even though the marriage was a Native custom marriage. This Court, however, cannot accept this view, and is of opinion that the principles of Native custom must apply, and that under this the children belong to the woman's first husband, whose dowry at the time of their birth had not been returned. At the time of their birth the Defendant had contracted no marriage with Nohofolo, and the marriage to Mdunyelwa still, according to Native custom, subsisted.

As regards the matter of the two cattle said to have been paid for the support of the two children, there seems to be no difficulty. It is not at all an unusual thing for a man to place a cow for the support of a child in whom he has an interest, and especially if it be an illegitimate child, and this is what appears to have been done in this case.

Plaintiff's father paid nine head of cattle as dowry for Nohofolo. Of these, five were returned to Plaintiff and four retained by the woman's father in respect of the children born. Of the five returned to him, Plaintiff handed two to the children's grandfather for their support.

The appeal is allowed with costs, and judgment altered to judgment for Plaintiff as prayed with costs.

Kokstad. 10 December, 1915. W. Power Leary, A.C.M.

Sikivi vs. Nonjila.

(Mount Ayliff. No. 111/1915.)

Illegitimate Children—Ownership of, when Full Fine not Paid.

The judgment of the Magistrate was for 2 head of cattle or £10 and costs.

Pres.:—In this case Plaintiff claims to be guardian of two girls and entitled to the dowries which may hereafter be paid in respect of the said girls, but Defendant refuses to recognise Plaintiff's claim. Plaintiff alleges in his summons:—

1. That about four years ago he rendered pregnant one Debe, daughter of the Defendant, she being then a woman, and a female child was born named Nomasantši and Plaintiff thereafter agreed to marry the said Debe and paid one beast and six goats and £2 (to represent two head of cattle) on account of dowry.

2. That thereafter Plaintiff again rendered pregnant the said Debe and a female child named Selina was born.

3. That the said proposed marriage was never consummated and Defendant has now married the said Debe to one Josiah Masokana of Mount Currie district.

In his plea Defendant admits payment of one beast and five goats as a fine, but denies the £2 and pleads specially that Debe at the time was the wife of Josiah. The Magistrate in his reasons for judgment states, *inter alia*: I do not believe Plaintiff married her in the first instance, neither did Josiah, indeed the father states no marriage took place until the return of the Plaintiff after five years' absence.

This Court concurs with this finding which is supported by the evidence.

Assessors' opinion. The case being put to the Native Assessors Mapolisa Hlubi states:—

Hlubi custom: The second man was a thief, the man who finished paying the dowry is the husband. The children belonging to the man who paid the dowry.

If the marriage with the first man was not consummated the children belong to the father of the girl. The fine and the children go to the girl's father. The Baca, Zulu and Xesibe Assessors concur.

Judgment has been entered for two head of cattle or their value of £10 and costs. There is no claim for the return of cattle in the summons, the claim is for a declaration that Plaintiff is guardian of certain two girls, and in giving judgment for the return of the two cattle the Magistrate has gone outside the summons. In the case of *Goco* vs. *F. Njiva* (N.A.C. I., 188) the Pondo custom is expounded by the Assessors who were men versed in the custom. That case had reference to a widow, the principle however applies to this. The principle that the putative father, to have a right to children, pays the father of the woman, is of general application amongst the Native tribes.

In the case of *Mpeti* vs. *Nkumanda* (N.A.C., 2, 43) it is clearly laid down that before any claim to the children can be allowed the full fine must be paid and that this sum may be paid at any period.

In this case only two head of cattle have been paid which are not a full fine.

Defendant would be entitled to at least six head as a fine, three head for each pregnancy, and two for maintenance.

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

Umtata. 30 July, 1914. W. T. Brownlee, A.C.M.

Ndlela Ntshongole vs. Spana Dantl.

(Engcobo. No. 291/1914.)

Illegitimate Children—Subsequent Marriage of Parents does not Legitimate unless Fine Paid—Tembu Custom.

Claim for a declaration of rights in respect of one Nondibane, born prior to the marriage of Plaintiff to Defendant's daughter and of which Plaintiff was the father. The Plaintiff having paid no fine for the pregnancy but only dowry on his marriage.

Pres.:—The points at issue in this case having been placed before the Native Assessors, they make the following statement of Tembu custom:—

(*a*) If a man seduces a woman and gets her with child and pays dowry for and marries her before the child is born, the child when born is his.

(*b*) Should a woman be seduced and have an illegitimate child, such child would be the property of her father even should she subsequently marry, unless a fine had been paid for the seduction and pregnancy, and this principle would apply whether the seducer was the man who subsequently married the woman or some other man.

(*c*) The subsequent marriage of the woman to the seducer and the payment of dowry by him after the birth of the child would not convey to him any right in the child.

With this statement of custom which is quite consistent with the statement made in the case of *Mowata* vs. *April* (I. Henkel, 98) before it this Court is of opinion that the Magistrate in the court below has erred.

He has found on the evidence that the girl Nondibane was born before the marriage of Plaintiff with Rumpule—and he has found that the cattle paid by Plaintiff were dowry and not fine, and this Court agrees with this finding; and this being so in the opinion of this Court Plaintiff cannot succeed on his claim.

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

Butterworth. 3 March, 1914. C. J. Warner, R.M., President.

Ntlanganiso Gubevu vs. Makaula Gubevu and Finizana Gubevu.

(Nqamakwe. No. 204/1913.)

Illegitimate Son of Qadi—Right of Succession when Born subsequent to Husband's Death.

The facts of the case are fully disclosed in the President's judgment.

Pres.:—The facts of this case seem to be that Appellant was born some years after the death of the late Gubevu, while his mother, the Qadi of Gubevu's Great House, was living with her people at Middle Drift, and that Gubevu's great son subsequently went for Appellant's mother and induced her to return with her children, of whom the Appellant was one, to the kraal of her late husband, where she resided until her death, and where Plaintiff has subsequently resided and where he was circumcised. The question to be decided is whether Appellant is to be regarded, according to Native law, as heir of the Qadi of the late Gubevu's Great House. On the question being put to the Native Assessors they are not agreed, the majority holding that the fact of Gubevu's great son, Finizana, going for Appellant's mother and bringing her back to her late husband's kraal with the Appellant and other children constituted Appellant heir of his mother's house. The minority maintain that as Appellant was born when his mother was living away from her husband's kraal he is illegitimate and cannot succeed as heir to her house. The latter opinion seems to be in accordance with the unanimous opinion of the Native Assessors in the case of *Noseyi* vs. *Gobozana* (H., 214). The case of *Sidubulekana* vs. *Fubu*, referred to by Appellant's attorney has no bearing in this case, as in that case the son was born during the lifetime of his reputed father, who treated him as his son. In view of the conflicting opinion of the Native Assessors and of the fact that the judgment in the Court below is an absolution judgment, this Court sees no reason to disturb it, and the appeal is dismissed with costs.

Umtata. 29 July, 1913. A. H. Stanford, C.M.

Silelo vs. Mhlontlo.

(Umtata. No. 183/1913.)

Illegitimate Son of Unmarried Woman cannot Inherit His Mother's Property.

The facts are not material in the case.

Pres.:—The question having been submitted to the Native Assessors, they state that the illegitimate son of an unmarried

woman cannot under Native custom inherit any property his mother may have accumulated during her lifetime. It would belong to her father, if alive; if dead, then to his lawful heir of the house to which she belonged. The judgment given by the Magistrate is in accordance with Native custom, as stated by the Native Assessors.

The appeal is dismissed with costs.

Umtata. 19 November, 1912. A. H. Stanford, C.M.

Noveyile vs. Zintshutu Mgcunu.

(Engcobo. No. 412/1912.)

1. *Interpleader Action—Magistrate to Decide whether or not Property Belongs to Judgment Debtor.*

2. *Wife—Interest of—Interpleader Action—Husband Absent.*

The stock was declared executable by the Magistrate.

Pres.:—The Respondent in this case obtained a judgment against Sibonda Daniso and Daniso, the latter in his capacity as Head of the kraal, and certain 52 sheep were attached, which are now claimed by the Appellant as being her property.

The evidence, so far as it has been taken, shows that she is the wife of one Dyantyi, who has been away for years, and that she claims the stock attached as being her own earnings. The Magistrate, on finding that the claimant was a married woman, living at her husband's kraal with her son, held that she could not maintain the action.

But in the case of *Doe* vs. *The Colonial Government* (Juta, volume 8, page 19) the Chief Justice stated:—"The Magistrate in this case had not to decide whose property the cart was but merely whether it was or was not Panou's (the judgment debtor), and in deciding that the cart was not the property of Doe, but of his mother, the Magistrate had gone beyond what he was asked to decide."

In the case of *Lepheana* vs. *Temple and Another* (C.T.R., 1908, 726), it was held by the Supreme Court that, though by Native law a husband may be liable for the debts of his wife and son, his property is not seizable in satisfaction of a writ issued upon a judgment for such debts against the wife and son unless he has been joined as a party in the action. From these and other authorities which have been quoted it is clear that in an interpleader action the Magistrate has not to decide whose property the goods are, but whether or not they belong to the judgment debtor—and also that persons having an interest, and not necessarily owners, are competent to enter an interpleader action. The

Appellant in this case clearly having an interest if the property in dispute be either hers or that of her absent husband is entitled to maintain an action for its recovery.

The appeal is allowed with costs, the Magistrate's ruling set aside, and the case returned to him to be further heard and dealt with on its merits.

Kokstad. 16 May, 1913. W. T. Brownlee, A.C.M.

Andries Mpako vs. Klaas Mpako.

(Tsolo. No. 118/1912.)

Jurisdiction of Magistrate's Courts—Unlimited in Transkeian Territories.

Action for £7 10s. for rent.

Plaintiff claimed that he and Defendant held a certain piece of land in Stutterheim in co-partnership, and which was leased at £16 10s. per annum.

That when the land was leased it was agreed that Plaintiff was to receive £7 10s. and Defendant £9 of the rent.

Plaintiff now claims his share of £7 10s. for the year 1911, which rent had been paid to Defendant for that period.

The Magistrate gave judgment for Plaintiff as prayed, and Defendant appealed.

Pres.:—In appeal it is sought to take exception to the jurisdiction of the Court of the Resident Magistrate of Tsolo, on the ground that the property in respect of which this action has been brought is not within the jurisdiction of that Court, but is situate in the Division of Stutterheim, where the Magistrate has no jurisdiction in cases regarding immovable property in which future rights are involved.

The Courts in the Territories, however, have unlimited jurisdiction over all persons resident in the areas over which they preside, and the principle that they also have jurisdiction in matters connected with immovable property has already been decided in the case of *Makakubane* vs. *Booi*, heard in this Court on the 16th August, 1910, and 10th December, 1910.

On the merits of the case this Court sees no reason to interfere with the decision of the Court below, and the appeal is dismissed with costs.

Kokstad. 19 December, 1913. W. Power Leary, A.C.M

Charles Khoapa vs. C. E. M. Seymour (Executor).

(Matatiele. No. 334/1913.)

Jurisdiction of Magistrate—Will.

Plaintiff claimed to have the will of his late father set aside on the grounds that it was contrary to Basuto law and custom, and stated:—

1. That he was the eldest son of the late Julius Khoapa, a Basuto, who in 1871 married Plaintiff's mother in Basutoland by Christian rites.

2. That in 1901 Plaintiff's late father committed adultery with one Moehi, in consequence of which Plaintiff's mother obtained a decree of Divorce, and thereafter Plaintiff's late father married Moehi by Christian rites.

3. That thereafter Plaintiff's late father make a joint will with the said Moehi, disinheriting the Plaintiff.

The Magistrate dismissed the summons, and Plaintiff appealed.

Pres.:—This action is to test the validity of a will made by one Julius Khoapa.

The will in this case has been proved, and letters of administration granted by the Master of the Supreme Court.

In the opinion of this Court a Magistrate's Court has no jurisdiction to test or set aside a will under these circumstances.

The appeal is dismissed with costs.

Butterworth. 26 March, 1912. A. H. Stanford, C.M.

Ndaba vs. Robert Kwezi.

(Willowvale. No. 52/1912.)

Jurisdiction—Residence.

The President's judgment sufficiently discloses the grounds of appeal.

Pres.:—This is an appeal on an exception taken in the Court of Willowvale, that the Defendant is not resident in this district and therefore the Court has no jurisdiction over him. Although he claims to be a resident of the Komgha district, Respondent himself states that he left that district three years ago, that he spent two years in Pondoland, and for the past six months has been staying continuously at his uncle's kraal in Madolo's Location, in the Willowvale district. In the case of *Oosthuizen* vs. *Pienaar* (S.C.R., Juta 14, 373) a residence of six weeks was considered sufficient to give the Magistrate jurisdiction, although the Appellant claimed to be a resident of Johannesburg, where he was a

partner in a business, and that he was only temporarily in the Colesberg district. In view of this decision the Court has no hesitation in determining that the Respondent is within the jurisdiction of the Court of Willowvale.

The appeal is allowed with costs, the Magistrate's ruling on the exception is set aside, and the case returned to the Magistrate to be heard on its merits.

Butterworth. 3 March, 1914. C. J. Warner, R.M., President.

Noveke vs. Nzima.

(Idutywa. No. 303/1913.)

I. Residence—Jurisdiction.

II. Jurisdiction—Residence.

Pres.:—The evidence taken on the exception as to the Magistrate's jurisdiction in the Court below shows that Respondent has a home in the division of King William's Town, but he does not say how long he has lived there, and he has been in the district of Idutywa for two months, apparently occupied in winding up the affairs of the estate of his late uncle. Kondile (Appellant's husband), and has obtained possession of five horses, which are claimed by the Appellant. Respondent appeared in the Court below in answer to the summons, and was also represented by an attorney, and took exception that as he was not a resident of the district of Idutywa the Court had no jurisdiction over him.

The exception was allowed, and the present appeal is brought against this ruling.

In the case of *Beedle and Co.* vs. *Bowley* (12, Juta, 401) it was held that a Defendant must be sued in the Court of the district in which he resides, and that the obvious meaning of "resides" is that it is his home, his place of abode, the place where he generally sleeps after the work of the day is done. In the case of *Oosthuizen* vs. *Pienaar* (14, Juta, 373), and in *Becker* vs. *Forester*, heard in the Cape Provincial Division of the Supreme Court on the 24th November, 1913 (not yet reported), it was held that a Defendant might be sued in the Court of a district in which he is temporarily residing for a certain purpose. It would, therefore, seem that as Respondent has resided in the district of Idutywa for two months for a certain purpose he can be sued in the Court of that district. The appeal is allowed with costs. The ruling on the exception is set aside, and altered to exception overruled.

Umtata. 11 August, 1914. W. T. Brownlee, A.C.M.

Tshiwula vs. Nopuza Ntondini.

(Libode. No. 7/1914.)

Jurisdiction—Residence Outside—Submission to.

The facts are fully disclosed in the judgment.

Pres.:—In this case the Defendant in the Court below, a resident of the district of Ngqeleni, is sued in the Magistrate's Court of Libode for the return of dowry. It appears from the record that Defendant's attorney had consented to the issue of summons against his client in that Court, but on the return day, and before his plea was filed, withdrew his consent, and excepted to the jurisdiction of the Court, tendering costs.

The Magistrate overruled the exception, and gave judgment on the merits.

This Court is of opinion that this exception was a good one, and should not have been overruled, as although a promise had been made on Defendant's behalf to submit to the jurisdiction of the Court at Libode, the Defendant, before joining issue in that Court, withdrew his consent, and took exception to the jurisdiction. There has, therefore, in the opinion of this Court, been no consent on the part of the Defendant to the jurisdiction of the Court at Libode, so as to apply to the decision in the case of *Orland* vs. *Key* (15, S.C.R., 315), relied on by the Respondent.

The appeal is, therefore, allowed with costs, the exception on this point is upheld, and the summons dismissed, Defendant to pay costs up to the time of exception.

———————————

Umtata. 24 July, 1917. J. B. Moffat, C.M.

Mbantsa Nqatu vs. Rangayi Joko.

(Umtata. No. 192/1917.)

Jurisdiction—Revival of Superannuated Judgment against Defendant who has left District.

This was an application to revive a certain provisional judgment against Defendant, which had become superannuated.

An exception was taken to the summons on the ground that the Defendant had removed to the district of Engcobo and was therefore not within the jurisdiction of the Magistrate of Umtata.

The Magistrate upheld the exception, and dismissed the summons.

Plaintiff appealed.

Pres:—The notice of appeal does not state explicitly the ground of appeal, but as there can be only one ground of appeal, viz.:—that the exception taken in the Court below was wrongly upheld,

this Court will accept the notice as filed. The Magistrate in upholding the exception relied on Section 22 of Proclamation No. 140 of 1885, which gives a Magistrate jurisdiction in civil cases over persons residing within his district. No authority to the contrary was produced in the Court below. In this Court amongst other cases Appellant's Attorney refers to the case of *Milner* vs. *Friedman* (T.P.D., 1911) in which it was laid down that the application to revive a superannuated judgment of a Magistrate's Court is a continuation of the original proceedings and the Court in which such judgment was given has jurisdiction to revive even when the parties are resident outside its jurisdiction. Van Zyl lays down that issue of summons perpetuates jurisdiction. In view of these authorities this Court must hold that the Umtata Magistrate's Court has jurisdiction over the Defendant in this case and the appeal must be allowed with costs. The case is returned to the Magistrate to be proceeded with on its merits.

Kokstad. 21 August, 1912. A. H. Stanford, C.M.

Sigcawu Siziba vs. Tolwana and Thomas Tungata.

(Qumbu. No. 161/1911.)

Jurisdiction—Two Residences—Defendant must be Sued where he is Residing.

Claim for £28 handed to Defendant at Cape Town to deliver to one Ntwezinzima of Nteto's Location in the District of Qumbu.

Exception was taken to the jurisdiction of the Magistrate's Court of Qumbu on the ground that Defendant was domiciled in Somerset West, Stellenbosch district, where he had lived and worked for over 10 years.

The Magistrate upheld the exception and dismissed Plaintiff's summons.

Plaintiff appealed.

Pres.:—The evidence clearly shows that the Respondent resides at Somerset West, in the District of Stellenbosch, although he has a kraal in the district of Qumbu. The Appellant himself states that he has only seen Respondent once in the Qumbu district during the last four years and that before process was issued he had already returned to Cape Town.

The judgment of the Supreme Court in the case of *Ngadi* vs. *Temba*, where the conditions were precisely the same as in the present case is conclusive on the point at issue, viz., that where an individual has two places of residence he must be summoned in the district in which he is residing.

The appeal is dismissed with costs.

Butterworth. 2 March, 1914. C. J. Warner, R.M.

Simon Cekiso and Cekiso Mshundulu vs. Tiwani Mabikwe.

(Nqamakwe. No. 2/1914.)

I. Kraal—Head—Judgment Final and Provisional.
II. Practice—Kraal Head and tort feasor*—Final and Provisional Judgments.*

Pres.:—The appeal in this case is on the question of provisional judgment being granted against the first named Defendant and final judgment against the second named Defendant in the Court below.

It was decided in the case of *Ndabeni* vs. *Kwanqa* (Henkel, page 245) that "it is not competent for any Court to give a greater judgment against the kraal head in his capacity, as such than against the actual *Tort feasor.*"

The appeal is allowed with costs and the judgment in the Court below is altered to provisional judgment for Plaintiff as prayed with costs against both Defendants.

Butterworth. 10 July, 1913. A. H. Stanford. C.M.

George Ncuka vs. Josiah Dlova and Willie Dlova.

(Willowvale. No. 305/1912.)

Kraal Head—Liability for tort feasor *lapses when latter has left District and established himself and family elsewhere.*

Claim for 6 head of cattle as damages for adultery and pregnancy.

Defendant No. 2 excepted on the ground that 1st Defendant was not a resident of this district nor has he been for the last 3 years and therefore this Court has no jurisdiction.

The exception was upheld with costs.

Plaintiff appealed.

Pres.:—In argument it is admitted that the first Respondent—the alleged *tort-feasor*—was not within the jurisdiction of the Court but is living in the district of Flagstaff where he has established a kraal of his own. It is however argued that the adultery complained of was committed in the year 1908, at which time the first Respondent was still an inmate of the second Respondent's kraal, and had the action then taken place the present exception could not have been maintained. This probably is correct but owing to his neglect in not taking action then the Appellant is now barred as it is impossible for him to get a joint judgment

against the Respondents. The second Respondent's liability is not retrospective and ceased after the first Respondent had left the district and established a kraal for himself and family elsewhere.

The appeal is dismissed with costs.

Umtata. 26 November, 1912. W. T. Brownlee, A.C.M.

Mdanelwa vs. Penya and Mbana.

(Libode. No. 220/1912.)

Kraal Head Responsibility—Father not liable for Damages if Son brought up at another Man's Kraal.

Claim 3 head or £15 damages for adultery with plaintiff's wife.

Defendant No. 2 admitted that No. 1 was an inmate of his kraal but that his (No. 1's) natural guardian was one Mgulugulu, the father of the said No. 1.

Judgment for Plaintiff as prayed.

No. 2 Defendant appealed.

Pres.:—The appeal in this case is brought only on the part of Defendant No. 2 who urges that under the custom of "Mgqabo" Mgulugulu, the father of Defendant No. 1 and not No. 2 is responsible for the torts of the Defendant No. 1 and in the opinion of this Court he cannot succeed in his appeal. The Defendant No. 1 was accepted by him and was brought up at his kraal and Defendant No. 2 has taken no steps to rid himself of responsibility for the acts of Defendant No. 1.

The appeal is dismissed with costs.

Kokstad. 12 May, 1913. W. T. Brownlee, A.C.M.

Cetywayo Cqoboko vs. Puhla Magxaba and Xwara.

(Qumbu. No. 49/1912.)

Kraal Head Responsibility—Guardian who has Paid Dowry of Ward.

Claim for 5 head of cattle or £25 damages for pregnancy of Plaintiff's wife by Defendant No. 1, who resided at Defendant's No. 2's kraal, the latter being liable for the *torts* of his younger brother.

No. 2 took the following exception to Plaintiff's claim.

Whilst admitting that 1st Defendant was a resident of his kraal stated that 1st Defendant was a married man for whom he (Defendant No. 2) had paid dowry and that therefore he was not liable for the *torts* of the 1st Defendant.

The Magistrate upheld the exception and dismissed the summons as regards No. 2's liability.

Plaintiff appealed.

Pres.:—The appeal is on the point of the ruling of the Court below on the exception raised by Defendant No. 2 and the point to be decided here is whether under the circumstances the second Defendant is responsible for the *torts* of the first Defendant, and this point has already been decided in the case of *Sinxoto* vs. *Nkonyana and Gonyela* heard in this Court on 15.8.10, where this same point was raised and where it was held that in circumstances similar to those surrounding the case now under consideration the kraal head was not responsible for the *torts* of his son whom he had provided with a wife.

The appeal is dismissed with costs.

Umtata. 23 November, 1915. W. Power Leary, A.C.M.

Mpikeleli vs. Nono.

(Ngqeleni. No. 144/1915.)

Kraal Head Responsibility—Inmate not Related—Pondo Custom Mgqabo Beast.

The facts of the case are fully set forth in the judgment.

Pres.:—This is an appeal from a judgment of the Resident Magistrate, Ngqeleni, in an action wherein Plaintiff in the trial Court sought to recover from Jack and Mpikeleli the sum of £15 as and for damages by reason of the adultery of Jack, described as Defendant No. 1, with Makumalo, the wife of Plaintiff, and Mpikeleli described as Defendant No. 2 is alleged to be liable according to Native custom for the torts and actions of Defendant No. 1 who, it is alleged, resides at the kraal of No. 2.

The Defendants appeared to answer to the summons on the 3rd January, 1914. Defendant No. 2 in his plea: "Admits Defendant No. 1 has resided at his kraal for four years and states he is only liable as head of the kraal for an Mgqabo beast." Further pleads: "Defendant No. 1 is the son of Mazi who resides at a separate kraal in the same location." Defendant No. 1 denied the adultery."

The hearing of the case was postponed to the 25th July, 1914, and on that date Defendant 2 was in default being reported ill. After hearing the evidence judgment was entered "for Plaintiff for £15 as prayed with costs—the judgment is provisional as far as Defendant 2 is concerned."

Defendant No. 1 appealed against this judgment to the Native Appeal Court. The appeal was heard and dismissed on the 17th March, 1915. On this a writ appears to have been issued and certain property belonging to Defendant No. 2 attached who then took steps to have the provisional judgment and the writ issued there-

under set aside. The application was granted and the provisional judgment set aside and the case was eventually heard on the 12th August, 1915, and the provisonal judgment against Defendant No. 2 was made final with costs. The case having been put to the Native Assessors, Jiyajiya states:—

"Acording to Pondo custom a kraal head is not sued for *torts* committed by an inmate of the kraal who is not related to him. The kraal head is aproached by the injured party who gives the *tort feasor* an Mgqabo beast and instructs him to return to his own kraal if the kraal head gets angry and chases him away his father would go and ask for an Mgqabo beast. This is however only done by or for a person who has done something for the kraal head, done some work or performed some service. If a man came and remained for say three weeks the kraal head is not responsible. If he stayed for 10 years the kraal head would have to pay the Mgqabo beast. The father of the *tort feasor* has an action against a kraal head for an Mgqabo beast, but not the injured party."

The Defendant in this case has not excepted to the summons as having been wrongly sued. In view of the fact that he took no steps to absolve himself by sending the *tort feasor* to his father with the Mgqabo beast such an exception could not have been upheld.

Appellant could only be absolved from liability by paying the Mgqabo beast, in his pleas he admits liability for this beast. The alleged payment of £3 to Jack as an Mgqabo beast has not been referred to on appeal and even if it were paid it is not equivalent to an Mgqabo beast and is not sufficient.

He has made no tender at any time during these proceedings and cannot now shelter himself under the custom as expounded by the Assessors. If in defending himself Appellant relies on custom he must follow that custom in its entirety. Kraal head responsibility for inmates of the kraal whether son or not is very clearly set out in the case of *Sifuba* vs. *Mbaswana and Ntleki* (N.A.C.I., page 222).

The appeal is dismissed with costs.

Umtata. 25 March, 1915. W. Power Leary, A.C.M.

Tomsana vs. Mnqanyana and Dlangamandla.

(Umtata. No. 476/1914.)

Kraal Head Responsibility—Liability for Crimes Committed by Inmate.

Claim £12 15s. 1d. for money stolen from Plaintiff's hut.

Defendant No. 2 pleaded he was not liable as Plaintiff's claim was based on a crime.

The Magistrate gave provisional judgment against Defendant No. 1. The summons as regards No. 2 was dismissed.

Plaintiff appealed.

Pres.:—The Magistrate rightly overruled the first exception. In the second exception the Court held that Defendant No. 2 would be responsible for *torts* committed by Defendant No. 1 but could not be held responsible for any claim based on a crime committed by him. With this view this Court is not in agreement.

In the case of *Sifuba* vs. *Mbaswana and Ntleki* (N.A.C.I., page 222) the Native Assessors stated:—"According to our custom, if a person, whether a minor or a major, lives at the kraal of another the head of the kraal is responsible for his *torts*, whether a son or not. Any profits he may bring in belong to the head of the kraal therefore the head is liable for his debts, even for debts contracted elsewhere and before he came to this kraal. This, however, does not apply to shop debts."

It is therefore quite clear that the kraal head would in accordance with Native custom be held responsible for a claim based on certain crimes.

The appeal is allowed with costs and the judgment in the Court below altered to provisional judgment for Plaintiff as prayed with costs, the one paying the other to be absolved, the property of Defendant No. 1 to be first excused.

Umtata. 25 July, 1916. C. J. Warner, A.C.M.

Saqoni and Mjingo v. Ndiko.

(Ngqeleni. No. 106/1916.)

Kraal Head Responsibility—Married Brother—Presumptions—Paternity.

Claim for 5 head of cattle or their value £25 and costs by reason of the 1st Defendant having committed adultery and having caused the Plaintiff's wife to become pregnant. The 2nd Defendant was sued in his capacity as guardian of 1st Defendant. It was proved that 2nd Defendant was an elder brother and that the kraals are together. That 1st Defendant was a married man and had lands of his own, and on this ground 2nd Defendant repudiated his liability.

The Magistrate gave judgment against both Defendants.

Pres.:—It is not usual for Native men to cohabit with their wives when they are suckling young babies therefore the presumption that the Plaintiff was the cause of his wife's pregnancy does not apply in this case. A claim was made against Defendant as soon as the Plaintiff discovered his wife's condition and there is evidence that Defendant admitted he was the cause of the pregnancy and tendered 10 goats through Defendant No. 2.

As regards the liability of Defendant No. 2 the Magistrate in the Court below found that Defendant No. 1 resided in the kraal of which Defendant No. 2 is head. The latter is therefore liable for the *torts* of the first Defendant.

The appeal is dismissed with costs.

Flagstaff. 21 August, 1916. J. B. Moffat, C.M.

Mayaxana vs. Mkuleli and Ntantiso.

(Flagstaff. No. 156/1916.)

Kraal Head—Responsibility—Married Son—Pondo Custom.

Plaintiff sued the Defendants for 5 head of cattle or £25 damages for pregnancy of Plaintiff's wife. Defendant No. 2 denied that he was responsible for the torts of Defendant No. 1, he having paid dowry for Defendant No. 1. The Magistrate found for plaintiff as against Defendant No. 1 but granted absolution from the instance as regards Defendant No. 2.

Plaintiff appealed.

Pres.:—The case was put to the Pondo Assessors, who reply:—"If a father has married his son to a first wife the son is out of the father's control. The son can marry other wives without referring to his father. The father is not liable although the son may be living at the kraal."

In view of the statement of Pondo custom made by the Assessors this Court upholds the decision of the Magistrate absolving the second Defendant (now Respondent) from liability.

The appeal is accordingly dismissed with costs.

Flagstaff. 14 April, 1915. W. Power Leary, A.C.M.

Tshololo Macebo vs. Marata Mham.

(Flagstaff. No. 27/1915.)

Kraal Head Responsibility—Non Joinder of Guardian—Practice.

Pres.:—In this case Plaintiff is suing Defendant, as father of one Nqakamatye.

The summons is:—

"AND HEREIN THE PLAINTIFF STATES:—

"1. That Defendant is the father of one Nqakamatye, an unmarried son still residing with the Defendant, and such is under Native law and custom liable for the *torts* of the said son.

"2. That Plaintiff is by judgments of this Court on the 29th day of December, 1914, entitled to recover from the said Nqakamatye the stock above referred to or its said value—in respect of damages for a proved act of adultery by him with the wife of the Plaintiff.

3. That the Defendant's name was in the process upon which the Plaintiff obtained judgment as stated inadvertently omitted but that he is equally liable with the said Nqakamatye for damages in respect of the said Native law and custom, and that demand was duly made upon him, the said Defendant, by the Plaintiff in the premises but that Defendant refused or neglected to comply therewith.

"4. That the Plaintiff has recovered no part of the said damages from the said Nqakamatye, but that the whole of the amount of the said judgment and costs are still due to him.

"Wherefore Plaintiff prays that this Court may adjudge the Defendant to be equally liable to him in the said premises for the whole amount of the said judgment but less any part thereof the Plaintiff may recover from the said Nqakamatye, and for costs of suit."

The Plea: "Denies there is any case against him. Admits he is the father of Nqakamatye, but when Nqakamatye was sued no summons was issued against him."

This plea which was taken by the Magistrate from the Defendant, who was not represented by an attorney in the Court below, is, in the opinion of this Court, an exception to the summons.

Previous decisions on this question having been referred to, the attorney for the Plaintiff stated that this is a special case in that the Plaintiff distinctly applied for a summons to proceed against the present Defendant, and was not aware until after the writ had been issued against Defendant's son that the son only had been sued.

The case was then proceeded with and judgment was entered for Defendant with costs, and against this decision this appeal is brought. The Magistrate's reasons for judgment are:—

"In this case the appeal has been noted against the principle laid down by the Appeal Court in various decisions, the latest being *Nkoti* vs. *Ndlela* (N.A.C. 1910—1911, p. 176), that when a kraal head has been joined with the *tort feasor* in the first instance a subsequent action may not be brought against him.

"The present Plaintiff sued one Nqakamatye, son of the present Defendant, for damages for adultery and was awarded three head of cattle. The father was not joined in the summons. The Plaintiff issued a writ and a horse belonging to the present Defendant was seized, and in an interpleader action it was declared not executable as the present Defendant had not been joined in the original case. The Plaintiff thereupon instituted the present action.

"The principle laid down by the Appeal Court does not exist in Native law, and my sympathies are entirely with the Plaintiff, but in view of the Appeal Court decisions I had no alternative but to enter judgment for Defendant.

The following cases reported in Warner have been quoted by the Appellant's Attorney:—

Dick John vs. *Bangani* (page 4); *Peter Class* vs. *Ngqweqwe* (p. 5); *Bajini* vs. *Fikeni* (page 42); *Bovi* vs. *Mgqitini* (page 27).

The extracts published in Warner in the above quoted cases seem to favour Appellant's contention. The case of *Bovi* vs. *Mgqitini* being identical with the present action.

In the case of *Rubulana* vs. *Tungana* (N.A.C.I., page 90), heard at Umtata on the 24th of July, 1905, the ruling reported in Warner was departed from. The President remarked:—

"Under Native law and custom the head of the kraal is liable

for any torts which may be committed by members of his kraal and formerly his property was attached, although he had not been joined in the summons. The position of the head of the kraal in such cases is not that of a wrong doer but rather that of a surety responsible for the good behaviour of the members of his kraal. The Court is of the opinion that the arguments advanced do not apply, the point at issue being one which can only be decided in accordance with Native custom."

This case was returned to be heard on its merits, and when again before the Appeal Court the judgment was:—

"*Pres.*:—The Court has previously ruled that the property belonging to the head of a kraal cannot be attached on a judgment against a member of the kraal if he was not joined in the summons. In the action brought by *Rubulana* vs. *John John*, the Plaintiff in the Magistrate's Court elected to sue John John only, and by a subsequent action against the Respondent seeks now to make him liable for the judgment obtained against John John. The Court is of opinion that the Appellant having failed to join the Respondent in the original action, is not now entitled to succeed. The appeal is dismissed with costs."

In that case it would seem John John did not reside at Tungana's kraal.

In the case of *Nosaiti* vs. *Nangati* (N.A.C.I., p. 50) referred to the President remarked:—

"The Court is aware that this is in conflict with Native custom but when Native custom is repugnant to justice and equity and to the provisions of the Proclamations for the Government of the Native Territories it must give way."

It is contended that the present action is not repugnant to justice and equity, or to Native custom. This Court is not prepared to hold that the present action is repugnant to justice or equity, and referred the question of custom to the Native Assessors.

In the case of *Ntenteni* vs. *Ngantweni Nkohla* (N.A.C.I, page 172), the President in his judgment is reported to have said:—"The responsibility of the head of a kraal for the *torts* committed by the members of his kraal is a condition peculiar to Native custom and there is no corresponding position to be found in Colonial law."

"The term 'Joint *tort feasor*' is wholly inapplicable to such cases, as it cannot be maintained or shown in any of these cases that the head of the kraal is a participator in the *tort* committed."

In the case of *Mkeqo* vs. *Matikita* (N.A.C.I., page 242) the following passage in the judgment is quoted as a proper finding:—

"As long as the Plaintiff is an inmate of his kraal the Defendant is responsible for the *torts* of the Plaintiff, and the only way in which the Defendant can relieve himself of this responsibility is by formally disinheriting his son or by making him set up an establishment for himself."

This does not decide the point now before the Court. It is not contended that where the head of the kraal was joined with an inmate of his kraal that he would not be responsible.

The case of *Nkoti* vs. *Ndlela* (N.A.C.11, page 176). The question of kraal head responsibility in circumstances such as those disclosed in this case have been fully gone into, and there it has been clearly laid down that Plaintiff, having elected to sue the son alone is not now entitled to raise this action against the father.

It is contended that Plaintiff's action was against both father and son, and the Plaintiff distinctly applied for a summons against Defendant, and in his evidence he states "I wanted to sue both the present Defendant and his son, and I made it clear to Constable Mbebe."

The present Respondent—Defendant in the Court below—admitted in his evidence in the case of Plaintiff (Appellant) vs. *Nqakamatye*, that Tshololo came to his kraal to report that he had caught his son in adultery with his wife. His contention then was that if Tshololo had caught his son he should have taken him to the Headman. The position in this case is that Defendant was present at the hearing of the action, *Tshololo* vs. *Nqakamatye*, and gave evidence for the Defendant: that he was not present as the head of the kraal, not having been joined in the summons as such.

In the cases quoted, no reference is made to the point raised having been put to the Native Assessors. This has now been done, as it is argued the question should be decided on Native custom.

The case having been put to the Native Assessors they state:—

"At the Qaukeni if a son is cited to appear without his father, and the Plaintiff is told he is stealing the son, the father must be joined. When the father is joined the case is gone into. If he has no father his guardian is joined with him.

"If the father is not joined when the case is first heard, after judgment is given against the son, the father could not be made liable. His defence would be that he had been absolved by proceedings being taken against the son alone, and by his not being joined in the action. The Chief would not consider such defence contempt, but it would be upheld as the son had been separated from the father, and emancipated from his control.

"We always join the father and the son in such cases. That was done in Faku's time, up to now. The son having been selected and sued, the father is absolved and could not be proceeded against.

"The Chief's messenger calls the kraal-head (the kraal is responsible) and says: "You are required at the Great Place, your son has committed adultery." If the son is cited personally, and not the father, he is absolved.

"In the circumstances disclosed in the case now before the Court, the present Respondent would not be liable. The Appellant having gone to Respondent, he should have sued him and not the son alone."

The Native custom as given by the Assessors is in agreement with the later decisions of the Native Appeal Court, and following these the Plaintiff cannot succeed in his action.

The appeal is dismissed with costs.

Kokstad. 13 May, 1913. W. T. Brownlee, A.C.M.

Noyani vs. Umfaan and Swaartbooi.

(Maclear. No. 162/1912.)

Kraal Head Responsibility—Person Temporarily Resident with.

The President's judgment sufficiently discloses the facts of the case.

Pres.:—In this case the Magistrate in the Court below is satisfied that the first Defendant has committed adultery with Plaintiff's wife and has got her with child, but he holds that because the first Defendant is resident in the District of Mqanduli he has no jurisdiction over him. The Magistrate also holds that the second Defendant cannot be held responsible for the *tort* of first Defendant because the woman's condition was not reported to him and because he has since provided the first Defendant with a wife.

On the first point this Court is not satisfied that the domicile of the first Defendant is in the District of Mqanduli. He was at the time of the alleged adultery resident at the kraal of the second Defendant, his father, in the Maclear District for several months and was at work there as a reaper, and in the opinion of this Court this conferred such a domicile as would bring him within the jurisdiction of the Court of the Resident Magistrate of Maclear. (See *Oosthuizen* vs. *Pienaar* (14 S.C.R., 373.)

On the second point this Court is of opinion that the defence cannot succeed. The second Defendant himself admits that under Native law he would be responsible had the matter been reported to him, and his contention is that he is not liable because the matter was not reported to him. In this contention, however, this Court is unable to concur with him. Had the matter been disputed by the first Defendant this contention might have been set up, but there is at present no denial of the adultery and pregnancy and as this adultery took place while the first Defendant was at the second Defendant's kraal, the second Defendant is responsible for the *torts* committed by the first Defendant at his kraal, even should the first Defendant have been at the time a bird of passage. The fact that the second Defendant has since provided first Defendant with a wife does not condone *torts* already committed.

The appeal is allowed with costs and the judgment of the Court below is altered to provisional judgment for Plaintiff as prayed with costs, the one paying the other to be absolved.

Butterworth. 3 March, 1914. C. J. Warner, R.M., President.

Benfort Bekwa vs. Mesheki Nomandla and Sabisa Nomandla.

(Nqamakwe. No. 151/1913.)

Kraal Head Responsibility—Separate Kraals—Major.

Plaintiff claimed 4 head of cattle for abduction and seduction of his daughter Trena, who became pregnant and gave birth to a female child of which first Defendant was the father. That second Defendant was responsible for the *torts* of first Defendant.

First Defendant was in default.

Second Defendant pleaded that first Defendant had his own kraal in the location.

The Magistrate found for second Defendant and gave provisional judgment against first Defendant.

Plaintiff appealed.

Pres.:—According to Native law the head of a kraal is liable for the *torts* of an inmate of his kraal. (*Klaas* vs. *Mqweqwe*, H. 19.) In the present case the Magistrate in the Court below found that at the time Mesheki abducted Appellant's daughter he was living in a certain hut which stands on a certain surveyed land, and there is evidence to support this finding. The evidence further shows that at the survey of the district the ground on which the hut stands was included in the allotment surveyed for Shadrack, Mesheki's brother, and transferred to Mesheki on the 26th October, 1908.

There is no evidence of Mesheki's age but as he was married at the time he abducted Appellant's daughter he was presumably a major and living in a hut situate on land he held under title deed. This being the case Respondent could have no control over Mesheki's land and actions, and therefore cannot be held liable for his *torts*.

The appeal is dismissed with costs.

Kokstad. 25 August, 1917. J. B. Moffat, C.M.

Jumba vs. Nodosi and Ndleleni.

(Mount Frere. No. 28/1917.)

Kraal Head Responsibility—Torts—*Accepting Liability for Non-Resident.*

Pres.:—The Defendant excepted to the summons for misjoinder on the ground that at the time of the alleged commission of the wrong the first Defendant was not living with second Defendant.

The seduction is alleged to have taken place when first Defendant was living at the kraal of one Gwabeni. According to Native custom the head of the kraal is responsible for acts committed by inmates of his kraal.

It is alleged in the summons that the second Defendant took responsibility for the *tort* committed by the first Defendant and Plaintiff asks that he may be afforded an opportunity of proving that second Defendant did take over the liability.

No authority has been brought to the notice of the Court to show that under Native custom a man can take over liability for damages for a *tort* committed by another man at a time when the latter was not an inmate of the former's kraal. The Native Assessors having been asked whether they know of any such case state that while the head of the kraal becomes responsible for the inmates of his kraal from the time they take up their residence at his kraal he cannot assume responsibility for acts committed by them before they come to his kraal.

The plea in bar was rightly upheld by the Magistrate, and the appeal must be dismissed with costs.

Flagstaff. 24 April, 1914. W. T. Brownlee, A.C.M.

A. Keswa vs. Malala.

(Bizana. No. 52/1914.)

Kraal Sites—Sale—Proclamation 125 *of* 1903.

Pres.:—Plaintiff sued Defendant for £1 4s., the value of certain sod walls standing on a site allotted by the Magistrate to Plaintiff under the provisions of Proclamation 125 of 1903.

The walls being of sod are a fixture to the ground and they were not sold to be removed. This is tantamount to Plaintiff having sold not only the walls but the site granted to him, and so far as Defendant is concerned he cannot occupy this site without permission of the Magistrate and is liable to be evicted at any time unless he has such permission.

The sale might have been conditional upon Defendant getting the necessary permit but as the sale was concluded it means that Plaintiff has sold what he could not, for he cannot warrant the property sold because Defendant is liable at any time to be evicted. While it is not expressly provided for in Proclamation 125 of 1903 it is quite certain that Government never intended to allow Natives to sell their kraal sites

The allotment of land is vested in the Governor by section 40, Proclamation 112 of 1879, and the Governor in turn has by Proclamation 125 of 1903 delegated this authority to the Magistrate so far as kraal sites and gardens are concerned and no transfer of any trading or other sites may be made in the Territories without the permission of the Governor.

The appeal is dismissed with costs.

Umtata. 25 November, 1915. W. Power Leary, A.C.M.

Nkunzi Mbonambe vs. Tyesi Mapiliba.

(St. Mark's. No. 174/1915.)

I. Land—Cultivation by Agent for Owner.
II. Agency—Cultivation of Land for Benefit of Owner.

The facts are disclosed in the judgment of the Appeal Court.

Pres.:—The Headman under Proclamation No. 125 of 1903 is charged with the duty of allotting arable land in his location and it is provided that it shall be lawful for any person with the consent of the Resident Magistrate to allow any relative or friend to cultivate his allotment. A person may then be in the location and allow some other person to cultivate his land but it must be with the consent of the Magistrate.

Section 7 (*b*) provides that the holder of an allotment who leaves the location temporarily for whatever purposes, may with the consent of the Magistrate leave his allotment in charge of some other person. This appeal must be decided on the construction to be placed on the words "leave his allotment in charge of some other person". These words in the opinion of the Court apply to a person who has left the allotment in charge of another who may use it for his own benefit and do not apply to a person whose family is in the location and who has simply requested a relation or friend to plough the land for him—for one season—as his agent.

It is averred in the summons that Plaintiff left the land in charge of Kitane Mwahla with instructions to cultivate and sow the land for him. He was prevented from doing this by the Headman alleging that he the Plaintiff had no right to the land. The Headman in so acting, if proved, went further than his authority. It would in such circumstances be the Headman's duty to report to the Magistrate and get his instructions.

In the opinion of this Court Proclamation 125 of 1903, as amended by Proclamation 209 of 1911, was not intended to prevent a holder of an allotment from engaging an agent to cultivate for him during short absences. It cannot be presumed that the common law rights of a holder were to be infringed without that intention being expressed in unmistakable terms.

The appeal is allowed with costs and the exception is overruled. The case is returned to the Magistrate for Defendant to plead to the summons and the case to be dealt with on the merits.

Dissenting Judgment (Frank Brownlee, R.M., Libode).

I dissent from the judgment in this case on the ground that the wording and intention of section 7 of Proclamation 209 of 1911 are quite clear in requiring that where a person is absent from a location and wishes to leave his land in charge of some other person he must obtain the permission of the Magistrate.

Umtata. 28 November, 1913. A. H. Stanford, C.M.

Malinde and Matamba vs. Madzana, assisted by Sixwela.

(Ngqeleni. No. 288/1913.)

Land—Heir has First Claim after Widow's Death or Departure from Kraal.

The facts are not material in this case.

Pres.:—A widow is entitled to the use of the land she cultivated during her husband's lifetime so long only as she remains with her family at her late husband's kraal. If she elects to leave the kraal then all the rights she formerly had in that kraal lapse.

In the present case the Respondent having left her late husband's kraal with the declared intention of not returning, has no further claim to use the land, or to the crop grown on it.

It is possible that the land in question may be made available for re-allotment by the Headman, but in such cases the heir of the deceased husband has a first claim for consideration.

The appeal is allowed with costs and the Magistrate's judgment for return of the grain or value £7 10s. is altered to judgment for the Defendant with costs.

