SELECTION OF CASES

DECIDED BY THE

NATIVE APPEAL COURT

FOR THE

TRANSKEIAN TERRITORIES

DURING THE YEARS

1918 — 1922.

COMPILED BY

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PREFACE.

The present volume of Reports, which should be quoted as N.A.C. 4, covers the years 1918 to 1922, and includes several important decisions. Where a decision has been subsequently overruled attention has been drawn to this fact by a footnote referring to the later decision. In other cases judgments are quoted in the footnote for comparison, particularly where a principle is modified or extended.

The question of reporting the cases in chronological order as was done by Mr. B. Henkel in his Reports (1891-1911) was carefully considered and opinion consulted. The bulk of opinion was in favour of the system of reporting cases alphabetically according to subject matter, as was done in the last volume of Reports (1912-17) and this system has therefore been adhered to.

A great deal of time and care has been bestowed upon the indexing of this volume. As far as possible the subject-matter of every case has been carefully indexed and cross-indexed, but it is too much to hope that it will be found faultless. A study of the index itself should furnish a fair knowledge of the general principles decided. The difficulty of indexing is well known. It is impossible to say under what particular head a case will be sought for; the same person will on different occasions look under totally different heads. It is really a matter of what particular point of view happens to be uppermost in the mind at the time. The index of litigants has also received careful attention. In addition an index of cases according to Courts of origin has been included, so that in the last resort, where the Court from which the case originated is known, it may be possible to "track down" the case required. It was at first intended to give a Summary of the decided cases on particular Native Customs up to date, so that the volume might be more or less complete in itself as a manual of Native Law and Custom in the Territories, but it was eventually decided that a work of this nature should be separate, and not form portion of a volume of reports. In conclusion we wish to thank the Chief Magistrate, Mr. W. T. Welsh, for the encouragement he has given us in the work of compiling these Reports.

A.V.D.
R.M.

Umtata,
10th October, 1923.

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NATIVE APPEAL COURT REPORTS.

Kokstad. 8th April, 1920. T. W. C. Norton, A.A.C.M.

SIKEMELE AND HLATI vs. BAMBIZULU.

(Mount Frere. Case No. 142/1919.)

Abduction—Elopement—No Elopement Fee payable under Baca Custom.

In this case Bambizulu sued Sikemele and Hlati for one beast as damages for the elopement of the first Defendant with his (the Plaintiff's) daughter: the second Defendant was sued as father of the first Defendant and liable for his torts. The Defendants excepted that there was no cause of action, inasmuch as there is no fine for elopement according to Baca Custom as laid down in the case of *Cetywayo* vs. *Ntontiya* (3, N.A.C., p. 100). The Magistrate took evidence from Chief Mncisana Makaula, who stated that a fine of one beast was payable for the abduction of a girl without the consent of her parents. Headman Tsibiyana Makaula gave evidence to the same effect. The Magistrate then overruled the exception with costs: the Defendants appealed.

JUDGMENT.

By President: Respondent sued Appellants in the Court below for one beast damages for abduction.

The exception was taken that no cause of action was disclosed there being no fine for elopement according to Baca Custom as laid down by the Native Appeal Court.

This Court has over a long period ruled that no abduction fine is claimable under Baca Custom. There seems no doubt that the Bacas themselves had such a custom and still desire to adhere to it but for some reason not disclosed in the decided cases, this fine has not been allowed by this Court. The learned President at one sitting of the Court, who had wide experience among the Bacas, expressed the definite opinion that "there is no fee for elopement."

The appeal is allowed with costs and judgment altered to "Exception upheld with costs."

Dissenting Judgment by the Magisterial Assessors, Mr. F. H. Guthrie, Resident Magistrate of Mount Currie, and Mr. H. E. Grant, Resident Magistrate of Umzimkulu.

"Although previous rulings of this Court appear to support the Appellant's contention in this case, we are of opinion that

it is a well-established custom among the Bacas and other tribes throughout the Transkeian Territories that an elopement fee is payable.

"We, as Assessors, appreciate the Acting President's reluctance to differ from the judgments of his predecessors. At the same time we cannot lose sight of the fact that this Court is established for the administration of Native Laws and Customs. This being so, it is, in our view, advisable in the best interests of the Natives that this Custom, which appears to be universally admitted by the people themselves, should be upheld, more especially as it is in no way contrary to the moral welfare of the people.

"We are, therefore, of opinion the ruling of the court below is correct and should stand."

Butterworth. 15th November, 1922. J. M. Young, A.A.C.M.

GABISO NYILA vs. MNYAMA AND TATABU TSIPA.

(Butterworth. Case No. 51/1422.)

Abduction—Abduction with view to marriage—Seduction—Damages for seduction payable where girl abducted and seduced—Fingo custom.

The Plaintiff alleged that the first Defendant did wrongfully and unlawfully abduct his minor daughter from his the Plaintiff's kraal, and did her seduce and carnally know. Wherefore he claimed two head of cattle or £10 from the Defendants jointly and severally, the 2nd Defendant as being the kraalhead and liable for the torts of the 1st Defendant. The Magistrate gave judgment for Plaintiff for one beast or £5; the Plaintiff appealed on the ground that the damages awarded were insufficient.

Judgment.

By President: The Appellant sued the Respondents for two head of cattle or £10 damages for the abduction and seduction of his daughter Ntombiyomhlaba, and obtained judgment for one beast or its value £5, the Magistrate holding that the abduction was with a view to marriage and that under Fingo Custom only one beast is payable.

The appeal is noted on the ground that the circumstances surrounding the abduction were aggravated and that under the circumstances Appellant was entitled to two head of cattle.

It appears that the 1st Respondent had paid 3 cattle and 10 goats as dowry and it had been arranged that a marriage according to Christian rites was to take place, that three years after payment of dowry and after three of the cattle and 6 goats had died the 1st Respondent secretly abducted the girl and took her to another district where he hid her for over three months. When her people accidentally discovered her whereabouts it was found that she had been seduced.

At the request of the Respondents' attorney the matter is put to the Native Assessors, whose unanimous opinion is consistent with that expressed in the case of *Molisana* vs. *Legela* (2 N.A.C., 189).

The appeal is allowed with costs and the Magistrate's judgment altered to "Judgment for Plaintiff for two head of cattle or their value £10 and costs."

Note: The following is the relevant part of the judgment in the case of *Molisana* vs. *Legela* (2 N.A.C., 189) referred to in the above case: "The customs of the tribes vary on the question of liability in cases where a girl is carried off for the purpose of marriage. . . . . Under Fingo Custom a beast is always paid for the abduction and there is also a further penalty if intercourse has taken place." (Judgment by A. H. Stanford, C.M.)

Compare judgments in case of *N. Mgqambeli* vs. *S. Jafta*, page 102, and *G. Masiza* vs. *M. Conjana*, page 211, of these Reports.

Butterworth. 5th July, 1921. W. T. Welsh, C.M.

SAMUEL BENYA vs. MORRIS BENYA.

(Butterworth. Case No. 41/1921.)

Adultery—Collusion—Husband and wife living together after the alleged adultery does not create presumption of collusion—Damages—Fingo Custom—Magistrate's discretion.

In this case the Plaintiff claimed from the Defendant, his brother, the sum of £100 as and for damages for the alleged abduction, adultery and pregnancy of his wife.

Defendant denied this and pleaded that as Plaintiff had married his wife by Christian rites and was still living with her it was not competent for him to sue for damages for adultery.

The Magistrate found the adultery proved and awarded the Plaintiff £25 damages and costs, stating:—"I fixed the amount at the ordinary rate or scale paid by the majority of the Native tribes, which, it is true, is higher than that payable under Fingo Custom, but as the parties in this case were married by Christian rites Fingo Custom did not necessarily apply, and the Court used its discretion. Defendant took advantage of Plaintiff's absence at the mines, and a man at the mines is in a somewhat similar position to a man on Active Service, and should be given special consideration. The parties too are more or less civilised, and their mode and habits of life should also be taken into consideration."

The Defendant appealed.

Judgment.

By President: The Magistrate has believed the evidence for the Plaintiff and this Court is not prepared to say he was wrong. There is nothing to show that there was collusion between the Plaintiff and his wife. The fact that they lived together after

the alleged adultery does not, in the opinion of this Court, raise a presumption of collusion. It is clear that the adultery occurred during the Plaintiff's prolonged absence at the mines.

The assessment of damages is in the discretion of the trial Court. In all the circumstances of the case this Court is of opinion that the amount awarded is not excessive. The appeal is dismissed with costs.

Kokstad. 3rd December, 1920. W. T. Welsh, C.M.

Ref. to in 1937 (T.N) 40

EDWARD TSHIPA vs. SIMON LETSOBELA.

Matatiele. Case No. 148/1920.)

Adultery—Application of Colonial Law—Christian marriage insufficient indication of abandonment of Native Custom—Pleadings.

Plaintiff claimed payment of three head of cattle or their value £15 (less £3 paid on account) as and for damages for the adultery of Defendant with the Plaintiff's wife. Defendant admitted adultery with the woman but applied for the case to be tried under Colonial Law, inasmuch as Plaintiff alleged that he was married to the woman by Christian rites. The Magistrate refused the application and after argument gave judgment for Plaintiff as prayed with costs. The Defendant appealed.

JUDGMENT.

By President: In this case the Plaintiff alleges that he is married to his wife by Christian rites; the Defendant's plea clearly amounts to an admission of a marriage. No evidence was necessary therefore to prove that the woman was Plaintiff's wife. The Defendant applied that the case should be tried according to Colonial Law, but the Magistrate decided that it should be decided according to Native Custom. Section 23 of Proclamation No. 112 of 1879 provides that "All such suits and proceedings shall be dealt with according to the law in force, at the time, in the Colony of the Cape of Good Hope, except where all the parties to the suit are what are commonly called Natives, in which case it may be dealt with according to Native Law."

The parties in this suit are Natives, and there is nothing on the record to show that they have discarded Native modes of life and adopted a European standard. The mere fact of the marriage by Christian rites of the Plaintiff and his wife is not a sufficient indication that they have abandoned Native Custom. Whether there were such circumstances in the case of *Magudumana* vs. *Sibaca* (3 N.A.C., 4) are not disclosed in the report.

In the opinion of this Court the Magistrate was justified in exercising the discretion vested in him to decide the case according to Native Custom.

The appeal is dismissed with costs.

Note: Defendant admitted the adultery in his plea but went on to say that he did not know how the woman was married. He

further alleged that Plaintiff "is trading on the immorality of his wife and acting in collusion with her." This was held both by the Magistrate and the Appeal Court to amount to an admission of the marriage.

Note: In a claim by a man against his father-in-law for the children of his marriage, which was by Christian rites, the Magistrate decided to try the case according to Colonial law, on the ground that the marriage was by Christian rites. The Native Appeal Court held that the Magistrate had not made an improper use of his judicial discretion in so deciding. *George Ndumndum* vs. *William Mhlakaza* (Tsolo case), Native Appeal Court, Umtata, July, 1923.

Umtata. 17th March, 1920. C. J. Warner, C.M.

SIHOHOYI GOVA vs. GREEN MASOYISE.

(Engcobo. Case No. 381/1919.)

Adultery—Counterclaim for damages for assault—Claim for restoration of "Ntlonze."

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

Judgment.

By President: Appellant was sued in the Court below for committing adultery with the Respondent's wife. He denied the adultery and claimed in reconvention the return of certain articles or their value which he alleged Respondent had taken from him, and also damages for an assault committed on him by the Respondent.

In answer to the claim in reconvention Respondent admitted having taken two blankets and a piece of leather "which he states is Ntlonze" and is "justified in having."

The Magistrate found the adultery proved and gave judgment for Plaintiff on the claim in convention and dismissed the claim in reconvention.

This Court sees no reason to disturb the judgment on the claim in convention.

It is a well-known practice among Natives, which is recognised in our Courts, for a husband to take from a man whom he detects committing adultery with his wife some article belonging to the adulterer, usually his blanket, which is subsequently produced at the trial as "Ntlonze" or proof of the catch, and this Court has no desire to interfere with this practice. But in this case Respondent expressed no intention to restore Appellant's property at the termination of the proceedings, and as the judgment stands Appellant would be unable to obtain possession of his property if Respondent refused to return it to him.

The claim for damages for assault was rightly dismissed, the Appellant having given provocation by committing adultery with Respondent's wife.

The appeal must be allowed with costs and the judgment of the Court below on the claim in reconvention altered to read: "On claim in reconvention: For Plaintiff in reconvention for the return of two blankets or their value £5 5s. 6d." The rest of the judgment to stand.

Butterworth. 5th July, 1921. W. T. Welsh, C.M.

SIPOXO HASHI vs. BUNXA DUMEZWENI AND ANOTHER.

(Willowvale. Cases No. 249/1920.)

Adultery—Counterclaim for assault committed by husband.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

Judgment.

By President: In this case the Plaintiff recovered from the Defendant three head of cattle or £15 as damages for adultery. On a claim in reconvention for £50 as damages for assault the Magistrate found in favour of the Defendant in reconvention, stating in his reasons that he found the Plaintiff in reconvention was committing an illegal act at the time.

The assault in respect of which the damages are claimed was according to medical evidence a stab through the neck with an assegai which entered close to the vertebrae and the exit of which was in front of the neck. The Defendant in reconvention admits that he stabbed the Plaintiff in reconvention about 500 yards from where he had caught him in adultery with his wife, and states that at the time the latter was attempting to escape.

This Court is of opinion that in the circumstances the Defendant in reconvention was not justified in inflicting the serious injuries he did with an assegai, even though the Plaintiff in reconvention was attempting to escape.

In the case of *Olivier* vs. *Olivier* heard in the Supreme Court in 1891 it was decided that an adulterer was entitled to damages for an assault committed by the husband who was also awarded damages for the adultery.

This Court while of opinion that the Defendant in reconvention exceeded his rights considers that the Plaintiff in reconvention is not entitled to more than nominal damages. These it will assess at five pounds.

The appeal on the counterclaim is accordingly allowed with costs and judgment in the court below entered for the Plaintiff in reconvention for five pounds and costs.

Kokstad. 4th April, 1919. C. J. Warner, C.M.

V. MGAM vs. S. RARAYI.

(Umzimkulu. Case No. 550/1918.)

Adultery—Damages—Alternative value placed upon cattle awarded—Grounds of appeal—Non-compliance with rules—Proclamations 391 *of* 1894 and 144 *of* 1915.

Action for 5 head of cattle or value, £35, for adultery and pregnancy. The Magistrate awarded 3 head of cattle or £21, finding the adultery proved but as there was evidence of access by the husband, he was not satisfied that Defendant caused the pregnancy. In placing the alternative value of £7 on the cattle he said that he had regard to the market value of the animals. The Defendant appealed on the grounds that: "The judgment is against the probabilities existing in the case also against the weight of evidence and Kaffir custom. Should the judgment in the lower court not be disturbed for the abovestated reasons, then a further ground of appeal is herewith adduced, namely, against the value of cattle placed in the judgment, namely, £7. In all fines for seduction and adultery which take place after rinderpest the value of cattle has been fixed at £5 and not the market value. Judgment should have been for 3 head, value £15."

JUDGMENT.

By President: The appeal is brought on two grounds. On the first ground that the judgment is against the weight of evidence and Kaffir custom; this Court does not consider there should be any interference with the judgment of the court below.

The second ground for appeal is against the value placed on the cattle as an alternative, viz., £7 each.

For some years past the alternative value placed on cattle in adultery and seduction actions in the Courts of Resident Magistrates in the Transkeian Territories has been £5 and in the absence of any generally expressed desire on the part of the Natives for an increase in such value, the Court is not disposed to depart from a practice which has been observed for so long.

The appeal is allowed with costs on the second ground of appeal and the judgment in the Court below altered to judgment for Plaintiff for three head of cattle or £15 and costs.

The Court feels constrained to point out that the Notice of Appeal does not comply with the provisions of Section 6 of Proclamation 391 of 1894 as amended by Proclamation No. 144 of 1915, in that the first ground of appeal does not explicitly state the grounds on which the appeal is based.

Umtata. 17th November, 1921. T. W. C. Norton, A.C.M.

NKONYANA DYANI vs. MAGADE DIYANA AND ANOTHER.

(Engcobo. Case No. 443/1921.)

Adultery—Damages—Acceptance by Messenger is binding on the principal.

Claim for balance of damages for adultery.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The sole question for decision in this case is whether the fact that Appellant's messengers drove off 30 small stock from Respondents precludes Appellant from claiming any further damages for the admitted adultery with his wife.

The Magistrate finds that the stock was accepted in settlement of the claim, and there is no evidence of a report being made to the Headman that the payment was on account.

The Native Assessors were asked if acceptance by Messengers is binding on their principal and state quite emphatically that such is the case.

The Court agrees with the Magistrate's finding.

The appeal is dismissed with costs.

Kokstad. 4th May, 1918. J. B. Moffat, C.M.

JIM KWEZA vs. MANXODIDI.

(Matatiele. Case No. 263/1917.)

Adultery—Domicile of husband—Marriage by Native Custom outside Territories—Proclamation No. 142 of 1910.

The Plaintiff, Jim Kweza of Lady Frere, sued Manxodidi, a resident of the Matatiele District, for 6 head of cattle or value, £30, as damages for the alleged adultery of the Defendant with his wife, whereby she had become pregnant on two occasions. Defendant admitted causing the first pregnancy but did not admit that the woman was the wife of Plaintiff. The Magistrate, after hearing evidence, gave judgment for Defendant, holding that the marriage took place in the Glen Grey district and that the Plaintiff was not domiciled in the Territories. In support of his judgment he quoted *Rasmeni* vs. *Plaatji* (N.A.C., 1, 30); *Binya* vs. *Mqekeza* (2 N.A.C., 26), and *Jeke* vs. *Judge* (11 Juta, 125). The Plaintiff appealed.

JUDGMENT.

By President: The Plaintiff in his summons does not say that he was married or when and where he was married. He simply refers to the woman as his wife.

Defendant in his plea does not admit that the woman is wife of Plaintiff.

Plaintiff in his evidence says that he married the woman in the Glen Grey district according to Native custom. He admits that he has no intention of residing in the Matatiele district where he has been for six months, and states that he intends to return to Glen Grey district when the case is settled.

The alleged marriage according to Native custom in the Glen Grey district is not recognised as a valid marriage in that district.

The principle that where a marriage according to Native custom has been entered into outside these Territories and the parties thereto subsequently take up their permanent residence in these Territories such marriage will be recognised as valid in these Territories has been adopted in previous decisions of this Court and in Proclamation No. 142 of 1910.

Before it can be claimed that the woman in this case is Plaintiff's wife he must show that his marriage in Glen Grey district has been validated in these Territories in accordance with the above principle by his having become a permanent resident in these Territories.

From his own statement he is not a resident in these Territories. His alleged marriage must be governed in accordance with decisions of the Supreme Court and of this Court by the law in force where he is domiciled and where the alleged marriage took place. According to that law the marriage is not a valid one and the woman is not his wife. He cannot therefore claim damages for adultery. The Magistrate correctly gave judgment for the Defendant.

The appeal must therefore be dismissed with costs.

Kokstad. 4th April, 1922. W. T. Welsh, C.M.

NGIYAFA vs. NKWEBANE.

(Umzimkulu. Case No. 419/1921.)

Adultery—Death of husband before litis contestatio—Actio personalis moritur cum persona.

The Plaintiff stated that he was the father of one Zitulele, deceased, and was his heir. He alleged that during the subsistence of his son's marriage with one Mamkelane, the Defendant committed adultery with the said Mamkelane and rendered her pregnant. He also alleged that Zitulele sued the Defendant before the Chief Baka and was awarded 5 head of cattle as damages, which Defendant had not, however, satisfied in whole or in part. Defendant pleaded that the late Zitulele was impotent, and that he (Defendant) at Plaintiff's request raised up seed to Zitulele's hut, and had intercourse with Mamkelane with the full knowledge and approval of Plaintiff. He further specially pleaded that the action lapsed with the death of Zitulele. The Magistrate upheld the special plea and dismissed the summons with costs. The Plaintiff appealed. In his reasons the

Magistrate stated, *inter alia*, " I came to the conclusion that Zitulele, having died before instituting legal proceedings against Defendant for the alleged adultery with his wife Mamkelane, it is not competent for Plaintiff, who is the late Zitulele's father, to maintain such an action, as any claim which the late Zitulele had against Defendant lapsed with his (Zitulele's) death.

JUDGMENT.

By President: In this action, the Plaintiff, now Appellant, sued the Defendant, now Respondent, in an action wherein he alleged that the Defendant committed adultery with the wife of his late son Zitulele. The Plaintiff in his summons alleges that the late Zitulele sued the Defendant before Chief Baka, and obtained judgment for five head of cattle as damages for adultery, which judgment has not been satisfied in whole or in part.

The action before Chief Baka is admitted. The Defendant specially pleads that Zitulele having died any action which he may have had against the Defendant has lapsed, and that the Plaintiff is not entitled to sue him. It appears clear that the action brought by Zitulele against the Defendant before Chief Baka was decided over three years ago, and nothing was done to enforce this order until the present summons was issued in October last. It was decided in the case of *Mqangabode* vs. *Mtshentshe* heard at Lusikisiki in December, 1920 (page 13 of these Reports), that a son and heir cannot be held liable for his deceased father who had committed adultery, as the father's wrong was a personal one and died with him.

In the case of *Meyer* vs. *Gericke* (Foord 14) it was decided that the death of a party before *litis contestatio* puts an end to an action for personal injury.

The question for this Court to decide is whether when Zitulele died his action had reached the stage of *litis contestatio*.

When Zitulele died no action had been commenced in the Magistrate's Court, and in the opinion of this Court there is no ground for holding that the award made by Baka formed any portion of the proceedings so as to produce the condition of *litis contestatio*.

The appeal is dismissed with costs.

Note: See opinion of Pondo Counsellors in case where the husband died after issue of summons, but before pleas were filed —*Tinini Zakaza* vs. *Dennis Pennington*, page 192.

Umtata. 15th February, 1919. C. J. Warner, C.M.

NOMANZOYIYA vs. MOYIKWA.

(Ngqeleni. Case No. 87/1918.)

Adultery—Evidence of wife alone is insufficient.

Action for damages for adultery and resultant pregnancy. The facts of the case are immaterial.

JUDGMENT.

By President: The only evidence in the court below to support Respondent's claim that Appellant caused the pregnancy of his wife is the evidence of the Respondent's wife alone. This, in the authority of *Richter* vs. *Wagenaar* (Menzies, Vol. 1, page 262) is not sufficient.

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

Lusikisiki. 13th December, 1922. W. T. Welsh, C.M.

BEKIZULU KA TSHINGITSHANA vs. MKONYWANA.

(Bizana. Case No. 210/1922.)

Adultery—Proof—Evidence—To establish claim for adultery specific acts of carnal intercourse must be proved.

Action for 3 head of cattle or £15 as damages for adultery. The Magistrate found that Defendant was caught with his arms around the Plaintiff's wife, and that he was kissing her, and held that in accordance with Native Law, this constituted adultery, more especially coupled with the fact of Defendant's previous intimacies with the woman, which he found to be proved. He gave judgment for Plaintiff as prayed, and the Defendant appealed.

JUDGMENT.

By President: The Plaintiff claimed from the Defendant the usual damages for adultery which he alleged was committed on 18th August, 1922. It is admitted that on the occasion in question the Defendant was found outside a hut which was then being plastered, with his arms round the Plaintiff's wife whom he was kissing. It is also admitted that intercourse did not take place. In the opinion of this Court these facts do not constitute adultery, which is defined as "the carnal connection between two married persons, other than the husband with his wife or between one married person and one unmarried person."

It is significant that there is no reported case in which this Court has awarded damages in circumstances such as are disclosed in the present action.

The appeal is allowed with costs and the judgment in the court below altered to one for the Defendant with costs.

Note: This decision was followed by the Court in the case of *Schermbrucker Menziwa* vs. *Velebayi Xotongo* (Qumbu. Case 271/1922) heard on appeal at Umtata in March, 1923.

It was also held in the case of *King Mtya* vs. *Dinana Matshaya and Mahashi Matshaya* (Engcobo. Case No. 472/1922), heard at Umtata on appeal in March, 1923, in view of the judgments in the cases of *Bekisulu ka Tshingitshana* vs. *Mkongwana* and *Raji* vs. *Silongalonga* (reported below) that a quarrel between two women about a man, not the husband of either, is not a good cause of action for adultery. Compare cases reported in 2 N.A.C., pages 12, 25 and 147.

Butterworth. 16th November, 1922. J. M. Young, A.A.C.M.

RAJI vs. SILONGALONGA.

(Kentani. Case No. 166/1922.)

Adultery—Proof—Admission—Proof must be furnished of specific acts of adultery—Mere admission is insufficient to establish an action for damages—Catch.

Claim for 3 head of cattle or £15 as damages for adultery. The Defendant denied the adultery. The Magistrate heard the evidence and gave judgment for the Plaintiff as prayed with costs. The Defendant appealed, *inter alia*, on the ground that there was no direct evidence of adultery having been committed at any definite time, and that an alleged admission, which was denied, was wrongly accepted by the Court and did not constitute evidence of adultery.

Judgment.

By President: The Plaintiff, now Respondent, sued the Defendant, now Appellant, for three head of cattle or their value £15 as damages for adultery with his, Respondent's, wife.

The Magistrate gave judgment for Plaintiff as prayed with costs.

It is alleged that the Appellant at a beer-drink made a statement to the effect that he was the "metsha" of the Respondent's wife. The Appellant denies having made this statement.

The Magistrate has considered this alleged statement as a confession of adultery and in his reasons states that it affords sufficient corroboration of the evidence of the two women that adultery had taken place. He goes on to say that "there is no proof of a specific act or acts of illicit intercourse but the terms of the Defendant's admission justify the implication and support the woman's statement that unlawful intimacy had continued until recently."

There appears to be no proof of any specific act of adultery and under the circumstances the alleged admission would not, in the opinion of this Court, constitute a "catch."

The appeal is allowed with costs and the judgment altered to "Absolution from the instance with costs."

See footnote on previous page.

Lusikisiki. 9th December, 1920. W. T. Welsh, C.M.

MQANGABODE vs. NTSHENTSHE.

(Bixana. Case No. 106/1920.)

Adultery—Son and heir cannot be made liable for deceased father's adultery—Pondo Custom—Actio personalis moritur cum persona—Litis contestatio.

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

The summons alleged that Defendant, Mqangabode, was the son and heir of one Mgadi, deceased, and that during his lifetime the said Mgadi committed adultery with Plaintiff's wife, whereby she became pregnant. Defendant denied all knowledge and liability.

The Magistrate found Mgadi's adultery proved and gave judgment against Defendant "in his capacity as heir to the late Mgadi for 5 head of cattle or £25 and costs."

Defendant appealed on the grounds (1) that the adultery had not been proved; (2) that this was a personal action and defendant could not be made liable, especially as the action was not commenced till some time after Mgadi's death and therefore the stage of *litis contestatio* had not been reached; (3) that in the event of the first two grounds failing execution could only proceed against the assets of the deceased.

JUDGMENT.

By President: The facts of the case having been put to the Native Assessors they state that according to Pondo Custom a son and heir cannot be made liable for his deceased father who had committed adultery, as the wrong which the father did was a personal one and died with him. The heir would not be liable even if action had been taken by the wronged husband against the adulterer, provided nothing had been recovered. The estate of the deceased is not liable for damages.

In view of this statement of Pondo Custom the Plaintiff has no action against the Defendant. The appeal is allowed with costs and the judgment in the court below altered to judgment for the Defendant with costs.

Umtata. 20th February, 1919. C. J. Warner, C.M.

BANANA FANDESI vs. LUVAYI NTSIZI AND MBI NTSIZI.

(Mqanduli. Case No. 305 1918.)

Adultery—Kraalhead responsibility does not extend to visitors—Pregnancy—Practice—Abandonment of part of claim before conclusion of case.

In this case the Plaintiff claimed five head of cattle or their value £25 as damages for adultery and consequent pregnancy.

Plaintiff alleged that 1st Defendant lived with 2nd Defendant and that the latter was responsible for the former's *torts*. The Magistrate found the adultery proved, and also held the 2nd Defendant liable for the *tort* of the 1st Defendant. The Defendants appealed.

JUDGMENT.

By President: The appeal in this case is brought on three grounds. The first that the Respondent failed to prove his case. The Magistrate in the Court below who had the witnesses before him found that Respondent had established his case as to adultery committed with his wife by first-named Appellant and the Court sees no reason to differ from this finding.

The second ground of appeal is that the second-named Appellant is not liable for the *torts* of the first-named Appellant as the latter is not a resident of, but a visitor at, the kraal of the former.

The question was submitted to the Native Assessors who state that in Native Law the head of a kraal is only responsible for the *torts* of inmates who are residents at his kraal, and that he is not liable for the *torts* of visitors. The evidence discloses the fact that the first-named Appellant has his home in the district of Engcobo. The second-named Appellant cannot therefore be made liable for his *torts*, and on this ground the appeal must succeed as far as the second-named Appellant is concerned.

The third ground of appeal is that Respondent sued for pregnancy and should not have been allowed to alter his claim to one for adultery alone. In his summons the Respondent sued Appellants for adultery and pregnancy and it was quite competent for him to abandon the whole or any part of his claim before the conclusion of the case. On this ground the appeal must fail.

The judgment of the Court is that the appeal is dismissed with costs as regards the first-named Appellant. As regards the second-named Appellant the appeal is allowed with costs, and the judgment in the Court below is altered to read:—

"For Plaintiff for three head of cattle or their value £15 with costs against Defendant Luvayi Ntsizi.'

For Defendant, Mbi Ntsizi, with costs.

Butterworth. 3rd March, 1921. W. T. Welsh, C.M.

SIPAJI TIWANI vs. MQALEKISO GUSHANI.

(Willowvale. Case No. 274/1920.)

Adultery—Damages—Marriage to Loose Woman—Amount awarded—Reduced damages.

The plaintiff claimed 5 head of cattle or £25 as damages for the adultery of Defendant with Plaintiff's wife, Noakile, and her resultant pregnancy. Defendant said that he had been having connection with the woman for the past five years, and that she was a loose woman.

The Magistrate found the adultery proved and gave judgment for Plaintiff as prayed with costs.

The Defendant appealed on the ground that there was no proper marriage between Plaintiff and the woman, and that even if there was such a marriage, the damages awarded were excessive.

JUDGMENT.

By President: According to Plaintiff's evidence the woman Noakile first married Mahi, and during the subsistence of that marriage she committed adultery with Magopeni. Plaintiff states that he knew she was living as a loose woman; he however subsequently married her. After living together for two months he left her and went away for over two years.

The circumstances having been placed before the Native Assessors they state that the measure of Damages is in the discretion of the Court, but that the Plaintiff would not be entitled to the full amount. With that opinion this Court agrees.

While concurring in the Magistrate's finding that there was a marriage this Court is of opinion that the damages awarded are excessive.

The appeal will be allowed with costs, and the Judgment altered to one for Plaintiff for three cattle or £15 with costs of suit.

Lusikisiki. 19th August, 1919. C. J. Warner, C.M.

SIYEZA vs. FEFENI KA TSEKWANA.

(Bizana. Case No. 82/1919.)

Adultery—Re-marriage of Woman during subsistence of Marriage —Claim by first husband for dowry paid by second husband in satisfaction of his claim against the second husband for adultery: Pondo Custom.

Plaintiff stated that two years previously he had married the daughter of Defendant and had paid 2 head of cattle and one goat as dowry. The woman stayed with the Plaintiff for six months and then returned to Defendant's kraal. She refused to return to him. Subsequently the Defendant again gave her in marriage to one Jeve, from whom he obtained 3 head of cattle and seven goats as dowry. Plaintiff now claimed the dowry paid by Jeve and also the return of his wife or the return of the dowry paid for her. The Magistrate dismissed the claim for the dowry paid by Jeve, but gave judgment for Plaintiff for the dowry paid by him, viz., 2 head of cattle or one goat. The Plaintiff appealed against the dismissal of his claim for the dowry paid by Jeve, on the ground that the so-called marriage of the woman to Jeve took place during the subsistence of her marriage to Plaintiff, and that according to Native Custom the stock paid by Jeve belonged to him. The Magistrate in his reasons for judgment said: " I know of no Pondo Law such as stated in the letter noting the appeal in this case. When a woman leaves her husband and she is subsequently married to another man before

the dissolution of the marriage the first husband sues the second for adultery, although he has paid cattle as dowry to the father, and then sues the father for the return of his wife or his own dowry. He cannot claim from the father the dowry paid by the second man, unless however the cattle were paid as damages for adultery, and which cattle would then be held by the father for the husband. I therefore held in this case that Plaintiff should have sued Jeve for adultery first if he could establish the fact that he took the woman before his marriage was dissolved, and that he was not entitled to the cattle paid as dowry by Jeve to the Defendant."

JUDGMENT.

By President: The appeal in this case is on the question whether the Appellant is entitled to the cattle paid as dowry for his wife by Jeve before the dissolution of the marriage between Appellant and his wife. The Magistrate in the Court below held Appellant should first have sued Jeve for adultery, and thereafter sued Respondent for the return of the cattle he had paid as dowry for his wife. This is consistent with the views of the Native Assessors in the case of *Mhlahlwa* vs. *Mtsenene*, heard at Flagstaff in April, 1918,* and again expressed in this Court with the addition that the cattle paid as dowry by the second husband could be attached to satisfy the first husband's claim for damages for adultery, viz.:—Three head of cattle. In the case referred to above, in which the issues were similar to those involved in this case, the Court held that the Plaintiff was entitled to succeed in his claim, and in accordance with that ruling, this Court considers that Appellant is entitled to Three of the cattle paid as dowry by Jeve.

The appeal is accordingly allowed with costs, and the judgment of the court below is amended by the addition of the words "On Claim A for Plaintiff for Three Head of Cattle or £15."

Kokstad. 4th April, 1922. W. T. Welsh, C.M.

HLEKEHLA NOVUKELA vs. SIKWIKWI NOJONTSHOLO.

(Mount Ayliff. Case No. 79/1920.)

Adultery—Marriage—Ngezo beast is paid whether dowry or fine is paid.

Action for 3 head of cattle or £30 as and for damages for adultery. Defendant pleaded that the woman with whom he was alleged to be committing adultery was his wife. One Mtsha giving evidence for the Plaintiff said: "Plaintiff brought Mamlayi to the kraal where I was staying. Huku was sent to report to Mlayi's (the woman's father's) kraal. On his return 20 goats were paid. After that Mamlayi's mother came to demand "ngezo." She was given five goats, one of which was killed at Huku's. After this a horse was paid and a bull calf

* Page 21 of the Reports.

as dowry. The girl stayed with the Plaintiff about 6 moons, I think. She stayed with Plaintiff all that time. I was present when "ngezo" was demanded. No fine for elopement was demanded nor was a fine demanded. Mamlayi was married to Hlekehla (Plaintiff)." The woman, Mamlayi stated that her husband was the Defendant, Sikwikwi. She admitted eloping with the Plaintiff and she heard that he paid two cattle. The Magistrate gave judgment for the Plaintiff for 3 cattle or £15 and costs, stating that "from the evidence now led the Court is satisfied that payment of stock was made by Hlekehla for the girl Mamlayi as dowry, and that she lived with him for a considerable time as his wife. When a more affluent suitor came upon the scene he was accepted and the girl was married to him, the former marriage still subsisting.

The Defendant appealed.

JUDGMENT.

By President: At a previous sitting of this Court the Magistrate's judgment for the Defendant was altered to one of absolution. After hearing further evidence the Magistrate has found for the Plaintiff. In arriving at this conclusion he appears to have been impressed with the evidence of Mtsha who gives direct evidence as to the payment of dowry and "ngezo." The Native Assessors having been consulted state that the payment of "ngezo" is made whether dowry or fine is paid.

The Defendant states that when he married Mamlayi he was not told anything of her previous relations with the Plaintiff, but her father Gqagqa says he told Defendant all about her relations with the Plaintiff.

The fact that the Plaintiff proceeded to the mines after the first payment, and on his return tendered further cattle corroborates his evidence that he was paying dowry. His allegations are supported by several witnesses whose evidence has at no time been found by the Magistrate to be unworthy of credence, and after considering the whole of the evidence this Court is of opinion that it would not be justified in disturbing the Magistrate's finding. The appeal is dismissed with costs.

Umtata. 10th July, 1918. C. J. Warner, A.C.M.

JOHN TOKI vs. BLAKEWAY NGUTA.

(Mcanduli. Case No. 41/1918.)

Adultery—Plea of marriage—Damages for continuous adultery—Marriage—Essentials of.

In this case the Plaintiff claimed ten head of cattle as damages for adultery committed by the Defendant with his (Plaintiff's) wife, and two pregnancies caused thereby, less one beast paid on account. Defendant pleaded that he had married the woman and paid the one beast on account of dowry. The Magistrate did not accept Defendant's story, and gave judgment for the Plaintiff. The Defendant appealed.

JUDGMENT

By President: The question at issue in this case is whether there was a marriage between Plaintiff and Masila Malonde (the woman in question). The fact that he paid nine head of cattle as dowry for her to her brother and guardian Alveni Malonde is not disputed. In fact Defendant admits that when he asked for her in marriage he was told by her guardian that nine head of cattle had already been received as dowry from Plaintiff. It is further not disputed that Masila lived for some time with Plaintiff as his wife. In Native Law the payment of dowry constitutes marriage, and the fact that Plaintiff paid nine head of cattle, and the woman then lived with him as his wife for some months clearly establishes marriage according to Native Law between them. The discrepancies as to the time of marriage in the evidence of the witnesses for the Plaintiff cannot influence the fact that a marriage actually took place. The Defendant in cohabiting with Plaintiff's wife must have been aware of the liability he incurred. The Court refers the question of the amount of damages claimable in a case of this nature to the Native Assessors who state that the Plaintiff could under these circumstances claim as for only one pregnancy.

The appeal is therefore allowed with costs, and the judgment in the Court below altered to judgment for Plaintiff for five head of cattle or £25 and costs.

In granting this judgment the Court does not include the beast valued at £15 which Defendant in the Court below paid as dowry to Alveni Malonde and which Plaintiff has no claim to consider was paid as fine.

Lusikisiki. 14th April, 1920. T. W. C. Norton, A.C.M.

TENGILIZWE vs. MLENGO NODLADLA.

(Bizana. Case No. 231/1920.)

Adultery—Plea of bona fide *marriage—Damages for continuous adultery—Woman's intention not to return to husband*

In this case the Plaintiff claimed 5 head of cattle for damages for adultery and pregnancy, alleging that the Defendant had for a period of two years lived in adultery with his, the Plaintiff's wife, and that the woman had given birth to a child of which the Defendant was the father. Defendant pleaded that he married the woman with consent of her guardian who informed him that she was free to marry. He further pleaded that if the woman was still the lawful wife of the Plaintiff he had suffered no damage, inasmuch as at the time of Defendant's marriage to her she had already separated from the Plaintiff and had, to the knowledge of the Plaintiff, been living with him (Defendant) for the past six years.

The Magistrate found:

(1) That there had been no formal dissolution of marriage between the Plaintiff and the woman.
(2) That two head of cattle and £5 paid by Defendant were paid as a fine and not as dowry.
(3) That Defendant knew all along that the woman was Plaintiff's wife, but still persisted in cohabiting with her.
(4) That the woman had never previously expressed her determination not to return to Plaintiff, and it was only now that she did so, and that the decision is governed by the case of *Gomfi* vs. *Mdenduluka* (N.A.C., 3, page 20) and had not reached the stage laid down in *Gomfi* vs. *Mdenduluka* on page 21 of the same reports.

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

JUDGMENT

By President: Respondent sues Appellant for 5 head of cattle fine for adultery.

The Appellant pleads that he *bona fide* married the woman.

It is contended on his behalf that this offence, if any, was one continuous act of adultery and that the utmost he can now be held liable for, is 2 head of cattle, he having already paid three head.

The case appears to be on all fours with the case of *Gomfi* vs. *Mdenduluka* (Meaker 20), where this Court allowed a second claim for damages for adultery in circumstances similar to these.

In the opinion of this Court, the Magistrate is correct in following this ruling, and not that on page 21 Meaker, in a later case between the same parties, where it was clear the woman refused to return to her husband.

It was only in the course of the proceedings in the Court below that she stated she had no intention of returning.

The appeal is dismissed with costs.

Lusikisiki. 19th August, 1919. C. J. Warner, C.M.

NOYEZA KA NOHAYI vs. NOMTSHEKETSHE NJENKENI

Flagstaff. Case No. 28/1919.)

Adultery—Plea of bona fide *marriage—Liability of man who innocently marries the wife of another.*

The Plaintiff claimed 3 head of cattle or £15 as damages for adultery. Defendant denied committing adultery with Plaintiff's wife, but stated that during the previous ploughing season he had married a daughter of one Nolangeni "with whom he is now living in wedlock." He denied Plaintiff's right to claim any damages from him. The Magistrate after hearing evidence gave

judgment as follows: " The Court holds that Plaintiff did marry the woman Manyati, but as Defendant married her *bona fide* he is not liable for adultery damages. Defendant to pay costs." The Defendant appealed on the ground that the Magistrate's finding was not justified by the evidence, and was not in accordance with Native Law and Custom, while the Plaintiff cross-appealed on the ground that it having been proved that Defendant committed adultery with Plaintiff's wife, the Plaintiff was entitled to the damages claimed.

JUDGMENT

By President: Respondent sued Appellant for damages for adultery committed with his wife, and stated that he had married the daughter of Nolangeni, and paid two head of cattle and a sum of money as dowry. He then proceeded to the Transvaal mines to earn sufficient to pay more dowry which was demanded, and on his return found that his wife was living with Appellant as his wife.

Appellant's defence is that he made enquiries of the woman's guardian, who assured him she was not married, and he then paid dowry, and obtained the girl, as his wife. The Magistrate found that the woman was first married to Respondent, and that that marriage had not been dissolved, and there is evidence to support this finding. The leading case bearing on the issues involved is the case of *Mguzazwe* vs. *Betyeka* (1 Henkel 193), in which it was held, following the opinion of Native Assessors, that even if a man marries the wife of another believing she is unmarried, he is liable to the husband in damages, as an ordinary adulterer.

The Court consults the Native Assessors who confirm this view and add that an adulterer who has innocently married the wife of another is liable for the full amount of damages. Appeal is therefore dismissed with costs.

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

Flagstaff. 25th April, 1918. J. B. Moffat, C.M.

TSOTSA MTSENENE vs. MBULALI MLAHLWA.

(Flagstaff. Case No. 164/1916.)

Adultery—Marriage—Dissolution of—Dowry, restoration of—Claim at same time for damages paid to wife's father for the wife's adultery.

The Plaintiff claimed, *inter alia*, the return of his wife or the restoration of the dowry paid for her, and for three head of cattle paid by a certain man to the woman's father as a fine for intercourse with the woman at a period when her marriage to the Plaintiff still subsisted. The Magistrate gave an order for the restoration of the wife or the return of dowry and also gave judgment for Plaintiff for the three head of cattle paid as fine.

The case went on appeal and the Native Appeal Court consulted the Native Assessors, who stated, " It is unusual for a man to sue at the same time for cattle paid as fine and for dissolution of marriage, and in the ordinary course under Native Custom Plaintiff should have sued first for the cattle paid to Defendant, and then have taken proceedings for the return of his wife or restoration of the dowry paid for her. Although this course has not been followed in this case the Plaintiff is entitled to the cattle paid as fine." The Magistrate's judgment was upheld.

Butterworth. 7th July, 1920. W. T. Welsh, A.C.M.

MXOLI SIKITI vs. KWAYIMANE MBENCANE.

(Willowvale. Case No. 36/1920.)

Adultery—Damages—Negligence on part of husband.

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

The Magistrate, after hearing the evidence, found that the adultery had been proved, but that Plaintiff had neglected his wife and absconded. Subsequently he found her living in adultery with the Defendant, but took no steps against her father to recover her or the dowry, although she had clearly committed an act of desertion. The Magistrate therefore considered that Plaintiff was negligent and only entitled to one beast as damages. Plaintiff appealed against the amount of damages awarded.

JUDGMENT.

By President: The appeal is against the amount of the damages awarded, which are stated to be insufficient. In cases in which there is negligence on the part of the husband the damages are not fixed, but vary according to the circumstances of each case.

In this case the Magistrate gave full consideration to the degree of negligence and came to the conclusion that the Plaintiff was entitled to only one beast. This Court considers that to be sufficient compensation to the husband, who does not appear to have been very diligent in the care of his wife's affections.

The appeal is dismissed with costs.

Umtata. 21st March, 1918. J. B. Moffat, C.M.

VATU vs. GXEKWA.

(Libode. Case No. 126/1917.)

Adultery—Ngena husband—No personal right of action—Exception—Leave to apply for amendment of summons refused.

Claim for £15 damages for adultery.

Plaintiff stated that he was the " ngena " husband of his late brother's widow, and that he had caught Defendant committing

adultery with her. Plaintiff sued in a personal capacity. Defendant excepted that Plaintiff had no right of action, and the Magistrate upheld the exception.

Plaintiff appealed.

JUDGMENT.

By President: The Plaintiff sues as the " ukungena " husband of one Mantole.

Exception was taken to the summons that the Plaintiff has no right of action.

Evidence was taken in the course of which he stated that he was heir to the late husband of Mantolo.

The Magistrate upheld the exception and dismissed the summons.

The appeal is brought on the ground that the Magistrate erred in holding that an " ukungena " husband has no right of action for adultery committed with an " ukungena " wife.

The Magistrate was quite correct.

Before this Court it has been argued that because the " ukungena " husband is the late husband's heir this exception should not have been upheld and that he has right of action. He is guardian of the late husband's estate, and if he had sued in that capacity his case might have been dealt with.

He however sues as an " ukungena " husband, and in his notice of appeal he claims the right to sue as such husband. On his summons and on his notice of appeal he cannot succeed.

Application has been made for leave to apply to the Magistrate for leave to amend the summons. The Court does not consider that in the circumstances leave should be granted in this case.

The appeal is dismissed with costs.

Lusikisiki. 2nd April, 1921. W. T. Welsh, C.M.

Rob. Ky 1937 (T.-N.) 34.

NTINJANA vs. DINIZULU AND MADOLO.

(Ngqeleni. Case No. 6/1921.)

Adultery—Ngena husband—Right of action on behalf of estate of deceased husband—Statement of custom by Native Assessors not accepted.

In this case Plaintiff sued Defendant for damages for adultery alleging that Defendant had committed adultery with his (Plaintiff's) late brother's widow, of whom he (the Plaintiff) was the " ngena " husband. He brought the action on behalf of his late brother's estate.

Defendant denied Plaintiff's right to bring the action and asked for dismissal of summons. The Magistrate gave judgment for Plaintiff.

Defendant appealed.

JUDGMENT.

By President: The Native Assessors having been consulted state:—

(1) That an "ngena" husband cannot claim damages for adultery under any circumstances either on his own account or on behalf of deceased's estate.
(2) That nobody whatever has the right to claim damages for adultery with a woman who had been "ngenaed" by the brother of her deceased husband.
(3) That when a husband dies his wife can cohabit with any man whether she is an "ngena" wife or not and that no damages are claimable therefor.

This Court is not prepared to accept this statement as being in accord with Native Custom. It is directly in conflict with previous decisions of this Court which were based on the opinions of the Native Assessors. Vide the case of *Manyosine* vs. *Nonkamyezi* (1, N.A.C., 114), which was an appeal from Ngqeleni in which Jiya Jiya and other Assessors stated the Pondo Custom in such cases, and *Mdoda* vs. *Skeyi* (3 N.A.C., 287).

In the present case the Appellant admits in his grounds of appeal that damages are recoverable for adultery with an "ngena" wife.

The question for decision is whether the temporary absence of the woman deprives the Plaintiff of this right. In the opinion of this Court it does not. The evidence discloses that the woman had been residing with her people for a period of two years, during which the "ngena" husband had periodically visited and cohabited with her. There is no question of the union having been dissolved.

This Court is of opinion that the Magistrate correctly decided in favour of the Plaintiff, and the appeal is dismissed with costs.

Umtata. 20th February, 1919. C. J. Warner, C.M.

VAROYI MAKINANA vs. VELAPI GXAMELENI.

(Mqanduli. Case No. 320/1918.)

Adultery—Damages—Pregnancy—Damages claimed for adultery and pregnancy and pregnancy not proved—Plaintiff not entitled to damages for adultery alone.

Claim for 5 head of cattle or value £25 for adultery and consequent pregnancy. Defendant denied the adultery. The Magistrate, after hearing evidence, gave judgment for Defendant, on the ground that Defendant could not be the father of the child born to the woman. He gave no definite finding as to whether the adultery had been proved or not, but stated that had the action been for adultery alone, evidence of certain previous acts of adultery alleged by the woman in evidence but not alleged in the summons, might have been taken into consideration, if supported.

The Plaintiff appealed.

JUDGMENT.

By President: Appellant sued Respondent in the Court below for damages for adultery with Appellant's wife resulting in her pregnancy.

The Magistrate found that Appellant had failed to prove his claim for pregnancy and this Court concurs in this finding.

It is argued in this Court that the evidence proves that Respondent committed adultery with Appellant's wife at various times, even if he did not cause her pregnancy and that if the Magistrate found that Appellant's case had failed to establish the pregnancy there should have been judgment for adultery or at least an absolution judgment.

The Magistrate in his reasons does not state whether or not he finds Respondent was guilty of committing adultery with Appellant's wife.

The Court submits this question to the Native Assessors, who state that if a man brings an action for damages against a Native for causing the pegnancy of his wife and fails to establish his case he is not entitled to claim damages for adultery alone, nor can he sue for such damages until there has been a fresh "catch."

This Court concurs in this opinion, and this case is distinguished from other cases decided in this Court where the Plaintiff abandoned the claim for pregnancy before the termination of his case and elected to sue for damages for adultery alone.

The Appeal is therefore dismissed with costs.

Note: This judgment is explained in the judgment of the Court in the case of *Pupusana Mtsewu* vs. *Beja Tyaliti* in the Appeal Court at Umtata on 15th March, 1920 (pages 24 and 25 of these Reports), where it is definitely laid down that where a Plaintiff claims damages for pregnancy and fails to establish the case for pregnancy, he may be awarded damages for simple adultery, provided the adultery is proved.

Umtata. 15th March, 1920. C. J. Warner, C.M.

PUPUSANA MTSEWU vs. BEJA TYALITI.

(Umtata. Case No. 317/1919.)

Adultery—Pregnancy—Damages—Where damages claimed for pregnancy and pregnancy not proved against Defendant, damages may be awarded for adultery, provided adultery proved—Access of husband to wife.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: Appellant who was Plaintiff in the Court below sued Respondent for £25 for committing adultery with, and causing the pregnancy of, Appellant's wife.

The Magistrate found that the adultery was proved, but that as Appellant had had access to his wife Respondent could not be held liable for the pregnancy and relying on the case of *Varoyi Makinana* vs. *Velapi Gxameleni* (heard in this Court in February, 1919, and not reported), *gave judgment for Respondent.

This Court sees no reason to disagree with the finding of the Magistrate that Plaintiff had access to his wife during the period she became pregnant, and is consequently not prepared to hold that he erred in finding for Respondent on the claim for pregnancy.

The next ground of appeal is that the Magistrate having found that Respondent had committed adultery with the Appellant's wife should have given judgment for Appellant as in an action for adultery alone.

It is a well known principle of Native Law, which has been expounded by Native experts in this Court on several occasions, that if a Native sues another for causing the pregnancy of his wife and fails to establish the charge of pregnancy though the adultery is proved, he cannot be awarded damages for the adultery alone until there has been another "catch." This rule however was departed from in the cases of *Kogo* vs. *Sokapase* (Meaker, p. 17) and *Matikilane and Another* vs. *Mteto* (Meaker, p. 19), which must be accepted as laying down the principle that the Native rule referred to above can no longer be observed.

In the later case of *Ngesi* vs. *Ntula* (Meaker, p. 18), this Court in following the above cases quoted laid emphasis in the fact that in the last case the claim for pregnancy was abandoned at an early stage in the proceedings.

This rule of Native Law was not relied on as a defence in the Court of first instance in the case of *Makinana* vs. *Gxameleni*, and a reference to the record shows that the Magistrate who heard the case in the first instance held that Defendant could not have committed adultery with Plaintiff's wife during the period alleged in the summons, and therefore the question of whether the rule of Native Law that a man charged with causing the pregnancy of the wife of another can not be held liable for adultery alone if the charge of causing pregnancy fails did not really apply, and the expression of the opinion of the Native Assessors recorded in the judgment was not necessary for the elucidation of either the facts or law applicable to the question in dispute.

This Court, as will be seen from the Cases quoted above, having departed from this principle of Native Law, and having already held that judgment may be given for adultery alone in an action for adultery and pregnancy, sees no reason to reverse its previous judgments.

The appeal is allowed with costs, and the judgment of the Court below is altered to judgment for Plaintiff for £15 and costs.

* Page 23 of these Reports.

Lusikisiki. 9th December, 1919. C. J. Warner, C.M.

CELEGWANA vs. MAGUDLWANA.

(Ngqeleni. Case No. 196/1919.

Adultery—Plea of Marriage—Damages—Damages awarded for pregnancy in addition to damages for previous act of adultery—Pondo Custom—Native Assessors statement of damages which would be awarded by Chief in similar circumstances.

Claim for damages for adultery.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

Judgment.

By President: The facts of this case appear to be that Respondent married his wife about the time of the appearance of East Coast Fever. Some time subsequent to his marriage he went to work, and on his return home during last green mealie season, he found his wife had disappeared from his kraal. He made search and eventually discovered her in adultery with Appellant at a certain stream. He took them both to the Headman, Gxumisa, in whose care Appellant's blanket was left until the hearing of the case. Respondent took the woman home with him, but when the crops were drying, she again disappeared, and on his searching for her, he found her with Appellant in Putyi's hut. Respondent was attacked by Putyi, and in the resulting confusion, Appellant and the woman disappeared. Respondent again got possession of her and took her to the Headman, Gxumisa, but she appears to have left him subsequently and has since lived with Appellant.

Appellant contends that he married her in green mealie season, paying six head of cattle as dowry for her, which, however, were not registered until July. If Appellant's story is correct, it is strange he did not at once inform the Respondent and the Headman, Gxumisa, that he was married to the woman. It is true that he denies going before the Headman, but in view of the latter's evidence, his denial cannot be accepted. Respondent sued Appellant in the Court below for 11 head of cattle, viz.: 3 for each of the two occasions he found his wife and Appellant together and five for the pregnancy of his wife. The judgment of the Court below was for 8 head of cattle or £40.

The first ground of Appeal was abandoned in this Court, and the Appellant relied on the second ground alone, which is that the damages awarded are excessive and quotes the case of *Gomfi* vs. *Mdenduluka* (Meaker 21). This Court fully concurs in the principle laid down in that case, but in the present case, Appellant, after he had been found with Respondent's wife and knew she was Respondent's wife and had returned to her husband, continued his intimacy with her, and his actions certainly leads to the conclusion that the cattle, he paid as dowry for her were not paid until July, and after he knew she was the wife of another.

In view of these facts, this Court considers that the Magistrate in the Court below, was correct in his finding and in awarding Respondent damages for the pregnancy in addition to damages for a previous act of adultery.

The appeal is accordingly dismissed with costs.

In accordance with the concluding paragraph of the Magistrate's reasons, the question was submitted to the Pondo native assessors, who state that had this case been tried before a Chief, 11 head of cattle would have been awarded for damages. But in recording this opinion of native law, it must be distinctly understood that this Court is not bound by it and that each case must be tried on its merits.

Umtata. 9th July, 1918. C. J. Warner, A.C.M.

KOMENI MTOTO vs. BELE GQODO.

(Mqanduli. Case No. 51/1918.)

Adultery—Woman under teleka-father of woman not liable to husband.

Plaintiff claimed the restoration of his wife or the dowry paid for her, and in addition for 5 head of cattle or £25 as damages for refusal on the part of the Defendant to disclose the name of the man who committed adultery with the woman while detained by the Defendant under the custom of "Teleka." The Plaintiff alleged that the woman was pregnant as the result of such adultery. Defendant admitted the pregnancy but denied that Plaintiff had any right of action against him. The Magistrate gave judgment for Plaintiff in respect of the adultery for 5 head of cattle or their value £25 and costs.

Defendant appealed. The Magistrate in his reasons for judgment relied on the judgment of the Native Appeal Court at Umtata in the case of *Ndabeni Mtanga* vs. *Mangunza* on 21st July, 1910 (Henkel, 2, 48).

JUDGMENT.

By President: The appeal is on the question whether the father of a Native woman who has been impounded under the Native Custom of "Ukuteleka" can be made liable to the husband for damages for the pregnancy of the woman by an unknown adulterer whose name she refuses to disclose.

Appellant relies on the cases of *Mklangaba* vs. *Dyalvani* (2 Henkel, 139) and *Mangaliso Qwesha* vs. *Maqina Mqanjelwa* (not yet reported)* decided in this Court on the 24th November, 1916. Respondent relies on the case of *Ndabeni* vs. *Manguza* (2 Henkel, 48) and the Magistrate in the Court below based his judgment on the last-quoted case.

The question at issue is put to the Native Assessors, Chief Dalindyebo and P. Nkala (Umtata), Nota (Engcobo) and Dudumayo (Mqanduli) and they state that no such action lies in

(* 3, N.A.C., 22.)

Native Law, and that the husband's only remedy in cases of this nature, if the wife refuses to disclose the name of her paramour is to endeavour to catch him.

The appeal is therefore allowed with costs. The judgment in the Court below is altered to " Judgment for Defendant with costs on the claim for five head of cattle or £25 for pregnancy of Plaintiff's wife."

Umtata. 25th March, 1919. C. J. Warner, C.M.

MFESI vs. MAXAYI.

(Port St. John's. Case No. 119/1918.)

Adultery—Woman under teleka—Husband cannot claim the damages for adultery until he has released the woman from teleka—Grounds of appeal—Proclamation No. 144 of 1915.

Claim for fines for adultery and pregnancy received by Defendant from one Qekeza who had committed adultery with the Plaintiff's wife. The Magistrate gave judgment for Plaintiff for one fine. Defendant appealed.

The essential facts are sufficiently clear from the judgment of the Native Appeal Court.

Judgment.

By President: As Appellant was not represented by an Attorney in the court below, this Court, in terms of Proclamation 144 of 1915 did not restrict the arguments in this Court to the " grounds of appeal."

It is clear that a marriage existed between Appellant's sister and Respondent and that she committed adultery with one Qekeza who caused her to become pregnant while she was living with the Appellant, to whom Qekeza paid fines for such pregnancies. Respondent claimed these fines and the Magistrate in the Court below, holding that a marriage existed between the Respondent and the Appellant's sister, gave judgment for Respondent.

It is clear that Appellant impounded his sister under the Custom of " teleka " as Respondent had failed to pay the dowry demanded. Respondent took no steps to recover his wife for a period of ten years or more and now seeks to recover her and also the fine paid by Qekeza to Appellant.

Under Native Law if a woman becomes pregnant by a man other than her husband while she is impounded under the Custom of " Ukuteleka " the husband cannot sue for damages for the pregnancy before he has released his wife.

Respondent has been premature in instituting these proceedings, before releasing his wife.

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

Umtata. 9th November, 1922. J. M. Young, A.C.M.

BUBONDA VETEZO vs. MPONDWANA RAYIBANA.

(Umtata. Case No. 596/1922.)

Affray—Damages for death of son—Participants in affray in pari delicto—*No action maintainable by parent or guardian in respect of damages sustained by parent or guardian by death of participant resulting from the affray.*

Action for £100 damages for death of son and £2 medical expenses. Plaintiff alleged that the Defendant wrongfully and unlawfully stabbed and wounded Plaintiff's son, Nteta, with an assegai, as a result whereof he died, or otherwise that the Defendant was engaged in an affray wherein the said Nteta was killed. The Magistrate found that the deceased Nteta voluntarily took part in the affray and was therefore *in pari delicto*, but held that the father was nevertheless entitled to reimbursement of medical expenses, although not entitled to any damages in respect of the death. The Defendant appealed and the Plaintiff cross-appealed. The appeal was on the ground that the judgment was contrary to law, inasmuch as the Plaintiff claimed through the deceased, who was *in pari delicto* with the Defendant. The cross-appeal was on the ground that the Magistrate erred in refusing to award damages for the death of the deceased and consequent loss of service to the Plaintiff.

Judgment.

By President: Appellant and the Respondent's son both took part in an affray in which the Respondent's son received injuries to which he eventually succumbed.

The Appellant and others were duly convicted of the crime of violence before the Circuit Court. There is a conflict of evidence as to what actually occurred during the affray.

The Magistrate in his reasons for judgment has found that the Respondent's son and others voluntarily took part in the affray This being the case they were all gathered together for an unlawful purpose. Under the circumstances the Respondent's son, had he survived his injuries, could not have claimed damages and it is difficult to see why his father should be placed in a better position.

There is nothing in the Magistrate's finding to show that the Respondent's son was in greater jeopardy than the Appellant was.

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

Kokstad. 15th April, 1921. T. W. C. Norton, A.C.M.

S. MDWEBU vs. N. MENE.

(Matatiele. Case No. 197/1919.)

Animals—Injuries by bull—negligence—Culpa.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: Appellant sued Respondent for £10 as damages for the loss of his cow which was poked by Respondent's bull at a dipping tank.

There is a conflict of evidence as to whether or not Appellant asked that the bull be kept out because it was known to be vicious. The Magistrate finds, however, that Appellant asked the person in charge of the bull not to put it into the tank until his cows were out, as it might bull his cows. The Respondent was entitled to have his bull at the tank. The sole question therefore is, was he negligent in not complying with the request made to him by the Appellant. Having regard to the conditions under which cattle are dipped, it is difficult to see how Respondent could have complied with Appellant's request. In these circumstances this Court is of opinion that Respondent's disregard of Appellant's request cannot be regarded as *culpa*. To hold otherwise, would be carrying the doctrine of *culpa* too far.

The appeal is dismissed with costs.

Umtata. 24th November, 1919. C. J. Warner, C.M.

TSALINKABI vs. MATETE AND ANOTHER.

(Qumbu. Case No. 141/1919.)

Animals—Injuries to—Damages awarded where the injury has caused no actual depreciation in the value of the animal.

Plaintiff claimed the sum of 12s. 6d. as damages for one of his sheep which had its leg broken owing to the 1st Defendant (minor son of the 2nd Defendant) throwing a stick at it. The allegation was denied and 2nd Defendant further pleaded that he was not liable for the *tort* of his son in such a case.

The Magistrate found that first Defendant had injured the Plaintiff's sheep, but as Plaintiff had failed to prove any damage he gave an absolution judgment.

Plaintiff appealed.

JUDGMENT.

By President: In the form in which this case is brought it is evident that Appellant is sued under Native Law which therefore must be applied to it.

The points at issue are submitted to the Native Assessors who state that in Native Law any person injuring the property of another is liable to pay damages to the owner of the injured property even if no actual damage is proved to have been suffered and that the object of their law in this respect is to prevent persons from carelessly or wilfully injuring the property of others.

The Magistrate having found that first Defendant had injured Appellant's sheep should have awarded damages though no damage was actually proved.

The appeal is allowed with costs and the judgment of the Court below altered to read " for Plaintiff for five shillings and costs."

Lusikisiki. 2nd April, 1921. W. T. Welsh, C.M.

SIXULA ZIMPOFU vs. SIGONYA MHLAKWAPALWA.

(Libode. Case No. 67/1920.)

Animals—Special knowledge of Natives—Latent defects—Purchase and sale—Actio redhibitoria.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT

By President: The Plaintiff in this case sued the Defendant for the sum of £7 under the *actio redhibitoria* in respect of a tollie which developed disease within 24 hours and died within 48 hours of the purchase. It is argued that in the absence of expert evidence to prove the cause of death the Plaintiff is not entitled to succeed.

It appears that Plaintiff took special care of the animal for which he paid a substantial amount, that as soon as it showed symptoms of disease he reported to the Headman, then to the Defendant and after its death to the Police, and that he then opened the animal. The evidence is to the effect that there was rotten matter in the intestines and that this appeared to be the cause of death. In the absence of a veterinary surgeon the Plaintiff seems to have taken all possible steps to ascertain the cause of death. The Defendant did not take any action on receipt of the Plaintiff's report and is not in a position to contradict the latter's allegations.

Maasdorp, Vol. III., page 171, states: " Whether a particular defect existed at the time of the sale is a matter of fact which will depend, amongst other things, upon whether it made its appearance shortly afterwards. Where an animal which has been purchased dies shortly after the sale it will be presumed that it died from latent disease, and the *onus* of proof to the contrary will be on the seller."

The Magistrate was satisfied that the animal died from a latent disease which must have existed at the time of the purchase.

The authorities which the Court has available do not require proof only by an expert witness, but by one who has special knowledge.

In the opinion of this Court the evidence adduced by the Plaintiff was, under the circumstances and in view of the special knowledge which Natives have of cattle, sufficient to entitle him to a judgment.

The appeal is dismissed with costs.

Umtata. 20th November, 1919. C. J. Warner, C.M.

VAKUBI NGQONGQOZI AND ANOTHER vs. NOSELEM NYALAMBISA AND OTHERS.

(Engcobo. Case No. 287/1919.)

Assault—Damages—Exception—Right of widow of Native marriage to claim damages under Colonial Law from parties who assaulted her late husband and caused his death.

Action by a widow of a Native marriage for damages for the death of her husband. Defendant excepted that Plaintiff, being a widow of a Native marriage, had no right of action under Colonial Law for damages for the death of her husband. The Magistrate overruled the exception and the Defendant appealed.

JUDGMENT.

By President: This is an appeal from the judgment of the Magistrate in the Court below overruling an exception that the Respondent, being a widow of a Native marriage, cannot institute an action under South African Law claiming damages from certain parties who had killed her husband.

In the case of *Ngqobela vs. Sihele* (X, 1893, Juta, 346) the learned Chief Justice stated: "Any marriage which would be regarded as valid in any dependencies of this Colony must be regarded as valid in this Colony, although our own solemnities may not have been observed, provided it is not opposed to the essential nature of the contract as understood in this Colony."

It is clear that Respondent would be regarded as an ordinary widow in the Cape Province and entitled to bring any action that any other widow may institute.

The fact of her living in Tembuland cannot deprive her of her right to sue under Colonial Law in this case.

The appeal is dismissed with costs.

Postea. Umtata. 8th November, 1920. W. T. Welsh, C.M.

Assault—Damages—contributory negligence.

The merits of the above case were gone into by the Magistrate. The Plaintiff claimed £100 as damages sustained by herself and her minor children (as co-plaintiffs) as the result of the death of her husband caused by the assault committed on him by the

Defendants, who had been tried therefor and convicted of the crime of culpable homicide. The Defendants pleaded justification of the assault, inasmuch as the deceased was trespassing in the vicinity of the kraal of the 1st Defendant's father at night time. The Magistrate gave judgment for Defendants and the Plaintiff appealed.

JUDGMENT.

By President: The Plaintiff, the widow and children of the late Sangqu Nyalambisa sued the Defendants for the sum of £100, as damages for having assaulted the late Sangqu Nyalambisa in consequence of which he died.

The Defendants pleaded justification and judgment was given in their favour. In his reasons for his judgment the Magistrate appears to have applied the doctrine of contributory negligence which was not raised in the pleadings. The assault committed upon the deceased was a most serious one and has not been justified.

The evidence does not disclose that the deceased was committing an unlawful act and if it was intended to arrest him there was no need to first inflict such serious injuries. The appeal is allowed with costs.

The case has been closed on both sides and to save expense this Court will alter the judgment to one for Plaintiffs and assess the damages at £50, the one paying the other to be absolved, with costs in the court below.

Umtata. 18th July, 1922. W. T. Welsh, C.M.

DELAYI BUKALI vs. BONQI KONZA AND OTHERS.

(Qumbu. Case No. 59/1922.)

Assault—Provocation—Verbal abuse is insufficient to justify the infliction of severe injuries.

The essential facts of the case are clearly stated in the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Plaintiff sued the Defendants for the sum of £15 as damages for assault.

The first Defendant in his plea admits that he fought with the Plaintiff and struck him with a sjambok but says that Plaintiff was the aggressor and provoked the fight by swearing at and striking him.

The second Defendant pleaded that he endeavoured to stop the fight between Plaintiff and Bonqi when Plaintiff turned on him and struck him whereupon he, Nokona, in self-defence struck the Plaintiff.

The third Defendant denies he assaulted the Plaintiff.

The Magistrate absolved the third Defendant with costs and awarded Plaintiff damages in the sum of one penny against the first and second Defendants and ordered each party to pay his own costs.

The Plaintiff has appealed against this judgment on the ground that the damages awarded are insufficient, that the third Defendant should not have been absolved and that the Plaintiff having been the successful party was entitled to his costs.

It appears from the proceedings that when the Plaintiff arrived on the scene, where a beer-drink was in progress, he was annoyed by one Mseje, thereafter he was irritated by Bonqi, the first Defendant, the Plaintiff then abused Bonqi by certain references to his mother. The Plaintiff was at this time sitting, and the first Defendant assaulted him with a sjambok, the second Defendant then came up and struck the Plaintiff with a stick.

It is clear from the medical and other evidence that the Plaintiff was seriously assaulted, he received a number of blows causing injuries on and about the head, one of which was a scalp wound two inches long reaching the bone. Whatever provocation the first Defendant may have received from the Plaintiff, an elderly man, the former is himself not free from blame as he had already annoyed the Plaintiff.

In the opinion of this Court the insulting retort of the Plaintiff was not sufficient provocation justifying the infliction of such severe injuries.

The appeal will be allowed with costs as against the first and second Defendants and the judgment of the Court below is altered to one for the Plaintiff against Bonqi Konza and Nakona Skwam for £5 with costs the one paying the other to be absolved. The Magistrate's finding absolving the third Defendant will not be disturbed. The latter is entitled to his costs of appeal.

Umtata. 18th February, 1919. C. J. Warner, C.M.

XAKALINKOMO MANGCOBO vs. NGQILI MQATAWA.

(St. Mark's. Case No. 129/1918.)

Assault—Damages—Loss of sight of one eye.

The facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The appeal in this case is on the amount of damages awarded in the Court below.

Respondent was convicted of an assault upon Appellant which resulted in the total loss of the sight of an eye and for this Respondent was sentenced to imprisonment with hard labour for one month.

Subsequently Appellant sued Respondent for £100 for damages for the loss of his eye.

When the case came on for hearing Respondent tendered the sum of £10 15s., which was the amount awarded by the Magistrate with costs to date of tender.

In the opinion of this Court the sum awarded was wholly inadequate seeing that there is nothing on the record to justify Respondent inflicting such a severe injury on the Appellant.

The appeal is allowed with costs and on the authority of *Makunga* vs. *Tshwela* (decided in the Appeal Court at Butterworth on the 17th November, 1913, but not yet reported),* the judgment in the court below is altered to judgment for Plaintiff for £50 (fifty pounds) and costs.

Butterworth. 10th July, 1919. C. J. Warner, C.M.

DALIWE MTUMA vs. NTENTENI NEKE.

(Willowvale. Case No. 54/1919.)

Assault—Damages—Alleged loss of eye—Tender.

In this case the Plaintiff claimed the sum of £50 as damages for assault. He alleged that the Defendant assaulted him by striking him divers blows with a stick on various parts of the body, whereby he became sick and wounded and lost the sight of his right eye.