The Court is not prepared to vary the Magistrate's order with regard to the female child of the late Pondoyi. In so far as the Respondent is concerned any claim which Sixwela may have with regard to this child will not be affected by the judgment as he is not a party to this suit.

Butterworth. 17 November, 1913. A. H. Stanford, C.M.

Qenu Gwicana v. Coniwe Mateza.

(Nqamakwe. No. 72/1913.)

Land—Property Remains in House to which Allotted.

The Plaintiff claimed for the restoration of his wife Noyenti or dowry paid on the ground of her desertion.

The Defendant pleaded: That Noyenti was Plaintiff's Great Wife. That Plaintiff had lately married another woman and placed her in the Great House contrary to Native custom.

That Noyenti was prepared to return to the Plaintiff's Great House.

The Magistrate gave a judgment for absolution from the instance with costs, and Plaintiff appealed.

Pres.:—Although Appellant's wife Noyenti may have had a misconception as to her status, it is clear that her proper status was that of right-hand wife, as his first wife left numerous

children, including male heirs. In this Court he states that his first wife was killed by lightning, and her hut burnt, and after her death he built a fresh kraal on a different site at which he lived from the time of his marriage with his second wife. He has now married a third wife, and is desirous of taking the lands cultivated by his second wife and giving them to his third wife. This he is not entitled to do, without making other provision acceptable to her, consequently his wife was justified in leaving him. If he wishes to make the arrangement he proposes he must first establish a kraal for his right-hand house and provide that wife with a land in such manner as the heir of her house will not lose it after his death. His proper course is to fetch back his wife to her present hut and the use of her land, until he can put through the transfer of the land he proposes to give her, and make the provision named.

The appeal is dismissed with costs.

Butterworth. 13 July, 1915. W. T. Brownlee, C.M.

Magaqana vs. Nofasi Sukulwa.

(Butterworth. 56/1915.)

Land Tenure in Surveyed Locations—Widow's Rights.

The judgment of the Appeal Court discloses the facts of the case.

Pres.:—In this case the Plaintiff claims in his capacity as guardian of the minor children of the Great House of the late Sukulwa a declaration of the rights, on behalf of the said minor children in part of the produce of a certain surveyed arable lot the property of the late Sukulwa, and at present in the occupation of the Defendant, who is the widow of the late Sukulwa in his Right Hand House. The defence is an exception that the summons is vague and embarrassing, inasmuch as it discloses no ground of action. This exception has been upheld, and in upholding the exception the Magistrate in the trial Court has dealt not merely with the question of the exception, but has gone into the merits of the case and has dealt with the whole question of right and title to the land itself, which was not before the Court; and appears to have relied for his decision upon the provisions of section 1, Proclamation 16 of 1905, and section 9 (1) of Proclamation 142 of 1910.

As the matter is of considerable importance it is perhaps as well to go somewhat exhaustively into the matter of land tenure in the surveyed districts and the legislation connected therewith.

Prior to the advent of survey in these Territories all land was held under communal tenure, and under this each wife of a polygamist was supposed to have her own field for the proper maintenance of herself and her family. These fields were not heritable.

With the advent of survey and the ensuing issue of title all arable lands became heritable, and in framing the necessary legislation it was provided that surveyed arable lands held under title should descend from one holder to another in accordance with a defined line of succession. This line of succession was the direct male line,—thus following the rule of succession under Native custom,—and exclude the succession of a widow, and was contained in section 23 of Proclamation No. 227 of 1898.

It was found, however, that this law of succession in many instances imposed great disabilities upon widows, many of whom were ejected from their fields by the heir upon death of their husbands, and so provision was made in section 1 of Proclamation 16 of 1905 that any widow should have the use and occupation of her deceased's husband's allotment and immovable property during her lifetime or until her remarriage. Had this section ended there, the case of a person in Defendant's position would have been a very strong one, but the section does not end there, and goes on to provide that the widow shall have this use and occupation "under the obligations imposed by law, and the conditions of the title." It is not necessary for the purposes of this case to enquire what were the obligations imposed by title, but when the conditions imposed by law are considered, the question immediately arises, what law was contemplated? Was it the common law? Or was it Native law? The common law is silent in this respect, and the inference therefore is that the law contemplated was Native law, and it must be borne in mind that in all this matter of succession to rights in land the Native rule of succession has been carefully adopted. Now Native law custom, while providing that a widow many enjoy the usufruct of her husband's property—at least so much of it as appertains to her house—at the same time stipulates that she shall so enjoy it at his kraal, and for the benefit of his and her children, and it is a claim in the interests of the children of Defendant's husband—though certainly the children of another wife than Defendant—that is brought: and in the opinion of this Court the Plaintiff should not have been refused the opportunity of producing evidence in support of his claim. Section 1 of Proclamation 16 of 1905 has, however, been repealed, and the Magistrate in the trial Court has relied upon a further provision of the law, namely, Proclamation No. 142 of 1910, which repeals section 1 of Proclamation No. 16 of 1905, and section 9 (1) which provides that any widow shall, during her lifetime, or till her remarrying, be entitled to the use and occupation of the immovable property belonging to her late husband, subject to the obligation imposed by title. The Magistrate holds that she may enjoy such occupation of use without control from any one, and did this section stand alone his contention would be correct, but in the opinion of this Court this section must be read in conjunction with the following one, which provides that if a widow had been other than the great wife of her late husband she may have the use and occupation of her late husband's

immovable property only if the great wife has left no descendant under the table of succession contained in the third schedule to the Proclamation. This is the same as that contained in section 23 of Proclamation 227 of 1898.

It seems then that the position of affairs is this, that if the great wife has left a son the Defendant has no claim to use and occupy the field in question.

The summons alleges that there are minor children of the Great House, but does not say whether they are sons or daughters. Plaintiff should have the opportunity of leading evidence on this point.

The appeal is allowed with costs, and the ruling on the exception is set aside, and the case is remitted to the Court below to be heard upon its merits.

Postea: J. B. Moffat, C.M. 18 July, 1916.

Magaqana vs. *Nofasi Sukulwa.*

Cross-Appeal: Nofasi Sukulwa vs. *Magaqana.*

(Butterworth. 56/1915.)

The notice of appeal in this case states that the appeal is made "on the grounds that the judgment was contrary to law." In the opinion of this Court this notice is not a sufficient compliance with the Regulations published under Government Notice No. 144/1915, which requires that notice of appeal "shall explicitly state in writing the special grounds on which the appeal is based". The exact points of law on which the Magistrate is alleged to have erred should have been stated.

The attorney for the Respondent consented to the grounds of appeal being amplified at once and the case proceeding. The main point of law raised by the attorney for the Appellant is that Proclamation No. 16 of 1905 is *ultra vires*, in that it varies the conditions of a title issued prior to the promulgation of that Proclamation. The Plaintiff's declaration admits the Defendant's claim to the right to cultivate the land in question, and he only asks for a declaration that the children of the Great House are entitled to a share of the crops of the land. No evidence was taken, but the following facts were admitted, *viz.*:—

1. That Sukulwa died on 24th February, 1916.

2. That the title to the land in question was issued prior to promulgation of Proclamation 16 of 1905.

3. That Defendant is not the mother of Mtshukutu, and the parties agreed that the point for decision was, who is to have control of this particular land, the Plaintiff, as guardian of the acknowledged heir, Mtshukutu, or the Defendant Nofasi, who it is admitted is the sole wife of the late Sukulwa ever since title was issued?

This goes further than the Plaintiff's original claim, which was simply for a share of the crops, and in the opinion of this Court it was not competent on the summons to deal with the special point submitted. The Magistrate's judgment did not do so. He gave judgment on the summons and declared that Mtshukutu is entitled to a share of the crops, which is all that Plaintiff asked for in his summons. This Court agrees with the finding of the Magistrate that Proclamation No. 16 of 1905 is not *ultra vires*. It does not restrict the conditions of title, but extends the benefit to the widow, thereby defining more clearly the widows' rights under Native custom, as recognised by the parties, and by which they are bound. The Proclamation does not vary the conditions of the title. It simply lays down the rights of the title holder's widow.

The Court also agrees with the Magistrate that Proclamation No. 142 of 1910 does not apply in this case. The Plaintiff by the Magistrate's judgment obtained all he asked for in the summons. He has appealed in order to get an order that he is entitled to control of the land, which was not asked for in the summons. His appeal must, therefore, be dismissed.

The cross-appeal is brought on the ground:—

1. That the judgment is not in accordance with the point submitted; and

2. That Plaintiff should have been ordered to pay costs.

With regard to the first, it has been laid down above that it was not competent for the Court to deal with the special point submitted.

On the second point, the Plaintiff succeeded in his claim, and he was entitled to costs.

This case was before the Court in July, 1915, when an appeal on an exception was allowed, and the case was remitted to the Court below to be heard on its merits. Instead of complying with this order the parties agreed to submit to the Magistrate's Court a special point which was not raised in the summons and could not be dealt with by him.

The appeal and the cross-appeal are both dismissed with costs.

Butterworth. 20 November, 1917. J. B. Moffat, C.M.

D. Majenge vs. C. Mbete

(Butterworth. No. 83/1917.)

Land Tenure—Transfer—Governor-General's Approval.

The facts of the case are fully disclosed in the President's judgment.

Pres.:—Plaintiff claims in his summons that as heir of the late Phillip Mbete he is entitled to a certain arable allotment in

the district of Butterworth registered in the name of Phillip Mbete. Plaintiff's father, Cobus Mbete, was Philip Mbete's heir, and did not elect to take up the allotment when Phillip died. It is clear that Plaintiff is the person to whom the allotment would in the ordinary course be transferred, if application was made for the required approval of the Governor-General to such transfer. In the Court below and in his notice of appeal the Defendant took up the position that Philip Mbete's title had been cancelled and that the allotment had been handed over to him for the use of his son In argument before this Court the Defendant's attorney abandons the position previously taken up and claims that Plaintiff should not have come to the Court for a declaration of rights in respect of the allotment, but should have applied to the Governor-General for approval of its transfer to him. The Magistrate's Court and this Court clearly have no right to say to whom the allotment is to be transferred on failure of Cobus Mbete to take it up as heir of Philip Mbete, the original grantee, on the latter's death. The Magistrate's judgment declares that Plaintiff is heir to the land and entitled to the land and transfer. He is heir to Philip Mbete, but is not heir to the land. The heir to the land was Cobus Mbete. As Cobus Mbete did not take up the land it is now available for reallotment by the Governor-General, who will re-allot it to Plaintiff in accordance with the table of succession laid down by Proclamation. The Defendant (Appellant) has failed entirely on the grounds on which he resisted Plaintiff's claim and on which he appealed. His appeal must, therefore, be dismissed with costs.

For the reasons given above this Court cannot confirm the Magistrate's judgment as it stand. Until the Governor-General has approved transfer of the lot to Plaintiff he cannot claim a declaration of rights in respect of it, nor can he claim delivery of the title deed.

The judgment on the claim in convention will be altered to summons dismissed. The Defendant having failed to substantiate the claim made by him in the Court below is not entitled to his costs in that Court. On the claim in reconvention judgment was given for Plaintiff in reconvention for £3 15s., paid as survey fees. The Plaintiff (now Defendant) in reconvention not having obtained approval of transfer to him of the allotment cannot be required to refund the survey fees disbursed by Defendant in respect of the allotment.

The judgment on the claim in reconvention must, therefore, be altered to judgment for Defendant in reconvention.

Umtata. 20 November, 1913. W. T. Brownlee, A.C.M.

Hanisi or Hans Vryster vs. Alex Jonas.

(St. Marks. No. 121 1913.)

Laws—Applicability in Dowry Cases of "Lex Loci Contractus."

The facts are fully disclosed in the President's judgment.

Pres.:—In this case the appeal is upon four separate grounds:—

1. That Appellant being a Griqua he is not amenable to Tembu custom and that the cattle in respect of which this action is brought were not paid to him as dowry but by way of gift.

2. That even should it be held that Defendant is amenable to Tembu custom, he has satisfied Tembu custom in this respect, by the tender to the Plaintiff of another girl, and that the Plaintiff is not justified in refusing such tender, and by his refusal puts himself out of Court.

3. That judgment should not in this case have been for more than one beast, as of the dowry paid the sheep have all died and Defendant is therefore not liable to restore these, and that of the remaining two head one should have been allowed the Defendant to wipe away his tears.

4. That the alternative value placed upon the two cattle for which judgment has been given is excessive.

On the first point this Court agrees with the Magistrate in the Court below that the cattle paid by Plaintiff were paid and accepted as dowry and that Defendant, who has lived for more than twenty years in Tembuland, has in this instance availed himself of and submitted himself to Tembu custom and has, under this custom, accepted dowry for his daughter. The intention of Plaintiff to pay dowry is made very clear by the evidence of Defendant's wife, who says that the Plaintiff stated that the stock paid represented three head of cattle; and as it is clear that Defendant accepted the payment of dowry under the Tembu custom the question of repayment must also be decided under Tembu custom.

The second and third points have been placed before the Native Assessors, and they state that under Tembu custom, (a) if a man pay dowry for a girl and before she is given to him in marriage she die, he may, if he does not wish to "extinguish friendship," ask for another girl instead of demanding the return of the cattle, but that should he not wish to have another girl he may demand the return of his cattle, and is entitled to recover them, and it is not within the right of the girl's father to extinguish the claim by tender of another girl; (b) that the woman not having yet become the man's wife, the whole of the dowry paid is recoverable.

It thus appears that the tender of a second girl by the Defendant, even had it been made—and which the Plaintiff denies—does not extinguish the Plaintiff's claim, and that he is entitled to recover all the cattle paid by him

It appears, however, that the sheep paid have all died. The Defendant in his evidence states this, and it is not disputed by Plaintiff—and as these have died before marriage they die to Plaintiff and not to Defendant, and the Plaintiff is entitled to recover only the two head which are still in existence and which Defendant has disposed of.

Respondent's attorney, in reply to the third point raised in appeal, states that one beast was allowed by the Magistrate to dry the Defendant's tears, and in arriving at a judgment the Magistrate decided that three head of cattle had been paid and that, deducting the one to dry Defendant's tears, two should be repaid. There is nothing on the record to bear out this statement, but supposing such to have been the conclusions of the Magistrate, he has committed a double error, for while on the one side he has made an allowance to the Defendant of one beast to dry his tears, and which should not have been made, he has on the other allowed the Plaintiff to recover the sheep which have died and which also should not have been done.

On the whole, in the opinion of this Court the decision of the Court below is substantially correct, and this Court would not be justified in allowing the appeal on the point of the value placed on the cattle, for in the first place this point might very well have been raised in the Court below and apparently was not, and in the second place it is competent for the Appellant to settle the judgment by payment of cattle, which Respondent would have to accept.

The appeal is dismissed with costs.

Umtata. 24 July, 1917. J. B. Moffat, C.M.

Nkinqa Xamdana vs. Matso Xamdana.

(Mqanduli. No. 189/1917.)

I. Levy—Meaning—Re-opening Provisional Judgment when Final.

II. Practice—Provisional Judgment—Meaning of Term "Levy".

The facts of the case are fully set forth in the President's judgment.

Pres.:—In this case provisional judgment for three head of cattle, or £36, was obtained against the Applicant on the 6th September, 1916, on a summons issued on 30th August, 1916. He alleges that he left for the mines on 21st August, 1916. A writ was issued on 9th September, 1916, and two head of cattle were seized on the 11th September, 1916, and were sold, realising £24.

In the case quoted on behalf of Appellant, heard in this Court on 21st March, 1910, this Court adopted the interpretation of "levy" given in the case of *Earle* vs. *Le Roux*, decided in 1909,

in which it was laid down that "levy" must be a levy sufficient to satisfy the amount of the judgment. This case was, however, not decided on the Magistrate's Court rule, but on the rule of the Supreme Court. In the case of *Dawood* vs. *Friedlander*, heard in 1913, the Supreme Court ruled that a provisional judgment in a Magistrate's Court became final after a return of *nulla bona*. The decision in the case of *Cole* vs. *Theron*, heard in 1915, supports that view taken by the Magistrate that the judgment became final one month after the 11th September, 1916, when certain cattle were seized on the writ. The Applicant has not brought forward any sufficient ground for reopening the case, and the Magistrate was, therefore, justified in dismissing his application.

The appeal is dismissed with costs.

[N.B.—See also *Marnewick* vs. *Sapiero* (8, C.T.R., 393).]

Umtata. 30 March, 1916. J. B. Moffat, C.M.

Nongomanzi vs. Ngcunge Ngedle.

(Libode. No. 66/1915.)

Maintenance—Amount Claimable.

Plaintiff claimed for 10 head of cattle or £100 for maintenance.

The Magistrate gave judgment for 6 head or £30 and costs.

Defendant appealed.

Pres.:—The Respondent, Plaintiff in the Court below, claims for maintenance of the widow and four daughters of the late Mfamana who lived at Respondent's kraal and who died in 1892. The widow and four daughters remained at Respondent's kraal and he claims that he supported them.

In 1903 the Appellant, who is Mfamana's heir, brought an action for a declaration that he was the guardian of the widow and the four daughters, on which he succeeded.

The Court gave judgment in favour of the Appellant (Plaintiff in that action) for the four daughters. Two of the daughters had already married. Respondent in the present case did not comply with the order for delivery of the other two.

At that time he made no claim for maintenance. He claimed additional dowry for Mfamana's wife who was his sister. Respondent was ordered to pay this additional dowry. As regards the claim for maintenance in this case the Court considers that the Respondent is entitled to something and awards him one head of cattle for each daughter.

The appeal is allowed with costs and the Magistrate's judgment will be altered to judgment for Plaintiff for four head of cattle or their value £20 and costs.

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Butterworth. 6 November, 1912. A. H. Stanford, C.M.

Bani vs. Njikilana.

(Idutywa. No. 187/1912.)

Maintenance—Claim for, and for Wedding Outfit and Intonjane Ceremony.

Claim by Plaintiff for 13 head of cattle or £65 being dowry for two girls received by Defendant on behalf of the estate of Plaintiff's late father to which Plaintiff was the heir. Defendant admitted that Plaintiff was the heir and entitled to such dowries.

Defendant claimed six head of cattle, three being the expenses of the marriage of the two girls and three for their maintenance as well as that of Plaintiff who was brought up by Defendant, leaving a balance due to Plaintiff of seven head which were tendered to Plaintiff prior to issue of summons and which Defendant now again tendered.

The Magistrate gave judgment for nine head or £45 and costs.

Defendant appealed.

Pres.:—The case having been submitted to the Native Assessors they state that a beast is payable for the maintenance of each child, sex being immaterial; that in the present case three head of cattle for the wedding expenses of two girls is not excessive. They further state that they are not in agreement with the opinion given by the Native Assessors in the case of *Sunduza* vs. *Mayiqongo* (Henkel, p. 216) that one beast covers both maintenance and expenses of Intonjane ceremonies.

The Court concurs in the view expressed. The appeal is allowed with costs and the Magistrate's judgment altered to judgment for Plaintiff for seven head of cattle or £35 with costs up to date of tender and costs in favour of Defendant after that date.

Butterworth. 2 March, 1914. C. J. Warner, R.M., President.

Vimbayo vs. Sweleni.

(Kentani. No. 241/1913.)

Maintenance—Close Blood Relative—Male Children.

Pres.:—Appellant sued Respondent in the Court below for two head of cattle for maintenance of a girl, Mini, the daughter of Respondent's sister, Elsie. The Magistrate found that Respondent had not proved his assertion that the sum of £9 was paid as maintenance for Mini and Beni as stated by Respondent and this Court concurs in this finding. But the Magistrate ruled that Appellant

was not entitled to claim maintenance for Mini on the ground of near blood relationship between the parties. The question is put to the Native Assessors and they state that according to Native law maintenance fees can be claimed between close blood relations.

As regards the question whether maintenance can be successfully claimed in the case of male children it was decided in this Court in the case of *Bani* vs. *Njikelana* (No. 254 of 1912)—see previous case—that "a beast is claimable for the maintenance of each child, sex being immaterial".

The Respondent having set up a claim in reconvention for these children cannot evade his liability for their maintenance. The appeal is allowed with costs and the judgment in the Court below is altered to judgment in convention for Plaintiff for one beast or £5. In reconvention for Plaintiff in reconvention (Defendant in convention) for the delivery of the three boys in question on payment by him to Defendant in reconvention of three head of cattle or £15. Absolution from the instance in respect of the claim for the sewing machine and two boxes. Defendant in convention to pay costs. Any cattle tendered in settlement are subject to the approval of the Resident Magistrate.

Kokstad. 5 December, 1916. J. B. Moffat, C.M.

Skaki vs. Mpahla and Mpungana.

(Matatiele. No. 298/1916.)

Maintenance—Desertion of Wife—Husband's Liability for Child.

Pres.:—The question to be decided in this case is whether Defendant is entitled to fees for maintenance of Plaintiff's two children.

The evidence as to whether the Plaintiff's first child was maintained at Plaintiff's or at Defendant's kraal is contradictory.

The Magistrate has found that it was maintained at Plaintiff's kraal. Defendant's claim for its maintenance must therefore fail.

With regard to the claim for maintenance of the second child, which was only about a year old when the case was heard, the Magistrate in disallowing the claim followed the judgment of this Court in the case of *Gotywa* vs. *Isaac Jiba*, in which it was laid down that if a woman deserts her husband and goes to her people, the husband is not compelled to pay maintenance for her children.

The Defendant in this case having taken the wife away from her husband and the child being only one year old, this Court does not feel justified in making him any allowance for the child's maintenance and agrees with the Magistrate's view.

The appeal is dismissed with costs.

Butterworth. 3 November, 1914. W. T. Brownlee, A.C.M.

Elias Mafanya vs. Klaas Maqizana.

(Nqamakwe. No. 104/1914.)

Maintenance -Fine Paid for Seduction—Native Custom to Apply.

Plaintiff claimed one Jessie who was the result of the seduction and pregnancy of Defendant's daughter one Lizzie by him (Plaintiff) and for which seduction and pregnancy he had paid 3 head of cattle or £15 and that he was entitled by Native law and custom to the said Jessie. Plaintiff also stated that he had tendered Defendant a beast as "Isondlo" which was refused and later £5 which was also refused.

Defendant pleaded: That he had maintained the girl for twenty years. That all the parties to this suit are Christian Natives and have always been accustomed to and do live and dress as such. That Defendant has thereby been occasioned much expense in the maintenance, education, and upbringing of the girl Jessie far beyond anything anticipated under Native law and custom. That he admitted the tender and has always been ready and willing to hand over the girl upon repayment by Plaintiff of the moneys he has expended on her as follows:—Schooling at Emgwali Training College for nine months, £18; school books, etc., £1 1s. 10d.; rail fares, £1 1s. 3d.; school outfit, £2 10s.; pocket money, £1 18s.; to maintenance, 18½ years at £2 per annum, £37; total, £61 9s. 1d.

The Magistrate gave judgment for the return of the girl Jessie to Plaintiff on payment of one beast or £5.

Defendant appealed.

Pres.:—The parties are not at issue upon the facts in this case which is brought under Native custom and also defended under Native custom, and the only question to be decided is whether the Defendant is or is not entitled, in view of the superior upbringing and education provided by him for the girl Jessie, to claim a larger amount for the maintenance of Jessie than that provided for by Native custom. The amount so provided being one beast irrespective of the period during which the child has been maintained. The Magistrate in the Court below has decided that Defendant is not so entitled, and this Court, while sympathising with the Defendant in his laudable efforts to educate Jessie, and to bring her up in a superior manner, and while not prepared to agree with the Magistrate's view that the education provided for her is of no use to her, is yet in agreement with the Magistrate in the view that this case having been conducted by both sides under the provisions of Native custom, the Defendant is not entitled under Native custom to demand more than is provided by Native custom more especially in view of the fact that the Defendant himself has been the first to invoke the Native custom which enabled him to

demand a fine from the Plaintiff in respect of Plaintiff's seduction of his daughter Lizzie. The offspring of this seduction is the girl Jessie and the fact that Defendant demanded a price for this seduction entitles the Plaintiff, under Native custom, to demand the delivery to him of the offspring.

The appeal is dismissed with costs.

Butterworth. 7 November, 1912. A. H. Stanford, C.M.

Johnson Nelani Mviti vs. Paulina Nelani Mviti.

(Nqamakwe. No. 152/1912.)

Maintenance—Heir to Provide Reasonable Support for Family of His Late Father.

Claim by Plaintiff that Defendant may be adjudged to maintain Plaintiff, her two minor sisters and brother in a proper way. Plaintiff stated that the Defendant refused to support Plaintiff and her sisters. That he wished them to come and live with him.

The Magistrate ordered that Defendant hand to Plaintiff a bag of mealies for consumption and on its being finished the same to be replaced, the mealies to be handed over in the presence of the Headman or his deputy. Defendant to pay costs.

Defendant appealed.

Pres.:—Under Native custom it is the duty of the Appellant —the person who will receive the dowries to be paid for the girls as heir of his late father—to provide reasonable support for his younger brother and sisters, who are entitled to take their meals in their late mother's hut, if they so desire. The judgment while affirming this principle is somewhat unfortunately worded and may possibly lead to abuse. It will therefore be amended to read that the Defendant will provide reasonable food and maintenance for the younger members of his late father's family during their minority, these children to have the right to occupy, prepare and take their meals in a separate hut. No order as to costs.

Umtata. 5 March, 1912. W. T. Brownlee, A.C.M.

Qomboyi vs. William Tsolombela.

(Ngqeleni. No. 15/1912.)

Maintenance—Isondlo—Costs—Refusal to Hand Over Children.

Claim in convention for certain two girls.

Claim in reconvention for "Isondlo" or maintenance 6 head of cattle or £30.

Judgment for Plaintiff in convention for the two girls. Judgment for Plaintiff in reconvention (Defendant in convention) for 2 head of cattle or £10 and costs.

Defendant in reconvention appealed.

Pres.:—In this case it seems to be clear that the Defendant is entitled to be paid for the maintenance of the children in question; they were delivered to him by their mother, and the Plaintiff, though he apparently knew where they were, made no attempt to recover them until they had been some three years with the Defendant. It follows then that if Defendant was entitled to demand maintenance he was under Native custom justified in refusing to deliver them until "isondlo" or maintenance had been paid. It is argued that the amount of "isondlo" allowed by the Court below is excessive but there are various judgments of this Court laying down the principle that the amount usually paid for "isondlo" is one beast for each child irrespective of the length of the period during which they have been maintained. It is true the Defendant has not received the amount of "isondlo" which is claimed but in the absence of any tender of "isondlo" by Plaintiff the Defendant has practically succeeded in his contention and this Court is of opinion that the Court below is right in awarding him costs.

The appeal is dismissed with costs.

Butterworth. 3 November, 1914. W. T. Brownlee, A.C.M.

Nkwenkezi vs. Aliva and Another.

(Willowvale. No. 223/1914.)

Maintenance—Not Claimable for Infant.

Claim for a maintenance beast ("Isondlo") or its value £5 or otherwise the restoration of a certain male child. The child in question was the result of the seduction and pregnancy of Plaintiff's daughter and for which fine had been paid. That the child had been removed from Plaintiff's possession without payment of the "Isondlo" beast.

The Magistrate gave judgment for Defendant, and Plaintiff appealed.

Pres.:—In this case the Magistrate has found upon the evidence that the child in respect of which "Isondlo" or maintenance is claimed was voluntarily handed over to Defendant by Plaintiff. This Court is, however, very doubtful upon this point. The matter at issue having however been placed before the Native Assessors, they state that it is not customary to demand "Isondlo" for a child who has not yet been weaned, and in view of the fact that the child was not more than a year old and was still at its mother's breast, this Court, without going into the question of the evidence, is of opinion that upon the grounds of Native custom, the Plaintiff is not entitled to succeed.

The appeal is dismissed with costs.

Umtata. 3 March, 1913. W. T. Brownlee, A.C.M.

Diba Tshayafuti vs. Noketile Qalashe and Nohamila Mqadi and Ntsebezo Qalashe.

(Mqanduli. No. 209/1912.)

Child's Maintenance—Sacrifice Provided by Child's Father—Native Custom.

Claim for the restoration of three minor children.

The Magistrate gave judgment for the return of the two children Nomama and Sidudu and for the male infant unnamed on payment of one beast or £5.

Defendants appealed.

Pres.:—In this case this Court sees no reason for interfering with the decision of the Court below. The Magistrate in the Court below has found on the evidence that one beast was paid as "isondlo" or maintenance for the two children Sidudu and Nomama and that they were thereupon delivered to Plaintiff but subsequently stolen from him and there is ample evidence to support this finding and this Court cannot say that the Magistrate is wrong in believing this evidence and the Magistrate is therefore right in ordering the immediate delivery of the two children Nomama and Sidudu. It is usual in cases of this nature to pay a beast as "isondlo" for each child maintained but the Magistrate has found as a fact that only one beast was paid and accepted for the two children.

With regard to the matter of the alleged sacrifices the Magistrate does not believe that any such sacrifices were ever slain and this matter having been put to the Native Assessors they state that in a case where a child falls ill while in the custody of the mother's people and a sacrifice is necessary it is usual that application be made for the temporary return of the child to its father's kraal even though the mother be impounded, and it is then usual that a consent is arrived at—that is should there be no intention of "extinguishing friendship". The sacrifice is offered to the gods of the child's father's family and it is contrary to custom for this sacrifice to be offered at the kraal of the mother's family.

The custom as here stated would seem to support the finding of the Magistrate in the Court below on the point of the alleged sacrifice of cattle, but this Court goes a step further and says that even supposing that the sacrifice had been offered as alleged, yet the claim for their repayment is premature, as the only witnesses who give evidence regarding these sacrifices are the two Defendants Nokatile and Nohamila, and they state that it was agreed that these sacrifices should be repaid out of the dowry of the children in question, and there is no evidence that these children have married or that dowry has been paid for them.

With regard to the further counterclaim raised by Nokatile for a beast for the maintenance of Nohamile, in the opinion of this Court the Magistrate in the Court below has rightly disallowed this claim. No claim has been raised by Plaintiff for the return of Nohamile, and the proper time to raise this counterclaim is when an action is instituted for the recovery of Nohamila or of the dowry paid for her, and which is still at the kraal of the Defendants.

The only remaining point raised in appeal is one of custom, and it is argued in the first place that no action should have been instituted against the Defendants Noketile and Nohamila, and that the case should have been brought against Ntsebezo, and in the second place that the Magistrate has erred in giving judgment against Ntsebezo, as Ntsebezo is not within the jurisdiction of the Court of the Resident Magistrate of Mqanduli.

On the first point, had this defence been raised in the Court below it might very well, in view of the evidence of Ntsebezo, have succeeded, but it was never raised, either in the first instance, when the two women were alone, or later on, when Ntsebezo intervened, but the action was on both occasions defended on its merits, and this defence cannot now be raised. On the point of jurisdiction, the Defendant Ntsebezo, by intervening, has submitted himself to the jurisdiction of the Court below, and the judgment of that Court against him as co-Defendant must stand.

The appeal is dismissed with costs.

Butterworth. 7 November, 1916. J. B. Moffat, C.M.

Paul Hlikihla vs. G. Gonyela.

(Willowvale. No. 159/1916.)

Marriage—Christian Rites—Alleged Adulterine Child.

Claim:—Declaration of rights and the delivery of a certain girl named Eleanor. It was admitted that the parties were married by Christian rites and that during Plaintiff's absence at the mines his wife was made pregnant by some other man and as the result thereof gave birth to the female child Eleanor.

The Magistrate found for Plaintiff and Defendant appealed.

Pres.:—The child Eleanor was born during the subsistence of the marriage between Plaintiff and his wife Sophia. The child having been born in wedlock it cannot be declared illegitimate on the mere statement of Plaintiff. For the purposes of this case it must be regarded as Plaintiff's child. He is entitled to declaration of rights whether the case is dealt with under the ordinary law or under Native law. The Defendant has failed to prove his plea that the child was given to him.

The appeal is dismissed with costs.

Kokstad. 19 January, 1915. W. Power Leary, A.C.M.

Joe Ntlongweni vs. William Mhlakaza.

(Tsolo. No. 272/1914.)

I. Marriage—Christian Rites—Recovery of Dowry Paid on Woman Contracting a Second Marriage.

II. Dowry—Recovery of, on Wife Contracting Second Marriage, the First having been by Christian Rites.

Plaintiff Joe Ntlongweni as heir of the late Richard Ntlongweni sued William Mhlakaza for the return of 10 head of cattle and 1 horse paid by his late brother under Native custom for one Agnes whom deceased had married according to Christian rites. Subsequent to the death of her husband Agnes returned to her father. After Agnes' return to her father she re-married. No dowry was paid in respect of the second marriage which was also celebrated according to Christian rites. The Magistrate gave judgment for Plaintiff for 7 head of cattle or their value and costs of suit. Against this Defendant appealed.

Pres.:—It is argued that as the dowry was paid under Native custom this Court must deal with it under that custom and that as no dowry has been paid for the woman in respect of the second marriage and the father does not hold two dowries or not being a consenting party (to re-marriage) he is not liable for the return of the dowry paid.

Dowry is paid under Native custom and must be dealt with under that custom. It has been frequently held by the late President of this Court that the form of marriage is immaterial where dowry has been paid. Under Native custom where a woman leaves her late husband's kraal with intent not to return, she rejects him and renders her parents liable to return the dowry paid. In this case the woman returned to her father and re-married from his kraal, it is said, without his consent. The fact remains that she has now cut herself off from her deceased (first) husband's kraal, which according to Native custom is a rejection, and his heirs are entitled to claim restoration of a proportion of the dowry.

Ten head of cattle and one horse were paid as dowry and the Magistrate has given judgment for the return of seven head and declared Plaintiff to be guardian of the minor Ethel. Quite a liberal proportion of the dowry has been allowed to Defendant.

The appeal is dismissed with costs.

Kokstad. 25 August, 1914. W. Power Leary, A.C.M.

Welton Sicence vs. Mlanduli Lupindo.

(Matatiele. No. 199/1914.)

I. Marriage—Christian Rites—Divorce—Recovery of Dowry Paid.

II. Dowry—Recovery of, when Marriage by Christian Rites Dissolved.

Pres.:—The Plaintiff sues Defendant for restoration of dowry which according to Native custom he paid to Defendant for his daughter to whom he was married in 1912 according to Christian rites. Subsequently in 1913 Plaintiff took a Native wife to live with him and whom he married according to Native custom.

The wife married in accordance with Christian rites thereupon sued Plaintiff for divorce and a divorce was granted by the Chief Magistrate for the Transkeian Territories at Kokstad.

The marriage with Defendant's daughter having been dissolved the Plaintiff now claims 26 head of cattle and one horse paid as lobola for her. Defendant excepts to the summons as disclosing no cause of action inasmuch as dowry is not recoverable when a marriage is dissolved on the ground of adultery of the person who paid the dowry, and prays that Plaintiff's summons be dismissed.

For the exception *Faroe* vs. *Moleko* (Seymour, page 165) and *Hebe* vs. *Mdinelwa Mba* (12, E.D.C. 6) and *Lupusi* vs. *Makalima* (11, N.A.C. 163) are quoted and in reply *Samson* vs. *Mnyateli Mbanga* (I. N.A.C., 217) and *Pantshwa* vs. *Msi* (II. N.A.C. 147) are quoted.

In *Samson* vs. *Mnyateli Mbanga*, the action was for restoration of the dowry following divorce after Christian marriage where the Plaintiff the husband was not the guilty party.

In the case of *Lupusi* vs. *Makalima*, the President in giving judgment is reported to have said: "Misconduct on the part of the girl is always sufficient grounds for the man to break the engagement and recover the cattle paid on account of dowry. It is only just that the converse should apply, and this was held to be so by the Eastern Districts Court, in the case *Hebe* vs. *Mdinelwa Mba* (12, E.D.C. 6)."

In the case referred to the learned Judge (Sir Jacob Barry, J.P.) is reported to have said, quoting from the report of the Commissioner for Native laws and customs: "A contract between the father and the intending husband of his daughter by which the father promises his consent to the marriage of his daughter and, to protect her in case of a necessity, and by which in return he obtains from the husband the ikazi or valuable consideration partly for such consent and partly as a guarantee of his good conduct towards his daughter as wife (Sec. 70) and that the ikazi is forfeited by the husband's misconduct, while on the other hand if the wife wrongly leaves her husband it must be returned."

Following the ruling of the case quoted the Magistrate upheld the exception and dismissed the summons and this Court finds no reason to disturb his ruling. The appeal is dismissed with costs.

Umtata. 20 March, 1917. J. B. Moffat, C.M.

Charlie Ngxala vs. Agnes Ngxala.

(Umtata. No. 473/1916.)

Marriage—Dissolution—Adultery not sufficient to Dissolve Marriage by Native Custom.

The Plaintiff (Charlie Ngxala) sued for a dissolution of his marriage with Agnes whom he had married by Native custom. The Defendant excepted to the Plaintiff's summons on the ground that it disclosed no cause of action under Native law and custom whereby a husband can sue his wife for dissolution of marriage or divorce.

The Magistrate upheld the exception and dismissed the Plaintiff's summons.

Pres.:—The Plaintiff asks for an order dissolving the marriage between himself and Defendant entered into according to Native custom.

The ground on which the order is asked for is that Defendant has committed adultery.

It has been laid down in previous cases that adultery is not sufficient ground for claiming a divorce under Native custom.

The Tembu Assessors having been referred to at the request of Appellant's Attorney, state that adultery is not sufficient ground for divorce, but that where a wife commits adultery the husband may drive her away and abandon any claim he has for return of the dowry.

The appeal is dismissed.

Flagstaff. 30 August, 1915. W. T. Brownlee, C.M.

Nomatusi vs. Nompetu.

(Lusikisiki. No. 147/1915.)

Marriage—Dissolution at Instance of Wife—Coercion and Illtreatment.

The woman Nompetu sued her aged husband Nomatusi for a dissolution of their Native marriage. The grounds of action are fully set out in the judgment of the Appeal Court.

Pres.:—In this case the Plaintiff asks for a dissolution of the Native custom marriage at present subsisting between herself and the Defendant, and the ground upon which this application is based is that the Plaintiff has never been a consenting party to it and that she was compelled by her father and brother to marry the Defendant who is old and repugnant to her, that she at no time lived with him, but constantly ran away from him and was as constantly forcibly taken back to him and was violently assaulted by her brother in his endeavour to compel her to accept the Defendant as her husband.

At the outset of the case the Defendant's Attorney took exception to the evidence of assault upon herself given by the plaintiff, on the ground that assault had not been alleged in the summons. This Court is, however, satisfied that this objection was rightly disallowed, and that the Plaintiff was entitled to adduce this evidence in support of the allegation that she had been compelled to go to the Plaintiff.

This Court is quite prepared to admit that in accordance with Native custom it is not unusual for a father to use force to his reluctant daughter to induce her to accept a bridegroom whom she does not desire and that in many cases the bride gives way to such force. The father is often influenced by the hope that the girl may give way to force of circumstances, that by some means or another the bridegroom may in course of time get the girl with child and that when once the girl has given birth to a child she may out of love for her child consent to remain with an unloved husband rather than be separated from her child, and so has no hesitation in using force and often violence. And then again it is customary for a bride, even should she be a willing bride, to exhibit the most lively signs of grief upon being taken from the familiar home of her fathers to that of a stranger, and the father may at times have good reason for thinking that his daughter is after all only indulging in those signs of grief which it is thought right and proper to exhibit on such an occasion, and so think himself to be justified in using persuasion or even force to his daughter.

While admitting as above (all this), however, this Court is of opinion that in view of section 297, Proclamation No. 140 of 1885, no girl or woman may be compelled to contract a marriage union repugnant to herself, and that any woman so compelled has the right to appeal to the law for relief from a situation intolerable to herself, and this Court cannot lend its sanction to any Native custom which is repugnant to and in conflict with all principles of law and humanity.

This Court has frequently laid down the principle that a Native man or woman may at any time divorce himself or herself, either with or without cause, so long as this divorce be carried into effect in a proper and constitutional manner. This Court has however at the same time laid it down that if either a man or a woman brings an action into Court, seeking relief from the marriage tie, then due cause must be alleged and proved, for it would be manifestly unjust to any man or woman to give an order perhaps in-

volving costs against him or her, in an action brought without proper cause, and so in cases where no cause has been proved this Court has refused to grant such orders when applied for.

In the case now before the Court the evidence is overwhelmingly clear that the Plaintiff was forced into a marriage with the Defendant. He himself admits that she fled from him. Her evidence shows that she fled to West Pondoland and to every district in East Pondoland in her vain attempts to escape him. Her evidence shows that for three years she has had no rest for the soles of her feet in her fruitless endeavours to escape a union which was in every way repulsive to her. Her evidence shows that again and again she was dragged back to the Defendant, once even at the end of a rope, and that she was on one occasion very severely beaten by her brother for refusing the bridegroom whom he and her father had provided for her. And this evidence of assault is supported by the testimony of the independent witness Mehluza.

The evidence of her father and brother shows that she refused her elderly suitor, and the whole evidence makes it abundantly clear that she will never live with the Defendant, and under the circumstances *this Court is satisfied that the Plaintiff has established most conclusively her claim for relief and the Magistrate was right in granting her relief from a situation which is altogether intolerable.*

In support of the appeal the case of *Mamgwanya* vs. *Thomas Mbekelwana* (unreported) heard in this Court sitting at Flagstaff in April, 1915, has been cited, but the decision in that case presents no difficulties to this Court.

In that case the ground of action alleged in the summons was almost exactly similar to that in the case now before the Court, and the Magistrate in deciding the case against the Plaintiff held upon the evidence that no compulsion had been proved. There was no evidence of any compulsion, and the Appeal Court in sustaining the judgment of the trial Court went out of its way to say that there was compulsion, and stated that the Plaintiff's only remedy under the provisions of section 297, Proclamation 140 of 1885 was in the Police Courts and not by way of civil action.

In the opinion of this Court the view of the Magistrate in the trial Court in that case was the correct one, namely, that the Plaintiff should show cause before an order could be given her.

As regards the argument that the only remedy lay in the Police Courts this Court is of opinion that the remedy provided by the criminal Courts would be of no avail to the Plaintiff as this remedy would operate only against the woman's father and would be quite inoperative against the husband, and the only remedy against the latter is that provided in the civil Courts.

It has been also argued in support of the appeal that the Plaintiff should not be allowed to bring this action without the assistance of her father and that her doing so may result in injury to her father or to her husband, in respect of the dowry paid for her. But while this argument might be of great force in any case where the woman had been a consenting party to the marriage yet in the

opinion of this Court it cannot have any weight in the case now before the Court in which the Plaintiff was manifestly not a consenting party, and if either the Defendant or the Plaintiff's father suffer any injury in the matter of the payment or the refund of dowry they have no one but themselves to blame. The Defendant when he paid dowry knew that he was marrying an unwilling bride. The father when he accepted dowry knew that he was forcing his daughter into a marriage which she regarded with aversion and neither of them have the sympathies of this Court, nor is this Court here for the purpose of providing them with a remedy for any difficulties in which they may find themselves involved as the result of their own deliberate actions.

A further argument in this case is that the Plaintiff's proper course was to have applied for an order declaring her marriage to be void *ab initio*, but this Court is satisfied that the Plaintiff has been well advised in bringing it in its present form which is the only form in which she could bring it under Native custom.

The appeal is dismissed with costs.

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Butterworth. 20 July, 1914. W. T. Brownlee, A.C.M.

Ntambule vs. Nojojini.

(Kentani. No. 109/1914.)

I. Marriage—Dissolution at Suit of Wife unassisted by Guardian.

II. Wife—Can Sue for Dissolution of Marriage Unaided.

Claim for dissolution of marriage instituted by the woman. Exception was taken that the woman could not sue unassisted by her father. The exception was overruled.

Pres.:—In the opinion of this Court the Magistrate in the Court below is right in holding that the Plaintiff may sue without the assistance of her guardian. It has on many occasions been laid down in this Court that when a Native woman's guardian refuses to assist her in her action she may sue without such assistance, and it has also been laid down that in any action against her guardian she may sue without assistance.

In this case the action is against her guardian according to Native custom and she may sue him without assistance for a divorce. The woman has, however, no claim upon the cattle paid as dowry for her, and this portion of the claim should be brought by her father or his representative, these being the persons responsible for the holding of and the repayment of dowry. Had the defendant applied to have this claim struck out of the summons, unless brought by the Plaintiff's father, he might perhaps have succeeded. But the Plaintiff cannot be prevented from bringing

her action for divorce should she have grounds for such an action, and the grounds alleged by her—those of an accusation of sorcery—have been held to be a sufficient ground for a claim for dissolution of a Native marriage: and she may not be prevented from prosecuting her action for dissolution of marriage seeing that it is she and not her father who has contracted the marriage. Her father may be interested in the matter of dowry, but she is the person who is chiefly interested in the matter of her marriage, and her father is interested in it only in so far as questions of dowry arise.

The appeal is dismissed with costs and the case is remitted to the Court below to be tried upon its merits.

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Butterworth. 22 July, 1914. W. T. Brownlee, A.C.M.

Bangani Nikiwe vs. Dyasi Dzeke.

(Nqamakwe. No. 93/1914.)

Marriage—Dissolution of—Beast to be Returned by Wife's Father to Mark Dissolution.

The Plaintiff claimed for restoration of his wife or dowry of 8 head paid for her.

The Magistrate ordered that Defendant must restore Plaintiff his wife within one month from date and costs of suit.

Defendant appealed.

Pres.:—In this case the Defendant has appealed against the order for the return of Plaintiff's wife on the ground that the order cannot be carried out.

This Court, however, is of opinion that the Defendant has no ground of appeal, as the Court below might very well, under the circumstances, have taken the alternative of ordering Defendant to pay cattle in the event of her failure to return and the Defendant has clearly benefited by the failure of the Magistrate to do so.

The Magistrate has fallen into the very common error of ordering the deduction by the Defendant of a beast to mark the dissolution of marriage, but then the beast to mark dissolution is paid not by the husband, but by the father of the woman.

The underlying principle is this: that no man may hold his daughter and the dowry paid for her as well. If his daughter returns to him without cause the dowry must be returned to her husband. Her father is, however, permitted in paying out or returning dowry to deduct one in respect of each child born of the marriage. It often happens that sufficient children have been born to extinguish the dowry entirely, but it has been held that even in such a case the father must pay out one beast so as to mark seven cattle, and he ought to have paid out the remaining beast. This beast would mark the dissolution of marriage. Had there the dissolution of the marriage. In this case eight head of cattle are found to have been paid, and seven children to have been born.

The children would thus confer upon defendant the right to deduct been eight or more children he would still have to pay out a beast to mark this dissolution.

Had the Plaintiff appealed on this point he would have succeeded.

The appeal is dismissed with costs.

Umtata. 18 March, 1915. W. Power Leary, A.C.M.

Tyobeka Mbedla vs. Jadezweni Maqokolo.

(Port St. John's. No. 135/1912.)

Marriage—Dissolution of—Beast to Mark—Deductions.

The judgment fully discloses the point at issue.

Pres.:—The Magistrate found on the facts that only six head of cattle had been paid as dowry. There were six children born of the marriage and Defendant should therefore retain a fair proportion of the cattle. The case having been put to the Pondo Assessors, Jiyajiya states:—

"According to our custom if a woman has borne children she is rightly ordered to return, and if a woman has borne children to her husband the dowry is not returned as in course of time she will return to her children. The reason why a husband does not claim the return of the dowry is because he wants to claim the illegimate children borne by his wife."

The view expressed by the Pondo Assessors in this case is in conflict with those given in *Mfazwe* vs. *Tetana* (N.A.C., 11, 40).

The appeal is allowed with costs and the judgment of the Court below altered to one for Plaintiff for the restoration of his wife or one beast valued at £3 to mark the dissolution of the marriage.

Kokstad. 17 December, 1913. W. Power Leary, A.C.M.

Mendziwe vs. Lubalule.

(Qumbu. No. 146/1913.)

Marriage—Dissolution by Tender of Dowry Sufficient.

The judgment of the Appeal Court fully discloses the facts of the case.

Pres.:—In this case Plaintiff sues Defendant for damages for adultery. The marriage of the woman is admitted in the plea and it is pleaded that when Plaintiff came for his wife he was

tendered the return of the dowry. This he refused. The cattle were tendered on three occasions and were refused on each. It is very evident from the pleadings that the woman refuses to live with the man. The case having been put to the Assessors they state:—"If cattle are tendered to the husband he is bound to accept them and he has no action for adultery, if the woman is re-married. If there are children the husband would not accept the tender of all the dowry because by doing so he would forfeit his right to the children. He could accept the return of the dowry provided deductions were made in respect of the children."

The refusal of the woman to live with her husband and the tender of the dowry is sufficient to dissolve the marriage.

The appeal is allowed with costs and the Magistrate's decision altered to one for the Defendant with costs.

Umtata. 23 March, 1915. W. Power Leary, A.C.M.

Gam Marawu vs. Magoloza Mzima.

(Cofimvaba. No. 106/1914.)

Marriage—Dissolution of, by Wife's Father—Consent of Woman Essential.

The Plaintiff Gam sued his son-in-law Magoloza for dissolution of the marriage of the latter with Plaintiff's daughter. In his summons he alleged that his daughter's married life had been most unhappy owing to ill-treatment and that Defendant had made it impossible and undesirable that the house (marriage) should continue, therefore Plaintiff was desirous of dissolving the said house in the interests of his said daughter. Further that he tendered Defendant through his attorney a beast to so dissolve the marriage subsequently increasing the tender to two head. Plaintiff now prays for an order of Court dissolving the marriage on payment by him of the said two head, Defendant to pay costs.

Defendant excepted to the summons on the grounds that the woman named in the summons was not a party to the action as a Plaintiff, nor does the summons allege or set forth that action was brought with her knowledge or consent.

The Magistrate upheld the exception.

Plaintiff appealed.

Pres.:—In this case, the matter having been put to the Native Assessors, Chief Dalindyebo states:—"According to our custom a father may not dissolve a marriage without the knowledge or consent of his daughter—when he goes to get the marriage dissolved he takes the daughter with him and she states that because of her unhappiness, she does not wish to return to her husband."

The exception was a good one and was rightly upheld.

The appeal is dismissed with costs.

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Kokstad. 20 January, 1916. W. Power Leary, A.C.M.

Somtsewu vs. Xwayi.

(Mount Ayliff. No. 119/1914.)

Marriage—Dissolution of, by Wife's Father—Neglect of Wife.

Xwayi instituted an action against Somtsewu in the name of his daughter Nomafata for an order cancelling a marriage subsisting between the latter and Defendant.

The summons alleges that in 1902 the Plaintiff Xwayi telekaed his daughter Nomafata and that since that date Defendant has not made any effort to obtain the return of his wife, and that by his neglect in so doing he has forfeited his right to return of his cattle paid as dowry except one beast which Plaintiff tenders.

Defendant in his plea admits the teleka and states he made attempts to recover his wife and puts Plaintiff to the proof.

Plaintiff in his evidence stated that after telekaing his daughter about ten years ago Defendant ignored her until a year ago when he tendered £2 as additional dowry which was refused.

Meanwhile the woman had had a child by another man which Plaintiff reported to Defendant without any action being taken in the matter.

Defendant admitted in evidence that the adulteries (two) were reported to him and that all he did was to tell the Plaintiff to demand a fine but that he did not go himself.

The Magistrate gave judgment for Plaintiff for dissolution of the marriage, subject to the return of three head of cattle.

Defendant appealed.

Pres.:—This Court sees no reason to disturb the Magistrate's finding in this case.

The Appellant has for a number of years neglected his wife. On two occasions her adultery was reported to him and he took no action. He did not visit her as is usually the case when wives are telekaed and this indifference amounts to rejection.

The case quoted—*Ncenjini* vs. *Nteta* (II. N.A.C., 106)—does not apply.

The appeal is dismissed with costs.

Flagstaff. 29 August, 1912. A. H. Stanford, C.M.

Mahanguka Mayo vs. Nomhlaba, assisted by her brother Qaleni.

(Bizana. No. 385/1911.)

Marriage—Dissolution of, by Wife on Returning the Dowry.

Claim for dissolution of marriage.

Defendant opposed dissolution of marriage and tendered balance of dowry, viz., one horse.

Magistrate's judgment: Dissolution of marriage granted subject to the return of eight dowry cattle paid or £40. Costs against Defendant.

Defendant appealed and Plaintiff cross-appealed.

Pres.:—Under Native custom a woman may at any time with the consent of her father annul her marriage by returning the dowry paid for her.

At the previous hearing of the case the order for the dissolution of the marriage was confirmed and the case remitted for further evidence and finding with regard to the children born and dowry paid. It is now clear that one child was born during the subsistence of the marriage and that eight cattle were paid as dowry.

The appeal is dismissed with costs, the cross-appeal is allowed with costs the Magistrate's judgment being amended, the number of cattle to be returned altered to seven head or value £5 each; if cattle are tendered they are to be subject to the approval of the Magistrate.

Umtata. 23 November, 1916. C. J. Warner, A.C.M.

Philip Noraqa vs. Qotwalilanga.

(Libode. No. 139/1915.)

I. Marriage—Dissolution—Deduction—Assault by Wife on Husband.

II. Dissolution—Assault by Wife on Husband—Deduction.

Claim for return of wife or dowry of 9 head of cattle or £45 by reason of Plaintiff's wife having seriously assaulted him and inflicted upon him serious and permanent injury and thereafter deserted the Plaintiff and refused to return. Plaintiff claimed that by reason of the injury the Defendant was not entitled to the usual deduction.

The Magistrate gave judgment for one beast or its value £3 and found that eight children were born of the marriage and that nine head of cattle had been paid as dowry. The Magistrate also found that the Plaintiff's leg was broken through the injury caused to it by the assault.

The facts were put to the Native Assessors and they gave the reply set forth in the President's judgment.

Pres.:—The Native Assessors, to whom the points at issue were submitted, state that even if Plaintiff's wife did assault Plaintiff and broke his leg the Defendant would be entitled to a deduction of a beast for each living child.

Though the Magistrate in the Court below found that the Plaintiff's leg was fractured as the result of a blow with a stick by his wife, the Court, in the absence of medical evidence, and in view of the fact that four days after the assault the Plaintiff was able

to walk to a beer party, and that the wife was fined £1 for the assault, is not satisfied that the proof is so clear as to justify the Court in penalising Defendant. The Court sees no reason to disagree with the Magistrate's finding as to the number of children borne to Plaintiff by his wife and the appeal is dismissed with costs.

Umtata. 26 November, 1915. W. Power Leary, A.C.M.

Tengani Mfomdidi vs. Sindiso Mdletye.

(St. Mark's. No. 228/1914.)

Marriage—Dissolution of—Deductions—Rejection of Wife—Teleka—Maintenance.

The facts of the case are fully set forth in the President's judgment.

Pres.:—In this case Plaintiff sues for the restoration of his wife Nopakade or return of the dowry paid for her, eleven head of cattle. The delivery of eight head of cattle paid as dowry for Titi the daughter of Nopakade. The delivery of two minor children borne by Nopakade and payment of £50 as damages.

The Defendant in his plea admits the marriage of Nopakade to Plaintiff in or about the year 1890, denies eleven head of cattle were paid as dowry and says only nine head were paid. That Plaintiff drove his wife from his kraal intimating that he did not want her. That Plaintiff only on one occasion in the past twenty-two years came to Defendant's kraal. Admits the woman was pregnant with child when she returned to her father's kraal and gave birth to the girl Titi for whom the Defendant has received seven head of cattle on account of dowry. Admits that five children were borne by the woman after Titi and that two survive. Denies Plaintiff has sustained any damage and claims that if the marriage is held still to subsist that Plaintiff agreed at the time of the duli to the duli party that he would pay a further four head of cattle by way of dowry and these he had failed to pay and Defendant now claims these or their value £20. That he is entitled to receive three head of cattle as maintenance fee at the rate of one beast for each child or their value £15, and that he is entitled to hold the woman and children until his claims are settled.

After hearing the evidence the Magistrate gave judgment for Plaintiff for the return of his wife within thirty days on his paying one teleka beast or its value £5. Upon failure on the part of the woman to comply with this order the marriage becomes dissolved and thereupon Defendant must restore five head of cattle to Plaintiff or pay their value £3 each. Defendant is further

ordered to deliver to Plaintiff the three children Titi, Lindipasi and Ntombi upon the payment by Plaintiff of three Sondlo cattle or their value £5 each. Defendant is further ordered to deliver to Plaintiff the seven dowry cattle received by him for Titi or pay their value £8 each, Defendant to pay costs of suit. Case in reconvention lapses. The Magistrate in his reasons for judgment found that the woman had not been rejected but held under the teleka system pending the payment of further dowry. This conclusion is not supported by the evidence. The woman left her husband's kraal in Matatiele and returned to her people in the Cofimvaba district alone. She says she was driven away. At this time she was seven months pregnant. No provision was made for an escort or maintenance on the road which would have been the case had the woman been visiting her people in the ordinary way.

The Plaintiff says she left the kraal during his absence at Hope Town and that the child Titi was about two years old.

He states:—"On my return home I went to fetch her; her people said I could have my wife. I told them to send her home because I had to go and see my father Paul at Indwe who was sick."

This is too casual to be convincing that he was in earnest about getting his wife back. For twenty-two years the Plaintiff has taken no active steps to recover his wife and as far as the records go they do not show that he provided anything or even visited the children. In the case of *Maseti* vs. *Mono* (N.A.C.I., p. 119) it was laid down that Plaintiff having allowed his wife to remain away for nineteen years he was not entitled to much consideration and one beast of the dowry paid was allowed him to mark the dissolution of the marriage. For twenty-two years the Plaintiff in this case has viewed with complacency the absence of his wife and allowed her to have intercourse with other men and bring forth children and taken no steps to vindicate his honour. There is no action to compel payment of dowry according to Native custom but means were adopted to recover it other than by action. If there was a specific contract to pay, that contract could be sued upon even if the marriage were by Native custom, which is recognised as a valid marriage in these Territories and is more binding on the Natives than the marriage by Christian rites or Colonial law. If therefore the contract to pay four cattle were proved Defendant would be entitled to recover them. The practice of awarding one beast for teleka where a large dowry has been paid is not a sound one and is not according to Native custom under which this beast is claimed and paid. The number of cattle paid for teleka is in the discretion of the Court and is not fixed by custom. Each case must be dealt with on its merits. The Plaintiff for so long a time having neglected his wife, practically rejected her, was not entitled to recover her by payment of only one beast, the tender of one beast was insufficient and Defendant was within his rights in refusing it.

The Magistrate found that only four children had been borne by this woman, the woman says she bore six—there is some discrepancy between her evidence and that of the witness Jadezweni. This Court is, however, of opinion the woman's evidence as supported by other evidence should be believed on the point, as it affects her son who would in the natural course of events inherit the property in his mother's hut unless someone else could show a greater right to it.

Defendant has claimed only three cattle for maintenance of the three children which he is entitled to. He might have been entitled to more in the case of Titi. *Meyema* vs. *Baba* (N.A.C., II., 125).

The appeal is allowed with costs and the judgment in the trial Court altered to read judgment for the return of his wife within thirty days on his paying three teleka beasts or their value £15; on failure on the part of the woman to comply with this order the marriage becomes dissolved and thereupon Defendant must restore two head of cattle to Plaintiff or pay their value £3 each. Defendant is also ordered to deliver to Plaintiff the two children Landipasi and Ntombi, also Titi or her dowry seven cattle valued at £5 each upon the payment to Defendant of three maintenance cattle or their value £5 each with costs against Defendant.

Kokstad. 24 August, 1914. W. Power Leary, A.C.M.

Cedle vs. Mankihlana.

(Mount Ayliff. No. 53/1914.)

Marriage—Dissolution—Imprisonment—Woman Re-married—Return of Dowry.

The facts are fully set forth in the judgment.

Pres.:—In this case Plaintiff sues for the restoration of two head of cattle and five sheep paid on account of dowry for Defendant's daughter. The Plaintiff shortly afterwards was imprisoned and the girl taken back by her father (Defendant), and since been married to another man. The Plaintiff is therefore entitled to the return of his cattle paid as dowry.

Defendant has no claim on cattle paid as dowry for "Nqutu," nor can he convert such cattle into an "Nqutu" beast. Had the girl been spoilt before the dowry agreed upon an "Nqutu" beast would have been demanded and exacted at once. The claim for the sheep having been withdrawn the Magistrate in the Court below gave judgment for two head of cattle or their value, £7 10s., and costs of suit.

The Court is not disposed to disturb that judgment.

The appeal is dismissed with costs.

Butterworth. 7 November, 1912. A. H. Stanford, C.M.

Mshweshwe vs. Nofayl Mshweshwe.

(Nqamakwe. No. 129/1912.)

Marriage—Dissolution—Incompatibility of Temper no Ground for.

Claim:—Dissolution of marriage for the following reasons:—

1. That Defendant had a violent temper and had on several occasions assaulted the Plaintiff, and that living together was extremely dangerous.

2. That Plaintiff had sent her home, but she refused to leave his kraal, and was causing Plaintiff a great deal of trouble and annoyance.

3. That he has had ten children by his wife, seven of whom are living.

Defendant denied the allegations contained in Plaintiff's summons, except No. 3, which she admitted.

The Magistrate found for Defendant, and Plaintiff appealed.

Pres.:—The facts of this case having been submitted to the Native Assessors, they state that they are aware that husbands do drive their wives away or send them back to their parents, but as a rule their children fetch them back, so they know of no instance in which a Court of law or Native Chief under the circumstances detailed has ordered a wife unwilling to do so, to leave her husband's kraal; that had this case, being one in which the woman has borne so many children, gone before a Native Chief, the Chief would have directed him to erect a separate kraal for her and place her there with her children and the stock of her house, under the charge of her eldest son.

The Court concurs in the opinion given by the Native Assessors, and it also considers that it is reasonable that Appellant should pay the costs of his wife's defence.

The appeal is dismissed with costs, in which will be included £3 applied for by Respondent's attorney.

Kokstad. 25 August, 1914. W. Power Leary, A.C.M.

Salina Kwababa vs. Zuku.

(Matatiele. No. 466/1913.)

Marriage—Dissolution—Insufficient Dowry—Illegitimate Child—Right to.

The facts are fully set forth in the President's judgment.

Pres.:—The Plaintiff claims restoration of his wife Madibuka and two children, or return of eleven head of cattle and the two children.

The declaration states Plaintiff paid four head of cattle, which have now increased to eleven head, and that five years ago Madibuka returned to Defendant's kraal to give birth to a child the issue of her marriage with Plaintiff, and so did, and she had since given birth to another child. The marriage is admitted, and the payment of three head of cattle as dowry, as also the birth of one child of the marriage and one illegitimate child.

Defendant admits liability for two head of cattle, and that Plaintiff is entitled to the child of the marriage, and that he has tendered accordingly, with costs to date of tender, on the 5th February, 1914. Plaintiff joins issue with Defendant in regard to the payment of the three head of cattle, and still states four were paid on account of dowry, and declines to accept two head of cattle and one child, but is agreeable to a judgment of two head of cattle and the two children being entered against Defendant, and admits the tender of two head of cattle and one child on the 5th February, 1914. The Magistrate in the Court below gave judgment for two cattle and one child, in terms of tender, with costs to date of tender, since tender to be paid by Plaintiff. And various cases were quoted. None of these decide the point raised here, that is, dissolution of the marriage by the father on failure of the husband to complete or pay dowry and return of an illegitimate child born before the return of the dowry. The case having been put to the Native Assessors, "they state there was no marriage, as insufficient dowry had been paid, and therefore the father was justified in dissolving the union and retaining the illegitimate child for himself, but add, had a larger number of cattle been paid, say five head, the husband would have been justified in claiming the return of portion of his dowry and the illegitimate child."

The replication disposes of the question of increase, and the Court has only to deal with the one illegitimate child claimed by Plaintiff. The Defendant's representative, Ramakuala, states the dowry was to have been paid in a month. He, however, allowed her to remain with Plaintiff for five months, and on her return he sent for Plaintiff and told him he had been instructed to fetch the girl because they had not kept their promise in regard to the payment of dowry. No return of dowry was tendered to Plaintiff on this or any other occasion until 5th February, 1914, after proceedings in the Magistrate's Court had begun. It was not in the power of the Defendant in this arbitrary manner to dissolve the marriage. Rules of procedure and custom must be followed even by natives, and that has not been done in this case. The Plaintiff, on the other hand, has not, in the opinion of this Court, carried out his contract, and has, by his negligence and unreasonable delay, which he admits, brought about the present conditions.

The opinion expressed by the Native Assessors is at variance with the admission of the Defendant, and the Court holds that until the marriage is dissolved in a proper manner, either by a competent Court or the return of dowry, the children born of the woman belong to the husband.

The case quoted—*Ngezi* vs. *Nzaya* (I., N.A.C., 271)—would appear to be incorrectly reported, as the context refers to an engagement which was broken off, whereas the judgment refers to the dissolution of the marriage.

The appeal is allowed with costs, and the Magistrate's judgment altered to judgment for two children and one beast, with costs.

Kokstad. May, 1913. W. T. Brownlee, A.C.M.

Gweni vs. Mhlalo and Monelo.

(Mount Fletcher. No. 162/1912.)

Marriage—Dissolution of, on Grounds of Stuprum.

Claim by Plaintiff for the dissolution of his marriage with Defendant's daughter, one Mbotshawuse, and restoration of his dowry paid, viz., fifteen head, or £75, by reason of the following facts:—

1. That during the fifth month of the marriage Mbotshawuse gave birth to a child, the natural father of whom was one Simon Moshesh.

2. That he (Plaintiff) was unaware of Mbotshawuse's condition when he married her, and by reason of her misconduct and pregnancy prior to her marriage he was entitled to the dissolution of the marriage and return of his dowry.

Defendant admitted the allegations in Plaintiff's summons, but that Plaintiff had condoned and pardoned his daughter.

The Magistrate gave judgment for Plaintiff as prayed.

Pres.:—None of the cases cited in support of the appeal have any direct bearing on the case now before the Court. In the case of *Tetani* vs. *Mnukwa* (I., N.A.C., 38), which is the one most similar to it, the husband demanded and recovered damages from the seducer before he repudiated his wife, and thus availed himself by the Native custom, which permitted him to regard pre-nuptial intercourse with the woman as an act of adultery with a married woman. The other cases cited deal with the question of divorce on the ground of adultery and with the right of a husband against the seducer in cases where his wife has been seduced prior to marriage, and in none of them is it decided that a man may not repudiate his wife on account of a pre-nuptial Stuprum of which he was not aware. In the opinion of this Court the Plaintiff is entitled to succeed in his action. He paid dowry as for a virgin, and married a woman whom he supposed to be a virgin, and had he discovered her condition prior to marriage he would have had good ground for refusing to marry her. In this case the woman concealed her condition, and when it was at last discovered persistently refused to disclose the name of her seducer until after the child was born.

The appeal is dismissed with costs.

Cases cited:—*Tetani* vs. *Mnukwa* (I., N.A.C., 38); *Tshetsha* vs. *Mavolontiya* (I., N.A.C., 111); *Conana* vs. *Dungulu* (I., N.A.C., 135); *Roji* vs. *Jongola* (I., N.A.C., 199); *Ngauana* vs. *Makuseni* (I, N.A.C., 220).

Flagstaff. 30 April, 1913. W. T. Brownlee, A.C.M.

Cqedeyi vs. Makati and Mniswa.

(Bizana. No. 267/1912.)

1. *Marriage—Dissolution—Passing of One Beast—Liability for.*

2. *Marriage—Woman may Sue for Dissolution if Reasonable Cause Shown.*

Claim for dissolution of marriage.

The Magistrate's judgment:—The order of dissolution of marriage was granted with costs, subject to the repayment of one beast out of the dowry to mark dissolution.

Defendant appealed.

Plaintiff cross-appealed

Pres.:—In this case a woman named Makati, duly assisted by Mniswa, sues the Defendant (her husband) for an order dissolving the marriage subsisting between them, and says that six years ago he drove her away from his kraal. She states that four head of cattle were paid as dowry for her and that there were three children born of the marriage. Defendant admits payment of four head, but states that four children were born. He denies driving her away, and alleges that she absconded from his kraal. In granting an order for the dissolution of the marriage, the Magistrate awarded one beast to mark the dissolution of the marriage. Defendant appeals against the order for dissolution, and Plaintiff's cross-appeal is brought on the point of the award of one beast to mark dissolution of the marriage, his attorney holding that the beast to mark dissolution should be paid by the Defendant and not by Plaintiff. The matter of divorce at the instance of the wife has been definitely decided on appeal in the case of *Noenjini* vs. *Nteta* (2 N.A.C., 106), in which a similar application was made, and in which it was laid down that a woman may divorce herself by returning to her husband the cattle paid by him as dowry for her, but that when an application for an order for dissolution is made in Court it becomes necessary for the woman to show good and sufficient cause before the Court will make such an order. In the case of *Nonafu* vs. *Pike* (1, N.A.C., 120), also, it was laid down that a woman married according to Kaffir or Fingo custom could have her marriage annulled upon

showing just and reasonable cause. In this case the doubt in the mind of the Magistrate as to cause seems to be very substantial, for his order is founded not on the ground that the woman had been driven away, but on the ground that it was quite improbable that she would ever return to her husband. In the opinion of this Court the woman has entirely failed to show just and reasonable cause and she is therefore not entitled to succeed in her claim, and this Court is unable to support the order made by the Court below. At one time Defendant went away to Kimberley, and on his return found that his wife was pregnant, and on being questioned by her husband as to the author of her pregnancy she gave him no satisfactory explanation, and it seems reasonable to suppose that there was a quarrel between them and that the woman left her husband because of this quarrel.

With regard to the cross-appeal, there appears to be some misunderstanding on the part of the attorney for the cross-Appellant as to the liability for the return of the beast to mark dissolution of marriage. Usually the father who holds dowry for the woman is allowed to deduct, when returning dowry, one beast for each child born of the marriage, but even where the number of children born extinguishes the number of cattle paid as dowry, at least one beast must be returned.

In the case of *Maseti* vs. *Meme* (1, N.A.C., 119), the Plaintiff sued for the restoration of his wife or the return of the dowry cattle paid for her. In that case the woman had married again after having been deserted by her husband twenty years previously. The Magistrate gave judgment for Defendant on the ground that by his desertion Plaintiff had forfeited his rights to the woman and child. The Appeal Court, in allowing the appeal subsequently brought, remarked that owing to the long desertion of his wife Appellant was not entitled to much consideration, but that as she had been married to another man there was little probability that she would return to her first husband, but that to mark the dissolution of the marriage the return of one beast was necessary.

In the case of *Conana* vs. *Dungulu* (1, N.A.C., 135), it was held that adultery was not usually made the cause for the repudiation of a wife, but the husband may, if he wishes, repudiate his wife, but if he does so he is not entitled to the return of the dowry paid by him. But even in this case, where the husband repudiated his wife on the ground of adultery, this Court ordered the return of one beast by the woman's father to mark the dissolution of the marriage.

The cross-Appellant has thus no grounds of appeal: the only condition upon which she could obtain the order for a dissolution of the marriage would be upon terms that at least one beast should be returned to the Defendant to mark the dissolution of the marriage, and the Plaintiff is in effect appealing against the order which she herself applied for.

The appeal is allowed with costs, and the cross-appeal dismissed with costs. The order of the Court below is set aside, and judgment altered to order applied for refused with costs.

Dissenting Judgment (A. Gladwin, R.M., Lusikisiki).

I dissent from the above judgment. One of the dicta laid down by the Chief Magistrate is that "a woman may receive an order for dissolution of her marriage upon showing just and reasonable cause." In my opinion, the word "reasonable" should receive a very liberal interpretation in favour of the woman, and in this case neglect is a reasonable cause. Defendant has for six years taken no steps to get his wife back. He has not sued for her return, nor has he sued her for her adultery until he is forced to do so by the woman suing him for the dissolution.

I concur in the dismissal of the cross-appeal.

Umtata. 25 November, 1915. W. T. Brownlee, C.M.

Mabani vs. Jekemani.

Jekemani vs. Mabani—Cross-Appeal.

(Libode. No. 66/1914.)

Marriage—Dissolution—Return of Dowry—Imputation of Sorcery.

Plaintiff sued for the return of his wife or dowry of 15 head of cattle, or value, £150.

Defendant pleaded that the woman was driven away on an accusation of witchcraft, and asked for a dissolution of the marriage.

The Magistrate decided in favour of Defendant, and dismissed Plaintiff's summons with costs, but ordered Defendant to restore two head of cattle to Plaintiff "to mark the dissolution of the marriage."

Plaintiff appealed for his costs.

Defendant appealed on the question of the cattle awarded to Plaintiff.

Pres.:—In this case there are two questions to be decided: First, whether the desertion of the Plaintiff by his wife was or was not the result of imputations of sorcery made by him against her, and second, whether in the event of the first question being answered in the affirmative the Plaintiff is or is not entitled to recover the dowry paid by him for her.

The Magistrate in the Court below has decided the first question in the affirmative, and this Court sitting as a Court of Appeal does not see how it can interfere with the finding upon points of fact of the Magistrate in the trial Court, who sat not only as a judge but also as a jury. There is abundant evidence that imputations of sorcery were made against the woman by her husband, and the Magistrate believed it, and this Court cannot say that he has erred in believing it or in coming to the conclusion that this is the reason why the woman has left her husband, the Plaintiff.

On the second question it is somewhat difficult to say what is the decision of the Magistrate in the trial Court, for while on the one hand the Magistrate has dismissed the Plaintiff's summons with costs, he has yet ordered the Defendant to restore to the Plaintiff two head of cattle. These, however, are to be paid "to mark the dissolution of the marriage." On the whole it would seem that the Magistrate holds that while the Plaintiff is not entitled to recover his dowry, yet in view of the fact that the Defendant has actually asked for a dissolution of the marriage it is necessary that cattle should be paid to mark such dissolution, and the Magistrate has accordingly ordered the payment of two head of cattle to the Plaintiff, and in his reasons for awarding this particular number says that he has exercised his discretion as to the number of cattle to be repaid. The two parts of the judgment are, in the opinion of this Court, inconsistent, and this Court cannot see how, if the Magistrate on the one hand dismissed the Plaintiff's summons and so practically entirely disposed of his claim, he can on the other hand make an order apparently on the Defendant's application for a dissolution—in the Plaintiff's favour—for a portion of the dowry claimed in his summons, which is dismissed: nor, again, can this Court understand why, when the Magistrate gave a judgment for a substantial amount in Plaintiff's favour, he should yet order him to pay costs. And the judgment in its present form cannot stand.

The appeal in this case is upon the question of costs withheld from Plaintiff, and the cross-appeal is on the question of the cattle awarded to Plaintiff. The Plaintiff's attorney, arguing that judgment being practically in his favour, he is entitled to costs, and the Defendant's attorney, on the other hand, arguing that as the Plaintiff's summons was dismissed with costs, and that as the cause of the woman's desertion of the Plaintiff is his imputation of sorcery against her, the Plaintiff is not entitled to recover anything at all, or in any case that even should he be entitled to the return of something to mark the dissolution of the marriage it should be only one head.

As regards the question of costs, this Court has already stated that it can find no reason for saying that the Magistrate has erred in his decision upon the evidence that the woman was accused of sorcery and assaulted and threatened. And if it be held that this is the case it must, in view of the decision in the case of *Mafaka* vs. *Dyaluvana* (1, N.A.C., p. 65), be held that Plaintiff is not entitled to receive anything, and the appeal is dismissed with costs.

On the question of the two cattle, this Court does not agree with the decision of the Magistrate. In the first place, this order is inconsistent with the former order, and in the second place, in view of the judgment already cited, the Plaintiff cannot recover. And the latter part of the order of the Court below should have stopped short after declaring a dissolution of the marriage. There is a further point which should be touched upon, and that is the remark of the Magistrate that he has exercised his discretion in making the award of two head of cattle. And it seems to this

Court that this is not so much a matter of discretion as of fact. The general principle of custom is that where the wife is to blame for the rupture of the marriage the dowry paid for her must be returned, and where the man is to blame he should not recover his dowry. When it is decided that dowry is to be returned the woman's father is entitled to certain deductions and a balance is struck, and the husband then recovers the balance, no more nor less. Where, however, the dowry has been all absorbed by deductions, the custom has been still to allow the husband one beast to mark dissolution. In this case the Magistrate has held that the cause of dissolution is an imputation of sorcery, and no dowry should be returned.

The cross-appeal is allowed with costs, and the judgment of the Court below is amended by striking out all that part after the words: " Marriage declared dissolved."

Butterworth. 16 November, 1915. C. J. Warner, R.M., President.

S. Mbandela vs. Komanisi Bikani.

(Willowvale. No. 347/1915.)

Marriage—Dissolution—Revival by Wife's Return to First Husband.

Claim for three head of cattle or £15 damages for adultery.

The Magistrate gave judgment for Defendant with costs.

The facts are fully set forth in the judgment by the Appeal Court.

Pres.:—The evidence in this case shows that the wife of Respondent Komanisi was sent to Appellant for treatment. She refused to return to her husband, who thereupon sued for return of his wife or dowry, and obtained judgment in the Court of the Resident Magistrate, Willowvale, but did not recover his cattle. It is alleged that Appellant then paid dowry to Sizatu, the woman's guardian, and that she became the wife of Appellant. The Magistrate in the Court below found on the facts that Appellant had failed to prove the payment of dowry, and this Court sees no reason to disagree with this finding. On the question being put to the Native Assessors they are unanimous in stating that as the dowry paid for her by Respondent was never delivered to him she is still his wife, and revived the marriage by returning to live with her first husband. This Court concurs with this view, as well as in the finding on the facts, and the appeal is dismissed with costs.

Umtata. 2 August, 1912. W. T. Brownlee, A.C.M.

Kepeyi vs. Somagagu.

(Ngqeleni. No. 51/1912.)

Marriage—Dissolution of—Want of Consent of Guardian—Pondo Custom.

Plaintiff claimed four original head of cattle and their increase, amounting to seven head, or their value, £55, and stated:—

1. That Defendant was the father and natural guardian of Gadiwe.

2. That about 1903 Gadiwe was married to one Gceka and four head of cattle paid as dowry to the defendant.

3. Defendant refuses to deliver the said dowry and increase, though he has no right thereto.

Defendant pleaded:—

(*a*) That Deleka was the mother of Gadiwe.

(*b*) That Sampule was the father of Deleka.

(*c*) That before "Hope's War" one Nogidela, without consulting Sampule, who was residing in Bomvanaland, gave Deleka in marriage to Plaintiff, who paid to Nogidela four head of cattle as dowry.

(*d*) That Gadiwe was issue of this marriage, that about 1881 Sampule heard of the marriage and returned to Ngqeleni district and took the said Deleka and Gadiwe with him to Bomvanaland, refusing to recognise the marriage. That Nogidela returned all four cattle to Plaintiff without deductions.

Defendant claimed in reconvention for a declaration of rights with respect to the dowry which he (Defendant) had received for Gadiwe from Gceka, which cattle are in his (Defendant's) possession.

The Magistrate gave judgment for Defendant in convention with costs and for Plaintiff in reconvention who was declared entitled to the dowry paid for or still to be paid for Gadiwe. The Court finds as a fact that four head were paid as dowry for Deleka and that all these were restored. Defendant in reconvention to pay costs.

Pres.:—The appeal in this case is first upon the point of the amendment to the Defendant's plea by the substitution of the word "brother" for the word "father" in paragraph (*b*) and secondly upon a point of Native custom. With regard to the amendment of the plea this Court is of opinion that Defendant was not prejudiced in any way by the amendment which was allowed, more especially as the man Sampule there referred to was throughout both the cases that were tried in this matter alluded to by both sides as the brother of Deleka.

On the point of Native custom it is argued on the side of the Appellant that as there was a marriage between Plaintiff and Deleka the child Gadiwe born of that marriage would belong to

Plaintiff and for the Respondent that the whole of the dowry paid for Deleka having been returned to Plaintiff all claim that Plaintiff might have upon Deleka or her issue was extinguished, and this point having been placed before the Native assessors they stated that under Pondo custom in cases where one man gives the daughter of another man in marriage without the consent of the latter, the latter may, should he not approve of this marriage, take his daughter and any children she may have, and should *all* the dowry paid for the woman be returned to the husband by the man to whom it was paid such repayment extinguishes all claim to the woman and her children unless the husband takes the dowry and pays it to the woman's guardian who may or may not accept it is he feels disposed, and in view of this statement of custom and as the Magistrate who tried the case has found upon the evidence that the cattle paid by Plaintiff for Deleka were all returned to him, this Court sees no reason to interfere with the decision of the Court below and the appeal is dismissed with costs.

Umtata. 3rd March, 1914. W. T. Brownlee, A.C.M.

Mgqongo vs. Lolwana Zilimbola.

(Engcobo. No. 13/1914.)

Marriages—Dissolved by Death—Children—Ownership where Woman Several Times Married.

The President's judgment sets forth the grounds at issue.

Pres.:—In this case the various events alleged by the parties to this suit, stated in their chronological order, are as follows:—

1. That twenty-five years ago Nowesile, the sister of Defendant, married Raraza, and dowry was paid for her.

2. Within a year of this marriage Raraza left his home and disappeared, and it is said that his dowry was returned to him.

3. Shortly thereafter the woman took up with a man of the Tsolo district, but after his death she returned to her people.

4. About 1899 Simenukana, the brother of Plaintiff, married Nowesile and paid the equivalent of three head of cattle for her, and he had five children by her, four of whom are still living.

5. About three years ago Simenukana died and later Nowesile left his kraal and returned to the Defendant taking the four children with her.

6. Nowesile has now again been married to Raraza and dowry has been paid for her.

Of the four children one is a boy—David by name—and Plaintiff claims as the guardian of the family of the late Simenukana the custody of the four children, and one beast to mark the dissolution of the marriage. The defendant denies that there ever was a

marriage with the late Simenukana, and says the woman's marriage with Raraza was never dissolved, he further says that after Raraza left Simenukana became the father of the four children by means of illicit intercourse with Nowesile and that they are the property of Raraza to whom she has returned with them.

It is necessary then to decide (*a*) whether there was any marriage with Raraza; (*b*) whether this marriage subsists, and (*c*) whether if it no longer subsists there was or was not a marriage between Nowesile and Simenukana. On the last point the Magistrate in the Court below is very emphatic in holding that there was a marriage between Simenukana and Nowesile and taking all the evidence into consideration this Court finds no reason to disagree with the Magistrate. Defendant's brother Nqanti gives very clear evidence on this point and says that he received the dowry from Simenukana on behalf of the Defendant. Holding this view then this Court is of opinion that the Court below is right in giving an order against Defendant; for he is not in a position to contest the Plaintiff's claim. He might very well have set up the defence that he is not the proper person to be sued and so have thrown upon Raraza the onus of defending this action. He has not chosen to do so but has contested Plaintiff's claim, and the order has rightly been given against him as regards the children and costs.

As regards the marriage with Raraza and its dissolution the marriage is admitted, and though the Magistrate has not recorded his finding as regards its dissolution yet the conduct of Raraza himself and of the woman is quite inconsistent with the view that the marriage subsisted, and after all the rights of Raraza in whose interest Defendant has contested this case are not affected by this judgment, for though he has given evidence in the case his claim has not been excussed and the judgment in this case can be no bar to any action to be raised by him.

On the question of the return of a beast to mark dissolution of the marriage between Simenukana and Nowesile this Court is, however, not in a position to agree with the decision of the Court below. It was at one time the practice in the Courts of these Territories to hold that under Native custom a woman's marriage is not cancelled by the death of her husband, and to give an order for the return of the dowry paid for her, or a portion of it, should she abandon her husband's kraal after his death and refuse to return to it; this practice however ceased after the decision of the E.D.C. in the case of *Mbono* vs. *Manroweni* (6, E.D.C., 62) in which the principle was enunciated that not only is a marriage dissolved by the death of one of the parties to it, but that a widow is no longer under the control of any one and may go where she wishes and the return of dowry may not be ordered if she refuse to return to the kraal of her late husband.

A new element was thus introduced into cases of this nature, and this Court following upon this decision of the E.D.C. has upon various occasions held that upon the death of a married man the marriage is dissolved and his widow is free to remarry; and it is only in cases where a widow has contracted a second marriage and a second dowry has been paid for her that this Court has held

that the first dowry should be returned. This is done, however, not to mark the dissolution of the marriage but on the principle that no man may hold more than one dowry in respect of one woman.

The general broad principle applying under Native custom for the dissolution of a Native marriage is that dowry should be returned, the holder of dowry, however, is allowed to retain one beast in respect of every child born of the marriage. It sometimes has happened that the number of children is greater than the number of dowry cattle, and in cases such as this the Court has laid down the rule that it is still necessary that at least one beast should be returned to mark the dissolution of the marriage, this be it observed however is when the marriage subsists.

In the case now before this Court the marriage does not subsist for it has been dissolved by the death of the husband, and there is neither any necessity nor any possibility of dissolving it a second time except the dead should rise from the grave.

In the opinion of this Court then the Plaintiff is not entitled to recover a beast to mark dissolution of marriage and the Appellant must succeed on this point.

The appeal is allowed with costs and the judgment of the Court below is altered to judgment for Plaintiff with costs for a declaration of rights as regards the four children, the Plaintiff being declared to be the guardian of the four children in question, and as such entitled to the dowries to be paid for them. This order however not to affect any right of action of Raraza.

Flagstaff. 19 August, 1913. A. H. Stanford, C.M.

James Zinti vs. Nozikotshi.

(Lusikisiki. No. 214/1913.)

Marriage—Dowry—Payment in Contemplation of Ownership—Engagement Cattle—Risk.

The facts of the case are fully set forth in the President's judgment.

Pres.:—In construing what was intended by the provisions of section 13 of Proclamation No. 142 of 1910 the Court must take into consideration and be guided by the whole of the proclamation, and section 2 provides that "this proclamation shall apply to every marriage contracted after the date of the promulgation thereof between parties both of whom are Natives." This read together with section 13 shows that the payments of dowry therein contemplated were dowries in cases where a marriage had taken place.

In the present suit the cattle were paid on account of dowry for a marriage to be subsequently entered into, and according to Native custom as affirmed by many decisions of the Native Appeal Court and confirmed by the Supreme Court ownership in such cattle does not pass until the marriage is entered into. The Court is therefore in accord with the ruling of the Magistrate on the exception taken in his Court. The second ground of appeal is that as the ownership in the cattle did not pass from the Respondent to the Appellant the loss of any animals dying was his, and this is in accord with numerous decisions of the Native Appeal Court. But there are certain requisites necessary to secure a father or guardian from liability to replace such cattle, the principal one being that the deaths of the animals shall have been reported to the owner or person in charge of his kraal if he is absent within a reasonable time of their deaths. As there is nothing on the record to show whether the deaths of the cattle in question were reported or not the Magistrate's judgment is set aside and the case is returned to him to take such evidence as the parties to the suit may wish to adduce and to give a fresh judgment, costs of the appeal to abide the result.

Umtata. 25 July, 1913. A. H. Stanford, C.M.

Loliwe Xosana vs. Gwama Dalasile.

(Engcobo. No. 211/1913.)

1. *Marriage—Expenses of Intonjane and Wedding Ceremony not Claimable if Girl Married without Authority.*
2. *Intonjane—Expenses not Claimable where Girl Married without Authority.*

Claim for 4 head of cattle or £30 for maintenance made up as follows:—

1. One beast for maintenance.
2. One beast for Tombisaing.
3. One beast for wedding ceremony.
4. One beast for Umpotulo.

The Magistrate gave judgment for 3 head or £22 10s. and costs. Defendant appealed.

Pres.:—The matter having been submitted to the Native Assessors, they state that where a man celebrates the Intonjane rites of the daughter of another man and gives her in marriage without his authority he has no claim for any expenditure he may have incurred. The fact that in the present case the Respondent was himself claiming the girl only makes his position worse, but as she was left by the Appellant at his kraal he is entitled to be paid maintenance for her.

The Court concurs in the view expressed by the Native Assessors, the appeal is allowed with costs, the number of cattle awarded by the Magistrate is altered from three head to payment of one beast or £7 10s. and costs of suit.

Kokstad. 26 August, 1914. W. Power Leary, A.C.M.

Ntobole, assisted by Ceza, his Guardian, vs. Mzanywa and Ngcukana.

(Qumbu. No. 61/1914.)

I. Marriage—Payment of Dowry—Legal Proof.
II. Dowry—Legal Proof of Payment of.

The facts are fully disclosed in the judgment.

Pres.:—The Plaintiff claims five head of cattle from Defendant for seduction of his sister. First Defendant pleads that he married Plaintiff's sister from the kraal of Nxadana where she grew up. Second Defendant denies liability by reason that first Defendant is a married man and has his own establishment and for whom he duly paid dowry.

From the evidence it would seem there is a dispute concerning the girl Nozikade. Nxadana says the girl grew up at his kraal and she is his and then related how Mzanywa eloped with the girl and Ngcukana, second Defendant, paid six head of cattle as dowry which he (Nxadana) did not take over but accepted the number. Present Plaintiff brought an action against this witness for seven head of cattle which he alleged had been paid him as dowry. Nxadana admitted Mzanywa had offered to marry the girl and promised to pay six head of cattle but the cattle were not handed over and an absolution judgment was granted. Since then he has received three head of cattle from Mzanywa as dowry paid before judgment was delivered in the former case. Ngcukana says the three cattle were paid after the present action was commenced. It seems from Ngcukana's evidence that he negotiated with Nxadana for the marriage of Nozikade with his son Mzanywa, and paid the dowry, and the number by word of mouth was six head, of which only two at the hearing of the case had been handed over. The point to be decided in this case is, was there a marriage? In the Compendium of Kafir Laws and Customs, by Colonel McLean, C.B., in Warner's Notes, page 71, we find the following: "The payment of the Ikazi is the legal proof of marriage, and is the only thing really necessary thereto, although dancing, feasting, etc., are generally indulged in on such occasions." And in Mr. Brownlee's notes, page 117:—"Marriage is contracted by the payment of cattle to the parents or guardians of the female, the number paid being regulated by the rank or beauty of the woman."

From the case of *Nkohla* vs. *Mangaliso* (1, N.A.C., page 202) it is clear that a marriage may be regarded as having taken place on an agreement, though no dowry has passed, and the remedy then is for the father or guardian to teleka the woman. In the present case there are all the essentials constituting a Native marriage. The promise to pay and acquiescence of the guardian for the girl to remain with the suitor as his wife—(at this time Nxadana was Nozikade's guardian)—and the subsequent payment and acceptance of the cattle paid. The Magistrate has, in the opinion of this Court, rightly held there was a marriage and consequently there could be no seduction. It has been argued in view of the provisions of section 13 (1), Proclamation No. 142 of 1910, that the dowry alleged to have been paid not having been registered, it is not capable of proof. Proclamation No. 142 of 1910 was amended by Proclamation No. 213 of 1913, and the section referred to now reads:—"No payment of dowry under Native custom which may be made at any date subsequent to the 31st December, 1910, shall be capable of proof in any legal suit or proceedings" for the recovery and return of same unless such payment shall have been declared to and registered by both parties. In this case the action is not for the return of dowry paid.

The appeal is dismissed with costs.

Umtata. 25 July, 1913. A. H. Stanford, C.M.

Xelo Magadlelana vs. Kalitshana Mbotshane.

(Engcobo. No. 147/1913.)

Marriage—Promise—Non-fulfilment of—Forfeiture of Cattle Paid.

The facts are fully set forth in the judgment.

Pres.:—The evidence shows that the Appellant's father, in his absence and seemingly without his knowledge, entered into negotiations with the Respondent for a marriage between the son of the one and the daughter of the other. The Appellant had not then or since ever seen the girl in question. It is admitted that the number of cattle to be paid was not finally agreed upon, but the Appellant's father says he sent five cattle and 20 sheep, the cattle being two cows with two calves and a yearling heifer. The number is admitted by the Respondent at four head of cattle, since dead of East Coast Fever, and 19 sheep. The Appellant now claims the return of the stock paid on the grounds that Respondent has failed to fulfil the contract by giving him his daughter in marriage. The Respondent says he is willing to do so

on payment of an additional 20 sheep. Seeing the number of dowry to be paid was not determined, the Court is of opinion that this was a very reasonable demand, but the Appellant says he no longer desires to marry the girl. The inference to be drawn from this is obvious. The Appellant was not privy to or a consenting party to the arrangement made by his father, and is unwilling to carry it out, and as he is now breaking the contract by refusing to marry the girl he is not entitled to recover the stock paid on account of the proposed marriage.

The appeal is dismissed with costs.

Butterworth. 19 November, 1913. A. H. Stanford, C.M.

Nobiya Songwevu vs. Daniel Songwevu.

(Willowvale. No. 72/1913.)

Marriage—Property of Husband Married by Native Custom not Executable on Writ Issued Against His Wife

The facts of the case are fully disclosed in the President's judgment.