Defendant denied the assault and alleged that Plaintiff first assaulted him and that a struggle ensued. He admitted that he was convicted of assault on Plaintiff. He denied that Plaintiff lost the sight of an eye or that he ever suffered the damages claimed. He further stated that in consequence of the conviction and to avoid further trouble, he tendered £5 to Plaintiff as damages, before issue of summons. The District Surgeon, who appeared as a witness, was of opinion that the Plaintiff's impaired sight was not due to the assault. The Magistrate gave judgment for Plaintiff for £10 and costs, and in his reasons for judgment stated that he did not consider this amount excessive in view of the fact that the Plaintiff had for a long time been unable to perform his usual duties at his kraal and had incurred medical expenses. Defendant appealed on the ground that Plaintiff had failed to prove that he had suffered the damages awarded through the *tort* of the Defendant and that the damages tendered were ample.

JUDGMENT.

By President: The appeal in this case is on the amount of damages awarded in the court below. Respondent in his summons states he has lost the sight of an eye on account of the

* Not reported.—The case came on appeal from the Resident Magistrate of Nqamakwe, the action being a claim for £250 for the loss of an eye and other injuries. The Magistrate awarded £100 damages and costs, and the Defendant appealed. The appeal court held that the damages were excessive and reduced them to £50, stating "the opinion of both Houses of Parliament may be taken as a guide, and in a mine accident, if the Respondent had lost the sight of both eyes, £50 is the maximum of what could be awarded (under Act 15 of 1911).

assault committed on him by the Appellant. This is contradicted by the medical evidence, that the condition of Respondent's eye is not due to the assault which, according to the same evidence, was not severe, and in the opinion of this Court the Respondent should have been satisfied with the sum tendered.

The appeal is allowed with costs and the judgment of the court below is altered to read:

"Judgment for Plaintiff for £5. Defendant to pay costs up to date of tender. Plaintiff to pay subsequent costs."

Flagstaff. 23rd April, 1918. J. B. Moffat, C.M.

NOLUZI vs. PAYIYANA.

(Bizana. Case No. 167/1917.)

Abduction—Bopa fee payable whether there has been seduction or not—Pondo Custom.

Claim for 3 head of cattle or £15 as damages for abduction and seduction.

The essential facts are sufficiently clear from the judgment of the Native Appeal Court.

Judgment.

By President: The first ground of appeal is that defendant abducted the girl with a view to marriage and that seduction has not been proved.

The Pondo Assessors having been referred to state that the bopa fee of one beast is paid for abduction irrespective of whether there has been seduction or not.

The Magistrate states that he found the probabilities were that there was seduction but according to the Assessors the seduction does not affect the question.

Plaintiff is entitled to one head as bopa fee for abduction of his daughter.

The Plaintiff admits receipt of seven small stock. Defendant alleges payment of eight. Whichever is correct the Plaintiff has received more than the equivalent of one head to which he is entitled and cannot be awarded any more.

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

Umtata. 18th February, 1919. C. J. Warner, C.M.

ERNEST NGETU vs. NDYUMBA.

(Ngqeleni. Case No. 240/1918.)

Bopa fee—Fee payable even though the girl refuses to go on with the marriage—Pondo Custom—Abduction—Engagement—Earnest cattle.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court, and from the note below.

Judgment.

By President: The question in this case is whether the appellant is entitled to claim the retention of a beast as " Bopa " on the refusal of his daughter to proceed with the marriage she had engaged herself to contract with Respondent.

The Magistrate in the court below found that Respondent had abducted the girl, and this Court agrees with his finding.

It appears that the Respondent paid two head of cattle which have since increased to three.

Appellant maintains that of the two cattle paid one was paid as dowry and one as " bopa."

The point at issue is put to the Native Assessors who state that in the circumstances disclosed in this case the father of the girl is entitled to the " Bopa " beast even if the girl refuses to go on with the marriage. This Court agrees with this opinion.

The appeal is accordingly allowed with costs and the judgment in the court below is altered to judgment for plaintiff for two head of cattle or £15 and costs.

Note.—The claim in this case was for one red and white cow valued at £15, one red and white bull valued at £10, and one red bull calf valued at £5, being one cow and one bull paid as earnest cattle, together with the increase, one calf. Plaintiff alleged that he became engaged to the girl two years previously and paid the two earnest cattle. Subsequently he enlisted and went to France with the Native Labour Contingent. On his return in July, 1918, he found the girl living with one Mxotyelwa as his wife. The marriage was denied and the Defendant stated that he was willing to go on with the marriage provided that the dowry agreed upon (6 head) was paid. Plaintiff had only tendered 10 goats in addition to the earnest cattle paid. On the day of hearing the girl refused to go on with the marriage and the Defendant tendered return of two head of cattle, retaining one beast as " Bopa " fee. The Magistrate found that the girl had been abducted and the earnest cattle subsequently paid. He found that the engagement had been broken off by the girl and that the Plaintiff was entitled to the return of the two head of cattle and the increase. He gave judgment for the Plaintiff for three head of cattle or their value £25, being £10 for cow, £10 for the bull, and £5 for the calf.

Umtata. 16th July, 1920. W. T. Welsh, A.C.M.

NONAWUSI MPAFA vs. NQONQO SINDIWE.

(Engcobo. Case No. 119/1919.)

Breast cattle—Custom not known in Tembuland—Gifts to wife amongst Natives infrequent and clearest proof required—Claims against estates of deceased persons require to be established beyond doubt.

The facts of the case are immaterial.

Extracts from Judgment.

By President: " An element which influenced him (the Magistrate) is the Plaintiff's statement in support of her claim that the cattle were given to her by her husband as breast cattle. No such custom is known in Tembuland.

Claims against estates of deceased persons require to be established beyond doubt, moreover while instances may be found of a Native making gifts to his wife this Court is of opinion that it is so infrequent as to require the clearest proof."

Note: This case had been previously on appeal. See page 268.

Umtata. 16th July, 1920. W. T. Welsh, A.C.M.

JEREMIAH MENE vs. ERNEST SONDLO.

(Engcobo. Case No. 33/1920.)

Breast cattle—Custom does not obtain in Tembuland.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

Judgment.

By President: To the Plaintiff's claim for two cattle which he states he lent the wife of Defendant the latter pleads that the cattle were given to his wife by Plaintiff as breast cattle.

The Native Assessors on the question being submitted to them unanimously state that the custom of giving breast cattle does not obtain in Tembuland.

This Court has not been referred to any previous decisions recognising such a custom in that Territory.

In view of this statement of custom this Court cannot, on the record of proceedings, be satisfied that the cattle were given as breast cattle, and is of opinion apart from other considerations that the Magistrate was therefore justified in giving judgment for the Plaintiff.

The appeal is dismissed with costs.

Lusikisiki. 10th December, 1920. W. T. Welsh, C.M.

MTYELO ASSISTED BY SIBANGO vs. QOTOLE.

(Tabankulu. Case No. 66/1920.)

Child, adulterine—Not legitimised by subsequent Christian marriage of parents—Maintenance—Act 24/1886, *Section* 168—*Right of person to enter into Christian marriage during subsistence of marriage by Native Custom.*

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

Judgment.

By President: The Plaintiff in this case claims a declaration of rights and custody of certain children. It appears that many years ago Plaintiff's father, Sibango, married Manyawuza according to Native Custom, and it is alleged that Plaintiff and two girls, Nokwenzani and Namasoke, were the issue of this marriage. Subsequently the Defendant eloped with the woman Manyawuza, and he alleges that he married her according to Native Custom paying £67 as dowry for her.

It is admitted that later, on 15th March, 1905, he married her according to Christian rites and the undermentioned children were the issue of this marriage, viz.:—Salamoni, Nopiliyoni, Daliyose, Nqanyulwa and Nompopi.

Defendant denies that the girls Nokwenzani and Nomasoka are the children of Manyawuza by Sibango.

After hearing both parties and their witnesses, the Magistrate held that it was impossible to arrive at a definite finding and gave an absolution judgment. This Court fails to appreciate the difficulty entertained by the Magistrate, as it is clear from the record that Sibango married Manyawuza according to Native Custom, and it is beyond doubt that Nokwenzani and Nomasoka are the children of Manyawuza. It is immaterial, for the purposes of a decision in this case, to find whether Sibango or Defendant is their father.

At the time Manyawuza eloped with Defendant she was the wife of Sibango. It follows, therefore, that the children born to Manyawuza during the subsistence of her marriage with Sibango are his according to custom.

It was argued on behalf of Defendant that he is the father of Nokwenzani and Nomasoka, and that his subsequent marriage with Nanyawuza according to Christian Rites legitimised the children born to him prior to such Christian marriage. This contention cannot be upheld as, even under Common Law, as laid down in the case of *Fitzgerald* vs. *Green and Others* (A.D. 1914, 88) adulterine children are not capable of legitimisation.†

In the opinion of this Court the Magistrate should have granted the prayer of Plaintiff in respect of the girls Nokwenzani and Nomasoka.

† But see judgment in case of *Stephen Zondi* vs. *Gwane*, page 195 of these Reports.

The Plaintiff also claims the other children the issue of the Christian marriage. To these he has no right as whatever rights he may have had under the marriage according to Native custom were interrupted by the Christian marriage. That it was competent for Defendant to marry the woman Manyawuza according to Christian rites is, in this Court's opinion, evident from the last proviso of Section 168 of Act 24 of 1886 where, in dealing with the question of bigamy, it is enacted that the section shall not extend to any person whose previous marriage with a husband or wife living was entered into according to Native custom whether the same was registered or not.

In the opinion of this Court the Plaintiff is entitled to a declaration of rights in respect to Nokwenzani and Nomasoka, the daughter of Manyawuza born during the subsistence of her marriage with Sibango, and prior to her marriage with Defendant by Christian rites.

As the other children were born after the Christian marriage of Manyawuza and Defendant, to which there was no legal barrier, it follows that Plaintiff is not entitled to a declaration in respect of them, and it must accordingly be refused.

The appeal is allowed with costs, and the Magistrate's judgment altered to one for Plaintiff with costs, granting him a declaration of rights to the girls Nokwenzani and Nomasoka and entitled to any dowry paid or to be paid for them. As Defendant has maintained the girls he is entitled to the usual maintenance beast or its value £5 for each child.

Lusikisiki. 12th August, 1920. W. T. Welsh, A.C.M.

LUCINGO vs. MGIQIKA.

(Bizana. Case No. 229/1919.)

Child, adulterine; born to a married woman is the property of the husband, and after his death, the child can be claimed by his heir—Pondo custom.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court, and the note below.

JUDGMENT.

By President: The circumstances of this case having been put to the Native Assessors they state that:

"If a married woman has a child by an adulterer, it is the child of the husband. If the husband takes no steps to obtain possession of the child, his heir, after his death, can claim it. He does not lose his right to it whether it be a male or a female child."

This statement of custom is consistent with the decision of this Court in the case of *Nkonqa* vs. *Ripu Jada*, heard in this Court in December, 1919.*

* Page 258 of these Reports.

In the present case the Magistrate finds, and it is in fact not denied, that the girl Nomasamani was born prior to the dissolution of the marriage between Bonxoti and his wife Mamsongelwa, the mother of Nomasamani. The Plaintiff is thus entitled to succeed.

The appeal will be allowed with costs, and judgment altered to judgment for plaintiff as prayed, except that the alternative value of the cattle will be fixed at £10 each.

Note: The claim was for a declaration of rights in a certain girl, Nomasamani, and for 4 head of cattle or value £60, the dowry received for her. The Magistrate gave judgment for Defendant with costs, on the ground, *inter alia*, that Bonxoti had never claimed the girl. The Plaintiff appealed.

Kokstad. 1st December, 1920. W. T. Welsh, C.M.

KOTENI vs. GRIFFITHS DAVIS.

(Mount Currie. Case No. 180/1920.)

Child, illegitimate—Illegitimate child of widow of Native marriage is not legitimised by her subsequent marriage to the father of the child by Native Custom.

The facts are immaterial.

Judgment.

By President: The question for decision in this case is whether a child of a widow by a man whom she subsequently marries by native custom is thereby legitimised or not.

For the appellant it is contended that a native custom marriage does not legitimise the issue of a widow which would therefore be the children of her deceased husband. In support of this argument the decision in the case of *Simon* vs. *Ngxenga* (Meaker 123) is relied upon.

According to Native custom the children of a widow are born to her late husband and do not become legitimised by the subsequent marriage according to Native custom of their parents. Such children have certain rights in the estate of their mother's first husband which would be interfered with by a subsequent alteration of their status. Though a widow is at liberty to marry whom she pleases, she cannot by so doing deprive her late husband's estate of rights already accrued. The principles governing the marriage of widows are not identical with those applying to the marriage of spinsters.

This Court is of opinion that this case should be decided according to the broad principles of Native custom, and that no sufficient grounds exist for applying Pondo custom.

The appeal will accordingly be allowed with costs and the judgment in the Court below altered to judgment for plaintiff for the child born prior to the marriage, with costs.

Note: The same principle was followed by the Native Appeal Court at Umtata on 16th November, 1921. T. W. C. Norton, A.C.M. President, in the case of *Katiti Maxwele* vs. *Ngove*

Rinana, on appeal from the Assistant Resident Magistrate of Elliotdale, in which Katiti Maxwele sued Nqove Rinana for declaration of rights in a certain girl, Kwahlakazi. Plaintiff was the son of Maxwele, deceased, by one Nohamile, who, after the death of her husband, went to reside at her father's kraal, and there gave birth to two illegitimate children, of whom Kwahlakazi was one, by the Defendant. Defendant subsequently married Nohamile, and the Magistrate held that this marriage legitimated Kwahlakazi, who was, therefore, Defendant's property. The Plaintiff appealed.

The Appeal Court held that the Magistrate had erred and allowed the appeal. Plaintiff was declared guardian of Kwahlakazi.

Kokstad. 2nd December, 1920. W. T. Welsh, C.M.

NGQOVU vs. PERRY MCIZA.

(Umzimkulu. Case No. 131/1920.)

Children, illegitimate—Illegitimate children of widow of Christian marriage are legitimised by her subsequent marriage by Christian rites.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

Judgment.

By President: In this case the Plaintiff, now Appellant, sued the Defendant, now Respondent, for a declaration of rights, alleging that he was heir to the estate of the late Mnguni and as such entitled to the custody of certain four children (three of whom are girls), and to any dowry received or which may in future be received for any or all of the said three girls.

The Magistrate gave judgment for the Defendant on the following facts which he found to have been proved and which are admitted in this Court:—

(1) That the late Mnguni married his wife Makulu according to Christian rites.

(2) That shortly after the death of her husband the said Makulu went to live at her father's kraal on farm Ebuta.

(3) That when her father removed his kraal from Ebuta to Mshushana, Makulu accompanied him.

(4) That since the death of her late husband the said Makulu has had four children by the Defendant, none of whom were born at the late Mnguni's kraal.

(5) That Defendant and the woman Makulu have lived together as man and wife practically ever since the late Mnguni died.

(6) That in February, 1920, the Defendant married Makulu by Christian rites.

The Plaintiff has appealed on the grounds that:

(2) The Magistrate erred in ruling that because the late Mnguni had married the woman, Makulu, in accordance with Christian rites Native law and custom would not apply to any question concerning the rights of illegitimate children born to Makulu after her husband's decease.

(3) The evidence discloses the fact that all the children born to Makulu by Defendant, were born prior to a marriage having taken place between Makulu and Defendant—the said marriage having taken place in February, 1920—and consequently the Defendant would have no right to the illegitimate children born prior to the date of such marriage.

(4) Defendant claims his right to the said illegitimate children by virtue of a marriage between himself and the woman, whereas the evidence, as above stated, shows clearly that he is incorrect as no marriage had taken place prior to the birth of the children claimed.

In the case of *Gqamse* vs. *Stemele*, N.A.C.1, page 113, this Court ruled that where a widow of a marriage contracted according to Native custom subsequently had children by a man whom she thereafter married by Christian rites, the children were thereby legitimised. In the present case as both of Makulu's marriages were by Christian rites, there can be no doubt that according to Colonial Law the marriage of Defendant and Makulu legitimised the children born to them prior to their marriage by civil rites. The plaintiff is thus not entitled to the declaration asked for, and the appeal is dismissed with costs.

Addendum to judgment by Mr. F. H. Guthrie, Resident Magistrate of Kokstad.

I would like to add that my reason for agreeing with that part of the President's judgment as regards the loss of any right by Plaintiff to the dowry paid, or to be paid, for the three girls in question is not so much because of the legitimising of the children by the subsequent marriage of their natural parents, but principally because the woman had been previously married by European custom.

———————

Kokstad. 3rd April, 1919. C. J. Warner, C.M.

M. MASHEME vs. SCOTT NELANI.

(Mount Fletcher. Case No. 80/1918.)

Child, illegitimate—Legitimisation by subsequent payment of dowry—Dowry cannot be sued for—Conflict of Custom—Tembus living in a Hlubi Location. Ukuteleka.

Opinion of Native Assessors not accepted.

In this case the Plaintiff claimed (1) to be declared the guardian of certain two minor children, and (2) for four head of cattle being balance of dowry. Plaintiff stated that prior to his

daughter's marriage to Defendant she gave birth to two female children, both illegitimate, and that Defendant or his lawful agent agreed to pay 12 head of cattle as dowry for the woman. Eight head had been paid, leaving a balance of four head still to be paid.

Defendant denied that the children had been born prior to the marriage, or that 12 head had been agreed upon as dowry. He had paid eight head on account. He further pleaded that as the parties to this action were Tembus, and his wife was being detained under the custom of "ukuteleka," which was customary among the Tembus, the Plaintiff had no right to sue for dowry during the period of "Teleka."

The Magistrate gave judgment for the Defendant and the Plaintiff appealed.

JUDGMENT.

By President: Plaintiff, who is the father-in-law of the Defendant in the Court below, sued for an order declaring him to be the rightful guardian of certain two children of his daughter, the wife of Defendant, whom she bore to Defendant before her marriage to Defendant, and for four head of cattle, the balance of dowry promised by Defendant. The Defence is that the children were born subsequent to the marriage.

On the question being put to the Native Assessors they state that if a man negotiating marriage wishes to claim such children he must pay "dowry" for them at the time of the marriage, and that if he fails to do so he loses all claim to them. This opinion is in conflict with the opinions of the Native Assessors in the case of *Ovolo* vs. *Tshemese* (heard in the Appeal Court at Umtata in July, 1912 †3, N.A.C., p. 121), but not yet reported, and in the case of *Kolopeni* vs. *Ngukumani*, heard in the Appeal Court at Kokstad on the 5th December, 1916 †(3, N.A.C., 122), but not yet reported). In both of these cases the Native Assessors expressed the opinion, which the Appeal Court adopted, that the payment of dowry subsequent to the birth of a child legitimises the child which then becomes the property of its father. This is in accordance with the principle of South African Law, and in the opinion of this Court Native law should, as far as possible, be assimilated to South African law except in purely Native institutions.

The appeal in respect of the claim for the two children must therefore fail.

With regard to the claim for the balance of dowry, the parties to the suit are said to be Tembus, and are residing in a Hlubi location in the District of Mount Fletcher. They are, therefore, subject to Hlubi laws and customs in respect of the payment of dowry. The Magistrate in the court below found that no contract for the payment of dowry had been entered into, and this Court agrees with this finding. If the Plaintiff thinks he is entitled to demand more dowry for his daughter his remedy is to impound her under the custom of "ukuteleka," but he cannot maintain an action for payment of dowry.

The appeal must fail on this claim also.

The appeal is dismissed with costs.

† 3, N.A.C., p. 121 and 3, N.A.C., p. 122.

Butterworth. 13th March, 1918. J. B. Moffat, C.M.

S. ZENZILE vs. Q. TUNTUTWA.

(Idutywa. Case No. 153/1917.)

Child, illegitimate—Illegitimate child of widow, ownership of—When return of full dowry claimed and no claim made in regard to the child, the party claiming cannot afterwards come forward and claim the child.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The facts taken as admitted or found are:—

(1) That Zenzile married Nowesile.
(2) That Zenzile died about or before 1897.
(3) Nowesile returned to her people and had a child while living with them, Zenzile not being the father of this child.
(4) In 1904 Nowesile having re-married, the Plaintiff, who is the heir to Zenzile, sued Defendant, who is Nowesile's brother, for the return of the dowry he had paid for her.
(5) No claim was made for the child of Nowesile nor was any deduction allowed for in respect of it from the dowry paid for Nowesile.
(6) Judgment for half the dowry paid was then given in Plaintiff's favour.

At Mr. Moll's request the facts are placed before the Native Assessors, who state that as Plaintiff, in the case in 1904 claimed return of the full dowry and made no claim in regard to the child he cannot now come forward and claim to be entitled to the child or to any dowry or damages paid for her.

This supports the Magistrate's judgment in favour of the Defendant, which must be upheld.

The appeal is dismissed with costs.

Flagstaff. 25th April, 1918. J. B. Moffat, C.M.

TSOTSA vs. MBULALI.

(Flagstaff. Case No. 164/1916.)

Child born of pregnancy existing at marriage and result of intercourse with man other than husband—Ownership.

In this case the Plaintiff claimed, *inter alia*, the daughter of his wife. It was stated that the woman was made pregnant by another man some three months before her marriage with Plaintiff, and that the daughter claimed was born of this pregnancy. The Native Assessors were consulted as to the position in such a

case and said: "If a man render a woman pregnant and pays the full fine before she marries, the child born of the pregnancy belongs to him, but if he pays no fine or only portion of the full fine before the woman marries, he cannot claim the child which becomes the property of the man the woman marries."

The Defendant pleaded that fine had been paid, but the Magistrate gave no finding on the point as to whether the seducer paid the full fine to Defendant for this pregnancy. The evidence on this point was not clear, and the Appeal Court was, therefore, not in a position to give a decision on it, and entered judgment of "Absolution from the instance."

Butterworth. 7th July, 1919. C. J. Warner, C.M.

MFANA CEKISO SONTSHATSHA vs. NCWADI GQIBENI.

(Butterworth. Case No. 33/1919.)

Child, illegitimate—Ownership of—Husband has no claim to child born to his wife while living with her own people if the marriage is dissolved as the result of the husband's action to compel her to return.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: In this case the question to be decided is whether a certain girl, Nodemeshe, is to be regarded as the daughter of Mbiko, the father of Plaintiff, or whether she was born of her mother and Plaintiff's mother to another man than Plaintiff's father after the dissolution of the marriage between Plaintiff's father Mbiko and his mother, Nojenti.

The Magistrate in the court below states in his reasons for judgment that the question is entirely one of credibility, but in the opinion of this Court it is not so much a question of credibility as of inferences to be drawn from established or admitted facts.

It is admitted by the Plaintiff's chief witness that Nodemeshe was born during rinderpest, i.e., 1897. It is established from the old records put in by consent that Plaintiff's father Mbiko sued his father-in-law Gqibeni in April, 1897, for the return of his wife or the restoration of the cattle paid as dowry for her, and in his summons he alleges that his wife had left him three years before, i.e., some time in 1894 or 1895. Sizani who must be regarded as Plaintiff's chief witness, states that Nodemeshe was a child at the breast when her mother's marriage was dissolved. This is inconsistent with the fact that she was born in 1897 three years after her mother's return to her own people if she was born during the existence of the marriage, and Mbiko's own evidence that he only had one surviving child by his wife.

From this and other facts brought out in evidence it would

seem that Nodemeshe must have been born about the time proceedings were instituted for the dissolution of the marriage between Mbiko and Nojenti, and consequently she must have been conceived while her mother was living with her own people.

In the case of *Ndlanya* vs. *Mhashe* (1 Henkel 112), *Pumlolo* vs. *Mbusi* (1 Henkel 179), and *Rolobile* vs. *Matandela* (2 Henkel 126), it was laid down by this Court that a man who sues for the return of his wife living with her people has no claim to any child she may have borne to any other man while so living with her people if the marriage is dissolved as the result of her husband's action to compel her return.

For these reasons this Court considers that Plaintiff has failed to establish his claim to the girl Nodemeshe.

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

Lusikisiki. 20th August, 1919. C. J. Warner, C.M.

CETYWAYO vs. MBETSHANA.

(Flagstaff. Case No. 193/1919.)

Child, ownership of—Husband's right to child born of pregnancy of wife existing at marriage and caused by another man where full fine for seduction has not been paid—Seduction—Native Custom—Variation from requires clearest proof.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

Judgment.

By President: Respondent sued Appellant in the court below for an order declaring him to be the father and guardian of a certain girl Faniswa, and entitled to any dowry paid for her. He alleges that he married Magoqole, the sister of Appellant, who is her guardian according to Native Law, and that Faniswa was born of this union. Appellant admits there was a marriage between Respondent and Magoqole, but pleads that Faniswa is not the daughter of Respondent, and that Magoqole was three months pregnant of Faniswa by another man when she married Respondent. He however admitted that no fine was paid by the seducer of Magoqole, by whom she was pregnant at the time of her marriage. The Magistrate without taking evidence gave judgment on the pleading for Plaintiff, and states in his reasons he was guided by the judgment in *Mbulali Mlahlwa* vs. *Tsotsa Mtsenene*, heard at the Flagstaff Appeal Court on the 23rd April, 1918, † but not yet reported. In that case the Native Assessors are reported to have said that if a man renders a woman pregnant and pays the full fine before she

† Page 45 of these Reports.

marries the child born of the pregnancy belongs to him, but if he pays no fine, or only a portion of the full fine before the woman marries he cannot claim the child which then becomes the property of the husband of the mother. The case of *Madola* vs. *Sanzekela* (Meaker 37), also laid down that where a man marries a woman who at the time is with child it is in accordance with Custom that the child when born is the property of the woman's husband, and that if it is sought to prove a variation of the custom, the variation should be established by the clearest proof.

In the present case there is no allegation of any agreement having been made at the time of marriage which would have the effect of depriving Respondent of his lawful rights to the child, and Appellant admits no fine was paid for the pregnancy by the seducer. Appellant could only, in view of no fine having been paid, claim the child by virtue of some agreement which as stated above is not relied upon in his plea.

The appeal is dismissed with costs.

Kokstad. 22nd August, 1918. J. B. Moffat, C.M.

S. NQWEMA vs. X. AUGUST AND ANOTHER.

Ref. to ~~W~~ N.) 67. 1429 (T. & N.) 67. (Mount Fletcher. Case No. 37/1918.)

Children, illegitimate—Ownership of—Husband does not acquire ownership of child born to his wife by another man before marriage by payment of beast—Marriage—Hlubi dowry—Deviation from Native custom requires clearest evidence.

Claim for declaration of rights to a certain girl Tandiwe, illegitimate child of Plaintiff's sister Sophia, born to her prior to her marriage with Defendant. Claim was also made for payment of balance of dowry due in respect of that marriage, Plaintiff alleging that only 16 head were paid out of the 20 head of cattle and one horse agreed upon as dowry. Defendant pleaded that it was arranged that he should take over the custody of the illegitimate child Tandiwe, and that he had paid 18 head of cattle as dowry, only 2 head of cattle and one horse remaining to be paid. Defendant further stated that it was in consideration of his taking over Tandiwe that he agreed to pay full dowry, which would not otherwise have been payable. The Magistrate gave judgment for 3 head of cattle and one horse and dismissed Plaintiff's claim for the guardianship of Tandiwe.

The defendant appealed and the Plaintiff cross-appealed.

Judgment.

By President: In the course of the argument it has been stated that the full Hlubi dowry is 20 head of cattle and a horse. According to Seymour it is 24 to 26 head and a horse, and in the case of *Mgabadeli* vs. *Meiteki* (1 Henkel, page 69), it is stated that the dowry was fixed at 24 head of cattle, 1 horse and a Mqobo beast.

In this case it is admitted that 20 head of cattle and 1 horse was agreed upon.

It is unlikely that the Plaintiff would have agreed to part with his daughter and his grand-daughter for less than the full dowry. It must be assumed therefore that he accepted the reduced dowry in view of the fact that his daughter had been made pregnant previously and that he was entitled to the child, the result of that pregnancy.

In the case of *Nowata* vs. *April* heard at Umtata in November, 1905 (1, N.A.C., page 98), the Native Assessors stated that they knew no such custom as that stated in that case that a man contracting marriage with a woman who has already a child by another man should by payment of a beast obtain that child.

The Court held in that case that a deviation from the Native custom that an illegitimate child would belong to the woman's father must be supported by the clearest evidence.

The evidence in this case is not sufficient to justify deviation from the custom, under which the girl Tandiwe belongs to Plaintiff.

The appeal on behalf of the defendant must be dismissed with costs. The cross-appeal on behalf of Plaintiff is allowed with costs. The Magistrate's judgment in regard to claim (*b*) for the return of the girl Tandiwe to Plaintiff, and a declaration of rights concerning Tandiwe, will be altered to " Plaintiff declared to be the rightful guardian of the girl Tandiwe, and entitled to any dowry paid for her."

Umtata. 24th November, 1919. C. J. Warner, C.M.

TSOLI NGUBENTOMBI vs. CIMEZI MNENE.

(Qumbu. Case No. 134/1919.)

Child, illegitimate—Rights in—Natural father has right at any time to claim child on payment of fine and maintenance—Where illegitimate girl child is left with and brought up by her mother's people after the natural father has paid the fine for the seduction and pregnancy of the mother, he does not lose his rights, but is entitled to the girl on payment of "isondlo" or maintenance fee. The mother's people incur "tombisa" and wedding expenses at their own risk—Seduction damages. Judgment on pleadings without evidence.

The Plaintiff, Cimezi Mnene, sued the Defendant, Tsoli Ngubentombi, for a declaration of rights in respect of the illegitimate child, Bangiwe, of Defendant's sister, Citiwe, alleging that he was the natural father and had paid the fine for the seduction and pregnancy of which Bangiwe was the result. He also claimed an account of certain 5 head of cattle paid as dowry for the said Bangiwe. The Defendant admitted that Plaintiff was the natural father of Bangiwe, and that he had paid fine for seduction and pregnancy, but stated that he (Defendant) had brought up the girl and that as the Plaintiff had not paid

" isondlo," he was estopped by his acts and conduct from making any claim to her. Further, if the Court ruled in favour of the Plaintiff, he counterclaimed for "isondlo" and certain " tombisa " and wedding expenses to which he, Defendant, had been put on account of the girl. He further pleaded that the girl's marriage had been dissolved and the 5 cattle returned. The Plaintiff's attorney asserted that in the pleadings the Plaintiff was entitled to the girl on tender of the " isondlo " beast. He therefore tendered this " isondlo " beast and disputed the claim for " tombisa " and wedding expenses on the ground that Defendant had incurred these at his own risk. He reduced his action to one merely for a declaration of rights to the girl, and the Magistrate, without taking evidence, gave judgment that Plaintiff was entitled to the girl on payment of one " isondlo " beast, but as the Plaintiff had made no previous tender of the " isondlo " beast he ordered him, Plaintiff to pay costs. The Defendant appealed on the merits of the case and also on the grounds that the Magistrate was wrong in giving judgment without taking evidence and that the judgment might be construed as a final judgment on the claim and counterclaim, and that he, Defendant must attack the judgment to safeguard his rights to bring the counterclaim before the Court at some future date.

JUDGMENT.

By President: Respondent sued for a declaration of rights in respect of a certain girl Bangiwe the offspring of an illegitimate connection between himself and Appellant's sister Citiwe. Appellant admits that the Respondent paid the equivalent of three head of cattle as a fine for the seduction and pregnancy of Citiwe, and as he makes no further claim for fine it must be presumed that these cattle paid were in full satisfaction of Appellant's claim for fine in view of the well-known fact that in some tribes the fine for causing the pregnancy of a girl is three head of cattle.

Appellant having accepted fine for the pregnancy of his sister well knew that Respondent could claim the child at any time by paying one more beast as " isondlo " or maintenance. Consequently he incurred " tombisa " and wedding expenses in connection with the girl Bangiwe without the authority of Respondent at his own risk. The law governing claims of this nature is stated in the case of *Xosana* vs. *Dalasile* (Meaker's Reports, 189).

The record does not show that any evidence was tendered by either party, and in view of the pleadings it does not appear any was necessary.

The appeal is dismissed with costs.

Kokstad. 14th April, 1921. T. W. C. Norton, A.C.M.

MGUNJANA LUPINDO vs. SIPAMBO BONJA.

(Matatiele. Case No. 302/1920.)

Child, illegitimate—Ownership of—Right of natural father to claim illegitimate child at any time on payment of fine and maintenance.

In this case the plaintiff claimed delivery of a certain female child of which he was the natural father, and tendered 3 head of cattle as fine for the seduction of the mother which resulted in the birth of the child: he also tendered one beast as "isondlo" (maintenance fee). The Defendant denied the Plaintiff's right to claim the child on payment of the fine and "isondlo" in the absence of any agreement to that effect. The Magistrate gave judgment for Plaintiff for delivery of the child on payment of four head of cattle or their value £20.

The Defendant appealed.

JUDGMENT.

By President: Respondent sued Appellant for a declaration of rights and delivery of a certain child.

The facts are not in dispute. The question for decision is whether on payment at any time of the usual fine and maintenance, the natural father may claim his child.

The Assessors are asked to say whether, according to custom, the Appellant in this case has the option to retain the child in spite of Respondent's offer of fine and maintenance.

The Basuto Assessors reply that he has the right to retain the child and refuse the tender.†

The other Assessors, Mount Frere, Mount Ayliff and Umzimkulu, differ and say the natural father may claim the child at any time on payment of fine and maintenance.

This latter opinion is in accordance with reported decisions.

The authorities are discussed in the case of *Sikivi* vs. *Nonjila* (Meaker, p. 125), and the principle laid down appears to be that the fine may be paid by the putative father at any time, but before he can claim the child, the full fine and maintenance must be paid.

The appeal is dismissed with costs.

† See note on page 77.

Lusikisiki. 18th August, 1922. W. T. Welsh, C.M.

MATENGA vs. QUZUMANE.

(Tabankulu. Case No. 11/1922.)

Dowry—Allotment of daughters to sons—Son has no right of action against father to enforce the allotment and to compel father to hand over the dowry—Pondo Custom—Exception.

The essential facts are sufficiently clear from the judgment of the Native Appeal Court.

Judgment.

By President: In this case the Plaintiff, now Respondent, sued his father, now Appellant, for a declaration of rights in respect of half the dowry paid and to be paid for his sister Kolane.

Plaintiff alleges that his father allotted Kolane jointly to himself and his elder brother Mkuzo, both being minor sons of the defendant's chief house.

Defendant excepted to the Plaintiff's summons on the ground that it disclosed no cause of action, inasmuch that according to Native law and custom, even if Kolane was allotted by Defendant to Plaintiff no dowry paid for her would become the property of Plaintiff until the death of Defendant. Defendant pleaded over that Kolane was allotted to Mkuzo solely, and that until his (Defendant's) death the dowry would not vest in Mkuzo. The exception was overruled judgment given in favour of Plaintiff. Against this ruling the Defendant has appealed.

The Pondo Assessors having been consulted, Meshack Gongo, Tolikana Mangala and Diamond Ntabenda, state that if the father admits the allotment the son has a right of action against him. Jebese Mkokobi and Maxaka Nqwiliso however state that the son has no right of action against the father to compel him to hand over the dowry of such allotted daughter. The opinion of the latter coincides with the decision given in the case of *Magadla* vs. *Magadla* (3, N.A.C. 28), and in the opinion of this Court the exception should have been upheld. The present action is distinguishable from that of *Tibe* vs. *Tibe* (1, N.A.C. 251), on which the Magistrate relied, for in that case the distribution of the dowry cattle had actually been effected.

The appeal will accordingly be allowed with costs, and the judgment of the court below will be altered to exception upheld with costs.

Kokstad. 7th December, 1922. W. T. Welsh, C.M.

ALEXANDER MAKALIMA vs. ISAIAH MBEU.

(Mount Fletcher. Case No. 60/1922.)

Defamation—Libel—Magistrate's ruling on exception is not a final and definite sentence and is therefore not appealable—Appeal—Practice—Exception.

Action for £200 damages for defamation (libel) in respect of certain defamatory statements alleged to have been contained in a certain letter written to the Superintendent-General of Education by the Defendant. The statements complained of were:—

(1) That the Plaintiff a teacher in Government service having a house set aside for his use as principal of the said school did not live there but at a kraal in the location.

(2) That Plaintiff devoted so much time to farming operations that the proper observance of school hours was affected.

(3) That Plaintiff compelled his pupils to work in his lands and that it was the wish of the parents and children attending school that Plaintiff should be dismissed from his post.

The Defendant excepted that the words complained of were not defamatory and disclosed no cause of action. The Magistrate held that the statements in (2) and (3) tended to injure the Plaintiff in his reputation, and overruled the exception with costs. The Defendant appealed on the grounds that the words were not *per se* defamatory and that the Plaintiff had not set forth any innuendo to prove that words were capable of a defamatory meaning.*

Judgment.

By President: It was decided in the case of *Lyons* vs. *Watson* (1915, E.D.C. 182) that a Magistrate's decision dismissing with costs an exception to a summons in an action for damages for libel and slander is not a final and definite sentence and is, therefore, not appealable. That case is similar to the one now before this Court where in an action for slander the Magistrate overruled with costs an exception that the words complained of were not defamatory and that, therefore, the summons disclosed no cause of action.

This Court is, therefore, of opinion that the appeal must be dismissed with costs.

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* This case was subsequently on appeal at the Native Appeal Court, Kokstad, in August 1923, when it was decided that the words used were not defamatory.

Umtata. 8th November, 1922. J. M. Young, A.A.C.M.

MAHASHE MBONJA vs. NOSE MBONJA.

(Umtata. Case No. 446/1922.)

Dowry—Allotment of sister by one brother to another is not an immoral transaction—Statement of Native Assessors not followed.

Claim by a younger brother against an elder brother for their sister and the dowry paid for her. The Plaintiff based his claim on an alleged allotment of the girl to him by the Defendant some ten years previously. The Magistrate gave judgment for the Plaintiff. The Defendant appealed on the grounds that the alleged allotment was contrary to Native Custom, and further that from the evidence of the Plaintiff it was not a contract of allotment, but an agreement of purchase and sale, and was therefore *contra bonos mores*.

JUDGMENT.

By President: The Respondent is the Appellant's younger brother of the same house.

The Respondent states that about 16 years ago damages for adultery were being demanded from the Appellant and that the Appellant then agreed to give Respondent their sister Nomaqoshosho, then a child aged about two years, provided the Respondent satisfied the claim for damages.

There is evidence that the Respondent paid two head of cattle and some sheep on Appellant's behalf and that the girl lived at Respondent's kraal for a number of years prior to her marriage. The girl, Nomaqoshosho, states that she was brought up at the Respondent's kraal and regards herself as his child.

The Appellant denies that the girl resided with the Respondent for more than four years and states that she was only lent to him.

There appears to be sufficient evidence to justify the Magistrate's finding that Respondent was promised his sister, Nomaqoshosho, in payment of the stock paid on Appellant's behalf.

The only question which remains is whether an agreement of this nature is valid under Native Custom.

The matter was put to the Native Assessors who state that it is contrary to Native Custom for one brother to allot a sister to another brother.

Nothwithstanding this statement of the Native Assessors this Court is of opinion that the transaction actually took place and that there is nothing in it of an immoral nature. Both parties being brothers of the girl it is difficult to see how it can be contended that the disposal of her prospective dowry by one brother to another can be regarded as an immoral transaction.

The appeal is dismissed with costs.

N.B.—Compare judgments in cases on pages 169, 170 and 171 of these Reports.

Umtata. 21st March, 1918. J. B. Moffat, C.M.

BEN SANGONGO vs. FALITA.

(Ngqeleni. Case No. 323/1917.)

Dowry—Apportionment of dowry when paid in instalments—Man paying dowry for his brother is entitled under Native Custom to portion of the dowry received for the brother's daughter—Pondo Custom—Teleka—" Ntonjane " Earnest cattle.

In this case the Plaintiff claimed ten head of cattle and stated that at Defendant's request he had paid eight head of cattle as dowry for Defendant's wife, and one beast and a sheep towards Defendant's daughter's (Nomabanjwa's) " Ntonjane." He further stated that he had sacrificed several small stock from time to time when the woman's people came to claim her dowry. Defendant admitted the payment of six head of cattle as dowry and one beast for his daughter's " Ntonjane." He also admitted the receipt of one beast and ten sheep for his daughter but alleged that they were paid as earnest cattle and that the marriage had not yet taken place. Defendant further pleaded that it had been agreed between him and the plaintiff and the father of the parties that Defendant should reside at Plaintiff's kraal and work for him and that Plaintiff would provide him with a wife. This was denied by the Plaintiff who stated that Defendant had come to live with him because he had quarrelled with his father.

The Magistrate gave judgment for the Plaintiff for the beast and ten sheep paid to the Defendant for his daughter, and gave absolution as regards the balance of the claim. The Defendant appealed.

JUDGMENT.

By President: The first and second grounds of appeal are that there was an agreement that Plaintiff was to pay dowry for Defendant in return for services rendered by Defendant in looking after Plaintiff's kraal during the latter's absence.

The evidence does not support the allegation as to an express agreement having been made.

The Plaintiff, therefore, has the right to claim in respect of dowry paid for Defendant's daughter, and it is not necessary to deal with the third ground of appeal.

The fourth ground that the action is premature cannot be upheld. The evidence shows that the woman has been married and has been telekaed by the Defendant.

The Pondo Assessors say that "If portion of the dowry has been paid it can be apportioned and that when additional is paid there can then be a further apportionment. They state that as a rule apportionment is not claimed where only a small instalment of the dowry has been paid, unless the claimant is pressed for money and wishes to settle urgent demands made upon him, or unless it is found that the receiver of the dowry is disposing of it. There is evidence in this case that defendant has parted with 10 sheep, portion of the dowry received by him."

The point raised on the fifth ground of appeal, viz., whether under the circumstances plaintiff can claim the whole of the dowry paid for defendant's daughter having been put to the Pondo Assessors they replied that " In such a case Plaintiff cannot claim the whole of the dowry. A man paying dowry for his brother is entitled under custom to portion of the dowry received by the brother for his daughter, the portion payable being a matter for mutual arrangement and dependent on the brother's generosity."

As according to the custom as stated by the Assessors the Plaintiff will be entitled to claim further payments if additional dowry is paid. The Magistrate was right in giving an absolution judgment on the balance of the claim.

The last ground of appeal that defendant is entitled to a reward for his services cannot be upheld.

The appeal is allowed with costs. The Magistrate's judgment will be altered to judgment for Plaintiff for the young bull received as dowry or if it is not returnable payment of its value £10.

Absolution from the instance as regards the balance of the claim.

Kokstad. 26th August, 1919. C. J. Warner, C.M.

PETRUS DUMA vs. MASHAYIBANA SIDOYI.

(Matatiele. Case No. 259/1919.)

Dowry Cattle—Deaths to be reported to the person paying dowry —Engagement.

Claim for the return of certain cattle paid by Plaintiff on behalf of his son as dowry to the Defendant in respect of a contemplated marriage between the Plaintiff's son and the Defendant's sister, with which marriage the girl refused to proceed. Defendant tendered the return of certain of the dowry, but pleaded that one of the dowry cattle had died from natural causes. The Magistrate gave judgment for the Plaintiff and the Defendant appealed. The relevant part of the judgment of the Native Appeal Court is given below.

Extract from Judgment.

By President: . . . . the Appellant admits that he never reported the death of the first beast that died, and his witness Lotoyi states that he only went to report that it was sick and that he never went again. In Native Law the person to whom dowry cattle are paid must report any deaths occurring amongst them before the marriage is completed, to the person paying the dowry, and also exhibit the skins of the dead animals if he wishes to escape liability for them. On this ground the appeal must fail.

Flagstaff. 9th April, 1919. C. J. Warner, C.M

MBOMBO vs. MLOMO NCAPAYI.

(Tabankulu. Case No. 148/1918.)

Dowry Cattle—Original Cattle returnable.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: Appellant, who was the Plaintiff in the Court below, sued Respondent for the return of a certain black cow and its calf, or their value £15, which he had paid as dowry for Respondent's daughter whom he had married, the said marriage having been dissolved.

Respondent pleaded that at the time of the refund of the dowry he had disposed of the cow in question and tendered £5 in lieu of it. Appellant refused this tender. The Magistrate took certain evidence and then gave judgment for Appellant in terms of the tender, and the appeal is against this judgment.

According to Native Law which alone is applicable to this case, the payer of dowry cattle has the right to demand the return of the original cattle paid on dissolution of the marriage under such circumstances as to entitle him to the return of the dowry cattle, if they are still in possession of the person to whom they are paid, or in Native phraseology he can demand the hair of his cattle.

The question at issue is whether Respondent had the beast in question in his possession when the dowry was refunded. He states in his plea he had disposed of it, but led no evidence in support of the plea, though Appellant's attorney requested that he should be called upon to do so. But from the extract (B.) it would seem that the cow in question was in possession of respondent at the time the dowry was refunded. If this was the case the Appellant would be entitled to claim its return.

The further question whether, if Respondent had disposed of the animal, Appellant would be entitled to claim £10 as its value does not call for decision at this stage.

The appeal is allowed with costs. The judgment in the court below is set aside and the case returned to the Magistrate for the Respondent to lead evidence in support of his plea, and such other evidence as either of the parties may wish to adduce, and for the Magistrate thereafter to give judgment on the merits of the case.

Lusikisiki. 18th August, 1919. C. J. Warner, C.M.

TSHOTSHEIBIKA vs. SAPUKA.

(Bizana. Case No. 42/1919.)

Dowry Cattle—Original Cattle returnable—Alternative value placed on dowry cattle paid before East Coast Fever.

Plaintiff claimed a certain red cow or its value £15, alleging that the red cow and £2 were paid to Defendant 5 years before East Coast Fever as dowry for Defendant's daughter. There was a marriage. During Plaintiff's absence Defendant received dowry from and married the girl to a man in Natal. No children were born of Plaintiff's marriage to the woman. Defendant pleaded that the cow was paid as fine for elopement, that the cow had died and that he had reported the death to Plaintiff. He admitted the marriage to the man in Natal. After pleadings the case was postponed to a later date for hearing. When the case came on again the Defendant was in default, and after hearing Plaintiff's evidence, the Magistrate gave judgment for the Plaintiff as prayed. The Defendant then appealed on the ground that the alternative value placed on the cow was excessive. The Magistrate stated that £15 was the average local market value.

JUDGMENT.

By President: The appeal in this case is solely on the valuation placed on the red cow claimed by Respondent.

According to Native Law, the payer of dowry is entitled, on the return of the dowry cattle, to the identical animals he paid if they are still in possession of the person to whom they were handed as dowry.

Appellant in his plea stated that the red cow was dead.

If Respondent wished to claim this beast or its present value he should have proved it is still in Appellant's possession. This he has not done.

In the case of *Nqakwana* vs. *Sixinti* (1 Henkel, 36), this Court ruled that a claimant for the return of cattle paid as dowry before Rinderpest was only entitled to the value of cattle at that time. The appeal is accordingly allowed with costs, and the judgment of the Court is altered to judgment for Plaintiff for one beast or £5, and to £2 and costs.

Note: In the above case the cattle were paid before East Coast Fever and *not* before *Rinderpest*. Apparently, therefore, the judgment extends the principle to pre-East Coast Fever cattle.

Umtata. 6th November, 1922. W. T. Welsh, C.M.

MOSHI MBAMBONDUNA vs. HAGILE MARONOTI.

(Umtata. Case No. 609/1922.)

Dowry—Return of—Original cattle must be returned if in existence—Maintenance—Guardian cannot claim right against husband to retain dowry cattle in respect of claims for maintenance, etc.—Ukuhlelela custom—Interpleader—Lien. Jus Retentionis.

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

JUDGMENT.

By President: This is an interpleader action in which Moshi Mbambonduna claims certain 5 cattle attached by virtue of a writ of execution issued at the instance of Hagile Maronoti against Bennett Ngantweni.

It appears that Hagile married Nozilile the sister of Bennett Ngantweni and paid five cattle as dowry to Mfinca who negotiated the marriage under the Ukuhlelela custom.

A few days after the marriage Nozilile deserted Hagile, who sued Bennett for her return, failing which the restoration of the five dowry cattle paid or their value. The Defendant being in default provisional judgment was given in favour of Hagile for the return of the woman within 14 days, failing which for the payment of five cattle, the original to be returned if in existence. A writ was issued and the five cattle originally paid as dowry were attached. The claimant, Moshi Mbambonduna, then instituted proceedings in an interpleader suit, but the Magistrate declared the cattle to be executable and against this order the Claimant now appeals.

It appears from the proceedings that the Claimant, now Appellant, claimed the cattle on the ground that the girl Nozililo had been made over to him when a child 3 years of age by Ngantweni the late father of Nozililo and of her brother Bennett, the judgment debtor. That question has, however, not been taken to appeal, the grounds for which are stated to be:—

(1) "That for the purposes of the appeal the finding of the trial Court to the effect that the agreement whereby the late Ngantweni made over the girl Nozilile to the claimant is unconscionable is accepted as being correct in law; nevertheless, Appellant contends that the judgment declaring the five cattle executable at the suit of the Respondent is bad in law in that the facts hereinafter referred to and established by the evidence give rise to a right of lien or "jus retentionis" on the part of the Claimant in and over the dowry of the said Nozililo;

(*a*) The residence of the girl Nozililo at Claimant's kraal from early childhood to the date of her marriage and his maintenance of her during that period.

(*b*) The carrying out of the Claimant of the rites appertaining to her attaining the age of puberty.

(*c*) The giving of her in marriage, through the agency of Mfinca.

(*d*) The furnishing of the marriage outfit.

(*e*) The receipt of the dowry by Claimant and his lawful possession thereof at the date of attachment.

(2) That the ruling of the trial Court that Claimant should sue Bennett for the cattle due to him, Claimant, for maintenance, ntonjane and marriage expenses, is not in accord with the principles of Native law and custom or the common law of lien inasmuch as maintenance, intonjane expenses, and wedding outfit are a first charge against the said Nozililo's dowry and Claimant is entitled to resist any claim for the delivery of such dowry either at the suit of Bennett or any other party until such claims are satisfied.

(3) That in this respect the judgment creditor is in no better position than Bennett and cannot defeat the Claimant's lien or "jus retentionis" by attachment unless or until the claim in respect of which the said lien or "jus retentionis" exists be satisfied.

(4) That if the contention set out in the next preceding paragraph is not applicable to the whole of the dowry attached, it, nevertheless, applies to three of the said dowry cattle to which Appellant has established a clear right.

(5) That the dominium in the cattle has at no time passed to Bennett and his right is "ad rem" and not "in rem," and this being the case, his claim thereto is subject to Claimant's lien or "jus retentionis" and inasmuch as Respondent claims restoration through Bennett he, too, is properly met with Claimant's right of lien or "jus retentionis."

As the alleged agreement, the legality of which it is not necessary for this Court to consider, that the girl Nozililo was given to the Appellant, when a child, by her father Ngantweni, was not proved it follows that Bennett is entitled to her dowry, and it is to him, therefore, that Hagile would look for the return of his wife or dowry, and, in fact, the Magistrate found on the evidence that when Nozililo deserted Hagile he was informed by Mfinca, who conducted the marriage negotiations, that Bennett was the woman's guardian and the person responsible for the restoration of her dowry.

Whatever expenses the Appellant may have incurred in regard to Nozililo this Court is of opinion that these cannot be maintained against the dowry paid by the Respondent, to the restoration of which he is entitled. Assuming that Bennett is liable to the Appellant for expenses incurred in connection with Nozililo the Respondent is in no way party thereto. He obtained an order for the return of his wife or her dowry, and according to Native law and custom he is entitled to the restoration of the full dowry paid and even to the identical animals.

It is quite clear that had Bennett incurred the expenses claimed by the Appellant he would have no right to re-imburse himself out of the dowry returnable to Hagile, and in the opinion of this Court, the Appellant has no lien or "jus retentionis" over the dowry cattle paid by the Respondent to the return of which he is, in default of the restoration of his wife, entitled.

The appeal is dismissed with costs.

Umtata. 26th July, 1919. C. J. Warner, C.M.

MARONONA MANGQASHA vs. NWENGXULA NKONTANI assisted by VUNIWEYO BONGA.

(Mqanduli. Case No. 310/1919.)

Dowry—Marriage—Re-marriage of woman during subsistence of marriage—Claim for dowry paid by second husband to satisfy first husband's claim for damages for adultery—Dikazi.

In this case the plaintiff sued (1) for the return of his wife Nonteto or the restoration of the dowry paid for her, viz., five head of cattle or £25, (2) for three head of cattle or their value £45 which Defendant had received as dowry for Plaintiff's wife on re-marrying her to one Luhadi, and (3) for a declaration of rights in a certain female child born of Plaintiff's marriage with the woman. Defendant, *inter alia*, denied the Plaintiff's right to the cattle received from Luhadi. He denied the woman's marriage to Plaintiff and further alleged that when Plaintiff co-habited with her she was a "dikazi" and that he paid no damages for causing her pregnancy.

The Magistrate found that the marriage between the Plaintiff and the woman Nonteto was proved, and that the child claimed was born after that marriage had taken place. He accordingly gave judgment as follows:—"For Plaintiff for the return of his wife within one month from date failing which the return of three head of cattle or their value £15. Defendant is also ordered to pay the three head of cattle received from Luhadi or their value £15. Plaintiff is declared to be the guardian of the child. Defendant to pay costs."

The Defendant appealed on the ground (1) that the marriage of Plaintiff and Nonteto was not proved and that the Magistrate's finding was not justified, (2) that if the Appeal Court held that such marriage was proved, then it was urged that the child was born before the marriage and according to Native Law and Custom belonged to plaintiff, (3) that the judgment for the three head of cattle paid as dowry by Luhadi was contrary to Tembu Law and Custom.

JUDGMENT.

By President: The appeal is brought on three grounds. As regards the first two there is sufficient evidence to justify the Magistrate's finding that there was a marriage between Respondent and Appellant's ward, and on these grounds the appeal must fail.

The third ground of appeal is very different. Respondent sued in the Court below not for the return of his wife or dowry only, but also claimed the cattle paid as dowry for her to Appellant by Luhadi who Respondent admits married Respondent's wife innocently not knowing she was then the wife of another. The Magistrate in the court below held that Respondent was entitled to these cattle and gave judgment accordingly. The third ground of appeal is against this part of the judgment.

The point is submitted to the Native Assessors who state that though Respondent may have an action for damages against Luhadi for adultery with his wife he cannot claim the cattle innocently paid as dowry. The Court concurs in this view which seems to accord with previous judgments of this Court.

The appeal is allowed with costs and the judgment of the Court below is altered to read " For Plaintiff for the return of his wife within one month from date failing which the return of three head of cattle or their value £15. Plaintiff is declared the guardian of the child.

Absolution from the instance in regard to the claim for the three head of cattle paid by Luhadi. Defendant to pay costs.

Note: See the case of *Siyeza* vs. *Fefeni ka Tshekwana* on page 15. This was a Pondo case and the Court ruled that dowry paid by the second husband could be attached to satisfy the first husband's claim for damages for adultery. The case reported below (*D. Matshiki* vs. *M. Klaas*) which is a Tembu case lays down that the first husband is entitled to claim the dowry paid by the second husband where his dowry has not been returned to him, but is silent on the point of the first husband's claim against the second dowry for damages for the "adultery" committed by the second husband.

Umtata. 22nd November, 1921. W. T. Welsh, C.M.

DOLOMBA MATSHIKI vs. MPAHLENI KLAAS.

(Umtata. Case No. 705/1921.)

Dowry—Re-marriage of woman during subsisting marriage—First husband's claim for dowry paid by second husband when his dowry not returned. Contrary to Native Custom for a man to hold two dowries for the same woman.

The facts are sufficiently clear from the judgment of the Native Appeal Court.

Judgment.

By President: The Appellant Dolomba Matshiki alleges in his summons that he married the daughter of the Respondent ten years ago, and that two years ago the Respondent gave her in marriage to another man.

The Appellant, as the husband of the Respondent's daughter, claims the five head of cattle paid as dowry by the second man.

The Respondent filed a special plea that the Appellant has no right of action for or right to the five head of dowry alleged to have been paid to the Respondent.

The Magistrate in the court below upheld the special plea and entered judgment for the Defendant with costs.

In his reasons for judgment he quotes the cases of *John Toki* vs. *Blakeway Ngutu*, Appeal Court, Umtata, 10th July, 1918 (page 17 of these Reports), and *Blakeway Ngutu* vs. *Alven Malonde* (page 102 of these Reports), Appeal Court, Umtata, 19.2.1919.

In the opinion of this Court these cases can be distinguished from the present one.

In the first case the plaintiff was suing for damages for adultery. In the second the adulterer was suing for a return of his dowry paid to the father of the woman.

The case is put to the Native Assessors who state as follows:—

It is contrary to Native Custom for a man to hold two dowries for the same woman, but where under the circumstances mentioned he gives his daughter in marriage without returning the first dowry, the second dowry received by him must go to the husband.

The appeal is allowed with costs, the special plea is set aside with costs in the court below and the case remitted to be heard on its merits.

Kokstad. 20th August, 1918. J. B. Moffatt, C.M.

MAKUTYWA vs. MXANYWA.

(Mount Ayliff. Case No. 12/1918.)

Dowry—Merger of fine in dowry—Chief's daughter—Magistrate's ruling not appealed upon within prescribed time will not be heard on subsequent appeal on merits of the case—Exception—Application for amendment of summons.

In this case the Plaintiff summoned the Defendant to show cause why a certain sum of £5 should not be registered as dowry paid by him for the Defendant's sister. The Defendant excepted on the ground that he was not the correct person to be sued, the dowry having been paid to one Ngceni, the guardian of the girl, and he having left a son and heir, one Zwelibanzi. He also pleaded over that the £5 was paid as a fine for elopement, and that as the Defendant was of Royal Blood, according to Native Custom the fine could not be considered as forming part of the dowry paid. The Plaintiff applied to amend his summons by describing the Defendant as the guardian of Zwelibanzi. The Defendant objected, but the Magistrate granted the application. The Defendant intimated that he wished to appeal on this ruling and the case was postponed *sine die*. He did not proceed with the appeal and subsequently the hearing was resumed. The Magistrate heard the evidence and gave judgment for Plaintiff as prayed with costs. The Defendant then appealed against the

amendment of the summons allowed by the Magistrate, and also against the Magistrate's judgment on the merits, which he stated was contrary to true Native Law and Custom.

JUDGMENT.

By President: Exception is taken by Mr. Mawby to the hearing of the appeal on the first ground stated in the Appellant's notice of appeal.

In the course of the hearing of the case application was made for amendment of the Summons, which was granted by the Magistrate.

The Defendant's attorney having stated that he wished to note an appeal against the Magistrate's ruling the case was postponed *sine die* on 22nd March, 1918.

Defendant's attorney did not note an appeal and filed an amended plea on 3rd May, 1918, on which the hearing of the case was proceeded with.

Notice of appeal was received by the Magistrate on 13th May, 1918.

The appeal on the ruling of the 22nd March not having been noted within the prescribed period the objection to the hearing of the appeal on the point then dealt with must be upheld and the hearing of this appeal must be limited to the second ground stated in Defendant' notice of appeal.

On second ground of appeal the point as to whether a fine paid in such a case as this is merged in dowry paid was put to the Native Assessors, who state that in the case of a chief's daughter the fine would not be merged.

While this may possibly be so in the cases of chiefs of high rank, according to the evidence in this case the Defendant belongs to a minor branch of the royal family and cannot be considered as entitled to claim special privileges attached to positions of paramount chiefs and their direct descendants.

The Magistrate correctly ordered registration of the £5 as dowry.

The appeal is dismissed with costs.

Butterworth. 7th July, 1919. C. J. Warner, C.M.

SHIDI MAJEKE vs. NGQWEQWENI NZUZANA.

(Butterworth. Case No. 4/1919.)

Dowry—Merger of fines in dowry—Custom in Transkei proper.

Claim for the restoration of Plaintiff's wife or the dowry paid for her. The Magistrate found that while a boy the Plaintiff had seduced and caused the pregnancy of Defendant's daughter and had paid three head of cattle as a fine. Subsequently—after the lapse of a considerable time—the marriage negotiations were entered into and seven head of cattle paid and the marriage consummated. The Magistrate held that following Native Custom the fine merged in the dowry in such circumstances. An appeal was noted by the Defendant on this point.

JUDGMENT.*

By President: The only question for decision in this case is as to the number of cattle Respondent is entitled to on the dissolution of his marriage with Appellant's daughter.

The Magistrate in the court below found that three head of cattle were first paid as fine for the pregnancy of Appellant's daughter, and later seven were paid as dowry when marriage took place between Respondent and Appellant's daughter, and this Court sees no reason to differ from this finding.

The court below held that upon marriage taking place the cattle paid as fine merged in the dowry and the appeal is against this ruling.

The question is put to the Native Assessors who state, "If a man or boy causes the pregnancy of a girl and pays a fine and subsequently pays dowry and marries her the fine and dowry are distinct and do not become merged in dowry." In this case since seven head of cattle were paid as dowry and two children born since marriage, the husband is entitled to the return of five head of cattle.

This opinion is in conflict with the general accepted opinion that "Fines for pregnancy merge in dowry," but in the absence of any ruling to the contrary this Court feels constrained to accept this as the Native Law prevailing in the Transkei proper.

The appeal is accordingly allowed with costs, and the judgment of the court below is altered to read:—"Judgment for Plaintiff for five head of cattle or £25. One beast being deducted for each child born since marriage, any cattle tendered in satisfaction of this judgment are subject to the approval of the Magistrate. Plaintiff to pay costs since date of tender of five cattle."

Note: The Native Assessors in the above case were: Mume Gubela of Idutywa, Langa Sokapase of Nqamakwe, Somana Hlanganise of Kentani, Smith Gawe of Butterworth and Bishop Manxiwa of Willowvale.

Butterworth. 5th November, 1919. C. J. Warner, C.M.

BEXESHA KWEZI vs. PETENI RAYI.

(Willowvale. Case No. 126/1919.)

Dowry—Merger of fine in dowry—Transkei.

The facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.*

By President: Appellant, who was Plaintiff in the court below, sued Respondent for the return of his wife or the dowry he had paid for her, five head in all, and stated that there was one child born of the said marriage.

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*See cases reported on pages 67 and 68.

The Magistrate found that Appellant first seduced Respondent's daughter and caused her pregnancy. He paid a fine of three head of cattle and later he paid two more as dowry and then married her. The appeal is on the question whether the cattle paid as fine became merged in the dowry upon payment of dowry and the marriage taking place. The Magistrate relying on the case of *S. Majeke* vs. *Ngqweqweni Nzuzana* (heard in this Court at Butterworth on 7th July, 1919), (page 64 of these Reports) held that the fine did not become merged in the dowry and awarded Appellant one beast: and the appeal is on the ground that the cattle awarded Appellant are insufficient.

It is to be regretted that this Court did not, in its judgment in the case of *Majeke* vs. *Ngqweqweni Nzuzana*, fully set forth the facts and so prevent misunderstandings which have arisen in consequence.

In that case the Plaintiff, while a boy, had caused the pregnancy of Defendant's daughter and a fine was paid. There was no talk of marriage then but some years later, and when Plaintiff had attained to manhood, he wished to marry the girl and after negotiations a marriage was agreed upon, and the dowry fixed at seven head of cattle. The Native Assessors expressed their opinion that in that case the fine did not merge in dowry.

The circumstances of this case are altogether different and the same Native Assessors state that in this case the fine and dowry became dowry upon the marriage taking place. This agrees with previous decisions of this Court.

The appeal is therefore allowed with costs and the judgment of the court below is altered to read:—"Four head of cattle or £20" instead of "one beast value £5."

Umtata. 21st November, 1919. C. J. Warner, C.M.

BOOI TOTOYI vs. MHOYI SITEMELE.

(Engcobo. Case No. 289/1919.)

Dowry—Merger of fines in dowry.

The facts are sufficiently clear from the judgment of the Native Appeal Court.

Judgment.*

By President: The facts of this case as found by the Magistrate in the court below, with which this Court agrees are that Appellant's brother seduced and caused the pregnancy of Respondent's daughter, and five head of cattle were paid as fine. At that time there was no talk of marriage between Appellant's brother and Respondent's daughter. Subsequently, however, marriage negotiations were entered into and three head of cattle paid as dowry by Appellant. The question is whether under these circumstances the first five cattle paid as fine become merged in dowry upon payment of dowry.

* See cases reported on pages 67 and 68.

The Native Assessors to whom the question is submitted state that the fine is not merged in the dowry. This agrees with the opinion of the Native Assessors in a similar case which came before this Court sitting at Butterworth in July, 1919.†

This Court, therefore, considers the Magistrate was correct in his finding, and the appeal is dismissed with costs.

Note: Both the Magisterial Assessors, Mr. T. W. C. Norton and Mr. J. Mould Young, dissented.

Kokstad. 8th April, 1920. T. W. C. Norton, A.A.C.M.

PETER MEYI vs. TOMVANA MGENGWANA.

(Matatiele. Case No. 181/1919.)

*Dowry—*Merger of fine in dowry.*

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.*

By President: Respondent sues Appellant for the Registration of seven head of cattle as dowry.

Appellant admits marriage but pleads that only one beast was paid as dowry, the remaining six being paid as fine.

The Magistrate finds for Respondent.

The ground of appeal is that fines do not merge in dowry without special agreement.

In the opinion of this Court and following numerous rulings the moment the agreement as to marriage is concluded and something additional is paid as dowry the fines already paid become merged in dowry.

Appeal is dismissed with costs.

Umtata. 6th November, 1922. J. M. Young, A.A.C.M.

MRAYI MAMPONDO vs. NKUNDLENI MANQUNYANA

(Engcobo. Case No. 341/1922.)

Dowry—Merger of fine in dowry—On consummation of marriage any cattle paid merge with former fine and the whole becomes dowry.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.*

By President: Appellant, who was Defendant in the court below, was sued by Respondent for the return of his wife or nine head of cattle, the dowry paid for her.

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†*Shidi Majeke* vs. *Ngqweqweni Nzuzana*, Butterworth, 7th July, 1919. Page 64 of these Reports.

*See cases reported on pages 64, 65, 66.

It is common cause, that the Respondent seduced Appellant's ward and caused her to become pregnant and that five head of cattle were paid as a fine, that she lived with Respondent for several years and had four children by him.

The Magistrate found that after seducing the girl and paying the fine, the Respondent married her and paid four head of cattle as dowry, and, that having done so, the five head of cattle paid as a fine became merged in the dowry and ordered the return of the woman within one week failing which the return of five cattle or payment of their value £37 10s. and costs of suit.

The appeal is brought on two grounds:—

(1) That there was no proof of payment of dowry and therefore no marriage.

(2) That cattle paid as damages for seduction and pregnancy do not merge in dowry.

With regard to the first point this Court is of opinion that there was sufficient evidence before him to justify the Magistrate in finding that there had been a marriage and that four head of cattle had been paid as dowry.

The question as to whether fines paid for seduction and pregnancy merge in dowry has been before this Court on several occasions and there have been numerous conflicting decisions. The generally accepted opinion, however, is that immediately the agreement as to marriage is concluded and something additional is paid as dowry the fines already paid become merged in dowry. There is no difference in principle whether the fine is paid long before or just before the marriage.

Note: The decisions in this case and that reported on the preceding page (*Peter Meyi* vs. *Tomvana Mgengwana*) accept the principle that "fines merge in dowry" without qualification, whereas the decisions reported on pages 64, 65 and 66 appear to qualify the principle to the extent that there must be some talk of marriage *when the fine is paid.*

Flagstaff. 27th August, 1918. J. B. Moffat, C.M.

SIZAKA vs. MBIKO.

(Lusikisiki. Case No. 49/1918.)

Dowry—Dowry paid by one hut for son of another hut—Dowry of son's first daughter is paid to the house which paid dowry his behalf—Illegitimacy—Status of illegitimate child of daughter relative to his mother's family—Teleka.

The Plaintiff, Mbiko, sued the Defendant, Sizaka Ntobole, for a declaration of rights in respect of the dowry paid or to be paid for a certain girl, Ngubhuke.

The Plaintiff alleged that he was the son and heir of the late Ntobole, and that deceased had an aunt named Nodlolo to whose dowry he was entitled. Nodlolo was married to a man who paid no dowry for her and she was telekaed, together with her child,

Nogqutsha. Nogqutsha grew up and was then made pregnant by one Maquva who paid no fine: as a result of this pregnancy Sizaka (the Defendant) was born. Sizaka was brought up by the Plaintiff's father, Ntobole, as his child, and dowry was paid for him when he got married. The girl whose dowry was now in question, Ngubhuke, was the issue of this marriage. Plaintiff claimed that according to Native Law and Custom he was entitled to the dowry paid for her. Defendant admitted the facts but denied that Plaintiff was entitled to the dowry paid for Ngubhuke.

The Magistrate gave judgment for Plaintiff, declaring him entitled to the girl Ngubhube and to all the dowry paid or to be paid for her, with costs of suit.

Defendant appealed.

JUDGMENT.

By President: The case having been put to the Native Assessors they state " The Defendant is the descendant through women of Plaintiff's family. Plaintiff's family has not received anything in the way of fine or dowry for Defendant's or his mother's births. The Defendant, therefore, belongs to Plaintiff's family."

" It is customary when dowry is paid by one hut for the son of another hut that the dowry paid for such son's first daughter is paid to the house which paid dowry on his behalf. In a case such as this the Defendant would be regarded as belonging to a separate hut and any dowry paid on his account by Plaintiff's father would be recoverable by Plaintiff's father from the dowry received by Defendant for his first daughter."

This statement of custom supports the Magistrate's judgment which is upheld.

The appeal is dismissed with costs.

Flagstaff. 8th April, 1919. C. J. Warner, C.M.

NHLONGO vs. NGCALEKA JAKEDE.

(Lusikisiki. Case No. 257/1918.)

Dowry paid for the eldest daughter of the second house paid to the Great House to replace the dowry paid for the second wife from the Great House cattle—Unusual for such dowry to be paid for a second wife from a source other than the Great House—Evidence in accordance with Native custom is usually more worthy of credence than evidence which is not.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court, and from the note below.

JUDGMENT.

By President: Appellant, Plaintiff in the court below, sued Respondent for a declaration of rights in respect of the eldest daughter of their father's second wife. The Magistrate in the

court below gave judgmeut for Respondent on the ground that the allotment of the girl Tembani to the Great House had not been proved. It is the universal practice in Native Law for the eldest daughter of the second house to be paid to the Great House to replace the dowry paid for the second wife from the cattle of the Great House. It would only be in the rare event of cattle paid for the second wife coming from another source than the Great House that the custom would not be observed, and in that case the *onus* of proof that the cattle were not paid by the Great House would be on the party relying on such a defence.

In the present case the parties were not represented in the court below or the case would probably have been better put before the Magistrate, but evidence which is in accordance with Native custom is generally more worthy of credence than evidence which does not agree with such custom.

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

Note: The Plaintiff in this case was the eldest son of the Great House of the late Jakede, and the Defendant was the second son of the second house of the late Jakede. Plaintiff claimed that the girl Tembani, daughter of the second house, had been allotted to the Great House, of which he, Plaintiff, was heir. The allotment was denied, and Defendant stated that he held the dowry paid for Tembani on behalf of his brother Makosile, eldest son of the second house.

The judgment in this case should be compared with that in the case of *Ngamtini Debeza* vs. *Tsitsa Debeza* on page 73.

Butterworth. 9th July, 1919. C. J. Warner, C.M.

GILBERT TUNGANA vs. BULLER TUNGANA.

(Idutywa. Case No. 18/1919.)

Dowry—Dowry paid for the wife of a minor house must be replaced by the dowry paid for daughter of such house—If eldest daughter dies unmarried the Great House is entitled to the dowry of the second daughter.

Claim for the dowry paid for a certain girl, Mbushu, second daughter of the Right Hand House of the late Stemele, of whom Plaintiff was the eldest son of the Great House and of whom Defendant was the eldest son of the Right Hand House. The Defendant denied that Plaintiff was entitled to Mbushu's dowry.

The Magistrate gave judgment for Plaintiff, and the Defendant appealed.

JUDGMENT.

By President: Respondent sued Appellant in the court below for the dowry obtained for Mbushu, the sister of Appellant. Appellant and Respondent are sons of the Right Hand House and the Great House respectively of their late father.

The eldest daughter of the Right Hand House, Eunice, was recognised as the property of the Great House. She, however, appears to have been of immoral character and had three children

born out of wedlock, for which no fines were obtained, and she eventually died unmarried. The second daughter, Mbushu, is now married and Respondent claims her dowry on the ground that no dowry was ever obtained for Eunice, the eldest daughter.

On the matter being referred to the Native Assessors they state that the Great House is entitled to the dowry of the second daughter of the Right Hand House if the eldest daughter should die unmarried in order to replace the cattle paid by the Great House for the wife of the Right Hand House. The Native Assessors do not agree as to whether the whole or what proportion of the second daughter's dowry is due to the Great House, but the underlying principle appears to be that the dowry of a daughter of a minor house must replace the dowry paid away for the wife of such minor house.

The appeal is accordingly dismissed with costs.

Kokstad. 29th August, 1919. C. J. Warner, C.M.

JOHN BOMELA vs. ISAAC BOMELA.

(Tsolo. Case No. 3/1919.)

Dowry—Cattle paid as dowry for the Right Hand House by the Great House must be replaced from the dowry paid for daughters of the Right Hand House—If dowry of the first daughter of the Right Hand House is insufficient, the balance must be refunded from the dowries of the remaining daughters of the Right Hand House—Apportionment of daughters—Formalities.*

The essential facts of the case are clear from the judgment of the Native Appeal Court.

Judgment.

By President: The question for decision in this case is whether Appellant, the heir of the Great House of the father of the parties or the Respondent, a minor son of the Right Hand House, is entitled to the dowry obtained for Lena, a daughter of the Right Hand House.

The Court consults the Native Assessors who state:

(1) If the cattle paid as dowry for the Right Hand House were originally obtained as dowries for daughters of the Great House they must be replaced from the dowries of the daughters of the Right Hand House.

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*Note that this principle does not extend to the dowries of daughters of daughtors, *vide* judgment in case of *Mvulo Nofidela* vs. *Ngqola Kekisana*, page 117. In the case of *Ngwenduna* vs. *Dubula*, page 142, it is laid down that the claim lapses unless a daughter is born to the wife for whom dowry was paid.

In the case of *Mabilwana Yabo* vs. *Ngubombini Siyodwana* (Umtata case) heard on appeal by the Native Appeal Court sitting at Umtata in July, 1923, the native assessors said "when a man having two sons in the same house provides the younger son's dowry, it is competent for the elder son's heir to claim a refund from the dowry paid for a daughter of the younger son."

(2) If the dowry of the first daughter is insufficient to satisfy the claim of the Great House the balance must be made up from the dowry of the younger daughters.
(3) If a man wishes to apportion a daughter of the Right Hand House to a minor son of the same house, the eldest sons of both the Great and Right Hand Houses should be present and be informed of the apportionment.

In view of this opinion with which this Court concurs, it would seem that the Respondent has not succeeded in establishing his claim.

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

Butterworth. 4th March, 1920. C. J. Warner, C.M.

MDIKANA MBUNCASE vs. NISHE NEKE.

(Willowvale. Case No. 136/1919.)

Dowry—Dowry obtained for the eldest daughter of a minor house goes to the principal house to replace the dowry paid for the wife of such minor house. Arrangement that dowry of youngest daughter of minor house should go to principal house for this purpose is unusual—Interpleader—Variation from Native custom must be conclusively proved.

Interpleader action. The relevant facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The question for decision in this case is whether certain four head of cattle attached by the Messenger of the Court at Willowvale in the Case of *Nishe Neke* vs. *Nozigodle* are the property of the claimant or the judgment debtor.

The cattle were attached at the kraal of the claimant who is the son of the Great House of the late Mbuncase; the judgment debtor is the son of Mbuncase's Right Hand House. The cattle in question were obtained as dowry for the fourth, also the youngest daughter of Mbuncase's Right Hand House.

It is a well-known Native custom that the dowry cattle obtained for the eldest daughter of a minor house go to the principal house to replace the dowry paid for the wife of such minor house, and in this case the dowry obtained for the eldest daughter of Mbuncase's Right Hand House would ordinarily be used to replace the cattle of the Great House which formed the dowry paid for the Right Hand wife, but an attempt has been made to prove that the dowries of the three eldest daughters were used for other purposes, and that it was arranged that the dowry of the youngest daughter should belong to the Great House. Such an unusual proceeding as is advanced in this case would require to be proved by very conclusive evidence free from any taint of suspicion.

In this case the evidence for the claimant consists of statements made by his brother and uncle, and under the circumstances of this case it is not free from suspicion.

The appeal is dismissed with costs.

Butterworth. 5th March, 1920. C. J. Warner, C.M.

NGAMTINI DEBEZA vs. TSITSA DEBEZA.

(Nqamakwe. Case No. 112/1919.)

Dowry—Great House can only claim dowry paid for daughters of minor house to replace cattle actually paid away for the wife of such minor house—Allotment of dowry.

Claim by the Great House for certain dowry cattle paid in respect of one Janet, daughter of the Right Hand House.

The essential facts of the case are clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The late Vimba, grandfather of the parties to this suit, paid dowry for his son's, Debeza's, great wife. After this wife had borne children she left her husband and the cattle paid as dowry for her were returned to Vimba and subsequently used to pay dowry for a second wife for Debeza who took the rank of his right hand wife.

Vimba and Debeza are now dead, and Appellant, the heir of Debeza's Great House, sued Respondent for the dowry obtained for Janet the eldest daughter of the Right Hand House of the late Debeza. Respondent denies this claim on the ground that the cattle constituting his mother's dowry were never the cattle of Debeza but the cattle of the late Vimba, and that Debeza's Great House can therefore have no claim to replace cattle which were never the property of that house.

This case presents some unusual features and the points raised are therefore submitted to the Native Assessors who state that if a father pays dowries for two wives of his son the Great House of the latter could have no claim to the dowry of the eldest daughter of the Right Hand House, seeing that dowry can only be claimed to restore cattle actually paid away from the Great House.

This Court is not prepared to disagree with this opinion and the Magistrate in the court below having found that the Plaintiff had failed to prove his allegation that the dowry of Janet was allotted to him at a meeting specially called for the purpose the appeal is dismissed with costs.

Kokstad. 13th April, 1921. T. W. C. Norton, A.C.M.

KONA MOKOATLE vs. LEKU MOKOATLE.

(Matatiele. Case No. 170/1920.)

Dowry paid to wife for her daughter in the absence and without the consent of the husband-head of kraal where woman stays is not liable to the husband for the dowry—Basuto custom—Maintenance.

The Plaintiff claimed 15 head of cattle paid as dowry for his daughter Nqina to Defendant by one Phakoane. Defendant

pleaded that the cattle had been paid to the plaintiff's wife, Maria, whom the Plaintiff had discarded about 15 years previously. Defendant counterclaimed for 8 head of claim as maintenance fees for Plaintiff's wife and three children who had resided with him for the past 15 years. The Magistrate gave judgment for the Plaintiff in convention for 15 head of cattle or £75 and costs. On the counterclaim he awarded the Defendant (Plaintiff in re-convention) 3 head of cattle or £15 with costs. The Defendant appealed.

JUDGMENT.

By President: At the request of the Appellant's attorney the Native Assessors are asked whether in the circumstances disclosed in this case, a woman may, according to Basuto custom, receive and dispose of dowry cattle and whether the head of the kraal at which she resides is responsible to the husband.

The Basuto Assessor, Mohatla Nkau, states an exactly parallel case in which the Basuto Chief Lerothodi decided that the head of the kraal is not responsible and further that as he is not responsible he cannot claim fees for maintenance.

The appeal is, therefore, allowed with costs, and the judgment altered to absolution with costs on the claim in convention and re-convention.

Kokstad. 3rd May, 1918. J. B. Moffat, C.M.

JOSEPH GWAZELA vs. WILLIAM MASIMINI and NKONZOMBI MASIMINI.

(Mount Fletcher. Case No. 14/1918.)

Dowry—Christian marriage-balance due in respect of Christian marriage may be sued for.

In this case the Plaintiff claimed the balance of dowry due by Defendant in an agreement made prior to the Defendant's marriage with Plaintiff's daughter.

Defendant admitted that there were some cattle still due but pleaded specially that as the marriage was entered into according to the law of the Colony, Native Custom could not now be applied to enforce payment of the balance. The Magistrate upheld the special plea and dismissed the summons. The Plaintiff appealed.

JUDGMENT.

By President: The Magistrate appears to have been misled by the abridged report in *Bisset & Smith* in regarding the decision of the Supreme Court in the case of *Msingeleli* vs. *Edward and Another* as deciding that in the case of a Christian marriage dowry agreed upon could not be sued for.

That case was one for review of the proceedings of this Court and did not deal with the merits of the case although the Judges expressed the opinion that there was nothing immoral in a contract for dowry in connection with a marriage according to Christian rites.

In the case of *Nozozi and Joni* vs. *Mahlala* heard in this Court in August, 1913,* it was held that it was quite competent to sue on an agreement for balance of dowry in consideration of a Christian marriage.

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

Flagstaff. 9th December, 1918. J. B. Moffat, C.M.

V. SONO vs. C. MAHLAKA.

(Tabankulu. Case No. 129/1917.)

Dowry—Christian marriage—Balance in respect of Christian marriage may be sued for—Exception.

The essential facts are clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Appellant (Plaintiff in the court below) sued for balance of dowry said to be payable by Defendant under an agreement entered into in connection with the marriage of Appellant's sister to the Defendant.

Defendant excepted to the summons that the marriage having taken place according to Christian rites, Colonial law applies and according to that law Plaintiff cannot sue on a contract to pay dowry, there being no legal consideration in the contract and such a contract being *contra bonos mores*.

If there was a contract to pay dowry it can be sued on.

For the reasons given by this Court in the case of *Sihuhu* vs. *Ntshaba* (1 Henkel, p. 62) a contract to pay dowry cannot be held to be against good morals.

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 heard on its merits.

Kokstad. 12th December, 1921. W. T. Welsh, C.M.

MJODI vs. JOHN MJIKWE.

(Umzimkulu. Case No. 340/1921.)

Dowry—Agreement to pay twenty head—Five head only paid—Claim for balance after dissolution of marriage by reason of husband's desertion—Ownership of children of the marriage—Length of absence of husband has no significance in so far as payment of dowry is concerned, and husband's nearest relative is liable.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: In this case the Plaintiff (now Respondent) sues the Defendant (now Appellant) for 15 head of cattle which he

*N.A.C. 3, page 70.

alleges are due to him as balance of dowry for Defendant's wife Ntombi, to whose dowry he is entitled. Plaintiff alleges that Defendant married Ntombi some twenty years ago, and agreed to pay as dowry for her 20 head of cattle, of which he alleges that five only have been paid. This agreement is denied on behalf of the Defendant, and it is alleged that 11 head of cattle were paid as dowry; that towards the end of the Boer War the Defendant went to Pondoland, and has not since been heard of; that about ten years ago plaintiff took Ntombi and her two children back to his kraal; and the marriage has been dissolved by reason of the Defendant's desertion, and the Plaintiff's taking back Ntombi and her children.

The Magistrate found the agreement proved, and that five head of cattle only had been paid on account of dowry. Judgment was entered for the Plaintiff for 15 head of cattle or their value £75. Against this decision an appeal is now noted.

In the opinion of this Court no sufficient cause has been shown for interfering with the Magistrate's finding on the questions of fact which he had to decide.

The circumstances of the case having been placed before the Native Assessors they state that the father or guardian is justified in claiming the balance of 15 head alleged to be due as dowry, the reason being that the children born do not belong to the woman's father but to the estate of the husband who has deserted his wife. If any of the children are girls their dowry would be paid to the husband's people, and the woman's father would have no claim thereto. The length of absence has no significance in so far as the payment of dowry is concerned. The nearest relative of the absent man is the person liable to pay the balance of dowry.

In view of this Statement of Native Custom the appeal will be dismissed with costs.

Kokstad. 21st August, 1922. W. T. Welsh, C.M.

J. MOITHERI vs. N. KHEHLEU AND ANOTHER.

(Matatiele. Case No. 664/1921.)

Dowry—Dowry should be paid to the person who has the custody of the girl.—Basuto custom.

The essential facts of the case are clear from the judgment of the Native Appeal Court, and from the note below.

Judgment.

By President: It appears that in 1909 the present Plaintiff, now Respondent, sued Sillo for a declaration of rights as to the custody and delivery of Sibonoang, the girl now in question, he failed to obtain an order and the girl remained with Sillo, her grandfather. Sibonoang was subsequently married to the Defendant, now Appellant, and certain dowry was paid by him to the kraal of the late Sillo where the girl was then lawfuly residing. The Plaintiff now sues the Defendant for the full dowry payable

in respect of Sibonoang. It is contended that the Defendant should have paid the dowry to the Plaintiff and that he had notice to that effect.

In the opinion of this Court it has not been proved that any such notice was given prior to the payment of the dowry. It follows therefore, in all the circumstances, that the Defendant was justified in paying the dowry to the person in whom the custody of Sibonoang had vested and this Court considers that the plaintiff is not entitled to succeed as against the Defendant. The question in issue is the whole dowry payable for Sibonoang and not the balance still remaining unpaid.

The appeal is allowed with costs and the judgment in the court below is altered to absolution from the instance with costs.

Note: The Plaintiff in this case was the natural father of the girl Sibonoang by Sillo's daughter. Judgment was given against present Plaintiff in 1920 for damages for the seduction of which Sibonoang was the result. In the case in 1909 Sillo admitted Plaintiff's right to the girl's dowry, but contended that he was entitled to the custody of the girl during her minority. Accordingly the girl remained at Sillo's kraal. The Defendant in the present case was the husband of the girl Sibonoang, who pleaded that the dowry had been paid to Sillo's brother, Hendrik Tsarane, who had the custody of the girl, Sillo being dead.

In the course of the hearing in the Magistrate's Court expert evidence was called on the question of ownership of illegitimate children under Basuto Custom. The balance of evidence was to the effect that under Basuto Custom an illegitimate child is the property of the maternal grandfather, and the payment of a fine by the seducer gives the seducer no right to the child. See judgment in case of *M. Lupindo* vs. *S. Bonza*, page 51.

Umtata. 22nd March, 1920. C. J. Warner, C.M.

NTONINTSHI TASHE vs. MANA FISANA.

(Cofimvaba. Case No. 145/1919.)

Dowry—Action by heir to recover dowry of daughter of deceased —Person to whom dowry is paid is the correct person to be sued therefor if he is still in possession.

Plaintiff alleged that he was the heir of one Nqiningana who died without male issue. The said Nqiningana was married by Native custom to one Nonayiti, by whom he had three daughters, Nozingo, Nobantu and Nozengazi. After the death of Nqiningana the widow disappeared with her daughters and was subsequently found to be living with the Defendant as his wife. Plaintiff alleged that Defendant had wrongfully given the girl Nozingo in marriage and received nine head of cattle as dowry for her. Plaintiff claimed this dowry and also a declaration of rights to the girls. Defendant admitted that Nonayiti bore three girls to Nqiningana but denied that any marriage subsisted between them. He denied Plaintiff's right to the girls, but asserted the right of Nonayiti's father, one Njotyolo, on whose behalf as

agent he stated he held the dowry of Nozingo. The Magistrate gave judgment for Plaintiff for four head of cattle or their value £7 each, with costs, and declared Plaintiff to be the heir of the late Nqiningana and guardian of the girls Nobantu and Nozengazi. The Defendant appealed.

JUDGMENT.

By President: Respondent as heir of Nqiningana sued Appellant for dowry obtained for one Nozingo, the daughter of Nqiningana and Appellant's wife who was formerly married to Nqiningana.

The facts of the case as alleged by Respondent are that Nqiningana and his wife were married in the Cape Province and soon after removed to the District of Engcobo where they lived for some years and where the wife bore three daughters. After the death of Nqiningana his widow returned to her own people, taking the three children with her and subsequently she married Appellant.

Appellant in his plea denies there was any marriage between his wife and the late Nqiningana, and secondly pleads that he holds the cattle obtained as dowry for Nozingo as agent for Helem, his wife's brother, on whose instructions he gave Nozingo in marriage.

This case arises out of Native customs and can only be dealt with under Native law.

Appellant in this case did not rely only in the defence that he was not the proper person to be sued, but also denied that Respondent had any claim at all to the cattle in dispute and also denied there was ever any marriage between the late Nqiningana and the mother of Nozingo.

The case is submitted to the Native Assessors who state that as appellant received the cattle and has them in his possession he is the proper person to be sued, and that had he desired to evade this liability he should have handed over the cattle to the person he says is the rightful owner.

This opinion agrees with the principle laid down in the case of *Jonas* vs. *Vulangenggele* heard in this Court on the 26th July, 1919,* and the reported cases quoted therein.

The appeal is dismissed with costs.

Kokstad. 18th August, 1920. W. T. Welsh, A.C.M.

D. MOSHESH vs. M. MATEE.

(Matatiele. Case No. 119/1920.)

Dowry, recovery of—Recovery of dowry paid in contemplation of Native marriage during subsistence of Christian marriage—Immoral contract.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Plaintiff in this case sued for the return of eight cattle which he alleged he had paid to Defendant on

* Page 96 of these Reports.

account of dowry due by his brother Edia Moshesh to the Defendant for the latter's daughter.

The Defendant pleaded in bar that no cause of action was disclosed in the summons inasmuch as Edia Moshesh, to the knowledge of the Plaintiff, was married according to Christian rites to one Adelici Ntsie on 11th January, 1916, which marriage still existed.

The plea in bar was upheld and the Plaintiff appeals.

For the Appellant it is ably argued that the dowry was agreed upon and paid over in accordance with Native custom and ideas: that the contract is not one prohibited by law; that it was not according to the habits of the parties, immoral; and that the Plaintiff is under the circumstances, entitled to recover.

The question for this Court to decide is whether the contention on behalf of the Appellant should prevail over the common law principle stated by *Van Leeuwen* (4.14.4) and *Voet* (12.5.2) as follows:—" That where money or property has been given or promised by one person to another for an immoral or illegal purpose, the law will not assist a claim for its recovery, at the instance either of him who has handed it over for the improper purpose or of him who, having performed the illegal or immoral act, demands the promised reward."

The Plaintiff's brother Edia, by his marriage according to Christian rites, placed himself, so far as his matrimonial affairs are concerned under the operation of the common law, the main principle of which is that he shall not have the right to marry any other woman during the subsistence of such marriage. This principle is recognised by sect. 3 of Proclamation No. 142 of 1910.

When Edia married by Christian rites, the Plaintiff cannot be assumed not to have known that the marriage by the former to another woman by Native custom, would, according to the tenets of the Church, be immoral.

The fact that this is not an uncommon practice does not constitute an established custom, more especially as it could only have arisen since the introduction of Christian marriages into these Territories.

It is admitted that the Defendant would not be entitled to sue for the payment of dowry had it not been paid over and in the opinion of this Court the converse case also holds good.

This Court is of opinion that whatever the practice may be amongst the Natives in regard to the so-called marriage of another woman during the subsistence of a marriage by Christian rites, it cannot recognise claims such as the one now in question.

The Court is, therefore, of opinion that the Magistrate came to a correct conclusion, and the appeal is dismissed with costs.

Umtata. 22nd November, 1921. W. T. Welsh, C.M.

ISAAC NTONGA vs. HOKISI DULUSELA.

(Umtata. Case No. 703/1921.)

Dowry, return of—Immoral contract—Payment of dowry by father for his son in respect of a contemplated marriage by Native custom during the subsistence of a marriage by Christian rites—Questions of damages to be dealt with under Native custom.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: In this case the Plaintiff alleges that the Defendant paid a chestnut gelding and three cattle as dowry for a contemplated marriage between Plaintiff's daughter Julia and Defendant's son James, that the horse was borrowed by Defendant who failed to return it and that he took possession of the bull and heifer and refuses to restore them. Defendant pleads that he arranged a marriage for his son with Plaintiff's daughter during the absence of his (Defendant's) son at work in Cape Town and paid three head of cattle described as dowry, but on his advising his son of this he refused to ratify the intended marriage, and even on his return home declined to have anything to do with Plaintiff's daughter, and that it was then agreed that the Plaintiff was to return the three head of cattle, two of which were duly returned and he counterclaims for the third beast. He denies that the horse was paid as dowry and states that he lent it to plaintiff who subsequently returned it.

It has repeatedly been decided by this Court that questions of dowry must be dealt with under Native custom, and not according to the principles of the common law.

The Magistrate found as a fact that the plaintiff and his daughter Julia had no knowledge that James was a married man at the time the agreement was entered into between the Plaintiff and the Defendant. The only evidence on this point is that of the Plaintiff who states: "I did not know that James was a married man." There was no cross-examination of this statement and no evidence to contradict it. Whatever the probabilities may be this Court is not in a position to say the Magistrate was wrong in accepting the Plaintiff's uncontradicted evidence on this important point. That being so it seems clear that the Plaintiff was not party to an immoral agreement, which was, therefore, immoral only so far as the Defendant was concerned.

In the case of *D. Moshesh* vs. *M. Matee* heard at Kokstad in August, 1920 (page 78 of these Reports) it was decided that where both parties knew of the previous marriage the Court would not interfere. The position in the present case is, however, different. In the opinion of the Court the Defendant could not, after bargaining for the marriage of the Plaintiff's daughter to his son, a man already married by Christian rites, recover the cattle paid on account of dowry on the marriage

negotiations being broken off by the Defendant and his son, indeed by virtue of the existence of this marriage the contract could not be carried out by the Defendant. This was due to no fault of the Plaintiff or his daughter Julia upon whom a fraud had been perpetrated, and he is, therefore, entitled to retain the cattle paid as dowry.

In regard to the horse alleged to have been paid as dowry, the Defendant is contradicted by his own witness Richard Ntonga and in the opinion of this Court the Magistrate was justified in finding that it was paid as dowry and not lent by the Defendant to the Plaintiff.

The appeal will accordingly be dismissed with costs.

Dissenting Judgment (by Mr. P. G. Armstrong, Resident Magistrate, of Ngqeleni): The parties in this case agreed to a marriage between the daughter of the Plaintiff and the son of the Defendant. It is common cause that the Defendant's son was away at work at the time and had no knowledge of the agreement. It is also common cause that he declined to be a party to the agreement so soon as he became aware of it.

The Defendant's son at the time of the agreement was married according to Christian rites. It is clear on the authority of the case of *D. Moshesh* vs. *Matee* that where both parties were aware of the previous Christian marriage there would be no right of action to recover dowry for the reason that they were parties to an illegal or immoral act.

In the present case the Plaintiff denies that he was aware of the fact that Defendant's son was a married man, but he admits that this would have made no difference and that he is still willing for her to contract a so-called marriage with the Defendant's son.

The Plaintiff's daughter gives no evidence as to whether or not she was aware of the fact that the Defendant's son was a married man.

It appears to me inconceivable that a Native would enter into arrangements in regard to his daughter's proposed marriage without ascertaining the position she is expected to occupy at the kraal of her prospective husband. In my opinion, therefore, it must be presumed in the absence of satisfactory evidence to the contrary that both the Plaintiff and his daughter were aware of the fact that Defendant's son was previously married by Christian rites. This being the case they were equally with the Defendant parties to an immoral and illegal agreement, and should not be allowed to recover the cattle and horse now in Defendant's possession.

The parties agreed before the trial that the case would not be regarded as one of spoliation. For this reason it cannot now be contended that the cattle should be restored to the Plaintiff.

For the same reason the Plaintiff should be allowed to retain the one beast still in his possession.

Lusikisiki. 17th April, 1920. T. W. C. Norton, A.C.M.

Ref. to in 1945 (T. & N.) 54.

MGUGUMALI vs. JIZELA DUNTSULA.

(Lusikisiki. Case No. 291/1919.)

Dowry, refund of—Stale claim—Prescription in Native Law.

Claim for refund of dowry paid by the Plaintiff's great-grandfather Nyangani on behalf of one Maroro, whose heir the Defendant was according to Native custom.

The Magistrate gave judgment for Plaintiff, stating *inter alia*, that the right of action never becomes prescribed under Native law and custom and consequently the principle of prescription did not apply.

The defendant appealed on the ground, *inter alia*, "that the Plaintiff's claim relates to a matter which happened more than twenty years ago and the Plaintiff (according to his own admission) was aware of the alleged claim many years ago, forfeited his right of action by waiting until almost all available evidence ws lost by death of witnesses, etc., before bringing his action."

JUDGMENT.

By President: Respondent sued Appellant for eight head of cattle, being dowry paid on behalf of one Maroro, by Plaintiff's great-grandfather, Nyangani, and Plaintiff now seeks to recover what should have been paid from the dowry of the first daughter born to Maroro.

The case is undoubtedly very stale and should have been settled many years ago.

There is, however, evidence that this matter was brought before the Chiefs Mqikela Sigcau and Marelane, so that it may be said Respondent and his predecessors have never allowed their claim to lapse.

The Magistrate has found that Maroro's wife's dowry was provided by Respondent's great-grandfather and that Appellant is heir to Maroro and that this dowry has never been refunded.

According to Native custom, Plaintiff is entitled to succeed, even though the case is stale, the evidence having established the fact of payment and that a refund was never made.

The appeal is dismissed with costs.

Dissenting judgment by Mr. W. T. Hargreaves, Resident Magistrate of Bizana: In my opinion the Plaintiff has lost his right of action owing to the staleness of the case. There is evidence that Nyangani helped Maroro to pay dowry and in Native law the repayment would come out of the dowry of Maroro's eldest daughter. This girl was married during the lifetime of Gqaneko and he should have insisted on his rights and been re-imbursed. It seems hardly fair or just now to come on his great-grandson for this when all the previous estates have fallen through and Defendant has never eaten any of the dowries. I think the summons should have been dismissed.

Note: Gqaneko was the father of the Plaintiff in the above action.

Lusikisiki. 19th August, 1919. C. J. Warner, C.M.

MBOFUMANI vs. HONYOSI MAQUBA.

(Bizana. Case No. 48/1919.)

Dowry, return of—Return of dowry on death of wife shortly after marriage—Division of dowry.

In this case the Plaintiff sued the Defendant for the return of the dowry paid for his wife, who deserted him shortly after marriage and subsequently died without issue. Plaintiff alleged that Defendant undertook to return the dowry, but he only returned two head, plus one calf, the increase of one of the cattle. He claimed the balance, three head or their value £45. Defendant pleaded that the woman stayed with Plaintiff for twelve months or more, that she was pregnant when she died, and that Plaintiff never claimed the dowry during the woman's lifetime. He therefore pleaded that Plaintiff was not entitled to any more dowry than that already returned to him. The Magistrate gave judgment for Defendant, with costs, finding that negotiations were going on for the woman's return when she died and that the case came under the custom set forth in the case of *Mfuzana* vs. *Wezi*, 2, N.A.C., p. 75. The Plaintiff appealed.

JUDGMENT.

By President: Appellant, who was Plaintiff in the court below, sued Respondent for the return of the dowry cattle he had paid for Respondent's daughter, who was persuaded into the marriage with Appellant's son, a deaf mute. A short time after marriage, the girl left her husband, and soon after died. Respondent thereupon returned two cattle and a calf to Appellant who however claims all the cattle he paid. In the opinion of this Court, this case is governed by the principle laid down in *Mfuzana* vs. *Wezi* (Henkel 2, 75) and following that ruling a fair and equitable distribution of the dowry has been made. The appeal is dismissed with costs.

Umtata. 18th November, 1919. C. J. Warner, C.M.

BUDLU CUBALETIKI vs. MBOXO MARWANQANA.

(Cofimvaba. Case No. 112/1919.)

Dowry, return of—Return of dowry on death of wife shortly after marriage—Division of dowry—Wedding outfit deductions.

In this case the Plaintiff married the Defendant's daughter in the scoffling season of 1918, and she died shortly after the New Year of 1919. Seven head of cattle were paid as dowry. Plaintiff claimed refund of dowry less one beast deducted for wedding outfit. No child was born of the marriage. Defendant tendered three head of cattle in Court and the Magistrate gave judgment in terms of the tender. The Plaintiff appealed.

JUDGMENT.

By President: The facts in this case are not disputed and it is a question of law whether Appellant is entitled to the return of the whole of the dowry he paid for his wife who died soon after marriage, less the usual deductions for wedding outfit, or only half the balance.

The Appellant relies on the cases of *Mgonongwana* vs. *Ndata* (2 Henkel 86), and *Gege Maruso* vs. *Mhlambiso Dwenga* (Meaker 63). The principle laid down in these cases is that the husband is entitled to the return of a portion of the dowry on the death of his wife except under circumstances set forth therein.

In the opinion of this Court the case of *Kowe* vs. *Mbilini* (1 Henkel 41) must be regarded as deciding the question as to the practice in the Courts of the Territories in cases of this nature.

This case, however, does not appear to have been brought to the attention of the Court in either of the above cases on which Appellant relies and which are quoted above.

In the opinion of this Court the Magistrate in the court below was correct in his finding and the appeal is dismissed with costs.

Umtata. 19th July, 1921. T. W. C. Norton, A.C.M.

SIKONOMFANA SOMZANA vs. PICKEN BANTSHI.

(Umtata. Case No. 129/1921.)

Dowry, return of—Return of dowry on death of wife shortly after marriage—Returnable where marriage was by Christian rites—Magistrate's jurisdiction in question of dowry in respect of Christian marriage—Conflict of Colonial law with Native Custom discussed—Exception—Proclamation No. 142 *of* 1910—*Questions of dowry to be dealt with under Native custom.*

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: Respondent sues Appellant for return of dowry paid for his sister Annie Sarah alleging that the marriage, which took place in 1919, was by Native Custom and that six head of cattle were paid as dowry, that the woman Annie Sarah dies some two months after marriage and, therefore, he is entitled to return of the dowry paid.

Appellant pleads specially that the marriage was under Colonial law and as there has been no breach of the marriage contract he is in no way liable to Respondent. Respondent, in reply, admits that the marriage was according to Colonial law, but denies the conclusions of law in the special plea and prays that it be overruled.

Appellant also files an exception asking for the dismissal of Respondent's summons on the grounds that the Magistrate's Court has no jurisdiction to hear this case which is subject to the jurisdiction of the Chief Magistrate's Court.

The Magistrate dismissed the special plea and overruled the exception with costs.

An appeal is now brought against both rulings

With regard to the exception Appellant quotes sect. 6, subsect. 2 of Proclamation 142/1910 and argues that the dowry paid in respect of a Colonial law marriage is one of "such questions" referred to in the above quoted section and in support of his contention cites *Lilly Matshongo* vs. *Mbadu* heard in the Kokstad Circuit Court in October, 1919.

The Court certainly in that case included among "such questions" rights of property, but went on to say "the sub-section cannot even by the widest possible interpretation be held to cover a claim by a third person, who is no party to the marriage, to cattle seized under a writ of execution taken out at the instance of a successful party in a divorce case. It is not, as was contended, a question of rights of property arising out of any marriage. Such a question would only arise between the husband and the wife or their heirs."

Similarly in the present case the husband sues a third person who was no party to the marriage and, in the opinion of this Court, the remarks of the learned Judge-President in the cases quoted above apply in these circumstances also.

In the case of *Thompson Kauleza* vs. *Komanisi Mqodolo* heard before the Chief Magistrate in March, 1921, it was held, following the ruling in *Lily Matshongo* vs. *Mbadu*, that the Chief Magistrate had no jurisdiction to determine a claim for damages against the co-respondent at the instance of a husband, who had obtained a decree of divorce on the ground of adultery.

In the case of *G. Gomani* vs. *D. Baqwa* heard before the Native Appeal Court at Kokstad in December, 1917 (Meaker 71), the jurisdiction of Court of Resident Magistrates under sect. 6 of Proclamation 142 of 1910 was discussed and it was laid down that these Courts had jurisdiction in suits for return of dowry where the marriage had been by Colonial law. The question was most fully considered in the dissenting judgment, the full Court being in agreement on this point though one member dissented on the question of return of dowry in the circumstances disclosed in that case. This case is opposed to excipient's contention as are also the two cases already referred to, and in the opinion of this Court the exception to jurisdiction was rightly overruled. The principles involved were fully discussed by this Court in *Gasa* vs. *Gasa* heard in March, 1921 (page 162 of these reports).

With regard to the special plea Appellant contends:—

(*a*) That there has been no breach of the marriage contract on the part of the dead woman, and a return of dowry would effect a rescission of the marriage contract.

(*b*) That dowry was paid in terms of a contract perfectly valid made antenuptem. He quotes *Piet* vs. *Goneso* in support (17 E.D.C. 23).

(*c*) That the utmost the Appeal Court has held in *Gomani* vs. *Baqwa* (Meaker 71) is that, where a marriage has been dissolved through the fault of a wife, dowry must be restored, so as not to enrich one who claims through the guilty party and so penalise the innocent party.

(*d*) That as the marriage was according to Colonial law such law must be followed since it is quite clear from the case of *Piet* vs. *Goneso* (17 E.D.C. 23) payment of dowry is cognisable under Colonial law, where the marriage is according to Colonial law.

(*e*) That to apply Native law improperly in cases of this nature would be opposed to all fairness and equity for the reasons set out in (*a*).

The decision in the case *Gomani* vs. *Baqwa* (Meaker 71) goes beyond Native custom in allowing the return of dowry at the suit of a husband, married by Colonial law, who had obtained a divorce on the ground of his wife's adultery, since Native custom does not admit of the dissolution of a marriage on the grounds of adultery.

The Court seems to have been guided by equity rather than by Native custom. The words used being "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 language is guarded and is very far from being a ruling that Native custom does admit of such an action being brought and cannot be taken to mean, as is contended for Appellant, that only in case of a wrong committed by the woman can dowry be claimed. A wrong had been committed by the woman and in that case divorce followed and the Appeal Court allowed a refund of dowry, but Appellant wishes to use that decision as laying down the proposition that only where a wrong has been done can such refund be allowed. This Court cannot accept this view. In the present case Native custom does, without a shadow of doubt, as yet provide for the return of dowry in the circumstances alleged in the summons and the fact that the marriage was by Colonial law does not preclude Respondent from exercising the rights allowed by custom.

The case of *Piet* vs. *Goneso* does not assist in this case. In that case a payment on account of dowry had been made and the point was that if such payment was made in contemplation of a Native marriage the contract, being considered immoral according to Colonial law, could not be enforced, but had the marriage contemplated been one by Colonial law no such objection could be taken to an action for the recovery.

It is straining the meaning of words to argue that this case enunciates the proposition that dowry forms part of, or arises out of, a Christian or Civil marriage. Payment of dowry is a purely Native Custom and the fact that dowry is paid in connection with a Christian or Civil marriage does not make it any the less Native custom.

Dowry is not an essential of a Colonial law marriage contract and cannot effect its rescission. There is no allegation in the summons of a breach of the marriage contract, but Respondent claims under well-established Native Custom.

Payment of dowry must be treated as distinct from the Christian or Civil marriage and cannot arise out of it, and can form no part of it. Meaker 163, * *Zace* vs. *S. Tukani* (1 N.A.C.

* *Joe Ntlongweni* vs. *William Mhlakaza.*

202) lays down most clearly that dowry paid in connection with a Christian marriage must be dealt with under Native law. It may be described as a parallel contract for want of a better term. The word marriage is used to express the union of a man with a woman whether by Colonial law or Native custom though they differ widely. The first is theoretically a union till death, the second is a union much more easily formed and much more readily dissolved and entailing much that is opposed to the ideas underlying Civil marriage. A Native may repudiate his wife for no cause at all provided he does not ask for the return of his dowry and a Native wife may dissolve her marriage simply by having the dowry paid for her restored to her husband.

Payment of dowry makes, and restoration of dowry dissolves, a marriage according to Native custom. It has neither effect in a Civil marriage. While Native custom is allowed to run parallel with common law—and undoubtedly the people are not ripe for its discontinuation, nor is it at present desirable that it should be discontinued—the only sound rule to follow is to apply Native law to the settlement of matters of Native custom. Any attempt to reconcile common law with Native law is bound to fail. The two systems are diverse, and opposed in principle in many respects and to attempt to oust the one with argument based on the other or to apply the principles of the one to the other is not legal and must lead to confusion.

In the opinion of this Court the special plea was rightly dismissed.

Appeal is dismissed with costs.

Kokstad 18th August, 1921. W. T. Welsh, C.M.

PETER MFINGO vs. WILLIE DLAMINI.

(Umzimkulu. Case No. 74/1921.)

Dowry, return of—Return of dowry on death of wife shortly after marriage—Division of dowry—No deduction for wedding outfit.

In this case the Plaintiff sued Defendant for the return of the dowry paid for his wife, who died without issue within a month of marriage. The dowry paid consisted of £20, four head of cattle, one horse and four goats, or a collective sum of £54. Defendant pleaded that as the marriage took place and the woman lived with the Plaintiff as his wife until her death no dowry was returnable. Alternatively he pleaded that the wedding expenses and outfit should be deducted from the dowry paid, and that no more than half of the balance then remaining was returnable. The Magistrate gave judgment for the return of the full dowry, and the Defendant appealed.

JUDGMENT.

By President: The Native assessors having been consulted state that in a case such as the present where a wife dies within one month of marriage, more than half the dowry is returnable, but

that no special reduction is made in respect of the wedding outfit, the father re-imbursing himself out of the portion of the dowry retained by him. The dowry appears to be equivalent to ten head.

In the opinion of this Court the Plaintiff is not entitled to more than seven cattle.

The appeal will accordingly be allowed with costs, and judgment in the court below altered to judgment for the Plaintiff for seven cattle or their value at £5 each with costs of suit.

Umtata. 21st November, 1919. C. J. Warner, C.M.

NOYUSE RAJOYI AND ANOTHER vs. ZADOLA DYANI.

(Mqanduli. Case No. 226/1919.)

Dowry, return of—Return of dowry on death of wife shortly after marriage—Defence that death was due to miscarriage—Proof.

The essential facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: Respondent sued for the return of the dowry cattle paid for Appellant's sister who died soon after marriage. Appellant pleaded that the death of the woman was due to a miscarriage and the dowry was therefore not returnable. The onus then lay on Appellant to prove his plea. The Magistrate in the court below found that Appellant had failed to prove the plea on which he relied and this Court considers the Magistrate was correct so far as his finding on the evidence is concerned.

According to the evidence of some of Appellant's witnesses the foetus was so far advanced that it could be distinguished as a male. If this is correct it would have been buried and the place of burial pointed out to Respondent (*Notatsala* vs. *Zenani*, 1 Henkel 209).

There is no evidence of this, and Appellant having failed to produce the most essential evidence to support his plea cannot possibly expect to succeed.

The appeal is dismissed with costs.

Dowry—Death of wife—Return of dowry—"Ukuketa" custom—Withdrawal of recognition in the Courts of the Transkeian Territories.

PROCLAMATION.

By Major-General His Royal Highness Prince Arthur Frederick Patrick Albert of Connaught, Knight of the Most Noble Order of the Garter, a Member of His Majesty's Most Honourable Privy Council, Knight of the Most Ancient and Most Noble Order of the Thistle, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Knight Grand Cross of the Royal Victorian Order, Companion of the Most Honourable Order of the Bath, Personal Aide-de-Camp to His Majesty the King, High Commissioner for South Africa, and Governor-General and Commander-in-Chief in and over the Union of South Africa.

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*No. 189, 1922.]

Whereas it appears to me that the Native custom known as Ukuketa, whereby a husband is entitled to claim the refund of the whole or portion of the dowry paid by him on the death of his wife shortly after marriage, has largely fallen into disuse and disrepute;

And whereas the said custom is opposed to the civilized sentiments of the majority of the Native people who desire its extinction;

And whereas in the interests of progress it is expedient so far as possible to give effect to the desire, by withdrawing all legal recognition from the said custom in the courts of the Transkeian Territories;

Now, therefore, under and by virtue of the powers vested in me by law, I do hereby proclaim and make known that from and after the 1st day of January, 1923, no claim under the said custom of Ukuketa, save and except a claim then pending shall furnish a cause of action in any court in the Transkeian Territories; provided that this Proclamation shall not affect any right acquired or obligation incurred under any judgment or order of any Court in respect of the said custom delivered or made before the said date.

God Save the King.

Given under my Hand and the Great Seal of the Union of South Africa at Pretoria this Ninth day of November One thousand Nine hundred and Twenty-two.

ARTHUR FREDERICK,
Governor-General.

By Command of His Royal Highness the
Governor-General-in-Council.

F. S. MALAN.

*Note.—In the case of *Mbanyapu Menziwa* vs. *Solomon Mazwi* (T-olo case) the cause of action arose prior to the promulgation of Proclamation No. 189 of 1922, but legal proceedings were only commenced subsequently. Held that no action lay for the recovery of dowry (Native Appeal Court, Umtata, July, 1923).

Lusikisiki. 1st April, 1921. W. T. Welsh, C.M.

YEKANI vs. FRANK GREGORY.

(Port St. John's. Case No. 108/1920.)

Dowry, return of—Return of dowry on death of husband shortly after marriage—Dowry not returnable where marriage subsisted for three years—Exception that widow not re-married.

In this case the Plaintiff claimed (*a*) the return of two head of cattle paid as dowry for his deceased son, and (*b*) the sum of £38 paid as compensation to his son's widow by the gold mines at Johannesburg. Defendant excepted to claim (*a*) on the ground that the widow had not re-married, and pleaded to claim (*b*) that he had not received any portion of the compensation which had been paid to the widow. The Magistrate found that the marriage had lasted for about three years and could not therefore be looked upon as a " courtship." He gave an absolution judgment on claim (*a*) and judgment for Defendant on claim (*b*). The Plaintiff appealed.

JUDGMENT.

By President: The Magistrate found that the marriage subsisted for about three years. The question for decision is whether that is such a short period as is contemplated in the case of *Myolwa* vs. *Ngalombini Dliseka* (3 N.A.C. 59). In the opinion of this Court it is not, and the Plaintiff is therefore not entitled to succeed, especially in view of the dowry paid having been only two cattle. This Court is of opinion that the Magistrate's decision on both claims should not be interfered with.

The appeal is dismissed with costs.

Lusikisiki. 4th April, 1921. W. T. Welsh, C.M.

NOKEPAYI BANDEZI vs. ALEC TINTA.

(Bizana. Case No. 247/1920.)

Dowry, return of—Return of dowry on death of husband shortly after marriage—Not returnable where marriage has subsisted for two years and a child has been born, though still-born—Pondo Custom.

The Plaintiff sued Defendant for the return of 7 head of cattle or value £84, being dowry paid by him to Defendant on behalf of his son, for the daughter of Defendant. The marriage subsisted for about two years and then the husband died. The summons alleged that there was no issue of the marriage, but Plaintiff subsequently admitted that the woman gave birth to a still-born child. Defendant pleaded that as there was a child of the marriage no dowry was returnable. The Magistrate gave judgment for the Defendant, holding that the birth of a child extinguished the

dowry in accordance with Pondo Custom. He distinguished the case from that of *Myolwa* vs. *Ngalombini Dliseka* (3 N.A.C. 59) in that the marriage lasted for more than a few months.

JUDGMENT.

By President: In the opinion of this Court the marriage has subsisted for a period of two years, and there having been a child, though still-born, the ~~Plaintiff~~ is entitled to succeed.

The appeal is dismissed with costs.

Butterworth. 6th July, 1921. W. T. Welsh, C.M.

DLUNGE vs. JAZA.

(Idutywa. Case No. 62/1921.)

Dowry, return of—Return of dowry on death of husband shortly after marriage—Division of dowry—Practice of court in Transkei proper—Remarriage of widow.

Plaintiff sued Defendant for return of ten head of cattle or £100, paid as dowry on behalf of his son for the Defendant's daughter. Plaintiff alleged that the girl only lived with his son for two months, and owing to her illness the marriage was never consumated. She then went back to Defendant's kraal and stayed there for eight months when she returned to her husband, who, however, died the day after her arrival. She returned to Defendant's kraal and subsequently remarried, eight head of cattle being paid to Defendant as dowry for her. Defendant admitted the remarriage, but alleged that only eight head of cattle were paid by Plaintiff as dowry, of which four were dead, and therefore only four were returnable. The Magistrate gave judgment for the return of five head, on the ground that the established practice of the Court was to allow the return of not more than half the dowry, quoting the cases of *Gwente* vs. *Smagile* (1 N.A.C. p. 71), and *Lobi* vs. *Noyo* (1 N.A.C. p. 269).

JUDGMENT.

By President: Whatever the custom as practised among Natives may have been in regard to the return of dowry on the death of the husband shortly after the marriage this Court said in its judgment in 1904 in the case of *Gwente* vs. *Smagile* (1 N.A.C. 71), that it had become customary in that Court not to restore more than half the dowry in such cases. That ruling was followed in the case of *Lobi* vs. *Noyo* (1 N.A.C. 269).

No decision in conflict with those cases has been produced before this Court.

In the present case the woman lived with her husband at his kraal for about two months when she returned to her people where she remained for a period of eight months before returning to her husband, who died almost immediately thereafter.

This Court is of opinion that no sufficient cause has been shown for departing from the general principles laid down and followed by this Court for over seventeen years.

The appeal is dismissed with costs.

Butterworth. 14th March, 1922. W. T. Welsh, C.M.

GWETYIWE JONAS vs. TANDATU YALEZO.

(Kentani. Case No. 242/1921.)

Dowry, return of—Death of husband—Remarriage of widow—Maintenance.

The Plaintiff alleged that he was the son and heir of the late Jonas, who during his lifetime married one Nosayiti, daughter of the Defendant. There were two children of the marriage, and seven head of cattle were paid by the late Jonas as dowry. Since the death of Jonas the widow Nosayiti had remarried. Defendant pleaded that three children were born of the marriage, one dying in infancy, and claimed that maintenance was due to him in respect of the two children. Defendant also pleaded that the Plaintiff has agreed with him that plaintiff's claim for a refund of dowry should be discharged by Defendant's claim for the maintenance of the two children. In Court the plaintiff's attorney intimated that he was prepared to pay two head of cattle as maintenance. The Magistrate found that three children had been born of the marriage, and allowed three head therefor together with two head as maintenance. He gave judgment for the return of the balance (two head) to the Plaintiff, or alternatively their value £6, with costs of suit. The Defendant appealed and the Plaintiff cross-appealed.

JUDGMENT.

By President: The Plaintiff is entitled to the return of the dowry paid for his late father's wife Nosayiti, on the principle that no man can hold two dowries. It is admitted that this dowry consisted of seven head of cattle. The Magistrate found that the woman Nosayiti had had three children, with which finding this Court agrees. This leaves a balance of four cattle to be dealt with.

The Defendant (Plaintiff in reconvention) claims two head of cattle or value £10 for the maintenance of the two children Nozikade and Nomhlahlu. This claim was admitted.

None of the cases quoted in argument lays down that where there have been children the balance of dowry should be divided on the remarriage of the widow.

The Native Assessors having been consulted on this point state that where a widow, having had children, remarries, the heir of the late husband is entitled to recover the dowry less a deduction of one beast for each child born.

The appeal of the Defendant in regard to his claim for a division of the balance of dowry must fail.

The appeal of the Plaintiff in reconvention for his costs in the Court below must succeed.

On the issues placed before him the Magistrate should in the opinion of this Court have entered judgment for Plaintiff for four head and costs for the Plaintiff in reconvention for two head and costs.

The appeal will be allowed with costs to the extent of allowing the Plaintiff in reconvention his costs on that claim. The cross-appeal will be dismissed with costs.

Butterworth. 16th November, 1922. J. M. Young, A.A.C.M.

ALVENI JOLOZA vs. GEZA.

(Kentani. Case No. 118/1922.)

Dowry, return of—Re-marriage of widow—Proof of dowry in respect of second marriage must be furnished.

Claim for return of eight head of cattle paid as dowry in respect of a woman whose husband had died and who subsequently married another man. Defendant admitted liability for return of four head and made tender of the same. The Magistrate gave judgment for Plaintiff as prayed. Defendant appealed on the ground that the judgment was in conflict with Native Law and Custom and on the ground that the number of cattle awarded to Plaintiff was excessive. The Magistrate relied on the judgment of the Native Appeal Court in the case of *Jonas* vs. *Tandatu Valezo*, heard at the Native Appeal Court, Butterworth, in March, 1922,* that upon remarriage of a widow, her late husband's heir is entitled to the return of the dowry, less a beast for each child born of the marriage, and that the widow cannot claim a division of the balance of the dowry.

Judgment.

By President: This is an appeal against a judgment of the Assistant Resident Magistrate of Kentani in an action in which Alveni Joloza, heir of the late Gwadiso Joloza, claimed eight head of cattle or their value £80 being dowry paid by his father for his mother who has remarried since her husband's death.

The facts are not in dispute. The appeal raises the question, not for the first time, whether an action can be maintained in these Territories for the return of the dowry in the event of the remarriage of a widow.

In the case of *Mqolora* vs. *Jim Meslani* (1 N.A.C. 97) the President referring to previous decisions, stated that "if the woman was remarried after the death of her husband then the first dowry was returnable on the principle that no man was entitled to retain two dowries for the same woman."

This decision was given after the decision of the Eastern Districts' Court in the case of *Mbono* vs. *Manxoweni* (6 E.D.C. 62).

The same principle was affirmed in the case of *Tandatu Valezo* vs. *Gwetyiwe Jonas*, heard in this Court on March, 1922.*

In the present case there is nothing on record to show whether or not dowry was paid in respect of the second marriage of the woman Lena.

The case is returned to the trial Court for evidence to be taken on this point, and a ruling given thereon. Costs to abide the final issue.

* Page 92 of these Reports.

Umtata. 17th July, 1922. W. T. Welsh, C.M.

RUTE NYAMA vs. PIMPI MPLAATYI AND ANOTHER.

(Engcobo. Case No. 168/1922.)

Dowry, return of—Death of husband immediately after consummation of marriage—Return of bride to father's kraal—Right of husband's heir to claim return of dowry—Wedding outfit —"Duli" party.

The essential facts are clearly stated in the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Plaintiff, now Respondent, sued the Defendant, now Appellant, on a summons which alleged:—

(1) That Plaintiff is the Guardian according to Native Law of the minor Wobu Nqangiso, who is the heir of late Nqangiso Mplaatye.
(2) That during the lifetime of the late Nqangiso Mplaatyi a marriage was arranged between the said deceased and Defendant's daughter Nomantondo, and one mare and its foal, a gelding, one cow and one young ox were paid by the said deceased to the Defendant on account of dowry in respect of the said intended marriage.
(3) That about July, 1921, before the said intended marriage was consummated the late Nqangisi Mplaatye died and his heir in consequence became entitled to a refund of the said dowry beasts.
(4) That notwithstanding the demand, Defendant neglects or refuses to repay to Plaintiff in his capacity as Guardian of the said minor Wobu Nqangiso, the said mare and a foal, one gelding, one cow and one ox.

To this claim the Defendant pleaded:—

(1) He admits paragraph 1 of summons and says that the marriage between the late Nqangiso and Nomantondo was consummated before the death of Nqangiso aforesaid.
(2) That before the marriage and before the duli party went to Nqangiso's only the mare and a young stallion were actually received by Defendant.
(3) That six more cattle were paid and pointed out to the "Duli" and were accepted by them, the seventh beast being paid by word of mouth.
(4) That Defendant supplied the outfit which remained at Nqangiso's and has never been back at Defendant's.
(5) That as the marriage actually took place the summons discloses no cause of action.

The Magistrate gave judgment for the Plaintiff for the return of the stock claimed with increase, if any, less one beast allowed to the defendant for the wedding outfit.

The Native Assessors having been consulted, unanimously state that the circumstances disclose that a marriage had been concluded, but that as the duli, on the death of Nqangiso, took the woman Nomantondo away and returned her to her father, where she remained, the bridegroom's heir has the right to recover the dowry.

In regard to the number of cattle awarded by the Magistrate, this Court is not prepared to interfere.

The appeal will accordingly be dismissed with costs.

Umtata. 18th November, 1921. T. W. C. Norton, A.C.M.

MADAZA MQWEBEDU vs. SIQUNGATI.

(Qumbu. Case No. 112/1921.)

Dowry, return of—Dowry not returnable merely because the widow refuses to stay at her late husband's kraal—Death of husband—Pondomise Custom—Statement of Native Assessors not accepted.

In this case the Plaintiff claimed the return of dowry paid on behalf of his son who had died shortly after his marriage with the Defendant's daughter. The latter had returned to Defendant's kraal. The Defendant excepted to the summons on the ground that it disclosed no cause of action against him in that it did not allege that the widow had remarried, and therefore the dowry was not returnable. The Magistrate upheld the exception with costs, and the Plaintiff appealed.

JUDGMENT.

By President: Several grounds of appeal were taken, but in this Court the appeal has been confined to the first only. The Court is asked to submit the matter to the Assessors, and particularly the opinion of the Pondomise Assessors is desired.

The Assessors state that there is no difference between Pondomise and Tembu Custom in this connection, and proceed to state Native Custom based on the assumption that a widow is the property of her late husband's kraal, and on her refusal to reside there dowry is returnable. This Custom has long been abrogated by decision of this Court and is in fact not disputed by Appellant, who merely urges that according to Pondomise Custom a marriage subsisting for a few months is looked upon as a courtship in terms of *Myolwa* vs. *Ngalombini Dliseka* (Meaker 59).

That decision is the opinion of Pondo Assessors The present Assessors do not accept it as being their Custom.

As regards the child, the pleadings do not dispute that this child belongs to the woman's late husband, and this is so well-established a Custom as to require no elaboration.

The appeal is dismissed with costs.

Umtata. 26th July, 1919. C. J. Warner, C.M.

NTANTISO JONAS vs. NGWADLA VULANGENGQELE.

(St. Mark's. Case No. 27/1919.)

Dowry, return of—Return of dowry on desertion of wife—Person to be sued is the person to whom the cattle were paid unless such person can prove that he handed the cattle over to the woman's rightful guardian.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: Respondent married the orphan daughter of Zayedwa, who lived with Appellant and paid dowry for her to Appellant. Subsequently she left Respondent and went to Ximba, the head of her late father's family. Respondent successfully sued Appellant in the court below for the return of the cattle he had paid as dowry, and the appeal is against this judgment.

The question for decision is whether Respondent should proceed against Appellant or Ximba, and the Court consults the Native Assessors, who state that the payer of dowry cattle must look to the man to whom he paid them for their return unless it can be shown that the cattle were handed to the rightful guardian of the woman or the marriage reported to him. This opinion agrees with the decision of this Court in the cases of *Mbekeni* vs. *Mbejeni* (1 Henkel 13) and *Tshobisa* vs. *Gugushe and Another* (Henkel 1, 139).

In the present case the dowry cattle were never handed to Ximba nor any marriage reported to him. Appellant says he informed him his sister was pregnant and that a fine (not dowry) had been paid.

With these facts and in view of previous decisions of this Court, the Court considers the Magistrate was correct in holding Appellant was responsible to Respondent for the return of the dowry cattle, and the appeal is dismissed with costs.

Note: The decision in this case was followed by the Native Appeal Court at Kokstad, August, 1923, in the case of *Siswenya Sotsake* vs. *Sikaka Nomlala*, ex Matatiele.

Butterworth. 8th July, 1920. W. T. Welsh, A.C.M.

PETROS NOHASI vs. MOANTI assisted by DELIHLAZO.

(Butterworth. Case No. 27/1920.)

Dowry, return of—Return of dowry on desertion of wife married by Christian rites—Exception—Person to be sued.

In this case the Plaintiff sued for the return of the dowry paid by him for his wife, whom he had married by Christian rites and who had subsequently deserted him.

JUDGMENT.

By President: In this case the Plaintiff, Petros Nohasi, sued Noanti, assisted by Delihlazo, for the return of the dowry paid by the former for his wife Lilian, the daughter of Noanti, whom he had married by Christian rites during 1918.

To this summons Defendants excepted:—

(1) That they were not the proper persons to be sued as there was an heir to the estate of the late Tyelinzima.
(2) That it was not competent for the Plaintiff to sue for his dowry without at the same time claiming alternatively the return of his wife.
(3) That as the marriage was by Christian rites, no action lay till it had been dissolved by a competent court.

No definite ruling appears to have been given on the exceptions raised and after hearing evidence called by the Plaintiff, judgment was given for the return of the dowry claimed.

The Plaintiff states that the dowry was paid at the kraal of the late Tyelinzima to Delihlazo, where it appears to have remained up to the institution of these proceedings. The heir to Tyelinzima's estate is one Clifford, a minor, who is at present at work on the Rand mines. These facts were known to the Plaintiff at the time he instituted proceedings. Delihlazo does not reside at Tyelinzima's kraal, and it is quite clear he did not receive the dowry on his own account, but on behalf of the estate of Tyelinzima whose heir is Clifford.

In the opinion of this Court the wrong parties had been cited, and it is therefore not necessary to consider the other exceptions.

The appeal will be allowed with costs, and the first exception upheld and the summons dismissed with costs.

Kokstad. 19th August, 1921. W. T. Welsh, C.M.

NKABEMBUZI vs. LEMON MANANGA AND ANOTHER.

(Umzimkulu. Case No. 141/1921.)

Dowry, return of—Desertion of wife—Proof of desertion—No order to be made for the return of a woman when her husband is dead.

In this case return of dowry was claimed in respect of a widow who was alleged to have deserted from her late husband's kraal.

JUDGMENT.

By President: In the opinion of this Court before any order for the return of the dowry claimed can be made, it is necessary for the Plaintiff to prove there has been desertion by the woman, which is denied. The mere admission that she is at Defendant's kraal, and is prepared to return, which she need not do, is not proof of actual desertion.

The judgment includes an order for the return of the woman, but it was decided in the case of *Myolwa* vs. *Ngalombini Dliseka* (Meaker 59), that such an order cannot be made. The Magistrate's attention is also drawn to the case of *Mbono* vs. *Manoxoweni* (6 E.D.C. 62).

The appeal will be allowed with costs, the judgment in the court below is set aside, and the case remitted to be heard and decided on its merits.

Lusikisiki. 10th August, 1920. W. T. Welsh, A.C.M.

NKONKILE vs. G. NGQONO.

(Tabankulu. Case No. 9/1920.)

Dowry, return of—Return of dowry on dissolution of marriage—Deductions for children—Beast to mark dissolution of marriage—Maintenance need not be specially pleaded.

The essential facts are sufficiently clear from the judgment of the Native Appeal Court.

Extract from Judgment.

By President: . . . . . The Magistrate has, however, erred in arriving at the number of cattle to be returned in the event of the order for the restoration of the wife not being complied with. It is admitted that the woman Mantlane has given birth to nine children, four legitimate and five illegitimate, the dowry paid was 10 head, therefore only one beast and not five has to be returned. The order regarding the additional beast to mark dissolution of the marriage is not correct. Such is only done when the deductions are equal to or exceed the dowry paid *vide* case of *Bangani Nikiwe* vs. *Dyasi Dzeke* (Meaker 169).

In regard to the claim for maintenance, it is not necessary that this should be specially pleaded. The Defendant is entitled to maintenance in respect of each of the five illegimate children brought up by the Defendant. He has not proved that he is entitled to more than the usual beast for such.

The appeal will be allowed with costs. The judgment for Plaintiff being altered to read for Plaintiff for the return of his wife Mantlane within thirty days failing which the restoration of one beast or its value £5. . . . . The Defendant is entitled to five head of cattle or their value at £5 each for maintenance, and judgment is accordingly given in his favour therefor. The costs in the court below must be paid by the Defendant.

Umtata. 19th July, 1922. W. T. Welsh, C.M.

NONKWATSHANA MBOMBO vs. NONDALA GUGA.

(Tsolo. Case No. 133/1922.)

Dowry, return of—Desertion of wife—Action against rightful dowry holder for return of wife or dowry debars action against the actual receiver of the dowry—Estoppel—Res judicata—*Acquiescence in judgment.*

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

Judgment.

By President: In this case the Plaintiff, now Respondent, sued the Defendant, now Appellant, for three head of cattle in an action wherein he alleged:—

(1) That during or about the year 1915 he paid to the Defendant five head of cattle as and for dowry for one "Nolugcado," the Defendant at the time representing himself to be her legal guardian and as such entitled to her dowry and the proper person to give her in marriage.
(2) That the Defendant is not nor was at the time of the said marriage the legal guardian of the said Nolugcado said one "Mandlakapeli" is her lawful guardian and the proper person to receive her dowry.
(3) That Defendant only handed over two of the said five head of cattle to the said Mandlakapeli and unjustly detains the other three.
(4) That although demanded the Defendant neglects and refuses to restore to the Plaintiff the said three head of cattle.

To this claim the Defendant pleaded:—

(1) Specially that the Plaintiff had already sued Mandlakapeli for the return of the woman in question and her dowry and obtained a judgment for the return of one beast, in the Court of the Resident Magistrate of Tsolo, wherefore Defendant contended that Plaintiff is now debarred from suing him, and prayed that Plaintiff's summons might be dismissed with costs. In the event ob the above plea being overruled Defendant pleaded.
(2) Defendant admitted receiving the five head of cattle mentioned in para. 1 of the summons, and giving the said woman in marriage.
(3) Defendant admitted para. 2 of the summons.
(4) In reply to para. 3 the Defendant pleaded that he handed over to Mandlakapeli five head of cattle (three head of cattle and 15 small stock) and denied that he unjustly retained three head.

The Plaintiff in his replication admitted the facts set out in the Defendant's special plea, but said the conclusion in Law is wrong as one of the essential elements in the plea of *res judicata* is that the parties in both causes must be the same, which is not the case in the present action.

He joined issue on the remainder of the Defendant's plea.

The Magistrate gave judgment for the Plaintiff for three cattle or £15 with costs and the Defendant now appeals on the grounds:—

(1) That the Plaintiff having first instituted an action against the principal Mandlakapeli and obtained a judgment against him, cannot proceed against the agent, the present Defendant.

(2) That the evidence shows that the present Defendant (Appellant) had settled and paid five head of cattle in accordance with Headman Bologodlela's judgment, to Mandlakapeli before the Plaintiff sued the said Mandlakapeli, and consequently Defendant's liability to Plaintiff had ceased at such time.

(3) That the said Mandlakapeli by accepting the five head of cattle paid by the Defendant before the Headman released Defendant from all further liability.

It appears from the record of the proceedings put in by consent that the present Plaintiff sued one Mandlakapeli in April, 1921, for the return of his wife or five cattle being the dowry alleged to have been paid by him to Mandlakapeli. In that case the Defendant tendered one beast to dissolve the marriage, this tender was refused, but the Court entered judgment for the Plaintiff for the return of one beast.

It is clear that the Plaintiff paid the dowry to the present Defendant Nonkwatshana, and in his evidence Mandlakapeli admits that he was present when this payment was made. Mandlakapeli sued Nonkwatshana for the dowry before the Headman and obtained judgment for five cattle, and five cattle were actually, in due course, handed over to him.

It is argued that the Plaintiff not having obtained from Mandlakapeli the return of all the dowry to which he was entitled is justified in now suing Nonkwatshana.

In the opinion of this Court the Plaintiff having sued Mandlakapeli for the return of his wife or the dowry paid and having obtained judgment is not now entitled to succeed in his claim against Nonkwatshana for further dowry. The Plaintiff paid a dowry of five cattle, he claimed the return of five from Mandlakapeli, he has acquiesced in the judgment awarding him one and in the opinion of this Court can have no claim on Nonkwatshana whatever the latter's liability may be to Mandlakapeli.

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

Butterworth. 25th November, 1918. J. B. Moffat, C.M.

M. MATIBANE vs. B. MCOSELI.

(Butterworth. Case No. 67/1918).

Dowry, return of—Return of dowry when marriage does not take place—Engagement—Whom to sue for return of dowry—Exception.

The facts of the case are fully set out in the judgment of the Native Appeal Court.

Judgment.

By President: The summons is for return of dowry said to have been paid in respect of a marriage which has not taken place.

The Plaintiff says he paid this dowry to Defendant for the latter's niece.

Exception was taken by the Defendant, who stated that the girl resides at her parent's kraal in another district and that her father Xinxi is the proper person to be sued.

Evidence on the exception was taken:—

This evidence shows—

(1) That at the time of the alleged arrangement to marry, the girl was visiting at the kraal of one Gola, the Defendant's uncle.

(2) That the girl is now at his kraal.

(3) There is no evidence that she has lived at her father's kraal. It now appears he is dead.

(4) The cattle paid remained at Defendant's kraal and were lately sold.

(5) It is said that the proceeds were handed to Tshaka, Xinxi's son and heir.

The question to be decided is whether Plaintiff knew that the stock paid had been handed over to Xinxi or his representative.

The Magistrate says that he is satisfied that Plaintiff knew this.

This Court, however, is not satisfied from the evidence on the record that Plaintiff knew Xinxi in the matter at all. It is true that Tshaka, Xinxi's son now comes forward and says that he received the proceeds of the sale of the cattle and holds himself out to be the guardian of the girl.

There is, however, not sufficient evidence to justify this Court in saying that Plaintiff had any knowledge of this at the time the transaction took place, or when the summons was issued.

Under the circumstances the Plaintiff had no other course open to him, but to sue the person to whom the alleged payment was made, viz., the Defendant.

The exception should not have been upheld.

The appeal is allowed with costs. The Magistrate's judgment is altered to exception overruled with costs and the case is returned to the Magistrate to be proceeded with on its merits.

Butterworth. 2nd March, 1921. W. T. Welsh, C.M.

NGADAYI MGQAMBELI vs. SORALI JAFTA.

(Butterworth. Case No. 68/1920.)

Dowry, return of—Abduction—Fingo custom—Girl abducted subsequent to payment of dowry—No abduction beast retainable when dowry returned—Engagement.

Claim for the balance of the dowry paid in contemplation of a marriage between Plaintiff and the Defendant's ward, which marriage did not take place, owing to Defendant's ward breaking off the engagement. The Defendant pleaded that he was entitled to retain one beast as a fine for the seduction of his ward. The Magistrate found that the girl had been abducted and returned intact, and gave judgment for the Plaintiff as prayed. The Defendant appealed.

JUDGMENT.

By President: The circumstances of this case having been put to the Native Assessors, they state that "according to Fingo custom, when dowry has been paid for a girl who is subsequently abducted no abduction beast out of that dowry can be retained by her guardian in the event of the marriage not taking place, and the dowry being returnable."

In view of this statement of custom, the Plaintiff is entitled to the return of his full dowry, and the appeal is dismissed with costs.

Note: Compare judgment in cases of *G. Nyila* vs. *M. and T. Tsipa*, page 2, and *G. Masiza* vs. *M. Gonjana*, page 211 of these Reports.

Umtata. 19th February, 1919. C. J. Warner, C.M.

BLAKEWAY NGUTA vs. ALVEN MALONDA.

(Mqanduli. Case No. 544/1917.)

Dowry—Return of dowry paid by man at a time when he knew that she was the wife of another—Man cannot hold two dowries in respect of the same woman. Immoral contract.

Claim for the return of the dowry paid in respect of a certain woman, Mercy, who at the time was the wife of another man, John Toki.

JUDGMENT.

By President: This is a case which can be dealt with only under Native Law. The Magistrate in the Court below found that the Respondent had paid twenty-eight sheep, one beast and £15 as

dowry for one Mercy who at the time was the wife of one John Toki. The woman has returned to her husband, and the question now is whether Respondent can claim the return of the cattle he paid as dowry when he knew at the time that she was the wife of another.

The case is put to the Native Assessors who state that in such a case the dowry is returnable as a man cannot hold two dowries for the same woman and if a father contemplates allowing marriage with a second man he should deliver the dowry cattle received from such second man on the return of the wife to her first husband, and moreover there is nothing wrong in Native Custom for a man to enter into negotiation with a father for the marriage of his daughter who may already be married to another man.

This opinion is in conflict with the judgment in the case of *Ntshanga* vs. *Mesana* (1 Henkel 16), but this Court considers it should be guided by the opinion of the Native Assessors on this point which is one of purely Native Law and Custom especially as in the case referred to it does not appear that the Court had the opinion of the Native Assessors.

The appeal is therefore dismissed with costs.

Note: See case of *John Toki* vs. *Blakeway Nguta*, page 17, where John Toki, the woman's husband, sued Blakeway Nguta, the present Plaintiff, for damages for adultery. The Defendant pleaded marriage, but the Magistrate gave judgment against him for two pregnancies. The Appeal Court altered the judgment and allowed damages for one pregnancy only. One beast paid by the Defendant as dowry and which was valued at £15 was not included in the judgment, the Court holding that Plaintiff had no right to regard this as a fine.

Kokstad. 13th December, 1921. W. T. Welsh, C.M.

MOYENI ZABULANA vs. NGQAYI MPANDLA.

(Mount Ayliff. Case No. 80/1921.)

Dowry, return of—Res judicata—*Action by husband for return of dowry after a previous judgment for return of his wife which has been complied with—Wife's subsequent desertion.*

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

Judgment.

By President: In this case it appears that the Plaintiff, who sued his wife's father for the return of his dowry on the ground of his wife's desertion, had previously obtained judgment for the return of his wife within 14 days or in default the restoration of his dowry. To the summons the Defendant pleaded *res judicata*, without however giving any details whatever. The Defendant complied with the previous judgment by returning the woman as ordered. She lived with her husband for two months and then again deserted, and there is nothing to show that she had any

reasonable cause for so doing. It is contended on behalf of the Defendant (now Appellant), that instead of issuing a fresh summons the Plaintiff should have taken out a Writ of Execution under the alternative order for the return of dowry cattle on the ground that the first judgment had not been satisfied.

This Court is of opinion that the Defendant complied with the previous judgment by returning the woman to Plaintiff with whom she lived for a period of two months. Whatever the woman's intention may have been it is clear from the proceedings that the Defendant carried out the judgment, and it cannot be implied from the subsequent action of the woman that he did not intend her to remain with her husband. The Court is therefore of opinion that the Magistrate correctly decided that the Plaintiff could sue for and recover his dowry cattle. The appeal is dismissed with costs.

Butterworth. 7th July, 1919. C. J. Warner, C.M.

RAUTINI MTUNGATA vs. TOTO QEMBA.

(Butterworth. Case No. 18/1919.)

Earnings—Earnings of minor become property of head of the kraal—Interpleader.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: This is an Interpleader action to determine the ownership of certain cattle attached to satisfy a judgment against Mtungata Nthlamthla, the father of Claimant.