Pres.:—Appellant's wife, as the summons alleges, assisted by her husband, entered an action against the Respondent, claiming damages for unlawful arrest. She failed in this suit, and costs were awarded against her. Respondent took out a warrant of execution, which directs the Messenger, on the moveable property of the said Plaintiff, to levy and raise the costs aforesaid. Upon this authority the Messenger, finding that the Plaintiff in that case had no property, laid under attachment a certain horse, which the return shows to be the property of the Appellant. The latter interpleaded, and claimed the animal as being his property, and not liable to execution, but at the hearing of the case the Magistrate held it was executable.

It is admitted that Appellant and his wife are married according to Native custom. In marriages contracted under Native custom there is no community of property. The question now arises whether, on a warrant of execution directed against his wife, Appellant's property can be attached in satisfaction of the judgment against her.

Appellant may or may not be responsible for liabilities incurred by his wife, but, in the opinion of this Court, in the absence of any judgment against him, his property cannot be made executable on a writ directed against his wife.

The appeal is allowed with costs, the Magistrate's judgment set aside, the property attached under the warrant of execution being declared not executable, with costs.

Umtata. 30 July, 1913. A. H. Stanford, C.M.

Sigaga Mkwayi vs. Kiloti.

(Libode. No. 65/1913.)

Marriage—Ranking of Wives—Pondo Custom.

The facts of the case are fully disclosed in the President's judgment.

Pres.:—The Pondo Assessors state that:—"The custom in Western Pondoland is that the first woman married is the 'Great Wife,' the second wife is the 'Right Hand Wife,' the third wife is the Qadi of the Great House, and the fourth wife is the Qadi of the Right Hand House. If the Great Wife has no son, the son of the Right Hand House would inherit the property of the Great House, notwithstanding the fact that the Qadi of the Great House has a son. If the Great or Right Hand Wife dies without leaving male issue the husband may marry a woman and place her in that house. If she has a son he then becomes the heir of that house, but if he has previously put in the son of the Right Hand House as heir this son cannot be ousted, but should the Great Wife give birth to a son by her husband, then the substituted heir must give way and return to his own house."

In the case before the Court, Mpikwa, by being placed in the Great House, became heir both to the Great and the Right Hand House of Swaza, consequently the son of his only brother, Mkwayi Sigaga, is the proper person to be guardian of Mpikwa's grandchildren by his son Simayile, and custodian of the property belonging to them. This statement of custom is practically the same as that stated by the Eastern Pondoland Native Assessors in the case of *Maliwa* vs. *Maliwa* (N.A.C., 2, p. 193). It would thus appear that under Native custom as prevailing in Pondoland the Respondent is not the proper person to have the custody of the children and estate of the late Simayile. The appeal is allowed with costs, and the judgment in the Magistrate's Court altered to judgment for the Defendant with costs.

It is noticed that the Magistrate allowed higher costs in this case. His attention is drawn to the case of *Avery* vs. *McLoughlin*, heard in April, 1910, in the Supreme Court, in which it was held that Rules 415 and 451 were not in force in the Territories.

Butterworth. 13 July, 1915. W. T. Brownlee, A.C.M.

Ndabeni vs. Nani.

(Idutywa. No. 47/1915.)

I. Marriage—Re-marriage Before Return of First Dowry.

II. Dowry—When Desertion does not Dissolve Marriage.

Pres.:—The facts in this case, as disclosed by the evidence, are these:—

1. The Plaintiff is the heir of the late Nonzinyana.

2. The late Nonzinyana married Nokwenza, the daughter of Jalvan, and paid dowry for her.

3. After living for some time with Nonzinyana, Nokwenza deserted him and returned to her father, and lived with him for a number of years.

4. After the woman had been eight years with her father she contracted a union with the Defendant, and has had children by him, one of whom is a girl named Mina.

Plaintiff claims the girl Mina on the ground that his father's marriage with Nokwenza was never at any time dissolved, and Defendant resists the claim on the ground that the marriage was dissolved, and before the Magistrate could give judgment for either party it was necessary for him to decide the point in dispute, and say, on the evidence, whether the marriage had or had not been dissolved. This he has not done, but contents himself with saying that Jalvan acted in good faith. There is evidence to the effect that the marriage had been repudiated by Nonzinyana, but it is, in the opinion of this Court, extremely unsatisfactory, and in view of the fact that Jalvan thought it necessary to come to the Magistrate's office and get a document of divorce, this Court comes to the conclusion that up to that time there had been no dissolution. The document itself is not a bill of divorce, and does not dissolve the marriage, and Defendant himself admits that when he married the woman her first husband was still alive. In the opinion of this Court the union between Defendant and Nokwenza was an unlawful one, and under Native custom all children born to Nokwenza are the property of her first husband. In the case of *Mditshwa* vs. *Ngenema* (1, Henkel, 106), it was held that even where the second so-called marriage has been *bona fide*, the children belong to the first husband if at the time of their birth the first marriage has not been dissolved. In this case the second marriage cannot in any sense be regarded as being *bona fide*, in view of Defendant's admitted knowledge of the first marriage, and of the fact that the first husband was still alive.

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

Flagstaff. 2 May, 1913. W. T. Brownlee, A.C.M.

Mjikwa vs. Nomazele.

(Lusikisiki. No. 12/1913.)

Marriage—Re-marriage of Widow—Majority—Pondo Custom.

Pres.:—The only point urged in appeal is whether a widow may or may not under Pondo custom remarry, and a request is made that this point be submitted to the Native Assessors. They state that if a widow leaves the kraal of her late husband and returns to her father's kraal, taking her children with her, she still belongs to the kraal of her late husband. If, however, she leaves her children at her late husband's kraal and returns to her father's kraal and anything then happens to her it is reported to the kraal of her late husband, and she cannot be again given in marriage. The only connection in which the term "ukuvalelisa" is used is when a woman has been smelt out and she then leaves her husband's kraal openly and formally intimates that she is leaving it on account of this illtreatment, and when she makes this intimation she is said to "valelisa."

This statement, however, is not in agreement with the statements of custom made in the cases of *Goro* vs. *Fujiva* (1, N.A.C., 188); *Tsibiyana* vs. *Ngceni* (1, N.A.C., 204); *Dlelani* vs. *Mkwayi* (1, N.A.C., 240); and *Qaji* vs. *Macala* (2, N.A.C., 102); in each of which the principle is either laid down explicitly or inferentially that a widow may remarry.

Furthermore, it has been decided in the case of *Mbono* vs. *Umxaweni* (6, E.D.C., 62) that under the provisions of section 39 of Proclamation 112 of 1879 the age of legal majority of males and females is fixed at 21 years. The woman Mamewabe being a widow it therefore follows that after the death of her husband she became a major and became free of all control and able to contract a fresh marriage, and the principles in this case were further affirmed in the case of *Nosaliti* vs. *Xangati* (1, N.A.C., 50). In view of these authorities it is clear that a widow may after the death of her husband remarry, and as this Court can see no reason for disturbing the decision of the Magistrate in the Court below on the question of the marriage of Plaintiff with the widow Mamewabe the appeal is dismissed with costs.

Flagstaff. 31 August, 1914. W. T. Brownlee, A.C.M.

Quza vs. Masilana.

(Bizana. No. 19/1914.)

I. Marriage—Re-marriage without Return of Dowry—Property in Children of Second Marriage.

II. Dowry—When Abandonment of Wife Dissolves Marriage.

The facts of the case are fully disclosed in the President's judgment.

Pres.:—A great number of cases have been cited on both sides in this appeal, and while it would seem that as a general principle a married woman may not contract a second marriage while her first marriage subsists and the cattle paid for her by her first husband have not been returned, yet it also seems that each case must to a great extent be governed by the particular circumstances attending it.

It appears that the Defendant married the woman Magamu many years before the annexation of Pondoland in 1894, and had one child by her, a boy, and that she thereafter left the Defendant and returned to her people, and has not since returned to Defendant till within the last few months she was fetched back by the son borne by her to Defendant. The purpose for which she returned to her people is variously stated. Plaintiff says she was impounded under the custom of "ukuteleka," with the view of compelling the Defendant to pay further cattle, and that the Defendant failed at any time to pay more cattle. Defendant says she left him on account of illness and was not impounded, and he says that on various occasions he sent to fetch her back, but in each instance failed to obtain possession of her. The Magistrate in his reasons does not say which of the two statements he has found to have been proved by the evidence, and this he should have done, but in any case the Defendant has not satisfactorily explained away his failure to take proper measures, either to pay cattle should it have been a case of impounding, or to take action should it have been a case of unlawful detention of his wife.

It appears further from the evidence that after the woman had remained for some considerable time with her parents the Plaintiff took her and paid cattle for her in 1892 or 1893, and that she has lived with him ever since and has had several children by him. Plaintiff says seven, and Defendant admits three, and that Defendant has not at any time taken any action either against the woman's father to vindicate his rights in the woman, or against the Plaintiff to recover damages for adultery, and this, in the face of the Defendant's admission that he knew that Plaintiff had taken the woman in 1893, justifies the presumption that the Defendant realised he had no rights in the woman.

The matter having been put to the Native Assessors, they state that when a man's wife leaves him he must take early action to recover possession of her and if he fails to do so he damages his own claim. And if he for many years neglects to recover his wife she may be given out in marriage and the children born will be the children of the second husband and not of the first husband. And this statement is in consonance with a statement made by Tembu Assessors to the effect that the neglect of a man to pay dowry for his wife who has been impounded is a tacit abandonment of his wife. Where a man and a woman have for many years lived together as man and wife and have had children this Court will always lean to the view that there has been a marriage and that the children are legitimate, and very strong proof will be required to the contrary.

The Native Assessors further say that the custom of cleansing, where a wife has been debauched, is a well-known custom, but that the custom is that when a man in a case such as that now before the Court exacts a fine he takes the cattle home with the woman and there slays one of the cattle to purify them both, and that the statement made by the Defendant that he left the woman with her people and took only one of the cattle paid by the Plaintiff for the purpose of purifying himself alone is not in accordance with custom and cannot be believed.

This Court then comes to the conclusion that the Defendant's wife was impounded for payment of cattle and that he did not pay cattle and abandoned his wife, and that she was subsequently married to the Plaintiff and that the children born of the marriage are the property of Plaintiff, and that the Magistrate has rightly given judgment in his favour.

The appeal is dismissed with costs.

Cases cited:—*Luleka* vs. *Sihlahla* (N.A.C., 1894-1909, p. 88); *Mtuyedwa* vs. *Tshisa* (ibid., p. 122); *Mbemodala* vs. *Gingci* (N.A.C., 1909-1911, p. 2); *Mtangayi* vs. *Mazwane* (ibid., p. 8); *Zwamza* vs. *Ntlanganiso* (ibid., p. 10); *Gangashi* vs. *Gunu* (ibid., p. 93); *Lutoli* vs. *Soutshebe* (ibid., p. 165); *Bayana* vs. *Myengo* (heard at Flagstaff, December, 1913, not reported); and *Mpayipeli* vs. *Makula* (heard at Flagstaff, December, 1911, not reported).

Flagstaff. 9 December, 1913. W. Power Leary, R.M., President.

Bayana vs. Myango.

(Bizana. No. 294/1913.)

Marriage to Another Man of Woman Telekaed—Rights to Children.

The facts of the case are immaterial.

Pres.:—The Appellant many years ago was married to one Majonase, who was in 1897 telekaed by her brother Jim. The

Appellant failed to pay any further cattle. In 1900 Majonase was given in marriage by her brother Jim to Respondent. The Appellant, though aware of the marriage with Respondent, did not interfere or make any protest. The woman has now returned to Appellant with the children borne to Respondent, and these he now claims, together with the woman Majonase. The case having been put to the Native Assessors they state:—"A girl if telekaed and no further dowry paid for her may be married to another man by her father. If she returns to her first husband he has no claim on her children by the second husband, and the second husband cannot sue for the return of the woman nor institute an action for adultery while the woman is with her first husband."

The Magistrate's decision is supported by custom and the evidence, and is in accord with the decision in the case of *Mpayipeli* vs. *Makula*, heard at Flagstaff on 12th December, 1911.

The appeal is dismissed with costs.

Butterworth. 8 November, 1912. A. H. Stanford, C.M.

Velelo Mpoko vs. Lucas Vava.

(Tsomo. No. 76/1912.)

Marriage—Under Colonial Law and Native Custom—Effects of Dowry Restoration.

Action for restoration of dowry.

Whereupon Plaintiff complained and stated:—

1. That he married Defendant's daughter Sarah Ann according to Christian rites.

2. That prior to the marriage and in keeping with Native custom he paid dowry, viz., 5 cattle, 10 goats, 20 sheep.

3. That two children were born of the marriage.

4. That Plaintiff had already obtained a decree of divorce in the Chief Magistrate's Court against his wife by reason of her adultery she forfeiting all benefits arising from the community of property under the marriage.

Defendant admitted all the above allegations but stated that Plaintiff drove his wife away and under Native custom was not entitled to recover his dowry.

The Magistrate gave judgment for 5 cattle at £5 each, 10 goats and 20 sheep or their value at 10s. each, less two cattle for the children born of the marriage.

Defendant appealed.

Pres.:—The conditions and obligations of a marriage entered into under Colonial law are different and distinct from those which apply to marriage entered into under Native custom. Under

the latter if a man drives away his wife she is justified in refusing to return to him as his act dissolves the marriage, but with a marriage contracted under Colonial law such an act would not dissolve the marriage which would still be binding on the parties. If a husband under a Native marriage cohabits with other women it would not justify his wife in leaving him and if she did so he would be entitled to recover his dowry, but under Colonial law it would entitle the wife to obtain a decree of divorce and the husband would have no claim to recover his dowry. It will thus be seen that all the conditions applying to a marriage entered into under Native custom cannot apply in the case of marriages contracted under Colonial law. In the present case the marriage still subsisted until it was dissolved by the Court on account of the wife's misconduct. The Respondent is therefore entitled to recover his dowry.

The appeal is dismissed with costs.

Umtata. 21 November, 1912. A. H. Stanford, C.M.

Lutoli Ntswayi vs. Hlinika and Cetywayo Dzedze.

(St. Marks. No. 95/1912.)

Marriage—When Consummated—Subsequent Abduction—Damages.

Claim 3 head of cattle or £15 damages for adultery.

The Magistrate gave absolution from the instance holding that no marriage existed between Plaintiff and one Noeight.

Plaintiff appealed.

Pres.:—In this case the weight of evidence is in support of the Appellant's case. The father of the girl alleges that he gave his daughter in marriage to Appellant, and that after she was his wife and after she had been taken to Appellant's kraal by the wedding party she eloped with the Respondent—his evidence is borne out by the men who formed the wedding party as well as numerous other witnesses. One of the strongest factors in support of the Appellant's case is that when Respondent eloped with the woman he did not follow the custom observed when a girl is carried off for the purpose of marriage, viz., take her to his father's kraal, place her under the care of his mother and await the arrival of the father's messengers to arrange the terms of marriage. Instead of this he eloped with the woman at night time and hid her with friends in the Nqamakwe district where she was for about six months before being discovered. This clearly indicates that he must have known she was a married woman, otherwise he would not have adopted so extraordinary a course—no doubt he hoped that the Appellant would despair of recovering his wife and annul his marriage and thus enable him to marry the woman. The fact

that the first three cattle paid as dowry were allowed to remain at Mpongwana's kraal is somewhat unusual, but such a thing is at times done when there is sufficient cause such as infectious disease at the kraal of the father. In the case quoted (*Nomgonoza* vs. *Mlingo Fanti*) the conditions are different; that action was for seduction and the father denied the existence of any marriage. For the reasons given the appeal is allowed with costs, the Magistrate's judgment altered to judgment for Plaintiff as prayed with costs of suit.

Kokstad. 21 August, 1917. J. B. Moffat, C.M.

Mgodla vs. Galela and Mbongolwana.

(Qumbu. No. 65/1917.)

Minor—Legal Guardian Resident Outside Jurisdiction—Procedure.

Claim by Plaintiff for certain stock removed without his knowledge and consent from his Right Hand kraal.

Pres.:—The Magistrate states that Defendant admits the correctness of Nobinjwa's statement that he is the guardian of Galela. No such admission appears on the record. Galela, the Defendant, who is a minor, is grandson of Makete in the Qadi House and is heir of that house. Mbongolwana, his uncle in the Qadi House, is joined as guardian of Galela.

Exception is taken that Mbongolwana is not Galela's guardian and that Nobinjwa, Galela's uncle in the Great House, is Galela's guardian. The Magistrate upheld the exception in holding that according to Native custom Nobinjwa is Galela's guardian.

Nobinjwa lives in the district of Libode. Mbongolwana lives at the kraal of the Qadi House where Galela also lives. This is in the Qumbu district.

The facts having been put to the Native Assessors they state that under the circumstances the uncle in the Qadi House (Mbongolwana) should assist Galela in defending the action but should notify Nobinjwa of what is being done. Nobinjwa gave evidence in this case and thus has notice of the proceedings. Nobinjwa is out of the jurisdiction of the Court at Qumbu which heard the case. Mbongolwana is the nearest male major representative of Makete in the district. He is living at the Qadi kraal where Defendant Galela is being brought up. He is the only person available to assist Galela, and has given notice to Nobinjwa, who, if he considers that the rights of the Great House are affected, can intervene to protect such rights.

The appeal is allowed with costs and the Magistrate's judgment will be altered to exception overruled with costs. The case is returned to the Magistrate to be dealt with on its merits.

Flagstaff. 13 April, 1915. W. Power Leary, A.C.M.

Mayeza vs. Majayini.

(Bizana. No. 287/1914.)

Mnyobo Fee cannot be Sued for—Contra Bonos Mores.

Mayeza sued Majayini for delivery of two head of cattle and ten goats or their value deposited with Defendant on Plaintiff's behalf by a third party. Defendant admitted receiving the original stock which he alleges were used for maintenance of Plaintiff's dependents—or died. Denies liability.

The evidence discloses the fact that the stock was received as Mnyobo for Plaintiff's mother.

The Magistrate gave judgment for Defendant on facts of case.

Plaintiff appealed.

Pres.:—The stock came into Defendant's possession—being Mnyobo fees. This is a fee for immoral intercourse and is *contra bonos mores* and should not have been entertained. The appeal will be dismissed. There will be no order as to costs.

Umtata. 18 November, 1912. A. H. Stanford, C.M.

Mehlwana Fanele vs. Mancede Nyelo.

(Engcobo. No. 288/1912.)

Negligence—Bull Goring Horse on Commonage.

Plaintiff claimed £16 as damages and stated that Defendant being the owner of a certain bull, wrongfully and negligently allowed the said bull to stray, that in consequence of such negligence the said bull did attack and gore a certain mare, the property of Plaintiff, thereby causing its death. Defendant in his plea denied Plaintiff's allegations. The Magistrate found that the mare was a very old one, fully 18 years of age, and was purchased for 3 bags of grain during 1897. He gave judgment for £6.

Plaintiff appealed.

Pres.:—The evidence for the Appellant shows that the mare had lived beyond the average age of the ordinary kafir horse being at the time of the injury 18 years of age. The goring of the animal happened on the communal commonage of the location and there is nothing in the evidence to show that the bull was known as a dangerous one and one in the habit of goring other animals, consequently negligence cannot be inferred. Nor does the evidence disclose any special reasons why so high a valuation as £16 should be made for so old a horse. The Magistrate appears to have exercised a reasonable discretion in determining the value. The appeal is dismissed with costs.

Butterworth. 15 July, 1912. W. T. Brownlee, A.C.M.

Mnyanda vs. Caula.

(Nqamakwe. No. 86/1912.)

Negligence—Bull Goring Horse on Grazing Ground.

Claim £17 as and for damages by reason of Defendant's bull having poked Plaintiff's horse whilst grazing on the Common grazing ground and from which injuries the said horse died. Defendant averred that the summons did not allege negligence or that the bull was known to be vicious. Judgment for Plaintiff as prayed.

Defendant appealed.

Pres.:—In the case of *Hall* vs. *Masen* (S.C.R., 1906, 746), it was laid down that if the owner of a full-grown bull allows it to wander abroad and injures the cattle of others on a public road there is such a degree of negligence on his part as to render him liable for damages. If the word "Commonage" was substituted for the word "road" then this case would be identical with the case above quoted and in the opinion of this Court it would not be necessary to allege negligence.

The appeal is dismissed with costs.

Umtata. 2 December, 1915. W. T. Brownlee, C.M.

Bopani Nconyelo vs. Sobalule.

(Umtata. 1915.)

I. Negligence—Grass Fires—Liability for Damages Caused by.
II. Damages—Grass Fires—Negligence.

Claim £22 value of 44 sheep. The Magistrate awarded £18 and costs.

Defendant appealed.

Pres.:—The principle involved in this case seems to have been decided in the cases *Van Tender* vs. *Alexander, Bisset and Smith*, IV., Column 344, and *Mkize* vs. *Maartens*, Part II., Supreme Court Reports, 1914, page 582.

In this case the Defendant's wife kindled a fire outside the hut for cooking purposes, in such a position that the embers of the fire were blown afterwards by a sudden gust of wind into the adjacent dry grass; and the grass took fire and burned the Plaintiff's sheep. It may be a practice that fires are kindled under conditions such as those disclosed, but even should there be such a practice it would not release the Defendant of any responsibility for carelessness on the part of his wife.

The appeal is dismissed with costs.

Butterworth. 15 March, 1913. A. H. Stanford, C.M.

Stephen Damane vs. Zwelendaba Damane.

(Willowvale. No. 252/1912.)

Negligence—Horse—Vicious Propensities.

Claim for £35 value of certain horse killed by Defendant's horse.

The Magistrate gave judgment for £20 and costs.

Defendant appealed.

Pres.:—There is evidence to prove that the Appellant's horse chased Respondent's gelding and as a result of the animal's effort to get away it collided with one of the sneezewood poles of a wire fence with great violence, the pole in question being broken. The animal thereafter was unable to leave the spot and died the following day. There is also evidence to show that this horse was in good health prior to this. Although no *post-mortem* examination was held it is a reasonable inference under the circumstances that the animal died as a result of the injuries there sustained.

The Appellant's horse is what is commonly called a rig, that is an animal from which one testicle only has been removed. Horses of this class still cover mares and it is not uncommon for them to show vicious propensities; and there is evidence to show that prior to the accident Appellant was warned of its vicious propensities, and he himself admits that since the death of Respondent's horse it has chased other horses.

Respondent's horse was on the common grazing ground where it had a right to be, consequently there was no contributory negligence on his part. On the other hand Appellant's horse being a rig and having shown vicious propensities he should have taken steps to prevent it from damaging other animals.

The appeal is dismissed with costs.

Kokstad. 3 December, 1912. W. T. Brownlee, A.C.M.

Mambusha vs. Sigwadi.

(Qumbu. No. 246/1911.)

Nqoma—Female Relations—Loan to.

In this case the Magistrate held that the cattle were executable on the ground that it was contrary to Native custom to Nqoma stock to female relations.

Applicant appealed.

Pres.:—In this case the Magistrate has erred upon a point of Native custom, for it is quite a common thing for a Native to loan cattle to his needy female relatives as is said to have been done in

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this instance. The Claimant has made out a strong case and it is not in any way rebutted and in the absence of any rebuttal the Court below should not have disregarded the Claimant's evidence.

The appeal is allowed with costs and the judgment of the Court below altered to judgment for Claimant with costs, the cattle attached being declared to be not executable.

Kokstad. 6 April, 1915. W. Power Leary, A.C.M.

Alex Mgobozi vs. Nceme and Ketwa.

(Qumbu. No. 220/1914.)

Nqoma—Kraal Head Liability for Inmates—Transfer of Nqoma.

The Plaintiff claimed 8 sheep or their value £4 under the contract of nqoma.

The Magistrate gave judgment for Plaintiff as prayed against both Defendants

Defendant Ketwa appealed.

Pres.:—The sheep appear to have been Nqomaed to Ketwa who was residing at Ncembe's kraal; from this kraal he removed taking with him three of the sheep, and these he subsequently returned to Ncembe's kraal. When Plaintiff went he found twenty-six sheep at Ncembe's kraal and he later sent Makontso for them. Makontso was handed twenty-one sheep but it transpired that the boy had made a mistake and had handed over three belonging to another man. Plaintiff again went to Ncembe's and was informed there were three sheep on the homestead and the other two were on the veld.

The Magistrate, on the facts, found there were eight sheep and the evidence supports that finding.

The question to be decided is, was the nqoma a joint one and if not can the head of a kraal be held liable for animals nqomaed to an inmate of his kraal with his consent.

These points having been put to the Native Assessors, they are unanimously agreed that there is no joint nqoma under Native custom.

It is not usual for a kraal head to be responsible for animals nqomaed to an inmate of his kraal. If a kraal head upon the removal of an inmate to whom stock is nqomaed on condition that it remains at his kraal allows the stock to remain he is responsible.

The responsibility would be on the elder Defendant, he accepted the return of three sheep which supports the contention of the Plaintiff that he agreed to his terms.

On the evidence of Plaintiff it is clear the nqoma was transferred and that he released Ketwa from responsibility.

The appeal is allowed with costs and the judgment in the Court below altered to one for Plaintiff as against Defendant Ncembe with costs and for Defendant as against Defendant Ketwa with costs.

Kokstad. 18 January, 1915. W. Power Leary, A C.M.

Mokwinihi vs. Mafenge.

(Matatiele. No. 465/1913.)

Nqoma—Purchase by Third Party in Good Faith.

Mokwinihi sued Mafenge for the return of a certain dun heifer or payment of its value which said heifer he alleged was the progeny of a cow nqomaed to one Paulus Manzini and which the said Paulus sold to Defendant without the authority of Plaintiff.

Defendant denied knowledge of the nqoma and stated he bought the beast in good faith and pleaded that Plaintiff had no action against him or if he had that he cannot claim the beast without tendering its present value to Defendant.

The Magistrate gave judgment for Defendant with costs.

Plaintiff appealed.

Pres.:—In this case Defendant is sued for the restoration of a heifer sold to Defendant by one Paulus Manzini to whom it was nqomaed by Plaintiff.

The action of the Defendant appears to have been *bona fide*. He had seen the beast for a considerable time at Paulus Manzini's kraal. Plaintiff himself in his summons says that the beast in question was the progeny of a certain white cow he had nqomaed to Paulus Manzini.

The ruling of the Appeal Court in the case of *Mavanda* vs. *Sokana* (1, N.A.C. 8) applies in so far as the Native custom of nqoma is concerned.

The point having been put to the Native Assessors, they state:—

The owner of the beast has no redress against the purchaser for *bona fide* purchase, his action is against the person to whom he nqomaed the beast. If the purchaser is aware that the beast is nqoma he may be sued for its restoration.

The appeal will be dismissed with costs, but the judgment of the Court below will be amended to one of absolution from the instance with costs, so that Plaintiff may not be barred from any further action he may be advised to take.

Kokstad. 14 May, 1913. W. T. Brownlee, A.C.M.

Mpayipeli Cabangana vs. Joseph Mabandla.

(Matatiele. No. 272/1912.)

Nqoma—Reward—Cannot be Sued for.

Pres.:—In cases of loan under the custom of nqoma it is customary that the person making the loan should reward the person loaned if he have successfully farmed the loaned animal, and if it should have increased substantially, but it is contrary to custom that the person loaned should compel payment of reward by resort to action at law.

Umtata. 25 July, 1916. C. J. Warner, A.C.M.

Haniso Luboko vs. Gusha Selani.

(Ngqeleni. No. 167/1916.)

Nqoma—When made to Married Woman, Husband not Liable for Return—Pondo Custom.

Claim for a certain pig and its progeny nqomaed by Plaintiff to Defendant's wife. Defendant excepted to Plaintiff's claim and stated that his wife should have been sued, the nqoma having been made her.

The Magistrate upheld the exception and dismissed the claim. Plaintiff appealed.

Pres.:—Appellant, Plaintiff in the Court below, sued Respondent for the return of a pig and its progeny which was placed with Respondent's wife under the Native custom of "nqoma."

Exception was taken to the summons that the wife should have been sued, and upheld in the Court below. The point is referred to the Native Assessors, who state:—

"If I nqoma my stock to your wife I can sue only my Induna to whom I nqomaed it. Therefore if nqoma was made to a wife only the wife must be sued for its return."

This Court agrees with this opinion and considers the Court below was right in upholding the exception on this point.

The appeal is dismissed with costs.

Flagstaff. 13 April, 1915. W. Power Leary, A.C.M.

Ncekana vs. Ntshivana.

(Bizana. No. 2/1915.)

Nqutu—Not a Pondo Custom.

Pres.:—The point of nqutu being put to the Native Assessors they state there is no "nqutu" amongst Pondos. If a girl is abducted and seduced she is "bopaed." The beast is termed a "bopa" fee. Only one beast is paid.

In the case before the Court there has been neither seduction nor pregnancy. The Appellant is acting *bona fide* in his intention to marry which is opposed by Appellant and therefore Respondent would not be entitled to pay bopa fee.

The appeal is dismissed with costs.

Flagstaff. 10 April, 1916. J. B. Moffat, C.M.

Siposo Damane vs. Telepula.

(Tabankulu. No. 183/1915.)

Nqutu Custom not Recognised as Pondo Custom.

Claim for the return of 1 ox or £15 seized and removed by the women of Defendant's kraal from Plaintiff's kraal.

The Magistrate gave judgment for Plaintiff.

Defendant appealed.

Pres.:—The Magistrate has given judgment for the Plaintiff without reference to the facts on the ground that the Nqutu custom is not recognised amongst the Pondos. The parties are resident in Pondoland. The Defendant states that he is a Pondomisi and grew up in Pondoland. The parties must be taken to be subject to Pondo law and custom.

Both parties appear to have accepted the nqutu custom throughout the events leading up to this case.

It is only in the last portion of the Plaintiff's replication that he claims non-liability for payment of a nqutu beast. In his evidence he states that he thought that he was liable for payment of a nqutu beast.

It has been argued, following the analogy of our law, that a payment under a mistake in law is not recoverable: in this case the Plaintiff having admitted liability for nqutu under a misapprehension of the law in Pondoland applicable to him cannot now raise the defence that he is not liable under such law.

The nqutu custom being however quite foreign to Pondomise custom although apparently from the evidence given it is being introduced informally, this Court is not prepared to countenance such departure from the recognised customs of the tribe, and therefore holds that the Magistrate was justified in refusing to consider a claim for nqutu.

The appeal is dismissed with costs.

Kokstad. 2 April, 1912. W. T. Brownlee, A.C.M.

John Hlaba vs. Joseph Jordan.

(Mt. Frere. No. 30/1912.)

Nqutu Custom—Requirements of.

The Plaintiff claimed £9 the value of a certain cow, which was spoliated and slaughtered by the women of Defendant's kraal, and £6 as damages in that the cow at the time had a suckling calf, and Plaintiff had to purchase milk to the value of £6 for its maintenance and sustenance.

The Defendant denied the Plaintiff's claim.
The Magistrate gave an absolution judgment.
Plaintiff appealed.

Pres.:—In this case the Defendant admits that the women of his kraal killed a cow belonging to the Plaintiff and his defence is that the cow in question was handed to the women under the custom of "nqutu." The Plaintiff however denies that he handed the animal to them and states that it was taken from the residence of Pym without his consent. Defendant's witnesses say that the cow was handed to them as security for the payment to them of an ox as fine for the seduction of Defendant's daughter Jane by Plaintiff's son Otto. Plaintiff says that when the women came to demand damages he told them not to go to his kraal to let him give them a beast himself if he should decide to do so and that he made a demand that the girl Jane should be examined either by a doctor or by the women of his own kraal, but this was not permitted. This statement is denied by the defence, and the defence witnesses moreover say that the cow was to be held until 9 o'clock, while the Defendant says that it was killed before 8.30.

This Court is of opinion that the Plaintiff should succeed in his action for it seems to be quite clear that the Defendant's women have not acted in accordance with custom in this matter. The Plaintiff was within his rights in demanding that the girl should be examined and that he should be satisfied that she had been deflowered before he was called upon to pay; he was also entitled under the custom of Nqutu to release any beast which had been seized by the women by the payment of another, and according to the evidence of the defence itself he does not appear to have been afforded this opportunity.

This Court does not wish to lay it down that the custom of seizure of cattle for "nqutu" should be permitted, but in this case while the Defendant shelters himself under this custom he and his people have not proceeded in accordance with the requirements of that custom and have committed a tort upon the Plaintiff which, in the opinion of this Court, entitles him to succeed in his case. The appeal is allowed with costs and the judgment of the Court below altered to judgment for Plaintiff for £10 10s. and costs, value of cow £5 10s. and damages £5. It is still open to the Defendant to bring an action against Plaintiff for damages for the seduction of Jane.

Umtata. 1 August, 1912. W. T. Brownlee, A.C.M.

Kogini Nkalitshana vs. Mdyogolo.

(Umtata. No. 191/1912.)

Pledge—Requirements of, under Native Custom.

The facts of the case are fully set out in the President's judgment.

Pres.:—At the request of practitioners the matter of pledge was put to the Native Assessors and they make the following statement:—

1. Pledge is known among Natives.
2. Where this practice is made use of the custom is that the pledge is merely pointed out and is not then delivered and the pledger is told that if the contract in respect of which pledge is given is not fulfilled we will then come and take the pledge.
3. There are cases where pledge is delivered but this is not customary.
4. The European custom is quite different from ours as it has interest.
5. Our customs do not change.
6. In olden times if a man departed from custom judgment was given against him.
7. If a man demanded his money and a beast was handed him we would say it is not a pledge, it is settlement.

This Court does not wish to dispute the statement of custom here made but desires to point out that it is admitted that the custom as laid down is at times varied.

In this case the Magistrate in the Court below is satisfied upon the evidence that the horse in question was delivered to Defendant as a pledge and not in settlement of his claim, there is evidence to support this finding and it has not been shown to the satisfaction of this Court that the Magistrate is wrong in his conclusion upon points of fact.

The appeal is dismissed with costs.

Umtata. 3 August, 1912. A. H. Stanford, C.M.

Jika Kubela vs. Annie Scheepers.

(Ngqeleni. No. 183/1912.)

Pound Regulations—Damages—Election—Tariff—Assessment or Proved Damages.

Plaintiff sued Defendant for £10 damages for wrongfully and unlawfully impounding 47 small stock belonging to him. Defendant (Plaintiff in reconvention) counterclaimed £5 for trespass of the said 47 stock on three occasions.

Judgment:—Claim in convention dismissed with costs. For plaintiff in reconvention for £1 10s. and costs of suit.

Plaintiff in convention appealed and Defendant in reconvention appealed.

Pres.:—In this case this Court sees no reason to interfere with the judgment of the Court below in so far as the judgment in the claim in convention is concerned. It is clear from the evidence that Plaintiff's stock trespassed on several occasions upon Defendant's standing crops and that though Defendant on various occasions complained of these trespasses and demanded payment the Plaintiff made no payment and the Defendant was under these circumstances justified in impounding the trespassing stock.

With regard however to the judgment on the claim in reconvention the Court below has erred, in the opinion of this Court. It seems to this Court that in cases of this kind there are three methods under which the proprietor of damaged crops may obtain redress; the first is to impound the trespassing stock—or in Native locations in these territories to make a demand upon the owner and if he does not pay, then to impound and claim through the pound ordinary damages under tariff provided by the regulations; second, if he is not satisfied with tariff rate damages to give notice of assessment to the owner and to have the damages assessed under the provisions of the pound regulations and the award of the assessors then becomes the amount to be received or paid as damages, and third, to claim damages by means of an action at law, and it would then lie upon the proprietor to prove what damages had been sustained. In either of these two latter cases the proprietor may impound the trespassing stock, but in each case it is necessary that the proprietor of the injured crops should notify the poundmaster of the particular damages claimed, whether tariff, assessment or proved damages. The Defendant—the reconvention Plaintiff—has chosen to recover damages under the tariff provided by the regulations and has been paid the sum of 14s. 3d., and the point now to be decided is whether she is entitled in addition to this to claim special pound damages, and in the opinion of this Court she is not.

Section 67 of Proclamation 387 of 1893 provides that no person who has claimed damages under the provisions of sections 38 or 29 of that Proclamation shall be able to require an assessment or to seek redress by legal process, and sub-section 27 of section 28 provides a tariff which is applicable to these territories and a calculation based upon the number of trespassing stock and the amount recovered by Defendant shows that this is the tariff that has been applied in connection with the impounding of the trespassing stock and here it should be noted that the two sections above referred to are taken over bodily from the Pound Ordinance 15 of 1892 the corresponding sections there being Nos. 75 and 32.

The foregoing statement of the law is borne out by the decisions in the cases of *Thompson* vs. *Schietekat* (10. Juta 46) which however is merely negative, and *Mason* vs. *Dihning* (S.C.R., Vol. 10, 338), in which it is very definitely laid down that any proprietor seizing any trespassing animal must elect which of the three remedies already indicated he will seek and having once elected to adopt one course he cannot afterwards change his mind and pursue another. In the case now under consideration it is clear that when Defendant impounded Plaintiff's stock she elected to avail herself of the course of claiming tariff rates and she is therefore now precluded from claiming any other form of redress and should not have been awarded damages. The appeal is dismissed in so far as the claim in convention is concerned, but as regards the claim in reconvention the appeal is allowed with costs and the judgment of the Court below is altered to judgment for Defendant with costs.

Umtata. 28th July, 1916. J. B. Moffat, C.M.

Spaji vs. Siyoyo.

(Port St. Johns. No. 87/1916.)

Practice—Grounds for Appeal when Appellant not Represented.

Pres.:—The Defendant in this case was not represented by a legal adviser in the Court below. He personally noted an appeal without specifying grounds of appeal.

Subsequently he employed an attorney, who gave notice specifying certain grounds of appeal, and later he gave further grounds.

In view of the proviso added to section 6 of Proclamation 391 of 1894 by Proclamation No. 144 of 1915, in a case such as this in which the Appellant was not represented in the Court below, the hearing of the appeal is not limited to the grounds stated in the notice of appeal. Under the rule grounds of appeal can be stated at any time.

Kokstad. 30th August, 1913. A. H. Stanford, C.M.

Mntuyedwa vs. Siposo.

(Mt. Frere. No. 122/1913.)

Practice—Onus *of Proof—Interpleader Action.*

In the Magistrate's Court the stock was declared executable with costs.

Pres.:—When property is attached in the possession of a judgment debtor and is claimed by a third party, the *onus* of proof is then on the claimant to prove that the property attached is his property and not executable. Where the property attached is not in the possession of the judgment debtor but in that of a third party, then the *onus* of proof rests upon the judgment creditor at whose instance the property has been attached.

In the present case the stock attached was not in the possession of the judgment debtor, consequently the *onus* of proving that it is executable is upon the respondent.

With regard to the mare the deputy messenger Tyelake states that when the attachment was made, the Claimant said: "The filly is not mine; it belongs to Mt. Fletcher people." This is contradicted by the next witness, Delayi, who states: "Applicant said in answer to the deputy messenger the cattle are Simon's. *Re* the horse he said it was Simon's."

The witness Siposo also gives evidence which is different from that of last witness and in conflict with that of the deputy messenger. The Court therefore considers that the evidence of these witnesses is unreliable and not such as should have carried a judgment with regard to the mare.

In this Court it is argued by the Appellant's attorney that the witnesses who say that they are near neighbours of the Claimant live in some instances many miles from him, but as the Magistrate, when the witnesses were sworn, omitted to record the place and location in which they live, as he should have done, the Court has nothing to guide it upon this point.

The appeal is allowed with costs with regard to the mare claimed, which is declared not to be executable, and with regard to the balance of the stock the case is returned to the Magistrate to take such further evidence as either party to the suit may wish to adduce, a police constable to be sent to ascertain how far from the claimant's kraal the witness Mcitakali lives. The case and further evidence taken to be returned to be dealt with at the next sitting of this Court.

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Umtata. 7th August, 1912. W. T. Brownlee, A.C.M.

Monqamele, Mventsheni, Qabazi vs. Francis Mazinyo.

(Libode. No. 77/1912.)

Practice—Provisional Judgment—Appeal as regards Kraal Head Responsibility.

The Plaintiff sued the Defendant, Monqamele, together with his father and natural guardian, Mventsheni, and his uncle, Qabaza, with whom first Defendant had been residing, for 5 cattle or £25 as damages for adultery. At the trial the first Defendant was in default, while the second and third Defendants appeared.

The Magistrate gave the following judgment: "Provisional judgment for Plaintiff as follows: 5 head of cattle against Defendant No. 1 or £25 and costs. Failing payment, provisional judgment against Defendant No. 2 for 4 head of cattle or value £20, and against Defendant No. 3 for 1 head of cattle or its value, £5. Defendants to pay costs."

Pres.:—In this case the appeal is brought by the Defendants Nos. 2 and 3 against the judgment in so far as it concerns themselves only, and the Respondent's attorney objects *in limine* to the appeal being heard on the ground that the judgment of the Court below being only a provisional judgment it is not competent to appeal against it, but the Defendants must seek relief by way of applying to have the provisional judgment set aside. It is argued, however, for the Appellants that the only point upon which the present appeal is brought is the point of kraal head responsibility, in which the ruling of the Court below is final and therefore appealable.

The case is beset with difficulties all round owing to the fact that the case is brought under Native custom and that the procedure followed in the Courts in the Native territories is that of the Magistrates' Courts in the Cape Province, and then while on the one hand a provisional judgment is not an appealable one, yet had the procedure been followed closely the judgment against the two Appellants would not have been a provisional but a final one for the reason that they are not in default but appeared in person and defended the case. The case, however, is a peculiar one, for the two appealing Defendants are brought into Court not for any tort committed by themselves or by reason of any contract entered into by themselves but by reason of a peculiar provision of Native custom, which has no analogy under the common law, and which holds a kraal head responsible for the torts of the inmates of his kraal. It will therefore be seen that in cases such as this there are two distinct issues to be decided, and before a Plaintiff can succeed against persons who hold the position of co-Defendants as is the case of the two Appellants, he must prove first that the principal Defendant, Defendant No. 1 here, is guilty of the tort charged against him, and then that the co-Defendant is the responsible kraal head, and a distinct and definite ruling ought to be delivered on each of these issues, and it is argued for the Appellants that there is an implicit and final ruling as against them in the second issue and that the judgment against them is provisional only so far as the first issue is concerned. Hitherto the practice has been in cases of this nature to give one comprehensive judgment in general terms, and up to the present the point now argued has never been raised. It seems to this Court that the contention raised is sound, and the fact that the Court below has given judgment against the Appellants in the main issues implies that he has decided against them in the second or "kraal-head" issue, and indeed he could not give judgment against them without so deciding, and it is clear that the decision on this point cannot be a provisional one for the appealing Defendants appeared in Court and definitely defended this issue, so it was not decided by default, as has been the case in the main issue, where the judgment is rightly provisional by reason of the default of the principal Defendant. In the main issue also the judgment against the Appellants would, in view of the appearance and defence, not have been provisional but for the fact that it has been held in the case of *Ndabeni* vs. *Kwanga* (N.A.C., p. 245) and in other cases that because of the very peculiar circumstances under which co-Defendants are liable in cases of this nature, a greater judgment may not be granted against them than has been granted against the principal Defendant, and so where provisional judgment has been given against the principal Defendant only provisional judgment has been given against the co-Defendants even though he has appeared in Court, but then this has been because, as has already been pointed out, the practice has been to give one general judgment, and the difficulty would be obviated were separate rulings to be given on each issue.

In the opinion of this Court then the ruling on the "kraal-head" issue is final and so is appealable, and the Respondent's objection is overruled and the appeal permitted on the point of the kraal-head issue.

After the merits had been gone into, the facts of the case were put to the Native Assessors and their statement of Pondo custom in cases of this nature is the same as that of the witness Siteto. They further state that they are not aware of any such practice as that of apportioning a boy to his grandfather, but that should the first Defendant have lived with his grandfather and from there have visited his uncle, the proper course is for the uncle to pay one beast and then send the case to the grandfather, who may or may not accept responsibility, but should he not accept responsibility he would have to take the Defendant to his father, who would have to pay.

It seems then that in any case the two Appellants would be liable if it were decided that they are responsible under Native custom, and as this point has been decided in the evidence in the Court below and as this Court sees no reason to disturb the finding of the Court below upon points of fact, the appeal is dismissed with costs.

Dissenting Judgment (W. T. Welsh, R.M., Mqanduli).

In my opinion the objection should be upheld. Section 33 of Act 20, 1856 provides for an appeal against any final judgment, decree or sentence or against any rule or order having the effect of a final or definitive sentence. Rule 29 of the Schedule to this Act provides for the re-opening of provisional judgment.

In this case the judgment against each of the Defendants is definitely stated to be provisional and can thus be re-opened and set aside and can therefore not be regarded as a final judgment, from which it is competent to appeal. Owing to the first Defendant being in default the judgment against him was provisional, and in accordance with various decisions of this Court the judgment against the other two Defendants had also to be provisional. This is in fact the judgment which was given by the Court below, and I do not think the finding as to kraal-head responsibility can be regarded as a final order, seeing the whole judgment is explicitly stated to be provisional and thus capable of being re-opened and set aside as affecting all three Defendants. That a final judgment cannot be re-opened by the Court of first instance is clear. I consider the objection that the appeal cannot be heard is a good one.

Umtata. 21 March, 1917. J. B. Moffat, C.M.

Myekeni Mnyaka and Kolo Ccina vs. Ntlangwini Mdutywa.

(Libode. No. 24/1917.)

Practice—Provisional Judgment—Final Judgment to be Given Against Defendant who has Appeared.

The facts of the case are sufficiently disclosed in the President's judgment.

Pres.:—On behalf of Respondent, the second Defendant in the Court below, objection is raised to the hearing of the appeal, excepting on the point of the kraal-head responsibility, on the ground that the judgment against the two Defendants is only a provisional one and cannot be appealed against.

The first Defendant was in default in the Court below, and the judgment in his case had to be provisional.

Following previous decisions of this Court that a greater judgment cannot be given against the kraal-head co-Defendant than against the principal Defendant (see case of *Gasa* vs. *Ginyo*, II, Henkel, page 20), the Magistrate gave provisional judgment against the second Defendant.

In a recent case of *Vos* vs. *Marquard and Company*, decided 12th September, 1916, the Cape Provincial Division of the Supreme Court laid down that if a Defendant has once appeared on the return day or on the day of hearing provisional judgment cannot be given against him. The Defendant was not represented in the Court below, and this Court is therefore not limited to the grounds stated in the notice of appeal.