The facts as found by the Magistrate in the court below, with which this Court agrees, are that the Claimant earned money when a minor which he sent to his grandfather with whom he lived to purchase a cow for him. This the grandfather did and the cattle in dispute are the progeny of the beast so acquired. The grandfather has since died and the father of the Claimant asserts the cattle are his as heir to his (the grandfather's) estate.

On the question being put to the Native Assessors they state that property earned by a minor becomes the property of the head of the kraal where he is living, and that in this case the proceeds of the Claimant's labour when a boy vested in his grandfather and the judgment debtor as heir to Claimant's grandfather succeeds to the cattle in dispute.

This opinion coincides with the opinion of the Native Assessors in the case of *Sifuba* vs. *Mbaswana and Another* (1 Henkel 222).

This Court accordingly comes to the conclusion that the cattle in dispute become the property of Claimant's grandfather and on his death devolve on his son as heir to his estate.

The appeal is dismissed with costs.

Umtata. 26th July, 1919. C. J. Warner, C.M.

LOGOSE vs. DYOPI YEKIWE.

(Engcobo. Case No. 123/1919.)

Earnings—Earnings of a discarded wife are her own property—Interpleader action—Marriage—Dissolution of marriage by driving away of wife.

The essential facts of the case are clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Respondent claimed certain stock attached by the Messenger of the Court to satisfy a Writ against the son of her late husband by another wife, on the ground that some ten years ago she was driven away by her husband and since that time she has supported herself and acquired the cattle in dispute.

This evidence is uncontradicted and for this reason and the surrounding circumstances must be accepted.

It has been held in this Court that the driving away of a wife by her husband dissolves her marriage.

It therefore follows that the Claimant's marriage was dissolved when she earned the cattle in dispute.

It has been further held in this Court that a Native widow's earnings are her own property, and it is only just to hold that the earnings of a discarded wife who is no longer supported by her husband's kraal must be her own.

This may not be strictly in accordance with Native Law, but it is the principle laid down in the case of *Volanti* vs. *Sintenteni* (1 Henkel 43) with which this Court is entirely in accord.

The appeal is dismissed with costs.

Flagstaff. 10th December, 1918. J. B. Moffat, C.M.

MBECWA KA QOMFA vs. GWADISO KA KOMFA.

(Flagstaff. Case No. 22/1918.)

Earnings of woman—Property of mother is inherited by the youngest son, and in case of his death, by the eldest son. Rule does not apply to money earned by woman for doctoring, which belongs to the husband—Pondo custom—Apportionment of property.

The Plaintiff and the Defendant were full blood brothers, the Plaintiff being the elder. Plaintiff alleged that he was the eldest son and heir of their father, the late Qomfa, and that the stock in the estate was wrongfully and illegally detained by the Defendant. The Defendant admitted that Defendant was the eldest son and heir of the deceased, but denied that the Plaintiff had any right or interest in the stock at his (Defendant's) kraal.

Defendant alleged that the stock in question was the property of his mother and that it was allotted to him by his father and that he (Defendant) took the place of the youngest son who died without issue. The Magistrate gave judgment for Defendant with costs and the Plaintiff appealed.

JUDGMENT.

By President: The questions involved having been submitted to the Native Assessors they say:—

(1) The property of the mother is inherited by the youngest son as a matter of course without any allotment to him.

(2) In the event of the death of the youngest son the mother's property would be inherited by the eldest son.

(3) It would not be competent for the father to allot the mother's property to the youngest son surviving after the death of the youngest son.

The Assessors state that these rules do not apply to fees earned by a woman by doctoring. Such fees belong to her husband who can apportion them amongst his sons even of different houses. He cannot give the whole of this property to one son. Failing any apportionment the eldest son would inherit the earnings.

The evidence shows that the mother of the parties did earn money by doctoring, but it is not clear whether the whole of the stock in question represents such earnings and their increase.

To succeed, the Plaintiff must satisfy the Court that all the stock claimed are the earnings or their progeny, of his mother and that none of it has been apportioned to other sons. He has not done this and is not entitled to judgment. He may be able to prove this and will be afforded and opportunity of doing so. The appeal is allowed with costs and the Magistrate's judgment will be altered to absolution from the instance with costs.

Postea. Lusikisiki, 20*th August*, 1919, *before* C. J. WARNER, ESQ.

By President: When this case was last before this Court it was held that in order to succeed, the Appellant must show that the property claimed was acquired by his mother's earnings as a doctor, and that none of it was apportioned to other sons. It is admitted by the Respondent that five head of cattle and 10 sheep are such property. It was also held in Pondo law the father of the parties could not give the whole of this property to one son, though he might apportion it among his several sons. An attempt has been made to show that Respondent was instituted as heir to his mother, on the death of Ntlantsi, but there is no evidence of any formal meeting having been called for this purpose.

The appeal is therefore allowed with costs and the judgment of the court below is altered to judgment for Plaintiff for five head of cattle, or their value £10 each, and 10 sheep or their value £1 each, Defendant to pay costs.

Kokstad. 28th August, 1919. C. J. Warner, C.M.

(Umzimkulu. Case No. 554/1918.)

RUDUDU vs. NDLETSHANA ZIYENDANE.

Earnings—Earnings of woman belong to her husband.

Plaintiff alleged that his wife left him and lived in adultery with the Defendant, and that she earned and acquired certain money and stock as a herbalist. He claimed this money and stock as his property. Defendant pleaded that the marriage of Plaintiff with the woman was no longer in existence, and that the woman was now his wife, he having paid dowry for her. He denied that the woman was paid any fees, but said they were paid to him as a Native doctor and he fixed the amount of such fees. Plaintiff denied that the marriage was dissolved or that the Defendant was entitled to any fees earned by the woman. The Magistrate found that the woman was Plaintiff's wife and that the money and stock were the earnings of the woman. He therefore gave judgment for Plaintiff as prayed, quoting *Sixakwe* vs. *Nonjoli* (1 Henkel 11) and *Nomtwebulo* vs. *Ndumndum* (2 Henkel 121) in support. The Defendant appealed.

JUDGMENT.

By President: The Court after submitting the issues involved in this case to the Native Assessors, considers that the Magistrate in the court below was correct in his finding on the facts and in his interpretation of the law, and the appeal is dismissed with costs.

Lusikisiki. 10th April, 1922. W. T. Welsh, C.M.

DUKAKA TANTSI vs. DEDILO KA TABALAZA.

(Lusikisiki. Case No. 345/1921.)

Earnings—Woman qualified as doctress prior to marriage—Earnings subsequent to marriage become property of husband.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Plaintiff, now Appellant, sued the Defendant, now Respondent, for certain cattle or £65 on the ground that he is entitled to whatever his daughter, the Defendant's wife, has earned as a doctress, for which she qualified prior to her marriage. The Defendant pleaded that such a claim could not, on the ground of equity, be recognised and that in any case the Defendant had paid the Plaintiff a beast to "buy the medicine," "inkomo yeyeza."

It appears that the marriage took place in 1902 and that the Defendant paid over to the Plaintiff certain cattle earned by the woman in question. It is also clear that since the beast was paid over whereby the Defendant states he purchased the sole right to his wife's fees, none of the woman's subsequent earnings has been paid over to the Plaintiff. The Magistrate found that the Defendant had purchased the right to his wife's earnings by the payment of a beast. The circumstances support this finding, which this Court accepts.

This Court ruled in the case of *Sixakwe* vs. *Nonjoli* (1 N.A.C. 11), and in several subsequent cases that whatever a married woman may earn is the property of her husband. In view of these decisions this Court is not prepared to admit the Appellant's claim, whatever the Pondo Custom may be.

The appeal is dismissed with costs.

Butterworth. 11th March, 1919. C. J. Warner, C.M.

DINISO MNYIPIKA vs. BEN MAGUNYA.

(Tsomo. Case No. 14/1919.)

Engagement—Return of dowry—Suitor entitled to return of dowry on death of girl—Act of God—Influenza epidemic.

The Plaintiff sued for 11 head of cattle and 10 sheep, with the increase thereof, being dowry cattle paid by Plaintiff to Defendant in respect of Defendant's daughter, who died during the influenza epidemic of 1918, before any marriage had taken place. Defendant tendered certain stock and pleaded that Plaintiff was at fault in that the engagement was unduly prolonged. He further pleaded that the influenza epidemic was an act of God, and that the burden of making a full restitution of dowry should not therefore fall upon him.

The Magistrate gave judgment for Plaintiff for 11 head of cattle. Defendant appealed on the grounds stated in the pleadings.

The Magistrate gave the following reasons for judgment:—

> "Plaintiff claims the return of dowry cattle paid by him. Plaintiff was engaged to Defendant's daughter and had paid certain cattle as dowry. Before the marriage could be consummated Defendant's daughter died.
>
> "Defendant claims that as his daughter died from Spanish influenza he should be allowed to retain a portion of the dowry seeing that Spanish influenza was no ordinary sickness, but amounted to a visitation of God and a public calamity.
>
> "The native law on the point is clearly laid down in previous decisions of the Appeal Court, that where there is no default on the part of the young man he is entitled to a refund of his dowry cattle. However, underlying all native law and custom there exists or existed the principle of an emollient (ukututuzela) when the circumstances are of an

unusual character, though like many other practices considered more in the light of a moral obligation and dependent to a great extent upon the agreeable mutual relationship between the parties, at the same time enforced should the circumstances justify it.

"It will be noticed in this particular instance Plaintiff voluntarily conceded two head to commiserate Defendant.

"In giving judgment the court below as a court of first instance felt bound by the previous decisions that seeing that the marriage had fallen through through no default on the part of Plaintiff he was entitled to the return of his cattle and that any question as to the variation of the principle could only be dictated by a Higher Court, particularly seeing that there must be very many similar cases throughout the whole of the Native Territories. It may be stated that there was no sister to the deceased who could have been offered in substitution in accordance with Native custom. The question also of the length of the engagement was raised, but the Court did not take that into consideration as it is well known that Native engagements frequently continue for long periods being regulated by the number of cattle demanded as dowry and the young man's capacity to find them."

JUDGMENT.

By President: According to Native Law the Respondent is entitled to the return of all the cattle paid as dowry and their increase and in allowing Appellant to retain two head of cattle he showed a generous and fair spirit. The appeal is dismissed with costs.

Lusikisiki. 17th August, 1922. W. T. Welsh, C.M.

M. QANQISO vs. M. MNQWAZI.

(Libode. Case No. 249/1922.)

Engagement—Dowry, return of—Misconduct of girl—Abduction and elopement—Claim for "Bopa" fee—Twala.

The essential facts of the case are clearly stated in the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Plaintiff, now Respondent, sued the Defendant, now Appellant, in an action wherein he alleged:—

(1) That about the end of the year 1919, Defendant agreed with Plaintiff to give his (Defendant's) daughter Mamranqeli in marriage according to Native Rites to the Plaintiff and Plaintiff paid to Defendant in respect of such intended marriage three head of cattle on account of dowry.

(2) That during the winter season of 1920, the said Mamranqeli was seduced and rendered pregnant by one Sityana Mkwate from whom the Defendant levied and received five head of cattle as a fine in respect of the said seduction and impregnation of the said Mamranqeli by the said Sityana Mkwabe.

(3) That the said cattle have now increased to four head.

(4) That in consequence of the said seduction and pregnancy of the said Mamranqeli, Plaintiff was not willing to carry out the intended marriage and though demanded, Defendant neglected or refused to restore to Plaintiff the said four head of cattle paid on account as dowry and increase.

The Defendant pleaded –

(1) That he admitted paragraphs 1, 2 and 3 of the summons.

(2) That he admitted that the Plaintiff was then unwilling to carry out his part of the original agreement, namely, that he should marry the daughter of the Defendant, but the Defendant said that as the Plaintiff himself refused to do so he was rejecting Defendant's daughter and hence the Defendant was not liable to restore to Plaintiff the cattle paid by him.

(3) That further he was of royal descent and as such was not liable for the return of any cattle .

(4) Should the Court find that Defendant was liable for the return of cattle paid by the Plaintiff then the Defendant stated that as he was no party to the breach of his daughter's engagement, and moreover as Plaintiff " twalaed " Defendant's daughter he was not liable for the restoration of all the cattle claimed by the Plaintiff, but that the cattle should be divided and the Defendant should be allowed to retain two head of the four claimed wherewith to wipe away his tears.

At the trial the Plaintiff admitted that he had eloped with the girl and had afterwards obtained consent to marriage.

The main ground of appeal, and indeed the only one argued before this Court, is that as the Plaintiff had abducted the Defendant's daughter prior to the payment of any cattle by him the Defendant is entitled to retain some of the cattle claimed by the Plaintiff as " bopa " fee, and that the Magistrate should therefore have made a division of the cattle paid.

It has frequently been held that immoral conduct on the part of a woman affords good ground for breaking off an engagement and entitles a man to claim a return of the cattle paid on account of dowry. A ' bopa " beast is usually paid only when a man having " twalaed " a girl fails to offer marriage or pay dowry, which is regarded as an affront to the girl and her relatives. In the present case marriage was offered and dowry paid to the Defendant, and he has therefore no claim to a " bopa " beast.

The Plaintiff is accordingly entitled to the return of the dowry paid and its increase. The appeal is dismissed with costs.

Kokstad. 3rd December, 1920. W. T. Welsh, C.M.

SOLOMON HLATI vs. STICK MADOLO.

(Matatiele. Case No. 8/1920.)

Engagement—Return of dowry—Substitution of another girl for girl who elopes with another man—Women messengers—Acceptance of substituted girl—Killing of acceptance beast—Negotiation opposed to Native Custom must be proved beyond doubt.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

Judgment.

By President: The Plaintiff, now Appellant, in this case claims the return of dowry paid to the Defendant, now Respondent, for his daughter Agnes, who subsequently eloped with another man. The Defendant pleaded that by mutual agreement Vida was substituted for Agnes, but that Plaintiff had broken off his engagement with her and is therefore not entitled to the dowry claimed. In his replication, the Plaintiff denies having agreed to the substitution of Vida. The Court gave judgment for Defendant, and the Plaintiff has appealed against the finding of the Magistrate.

It is quite clear that the *onus probandi*, which Defendant accepted, must be discharged before he could succeed.

The Defendant states that negotiations in regard to the substitution were conducted by women of Plaintiff's kraal with whom Mengqe (Plaintiff's elder brother) was associated. This Court is advised by the Native Assessors that it is entirely contrary to Native Custom for women to act as messengers on behalf of the bridegroom. The Native Assessors also state that it would be contrary to Custom for the bridegroom to intimate his acceptance of the substituted girl in person and that the acceptance animal should be killed, not for him, but for his messengers. Defendant's version of the conduct of these negotiations being opposed to Custom must be established by the clearest evidence and proved beyond any doubt. It is difficult to understand why the Plaintiff, if he agreed to accept Vida, should, without any cause, have changed his mind. This Court is not satisfied that the Plaintiff paid any additional cattle after seeing Vida, nor is the delay in taking proceedings at the end of 1919, in respect of the cattle paid for Agnes, who eloped in May, 1917, unreasonable in all the circumstances.

The probabilities do not support the Defendant and his actions were not consistent with Native Custom. In the opinion of this Court he has failed to discharge the *onus* of proving that the original contract was novated.

The appeal is allowed with costs, and judgment entered in the court below for 10 cattle or their value £10 each, with costs.

Kokstad. 1st May, 1918. J. B. Moffat, C.M.

KOKO NDLOVU vs. MPIKELELI MRADLA.

(Mount Fletcher. Case No. 162/1917.)

Engagement—Return of dowry—Breaking of engagement due to the girl's elopement with another man—Father's claim to retain certain cattle as damages for the previous seduction and pregnancy of the girl by the suitor—Twala.

Claim for the return of five head of cattle, made up of one beast fine for "twala," three head engagement cattle, and one beast prospective increase of a beast which was slaughtered by the Defendant while heavy in calf. Plaintiff alleged that his son was engaged to Defendant's sister, but such engagement was broken off owing to the girl's action in eloping with another man. Plaintiff alleged that Defendant had received dowry from this other man. Defendant alleged that Plaintiff's son had twice "twalaed" his sister, and was liable to pay one beast for each occasion, and further he had seduced and caused the girl's pregnancy and was liable to pay a fine of three head of cattle for such seduction and pregnancy. Plaintiff's claim was therefore extinguished. The Magistrate gave judgment for Plaintiff for the return of three head of cattle, or their value, £15, with costs. The Defendant appealed.

Judgment.

By President: The Plaintiff claims return of cattle paid on account of dowry for his son, who eloped twice with Defendant's sister.

The son having gone to Johannesburg with the girl, who has been made pregnant by Plaintiff's son, has run away with another man who is said to have paid certain cattle for her which are presumably on account of dowry.

The marriage having been broken off by the action of the girl, the Plaintiff is entitled to return of the cattle paid by him on account of dowry.

Defendant claims that he is entitled to damages for the seduction of the girl by Plaintiff's son. The Plaintiff's son was prepared to marry her and payment on account of dowry was made. It is due to the girl's action that the marriage has not taken place, and her guardian is not under the circumstances entitled to damages. There was no claim for seduction prior to the marriage negotiations between Plaintiff's son and Defendant's sister.

Butterworth. 9th July, 1919. C. J. Warner, C.M.

BANGO MKEHLE vs. MZENZIE RULMAN.

(Tsomo. Case No. 36/1919.)

Engagement—Return of dowry—Plea that suitor has broken off the engagement by marrying another girl.

Plaintiff claimed the return of certain cattle paid as dowry to Defendant in respect of a contemplated marriage with the Defendant's daughter, who died before the marriage was consummated. The Defendant stated that his daughter died of Spanish influenza, but prior to her death the Plaintiff had rejected her. He denied that Plaintiff was entitled to any refund.

After hearing the evidence the Magistrate gave judgment for the Defendant with costs, holding that Plaintiff was at fault. The Plaintiff appealed.

JUDGMENT.

By President: An agreement was entered into between Appellant and Respondent that a marriage should take place between Appellant and Respondent's daughter, and a beast (since increased to three) was paid by Appellant to Respondent on account of dowry. Shortly after Appellant's mother went to the Respondent to demand the return of the beast. Respondent told her to come with the messengers of Appellant, and states that neither they nor she came again, and in his evidence he states that he regarded the claim of Appellant's mother to the beast paid as dowry as a rejection of the girl. Respondent says he regarded Appellant's marriage with another girl as a rejection of his daughter, and later he says he did not treat the abduction of Arosi's daughter by Appellant as a rejection.

There is nothing in this case to show that the marriage between Appellant and Respondent's daughter was to have been by Christian rites, and consequently the principle laid down in *Lupusi* vs. *Makalima* (2 Henkel, 163) does not apply, but in the opinion of this Court this case is governed by the case of *Pantshwa* vs. *Msi* (2 Henkel, 147).

This Court is not prepared to hold that the marriage by Native Custom of a native man to another woman would not justify a girl for whom he was paying dowry before such marriage, in regarding the marriage to another as a rejection of herself, but in this case Appellant denies he has married another, and this Court does not consider the alleged marriage has been proved.

The appeal is allowed with costs, and the judgment in the court below is altered to judgment for Plaintiff as prayed with costs.

Umtata. 25th July, 1919. C. J. Warner, C.M.

SIKONKOLO RANAYO vs. XAYIMPI NAMBA.

(Engcobo. Case No. 150/1919.)

Engagement—Return of dowry—Marriage of girl to another man is a repudiation of engagement and entitles man to return of dowry less one beast as fine where seduction and pregnancy has taken place—Abduction—Proclamation No. 142 *of* 1910 *—Increase of dowry cattle—When returnable.*

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

Judgment.

By President: Respondent first sued Appellant in the court below for an order of registration of six head of cattle which he alleged he paid as dowry for Appellant's daughter to whom he stated he was married. The marriage and payment of dowry were denied by Appellant, and the Magistrate refused the application with costs against the Respondent.

Subsequently Respondent sued Appellant for the return of six head of cattle and two increase he stated he paid on account of dowry for Appellant's daughter who has since been married to another, and admitted there had been no marriage between himself and the girl. Defendant denied there was any engagement between Respondent and his daughter, and pleaded that five head of cattle were paid as fine for the pregnancy of his daughter by Respondent and one as a fine for her abduction subsequent to the pregnancy.

The Magistrate in his reasons for judgment stated that in the first case he found though there was no actual marriage that the cattle were paid as an instalment of dowry. In view of this it is to be regretted that he did not order the registration of the dowry as prayed for seeing that there is nothing in the Proclamation No. 142 of 1910 and subsequent amending legislation prohibiting the registration of instalments of dowry and as a matter of fact this is frequently done by Natives.

This Court however is not prepared to challenge this finding, and considers there is sufficient evidence to support the Respondent's case that the cattle were paid as dowry and not as a fine. The Magistrate gave judgment for Respondent for three head of cattle or their value £7 10s. each and costs, and the appeal is against this judgment

For the reasons set forth above this Court sees no reason to disturb this judgment, so far as the appeal is concerned, which is dismissed with costs.

Cross-Appeal.

The cross-appeal is brought on the ground that the court below has not awarded Appellant all he is entitled to.

The Court has found that the cattle were paid as dowry, and it appears that Appellant subsequently abducted the girl and lived

with her at his kraal for a month. She became pregnant, and Appellant throughout has expressed his willingness to marry her. The Magistrate in the court below held that Respondent was entitled to five head of cattle as fine for the pregnancy of his daughter.

The question at issue is put to the Native Assessors who state that "if a man is paying dowry for a girl, and causes her pregnancy it is regarded as though a marriage had taken place, and the girl having repudiated her engagement her father is not entitled to any fine, but one beast may be deducted for pregnancy."

This opinion agrees with the principle of Native law laid down in *Malusi* vs. *David Dandi* (1 Henkel, 169).

The Native Assessors further state that had a marriage taken place the Respondent would have been entitled to the increase of the dowry cattle, but there having been no marriage the increase are the property of Appellant.

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

Umtata. 23rd July, 1918. C. J. Warner, A.C.M.

JAMES BINASE vs. PAPI NGQASE.

(Xalanga. Case No. 6/1918.)

Engagement—Return of dowry—Misconduct of both parties—Father's claim against dowry paid for seduction and abduction of girl—Twala.

The facts of the case are sufficiently clear from the Judgment of the Native Appeal Court.

JUDGMENT.

By President: Respondent engaged to the Appellant's daughter and paid six head of cattle as dowry. He was anxious for the marriage to take place and was constantly met with demands for more cattle. While working at Idutywa, Respondent misconducted himself with a girl whom he caused to become pregnant, and about the same time or soon after the Appellant's daughter became pregnant by another man. Appellant does not appear to have wished to break off the marriage in consequence of Respondent's misconduct and was willing to allow it to take place if the cattle he demanded were paid. Respondent was within his rights in breaking off the marriage and demanding return of his cattle when he discovered the pregnancy of Appellant's daughter, and the fact that he misconducted himself in the same way cannot militate against him now seeing it was apparently condoned by Appellant when he knew of it.

The question of the claim in reconvention (for the seduction and " twalaing " of the girl by the Respondent) is put to the Native Assessors who state that as Appellant made no demand for the abduction and seduction of the daughter at the time he cannot set up a claim now.

The appeal is dismissed with costs.

Kokstad. 15th April, 1921. T. W. C. Norton, A.C.M.

SOLOMON NYAMENDE vs. MADELA MDLELENI.

(Matatiele. Case No. 196/1919.)

Engagement—Return of dowry—Misconduct of girl—Seduction— Onus *of proof—Agreement to forfeit dowry paid.*

In this case the Plaintiff, Madela Mdleleni, sued the Defendant, Solomon Nyamende, for certain seven head of cattle or their value, £35, and an account of their increase. The cattle were alleged to have been paid in respect of a contemplated marriage between Plaintiff's son, Albert Mdleleni, and Defendant's sister, Legina Nyamende. The girl was subsequently seduced by one John Maqabane, who paid a fine for the seduction and Plaintiff's son refused to go on with the marriage, which he was entitled to do in view of the girl's misconduct. The Defendant denied the seduction and the right of Plaintiff's son to reject the girl, and counterclaimed for forfeiture by the Plaintiff of all rights in the dowry paid for the girl prior to April, 1919 in terms of a certain agreement dated 3rd February, 1919. This agreement provided that the Plaintiff, Madela, should pay two head of cattle as soon as called for, and a further four head of cattle and one horse on or before 30th April, 1919, failing which the engagement would automatically cease to exist, and the cattle paid as dowry up to April, 1919, would be forfeited. The Magistrate gave judgment for Defendant with costs, and on the counterclaim for the Plaintiff in reconvention (Defendant in convention). The Plaintiff appealed on the grounds that it was clearly proved that John Maqabane paid a fine for seduction, and that the agreement was not signed by the Defendant or his late father, and further that as the girl had been seduced and damages paid, the Defendant was not entitled to succeed on the counterclaim. The agreement, which was put in, was signed by Edward and Barnabas Nyamende, brothers of the girl.

Judgment.

By President: Appellant sued Respondent for the return of seven head of cattle paid as dowry for the latter's sister on the ground that the girl was seduced by one John Maqabane, in consequence of which he declines to marry her.

Respondent admits receipt of the cattle, but denies the allegation of seduction and counterclaims for a declaration that Appellant has forfeited his rights in terms of a certain agreement annexed to the summons. Appellant admits signing this agreement.

The Magistrate has found that the seduction has not been proved and Appellant succeeded on both claim in convention and in reconvention.

The *onus* of proving the seduction was on Respondent, but as he proves payment by, and Appellant admits receipt, from J. Maqabane, of three head of cattle, the usual fine for seduction, the *onus* is shifted to Appellant to show that the cattle paid were for some other purpose and not as fine for seduction. Appellant

calls witnesses to show that these cattle were paid as a fine for tearing the girl's dress, and the Magistrate has believed this evidence although neither John Maqabane nor the women who examined the girl were called, and there is evidence that these cattle were paid as a fine for seduction.

The question is therefore whether Appellant has discharged the *onus* which was shifted to him from Respondent.

In view of the fact that further most material evidence was available, this Court is of opinion that the Magistrate has erred in not placing the *onus* on Appellant after Respondent had proved the receipt by Appellant of the three head of cattle from John Maqabane, the alleged seducer, as in his reasons he states the seduction was not proved.

There is no evidence on the record to show that the terms of the agreement have been broken by Respondent.

The appeal is therefore allowed with costs, and the judgment altered to absolution from the instance, with costs in convention and reconvention.

Umtata. 22nd March, 1922. W. T. Welsh, C.M.

MVULA NOFIDELA vs. NGQOLA KEKISANA.

(Mqanduli. Case No. 303/1921.)

Estate—Children, illegitimate—Custody and guardianship of illegitimate daughter of a daughter of the Right Hand House remains with the Right Hand House—Dowry, replacement of—Great House claim for re-imbursement of dowry paid for the Right Hand wife only extends to the dowry paid for daughters of that house, and not to the dowry received for the daughters of daughters.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

Judgment.

By President: In this case the Plaintiff (now Appellant) who is the eldest son of the Great House of the late Nofidela, sued Defendant (now Respondent) for a declaration of rights, claiming to be the heir to the late Nofidela in his Right Hand House by failure of legitimate male issue in that house, and so entitled to the use of his lands in that house, the crops therefrom and the guardianship and dowry of an illegitimate daughter, Nonqutu, of the daughter of the Right Hand House, Kweleta, alleging further that the Defendant, who claimed by virtue of his being the eldest son of the Qadi of the Right Hand House was illegitimate and had no status, and that in any case the dowry in respect of Nonqutu's marriage was payable to the Great House. Judgment was given for the Defendant in the court below.

Appellant's attorney in the course of argument admitted Defendant's legitimacy and right to the land and crops of the Right Hand House, and confined his claim to the guardianship and right to receive dowry in respect of the girl Nonqutu.

It appears that Kweleta was seduced and made pregnant by Manxiweni, who paid a fine of five head of cattle, who has never claimed Kweleta in marriage, nor the custody of her daughter, and who has not since been heard of. Thereafter Kweleta married another man who paid three head of cattle as dowry. Which house received the benefit of the fine and dowry is the subject of dispute. The Magistrate is silent as to the appropriation of the fine, but finds that the dowry was used by the Great House.

The Appellant contends that the Great House received no benefit, and therefore must fall back on the dowry of Kweleta's daughter, Nonqutu, by virtue of the provision of Native Law which requires the dowry received for the eldest daughter of the Right Hand House to be paid to the Great House in return for the Great House cattle paid as dowry for the Right Hand Wife.

The question has been put to the Native Assessors whether in circumstances such as are alleged by the Appellant the Great House can claim (1) the custody of the illegitimate daughter of the daughter of the Right Hand House, and (2) the dowry receivable in respect of her marriage. They reply (1) that the custody and guardianship remain in the Right Hand House, and (2) that the Great House should have pressed its claim to the fine of dowry, or both, of the daughters of the Right Hand House, and, having failed to secure such cattle as were paid, cannot extend its claim for reimbursement to the issue of the daughter.*

This Court accepts their opinion, and so it becomes unnecessary to pronounce upon the facts in dispute.

The appeal is dismissed with costs.

Butterworth. 26th November, 1918. J. B. Moffat, C.M.

DAVID MGOQI vs. REBECCA MGOQI.

(Tsomo. Case No. 91/1918.)

Estate—Community of property—Marriage by Christian rites subsequent to promugation of Proclamation No. 227 *of* 1898 *—Act* 18 *of* 1864—*Act* 24 *of* 1913.

The Plaintiff, David Mgoqi, sued his sister-in-law, Rebecca Mgoqi, widow of the late Philemon Mgoqi, for one-half of the assets in the joint estate of Defendant and her late husband, and for an order compelling her to reside at the kraal of her late husband with her two children and stock, failing which he asked that the stock in the joint estate should be placed under his control. He further asked for an order declaring him to be entitled to the dowries to be paid for the Defendant's two daughters. The Defendant pleaded that she was married in community of property to the late Philemon Mgoqi on 28th September, 1910, and claimed that she was entitled to one-half of the joint estate, the remaining half belonging to the two female children of the marriage. She claimed that she was entitled to have the estate

* *Vide* case of *Ngwenduna* vs. *Dubula*, page 142.

administered by the laws in force prior to the promulgation of Act No. 24 of 1913, and asserted that she was the guardian of the children, and as a widow of a Christian marriage she was free from all tutelage, entitled to the custody and control of the joint estate. She denied that the Plaintiff had any right to the dowries to be received for her daughters.

The Magistrate gave judgment for Plaintiff for the half of the estate as set out in the summons, and declared Plaintiff entitled to the dowries of the two minor daughters of the marriage when paid. Defendant to pay costs. The Defendant appealed.

JUDGMENT.

By President: The question to be decided in this case is whether the property in the estate of the late Philemon Mgoqi is to be administered according to the law regulating succession in case of Christian marriage entailing community of property or whether is to be distributed according to Native Law and Custom.

In the case of *Xasa* vs. *Xasa* heard in the Eastern Districts Court in May and June, 1893 (7 E.D.C. 201), in which natives residing in the district of Queenstown were concerned, the Court said that inasmuch as the Act of 1864 was not intended to deprive natives married according to Christian rites of the benefits of community or to prevent a native wife from acquiring property in the manner contemplated by a Christian marriage, but seems rather to make provisions for the distribution of property treated in the heading of the Act as abandoned, it was of opinion that the widow was entitled to half the joint estate, and that the other half should be administered according to Native Law.

In the case of *Mazamisa* vs. *Mazamisa* heard in the same Court in 1909 (E.D.C., 1909, p. 122), the Court, after referring to the case of *Xasa* vs. *Xasa*, said the Courts had laid it down that the provisions of Act 18 of 1864 do not affect the community of property established by a marriage entered into by a native according to Christian rites, and that there is nothing in the Act itself to show that the rights established by such a marriage are in any way curtailed or taken away. The Court then went on to say:—

> "Consequently, it is obviously inconvenient, if not inconsistent, to hold that once a marriage in community of property is established, the Court must order and direct that half the common or joint estate shall be administered according to the law of the Colony, and the other half according to native law and Custom. Before the Act of 1864 natives could marry according to Christian rites, and if there was no antenuptial contract between them community of property would be established. The Act does not interfere with that. It merely recognises a marriage according to Native Custom within the Colony for a special purpose."

In the case of *Tutu* vs. *Tutu* heard in this Court in 1911 (2 N.A.C. 167), this Court said that the conditions laid down under Act 18 of 1864, and Proclamation No. 227 of 1898 being precisely the same the decision of the eastern District Court must apply to marriages existing at the time Proclamation No. 227 of 1898 was promulgated, and as a consequence in that case half the estate

was awarded to the widow and the other half was dealt with under Native Custom.

In comparing the Act of 1864 with Proclamation No. 227 of 1898 it must be borne in mind that the former was passed to provide for succession in native estates for which there was no legal provision whatever in the Cape Colony.

On the other hand in these Territories succession according to Native Law and Custom is recognised. The provisions of secs. 18 and 22 of Proclamation No. 227 of 1898 clearly lay down that in the case of every holder of a quitrent title issued under the Proclamation and every resident in a location in districts to which the Proclamation applies, at his death the property belonging to such holder or resident shall subject to sec. 23 and subject to any testament executed in accordance with the law of the Colony, be applicable to the tribe to which deceased belonged. It provides further that in case he has left a will his property is to be dealt with under the Colonial Law relating to testate succession.

In the case of *Tutu* vs. *Tutu*, the marriage had taken place prior to the promulgation of Proclamation No. 227 of 1898, and the provisions of the Proclamation were held not to apply. In this case the marriage took place in September, 1910. It must be held that the provisions of the Proclamation do apply and that consequently the estate of the late Philemon Mgoqi must be administered according to Native Law and Custom.

The Magistrate has awarded the Plaintiff half the estate, which is all that Plaintiff claimed, and has given an order declaring Plaintiff is entitled to receive any dowries that may be paid for the late Philemon's daughters.

The Plaintiff is entitled to this and the Magistrate correctly gave judgment in his favour.

The appeal is dismissed with costs.

Note: Compare the judgments in the cases of *Dyer Dingiswayo* vs. *Louisa Dingiswayo*, Butterworth, 6th July, 1920,* and *R. Mhambi* vs. *S. A. Mhambi*, Butterworth, 2nd November, 1920.† In the latter case the marriage took place in 1906, subsequent to the promulgation of Proclamation 227 of 1898, and must be regarded as specifically overruling the judgment in the above case.

Butterworth. 7th July, 1919. C. J. Warner, C.M.

TWENTYMAN MANI, assisted by MESHACK MANI vs. DAVID NGCABA.

(Butterworth. Case No. 18/1919.)

Estate—Community of property—Estates of deceased persons married in community of property are to be administered according to Native Law and Custom—Letters of administration are not necessary to enable heir to sue for debts owing to the estate —Proclamation 142 of 1910—Proclamation 213 of 1913—Proclamation 127 of 1918—Exception—Executor.

The Plaintiff, a minor, and heir to the estate of his late father, sued for certain stock in possession of the Defendant which he

* Page 124 of these Reports.
† Page 126 of these Reports.

alleged to be the property of his late father. The Defendant excepted that Plaintiff had no *locus standi*, inasmuch as the deceased and his wife were married according to Christian rites and in community of property on the 17th March, 1896, and that the only persons who could maintain the action was a duly appointed Executor Dative in the joint estate of the deceased and his wife. Defendant further excepted that Plaintiff was wrongly assisted and should be assisted by his mother and natural guardian. He also alleged that if it was held that the marriage was not in community of property, then one Hodges Mani was the eldest son and the heir to the deceased according to Native Custom. The Magistrate overruled all three exceptions and the Defendant appealed.

JUDGMENT.

By President: Respondent, as eldest son and heir of the estate of his late father, July Mani, sued David Ngcaba, the Appellant, for three head of cattle which he alleges were purchased from Appellant by his late father, who left them in possession of Appellant.

Appellant excepted to the summons on the ground that the Respondent's father and mother were married by Christian rites, and therefore in community of property, in 1896, and that an action for a debt due to the estate of the late July Mani could only be maintained by a lawfully appointed Executor.

A further exception was taken that not Plaintiff but one Hodges Mani was the eldest son and heir of the late July Mani, but as this exception was not pressed in argument in this Court or mentioned in the grounds of appeal it need not be considered.

Considerable argument was directed to showing that community of property was established between the late July Mani and his wife, and this contention is, in the opinion of this Court, clearly established by several decisions of the Higher Courts which have been frequently quoted in this Court. But the question remains whether in the absence of a will by the late July Mani his heir according to Native Custom can maintain an action for the recovery of property due to the estate of his late father, or whether this can only be done by a lawfully appointed Executor.

In the opinion of this Court the provision of Proclamation 142 of 1910 as amended by Proclamation 213 of 1913 and 127 of 1918 apply to this marriage notwithstanding that it was contracted in 1896, and therefore in terms of sec. 12 (1) of the first mentioned Proclamation no letters of administration from the Master of the Supreme Court are necessary and any suit between Native and Native in regard to any property of the estate must be determined according to Native Law in the Court of the Resident Magistrate for the District.

All of the cases quoted in argument were to settle disputes between the relatives of the deceased as to the ownership of the property in the estate.

In the present case the question is whether Respondent has the right to sue for a debt due to his late father's estate.

In Native Law he has such a right, and in view of the provisions of the Proclamations quoted above, Native Law applies in this case and the exception was properly overruled.

The appeal must be dismissed with costs.

Note: This case was subsequently again on appeal and came before the Native Appeal Court at Butterworth on the 5th March, 1920. The Magistrate gave judgment for the Plaintiff on the merits of the case and the Defendant appealed. The appeal was dismissed with costs.

Umtata. 21st March, 1922. W. T. Welsh, C.M.

MARTHA MABANDLA vs. HENRY MABANDLA.

(Tsolo. Case No. 127/1920.)

Estate—Marriage in community of property—Administration of estate under Colonial Law—Widow of marriage in community has the right to sue heir for her half of the joint estate of which she has been dispossessed, and need not wait for the appointment of an executor—Ordinance No. 104 *of* 1833.

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

JUDGMENT.

By President: In this case the Plaintiff, Martha Mabandla, now Respondent, widow of the late Zota Mabandla, to whom she was married in community of property by Christian rites in Peddie in the year 1872, sued the Defendant, now Appellant, the eldest son of such marriage, for certain property, being her half share of the joint estate of herself and her deceased husband.

The defendant pleaded that any action which she, Plaintiff, may have can be instituted only against an Executor to be appointed according to the laws of the Cape Colony dealing with the administration of deceased estates. On these issues the Magistrate gave judgment for the Plaintiff for (1) 50 sheep, (2) 84 goats, and (3) £50, with costs of suit.

Defendant has appealed, *inter alia*, on the ground that the estate of the late Zota Mabandla must be administered in terms of Ordinance No. 104 of 1833, and that the Resident Magistrate has no jurisdiction to administer and distribute such estate by judgment of his court.

Defendant in his plea admits that on the late Zota Mabandla's death he took possession of all the estate mentioned in paragraph 3 of the summons, which then consisted of 40 cattle, 100 sheep, 130 goats, two horses, and a homestead on Neli Mabandla's farm.

On the authority of the cases of *Noremve* vs. *Mapini* (7 E.D.C. 3), *Luti* vs. *Siqola and Siqola* (2 N.A.C. 157), and *Simoko* vs. *Simoko*, referred to on page 102 of Seymour, this Court is of opinion that the Plaintiff is entitled to maintain the action brought by her against the Defendant for her half-share of the joint estate.

The Defendant is therefore under an obligation to restore to the Plaintiff her share of the property which he admits he possessed himself of, unless he can satisfactorily account for any portion thereof. This he has failed to do.

This Court is of opinion that the Magistrate was justified in finding for the Plaintiff for 50 sheep and £50, but it is admitted that there is nothing to support his award of 84 goats. The Defendant admits having possessed himself of 130, but there is no evidence of their ever having increased beyond that number. The Plaintiff is therefore entitled to only half of these and to that extent the appeal must be allowed. The Magistrate's judgment will therefore be altered by reducing the number of goats from 84 to 65, otherwise the award made in the court below will stand.

As the Appellant has succeeded only in a minor degree and has entirely failed on the main issue, there will be no order as to the costs of appeal.

Butterworth. 10th July, 1919. C. J. Warner, C.M.

CHARLES MAJWAMBE vs. GEORGE MAJWAMBE.

(Idutywa. Case No. 13/1919.)

Estate—Community of property—Proclamation No. 127 *of* 1918 *merely protects rights between the spouses—Estates of the spouses are administered according to Native Law and Custom*

In this case the Plaintiff claimed a one-fifth share of the estate of his late father and mother who were married in the Cape Colony by Christian rites in community of property. In his summons the Plaintiff stated:—

(1) That his parents were married many years ago in the Colony proper in community of property according to the Law of the Colony.

(2) That his mother died before rinderpest and there were five children of the marriage, viz., the Defendant, the Plaintiff, another son named Jeremiah, and two daughters.

(3) About 1903 his late father married one Elizabeth by Christian rites in the District of Willowvale, but there was no issue.

(4) That after such marriage his late father had sent for him to live at his kraal and look after his property which Plaintiff thereupon did and regarded himself as heir of his late father, notwithstanding that Defendant was older than he.

(5) That his late father died in 1912 and Defendant removed from his kraal and came and resided at his late father's kraal, where Plaintiff was living; he took possession of the estate property and drove the widow away.

The Defendant pleaded that the Plaintiff had no *locus standi* and was not entitled to any of the property. The Magistrate upheld this contention and dismissed Plaintiff's summons. The Plaintiff appealed on the ground that the marriage of the parents in community of property fixed the status and the rights of

inheritance of the children, and that no Proclamation promulgated subsequent to the birth of such children could deprive them of such rights. The Magistrate held that the provisions of Proclamation No. 142 of 1910 as amended by Proclamation No. 127 of 1918 applied, and that the Defendant, being his father's heir according to Native Custom, was entitled to the whole estate.

JUDGMENT.

By President: Appellant prays for a declaration that he is entitled to a fifth share of the property of the estate of his late father and mother by virtue of the community of property established by their marriage. The community established by the marriage of the father and mother is protected by the last proviso to Proclamation No. 127 of 1918. The Proclamation also enacts that the estate of every Native must be administered according to Native Law, but the fact that the father was married in community means no more than that half the estate belonged to his wife. This does not give Appellant any rights in particular. According to Native Law the eldest son would succeed to the whole estate of both the father and the mother.

The appeal is dismissed with costs.

Butterworth. 6th July, 1920. W. T. Welsh, A.C.M.

DYER DINGISWAYO vs. LOUISA DINGISWAYO.

(Nqamakwe. Case No. 22/1920.)

Estate—Community of property—Marriage by Christian rites—Proclamation No. 110 *of* 1879*—Community of property not abrogated by Proclamation No.* 227 *of* 1898*—One-half of joint estate goes to surviving spouse and the remaining half falls to be administered by Native Custom.*

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: In this case Plaintiff, Dyer Dingiswayo, as the eldest son and heir of the late James Dingiswayo sues his mother Louisa for certain property and rights in the estate of his late father. The Defendant controverts this claim, basing her contention upon the admitted fact that she was married according to Christian rites to the late James Dingiswayo in 1883, and contends too that community of property operated. By virtue of the community she counterclaims for half the estate of her late husband, and further the right to remain in possession of the whole, and she also applies for an order to prevent the Plaintiff from administering the estate, and further that he must render an account of his administration of the estate since his father's death.

The Magistrate granted absolution from the instance in both claims against which both the Plaintiff in convention and Plaintiff in reconvention herein referred to as the Defendant have appealed.

The main point for decision is whether the marriage of the late James Dingiswayo with the defendant in 1883 produced the consequences of community of property and, if so, whether subsequent legislation or action of the parties nullified such consequences. It appears that in February, 1906, the parties appeared before the Magistrate at Nkamakwe, when the Defendant acknowledged the Plaintiff to be the heir of her late husband, and stated that she was laying no claim whatever to any portion of her husband's estate. Since that date disputes have arisen between the parties.

This Court is of opinion that the Defendant did not by this action renounce her legal rights, as it is an elementary principle of law that renunciation of rights cannot be assumed and must be made with a full knowledge of those rights. This point does not appeared to have been specifically pleaded by Plaintiff as Defendant in reconvention. There can be no doubt from analogous decisions of the Supreme Court, which are referred to and followed in the case of *Tutu* vs. *Tutu* (2 N.A.C. 167) that community of property would obtain in a case of this nature. Similar decisions supporting this view are the cases of *Novamvo* vs. *Mapini* (7 E.D.C. 3), *Xasa* vs. *Xasa* (7 E.D.C. 201) and *Kohli and Others* vs. *Umhlebi* (1910. E.D.C. 74).

Whatever may be said to the contrary and whatever interpretation this Court might have felt disposed to place upon the provisions of Proclamation 227 of 1898 embodying the relative provisions of Act 18 of 1864, this Court must be guided by the decisions of the Supreme Court which are in agreement with the view taken by this Court in the case of *Tutu* vs. *Tutu* and the case of *Charles Majwambe* vs. *George Majwambe* (not reported)† heard at Butterworth, 1919. In these cases it has been held that the principle of community of property has not been thereby abrogated and that an estate such as this must be divided—the one half going to the surviving spouse and the other to be administered according to Native Custom.

In the opinion of this Court the community which was established at the time of the marriage in 1883, by virtue of Proclamation 110 of 1897, and the rights that accrued to the Defendant on the decease of her husband in 1905 cannot be held to be affected by the later Proclamations. It follows therefore that the Defendant is entitled to one half of the joint estate and that by virtue of Proclamation 227 of 1898, as amended, construed in the light of the decisions referred to, the remaining half must be administered and distributed according to Native Custom.

From the evidence adduced, this Court is not prepared to say that sufficient reason has been shown to justify the removal of the Plaintiff from his position as administrator of his father's share of the estate.

The appeal is dismissed with costs and the cross-appeal is allowed and the judgment in the Court below is altered to read as follows:—

The Defendant (Plaintiff in re-convention) is declared to be entitled to half the joint estate of herself and her late husband, James Dingiswayo, the other half to be administered and distributed according to Native Law and Custom.

† Page 123 of these Reports.

As it is clearly undesirable that the division of the estate should be placed in the hands of either of the parties the Court will order that the Magistrate of Nqamakwe appoint a fit and proper person with full powers to collect and divide the estate, and as the Defendant (Plaintiff in reconvention) has succeeded in establishing a claim to half the estate, she is entitled to her costs in this Court and the court below, such costs to be paid out of the deceased's estate.

Butterworth. 2nd November, 1920. T. W. C. Norton, A.C.M.

R. MHAMBI vs. S. A. MHAMBI.

(Idutywa. Case No. 61/1920.)

Estate—Community of property—Community of property not abrogated by Proclamation No. 227/1898.

Claim by the widow of a Christian marriage for property in the estate of her late husband. The parties were residents of the District of Idutywa, to which the provisions of Proclamation No. 227 of 1898 apply, and the marriage took place in the year 1906. The Magistrate gave judgment for the Plaintiff, and the Defendant appealed.

JUDGMENT.

By President: The summons is badly drawn, and does not allege the grounds on which Respondent claims.

From the record, however, it becomes clear that she is claiming property in the estate of her late husband.

The marriage between Respondent and her late husband took place in 1906, that is, after the promulgation of Proclamation 227/1898, and before the promulgation of Proclamation 142 of 1910.

In the case of *Mgoqi* vs. *Mgoqi*, a case on all fours with this, heard in this Court in November, 1918,* it seems clear that the intention of the Court was to have the whole estate administered according to Native Custom, although there was a marriage in community, but as Plaintiff in that case had only claimed half the estate, only half could be awarded to him.

It must be presumed that the Appeal Court, in deciding the case of *Dingiswayo* vs. *Dingiswayo* in July, 1920,† had this case before it, and though not specifically overruling it, has laid down that "the principle of community of property has not been abrogated thereby" (*i.e.*, by Proclamation 227/1898)). Such being the case this Court is constrained to accept this ruling.

It therefore follows that Respondent, being married in community of property, is entitled to half the estate of her late husband, the other half to be administered by the heir according to Native Custom.

The appeal is brought on several grounds, one of which is that the Magistrate has awarded the whole ascertained estate to the

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* Page 118 of these Reports.
† Page 124 of these Reports.

Respondent, though stating that it should be divided, and has not taken into account either debts liquidated by him since litigation began.

This Court accepts the Magistrate's finding as to the value of the specific items mentioned in his reasons for judgment.

The appeal is allowed, and the judgment altered to—

"Plaintiff is declared entitled to half the estate of her late husband, costs in this Court and the court below to come out of the estate."

Following *Dingiswayo* vs. *Dingiswayo* the Magistrate Idutywa is to appoint some suitable person to divide the estate, due consideration being given in such division to the debts already liquidated.

Lusikisiki. 2nd December, 1921. W. T. Welsh, C.M.

MARU MDA vs. WALTER MDA AND OTHERS.

(Bizana. Case No. 163/1921.)

Estate—Community of property—Marriage in community of property—Effect of subsequent marriages by Native Custom—Rights of children of marriages by Native Custom—Immoral Contract—Women's earnings—Gifts to women—Ubulunga—Nqoma.

JUDGMENT.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

By President: In this case the Plaintiffs, W. Mda and his sisters, prayed for an Order of Court compelling the Defendant—Appellant in this action—to furnish a true and full account, as Executor Dative, of the balance of the assets in the joint estate of the defendant and his predeceased spouse Emma Mda, not accounted for in the administration and distribution account filed with the Master of the Cape Supreme Court.

It appears that the Defendant in the court below married one Emma by Christian rites under Colonial Law in community of property at Stutterheim in the Cape Province on 6th December, 1887. He alleges he subsequently married the undermentioned women according to Native Custom, viz.:—Makaulela, Mangojini, Maboqo, Maramzi and Nohnti, married after Makaulela's death and placed in her House. At the time of his marriage to Emma he resided at Idutywa in the Transkei, and after the marriage she lived with him there. Some time after he removed to Mount Ayliff, East Griqualand, as a forest guard. Emma accompanied him, but shortly afterwards returned to Idutywa, where Walter, one of the Plaintiffs, was born. Apparently she did not return to him again until he was appointed a policeman in Pondoland after the annexation in 1894. Emma died in 1919.

Defendant contends that he has included in the administration and distribution accounts all the assets in his and Emma's joint estate. Further, he states he disinherited his son Walter and is

not liable to furnish an account of the property and stock acquired by these women by means of work, gifts, nqoma, ubulungu, and trespass fees on lands allotted to him for cultivation in the Bizana District for their support, nor for the dowries paid for the daughters of these women.

It was argued on behalf of the Plaintiffs that even if the marriages according to Native Custom were illegal the dowries paid for those women should be considered as fines for the seduction, and that the Defendant was therefore entitled to recover the dowries of any females, the issue of these irregular unions. If this contention be correct, the dowries received by him in respect to such females would form part of the joint estate, and he would be required to account for them. Further, it was contended that the earnings of these women and any gifts received by them, prior to the death of Emma in 1919 should be brought into the joint estate and accounted for. This Court is not prepared to accept these propositions. It has repeatedly been held that a Native married according to Colonial Law cannot contract any other marriage during its subsistence. The arrangements therefore entered into by Defendant with Makaulela and the four other women were immoral contracts and cannot be recognised by the Courts. Whatever the position may be in regard to the earnings of a wife married according to Native Custom it appears to be clear that all stock earned by the woman Makaulela as a Native herbalist, and by the others in various ways, all gifts received by them, cattle nqomaed, ubulungu cattle, and dowries received for their daughters cannot form portion of the joint estate.

Though the presiding Magistrate has given this case considerable care and close attention, in the opinion of this Court the undermentioned items should be excluded from the account:—

(*a*) All property earned by the women,

(*b*) All gifts to them,

(*c*) All ubulungu cattle,

(*d*) Nqoma cattle,

(*e*) All dowries received for their daughters,

but should include:—

(*f*) All property inherited by Defendant and the progeny of stock acquired from money received for trespass on any lands allotted to Defendant for cultivation or from the sale of crops from such lands,

(*g*) Proceeds of estate effects sold.

The appeal will therefore be allowed with costs, and the judgment of the court below will be amended to include the following items only:—

Cattle: Three head inherited (page 4, book J).

Sheep: Eight purchased with tobacco and grain (page 5, book J). Eleven progeny of one sheep purchased with money from trespass fees (page 5, book J). Twenty-two inherited, page 7, book J).

Proceeds of effects sold, £53 10s.

The costs, which will be allowed on the higher scale, are ordered to come out of the estate.

Butterworth. 8th November, 1921. T. W. C. Norton, A.C.M.

SIBONDANA MARANUKA vs. DAVID SOMDAKAKAZI.

(Butterworth. Case No. 63/1920.)

Estate—Presumption of death—Guardianship and custody of an Estate during the real owner's absence—Matters of exception and presumption can only be dealt with under Common Law, as such are unknown to Native Custom—Wedding outfit—"Tshipa."

The Plaintiff, Sibondana Maranuka, assisted by his guardian, Gqweta Mkangiso, sued the Defendant, David Somdakakazi, for certain stock and to account for the increase thereof, and further to account for all moneys received for the sale of wool from the sheep which formed part of such stock. Plaintiff stated that he was the eldest son and heir of his father, Maranuka, who disappeared in 1905, and who was presumed to be dead. The stock in question was said to have been handed over to Defendant in the year 1917 for safe keeping, such stock being the dowry paid for Plaintiff's sister. Defendant excepted that the proper person to sue was the Plaintiff's father, Maranuka, who he denied was dead: he put Plaintiff to the proof thereof. He further put in a plea that such stock was not put into his care for safe-keeping, but stated that he contributed goods and stock to the value of £48 4s. 8d. to the wedding outfit and wedding party of Plaintiff's sister, at the request of the girl's mother and uncle. After the wedding the mother handed over to him, out of the dowry received, and in consideration of his contribution to the wedding outfit and the wedding party, a bull calf and 24 sheep. These sheep had increased to 35, and he had received approximately £20 for wool. He claimed the stock and the wool as his absolute property. The Magistrate overruled the exception and ordered the case to proceed on its merits. The Defendant appealed. At the Native Appeal Court, Butterworth, on the 2nd March, 1921, the Court held that Plaintiff must produce such evidence in support of his allegations as would justify the Court in arriving at the conclusion that the prolonged absence of Maranuka has under all the circumstances raised a presumption of his death. This had not been done, and the Court allowed the appeal and set aside the Magistrate's ruling on the exception, and remitted the case for decision after evidence had been taken and a ruling given on the exception. Subsequently evidence on the exception was given before another Magistrate, who upheld the exception and dismissed the summons with costs, holding that something more than mere absence were required before death could be presumed. The Plaintiff then appealed.

JUDGMENT.

By President: The appeal in this case is on three points:—

(1) That there is ample evidence on which the Court can presume the death of Plaintiff's father.

(2) That in Native Law the guardianship and custody of an estate falls to the next-of-kin during the real owner's absence.

(3) That the Magistrate is wrong in basing his finding on European law whereas the case is one purely of Native Custom.

At the last sitting of this Court it was laid down that Appellant must adduce such evidence as would justify this Court in arriving at the conclusion that the prolonged absence of Maranuka Mkangiso raised a presumption of his death. The additional evidence led, as the Magistrate rightly states, carries the case no further, and merely shows that Maranuka has been absent for years and that he has not been heard of.

As regards the second point the Native Assessors were consulted and their opinion is that Courts should be slow to presume death in these days when so many men become wanderers ("tshipa"), and that in the absence of the owner it is not customary for the guardian to take steps, during the minority of the heir, to remove stock or collect debts lest the estate should suffer.

The third ground was not strongly urged in argument, and it is sufficient to say that matters of exception and presumption can only be dealt with under Common Law, as such are unknown to Native Custom.

The appeal is dismissed with costs.

Butterworth. 9th July, 1919. C.J. Warner, C.M.

JOEL vs. ZIBOKWANA.

(Idutywa. Case No. 48/1919.)

Estate—Disinherison—Magistrate has no jurisdiction to set aside a public disinherison.

In this case the Plaintiff asked for an order setting aside a public disinherison. He alleged that he was the eldest son and heir of the Defendant's Right Hand House, and that upon or about the 16th February, 1919, and at a public meeting convened by the Defendant, the said Defendant publicly disinherited and repudiated him on the ground that the Plaintiff had driven him, the Defendant, away from his (Defendant's) kraal. He alleged that the said charge was false and that the disinherison was therefore wrong in law. The Magistrate was not satisfied that Plaintiff had driven Defendant away and granted an order setting aside the disinherison. The Defendant appealed.

JUDGMENT.

By President: The sole question for decision in this case is whether the Resident Magistrate has jurisdiction to set aside a public repudiation and disinherison of a son by his father.

The Native Assessors state that in Native Law as administered by the Native Chiefs a son who was publicly disinherited by his father has no right of appeal to the Chief, and that the Chief never reinstated a son who had been publicly disinherited.

This case is one of purely Native Custom, and in view of the opinion of the Native Assessors this Court considers it was not competent for the court below to set aside a public disinherison of the Plaintiff.

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

Umtata. 19th November, 1921. W. T. Welsh, C.M.

LUFELE KALIPA vs. SIFOFONI NOBENGEZELANA.

(St. Marks. Case No. 209/1921.)

Estate—Native Law—Liability of heir—Capacity in which sued—Counterclaim—Exception—Practice—Maintenance.

In this case the Plaintiff claimed certain stock in possession of the Defendant, which he alleged to be his property. Defendant counterclaimed against Plaintiff for the maintenance of Plaintiff and his sisters, stating Plaintiff was liable for this as heir of the late Nobengezelana. Plaintiff took exception that as he was suing in his personal capacity, a counter-claim against him in his representative capacity as heir of the late Nobengezelana could not be maintained. The Magistrate upheld the exception and the Defendant (Plaintiff in re-convention) appealed.

JUDGMENT.

By President: The exception, which was upheld, in the opinion of this Court disposed of the counterclaim for the time being, and the objection *in limine* to the hearing of the appeal cannot be sustained.

This is a case between Natives and must be decided according to Native Law and Custom. In his counterclaim the Defendant refers to the Plaintiff as heir to the estate of the late Nobengezelana, but does not sue him in that capacity. The Plaintiff, as heir to that estate, would be entitled to the assets subject to the liabilities imposed upon him by custom, and in the opinion of this Court the exception to the counterclaim that this claim was made against Plaintiff in his representative capacity should not have been upheld. The Plaintiff in acquiring the assets of the estate, *ipso facto* became liable to for the liabilities provided these do not exceed his inheritance.

The appeal will accordingly be allowed with costs, and the ruling on the exception to the counterclaim is set aside with costs and the case remitted to be decided on its merits.

Butterworth. 5th July, 1922. J. Mould Young, Ag.A.C.M.

Ref. to in 1945 (T. & N.) 54.

NQOBOLO NGQANDULWANA vs. HLALUKA GOMBA.

(Butterworth. Case No. 176-1921.)

Estate—Heir—Native Custom—Liability of heir is not confined to extent of estate inherited where claim originates solely in Native Custom—Stale claim—Staleness of claim is no bar to suit where claim is kept alive by requests for payment from time to time—"Intonjane" ceremony—"Ukufakwa."

The essential facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: In this case the Plaintiff in the court below claimed three head of cattle or their value, £30.

The claim is arrived at as follows:—

(*a*) Two head of cattle alleged to have been contributed by Plaintiff to the dowry of Ngqandulwana, a son of the Great House of one Komba, and father of Defendant.

(*b*) One head of cattle for a goat slaughtered on the occasion of the Intonjane ceremony of Nomqavana, Ngqandulwana's daughter, on which occasion he was put into the dowry of Nomqavana in respect of all three cattle now claimed.

The Magistrate gave judgment for Plaintiff as prayed, and against this decision an appeal has been noted.

(1) On the ground that the case is a stale one.

(2) That the Defendant can only be liable to the extent to which he has inherited from his father's estate.

(3) That the evidence does not support the finding.

On the evidence this Court is satisfied that the conclusion arrived at by the Magistrate is correct.

As regards the second ground of appeal, a distinction must be drawn between claims against an estate arising out of Native Custom and otherwise. The present claim is based entirely on Native Custom, and the obligations undertaken by Ngqandulwana fall to be discharged by his heir, the Appellant.

Coming to the first ground of appeal, the claim is undoubtedly a stale one, but the evidence shows that it was not allowed to lapse as requests for payment were made from time to time.

The appeal is dismissed with costs.

Umtata. 17th March, 1920. C. J. Warner, C.M.

HENRIETTA LUKE vs. MICHAEL LUKE.

(Engcobo. Case No. 420/1919.)

Estate—Property—Respective rights of widow and heir—"Usufruct" has no equivalent in Native Law—Exception.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: Appellant is the widow of the late Philip Luke to whom she was married by Christian rites before the annexation of Tembuland, and the Respondent is the son of this marriage and heir to the late Philip Luke. At some time Respondent had established his own kraal, but apparently after the death of his father returned to his late father's kraal, and disagreements with Appellant ensued.

Appellant sued for a declaration that she is entitled to the usufruct of the estate of her late husband and for an order ejecting the Respondent from the said kraal.

The term "Usufruct" has no equivalent in Native Law, and it is to be regretted that it was ever imported into reported judgments of this Court.

Exception was taken and upheld that the summons disclosed no cause of action.

The points at issue are submitted to the Native Assessors, who state that an heir may not be ejected from the kraal of his father, and further that the control of the estate of a Native vests on his death in his heir who has control of it, but must consult his mother, *i.e.*, the widow.

They further state that in the event of disagreement between the heir and the widow the decision rests with the heir who has taken the place of his late father, and therefore he has the duty of supporting the widow and family of his late father.

It would only be in the event of his abusing this trust that the Chiefs or Courts could interfere.

This opinion agrees with the judgment of the Supreme Court in the case of *Sekelini* vs. *Sekelini* (21 Juta 118) and with what the Court believes to be the Native Law.

There is no allegation on the summons that Respondent is failing in his duty to support the family or making an improper use of the property in the estate, and consequently in the opinion of this Court the exception was correctly upheld.

The appeal is dismissed with costs.

Umtata. 8th November, 1920. W. T. Welsh, A.C.M.

NOIENTI MQOTYANA vs. NZAMO SIHANGE.

(Engcobo. Case No. 179/1920.)

Estate—Property—Rights of heir—Property may not be diverted from one house to another.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Plaintiff, now Appellant, Nolenti Mbotyana, a widow of the Right Hand House of the late Mqotyana, sued the Defendant, Nzamo Sihange, the eldest son of the Right Hand House of the late Sihange (who was the eldest son and heir of the Great House of the late Mqotyana), for the delivery of certain stock which she alleges is the property of her house.

The Defendant pleaded that he held the property as guardian of Mavangube, a minor, the son and heir of the Great House of Sihange, and to which property the Plaintiff had no right of possession, custody or control.

The Magistrate gave an absolution judgment, and in his reasons said the interests of the widow had not been interfered with, and that the action of the Defendant in removing the stock from the Right Hand House to the adjacent kraal of the Great House, where he lives, was not unreasonable in the circumstances. The case of *Luke* vs. *Luke*, heard at Umtata in March, 1920,† and the cases of *Malinga* vs. *Malinga*‡ and *Dyidi* vs. *Dyidi*‡ do not bear the construction which the Magistrate has put upon them, for in none is it laid down that the property can be diverted from one house to another. Such a ruling would be entirely contrary to Native Custom and to the decisions of this Court. It follows therefore that the property of the Right Hand House must be returned to that kraal. To enable this to be done the judgment of absolution with costs will be set aside and the case remitted to the Court below for the Magistrate to determine after hearing any further evidence which either party may tender what property belongs to the Right Hand House and to order its restoration thereto. The Respondent is ordered to pay the costs of appeal, all costs in the Court below to abide the issue.

† Page 133 of these Reports.
‡ Not reported.

Umtata. 21st March, 1922. W. T. Welsh, C.M.

NGWEBI ZITO vs. NTLUNGU ZITO.

(Xalanga. Case No. 164/1921.)

Estate—Son of Right Hand House placed in Great House as heir is ousted by the subsequent birth of a son to the third wife, whether she be married as "Qadi" to the Great House or as seed-bearer to the Great House—Succession under Proclamation No. 142 *of* 1910.

The Plaintiff sued Defendant in an action for a declaration of rights to the property in the estate of the late Zito Nakani, including a certain land, Lot No. 164, Spafeni, in the District of Xalanga. The Plaintiff, a minor, was the grandson of the deceased, and claimed to be the eldest son and heir of the late Pakamile Zito, the son of Zito's second wife, Nonenti. He alleged that his father, the late Pakamile, had been placed in the house of Nowanti, the heirless first wife of Zito. He stated that the Defendant was the son of Nomenti, the third wife of the late Zito. The Defendant pleaded that his mother, Nomenti, was placed by his father, Zito, in the Great House for the purpose of raising an heir to that house, and that he (Defendant) was the eldest son of Nomenti and was born in that house; he therefore claimed to be the legal heir of the late Zito. The Magistrate found that Plaintiff's father, Pakamile, had been placed in the Great House (in which there was no male issue) before the marriage of Zito with the Defendant's mother, Nomenti, and that the said Pakamile remained there after such marriage. The Magistrate gave judgment for the Plaintiff, and the Defendant appealed, on the ground that the son of another house placed in the Great House in the absence of an heir is ousted by the birth of a son to the "Qadi" or Seedbearer of the Great House.

Judgment.

By President: The Plaintiff, Zoyisele, eldest son of Pakamile, the eldest son of the Right Hand House of the late Zito Nakani, sued the Defendant, the son of the third wife of the said Nakani, for a declaration of rights to estate property on the grounds that his father Pakamile was placed as son and heir in the Great House of the late Nakani.

The Defendant pleaded that his mother, Nomanyti, was placed by Nakani in his Great House for the purpose of raising an heir thereto, the Great Wife having produced no heir.

The Native Assessors having been consulted, state that where a son of the Right Hand House has been placed by his father in the Great House as heir thereto, the son of the third wife, whether she be a "Qadi" or seed-bearer to the Great House, would oust the former from his heirship to the Great House, and he would then revert by law to his former house.

With this expression of opinion this Court is in agreement.

Assuming that the Magistrate's finding that Pakamile was placed in the Great House is correct, the subsequent birth of a son to the third wife—whether "Qadi" or seedbearer—would by mere operation of law terminate such an arrangement.

It has been argued on appeal that in any circumstances the Plaintiff is entitled, by virtue of the table of succession appended to Proclamation No. 142 of 1910, to succeed to the allotment of the late Nakani.

According to section 2 of this table, however, Houses succeed in their order, that is to say in their order according to Native Custom.

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

Butterworth. 4th November, 1919. C. J. Warner, C.M.

PALA MBADAMANA vs. SARAH JANE MBESI.

(Nqamakwe. Case No. 81/1919.)

Estate—Marriage—Declaration under section 7 (1) of Proclamation No. 142 of 1910 once made cannot be departed from—Ranking of wives—Unusual to marry a wife to replace the wife of a house where there are already children.

The Plaintiff claimed certain stock in his deceased father's estate. He stated that he was the eldest son and heir of the Right Hand House of the late Mbesi, and that Defendant was a widow of the late Mbesi and the "Qadi" of her deceased husband's Right Hand House. Plaintiff based his claim under an allotment made by the late Mbesi on 25th May, 1917, in terms of section 7(1) of Proclamation No. 142 of 1910, while Defendant relied on a subsequent allotment in terms of the same section made on the 24th April, 1918, in which she was shown as being the Right Hand wife of the late Mbesi. The Defendant also counterclaimed for certain property of the Right Hand House in the possession of the Plaintiff. The Magistrate gave judgment for the Defendant in convention and for the Plaintiff in reconvention. In the original declaration the Defendant was shown as the "Qadi" of the Right Hand House, while the Right Hand wife was shown as Nolenti (deceased). The Magistrate held that the second declaration was the valid one and that it superseded the one previously made. The Plaintiff in convention appealed.

JUDGMENT.

By President: The question at issue in this case is as to the interpretation to be placed on section 7 (1) of Union Proclamation No. 142 of 1910.

The facts are that the late Mbesi Mbadamana had four houses and of these the Respondent was the "Qadi" of the Right Hand House. On the 25th May, 1917, the late Mbesi being desirous of contracting a civilized marriage with Respondent made the declaration required by the enactment referred to above. In this he showed that eight head of cattle, a mare, a filly and 17 sheep were the property of the Right Hand House, of which House Appellant is the heir and representative. At this time all the wives of the late Mbesi except the Respondent were dead. The

contemplated marriage does not appear to have been contracted until May, 1918, and on 24th April, 1918, the late Mbesi made a second declaration in terms of section 7 (1) of Proclamation No. 142 of 1910, which shows Respondent as wife of the Right Hand House, and the property in that house as consisting of 13 head of cattle, two horses and 17 sheep.

Respondent relies on the second declaration of the late Mbesi to establish her claim to be the wife of the Right Hand House and entitled to the property of that House. The Magistrate in the court below held that the second declaration annulled the first, and upheld Respondent's contention and the appeal is against this ruling.

In Native Law a man not of the rank of Chief, is not allowed to nominate the rank of each wife he marries, but the rank and status of each wife follow the order in which they are married. In the declaration made and signed on the 25th May, 1917, the late Mbesi showed Nolentyi (deceased) as wife of the Right Hand House and Respondent as the " Qadi " of that House. Appellant is the son of Nolentyi and heir of that House, and it is most unusual to marry a wife to replace the wife of a House in which there are already children. Further, since Respondent was married to the late Mbesi by civilized rites she became his only wife in the eyes of the law and for this reason she cannot claim to be the wife of the Right Hand House.

The effect of signing the declaration required by section 7 (1) of Proclamation No. 142 of 1910 was fully dealt with by the Native Appeal Court sitting at Kokstad on the 3rd April, 1917, in the case of *Kopman* vs. *Nohakisa* (Meaker's Reports, 228). In that case the Court held that a native making a declaration must be held to declare and place on record what property has under Native Custom been already allotted to each of his then existing houses. This Court fully concurs in this view, and it is only necessary to add that if the contention of Respondent that a Native can annul a solemn declaration of the disposition of the property to his various houses by making subsequent declarations the object with which section 7 of the Proclamation was framed would be defeated.

It is quite clear that when Mbesi made the declaration on the 25th May, 1917, Respondent held the status of " Qadi " of the Right Hand House, and no subsequent declaration can alter her status or the disposition of property which then had been allotted to the different houses.

The appeal is accordingly allowed with costs, and the judgment of the court below is altered to read: " On the claim in convention for Plaintiff for 13 head of cattle including the two in his possession of the value of £8 each, 17 sheep or £17, and costs." The claim in reconvention is dismissed. The original cattle to be handed to Plaintiff if in existence.

Postea. Butterworth. 2nd Nov., 1920. T. W. C. Norton, A.C.M.

SARAH JANE MBESI vs. NKOHLAKALI MBADAMANA AND TOTWANA MBADAMANA.

(Nqamakwe. Case No. 94/1920.)

Estate—Right of heir of Great House as against the widow of deceased of a marriage by Christian rites subsequent to Proclamation No. 142 of 1910—Spoliation—Appeal—Magistrate's reasons for judgment—Maintenance.

Sarah Jane Mbesi, the Respondent in the above case of *Pola Mbadamana* vs. *Sarah Jane Mbesi*, subsequently sued Nkohlakali Mbadamana, eldest son of the Great House of the late Mbesi, and his brother Totwana Mbadamana, in a spoliatory action for certain cattle and sheep, which she alleged belonged to the kraal of the "Qadi" of the Right Hand House of the late Mbesi, and of which she was entitled to remain in possession. Defendants pleaded that the stock in question was the property of the first Defendant, that the Plaintiff had lost her rights as "Qadi" of the Right Hand House by her subsequent marriage to the late Mbesi by Christian rites, and that in the declaration made by the late Mbesi on 25th May, 1917, no cattle were allotted to the Plaintiff. The Magistrate gave judgment as follows:—

> "For Plaintiff for the return of the stock or £170 10s. claimed to the kraal of the late Mbesi, pending the appointment of a fit and proper person agreed upon by the parties or appointed by the Court to distribute the property, having in view the legal rights of all parties concerned."

The Defendants appealed. The Native Appeal Court, in considering the chief ground of appeal, that the case was an abuse of the spoliatory action in that it was impossible to prove possession without going in to the question of ownership, referred to the case of *M. Sidiki* vs. *T. Sidiki*, heard at the Native Appeal Court, Umtata, in July, 1920,† and said:—

> ". . . . in the opinion of this Court this action was wrongly brought as and wrongly held to be a spoliatory action."

The summons in the present case distinctly stated that the action was brought "under the law of Spoliation."

The Court went on to repeat what had been laid down in the case of *P. Mbadamana* vs. *S. J. Mbesi*, that a declaration under section 7 (1) of Proclamation No. 142 of 1910 once made cannot be departed from, and continued:

> This Court is of opinion that the only property to which Respondent is entitled is that appearing in the first declaration or derived therefrom, and no other. Appellant is by law the heir and administrator of his late father's estate to which he succeeded immediately on his father's death, being the

† Page 329 of these Reports.

eldest son of the Great House. The stock said to have been spoliated was at that kraal in his constructive possession. He has accorded Respondent maintenance at the Great House as though she were a widow according to Native Custom, thus giving her what she was not entitled to claim. He had a perfect right to do as he chose with his stock appertaining to his House subject always to his obligations as heir of his father which, let it be repeated, did not include the maintenance of the widow by Christian rites, who had certain property allotted to her by declaration for her support. It is admitted by Appellant that a certain heifer was given to Respondent many years ago, but as no cattle appear as allotted to her she cannot now claim such heifer or its progeny. The only course open to the Respondent is, if so advised, to sue for the stock allotted to her by Declaration or derived therefrom should such be in possession of Appellant, and to enable her to do so if necessary, the Court, in allowing the appeal with costs, will alter the judgment to " Defendant is absolved from the instance with costs."

Note: *Magistrate's Reasons for Judgment*: In the above case the Court in the course of its judgment remarked as follows: " The Court wishes to draw the attention of the Magistrate to the fact that in giving reasons for judgment it is quite unnecessary and indeed futile to enter into a critical argument on the Appellant's reasons for appeal. It is quite sufficient if he states the facts he finds proved and his reasons for such finding."

Lusikisiki. 12th December, 1922. W. T. Welsh, C.M.

MNYANYEKWA vs. MACUBA.

(Flagstaff. Case No. 233/1922.)

Estate—Heir—Widows—Rights of widow in respect of property of kraal—A son who survives the father, who is kraalhead, becomes in his turn the kraalhead, and on his death the rights of his widow are superior to those of his widowed mother—Pondo Custom.

Action by the Plaintiff, Mnyanyekwa, great-grandson and heir of the late Nyangana, against one Macuba, widow of the late Ngodwana, a grandson of the late Nyangana, for a declaration awarding him possession of the property of the estate of the late Jali (son of Nyangana and father of Ngodwana). The Magistrate declared the Plaintiff to be the heir, but held that he had no right to remove the stock while the Defendant remained at the kraal of her late husband. The Plaintiff appealed.

Judgment.

By President: The Plaintiff, the great grandson and heir of the late Nyangana, claimed to be declared the heir and as such entitled to have possession of the property belonging to the late Jali. Jali

was a younger son of the late Nyangana, and married one Nojejane by whom he had one son, the late Ngodwana, who died leaving surviving him a widow named Macuba, the present Defendant, but no male issue.

The Plaintiff now seeks to compel the Defendant Macuba to remove with the property in her late husband's estate to his kraal. This she has refused to do.

The Magistrate declared the Plaintiff to be the heir, but declined to authorise him to remove the stock to his kraal, while the Defendant remains at the kraal of her late husband.

It appears that Nojejane, the widow of the said Jali, is willing to comply with the Plaintiff's wishes and remove to his kraal.

The Plaintiff has appealed against that portion of the Magistrate's judgment restraining him from removing the estate stock to his own kraal, and contends that as the rights of the late Jali were superior to those of the late Ngodwana who inherited from the former, the rights and wishes of their respective widows must take the same order of precedence and that in the event of disagreement as to choice of domicile the wishes of Jali's widow should prevail.

The matter having been placed before the Native Assessors they unanimously state that according to Pondo Custom the Defendant, Ngodwana's widow, is justified in refusing to remove from the late Ngodwana's kraal and preventing the estate property from being removed therefrom. They further state that on Jali's death his rights passed to his son and heir Ngodwana whose widow's claims are therefore superior to those of Jali's widow Nojejane.

In the opinion of the Native Assessors the Plaintiff should place a responsible person at the Defendant's kraal to take charge of the estate property.

The appeal is dismissed with costs.

Umtata. 26th July, 1919. C. J. Warner, C.M.

NONAYITI TSHOBO AND ANOTHER vs. SOJA TSHOBO.

(St. Marks. Case No. 14/1919.)

Estate—Property—Rights of kraal head—Diversion of property from one house to another—Disinherison of heir must take place at a public meeting of relatives and a report made to the Chief or Magistrate—Institution of heir.

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

Judgment.

By President: Appellants are the wife and eldest son of the Right Hand House of the Respondent and sue for the return of certain stock removed by Respondent from the Right Hand House to the Great House, Respondent in his plea denies he has any intention of depriving the Right Hand House of the ownership of

the property in dispute and alleges he has removed it for safe keeping to the Great House, where it is in charge of a younger son of the Right Hand House to whom he admits he has made an allotment of certain of the property in dispute. He further admits it is his intention to substitute this younger son as heir to the Right Hand House in place of his elder brother one of the Appellants.

It is a well-known principle of Native Law which has been recognised in the Supreme Court of the late Cape Colony that a Native may not deprive any of his houses of the property belonging to it.

In view of the peculiar feature of this case it has been submitted to the Native Assessors, who state:—

> "According to Native Law a man cannot take property of the Right Hand House. The Right Hand House is also his kraal, and if he wishes to dispose of any property of the Right Hand House it must be done at the Right Hand Kraal in consultation with the members of that kraal. Further a son cannot be disinherited except at a public meeting of relatives, and a report must be made to the Chief or Magistrate. A younger son cannot be instituted as heir until the eldest son has been publicly disinherited. Further no apportionment of property may be made to a younger son at the expense of the eldest son unless the wife and heir of that house are consulted.

This opinion is in accord with previous opinion of Native Assessors and also in accord with judgments of this and the Higher Courts. The only reason Respondent advances for removing the stock from his Right Hand House is that it is not being properly looked after, but the grounds he gives for this reason are insufficient to establish his allegation. In the opinion of this Court Appellants were acting within their legal rights in suing for return of the property removed from the Right hand House and in this point the appeal must succeed.

With regard to the balance of the property claimed it is not clearly established that Respondent may not have to meet certain lawful claims against it, and in the opinion of this Court Appellants claim to it is premature.

The appeal is allowed with costs, and the judgment of the court below allowed to read judgment for Plaintiffs for the return of the seven head of cattle and thirty-seven sheep removed from the Plaintiff's kraal.

Absolution from the instance in respect of the balance of the Plaintiff's claim. Defendant to pay costs.

Umtata. 20th July, 1920. W. T. Welsh, C.M.

NONAYITI TSHOBO AND NZIMANI TSHOBO vs. SOJA TSHOBO.

(St. Marks. Case No. 9/1920.)

Estate—Property—Right of Kraal Head to dispose of produce of the various houses for the benefit of the whole estate.

By judgment of the Native Appeal Court dated 26th July, 1919, the Plaintiffs had obtained judgment against the Defendant for the return of seven head of cattle and thirty-seven sheep removed from the Plaintiffs' kraal. Subsequently the Plaintiffs sued the Defendant for £29 12s., the money obtained for the wool, the produce of the sheep recovered, over a period of five shearing seasons. The Magistrate gave judgment for the Defendant, holding that money obtained for the produce of stock vested in the head of the kraal, the Defendant, and so long as he used it for the needs of himself and family the Plaintiffs (the Right Hand wife and eldest son of the Right Hand House of the Defendant) had no right to demand that it should be handed to them or kept in any particular way or in any particular place. The Plaintiffs appealed.

JUDGMENT.

By President: Having obtained a judgment of this Court for the sheep of the Right Hand Kraal the Plaintiffs now claim the right to the wool of the said sheep realised during the period they were away from the Right Hand Kraal.

This disposal of the income of the estate is vested in the husband.

The Native Assessors state that the head of the kraal is entitled to utilise for the benefit of his whole estate proceeds of the produce of the various houses as he thinks best.

This is of course subject to the well-established rule that the wife and family concerned are not impoverished.

Though the Defendant appears to have acted somewhat arbitrarily this Court is of opinion that he has not exceeded his rights under Native Law.

The appeal is dismissed with costs.

Butterworth. 14th March, 1922. W. T. Welsh, C.M.

NGWENDUNA vs. DUBULA.

(Idutywa. Case No. 330/1921.)

Estate—Property acquired after abandonment of Great House and placed in Right Hand House belongs to Right Hand House—Dowry—Replacement of dowry paid by Great House for wife of another House lapses unless a daughter is born to that house.

This case was a sequel to the case of *Ngwenduna* vs. *Dubula*, heard at the Native Appeal Court on 9th November, 1921: see page 379 of these Reports for judgment in that case.

JUDGMENT.

By President: This Court at its last sitting decided that the late Mqatane, after paying the dowry of his Right Hand Wife still possessed some stock which was the property of the Great House, and that he used it to pay the dowry of the "Qadi" to the Great House. It appears from the evidence that after this payment was effected there was no more stock left in the Great House.

It is clear that after Mqatane left Rode he abandoned his Great House and had nothing more to do with it, and that when his son Mtengemntu of the Great House came to visit him he gave him a cow and calf from the Right Hand House. Subsequent to the establishment of his Right Hand House Mqatane acquired considerable property which he placed in that house; this property was obtained by his personal efforts and was not diverted from the Great to the Right Hand House. The property thus accumulated being still in the possession of the Right Hand House the *onus probandi* that any of it is Great House property is upon the Plaintiff.

The Native Assessors having had the issues placed before them state that stock acquired by the late Mqatane after his removal and abandonment of his Great House, and placed by him in his Right Hand House cannot be claimed by or on behalf of the Great House unless specifically apportioned thereto.

After carefully considering the evidence and the reasons for judgment, this Court is not prepared to say the Magistrate erred in holding that the Plaintiff had failed to establish his allegations in regard to the stock which he alleged was the property of the Great House.

The Native Assessors having been consulted state that when the dowry of the Right Hand Wife is provided out of the Great House and only a son is born to the former, the claim of the Great House for the return of the dowry lapses, and is not recoverable out of the dowries of that son's daughters: *i.e.*, the grandaughters of the Right Hand House.

In the opinion of this Court no sufficient grounds have been shown for disturbing the Magistrate's judgment, and the appeal is dismissed with costs.

Butterworth. 6th July, 1921. W. T. Welsh, C.M.

NOMAYILE TSHEMESE vs. BETSHWANA TSHEMESE ASSISTED BY HIS GUARDIAN PONI NGUBOMBI.

(Nqamakwe. Case No. 48 1921.)

Estate—Property—Rights of Kraal Head—Diversion of property from one house to another—Status of wives. Judgment not in terms of claim. Overwhelming proof of variation from Native Custom must be adduced.

This was an action for a declaration of rights to certain stock which Plaintiff claimed as heir to the Right Hand House of the late Tshemese, which he alleged had been allotted to the Right Hand

House by the late Tshemese prior to his death. Defendant was heir to the Great House of the late Tshemese and pleaded that the Plaintiff's mother was married as successor to the Great House and not as Right Hand Wife. He alleged that this woman, after the birth of three children, pressed the late Tshemese to make her his Right Hand Wife, which he agreed to do, but which it was not in his power to do, since he could not alter the status of a wife. He (Defendant) further pleaded that the late Tshemese did, on his deathbed, allot certain property to this woman, but this was illegal, as amounting to the diversion of property from one house to another. The Magistrate gave judgment for Plaintiff and the Defendant appealed.

JUDGMENT.

By President: The grounds of appeal are:—

(*a*) That the evidence shows that this woman was married into the Great House and was a successor of the Great Wife, and that her status was altered to that of Right Hand Wife several years after marriage.

(*b*) That it was out of the power of the husband to alter her status and she remained and still is the Great Wife, and cannot bring the action, and on that ground she should have failed in her action, and judgment on the claim in convention should have been for Defendant with costs.

(*c*) That the diversion of the property from one house to another was beyond the power of the deceased Tshemese, and on that ground the Plaintiff should have failed in her claim.

(*d*) That the summons claimed a declaration of rights in regard to three particular cattle, whereas the judgment was not in terms of this claim, but was for any three cattle, and, further went on, without evidence as to value, to place a value of £6 on these cattle. So far as judgment went in regard to the three cattle it was *ultra vires*, and should be expunged, with costs of appeal.

The late Tshemese married as his Great Wife the mother of Defendant (now Appellant). There were also other children, issue of that marriage. Shortly after the death of that wife the late Tshemese married Nomayile (the present Plaintiff), now Respondent, who claims to have been married as the Right Hand Wife. The Appellant however maintains that Nomayile was married as successor to the deceased Great Wife and not as the Right Hand Wife.

In the case of *Petu Yoywana* vs. *Tsomo Yoywana* (3 N.A.C., 301), it was laid down that the wives of a commoner must take precedence in accordance with the custom applicable to common people, and that where any variation of custom is alleged, overwhelming proof of such variation must be adduced. In the present case there is no such proof and this Court concurs in the finding of the Magistrate in the Court below that Nomayile was married as the Right Hand Wife.

In the opinion of this Court the Appellant has failed to prove that there has been an improper diversion of the property from the Great to the Right Hand House. The disposition complained

of appears to have been no more than an allotment by Tshemese of a reasonable proportion of his property to the Right Hand House. While this Court agrees with the well-established principle that a man may not divert property from one house to another, he is entitled and morally bound to make suitable provision for the maintenance of all his houses. The late Tshemese not having previously made an allotment of his property was in the opinion of this Court justified in doing so when in apprehension of death. The property allotted to the Right Hand House being less than half of what he possessed at the time was not unreasonable.

As regards the fourth ground of appeal, in the opinion of this Court substantial justice has been done, and it is not prepared to interfere with the Magistrate's decision.

The appeal will be dismissed with costs.

Umtata. 21st July, 1921. T. W. C. Norton, A.C.M.

N. SKOTA vs. S. TINTI.

(Engcobo. Case No. 511/1920.)

Estate—Property—Rights of Kraal Head—Diversion of property from one house to another.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Appellant, the Great Wife of Respondent, sues for certain cattle and sheep the property of her house, alleging that Respondent has removed this stock from the Great House and placed it at various kraals, those of minor houses among others.

Respondent denies that he possesses stock to the number claimed, but admits that he has placed the cattle at his Vee kraal for grazing and the sheep at his Right Hand kraal, where there is a sheep kraal. He admits that 16 cattle and 74 sheep belong to the Great House.

The Magistrate has given an absolution judgment stating that there is no proof as to what stock the Great House owns. He appears to have overlooked Respondent's admissions.

It has been laid down repeatedly by this Court that the head of a kraal may not divert stock from one house to another. *Nolenti Mqotyana* vs. *Mzamo Sihange* † is a recent case in point. It is clear from the evidence that the Respondent and his Great Son have disagreed, Respondent stating that his son does not take proper care of the stock. This is no reason for diverting the stock to other houses. While it is competent for the head of a family to move stock for grazing as necessity arises, this must not be used as an excuse to deprive any house of the stock appertaining thereto, as is evidently being done in the present instance.

The appeal will be allowed with costs and judgment entered for Plaintiff for the return to her kraal of the 16 cattle and 74 sheep admitted by Respondent with costs.

Absolution as regards the balance of the claim.

† See page 134 of these Reports.

Lusikisiki. 18th August, 1919. C. J. Warner, C.M.

GWANDUMTUTU vs. NOTA KA DLIKITELA.

(Bizana. Case No. 64/1919.)

Estate—Dowry—Payment of dowry by Great House for the wife of another house—Replacement from dowry of first daughter of that wife—Property not allotted to any of his houses by a Native during his lifetime belongs to the Great House.

The essential facts are sufficiently clear from the judgment of the Native Appeal Court.

Judgment.

By President: Appellant claims certain cattle obtained as dowry for his sister, the second daughter of the fifth house of the late Dlikita. Respondent, who is the eldest son of the Great House, claims these cattle to replace the dowry paid out of his mother's hut for the wife of the fifth hut.

It is a well-known principle of Native Law, and it is admitted by the Appellant's Attorney, that the Great House is entitled to the dowry paid for the first daughter of a subsidiary house to replace the dowry paid for the wife of such minor hut, but it is contended in the argument that as the cattle paid by the late Dlikita for the fifth wife came from the dowries obtained for his (Dlikita's) sisters they belonged to his mother's hut and not to the Great House (of Dlikita).

This Court is unable to accept this view. It is Native Law which has been recognised in this Court, that any property not allotted by a Native to any of his houses during his lifetime belongs to the Great House.

In this case Respondent was lawfully entitled to the dowry paid for the first daughter of Appellant's mother's hut. As he did not get this, he could claim the dowry of the second daughter.

Note: The Appellant's contention appears more fully in the grounds of appeal, which are as follows:—"It is established in the evidence and found as a fact by the presiding Magistrate that the cattle wherewith the late Dlikitela paid the dowry for his fifth wife were cattle which had been paid as dowry for his (Dlikitela's) sisters. The Court held, notwithstanding this fact, that such cattle would belong to the first hut of the late Dlikitela and thus the heir of the first hut would be entitled to the dowry of one of the daughters of the fifth hut, and on this ground gave judgment for the Defendant. It is contended that the said cattle during Dlikitela's lifetime would not belong to his first hut or to any particular hut of the said Dlikitela, they forming part of his (Dlikitela's) inheritance from his father, and thus it is contended that the Magistrate's judgment is founded on a misconception of Native Law and Custom." ("Dlikitela" in the grounds of appeal is the same as "Dlikita" in the judgment of the Native Appeal Court.)

Umtata. 25th March, 1919. C. J. Warner, C.M.

RADEBE XELITOLE, ASSISTED BY NOLIFILE XELITOLE vs. BUYANGANI XELITOLE.

(St. Mark's. Case No. 156/1919.)

Estate—Child, illegitimate—Rights of succession of illegitimate son of widow to his mother's house—Native Assessors—Conflict of opinion.

Claim for the dowries paid for certain two girls, daughters of the late Xelitole by his wife, Nolifile, and belonging to his estate. Plaintiff was the son of Nolifile, but was born to her at her people's kraal many years after the death of Xelitole. The Defendant was the son of Xelitole by a wife married previous to Nolifile. Defendant admitted Nolifile's right to a life-usufruct in the estate of the late Xelitole, but alleged that Plaintiff was illegitimate and had no rights in the estate.

The Magistrate gave judgment for Defendant with costs of suit.

The Plaintiff appealed.

JUDGMENT.

By President: The facts of this case are not disputed and it is a question of Law whether Appellant can succeed to the property of his mother's house.

The case is put to the Native Assessors who are divided in their opinion.

The majority (three) state that a son born to a widow after the death of her husband, and while she is living away from her late husband's kraal cannot inherit the estate of her house.

The minority (two) state that such a son can inherit, but his case would have been strengthened had he and his mother returned to the kraal of her late husband before setting up a claim to the property of her house.

The Appellant relied in this Court on the cases of *Madlongo* vs. *M. Nandi* decided in this Court on the 19th November, 1913,* *K. Bongoshi* vs. *Manise* decided on the 5th March, 1914.† In the former case the Court held that boys born after the death of their mother's husband can inherit in default of sons of the late husband.

The latter case merely decided that one Bushula was not heir to a certain estate he claimed, but did not touch upon the question whether a son born after the death of his mother's husband can inherit the property of her house. In the case of *Noseyi* vs. *Gobozana* (1 Henkel 214), this Court held that an illegitimate child born at the kraal of his mother's late husband, must be regarded as the heir of her house in the absence of any other son in that house.

This judgment was founded on the opinion of the Native Assessors who stated that the only son who can be called illegitimate

* 3 N.A.C. 119.
† Not reported

This as far as can be ascertained is the Native Law on the subject and in the present case the son it is sought to establish as heir was born several years after the death of his mother's husband and while she was living with her own people.

In the opinion of this Court, the Magistrate in the Court below was correct in the view he took of the law and the appeal is dismissed with costs.

Butterworth. 2nd March, 1920. C. J. Warner, C.M.

XOLIWE vs. DABULA.

(Idutywa. Case No. 97/1919.)

Estate—Placing by father of illegitimate son in house as heir where there is no legitimate heir—Fine for his birth and "isondlo" must first be paid to his mother's people—Facts inconsistent with Native Custom require clearest proof.

The essential facts of the case are clear from the judgment of the Native Appeal Court.

Judgment.

By President: Respondent, who was Plaintiff in the Court below, claims to be the heir of the Qadi of the Right Hand House of the late Tshetshe Godnka. Appellant, heir of the Great House, disputes this and contends that he is the legal guardian of the heir of the Right Hand House and who, in the absence of any son in the Qadi of the Right Hand House, is heir of that House as well.

Respondent admits he was born out of wedlock, but claims that he was taken to his late father's kraal and formally instituted as heir of the Qadi House. He admits that he was circumcised by his mother's people and that they paid dowry for his wife. He gives as the reason for these facts that his father died before his circumcision and also that the kraal was broken up in consequence of family quarrels. It is also admitted by Respondent that his father never paid any "isondlo" or maintenance fee.

These admissions are wholly inconsistent with Respondent's claim and when anyone seeks to establish a claim on facts which are so inconsistent with Native Law and Customs very clear and conclusive evidence would be required. There are, however, many inconsistencies and improbabilities in the evidence adduced by the Respondent, and moreover the woman Maggie, who was the Qadi wife denies most emphatically that Respondent was ever placed in her hut as her son.

This case was submitted to the Native Assessors who state that it is not unusual for a native to send for an illegitimate son of his and place him in a house which has no son, but before this is done the fine for his birth and the maintenance or "isondlo" would be paid to his people, and further such a son would be circumcised at his father's kraal.

This opinion agrees with previous decisions of this Court in similar cases.

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

Kokstad. 17th August, 1920. W. T. Welsh, A.C.M.

M. RAFUTO AND ANOTHER vs. K. TENZA.

(Matatiele. Case No. 98/1920.)

Estate—Succession—Relative rights of illegitimate child of woman and her child by an ukungena marriage—Basuto custom—Seduction.

The parties were Basutos and the Plaintiff sued the Defendant for damages for the seduction of one Notsi Tenza, of whom he alleged he was the guardian and the proper person to receive the fine. Defendant excepted that Plaintiff had no *locus standi*, inasmuch as the eldest brother of the girl Notsi was one Motonana, who was a major, and who was the correct person to sue. The Magistrate heard evidence on the exception and over-ruled it with costs. The Defendant appealed. The evidence showed that the Plaintiff, Kuku Tenza, had a son, Mbali Tenza, who married the mother of Motonana and died without male issue. The woman was "ngenaed" to Mbali's brother, Geagca, and during the subsistence of this ngena union gave birth to a male child, Motonana, of which the ngena husband, Geagca, was not the father. The girl Notsi was born of this ngena union, but there was no male child. Evidence was led to show that Motonana had been married and was therefore a major, but the Magistrate was not satisfied with the evidence of such marriage.

JUDGMENT.

By President: The circumstances of this case having been put to the Native Assessors, Ralibitso states that, according to Basuto Custom, when a woman deserts her ngena husband and has a child by another man, not a relative of her deceased husband, and the dowry has not been returned, the child, if a male, would become the heir and Administrator of the deceased husband's estate. He also states that the subsequent birth of a son by the ngena husband would not oust the illegitimate child.

The other four Assessors state that, according to the Customs of the tribes they represent, viz., Hlubi, Baca, and Xesibe, the illegitimate child would not succeed in preference to the son of the ngena union. In the case of *Molife* vs. *Xtebele* (1 N.A.C., p. 167) Chief Letsie stated: "It is an essential point that this heir, if not begot by the husband of the woman, must be begot by a blood relation of the husband. Therefore, if a male child is born three or four years after the death of the husband, and it cannot be proved that he was begot by a blood relative of the deceased husband, he has no right to the inheritance."

Ralibitso's statement that the subsequent birth of a son by the ngena husband would not oust the illegitimate child, is not in accord with the views of Chief Letsie, and does not appear to this Court to be a correct statement of the custom relating to ngena.

While the woman is alive and it is possible that an heir can be born according to custom to the deceased husband, this Court is of opinion that Motonana, whatever his ultimate rights may be, cannot, at present, be regarded as the heir to this estate. That being the case the exception that Motonana was the proper person to sue was properly over-ruled. The question, as to whether, Motonana attained majority, by virtue of his marriage, or on reaching the age of 21 years need not, therefore, be considered.

The appeal is dismissed with costs.

Butterworth. 5th July, 1921. W. T. Welsh, C.M.

MAHLULI M. MAZWANA vs. MONGAMELI.

(Butterworth. Case No. 120/1920.)

Estate—Rights of succession of illegitimate children—Illegitimate child of widow—Fingo custom.

Claim for certain property in the estate of the late Maxwayelo Mazwana. The Plaintiff claimed to be the son and heir of the late Maxwayelo. The Defendant denied Plaintiff's legitimacy and urged his own right to the property as the son of Maxwayelo's sister. The Magistrate gave judgment for Plaintiff, and the Defendant appealed.

JUDGMENT.

By President: It is clear that the dowry paid for Plaintiff's mother has never been returned. This Court is satisfied that whether Plaintiff was or was not the actual child of Maxwayelo Mazwana, his mother's husband, he was born at the kraal of the late Maxwayelo, where he was brought up. It has previously been decided by this Court that in Fingoland a boy born and reared under such circumstances can succeed in the absence of legitimate issue. This Court is satisfied that the Defendant, an illegitimate child of Konye, sister to Maxwayelo, has no claim whatever. . . . . .

The appeal is dismissed with costs.

Butterworth. 13th March, 1922. W. T. Welsh, C.M.

ROBBIE MGADI vs. MKUNDLENI MGADI.

(Idutywa. Case No. 237/1921.)

Estates—Succession—Right of adulterine child to succeed to his mother's house—Proclamation No. 227 of 1898—Native and Christian marriages.

Action for a declaration of rights. The facts of the case are fully disclosed in the judgment of the Native Appeal Court.

JUDGMENT.

By President: In this case the Plaintiff claimed against the Defendant a declaration of rights and alleged in his summons:—

(1) That he is the eldest son and heir of the Great House of the late Ben Mgadi, who died during the influenza epidemic of 1918.

(2) That the Defendant, who is also a son of the late Ben Mgadi, claims that he is the heir of the said Great House of the late Ben Mgadi.

(3) That there is certain property belonging to the said Great House, and that this is the property of the Plaintiff.

(4) That the Defendant is interfering with this property, claiming that it is his own; and has possessed himself of a saddle belonging to the said House, and is milking one of the cows belonging to the said House, and refuses to restore the saddle to the Plaintiff or to cease milking the cow.

To this claim the Defendant pleaded:—

(1) That the late Ben Mgadi was married to his wife Angelina according to Christian rites in community of property and prior to the promulgation of Proclamation No. 127 of 1918; that the estate of the said Ben Mgadi should therefore be administered according to Colonial Law; that the Plaintiff accordingly has no *locus standi*, and that pending the appointment of an executor to administer the said estate, the property should be in the possession of the said Angelina.

(2) He denies that the Plaintiff is the son of the said Ben Mgadi, but states that he is the illegitimate son of one Ntlamo.

(3) He states that but for the above-mentioned marriage to Angelina he, Defendant, would be heir to the estate of the late Ben Mgadi.

(4) He admits that he is in possession of the saddle, but states that it is with the consent and approval of the said Angelina.

(5) He denies that he is interfering with the said property or that he is claiming it as his own or that he is milking one of the cows.

The Plaintiff in his replication stated:—

(1) The Plaintiff admits that the late Ben Mgadi married Angelina according to Christian rites, but states that, as the marriage took place after the promulgation of Proclamation No. 227 of 1898, the estate must be administered according to Native Law and Custom.

(2) The Plaintiff says that at the time when Ben Mgadi married Angelina, the said Ben Mgadi had already a legal wife whom he had married according to Native Law and Custom named Noveyile, and that the said Noveyile was the Great Wife of the said Ben Mgadi; and that the marriage with Angelina could not affect the position of Noveyile as Great Wife under Native Law.

(3) The Plaintiff says that he is the only son of the said Noveyile, now deceased, and that consequently he is the heir of her house.

(4) The Plaintiff repeats that Defendant is interfering with the property of the Great House of the late Ben Mgadi.

The parties reside and the deceased Ben Mgadi resided in the District of Idutywa, to which the provisions of Proclamation No. 227 of 1898 apply. It seems clear that the late Ben Mgadi married Angelina by Christian rites between 1898 and 1910, having previously married by Native Custom, Noveyile the mother of the Plaintiff and Nohenise the mother of the Defendant.

The question of Angelina's half-share of the joint estate of herself and the late Ben Mgadi by virtue of their marriage in community of property is not before the Court.

This Court has repeatedly held that the deceased's estate in circumstances similar to those disclosed in the present proceedings must be administered according to Native Custom. It was clearly laid down by this Court in the case of *Lize* vs. *Bushula Makalima* (2 N.A.C. 180), that if a man married his Right Hand Wife by Christian rites this would not have the effect of diverting property thereto from the Great House.

In the opinion of this Court the property of Ben Mgadi's Great House would thus not be affected by his subsequent Christian marriage to Angelina.

The Plaintiff is an adulterine child of Ben Mgadi's Great Wife Noveyile, who has no other male issue, and the Defendant is the son and heir of the second, or Right Hand Wife, Nohenise.

It has been argued for the Appellant that the Plaintiff not being Ben Mgadi's own son is not entitled to succeed to the property of the Great House.

All the more recent authorities to which the Court has been referred show that no married woman produces a bastard and that to bastardise a child it is necessary for his mother's husband to repudiate him. The Magistrate has found that the Plaintiff was brought up in the Great House as Ben Mgadi's son and never in any way repudiated. The circumstances having been put to the Native Assessors they unanimously state that the Plaintiff is entitled to succeed as heir of the Great House, and that the Defendant has no claim thereto.

In the opinion of this Court, the Magistrate correctly declared the Plaintiff to be the eldest son and heir of the Great House of the late Ben Mgadi and entitled to his share of the property.

The appeal is dismissed with costs.

Lusikisiki 11th December, 1919. C. J. Warner, C.M.

ZILWA TONGA vs. BUSO TABATABA.

(Flagstaff. Case No. 60/1918.)

Estate—Succession—Ngena son's right of succession as heir to his mother's deceased husband as against his natural father, who is the ngena husband of his mother and who is the brother of her deceased husband—Pondo custom.

The Plaintiff's mother, Mampondo, was the widow of the late Tabataba, son of Tonga, and was "ngenaed" to Tabataba's brother, the Defendant in the present action. The Plaintiff was the son of this "ngena" union, and sued Defendant to have it declared that he was the heir to the estate of the late Tonga, as heir of the late Tabataba. The Defendant denied that Plaintiff had any *locus standi*, inasmuch as he was Defendant's own son and heir to his mother's hut, the property of which he would inherit on his (the Defendant's) death, and not before. The Magistrate gave judgment for Plaintiff and the Defendant appealed.

Extract from Judgment.

By President: . . . . . The issues involved are submitted to the Pondo Assessors, who state that Appellant, having "ngenaed Mampondo, raised up seed to his late brother and thereby 'killed himself,' and that Respondent is, according to law, the son of Tabataba and heir through him to the estate of his grandfather, Tonga." The ground of appeal therefore fades . . . . . and the appeal is dismissed with costs.

Note: The remainder of the judgment is immaterial to the above issue.

In the Cape Provincial Division of the Supreme Court, 25th April, 1921, before Searle, Ag.J.P., and Benjamin, J.

PAKKIES vs. PAKKIES.

(Matatiele.)

Estate—Succession—Proclamation No. 112 of 1879, sec. 31—Polygamy—Subsequent marriage of wife of Native Custom marriage by Christian rites—Apportionment—Usufruct.

Mr. Justice Searle (*Acting Judge President*), in the course of his judgment, said that the present Appellant, William Pakkies, was summoned before the Magistrate's Court, Matatiele, in the Transkei, at the instance of Respondent, Molife Pakkies, in an action for delivery of certain 49 cattle, three horses and 20 sheep. The summons was taken out on September 30, 1916, for October 13, 1916.

Plaintiff alleged that he and Defendant were Basutos; that he (Plaintiff) was the eldest son of the chief hut of the late Swanepoel

Pakkies, who died in December, 1914, and that Defendant was the eldest son of the second hut, that the deceased Swanepoel was the eldest son and heir under Basuto custom of the chief hut of his father, Wm. Pakkies, who died many years ago, leaving a widow Magdalena (the mother of Swanepoel); that under Basuto custom Magdalena was entitled to the usufruct of the whole of the estate of her late husband belonging to her hut; that she survived Swanepoel for nearly two years, and died in August, 1916; that Plaintiff was the heir of the chief hut of Swanepoel and was entitled to rank as heir to Magdalena's hut, and was now entitled to all the stock which belonged to that hut; and that Defendant had now in his possession 49 cattle, three horses and 20 sheep, the property of Magdalena's hut which he refused to give up to Plaintiff.

The Defendant's plea stated Plaintiff's mother was one Maria, who married the late Swanepoel Pakkies, but that Defendant was the eldest son of Swanepoel and his lawful wife, Paulina, that on August 6, 1909, Swanepoel, in contemplation of marriage according to Colonial law with Paulina, executed a deed of gift whereby he put aside Maria, to whom he was married by Native custom, and apportioned certain stock and property for that particular hut; and that that hut and the children thereof ceased, from the date of the Christian marriage with Paulina, to have any right or interest in any property of Swanepoel other than that mentioned in deed. Defendant denied that Plaintiff had any *locus standi* and prayed that the action be dismissed.

The co-executor dative, one George E. M. Seymour, appointed to Swanepoel's estate, was allowed upon his application to intervene as co-defendant. He alleged that Swanepoel was married to Paulina by anti-nuptial contract excluding community and that Swanepoel died intestate and he claimed that as executor dative he was the proper person to administer the estate, whether eventually it had to go to Plaintiff or Defendant. Argument was heard on the exception as to Plaintiff having no *locus standi* and this exception was over-ruled with costs and on appeal to the Chief Magistrate that decision was confirmed.

The deed of gift by Swanepoel Pakkies recited that he had married two wives by Native custom; that, having been converted to the Christian faith, it was his intention to put aside his first or "big" wife, Maria, and inasmuch as it was his intention before entering into the Christian marriage with his second wife, Paulina, to make suitable provision for his first wife and her children by him, he, therefore, set aside for his first wife and two sons, Molife (the Plaintiff) and Solomon, firstly, a portion of the farm Nahana possessed by him, to be divided equally between the two sons; and secondly, 67 head of cattle, two horses, and 30 goats and sheep already set aside and apportioned to the first hut in accordance with Native Law and Custom. This property was to remain in his (Swanepoel's) charge and possession and he was to have the usufruct of the farm. As regards the cattle, he was to remain in possession of them and deal with them as if they were his own property, though he should not be at liberty to dispose of them until after having obtained the consent of Maria, or her two sons, and the cattle should increase or decrease to the son's advantage or disadvantage; Maria's two sons should maintain and care for her after his (Swanepoel's death) and allow her a residence on the

land given and should not be permitted to sell or lease the farm before her death without her consent; and the sons were to be bound to support Maria and her daughters according to Native Law and Custom.

A great deal of evidence was heard on both sides and eventually the Magistrate held that, upon the evidence and law applicable thereto, the Plaintiff had proved his case and ordered that the animals claimed be given up by the first Defendant (William Pakkies), or that he pay their value, £442, and as against the second Defendant he granted a declaration of rights that the stock in question was Plaintiff's, the second Defendant's costs to be paid out of the estate. The Magistrate held that, according to Native Law and Custom, Plaintiff was the heir of the Great House of Swanepoel and was thus entitled to the property in the estate of his paternal grandfather (William Pakkies, senior), which had been retained by his grandmother, Magdalena, for her support, and that, inasmuch as Swanepoel predeceased his mother, Magdalena, without making a will, the heir under the property under Native Custom would be the Plaintiff.

The evidence certainly seemed to him (*Mr. Justice Searle*) to show that the stock claimed by Plaintiff had been assigned by Swanepoel to Defendant, subject to Magdalena's usufruct, and that Swanepoel intended Defendant to have it: in fact, that he made what he considered an equitable distribution of his property between his two houses during his lifetime, and there was also evidence that according to Native Law and Custom he was quite justified in doing this.

Appellant relied on section 31 of Proclamation 110 of 1879, which was as follows: "Any marriage solemnised by any minister of the Christian religion according to the rites of the same or by any civil marriage officer duly appointed by the Governor to solemnise marriages, or according to the ordinary Kaffir or Fingo forms, provided such last-mentioned marriage shall be registered within three months from the date of such marriage . . . . . shall be taken to be in all respects as valid and binding and to the same effect upon the parties to the same, their issue and property as a marriage contracted under the marriage laws of the Cape Colony."

In the present case there was a considerable amount of stock definitely assigned to the "Great House" of Swanepoel by the deed. That assignment did not thereafter appear to have been in any way interfered with by Swanepoel and the Court might presume that Plaintiff and his brother had now got that stock in accordance with the deed. But Plaintiff now sought not only to retain what was thus assigned, but to have what appeared to be practically the whole of the rest of the estate handed over to him, property which neither he nor his mother ever possessed at all. The effect of this he (the learned Judge) should gather, would be to leave the heir by the Christian marriage without anything at all. This would appear to be most inequitable.

The present case ought, in his opinion, to be decided upon the wording of the Proclamation and the principles referred to in the two cases quoted in the argument. In order to take property out of the estate of a deceased native, married according to Christian rites, and present its administration under section 31 of the Proclamation, there must, at all events, be clear proof of a definite

assignment of it by the deceased in his lifetime in accordance with Native Law and Custom, or in accordance with Roman-Dutch Law. There was no such proof here in respect of the property that Plaintiff claimed. The result was that the appeal must be allowed with costs and the judgment of the Magistrate's Court altered into one for Defendants with costs.

"The Taxing Officer," added the learned Judge, "in dealing with the question of costs is requested to devote special attention to the matter of the repeated postponements and to decide who is responsible for them and act accordingly."

Mr. Justice Benjamin concurred.

Note: This case is fully reported on page 508, C.P.D., 1921.

Kokstad. 29th April, 1918. J. B. Moffat, C.M.

JEREMIAH GULUSE vs. HARRIET ZUKA *alias* NOMABISA.

(Umzimkulu. Case No. 205/1917.)

Estate—Property—Rights of widow—Usufruct—Refusal of widow to stay at her late husband's kraal.

The Plaintiff, as heir, sued the Defendant, a woman, for certain property in the estate of one Samuel Guluse, deceased. Defendant pleaded that she was the widow of deceased, having been married to him by Native Custom, and she therefore claimed that she had the right of usufruct of the estate property and that the heir had no right to claim it. The Magistrate found that the marriage was proved and that Plaintiff was heir of deceased. He also found that the Defendant had wrongfully disposed of estate property without consulting the Plaintiff, and further that she refused to live at Plaintiff's kraal. He gave judgment for the Plaintiff, and the Defendant appealed.

JUDGMENT.

By President: The case is undoubtedly a hard one. The request made by the Defendant's attorney that under the circumstances the Plaintiff should have made the Defendant some allowance was a reasonable one.

It has been argued that the Defendant has a perfect right to live where she chooses. Whilst this is so, the Plaintiff as heir to the late Guluse is entitled to claim that unless she resides at her late husband's kraal or other place approved by him, she cannot be allowed to retain possession of the estate property.

The Defendant refuses to go and live with Plaintiff who has offered to maintain her if she goes there.

Whilst this Court sympathises with Defendant it cannot, in view of the facts found by the Magistrate, which finding is not questioned, interfere with the Magistrate's judgment.

The appeal is dismissed with costs.

Note: The remarks that the case was a hard one appear to be based on the following facts put forward by the Defendant's

attorney: The claim was for everything which the deceased (a member of the 1st S.A.M.R.) had left at his death. When the deceased proceeded on Active Service, he left all his property with the Defendant. The attorney considered that the Plaintiff should allow her some recompense for her services to the deceased, and also something as a solatium to her feelings, seeing that she had sustained a bereavement in the death of her husband, of whom she appeared to be very fond.

Kokstad. 30th April, 1918. J. B. Moffat, C.M.

MASOKOTO vs. NTSONYANA.

(Mount Frere. Case No. 230/1917.)

Estate—Widow—Widow's claim to establish separate kraal when she cannot live amicably with her son Refusal of widow to stay at late husband's kraal.

In this case, the Plaintiff, a widow, sued Defendant, the heir of her late husband, for an order declaring her to be entitled to the use of sufficient cattle and small stock from the estate of her late husband to enable her to support herself and her two minor children in comfort, and also declaring her to be entitled to establish a separate kraal under the guardianship of some person to be nominated by the Court. She based her claim on the fact that Defendant ill-treated her and neglected to make provision for her. Defendant denied the ill-treatment and asserted that he had never refused any reasonable request of the Plaintiff. He further went on to state that the Plaintiff had refused to live at her late husband's kraal for the last four years.

The Magistrate found that Defendant had beaten his mother on several occasions and was not maintaining her properly. Further he found that Defendant would not permit her relatives to enquire into her grievances. He gave the following judgment:—

> "The Plaintiff is entitled to establish a kraal of her own and to have six oxen, four cows and calves and 100 sheep placed at her disposal. Matsiyo is declared to be her guardian and the custodian of her stock. Costs to be paid out of the estate of the late Huku (her late husband)".

Matsiyo was the uncle of the Defendant and had been his guardian during his minority. The Defendant appealed.

JUDGMENT.

By President: The parties in this case have already been on bad terms for some time. The fact that the woman has had to take judicial proceedings against her son shows that matters have come to such a pass at the kraal that there can be no reasonable prospect at present of their living peaceably together.

Under the circumstances the order given by the Magistrate is a very fair one, and his judgment is upheld.

The appeal is dismissed with costs

Umtata. 17th February, 1919. C. J. Warner, C.M.

MATE DAMOYI vs. COBO MATSHIKI.

(Libode. Case No. 125/1918.)

Estate—Property—Rights of widow—Usufruct—Dowry received for daughters—Appeal—Claim not raised in Court below cannot be considered on appeal.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: Respondent sued Appellant in the court below for the recovery of certain cattle received as dowry for one Pasalina the daughter of Respondent's father by the right hand house. Appellant admitted receiving the cattle and states in his plea that he accounted for them to the mother of the girl who disposed of some of them, but admitted he had three of these cattle in his possession and that they were the property of Nozindaba the right hand widow of Respondent's father and mother of the girl in question.

The Magistrate in the court below gave judgment for Respondent for the three head of cattle admitted to be in the Appellant's possession and the two disposed of by Nozindaba, and the appeal is against this judgment.

In Native Law the widow Nozindaba would have no claim to the usufruct of any portion of her husband's estate while living with her people, and the Appellant must have known of the liability he incurred by allowing her to dispose of the cattle which had been received on behalf of her husband's estate.

In Appellant's grounds of appeal, a claim for maintenance is set up. This was not raised in the court below and cannot be considered at this stage.

The appeal is dismissed with costs.

Note: The Respondent in the above case was the heir of Nozindaba's deceased husband, and the Appellant was the head of her own people's kraal, to which the woman had returned with her daughter.

Kokstad. 2nd April, 1919. C. J. Warner, C.M.

MARIA LETOAO vs. GREEN LETOAO.

(Matatiele. Case No. 73/1918.)

Estate—Property—Rights of widow—Usufruct—Basuto Custom—Costs—Declaration under Proclamation 142 *of* 1910.

The Plaintiff, the widow of the deceased Petros Letoao by a Christian marriage, claimed certain property belonging to the estate of the deceased, which she alleged had been wrongfully taken

possession of by the Defendant, who was the youngest son of the first wife of the deceased, apparently by a marriage by Native Custom. This first wife was dead. The Plaintiff claimed the possession and use of the property taken possession of by the Defendant. The Magistrate gave judgment for the Plaintiff, and the Defendant appealed.

JUDGMENT.

By President: According to Native Law a widow has the right to the custody and use of the property of her late husband so long as she lives at his kraal, and the Native Assessors state that in Basuto Law a widow must be consulted by her husband's sons in the management or disposal of any of the property, and that any proceeds obtained from the property must be accounted for to her.

The Respondent in this case is entitled to the use and custody of the property in dispute while she lives at the kraal of her late husband though the ownership is vested in the lawful heir according to Native Custom of the late Petros.

The judgment as it stands is tantamount to a declaration in favour of the Respondent and must be varied.

The appeal is therefore allowed to the extent of varying the judgment of the court below to read as follows:—

(1) That the unapportioned property in the estate of the late Petros Letoao as set forth in the summons is vested in his heir at law.

(2) That the custody and usufruct of the said property are vested in Plaintiff while resident at the kraal of her late husband, but that she cannot dispose of any of it except by the authority of the said heir or his lawful representative.

With regard to costs, as Plaintiff in the court below was obliged to come to Court to secure redress and obtain judgment the costs in the court below must remain as ordered.

But as Appellant obtained a material alteration in the terms of the judgment his costs in this Court must be paid out of the unapportioned property of the estate referred to in the summons.

Note: The deceased married the Plaintiff by Christian rites on 14th July, 1914, and prior to this, on the 30th June, 1914, had made a declaration in terms of Section 7 (1) of Proclamation No. 142 of 1910, apportioning certain property among the children of his deceased first wife. It will be observed that the Defendant in the above case was not the heir of the deceased.

Umtata. 21st July, 1919. C. J. Warner, C.M.

NCIYANA vs. MANDULINI.

(Ngqeleni. Case No. 246/1918.)

Estate—Widow—Widow's rights to maintenance—Application for removal of guardian—Costs.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: Respondent sued Appellant in the court below for eight head of cattle belonging to the estate of the late Takata to which he is heir.

Appellant admits she has disposed of five of the cattle and has three in her possession, and pleads she was driven away from her late husband's kraal by Respondent.

Appellant claims in reconvention that Respondent be removed from his position as her guardian and for some other person to be appointed.

There are several grounds set out for appealing against the judgment of the court below, but it can only be necessary to state that the evidence does not establish that Respondent drove Appellant from her kraal or gave her sufficient cause to leave it, neither does it prove that Respondent is an unsuitable person to act as Appellant's guardian.

It is a well-known principle of Native Law that a widow has the right to maintenance from her husband's estate only while she is living at his kraal and that she loses this right if she leaves the kraal without just and reasonable cause. It is equally well known that she has no right to dispose of any of the property belonging to the estate of her husband.

Appellant's action in this case has been in conflict with Native Law, and in the opinion of this Court the Magistrate rightly found for Respondent.

As regards the question of costs the Appellant by her unlawful acts rendered these proceedings necessary and is entitled to no consideration.

The appeal is dismissed with costs.

Butterworth. 5th July, 1922. J. Mould Young, Ag.A.C.M.

MAGAQANA vs. NONANTI.

(Butterworth. Case No. 23/1922.)

Estate—Widow—Practice—Widow's right of action unassisted against her guardian to protect her late husband's estate from improper administration—Exception.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: This is an action in which the Plaintiff, a widow, sued the Defendant to show cause why he should not be removed from his position as guardian of her husband's estate, and why some other fit and proper person should not be appointed in his place.

The Defendant excepted to the proceedings on the ground that Plaintiff, being a widow, had no right to institute the action in her own name, and that any process for the removal of Defendant should be in the name of the ward Msukutu.

The Magistrate, after an amendment of the summons had been made, overruled the exception and against this ruling the Defendant has appealed.

In the case of *Nosentyi* vs. *Makonza* (1 N.A.C. 37) it was laid down that "every Native woman has a right of action, unassisted, against the guardian in her late husband's estate, to protect herself, her children and property, from improper administration."

No reason has been advanced why this ruling should be departed from.

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

Butterworth. 5th July, 1922. J. Mould Young, Ag.A.C.M.

DWESENI vs. NODOLOPI.

(Idutywa. Case No. 93/1922.)

Estate—Widow—Widow has right as against her husband's heir to continue to live with the stock allotted to her at the kraal established for her by her late husband—Usufruct.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The present claim is one by the widow of the 'Qadi" of the Great House of the late Booi to be placed in possession of the stock belonging to her House.

From the evidence it appears that during his lifetime Booi placed Respondent and certain stock at a Vee kraal at Xonye belonging to the Right Hand House.

The Appellant contends that as Booi is dead, he as heir to this property will be precluded from exercising any control over it if it is to be kept at this Vee kraal.

It was clearly Booi's intention that the Respondent should remain at Xonye as he had gone to the extent of providing her with a land there. The Respondent would therefore be entitled, after Booi's death, to continue to live at such kraal and enjoy the usufruct of the stock allotted to her by her late husband, subject to the Appellant exercising all the rights due to him as heir.

The appeal is dismissed with costs.

Umtata. 16th March, 1921. W. T. Welsh, C.M.

SIMON P. GASA vs. SPURGEON GASA.

(Umtata. Case No. 415/1920.)

Estate—Will—Dowries paid for daughters after the death of a Native who has left a will do not fall into the estate of the deceased, but become the property of the heir according to Native Custom—Appeal—Limitations of ground of appeal—Native Appeal Court procedure—Objections must be lodged before the sitting of the Court—Exception—Plea in bar—Conflict of Colonial Law and Native Custom—Proclamation No. 142 of 1910. Questions of dowry to be dealt with under Native Custom—Maintenance—Wedding outfit.

The facts are very fully set forth in the judgment of the Native Appeal Court.

Judgment.

By President: Mr. Hemming, for Respondent, hands in a preliminary objection as follows:—

> "Respondent excepts *in limine* to the appeal in the above suit in so far as grounds 1, 2 and 3 in the Notice of Appeal are concerned, inasmuch as the issues therein raised were finally adjudicated upon by the court below in overruling Appellant's Plea in Bar on the 22nd of October, 1920, which judgment was not appealed from within the time prescribed by law.
>
> "Wherefore Respondent prays that Appellant's appeal which was noted on the 25th November, 1920, 34 days after the decision and judgment on the said Plea in Bar, may be confined to grounds 4, 5, 6 and 7 of the Notice of Appeal."

Judgment on Exception.

It is to be regretted that a copy of this objection was not lodged prior to the sitting of the Court. In future where objections of this nature can be but are not so filed, the Court may refuse to hear them.

No authority directly in point has been placed before the Court, and as the issues objected to, in so far as they appear to be material, are set forth in the plea, the Court is of opinion that the objection should be overruled.

SPURGEON GASA vs. SIMON P. GASA.

Judgment.

By President: In this case the Plaintiff, now Respondent, sued the Defendant, now Appellant, in his capacity as the heir and

administrator of the estate of the late Johnson Renton Gasa, and in his personal capacity in an action in which he, the Plaintiff, alleged:—

(1) That the late Johnson Renton Gasa was Plaintiff's eldest son.

(2) That Plaintiff paid the dowry for the late Johnson Renton Gasa's wife, one Eliza.

(3) That Defendant is the eldest son and heir of the late Johnson Renton Gasa by the said union and is also the administrator of the late J. R. Gasa's estate and is sued in the premises in such capacity as well as in his personal capacity.

(4) That one Effie Gasa is the first daughter of the late J. R. Gasa by the said union.

(5) That the said Effie was recently given in marriage by Defendant, who received seven head of cattle and ten sheep in respect thereof.

(6) That by reason of the allegations contained in paragraphs 2 and 4 the said Effie or her dowry belong to Plaintiff and he is therefore, according to Native Law and Custom, entitled to the said seven cattle and ten sheep referred to in paragraph 5, together with their increase.

(7) That, although demanded, Defendant neglects or refuses to hand over the said seven cattle and ten sheep, together with the increase thereof, to Plaintiff, and denies Plaintiff's right in and to the dowry already received and hereafter to be received in respect of and for the said Effie.

To the summons a Plea in Bar in the following terms was filed:—

"For a Plea in Bar the Defendant says that if Plaintiff has any claim or right of action (which Defendant denies) the same should be brought against Eliza Gasa, who is the Executrix Testamentary, duly appointed, of the estate of the said John Renton Gasa."

The Plaintiff replied to the Defendant's Plea in Bar or exception, as he calls it, as follows:—

(1) That the same is bad in law inasmuch as the girl Effie referred to in the summons was unmarried at the time of the said Johnson Renton Gasa's death and was not therefore an asset in his estate.

(2) That the said Effie's dowry devolves, according to Native Law and Custom upon the nearest male relative of the said Johnson Renton Gasa, who is the Defendant.

The Magistrate, in overruling the Plea in Bar, stated:—

"In terms of *Lupuwana* vs. *Lupuwana* (1 N.A.C. 72) Plea in Bar is overruled with costs. The dowry of the girl Effie in the present case cannot be regarded as an asset in an estate which is to be administered according to Colonial Law, and therefore no action can be brought against the Executrix of the late J. R. Gasa for such dowry."

The hearing then proceeded, the Defendant having filed a plea which reads as follows:—

(1) He admits paragraph 1 of Plaintiff's summons.

(2) He has no knowledge of the allegation contained in paragraph 2, and puts the Plaintiff to the proof thereof.

(3) He admits that he is the eldest son of the late J. R. Gasa, but denies he is the sole heir. He says he is a co-heir of the estate of the late J. R. Gasa and his surviving spouse Eliza, and craves leave to refer to the mutual will which has been filed of record. He denies that he is the administrator of the said estate, and further denies that Plaintiff has any claim against him in the premises in his personal capacity.

(4) He admits paragraph 4.

(5) He denies paragraph 5 and says that the said Effie was given in marriage by the said Eliza Gasa in her capacity as the Executrix Testamentary of her late husband's estate, who received any dowry that may have been paid for the said Effie, and now holds the same in her aforesaid capacity.

(6) He denies that Plaintiff has any claim to the dowry of the said Effie, as according to Native Custom there is no obligation on the Great Son to refund dowry, which may have been paid for him by his father, in the manner claimed by the Plaintiff.

(7) He admits paragraph 7.

The Magistrate, after hearing evidence, decided in favour of the Plaintiff, and against this Judgment the Defendant appeals on the grounds:—

(1) That as there is a duly appointed Executrix and Administratrix of the estate of the late Johnson Renton Gasa the Plaintiff should have brought his claim against her and not against the Defendant.

(2) That there is nothing in evidence to show that the Defendant is the administrator of the estate of the late Johnson Renton Gasa as alleged in the Plaintiff's summons. On the contrary, the evidence goes to prove that the administratrix is one Eliza Gasa, who has received letters of administration from the Master of the Supreme Court to administer the said estate.

(3) That the principle laid down in the case of *Lupuwana* vs. Lupuwana, which the learned Magistrate felt constrained to follow, is wrong in law and has lead and is leading to chaos and confusion.

(4) That as all the parties in this case are educated, civilized Natives and have adopted European habits and mode of living, and as the testator, Johnson Renton Gasa, devised his estate according to Colonial Law, Native Law and Custom should not be applied.

(5) That to have two administrators, one under Colonial Law and another under Native Law is bad in law and wrong in principle.

(6) That the evidence shows that the Defendant neither gave the said Effie in marriage nor received any of her dowry. On the contrary, the evidence shows that the said Effie was given in marriage by the Executrix of Renton Gasa's estate at the request of the Plaintiff, who provided the necessary outfit at the request of the Plaintiff.

(7) That the allowance made for the wedding expenses and maintenance and education of the said Effie are wholly inadequate.

This case is an example of the difficulties and confusion which are bound to arise by the increasing conflict of Common Law with Native Custom, caused by the advance in civilization of the Native people.

The deceased J. R. Gasa and his surviving spouse Eliza left a mutual will appointing the survivor and one Dawson Gasa as Executors and Administrators of the joint estate. The Defendant is the eldest son of deceased, and his heir according to Native Custom, and he is sued by his grandfather for dowry paid on account of Effie, eldest daughter of deceased and sister of Defendant. As the Plaintiff paid dowry for the wife of the deceased he is entitled, under Native Custom, to be reimbursed out of the dowry paid for Effie. The Defendant, however, alleges that this dowry has not been paid to him but to Eliza, widow of the late J. R. Gasa, and joint executrix to his estate. It is admitted that Effie was not married at the time of the death of her father, the late J. R. Gasa. The Magistrate, in giving judgment against the Defendant, states he felt bound by the decision in the case of *Lupuwana* vs. *Lupuwana* (1 N.A.C. 72), though that led to the absurd position that while the executrix is bound by law to administer the estate in accordance with Colonial Law, the heir, according to Native Custom, must be held liable as regards this one girl's dowry.

While the time may be approaching when this Court or the legislative authority will have to consider whether Native Customs should continue to apply to civilized Natives who contract marriages by Christian or civil rites, the Court must be slow to interfere with well-established principles of law or practice laid down and followed through a long period of years, by means of which the law has become well defined and crystallised.

In the case of *Luti* vs. *Siqola and Siqola* (2 N.A.C. 157), this Court quoted with approval the decision in the case of *Lupuwana* vs. *Lupuwana*, and followed the ruling therein laid down, which, so far as can be ascertained has not been departed from.

In the case of *Joe Ntlongweni* vs. *William Mhlakaza* (3 N.A.C. 163) this Court in discussing the effect on dowry of a Christian marriage said dowry is paid under Native Custom, and must be dealt with under that Custom; see also the case of *Pantshwa* vs. *Msi* (2 N.A.C. 147).

Section 12 (2) of Proclamation No. 142 of 1910 enacts that in regard to the administration of property devisable by will under the provisions of sub-section (3), section 8, of these Regulations,

and so devised, the law of the Colony shall apply. But it has been held that the institution of dowry is unknown to the law of the Colony and cannot be adjudicated upon under it.

This appeal has been fully and ably argued on behalf of both the Appellant and the Respondent. The former contends that the dowry is an asset in the estate of the late J. R. Gasa, and should be administered by his executors in terms of the mutual will, while the latter claims that dowry paid after the testator's death is not an estate asset and must be dealt with according to Native Custom, as laid down in the decisions of this Court.

It appears to the Court that anomalies cannot be avoided whether the dowry is dealt with according to Common Law or Native Custom. The Superior Courts have long recognised the principle of dual administration of Native estates. In the case of *Xasa* vs. *Xasa* (7 E.D.C. 201) it was held that the Christian wife was entitled to one-half of the joint estate under Colonial Law, while the other half should be administered according to Native Law. This decision was approved in *Estate Tantsi vs. Executors of Nchela* (14 C.T.R. 943), and has been followed by this Court in several reported decisions. These peculiarities of a dual system of administration, though severely commented upon, have not been overruled. In *Mazamisa* vs. *Mazamisa* (1909, E.D.C. p. 226), the learned Judge-President said:—"It is obviously inconvenient, if not inconsistent, to hold that, once a marriage in community of property is established, the Court must order and direct that half the common or joint estate shall be administered according to the law of the Colony, and the other half according to Native Law and Custom."

After careful consideration of the issues involved and the various authorities cited, this Court is of opinion that the Appellant has failed to show good and sufficient grounds why the previous decisions of this Court, founded upon basic principles, should not be followed.

This Court is therefore of opinion that the dowry received for Effie, daughter of the late J. R. Gasa, paid after his death, is not an asset in his estate, but became the inheritance, according to Native Custom, of his eldest son the Defendant, who is answerable to the Plaintiff for whatever claim he has upon it for reimbursement of the dowry paid by him on behalf of the deceased.

In regard to the appeal as to the amount of the allowance made for wedding expenses, maintenance and education of the girl Effie, this Court is of opinion that the deduction ordered by the Magistrate conforms to Native Custom and it is in agreement with the view expressed in the case of *Elias Mafanya* vs. *Klaas Maqizana* (3 N.A.C. 158).

The appeal is dismissed with costs.

Umtata. 22nd March, 1918. J. B. Moffat, C.M.

NGOLO vs. MJOLA.

(Libode. Case No. 1/1918.)

Fees—Fees claimable by Headman acting as messenger—Headman's judgment cannot be enforced.

In this case the Plaintiff claimed from Headman Mjola certain stock which had been collected by the Headman in respect of a judgment given by the Headman, in plaintiff's favour. The Defendant claimed that he was entitled to one beast for his services. The Magistrate gave judgment for the plaintiff for the stock claimed less one beast which was to be paid to the Defendant. The Plaintiff appealed.

JUDGMENT.

By President: In the case quoted by the Magistrate (*Mtambayahlaba* vs. *Samblata*, 1 Henkel, 187) the Court decided that the messenger who recovered the cattle awarded was entitled to a fee, which in that case was a beast.

The Magistrate in this case says that the Headman acted as messenger. It is admitted that the Headman collected the stock. It does not necessarily follow that he did so personally.

It would be most unusual for a Headman to act as his own messenger.

The Headman has no right to enforce his judgment to recover a fee, and he was therefore not entitled to retain the stock until the fee claimed by him had been paid. If he considered that he had a right to a fee he should have tendered the stock and counterclaimed.

The appeal must be allowed with costs. The Magistrate's judgment will be altered to judgment for plaintiff as prayed with costs, excepting that the alternative value of the 20 sheep shall be taken as £10.

Butterworth. 2nd July, 1918. J. B. Moffat, C.M.

NOCHANCE vs. MAGONGQONGO.

(Kentani. Case No. 76/1918.)

Fees—Midwife—Fees recoverable by uncertificated midwife—Medical and Pharmacy Act, 1891, *section* 60—*Exception.*

Action for the recovery of one beast, being the fee payable for the services rendered by the Plaintiff as a midwife at the confinement of the Defendant's wife. The Defendant denied that Plaintiff was called in to render services as a midwife, although he admitted that she was present at the confinement; she came in voluntarily as a neighbour. He further pleaded that as Plaintiff was not a certificated midwife in terms of the Medical and Pharmacy

Act, 1891, she was not entitled to recover fees for the services alleged to have been rendered. Defendant later applied to have this latter "plea" considered as an exception that the summons disclosed no cause of action. The Magistrate upheld this exception with costs, and the Plaintiff appealed.

JUDGMENT.

By President: The Medical and Pharmacy Act, 1891, provides for registration of midwives, but does not debar an uncertificated midwife from practising her profession.

Section 60 of the Act provides that no person shall be entitled to recover any charge for any medical or surgical advice or attendance or for the performance of any operation as a medical practitioner or dentist or commonly performed only by a medical practitioner or dentist.

There is no provision in the Act debarring a midwife, whether certified or not from suing for fees for services rendered as a midwife. The exception taken in the court below should have been overruled.

The appeal is allowed with costs, and the Magistrate's judgment is altered to exception overruled. The case is returned to the Magistrate to be dealt with on its merits.

Umtata. 14th March, 1921. T. W. C. Norton, A.C.M.

MNYELISWA MANJINGOLO vs. NZOYI MANJINGOLO.

(Qumbu. Case No. 116/1920.)

Girls—Allotment of girls—Formalities—Cattle kraal—When girls may not enter—Allotment of girls on return of boys from circumcision.

The facts of the case are immaterial. It was alleged in the grounds of appeal that women are never allowed in the kraal when young men return from circumcision, and that it is contrary to custom to allot a girl without the family being present.

The Native Assessors were consulted, and stated that girls are not allowed to enter the cattle kraal during their periods, but otherwise may do so. They further stated that it is not customary to make an allotment when boys return from circumcision as the allotment of a girl is a family matter while the return of the boys is rather a public matter.

In this case the Magistrate found as a fact that the allotment was made on the occasion of the return of the boys. The Court held this to be a matter of credibility and as the Magistrate, who was in the best position to decide held there was an allotment, the Court said it was not in a position to say the Magistrate was wrong in coming to this conclusion.

Umtata. 9th November, 1920. W. T. Welsh, C.M.

SIDUBEDUBE vs. JEREMIAH RUNE.

(Umtata. Case No. 171/1920.)

Girls—Cession of rights in girls—Formalities—Fakwa Custom—Immoral contract—Maintenance—Dowry.

The facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Appellant, who was the Plaintiff in the Court below, sued the Respondent:

(1) for the return of two girls Nomaqoyi and Nomtantsalala, both daughters of the Qadi Wife of the Great House of his grandfather Nojawolo;

(2) Alternatively for a declaration of rights.

The Respondent pleads that the Appellant's late father Xaketwana having publicly refused to assist in the maintenance of Nojawolo and his family renounced all his rights to the dowries of his sisters Nomaqoyi and Nomtantsalala and that Nojawolo being in indigent circumstances appeared with the Respondent before an attorney and entered into a written agreement in terms of which the Respondent was to maintain Nojawolo, his Qadi Wife and two female children upon condition that after the death of Nojawolo the two children mentioned should become the property of the Respondent and subject to his control and authority and further that he should be entitled to all dowry cattle received for them. Alternatively, the Respondent pleads that he is entitled to be compensated by the Appellant for his support of the late Nojawolo and his family which he assesses at 20 head of cattle.

He claims in reconvention the cattle already received by the Appellant for the girl Nomtantsalala.

The Appellant in his replication denies the alleged renunciation or repudiation by his father Xaketwana, and challenges the legality of the agreement entered into between the Respondent and the late Nojawolo.

As regards the question of the disposal of the two girls to the Respondent who is in no way related to them it has been laid down by the Native Appeal Court, in the case of *D. Pennington* vs. *S. Ndabankulu* (Flagstaff, No. 11/1919) † that such transaction cannot be recognised in a Court of Law.

The only question therefore to be decided is whether the Respondent is entitled to their dowries.

The question whether a man can dispose of his daughter to the prejudice of his lawful heir was put to the Native Assessors. Their opinion is as follows:—

> "If a man wants to give his child away he must first notify his relatives and the Chief otherwise his heir can reclaim

† See page 171 of these Reports.

it." It is clear from the evidence that no such formal notication was made. They further added that a man cannot be "fakwaed" to the extent of the whole of the girl's dowry.

The agreement embodied in the document by which the Appellant's grandfather purported to cede his children to the Respondent, not having complied with the requisite formalities of Native Custom, is void and must be set aside. Nojawolo at the time he obtained assistance from the Respondent was possessed of property in one of his other houses. It is clear, however, that he resided with the Respondent for about two years and that after his death his widow and daughters lived there for a time. For these services he is entitled to be compensated.

The appeal is allowed with costs and the judgment of the Court below is altered as follows:—

The Plaintiff is declared to be the legal guardian of the girls Nomaqoyi and Nomtantsalala and entitled to their dowries less three head of cattle or £30 due to the Defendant for services rendered by him to Nojawolo and his family. The Defendant to pay costs in the Magistrate's Court. The judgment of the Court below on the claim in reconvention is set aside with costs.

Lusikisiki. 19th August, 1919. C. J. Warner, C.M.

MKATSHWA vs. KUSA NDULUKA.

(Bizana. Case No. 70/1919.)

Girls—Dowry—Handing over daughters in payment of debt—Pondo Custom.

The Plaintiff claimed a declaration of rights in regard to Defendant's daughter, Funeka, and payment of six head of cattle and £5 received as dowry for her.

Plaintiff in his summons stated that about 1897 Defendant gave him the said daughter in settlement of a debt due by the Defendant. The girl had since been given in marriage and six head of cattle and £5 had been paid to the Defendant as dowry for her. Defendant admitted the Plaintiff's claim but stated that one cow and £10 only had been paid. The Magistrate declared Plaintiff the lawful guardian of the girl and entitled to all dowry paid for her, and further gave judgment for the cow and £10 already paid. The Defendant appealed.

Judgment.

By President: Respondent's case rests on an alleged agreement by which he was to receive the dowry obtained for Appellant's daughter Nomahashi in satisfaction of a claim he had against Appellant, and the question for decision is simply whether Respondent succeeded in proving his allegation. The custom of handing over a daughter in settlement of a debt is very common in Pondoland, and there is nothing inconsistent with Native Law or Custom in Respondent's claim. Moreover his conduct in endeavouring to get this matter settled for some time past

indicates that he believed he had a good claim to the girl Nomahashi. On the other hand Appellant's conduct in allowing his daughter to live so long with her husband without taking steps to ensure payment of dowry is inexplicable except on the ground that knowing he could not keep the dowry he was indifferent whether the husband paid any or not.

The appeal is dismissed with costs.

Note: *Vide* also judgment in case of *M. Mbonja* vs. *N. Mbonja* on page 54 of these Reports, and also compare judgments on pages 171 and 252 of these Reports.

Lusikisiki. 20th August, 1919. C. J. Warner, C.M.

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SIGIXANA NDABANKULU vs. DENNIS PENNINGTON.

(Flagstaff. Case No. 11/1919.)

Girls—Purchase of rights in girl is an immoral contract—Maintenance not recoverable in such a case—Pledge of anticipated dowry.

The Plaintiff in this case was son of the late Chief Langa, and prayed for an order declaring him to be the guardian and entitled to the care and control of one Amelia, who was the daughter of Plaintiff's late father's sister. Defendant pleaded that at the special request of the late Chief Langa he undertook the duties, responsibilities and privileges of the said Amelia, in respect of whom he agreed to give Langa two head of cattle, which cattle had been duly delivered to the said Langa. It was admitted that Langa's sister (Amelia's mother) was made pregnant by a certain coloured man, and that Defendant, who was not a relative of the seducer, paid Langa two head of cattle for the child when an infant. The Magistrate held that such a proceeding was an immoral contract and was also contrary to Native Custom. Judgment was given for Plaintiff, and the Defendant appealed.

JUDGMENT.

By President: Respondent sued for an order declaring him to be entitled to the care and control of a certain female child, Amelia, the daughter of Nomaswahla the sister of Respondent's late father.

Appellant pleaded that he had obtained the guardianship of Amelia from the Respondent's late father, Langa, to whom he had paid two head of cattle in respect of the said child.

In Native Law the only persons who can claim any rights to the child Amelia, are the natural father, on paying a fine for causing the pregnancy of her mother or the guardian in law of the mother. Any other transaction by which a third party may, for consideration, acquire any rights in the child, partakes of sale, or barter of human beings, and cannot be recognised by a Court of Law. The Native Custom by which the anticipated dowry of a girl is pledged to meet a lawful claim is quite distinct from a transaction of this nature.

Appeal is dismissed with *costs*.

Postea: Subsequently the Appellant sued the Respondent in the Resident Magistrate's Court, at Flagstaff, for four head of cattle or £20, being two head refund of purchase price of Amelia and two head for her maintenance. The Magistrate dismissed the summons. The case came on appeal at Lusikisiki on 17th April, 1920, before Mr. T. W. C. Norton, Acting Chief Magistrate, who gave the following judgment:—

"The Magistrate has found that the purchasing of this girl, already held by this Court to be an immoral contract, and her maintenance for which Appellant now claims payment, is one continuous act. Appellant cannot claim a refund of the purchase price under an immoral contract and as the maintenance of the girl is part of the same transaction, he is not entitled to claim the usual fee. The appeal is dismissed with costs."