The appeal is allowed with costs. The Magistrate's judgment is set aside, the case is remitted to the Court below for a final judgment to be given in regard to the case against second Defendant, and his attention is drawn to the case mentioned.

Umtata. 5 March, 1912. W. T. Brownlee, A.C.M.

Sokoyi vs. Lutoli and Mdungazwe.

(Libode. No. 240/1911.)

Practice—Res Judicata—*Claiming Damages for Adultery and then for Pregnancy.*

In the first case plaintiff obtained provisional judgment for 3 head of cattle or £15 as damages for adultery on the 6th of July, 1911. In October, 1911, Plaintiff issued a further summons for 5 head or £25 damages for pregnancy, less 3 head or £15 already paid, leaving a balance of 2 head or £10.

The Defendant pleaded "*Res Judicata.*"

The Magistrate overruled the exception and Defendant appealed.

Pres.:—This Court is of opinion that the special plea of "*Res Judicata*" is a good one. For though the amount claimed is different, the parties are the same and the cause of action is the same as in the previous case alluded to. It is argued that the failure on the part of the Plaintiff to claim the full amount which he was entitled to claim was due to a mistake of fact, but this Court does not consider that there was any mistake of fact, the Plaintiff at the time he brought his first action was aware of the condition of his wife, and when the Court below refused to allow the amendment of the summons it was competent for him to have withdrawn his summons and to have entered a fresh action. This was not done, and the Plaintiff, in the absence of the Defendant, applied for and got provisional judgment, and levied under it, and is not entitled now to say that the claim in that case was brought under a mistake of fact.

The appeal is allowed with costs, and the ruling on the special plea is set aside, and the summons is dismissed with costs.

Butterworth. 8 November, 1912. A. H. Stanford, C.M.

Mncete vs. Bongoza.

(Idutywa. No. 152/1912.)

Practice—Writ not in Accordance with Judgment of Court.

Application by Plaintiff to have certain Warrant of Execution set aside as it was incorrect and did not represent the judgment of the Court.

Defendant admitted that the writ was not in order, but had been amended in accordance with the judgment.

The Magistrate set aside the writ, Respondent to pay the costs of the application.

Respondent appealed.

Pres.:—It is admitted that the warrant of execution upon which the attachment of the sheep was made was not in terms of the judgment. The judgment was for the Plaintiff for three head of cattle of the value of £15, but in the warrant of execution the judgment was shown as being one for £15, which was manifestly incorrect. On receiving the warrant of execution, it was the messenger's duty to have demanded from the judgment debtor three cattle of the value of £15, in terms of the judgment. This he did not do but demanded £15, which the judgment debtor was justified in refusing to pay, and while specially bound by the judgment to attach cattle he attached sheep, and although since the attachment the warrant of execution has been amended, it does not legalise the attachment of the sheep. In the case of *Hart* vs. *Cohen* (Juta, 1899, page 363), a case somewhat similar to the present one, in which damages were sued for, the Court held that

the proper course was first to sue for the writ to be set aside. This Court, having considered all the circumstances of the case and guided by the decision quoted and also the judgment in the case of *Stanton* vs. *Westaway* (E.D.C. 8, p. 1), is of opinion that the Magistrate acted correctly in setting aside the warrant of execution.

The appeal is dismissed with costs.

Kokstad. 20 August, 1912. A. H. Stanford, C.M.

N. Magadla vs. A. Mncunza.

(Matatiele. No. 149/1912.)

Prescription—Money Lent—Colonial Law Applicable—Action by Plaintiff for the Recovery of £8 Lent and Advanced to Defendant in 1896.

Defendant pleaded prescription.

The Magistrate over-ruled the exception, and Defendant appealed.

Pres.:—The transaction clearly is not of such a nature that Native custom only would apply, or which could more fittingly be dealt with under Native custom, but is a claim under an ordinary business contract for money lent and advanced for the purchase of grain, and is one which should be heard under the ordinary law of the Province, and thus falls under the Act of Prescription.

The appeal is allowed with costs, the Magistrate's ruling set aside, the plea being upheld with costs.

Umtata. 17 November, 1917. J. B. Moffat, C.M.

(Engcobo. No. 390/1917.)

Thomas Gubanxa vs. Nkatazo Makalima.

Prescription—Native Custom—Conflict of Laws.

Plaintiff sued Defendant for £23 15s. for cash lent with interest and £1 for beans sold in 1906. The Defendant excepted to Plaintiff's claim on the ground that it was barred by the Prescription Act, No. 6 of 1861. The Magistrate upheld the exception and dismissed the summons.

Plaintiff appealed.

Pres.:—The claim in this case is mainly for money lent and interest thereon. There is one item of £1 for beans. The transactions in respect of which the claim is made are said to have taken place in the year 1906.

An exception taken that the claim is prescribed under Act No. 6 of 1861 was upheld by the Magistrate. This decision is appealed against on the ground that Act No. 6 of 1861 does not apply to the action brought by Plaintiff.

It is not stated why it is contended that the Act does not apply. From the arguments on Appellant's behalf it is gathered that it is contended that the Act does not apply because the parties are Natives, and that as prescription is not recognised in Native law the Plaintiff has the right to bring his action at any time for the recovery of the debt said to be due.

The charging of interest as a loan is quite foreign to Native ideas. A claim for interest could not be dealt with under Native law and custom, and so far as £23 charged for interest is concerned the claim would have to be dealt with under the ordinary Colonial law. In view of the provisions of the Act mentioned above the claim for interest must be held to be prescribed, and to that extent the Magistrate's decision must be upheld.

The claim for money lent and goods sold is on a different footing. Under Native law and custom the sale and loan of property is recognised, and anything sold or lent, or its equivalent in value, can be recovered at any time. The practice of the Courts in these Territories has been to deal with cases between Natives as far as possible under Native law.

In this case the claim for £23 15s. for money lent and £1 for beans sold can be dealt with under Native law and custom. There being no prescription under such law and custom, the Plaintiff can bring his action for these items at any time.

The appeal is allowed with costs and the case is returned to the Magistrate to be tried on its merits so far as the items £23 15s. for cash lent and £1 for goods sold are concerned.

[N.B.—Plaintiff, having claimed interest, clearly did not bring his action under Native custom. It is difficult to see how the claims for principal and interest could or should be split and different systems of law applied by the Appeal Court. Cases have to be heard under Colonial law, but Native custom may be applied. It does not seem desirable to allow old claims of this nature to be raked up after a lapse of over 10 years.]

The Supreme Court of South Africa,
Cape of Good Hope Provincial Division,
Wednesday, February 27th, 1918.

Makalima vs. Gubanxa.

Sir John Buchanan:—The parties to this case are Natives. A suit was brought in the Court of the Resident Magistrate at Engcobo, which was decided against the Plaintiff. An appeal was thereupon taken to the Court of the Chief Magistrate of the Native Territories, who reversed in part the decision of the Magistrate of Engcobo and sent the case back for trial as to part of the

Plaintiff's claim. This case has now been brought before this Court by way of review. The Legislature has provided that questions between Natives in these Territories are to be tried according to Native law, and has laid down that there is no appeal from the decision of the Chief Magistrate; though this Court has the power of review over all inferior Courts. The question in this case is whether this case be treated as a case of review or is it a case of appeal? The ground upon which it is alleged that this a reviewable matter is that there has been a gross irregularity in the Chief Magistrate's Court in that the Chief Magistrate did not recognise the applicability of the Colonial law of prescription to a case between natives. The issues in the Native courts raised the point whether or not the Prescription Act applied to claims between Natives for interest and for debt: and the Chief Magistrate held that as "interest" was unknown altogether to Kaffir law, the Prescription Act could apply, but that as to debt there was no such thing as prescription known to Native law. It appears to me that this is not a question for appeal. It was argued that as the Prescription Act was a regulating Act, in that it provides that no action was to be brought after the lapse of certain periods, that therefore the Chief Magistrate contravened a regulation, and that thus it was a matter of review and not of appeal. The numerous cases which have been decided in this Court show that the grounds for review which the Court recognised are those set forth in the old Criminal Law of 1828, which are, speaking generally, want of jurisdiction, gross irregularity, wrongful admission of evidence, and the like. But the same cases also show that where the Magistrate has not properly applied the law, in Native cases, it is not a matter of review but a matter of appeal. In one of the cases which has been cited, that of *Mpemvu and Others* vs. *Nqasala* (26 S.C., p. 5310), the Chief Justice remarked: "I quite approve of those cases in which it has been decided that in cases of review like the present the Court may set aside any illegal or grossly irregular procedure; but it does not exercise the functions of a Court of Appeal." Now, can the decision of the Chief Magistrate be said to be a gross irregularity? It may be a question whether the decision was right or wrong, but that is not an irregularity. In the case of *Clegg* v. *Greene* (11 S.C. 352), the Chief Justice laid down that it was an irregularity to refuse to hear a case on the ground of want of jurisdiction. The Chief Justice called it "a denial of justice"; but it came within the grounds upon which there could be a review. The Court there held that the Magistrate did possess jurisdiction, and ordered the case to be heard accordingly. I will only refer further to the case of *Msingeleli* v. *Edward and Mashasho* (1913, C.P.D. p. 23), a case between natives, in which I remarked: "The Magistrates are the Judges both of the facts and the law. In this case the only irregularity which is alleged is that the Chief Magistrate, when dealing with the case, has gone wrong on the law. If he did so that is a matter for appeal and not for review. I think we are only following the current of previous decisions in holding that this is not a reviewable case. It is ad-

mitted that there can be no appeal, and there is no irregularity because the Magistrate may have mistaken, if he has mistaken, the Native law which applied to the case. The application for review must therefore be refused with costs.

SEARLE, J.: This is an application by the defendant to review certain proceedings before the Chief Magistrate of the Native Territories sitting in the Native Court of Appeal, on the ground of gross irregularity and illegality in the Court, disregarding the laws proclaimed and in force in the said Territories and applicable to the case, purported to apply Native law and custom to the plaintiff's claim which was founded on goods sold and delivered and cash lent and advanced.

The plaintiff brought an action in the Magistrate's Court at Engcobo in Tembuland for £47 15s. for goods sold and cash lent in 1906, with interest. The defendant pleaded that the action was barred by the Prescription Act of 1861, which had been specially applied by Governor's Proclamation to the Transkeian Territories; the Magistrate upheld this so called exception, and dismissed the summons. Thereupon plaintiff appealed to the Chief Magistrate, who upheld the plea of prescription as far as the claim for interest was concerned, which he said was a claim unknown to Native law, and he held, therefore, that the Act applied; but overruled the exception, and to this extent allowed the appeal, with regard to the claim for cash lent and goods supplied. He held that this claim must be decided according to Native law; that according to that law there was no prescription of these claims, and that therefore the Act could not be applied in respect of them.

It is urged for the applicant that this is a gross irregularity, inasmuch as the Prescription Act says that no action shall be brought in respect of certain claims after a certain period; that this Act has been proclaimed in force in the Transkei, and applies to all actions whatever the claim is, and that the Chief Magistrate was not entitled to hold that that Act must be limited in its operation to that portion of the claim which is unknown to Native law. The Respondent relied strongly on the case of *Doyle* v. *Shenker* (A.D. 1915, p. 233), which laid down that a mere mistake of law made by a Magistrate in a case decided under jurisdiction conferred by an Act which provided that his decision should be final, was not such a gross irregularity as to afford relief by way of review. That was a civil case under the Cape Workmen's Compensation Act, and in giving judgment the Chief Justice in determining whether this was a case in which review proceedings properly lay is reported to have said: "The 32nd section of the Charter of Justice conferred upon the Cape Supreme Court authority to review the proceedings of all inferior Courts of Justice in the Colony, and, if necessary, to set aside or correct the same. But the grounds upon which this power was to be exercised were specifically set out in Ordinance 40 of 1828 (sec. 5), and in Ordinance 73 of 1830 (sec. 3). It is unnecessary to enumerate them here, because in effect only one of them is relied on, and that is the occurrence of gross irregularity

in the proceedings. . . . Now a mere mistake of law in adjudicating upon a suit which the Magistrate has jurisdiction to try cannot be called an irregularity in the proceedings, otherwise a review would lie in every case in which the decision depends upon a legal issue, and the distinction between procedure by appeal and procedure for review so carefully drawn by the Statute, and observed in practice, would largely disappear."

In the Transvaal, the Administration of Justice Proclamation 14 of 1902, sec. 19, provides the grounds on which it is competent for the High Court to review the proceedings of Inferior Courts, and those therein set out are taken verbatim from sec. 5 of the Ordinance 40 of 1828; so that in that Province it is clear that civil and criminal review have been placed by Statute on the same footing. But with regard to the Cape it may be pointed out with great respect that the position is different. Ordinance 40 of 1828 was an Ordinance entitled Criminal Procedure, and evidently was entirely confined to criminal cases. And sec. 5 sub-sec. 1 thereof makes it clear that the grounds of review were only intended to deal with criminal cases; for it refers to excess of jurisdiction whether committed by the Judge in trying for an offence not subject to his jurisdiction, or in awarding a greater punishment than by the constitution of the Court he had power to award. Similarly the amending Ordinance 73 of 1830 was entirely confined to Criminal Procedure. The Charter of Justice referred to was not promulgated until 1832, and sec. 32 thereof contained no reference to the Criminal Procedure Ordinances. This distinction was forcibly brought to the attention of the Cape Supreme Court in the civil case of *De Witt* vs. *High Sheriff* (1 Juta, p. 312), and was recognised and acted upon by the Court. Later on, it was again pointed out in the argument in the case of *R.* vs. *Nathanson* (see p. 110 of 5 Juta), that the Charter gave wider powers than the Ordinance. If it had not been for the Charter there would be no power of review at all in civil cases, and as far as I am aware it has never been laid down in any Ordinance or Statute of this Province upon what grounds the power of review should be exercised in civil cases. Rule of Court 190 merely indicates the procedure. Undoubtedly, however, the Court has endeavoured to assimilate the grounds of civil review to those specifically laid down for criminal review, and "gross irregularity" is, of course, a term of convenient vagueness. The decisions of the Court, however, given from time to time on this question of what cases are reviewable are somewhat difficult to reconcile.

Even with regard to criminal cases, in the earliest reported case *R.* vs. *Higginson*, decided in 1831, the Court held that under the 1st Charter of Justice, sec. 34, of which I gather, corresponded to sec. 32 of the present Charter, the Supreme Court had jurisdiction to review the proceedings of all inferior Courts, not only on the specific grounds mentioned in the Ordinances of 1828 and 1830, but whenever such proceedings might be erroneous in any respect whatever, and that Ordinances 40 and 73 merely enume-

rated certain specific instances which were not intended to be exhaustive as to this Court's power.

It may be that at that time there were not the same facilities for appeal, and therefore the Court adopted a very liberal meaning of the word "review." The Supreme Court in *R.* vs. *Nathanson* (5 Juta, p. 109), settled the practice as to whether application should be made to the Court, for leave to review or whether a summons should be issued out of the Registrar's office. De Villiers, C.J., said: "A further question arisen, namely, upon what grounds ought such an application to be made"—he then refers to Rule 190, and proceeds: "I do not think the summons would be in proper form unless at least one of the grounds mentioned in Ordinance 40 of 1828, as amended by Ordinance 73 was mentioned." He then lays down an alternative procedure, either by applicant direct to the Court or to the Registrar. This case is sometimes quoted as an authority for the proposition that a review of a civil case may be made on the same grounds as a review of a criminal one; but the case itself was a criminal one, and it was quite unnecessary to decide anything as to civil review. *Mr. Sutton* relied mainly upon two cases in our Courts—the first was *Mpemvu and Others* vs. *Nqasala* (1909, S.C., p. 531), where the Court held that to give judgment against a defendant against whom there was not any evidence was a gross irregularity. Wessels, J., in *Stephen* vs. *Gaius* (1914, T.S., p. 622), seemed to question that decision, and the full Transvaal Court held that an error in law, the result of which was an incorrect judgment, was not a sufficient ground of irregularity to justify the Court in interfering by way of review. In such cases the proper remedy is by way of appeal. The other case was *Clegg* v. *Greene* (11 Juta, p. 352), in which there had been an appeal to the Chief Magistrate from the Magistrate of Matatiele, in an action in which the Magistrate had given damages against a co-respondent. The Chief Magistrate reversed the decision of the Resident Magistrate, on the ground that he (the Magistrate) had no jurisdiction in the suit. De Villiers, C.J., in giving judgment, said: "In most cases of irregularity of proceedings the Magistrate is led to commit it, not by wilful blundering, but by honest conviction as to his legal duty. The Court below deemed it to be its legal duty to set aside a judgment which in its opinion was given by a Court without the requisite jurisdiction. . . . If the Court below after hearing the appeal had decided against the appellant upon a matter of fact or of law, there would have been no appeal to this Court. But the Court below refused to hear the appeal, and this refusal is, in my opinion, such an irregularity as to constitute a ground of reveiw." In *Ellis* vs. *Morgan and Dessai* (1909, T.S., p. 581). Mason, J., said: "An irregularity in proceedings does not mean an incorrect judgment, it refers not to the result but to the methods of a trial, such as for example, some high handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined." It will thus be seen that the Courts have not taken quite the same view of the principles on which cases can be reviewed. See also *Rex*

vs. *Richardson* (1914, C.P.D., p. 672), where the Cape Supreme Court squashed a conviction on review, holding that it was a sufficient irregularity to justify interference that an innocent man had been convicted.

The appellant's argument in the present case is that the Prescription Act is a matter dealing with procedure, that this Act which provides that no action shall be brought in certain cases, has been extended to the Transkei, and is binding with regard to all cases that come before the Courts; and that to hold that the provisions of sec. 22 of Proclamation 140 of 1885 overrule this definite provision of law is a gross irregularity. Certainly the Chief Magistrate's decision is of great importance, for it amounts to this, that prescription cannot be pleaded in suits between Natives. Sec. 22 provides that all civil suits shall be dealt with according to the law in force at the time in Cape Colony, except where all the parties to the suit are Natives, in which case it may be dealt with according to Native law. In *Sekelini's* case (21 S.C., p. 118). De Villiers, C.J., held that the word "may" in this section must be construed as equivalent to "shall."

There is some force in the contention that dealing with a case of contract such as this according to Native law means applying Native law to the circumstances of the contract between the parties, and not dealing with the manner of procedure, or the time within which the case must be brought on. But even if this be so, and the Chief Magistrate erred in the view that the Prescription Act had no application to suits between Natives, is this anything more than a mistake in law? And for mere mistakes in law there is no remedy on the ground of irregularity according to the general trend of the decisions.

Upon the whole, therefore, I think it best to follow those decisions which regard matters of law as merely appealable, and not reviewable; and, therefore, I consider that this application should be refused with costs.

Kokstad. 25th August, 1917. J. B. Moffat, C.M.

Msutu Langa vs. Mlambene Langa.

(Matatiele. No. 442/1916.)

Procedure—Appeal—Power of Attorney—Authority to Note.

Pres.:—The appeal on behalf of Plaintiff was noted on the 28th March, 1917, by an attorney, who was authorised to appear for Plaintiff. This power which simply authorises the attorney to continue proceedings, is dated 27th April, 1917.

At the time the attorney noted the appeal he did not produce any authority from Plaintiff to do so, and his notice of appeal should not have been accepted.

Butterworth. 8th July, 1913. A. H. Stanford, C.M.

Barnet Shinta vs. Gilbert B. Mdodana.

(Idutywa. No. 283/1912.)

Procedure—Appeal—Power of Attorney—Written Authority for Noting.

Pres.:—Mr. Warner files an objection to the hearing of the appeal in this case on the ground that Mr. Daines had no power of attorney authorising him to note an appeal.

Mr. Daines, in reply, states that he had verbal instructions from Barnet Shinta to note the appeal, and was subsequently furnished with a written power of attorney.

The question to be decided is whether a practitioner in a Court of law can act for another person in a civil case for the purpose of noting an appeal without having obtained a power of attorney from such person.

It would appear that one Barnet Shinta—the Appellant—had a civil action in the Court of Idutywa against one Gilbert B. Mdodana—the Respondent—in which the Appellant was represented by Mr. Callahan under power of attorney.

Judgment was given in favour of the Respondent.

On the 11th November, 1912, Mr. Attorney Daines wrote to the Clerk of the Court at Idutywa to note an appeal on behalf of Barnet Shinta—the Plaintiff in that Court—but did not enclose his power of attorney. The attorney for the Respondent now objects to the case being heard, on the grounds that Mr. Daines, on the date he wrote the letter in question, had no power of attorney from Barnet Shinta, and could not legally note the appeal.

In argument the representative attorneys have been unable to quote any case decided in the Higher Courts bearing on the issue.

By rule No. 209 no person can sue out process in Circuit Courts without first producing to the proper officer a power of attorney or warrant in writing, and the rules and regulations for the Native Territories Appeal Court under Proclamation No. 391 of 1894, provide in section 6 that any person intending to appeal to the Court shall by notice in writing signed or marked by the Appellant or his authorised agent make known his intention to the Clerk of the Court in which the case is heard.

In the opinion of this Court the authority mentioned clearly means the power of attorney which is necessary for one person to act for another, and which the Clerk of the Court is entitled to, and should demand the production of, to satisfy himself that the person noting the appeal has the proper authority for so doing.

It is clear then that in writing the letter of the 11th November, 1912, Mr. Daines has no legal authority to act in the matter for Barnet Shinta, whose power of attorney in favour of Mr. Callahan was still in full force, consequently an appeal in accordance with law has not been noted.

The objection taken by Mr. Attorney Warner is sustained, and the appeal dismissed with costs.

Flagstaff. 15th April, 1912. W. T. Brownlee, A.C.M.

John Xonywa vs. Nongezi.

(Bizana. No. 190/1911.)

Procedure—Evidence Heard by Different Magistrates.

The President's judgment discloses sufficiently the facts of the case.

Pres.:—In this case it is most unfortunate that the decision has been given by an officer who has heard only a part of the evidence, and in fact has heard only one of the Plaintiff's witnesses, and yet is called upon to decide upon the value of the evidence that all witnesses had given. The Assistant Magistrate himself seems to have been in doubt as to the proper decision to be given, for in the first instance after full evidence had been led on the merits, he threw out the case on an exception, and it is only after the ruling on this exception had been set aside by this Court that a decision on the merits of the case has been given.

This Court is therefore in great doubt as to the correctness of the decision in the Court below, and the appeal is allowed, and the judgment of the Court below is set aside, and the records are remitted to the Court below for the case either to be heard by the Resident Magistrate himself from the point at which the proceedings were no longer before him, or to be heard *de novo* by some other officer and a fresh judgment given.

Costs to be costs in the cause.

Butterworth. 7th November, 1916. J. B. Moffat, C.M.

Qwashe Hobohobo vs. D. Mqoyi.

(Nqamakwe. No. 67/1916.)

Procedure—Grounds of Appeal.

Pres.:—The question of Plaintiff's *locus standi* has been raised in argument before this Court. It was not raised in the Court below, nor in the notice giving grounds of appeal. The Defendant must be taken to have tacitly accepted the position that Plaintiff had the right to sue on behalf of his brother, who is an absentee. This Court is not prepared to question that right at this stage.

Kokstad. 22nd August, 1917. J. B. Moffat, C.M.

R. Tonjeni vs. Sigwadi.

(Qumbu. No. 267/1916.)

Procedure—Grounds of Appeal to be Lodged Promptly.

Pres.:—The attention of the attorney for the Appellant is drawn to the fact that in noting the appeal he has not complied with the regulation requiring that the grounds of appeal shall be specifically stated in the notice of appeal. In this instance the appeal was noted on 30th May, and the statement of grounds of appeal were not sent in until 8th June, several days after the time for lodging notice of appeal had elapsed. No objection to the hearing of the appeal has been raised, but the Court points out that failure to comply with the rules justifies the Court in refusing to hear the appeal, even if no objection is raised by the parties.

Butterworth. 10th July, 1913. A. H. Stanford, C.M.

Moses Kwinana vs. Annie Makasi.

(Willowvale. No. 91/1913.)

Procedure—Irregularity—Evidence not given before Magistrate who gave Judgment.

The facts do not concern the judgment.

Pres.:—In this case a grave irregularity has occurred. The evidence for the Plaintiff's case and a number of witnesses for the defence were heard by the Resident Magistrate. The case was then postponed, and the further evidence was heard by the Assistant Resident Magistrate, who gave judgment. But the record does not show that he proceeded with the case by consent of parties, or that he recalled and reheard the evidence of the witnesses examined by the Resident Magistrate. He further made the mistake of giving a judgment for Defendant, notwithstanding the fact that the latter had made a tender of ten bags of grain.

To obviate the necessity of setting aside the proceedings before the Assistant Resident Magistrate on the grounds of irregularity a judgment by consent has been arranged in this Court.

The appeal is allowed with costs, the judgment in the Magistrate's Court is altered to judgment for the Plaintiff for the 10 bags of grain (mealics), tendered as per sample exhibited in Court, the Magistrate to decide, if necessary, on the quality of the mealies tendered.

Plaintiff to pay costs.

Butterworth. 23rd July, 1914. W. T. Brownlee, A.C.M.

William Klaas vs. M. Jama.

(Willowvale. No. 71/1914.)

Procedure—Judgment must be Final when Party Represented by an Attorney.

Pres.:—In the Court below the Defendant was duly represented by his attorney, who closed Defendant's case, and this being so the judgment against him should have been final. The action of the Magistrate in giving provisional judgment is quite irregular, and has embarrassed the Defendant in his appeal. Exercising its power under section six of Proclamation No. 391 of 1894, this Court allows the appeal, sets aside the provisional judgment of the Court below, and remits the case to the Court below for the evidence of Defendant to be heard, and a fresh judgment to be given.

Costs of this appeal to abide the issue.

Butterworth. 21st November, 1917. J. B. Moffat, C.M.

M. Sasa vs. M. Mxonywa.

(Kentani. No. 42/1917.)

Procedure—Postponement of Case.

Pres.:—After two adjournments at the request of Defendants the case was proceeded with on 10th July, 1917, the evidence of Plaintiff and his witnesses was taken, and the Plaintiff's case was closed. First Defendant gave evidence. He said the cattle alleged to have been paid as dowry were sent to a son of Jim Roli Toli, the father of the woman.

The Defendants' attorney then went into the box, and said that Jim Roli Toli's evidence was material to Defendants' case, and asked for a postponement for the evidence of Roli Toli, who was not present. Roli Toli's absence was not accounted for, nor was any statement made as to the nature of the evidence he was going to give. Ample opportunity has been afforded the Defendants of putting their case before the Court. Under the circumstances this Court is not prepared to say that the Magistrate exercised his discretion wrongly in refusing to grant a further postponement.

The appeal is dismissed with costs.

Kokstad. 27th August, 1913. A. H. Stanford, C.M.

Sethathi vs. Ramolongua Mohlokoana.

(Matatiele. No. 43/1913.)

Procedure—Previous Record Inadmissible as Evidence without Consent.

The facts of the case are immaterial.

Pres.:—This is an appeal from the Court of Matatiele, against an order made by the presiding Magistrate, that the record of a previous case between the parties on practically, but not altogether the same issue, could be admitted as evidence, in face of the objection made by the opposite party. The Court has been unable to find any decision by the Higher Courts of the Union dealing with this matter, but in the Cape Province it would seem to be governed by sections 37 and 42 of Ordinance No. 72 of 1830. Under the former the suitor is bound to produce the best possible evidence, and undoubtedly the best evidence is that of the witnesses themselves, and other or secondary evidence can only be admitted by consent of the opposing party. Section 42 makes provision in the case of dead or absent witnesses, and Stephen's Digest of Evidence makes clear the only grounds upon which the evidence of absent witnesses, whose evidence previously given can be admitted, and these grounds have not been shown in the present case. The Court is therefore of opinion that the record in question was not admissible as evidence, unless with the consent of the opposing party, which was refused. The attorney for the Respondent has raised the question as to whether the ruling of the Magistrate is such a definite sentence as may be appealed from, but section 9 of Proclamation 391 of 1894 says the Court shall at the hearing of any appeal have and exercise all the powers exercised by the Supreme Court as a Court of Review—and the permitting by any Court of inadmissible evidence is a ground for review.

The appeal is allowed with costs, the Magistrate's order admitting as evidence the evidence taken in case 286/1911 is set aside, and the case returned to him to be proceeded with on its merits.

Kokstad. 3 April, 1917. J. B. Moffat, C.M.

N. Kopman vs. Nohakisa.

(Tsolo. No. 161/1916.)

Property—Allotment to the Various Houses on Marriage by Christian Rites being Contracted—Proc. 142 *of* 1910.
Allotment—Distribution amongst Houses on Marriage by Christian Rites being Contracted—Proc. 142 *of* 1910.

The facts are fully disclosed in the President's judgment.

Pres.:—In this case the Plaintiff sued the Defendant, his wife of the Right Hand House, to compel her to remove from the kraal of his Great House in order that he might revive the latter in accordance with Native custom. Defendant, while admitting she is Plaintiff's wife of the Right Hand House, denies that the kraal at which she is residing is or ever was the Great Kraal, and states it was specially arranged she should live there. The Magistrate found that the kraal in dispute was common to both houses. The Defendant in her evidence admits that the Plaintiff has the right to establish her in another kraal, and it is clear that under Native custom he has such powers and that so long as a woman receives proper treatment and maintenance from her husband she should reside at such place as he appoints.

See *Mfenqa* vs. *Tshali* (1, N.A.C. 31). The Plaintiff states that he is about to marry another wife and place her in the Great House in which there is no heir, he having abandoned all intention of contracting a marriage by Christian rites with Janet or anyone else. This he has a right to do, and the Defendant is bound to remove from the kraal in question, which Plaintiff regards as his Great Kraal, provided he makes suitable provision for her and her family.

The main point in this appeal is the construction of section 7 (1) of Proclamation 142 of 1910.

It appears that in July, 1916, the Plaintiff in contemplation of civil marriage with Janet Tshele, made a declaration showing his subsisting marriages by Native Custom, the issue therefrom, and the disposition of property connected therewith, and it is contended, on his behalf, that that marriage not having taken place, the allotment made lapses.

For the Defendant it is argued that the allotment having been made stands as a gift or grant, and that the stock therein referred to have thereby become her property.

Section 7 (1) of the Proclamation reads as follows: " From and after the date of the promulgation of this Proclamation it shall not be lawful for any male Native during the subsistence of any marriage or marriages according to Native Custom to contract a marriage according to the law of the Colony unless he shall first have declared upon oath before the Resident Magistrate or Assistant Resident Magistrate of the district in which he is domiciled the name or names of wife or wives of such subsisting marriage or marriages; the names of the children of such marriage or marriages; the nature and amount of the movable property allotted by him to each such wife or house under Native custom; and such other information relating to such marriage or marriages as the said Resident Magistrate or Assistant Resident Magistrate may require." This does not compel a man to make an allotment prior to a civil marriage, but sub-section 3 of section 7 penalises him if he fails to declare what allotments have been made, and the civil marriage is not expressly invalidated by the omission.

In this Court's opinion what the section requires is not that specific provisions shall then be made, but that a man shall declare to

and place on record what property has, under Native custom, been already allotted to each of his then existing houses. The wives of a man's various houses, according to custom, would still be wives under his control, but the property could not be diverted from any one house to another any more or less than before; it would still have to be administered strictly in accordance with custom; the *dominium* would remain in the husband, and each house would have the usufruct, and the woman could not claim any right in the property, the rights of neither party being impaired nor increased by the section in question. The document signed by the Plaintiff in this case was entered into by him with the intention of marrying Janet Tshele, and is binding on him.

It may be contended that the form used goes beyond the requirements of the section, but this specially provides that "such other information as the Magistrate may require shall be given," and the insertion of the name of the bride seems most necessary. If this view of the construction to be placed upon section 7 (1) of Proclamation 142 of 1910 is correct, the Plaintiff, in signing this document, did no more than confirm and place on record the property allotted to his various houses. As a matter of fact, he seems to have allotted practically all his property to his Right Hand House. If it were to be held that the Proclamation intended a gift of the property to each house, this would create such an obstacle to civil marriages that none would take place.

This Court considers that it was not intended that any alteration in status, person or property was to be effected by this section. A woman thus provided for would still be a man's wife, subject to his control and entitled to his protection; he would be the proper person to arrange for the marriage of their daughters and the setting up in life of their sons. The object arrived at is merely to perpetuate the allotment made under Native custom and so safeguard these wives from the consequences of the civil marriage which has no place in Native custom.

Section 4 of the Proclamation reads as follows: "No marriage according to the law of the Colony or registered Native marriage contracted during the subsistence of any marriage according to Native custom, shall in any way affect the rights of property under this Proclamation of any wife of such marriage by Native custom or any issue thereof, and the widow of any such marriage according to the law of the Colony or of such Native registered marriage, and any issue thereof, shall have no greater rights in respect of the property of the deceased spouse than she or they would have, had the said marriage been a marriage by Native custom." safeguards the rights of the wives by custom and specifically limits the rights of the wife by civil rites. The Plaintiff has made a declaration that certain movable property has been allotted to the Right Hand House.

The declaration is not a disposition or deed of gift or grant. The Plaintiff, by making the declaration, did not divest himself of any rights he has to any of it. He can, however, only deal with it in accordance with Native custom regulating the rights of houses in respect of property allotted to them.

No Court would be justified in deciding that a man loses his property entirely on contracting a civil marriage without such an effect being expressed in the clearest language.

Whether a civil marriage takes place or not the movable property specified in the declaration is declared to have been allotted to the Right Hand House.

Although the movable property specified has been allotted to the Right Hand House, the Plaintiff is entitled to make his wife reside at any place he may appoint, provided he makes suitable provision for her residence and maintenance.

The appeal is allowed. No order is made as to costs.

The Magistrate's judgment is altered to "Order granted that the Defendant remove from Plaintiff's Great Kraal upon Plaintiff making proper and satisfactory provision for her separate establishment as his Right Hand wife with the property allotted to that house."

Flagstaff. 2 September, 1914. W. T. Brownlee, A.C.M.

Petition of Geqevu.

Provisional Judgment—Re-opening after Becoming Final.
Practice—Petition to Re-open Provisional Judgment which had Become Final.

Pres.:—Geqevu petitions this Court to set aside a judgment of the Resident Magistrate's Court at Bizana, in which Ntonkulu obtained a provisional judgment on the 21st November, 1913, and in which a warrant of execution was issued on the 25th idem, on the ground that he was away from home and only returned in June, 1914. On behalf of the Respondent it is urged that this Court has no jurisdiction to hear this petition. Under Regulation 9 of Proclamation No. 391 of 1894 this Court "shall have and exercise all the powers exercised by the Supreme Court as a Court of Review," and this Court is of opinion that in such a petition as the one now before the Court it has jurisdiction to hear and determine this petition.

This Court, having heard the petition read, is of opinion that the Applicant has himself to blame for what occurred. He left home when it is obvious that he was aware of the case pending against him. The amount is very small, and this Court is of opinion that for the applicant's own sake the proceedings should be stopped.

The application is refused with costs. (See cases of *Marnewich* vs. *Sapiero* (16, S.C. 26) and *Van Heerden* vs. *Verster* (2, S.C. 408).)

Umtata. 28 November, 1912. A. H. Stanford, C.M.

Ndoqo vs. Msweli.

(Ngqeleni. No. 346/1912.)

Provisional Judgment—Re-opening—Facilities should be Allowed.

Pres.:—The Messenger's return shows that service was effected at Appellant's kraal during his absence by affixing a copy of the summons to the door of his hut.

The Appellant's statement that he did not find the copy of the summons on the door but that it was handed to him by Gulani's son is not refuted. In any case the Appellant is an uneducated Native who could not know the nature of the summons until he could get someone to read and interpret it to him, and he appears to have made efforts to do so, and found that he could not be in time for the hearing.

This Court has always held that in such cases every facility should be given to enable the Defendant to be heard, and in this case in particular the Court is of opinion from the nature of the service that there should have been no question as to the re-opening of the provisional judgment.

The appeal is allowed with costs, the Magistrate's judgment altered to one allowing the re-opening of the judgment. The Plaintiff in the action for re-opening to pay the costs incurred by his default.

Umtata. 29 July, 1912. W. T. Brownlee, A.C.M.

Nadopi vs. Pangumpu.

(Cofimvaba. No. 16/1912.)

Provisional Judgment—Re-opening—Interpretation of Term "Levy".

Application to re-open provisional judgment.

Summons in original case issued on 28th June, 1911.

Provisional judgment granted on 21st August, 1911, for seven head of cattle or £35 and costs.

Summons to re-open on 19th January, 1912, and stated Applicant was away at work in the Transvaal from March, 1911, to December, 1911.

Writ issued 21st August, 1911, for seven head of cattle or £35 and costs, £5 5s. 6d., and four cattle attached.

Cattle sold on 23rd September, 1911 and realised £16 11s..

Respondent excepted to re-opening on ground that more than one month had elapsed since issue and levy of writ of execution before issue of present summons.

After evidence having been led, the Magistrate allowed the re-opening and Applicant to pay costs by his default. Applicant's attorney objected to paying costs of the application.

The Court orders that in view of his opposition the Respondent be ordered to pay the costs incurred through his opposition.

Respondent appealed.

Pres.:—The appeal in this case is in the first place against the judgment of the Court below generally, and then specifically on the point of costs.

The points at issue upon the general appeal have been already decided in the case of *Nyatela* vs. *Sitwayi*, heard on the 24th March, 1910, and in which the judgment is as follows: "In this case it is necessary to give an interpretation of the term 'levy,' and the only interpretation of the term that seems so far to have been given is that in the case of *Earl* vs. *Le Roux* (C.T.R. 28, 1909), in which it is laid down that a levy must be a levy sufficient to satisfy the amount of judgment." In the same case there is the further remark: "When proceedings have gone by default in the absence of the defendant, and there seems to be some grounds for thinking that there may be a substantial defence, the Court would naturally be inclined to afford an opportunity for the matter to be gone into on the merits, if not clearly precluded from doing so by any general principle of law, or statutory provision or ambiguous rule of Court." In this case it is clear that there has not been a levy sufficient to satisfy judgment.

The appeal is allowed with costs and the Magistrate's judgment set aside, and the case remitted to the Court below. An order granted for the re-opening of the original judgment. And for the reasons there stated this Court sees no reason to interfere with the decision of the Court below in the order for the setting aside of the provisional judgment.

On the question of costs, this Court is of opinion that the appeal is premature. Rule 29 of Schedule B of Act 20 of 1856 is as follows, that a provisional judgment may be set aside "upon the terms, nevertheless, of payment of costs incurred by his (Applicant's) default," and it seems to this Court that the only costs which the Appellant, the Respondent in the Court below, has been ordered to pay are the costs represented by the difference between costs of an unopposed and those of an opposed case, and in any case it seems to this Court that the costs which the Appellant has been ordered to pay could be ascertained only upon the taxation of a bill of costs and upon the review of such taxed bill by the Magistrate who gave the order.

The applicant has still to pay all the costs incurred by reason of this default, and the Respondent is ordered to pay only the costs incurred through his opposition of the application, and it might very well be held that these are not costs incurred by reason of applicant's default.

The appeal is dismissed with costs.

The Respondent has made application to this Court to review and set aside the whole of the proceedings on the ground of an

alleged irregularity in the service of summons in the original case and argues that there has been no proper service in the case in which the provisional judgment was given, and quoted the case of *Botha* vs. *Duming*. Now while it was quite clear in the latter case that the summons was served at the residence of Defendant's father, and it was not made clear by the return of service that the father's residence was the domicile of the Defendant, and the service was on that ground held by the Superior Court to be insufficient, yet in this case it may be inferred from the return that the summons was served at the Defendant's residence, and until it is shown to this Court that such was not the case this Court does not consider that it would be justified in exercising its powers of review.

Dissenting Judgment: Reasons for Judgment.

(W. T. Welsh, R.M., Mqanduli.)

I entertain considerable doubt as to the correctness of the interpretation given by this Court to the term "levy" in Rule 29 of the Magistrate's Court Act, and am not prepared to subscribe to an acceptance of the judgment in the case of *Nyatela* vs. *Sitwayi*, which is being followed in the present decision. No authority of the Superior Courts has been produced, nor have I been able to find any construing a "levy," under Rule 29, to mean only a full satisfaction of the judgment. The case above referred to appears to have followed the ruling laid down in the case of *Earl* vs. *Le Roux* (26, Juta, 386), but that decision was in respect of a writ issued out of the Superior Court, and Rule 329 (*b*) contains the significant words "or if he shall have satisfied the judgment without a levy," which words are omitted from the corresponding Rule in the Magistrate's Court Act, and while, therefore, explaining the former, cannot assist to an interpretation of the latter rule. There is, moreover, no analogy between the provisional sentence of a Superior Court and the provisional judgment of a Magistrate's Court.

As I am not satisfied that the execution of a writ in part is not a "levy" within the meaning of the Rule in question, I do not desire to be bound by this Court's decision, with which I do not concur, should a similar question come before me.

Umtata. 10 March, 1913. W. T. Brownlee, A.C.M.

Xolikati vs. Lutanda.

(Ngqeleni. No. 538/1912.)

Provisional Judgment—Re-opening on Reasonable Cause.

Application for re-opening of provisional judgment.

Defendant opposed re-opening. Magistrate allowed re-opening, and the full facts are set forth in the President's judgment.

Pres.:—In this case it is clear that the Appellant had no intention of allowing the case to go by default. He appeared in Court on the day set down for hearing and the case was then adjourned. He was apparently given a memorandum of the date set down for further hearing and appeared before the Court on the 27th day of November; the case had, however, been heard on the 26th day of November, and the Appellant's story is that, being uneducated, he asked a friend to read the date set forth on the memorandum and was informed that the 27th was the date specified.

Under these circumstances this Court is of opinion that this case would come under the provisions of section 29, Schedule B, Act 20 of 1856, which permits the setting aside of provisional judgment where it shall be made to appear that a Defendant was prevented by reasonable cause from attending Court, as in the opinion of this Court the cause shown by Appellant is reasonable.

The case of *Ykatshela* vs. *Mbem Tala* referred to is not quite on all fours with the case now before the Court, as in that case it was held that the Applicant had not exercised that vigilance which he should have done upon receipt of summons. In the opinion of this Court a liberal construction should always be placed upon the section above alluded to. This is clearly shown in the judgment in the case of *Ngonyama* vs. *Gcekabantu* (I, N.A.C.R., p. 159), where the re-opening was allowed, even where the Defendant had purposely made default, but where he had shown cause.

The appeal is dismissed with costs.

Umtata. 29 July, 1912. W. T. Brownlee, A.C.M.

Mdaka vs. Mbem.

(Cofimvaba. No. 33/1912.)

Provisional Judgment—Re-opening—Reasonable Cause—Neglect.

Pres.:—Rule 29 of Act 20, 1856, provides that a Defendant may within one month after levy, take out a summons calling upon the Plaintiff to show cause why the judgment against him should not be reversed, " and if it shall appear to the said Court by oath that the Defendant, having been duly summoned, was by just and reasonable cause prevented from attending the Court in pursuance of the summons, then the Court shall order the said judgment to be opened." In the case now before the Court the Applicant admits that he received the summons in ample time, and alleges as the reason of his default that he was misinformed as to the date of hearing, and the Magistrate in the Court below considered that this was not sufficient cause to justify him in allowing the case to be re-opened, and in this view this Court sees no reason to disagree.

The Applicant had the summons in his possession in ample time to enable him to ascertain the date of hearing, and his neglect to do so does not furnish such just and reasonable cause as would, in the opinion of this Court, warrant it in disturbing the decision of the Court below.

The appeal is dismissed with costs.

Butterworth. 15 July, 1915. W. T. Brownlee, C.M.

Mdodo vs. Katikati and Nosamana.

(Willowvale. No. 103/1915.)

Qadi Houses—Dowry of First Daughter Appertains to Principal House—Widow's Usufructuary Rights.

Claim for 4 head of cattle, or £60.

Plaintiffs stated in their summons that:—

(*a*) First Plaintiff was the son and heir of the Great House of late Mqoliwe, and as such was the guardian of the second Plaintiff, who was the Qadi of the Great House, and of her family.

(*b*) Defendant was the son of the Right Hand House of the late Mqoliwe, and Siwepu was a minor son of the second Plaintiff.

(*c*) That Defendant had in his possession 4 head of cattle, property of the Right Hand House, which he wrongfully refused to deliver to Plaintiffs or to allow the second Plaintiff the use thereof, though she was residing at the late Mqoliwe's kraal.

Defendant pleaded that Nosamana was the Qadi wife of the Right Hand House of the late Mqoliwe and, together with her minor son, were under his guardianship; that the 4 head of cattle in dispute are dowry for the eldest daughter of Nosamana.

The Magistrate found (1) that Nosamana was the second Qadi married, was therefore the Qadi of the Right Hand House; (2) that Defendant had removed the stock in question from Nosamana's kraal. He ordered the Defendant to restore the stock to Nosamana's kraal, and that she was not to dispose of the stock without consulting Defendant.

Defendant appealed.

Pres.:—In this case there are two questions to be decided:—

First, whether the woman Nosamana is the "Qadi" or supporting wife of the Great House or of the Right Hand House of the late Mqoliwe, and, second, to whom the cattle paid as dowry for the first daughter of Nosamana appertain.

On the first question the Magistrate in the trial Court has decided that Nosamana is the "Qadi" of the Right Hand House, and as there is no appeal on this point, both sides accepting the ruling of the Court below, it is not necessary for this Court to make any comment on the Magistrate's decision.

As regards the second question, the Magistrate has decided that as it is not clear whether the dowry for Nosamana came from the

Great or the Right Hand House, Defendant cannot claim the dowry of her daughter Nontshula, and he has therefore ordered the defendant to replace them with Nosamana.

It seems clear, however, that whoever the cattle may belong to, they do not belong to Nosamana, and they must belong either to the plaintiff, Katikati, or to the Defendant, for the usual custom is—and in this view this Court is supported by the opinion of the Native assessors—that the dowry of the first daughter of a Qadi House appertains to its principle house—either Great or Right Hand—to replace the cattle paid as dowry for the Qadi wife, and it is for the head of the Qadi House to make provision for the maintenance of that house, or to apportion it any of the first daughter's dowry should he see fit.

This Court agrees with the general principal that a widow is entitled to the usufruct of the property appertaining to her house, but this Court cannot agree with the view of the Magistrate that the dowry of the first daughter of a Qadi wife is necessarily the property of that house, for, as already stated, it is usual for the first daughter of a Qadi wife to be placed in the house from which the dowry paid for such wife came.