Note: See judgments reported on pages 54, 169, 174 and 252 of these Reports. The underlying principle appears to be that a contract whereby a man acquires rights in the *dowry* of a girl is *not* immoral; but where rights are acquired in the *girl herself*, then the contract *is* immoral.

Kokstad. 3rd December, 1920. W. T. Welsh, C.M.

MARY ANN NTOYI vs. KONCO NTOYI.

(Mount Fletcher. Case No. 44/1920.)

Guardianship—Estate—Marriage since 1910 *by Christian rites out community of property—Right of widow to property brought by her into the marriage—Widow of Christian marriage is the guardian of her minor child—Proclamation No.* 142 *of* 1910.

The Plaintiff in this case was married by Christian rites to her husband in 1915: he died in 1918. She claimed the property brought by her into the marriage, which being subsequent to 1910, was not in community of property. She also claimed the guardianship of the minor child of the marriage, as being the mother and natural guardian. The Magistrate gave judgment for the Plaintiff as prayed, with costs.

JUDGMENT.

By President: Proclamation No. 142 of 1910 specifically excludes the operation of Colonial Law from certain results which would ordinarily follow upon the consummation of a marriage between Natives by Christian or civil rites. In the absence of any provision, and none has been brought to the notice of this Court, prohibiting a widow becoming the guardian of her child, issue of a civil marriage, the common law, by which she has the rights of guardianship, would, in the opinion of this Court, apply. The plantiff is therefore entitled to an order declaring her to be the guardian of her child. The marriage in question having admittedly been out of community of property the Plaintiff is justified in claiming and removing the property brought by her into the marriage . . . .

(The remainder of the judgment is immaterial.)

Butterworth. 2nd March, 1921. W. T. Welsh, C.M.

M. DLAKIYA vs. Z. NYANGIWE.

(Kentani. Case No. 235/1920.)

Guardianship of children, the issue of a marriage by Christian rites, devolves upon the mother upon the death of the father—Claim for dowries of girls—Pleading—Exception—Special plea—Plea in bar.

The Plaintiff, the elder brother of the late Rafu, claimed that he was the legal guardian of the late Rafu's family, and entitled to the custody of the two minor daughters of the marriage, and to the dowry paid for the third daughter of the marriage, who was married. The Defendant was the son and heir of one Yengiwe, to whom Rafu's widow was married before she married Rafu. Defendant pleaded that he laid no claim whatsoever to the estate of the late Rafu or to the custody or guardianship of his daughters. The Plaintiff was at liberty to remove them from his kraal. After pleading to this effect he went on to say:—"And should the above plea not avail then Defendant excepts to the summons in form and manner set forth on the annexure marked 'A.' Defendant as hitherto delays in excepting to Plaintiff's right of action inasmuch as he seeks to avoid confusion in dispute where he is not concerned."

The annexure "A" was an exception that as the marriage of Rafu and his wife was by Christian rites, his widow was the guardian of the children, and the question of guardianship could not therefore be decided by Native Custom. He further went on to say: " Should the above exception not avail, Defendant excepts to the summons on the grounds that not the Plaintiff but one Qaziyana is the proper person to institute the present action to be declared guardian of Rafu's estate and the children."

The Plaintiff's attorney applied for this to be struck out as being contradictory of the plea and embarrassing. The Court directed that the exception should be dealt with first, and that should it be overruled, the question of joining issue on the plea could be ruled upon. The Magistrate then took evidence which went to show that the late Rafu and his wife were married by Christian rites, and this was admitted by the Defendant's attorney. The Magistrate sustained the exception, holding that the children of a Christian marriage are lifted out of the operation of Native Law as regards guardianship. The Plaintiff appealed on the grounds that the Magistrate was wrong in not sustaining his objection to the form of pleading, and that the Magistrate should have overruled the exception and gone into the case on its merits.

Judgment.

By President: In this case Plaintiff claims from Defendant a declaration that he is the guardian of certain two minor girls, and a married woman, the sister of these two girls, also that he is entitled to receive their dowries.

Defendant specially pleads that he does not lay any claim to any of these girls or their dowries, that he has never done so, and that he has tendered to deliver them, and still tenders to do so.

He further excepts, by what is really a plea in bar, that Plaintiff is not the legal guardian of the girls, as their mother was married by Christian rites, and also that Plaintiff is not the *eldest* brother of her late husband.

It is admitted that the woman was married by Christian rites, and it follows that she is the legal guardian of her minor children. Plaintiff therefore cannot become their guardian during the lifetime of the mother.

It was admitted in argument before this Court, that the Plaintiff is not the eldest brother of late Rafu, who alone during his guardianship of the estate has, as such eldest brother, a right to claim any dowry or dowries yet to be paid, and therefore Plaintiff cannot succeed on this point.

In the opinion of this Court the Magistrate was justified in ruling on the so-called exception, before dealing with the special plea, which is in reality also a plea in bar.

Had the pleadings been more carefully drawn, a good deal of confusion and costs would have been avoided.

The appeal is dismissed with costs.

Lusikisiki. 13th August, 1920. W. T. Welsh, C.M.

MATONTI vs. SIKATELE.

(Lusikisiki. Case No. 31/1920.)

Guardianship—Pondo Custom—Appointment of guardian.

The facts of the case are immaterial.

JUDGMENT.

By President: The circumstances of this case having been referred to the Native Assessors, they state that, according to Pondo Custom, it is not competent for a man to appoint as guardian to his minor son and heir any person other than the person, being a major, who would inherit in case of the heir's death, and that even among Chiefs, the guardianship goes according to Custom.

This Court is not prepared to say that under no circumstances whatever would it not be competent for man to select and nominate as guardian of his minor son, another fit and proper relative in place of the one who would ordinarily assume the office.

In this case, however, no reasons are assigned for the deceased's action in departing from the Custom, as stated by the Assessors, in the absence of which the ordinary procedure as stated in the case of *Mdungazwe* vs. *Mabacela* (1 N.A.C. 219) should be followed.

The remainder of the judgment is immaterial.

Lusikisiki. 11th December, 1919. C. J. Warner, C.M.

KWADA MBI vs. MAGQABENBUZI.

(Lusikisiki. Case No. 225/1919.)

" Isinuka " beast—Smelt out wife—Pondo Custom—" Isinuka " beast is property of woman's father, but the kraal where she took refuge may claim something to re-imburse expenses.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

Judgment.

By President: Respondent is the son and heir of the late Mapetse and has a sister Nomalawu. Nomalawu grew up at the kraal of her mother's brother, the Appellant, who gave her in marriage to one Makonxa, the dowry obtained being handed to Respondent. Subsequently Nomalawu was smelt out and went to the kraal of Appellant for refuge, where she lived for some years, but it appears that Respondent killed a beast as a sacrifice for her, and also supplied her to a certain extent with food. After the death of her husband, his son wished her to return to him, and Appellant demanded an " Isinuka " or cleansing beast. A white heifer was paid to Appellant by the son of Makonxa and was claimed by Respondent on the ground that as " eater " of the dowry, he is entitled to the " Isinuka " beast. The Magistrate gave judgment for Respondent and the appeal is against this judgment.

The question is submitted to the Pondo Assessors, who state that according to Custom, the " Isinuka " beast belongs to the woman's father, but the kraal, where she took refuge, may demand something to re-imburse expenses incurred while she lived with them, from her father.

The appeal is therefore dismissed with costs.

Umtata. 22nd July, 1919. C. J. Warner, C.M.

MBIZO vs. MAGOQWANA.

(Ngqeleni. Case No. 28/1919.)

" Isipipo " beast—Pondo Custom—" Isipipo " beast is property of the wife and on her death it is the inheritance of her youngest son—" Nyoba " fee—Dowry, apportionment of—" Ntonjane."

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: Respondent sued Appellant in the court below for £4, which he alleges was paid as dowry for his sister Mandovu, who had been allotted to him, upon her second marriage with one Josiah, a red and white cow and its calf, which were paid as dowry for Respondent's daughter Nontso, and a black ox which Respondent acquired by purchase.

Appellant admits the receipt of the sum of £4 which he states was paid to him as a "Nyoba" fee in respect of Mandovu, and claims it as head of the kraal, and denies her marriage to Josiah. He admits having possession of the cattle in dispute and pleads he has apportioned them to himself to replace a beast killed at Mandovu's "Intonjane," and a beast contributed by the mother of the parties with the consent of Paulikali towards the dowry paid by the Respondent for the mother of the girl whose dowry is in dispute. Appellant's claim to the last animal is based on an allegation that the animal contributed to the dowry paid by Respondent was an "Isipipo" beast, and was the property of Paulikali, who would inherit it as youngest son of his mother.

Appellant claims he is heir to Paulikali. Respondent brings evidence to show that the claim in respect of Mandovu's "Intonjane" ceremony was settled, and the court below accepted this evidence.

With regard to the alleged "Isipipo," the court below found that it was not an "Isipipo," but a gift from the mother of the parties to the Respondent. This Court agrees with the court below that it is immaterial whether it was an "Isipipo" beast or not, for on the question being put to the Native Assessors they state: "The 'Isipipo' is the property of the wife, and on her death if she has even five sons it goes to her youngest son. If the youngest dies without issue the 'Isipipo' goes to the eldest son because the youngest son is the inheritance of his eldest brother. During the lifetime of the woman she may dispose of the 'Isipipo' and may also give it to any of her sons."

It would therefore seem that even if this were an "Isipopo" beast Respondent's mother was within her rights in giving it to Respondent.

The Magistrate found there was a marriage between Josiah and Mandovu, this Court agrees with this finding, and also with the findings on the other points raised, and the appeal is dismissed with costs.

Kokstad. 18th August, 1920. W. T. Welsh, Ag.C.M.

K. MASEPE vs. E. SESHEA.

(Matatiele. Case No. 94/1920.)

Kobo cattle—Ditsua cattle—Payment of Kobo cattle not enforceable in District of Matatiele—Basuto Custom.

The facts of the case are not material.

JUDGMENT.

By President: The question for decision in this case is whether "Kobo" cattle are recoverable at law, and if so how many.

On the matter being referred to the Native Assessors, Ralibitso states that according to Basuto Custom a "Kobo" beast can be sued for, but admits he does not know of any cases in which this has been done.

The Magistrate, in his reasons for judgment, states the Basutos in the District of Matatiele are very doubtful as to whether the custom obtains there, but that experts in Basutoland state the custom is an enforceable one.

The Magistrate finds that the "Ditsua" cattle have not been paid. Ralibitso states that the maternal uncle cannot be called upon to pay a "Kobo" beast before he received the "Ditsua" cattle.

The Plaintiff obtained judgment for two "Kobo" cattle against her father's son and heir.

This Court is not satisfied that the payment of "Kobo" cattle has ever been enforceable in the District of Matatiele. Had such a custom obtained cases must necessarily have occurred and none have been brought to the notice of this Court. It would thus appear that in so far as the District of Matatiele is concerned, the custom has been recognised as conferring only a moral or natural obligation.

This Court, therefore, is not prepared to recognise what may may be a custom in Basutoland, but which clearly appears not to be an established custom in the district where the cause of action arose.

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

Lusikisiki. 16th April, 1920. T. W. C. Norton, Ag.C.M.

QUKWANA AND ANOTHER vs. MAKUBALO.

(Port St. John. Case No. 87/1919.)

Kraal Head liability—Responsibility of kraal Head for torts of inmates does not extend to matters of contract—Practice—Provisional and final judgment.

The essential facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Respondent sued Appellant and his son in an action on a contract of sale.

Paragraph 1 of the summons is not in accordance with Native Custom, which does not hold a father liable for his son's debts in matters of contract. The evidence does not support the Magistrate's finding in this respect.

The Magistrate has given final judgment against both Defendants in the court below, although Defendant No. 1, the actual party to contract, was in default.

As no appeal has been brought by Defendant No. 1, this Court cannot in the present appeal deal with this part of the judgment. Appellant was wrongly joined in the summons. As far as he is concerned, the appeal is allowed with costs and the name of Defendant Mdulashe expunged from the summons and judgment with costs in the court below.

Note: Paragraph 1 of the summons reads as follows: "That Defendant No. 2 is the guardian of the Defendant No. 1 and liable for his torts and actions." The Magistrate accepted the plaintiff's version of the transaction and gave judgment for *Plaintiff* as prayed.

Umtata. 19th November, 1919. C. J. Warner, C.M

JAKENI MDINGI AND NHINHI MDINGI vs. JOE WADONISE.

(Engcobo. Case No. 251/1919.)

Kraal Head liability—Appeal—Appeal against a provisional judgment—Strict rules of pleading do not apply to Kraal Head responsibility.

The essential facts are clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: This is an appeal from a judgment from the Court of the Resident Magistrate, Engcobo, wherein Appellant was held to be responsible for the torts of his younger brother Nhinhi, who is alleged to have been an inmate of Appellant's kraal, and who was sued with Appellant. Appellant seeks to show that Nhinhi does not live with him but in the kraal of their late father Mdingi.

The Magistrate found that Nhinhi was an inmate of Appellant's kraal. There is evidence to support this and the appeal is dismissed with costs.

*The point was not taken that this is an appeal against a provisional judgment, but as Native Custom of Kraal Head responsibility is without parallel in our law and therefore is not one to which the rules of pleading can be strictly applied this Court decided to hear the appeal on the sole question whether Appellant could be liable for the torts of Nhinhi as Head of the Kraal where Nhinhi resides.

Note: The evidence shows that the first Defendant (Nhinhi or Nkinki) was a widower.

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*The decision in this case was followed by the Native Appeal Court in the case of *S. Huwa and Another* vs. *S. Ntantiso*, on appeal from Kentani, Native Appeal Court, Butterworth, July, 1923.

Umtata. 16th November, 1921. T. W. C. Norton A.C.M.

CELIGAMA NGCONGCO vs. MAQAKAMBA alias GAWUZA DAYIMANI AND DAYIMANI GURUWE.

(Engcobo. Case No. 419/1921.)

Kraal Head liability—Kraal Head who is not joined with tort-feasor in original action cannot subsequently be sued with tort-feasor and made responsible for the tort—Special plea.

Action for five head of cattle or their value £25 as damages for the seduction of Plaintiff's niece by the first Defendant and her resultant pregnancy. The Plaintiff had previously sued the first Defendant alone for the tort, and the Magistrate had given judgment of absolution from the instance. The Defendant No. 1 now put in a special plea that as he had been sued alone for the tort and the judgment of absolution given in that case, it was not now competent to join the second Defendant with him. The Magistrate overruled the special plea on the ground that the judgment in the first case was one of absolution and not a final judgment. The Plaintiff appealed.

JUDGMENT.

By President: The appeal in this case is on the Magistrate's ruling overruling the special plea that as second Defendant had not been joined in the original case he could not now be joined with first Defendant.

In a long series of decisions this Court has laid down the principle that if a Plaintiff elects to sue an inmate of a kraal without joining the head of the kraal he cannot thereafter make the head of the kraal a party.

The decided cases are discussed in the case quoted in Meaker, page 139.

In the opinion of this Court the Magistrate has erred in his ruling as far as second Defendant is concerned.

The appeal is allowed with costs and the judgment altered to "Special plea upheld with costs in so far as second Defendant is concerned," and the case is remitted to the Magistrate for decision on the merits with respect to first Defendant, second Defendant's name to be expunged from the record.

Lusikisiki. 14th December, 1922. W. T. Welsh, C.M.

MATIKA vs. NORATI AND LUKALWENI.

(Tabankulu. Case No. 81/1922.)

Kraal Head liability—Adultery—"Mgqabo" beast—Pondo Custom.

Action against the Defendants jointly and severally for five head of cattle or £25 as damages for adultery of the first Defendant

with the Plaintiff's wife, the second Defendant being sued as the Head of the kraal at which the first Defendant, an unmarried man, resided. The second Defendant denied liability for the first Defendant, who was no relation of his. and pleaded that at the time the pregnancy was reported he had tendered a "Mgqabo" beast to the first Defendant and instructed him to return to his own people. The first defendant had, however, left his kraal without taking the beast, though it was still at his disposal. The Magistrate gave provisional judgment against Defendant No. 1 and dismissed the summons with costs against Defendant No. 2. The Plaintiff appealed.

JUDGMENT.

By President: The Native Assessors having been consulted state that according to Pondo Custom when a man not related to the kraal Head resides with the latter and there commits adultery, the kraal head can free himself from liability by the payment of a "Mgqabo" beast. They further state that it is a sufficient compliance with the custom for the Kraal Head to hand the beast to the tort feasor and instruct him to drive it to his father, and if this is not done the Plaintiff can himself take the "Mgqabo" beast to the father.

In the present case a formal tender was actually made and in the case of *Mpikeloli* vs. *Nono* (3 N.A.C. 136) it appears that has a tender of a "Mgqabo" beast been made during the proceedings that would have been held to be a compliance with the custom in question.

In view of the Assessors' statement of custom the appeal is dismissed with costs.

Lusikisiki. 19th April, 1920. T. W. C. Norton, A.C.M.

KUTSHUZA vs. LUNYENI AND FIVE OTHERS.

(Libode. Case No. 137/1919.)

Kraal Head liability—Responsibility of Kraal Head in cases of witchcraft—Appeal—Appeal against a provisional judgment —Native Assessors' statement of custom not accepted.

The Plaintiff sued one Mazimasana, together with one Mazimba, an inmate of his kraal, and also one Yunyeni Myalo, together with Matanzima and Makwedini, inmates of his kraal, for £200 damages in respect of the alleged burning down of six of Plaintiff's huts by the Defendants Mazimba, Matanzima and Makwedini. Mazimasana and Lunyeni were sued as being responsible for the wrongful acts of the inmates of their respective kraals. At the hearing of the case Mazimasana only appeared, the other Defendants being in default. Mazimasana admitted that Mazimba was an inmate of his kraal, but he, Mazimba, was at present undergoing imprisonment at Kimberley, as a result of a conviction at the Circuit Court in respect of the burning of the huts in question; Mazimasana denied that he was liable for Mazimba's crime. The

Magistrate heard evidence and then gave provisional judgment for Plaintiff as against all Defendants for £150 and costs. Mazimasana appealed.

JUDGMENT.

By President: A preliminary objection is taken that the judgment being provisional, no appeal lies at this stage.

The Magistrate by his decision has in effect held that Appellant is responsible in cases of arson and to this extent his judgment is final as against Appellant. †

In terms of the ruling in the case *Mongomele & Ors* vs. *F. Mazinyo* (Meaker 212), the objection is overruled.

The appeal is whether according to Native Law, Appellant is liable in damages for the crime of arson committed by his son. The other grounds of appeal are not appealable at this stage, the judgment being only provisional.

The Native Assessors are asked to express an opinion on the liability of the Kraal Head in cases of arson. They state that this being a crime based on witchcraft, the Head of the kraal is not responsible.

This Court cannot agree with this opinion, as the principle is established that the Kraal Head is responsible for the torts of inmates (Meaker 137).*

The appeal is dismissed with costs.

Lusikisiki. 12th December, 1922. W. T. Welsh, C.M.

NTSHONGELA DLOMO vs. MJOJI DLOMO.

(Flagstaff. Case No. 140/1922.)

Kraal site—Proclamation No. 143 of 1919—Allotment of lands is a matter for action by the Magistrate in his administrative capacity, and his order thereon cannot be made the subject of litigation before the Court—Exception.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: In this case the Plaintiff, now Appellant, claimed from Defendant, now Respondent, payment of the sum of £10 as compensation, alleging that he had erected certain huts upon a residential site in a Crown location which he had been authorised to occupy in 1912, but that the Defendant claimed to be the owner of the said site which the Magistrate in June, 1922, in his administrative capacity had decided to be his. The Defendant excepted to the Plaintiff's summons as disclosing no cause of action.

† See footnote on page 178.

* *Tomsana* vs. *Manqanyana and Dlangamandla*, 3 N.A.C. 137.

It appears that the land in question was allotted to the Defendent in 1912, in support of which the register of land sites was produced. On 12th June, 1922, the matter came before the Magistrate in his administrative capacity, when he decided in favour of the Defendant. At the hearing of the action the Plaintiff wished to call evidence to show that the "land" was allotted to him and that the registration referred to was obtained by fraud. This application was refused and judgment entered on the exception for the Defendant with costs. It is admitted by the parties that no mention was made of compensation for improvements for huts erected.

The allotment of land is vested by the regulations in the Magistrate, whose actions in connection therewith are administrative and specifically precluded by section 21 of Proclamation No. 143 of 1919 from appeal or review by any court.

The present action is an attempt to obtain a review or reversal of the Magistrate's administrative decision by an order of court. In the opinion of this Court the presiding Magistrate had no authority to entertain the Plaintiff's claim in respect of Crown land found after due enquiry to be in the lawful occupation of the Defendant.

The appeal is dismissed with costs.

Kokstad. 7th December, 1922. W. T. Welsh, C.M.

MEVANA MPAKANYISWA vs. MAYIME ASSISTED BY MINYA.

Mount Frere. Case No. 62/1922.)

Kraal site—Proclamation No. 143 of 1919—Heir—Rights of holder lapse on his death and cannot form ground of action at law by heir, the re-allotment being a matter for the Magistrate in his administrative capacity.

Action for an Order of Court declaring the Plaintiff to be the owner of a certain kraal site, and also for an order of ejectment against the Defendant. The Defendant pleaded that he had bought the site from the widow of the late holder, who had the Headman's permission to do so. The Magistrate declared the kraal site to belong to the Plaintiff, and declared the alleged sale to be null and void. He further ordered the Defendant to vacate the site. The Defendant appealed.

JUDGMENT.

By President: The Plaintiff, alleging that he was owner of a certain kraal site in the district of Mount Frere, sued for and obtained an Order of Court declaring him to be the owner thereof and ordering the Defendant to vacate the same. Plaintiff claims to be the owner of the site by virtue of being heir to his late father Ntsumpa, the previous occupier. On the death of Ntsumpa his rights were *ipso facto* cancelled by section 9 (2) of Proclamation No. 143 of 1919. This section provides that an heir has the first

claim for re-allotment should the Magistrate consider that he requires the same. No steps appear to have been taken by the Plaintiff to obtain the Magistrate's administrative approval as provided by the Proclamation.

Whatever action may be open to the Plaintiff he is not, in the opinion of this Court, entitled to an order made by the Magistrate.

The appeal will be allowed and the judgment in the court below altered to "Absolution from the instance with costs." In the special circumstances of the case there will be no order as to the costs of appeal.

Umtata. 21st July, 1921. T. W. C. Norton, A.C.M.

J. MABONA vs. G. MABONA.

(Engcobo. Case No. 229/1920.

Land—Rights of women—Women have the use of land but the owner is the head of the family—Heir—Right of heir to the crops yielded by the land for the support of the deceased's family.

The essential facts are clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: Appellant sued Respondent for certain crops and by agreement the court below was asked to decide in which party the right to a certain land vested.

The Magistrate found for Respondent, and the appeal is against this decision.

The grounds of appeal are based on the supposition that Appellant is entitled to the land by virtue of the fact that his mother had cultivated it for years, that Respondent's mother who deserted her husband years ago must have forfeited any rights she may have had.

The Magistrate does not accept evidence of the allotment to Appellant's mother and this Court considers he was not only justified in his view, but also that appellant's contention is unsound. Women have the use of lands, but the owner is the head of the family and it is incorrect to say that succession to a land is through a woman. The father of the parties, who died last year, had this land only, and both his Great and Right Hand families were supported by it. The crop in question was for the benefit of all the family and the Respondent, heir to his deceased father, succeeds to his responsibilities, and there can be no doubt that the land devolved on the Great House and the heir is entitled to the crops to enable him to support his late father's family. This Court is asked at least to amend the judgment as no evidence of value of crop was led. As however the grain in question is in possession of the Headman, Appellant runs no risk of being made to pay the value claimed. The appeal is dismissed with costs.

Lusikisiki. 5th April, 1921. W. T. Welsh, C.M.

MNYOVANE XAMA vs. MFOKAZI XAMA.

(Flagstaff. Case No. 229/1920.)

Maintenance—Pondo Custom—Elder brother not liable to younger brother who supports his mother and sisters at his father's kraal.—Exception.

In this case a younger brother sued his elder brother for the maintenance of his mother and sisters. It appeared that the Plaintiff was maintaining them at his late father's kraal. Defendant excepted that the Plaintiff had no action against him under these circumstances, and the Magistrate allowed the exception. The Plaintiff appealed.

JUDGMENT.

By President: The Native Assessors having been consulted state:—

That according to Pondo Custom a younger brother who lives with and maintains his mother and sisters at his father's kraal cannot thereafter claim maintenance from his elder brother who lives elsewhere, as it is his duty to maintain them under the circumstances.

In view of this statement the Magistrate's decision upholding the exception that the summons disclosed no cause of action is sustained and the appeal is dismissed with costs.

Umtata. 12th February, 1919. C. J. Warner, C.M.

NJINELI MAPIKANA vs. PUTSUBANA FELEMNTWINI.

(Engcobo. Case No. 121/1918.)

Maintenance—Maintenance payable for a boy—No allowance for assistance.—Special plea.

Plaintiff, Putsubana Felemntwini, sued Defendant Njineli Mapikana, for £30 or four head of cattle for the maintenance of Mzanywa, Nomjane and Nana, children of the late Mapikana, and also one Noheshele, widow of the Right Hand House of the late Mapikana. Defendant was the eldest son and heir of the late Mapikana's Great House. Noheshele was Plaintiff's aunt on his father's side. Defendant pleaded specially:—

(1) That as he was the eldest son of the Great House, and the children in respect of whom maintenance were claimed were children of the Right Hand House, of which Mzanya, a minor, was the heir, he should be sued in his representative capacity as guardian of the children.

(2) That as Mzanywa was a boy of about 14 years of age and was herding stock, his services sufficiently compensated

for his upkeep, and no "isondlo" fee was claimable on his account according to Native Law and Custom.

(3) That the woman Noheshele stayed with Plaintiff as the representative of her people, who had received the dowry for her, and therefore no maintenance was claimable on her account

Evidence was led on the special plea, which was upheld by the Magistrate as far as the woman Noheshele was concerned, and her name was expunged from the claim. Further evidence went to show that a cow was loaned and a bag of mealies supplied by the Defendant to Plaintiff to assist in the maintenance. The Magistrate gave judgment for three head of cattle or £15 and costs. Defendant appealed on the grounds, *inter alia*, that maintenance for Mzanywa should not have been allowed, and that the Defendant's assistance in maintenance should have been taken into consideration. The Magistrate's reasons for judgment were as follows:—

"Maintenance cannot be claimed for the support of a male child as his services are considered sufficient for his keep, *provided he is old enough to work, or herd cattle* (*Seymour*, page 149). In the present case the boy, Mzanywa, for whom maintenance is claimed, is said to have been a sickly child and, in the opinion of the Court, the services rendered by him up to the time of his removal were not sufficient for his keep as he was only then becoming useful.

"The assistance, if any, rendered by the Defendant in the maintenance of the children cannot be taken into consideration under Native Custom.

JUDGMENT.

By President: The question in this case is whether "isondlo" or maintenance may be claimed in respect of the boy Mzanywa, and secondly, whether in payment of maintenance fees allowance should be made for the use of the cow and bag of mealies supplied by Defendant for the use of the family while they resided with Plaintiff, in the court below. On the question being submitted to the Native Assessors they state that "isondlo" may be claimed for a boy who went to his mother's people with his mother as a baby and lived there for some time, and that no allowance can be claimed under Native Law in respect of the cow and bag of mealies supplied by Defendant.

It therefore appears that the judgment in the court below was correct.

This is not in conflict with the decision in the case of *Hlatuka* vs. *Malonhlo* (1 Henkel, 45), and *Lande* vs. *Soga*, decided in this Court in July, 1918 (not yet reported)† where the facts were different from the facts of this case.

The appeal is dismissed with costs.

†(Page 186 of these Reports).

Umtata. 13th July, 1918. C. J. Warner, C.M.

BENI LANDE vs. MORRIS SOGA.

(Xalanga. Case No. 32/1918.)

Maintenance—No maintenance payable in respect of persons who are dead.

In the case the Plaintiff, Morris Soga, sued the Defendant, Beni Lande, for certain property which he alleged belonged to one Major Rasmeni, deceased, of whom he was the heir. Major Rasmeni was the only son of the late Zaba Rasmeni, who was the eldest son of the Great House of the late Rasmeni Soga. The Plaintiff was second son of the Great House of the late Rasmeni Soga. The above facts were admitted by the Defendant, but he alleged that the late Major Rasmeni was possessed of only one beast at the time of his death, and this was afterwards sold for the purpose of buying medicines for his (Major's) sister. He counter-claimed, *inter alia*, for maintenance fees in respect of the late Major and his sister, Annie, also deceased. The Magistrate gave judgment for the Plaintiff in convention for certain stock and money, and for the Defendant (Plaintiff in reconvention) for two head of cattle—one head for the maintenance of Annie and one head for her wedding expenses. The Defendant appealed on the ground that he was entitled to two head for Annie's wedding expenses and also to one head for Major's maintenance. At the hearing of the appeal the Native Assessors were consulted and stated that maintenance cannot, in Native Law, be claimed in respect of persons who are dead.

The Appeal Court held that the appeal in respect of Major's maintenance must fail for the reasons stated by the Native Assessors, and refused to disturb the Magistrate's finding on the claim for wedding expenses, particularly as the Defendant was awarded a beast for Annie's maintenance, to which he was not entitled.

Kokstad. 20th August, 1918. J. B. Moffat, C.M.

MAROQOKAZI vs. MJARO.

(Umzimkulu. Case No. 237/1918.)

Maintenance—Husband not liable to maintenance for deserting wife, whose people have received the dowry for her.

Plaintiff was the great wife of the Defendant and alleged that Defendant had driven her away without any lawful reason or just cause, and claimed certain 29 head of cattle for the maintenance of herself and her five children.

The Defendant pleaded that the Plaintiff had deserted him and that he looked upon the marriage as dissolved. He had married another wife and placed her in the great hut.

Plaintiff denied that the marriage was dissolved and stated that she was and always had been willing to return to the Defendant with her children.

The Magistrate gave judgment for Defendant with costs.

The Plaintiff appealed.

JUDGMENT.

By President: The case of *Meleni* vs. *Mandlangasa*, heard in this Court on 5th December, 1911, reported in 2 Henkel, p. 191, has been quoted in support of the appeal.

The circumstances in that case differ materially from those in this case.

In that case the husband turned his wife out of the kraal and removed the property of the kraal, alleging misconduct on her part, which, however, was not proved.

In this case the woman brought a charge of assault against her husband on the trial of which he was acquitted. She left his kraal and has obtained a site from the Magistrate on which she has erected a hut.

The Defendant is prepared to provide for the maintenance of the children if they will return to his kraal, but declines to have his wife back. At the same time he says he does not claim the return of the dowry which he paid for her.

The Plaintiff has only herself to blame for the position she is in. She left the Defendant, and her people have the dowry paid for her, out of which they should provide for her maintenance.

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

Umtata. 12th February, 1919. F. H. Guthrie, R.M., Port St. John's, President.

MAYILE MDAKILITYE vs. NOMBO NZENZE

(Umtata. Case No. 284/1918.)

Marriage—Seduction—Not unusual for a boy to marry within a short time of coming out of the "usutu" hut.

The facts of the case are immaterial.

EXTRACT FROM JUDGMENT.

By President: . . . . The point as to what period should elapse after a boy comes out of the "usutu" hut before he marries was submitted to the Native Assessors, who state:—

(1) That if a boy makes a girl pregnant he is usually as soon as possible placed in the "usutu" hut and then married to the girl within a very short period of his coming out.

(2) That even if the girl was not made pregnant before the boy entered the hut it is not unusual for a boy to marry within a short period of his coming out.

In this case, therefore there seems nothing out of the way in Plaintiff's son coming out the the "usutu" hut in the spring and getting married before he died in the following weeding season . . . ."

Umtata. 15th July, 1920. W. T. Welsh, Ag.C.M.

MBAMBALALA vs. PLAATYI MTWANA.

(Tsolo. Case No. 139/19.)

Marriage—Ceremony—No marriage when girl substituted for a woman who has discarded her husband—Dowry contributed by father for son is a gift to the son in whom it subsequently vests.

Plaintiff, Mbambalala, sued the Defendant, Plaatyi, for the return of two head of cattle, being his property, which were paid as portion of the dowry by his illegitimate son, Dazini, for the Defendant's niece, one Nomagazi, who subsequently discarded Dazini. The Defendant admitted the marriage of Dazini and Nomagazi, and that Nomagazi discarded Dazini, but stated that Plaintiff refused to accept return of the dowry, but asked for his (Defendant's) daughter Kogi to be substituted, the dowry paid for Nomagazi to be left as dowry for Kogi. He further stated that Kogi was now living with Dazini as his wife. The Plaintiff replied that he had no knowledge of any arrangement to substitute Kogi for Nomagazi. The Magistrate found that Plaintiff had subscribed two head of cattle to the dowry paid by Dazini, and that on the dissolution of the marriage between Dazini and Nomagazi, the Defendant had returned them to Plaintiff, and Dazini jointly by word of mouth, but they had not been removed from Defendant's kraal. The Magistrate said that Dazini had no right to pay away these cattle as dowry without the Plaintiff's consent, as it was not in accordance with Native Custom. He gave judgment for Plaintiff as prayed with costs. The Defendant appealed on the grounds (1) that the judgment was not in accordance with evidence, (2) that the action was wrongly brought against the Defendant, inasmuch as if the Plaintiff had any cause of action it was against Dazini, (3) that assuming the evidence to be correct the property in the cattle vested in Dazini, (4) that two years had elapsed since the marriage of Dazini and Nomagazi and the Plaintiff's failure to take action immediately to recover his cattle was a tacit approval of Dazini's action.

JUDGMENT.

By President: The question of custom having been put to the Native Assessors, they state that:—

When a woman discards her husband and another girl is substituted by her guardian, there is no marriage ceremony, and that the girl is either sent or fetched according to circumstances.

That any cattle contributed by the father are a gift and become the second woman's dowry, though if the son is living at the father's kraal he should be consulted, and if living apart he should be told any objection however would be of no effect.

In view of this statement of Native Custom this Court is satisfied that the dowry became dowry for the girl Kogi, and that the Plaintiff is not entitled to recover the cattle which he contributed, Dazini having the right to let his dowry stand for the wife substituted by the Defendant.

The appeal is allowed with costs and the judgment altered to absolution from the instance (as asked by the Appellant) with costs.

Butterworth. 15th November, 1922. J. M. Young, A.A.C.M.

ANNIE DLALO vs. MHLABENI NDWE AND OTHERS.

(Butterworth. Case No. 54/1922.)

Marriage—Christian marriage—Rights of wife and children of prior Native marriage—Proclamations Nos. 227 *of* 1898 *and* 142 *of* 1910—*Marriage by Christian rites in Colony, of Natives who at the time are domiciled in the Territories, subsequent to promulgation of Proclamation No.* 142 *of* 1910 *falls under provisions of that Proclamation.*

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

JUDGMENT.

By President: In this case the Plaintiff, now Appellant, claimed a declaration of rights against the Defendants, now Respondents, declaring her to be the only widow of the late Samana, and as such entitled to the sole use of certain property, including a kraal site and an agricultural land situate in the district of Butterworth, where the provisions of Proclamation 227 of 1898 are in force.

It appears that the late Samana married the third Defendant, Nonqumba, according to Native Custom about 1897, and that during the subsistence of this marriage he eloped with the Plaintiff and married her according to Christian rites at East London on 29th December, 1910. Samana died some three years ago.

The Magistrate gave judgment in favour of the Defendants on the ground that Samana having failed to comply with the provisions of section 7 (1) of Proclamation No. 142 of 1910, the provisions of section 4 must apply and accordingly the third Defendant should succeed under the provisions of section 9 (1). It is clear that the Plaintiff and the late Samana were domiciled in the Transkeian Territories at the time of their marriage, which, if it had been celebrated therein, would have been governed by Proclamation No. 142 of 1910 which became operative from the 20th October, 1910. The first question to decide is whether the provisions of Proclamation No. 142 of 1910 apply to the property of the late Somana, as they undoubtedly would have done had his marriage with the Plaintiff been celebrated within the Transkeian Territories, where they were both domiciled, instead of at East London. It was decided in the case of *Blatchford* vs. *Blatchford* (1 E.D.C., 365) that the law of the domicile of marriage will prevail to regulate the rights of spouses, in regard to property acquired in the Cape Colony by persons married elsewhere, but who have subsequently removed to the Colony. A similar question was considered in the case of *Brisley* vs. *Brisley* (1899, S.C., 313). In that case Brisley, who was domiciled in Griqualand East, married his wife in England both intending to reside in this Colony, but no antenuptial contract was executed. It was held by the full

Court that the law of the matrimonial domicile, viz., of this Colony must regulate the rights of the parties. In the course of its judgment, the Court said "their marriage so far as it affects their respective rights of property must be regarded as having taken place in this Colony . . . when once the ubiquity of the law of the matrimonial domicile is admitted it makes no difference whether the ceremony of marriage was celebrated in this Colony or not, provided only that this Colony is the place of the matrimonial domicile."

Consideration of the somewhat involved provisions of Proclamation No. 142 of 1910 indicates, in the opinion of this Court, a clear intention that the property of persons domiciled in these Territories should be regulated thereby. But be that as it may, this Court is of opinion that the question in issue must be decided according to the principles laid down in the cases of *Blatchford* vs. *Blatchford* and *Brisley* vs. *Brisley*. It therefore follows that as the Plaintiff and her late husband Samana were domiciled in these Territories, proceeded to East London merely for the purpose of being married, and immediately thereafter returned to their matrimonial domicile where they continued to reside, their marriage was contracted according to the provisions of Proclamation No. 142 of 1910, which excludes community except under certain conditions which are absent. The marriage therefore conferred no rights upon the Plaintiff which conflict with the law of the matrimonial domicile.

This Court is also of opinion that the Plaintiff's claim to the sole use of the kraal site and agricultural land must fail. Section 9 (1) of Proclamation No. 142 of 1910 confers certain rights upon a woman who was the great or principal wife of the deceased, entitling her to the use and occupation of the immovable property held under title granted under the provisions of Proclamation No. 227 of 1898.

It appears that the land in question was acquired by Samana prior to his marriage with Plaintiff in 1910, and at a time when Nonqumba was his only and therefore the great wife. According to section 8 and the Third Schedule of Proclamation No. 142 of 1910 the son of Nonqumba would succeed to the land, and this right vested in him prior to Plaintiff's marriage. It is contended that Nonqumba's marriage was dissolved by her husband's subsequent Christian marriage and that therefore, not being a wife at the time of his death, she could not be a widow within the meaning of section 9 (1). The intention of the Proclamation is however to safeguard the rights of women married according to Native Custom, and in the opinion of this Court their rights and those of their sons to landed property held under Proclamation No. 227 of 1898 are not affected by a subsequent Christian marriage with another woman.

It has been held (Maasdorp I, 199) that where the testator was married at the time he made his will the term "wife," if used without indicating any particular individual by name or description is held to apply to the wife who was alive at the time of the execution of the will, and not to any subsequent wife. Analogously this Court is of opinion that the wife within the meaning of section 9 (1) of the Proclamation must be held to be the wife who was such

when title to the land was acquired by the deceased. It is clear that her son should, by virtue of sub-sections 2 and 3 of section 9 of the Proclamation, succeed to this property, but not until his mother's death, and it would be an anomaly if in the interim it were to pass into the control and possession of the Plaintiff to the detriment of Nonqumba's and the heir's vested rights.

This Court is therefore of opinion that the Plaintiff cannot obtain an order declaring her to be entitled to the use of the land in question. The Appellant's right to reside at the kraal of the late Samana is not disputed. The appeal is dismissed with costs, but the Magistrate's judgment is modified to this extent that there will be absolution from the instance in so far as the articles enumerated in clause 12 of the summons are concerned, it not being clear whether these were acquired before or after the Christian marriage and by whom they were used.

Kokstad. 2nd December, 1919. C. J. Warner, C.M.

QABA AND KALPENS BEKAMEVA vs. CONSTABLE JIKINGQINA.

(Mount Fletcher. Case No. 65/1919.)

Marriage—Conflict of customs—Dowry—Father's liability for son's dowry—Application of lex domicilii—*Hlubi Custom—Teleka.*

In this case the Plaintiff sued the Defendants for 15 head of cattle or their value £75, joining the father and natural guardian of the first Defendant as liable under Hlubi Custom for the dowry of the first Defendant. The second Defendant pleaded that the dowry was agreed upon under Xosa Custom and not under Hlubi Custom, and that the dowry agreed upon was ten head of cattle and one horse. This dowry was paid not on account, but in full settlement. The first Defendant admitted the Plaintiff's claim for 13 head, but denied the liability of his father, the second Defendant, for his dowry. The Magistrate gave judgment for Plaintiff for 13 head of cattle or value £65, and costs, the judgment being against the Defendants jointly and severally, the one paying the other to be absolved. In support of his judgment against the second Defendant the Magistrate quoted the cases of *Elias Mti* vs. *Mracane and Maliwa* (Meaker, 56) and *Bokwa* vs. *Ntambo and Jantyi* (Henkel, 1, p. 75), and stated that the usual amount of dowry paid in the Mount Fletcher District varied from 20 to 25 head of cattle, and that 10 head of cattle and one horse (representing two head) had been paid on account in the present case. The second Defendant appealed on the ground that the Plaintiff was a Tembu and he was a Pondomise, and that the marriage was entered into according to Xosa Custom, and also on the ground that the parties being members of tribes which practised the "teleka," the Plaintiff's remedy was by "teleka" and not by action.

JUDGMENT.

By President: Appellant in this case is a Pondomise and Respondent a Tembu, and both lived in the district of Mount Fletcher, but there is no evidence as to the tribe occupying the location in which they live.

It was held by the Native Appeal Court in the case of *Tafeni* vs. *Booi* (Meaker's Reports, 41) that Tembus living in Basuto locations for many years must be held to be under Basuto Custom. This Court agrees with this principle, but at the same time there is nothing which would prevent Tembus living in a Hlubi location from entering into an agreement to celebrate a marriage by Xosa Custom though such agreement would have to be proved by evidence.

In the present case the evidence of Appellant and the Headman Moffu is that the marriage was by Xosa Custom. This evidence is not rebutted and must therefore be accepted.

The appeal is allowed with costs, and the judgment of the court below altered to read:—Judgment for Plaintiff for 13 head of cattle or £65 against the first Defendant. Absolution from the instance with costs as regards the second Defendant.

Lusikisiki. 4th April, 1921. W. T. Welsh, C.M.

TININI ZAKAZA vs. DENNIS PENNINGTON.

(Flagstaff. Case No. 163/1920.)

Marriage—Dissolution of—Adultery—Where a wife is smelt out during the absence of the husband and without his knowledge, the marriage is not thereby dissolved—Estoppel—Death of Plaintiff after institution of personal action—Pondo Custom Apology beast—Special plea—Exception.

In this case the Plaintiff claimed five head of cattle or value £25 as damages for the adultery and pregnancy of his wife by the Defendant. Defendant pleaded specially (1) that as the action was a personal one it died with the Plaintiff and could not be transmitted to his heirs, (2) that the Plaintiff's wife had been driven from his kraal on an accusation of witchcraft, and that Plaintiff never at any time before his death secured the return to him of his wife, nor did he personally make any claim for damages for adultery against the Defendant; further, the Plaintiff had stated that he had no intention of taking action against the Defendant, and he (the Defendant) was at a loss how the summons came to be issued in the Plaintiff's name. Subsequent to issue of summons and before these special pleas were filed the Plaintiff (Tinini Zakaza) had died, and the heir, Sinawuka, being a minor, his guardian, Ntabeni Zakaza, was substituted by consent, without prejudice to special plea (1). The Magistrate then took evidence from Pondo Counsellors to the effect that once an action is instituted it does not "die," and then overruled special plea (1). The case was again postponed, and before it came on again for hearing Sinawuka died, and the name of Qokwana, a minor, heir to Sinawuka, was

substituted by consent, the Defendant's attorney however asserting that Sinawuka had no right to sue. The Magistrate then took evidence on special plea (2), and found that the woman was smelt out, and that Defendant cohabited with her while she was at her father's kraal and before an "apology" beast was paid, and therefore at the time of the intercourse with Defendant she was a "free" woman. He therefore upheld special plea (2) and dismissed the summons with costs. The Plaintiff (as substituted) appealed.

JUDGMENT.

By President: The Native Assessors, having been consulted, state: "That if a wife is smelt out during the absence and without the knowledge of the husband the marriage is not thereby dissolved, and the husband can claim damages for adultery."

In view of this statement of custom the Court is of opinion that the Magistrate has erred. The appeal is allowed with costs, and the ruling on the special plea is set aside with costs, and the case remitted to be decided on the issues involved.

Postea, Lusikisiki, 2nd December, 1921, *W. T. Welsh, Pres.*

When the case again came before the Magistrate the Defendant excepted to the summons, "that the said Plaintiff has no *locus standi in judicio* he not being the heir of the late Tinini, whose heir is his minor son, one Baziya." The exception was overruled with costs, and the Defendant appealed.

EXTRACT FROM JUDGMENT.

The Defendant (now Appellant) did not object to the name of Sinawuka being substituted as heir to the late Tinini.

Subsequently the Defendant did not object to Qokwana's name being substituted as heir to the late Sinawuka.

The notice of appeal alleges that Baziya is heir to the late Tinini.

In view of the Defendant agreeing to the substitution of Sinawuka as heir to Tinini, and then Qokwana as heir to the former, this Court is of opinion that he is now estopped from alleging that Baziya is heir to the late Tinini.

Kokstad. 4th May, 1918. J. B. Moffat, C.M.

DIAMAN MAYEKI vs. SCOTCHCART KWABABA.

Rep. to in 1917 (T.&N.) 116.

(Matatiele. Case No. 206/1917.)

Marriage, dissolution—Dowry, return of—Deductions—Desertion of wife—Allowance for miscarriages—Basuto Custom not followed.

The Plaintiff sued the Defendant for the return of his wife and four minor children of the marriage, or alternatively restoration

of four head of cattle or £20 and delivery of the children. Plaintiff stated that about 21 years previously he had married the daughter of the Defendant, and had paid as dowry seven head of cattle and four horses. There were seven children of the marriage. In July, 1917, the Plaintiff's wife deserted him, taking with her the four minor children of the marriage. Defendant stated that six head of cattle and four horses were paid as dowry, and that eight children were born. In addition the woman was pregnant of another child. Defendant further pleaded that the woman was compelled to leave her husband on account of his brutality and ill-treatment of her. He tendered one beast and the return of the minor children as soon as they were old enough to leave their mother. The Magistrate gave judgment for the Plaintiff for the return of his wife or return of two head of cattle or their value £10, being balance of the dowry after making the necessary deductions, and for the return of the minor children when they reached the age of five years. The Defendant appealed. The Magistrate found that the dowry was as stated by the Defendant, that there were seven children of the marriage and one miscarriage, and that the woman was shortly to be confined. The Magistrate stated that in accordance with the Appeal Court's ruling in the case of *Nqwegana* vs. *Papiso* (1903), that no beast could be deducted for the miscarriage, but that a beast could be deducted for the woman's present pregnancy. He was not satisfied that there had been ill-treatment and brutality. The appeal was on the ground that a beast should be deducted for the miscarriage, the foetus having been five months old and properly buried.

JUDGMENT.

By President: The Court has not been able to refer to the case quoted by the Magistrate.

Seymour says on page 39, on the authority of this case, that miscarriages are not reckoned as "births," and no allowance is made for them. The Native Assessors having been referred to, the Basuto Assessors state that no deductions are made for miscarriages. The other Assessors state that deductions are made according to the development of the child, one Assessor stating that allowance is made after three months.

The parties in this case are resident in the Cedarville Location, which is a village and not a tribal location.

In the case of *Notatsala* vs. *Zenani* (1 Henkel, 209/10) the Native Assessors stated that when a miscarriage takes place in the third month it is regarded as a person.

There is nothing to show that the parties in this case are Basutos. They do not reside in a Basuto Location. Applying the general principle laid down in the above-quoted case allowance should have been made of one beast for the miscarriage.

The appeal is allowed with costs, and the portion of the Magistrate's judgment regarding the return of cattle will be altered to one head of cattle or £6, instead of two head or £10, and the order as to costs will be defendant to pay plaintiff's costs up to the date of tender of one beast, plaintiff to pay costs after date of tender.

Butterworth. 5th July, 1922. J. Mould Young, Ag.A.C.M.

DE WET NXITYWA AND ANOTHER vs. NDINISA MANGALA.

(Nqamakwe. Case No. 15/1922.)

Marriage, dissolution of—Dowry, return of—Where dowry beast dies before consummation of marriage and the death is reported, this beast must be deducted from the cattle returnable on dissolution of marriage—Desertion of wife.

This was an action for the return of dowry cattle on desertion of the wife. Eight head of cattle were paid as dowry, and the Magistrate found that one beast should be deducted for abduction and two for the two children born of the marriage, and he gave judgment for the Plaintiff for the return of five head of cattle or their value, £25. The Defendant appealed. One of the dowry cattle had died before marriage, but the Magistrate did not allow a deduction for this, on the ground that there was insufficient proof of " skin " money having passed.

JUDGMENT.

By President: This is a claim for the return of dowry cattle or their value, less certain deductions.

The only point pressed by Appellant in this Court is whether a certain animal alleged to have died before the marriage was consummated should be deducted from the number to be returned.

The Plaintiff, in his replication, admits that the death of this animal was reported. This being so, and as death occurred before the marriage took place the Magistrate should have allowed a deduction of this beast from the number to be returned.

The appeal is allowed with costs, and the Magistrate's judgment altered to one for Plaintiff for four head of cattle or their value, £20, and costs.

Flagstaff. 9th April, 1919. C. J. Warner, C.M.

STEPHEN ZONDI vs. GWANE.

(Bizana. Case No. 226/1918.)

Marriage, dissolution of—Circumstances in which a subsequent marriage by Christian rites dissolves a prior marriage by Native Custom—Claim by first husband for the children of the second marriage, and for the dowry paid by the second husband—Adulterine children, legitimisation of—Action for declaration of rights.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: Appellant married Respondent's sister, Masonjica, about the year 1900 by Native Custom. Some time after he went to East London and was absent for 12 or 16 years. During this time he does not appear to have held any communication with his wife, and five years after he had left her she contracted a marriage according to Native Custom with one Mtshulane, by whom she had two children. Some time after this, Appellant, while at East London married a Native woman by Christian rites. Subsequently Appellant returned to his old home, and now claims the children born of the marriage between Masonjica and Mtshulane, the cattle paid as dowry by Mtshulane for Masonjica, and their increases. The facts are admitted by the Respondent, who sets up the defence that Appellant had deserted his wife Masonjica when she entered into her marriage with Mtshulane, and that she was free to enter into another marriage. This, in the opinion of this Court, is the whole point at issue. The cases quoted by the Magistrate in the court below in his reasons for judgment merely decided that a polygamous Native marriage entered into during the subsistence of a Christian marriage could not be regarded as valid. But this Court held in the case of *Ungame* vs. *Stemele* (I. Henkel 113) that where a woman married according to Native Custom, left her husband and subsequently married by Christian rites a man with whom she had previously lived in adultery and by whom she had had children, such Christian marriage had the effect of annulling the previous Native marriage and legitimised the adulterine children.* This Court considers that the converse should apply, and that the Appellant having entered into a Christian marriage with another woman after having left his wife for several years, must be held to have dissolved his marriage by Native Custom.

The appeal is dismissed with costs.

Lusikisiki. W. T. Welsh, C.M

MYAKA vs. XINTI.

(Port St. John's. Case No. 47/1920.)

Marriage, dissolution of—Dowry, return of—No deduction for woman's services—Pondoland—Children, deductions for.

EXTRACT FROM JUDGMENT OF NATIVE APPEAL COURT.

". . . . The Magistrate's attention is drawn to the fact that no beast is allowable for the woman's services and that one should be deducted for each child born during the subsistence of the marriage whether the husband be the father or not. . . .

* But see judgment in case of *Mtyelo and Sibango* vs. *Qotole*, on page 39 of these reports, where it is laid down that adulterine children are not capable of legitimisation.

Butterworth. 1st November, 1920. T. W. C. Norton, A.C.M.

D. NCOSE vs. NANDILE.

(Kentani. Case No. 79/1920.)

Marriage, dissolution of—Impotency of husband—Dowry, return of—Desertion of wife.

In this case the Plaintiff sued for the return of his wife or ten head of cattle which he had paid as dowry. After hearing evidence the Magistrate found that seven head of cattle had been paid. The marriage had subsisted for three years, when the Plaintiff's wife deserted and returned to her father's kraal. The Defendant pleaded that Plaintiff was impotent and that no dowry was therefore returnable. The Magistrate gave judgment for Plaintiff for four head of cattle, and the Plaintiff appealed.

JUDGMENT.

By President: Mr. Moll applies to call medical evidence as to the impotence or otherwise of Plaintiff, and quotes the case *H. Mdleleni* vs. *N. Mdleleni* (Butterworth Appeal Court, November, 1911) not reported, as a precedent. Mr. Swan opposes as Plaintiff, who was represented in the court below, has had ample opportunity of producing such evidence, and that a period of months has elapsed since the hearing that the man's state may not now be as it was then.

The Court refuses the application on the ground that Plaintiff had sufficient opportunity to make his application in the court below during the hearing, but only does so now, and notifies Respondent on the 27th October, 1920.

The Appellant claims to be entitled to the return of the whole of his dowry, which Respondent admits was seven head.

The Magistrate is satisfied that Appellant is impotent, and this Court sees no reason to differ from his finding.

The question for decision is whether Plaintiff is entitled to return of all or any of his dowry.

The Assessors, to whom the point was referred, state that, according to Native Custom, as the girl has returned to her father intact, Appellant is entitled to the return of all his dowry.

In the case of *Siyekile* vs. *Qiki* (I. N.A.C. 73) a similar case was referred to the Assessors by this Court, and the opinion then expressed was that an impotent person is not entitled to recover the whole of his dowry, and the Magistrate's judgment awarding five head in that case was reduced to two. This ruling was followed in the recent case of *Dabi Smit* vs. *Galada Fuleni* (Butterworth Appeal Court, March, 1918).*

The appeal is dismissed with costs.

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* *Not reported*: The action was for return of dowry (6 head) on the ground of the woman's father having taken her away and refused to return her. Defendant pleaded that Plaintiff was impotent. He (Defendant) therefore tendered 4 head of cattle and claimed dissolution of the marriage. Tender was refused, but the Magistrate found for Defendant in terms of tender, quoting cases of *Ndatambi* vs. *Ntozake*, 1 N.A.C. 3, *Yapi* vs. *Ngayi* 1 N.A.C. 61, *Siyekile* vs. *Qike*, 1 N.A.C. 73. An appeal was noted, *inter alia*, on the number of cattle allowed. The Appeal Court (J. B. Moffat, C.M.) held that the cases quoted supported the judgment. (*Dabi Smit* vs. *Galada Fuleni*, Kentani Case 18, 1918.)

Umtata. 16th March, 1921. W. T. Welsh, C.M.

NYANZEKA DIDI vs. THOMAS MAXWELE.

Reb. to in 1944 (T.N) 40.

(Umtata. Case No. 297/1920.)

Marriage, dissolution of—Repudiation by husband not to be lightly assumed—Conflict of evidence—Functions of Court of first instance—Plea in bar.

The essential facts of the case are set forth in the judgment of the Native Appeal Court.

JUDGMENT.

By President: In this case the Plaintiff (now Appellant) sued the Defendant (now Respondent) for the return of his wife or the restoration of the dowry paid for her. In addition to pleading to the merits of the case the Defendant pleaded in effect, though somewhat inartistically, that the marriage was dissolved by Plaintiff driving away the woman for good and abandoning her and the dowry paid for her.

The *onus probandi* was accepted by the Defendant, and after hearing several witnesses on each side the Magistrate found against the Plaintiff on the question of repudiation and gave judgment for the Defendant.

Against this decision the Plaintiff has appealed mainly on the ground that the alleged repudiation of his wife has not been conclusively proved, and even if it did take place that it was cancelled by the subsequent return of his wife.

For the Appellant the evidence of Headman Mgudu has been severely criticised. It is true he is the Defendant's nephew, but that in itself is not sufficient cause for assuming that he would be guilty of making misrepresentations to the officials at Umtata as to what occurred at the meeting between the parties, and that he would follow this up by deliberate perjury, he is moreover corroborated by Bango and Tyofani, and all that has been said against accepting the evidence of the latter is that they would, under the circumstances, be disposed to support Headman Mgudu.

The Plaintiff's witnesses deny knowledge of the meeting relied upon by the Defendant, and he himself says that the cases he took to the Headman were for damages.

Reference to the cases quoted on behalf of the Appellant shows that repudiation or rejection by implication cannot lightly be assumed and that it is necessary for a period sufficiently lengthy, according to the circumstances, to have elapsed before such a presumption arises, but in the opinion of this Court those principles are not applicable to a case where a direct and overt act of repudiation has occurred and where efforts at a reconciliation have failed.

There is in this case a direct conflict of evidence, and unless it can be clearly shown that the trial Court has erred in its conclusions on the evidence adduced before it this Court must be slow to interfere and assume functions which appertain to a Court of first instance.

This Court is not prepared to say that the Magistrate was not justified in accepting the evidence adduced in support of the plea-in-bar as sufficient and satisfactory.

The appeal is dismissed with costs.

Umtata. 25th March, 1919. C. J. Warner, C.M.

MFESI vs. MAXAYI.

(Port St. John's. Case No. 112/1918.)

Marriage, dissolution of—Pondo Custom—When husband rejects wife, a beast must be paid to mark the dissolution of marriage —Appeal, additional grounds of.

In this case the Plaintiff sued for the return of his wife or the three head of cattle paid as dowry for her. It was admitted that the woman only remained a short while with the Plaintiff and then the Defendant took her away pending the payment of further dowry. There was no issue of the marriage. The Magistrate gave judgment for the return of the woman within one month of the date of judgment: on the wife's failure to return the marriage to be considered as cancelled. No order was made as to costs. The Defendant appealed. The Magistrate, in his reasons for judgment, stated that there was no appeal from the Plaintiff for any portion of the dowry or for the costs.

Judgment.

By President: 1. At the hearing of the appeal Appellant's attorney filed additional grounds of appeal. As Mr. Birkett, for Respondent, did not object, the Court allowed arguments in the additional grounds of appeal.

2. It is agreed that a marriage took place between Respondent and Appellant's daughter some ten years ago, and the point at issue between the parties is whether there has been a cancellation of the marriage according to law. Appellant states that he allowed the marriage to take place on Respondent's undertaking to pay three head of cattle as dowry in addition to two already received, and that when Respondent failed to carry out the terms of the agreement he cancelled the marriage, took his daughter home and kept the two head of cattle he had received as payment for wedding outfit, etc. The question is submitted to the Pondo Native Assessors, who reply through Chief Maxaka: "Defendant, in taking his daughter, was impounding her for the promised cattle. If the husband does not pay the cattle he promised the marriage is dissolved, but the father should sue before the Headman to have the marriage cancelled."

It has been held in numerous cases in this Court that when a marriage is dissolved by rejection of the husband, something must be paid by the wife's father to the husband to mark the dissolution of the marriage. Even in cases where the lawful deductions from

the dowry received exceed the number of cattle paid as dowry it has been held that a beast must be paid by the father of the woman to the husband as a token of the cancellation of the marriage.

In this case no cattle have been returned to the Respondent, though Appellant admits receiving two head which, upon the marriage taking place, became merged in dowry, nor has Appellant taken any steps, such as reporting to the Headman the cancellation of the marriage.

The Court therefore considers that there has not been any lawful dissolution of the marriage, and the appeal is dismissed with costs.

Dissenting Judgment by Mr. J. M. Young, Resident Magistrate of St. Mark's.

I am of opinion that the Magistrate's judgment is wrong for the following reasons:—

(1) He evidently disbelieved the Plaintiff's contention, otherwise it is difficult to understand why he did not order the return of some portion of the dowry paid and order Defendant to pay costs.

(2) He appears to have accepted Defendant's statement that the marriage was only to be regarded as complete on payment "at once" of a further three head of cattle.

(3) The Defendant took the woman away immediately, and although Plaintiff resides next door to him he has sat still and taken no steps for a period of ten years to recover her.

(4) There is nothing on record to show he ever visited her or did anything else that could be construed in the light of his having regarded her as his wife. If he still considered her as his wife, is it not likely that when he became aware that, she was pregnant by another man, he would have taken immediate action against the adulterer.

(5) His general attitude and all the surrounding circumstances seem to point to the fact that he acquiesced in the action of the Defendant, and considered the marriage at an end as from the time the woman was taken from him.

Under these circumstances I think the appeal should be allowed and judgment entered for Defendant with costs, declaring the marriage as dissolved from the date the woman was taken away by Defendant.

Kokstad. 1st September, 1919. C. J. Warner, C.M.

BALENI vs. QOSHA.

(Tsolo. Case No. 129/1918.)

Marriage, dissolution of—Return of wife or dowry—Death of wife during course of proceedings—Smelling out on accusation of witchcraft—No return of dowry where wife dies and there are two children of the marriage—Costs.

Baleni sued Qosha for the return of his wife or the dowry paid for her. He alleged that some nine years previously he married the daughter of Qosha and paid seven head of cattle as dowry for her. Two children were born of the marriage. Some few months previous to the action the woman deserted him and refused to return. Defendant admitted the marriage, but stated that only five head of cattle were paid as dowry. He admitted that two children were born of the marriage. He stated that the Plaintiff accused the woman of witchcraft and drove her away from his kraal during the winter of 1917. The woman died of Spanish influenza after the summons was served. The Magistrate gave judgment for the Plaintiff for the return of two children of the marriage, and for Defendant in regard to the claim for the return of the woman or dowry, Plaintiff to pay costs. The Plaintiff appealed.

Judgment.

By President: Appellant sued in the court below for the return of his wife or the cattle he paid as dowry for her. The defence was that the woman had been smelt out and accused of witchcraft. It appears that the Appellant's wife died after the institution of proceedings.

This Court does not consider that the accusation of witchcraft has been properly established.

The question whether the Appellant can claim the return of his cattle seeing that his wife is now dead, is submitted to the Native Assessors, who state that as the woman has borne two children, Appellant can have no claim to the return of the cattle unless he is prepared to abandon his rights to the children in favour of his wife's people.

The Court concurs in this view, and the appeal is dismissed with costs.

Appellant's attorney having raised the question of costs, this Court considers that as the parties in the court below agreed to confine the issue to the number of cattle to be returned, and the Appellant failed to prove he was entitled to the return of any cattle, the Magistrate correctly ordered Plaintiff to pay costs in the court below.

Umtata. 26th March, 1919. C. J. Warner, C.M.

NOPAKI TOTWANA vs. TOTWANA SIDIKI.

(Mqanduli. Case No. 257/1918.)

Marriage, dissolution of—Wife may sue for—Native Assessors' statement of custom not accepted—Deductions for children and wedding outfit.

Nopaki Totwana, wife of Totwana Sidiki, summoned her husband in an action in which she asked for an Order of the Court dissolving her marriage with him, on the ground that he had driven her away from his kraal and had never visited her. The Plaintiff's father intimated that he was quite prepared to return the dowry paid by the Defendant, less one beast for marriage outfit and one beast for the child, leaving three head to be returned. Defendant denied driving his wife away. The Magistrate refused the application with costs, and the Plaintiff appealed.

JUDGMENT.

By President: The case is referred to the Native Assessors, who state that in Native Law a wife cannot sue for the dissolution of her marriage, and that if she wishes to dissolve her marriage she should return the dowry cattle to the husband. But in the case of *Nonafu* vs. *Pike* (1 Henkel, 120) it was decided that a wife could maintain an action for the dissolution of her marriage in a Resident Magistrate's Court in the Transkeian Territories. In the present case the Plaintiff is willing to restore to defendant the dowry he paid for her less two head of cattle for legal deductions, and in the opinion of this Court she is entitled to succeed on this ground.

The appeal is therefore allowed with costs, and the judgment of the court below is altered to judgment: That the marriage between Plaintiff and Defendant is dissolved on Plaintiff delivering to the Defendant three head of cattle or £15. Defendant to pay costs.

Butterworth. 3rd March, 1920. C. J. Warner, C.M.

NOKLAM vs. SELONGA QANDA.

(Kentani. Case No. 136/1919.)

Marriage, dissolution of—Wife may sue for—Contributions by husband to wedding outfits of wife's relations are not added on to the dowry paid by him for the purpose of return on dissolution of his marriage—Deductions for children.

The essential facts are clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: Respondent instituted proceedings against her husband (Appellant) in court below to have her marriage with

him by Native Custom dissolved for "good and sufficient reasons," and alleged in her summons that six head of cattle had been paid as dowry for her, and that there were four children of the marriage and she tendered the Appellant the sum of £10, representing two head of cattle to dissolve the marriage.

Appellant pleaded that he paid seven and not six head of cattle as dowry, and therefore claimed three head of cattle and not two on dissolution of marriage. In this Court a further point is taken which was not pleaded in the court below, viz., that the Respondent's guardian should have sued or assisted the Respondent or sued jointly with her.

In the opinion of this Court this point has been disposed of by the ruling in the case of *Ntambule* vs. *Nojojini* (Meaker's Reports, 168) where, on an exception being taken that the guardian and not the wife should institute proceedings for the dissolution of a native marriage, this Court ruled that the woman as a party contracting the marriage was the proper person to sue for its dissolution. Again, in the case of *Nonafu* vs. *Pitke* (1 Henkel, 120) this Court held that a Native woman could sue for the dissolution of her marriage according to Native Custom, and the only question the Court had to decide was the portion of the dowry to be returned by the woman's guardian.

In the opinion of this Court these cases dispose of the first ground of appeal.

There remains the question of how many cattle are to be returned to mark the dissolution of the marriage. Appellant pleaded seven were paid as dowry and in his evidence at the first hearing he stated that the seventh beast consisted of the sum of £4 15s., used for the wedding outfit of his wife's sister, and at the later hearing stated that when he paid the money he was told that it was wanted for the wedding expenses of his sister-in-law. The Native Assessors state that any contributions made by a Native man to the marriage outfit of another member of his wife's family are not added to the dowry cattle nor reckoned as dowry though the contributor may have a claim against the dowry of the girl to whose marriage outfit he has contributed. It would therefore seem that only six head of cattle were paid by Appellant as dowry, and there having been four children of the marriage he is not entitled to a return of more than two upon dissolution of his marriage.

The appeal is accordingly dismissed with costs.

Lusikisiki. 12th August, 1920. W. T. Welsh, Ag.C.M.

QEYA vs. LATYABUKA.

(Port St. John's. Case No. 27/1920.)

Marriage, dissolution of—Dissolution of marriage at suit of wife—Order of Court dissolves marriage even though cattle have not passed to mark the dissolution.

The essential facts of the case are disclosed in the judgment of the Native Appeal Court, and in the note below.

JUDGMENT.

By President: The Plaintiff in this case sued for an order for the registration of certain dowry which he alleged he had paid for Deliwe to her father, Latyabuka, the Defendant. The marriage was denied. After hearing evidence, the Magistrate gave judgment of absolution, from which the Plaintiff has appealed on the ground that the Magistrate was wrong in holding that the marriage of Deliwe with Nunwana had not been dissolved, and that the order asked for should, therefore, have been granted.

It appears from the record of a case put in that Deliwe and Latyabuka sued Nunwana for cancellation of the marriage then subsisting between Deliwe and Nunwana. Judgment was given on 11th June, 1918, as follows: "Provisional judgment for Plaintiff with costs. The marriage to be considered cancelled unless Plaintiff opens this case within one month of this date, when the matter will then be further enquired into."

No subsequent proceedings appear to have been taken in that case.

The question now before this Court is whether that order operated as a dissolution of the marriage then in question, no cattle having passed. In the opinion of this Court the case of *Mapekulu* vs. *Steti Zeka* (Meaker, 6), is not in point.

The case now under consideration was not one for the return of the wife or dowry, but was an action by the woman, assisted by her father, for the cancellation of her marriage on the grounds of desertion. The order made by the Magistrate granted the cancellation asked for, and there was no necessity for any cattle to pass as a mark of dissolution. It is quite competent for a court to grant a woman a decree of dissolution of marriage for good cause without making an order for the return of dowry.

The appeal will accordingly be allowed with costs, the Magistrate's judgment is set aside, and the case returned to be decided on its merits, costs in the court below to abide the issue.

Note: Defendant denied the marriage and asserted that the cattle in question were paid as a fine by Plaintiff for causing the pregnancy of the woman, who was the wife of one Nunwana. An order for the cancellation of the marriage between Nunwana and Deliwe was made by the Magistrate on 11th June, 1918, but no portion of the dowry had been returned. The Magistrate held that under these circumstances the marriage could not be considered as cancelled, and that it was not therefore competent for Deliwe to contract a second marriage with Plaintiff. The Plaintiff appealed.

Kokstad. 5th April, 1919. C. J. Warner, C.M.

SIPOXO AND DELAYI vs. RWEXWANA.

(Qumbu. Case No. 150/1918.)

Marriage, essentials of—Marriage, dissolution of—Abduction—Seduction—Non-liability of father for tort of married son.—Successful claim for the dowry by third party dissolves marriage.

Rwexwana sued Sipoxo and his father Delayi for five head of cattle or their value, £25, as damages for the alleged seduction and pregnancy of his daughter, Nonkefane, by Sipoxo. The Defendant Delayi pleaded that Plaintiff gave his daughter in marriage to Sipoxo, and could not therefore claim damages for seduction and pregnancy. Sipoxo paid three head of cattle from Delayi's chief kraal, but did not consult Delayi, who subsequently obtained judgment against the Plaintiff for their return. The Magistrate found that this dissolved the marriage or annulled the marriage, and that the girl was made pregnant by Sipoxo after this dissolution of the marriage, at which time he was in the position of an unmarried man, and his father Delayi was responsible for his tort, as he (Sipoxo) was then living at his kraal. The Magistrate gave judgment for the Plaintiff as prayed. The Defendant Delayi appealed on the ground that the weight of evidence was to show that the pregnancy took place while the girl was residing at Sipoxo's kraal, and that there was no *bona fide* intention on Sipoxo's part to dissolve the marriage.

Judgment.

By President: The facts of the case are that Appellant and his son Sipoxo are on bad terms with one another. Sipoxo lives at the great kraal of his father, the Appellant, which the latter seldom or never visits.

In March, 1917, Sipoxo abducted the daughter of Respondent and took her to Appellant's great kraal. Her people followed her up, and Sipoxo then paid three head of cattle belonging to Appellant and proposed marriage. He was accepted by Respondent, who allowed his daughter to live with Sipoxo at Appellant's chief kraal as his wife. When these facts came to the knowledge of Appellant he repudiated any right by Sipoxo to dispose of any of his property without his consent, and instituted proceedings against Respondent for the return of cattle paid as dowry by his son Sipoxo. In this he was successful, and on Respondent appealing to this Court the judgment was upheld. When Respondent had to return the cattle to Appellant he took his daughter back, and states he dissolved her marriage with Appellant's son. The intimacy between the girl and Sipoxo, however, continued after her return to her father's kraal, with the result that she became pregnant, and the present action against Appellant and his son was instituted by Respondent, who claimed five head of cattle or £25 as damages, and obtained judgment in his favour in the court below, and the appeal is against this finding.

The first ground of appeal is that the judgment of the court below is against the weight of evidence which shows that the pregnancy of Respondent's daughter took place while she was residing at Appellant's kraal.

The Magistrate found that the girl became pregnant after her return to her father's kraal, and this Court agrees with this finding.

The second ground of appeal is that there was no *bona fide* intention to dissolve the marriage, and there was collusion between Respondent and his daughter and Appellant's son.

In Native Law one of the chief essentials of a marriage is the payment of dowry to the girl's father, and the return of the dowry cattle has the effect of dissolving the marriage.

The Native Assessors to whom the question was submitted state that there can be no marriage if there are no dowry cattle in the kraal of the woman's father. This Court agrees with this view.

The Appellant by his own action caused the dowry cattle to be returned thereby annulling the marriage, and he cannot now set up the defence that the marriage still exists.

The third ground of appeal is that Appellant's son being married, the Appellant is no longer liable for his torts. Even granting this to be the Native Law, the Appellant himself took steps which resulted in the dissolution of his son's marriage very soon after it took place, and allowed his son to continue to reside in his kraal as an unmarried man. He is therefore responsible for his son's actions.

For these reasons this Court considers Appellant has failed to show good cause for disturbing the judgment of the court below, and the appeal is dismissed with costs.

Mr. W. T. Welsh, Resident Magistrate of Mount Currie, concurred, but Mr. W. Carmichael, Resident Magistrate of Tsolo, dissented for the following reasons:—

The facts and grounds of appeal in this case are fully set forth in the judgment of the President of the Court, and, in concurring generally in his finding on the facts, I need only comment upon one feature of the evidence, *viz.*, that relating to the part filled by the woman Nokefane in the domestic jigsaw that has led to this appeal, for in the view I take of the case this is a factor of prime importance.

It has been shown that at some time after the dowry cattle were returned to her father, Nonkefane was taken home by her brother, but continued cohabitation with Sipoxo. Of this conduct there are two possible interpretations and, as it seems to me, two only. Either she did not intend to repudiate her husband and dissolve the marriage or else she did and with a view to helping her father to get cattle by means of a fresh "seduction." The Magistrate, following another line of suggestion, touches on this feature of the case only to brush it aside as of no importance, and this Court must therefore arrive at its own conclusion unaided.

The Appellant Delayi's charge against the woman is that, being divorced from her husband, she deliberately prostituted herself to him in order to enrich her father. Were it so, no Court could support her father's claim, but it would need stronger evidence than that adduced to convince me of the fact. It is true that she left with her brother when he came for her, but it is reasonable to suppose that she did so under duress, or thinking of teleka, and

the presumption of repudiation is rebutted by the continuance of marital relation. I find therefore that she did not on her part dissolve the marriage by leaving without an intention to return. Neither is there any suggestion that Sipoxo divorced her by driving her away, and any idea that Rwexwana declared the marriage dissolved by reason of his consent not having been obtained by a *bona fide* payment of dowry is set aside by the fact that he fought for the maintenance of the marriage through the lower and Appeal Courts, and left his daughter undisturbed at her husband's kraal for some time (which he estimated at four or five months) after sending the cattle back. Accordingly if the marriage had been dissolved at all its dissolution was effected merely by virtue of the Appellant (Delayi) wresting his cattle from the father of Nonkefane.

Turning now to the question of law, I will remark that for the purposes of this case I accept broadly the description of pure Native Custom as contained in the learned President's judgment, but it does not follow that the Courts must apply the sanctions of our jurisprudence to Native Custom in its entirety, more especially when, as in this instance, the wide experience of the Chief Magistrate recalls no parallel case and none can be traced in any other authority. The Appeal Courts of these Territories, have always held themselves free by the nature of their constitution and the provisions of the General Regulations to decide how far they will give legal effect to Native Custom, and while accepting it in the main they have softened or shorn off excrescences here and there when such conflicted with the common rights of all subjects of the Empire or outraged deep-seated instincts of humanity. In particular the Courts of East Griqualand, under the wise presidency of Senator Colonel Stanford, when Chief Magistrate here, sought so to mould the Native Law as to permit of a gradual rise in the status of Native women. In support of these remarks I shall have occasion presently to refer to certain rulings bearing closely on the present case, but for the moment it will be sufficient to refer to the broad statement contained in the preface of Seymour's *Native Law and Custom*, that "customs have only to a certain extent been recognised by the Courts, as it has been found that some of them are tainted with slavery, or are adverse to the interests of morality, while others are in direct conflict with Proclamations."

According to Native Custom as described, not only is the payment of dowry indispensable for the institution of a marriage, but its retention by the wife's father or guardian is necessary for the perpetuation of a marriage. If the wife's father sends back the cattle or he is deprived of them by action of the husband's father, the union is dissolved and should marital relations continue the issue thereof are bastards on whom their father has no claim and to whom he owes no responsibility. In other words, man and wife while they may part at pleasure may not remain together at pleasure, but the continuance of their marriage depends upon the will of their parents.

A Native father, according to Dudley Kidd, when his new born daughter is first placed in his arms, kisses her on both thighs and says, "My cattle, my cattle." The expression is symbolic; he is entitled to his daughter's services through life; if he loses her services he must be compensated, if he loses the compensation he must regain the services.

Such conditions are of course familiar to all students of the history of primitive societies, and a close parallel has been traced by Sir Henry Maine in the beginnings of Roman Law. "The parent," he says in his work on Ancient Law (p. 138), "when our information commences, has over his children the *jus vitae necisque* (see Code 8.47.10, and for remedial measures, Digest 37.12.5 and Code 8.5.2.2.), the power of life and death, and a *fortiori* of uncontrolled chastisement; he can modify their personal condition at pleasure; he can give a wife to his son, he can give his daughter in marriage; *he can divorce his children of either sex*; he can transfer them to another family by adoption, and he can sell them."

The harsher feature of this law were effaced by slow degrees through agencies which the learned author goes on to describe. A similar process has been busy with our system of Native Law, and the question which the Court must now decide is whether it shall set the stamp of authority and legal sanction on parental claims to the power of divorce.

A less complicated case than the present will set the issue in a clearer light. Suppose a man and woman married when the relations of all parties are harmonious; thereafter both fathers conceive a grudge against the husband who however retains the affections of his wife. Her father tries to "teleka" her; she refuses to leave her husband; her father by arrangement with the husband's father (to whom he is perhaps in debt) returns a beast, the rest of the dowry being set off by the marriage outfit and the number of children born. Following Native Custom as described, the Court must then declare the relations between man and woman illicit and their future children illegitimate.

Such is the logical working of the *patria potestas*. No dowry, no woman! And of course, conversely, no woman, no dowry. Here at length descend from the rarified atmosphere of general discussion to the bed rock of concrete rulings in the Courts. The case of *Mabono* vs. *Manoxowem* (6 E.D.C., 62) was an appeal from the judgment of a Transkeian Court ordering the return of a widow from her father's to her late husband's kraal or the repayment of dowry. The Eastern Districts Court by a majority of two Judges to one refused to recognise Native Custom in this respect and reversed the Magistrate's decision. It is instructive to turn to the reasons for judgment given by the concurring Judges in that case. Jones, J., based his opinion mainly on the freedom of the person and the abolition of slavery. Barry, J.P., refrained from stigmatising the custom in any way and took his stand merely on the law of majority. But in the later case of *Mqolora* vs. *Mesani* (1 Henkel, 97) where the same issued was raised, the then Assistant Chief Magistrate, Mr. A. H. Stanford, staunch champion though he was of Native Marriage Customs in general, boldly laid it down that "the Native Custom that the woman after the death of her husband still remained the property of his kraal or heir and could not contract a second marriage is in conflict with the law in force in the Territories and contrary to public policy and good morals."

If this is so, how much more so must be the essentially slave law of parental divorce!

Agreeing as to the fitness of the "lobola" contract as a whole to the Native people at their present stage of development, and fully realising the danger of tampering lightly with their customs in the interests of a standard of morality in advance of their conceptions, it is with great reluctance that I find myself obliged to differ from the learned President of the Court in regard to this feature of Native marriage institutions. I cannot but think that to recognise it now and impress upon it the judicial seal, would be to go back upon the best traditions of our Courts. In my judgment a Native marriage should be regarded as dissoluble in life only by the will and act of the party thereto. Supplemented by the custom of "teleka" this rule should meet all reasonable requirements.

Applying it then to the facts of the present case, as neither husband nor wife is proved to have divorced the other, but the circumstances point rather to a common wish to continue marital relations, I am of opinion that the marriage still subsists, that the wife's father has no claim to damages on account of their intercourse, and that the appeal should be allowed with costs, the judgment being altered into one for the Defendants with costs.

Kokstad. 27th August, 1919. C. J. Warner, C.M.

MBIZO QHOBOSHANE vs. MBONGELI MBOBO.

(Mount Fletcher. Case No. 61/1918.)

Marriage, essentials of—Hlubi Custom—Sedwangu beast—Hlubi dowry—Twala—Engagement cattle.

The Plaintiff, Mbizo, stated that he was the father and natural guardian of one Jannet, and that the Defendant was the eldest son and heir of the late Nqabeni, and guardian of the estate of the late Zinxondo, a younger brother. About seven years previously the said Zinxondo "twalaed" the said Jannet, having previously paid two head of cattle as engagement cattle. Subsequently a beast was paid as fine for the "twala," and also a "sedwangu" beast for the seduction of the girl. The girl, Jannet, remained with the said Zinxondo for some seven years thereafter as his wife, and had two children by him. Plaintiff further alleged that during the lifetime of the said Zinxondo, the Defendant agreed to pay dowry for the said Jannet, as also did Zinxondo, but up to the time of the death of Zinxondo the dowry had not been paid. Plaintiff now claimed the dowry, *viz.*, 20 cattle and one horse, less two cattle paid on account. The Defendant admitted the payment of the "twala" and the "sedwangu" beast, but denied that there was any marriage or any agreement as to dowry. The Magistrate gave judgment for Plaintiff for 17

Compare case of *Hombeni* vs. *Zotelana*, on page 214 of these Reports, where the same principle was followed.

head of cattle and one horse or their value, £95. The Magistrate's reasons for judgment were as follows:—

Reasons for Judgment.

In this case the Plaintiff is claiming 18 head of cattle and one horse as balance of dowry due for his daughter Jannet, who was married some years ago to the Defendant's brother Zinxondo.

Four head of cattle were paid by the Defendant, two for the engagement, one as a "twala" fine and one as a "sedwangu" beast.

The main points in dispute between the parties are the fact of the marriage and the promise to pay a fixed number of stock as dowry.

I found that the marriage actually took place. Two preliminary head of cattle were paid before the marriage, and when the girl was "twalaed" two more cattle were paid by way of fine or damages. The Defence relies mainly upon the fact that no marriage ceremony took place. But in view of the decision of the Native Appeal Court in the case of *Mpakanyiswa* vs. *Ntshangase* (1 Henkel, 17) such a celebration is not held to be a necessary essential to constitute a marriage. As that judgment reads: "Payment of cattle and the handing over of the woman are the essentials found to guide the Courts." (See also the resumé of decisions given in Seymour, pp. 8 and 9.)

There is ample proof for Plaintiff that the dowry was fixed between the parties, the only uncertainty on that point being whether this was done before or after the death of the late Zinxondo. But from what the Headman says the arrangement was probably made before his death. Defendant himself says, "The dowry is fixed in Hlubi Custom. It is 20 head of cattle and a horse."

I came to the conclusion that the marriage was duly entered into and the dowry fixed at 20 head of cattle and a horse.

With regard to the Defendant's claim in reconvention, I consider that as the cattle paid were held to be dowry cattle the Defendant could not under the circumstances claim their return.

The Plaintiff is laying no claim to either the woman Jannet or her child Nokufa, and they are not so he says being detained by him. There is no definite proof to the contrary. They still belong to the Defendant. Defendant therefore has no claim against the Plaintiff in this account. His counterclaim was therefore dismissed.

The "sedwangu" beast was held to be non-returnable. Judgment was given for the Plantiff for 17 head of cattle and 1 horse or their collective value (£95) and costs of suit. (Individual value of stock £5 a beast and £10 the horse.)

The Defendant appealed.

JUDGMENT.

By President: This is an action to compel payment of dowry for Respondent's daughter who is alleged to have been married to the late Zinxondo. Appellant is sued as guardian of the estate of the late Zinxondo.

The facts as found by the Magistrate in the court below, and this Court sees no reason to disagree with his finding, are that the late Zinxondo paid two head of cattle as engagement fee, one for abduction of the girl and one for the " sedwangu " beast. Respondent's daughter thereupon lived with Zinxondo as his wife until his death and had children by him.

The facts having been submitted to the Native Assessors, they state that according to Hlubi custom there was a marriage between Zinxondo and Respondent's daughter, and that Respondent can sue for the dowry.

The Court concurs in this view and the appeal is dismissed with costs.

Butterworth. 4th March, 1920. C. J. Warner, C.M.

GONGOTA MASIZA vs. MAKINYANA GONJANA.

(Nqamakwe. Case No. 198/1919.)

Marriage, essentials of—Dowry, return of—Deductions for abduction and seduction—Engagement—Misconduct of girl.

The Plaintiff sued for the return of the cattle (five head, with nine increase) paid by him to the Defendant in respect of Defendant's sister, to whom he had been engaged to be married according to Christian rites. He alleged that the girl had misconducted herself with another man, as a result of which she had given birth to a child. He therefore claimed cancellation of the marriage and return of dowry. Defendant pleaded that after the payment of the five head (which had increased to nine head) the Plaintiff abducted the girl, and when messengers were sent to demand her return he asked that she be allowed to remain as his wife, and paid a certain black ox by word of mouth as a fine. The Magistrate gave judgment for Defendant with costs, and the Plaintiff appealed.

Judgment.

By President: Appellant sued Respondent in the court below for the return of certain cattle, and their increase, which he had paid to Respondent as dowry for Respondent's sister, Mary Ann, whom he had contracted to marry by Christian rites; Respondent admitted the engagement to marry by Christian rites, and the payment of dowry cattle, but relied on a special plea that Appellant abducted the girl, and that he then married her by Native Custom, and consequently as she became his wife he cannot claim the return of the cattle.

The sole point to be decided in this case is whether Respondent has discharged the *onus* which was on him to prove his special plea that there was a marriage by Native Custom between Appellant and Mary Ann. He admits that when Mary Ann was abducted he sent John Gxoka to demand her return. He states that she did not return. Appellant, on the other hand, says she went away with the messenger who came for her. If this was the case there

was no marriage. Respondent has not produced any evidence to support his testimony as the evidence of Qoni is chiefly hearsay, and in the absence of anything to show that the evidence of John Goka and Mary Ann is unobtainable is would seem that Respondent has not produced the best evidence to substantiate his plea.

For these reasons the Court considers that Respondent failed to establish the plea on which he relied.

The appeal is therefore allowed with costs, and the judgment of the court below altered to judgment for Plaintiff for nine head of cattle or £90, and costs; absolution from the instance as regards the balance of Plaintiff's claim.

Mr. Warner applies for some deduction for the abduction and pregnancy of Mary Ann.

After argument and submitting the the question at issue to the Native Assessors, the Court, following the decision in *Maqungu* vs. *Mvakwendlu and Another* (Meaker's Reports, 259), amends the judgment by allowing two head of cattle to be deducted from the number awarded Appellant for the abduction and pregnancy of Mary Ann.*

Lusikisiki. 8th December, 1919. C. J. Warner, C.M.

MDLENI vs. PEZANI.

(Ngqeleni. Case No. 252/1919.)

Marriage, essentials—Dowry, return of—Custom—Bomvana Clan in Pondoland are under Pondo Law.

In this case the Plaintiff claimed the return of five head of cattle he had paid to Defendant on account of Defendant's daughter, no marriage having taken place. The Magistrate gave judgment for the Plaintiff, and the Defendant appealed.

Judgment.

By President: With regard to the first ground of appeal, in the absence of any evidence that the Bomvana Clan were allowed by the Pondo Chief, before the annexation of Pondoland, to follow their own laws and customs, this Court must hold that they are under Pondo Law.

This Court agrees with the Magistrate that there was no marriage between Respondent and Appellant's daughter. The evidence discloses that she refused to cohabit with Respondent and left him after a stay of a few days at his kraal, and there is nothing to show that she ever consented to marriage with Respondent, this Court cannot hold there was such a marriage.

The Magistrate was, therefore, correct in holding that Respondent was entitled to the return of the cattle, he had paid as dowry, and the appeal is dismissed with costs.

* Compare judgments reported on pages 2 and 102 of these Reports.

Kokstad. 27th August, 1919. C. J. Warner, C.M.

ROBO vs. MADLEBE.

(Umzimkulu. Case No. 84/1919.)

Marriage—Essentials of marriage—Payment of dowry by word of mouth—East Coast Fever restrictions—Engagement—Presumption of marriage.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: Appellant sued Respondent in the court below for certain four head of cattle and stated that he obtained two cattle, then running at Respondent's kraal, from one Gantsa as dowry for Appellant's daughter; that he arranged with Respondent to keep these cattle for him and they have now increased to four.

Appellant's case is that Respondent married the daughter of Vellum some time ago and paid dowry for her to Vellum, but that owing to East Coast Fever restrictions the cattle remained with Respondent, that Vellum disposed of one of these cattle which passed through several hands, though always in the possession of Respondent, until Appellant acquired possession of it from Gantsa. Appellant has succeeded in establishing a complete chain of evidence by calling the different owners of the animal from the time that Vellum disposed of it until it came to be his property.

Respondent denies that there was any marriage between himself and Vellum's daughter, though he admits he was engaged to her and that she lived at his kraal for "engagement purposes," but he does not explain what he means by this term. Another of his witnesses states that Respondent paid eight head of cattle as dowry for Vellum's daughter and that she lived with him for two years.

Since the movements of cattle have been restricted in consequence of East Coast Fever natives have, in many cases, adopted the system of paying dowry cattle by description or word of mouth, and though in these cases the cattle have remained in possession of the payer of the dowry, the Courts have held that this constitutes a sufficient payment of dowry cattle.*

It has been held in this Court that the old Native essentials of marriage are now seldom observed, and that the payment of dowry and the handing over of the girl constitute a Native marriage. In the present case the facts that Respondent paid eight head of cattle as dowry for Vellum's daughter, and that she lived with him for at least a year, raises a presumption of marriage which required to be rebutted by the clearest evidence.

This Court therefore finds that there was a marriage between Vellum's daughter and Respondent, that Vellum disposed of one of the dowry cattle while it was in the possession and charge of Respondent, and that after it had changed owners several times Appellant finally became its owner.

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

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* Followed in case of *Ngwevenunu* vs. *Macasimba* (Mount Frere ease)· Native Appeal Court, Kokstad, August, 1923.

Lusikisiki. 19th August, 1919. C. J. Warner, C.M.

HOMBENI vs. ZOTEKANA.

(Bizana. Case No. 213/1918.)

Marriage—Presumption that man and woman living together as man and wife are lawfully married—Marriage, dissolution of —Successful claim by third party for cattle paid as dowry dissolves the marriage.

Action for a declaration of rights to two girls by name Nokusila and Nomabakala, and an account of the dowries received for them. Plaintiff (Zotekana) alleged that he was the heir of one Mjanyelwa, who during his lifetime married one Magora, the girls Nokusila and Nomabakala being issue of that marriage. After the death of Mjanyelwa the woman Magora and her two daughters went to live at the kraal of her late father, Mcazwa, father of the Defendant. The Defendant had given the girls in marriage and received the dowry for them, refusing to recognise the right of Plaintiff thereto. The Defendant denied that the Plaintiff was heir to the late Mjanyelwa, but he admitted the marriage of Mjanyelwa to Magora, of which the two girls Nokusila and Nomabakala were born. He alleged, however, that the cattle paid as dowry by Mjanyelwa for Magora were successfully claimed by one Ngxangile, who alleged that one of the cattle had been stolen from him by Mjanyelwa, and that judgment was given for the seizure of all the cattle by Chief Manundu, prior to the annexation of Pondoland. The cattle were duly seized, so that Mcazwa actually received no dowry for Magora, and therefore the late Mjanyelwa had no claim to the children. The Magistrate gave judgment for Plaintiff, and the Defendant appealed on the grounds (1) that Plaintiff had failed to prove that he was the heir of Mjanyelwa; and (2) that the cattle paid by Mjanyelwa having been seized by order of the Chief, Mjanyelwa had no claim to the children born to Magora; (3) that the cattle paid as dowry for the girls having died of East Coast Fever before demand, Defendant was not liable.

Judgment.

By President: Respondent who was Plaintiff in the court below sued Appellant for a declaration of rights in respect of two girls, Nokusila and Nomabakala, the daughters of the late Mjanyelwa. The first essential point which Respondent had to prove was that there was no marriage between the late Mgili and Mcwadile, the father and mother of Mjanyelwa.* He states he was a young man at the time, the case arising out of the stolen animal discovered among the cattle paid as dowry by Mjanyelwa was heard; consequently his knowledge of whether or not Mgili and Mcwadile were married must be hearsay. It is a presumption

* *Note.*—In evidence Zotekana stated that he was the heir of one Benjengele who was the son and heir of Myekayeka. Myekayeka had a sister called Mcwadile who "eloped" with Mgili, and had children by him, of whom one was the late Mjanyelwa, whose heir, Zotekana claimed to be. It follows that Zotekana's claim to be heir depended upon no marriage having taken place between Mcwadile and Mgili, *i.e.*, upon Mjanyelwa's illegitimacy, since he claimed through Mjanyelwa's *mother* and not his father. *Vide* table at foot of next page.

of law that people living togther as man and wife are lawfully married, and in the opinion of this Court, sufficient evidence has not been adduced by Respondent to rebut this presumption.

The second ground of Appellant's defence is that the marriage of Mjanyelwa was dissolved by reason of the fact that a stolen beast having been discovered among the cattle paid by him for dowry for his wife, all the dowry cattle were seized by the Chief, and thus the marriage was dissolved.

It is a principle of Native Law that if cattle paid as dowry are successfully claimed by a third party who recovers them from the person to whom they were paid, this has the effect of dissolving the marriage, as there can be no marriage without cattle.

There is certainly strong evidence that Mjanyelwa's marriage was broken off for this reason. The third question for decision is whether Appellant can be made liable for cattle paid to him as dowries for the girls in dispute which have died. Seeing that Appellant received the cattle in *bona fide* belief that he was entitled to them, and that he had good grounds for holding this view, and that Respondent allowed some time to elapse before instituting proceedings for the recovery of these cattle, he cannot now in the opinion of this Court, hold Appellant responsible for cattle which have died from the effects of East Coast Fever.

For these reasons the Court considers that Respondent failed to establish a better right than Appellant to be regarded as the owner of the girls in dispute.

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

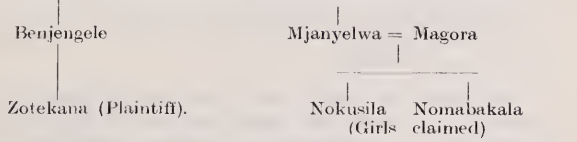
Butterworth. 9th November, 1921. T. W. C. Norton, A.C.M.

JOHN SIHLALA vs. TYABONTYI NDLEBE AND ANOTHER.

(Willowvale. Case No. 114/1921.)

Marriage—Long cohabitation creates presumption of marriage—Dowry—Guardianship—Legitimacy of children.

In this case the Plaintiff claimed a declaration of rights concerning a certain girl Dinah and four head of cattle paid as dowry for her. In his summons he stated:—



The Defendant, Hombeni, claimed through the woman Magora, alleging that the marriage between Mjanyelwa and Magora was dissolved by the seizure of the dowry paid.

For the same principle that a successful claim for the dowry by a third party dissolves the marriage, see case of *Sipoxo* and *Delagi* vs. *Rewana*, on page 205 of these Reports.

(1) That he was the grandson and heir of the late Lumkwana.

(2) That after Rinderpest, one Deliwe, daughter of Lumkwana, was seduced by Msizileni Sihlala, now deceased, and the Defendant was born as the result of the said intercourse.

(3) That subsequently Msizileni eloped with Deliwe and took her to Mashonaland, where she gave birth to two illegitimate children, both girls, named Dinah and Selina.

(4) That Msizeleni died in Mashonaland and Deliwe returned with her three children and went to reside at the kraal of Plaintiff's uncle.

(5) That Defendant secretly removed Dinah and gave her in marriage, receiving four head of cattle.

Defendant admitted that his late father had seduced Deliwe, but he thereafter married her and removed to Mashonaland. He claimed the girls as the property of his late father's estate. Defendant counterclaimed for a declaration of guardianship in regard to Dinah and Selina, and declaring him to be entitled to the dowries received for them. It was admitted that Deliwe lived with Msizileni for about nine years. The Magistrate gave judgment for the Plaintiff as prayed, and dismissed the counterclaim. The Defendant appealed.

JUDGMENT.

By President: Appellant seeks the reversal of the judgment in the court below both on claim in convention and reconvention.

The Magistrate finds that no dowry was paid for the woman Deliwe, and that Appellant is illegitimate, and that therefore Respondent as heir to Lumkwana, the father of Deliwe, is entitled to the girls or their dowries.

In the opinion of this Court the Magistrate has not given sufficient weight to the presumption of marriage arising from the long cohabitation of Deliwe with Msizileni.

In the cases, *Kiliwe Tom* vs. *Ntwanambi and Matokazi*, heard at Umtata in March, 1905, and *Zekelo* vs. *Mbauli*, heard at Umtata in July, 1910, neither of which is reported, long cohabitation was held to create a presumption of marriage.

In the present case cattle had been paid, and the woman was not fetched back from Msizileni's, which in itself goes to show there was a marriage.

The appeal is allowed with costs and judgment entered "For Defendant in convention with costs, and Plaintiff in reconvention (Defendant in convention) is declared guardian of Dinah and Selina and entitled to receive their dowries."

Umtata. 16th November, 1921. T. W. C. Norton, A.C.M.

M. MXABELA vs. J. MXABELA.

(Elliot. Case No. 186/1921.)

Marriage—Long cohabitation creates presumption of marriage—Earnings of a woman during marriage belong to her husband.

The Plaintiff, July Mxabela, sued the Defendant, Mietje Mxabela, for certain stock of the value of £101 10s., alleging that he was the heir and legal representative of the late Mxabela, and that the Defendant was the " Qadi " widow or the seed-bearer of the Great House of the late Mxabela. The Defendant denied that she was wife of the late Mxabela, who never paid dowry for her, but stated that she was the widow of one Mzadu, and the stock claimed was earned by her during widowhood. The Magistrate found that the marriage of Mxabela with the Defendant was not proved, although the Defendant had lived with him, and a girl, one Yawata, was probably the result of their cohabitation. The late Mxabela had received dowry for Yawata, and this was apparently among the stock in possession of the Defendant which the Plaintiff claimed. The Magistrate found that Plaintiff was entitled to all the stock claimed, with the exception of six sheep, which were the earnings of the Defendant. The Defendant appealed, on the grounds (1) that the judgment was against the weight of evidence, (2) that the Magistrate having found there was no marriage between the Defendant and Mxabela, should have granted absolution from the instance, the *onus* being on Plaintiff to prove that the stock was the property of Mxabela, (3) that there was insufficient evidence on the record to prove that the stock belonged to the late Mxabela

Judgment.

By President: Respondent as legal heir and representative of late Mxabela sues Appellant for stock admittedly in her possession, alleging that she was " Qadi " wife of late Mxabela.

Appellant denies the marriage and claims the stock as her earnings during her widowhood, she having been previously married to one Mzadu. She admits having lived with Mxabela for years, and the defence evidence shows the cohabitation had continued since before Rinderpest, a period of over 25 years.

The Magistrate finds that there was no marriage, but gives judgment in favour of Respondent on the ground that Appellant has not proved that she earned any of the stock, with the exception of six sheep, which are not included in the judgment, and in respect of which no cross-appeal has been noted.

The evidence does not support the Magistrate's finding, but does support his judgment, and from the Magistrate's remarks it is clear that he is not conversant with Native Custom, and has erred.

To clear the matter up, this Court will exercise its powers of review.

The long cohabitation of Mxabela with Appellant creates a presumption of marriage. *Kiliwe Tom* vs. *Ntwanambi and Matokazi* (Umtata, March, 1905), and *Zekelo* vs. *Mbauli* (Umtata, July, 1910), not reported.

There is evidence that dowry was paid by Mxabela, and the fact that neither Yawata nor her dowry were ever claimed by the heir of the woman's first husband satisfies this Court that there was a marriage between Mxabela and Appellant.

This being so, it follows that during the subsistence of the marriage any earnings of the woman would belong to her husband and he was entitled to the dowry of Yawata, who is found by this Court to be the daughter of Mxabela, born of his marriage with Appellant.

Finding the marriage proved, it is not necessary to consider the third ground of appeal.

The appeal is dismissed with costs.

Kokstad. 28th August, 1919. C. J. Warner, C.M.

NYANGANINTYI SIDLAYIYA vs. MDUNA MANGALI.

(Mount Fletcher. Case No. 42/1919.)

Marriage—Rejection of husband by wife—Substitution of wife by another girl—Return of a woman to her first husband subsequent to her second marriage—Ownership of children born of second marriage.

Nyanganintyi sued Mduna for three head of cattle or £15 as damages for adultery alleged to have been committed with his wife, and also for the return of the two minor children of the marriage. Nyanganintyi alleged that Mduna was living in adultery with his wife. Mduna denied Nyanganintyi's marriage with the woman, stating that this marriage was null and void as she was already married to him. He admitted that the woman was absent from him for a long period, and that two illegitimate children were born to her, but he claimed these children on account of their having been born during the subsistence of his marriage with the woman. In reconvention, he claimed damages for the adultery and the two pregnancies of the woman by Nyanganintyi. The Magistrate gave judgment for the Plaintiff in convention and for the Defendant in reconvention. The Plaintiff (Nyanganintyi) appealed.

Judgment.

By President: The main question at issue in this case is whether the woman Nogulanti is the wife of Appellant or Respondent.

It appears from the evidence that she married Appellant about the year 1897, and eight head of cattle were paid as dowry for her. Some five years after she left her husband owing to the death of her children and on her refusing to return to him, and on his making a demand for the return of his cattle paid as dowry for her, he was given, and accepted another girl Noma in her place.

Nogulanti's guardian then gave her in marriage to Respondent with whom she lived for some years and by whom she has had children. Recently Nogulanti returned to Appellant, her first husband, and Respondent sued him for damages for adultery and the children of the second marriage.

The isues in this case are put to the Native Assessors who state:—

(1) If a girl rejects her husband and he demands the return of his dowry cattle, he may be given another girl to replace his wife.

(2) It is not unusual for a woman to leave her second husband and return to the first.

(3) The second husband may then demand the return of his dowry cattle from the father of the woman as she has revived her first marriage by returning to her first husband, and the father may then demand dowry from the first husband for the second wife, as well as the first.

(4) The children of the second marriage are the property of the second husband.

(5) The first husband has no claim against the second for damages for adultery by reason of his wife's cohabitation with the second husband during the subsistence of her second marriage.

The Court concurs in these views and the appeal is allowed with costs and the judgment of the court below altered to read:—

On claim in convention: Plaintiff is declared entitled to the children claimed in the summons. For Defendant in respect of the claim for three head of cattle or £15 damages for adultery.

Defendant to pay costs.

On claim in reconvention: For Defendant in reconvention with costs.

Lusikisiki. 15th April, 1920. T. W. C. Norton, Ag.C.M.

KEFU vs. MRWEGENI AND GCINANI.

(Ngqeleni. Case No. 319/1919.)

Marriage, revival of—Marriage is not revived by the return of the wife after the dowry has been returned.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

Judgment.

By President: The Appellant sued Respondent for five head of cattle as damages for adultery with his wife, Nonene.

Respondent pleaded that he had previously married the woman, but that his dowry was returned, this marriage dissolved, and that about 12 years after her marriage to Appellant, she returned to Respondent, thus reviving her marriage.

The ground of appeal is that the decision is contrary to Native Law.

Certain cases are quoted by the Magistrate in support of his finding, but these cases are not in point as they deal with questions of widows.

In the opinion of this Court the Magistrate has erred.

The first marriage having been dissolved by return of dowry and a second marriage having been contracted, it is quite impossible for Respondent's marriage to be revived by the mere return of his former wife to his kraal, her second marriage admittedly still subsisting.

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

Kokstad. 1st/4th December, 1919. C. J. Warner, C.M.

B. GUMA vs. S. GUMA.

(Mount Fletcher. Case No. 12/1919.)

Marriage—Ukungena Custom—Marriage by Christian rites of ukungena husband and wife—Legality of—Status and ownership of children born prior to the Christian marriage—Act 40 of 1892—Proclamation 466 of 1906—Proclamation 142 of 1910—Proclamation 127 of 1918—Act 24 of 1886—Legitimisation of children.

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

JUDGMENT.

By President: In this case the Plaintiff in the court below (now Respondent) sued the Defendant (now Appellant) for a declaration of rights arising from the cohabitation of his mother first with his father under marriage according to Native Custom, then with his dead father's brother under the " ukungena " custom, and lastly with the same brother under marriage by civil law.

The case came before this Court at its last session, and was returned to the Magistrate for further evidence. The facts, as established to the satisfaction of the Magistrate and this Court, show that in his lifetime Mfalala married under Native Custom one woman only, named Nomatafa, who bore a child, Solomon Guma (the Plaintiff); that after Mfalala's death his brother Benkosi (the Defendant) cohabited with Nomatafa under the " ukungena " custom and she bore issue; that subsequently she married Benkosi by civil law and bore further issue.

The Plaintiff claimed a declaration of rights in respect of (1) certain huts occupied by his father, (2) the children of both " ukungena " and subsequent marriage unions, and (3) an account of the dowries paid or to be paid in respect of the daughters of these unions.

The Defendant's plea repudiated every claim and claimed the children of both ukungena and civil marriage unions by virtue of the latter. No evidence was led in support of the claim to the huts, and the judgment did not deal therewith. It declared the Plaintiff the guardian of all the children and entitled to daughters' dowries and an account of all dowries already received, on the ground that the marriage between Defendant and Nomatafa was invalid as one between a man and his deceased brother's widow.

In his reasons for appeal the Defendant argues, apart from questions of fact, as follows:—

(1) "That Plaintiff is bound by his pleadings and that the point of illegality of Defendant's marriage was not raised (clause 3).

(2) "That the Magistrate erred when he found that the marriage existing between Defendant and his wife was illegal and could not be recognised in law, for though section 2 of Act 40 of 1892 prohibits the marriage of a man with his deceased brother's wife this would not refer to the case in question as it is common cause that Defendant's brother was married to the woman in question by Native custom, which would not be a bar to Defendant's subsequent marriage, and further it has been held that a Native may contract any marriage recognised by Native Custom provided such custom be not contrary to the natural law (*vide Rex* vs. *Mawabe*) as in this case (clause 2).

(3) "That once a legal Christian marriage is admitted it is clear that Defendant is entitled to the dowries of his children which are his legitimate issue, and is their guardian according to law, and even if the finding is for Plaintiff according to Native Custom, such custom cannot override the law" (clause 4).

The first ground of appeal is disposed of by a reference to Plaintiff's amended replication which roundly charges the Defendant with having committed the crime of incest. It would be hard to find a crisper form of challenge.

Before considering the remaining issues it may be well to point out that it is in the common law rather than Act No. 40 of 1892 that the prohibition against marriage between a man and his deceased brother's widow really lies. The Act merely makes it clear that in allowing one exception to the common law it is not making a second, and it is to the common law that we must go to learn the real nature of the bar. Here, too, it is of vital importance to determine whether it is the sexual union or the forms of its recognition that creates the bar. Thus the issues for decision may be resolved into three distinct questions:—

(1) Did the mere fact of cohabitation between Mfalala and Nomatafa, independently of whatever marriage ties subsisted between them, debar Nomatafa's subsequent marriage with his brother?

(2) If not, did those ties, consisting of a marriage according to Native Custom, debar it? and

(3) If not, did the subsequent marriage vest in the Defendant the guardianship and rights to dowry of children born of the ukungena union?

On the first point there seems to be some reason for thinking that the mere circumstance of cohabitation rather than its ritual incidents was at one time regarded as the dominating factor in deciding questions of affinity and consanguinity. It has, for instance, been seriously argued by a modern authority on Canon law that the marriage of Henry VIII. with Katherine of Arragon was valid apart from the Papal dispensation if, as was surmised, her previous marriage with his brother was never consummated (see Puller: *Deceased wife's sister*). And according to Voet (23.2.25) "marriage does not appear to be allowed between a deflowerer and a blood relation of the person deflowered in cases where, if a lawful marriage and not defloration had taken place between the deflowerer and the deflowered, marriage between the deflowerer and the relation in question would have been prohibited on the ground of affinity. Nor *vice versa* does marriage appear to be allowed between the person deflowered and a blood relation of the deflowerer who is bound to him in a similar tie of consanguinity." The latter question seems to have been reviewed in the case of the State vs. Fouche (1885, S.A.R. 23).* This Court has not had the opportunity of referring to the report of that case, but it is quoted by Gardiner and Lansdowne (*South African Criminal Law and Procedure*, vol. 2, pp. 787-8) in support of a categorical statement that "the theory suggested by Voet that a quasi-affinity may be created by intercourse out of wedlock which would act as an impediment to marriage would not be supported nowadays, and our courts would not regard as unlawful the marriage of a woman with the brother of her seducer."

Consequently the answer to the first question is that the mere cohabitation created no bar, and we pass to consider the effect of a union according to Native forms.

Here it is necessary to guard against the assumption that, because the single term "marriage" is used to describe the conjugal relationships established under both the common law of the country and Native law, they are one and the same thing. They have indeed so much in common, that each form regularises sexual union and the status of offspring, but in other respects the two institutions are fundamentally different in nature and the law governing them. While a common law marriage implies a contract on both sides of exclusive cohabitation terminable only on death or the decree of the Courts, a Native marriage is essentially casual and one sided, allows polygyny, and may be dissolved by the action of either party; it is moreover subject to the doctrine of "no cattle no wife" which was reaffirmed by this Court so recently as last April (*Rwexena* vs. *Sipoxo and Another* (Kokstad)† unreported).

Within the sphere of its own origins and the present conditions of its existence, it is doubtless a suitable form of relationship, but to project it into the whole field of South African Common Law as something identical with civil marriage would need the clearest reasons and the weightiest authority for its support.

Two cases, however, have been referred to in support of the proposition, viz.: *Ngqobela* vs. *Sihele* (10 S.C.R. 346) and *Gqili* vs. *Siqangwe* (I. Henkel 155). The first decided that a monogamous marriage according to Native custom was recognisable by the

* Bisset & Smith, 1, page 565.

† 205 of these reports.

Courts for the purpose of recovering dowry on desertion and the remarks of the late Chief Justice in that case contained *obiter dicta* suggesting post-annexation unions of this nature had all the character and consequences of a civil marriage,—prohibited polygamy, for instance, and were only dissoluble by virtue of the common law and by decree of the Courts. Had these dicta possessed legal effect the whole fabric of the Native marriage institution would have been revolutionised, for as already pointed out the Native marriage is fundamentally different from that known to the South African law. But these larger issues were not really before the Court for decision, the provisions of the General Regulations bearing upon them were not quoted, they have never been adopted in the Territorial Courts, and any doubts as to their inapplicability were resolved by the fresh interpretation given to the Regulations by Proclamation No. 466 of 1906 whose provisions are reincorporated in Union Proclamation No. 142 of 1910 as amended by Proclamation No. 127 of 1918.

Accordingly this case can no longer be quoted as ruling that a marriage by Native custom is the equivalent of a civil marriage.

Before commenting on the next case it may be well to examine the bearings of the criminal law on the question. According to the common law the marriage of a person with his deceased brother's widow would be incest. But section 123 of the Transkeian Territories Penal Code narrows down that crime to sexual unions between consanguinous persons, and, when so specific in form, must (notwithstanding section 265 of the Code) be taken as to that extent repealing the common law of crimes. Again it is specifically enacted in section 168 that a person married by Native Custom and contracting a fresh marriage shall not be held to have committed the crime of bigamy.

The close connection between criminal and civil disabilities is emphasised in the judgment of the Appellate Division in the case of *Estate Heinamann, etc.*, vs. *Heinamann* (1919, A.D., 99) in which it was decided that, "adultery having ceased to be a crime, the prohibitions which were merely accessory have necessarily gone with it." Whether the civil disability in the case of affinitous marriages merely follows on the penal sanction, as was held to be the case in adultery, is a question on which it would be impossible to pronounce without a reference to authorities not available in this place; but at the least, the statutory removal without reservation of the criminal penalty creates a strong implication that the civil disability fell away therewith, and in any case it would be difficult to sustain an argument that a union is at once a marriage under the civil law and not a marriage under the criminal law.

The second case was essentially similar to the present one, and decided that a man could not marry by civil law a woman to whom his deceased brother had been married by Native Custom. This Court could only depart from its previous rulings in questions so important as the law of status with great reluctance. But the judgment referred to was apparently one of first impression and there is nothing to suggest that the broader considerations involved were presented before the distinguished officer who presided on that occasion.

The simple fact is that the Native customary relationship can be identified as a marriage only by reference to its surroundings: its recognition is strictly limited and local: and to separate the

custom from its associations, universalise its recognition, and judge of its significance in every issue of South African Law by the tests of a civil marriage must inevitably lead to confusion and chaos. Whatever it may be a marriage by Native Law is not equivalent to a marriage by common law.

Any restriction on the liberty of a person to contract a marriage must be strictly construed. The common law forbids a marriage between two persons within a certain degree of affinity by marriage as established by common law. There is nothing to show that it goes further and prohibits marriage because of affinities traceable through unions peculiar to Native Custom.

Accordingly this Court is of opinion that the previous union of Mfalala with Nomatafa did not debar her subsequent marriage with Defendant and that that marriage is valid.

In regard to the final question, the Defendant in effect contends that his civil marriage legitimised the offspring of his previous illicit relationship with Nomatafa, and therefore gives him full parental rights over them. But that relationship was not illicit: it is one recognised by Native Law and the Courts: the "ukungena" children are legitimate; their status is governable by the law of "ukungena"; they belong to the dead man's household. They do not belong to the woman and she cannot bring them with her, as if they were illegitimate, into the new marriage.

The appeal is allowed and the judgment altered to read as follows:—

(1) Plaintiff is declared to be the guardian of all issue of the "ukungena" union and entitled to the dowries paid or to be paid in respect of the female issue, and Defendant is ordered to account to Plaintiff for all such dowries received by him.

(2) The remaining portion of Plaintiff's claim is dismissed.

As the Plaintiff is awarded a substantial portion of his claim which was expressly repudiated by the Defendant, the former is entitled to his costs in the court below, but must pay the costs of appeal.

Butterworth. 7th July, 1920. W. T. Welsh, Ag.C.M.

MKUSE GWABENI vs. NGCAYICIBI GWABENI.

(Tsomo. Case No. 127/1919.)

Marriage—Widow—Fingo Custom—Contrary to custom for a man to marry his brother's widow—Ownership of illegitimate children.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

Judgment.

By President: In this case Plaintiff sues the Defendant, his younger brother, for a declaration of rights to certain two girls and certain property.

The Defendant pleads that the children are his property, by virtue of his having married the widow of the late Marela Gwabeni his eldest brother. It is common cause that the children are the issue of the widow and Defendant. The main question for decision is whether the Defendant married his brother's widow. The Magistrate found that such a marriage did take place, being an exception to the custom.

The Defendant alleges that he paid £5 equal to two head of cattle as dowry. This statement cannot be accepted without the strongest corroboration. Had this been a marriage the probability is that the first dowry would have been recovered. The Defendant admits, that when entering into a Christian marriage with Dorcas, five years ago, he described himself as a bachelor.

The Native Assessors state it is contrary to custom for a Native to marry his brother's widow.

The Court is satisfied that the Defendant has failed to prove that he contracted a marriage with his brother's widow.

The appeal is allowed with costs and judgment entered for Plaintiff with costs. Declaring the girls Miriam and Maria to be his, and that Defendant be ordered to hand them over to him.

There will, however, be absolution from the instance for the balance of the claim.

Butterworth. 3rd March, 1920. C. J. Warner, C.M.

ZENZILE GQWABE vs. TOLITYI TYOBE.

(Kentani. Case No. 194/1919.)

Marriage—Wife—Action for return of wife or dowry—Illness of wife no answer to claim for return of wife or the full dowry.

Plaintiff claimed the return of his wife or the eight head of cattle paid for her as dowry. In his summons he stated that he married his wife about 1884 and paid eight head of cattle for her. She had deserted him and now refused to return to him. There were no children of the marriage. The Defendant pleaded that the Plaintiff himself had placed the wife with her brother Sihomo, who refused to give her up. He alleged that Plaintiff had paid dowry to Sihomo. The magistrate found that the Defendant was the heir of the dowry holder and that Sihomo never received any dowry, nor was Sihomo the legal representative of the person to whom the dowry was paid. The Magistrate said that the case was a hard one. The Plaintiff and his wife were so old that they were unable to stand; the woman could not even sit on the form. It was severe on the Defendant, who was merely the heir, to refund dowry that had ceased to exist for a great number of years. The Magistrate gave judgment for the return of the wife by a certain date, or otherwise the return of the dowry paid, viz., eight head of cattle or value £24 and cost of suit. The Defendant appealed.

JUDGMENT.

By President: Respondent who was Plaintiff in the Court below sued Appellant as heir of the late Tyobo for the return of his wife or the dowry he had paid for her.

It appears from the evidence that Respondent and his wife were married about the year 1884. The woman appears to have been of a delicate constitution, and about the year 1910 she went to live with her brother one Sihomo with whom she had lived ever since. She has never returned to her husband who sued for her return or the dowry paid by Respondent.

It is argued in this Court that as the Respondent's wife is too ill to return to him or to discharge the duties of a wife Respondent should not have been awarded the full number of dowry cattle he paid.

The record shows that after the wife went back to her own people Respondent made several attempts to get her back, he provided a doctor for her and paid her brother Sihomo a beast, and his wife admits that she has no cause to complain of his treatment of her and that it was she who requested Appellant to return the cattle as she was too ill to go back to her husband.

On the other hand the conduct of the Appellant has not been such as to entitle him to much consideration from the Court. When the woman went to him as heir of Tyobo and therefore her guardian and told him she required a doctor he seems to have attempted to evade his obligation to tend her during illness but sent her to Sihomo.

The judgment of the court below is in accordance with Native Custom and the appeal is dismissed with costs.

Kokstad. December, 1921. W. T. Welsh, C.M.

MATYESI KIBIDWA vs. MAULA MAKAULA.

(Mount Frere. Case No. 92/1921.)

"Metsha" Custom—Claim for damages for "ukumetsha" cannot be admitted—Custom—Rule made by a Chief for the benefit of his own family cannot be recognised as a Custom—Plea in abatement.

The facts are sufficiently clear from the judgment of the Native Appeal Court.

Judgment.

By President: The Plaintiff sued the Defendant in an action wherein he alleged:—

(1) That Plaintiff is a Headman and eldest son of the late Makaula in Mambem's hut, and a son of the late Chief Makaula is entitled to higher damages than a Commoner.

(2) That Defendant in or about the autumn of 1921 slept with and "metshaed" with Plaintiff's daughter Nomanwu in the store hut of one Saduma at Lutateni in the district of Mount Frere, and thereby caused damages to Plaintiff to the extent of 10 head of cattle or their value, £50, according to Custom, which damages according to Custom Plaintiff is entitled to in his aforesaid capacity and position as a son of the late Chief Makaula.

(3) That Defendant paid on account of the said damages two head of cattle or their value, £10, leaving a balance of eight head of cattle of their value, £40, due to Plaintiff, which cattle or their value have been demanded from Defendant, but Defendant neglects or refuses to pay.

The Defendant pleaded in abatement:—

(1) That the summons discloses no cause of action in that such a claim as made in the summons is not known in Native Custom.
(2) Further, that such a claim for damages is *contra bonos mores*.

The Magistrate overruled the plea in abatement, against which ruling the Defendant has appealed.

The Plaintiff, in his evidence, alleges that his late father, when Paramount Chief, laid it down that anyone " metshaing " with his daughters would be liable to pay him 10 head of cattle, but that this rule did not then apply to Commoners. In this Court's opinion a rule or regulation made by a Chief for the benefit of his own family cannot be recognised as a Custom entitling him to claim damages. It was decided by this Court in the case of *Qabazayo* vs. *Vooso* (2 N.A.C. 7) that a claim for damages for " ukumetsha " cannot be admitted. Whatever may have been the practice during the lifetime of the Paramount Chief Makaula, this Court is not prepared to recognise the claim put forward by the Plaintiff as giving him a good cause of action.

In the opinion of this Court the Magistrate has erred. The appeal will be allowed with costs, and the first plea in abatement upheld with costs.

Lusikisiki. 9th December, 1919. C. J. Warner, C.M.

MLANYWA vs. MKOBENI.

(Ngqeleni. Case No. 191/1919.)

" Ngoma "—Customary for cattle to be lent by one house to another as " ngoma "—Wives, ranking of—Woman married in place of smelt-out wife does not assume the position of the smelt-out wife, who resumes her status *if she returns—Pondo Custom.*

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: Appellant and Respondent are the sons respectively of the Great and Right Hand Houses of their late father.—

Appellant sued Respondent for a declaration that he is the owner of certain four head of cattle. Respondent pleaded that the cattle were the property of the Great House, of which he is heir,

and that two were the progeny of cattle which had been lent under the Custom of "Nqoma" to the "Qadi" of the Right Hand House, and that a red heifer, which had since had a calf, was apportioned by him to the said "Qadi."

Appellant further contends that the woman, who Respondent says is "Qadi" of the Right Hand House, was married to replace his mother, the right hand wife, who had been smelt out and had returned to her own people.

The Native Assessors state that it is customary for cattle of one house to be lent as "Nqoma" to another, and further, that a wife married in place of a smelt-out wife does not assume the position of the last-mentioned wife, who resumes her *status* if she returns to her husband's kraal.

The Magistrate's finding is supported both by evidence and Native Custom, and whether the cattle were apportioned to Noventi as the property of her house or lent under the Custom of "Nqoma," the Appellant, who is heir to the Right Hand House and not to Noventi's House, can have no possible claim to them.

The appeal is dismissed with costs.

Butterworth. 6th July, 1921. W. T. Welsh, C.M.

BENELA MALINGA vs. JENTI JAKENI.

(Idutywa. Case No. 41/1921.)

"Nqoma"—Rights of owner—Owner may claim stock from malafide *purchaser—Ubulunga—Temporary and permanent—Vindicatory action.*

Plaintiff sued Defendant for the return of certain stock, alleged to be a temporary ubulunga beast and her progeny. He further claimed one bay stallion, which he alleged Defendant had wrongfully possessed himself of. Defendant pleaded that the beast was not a temporary ubulunga but a permanent ubulunga, and that he had purchased the stallion from one Noofisi, widow of the late Malinga. The evidence showed that this stallion was "nqomaed" to Noofisi by the Plaintiff's people. The Magistrate gave judgment for the Defendant as regards the ubulunga cattle, and absolution from the instance as regards the stallion. The Plaintiff appealed.

JUDGMENT.

By President: This Court is not prepared to disturb the Magistrate's decision in regard to his judgment from Defendant in respect of the cattle claimed in paragraph 2 of the summons.

In regard to the judgment of absolution regarding the stallion this Court is of opinion that the Magistrate has erred. It was decided in thecase of *Houston* vs. *Mokuninhi* (1915 C.P.D. 219), that an owner is entitled to recover from the purchaser cattle bought by him *bona fide* from a person to whom they had been nqomaed and who had sold them without the owner's consent.

In the case of *Morum Brothers* vs. *Nepgen* (1916 C.P.D. 392), the Court said that the great balance of authority followed by the

Courts was in favour of the law that where a person who holds movables with the consent of the owner sells them to a *bona fide* purchaser without the knowledge of the owner the latter can recover them.

In the present case the Defendant, who was asked by Noofisi to sell the stallion, sold it to himself, he was perfectly aware of the respective rights of Plaintiff and Noofisi and made the purchase without the knowledge or consent of the Plaintiff. The sale by Noofisi of the stallion was not for the purpose of raising funds to purchase necessaries for herself but in order to institute legal proceedings.

This Court is of opinion that it would be inequitable not to apply the principles of the vindicatory action to the present case.

The appeal will be allowed with costs and judgment entered in the court below for the Plaintiff for the restoration of the stallion claimed or payment of its value, £15, with costs of suit.

Note.—In the above case the Defendant was a *mala-fide* purchaser, and the principle laid down in *Mavanda* vs. *Sokana* (1 N.A.C. 8), that the owner cannot recover against the *bona fide* purchaser of "nqoma" stock does not apply. Nevertheless the Court in the above case appeared to approve of the principle laid down in the case of *Houston* vs. *Mokuinihi* (1915 C.P.D. 219), that the owner can recover from a *bona fide* purchaser. This was a case between a European and a Native in the Supreme Court, and Native Law could not be applied, although the case arose from a "nqoma" transaction.

Flagstaff. 8th April, 1919. C. J. Warner, C.M.

MAFIKATSHO MGILANE vs. NGALO.

(Lusikisiki Case).

"Nqoma"—Not unusual for a beast to be handed over to a boy as "nqoma"—Busa Custom—Pondoland.

The facts of the case are immaterial.

Judgment.

By President: Plaintiff in the Court below sued Defendant for the recovery of certain cattle he states are the progeny of a beast handed to Defendant under the Native Custom of "nqoma" about twenty years ago. The Defendant pleads the original beast was delivered to him as wages for services rendered to Plaintiff.

The Court refers the question at issue to the Native Assessors who state that if a beast is delivered to another person under the custom of "Busa" the donor, if he does not permit the donee to kiss his hand may subsequently claim the beast so handed over and its progeny. They further state that it is not unusual for a beast to be handed to a boy under the custom of "nqoma."

There is therefore nothing inconsistent with Native Law and Custom in Plaintiff's case.

There remains the question whether Plaintiff has proved his case. The evidence in the case appears on the surface to be confused and conflicting, but the Magistrate, who had the witnesses before him, found that plaintiff had proved his case.

This Court is not in a position to say the Magistrate was wrong and the appeal is dismissed with costs.

In the Eastern Districts Local Division of the Supreme Court of South Africa (at Grahamstown, on 25th February, 1920, Gane, A.J.

MAYEKISO vs. CLERK OF COURT, ELLIOT.

Practice—Appeal—Act No. 12 *of* 1913—*Right of appeal in cases on Native Custom in the Courts of the Magistrates of Elliot and Maclear still remains to the Native Appeal Court—Rules of Act No.* 32 *of* 1917 *not applicable—Rules of prior Acts and Proclamations remain in force—Act* 26 *of* 1894—*Act* 20 *of* 1856—*Proclamation* 142 *of* 1910—*Proclamation* 127 *of* 1918.

The facts of the case are clearly stated in the judgment of the learned Judge:—

Mayekiso vs. *The Clerk of the Court, Elliot* (*Mayekiso* vs. *De Swardt, N.O.*).

Applicant sought a *mandamus* to compel the Respondent to forward a record to the Native Appeal Court at Umtata. Judgement had been given Applicant in a civil case at Elliot, and an appeal was noted, and the clerk of the court demands £20 as security for costs. This the Appellant refused to pay, contending that Act 32 of 1917 did not apply.

Mr. D. Grant Hodge for Applicant.

Mr. F. G. Stapleton for Respondent.

Gane, A.J.: On 9th January, 1920, judgment was given in the Magistrate's court for the District of Elliot in the case of *Ndabambi Makutyana* vs. *Jeke Mayekiso*, in which the present Applicant, a native, was sued by Ndabambi Makutyana, also a native, for the return of his wife, or restitution of the dowry paid him, or payment of its value. Judgment was given against the present Applicant, who decided to appeal against the judgment, and gave notice to the Respondent that he proposed to appeal to the Court of Appeal for Native Cases at Umtata on the grounds, *inter alia*, that:—

(2) The marriage was not registered as by law required or otherwise the alleged registration was grossly irregular, and was *ultra vires* and beyond the jurisdiction of the Magistrate of Engcobo; and

(3) The Defendant is entitled to retain the woman under the custom of "ukuteleka" for whatever number of cattle the court may order.

The Respondent, who states that he is the duly appointed clerk of the court for the District of Elliot in terms of section 12 of Act 32 of 1917, demanded the security of £20 for the Respondent's costs of appeal required by section 2 (2) of Order XXX. of Act 32 of 1917. This the would-be Appellant refused to give, stating that his appeal was made under Proclamation 391 of 1894, under which no security is required. The present Respondent thereupon refused to forward the record to the Registrar of the Native Appeal Court. The present application is now brought to compel him to do so. The application therefore clearly raises the questions:—

(1) In the event of there still being such a right of appeal as the Applicant contends, is the procedure to be followed that provided by Act 20 of 1856, as applied by regulation 10 of Proclamation 391 of 1894, or that provided by the rules of Act 32 of 1917; and

(2) Is there as a matter of fact such a right of appeal?

It is necessary to answer the last question also, because, though the Respondent does not apparently contest the right, but only the procedure to be followed, the Court can hardly make an order in favour of either party in this dispute unless satisfied on the question whether or no the right in fact exists. Moreover it would appear that the whole, or at any rate the main object of the application is to test the question whether such a right of appeal exists in the district of Elliot, and the matter was argued by both counsel on this basis.

The territory of Tembuland, of which the district of Elliot is a part, was annexed to the Cape Colony by Act of 1885, section 2 of which gave the Governor the right to legislate by proclamation for such territory. By Proclamation 140 of 1885 (General Regulations, Tembuland), section 22, it was enacted that suits between native and native should be dealt with by the magistrates according to Native Law. By Proclamation 91 of 1894 a court of resident magistrate was established for the district of Elliot. By Act 26 of 1894, section 3, it was provided that in civil suits to which natives alone were parties no appeal should lie in Tembuland from a Resident Magistrate's Court judgment "except to a Court consisting of the Chief Magistrate of the territory in which such suit, action or proceeding shall have been instituted and two assessors to be appointed by the Governor." The Act also empowered the Governor to make regulations for such Native Court of Appeal, and such regulations appeared in Proclamation 391 of 1894. This proclamation provides (regulation 6) that a person intending to appeal shall give notice in writing to the clerk of the court in which the case has been decided. The Magistrate or his clerk is to notify the Chief Magistrate (regulation 7). The procedure in regard to forwarding records is *mutatis mutandis* to be that in existence of the courts of resident magistrates in Cape Colony (regulation 10). It follows therefore that section 59 of Schedule B to Act 20 of 1856 would indicate the procedure for forwarding the record, and that it should be forwarded by the clerk of the court to the Registrar of the Native Court of Appeal, together with a certificate of authentication. Schedule A to Proclamation 391 of 1894 prescribes certain fees to be paid, but makes no mention of any security for Respondent's costs of appeal.

The ordinary case of security *de restituendo* in case the judgment is carried into execution, and of security in the event of suspension of execution, is fully dealt with by regulation 6. Whether or no the deposit of £1 17s. 6d. mentioned in rule 33 of Schedule B to Act 20 of 1856 as to be lodged as security for the costs of conducting the appeal, can be demanded from the person wishing to appeal to the Native Appeal, Court is not so clear. But I think I am entitled to infer from the fact that the clerk of the court does not dispute the statement in Mr. Aling's letter attached to his affidavit that no security is in the ordinary way required under Proclamation 391 of 1894 that the deposit has not in practice been demanded.

I may add that Proclamation 142 of 1910, as amended by Proclamation 127 of 1918, in regard to Native marriages and the administration and distribution of estates, provides in section 6, sub-section 1, that subject to certain other provisions of the same 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 questions may properly be brought, subject to appeal to the Native Appeal Court." Section 6 (2) provides that in the case of marriages contracted according to Colonial Law, or Native Registered marriages, such questions are to 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. I am entitled to assume from the fact that the Magistrate exercised jurisdiction in the present case that the matter was not one falling under section 6 (2) of this Proclamation. It therefore fell under Section 6 (1) of the Proclamation as amended, so that clearly until the coming into force of Union Act No. 12 of 1913, the dispute was one in which an appeal would have lain only to the Native Appeal Court, and in which the Appellant could have claimed, on duly noting an appeal and otherwise complying with the Regulations, to have the record forwarded to the Registrar of that court.

A very important question thus arises. What has been the effect, if any, of the application to the district of Elliot of Act No. 12 of 1913? That Act does not alter the geographical nomenclature of the district; in fact it still speaks of it as being "in the Transkeian Native Territories." But in section 1 of the Act it is provided that from and after a date to be fixed by Proclamation 297 of 1913, as 1st January, 1914, the provisions of section 2 of Act 3 of 1885 of the Cape of Good Hope shall no longer apply to that district, but that—

(*a*) "Those laws, proclamations and regulations which were then in force in the said districts, but were not then in force in the parts of the Cape of Good Hope not subject to the said Acts shall, save as hereinafter excepted, cease to be in force in the said districts."

(*b*) "All laws, proclamations and regulations which would at the said date have been in force in the said districts, if the same had not been made subject to the said Acts or any of them, shall come into operation and be in force therein."

The material proviso so far as the present case is concerned is as follows: " Provided further, that nothing in this Act contained shall be construed as preventing those Native Laws and Customs which were in force in the said districts immediately prior to the said date from being recognised thereafter in the said districts to the same extent as they were before that date therein recognised, or as preventing any court after the said date from determining under any of the laws, proclamations and regulations mentioned in paragraph (*a*) any matter which before the said date it would have determined in accordance with Native Laws and Customs."

Mr. Stapleton, for the Respondent, has argued that section 1 (*a*) has had the effect of repealing Act 26 of 1894 so far as its application to the district of Elliot is concerned, and that the effect of the proviso is merely to preserve Native Law and Custom in the substantive sense, and not the adjective law relating thereto. " Any court," he argues, will mean any court becoming competent under the new order of things; but will not include the Native Appeal Court, which has become defunct so far as that district is concerned. If this argument is correct, it follows that the Court of Appeal in these Native cases would, after 1st January, 1914, be the Cape Provincial Division or this Court, and those Courts would have seriously to face the duty of sitting as Courts of Appeal in matters depending entirely in Native Law and Customs. But the argument, though ingenious, does not appear to me to be acceptable. Had the proviso ceased at the words " therein recognised " the argument would have been more cogent, though even then the words " from being recognised . . . . to the same extent as they were before that date," would have demanded that a very wide effect should be given to them. But when the proviso goes on to say that any court may after the said date determine under the laws, proclamations and regulations mentioned in paragraph (*a*) the matters which before that date would have been determined in accordance with Native law and customs, it seems to me impossible to avoid the conclusion that " any court " includes the Native Appeal Court, and that the powers given to that court are still preserved undiminished. It is satisfactory to be able to find that such questions even when they arise in the Elliot district can still be dealt with on appeal by a court consisting of experts in Native law and customs. There still remains the question, what procedure must now be followed in bringing such appeals before the Native Appeal Court? By Proclamation 391 of 1894, Regulation 10, it is provided that " the rules, orders and regulations regarding the manner and form of proceeding with regard to the forwarding of records and with regard to the prosecution of appeals in cases brought before the Court constituted by section 3 of Act 26 of 1894 shall, *mutatis mutandis*, and as far as the circumstances of the country will admit and subject to any alteration made at any time by the Chief Magistrate, with the approval of the Governor, be the same as those from time to time in existence in the Court of Resident Magistrate in the Colony." Until at least 1st January, 1918, there could be no doubt what these rules were. After that date Act 32 of 1917 came into force in the Colony proper, and the old " Courts of Resident Magistrates " or " Divisional Courts " became " Magistrates' Courts" in virtue of section 3 (1) of that Act. Although section 108 (4) of Act 32 of

1917 provides that " This Act shall not apply to the Transkeian Territories of the Cape of Good Hope, except in so far as it may be extended thereto by proclamation issued according to law," it has since 1st January, 1918, been treated as in force in the district of Elliot: see *Gazette* of 23rd January, 1920, p. 191, appointing a clerk of the court in that district; and of *De Wet* vs. *Bower* (1918, C.P.D. 433), where the effect of Order XIV., Rule 2 (2), was discussed on an appeal from that district. It was no doubt considered that, although Elliot still remained nominally part of Tembuland and the Transkeian Native Territories," the effect of Act 12 of 1913 was for legal purposes to sever it from them, so that enactments made thereafter for those Territories, though using language which geographically would include that district, would not in their legal effect apply to it. For this reason Proclamation 144 of 1918, providing that the rules of procedure in force in the Native Territories (including Tembuland) shall continue to be those observed prior to 1st January, 1918, has also been treated as not touching the district of Elliot. The proclamation would, of course, have been *ultra vires* had it purported to touch that district, since the general power of legislating by proclamation thereafter has been taken away by Act 12 of 1913. The result is somewhat confusing, and it may be advisable in future to speak of the " Native Territories Proper " as distinct from that portion of the Territories to which the laws of the Territories no longer apply. At the same time the legal position seems clear. Act 32 of 1917, and the procedure thereunder, is now in force in the Elliot district. Is it in force in relation to appeals to the Native Appeal Court? Those are still governed by the regulations in Proclamation 391 of 1904, which remain in force under the proviso above set out to section 1 of Act 12 of 1913.

But I do not think the new rule as to security need be applied. As I have indicated above, it would appear that Proclamation 391 of 1894, by dealing exhaustively in the regulations with the security to be given in the case of execution or suspension of the judgment pending appeal, has intimated that that is the only sort of security for which it has been deemed necessary to provide. Regulation 10, referring to the " rules, orders and regulations respecting the manner and form of proceeding with regard to the forwarding of records and with regard to the prosecution of appeals," may still be given effect in matters other than that of security. This interpretation avoids the awkward consequence of holding that, while in the rest of the Transkei the old rules still obtain, in the district of Elliot new rules must be regarded as in force; and seems to me under all the circumstances to be a fair reading of the law. I have been referred by Mr. Stapleton to Proclamation 91 of 1919, which, repealing section 3 of Proclamation 391 of 1894 and Proclamations 227 of 1900 and 24 of 1912, provides for the sitting of the Appeal Court for the other districts of the Native Territories at various places, but makes no mention of this district, as showing that his contention that Act 26 of 1894 no longer applies to the district is correct. It certainly goes to show that the framer of the proclamation held that view, but in my opinion this view is not the right one. There appears to me to be no reason why Elliot should not have been included in the proclamation, since Act 26 of 1894 is still in force there for the purposes of native appeals, and therefore the power given by section 4 to regulate the

sittings and proceedings of the Court by proclamation still remains undiminished. And should it be found necessary, in view of the dubious state of the law in this matter, to frame new rules for appeals from the district, it will still, under Regulation 10 of Proclamation 391 of 1894, be possible for the Chief Magistrate, with the consent of the Governor-General, to frame them.

It was also argued that the proper course in this matter was to have applied to the Magistrate under section 12 (2) of Act 32 of 1917 to order the clerk of the court to do his duty. But that subsection refers to a refusal by the clerk to do "any act which he is empowered by this Act to do," and the forwarding of a record to the Native Appeal Court is not one of them. In the event of this not being held to be the proper course, it was urged that the Court of Appeal itself should have been approached, and procedure analogous to that in *Biddulph* vs. *Yates* (9 S.C. 498) should have been employed. There is much to be said for this being the most appropriate, if not the only course open to the applicant. But, in view of the relative position of that Court and this one, I think that on the whole there is nothing to prevent this Court from ordering the clerk of the court to do his duty in this matter, and forward the record in this appeal. I think that this Court was expressly sought with a view to obtaining the expression of a superior Court on the question at issue and I think it has jurisdiction in the matter, though it is probable that the Native Appeal Court itself could also have dealt with it.

The clerk of the court will therefore be ordered to forward the record as requested. No order as to costs has been asked for on either side.

Attorneys for Applicant: Espin & Espin; Attorneys for Respondent: Bell & Hutton.

N.B.—This case is fully reported in 1920, E.D.L., page 179.

Note: In the case of *Zwartland* vs. *Stefanus* on appeal from Elliot to the Native Appeal Court sitting at Umtata in July, 1923, that Court decided that by virtue of Act 12 of 1913, section 13 of Proclamation No. 142 of 1910 (Dowry Registration) is no longer in force in the district of Elliot.

Umtata. 24th November, 1919. C. J. Warner, C.M.

TONGO MOLOSI vs. NOBELU LUBALA.

Mqanduli. Case No. 418/1919.)

Practice—Appeal—Attorney—Power of Attorney to note appeal—Proclamation No. 391 of 1894—Exception.

The facts of the case are immaterial.

JUDGMENT.

By President: Mr. Hemming, on behalf of Respondent, files an exception to the hearing of the appeal marked AA and attached to the record.

It appears that after the first appearance of the parties and the postponement of the case for hearing the Defendant died. On the day set down for hearing the name of Barile, a minor, assisted by his guardian, was substituted by consent for the name of Tongo Molosi. No power of attorney authorising Mr. Attorney van der Spuy to appear for the minor Barile was filed. This should have been done as the power of attorney granted by Tongo Molosi terminated with his death. Subsequently Mr. van der Spuy signed a notice of intention to appeal in the case of *Nobelu Luhala* vs. *Tongo Molosi*. The power of attorney authorising Messrs. Ballot and Parsons to appear for Appellant in this Court is signed by Barile, but there is no authority attached to the record empowering Mr. Attorney van der Spuy to note the appeal on behalf of Barile. Section 6 of Proclamation 391 of 1894 directs that notice of appeal shall be in writing signed or marked by the Appellant or his authorised agent, and in view of the omission to file a power of attorney signed by Barile authorising Mr. van der Spuy to note an appeal on his behalf, the exception is a good one and must be upheld. This was the view taken by this Court in the case of *Barnet Shinta* vs. *Gilbert Mdodana* (Meaker's Reports, 224). The appeal is accordingly dismissed with costs.

Lusikisiki. 12th August, 1920. W. T. Welsh, Ag.C.M.

RIPU JADA vs. NKONQA.

(Ngqeleni. Case No. 152/1919.)

Practice—Power of attorney to "proceed to the final end and determination" of a case is sufficient warrant for noting an appeal.

The facts of the case are not material.

JUDGMENT.

By President: Mr. C. Stanford, for Respondent, objects *in limine* to the appeal being heard on the ground that Appellant's attorney did not file a power authorising him to note the appeal.

The objection is overruled on the ground that the original power, authorising the Plaintiff's attorney to proceed to the final end and determination thereof, is sufficient warrant for noting the appeal.

Umtata. 24th March, 1919. C. J. Warner, C. M.

FREDERICK CLAYTON vs. ELIJAH RONTI MIANJENI.

(St. Mark's. Case No. 23/1919.)

Practice—Appeal—Right of coloured persons to appeal to the Native Appeal Court—Slander—Imputation of witchcraft against a coloured man in the presence of persons who do not believe in witchcraft, does not give rise to an action—Act 26 *of* 1894—*Proclamation* 391 *of* 1894.

The Plaintiff, Frederick Clayton, a coloured man, sued the Defendant, Elijah Ronti Mlanjeni, a Native herbalist, for £50 damages for using certain words in the Xosa language with reference to the accused in the presence of a number of witnesses, imputing that a certain sick person was bewitched and made ill by non-natural means made use of by the Plaintiff. The Magistrate dismissed the summons with costs, holding that there was no cause of action, and quoting the case of *Ex parte du Plooy* (10 S.C., 7). The Plaintiff appealed.