In this case it is held that the plaintiff, Nosamana, is the Qadi of the Right Hand House, and until cause be shown to the contrary Nosamana's eldest daughter belongs to the Right Hand House, and her dowry should be paid into that house.

Defendant now holds these cattle, and until it is proved that he is not lawfully entitled to them he should not be deprived of them.

And while this Court does not interfere with the ruling of the trial Court as to the status of the woman Nosamana, the appeal is allowed with costs in so far as the cattle are concerned, and in this respect the judgment is altered to absolution from the instance, with costs.

Kokstad. 28 August, 1913. A. H. Stanford, C.M.

Msingeleli vs. Edward and Mashasha.

(Matatiele. No. 166/1913.)

Res Judicata—*Subject Matter—Contract to Pay Dowry in Marriage by Christian Rites.*

Pres.:—The question to be decided in this case is whether the plea of *Res Judicata* is a good plea or not. In March, 1912, the Appellant sued the Respondent for payment of nineteen cattle, one horse, and ten small stock, or their value £115, the summons alleging that about the year 1907 the first Defendant married Plaintiff's daughter Rosa according to Native custom, and the Defendants agreed to pay twenty-four cattle, one horse and ten small stock as dowry, and paid five head of cattle on account of such dowry. The summons also contains other allegations which for the purposes of this judgment it is not necessary to recite.

To this claim the Defendants in the Court below specially pleaded that the said Edward married the said Rosa according to Christian rites and not according to Native forms, and that by virtue of this fact the Defendants are absolved from payment of dowry under Native custom, and Defendants ask for judgment with costs of suit.

In his replication the Plaintiff admitted that this was a Christian marriage and contended that the Defendants were still liable on their agreement to pay dowry. The Court overruled the exception, and an appeal was noted to the Native Appeal Court sitting at Kokstad on the 20th August, 1912, when the case came on for hearing. In the Appeal Court it was held that the marriage having been entered into under the ordinary law of the Cape Colony, Native custom could no longer be applied to compel payment of dowry, and any agreement previously entered into under Native custom became cancelled. The appeal was allowed with costs; the Magistrate's judgment set aside, the exception taken being allowed with costs.

The Appellant, under pretext of review, endeavoured in the Supreme Court to get the judgment of the Native Appeal Court set aside, but failed.

He has now brought a fresh action, in which the parties to the suit are the same, the subject matter the same, viz., being for nineteen cattle, one horse, ten small stock, or their value, £115, claimed on account of an alleged agreement between the parties to pay dowry by reason of the marriage between his daughter Rosa and the second Respondent. There are some verbal differences between the two summons, and it is now alleged that the contract was for a Christian marriage, whereas in the previous summons the marriage was stated to be one according to Native custom.

The Court finds that its previous judgment was in the nature of a final sentence, and the parties being the same, and the claim the same, the Magistrate rightly sustained the plea of *Res Judicata*. It seems clear from the judgment of the Supreme Court in the case of *Wolfaardt* vs. *Colonial Govt.*, heard in May, 1899, that the defence of *Res Judicata* is not defeated by the fact that the action differs in form from the previous action if the matter at issue is the same.

The appeal is dismissed with costs.

Umtata. 7 August, 1912. W. T. Brownlee, A.C.M.

Mpemva vs. Kili.

(Libode. No. 188/1912.)

Res Judicata—*Subject Matter—Essentials of—Parties—Grounds.*

Pres.:—The point to be decided in this case is whether or not the matter in question is *res judicata*, and Nathan, in dealing with this subject, remarks as follows (Vol. IV., paragraph 2162): "In order

to prevent multiplicity of suits and conflict of jurisdiction or of judgments, parties are in certain circumstances entitled to raise the defence of *lis finita*, under which is included the special plea of *res judicata*, namely, that the matter at issue between the parties has previously been decided by a Court." Paragraph 2163: "The defence of *res judicata* can only be pleaded when an action, having been previously determined, is again instituted between the same parties or their privies in relation to the same subject matter and based on the same cause of complaint as the prior section." Paragraph 2164: "The plea of *res judicata* will be available where the same subject matter is at stake, even if the earlier action differs in form from the later one, for it is not the action which causes the identity of the subject matter but the basis of the claim." Maasdorp writes on this subject as follows (Vol. IV, Book III, Chapter IX): "The essential requirements are threefold, namely that the previous judgment shall have been given in an action (1) with respect to the same subject matter, (2) based upon the same grounds, (3) between the same parties.

The same subject matter will be regarded as in issue between the same parties where the same thing, whether increase or diminution in value, is prayed for, as also where only a part of the thing claimed in the first action is sued for in the second, nor does it matter whether the same words are used in describing it, provided it is in fact the same thing." In the matter now under consideration the claim in both cases is in connection with the increase of a certain sheep alleged to have been loaned to Defendant by Plaintiff under the Native custom of "Nqoma." In the first action the Plaintiff prayed "that the Defendant may be adjudged to account to him for the increase of the said ewe sheep and to deliver the same (that is the increase) to him together with the said ewe sheep referred to in paragraph 2," and in that action the plaintiff got judgment for one sheep and for an account, and upon appeal this judgment was upheld in this Court. In the second action, that is the action now under appeal, the Plaintiff stated that he had loaned a sheep to defendant and that the Defendant had informed him that the increase of this sheep was fifty sheep, and he prayed for the delivery of these sheep to him. It will be seen then that the subject matter in each case is the progeny of a sheep and that the only difference in the two claims is in the description and the subject matter. In the one case this is described as the increase; in the other it is described as 50 sheep, and the parties and the subject matter being the same in each case, in the opinion of this Court the Magistrate in the Court below has erred in holding that the matter is not *res judicata*.

The appeal is allowed with costs, and the ruling of the Court below is set aside, and the special plea of *res judicata* sustained and the summons is dismissed with costs.

Umtata. 11 March, 1914. W. T. Brownlee, A.C.M.

Habele vs. John Mpeta and Dumisani.

(Ngqeleni. No. 388/1913.)

Seduction—Action under Common Law or Native Custom—Marriage of Minor—Seduced—Malâ fides.

Claim of 5 head of cattle, or £25 damages, for seduction and pregnancy.

It appears that Defendant No. 1 abducted plaintiff's minor daughter and took her to his uncle's kraal, second Defendant, where he had been brought up. After that he married the girl according to Christian rites and went and lived with her at his father's kraal. The Magistrate gave judgment as prayed against Defendant No. 1, and for 1 beast or £5 against Defendant No. 2, the liability of the second Defendant being a joint one with first Defendant as far as the 1 beast is concerned.

Pres.:—Were this Court to apply the common law in this case, then it seems clear that the Appellant would be entitled to succeed. (See Maasdorp's Institutes of Cape Law, Vol. IV., p. 123.)

The action, however, has been brought, not under the common law, but under Native law, and until it is clearly shown that the Defendant is removed out of the sphere of Native law—as in the case of *Tumana* vs. *Smayile and Mankayi Renge* (1, N.A.C., p. 207)—this Court is of opinion that Native law is the proper law to be applied, and under Native law, in the opinion of this Court, the Plaintiff is entitled to succeed in his action. See *Somdaka* vs. *Tshemese* (1, N.A.C., p. 146).

The evidence in the case discloses the following circumstances: The Plaintiff being absent from home under judicial restraint, the first Defendant abducted his minor daughter, Mesi, also called Mercy, and seduced her and lived with her in unlawful intimacy for a period of six months and then married her by civil rites, though she was then a minor and could not marry without her father's consent, and just prior to the Plaintiff's emancipation. Had this case been brought forward in the form a criminal action for abduction, the fact of the subsequent marriage would not have condoned the offence. The plaintiff has under Native law clearly suffered damages by the seduction of his daughter, and in the opinion of this Court the marriage was contracted with the sole view of defeating Plaintiff's claim, and was itself, in view of Mercy's minority, a fraud against the Plaintiff, and in the opinion of this Court, can be no bar to the Plaintiff's action, as Defendant cannot avail himself of his own wrong-doing to deprive Plaintiff of an accrued right. The appeal is dismissed with costs.

Umtata. 20 November, 1912. W. T. Brownlee, A.C.M.

Dingizweni Paponi vs. Mngqongile Mpakati.

(Mqanduli. No. 324/1912.)

Seduction—Child—Property in.
Illegitimate Child—Property in Cases of Seduction.

Plaintiff claimed a declaration of rights in respect of the estate of Nteto Mpakati, to have it declared that he was the heir thereto for the following reasons:—

1. That he was heir to Paponi, to whom one Nameka (deceased) belonged by Native law and custom.

2. That Nameka was in her lifetime seduced by one Mpakati (father of Defendant) and gave birth to an illegitimate child, the late Nteto Mpakati, who died about 1910.

3. That no fine was paid for the seduction and pregnancy, and Nteto in consequence remained the property of late Paponi, whose heir Plaintiff was.

4. That defendant has at divers time laid claim as heir to the estate of Nteto's and disposed of certain of the property.

Defendant (1) denied disposing of any of the property, and (2) tender of £25, the amount of fine to be paid for seduction and pregnancy of the late Nameka by Mpakati, which tender according to Native law and custom, Plaintiff was bound and obliged to accept. Wherefore Defendant prayed for an order compelling Plaintiff to accept the £25, and he, the Defendant, to be entitled to the estate of the late Nteto.

Plaintiff's replication —

That late Nteto was born about 1850, and Nteto's father, Mpakati, died about 1865. That late Mpakati failed to pay the fine during his lifetime, no right to do so passes to his heir. That the late Nteto during the whole of his lifetime was the property or child of the late Paponi.

Judgment was for Plaintiff as prayed, and Defendant appealed.

Pres.:—The issues involved in this case having been put to the Native assessors they state that they know of no such claim as that set up by the Defendant in this case. All cases of seduction and affiliation are settled between the parties concerned, and if no fine is paid by the seducer he has no claim to the child born as the result of his illicit intercourse, and the child becomes the property of the father of the woman seduced.

In this case it is admitted that though a fine was demanded it was not paid, the child Nteto thus became the property of Paponi and his estate, failing male issue of his own body, would devolve upon Paponi and his heirs, and Plaintiff is, therefore, entitled as the heir of Paponi to claim the estate of Nteto, and as Defendant in his plea demands that Plaintiff should accept a fine so as to place Defendant in a position to claim the estate. Plaintiff is further entitled to a declaration of his rights, and in the opinion of this Court the Magistrate in the Court below has rightly decided in Plaintiff's favour.

The Defendant's father might have secured his rights in Nameka's child by the payment of a fine, and his failure must be regarded as an abandonment by him of all his claim, and in any case Defendant must now fail, for the usual form of action under Native custom in cases such as this is for the delivery of the child, and in the present instance there is this obstacle in Defendant's way, that not only has Nteto attained the age of majority, thus placing it outside the possibility of Plaintiff or anyone else to make delivery of him without his own consent, but also he is now beyond the jurisdiction of any mundane tribunal, and Plaintiff who would have to join Nteto with Defendant in any claim which he might wish to institute would have some difficulty in effecting service of summons, or in attaching the person of Nteto in the event of his obtaining a judgment, and as there was a complete failure of Defendant's father, Mngqongile, to establish his rights in Nteto during Nteto's lifetime, it is not competent for anyone to establish rights in his property now that he is dead, and this property has passed to Nteto's heirs.

The appeal is dismissed with costs.

Umtata. 8th March, 1912. W. T. Brownlee, A.C.M.

Gola Nongoboza vs. Monelo, assisted by Velapi.

(Mqanduli. No. 40/1912.)

Seduction—Commencement of Action during Lifetime of Woman —Native Custom.

Claim 5 head or £25 as damages for seduction and pregnancy of Plaintiff's deceased daughter, Nomagaza, by 1st Defendant. Plaintiff alleged that from about the beginning of 1910 up to November, 1911, the 1st Defendant seduced and carnally knew the said Nomagaza in her lifetime, and thereby caused her to become pregnant with child to which she gave birth at Defendant's kraal about November, 1911. That the said Nomagaza died at Defendant's kraal about 10 days after she had given birth to a female child, of whom 1st Defendant was the natural father. The Defendants took exception to Plaintiff's claim, inasmuch that the Plaintiff had no cause of action, in that he admitted that Nomagaza was dead, and according to Native law and custom the Plaintiff was barred thereby, as no action had been commenced during her lifetime. That actions of this nature according to Native law and custom die with the girl, except when action had been instituted during her lifetime—and Defendants pray for the dismissal of the summons with costs. It was admitted by Plaintiff that the woman did not die from the effects of child-birth. It was also admitted a demand was sent before Nomagaza's death. The Magistrate upheld the exception and dismissed the summons.

Plaintiff appealed.

Pres.:—In the case of Mdinga versus Mzozana (Henkel 132), where the girl alleged to have been seduced committed suicide, the judgment of this Court was for the Defendant, because with the girl's suicide all evidence of the seduction had disappeared. In the case of Mdupana versus Mxoxeni, heard in Umtata on the 24th November, 1911, where a girl alleged to have been seduced, and got with child, died after having accused the seducer, but before the case was decided the Native assessors held that where a girl dies after having accused someone it is then competent to bring an action, and the case is then decided according to the evidence.

This Court is of opinion then that the right of action does not die with the girl, but depends upon testimony, and in this case the Plaintiff has not been allowed the opportunity of producing his evidence.

The appeal is allowed with costs, and the ruling on the exception set aside, and the exception is overruled and the case remitted to the Court below to be tried upon its merits.

Umtata. 26 July, 1912. W. T. Brownlee, A.C.M.

Xelelo Mdala vs. Mazombe Dunya.

(Engcobo. No. 450/1910.)

Seduction—Damages—Liability of Heir.

Plaintiff in his summons stated:—

1. That Defendant was the eldest son and heir of Dunya, deceased, and as such was the heir of his deceased younger brother Mavuso, who died unmarried.

2. That Plaintiff was the eldest son and heir of Mdala, deceased.

3. That in May and June, 1910, the said Mavuso seduced and carnally knew Nofeva, the unmarried sister of Plaintiff, and daughter of the late Mdala, whereby she became pregnant.

4. That in June, 1910, Mavuso did abduct the said Nofeva from the kraal of the Plaintiff.

5. That in consequence of this seduction, pregnancy and abduction Plaintiff has suffered damage in 6 head of cattle or £30.

Defendant's exception:

Admitted paragraphs 1 and 2.

In regard to paragraph 3 the charge was never taken to Mavuso's kraal in his lifetime, and that Mavuso left the kraal in October last, and Defendant was therefore not liable. As regards paragraph 4 Defendant claimed that no damages were payable for abduction in Tembu law unless followed by seduction. In this case it was alleged by Plaintiff that abduction was subsequent to seduction. Defendant denied that, if all the allegations of fact in summons be true, he was liable as Mavuso's heir in damages for this tort alleged. Defendant admitted that the girl was abducted by deceased in June, and remained at the kraal during a portion of that month, and fetched back by her people immediately.

Exception upheld, and Plaintiff appealed.

Pres.:—This case having been put to the Native Assessors they make the following statement of Tembu custom. Where a girl has been abducted by a man and taken to his kraal and then seduced and got with child it is not necessary to take her back there for the purpose of demanding fine, as the seduction has taken place at his kraal. In cases where a man seduces a girl and dies his heir is liable for damages. In this case there are certain points of both custom and of fact to be established. The points of custom are these.

1 Was it necessary to take the girl to the kraal of Defendant for the purpose of making a demand for damages, and in view of the statement of the Native Assessors this question must be answered in the negative.

2. Is the heir of a dead man who has seduced a girl liable to an action for damages for this seduction, and in view of the statement of the Native Assessors this must be answered in the affirmative.

The points of fact are these:—

1. Did the late Mavuso seduce the girl Nofeva.

2. And did he abduct the girl Nofeva.

The seduction is not admitted, and the abduction is admitted, and the note on the record " Facts are admitted as per clause 5 of the Exception," is not sufficient to show that the seduction was admitted, for this clause refers specifically to abduction, and to that only, and, as a matter of fact, there is nothing in the record to show by whom this admission was made. It is presumed in view of Plaintiff's attorney's intimation when the case was resumed on the 28th March, that this admission was made by him, but even assuming this, the plea and the admission still both of them leave the question of the alleged seduction untouched, and the alleged seduction remains still not admitted and not proved.

This Court gave the Plaintiff at its last hearing of this case the opportunity of having his case fully gone into, and of producing proof, but he has not chosen to do so, and this Court cannot refrain from stating its opinion that the interests of the Plaintiff have not been . . carefully safeguarded as they should have been.

The plea as it stands is incomplete, inconsistent and evasive, and the Plaintiff might have excepted to it, but instead of taking exception to it and demanding that an amended plea dealing with each point specifically should be put in, the Plaintiff accepted the plea, and proceeded with his case on the plea as it stood, and this Court is of opinion that he is not now entitled to succeed in his appeal, as upon his failure to prove what it was necessary for him to prove, it was impossible for the Magistrate in the Court below to give judgment in his favour.

The appeal is dismissed with costs.

In order, however, that the judgment should be no bar to fresh action being brought the judgment of the Court below is altered to judgment of absolution from the instance, with costs.

Umtata. 24 July, 1917. J. B. Moffat, C.M.

Pupani Vusani vs. Poni Tshezi.

(Engcobo. No. 108/1917.)

Seduction—Damages—Prescription.
Prescription—Damages for Seduction.

Claim for 5 head of cattle, or £25 damages, in respect of the seduction and pregnancy of Plaintiff's sister in 1890. The child born being now above the age of 21 years.

The Magistrate gave judgment for Plaintiff as prayed, and Defendant appealed.

Pres.:—Facts put to Tembu Assessors, who reply:—

"According to Native custom damages for seduction and pregnancy are demanded during the minority of the child. If the child grows up before damages are claimed he or she becomes finally the property of his or her mother's family. No damages can be demanded after the child has grown up."

Following the custom as laid down by the Assessors, the Plaintiff has no claim for damages against the Defendant.

The appeal must therefore be allowed with costs, and the Magistrate's judgment will be altered to judgment for Defendant with costs.

Umtata. 19 November, 1912. A. H. Stanford, C.M.

Zentshutu Mgcunu vs. Sibonda Daniso and Daniso.

(Engcobo. No. 350/1912.)

Seduction—Death of Girl—Litis Contestatio—*Liability of Seducer.*

Claim for 4 head of cattle or £20 (1 head having been paid on account and which was still in the possession of the Headman), as and for damages for seduction and pregnancy of Plaintiff's unmarried daughter by the first defendant. The girl died before this action was brought.

Defendants denied all the allegations in the Plaintiff's summons.

Judgment was given for Plaintiff as prayed.

Defendants appealed.

Pres.:—It is clear from the evidence that the case was taken to the Headman during the lifetime of Respondent's daughter; the Appellants there admitted the charge and their liability and paid one beast on account, which is still in the possession of the Headman, presumably collected by the Messenger, who naturally awaits the completion of the payment before handing over to the Respondent.

It is obvious that the Appellants have availed themselves of the opportunity caused by the death of Respondent's daughter to evade their liability, and now contest a matter which, had the girl lived, would assuredly not have been brought into Court.

The appeal is dismissed with costs.

Kokstad. 25 August, 1917. J. B. Moffat, C.M.

M. Ludidi vs. S. Nonganga.

(Matatiele. No. 379/1916.)

Seduction—Deposit Held to be Fine not Pledge.

Pres.:—There is no question that two head of cattle were paid. It is alleged by Plaintiff that these were paid as a pledge and that they were to be returned if the girl was found not to be pregnant.

The evidence shows that Plaintiff's son seduced Defendant's daughter. The Plaintiff paid two head of cattle. He alleges as stated that they were paid as a kind of pledge or deposit, which was to be returned if the girl was not found to be pregnant.

Whether the girl was pregnant or not, Plaintiff was liable to pay a fine. Payment of such a pledge or deposit as is alleged under the circumstances is unknown under Native custom, and this Court considers that the Magistrate could have come to no other conclusion than that arrived at by him, viz., that the two cattle were paid as fine for seduction, and that Plaintiff has no right to recover them.

The appeal is dismissed with costs.

Umtata. 27 November, 1913. W. T. Brownlee, A.C.M.

Sikali Mbini vs. Talalisa Tshaka.

(Umtata. No. 361/1913.)

Seduction—Disposal of Fine Paid if Girl Seduced by Person other than Proposed Husband—Tembu Custom.

The Plaintiff claimed for the restoration of his wife, who had deserted him, or return of the 7 head of cattle paid as dowry, including 1 beast paid as an elopement fee to Defendant, by one Cetywayo, before the consummation of his (Plaintiff's) marriage to Defendant's daughter, but after payment of dowry. The Magistrate found that two children had been born and a wedding outfit provided. He also found that the beast was paid by Cetywayo prior to Plaintiff's marriage to Defendant's daughter and after payment of dowry.

The Magistrate gave judgment for plaintiff for 3 head of cattle, holding that the beast paid by Cetywayo did not form portion of the dowry paid for Defendant's daughter.

Plaintiff appealed.

Pres.:—The appeal in this case is brought in respect of the beast paid as fine by Cetywayo, and it is argued by Plaintiff's attorney that as this beast was paid after the receipt of dowry by the Defendant from Plaintiff for his daughter, Mohengise, the beast is the property of the Plaintiff and cannot belong to Defendant.

The above point was put to the Native Assessors, and they say that, according to Tembu custom, when dowry has been paid for a woman and she is seduced by some person other than her proposed husband, and the seducer pays a fine, such fine is taken by the girl's father and handed to the proposed husband so as to make good the woman whom he was about to marry. In view of this opinion this Court is of opinion that the Plaintiff should succeed in his claim to this beast, and the appeal is allowed with costs, and the judgment of the Court below is altered to judgment for Plaintiff for four head of cattle and costs of suit.

Umtata. 29 November, 1915. W. Power Leary, A.C.M.

Gcaliso Conana vs. Qaya.

(Engcobo. 1915.)

Seduction—Fine cannot be kept as Maintenance.

Interpleader action in which cattle were declared executable.

Pres.:—The cattle in question were paid for the pregnancy of the daughter of the judgment debtor, and were paid as a fine to her grandfather, who had brought her up. The grandfather has a claim for maintenance; he might be entitled to retain one or more of these when Dliso sends for them; he might even claim a beast for his services in exacting the fine. At present the stock belongs to the father.

The case being put to the Native Assessors, they state:—

"The grandfather reported to the father, who instructed him to exact the fines. The cattle are the property of the father and could be seized for his debts. The balance of the cattle are still to be paid, and the grandfather has the girl; he has a lien on her."

The appeal is dismissed with costs.

Umtata. 19 March, 1917. J. B. Moffat, C.M.

Nziweni Mayekiso vs. Petros Sifuba and Sifuba.

(Engcobo. No. 22/1917.)

Seduction—Heirs' Liability—Kraal Head.

Plaintiff claimed 5 head of cattle for the seduction and pregnancy of his daughter by 1st Defendant. Defendant No. 2 pleaded

that 1st Defendant was dead and that he was not liable for the torts committed by him, as death took place before his (Defendant No. 2) liability was fixed upon him by any legal procedure.

The Magistrate gave judgment for Plaintiff as prayed, the Defendant not being liable beyond the value of his late son Petros' estate.

Plaintiff appealed.

Pres.:—The summons as amended was against Sifuba in his capacity as heir to the late Petros Sifuba and also in his capacity as Kraal Head.

As heir to his son Petros, Defendant would only be liable to the extent of Petros' estate.

As Kraal Head, however, Sifuba is liable for the whole amount, irrespective of whatever property Petros possessed.

If Petros were alive and had no property whatever, Sifuba would be liable for the whole amount.

Petros' death cannot relieve him of this liability. The point having been put to the Tembu Assessors, they agree with this view.

The appeal is allowed with costs, and the judgment is altered to judgment for Plaintiff as prayed with costs.

Umtata. 5 March, 1914. W. T. Brownlee, A.C.M.

Dayimani vs. Mbovane Rebe.

(St. Marks. No. 120/1912.)

Seduction—Husband's Claim when Discovered only after Marriage.

Claim for 5 head of cattle or £25 damages for seduction.

The Magistrate gave judgment as prayed.

The facts of the case are fully disclosed in the President's judgment.

Pres.:—In this case the appeal is brought by the Defendant Dayimani alone, and two points are raised in appeal.

Firstly, that as the seduction complained of is alleged to have taken place before Plaintiff married the woman Nofiva and paid dowry for her, he can have no claim for damages, and, secondly, that as Defendant, Hom, is a major, he alone is responsible for his torts.

The first point has been decided in the case of *Tshetsha* vs. *Mavolontiya* (I. N.A.C., p. 111), where it was laid down that where pregnancy is discovered after dowry has been paid and the *duli* has left, the husband has a right of action for damages; and the second point has been decided in the case of *Daniso* vs. *Makinana* (I. N.A.C., p. 86), where it was laid down that a Kraal Head is responsible for the torts of all inmates of his kraal, even though such inmates have attained the age of majority. It is clear from

the evidence that the woman's father, though he knew of the seduction, took no action, and he has thus by giving the woman to the Plaintiff waived all right of action, and it is equally clear that the Plaintiff was not aware of the woman's condition till some time after the marriage. The evidence shows also that the Appellant is the head of the kraal in which the Defendant, Hom, lives

The appeal is dismissed with costs.

Umtata. 11 March, 1912. A. H. Stanford, C.M.

Fosi vs. Stanford and Nomyayi.

(Engcobo. No. 53/1912.)

Seduction—Kraal Head Responsibility.
Magistrate's Jurisdiction—Residence.

Claim for 5 head or £25 damages for seduction and pregnancy of Plaintiff's sister, and whereupon Plaintiff stated:—

1. That he was brother and guardian of his minor sister, Jemimah.

2. That 1st Defendant eloped with and did seduce and carnally know Jemimah about two years ago, thereby causing her to become pregnant and give birth to a male child.

3. That 2nd Defendant was head of the kraal at which 1st Defendant resided.

Defendant No. 2 pleaded that his son, No. 1, was a major and married and was and had been for the past three years and upwards residing beyond the jurisdiction of this Court. It was proved that for the past three years No. 1 had been absent from the district and working in the Colony.

The Magistrate dismissed the summons, and Plaintiff appealed.

Pres.:—This is an action brought in the Court of the Resident Magistrate, Engcobo, by Fosi against Stanford and Nomyayi, the latter as Head of the Kraal and as such responsible and liable for the torts of the former, claiming damages for the seduction and pregnancy of a girl named Jemimah, the minor sister of Plaintiff, who sues as guardian of this girl. The defence is by exception that the 1st Defendant is not within the jurisdiction of the Court. By the provisions of the Proclamation Constituting the Courts of Resident Magistrates in these Territories, Magistrates have jurisdiction in all civil cases over and against all persons residing within their districts. The evidence in the case shows that 1st Defendant left the Engcobo District over two years ago and consequently, following the judgment of the Supreme Court in the case of *Mgadi* vs. *Temba* (Juta, Vol. 22, p. 574), is not within the jurisdiction of that Court. The 2nd Defendant's liability is a contingent one under Native custom, and he only becomes responsible for the tort alleged to have been committed by the 1st Defendant while an

inmate of his kraal, upon proof and judgment against the 1st Defendant, which at the present time cannot be obtained; this, however, is the result of the Appellant's failure to bring his action at a time when the Court still had jurisdiction over 1st Defendant.

The appeal is dismissed with costs.

Umtata. 23 November, 1916. C. J. Warner, A.C.M.

Edmund Ntikinca vs. Xamxam Mzilikazi.

(Mqanduli. No. 266/1916.)

1. Seduction—Law Applicable—Civilised Native.
2. Practice—Seduction—When Native Custom Applicable.

Claim for 5 head of cattle or £25 damages for seduction and pregnancy of one Violet, daughter of Plaintiff.

Defendant pleaded that the case should be tried according to the law of the Colony for the following reasons:—That Defendant's father was a Christian and that Defendant was also a civilised Native and was baptised and married in a Christian Church. That Defendant was educated and employed as an attorney's clerk. That the girl Violet was a civilised Native girl, attended Church and was a member of a Christian Church.

The Magistrate ruled that the case would be tried according to Native law, and Defendant appealed.

The attorney for Respondent objected to the appeal being heard on the ground that the ruling of the Magistrate in the Court below is not a final order or definitive sentence which can be appealed against. In view of the cases of *Dumara* vs. *Smayile and Another* (1, Henkel, p. 267) and *Poney* vs. *Nyeleka and Others* (4, Juta, p. 219), the Court holds that the ruling of the Court below is such a final and definitive ruling, and can be appealed from.

Pres.:—Section 22 of Proclamation 140 of 1885 states that where all the parties to a civil suit are what are commonly called Natives, it may be dealt with according to Native law, and in the case of *Poney* vs. *Nyeleka and Others* (4, Juta, p. 219) the Supreme Court held that this section vests in the Magistrate's full discretion in cases between Natives, to adjudicate under the Native law. Further, in the case of *Sekeleni* vs. *Sekeleni* (21, Supreme Court Reports, p. 118), the learned Chief Justice ruled that the word "may" in section 22 of the Regulations means "shall," and that as a general principle cases between Natives should be decided according to Native law. During the argument the Court was directed to the cases of *Somara* vs. *Smayile and Another* (1, Henkel, p. 267), *Gwayi* vs. *Gwiji* (1, Henkel, p. 235), and *Mboniswa* vs. *Gasa and Another* (1, Henkel, p. 264).

In the first of these cases it was shown that the parties had abandoned Native customs and modes of life and were living each on his own farm. The summons, moreover, included a claim which

is not known to Native law. The second case was brought under Colonial law, and was a claim for breach of promise of marriage, which is unknown to Native law, and for seduction. In the third case it was shown that the second Defendant, whom it was sought to make liable for the torts of his son, was a deacon of the Church of England and had abandoned Native customs, and, further, that his son was not living with him at the time he committed the tort.

In the present case the Defendant is sued alone, and there is no attempt to make his father liable for his actions; moreover, there is nothing before the Court to show that the parties have abandoned Native customs and modes of life and are living as Europeans. It does not necessarily follow that because Defendant was educated and baptised and married in a Christian Church that he has abandoned all Native methods of life and customs.

For these reasons this Court is of opinion that the Magistrate in the Court below has not exercised his discretion unreasonably, and the appeal is dismissed with costs.

Butterworth. 7 November, 1912. A. H. Stanford, C.M.

Abner Mbuli vs. Dyer Dingiswayo.

(Nqamakwe. No. 134/1912.)

Seduction—Maintenance of Child.

Actions must be either under Native or common law.

Claim for £1 per mensen for maintenance and support of Plaintiff's sister's child, of which Defendant was the father, the Defendant having wrongfully and unlawfully seduced the Plaintiff's sister, who gave birth to a male child. Exception was taken by the Defendant that as the action was brought under Colonial law the proper person to sue was the girl, who, according to Plaintiff's summons, was a major. Further, the mother of the girl was still alive. It was admitted by the parties that damages were paid according to Native custom for the seduction and pregnancy of Respondent's sister.

The Magistrate overruled the exception, and Defendant appealed.

Pres.: It is admitted that the Respondent sued Appellant for damages for the seduction and pregnancy of his sister under Native custom, and obtained judgment for three head of cattle or £15, which was paid. According to Native custom Respondent on this payment must maintain the child for a reasonable period and later he will have an action for maintenance (isondhlo). It would not be reasonable after his having elected to proceed under Native custom, and succeeded, to allow Respondent a second action according to Colonial law—and under Colonial law also the Court is of opinion that Respondent has no *locus standi*, the action for maintenance, if it could now be brought, could only be maintained by

the mother of the child, who is a major. The Court is, therefore, of opinion that exception No. 1 should have been allowed in the Court below. The attorney for the Respondent has argued that having made a tender of 8s. to the letter of demand Appellant is now barred, but the claim in the letter of demand is of a totally different nature from the one made in the summons. The claim in the demand is for a beast to be delivered to Respondent for the support of the child (presumably a cow for milking), a thing which is sometimes done by Natives in such circumstances, whereas the claim in the summons is for £1 per month for an indeterminate period.

For the reasons given the appeal is allowed with costs, the Magistrate's ruling set aside, exception No. 1 being upheld with costs.

Umtata. 5 March, 1914. W. T. Brownlee, A.C.M.

Willie Nquma vs. Jemima Koni.

(St. Marks. No. 69/13.)

Seduction—Personal Action by Woman Seduced—Locus Standi—*Common Law.*

Claim for £25 damages for seduction.

Defendant excepted to the summons:—

1. That Plaintiff was a married woman;

2. That Plaintiff was a daughter of a marriage according to Native law and custom.

The Magistrate dismissed the exceptions and Defendant appealed.

Pres.:—The appeal in this case is against the ruling of the Court below on the two exceptions raised, namely, (*a*) that as the woman is a married woman the only person entitled under Native custom to raise an action is her husband, and (*b*) the Plaintiff being a female, she has no *locus standi* under Native law to sue for either damages or maintenance.

With regard to the first point, the evidence discloses that the woman is not married, and it is not necessary to comment further thereon.

With regard to the second point, section 22 of Proclamation 140 of 1885, under which jurisdiction is conferred upon Courts of Resident Magistrates in Tembuland, provides that the law to be applied shall be the law of the Colony of the Cape of Good Hope, further provision is, however, made that where both parties to any suit are Natives Native law *may* be applied; and here it is of importance to note the verbiage of this section, for with regard to the common law of the Colony the directory word "shall" is employed, while in the case of Native law the permissive term "may" is used. It is argued for the Appellant that the word "may" should be read as though it had been "shall," and the decision in the case

of *Sekeleni* vs. *Sekeleni* (21, S.C. 118) is referred to, in which the learned Chief Justice remarks that "he would have read the Act as if words had been 'shall be dealt with according to Native law,'" and it is argued that the learned Chief Justice regards the word "shall" as the proper word to be used and understood in this section.

It is clear, however, that in the remarks quoted the learned Chief Justice was not giving an interpretation of the law, but was merely stating how in his opinion "he," *i.e.*, the Magistrate, "would interpret the Proclamation."

It seems clear that while Native law may be applied, yet the common law shall be applied, and in the opinion of this Court no one may be prevented from availing himself or herself of the common law where it only is applicable; and it seems clear that the provision of this section was intended to make provision for cases where the common law does not apply, and, indeed, in the case now before the Court the common law is the only law under which the Plaintiff may obtain a remedy. For under Native law she can have none, and if it is to be insisted upon that she must bring her action under Native law then she is being shut out from all redress.

Another section of the Proclamation above referred to provides that all persons, whether male or female, are majors as soon as they have attained the age of twenty-one years. The evidence discloses that the Plaintiff is twenty-two years. And the Plaintiff, being a major and unmarried, has the right of action and may sue without assistance; and under the provisions of the section just referred to she has the right of bringing the action under the common law, which, indeed, is the only law applicable to the action which she has instituted.

The appeal is dismissed with costs.

Butterworth. 4 March, 1913. A. H. Stanford, C.M.

Albert Nondlwana vs. S. Lubaxa.

(Willowvale. No. 220/1912.)

Seduction—Person to whom Girl Allotted Should Bring Action.

Claim for 2 head of cattle or £10 damages for seduction.

Defendant excepted to the summons that Plaintiff was not the eldest brother of the family and therefore not entitled to sue.

The Magistrate upheld the exception and dismised the summons.

Plaintiff appealed.

Pres.:—The question having been submitted to the Native Assessors, they state that, according to custom, when a sister is allotted by the father or lawful guardian to one of her brothers and subsequently lives with him at his kraal, such a brother has a right of action to recover damages for the seduction of his sister.

In the present case it is common cause that such allotment was made and that the girl in question, Jane Lubaxa, is living with the Appellant. Seeing that he has such interest in the girl, the Court is of opinion that he has a right of action.

The appeal is allowed with costs, the Magistrate's ruling on the exception set aside, and the case returned to be heard on its merits.

Kokstad. 27 August, 1913. A. H. Stanford, C.M.

Maweni vs. Ngcongolo.

(Matatiele. No. 294/1912.)

Seduction and Pregnancy—Engagement Cattle—Ownership Pending Marriage.

Interpleader action in which the cattle were declared not executable.

Pres.:—The evidence shows that the claimant, Ngcongolo, became engaged to Hlekwase, the daughter of Mciteki, the judgment debtor, and that five cattle were paid on account of dowry. It is admitted that during the course of the engagement Hlekwase became pregnant by Ngcongolo, and the Appellant has endeavoured to prove that a marriage took place, but the Court is satisfied that this is not the case. There was no *duli* party and no evidence whatever of any formal handing over of the girl, and even if she did stay for five months at the Claimant's kraal, which is doubtful, it is clear that she went there to report her condition. This is stated by Appellant's own witness, Mabaku. It is well known that cattle paid as dowry on account of a marriage to be subsequently entered into remain the property of the person paying until the marriage is completed, but the question now arises whether or not owing to the pregnancy of the girl caused by Ngcongolo, Mciteki has obtained such a right in them as would constitute ownership and render them liable to execution at the instance of a third party.

This question having been submitted to the Native Assessors, they state that this is not the case, and that the animals rank as engagement cattle until such time as the marriage takes place or the engagement is broken off, when they will become liable as fine for the pregnancy.

The Court sees no reason to dissent from the views expressed by the Native Assessors.

The appeal is dismissed with costs.

Umtata. 23 July 1915. W. T. Brownlee, C.M.

Rama Sobuwa v. (1) Nqweniso Tyelembola, (2) Hlukaniso Makwenkwana.

(Cofimvaba. No. 57/1913.)

Seduction and Pregnancy—Fine Paid in Error for Pregnancy is Recoverable.

Claim for 4 head or £20, being overpayment of damages paid for seduction and pregnancy.

Pres.:—In this case the Appellant, Plaintiff in the Court below, paid Respondent four head of cattle in the mistaken belief that his son had caused the pregnancy of Respondent's ward. Subsequently he ascertained that the girl was not pregnant, and sent Messengers to have the girl examined. Respondent refused to allow the examination. The Appellant now claims the restoration of the cattle paid as fine, which in his summons he alleged he was induced to pay by false and fraudulent representation.

Respondent denies that his statements were false and fraudulent. He admits having received the stock claimed in the summons, and his attorney states that there was pregnancy, but that the girl had a miscarriage.

The case rests entirely on Native custom. Was it incumbent upon Respondent to report to Appellant that the girl had a miscarriage?

The case having been put to the Native Assessors, they state: "The guardian got the fine without trouble. They should not have trampled upon the clot of blood; they should have reported. Their destruction of the clot shows that the girl was not pregnant, and the fine in such cases can be recovered.

This opinion and statement of Native custom is supported by that given in the case of *Votatsala* vs. *Zenani* (page 209, N.A.C.I.), which is identical with the present case.

The appeal is allowed with costs, and the judgment in the Court below altered to one for Plaintiff for four head of cattle or £20 and costs.

Umtata. 19 November, 1913. W. T. Brownlee, A.C.M.

Albert E. Gobodo vs. Lydia Ngomana.

(St. Mark's. No. 79/1913.)

Seduction—Right of Action for Maintenance of Woman.

Claim for £200 maintenance of child or £1 5s. per mensem until child attained age of 16 years.

Plaintiff stated that Defendant had carnal knowledge of her, whereof she was delivered of a female child.

Defendant excepted to Plaintiff's claim on the grounds that she had no right to avail herself of Colonial law for these reasons:—

(*a* That Plaintiff was a daughter of a marriage celebrated according to Native custom.

(*b*) That her parents have not embraced Christianity and they have not freed themselves from Native customs.

(*c*) That Plaintiff was under Native law, the property of her father or heir in her mother's house, and thus the said child was also her father's property.

The Magistrate dismissed the exception.

Defendant appealed

Pres.:—In the opinion of this Court the ruling of the Court below on the exception is correct and must be sustained. In the case of *Gwayi* vs. *Gwija* (I. N.A.C. 235) this Court affirmed the principle that a Native woman might sue for damages for seduction, and also that though a Native under the provisions of section 23 of Proclamation 140 of 1885 may have a case tried under Native custom, yet such Native is not compelled to do so, and in the case of *Ndungane* vs. *Nxiweni* (II. N.A.C. 140), where the claim also was one for damages for seduction and breach of promise, this Court held that the Magistrate had rightly dealt with the suit under Colonial law. Indeed, under the peculiar circumstances of this case, it is difficult to see what other law could be applied. The Plaintiff's father has no *locus standi* for having first of all contracted a legal marriage, and this marriage still subsisting he put it out of his power to contract a marriage under Native custom, and any issue of such marriage is illegitimate.

The appeal is dismissed with costs, and the case is returned to the Court below to be tried upon its merits.

Umtata. 21 November, 1912. W. T. Brownlee, A.C.M.

Mtayini Mbongwana vs. Nombokotwana Ngolozela and Ngolozela Cila.

(Mqanduli. No. 446/1912.)

Seduction—Right of Father to Sue for Damages.

Claim for 5 head or £25 damages for seduction and pregnancy of Plaintiff's daughter.

Judgment for Plaintiff as prayed.

Defendant appealed.

Pres.:—The principles involved in this case have been decided by this Court upon various occasions, more especially in the case of *Daniso* vs. *Makinnon* (H.N.A.C. 86). In that case the Defendant, Makinnon, was sued in his capacity of Kraal Head and for damages for a tort committed by his son, Fountain, and there the

defence set up by Makinnon was that his son Fountain had attained the age of twenty-one years and was under the provisions of section 38 of Proclamation 110 of 1879 a major and therefore himself, and himself alone, responsible for his own torts. The Resident Magistrate of Butterworth upheld the defence set up by Makinnon and gave judgment in his favour, but this Court upon appeal reversed the Magistrate's decision and held that Native custom was applicable to that case, and that the Defendant could not take advantage of the section referred to for the purpose of ridding himself of the responsibility for torts committed by any inmate of his kraal.

If, then, Native custom applies in that case it must equally apply in the case now before the Court, for if the Court will refuse to relieve a Native parent of responsibilities involved by a peculiar provision of Native custom, much more will it refuse to deprive a Native father of a privilege conferred upon him by the same custom and which is not inconsistent with or repugnant to our own law and custom. It has also been argued that in any case the person injured is the Plaintiff's daughter and not the Plaintiff himself, but in the opinion of this Court in cases of this kind it is the Native father who suffers real injury, for while among Europeans the injury is more to the outraged sense of propriety and morality, yet in Native cases the injury is real and material, for the father looks to his daughters to build up the fortunes of his house by means of their dowries, and the deflowering of any of his daughters has the immediate effect of depreciating her marriageable value.

In this connection also the Native axiom applies: "No man may eat his own blood." This is a case brought under Native custom, and it must be decided under Native custom, under which the father is the proper person to sue.

The appeal is dismissed with costs.

Umtata. 18 March, 1915. W. Power Leary, A.C.M.

Daniso Ntloko vs. Jim Tseku.

(Libode. No. 11/1915.)

Seduction—Subsequent Pregnancies—Damages for—Pondo Custom.

Claim for 5 head of cattle, less 1 head paid on account, or £20 damages for pregnancy of Plaintiff's daughter, one Lydia.

The Magistrate held that as the parties resided in Pondoland, they were subjected to Pondo law and custom.

The Magistrate gave judgment for 3 head or £15 and costs, less 1 beast or £5 paid on account, viz., 2 head or £10 and costs.

Pres.:—This is an appeal from a judgment of the Magistrate, Libode. The Plaintiff sues Defendant for damages for the seduc-

tion and pregnancy of his daughter. From the evidence it appears that Defendant on a previous occasion seduced and made this girl pregnant and paid five head of cattle as a fine. In his plea, Defendant admits that he caused the pregnancy of Plaintiff's daughter Lydia, and pleads:—

Firstly: That Plaintiff is a Gcaleka and that Defendant is Fingo, and that according to their custom Plaintiff is only entitled to claim three head of cattle in respect of the seduction and pregnancy of his daughter.

Secondly: That Plaintiff's said daughter Lydia was seduced and made pregnant in 1911 by Defendant, and for which seduction and pregnancy he received in payment of damages five head of cattle, and therefore Plaintiff is not entitled to claim damages for a further pregnancy of his daughter.

Thirdly: That previous to the issue of summons Defendant paid Plaintiff the sum of £5, which sum Plaintiff accepted in satisfaction of his claim against Defendant. Wherefore Defendant prays for judgment with costs.

The question of custom has been fully dealt with by the Magistrate in the Court below and this Court concurs with his views on that point. Defendant's payment of the five head of cattle on the first occasion was in itself an acceptance of Pondo custom. See also case referred to (N.A.C.I.) 1, *Patsna* vs. *Daniel*. In reference to the question of £5 being paid and accepted as full settlement of the claim, the Magistrate did not believe the witnesses for the Defendant. The question of paying by instalment, *i.e.*, where one beast is offered and taken away by the Claimant or his messenger was put to the Pondo Assessors.

Jiyajiya states: If I make a girl pregnant I have to pay damages. To escape paying further damages, I must marry her; if I do not and make her pregnant again I would have to pay again, and so one for each pregnancy. The payment of one beast is taken as an "Intlonze" and further cattle may be demanded. It is taken as an acknowledgment and admission that he owes five head of cattle. It is not necessary to report to the headman when the parties intend to settle the matter amicably.

The Court can find no reason to disturb the Magistrate's judgment.

The appeal is dismissed with costs.

Before dealing with the merits of the case an application was made by Respondent's attorney to put in certain affidavits. This the Court refused as irregular.

Flagstaff. 2 September, 1914. W. T. Brownlee, A.C.M.

Coster Conjwa vs. John Jwengu.

(Lusikisiki. No. 219/1914.)

Seduction—Subsequent Pregnancies—Liability of Seducer—Pondo Custom.

The facts of the case are fully set forth in the President's judgment.

Pres.:—In this case the Magistrate in the Court below has found that the woman Harriet has been made pregnant on various occasions, and with this finding this Court sees no reason to interfere. The only point then remaining to be decided is whether a fine is recoverable in the case of a subsequent pregnancy. The point being put to the Pondo Assessors, they state that under Pondo custom a father may demand fines for the pregnancies of his unmarried daughter, no matter how many they are, and that the fines to be paid in each case is the usual fine, though there are cases in which by reason of the offender's poverty he pays less. This statement of custom is in harmony with the statement by the West Pondo Assessors in the case of *Swelindawo* vs. *Nyekeni* (N.A.C. 1894-1909, p. 267).

This Court is therefore of opinion that the Plaintiff is entitled to demand damages even though his daughter may have had illegitimate children, and that the Magistrate in the Court below has erred in his ruling upon the exception raised by the Defendant.

The appeal is allowed with costs and the ruling of the Court below is set aside, and as Defendant admits causing the pregnancy of Harriet, judgment is entered for Plaintiff for three head of cattle and costs.

Butterworth. 23 July, 1914. W. T. Brownlee, A.C.M.

Joel Maqungu vs. Mvakendlu and Elijah Baleni.

(Tsomo. No. 96/1914.)

Seduction—Subsequent Pregnancies—Transkei Custom.

Claim 3 head or £15 damages for seduction and pregnancy of Plaintiff's sister, who gave birth to a female child.

Defendant pleaded that Plaintiff's sister being a dikazi no damages were recoverable.

The Magistrate gave absolution from the instance with costs, holding that the woman was a "dikazi," damages cannot be recovered (*Zidlele* vs. *Matshamba*, N.A.C.1., p. 263.)

Plaintiff appealed.

Pres.:—The Appellant's attorney cites the case of *Mgwebi* vs. *Ben Jele* (No. 98 of 1895, not reported, in which this Court allowed one beast for a second pregnancy) and also the case of *Mzwakali* vs. *Mahlati* (Vol. II, Henkel, p. 31), and the matter at issue having been placed before the Native Assessors, they state that according to Native custom in the Transkei a man may demand damages for two pregnancies of his unmarried daughter but not for three, and that the amount of damages for the second pregnancy will be anything up to three head of cattle in the discretion of the Court, according to the care exercised by the father over the daughter.

In view of the cases cited and of this statement of custom, this Court is of opinion that the Magistrate in the Court below has erred in his decision, and the appeal is allowed with costs and the ruling set aside and the case remitted to the Court below to be tried upon its merits.

The case of *James Jama* vs. *Veldman*, cited by the Respondent's attorney, does not meet the present case, for in that case the woman in question was a widow, and no damages are claimable under Native custom outside of Pondoland for intercourse with a widow.

Umtata. 7 August, 1914. W. T. Brownlee, A.C.M.

Cqilipela Tanyana vs. James Mabija.

(St. Marks. No. 21/1914.)

Seduction—Usual Fine—Regarded as Damages and not Dowry.

Claim for 3 head of cattle or £21 paid for a contemplated marriage.

The Defendant pleaded that the said cattle were paid as fine and not as dowry.

The Magistrate gave judgment of absolution from the instance with costs.

Plaintiff appealed.

Pres.:—In this case it is argued for the Appellant—the Plaintiff in the Court below—that the Magistrate in the Court below has admitted into his decision matters of fact not raised in either the summons or pleading. (See Nathan, Vol. 4, p. 2002.)

Inasmuch as he has found on the evidence that there was a marriage between the late Malangeni and the Defendant's ward Mina, while the summons and pleadings are on agreement that there was no such marriage. And while this Court is of opinion that the Magistrate has erred in admitting these matters of fact, yet it is of opinion that upon other grounds the appeal should fail.

It is clear from the evidence that Malangeni eloped with Mina, and that Mina was seduced and got with child. The Magistrate in the Court below is doubtful whether Malangeni was the seducer; but this Court is of opinion that there can be no doubt upon this

point, and that had anyone else been the seducer Plaintiff would have paid neither fine nor dowry.

It is quite in accordance with Native custom that where a young man has seduced a young woman and a fine is demanded by the guardian the young man offers the reparation of marriage. And in such cases, if the parties agree and a marriage takes place, the cattle paid are all regarded as dowry, whether originally paid as fine or not. The Native Assessors state, however, that in cases such as this the seducer is not regarded as having cleared himself till he has paid more than the amount usually demanded as a fine, that is, in the case of seduction and pregnancy, five head; they further state that parties may, between themselves and out of friendship, agree to anything, even though it be not in accordance with custom, but where there is disagreement then the Native courts apply custom. And in this case as there was no marriage and no completion of fine, the cattle must be dealt with as though they had been paid as a fine, even though it had been agreed that there should be a marriage. This Court sees no reason to dissent from this statement of Native custom, and is of opinion that since there has been no marriage, and no condonation of the offence, the Plaintiff is not entitled to succeed.

The appeal is dismissed with costs.

Umtata. 26 July, 1913. A. H. Stanford, C.M.

James Sontundu vs. Student Damane and Jongilanga Damane.

(Mqanduli. No. 252/1913.)

Seduction—Woman's Evidence as to Paternity—Native Custom.

Claim for 5 head of cattle for seduction and pregnancy of Plaintiff's sister by first Defendant.

First Defendant denied the Plaintiff's claim.

Second Defendant pleaded that he was not liable for the torts of the first Defendant.

The Magistrate found for Defendants with costs, and Plaintiff appealed.

Pres.:—The case having been submitted to the Native Assessors, they state: "Under Native custom, if intercourse is proved, the woman's statement as to the paternity is usually believed, although more than one man may have visited ("metshaed") her, but there are cases where if it is shown that these men all visited her about the time conception took place, then the case is postponed until the birth of the child, and the case goes against the man to whom it bears resemblance."

Had this action been tried under Colonial law, the reasons of the Magistrate would have carried great weight, but this is not

the case; it is one brought by the brother of the girl, who under Colonial law would have no right of action, consequently Native custom must apply.

The witness Reinet Sontundu accuses the Respondent of causing her pregnancy, and there is clear proof of intercourse between them. It is evident that directly the girl discovered the cessation of her menses, she told the Respondent, and her selection of him at that early date is strong proof of her *bona fides*, and this view is supported by the letter marked "B" written to her by the Respondent. Does he there say: "What are you telling me this for; I have never had intercourse with you?" No; his letter shows that intercourse had taken place and that he is most anxious to know the time of the cessation of her periods, and proves the untruthfulness of his evidence when he denies that he ever had intercourse with her. Thus, on this ground there is no reason for preferring his evidence to hers. In view of the opinion expressed by the Native Assessors and the proof of intercourse in the evidence, the Court is of opinion that the Magistrate should have accepted the girl's evidence as to the paternity of her child.

The appeal is allowed with costs, and judgment in the Magistrate's Court altered to judgment for the Plaintiff against the first Defendant for five cattle or £25 and costs of suit, the option of paying in cattle or money being with the Defendant.

Absolution from the instance with costs in regard to the second Defendant.

The Court wishes to draw attention to the plea filed by the Defendant's attorney, which is not in accordance with the requirements of Rule 449.

Umtata. 9 August, 1912. W. T. Brownlee, A.C.M.

Sipala vs. Mfanekiso.

(Umtata. No. 257/1912.)

Spoliation—Constructive Possession.

Action by Plaintiff for spoliation.

The Plaintiff claimed a barrel or its value, £2, and stated that Defendant wrongfully and unlawfully entered and trespassed upon Plaintiff's hut, wherein such barrel was, and did wrongfully and unlawfully and by force carry off the said barrel, and has since detained same against the will of the Plaintiff.

Defendant pleaded:—

That the Plaintiff was not the proper person to bring the action, inasmuch as he (Defendant) removed the barrel from Gushelo's hut, a neighbour of Plaintiff, and that Gushelo was the proper person to institute the proceedings.

The Magistrate upheld the exception, and Plaintiff appealed.

Pres.:—In this case the Magistrate in the Court below has found upon the evidence that the barrel was removed from the hut of Gushelo, and this Court cannot say that he has erred in this decision. Gushelo and Plaintiff's wife disagree upon a material point in their evidence, for while the latter says that Gushelo did have a beer-drink and invited his friends to it, he says that he never had any beer-drink, and in the opinion of this Court this denial is made with a view of strengthening the contention that the barrel was not in his hut. On the legal aspect of the case the following authorities are cited by the Appellant's attorney: Van Leeuwen (Vol. IV, p. 41), Addison on Torts (p. 480), *Kemp* vs. *Rope* (Appeal Court Reports, 141), Nathan (Vol. I, paragraphs 564, 567, 568 and 649), and by the Respondent's attorney: Mooris (p. 65), and after hearing lengthy arguments this Court is of opinion that the Plaintiff should have succeeded in his claim, for even conceding that the barrel in question was in the hut occupied by Gushelo at the time it was taken by the Defendant, it was still in the constructive possession of Plaintiff and he was entitled to institute proceedings for its recovery. The act of spoliation is not denied, and the defence relied upon is that Plaintiff in this case has no ground of action.

Appeal is allowed with costs and the judgment in the Court below is altered to judgment for Plaintiff for the delivery to him of the barrel in question or 5s. and costs. This Court, in view of the fact that the hut trespassed upon was at the time in the occupation of Gushelo and not of Plaintiff, does not consider that Plaintiff is entitled to damages for trespass.

Kokstad. 5 May, 1914. W. T. Brownlee, A.C.M.

Leqeku vs. Nathtali Ntsle.

(Matatiele. No. 182/1913.)

Spoliation—Property Temporarily out of Plaintiff's Possession—Damages.

Spoliatory action in respect of certain mare, saddle and bridle, temporarily lent to one Ntsita by Plaintiff, and damages of £2. Plaintiff stated that he had lent the mare, saddle and bridle to Ntsita and that near Moshesh's kraal Defendant spoliated the said mare, saddle and bridle from Ntsita and now detains them against Plaintiff's will and consent and refuses to hand them up.

Defendant admitted possession of the mare, saddle and bridle, but denied spoliation and claim for damages.

The Magistrate gave judgment for Plaintiff as prayed, finding that the horse had been lent to Plaintiff's brother for the day.

Pres.:—In this Court the appeal is urged upon the ground that the property said to have been spoliated was not in the actual

possession of the Plaintiff, and that, therefore, no act of spoliation has been committed as against him, and a number of authorities have been cited in support of this argument. None of these authorities, however, seem to have any bearing upon the point at issue in this case, and in any case this defence was not raised in the Court below, and there the defence was a total denial of spoliation, and the Plaintiff would be greatly prejudiced were the appeal to be dealt with on these grounds. The authority cited by the Respondent's attorney, L., Maasdorp, pp. 27-28' is very much in point, and there the principle is laid down that the fact of the property being temporarily out of the possession of the Plaintiff will not deprive him of the right of a spoliatory action, should such property be spoliated. The same principle was also laid down in the case of *Payn* vs. *Yates* (9 S.C.R. 494), when the pledge acquired by Payn was never in his possession but was acquired by him while in the possession of a third party and remained in the possession of the third party. In the case now before the Court, the horse in question was pledged to Plaintiff with the knowledge and approval of Simon Moshesh. It is said to have been pledged to Defendant also in the presence and with the approval of Simon Moshesh, and he says the pledge was actually delivered to Defendant, but it is manifest that his evidence is untruthful, for he says the mare was delivered at his kraal and was off-saddled and knee-haltered by his orders, while Defendant and another witness say that it was not, but that the man Ntsita rode it away. As far as the act of spoliation itself is concerned there can be no possible doubt of that, and in so far as this is concerned the appeal is dismissed.

With regard, however, to the question of damages, although the Plaintiff has the sympathy of this Court, yet, in view of the decision in the case of *Goss* vs. *Masandele* (C.L.J., November, 1913), this Court is of opinion that damages should not have been allowed. No damages have been proved, and the mere fact that the mare was ridden does not in itself prove damages. In so far as this point is concerned the Defendant must succeed.

The appeal is allowed with costs, and the judgment of the Court below is altered by striking out that part of the judgment which awards damages.

Authorities cited by Defendant's attorney:—

3, C.T.R., 261.
5, Bisset and Smith, 43 p.
4, Bisset and Smith, 102.
Kearns vs. *Cole*, 20 C.T.R. 216.
17, E.D.C. 117.

Umtata. 19 November, 1912. A. H. Stanford, C.M.

Qashiwe vs. Dayeni Sipele.

(Engcobo. No. 419/1912.)

Spoliation—Wife's Right of Action when Husband Absent.

In this case the Assistant Magistrate dismissed the Plaintiff's summons.

Pres.:—This is an action brought in the Magistrate's Court, Engcobo, by the Appellant for the recovery of a certain red heifer, her property or in her lawful custody during the absence of her husband from the district, which in her summons she alleges has been spoliated by the Respondent.

The Respondent in the Magistrate's Court excepted that the Plaintiff had no right to sue; this was overruled by the Magistrate and is one of the issues raised on appeal.

In the opinion of this Court the Appellant, being in charge of her husband's property during his absence, had a right of action to sue for the recovery of the property spoliated, and the Magistrate rightly overruled the exception.

The case was postponed and came on later for hearing before the Assistant Resident Magistrate, who appears to have disagreed with the Magistrate's ruling on the exception, and instead of dealing with the case as one of spoliation he has allowed evidence to be led as to ownership, which was clearly outside the provisions of the summons.

In Van Zyl "Judicial Practice," Chapter 18, on application, it is clearly laid down that the question of ownership in such an action should not be gone into, and in the present case the presiding Magistrate was wrong in allowing evidence of such a nature to be led.

On the question as to whether there was spoliation or not there can be no doubt; the evidence shows that the animal in question had been in the possession of the Appellant's husband for four years and that the Respondent either removed it from the common grazing ground as Appellant's witness alleges, or if his version is correct, it strayed to his kraal and he forcibly retained the heifer though demanded.

For the reasons given, the appeal is allowed with costs and the Magistrate's judgment altered to judgment for the Plaintiff as prayed.

Kokstad. 18 December, 1913. W. Power Leary, A.C.M.

Lebitsa Nkhuadi vs. Samson Mafunda.

(Mt. Fletcher. No. 149/1913.)

Spoor Law—Liability under Native Custom.

Claim for a purse (value 6d.) and £2, the contents of the purse
The Magistrate found for Plaintiff as prayed.
Defendant appealed.

Pres.:—The finding of the Court is supported by the evidence. Under Native law where a stolen article is traced to any kraal, the owner of the kraal is liable to make it good.

Under Colonial law, of course, such an action could not be maintained, but this case is dealt with entirely under Native custom.

The appeal is dismissed with costs.

Umtata. 24 November, 1916. C. J. Warner, A.C.M.

Mondzi Jantji and 15 Others vs. Mpayipeli Mbude.

(St. Marks. No. 184/1916.)

Spoor Law—Procedure—Evidence.

Pres.:—This is an appeal from a decision given in the Court of the Resident Magistrate for the district of St. Marks, holding the Appellant and others liable, in terms of section 200 of the Penal Code as amended by Act 41 of 1898, for the value of a certain heifer, the property of Respondent.

Section 200 (4) as amended by Act 41 of 1898 enacts that when the spoor is lost or obliterated on any lands the responsibility for the value of such stolen animal shall devolve upon the heads of the kraals adjacent to and surrounding the spot where such spoor has been lost or obliterated. The Native Appeal Court and the Higher Courts have ruled that actions brought under this section are to be regarded as purely civil actions. It therefore follows that to establish a claim for value of a stolen animal under the Spoor law there must be the same degree of proof as would be adduced in any other civil case.

In the present case there is evidence that portions of the stolen or lost animal were discovered in the land and at the kraal of the Appellant Sigxeshe Mvubu. This, in the opinion of this Court, is sufficient to hold him responsible under the Spoor law. There is nothing whatever to show that any of the other Appellants are owners of kraals adjacent to or surrounding the spot where the spoor was lost or obliterated except a statement by the Magistrate in his reasons for judgment, which cannot be accepted as evidence.

The appeal of Sigxashe Mvubu is dismissed with costs.

The appeal in the case of Appellants Meyi Kaspile, Tshiza Tshencc, Sinemesi Mapete, Jim Mvubu, Mgquba Gogo, Marau Jantyi, and Colanisi Ntamekwana is allowed with costs and the judgment in the Court below altered by striking out Nos. 10, 11, 13, 15, 14 19, 20 and 21 from the judgment.

Butterworth. 19 July, 1916. J. B. Moffat, C.M.

Thomas Nombewu vs. Kwindla and 3 Others.

(Willowvale. No. 141a/1916.)

Spoor Law—Procedure—Mode of Citation.

Claim for 18s. for certain goat lost or stolen under the spoor law. Appellant's attorney had sent a notice out calling on the parties to appear before the Magistrate.

The Respondents duly appeared and exception was taken to the informal notice which was delivered, in that it should have been signed by the Resident Magistrate or the Clerk of the Court and it should have been served by the Police or Messenger of the Court, and that therefore the proceedings were irregular.

The Magistrate upheld the exception, and Plaintiff appealed.

Pres.:—Section 202 of Act 24 of 1886 provides that a Magistrate may enquire summarily and without pleading into spoor law cases. Such inquiry must, however, be held in the presence of the heads of kraals upon whom responsibility is sought to be attached. There is no provision as to how the parties are to be brought before the Magistrate. From the wording of the section mentioned it was apparently contemplated that the Magistrate should hold the inquiry at the kraal concerned. In this case the parties were before the Magistrate and he should have proceeded with the enquiry. The exception was, in the opinion of this Court, wrongly taken and should not have been upheld.

The appeal must therefore be allowed with costs and the case returned to the Magistrate to be dealt with on its merits.

Umtata. 8 March, 1912. W. T. Brownlee, A.C.M.

Zwaartbooi vs. Gunjwe and 8 Others.

(St. Marks. No. 18/1912.)

Spoor Law—Procedure—Summary under Penal Code or by Civil Summons.

Pres.:—In this case the Plaintiff alleges he lost twenty-seven sheep and that he traced the spoor of these to the vicinity of the

kraals of the Defendants and there found sixteen of his sheep and also skins and portions of the carcases of the other eleven sheep, and he now claims from the Defendants the value of the eleven sheep still missing and the value of the wool of the rest of them that he had recovered, and this claim apparently is made under the provisions of what is known as the Spoor Law.

The defence is an exception taken to the summons on the ground that the Plaintiff has no right in law to proceed against the Defendants by way of Civil Summons in the premises, because the procedure in such matter is regulated by section 202 of Act 24 of 1886, and, further, on the ground that even if such right did exist the summons is bad in law because it did not describe the defendants as " Abaninimizi " or owners of kraals.

This exception has been overruled, and it is on the point of the ruling in this exception that this appeal is now brought. This Court does not suppose that the latter portion of the exception is very seriously taken or that it was intended that the Court below or this Court should very seriously consider it, in any case this Court does not consider that the failure to describe the defendants as " Abaninimizi " is such a serious omission as to cause them prejudice, and the only portion of the exception which this Court considers is to be seriously considered is that bearing upon the procedure to be followed in cases such as this. It is argued here that since section 202 of the Penal Code provides that in Spoor Law cases it shall be lawful for the Magistrate to enquire summarily and without pleadings that the Plaintiff has no right to issue the summons that he has issued, and that the Defendants are prejudiced because the issue of the process in this case has involved considerable expense which they would have to pay in the event of the case going against them, and it is further argued that the provisions of sections 201 and 202 oust all rights that the Plaintiff previously had, and that in cases of this kind the Plaintiff must proceed under the provisions of the Spoor Law and under no other, and that in fact the provisions of the Spoor Law deprive the Plaintiff of the right of issuing a civil summons. The Magistrate in the Court below has ruled that there is nothing in the wording of this section which can be taken to mean that a plaintiff is deprived of his rights to proceed in the usual way by means of a civil summons, and in this view this Court entirely concurs.

This Court is of opinion that the provisions of these sections of the Penal Code were merely intended to provide a means whereby any person whose stock had been stolen and who could not bring home the theft to any individual, but who could show by means of tracing a spoor that the stolen property had been taken to a given locality could impose a collective responsibility for the production of the value of his stolen stock upon all owners of kraals in the locality to which the stolen stock had been traced. In other words it gives the owner of stolen stock the means of redress for a tort under which he is suffering against persons whom he cannot prove to have taken any part in the tort.

It is a distinct privilege conferred upon the owner of stolen stock and is quite unknown to the common law, and has no parallel except in the collective responsibility under the old Feudal Law. But though this privilege does exist, this Court holds that it does not oust any rights which the owner of stolen stock possessed under the common law and by which he might obtain redress any more than a criminal prosecution and conviction for theft deprives the owner of the stolen property of his right of proceeding by way of civil action to recover damages caused by the act of theft. This Court, however, holds that when a stock-owner elects to take action in a case such as this, he must make his election clear and distinct, he must elect to proceed either under his common law rights or under the provisions of the Spoor Law, and he must not mix up the provisions and the privileges which are involved under the two different procedures, and it is for the stock-owner alone to make this election, and whenever he has elected to proceed under the Spoor Law and has made his request to the Magistrate, it is then lawful for the Magistrate to proceed under the provisions of the Spoor Law, and the Magistrate also must be very careful that only one procedure or the other is adopted and followed. If the Spoor Law procedure under the provisions of section 202 of the Penal Code is followed, then the proceedings must be summary and without pleadings, and that being the case it is quite conceivable that the Defendants might say that they are entitled under the provisions of this procedure to have the enquiry held without costs to them and that they would be prejudiced by any order to pay costs, and, without here expressing any opinion, this Court thinks that this is a proposition that would have to be seriously considered. In the meantime no such order has been made against the Defendants and the prejudice has not arisen, and that being so this Court is of opinion that the appeal, seeing that the contingency of having to pay costs is the only prejudice which the Defendants allege in support of the exception, is premature and that the Magistrate in the Court below is right in overruling the exception.

The appeal is dismissed with costs.

Flagstaff. 2 May, 1913. W. T. Brownlee, A.C.M.

Hloboyiya vs. Kulakade.

(Tabankulu. No. 120/1911.)

Succession—House—No Male Issue.

Plaintiff claimed that the male issue of his late father's (Mnyakaza) Second House having died without issue, that he as heir to the Great House, was heir to the estate of the Second House

Defendant pleaded that on the desertion of his second wife, the late Mnyakaza married Magaduki, Defendant's mother, and placed her in his second hut.

The Magistrate gave judgment for Plaintiff.

Pres.:—The Magistrate in the Court below has apparently been altogether in doubt upon the evidence, and in only one instance does he appear to have made up his mind upon the evidence, namely, upon the point of number of sheep obtained in exchange for a certain beast, and in this instance the Magistrate has decided in favour of the Defendant, and the decision in the case has been founded entirely upon the probabilities and upon custom. Upon the point of custom the Magistrate would appear to have erred. He says: " It is not usual for Natives, and contrary to their customs, to revive a house where there is male issue, there being an heir to Qusini there would be no need to raise an heir," and this point having been submitted to the Native Assessors they state that in cases where a man has married two wives and the second wife absconds or dies, whether she have children or not, it is customary for the husband to marry a girl to be the wife of the house and the mother of the children, if any, of that hut. They state, however, that where a man has married many wives and appointed them to their status it is quite contrary to custom that upon the death of, or desertion of her husband by, the second wife, the third wife should be placed into the second hut. The third wife appertains to the great hut, and the woman to be placed in the second hut would be the fourth wife.

In this case, therefore, it is important that it should be decided definitely when Defendant's mother was married. Was it before or after the absconding of Qusini's mother? If before, she could not have been put into Qusini's mother's hut. If after she might have been, and until this point is decided the very clearest evidence should be adduced in support of Plaintiff's claim. The evidence so far as it goes seems to be in favour of Defendant's case. His mother says she lived in Qusini's mother's hut and that the late Mnyakaza lived with her there and that the dowry paid for Qusini's sister was kept in that hut, and Plaintiff himself admits at the first hearing that Qusini's stock was always kept in the third hut. He also says that a long time after Qusini's mother's desertion Mnyakaza built his third wife a new kraal and went there to live, and then Qusini went there. Before that the third wife had lived in her own hut at the kraal with the other wives. Plaintiff also says that eight head were paid for Patika, Qusini's sister, and three cattle went to the chief hut.

All this would seem to show that Defendant's mother was placed in the hut of Qusini's mother and that Qusini's sister's dowry was distributed and that all Plaintiff's mother's hut was entitled to was the three handed over to it.

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

Umtata. 27 July, 1915. W. T. Brownlee, C.M.

Sidingana Payi vs. Dweza Payi.

Umtata. No. 168/1915.)

I.—Succession—Rights of Allotted Sons.
II.—Apportionment of Sons—Succession.

Sidingana sued his brother Dweza for certain property forming the estate of their late eldest brother Ntanga. The late Payi had four sons: Ntanga (1st son), Sidingane (2nd son, Plaintiff), Dweza (3rd son, Defendant), and Raca (4th son). Payi had allotted the sons as follows: Defendant (Dweza, the 3rd son) to Ntanga, the eldest son, and Raca, the 4th son, to Plaintiff (the second son). Ntanga died without male issue, leaving the estate in question. Plaintiff claimed it by virtue of being eldest surviving brother. Defendant contended that having been allotted to deceased he became his heir.

Magistrate gave judgment for Defendant.

Plaintiff appealed.

Pres.:—In this case the only point to decide is whether a younger son can inherit to the exclusion of an elder son by virtue of the fact that he had been apportioned to the brother who has died without issue. The question of apportionment was considered in the case of *Boko* vs. *Magonondo* (2 Henkel 14), and the question of apportionment was there described; the question of an apportioned brother was not, however, then decided, and the point at issue having been put to the Native Assessors, they state that: Under the custom of apportionment of brothers the younger brother apportioned to an elder brother does not oust the lawful heir but property devolves upon the natural heir in the ordinary course of succession, and that in the case now before the Court the heir of Ntanga failing his own issue is his next brother Sidingana, the Plaintiff, and not the younger brother apportioned to Ntanga.

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

Kokstad. 12 May, 1913. W. T. Brownlee, A.C.M.

Mbangwa vs. Simungumungwana.

(Qumbu. No. 270/1912.)

Succession—Rights of Seed-bearer.

Claim for the estate of the Right Hand House of the late Renqe, viz., 16 head of cattle or £80.

Plaintiff stated that Defendant was the heir of the Great House of the late Renqe, and he (Defendant) son of the Right Hand

House, and as such entitled to all the estate accruing to the said House.

Defendant pleaded as follows: He denied that Plaintiff was the heir of Renqe's Right Hand House, but that he was heir to Renqe's Right Hand House.

2. That Plaintiff's mother was placed as a seed-bearer in the hut of Defendant's mother, the chief wife of Renqe, and that the said Plaintiff was the offspring of the seed-bearer by one Mrwaulana, and was born long after Renqe's death, the dowry for Defendant's mother was paid from the Great House. The Magistrate gave judgment as prayed, and Defendant appealed.

Pres.:—The evidence in this case discloses the fact that the Plaintiff cannot be the son of the late Renqe. Renqe died during the war of 1877-8, and Plaintiff was not born till the war of 1880-1, and this being the case he cannot inherit in the estate of Renqe, as long as there is a son of Renqe's own body, but ranks merely as a younger brother. The Magistrate also seems to have gone astray upon a point of Native custom. It is the custom that Natives, other than Chiefs, marry their wives in the order stated; but it is also quite a common custom for a man whose wife is childless, or whose children die, to marry a seed-bearer, and the children of this seed-bearer have no separate status nor state, but rank as younger brothers of the children, if any, of the woman to whom their mother is seed-bearer. The evidence for the defence is very strong, and the only evidence for the Plaintiff is that of his old mother Nolosi, and if her evidence is to be believed, then the second daughter was born before the first. The appeal is allowed, with costs, and the judgment of the Court below altered to judgment for the Defendant, with costs.

Kokstad. 25 August, 1917. J. B. Moffat, C.M.

Sina Mentor vs. Martha Motsabe.

(Kokstad. No. 35/1917.)

Summons—Material Amendment of—Refusal.

Pres.:—The Plaintiff alleged in her summons that she was allotted a certain portion of the farm Leeuwfontein in 1913.

The Defendant excepted to the summons. Plaintiff then applied for an amendment of the summons, by substituting a new paragraph, alleging in or about 1913, Plaintiff and others were allotted portions of the farm in terms of an agreement entered into between certain persons, to which Defendant was a party. The Plaintiff then proceeded to lead evidence, in the course of which it was stated that the land was allotted to Plaintiff under an agreement entered into in 1909. After the Plaintiff had given her evidence her attorney applied for a further amendment of the

summons, alleging that the land was allotted in 1909, under an agreement which was confirmed in 1913. This application was refused, and the Magistrate's judgment on this point is appealed against. A number of authorities have been quoted in support of the appeal, but none of these support the Plaintiff's contention.

The second amendment asked for was a very material one, and put forward quite a different claim from the one alleged in the summons, and the Magistrate rightly refused to allow it. The second ground of appeal is that apart from the amendment the evidence did not justify the Magistrate in dismissing the case. The evidence on the record does not conclusively establish the Plaintiff's right to occupation of the land in dispute, as against the Defendant, and the Magistrate could not have given any other judgment than the one he gave, viz.: Absolution from the instance with costs.

The appeal is dismissed, with costs.

Kokstad. 14 May, 1913. W. T. Brownlee, A.C.M.

Sipolo vs. Mqa.

(Mount Ayliff. No. 30/1913.)

Summons—Omission of Date of Issue—Fatal.

Exception was taken that the summons was undated, and that it was material and prejudicial to Defendant.

Pres.:—The point raised in the first exception has been decided in the case of *Mkuhlane* vs. *Mpobeni*, heard in this Court at Kokstad on the 20th August, 1912, where it was held that the omission of the date of issue of summons is fatal.

The appeal is dismissed, with costs.

Umtata. 25 July, 1916. C. J. Warner, A.C.M.

David Mgxada vs. Nasi.

(Ngqeleni. No. 138/1916.)

Summons—Service of—On Attorney—Interpleader Action.

Interpleader action. Exception was taken to the service of summons on the present Appellant's attorney who had appeared for him in the original action, and who refused to accept service. The Magistrate held the service a good one, and present Appellant appealed.

Pres.:—Before proceeding with the appeal in this case, the attorney for the Respondent objects to the appeal being heard, on the ground that the Magistrate's order overruling the exception in

the Court below was an interlocutory order, and, therefore, no appeal lies. Several cases were quoted during argument, but this Court relying on the cases of *Dominy* vs. *Botha* (E.D.C. 1910, p. 65), and *Freemantle* vs. *Mackenzie* (Juta's Daily Reporter, 1915), considers that the order appealed against has a direct effect upon the final issue, it disposes of a definite portion of the suit, and causes prejudice which cannot be repaired at the final stage, and that in essence it is a final order, and may be appealed against. On the main case Appellant's attorney withdrew the first exception, and the issue depends on whether service of the summons on the Appellant's attorney was a legal service. The Magistrate in the Court below states in his reasons that Rule 58 of Act 20 of 1856 is applicable to interpleader suits, and that consequently it is sufficient service if the summons be served on the attorneys to the parties to the action. While agreeing with the first part of the Magistrate's reasons this Court is unable to find anything in the Act, or in any reported case, to uphold the contention that service may be made on the attorneys. The case of *Colonial Government* vs. *Hall* (26 Juta, p. 582), appears to dispose of the question at issue. In that case it was held that though service on attorneys who held a very full power from Defendant to commence or defend actions on his behalf could be considered sufficient service if the attorneys accepted it, the Court could not hold that service on an attorney who refuses to accept it is sufficient.

Following this rule the appeal is allowed with costs, the ruling of the Court below set aside, and the Defendant's exception 2 and 3 in the Court below allowed with costs. The Court on the application of the Appellant's attorney allows costs on the higher scale for his appearance in this Court.

Kokstad. 21 August, 1912. A. H. Stanford, C.M.

Cetywayo Cqoboka vs. Puhla Magxaba and Xwara.

(Qumbu. No. 161/1911.)

1. Torts—Kraal Head not Responsible for Married Member.

2. Kraal Head Responsibility for Torts of Married Member.

Pres.:—The question of the liability of the head of a kraal for torts committed by a married member of a kraal having been submitted to the Native Assessors, who represent the following districts:—Mount Fletcher, Matatiele, Mount Frere, Mount Ayliff, and Umzimkulu, they are unanimously of opinion that in the districts named occupied by the Basuto, Hlubi, Baca, Xesibe, and Hlangwini tribes, no responsibility attaches.

Umtata. 30 July, 1912. W. T. Brownlee, A.C.M.

Matamba Ngadlela vs. Magatyeni and Others.

(Cofimvaba. No. 281/1911.)

Trespass—Damages—Action can be Brought against One or More of the Owners.

Plaintiff claimed £20 as damages for trespass of Defendants' cattle on Plaintiff's cultivated lands. The Defendants denied the trespass.

The Magistrate found for Plaintiff, and gave judgment as prayed. Defendants appealed.

Pres.:—In this case Defendants are sued for damages done by their cattle to the crops in Plaintiff's cultivated lands. It is urged in appeal here that the Plaintiff is not entitled to succeed in his action, because he has omitted to join Headman Cambalala, some of whose cattle also trespassed with the Defendants', but in view of the decision in the case of *Bartlett* vs. *Willimon* (10 E.D.C. 88), this Court is of opinion that the Plaintiff was not under the obligation of suing all the persons whose cattle had trespassed, but had the option of suing any one or more of them.

The appeal is dismissed with costs.

Kokstad. August, 1914. W. T. Brownlee, A.C.M.

Xumbululu vs. Mgandela.

(Qumbu. 13/1914.)

Trespass Fees—Fencing of Arable Lots—Headman's Powers.

Claim for £1 as damages for impounding Plaintiff's horse. Defendant pleaded that the horse had trespassed upon his land, and that he had impounded it after demanding 6d. trespass fees, which Plaintiff refused to pay, on the grounds that the land was allotted subject to Defendant placing a sufficient fence around it. The Magistrate gave judgment for Plaintiff for 2s. 6d., and Defendant appealed.

Pres.:—The point at issue in this case is whether or not the headman of a Location has power to impose a condition that any person to whom an arable lot or "intsimi" has been allotted shall fence such lot, and this point has been decided in the case of *Kupiso* vs. *Siyo*—not reported—heard in this Court at Kokstad on the 29th August, 1913, when it was laid down that the Headman has no such power, and that if it were a matter of agreement it should be registered by the Magistrate, and in the case now before the Court the Magistrate states that there was no registration, and the Defendant can therefore not be prevented from claiming payment for trespass upon the land in question. The appeal is allowed with costs, and the judgment of the Court below is altered to judgment for defendant, with costs.

The case of *Ngangula* vs. *Tungata*, of N.A.C.R. 62, is not on all fours with the case now before the Court, for in that case the ground trespassed upon was not an ordinary arable lot, but was an "igadi" or orchard, and it was there shown that the local custom to which the owner of the "igadi," in question, consented, was that they should be sufficiently fenced.

Kokstad. 1 May, 1914. W. T. Brownlee, A.C.M.

Raqa Mpingana vs. Mboyi.

(Mount Ayliff. No. 18/1914.)

Trespass Fees—Fencing of Gardens Necessary.

Pres.:—The land upon which the trespass is alleged to have taken place is what is commonly known as an "igadi," or homestead orchard, and while no oppressive conditions or servitudes may be imposed by the headman upon arable lots given out under the provision of section 5 of Proclamation 125 of 1903, commonly known as "amasimi," still it is right and proper that these homestead orchards or "igadis" which are themselves an encroachment upon the commonage, and so a menace to all stock owners who have the free right of grazing upon such commonage, should be properly fenced. The Defendant himself tacitly admits this position, for the whole case has gone off on the question whether this garden was or was not properly fenced.

The pound regulations—Proclamation 387 of 1893, section 2, last paragraph but one—lay down the definition of sufficient fence, and provide that a sod wall must be at least four feet six inches high. The Defendant's fence is proved to be only three feet three inches high, and is, therefore, not a sufficient fence, and the Magistrate in the Court below is right in holding that the goats were wrongfully impounded.

The appeal is dismissed, with costs.

Umtata. 27 November, 1913. W. T. Brownlee, A.C.M.

Mafumana Tyumre vs. Solomon Ndinisa Bam.

(Umtata. No. 327/1913.)

Trespass—Fees not Claimable unless Applicant in Lawful Occupation.

Claim for 5s., trespass of Defendant's stock.

The Magistrate gave judgment for Defendant. Plaintiff appealed.

Pres.:—In this case it seems to be quite clear that the Plaintiff is not in lawful occupation of the land trespassed upon, the particular land trespassed upon having been ascertained by the Magistrate in the Court below on the occasion of his visit to the locality in question. It is quite clear from the evidence of the Headman Hagile that the land trespassed upon is an encroachment on the commonage, and that the Plaintiff's occupation of this encroachment is unlawful, and the fact that the Headman authorised his occupation of it is not sufficient: authority should have been obtained from the Resident Magistrate.

As the occupation of this land by the Plaintiff is unlawful, he may not demand damages for trespass upon it, and the appeal is dismissed, with costs.

Umtata. 6 March, 1912. W. T. Brownlee, A.C.M.

Blikman Mduna vs. Ngubo.

(St. Marks. No. 211/1911.)

Trespass Fees—Not Claimable where Magistrate's Certificate not Obtained to Land under Proclamation 125, 1903, *as Amended.*

Claim for 17s. 4d., by reason of the trespass of Defendant's small stock on Plaintiff's cultivated lands. Defendant pleaded that the Plaintiff had no right at law to the land in question, and could not claim trespass fees. The Magistrate ruled that Plaintiff had failed to satisfactorily establish his right to the land, and could not therefore maintain the trespass action, and dismissed Plaintiff's summons with costs. Plaintiff appealed.

Pres.: In this case the claim is for trespass on growing crops, and the defence is that the lands upon which the crops alleged to have been trespassed upon is not in the lawful possession or occupation of the Plaintiff, and that he therefore has no right to impound or to claim damages for trespass upon them, and the point to be decided in this appeal is whether the Plaintiff was or was not in lawful occupation of the land in question. Under the provisions of Section 5 of Proclamation No. 125/1903, no man may cultivate any land which has not been allotted to him by the Headman, with the approval of the Resident Magistrate, and Section 12 added to this Proclamation by Proclamation 195/1908, provides the manner in which any grant of land shall be registered, and goes on to say that "any person charged with contravening either of the said Regulations shall be deemed not to have obtained the necessary consent or permission unless such entry or certified copy shall be produced in proof thereof." The evidence goes to show that no grant of land to the Plaintiff has been registered, and it follows that no grant has been made to him with the approval of the Magistrate, and, therefore, even though the Headman may have allotted land to the Plaintiff, until such allotment has been ap-

proved by the Magistrate the Plaintiff could not lawfully occupy such land.

The evidence of Plaintiff's own witnesses also goes to show that the Plaintiff who wished to move from the Cala District to that of St. Marks had not yet obtained the approval of the Chief Magistrate, and before any resident of one district may move to another and settle in the latter it is necessary that he should first obtain the permission of the Chief Magistrate, and until this has been obtained it is not permissible for even the Magistrate of the District to make a grant of land to the applicant.

It seems to me quite clear then that the Plaintiff was not and could not be the lawful occupier of any land in the District of St. Marks, and that the decision of the Magistrate in the Court below that his occupation of the land was unlawful is correct.

. The appeal is dismissed, with costs.

Kokstad. 22 August, 1917. J. B. Moffat, C.M.

William Mabinda vs. T. Melwane.

(Qumbu. No. 19/1917.)

Trespass—Fencing Condition—Issue of Registration Certificate.

The facts of the case are fully set forth in the judgment of the Court.

Pres.:—The Plaintiff claims £3 as damages for trespass on 25th of January, 1917, by Defendant's stock on land allotted to him in 1915 by the Headman. The Defendant alleges that the allotment was subject to the condition that Plaintiff was to fence the land. The allotment of the land to Plaintiff was not approved and registered by the Magistrate until 20th February, 1917.

The first ground of appeal is that Defendant has failed to prove that the land was allotted with the condition that it was to be properly fenced. The Headman states that he made this condition and that Plaintiff agreed to fence the land.

There is ample evidence to support the Magistrate's finding that this condition was made.

The second ground is that even if such a condition was made, it was an unreasonable one and could not be enforced.

In the case of *Ncanjula* vs. *Tungata* (II Henkel, p. 61) this Court stated that the condition as to fencing of a land as distinguished from a garden would be an unreasonable one and could not be enforced. As a general rule this may be so, but there might be circumstances under which it would be unreasonable for a man to be allowed to cultivate land so situated that it would interfere with free grazing and watering of stock on the commonage unless it were fenced.

In this instance it seems clear that the situation of the land is such that its cultivation without being fenced makes it difficult

for stock-owners to keep their stock out of it. Under such circumstances the condition would not be an unreasonable one. While Plaintiff could not be compelled to fence, the permission to occupy might be withheld until he had done so, and cultivation before issue of permission is prohibited by the Land Proclamations.

The third ground of appeal is that the condition was not confirmed by the Magistrate and was not accepted by the Plaintiff. According to the evidence the Plaintiff accepted the condition and agreed to fence. The allotment was not registered at the time the alleged trespass took place, and Plaintiff was therefore not in lawful occupation at the time. The Plaintiff had no right to cultivate until he had obtained his certificate of occupation from the Magistrate, and cannot claim for damages done to his crops on land illegally occupied. The judgment in favour of Defendant must be upheld. The appeal is dismissed with costs.

Kokstad. 14 May, 1913. W. T. Brownlee, A.C.M.

Fadane vs. James Skolo.

(Matatiele.)

Trespass—Garden Lands—Fencing of Necessary.

The Plaintiff sued for trespass of Defendant's stock on his garden and obtained judgment.

Pres.:—In this case the evidence clearly shows that the crops trespassed upon are in what is commonly called an "igadi" (*i.e.*, an enclosed orchard), generally situated in the precincts of a homestead, and these "igadi" are not cultivated as a matter of right, but by way of indulgences. The ordinary arable lands or "amasimi" are cultivated as a matter of right, and no conditions as to fencing may be imposed in respect of them.

In the case of "igadi," however, which are not cultivated as a matter of right but as a matter of indulgence, and which are always in the vicinity of residential areas, and thus a menace to the stock of surrounding kraal-owners, it is only reasonable that a condition should be imposed that the land should be properly fenced. The evidence shows that the local custom is that such "igadi" lands are given out subject to this condition, and if the person cultivating an "igadi" accepts the allotment of "igadi" burdened with the condition that he should properly fence, then he must be bound by his own engagement to fence and cannot be allowed to claim damages or trespass fees if the ground is not properly fenced. The garden in question is not sufficiently fenced, and in the opinion of this Court the Plaintiff is not entitled to succeed

There is no evidence to show that the certificate of occupation put in refers to the ground trespassed upon.

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

Kokstad. 25 August, 1913. A. H Stanford, C.M.

Milizo vs. Maqolo.

(Mt. Fletcher. No. 46/1913.)

Trespass—Person Impounding Stock must Notify Poundmaster whether Claiming Trespass Fees or Damages.

The facts are fully set forth in the President's judgment.

Pres.:—Under the Pound Regulations (*vide* section 28) a person impounding stock is required to notify the poundmaster whether he claims under the tariff rates for trespass or desires a valuation by the Field Cornet and two land-owners, or whether he elects to sue under the common law for the tort committed as provided in section 67 of the Regulations. If he fails to do this then he can recover only at the ordinary tariff for trespass. The Applicant not having made any such notification to the poundmaster is now barred from claiming special damages, consequently the appeal on the claim in reconvention must fail.

The amended section 77 of the proclamation provides that in Native locations where the owner is resident in the location or an adjoining one and is known, the owner of the land shall take the stock to him or notify him of the trespass before impounding the animals, which he may do if the said owner shall refuse to pay.

In the present case the owner of the land called the owner of the horses to the land. The trespass of the animals was admitted and an offer of payment at the rate of 1s. 6d. a head was made and refused, consequently the Appellant had no legal right to impound the animals unless it was his intention to claim special damages as provided for in sections 28 and 67 of the regulations, which he did not do. Under these circumstances the impounding was clearly wrongful, but the Magistrate in his judgment has included the amount of 3s. paid by the poundmaster to the Appellant for the trespass of the horses. His judgment will therefore have to be amended, and the sum of £1 8s. and costs altered to £1 5s. and costs.

As the Appellant has failed in the main issues of the case, viz., the claim in reconvention and the Magistrate's finding on the question of the wrongful impounding of the horses, the Court is of opinion that the small alteration made in the judgment should not deprive the Respondent of his costs, more especially as a tender in excess of the 3s. was made to Appellant and refused after judgment was given. Appellant will therefore pay the costs of appeal.

Umtata. 9 August, 1912. W. T. Brownlee, A.C.M.

Harriet Nonkasa vs. Eustace Toni.

(Umtata. No. 194/1912.)

Trespass—Sufficient Fences—Garden Allotment—Conditions of.

Plaintiff claimed £16 10s. damages by reason of the trespass of Defendant's stock during December, 1911, in her cultivated garden during the night-time.

Special plea in bar. Defendant admitted Plaintiff's lawful occupation of garden, but contended that the Plaintiff was not entitled to recover damages on the following grounds:—

1. Garden situated amongst several Kaffir kraals.

2. Garden not properly fenced as required in garden allotments, it being a condition precedent to allotment that garden must be properly fenced.

3. Garden not enclosed with sufficient fence.

Magistrate upheld the plea and found:—

1. Garden was in residential portion of location, enclosed by sod wall and aloes 18 inches to 2 feet in height.

2. That the garden was allotted subject to its being properly fenced.

Plaintiff appealed.

Pres.:—It is clear from the evidence of Headman Dumalisile that the garden in question was allotted to Plaintiff's husband subject to the condition that it should be properly fenced. It is argued that any such condition was *ultra vires* and could not be enforced, but the opinion of this Court is that even were such a condition *ultra vires*, yet as the Plaintiff's husband accepted the land burdened with this condition, he was bound by it and she also must be bound by it. The evidence of Dumalisile further shows that the land is in among kraal sites and that the local condition was that such gardens should be fenced. This is an eminently reasonable condition, as was pointed out in the case of *Zechariah Ngcangula* vs. *Macebe Tungata*, heard in this Court on the 29th July, 1910, where the claim was similar to the claim here and where the defence was the same. It is contended that local people are to be the judges as to the sufficiency of any fence, but this Court cannot accept this view and is of opinion that the only judge is the Magistrate, who must form his conclusions from the evidence laid before him. In the present case there is abundant evidence as to the dimensions and the condition of the fence, and in the opinion of this Court the Magistrate in the Court below has rightly held that the fence was insufficient. An attempt has been made to show that the fence has never been out of repair since it was erected by Plaintiff's husband 18 years ago, but this is effectually disposed of by Plaintiff's witnesses, Nyalo and Danisa, who say that they saw repairs being effected during last year.

This Court is of opinion that before the Plaintiff can claim damages for trespass in this garden she must keep the fence in such a condition as to protect it against stock.

The appeal is dismissed with costs.

Butterworth. 4 March, 1914. C. J. Warner, R.M.

Grey vs. Collis Mtana.

(Idutywa. No. 341/1913.)

Trespass—Sufficient Fence—Surveyed Grant.

Claim for £1 1s. damages for trespass of pigs in Plaintiff's cultivated land.

Magistrate gave judgment for 1s., and Defendant appealed.

Pres.:—Proclamation No. 26 of 1911 states that no claim for damages because of trespass by animals in respect of a holding granted under the provisions of Proclamation 200 of 1910 shall lie unless the holding is enclosed by a sufficient fence. "Sufficient fence" is defined by Schedule B to Proclamation 408 of 1896, when applied to wire fences, as "a fence of so many wires and of such construction as the Resident Magistrate of the district shall from time to time decide. There is nothing in the record before the Court to show that the fence in question is of a nature ever approved by the Resident Magistrate. The Magistrate in his reasons for judgment states that the policeman sent to inspect it states it is a good and sufficient fence. This does not satisfy the requirements of the law, and the case is postponed to the next sitting of this Court, and in the meantime referred back for evidence as to whether the fence is of so many wires and construction as the Magistrate decides are necessary to constitute a sufficient fence. Costs to be costs in the cause.

Postea.

22 July, 1914. W. T. Brownlee, A.C.M.

Grey vs. Collis Mtana.

Pres.:—The Magistrate in the Court below seems to have misapprehended what the intention of this Court was in remitting this case to the Court below. This Court desired evidence to be recorded as to whether or not the Magistrate had defined what was to be a sufficient fence for the district of Idutywa, and whether, in this case, the fence in question was or was not in accordance with such definition. It did not desire the Magistrate now to make such definition, and indeed this Court does not see how such definition, if now made, could affect this case, for it is questionable whether such definition could be made retroactive in its operation.

This case does not, however, rest upon any definition to be made by the Magistrate, for there appear to be other provisions of the law under which it will have to be decided.

The first provision of the law is contained in section 2 of Proclamation No. 387 of 1893, where a sufficient fence is defined as a fence of so many wires and of such construction as the Magistrate of the district shall from time to time decide, and the provisions of section 3 of Proclamation No. 26 of 1911 prohibit the claiming of damages for trespass upon any holding other than holdings granted under the provisions of section 4 of Proclamation No. 227 of 1898. The holding in question not having been granted under the last section referred to, it would follow that there must be a sufficient fence as defined by the Magistrate were Proclamation No. 26 of 1911 still of effect. This Proclamation has, however, been repealed by Proclamation No. 22 of 1913, the third section of which provides that no action for trespass upon holdings other than those granted under section 4 of Proclamation No. 227 of 1898 shall lie, unless such holding is enclosed by a dividing fence as defined in section 2 of the Fencing Act of 1912. This section, however, unfortunately does not give any direction as to the manner or material of the construction of a dividing fence, but merely defines the "*locus in quo*" of the fence, and the only other reference to the particular form of a dividing fence is contained in section 10 of the Act, which deals with the cost of erection of such dividing fence and which provides that the cost of a dividing fence shall not exceed the cost of an ordinary six-wire fence. This provision in the opinion of this Court seems to indicate that an ordinary six-wire fence is a sufficient dividing fence, and ordinary six-wire fence would therefore be a sufficient fence for the purposes of this case. The evidence proves that the Plaintiff's fence is not merely an ordinary six-wire fence, but is, in addition to six wires, fortified by the emplacement of wire netting all round, and the Plaintiff would appear not only to have complied with what was barely necessary, but also to have provided additional security to his fence.

The appeal is dismissed with costs.

Butterworth. 10 July, 1913. A. H. Stanford, C.M.

Nomanti vs. Zangqingqi.

(Willowvale. No. 90/1913.)

Ubulunga Beast Attachable for Debts of Husband or after Death those of his Heir.

Interpleader action. The stock was declared executable.

Pres.:—The wife to whom an "Ubulunga" beast is given has an interest in the animal and its progeny. She is entitled to the milk, and the husband could not divert them from her house to

that of another wife without her consent, but such cattle are the property of the husband, and this Court decided in the case of *Siwangobuso* vs. *Ygindana* (N.A.C. 1, p. 142) after consultation with the Native Assessors that ubulunga cattle were attachable for the debts of the husband. In the present case on the death of the Appellant's husband the cattle by inheritance became the property of his heir, her son, the judgment debtor, and are attachable for his debts.

The appeal is dismissed with costs.

Umtata. 27 July, 1916. C. J. Warner, A.C.M.

Msefo Jonas vs. Koli Mhlekwa.

(St. Marks. No. 21/1916.)

Ubulunga Beast—In no way Affects the Dowry.
Dowry—Father of Woman who has Received Dowry may Sue for her Recovery from her Mother's People.

Koli sued Msefo for the return of his (Plaintiff's) daughter, whom he had married to one Ncini. That this daughter had disappeared from her husband's kraal last reaping season and that Defendant, who was Plaintiff's wife's brother and uncle of Ncini's wife, wrongfully refuses to give her up.

Defendant took exception to Plaintiff's summons that he had no *locus standi* as the woman's husband was living.

The Magistrate overruled the exception and the case proceeded. The Magistrate eventually gave judgment for Plaintiff as prayed.

Defendant appealed.

Pres.:—The issues arising out of this case having been submitted to the Native Assessors, they state:—

1. The "ubulunga" beast is always a cow or a heifer. Sometimes an ox or bull calf is taken to the husband's kraal but always on the understanding that it is a temporary "ubulunga" and will be replaced by a cow or heifer.

2. If the temporary "ubulunga" beast dies and the death is reported to the father of the woman no claim lies against the husband.

3. The "ubulunga" beast is the property of the woman and has nothing to do with cattle paid as dowry. If the temporary "ubulunga" beast dies no beast can be deducted from the dowry in respect of the "ubulunga."

4. Any fines paid by the husband for assaulting the wife are merged in the dowry.

5. If a woman leaves her husband and goes to the kraal of her mother's people, her father, to whom dowry has been paid for her, has the right to maintain an action for her against her mother's people, but only after the husband has reported the disappearance

of his wife, and that he has demanded her return and cannot get her back.

The case is therefore postponed to the next sitting of this Court, and the record returned to the Court below for Plaintiff's evidence to be taken as to whether his son-in-law Neini Gonyolo has taken any steps for the recovery of his wife. Costs to be costs in the cause.

Postea 24 November, 1916.

The further evidence adduced discloses that Neini had taken steps for the recovery of his wife.

Pres.:—With the additional evidence before it this Court sees no reason to disturb the finding of the Court below and the appeal is dismissed with costs; but to avoid any risk of complication in future the judgment of the Court below is altered to read: "Plaintiff's prayer for a declaration of rights and ownership of the said Nobake is granted with costs."

Umtata. 23 July, 1913. A. H. Stanford, C.M.

Mfazweni Joko vs. Klaas Cqirana.

(St. Marks. No. 215/1912.)

Ubulunga Beast—Husband Liable for its Return on Dissolution of Marriage.

Claim for the restoration of the "ubulunga" beast on the dissolution of Defendant's marriage with Plaintiff's daughter.

Defendant admitted the receipt of an "ubulunga" beast, but denied liability on account of its death.

The Magistrate gave judgment for Plaintiff for 1 beast or £8.

Defendant appealed.

Pres.:—In his plea the Appellant admits the receipt of the "ubulunga" beast but pleads that it died and that this was duly reported to the Respondent, and by reason of the death of the animal the Respondent has no claim to have it replaced.

Native custom is clear on this point. When a dissolution of marriage takes place, just as the dowry has to be returned, whether the animals are alive or not, so the "ubulunga" beast must be returned or replaced in the event of its death.

The appeal is dismissed with costs. In the event of a beast being tendered in settlement of the claim, the animal shall be subject to the approval of the Magistrate.

Umtata. 30 March, 1916. J. B. Moffat, C.M.

Rangxabe Sipayile vs. Masumpa Hanies.

(Engcobo. No. 11/1916.)

I. Ubulunga Custom—Replacement of Temporary Ubulunga.

II. Nqoma Custom—Payment of Reward—When Made Ubulunga Nqoma.

Plaintiff sued for declaration of rights as to ownership of a cow and calf, progeny of a cow "nqomaed" to Defendant's wife, and for their delivery or payment of their value. The calf had died.

Defendant alleged that the cow in question was the progeny of an ubulunga beast given to his wife by her mother. The first ubulunga sent was a temporary one and was taken back before rinderpest (1897), and Defendant stated that it was replaced at the end of the Boer War (1902) by a beast of which the cow now in question was the progeny.

The Magistrate was not satisfied as to the credibility of the Plaintiff and his witnesses, and found that Plaintiff had not established his claim and absolved Defendant from the instance.

Pres.:—At the request of the attorney for the Appellant the Native Assessors are asked:—

"Whether a man giving a temporary ubulunga beast can remove it without replacing it by a permanent one. In this case the temporary beast is said to have been taken away before rinderpest for the purpose of payment of dowry and was not replaced until the end of the Boer War. A period of about five or six years thus elapsed between the taking away of the temporary ubulunga and its replacement by a permanent one."

The Assessors state that "the custom is that when the temporary ubulunga is removed it is replaced at once."

At the request of the attorney for the Respondent the Native Assessors are asked: "Whether in the case of cattle being nqomaed and a reward being paid such reward is only paid when the cattle are removed or whether the reward can be paid and the cattle, or some of them, be left with the person to whom they are nqomaed?"

The Assesors reply that "a man having nqomaed cattle with another can reward the latter at any time. He need not necessarily take the cattle away when he gives the reward."

The evidence on behalf of the Appellant is quite consistent with the nqoma custom, while the Respondent's evidence is clearly contrary to the custom of ubulunga custom and his evidence in support of his plea cannot be accepted.

The appeal is allowed with costs and the judgment of the Magistrate will be altered to judgment for the Plaintiff for return of the cow or its value, £15, with costs.

Kokstad. 28 August, 1916. J. B. Moffat, C.M.

Mdoda vs. Skeyi.

(Tsolo. No. 109/1916.)

Ukungena Husband—Right of Action for Damages for Adultery.

Claim for £15 damages for adultery with Plaintiff's wife.

Defendant pleaded that Plaintiff being the ngena husband had no *locus standi* and could only sue on behalf of the Estate.

The Magistrate granted absolution from instance with costs.

Plaintiff appealed.

Pres.:—The case having been put to the Native Assessors, Mbizweni replies:—According to Xesibe custom a man put into a hut as seed-raiser is entitled to sue the adulterer. Damages paid must go to the deceased husband's estate. The seed-raiser cannot take them to his own kraal.

Ralibitso replies:—The Ngena custom is practically the same for all tribes. According to Basuto custom the seed-raiser is entitled to sue. Damages paid by the adulterer belong to the estate of the deceased man.

Mbizweni states:—Pondos, Bacas, Xesibes and Pondomise have the same custom.

According to Native custom amongst tribes that recognise the practice of "Ukungena," the Ngena man has a right of action against an adulterer in such a case as this.

He is, however, not personally entitled to any damages recovered which would go to the estate of the deceased husband. In this case the Plaintiff has sued personally for damages alleging in the summons that the woman is his lawful wife. He subsequently admitted that she is only ngenaed to him. The Magistrate granted absolution on the ground that as there is an heir in the estate the action should have been brought by the heir. According to custom as stated above the Plaintiff is entitled to sue on behalf of the estate. He has not done so but has sued personally for damages. Under these circumstances he cannot succeed in his action and the Defendant was rightly absolved.

The appeal must accordingly be dismissed with costs.

Kokstad. 31 August, 1916. J. B. Moffat, C.M.

Tiba vs. Austin Ntseki and Another.

(Matatiele. No. 40/1916.)

Ukungena Husband—Right of Action on Behalf of Estate.

Plaintiff sued Defendant for 5 head of cattle or £25 damages, for the elopement and seduction of his daughter Motsekoa. De-

fendant took exception to Plaintiff's claim on the ground that Plaintiff was the ngena husband of the widow Moiketse, mother of Motsekoa, and the proper person to sue was the eldest son of Moiketse, assisted if he was a minor by his guardian.

The Magistrate upheld the exception and dismissed the summons.

Plaintiff appealed.

Pres.:—The following questions were put to the Assessors at the request of the Appellant's Attorney:—

1. Whether there is a custom under which where a husband dies before living with and having connection with his wife, a brother can be substituted for his brother as husband, not merely as seed-raiser.

Ralebitso says the brother can only be put in place of the deceased as an ngena husband.

The other Assessors say the woman is not the brother's wife. The dowry was paid for the husband.

2. Whether the seed-raiser can sue for damages for seduction of a daughter the result of the ngena union.

Ralebitso says:—The seed-raiser can sue on behalf of the estate of the deceased husband, but not in his personal capacity.

The other Assessors agree.

The Plaintiff in this case is suing in his personal capacity as father of the girl Motsekoa. According to Native custom as laid down by the Assessors in reply to the first question put to them the girl is the daughter of the Plaintiff's deceased brother in whose hut he has been placed to raise seed for him.

The Plaintiff has no *locus standi* personally, he being under Native custom only the ngena husband of the woman Moiketse.

The exception taken went further and said that the proper person to sue is the eldest son of Moiketse or his guardian. This is not quite correct. The Plaintiff is entitled to sue on behalf of the estate. He has sued personally and the exception must therefore be upheld. The appeal is dismissed with costs.

Leave is granted for Plaintiff to apply to the Magistrate's Court for leave to amend the summons by stating that he is suing in his representative capacity and to proceed thereon on payment of costs awarded by this judgment.

(*Quaere*, where an appeal has been dismissed upon an exception taken in the Court below dismissing a summons, can such dismissed summons be revived upon an application made to the Appeal Court to amend such dismissed summons.)

Flagstaff. 16 April, 1912. W. T. Brownlee, A.C.M.

Tshwata vs. Gxonono.

(Bizana. No. 400/1911.)

Ukungena Unions—Native Custom—Majority.

Action by Plaintiff for damages for adultery.

Plaintiff claimed that he was the "ngena" husband of the widow of his late brother Koleka.

Plea:—Defendant pleaded that he married the widow of the late Koleka and paid dowry for her.

The Magistrate gave judgment for Defendant with costs, holding that Plaintiff was not the "ngenaed" husband of Koleka's widow.

Plaintiff appealed. (Plaintiff sued in his personal capacity, but no exception was taken.)

Pres.:—In the case of *Mbono* vs. *Mamroweni* (6 E.D.C. Reports, p. 62) it was laid down that a widow may not be compelled to return to the kraal of her late husband, section 39 of Proclamation 112 of 1879, which is applicable in Eastern Pondoland, having by declaring that 21 years is the age of majority withdrawn from women the tutelage to which they were previously subjected by Native custom, and in the case of *Raza* vs. *Qawe* (N.A.C. Reports, 1, p. 14) it was laid down that a woman married according to Native custom and subsequently refusing to live with her husband cannot be forced to return to him, and that a woman taken over under the custom of "raising the seed" (or Ukungena) by a deceased husband's brother cannot by that act be placed in a worse position regarding her personal liberty, and in this latter case the judgment of the Magistrate giving the "ngena" husband damages for adultery was reversed and a judgment of absolution entered by this Court. On these grounds alone the appeal in this case should be dismissed.

In the case of *Manyosine* vs. *Nonkanyezi* (N.A.C. 1, p. 114) the Native Assessors made a very comprehensive statement of Native custom in the matter of "ngena" unions, and *inter alia* remarked: "To mark an ukungena union the man must be approved by the relatives and an animal slaughtered to cleanse the utensils, the man then having all the rights of a husband, and if he finds another man committing adultery with the woman he has a right of action against him for damages." This statement being put to the Native Assessors here, they concur in it, and they add that in addition to the animals slaughtered the "ngena" husband should take a beast and pay it to the woman's father so that he may know to whom to look for further dowry.

There is no evidence of the above customs having been complied with, and it is in the opinion of this Court that on this ground also the judgment of the Court below should not be disturbed.

The appeal is dismissed with costs.

Flagstaff. 10 April, 1916. J. B. Moffat, C.M.

Nolwatshu vs. Ben Tshikitshwa.

(Tabankulu. No. 129/1915.)

Ukungena Union—Subsequent Marriage of Woman and Abandonment of Ngena Husband.

Claim: 3 head of cattle or £15 damages for adultery.

The Magistrate gave judgment for Defendant.

Pres.:—The Magistrate has given his decision in this case on a question of Native law, holding that a widow who has been ngenaed by her husband's brother can disown the ngena marriage and be married to another man according to Pondo custom.

The point having been put to the Pondo Assessors they state that they would prefer not to give a reply until they have consulted the Chief and Councillors, the point being one on which they are in doubt.

The Plaintiff alleges that he ngenaed Mantsake who was his brother's widow; that the ngena was celebrated with the usual ceremonies, and that he paid four head of cattle. After living with him for two years she left him and returned to her own people. In March, 1914, he took the case before the headman who ordered her brother to return her to the Plaintiff or to return the dowry paid by Plaintiff.

She did not comply and subsequently in July, 1915, she married Defendant.

The Defendant alleges that the four head of cattle referred to were paid by the deceased husband, and denies the ngenaing. The Plaintiff's case does not appear to have been closed and the Defendant had led no evidence when the Magistrate gave his decision on the point of law mentioned above.

In argument a number of cases have been quoted but none of these deal with the point now raised.

The Native Assessors have not been able to assist the Court.

An essential factor in ngena unions is that the woman shall remain with her late husband's family. In this case Plaintiff admits that she left his kraal and returned to her own people. He tried to get her back in March, 1914. She would not return.

Since then he has taken no steps to get her back and thus secure compliance with the essential condition of an ngena union.

The woman by her departure from the Plaintiff's kraal has thus broken the ngena union and is at liberty to marry another man.

The Magistrate's decision is the correct one under the circumstances.

The appeal is accordingly dismissed with costs.

(N.B.—See Cases Kokstad, September, 1916, *re* proper person to sue.)

Kokstad. 1 May, 1914. W. T. Brownlee, A.C.M.

Mahoza, assisted by her Guardian, Mqokweni vs. Pringle.

(Mt. Ayliff. No. 102/1913.)

1. Ukusisa—Holder's Liability and Duties.
2. Nqoma—Holder's Liability and Duties.

Claim for 13 sheep or their value, £13, being balance of "Sisa" sheep.

Plaintiff stated that about 1911 he placed 8 ewe sheep under Native custom of "Sisa" with Mnyenzana, now deceased. That Defendant was the wife of the late Mnyenzana, and Mqokweni her guardian.

Defendant admits the "Sisa" of 8 sheep, but put Plaintiff to the proof of the increase.

The Magistrate gave judgment for 11 sheep or their value, £5 10s., and costs.

Defendant appealed.

Pres.:—In this case it is clear that the Plaintiff deposited with the late Mnyenzana, under the custom of "Ukusisa," certain eight ewes, and there is clear evidence from the Plaintiff to show that these sheep increased to twenty-four, and there is no attempt on the part of the Defendant to dispute this evidence. It is the duty of the holder of "Sisa" stock to make complete and accurate account of such stock and all its increase, and if he is unable to give proper account of the stock to make it good. Besides the stock deposited with Mnyenzana by Plaintiff, the former seems to have held other stock under this custom, and after his death it appears that the various owners of stock demanded the return of the stock belonging to them, and Plaintiff was handed over five sheep.

Under ordinary circumstances it might be held that by taking over the five sheep the Plaintiff has accepted them in full settlement, and it would lie upon him to prove that such was not the case. It appears, however, that after he had taken delivery of the five sheep, he found three of his sheep—each with a lamb at foot—in the possession of Qabaka, to whom they were delivered by the Defendant. It does not matter whether they were handed over to Qabaka by Defendant or whether he picked them out for himself, the fact remains that they were delivered to Qabaka by Defendant. The Defendant has, therefore, by her own negligence in the care and administration of the deposit made with her husband, made herself liable to the Plaintiff for all the property deposited.

The Magistrate has found on the evidence that the sheep increased to twenty-four and that only thirteen have been accounted for, and has given judgment for the balance of eleven. In this decision this Court concurs.

The appeal is dismissed with costs.

Kokstad. 15 December, 1913. W. Power Leary, R.M.

Monghayelana vs. Msongelwa.

(Mt. Frere. No. 251/1912.)

Ukuteleka—Action to Compel Payment of Further Dowry not Maintainable where Ukuteleka Custom Operates.

Claim for 2 cattle, being further dowry alleged to be due by Defendant to Plaintiff on account of latter's niece, Nozala, which balance, Plaintiff states, Defendant had promised and agreed to pay.

The Defendant excepted that the summons disclosed no cause of action under Native custom.

The Magistrate gave judgment as follows:—

"The Court rules that such an agreement cannot be enforced in Colonial law, following its decision in Mtinti's case (Henkel, 218), which was supported by the Appeal Court. Summons dismissed with costs."

Pres.:—This is an appeal from the ruling of the Court below that an agreement such as is alleged in the summons cannot be enforced under Colonial law, following its ruling in the case of *Mangana* vs. *Ntintili* (N.A.C.I. 218).

The ruling in that case has been varied by subsequent decisions, notably in the case of *Nzozo and Johnny Mahlala*, heard in this Court on the 28th August, 1913.

The question asked in the Court below whether an agreement of the nature alleged, made prior to marriage, can be enforced is answered in the affirmative in the cases of *Haba* vs. *Mdinelwa Mba* (E.D.C.R., Vol. 12, p. 6) and *Piet* vs. *Gonose* (E.D.C.R., 1902-1905, p. 23), where the contemplated marriage is to be celebrated according to Christian rites.

It has been held that where the custom of "Ukuteleka" obtains no action lies to compel the payment of dowry. The exception taken by the Defendant's attorney was a good one therefore, and on it the summons was rightly dismissed. The remedy is in the hands of the Plaintiff, the girl being at his kraal he may retain her under the custom of "Ukutelcka" until the cattle he claims are paid.

In the opinion of this Court no action lies in this case either under Colonial law or Native custom, and the appeal is dismissed with costs.

Kokstad. December, 1912. W. T. Brownlee, A.C.M.

Nodange Mkubiso vs. Dick Myenqana.

(Matatiele. No. 216/1912.)

Ukuteleka Custom—Agreement to Pay Specified Dowry does not Prevent Woman being Telekaed.

Claim for return of wife and minor child or 9 head of cattle, or £45 paid as dowry.

Plaintiff stated that his wife deserted him without lawful cause or excuse.

1. Defendant's plea admitted marriage according to Tembu custom.

2. That no fixed dowry was agreed upon between the parties but that dowry usually paid among tribes in East Griqualand and particularly in the Matatiele district exceeded 20 head of cattle. That Plaintiff had paid 9 head and had promised to pay further dowry, particularly 4 head and 1 horse 3 or 4 years ago as further instalment, which he has refused or neglected to do, wherefore Defendant, according to Tembu custom, has "telekaed" or impounded the woman. That he is perfectly willing to restore her on payment of the further instalment.

The Magistrate gave judgment for Defendant with costs and Plaintiff appealed.

Pres.:—The appeal in this case is upon three points. First on the ground that as the Plaintiff alleges an agreement to pay a certain number of cattle as dowry, he is estopped from putting into practice the custom of "teleka" or impounding, and must proceed by way of action for the recovery of the dowry agreed upon. Second, that before the Plaintiff can succeed in his action he must produce the woman in Court. Third, that even if the Plaintiff was not entitled to succeed in his action the judgment should have been one of absolution and not a final judgment for Defendant. In the opinion of this Court the Plaintiff is not entitled to succeed in this appeal. The agreement to pay a specified number of cattle does not in any way prevent the operation of the custom of teleka, but this custom may be put in practice until the whole of the dowry agreed upon or in the absence of agreement until sufficient dowry has been paid, and in this case the production of the woman is not necessary, for the Defendant submitted himself to the judgment of the Court and offered to make delivery of the woman upon payment of three or even two cattle, and no tender of any sort was made by the Plaintiff. With regard to the final judgment recorded, this Court is of opinion that the Magistrate in the Court below might have given a conditional judgment, that is that he might have ordered the return of Plaintiff's wife to him upon the payment of a specified number of cattle and costs, and in these cases of teleka it is usual to

deliver the woman upon payment of one beast. As, however, the Plaintiff could not possibly have succeeded in his action in its present form and as he made no tender, this Court is of opinion that the appeal should not be allowed on these grounds, and the appeal is dismissed with costs, the judgment in this case, however, to be no bar to any further action Plaintiff may wish to bring when he may have put himself in a position to do so.

Kokstad. 18 January, 1915. W. Power Leary, A.C.M.

Mgodeli Nkontwana vs. Beyise Mlata.

(Qumbu. No. 117/1914.)

Ukuteleka Custom—Repetition of Teleka.

Pres.:—Plaintiff in this case is suing for the restoration of his wife, or, in the alternative eight head of cattle, one horse and ten goats or their value £60, being dowry paid for her.

The Defendant pleads teleka. The plea of teleka has been held to be a good one and undoubtedly is if genuine and not set up for the purpose of obstructing and defeating a proper claim for the restoration of wife or dowry.

The Magistrate gave judgment for Plaintiff for the return of the woman or payment of six head of cattle or their value with costs, and in his reasons stated. . . . She was recently telekaed. Sufficient dowry has been paid for her compared with those paid for her sisters, and I do not, therefore, believe that the woman has been telekaed. Nor do I think it competent for the Defendant to teleka so soon after the previous teleka in the absence of illtreatment—which is not alleged."

It would appear that the Plaintiff first paid seven head of cattle and the woman was telekaed and further two head were paid. The Defendant was not satisfied and demanded further cattle; eventually the matter went to the headman and he ordered a further beast to be paid. The woman has borne four children to Plaintiff and Defendant now claims further dowry. It is clear from the evidence that Defendant from the outset required a certain number of cattle, he says twelve, it is also clear that the Plaintiff paid the last two head of stock only when the woman was telekaed, and the final one when he went before the headman, since when the woman has borne Plaintiff two of the four children. The teleka is therefore not so very recent.

This Court does not agree with the Court below that it was not competent for Defendant to again teleka the woman; he was obliged to force the Plaintiff's hand to obtain the dowry for his daughter. He complied with the headman's order in allowing the woman to return on payment of the tenth animal but such compliance does not debar him telekaing again for the balance.

The Magistrate had the witnesses before him. He did not believe the woman was telekaed, and is satisfied that the woman is unwilling to remain with the Plaintiff. That being so he exercised a proper discretion in ordering the woman to return or repayment of the dowry.

The appeal is dismissed with costs.

Kokstad. 3 January, 1913. W. T. Brownlee, A.C.M.

Mlotywa vs. Meji Hoyo.

(Qumbu. No. 137/1912.)

Ukutwala—Bopa Fee—When Payable.

Claim for the return of 1 beast or £5 paid as dowry, 1 having already been returned.

Defendant pleaded that the 1 beast was paid as "bopa" on account of Defendant having twalaed his daughter without his consent.

Magistrate gave judgment for Plaintiff as prayed.

Defendant appealed.

Pres.:—In this case it is common cause that Plaintiff cloped with or "twalaed" Defendant's daughter and that he paid one beast to Defendant. The Plaintiff says that the animal was paid as dowry, and the Defendant says it was paid as a "bopa" beast It is a very common practice for young men to "twala" or carry off a young woman with the view to marriage, and should marriage be offered this carrying off in itself constitutes no affront or injury to the girl or her father, but should marriage not be offered it is an affront, and so far as this Court is aware there are only two conditions under which a "bopa" beast or fine is paid upon the carrying off of a girl under the practice of "ukutwala": first, should the girl be proved to have been deflowered, and, second, should the young man fail to offer marriage or fail to pay dowry. In the first case a fine must be paid to "bopa" or bind up the injury done to the girl, and in the second case a beast must be paid to "bopa" or bind up the injured dignity of the girl and her father.

In this case no seduction is alleged, and it is admitted by Defendant's own witness, Pikani, that Plaintiff offered marriage and that the beast handed them by him was paid as dowry.

This Court comes to the conclusion that the beast was paid and accepted as dowry, and as the girl Nongogwana has now been married to another man the Plaintiff is entitled to recover the dowry paid by him. The appeal is dismissed with costs.

Flagstaff. 25 April, 1914. W. T. Brownlee, A.C.M.

Cobo vs. Mgqitywa.

(Lusikisiki. No. 542/1913.)

Wedding Outfit—Deductions—Custom in Transkei.

Pres.:—In this case the appeal is brought by the Plaintiff, and is solely on the point of the deduction from dowry allowed to the Defendant of £3, in respect of wedding outfit, and it is argued that there is no evidence of any outfit having been supplied. The case of *Dilikane* vs. *Mazaleni* (2 N.A.C. 103 (R)) is also cited in support of the appeal.

As regards this deduction, it is true that there is no evidence of the supply of any outfit, and the appeal will be allowed in so far as this is concerned. It is quite possible, however, nay, probable, that a wedding outfit was supplied, and it would be hard to deprive the Defendant of his recovery of the value of this, should it have been supplied, and the case will be remitted to the Court below for evidence to be taken on this point.

With regard to the case cited it must be observed that the judgment of this Court is as follows: " This Court is not aware of any case in which any deductions have been allowed in this Court in the Transkei for wedding outfit." The case was heard at Butterworth and the words " in the Transkei " were used with the intention and for the purpose of restricting the operations of the judgment to the territory known as " The Transkei " alone and not so as to affect other territories where these deductions are allowed.

Furthermore, the action in this instance was specifically raised by the person who provided outfit for its return and was not an action such as the present one for the return of a wife, in which it is competent for the friends of the woman to raise by way of set-off or counter-claim a claim for a deduction in respect of outfit supplied for the woman whose return is sued for.

The appeal is allowed and the judgment of the Court below is set aside and the case remitted to the Court below for evidence to be taken on the point of wedding outfit and a fresh judgment to be given. Costs of this appeal to abide the issue. .

Flagstaff. 31 August, 1917. J. B. Moffat, C.M.

Ceme vs. Ndoda and Nqina.

(Tabankulu. No. 181/1916.)

Wedding Outfit—Woman's Services—Pondo Custom.—Deductions for.

Pres.:—The Plaintiffs alleged first that seven head of cattle were paid as dowry and that one was returned. Subsequently

Plaintiff admitted that only five were paid, and the register shows that the latter is the correct number. The Defendant alleges that three were repaid. The Magistrate finds on the evidence that this allegation is correct. There are discrepancies in the evidence, but these are not sufficient to justify this Court in interfering with this finding. There is evidence that an outfit was provided. It is customary to allow one beast for such outfit without going into the question of its value. According to Pondo custom a beast is allowed for the services of the woman where no child is borne.

The Defendant has returned three head of cattle and is entitled to retain two. As he only received five the Plaintiff has no further claim on him.

The appeal is dismissed with costs.

Butterworth. 2 March, 1914. C. J. Warner, R.M. Pres.

Sonamzi vs. Nosamana.

(Kentani. No. 305/1913.)

Widow—Rights to Husband's Property and Custody of Her Children.

Pres.:—The Respondent, being a widow, is, in the eyes of the law, a major and entitled to live where she chooses. The question whether she is right in claiming the custody of her children and the usufruct of her husband's estate being put to the Native Assessors, they state that so long as she lives at her late husband's kraal she cannot be deprived of the custody of the children or of the estate of her late husband. This Court concurs in this view, and the appeal is dismissed with costs.

Kokstad. 24 and 25 August, 1915. W. T. Brownlee, C.M.

B. H. C. Ndaba vs. Martha Sihawu.

(Mt. Ayliff. No. 89/1915.)

I. Widow—Right to Sue—Spoliatory Action.
II. Practice—Widow's Right to Sue—Spoliatory Action.

The facts of the case are set out on the judgment of the Appeal Court.

Pres.:—In this case the Plaintiff, who describes herself as a widow, and complains that the Defendant has wrongfully unlawfully and forcibly deprived her agents, Richard and George, of a certain goat, which she describes as her property and then in her

lawful possession, and has killed the goat, and she now claims the sum of £2 by way of damages from the Defendant.

The defence set up is an exception (1) that the Plaintiff has not sufficiently described herself in the summons; (2) that she cannot hold property; and (3) that she cannot sue unassisted; and the Magistrate has without taking evidence overruled this exception, and the appeal is brought against this ruling.

It is argued for the Appellant that the exception is really a special plea and that the Magistrate should not have dismissed it without hearing evidence, but in the opinion of this Court this is a case which cannot be met by a defence such as that set up.

The action, as remarked by the Magistrate, is practically a spoliation action, and as such all that it is necessary for the Plaintiff to prove is lawful possession as the Defendant was in a position to defend this action on the summons as it stood.

The appeal is dismissed with costs and the case remitted to the Court below to be heard upon its merits.

See Maasdorp II, p. 28.

Kokstad. April, 1912. W. T. Brownlee, A.C.M.

Tetelwa vs. John Mkatshane.

(Matatiele. No. 140/1911.)

Widow—Usufruct of Late Husband's Property—Heirs—Obligations.

The facts are set forth in the President's judgment.

Pres.:—In this case it is clear that the property claimed is property in the estate of the late Koyi, the husband of Plaintiff, and the Plaintiff therefore has a usufructuary right in it as long as she lives at the kraal of her late husband or at some kraal to be established for her by her late husband's heir. It would appear that after her husband's death Plaintiff went to her own people and there brought up her children, her son Goza being one of them, and that after Goza married and established his own kraal she went and lived with him. It appears, however, that in consequence of disagreements with Goza's wife she left his kraal and went to Cedarville to work and was away there for three years, and that during her absence Goza desiring to go to the goldfields and to have his wife there with him arranged that his cattle should be placed in the custody of the Defendant, his wife's brother, there being no male relative of his own with whom he could leave them. It now appears that the Plaintiff wishes to remove the cattle in question and to hand them over to a man named Pinda, whom she describes as her natural guardian and who apparently is her late husband's nephew.

Now, while the Plaintiff is entitled to the use of these cattle this Court is of opinion that she is not entitled to succeed in her action under the peculiar circumstances of this case. Her son Goza has not deprived her of the cattle, but she of her own accord left his kraal when, if she was being ill-treated by her daughter-in-law, she might have demanded that a separate kraal should be established for her, and Goza was quite entitled under all the circumstances to make the most suitable arrangements for the custody of the cattle, which after all are his inheritance, during his temporary absence, and, moreover, her expressed intention is to hand the cattle to Pinda, who has no shadow of right to them, and who is not her guardian, her natural guardian under Native custom being her son Goza. In the opinion of this Court her proper course is to return to Goza when he comes back from the goldfields, and either live with him or demand from him the establishment of a separate kraal for herself, which, however, must be under the control of Goza.

This Court sees no reason to interfere with the decision of the Court below, and the appeal is dismissed with costs.

Dissenting Judgment (L. Farrant, R.M., Mount Ayliff).

It is clear to me that the wife of Goza made it so unpleasant for the Plaintiff that she found it was advisable to move off, and she went to work at Cedarville for her living. After Goza had gone to work his wife followed him, leaving the cattle, upon which the Plaintiff, Goza's mother, had a lien, with her people.

The cause of disturbance no longer existing, the Plaintiff who had brought up her late husband's family returned with a male relative of her late husband to look after the cattle of her kraal. As against the Defendant under my reading of Native law she is entitled to her claim to the use and custody of the property claimed. She should have been consulted, and given an opportunity to look after the kraal of her son Goza, and the property upon which she had a distinct lien.

Kokstad. 25 August, 1917. J. B. Moffat, C.M.

C. Hlwili vs. Mohlabelwana.

(Matatiele. No. 368/1916.)

Wife—Death of, soon after Marriage—Baphuti Custom—Dowry.

The facts of the case are fully set forth in the judgment.

Pres.:—The first point raised is as to what dowry, if any, is payable in a case in which the wife dies two or three years after marriage, having borne one child. The parties are Baphuti.

The point was put to the Basuto Assessors, who are unable to enlighten the Court as to the Baphuti custom.

In the Court below the Magistrate was asked to give a ruling on the point, and the case adjourned for consideration. The Magistrate made inquiries among the Baphuti living in his district, and in Basutoland he found that the custom was that the death of the wife fixed the dowry at ten head, and that if the husband has paid the ten head he is entitled to the child of the marriage, but if he has paid a lesser number he must bring the payment up to ten head, and then he is entitled to the child. The custom as stated by the Magistrate is accepted by this Court.

The Plaintiff claimed a declaration of rights regarding the child, delivery of the child, division of eight head of cattle paid as dowry, alternative relief, and costs. The Magistrate gave judgment for Plaintiff in convention on the prayers for declaration of rights, delivery of the child, and costs.

On the case coming into Court the Defendant in his plea stated that he had always been ready and willing that Plaintiff should have the child. He tendered delivery of the child, and submitted to the Court's declaration that the girl is Plaintiff's child.

The second ground of appeal is that Appellant should have been awarded costs, because he tendered the child before and after summons. There is no evidence of tender before summons, but in view of the definite tender in the plea the Defendant should not be required to pay costs of the claim in convention after his plea.

The appeal on the claim in convention is allowed, with costs, and the portion of the judgment relating to costs on this claim will be altered to Defendant to pay Plaintiff's costs up to filing of plea, Plaintiff to pay Defendant's costs after filing of plea on claim in convention.

The Defendant as Plaintiff in reconvention claims for eight head of cattle, balance of dowry.

The Magistrate has found that eight head of cattle were paid, and gave judgment for two head, to make up the ten payable according to Native custom as laid down above.

The question of the allowance of five head for forty small stock found to have been paid has been raised, it being argued that the practice is to reckon ten head of small stock as one head of cattle. The Native Assessors state that ten head is not necessarily reckoned, and that the number may be six or eight, according to agreement and circumstances.

The Magistrate's judgment on the point can be accepted as correct.

The Appellant claims that costs in reconvention should have been awarded to him, because Defendant in reconvention did not even tender two head, and resisted the counterclaim.

The Defendant in reconvention denied that any further dowry was payable. The Plaintiff in reconvention claimed eight, and succeeded as to two, and was entitled to his costs.

On this point also the appeal must be allowed, with costs, and on the claim in reconvention the judgment will be altered to judgment for Plaintiff for two head of cattle and costs.

Umtata. 12 March, 1912. W. T. Brownlee, A.C.M.

Petu Yoywana vs. Tsono Yoywana.

(Umtata. No. 370/1911.)

Wives—Ranking of—Commoners—Qadi Wife and Seed Bearer.

The President's judgment fully sets forth the case.

Pres.:—In this case the Magistrate in the Court below has decided upon the evidence that the Plaintiff has failed to prove his case and has given judgment for the Defendant, and in this finding the Court concurs. This Court, however, goes further and is of opinion that the Plaintiff's contentions are entirely contrary to Native custom. Under Native custom common people do not nominate the rank of their wives but their rank and status follows in the order of their priority in marriage and it is only Chiefs who exercise the right of nominating the rank of their wives and even in the custom as followed by Chiefs there seems to be a diversity of practice, for while in Tembuland a Chief may depose a wife from her rank should he subsequently marry a woman of superior rank from the same tribe, yet in Gcalekaland it is held to be the custom that once a Chief's wife has had her precedence assigned to her she may not be deposed from it even should a woman of superior rank in the tribe from which she was married be married after her. In the case of common people it is the custom that the first woman married is the great wife and the second is the right-hand wife, the next is the Qadi or supporting wife of the Great House and the next after that is the Qadi of the Right-hand House, and this is the invariable order and common people may not alter the precedence of their wives once they have been married. In the case now before the Court it is admitted by both sides that the woman Nokapa was at the time of their father Yoywana's death his right-hand wife and the natural inference from this is that she had attained this rank at the time of her marriage. The Plaintiff's allegation, however, is that Yoywana's wives at the time of their marriage took the following ranks: Notyesi, Great Wife; Nomonti—the mother of Defendant and himself—Right-hand Wife; and Nokapa, Qadi Wife of the Great House; and ordinarily if they had been married in that sequence that is the rank and precedence they would have held and so far Plaintiff's statement is in harmony with custom. He proceeds, however, to say that later on his father reconstituted their status and gave them the following precedence: Notyesi Great Wife, Nokapa Right-hand Wife and Nomonti Qadi Wife of the Great House. Plaintiff further states that Defendant was taken by their father and placed in the Great House as its heir and one of their sisters was placed with him in that house, while he (Plaintiff) was left as the heir of the Qadi House. The Defendant's statement on the other hand is that owing to the fact, which is admitted by Plaintiff, that Notyesi the Great Wife had no children

their mother Nomonti was married as a seed-bearer to Notyesi and that Nokapa was married as Right-hand Wife. Now while the allegation of the Plaintiff of the reconstitution of the precedence of his father's wives is quite at variance with Native custom, the allegation of the Defendant is consonant with Native custom and it is quite in accordance with custom for a man to marry a seed-bearer for either of his two principal wives who owing to either death or barrenness produces no heir, and there is this difference between a Qadi wife and a seed-bearer—that while the former has a distinct status and her house acquires a separate estate through the marriages of her daughters which is inherited by her son the seed-bearer wife has no status but becomes the "body" of the woman for whom she has to raise up seed and the children borne by her are regarded as being those of the woman to whom she is seed-bearer. Usually the seed-bearer is taken from the same family as that of the woman for whom she is to raise up seed and in the case of a seed-bearer the ordinary sequence would be departed from.

Furthermore not only are the Plaintiff's allegations inconsistent with Native custom but also there was no necessity for Yoywana to have reconstituted the precedence of his wives because granting for the sake of argument that his statement of their original precedence is correct there is no need for Yoywana to make any special provision for an heir to the Great House for this was automatically provided for in the fact that Nokapa the supporting wife of the Great House bore a son and custom provides that where a principal House has no heir and its Qadi House has a son such son is instituted the heir of the Great House.

Plaintiff himself seems to have recognised this, for it is alleged on his side that the reconstitution was necessary to prevent the Defendant "being ousted by a Chief's daughter," but this contention is untenable both because Yoywana being a common man his wives must take precedence in accordance with the custom applicable to common people and also because again granting for the sake of argument that Nokapa was originally married as a Qadi House, her son would in the natural order of things have become the heir to the Great House of Yoywana and so would have occupied a higher position than he does as the heir of the Right-hand House and so in effect the alleged reconstitution has ousted him from the position which he might otherwise have occupied.

This Court is satisfied that the findings of the Court below upon points of fact are justified by the evidence, and without going so far as to say that it is impossible for any Native at any time to vary existing custom yet is of opinion that where any variation in custom is alleged overwhelming proof of such variation must be adduced and this the Plaintiff has failed to do.

The appeal is dismissed with costs.

Butterworth. 4 March, 1913. A. H. Stanford, C.M.

Tshubuso vs. Nojaji.

(Willowvale.)

Xiba House—Establishment of, by Commoners.

The facts of the case are immaterial.

Pres.:—The case having been submitted to the Native Assessors they state that a Xiba house may be established by commoners as well as chiefs; that it is a house established for a man's father or mother, or for both, and is supported by cattle taken from his mother's house. If this house has male issue the heir will inherit the grandfather's property, but if no male issue the son of the Great House inherits the property belonging to it. They further state that a Xiba wife can be married at any time after the marriage of the Great Wife.

The weight of evidence strongly supports the Respondent's contention that she was married as the Xiba wife of the late Ngangeni. This is stated by three of the brothers of the late Ngangeni, by his eldest son of the Right-hand House, as well as by the Respondent and her brother: and under the conditions which existed between Ngangeni and his wife of the Great House, who deserted him for a period of 20 years, it can be readily understood why he should establish a Xiba house, more especially as at the time of this marriage his mother was still alive.

It is also evident that Ngangeni had three kraals—that built for the Great Wife after her return, the kraal of the Right-hand wife, and the one established for the Xiba wife, at which Ngangeni appears to have lived, although no doubt he visited his other kraals and wives after the manner of Natives.

The Court can find no grounds upon which the Magistrate's judgment can be disturbed.

The appeal is dismissed, with costs.

Umtata. 24 July, 1917. J. B. Moffat, C.M.

Lubayi Mpunzima vs. Nompetu Mpunzima.

(Umtata. No. 438/1917.)

Xiba House—Succession to.

The facts of the case are fully disclosed in the President's judgment.

Pres.:—The Plaintiff in this case claims against Defendant, who is heir of her husband's Great House; (*a*) a declaration of rights, (*b*) certain property belonging to the Xiba house of her

late husband, and (*c*) recognition of her son as heir of that house, on the ground that she is the wife of the Xiba house. In his plea Defendant admits that the Plaintiff is a widow of the late Mpunzima (Defendant's father), and that she is of the Xiba House, where she was put to bear children at the request of Defendant as the Xiba wife, Qashiwe, who was then living, was without issue. He further claims that he was appointed heir of the Ixiba house before his father's marriage with Plaintiff and denies that the Plaintiff's son is heir of that house. Mr. Heathcote on behalf of the Appellant (Defendant in the Court below) asked that the following questions might be put to the Native Assessors, viz.:—

(1) Whether under Native custom when the Xiba house has no male issue the heir of the Great House can be appointed heir of the Xiba house?

(2) Whether when an heir has been appointed to a Xiba house which has no male issue it is in accord with Native custom for a woman to be married into that house with a view to her bearing children for that house; and

(3) If that is done and such wife bears a male child would such male child become heir to that house in place of the heir appointed thereto?

In reply to the first question the Assessors state that it is not customary for the heir of the Great House to be appointed heir of the Xiba house. If there is no male issue of the Xiba house he as heir of the Great House is *ipso facto* heir of the Xiba house. In view of this reply the second and third questions are not asked. The Assessors are then asked whether the wife of the Xiba house being childless and another woman being married into that house, during the first wife's lifetime, in order to raise issue for that house and having a son such son would be heir of the Xiba house. They reply as follows, viz.:—"The son of the second wife would not be the heir of the Xiba house. He would be regarded as a younger brother of the heir of the Great House who would inherit the property of the Xiba house. If the first wife had had a son that son would have been heir of the Xiba house. The second wife in this case would be regarded as a Qadi of the Xiba house." The Plaintiff's claim is that her minor son is the heir to the Xiba house. According to the statement of the Native Assessors he is not the heir, he being the son of the Qadi house of the Xiba house and not the son of the latter house. The Defendant, however, denies the heirship of this on a different ground altogether.

In his plea he says that he had been appointed heir prior to Plaintiff's marriage to Defendant's father and claims by virtue of such appointment. The Magistrate found rightly in the opinion of this Court that no such appointment had been proved. As a fact according to the statement of custom made by the Assessors no such appointment was necessary as according to custom as laid down by them Qashiwe the wife of the Xiba house being childless

the Defendant became heir of that house without the necessity for any special appointment as such heir. The Defendant is entitled to the property of the Xiba house. As regards the claim for recognition of Plaintiff's right to reside and live at the late Mpunzima's kraal there is no evidence to show that this right has been denied her by the Defendant who in his plea asserts his willingness to receive and support her.

The appeal is allowed with costs and the Magistrate's judgment is altered to judgment for Defendant with costs.