Judgment.

By President: Appellant in his evidence in the court below states he is a coloured man, not a Native.

The first question for this Court to decide is whether an appeal lies to this Court, seeing that Appellant is not a Native, but a coloured man. The point was settled in the case of *Mangina* vs. *Jonas* (24 Juta, 606), in which it was held that as a coloured man is not a European there can be no appeal, in terms of Act 26 of 1899, to the Supreme Court in a case wherein the parties are Natives or coloured. The Appellant was therefore correct in appealing to this Court. There remains the question whether the words complained of are defamatory.

In Native Law an action lies in respect of libellous accusation of practising witchcraft, and if this case were between pure Natives an action might be said to lie.

In the matter of *In re du Plooy* (10 Juta ,9) the Supreme Court held that no action lay in a charge of accusing a person of bewitching another. In this case the Plaintiff and all his witnesses say they do not believe in witchcraft or "mamlambo." It is therefore difficult to see what harm the Plaintiff has suffered.

The appeal is dismissed with costs.

Note: This judgment overruled the decision of the Native Appeal Court sitting at Umtata, on 21st March, 1918, Mr. J. B. Moffat, C.M., President, wherein a coloured man named Jones was the Defendant and Respondent. The Respondent's attorney objected to the hearing of the appeal on the ground that the Respondent was not a Native. Evidence was taken by the Appeal Court, and Jones said that his father was an Englishman and that his mother was a coloured woman. He resided in a Native location and paid hut tax. The Court held that in the absence of a definition of "Native" in Act No. 26 of 1894, or in Proclamation No. 391 of 1894, it was necessary to judge by appearance.

The Respondent was not a Native in appearance, and therefore the Court could not hold that he was a Native. The objection to the hearing of the appeal was upheld.

Further Note: A Plaintiff, the son of a European by a Native woman, holding an allotment in a Native location, was held not to be a Native within the meaning of Proclamation No. 391 of 1894, and that consequently he had no appeal to the Native Appeal Court (*J. T. o'Reilly* vs. *Nkambagedwa*, Native Appeal Court, Kokstad, August, 1923). But see the definition of "Native" in section 103 of Proclamation No. 145 of 1923.

Umtata. 21st March, 1922. W. T. Welsh, C.M.

MARTHA MABANDLA vs. HENRY MABANDLA.

(Tsolo. Case No. 127/1920.)

Practice—Appeal—Exception—Circumstances in which an exception upon which a Magistrate has given a ruling and which has been appealed upon, but which the Appeal Court refused to hear on the ground of non-compliance of the grounds of appeal with the requirements of Proclamation No. 144 *of* 1915, *may again be brought before the Appeal Court subsequent to decision by the Magistrate on the merits of the case—Ordinance* 104 *of* 1833.

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

JUDGMENT.

By President: Mr. Hemming, for the Respondent, excepts in limine to the hearing of the appeal in so far as grounds Nos. 1 and 3 of the Appellant's notice of appeal of the 20th October, 1921, are concerned, for the reasons following:—

(1) That as regards ground No. 1 of the said notice of appeal no appeal lies inasmuch as the question therein raised was adjudicated upon by the Court of the Resident Magistrate of Tsolo and decided against the Appellant on the 21st October, 1920, by the overruling of the Appellant's exception marked "A."

(2) That an appeal noted by the Appellant on the 2nd October, 1920, against the judgment overruling the said exception was dismissed with costs, and the said judgment thus and thereby became final and irrevocable by operation of law. That ground No. 3 is inexplicit and does not comply with the provisions of Proclamation No. 144 of 1915, Schedule (1) inasmuch as it is not stated therein in what respect the said judgment is against the weight of evidence or wrong in law.

When this action originally came before the Magistrate's court at Tsolo, the Defendant excepted to the Plaintiff's summons on the following grounds:—

(1) That Plaintiff has no cause of action against the Defendant in the premises by reason that the estate of the late Zota Mabandla was not administered according to the laws governing the administration of deceased estates in the Cape Colony.

(2) That any action for claim to the estate of the late Zota can only be maintained against the executor appointed or to be appointed to such estate.

(3) That whatever action the Plaintiff may have in the premises is premature, seeing that an executor has not been appointed in the estate of the late Zota Mabandla.

The Magistrate overruled this exception and the Defendant thereupon appeal to this Court, giving as his only ground of appeal "that the Magistrate's ruling on the exception is bad in law."

When the appeal came before this Court an objection that the notice of appeal did not comply with the requirements of Proclamation No. 144 of 1915 was sustained. The case was thereafter continued in the Magistrate's court, which declined to go into the question raised in the exception on the ground that it had been finally disposed of. Eventually judgment was given for the Plaintiff.

Against this judgment the Defendant has appealed, giving as his first ground of appeal that the estate of the late Zota Mabandla must be administered in terms of Ordinance No. 104 of 1833, and that the Resident Magistrate has no jurisdiction to administer and distribute such estate by judgment of his court.

The appeal against the Magistrate's decision overruling the exception was not, as is alleged by the Respondent in his objection, dismissed. This Court's ruling was that it could not be heard. That ruling was given on the 11th November, 1920. When the hearing was resumed in the Magistrate's court at Tsolo, the Defendant filed his plea dated 18th July, 1921, in which he again challenged the Plaintiff's right to institute an action against him and alleged, *inter alia*, that such action could only be maintained against the executor of the estate who must be appointed in accordance with the laws of the Cape Colony proper.

No exception was taken by the Plaintiff to the Defendant's plea, and the question for this Court to decide is whether the Defendant is entitled, in the circumstances, to bring the issue therein raised before the Court.

It is also contended on behalf of the Appellant that as the Magistrate's decision on the exception has not been ruled upon by this Court it is competent for that issue, which was raised again in the plea, to be brought before this Court in an appeal against a final judgment of the Magistrate's court.

In the opinion of this Court the Appellant should not be prevented from placing before it the issues specifically raised in his plea, to which no exception was taken, and on which this Court has given no decision.

In regard to the objection to the third ground of appeal, this Court is of opinion that grounds (1) and (2) state how the judgment is alleged to be wrong in law and against the weight of evidence. Ground No. 3 therefore appears to be mere surplusage.

The objection taken in *limine* by the Respondent must therefore be overruled with costs.

Flagstaff. 9th April, 1919. C. J. Warner, C.M.

AARON vs. JULIA QATA.

(Bizana. Case No. 204/1918.)

Practice—Appeal, grounds of—Proclamation No. 391 of 1894, as amended by Proclamation No. 144 of 1915—Statement that judgment is against weight of evidence and contrary to Native Custom does not comply with rule.

The facts of the case are immaterial to the point at issue.

JUDGMENT.

By President: The notice of appeal in this case does not comply with the provisions of section 6 of Proclamation No. 391 of 1894, as amended by Proclamation No. 144 of 1915, in that it does not explicitly state the grounds of appeal.

The bare statement that the judgment is against the weight of evidence and contrary to Native Custom without stating in what particulars it is against the weight of evidence, or in what respect it is contrary to Native Custom is not in compliance with the provisions of the law which requires the grounds of appeal to be explicitly stated.

As, however, no exception was taken to the hearing of the appeal in this Court, the Court allowed it to be proceeded with.

The Magistrate in the court below found that the Appellant had failed to prove his case and gave judgment for the Respondent.

There is ample evidence to justify the Magistrate's finding. No sufficient reasons have been shown for disturbing the judgment of the court below and the appeal is dismissed with costs.

Lusikisiki. 4th April, 1921. W. T. Welsh, C.M.

DALUTSHABA vs. JAMES WALA *ALIAS* XOKWE.

(Ngqelini. Case No. 130/1920.)

Practice—Appeal—Proclamation No. 144 of 1915—Grounds of appeal must be explicitly stated—Act 32 of 1917.

The actual facts of the case are immaterial. The Magistrate gave judgment for Defendant with costs, and Plaintiff appealed on

the ground " that the judgment is against the weight of evidence and not in accordance with the Custom of the Pondomisi tribe, on which the case should have been heard."

JUDGMENT.

By President: In the opinion of this Court the notice of appeal does not comply with the provisions of Proclamation No. 144 of 1915, which provides that an Appellant " shall explicitly state in writing the special grounds on which his appeal is based.

In the case of *Griffiths* vs. *Herschel Motor Engineering Works* (Law Journal, page 461), it was ruled by the Cape Provincial Division of the Supreme Court that it is not a sufficient compliance with Rule 2 (4) (*b*) of Order No. 30 of Act No. 32 of 1917, merely to allege that a judgment is contrary to law, but that there should be an allegation giving the reason why the judgment is contrary to law.

This Court has consistently ruled to the same effect, and did so in the case of *Taliwe Mayibenye* vs. *Malawu Qati*, heard at Umtata on 16th March, 1921.*

The Appellant cannot therefore be heard on the second ground stated in his notice of appeal.

In the opinion of this Court the Magistrate correctly found for the Defendant on the facts in issue.

The appeal is dismissed with costs.

Umtata. 19th November, 1919. C. J. Warner, C.M.

BEN LANDE vs. NOTEKI LANDE.

(Engcobo. Case No. 281/1919.)

Practice—Appeal—Proclamation No. 391 *of* 1894—*Proclamation No.* 144 *of* 1915—*Grounds of appeal must be explicitly stated —It is not a compliance with rule merely to allege that judgment is " contrary to law."*

The facts of the case are immaterial to the judgment.

JUDGMENT (EXTRACT).

President: The notice of appeal states that the grounds of appeal are that the judgment is against the weight of evidence and contrary to law, but it does not state in what particular it is contrary to law, and therefore is not a compliance with the provisions of section 6 of Proclamation No. 391 of 1894 as amended by Proclamation No. 144 of 1915, which requires the Appellant to " explicitly state in writing the special grounds on which his appeal is based."

This Court, in the case of *R. Tonjeni* vs. *Sigwadi* (Meaker's N.A.C. Reports, 226), stated that failure to comply with the rules would justify the Court in refusing to hear an appeal even if no objection were raised by the parties.

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* Page 242 of these Reports.

The notice of appeal in this case certainly does not comply with the rules, and this Court desires to repeat its warning to practitioners to avoid any slackness in complying with the rules.

Umtata. 16th March, 1921. W. T. Welsh, C.M.

TALIWE MAYIBUYE vs. MALAWU QATI.

(Umtata. Case No. 284/1920.)

Practice—Appeal—Proclamation No. 144 of 1915—Grounds of appeal must be explicitly stated—Act 32 of 1917.

In this case one of the grounds of appeal was "that the judgment entered in the said suit is contrary to Native Law and Custom affecting and applicable to the issues raised, and is otherwise contrary to law."

Extract from Judgment.

In the opinion of this Court the notice of appeal does not comply with the provisions of Proclamation No. 144 of 1915, which provides that an Appellant "shall explicitly state in writing the special grounds on which his appeal is based."

In the case of *Griffiths* vs. *Herschel Motor Engineering Works* (1920, Law Journal, 461*) it was ruled by the Cape Provincial Division of the Supreme Court that it is not a sufficient compliance with rule 2 (4) (*b*) of Order No. 30 to Act 32 of 1917 merely to allege that a judgment is contrary to law, but that there should be an allegation giving the reason why the judgment is contrary to law. The Appellant cannot therefore be heard on the second ground stated in his notice of appeal.

Umtata. 17th March, 1920. C. J. Warner, C.M.

DYAMALA MACINGWANE vs. CHARLIE AND ELIZA MABADI.

(Engcobo. Case No. 383/1919.)

Practice—Appeal, grounds of—Insufficient to allege that judgment contrary to Native Law and Custom—Evidence, illegal and incompetent—Irregularity—Proclamations Nos. 391 of 1894 and 144 of 1915—Pleadings—Exception.

The relevant facts are clearly stated in the judgment of the Native Appeal Court.

Judgment.

By President: Mr. Muggleston files an exception to the hearing of the second ground of appeal in that it does not comply with the

* C.P.D. 1920, page 389.

provisions of Proclamation No. 391 of 1894, as amended by Proclamation No. 144 of 1915 in that it does not state in what respect the judgment is contrary to Native Law and Custom.

The Proclamation No. 144 of 1915 enacts that an Appellant shall explicitly state in writing the special grounds on which his appeal is based.

The notice of appeal in this case states that the second ground of appeal is that the judgment is contrary to Native Law and Custom, but does not specify in what respect it is contrary to Native Law and Custom. In other words it does not explicitly state the grounds of appeal and is therefore not in accordance with the requirements of the law.

The exception is allowed.

JUDGMENT: The summons alleges that the Defendants jointly and severally possessed themselves of certain cattle which they unjustly detain from the said Plaintiff.

The plea is merely a denial of paragraph 2 of the summons. This plea, on the authority of *Crosbie* vs. *Insolvent Estate Halgryn* (1916, C.P.D. 664), was vague and embarrassing, and it is surprising that the Plaintiff's attorney did not take exception to it.

Defendant then led evidence to show that he had acquired the cattle by gift. In view of his plea the Plaintiff very properly objected to this evidence. The objection, however, was overruled and the case proceeded to its determination, when judgment was given for Defendants.

The first ground of appeal is that illegal and incompetent evidence was admitted, and Defendants allowed to set up a special defence, which was not pleaded.

This in the opinion of the Court was an irregularity, and the evidence called by Defendant to support his special defence should not have been admitted. When this incompetent evidence is eliminated, the only evidence remaining is that the original beast was lent to Defendant for milking.

The appeal is allowed with costs, and the judgment in the court below altered to judgment for Plaintiff as prayed with costs.

Umtata. 20th July, 1921. T. W. C. Norton, A.C.M.

NGIKILITYE NGUKUMBA vs. SIGWEBO QALA.

(Umtata. Case No. 122/1921.)

Practice—Appeal, grounds of—Proclamation No. 391 of 1894, as amended by Proclamation No. 144 of 1915—Appeal that judgment is against weight of evidence and probabilities does not comply with rule—Exception.

In this case an appeal was noted on the ground that the judgment was against the weight of evidence and probabilities, and contrary to Native Custom.

JUDGMENT.

By President: Mr. Trollope, for Respondent, asks that the grounds of appeal be expunged as they are not a compliance with

the rule, and refers to case *Levisieur* vs. *De Frankfort Boere K.V.* (March, 1921, paragraph 102. Judicial Circular), and quotes *Mayibuye* vs. *Mdawu Qati*† and excepts to the hearing of this appeal.

JUDGMENT: Proclamation No. 144 of 1915 lays down that Appellant "shall explicitly state" the special grounds on which his appeal is based."

In the case *Levisieur* vs. *De Frankfort Boere Ko-operatiewe Vereniging* (Judicial Circular 102, March, 1921*), the objects to be served in stating grounds of appeal were laid down in detail. Applying these to the present case it must be held that to state as a ground of appeal that a judgment is against the weight of evidence and probabilities is not a compliance with the rule.

As regards the second ground it is not stated in what respect the manner of payment of dowry is contrary to Native Custom, and therefore it falls within the ruling in *Dyamala Macingwane* vs. *Charlie and Eliza Mabadi*, heard in this Court in March, 1920.‡

The Exception is allowed with costs.

Lusikisiki. 12th August, 1920. W. T. Welsh, Ag.C.M.

MAQUNDE vs. TSHISA.

(Flagstaff. Case No. 163/1919.)

Practice—Appeal—Appeal limited to grounds stated in notice of appeal—Proclamation No. 144 of 1915.

The facts of the case are immaterial to the judgment of the Native Appeal Court.

JUDGMENT.

Extract from judgment.

Before this Court it is argued that the decision in the case of *Tshisa* vs. *Zwelonke* heard at Bizana in August, 1919, operates as judgment in *re* and, therefore, prevents the present Plaintiff from any further action. This point was not raised in the pleadings nor in the grounds of appeal. While a question of law of this nature might well be raised on appeal without having been pleaded, this Court is of opinion that in view of Proclamation No. 144, which states that Appellant shall explicitly state in writing the special grounds on which his appeal is based, and that the hearing of the appeal shall be limited to the grounds stated in the notice of appeal, it is precluded from considering the legal point now raised for the first time.

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* Orange Free State Provincial Division, 9th March, 1921, before De Villiers, J.P. and Ward, J.

† Page 242 of these Reports.

‡ Page 242 of these Reports.

Lusikisiki. 23rd August, 1921. W. T. Welsh, C.M.

MAXAYI vs. NDUMISO.

(Port St. John's. Case No. 72/1920.)

Practice—Appeal—Grounds of appeal to be furnished within fourteen days of judgment.

The facts of the case are immaterial.

JUDGMENT.

By President: In this case judgment was delivered on the 27th January, 1921. An appeal was noted on the 1st February, but no grounds of appeal were furnished until the 15th March.

Following the decision in the case of *Mevana* vs. *Ranyela**, heard at the last sitting of this Court, the grounds of appeal cannot be considered.

The appeal is dismissed with costs.

Lusikisiki. 1st April, 1921. W. T. Welsh, C.M.

RANYELA vs. MEVANA.

(Port St. John's. Case No. 91/1920.)

Appeal—Notice of and grounds for appeal—Grounds must be furnished within fourteen days of judgment.

The facts of the case are immaterial.

JUDGMENT.

By President: Proclamation No. 391 of 1894, as amended by Proclamation No. 144 of 1915 requires an Appellant to give notice of appeal and state the grounds on which it is based within fourteen days from the date of the judgment appealed against.

In the present case the appeal was noted on 22nd January, 1921, and the grounds were furnished on 16th February, 1921.

As the rule was not complied with, the grounds of appeal cannot be considered.

The appeal is dismissed with costs.

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* Reported below.

Butterworth. 14th March, 1922. W. T. Welsh, C.M.

DUDU LUPUZI vs. MAGGIE SAUL LUPUZI.

(Kentani. Case No. 204/1921.)

Practice—Appeal—Notice of appeal—Grounds of appeal must be furnished within 14 days of judgment—Proclamation No. 391 of 1894 as amended by Proclamation No. 144 of 1915—Objection.

The essential facts are stated in the judgment of the Native Appeal Court.

JUDGMENT.

By President: Mr. Warner objects to the appeal being heard on the ground that the reasons were not lodged within 14 days of the date of judgment as required by law.

Proclamation No. 391 of 1894, as amended by Proclamation No. 144 of 1915, requires an Appellant to give notice of appeal and state the grounds on which it is based within 14 days from the date of the judgment appealed against.

In the present case judgment was delivered in the court below on the 22nd November, 1921. An appeal was noted on the 5th December, 1921, and the grounds thereof furnished on the 22nd February, 1922.

As the rule was not complied with the grounds of appeal cannot be considered.

The objection is accordingly upheld, and the appeal dismissed with costs.

Lusikisiki. 2nd April, 1921. W. T. Welsh, C.M.

MHLUNGWENI vs. BOMBA AND BLAYI.

(Ngqeleni. Case No. 219/1920.)

Practice—Appeal—Grounds of appeal must be furnished within 14 days of judgment—Requirements of Proclamation No. 391 of 1894, as amended by Proclamation No. 144 of 1915.

The facts of the case are not material to the judgment.

JUDGMENT.

By President: Proclamation No. 391 of 1894, as amended by Proclamation No. 144 of 1915 requires an appellant to give notice of appeal and state the grounds upon which it is based within 14 days from the date of the judgment appealed against.

In the present case the appeal was noted on the 15th December, 1920, and the grounds were furnished on the 13th January, 1921.

It is also laid down in section 6 of Proclamation No. 391 of 1894 that the notice of appeal shall be in writing "signed or marked by the Appellant or his authorised agent." In the present

case the notice is signed by" L. D. Crowther, p.p. J. M. Tsamse," and there is nothing to show that J. M. Tsamse holds a power from Mr. Crowther or is the authorised agent of the Appellant.

For these reasons the grounds of appeal cannot be considered.

The appeal is dismissed with costs.

Butterworth. 5th March, 1920. C. J. Warner, C.M.

BILI MSENGANA vs. HECTOR MSENGANA & OTHERS.

(Nqamakwe. Case No. 61/1919.)

Practice—Appeal—Notice of appeal must reach clerk of the court within 14 days of the judgment—Proclamation No. 391 of 1894—Objection.

In this case judgment was given on the 5th June, 1919, and the Defendant's attorney posted a letter from Tsomo to the clerk of the court at Nqamakwe, where the judgment was given, on the 17th June. The endorsement on the record showed that the clerk of the court received this notice on the 23rd June. In the Appeal Court the Respondent's attorney objected to the appeal being heard, on the ground that it had been noted after the prescribed period. On application a postponement was granted, Appellant paying the costs, till the next sitting of the Court, in order that a petition might be submitted (Native Appeal Court, Butterworth, 3rd November, 1919). At the next sitting of the Appeal Court the petition was submitted, the Respondent opposing.

Ruling.

By President: The record shows that the judgment of the Court at Nqamakwe was delivered on the 5th day of June, 1919, and the notice of appeal is dated 17th June, 1919. This notice appears to have been despatched by mail, but there is no information before the Court to show that had the notice gone by mail and been posted on the 17th it would in the ordinary course have reached Nqamakwe before the 20th June. The acknowledgement attached to the petition showing that a letter posted at Tsomo on the 17th June reached Butterworth on the 20th idem is not of much assistance. It is common knowledge that the distance between the villages of Nqamakwe and Tsomo is not more than 18 miles and there is nothing before the Court to show why, seeing the short notice available, the notice of appeal could not have been sent by special messenger.

Proclamation No. 391 of 1894 requires an appeal to be noted within 14 days. The Court sees no season to depart from the rule in this case, and the petition must be refused and the appeal dismissed with costs.

Umtata. 24th July, 1920. W. T. Welsh, C.M.

APPOLLIS NOLUSUTO vs. MISANI BANDE.

(Xalanga. Case No. 38/1920.)

Practice—Appeal—Proclamation No. 391 *of* 1894—*Proclamation No.* 144 *of* 1915—*Telegram noting appeal does not comply with requirements.*

The relevant facts are clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: Section 6 of Proclamation No. 391 of 1894 provides that notice of appeal shall be given by the Appellant in writing, signed or marked by him or his duly authorised agent, and Proclamation No. 144 of 1915 enacts that he shall explicitly state in writing the special grounds upon which his appeal is based.

In the court below the Defendant, now Appellant, was represented by Mr. Attorney Hyde, whose warrant to defend and note an appeal had not been cancelled. Judgment was given on 7th May, 1920, and on 19th idem the Clerk of the Court at Cala received a telegram from Mr. Attorney Walker, at Cofimvaba, notifying an appeal on behalf of the Plaintiff. From subsequent telegrams it would appear that the appeal was intended to be on behalf of the Defendant. The grounds of the appeal were also conveyed by telegram. In reply to telegraphic enquiries, this Court is advised that no confirmatory letter has been received by the Clerk of the Court, nor has a warrant authorising Mr. Walker to note an appeal been filed. As notice of appeal was not given by the Appellant or his duly authorised agent in terms of section 6 of Proclamation No. 391 of 1894, this appeal cannot be heard, and following the decisions in the case of *Nsutu Langa* vs. *Mlambene Langa* (3 N.A.C. 223), and *Barnet Shinta* vs. *Gilbert B. Ndodana* (3 N.A.C. 224), the appeal is dismissed with costs.

Umtata. 23rd/26th July, 1920. W. T. Welsh, Ag.C.M.

JOHN MATEZA vs. JOEL MAGXA.

(Umtata. Case No. 79/1920.)

Practice—Exception—Interlocutory order not appealable—Contract—Depositum—*Depositary's right of action against third person for recovery of the property—Counterclaims—"Nqoma"—Estate.*

In this case the Plaintiff claimed the return of 15 head of cattle "nqomaed" to one Harriet Hlalukana, which cattle he alleged had been taken possession of by the Defendant.

The Defendant pleaded that Harriet was, at the time of the "nqoma," married by Christian rites to the late Dixon Hlalukana. The heir and administrator of the joint estates of the late Dixon and his father Gwedana, was one Magxa, an inmate of Emjanyana. The cattle were at the kraal of the late Gwedana. Defendant pleaded that he was not the correct person to be sued. The Defendant also counterclaimed for certain five horses which belonged to the estate of the late Gwedana and which had been placed in his control by Magxa, the Plaintiff having removed these horses into the district of Elliotdale, out of his (Defendant's) control. The Plaintiff (Defendant in reconvention) excepted to the claim in reconvention, which he contended should be brought by the administrator of the estate of the late Dixon. An application on behalf of Magxa to intervene in the claim in reconvention was refused by the Magistrate. The claim in convention was withdrawn, and the Magistrate upheld the exception to the counterclaim. The Defendant (Plaintiff in reconvention) appealed.

JUDGMENT.

By President: Mr. Trollope, for the Respondent *in limine*, objects to the appeal on the second ruling being heard on behalf of the intervenor, Magxa Hlalukana, on the ground that the ruling on his application was not a final judgment or order. It was decided in the case of *Steytler, N.O.* vs. *Fitzgerald* (1911, A.D. 295), that merely interlocutory orders, having no final or irreparable effect, are not appealable. This view is supported by many decisions quoted in 4 Nathan, section 2402.

The ruling merely amounts to an intimation to the applicant to the applicant that he had chosen the wrong form of remedy and therefore has not an irreparable effect upon his suit.

It is, in the opinion of this Court, therefore not such a final order as to be appealable.

The objection is sustained with costs against the applicant. (23rd July, 1920.)

26th July, 1920.

The Defendant, Joel Magxa, now Plaintiff in reconvention, and Appellant, filed a counterclaim alleging that he was placed in charge of certain five horses by Magxa Hlalukana, to whom he is responsible, which horses had during his absence been wrongfully and unlawfully removed by the Plaintiff, John Mateza, now Defendant in reconvention, who refused to return them to his custody, control and care; he accordingly claimed the restoration of the said horses or their value. To this claim the Defendant in reconvention excepted on the grounds that the action must be brought by the administrator of the estate of the late Dixon. This excepion was upheld with costs by the Magistrate, against which decision the Plaintiff in reconvention appeals.

On appeal this case has been argued as one of *depositum* which, *ex facie* in reference to the counterclaim, would appear to be the case. It was decided in the case of *Melville* vs. *Hooper* (3 Juta 261) that a person placed in charge of property has a right of action, without a power of attorney, for its recovery from a third person who has deprived him of its possession.

This case, together with the original authorities, was reviewed and followed in the cases of *Doubell* vs. *Tipper* (11 Juta 23) and *Geldenhuis* vs. *Keller* (1912, C.P.D. 623). From a careful consideration of these authorities this Court is of opinion that the Defendant's counterclaim discloses a right of action.

The appeal against the ruling upholding the exception is allowed with costs, that ruling is set aside with costs and the case returned to the Magistrate to decide on its merits, other costs in the court below on the claim in reconvention to be in the discretion of the Magistrate.

Umtata. 19th February, 1919. C. J. Warner, C.M.

KOFU GIJANA vs. MKE NDOBI.

(Cofimvaba. Case No. 155/1918.)

Practice—Interlocutory order—Magistrate's order to lead evidence is not a final judgment and is not appealable—Act 20 of 1856—Objection.

The facts of the case are immaterial to the judgment.

JUDGMENT.

By President: Respondent's attorney takes exception to the hearing of the appeal on the grounds stated in his written application filed with the record.

It appears from the record that the summons in the court below was amended, and the first ground of appeal is unnecessary. There does not appear to have been any appeal in respect of the order amending the summons.

There remains the second ground of appeal which is against the order of the Magistrate that the Defendant should lead evidence first.

The exception contends that this is not such a final judgment as is contemplated by section 38, Act 20 of 1856.

Several authorities were quoted during the argument, but all of these were cases on the question of the right to appeal against the allowing or disallowing of exceptions, and none seemed to bear directly on the case in point.

In the case of *Ntlahla* vs. *Mkungana* decided in the Butterworth Appeal Court on the 6th March, 1917, it was held that an appeal did not lie against an order of the Magistrate directing the Defendant to lead evidence first.

This Court concurs in this ruling.

The exception is accordingly allowed, and the appeal dismissed with costs.

Butterworth. 4th July, 1918. J. B. Moffat, C.M.

NONOMBOLO RANGAYI assisted by RWECANA ZIWA vs. FENE MZONDO.

(Tsomo. Case No. 49/1918).

Practice—Appeal—Ruling on an exception not a final order—Objection—"Nqoma."

The Plaintiff, Headman Fene Mzondo, of the Nqamakwe District, the eldest son and heir according to Native Custom of his father, the late Mzondo, sued the Defendant, the widow of the late Rangayi, assisted by her guardian. He alleged that certain stock was "nqomaed" by the Plaintiff's father to the Defendant's husband, and misappropriated by the latter, and that in settlement of the debt the late Rangayi allotted to the late Mzondo a certain girl Nomanevi to be brought up at his kraal, and that he might receive the dowry for her when she married. The girl was supported at Plaintiff's kraal till 1915 from shortly after rinderpest. She returned to Defendant's kraal and during 1915 was married, 4 cattle and 10 goats being paid as dowry, and the cattle had since increased by two head. Plaintiff prayed for an order declaring him to be entitled to the said girl and her dowry, or its value £70. The Defendant excepted that her true name was Nonombolo Ziwa, and that she was still a spinster and unmarried, and that the summons as far as she was concerned should be dismissed with costs. She further excepted that the Plaintiff had no right to maintain the present action as it was based on a contract illegal in its nature and opposed to good policy. The Magistrate overruled both exceptions. The Defendant appealed on the second exception.

JUDGMENT.

By President: Mr. Clark objects to the hearing of the appeal on the ground that the Magistrate's decision is not a final judgment.

On behalf of the Respondent Mr. Clark quoted the case of *McLaren* vs. *Wasser*, heard in the Eastern Districts Court in May, 1915.

On the other side, Mr. Warner has quoted the judgment of the Supreme Court in the case of *Koto and Another* vs. *Webbe*, heard in the Supreme Court in Febraury, 1917 (C.P.D. 1917, p. 41). In the course of his judgment in that case, Judge BUCHANAN quoted words used in the case of *Steytler* vs. *Fitzgerald* (1911 A.D. p. 313) heard in the Appellate Division, by Judge INNES, who said that "When an order incidentally given during the progress of litigation has a direct effect upon the final issue, when it disposes of a definite portion of the suit, then it causes prejudice which cannot be repaired at the final stage, and in essence it is final, though in form it may be interlocutory."

In this case the decision does not dispose of a definite portion of the suit.

The summons in this case is good, the defendant should have pleaded instead of excepting, and the Magistrate could then have taken evidence in support of the plea.

The Magistrate, in overruling the exception did not decide the dispute between the parties, and his order cannot be held to be a final one.

The objection to the hearing of the appeal must be upheld. The appeal must therefore be dismissed with costs.

The case will be returned to the Magistrate to be tried on the merits. The defendant can then set up any plea he wishes.

Postea, Butterworth, 8th July, 1919, Mr. C. J. Warner, President.

Practice.—Non-institution of criminal proceedings no bar to civil proceedings—Handing over girl in payment of debt not an immoral contract—Compounding of theft—"Nqoma."

The Magistrate, having gone into the merits of the case, found that the marriage of the first Defendant to the late Rangayi was proved, and that the Plaintiff had substantiated the contract alleged in the summons. He gave judgment for Plaintiff, and the Defendant appealed on the ground (1) that the alleged marriage between the first Defendant and Rangayi had not been proved; (2) that the alleged contract was not proved; (3) that even if the contract was established, it was a compounding of the crime of theft and illegal.

JUDGMENT.

By President: Respondent sued Appellant for the dowry of a certain girl named Nomanevi, alleging that she had been allotted to his (Respondent's) father some years ago in satisfaction of a certain claim Respondent's father had against Appellant's husband for misappropriating certain goats with him by Respondent's father under the Native Custom of "Nqoma."

The argument relied on principally in this Court is that this was an illegal contract and therefore not enforceable in a court of law. According to the authorities quoted, it is clear beyond question that if the contract was entered into by the late Rangayi under threat of criminal proceedings or a promise to abstain from the institution of criminal proceedings it would be invalid.

In the case of *Schoeman* vs. *Goosen* (3 E.D.C. 7) it was held that anyone may proceed civilly against anyone who has wronged him without first prosecuting him criminally for the offence. The agreement between Respondent's father and Appellant's husband could only be set aside on the ground that it was entered into on the part of the late Rangayi to avert a criminal prosecution. The only evidence to support this is an indefinite statement by the witness Kondile in cross-examination, but he does not say who told the late Rangayi he would be arrested, and this statement by Kondile is not only unsupported but contradicted by another witness.

The other grounds of appeal were not pressed in argument, and in any case this Court is satisfied that the marriage between Rangayi and Nonombolo did take place, and that the girl in question was allotted to Respondent's father as alleged in the

summons. This is a common practice among Natives, and such a contract is not immoral. The appeal is dismissed with costs.

Note: *Vide* also judgments on pages 54 and 170 of these Reports.

Butterworth. 9th November, 1921. T. W. C. Norton, A.C.M.

RWANE NKATA vs. H. A. CONJWA.

(Willowvale. Case No. 176/1921.)

Practice—Appeal—Acquiescence in judgment—Peremption of appeal—Objection.

The facts of the case are immaterial.

JUDGMENT.

By President: Mr. Warner, for Respondent, objects to the hearing of this appeal on the ground that Appellant having accepted costs, has acquiesced in the judgment, and quotes *Bissett & Smith* (1, page 44), and *Buckle* (page 72).*

Appellant argues that having previously informed Respondent of his intention to appeal, his acceptance of the costs tendered was not acquiescence.

In the opinion of this Court it was necessary for Appellant to notify Respondent when the costs were tendered that he intended to appeal, and that, not having done so, he did acquiesce in the judgment and so lost his right to appeal, as these costs were a full settlement of the judgment in his favour.

The objection is therefore allowed with costs.

Umtata. 21st November, 1919. C. J. Warner, C.M.

MONI RATSHANA vs. KOMANI QWAKA.

(Engcobo. Case No. 280/1919.)

Practice—Appeal—Peremption of appeal—Acquiescence in judgment—Objection.

The relevant facts are stated in the judgment of the Native Appeal Court.

JUDGMENT.

By President: Exception is taken to the hearing of the appeal on the ground that the Appellant has, by his actions, acquiesced in the judgment now appealed against.

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†The relative pages of Buckle & Jones "Civil Practice of the Magistrates' Courts in South Africa" (1st Edition, 1918) appear to be Nos. 151 and 152.

From the record and affidavits put in by both parties it appears that Appellant was sued by Respondent for four head of cattle or £30, and on the 16th September, 1919, judgment was given in favour of Respondent and against Appellant for three head of cattle or their value £7 10s. each. On the following day the Appellant went to Respondent's attorney and informed him that he (Appellant) acquiesced in the judgment and paid the costs and stated he would hand the stock to Respondent to satisfy the judgment. On the 24th September Appellant and Respondent submitted to the Assistant Magistrate two young animals which the Appellant tendered in satisfaction of the judgment. These did not meet with the approval of the Magistrate, who rejected them and on the same day Appellant noted his intention to appeal. It is however abundantly clear from the above facts that Appellant acquiesced in the judgment, and it was only when the cattle he tendered in satisfaction were rejected as unsuitable that he decided to appeal.

In the opinion of this Court the exception, in view of the Appellant's actions, is a good one, and the appeal is dismissed with costs.

Kokstad. 12th April, 1921. T. W. C. Norton, A.C.M.

DEBEZA vs. MANTISI.

(Mount Frere. Case No. 43/1921.)

Practice—Appeal—Peremption of appeal—Acquiescence in judgment—Objection.

In this case a preliminary objection was taken to the appeal on the ground that the Appellant had acquiesced in the judgment of the Magistrate's Court by payment of the amount.

By President: " In the opinion of this Court the fact that Appellant, an illiterate Native, not represented in the court below, paid the amount of the judgment, is not necessarily inconsistent with his intention to appeal, he having as a fact employed an attorney on the same day to note an appeal. The objection is therefore disallowed."

Umtata. 6th January, 1920. C. J. Warner, C.M.

GXWALINTLOKO vs. NOLAM.

(Nqamakwe. Case No. 42/1919.)

Practice—Appeal—Review of bill of costs—Attorney's claim to two separate fees—Proclamation No. 428 of 1907.

This was a review of a bill of costs by the Chief Magistrate in chambers.

The Chief Magistrate (Mr. C. J. Warner) ruled as follows:—

"This is an application for a review of a bill of costs in favour of Appellants' attorney in the case of *Gxwalintloko* vs. *Nolam*, heard in the Native Appeal Court sitting at Butterworth on the 4th day of November, 1919.

The Respondent Nolam sued the Appellant Gxwalintloko in the Court of the Resident Magistrate, Nqamakwe, for certain cattle which she alleged belonged to her husband whose whereabouts were unknown.

The Appellant by his Attorney filed an exception that the Respondent could not sue unless duly assisted according to law. The exception was overruled and the case heard to its conclusion when an Absolution Judgment was given. Appellant (Defendant in the Court below) thereupon noted an appeal against the oper-ruling of the exception and the Respondent (Plaintiff in the Court below) cross-appealed against the Judgment of Absolution. The Native Appeal Court allowed the appeal and dismissed the cross-appeal.

The Appellant's Attorney contends that as there were two appeals and he was successul in both he is entitled to the fee of £2 2s. for each making £4 4s. in all. There would seem to be some force in this contention but unfortunately Proclamation No. 428 of 1907, Schedule B, section 4, places the question beyond doubt. It fixes the fee to be paid to the attorney for "conducting a case in Court" not conducting an appeal. If the legislature had intended the fee should be paid in respect of each separate appeal the word "appeal" would have been substituted for "case" but as the Proclamation reads I am of opinion that only one fee can be allowed in this case, as though two appeals were really heard there was bnt one case, and that the Bill of Costs should be reduced by £2 2s.

Kokstad. 3rd April, 1919. C. J. Warner, C.M.

NYEMBEZI MDLOVU vs. MAMEKATA.

(Mount Ayliff. Case No. 9/1919.)

Practice—Appeal—Grounds on which Appeal Court will reverse a Magistrate's judgment on fact—Interpleader—Onus *of proof.*

The facts of the case are immaterial.

JUDGMENT.

By President: In this case the Appellant claims as his property an ox seized at his kraal on a writ taken out by the Respondent as judgment creditor in the case of *Mamekata* vs. *Nontshakaza*. The Magistrate declared the ox executable, and this judgment is appealed against on the ground that (1) by calling upon the claim-ant (who was unrepresented in the court below) to lead his case

Note: For original case see page 302.

first the Magistrate showed that he regarded the *onus probandi* as lying upon the claimant and (2) that the judgment is against the weight of evidence.

In regard to appeals on questions of fact this Court thinks it well to express its view that the Court of first instance is the proper place for determining questions of fact, and that a Court of Appeal is justified in reversing a Magistrate's judgment on facts only if it appears that he has:—

(1) Based his conclusions on inadmissible evidence;

(2) arrived at positive conclusions in the absence of available and essential evidence:

(3) drawn inferences from facts proved which they cannot reasonably be made to carry;

(4) failed to make necessary deductions from facts proved; or

(5) overlooked presumptions of law in regard to *onus probandi*.

Applying these tests to the present case, the only point on which the judgment can be brought up for challenge is that the Magistrate overlooked the fact of the burden of proof resting on the judgment creditor. This point however has only been raised on the hearing of the appeal. The Magistrate has not had the opportunity of commenting on it, and this Court sees no sufficient ground for concluding that he erred in the matter.

The appeal is dismissed with costs.

Umtata. 19th July, 1920. W. T. Welsh, A.C.M.

MATIYASE LUKE vs. KLAAS TITUS.

(Engcobo. Case No. 116/1920.)

Practice—Appeal—Grounds on which Appeal Court will reverse a Magistrate's judgment on fact—Departure from Native habit not to be lightly assumed—"Ngoma"—Gift—Onus of proof.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Plaintiff in this case, the eldest son and heir of the late Matiyase Luke, sued the Defendant, Klaas Titus, for three cattle, viz.:—A certain cow which he alleged his late father had lent to the Defendant's wife for milking purposes and its progeny. The Defendant pleaded that the cow referred to was donated by the late Matiyasi to his daughter Rebecca now Defendant's wife.

The Court ruled that the *onus probandi* lay upon the Defendant. This was accepted under protest, and has not been questioned on appeal.

The grounds of appeal are that the judgment was against the weight of evidence and probabilities.

In regard to appeals on questions of fact this Court thinks it well to repeat the ruling laid down in the case *Ngomboti Mlovu* v. *Mamekata* heard at Kokstad in April, 1919 (page 255 of these Reports), that the Court of first instance is the proper place for determining questions of fact, and that a Court of Appeal is justified in reversing a Magistrate's judgment on facts only if it appears that he has:—

(1) Based his conclusions on inadmissible evidence.

(2) Arrived at positive conclusions in the absence of available and essential evidence.

(3) Drawn inferences from facts proved which they cannot reasonably be made to carry.

(4) Failed to make necessary deductions from facts proved, or

(5) overlooked presumptions of law in regard to *onus probandi*.

The argument for the Appellant falls under heads 3, 4, and 5.

The Magistrate while nominally holding that the *onus* was upon the Defendant seems to have considered that it was transferred by long possession. While in general this may be a sound principle of law, the circumstances in this case are unusual as ownership is claimed upon an alleged gift to a woman which is so rare that it needs to be established by the clearest proof and as possession by Rebecca is equally explainable under the well recognised custom of Nqoma.

The absence of the heir when the gift is alleged to have been made is not satisfactorily explained nor is there evidence to show that he was informed. Rebecca admits that the beast was not taken to her first husband's kraal, a fact not without significance.

The Magistrate has too lightly assumed the probability of a departure from native habit on the part of Matevisi Luke: there is insufficient evidence of contact with European influences on which to have based such a deduction.

Although the Magistrate has obviously exercised great care in stating the reasons for his decision, this Court is of opinion that he has erred in his judgment. It is admitted on appeal that only two of the cattle claimed are now in existence.

The appeal is allowed with costs and judgment entered for the Plaintiff for the two cattle in question failing which payment of their value at £5 each with costs.

Lusikisiki. 10th—12th December, 1919. G. J. Warner, C.M.

NKONQA vs. RIPU JADA.

(Ngqeleni. Case No. 152/1919.)

Practice.—Estoppel—Res judicata—*Judgment* in rem *and judgment* in personam—*Special plea—Ownership of illegitimate children—Rights in girls—Plea in bar—Proc.* 140 *of* 1885—*Application of Native Law and Custom—Dowry.*

Ripu Jada sued Nkonqa for a declaration of rights as the guardian of two minor children, Nomtshakazi and Badi, and a declaration of rights to all dowry or damages paid. He alleged that he was the guardian of Mhlanganelwa son of Mgodeli, deceased, and that he sued the Defendant in that capacity. The late Mgodeli was married according to Native Custom to one Marwexwana, daughter of Rwexwana, and had by her a girl named Nozicumfu, who was in Plaintiff's possession: at Mgodeli's death his wife was pregnant and she subsequently gave birth to the girl named Nomtshakazi, now claimed. Later she had an illegitimate child, named Badi, whom Plaintiff also claimed. *Inter alia*, the Defendant put in a special plea of *res judicata* in that the matter of the ownership of the two children Nomtshakazi and Badi had been decided in the case of Nkonqa Gladile vs. Rwexwana in the same Court, in which it was decided that Nkonqa (the present Defendant) had duly married the said woman Marwexana and had issue by her, the two children in question, Nomtshakazi and Badi, and that he was entitled to these children. This judgment was upheld on appeal. The Magistrate overruled the special plea with costs, on the ground that the parties to the action were not the same, since, although the present Defendant was a party to both actions, the other party in the first case was the father of the woman Marwexwana, wheras the Plaintiff in the present case represented the deceased husband. The Defendant then pleaded specially in bar that the previous judgment operated as an estoppel, and was a final bar to all other actions concerning the status of the woman Marwexwana and the children Nomtshakazi and Badi. The Magistrate overruled this plea in bar on the ground that the Plaintiff could not be presumed to have knowledge of the previous action, and that the English law of estoppel could not apply to a case based entirely on Native Law, where the circumstances where such as could not arise in England. The Defendant appealed.

Judgment.

By President: The first ground of appeal was not pressed in this Court and the second ground was only relied on.

The Respondent's claim is founded entirely on Native custom, and is one which could not be entertained under ordinary South African Law. Consequently it can only be dealt with under Native Law as applied by section 22 of Proclamation No. 140 of 1885.

The underlying motive in all claims by Natives to the control of, or declarations of rights in females, is that they may obtain the cattle paid as dowry when such female is married. When a Native

seeks a declaration that he is the father or guardian of a girl, or that he is married to a certain woman, it is with the object that he may possess the dowry of the former and the cattle to be obtained as dowries for the daughter of the latter.

This is apparent from the summons in this case in which Respondent does not claim certain children alone, but also a declaration that he is entitled to all dowries received or to be paid for them.

It would then seem to follow that a judgment declaring a Native to be the father or guardian of a woman, is one chiefly affecting the cattle to be paid for her by her husband and not the real status of the girl, for there are many instances of Natives, after obtaining a judgment in their favour allowing the girl to continue to live with the person from whom she was claimed, content to wait until she was married to assert his right to her dowry.

It is argued in this Court that the judgment of the court below in the case of *Nkonqa Gladile* vs. *Rwexwana*, declaring a certain woman, Marwexwana, to be married to Plaintiff who is also declared to be the father of the girl, Nomtshakazi, (who is claimed by the Respondent in the present case) is a judgment *in rem* and therefore acts as an estoppel and debars Respondent from setting up any claim to the said girl or to any dowry cattle that may be obtained for her. It is further argued that this Court has followed the judgments of the Higher Courts in questions of procedure to be followed in the Courts of Resident Magistrates, and to be consistent should uphold Appellant's contention.

This Court has invariably taken the decision of the different divisions of the Supreme Court as its guide, but no reported case in which any decision of the Supreme Court holding that the English Law doctrine of estoppel operates in cases of this nature, has been referred to in argument, nor is the Court aware of any such decision. Further the real point at issue being, as already stated, the cattle to be obtained for the girl, Nomtshakazi, on her marriage, this Court considers the judgment in the case between *Nkonqa Gladile* and *Rwexwana* is more of the nature of a judgment *in personam* than a judgment *in rem*.

This is a case which can be dealt with only under Native law, arising as it does out of purely Native customs, which would not be recognised by English or South African Law. It is not unusual in Native practice, after a judgment as to rights to certain females has been given for another claimant to attempt to set up a stronger claim to the same rights and Native law (in which the doctrine of estoppel as understood in English Law is unknown) recognises the right to bring such claims and have them adjudicated upon.

This Court with the extremely limited law library at its disposal, has laboured under the disadvantage of not having access to most of the authorities which would assist it in expressing its opinion on the important questions raised in the lower court and in argument before the Court, but there is another aspect which has been dealt with by the Magistrate in his able reasons for judgment and to which this Court is bound to refer. Even admitting the English law principle of estoppel to apply to cases of this nature, the question arises whether it would operate against the Respondent in consequence of any act or conduct on his part. In the case of *Merriman* vs. *Williams* (1 Bisset & Smith, 825) the learned Chief Justice remarked: "It is by no means clear to me that the principles of English Law relating to estoppel are applicable without

any modification to the law of this Colony. No doubt by our law an agreement may be implied by acts or conduct of a person without any express contract, and the Court will in all cases refuse to assist in acting against or setting aside such implied agreements." Again the case of *Fitzgerald* vs. *Green and Others* (1913, C.P.D. 403) the learned Judge stated: "Even if the executor had been a party to the suit right up to the end of the suit, I incline to the view that another heir for whom the executor was not acting, and, who had no formal notice of the suit so as to allow him to intervene if he wished would not be barred from bringing an action in the same matter."

There is nothing in the record before the Court to show that Respondent had any knowledge of the previous action between Appellant and Rwexwana nor is there anything that would justify the Court in coming to the conclusion that agreement may be implied from any of his acts or conduct.

For these reasons the Court considers the Magistrate was correct in his judgment and the appeal is dismissed with costs.

Flagstaff. 23rd April, 1918. J. B. Moffat, C.M.

SIGXA vs. MASHUMANE.

(Tabankulu. Case 59/1917.)

Practice—Evidence—Prejudice—Closing of case by Attorney is binding on client.

The relevant facts are stated in the judgment of the Native Appeal Court.

JUDGMENT.

By President: In the course of the hearing of this case, by consent of the parties, the record of a case against the plaintiff in this case was put in.

The Defendant's Attorney then stated that in view of the evidence in the case put in he was not prepared to defend the action.

Certain admissions were made by Plaintiff and Defendant, and the Magistrate gave judgment for Plaintiff.

The appeal is brought on the ground that the Defendant was prejudiced through not being given an opportunity of calling evidence in support of his case.

The Defendant had an opportunity of calling evidence. His Attorney, after hearing Plaintiff's evidence, said that in view of the evidence put in he was not prepared to defend the action.

Defendant's Attorney virtually closed his case without calling any evidence and his client must take the consequences.

If the Attorney was not justified in taking the action he did that is a matter between him and his client.

Under the circumstances the Magistrate could only give judgment for Plaintiff.

The appeal is dismissed with costs

Lusikisiki. 17th August, 1922. W. T. Welsh, C.M.

KOTSO AND ANOTHER vs. MBANGWA.

(Bizana. Case No. 63/1922.)

Practice—Right of Bailee or Depositary to sue for damages for injury inflicted by third party to the subject-matter of the contract.

The essential facts of the case are set forth in the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Plaintiff, now Respondent, sued the Defendant, now Appellant, for damages for injuries to a horse which admittedly was the property of one Cavie, a European. This Court is, therefore, of opinion that the issues must be decided on common law principles.

There is no allegation in the summons that the plaintiff suffered any damage nor is there anything whatever to show that he is liable to Cavie, the owner, for any injury to his horse. To enable the Plaintiff to succeed he must, in the opinion of this Court, prove that he is responsible to the owner for injury to his property as was laid down in the case of *Bauer* vs. *Divisional Council of Albany* (7 E.D.C. 211).

Holding this view it becomes unnecessary for the Court to discuss or decide the question of negligence.

The appeal will accordingly be allowed with costs and the Magistrate's judgment altered to one of absolution from the instance with costs.

Butterworth. 10th March, 1919. C. J. Warner, C.M.

PHILIP NQWILI vs. MBANJWA HALOM AND TYINDYI HALOM.

(Butterworth. Case No. 3/1919.)

Practice—Costs—A party who is compelled to come to Court to get a declaration in his favour is entitled to costs.

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

JUDGMENT.

By President: Plaintiff in the court below sued Defendant for a declaration of rights in respect of a girl, Nondyokazi, and her delivery. The Magistrate in the court below gave judgment for Plaintiff as prayed with costs. The appeal is on the question of costs, and it is alleged that Appellant set up no claim to the girl,

and was quite willing to recognise Respondent's rights to her as her legal guardian. A letter, dated 7th January, is put in in support of this allegation. On the other hand it is quite clear that when the parties went to the Police about the matter Appellant set up a claim to the girl, and Respondent stated he received the letter put in after they had been to the Police. There is no evidence to show when Respondent instituted proceedings, but it is improbable that Appellant would have gone to consult an Attorney after refusing to give up the girl unless he had good grounds for knowing that Respondent had instituted proceedings against him.

It was held in the case of *Brink* vs. *Triggs* (19 C.T.R. 935) that when a party is compelled to come to Court to get a declaration in his favour he is entitled to costs.

In this case Appellant's action in setting up a claim to the girl forced Respondent to take legal proceedings and the appeal is dismissed with costs.

Butterworth. 5th March, 1920. C. J. Warmer, C.M.

NQWILISO MAYAPI vs. NOMENTYI MAYAPI AND NXOKWENI MAYAPI.

(Nqamakwe. Case No. 107/1919.)

Practice—Costs—When Defendant in a spoliatory action (in which he may plead ownership) institutes an action for a declaration of rights in respect of the same property, he should be ordered to pay the costs of the latter action—Lis alibi pendens—*Pleadings.*

Plaintiff sued Defendant for a declaration of rights in respect of a certain ox. Defendant pleaded *lis alibi pendens*, the ox already being the subject-matter of a spoliatory action instituted by the Defendant against the Plaintiff. The Magistrate heard evidence and dismissed the application, making no order as to costs. Defendant appealed.

JUDGMENT.

By President: The records before the Court in this case show that Appellant instituted proceedings under the law of spoliation against Respondent. The summons is dated 9th September, 1919, and was served on the Respondent on the same day. On the return day Respondent filed a plea denying the allegations in the summons and claiming the ox in question as his own property.

On the 11th September, 1919, Respondent issued summons against Appellant for a declaration of rights in respect of the same ox mentioned in the first action. He therefore must have known when he caused this summons to be issued that Appellant had already taken proceedings for spoliation of the same ox and that he intended setting up the defence of ownership. This Court cannot see what need there was for Respondent to institute proceedings seeing that the subject of his action already, and to his knowledge,

formed the subject of another case then pending to which he was a party, and on the authority of *Lyons* vs. *Weir* (1916, C.P.D. 226) the Magistrate in dismissing the Respondent's claim should have ordered him to pay the costs seeing he was responsible for litigation which was wholly unnecessary.

With regard to the second ground of appeal this Court can see no reason to alter the judgment of the court below into a judgment for Appellant on the question of the ownership of the ox.

The appeal is allowed with costs, and the judgment of the Court below is altered to "Application dismissed with costs against Plaintiff."

Umtata. 23rd July, 1920. W. T. Welsh, A.C.M.

NOHAFILE vs. SARUMOYA NANISO AND MTONDWANA.

(Umtata. Case No. 198/1920.)

Practice—Evidence—Inadmissible—Production of Record from proper custody—Irregularity—Affray—Death resulting from —Pleading—In pari delicto.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: In this case Nohafile, the Plaintiff in the Court below (now Respondent), sued Defendant, Sarumoya Naniso, for damages in respect of his Culpable Homicide of her late husband Mbizo. The Defendant's plea admitted that he was the cause of the death of Plaintiff's husband, but alleged that the injury which Mbizo received was during the course of the affray in which he was *in pari delicto*.

At the commencement of the hearing Plaintiff's Attorney applied for leave to file the record in the case of *Rex* vs. *Sarumoya* charged with Culpable Homicide. Defendant's Attorney objected but the Magistrate overruled the objection and admitted the record without evidence of its origin or nature.

Plaintiff was then called as a witness and said that the Defendant killed her husband though she admitted she was not present at the affray, and she was supported by an eye witness, Mbizo's brother, Marawula, who said that Defendant stabbed Mbizo with an assegai while the latter was helping an injured boy.

For the defence evidence was given by Matsupelele, who had been convicted of affray and swore that Mbizo was of the attacking party.

Judgment was given for the Plaintiff. The Defendant appeals on the ground that the admission of the evidence in the criminal case was grossly irregular and that the judgment, being influenced thereby, was wrong.

In his reasons for judgment the Magistrate admits the irregularity but holds that the *onus* of proving non-liability rests upon the Defendant by virtue of his plea and that he has not discharged this *onus*.

Before this Court Mr. Trollope, on behalf of Appellant, has argued that the record as a whole is to be regarded as improperly admitted. Mr. Hemming, on behalf of Respondent, while admitting the inadmissibility of the evidence, urges that the ground of appeal is confined to this point and that the Circuit record of the charge, plea, conviction and sentence were properly before the court below, and constituted an admission of liability.

Allowing that the notice of appeal is confined to the improper admission of evidence, this Court has still to form its conclusions on the record before it and cannot take cognizance of documents improperly put in. There was no attesting evidence of the record of charge, plea, conviction, or sentence, its authenticity was not admitted, and therefore it is not before this Court for consideration. While this Court wishes to avoid the semblance of having reached any positive conclusions, yet on the evidence actually led in the Civil case it is open to question whether the *onus* has not been discharged by the Defendant, and the Magistrate's view to the the contrary may have been unwittingly influenced by his knowledge of the facts which could not properly be taken into account.

On these grounds the Court considers that the matter should be reopened and all available evidence which may be tendered be taken.

The appeal is allowed with costs, the judgment in the court below is set aside, and the case is returned to be heard on its merits, the costs in the court below to abide the issue.

Umtata. 19th July, 1921. W. T. Welsh, C.M.

SINQINANQINA MFENGUZA vs. NGOMANI HALOM.

(Umtata. Case No. 55/1921.)

Practice—Appeal—Evidence—Demeanour of witnesses—Functions of Trial and Appeal Courts—Adultery—Counterclaim—"Ntlonze"—Credibility.

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

JUDGMENT.

By President: In this case the Plaintiff, now Respondent, sued the Defendant, now Appellant, for the restoration of an ox and damages in the sum of £5, alleging that the ox had been seized and removed out of his lawful possession by the Defendant.

The Defendant denied this allegation and pleaded that he had caught the Plaintiff in adultery with his wife Nohershell and that the ox had been paid on account of damages. He claimed in reconvention two head of cattle as damages for adultery, they being in addition to the one alleged to have been paid on account.

After hearing evidence at considerable length the Magistrate gave judgment for the Plaintiff in convention for the return of his ox and in reconvention entered judgment for the Defendant—Plaintiff in convention. From this judgment the Defendant has appealed on both the claims in convention and in reconvention.

The evidence placed before the trial Court a case for the Plaintiff which was in direct conflict with that presented by the Defendant and it is quite clear both versions cannot be correct.

The question for this Court to decide is, was the Magistrate, a very experienced Officer, who in his reasons for judgment has analysed the evidence and weighed the probabilities at length, wrong in believing the evidence adduced on behalf of the Plaintiff in preference to that of the Defendant.

The Court is of opinion that the probabilities are in favour of the Plaintiff. Had the Defendant caught the Plaintiff as alleged it is remarkable that the usual alarm was not raised and that of the three men specially called by the Defendant to witness the imprisonment of the Plaintiff, only one should appear. The alleged calm demeanour of the Plaintiff when the Defendant's wife opened the door of his hut and the willingness with which he submitted to capture when he might well have made some attempt to escape in the darkness of the night are inconsistent with what usually occurs in such cases. The surrender by the Defendant of the Plaintiff's blanket, valuable as "ntlonze" and the former's explanation thereof, the taking of the woman to the Plaintiff after he is said to have admitted liability, and the nature of the proceedings at the Headman's enquiry are factors which could not fail to weigh, in the circumstances disclosed, against the Defendant. The omission of the Defendant to possess himself of the Plaintiff's blanket as "ntlonze" immediately after the alleged catch is very unusual. Leaving him in the hut, even though the door was locked, was taking a wholly unnecessary risk of the "ntlonze" disappearing.

The ox appears to have been seized during the second day after the alleged adultery. When the Plaintiff armed with assegais was prevented by his companions from following it up, he immediately proceeded to the Headman. Had he paid the ox on account of damages this action would be almost inexplicable. It is however entirely consistent with his evidence that the ox had been unlawfully seized and removed by the Defendant. Had he admitted liability for the adultery and paid one beast one would expect him to have kept away from the Headman rather than to have gone to him. For what purpose would he do so, surely not to provide the Defendant with evidence of his liability for the balance.

It is difficult for this Court to believe, and the Magistrate did not, that the Plaintiff admitted the charge of adultery until he had hopelessly compromised himself and that he then for the first time protested his innocence.

While a trial Court, not infrequently must have some difficulty in arriving at positive conclusions on questions of credibility it is necessarily assisted by certain factors, such as the general demeanour of the witnesses, where an Appeal Court is placed at a disadvantage. It was however laid down by the Appellate Division of the Supreme Court in the case of *Parkes* vs. *Parkes* (1921, A.D. 69) that this test must be applied with care, as an Appeal Court has power to set aside such a finding and will not hesitate to do so when it is satisfied from other circumstances that the trial Court has arrived at conclusions which cannot be justified.

The broad ground on which this appeal has been attacked is that the probabilities favour the Defendant, but as already remarked

this Court is of opinion that they support the Plaintiff. The principles which should guide an Appeal Court in dealing with an appeal on questions of fact depending upon the credibility of witnesses have been elaborated by the Privy Council, and were cited by the Appellate Court in the case of *Parkes* vs. *Parkes* (*supra*).

It is desirable to call attention to the language in which those principles were enunciated.

"In coming to a conclusion on such an issue, their Lordships must of necessity be greatly influenced by the opinion of the learned trial Judge, whose judgment is itself under review. He sees the demeanour of the witnesses, and can estimate their intelligence, position and character, in a way not open to the courts, who deal with the later stages of the case . . . . Of course it may be that in deciding between witnesses, he has clearly failed on some point to take account of particular circumstances or probabilities, material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact: but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a Court of Appeal will hesitate long before it disturbs the findings of a trial Judge based on verbal testimony."

The Appellate Court of South Africa added that the lines thus clearly expressed were the lines upon which it always proceeded in dealing with questions of facts depending upon credibility.

This Court is of opinion that it must be guided by those principles, which indeed, it might be remarked with respect, it has consistently endeavoured to establish.

After carefully weighing the evidence, the probabilities and the Magistrate's reasons, and giving full consideration to the able arguments of the Appellant's Attorney this Court is of opinion that there are no grounds for interfering with the finding of the trial Court.

The appeal will be dismissed with costs.

Flagstaff. 8th April, 1919. C. J. Warner, C.M.

NOGEYI MGWILI vs. GCINANI.

(Lusikisiki. Case No. 275/1918.)

Practice—Evidence—Magistrate to hear witnesses before deciding whether evidence is irrelevant.

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

Judgment.

By President: Appellant, who was Defendant in the court below, obtained a postponement in the court below for the purpose of calling further witnesses but on the day of hearing though Appellant was present with his witnesses the Magistrate declined to hear

them on the ground that Appellant's reply to a question by the Court as to the nature of the evidence to be given by the witnesses showed that such evidence would be irrelevant.

This Court is of opinion that the Magistrate erred in the course he adopted. Defendant should have been allowed to call his witnesses and after hearing their evidence the Magistrate could have then decided whether it was irrelevant or not.

The appeal must succeed on this ground, and this Court holding this view, does not consider it necessary to go into the first ground of appeal.

The appeal is allowed with costs. The judgment in the court below set aside and the case returned to the court below for the evidence of Defendant's witnesses and for judgment to be given after hearing such witnesses.

Umtata. 21st July, 1920. W. T. Welsh, A.C.M.

WALUWALU MHLAKWENZIWA vs. MAPIKO TSHAYINGWE.

(Mqanduli. Case No. 62/1920.)

Practice—Evidence—Proof of ownership of stock—Degree of proof required in civil and criminal actions—Act 7 of 1905—Onus *of proof.*

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

JUDGMENT.

By President: The Plaintiff (now Respondent) in this case lost two sheep. On making search he found one, apparently in the Location in which he lives and, eventually, the head of a sheep in the Defendant's hut which is in another Location.

The Defendant was charged with theft of one sheep from the Plaintiff, was found guilty of being in possession of meat and not giving a satisfactory explanation of such possession and was sentenced to six months' imprisonment and 15 lashes. Thereafter Plaintiff sued the Defendant for the value of the sheep. The only evidence adduced by him was that contained in the criminal record which was put in by consent. The Magistrate gave judgment for the Plaintiff, and the appeal is against that judgment and is on the ground that the evidence was insufficient in respect of identification. It is argued on appeal that had the Magistrate been satisfied that the head was that of the Plaintiff's sheep he should have found the accused guilty of the charge as laid and have imposed a fine in terms of Act No. 7 of 1905. From the record of proceedings it is clear that the head was in such a condition as not to be identifiable. The question, however, arises whether the Defendant, having destroyed all possible means of identification, has the onus placed upon him of proving that the head was not that of Plaintiff's sheep and whether he has discharged that onus.

Beyond the admitted fact that the Plaintiff had lost a sheep there is nothing more to connect him with this head than to connect any other person who may make a similar claim.

The Stock Theft Act expressly places the burden upon the accused in certain circumstances, but this Court is of opinion that that principle does not apply to civil actions such as this arising out of thefts of stock, and it is for the Plaintiff to establish a presumption of identity in respect of the property which he claims.

This Court cannot but be influenced by the Magistrate's decision in the criminal case for this is not a case of a less degree of proof being necessary for a civil than for a criminal judgment. The Defendant was found guilty of being in unlawful possession. The question of whose sheep he was in possession of was a separate matter in which the point at issue in both cases is the same and an equal degree of proof is required in each.

In all the circumstances this Court is not satisfied that the Magistrate was justified in finding for the Plaintiff.

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

Umtata. 21st July, 1919. C. J. Warner, C.M.

NONAWUSI MPAFA vs. NQONQO SINDIWE.

(Engcobo. Case No. 119/1919.)

Practice—Evidence, improper rejection of—Gifts from husband to wife—Widow—Claim for property—Estate—Summons, form of.

Plaintiff, widow of the late Mpafa, sued the Defendant, grandson and heir of the late Mpafa, for certain property, consisting of two horses, valued at £30, six horned cattle, valued at £60, and the sum of £46, which she alleged the Defendant unlawfully detained from her. Defendant admitted that the stock and £42 of the money claimed was in his possession, but denied that he unjustly possessed himself thereof. He stated that he was residing at the kraal of the late Mpafa, where the property was and always had been. In the course of her evidence Plaintiff stated that her husband had allotted her a beast out of the dowry of one Manga. The Defendant objected to this evidence on the ground that it was an attempt to prove that the property was Plaintiff's, whereas the summons indicated it to be that of the estate. Plaintiff argued that the summons was in the proper form for detention of property and money and did not allege that the property belonged to the estate. The Magistrate upheld the Defendant's objection. The case was proceeded with and the Magistrate gave judgment for the Defendant. The Plaintiff appealed on the ground of the exclusion of material evidence, and on the ground that the judgment was contrary to Native Law and Custom.

JUDGMENT.

By President: Appellant, and Plaintiff in the court below, sued Respondent for two horses, six head of cattle and the sum of £46. Respondent in his plea admitted that the stock claimed was in his possession, but denied that he unjustly so possessed himself, and admitted that he was in possession of £42 from the estate of his late father.

Appellant endeavoured to lead evidence to show that she had been allotted a beast by her late husband from the dowry received for one Manga. Objection was taken to this evidence being led and upheld. The first ground of appeal is against this ruling.

The Magistrate in his reasons says that the summons does not show that the property is claimed as the personal property of the Plaintiff but rather that of her late husband's estate in which she has a life interest.

How the Magistrate gained this impression does not appear. Neither in the summons nor in the pleas is it alleged that the stock claimed formed part of the estate of the late Mpafa. Paragraphs one and two of the summons are descriptive, and may be surplusage, but the claim in the summons does not indicate that she is claiming the usufruct of her late husband's estate. It is true that she admits in her evidence that the money claimed is the proceeds of the estate, but this does affect the claim to the horses and cattle.

In Native Law a man may make a gift to his wife which then becomes her own property, and she may maintain a claim against the heir to her late husband's estate.

In the opinion of this Court the Magistrate improperly rejected evidence by which the Appellant sought to establish her claim to the horses and cattle, and on this ground alone the appeal must succeed.

The appeal is allowed with costs.

The judgment of the court below is set aside and the case returned to the court below for such evidence as either of the parties may desire to lead, and for the Magistrate thereafter to give a judgment.

Note: The following was the form of summons in the above case:—

Summon Nqonko Sindiwe . . . . to answer Nonowusi Mpafa . . . . in an action for detention of property and money.

Whereupon the Plaintiff complains and says:—

(1) That she is the widow of the late Mpafa and Defendant is the grandson and heir of the late Mpafa.

(2) That she resides at the kraal of her late husband.

(3) That Defendant possessed himself of two horses valued at £30, six horned cattle valued £60, and the sum of £46, which he unjustly detains from the said Plaintiff; and the said Plaintiff prays he may be adjudged to restore to her the said two horses, 6 head of cattle or pay her the value of the same and the sum of £46, with costs of suit.

For the final decision in this case see page 38.

Butterworth. 9th July, 1919. C. J. Warner, C.M.

PETER MAFANYA vs. FUTSHANE MTSHAKACANA.

(Idutywa. Case No. 55/1919.)

Practice—Exceptions in Native cases—Application for amendment of summons—Act 20 of 1856—Ownership of illegitimate child.

The summons in this case read as follows:—

"Plaintiff claims a declaration of rights regarding a certain child,

"And whereupon Plaintiff complains and says:

"That about four years ago he seduced and caused the pregnancy of Defendant's daughter, Lydia, and she duly gave birth to a child.

"That he paid Defendant three head of cattle as a fine for such seduction and pregnancy.

"That Defendant now claims the child as his property. Wherefore Plaintiff prays that the child be declared his (Plaintiff's) property and that Defendant be ordered to pay the costs of this suit."

Defendant excepted to the summons on the ground that it disclosed no cause of action against him inasmuch as it did not allege that Defendant had by some overt act infringed any right of the Plaintiff. The Defendant's attorney quoted the case of *Lax* vs. *Hotz* (C.T.R., 1913) in support of his exception. In reply, the Plaintiff's attorney applied, if the exception was considered in order, to be allowed to amend the summons as follows: After the word "property" insert the words "although well knowing the same to be Plaintiff's property, refuses and neglects to hand over the said child to the Plaintiff." The Defendant's attorney opposed the amendment. The Magistrate upheld the exception and dismissed the summons with costs. Plaintiff appealed.

JUDGMENT.

By President: Appellant sued Respondent in the court below for a declaration of rights in respect of a certain child. Exception was taken that the summons disclosed no cause of action. An application was then made for the amendment of the summons, which was refused, and the summons was dismissed with costs. The appeal is against this ruling.

This is an appeal on a question of procedure which, according to the law of the Native Territories, must be the same as the procedure laid down in (Cape) Act 20 of 1856, and subsequent enactments, and consequently the ruling of this Court that it is not competent to take exceptions in purely Native cases does not apply.

The summons contains no averment that Defendant has possession of or any control over the child in question, and the amendment to the summons applied for would not take it any further.

In the opinion of this Court the exception was rightly upheld, and the appeal is dismissed with costs.

Umtata. 9th November, 1920. W. T. Welsh, C.M.

SITEKISI JINGQI vs. M'METSHI MHLABENI.

(Engcobo. Case No. 383/1920.)

Practice—Exception, premature—Appointment of curator ad litem.

The Plaintiff in this case applied for the appointment of a curator *ad litem* to assist the Defendant, a minor, in an action which he, the Plaintiff, wished to bring against him, the Defendant, for the return of certain dowry. The Defendant excepted that there was no cause of action, and that there was therefore no need for the appointment of a curator *ad litem*. The Magistrate upheld the exception and dismissed the summons. The Plaintiff appealed. The Appeal Court held that as the only claim before the Court was for a curator *ad litem* it was premature to go into the merits of the case. The appeal was allowed, and the case returned to the Magistrate to decide on the application for the appointment of a curator *ad litem*.

Kokstad. 3rd December, 1920. W. T. Welsh, C.M.

NYADI KOPO vs. BEYIMANI NJENJE.

(Matatiele. Case No. 199/1920.)

Practice—Guardian suing on behalf of minor—Exception.

Nyadi Kopo, in his capacity as guardian of one Madosha, sued Beyimani Njenje for the return of a mare and foal, value £35. The Defendant excepted to the summons on the ground that the Plaintiff had no *locus standi*, inasmuch as the action should be brought in the name of the proper Plaintiff, namely Madosha, duly assisted by his lawful guardian, and not in the name of the guardian himself. The Magistrate allowed the exception with costs, and Plaintiff appealed.

JUDGMENT.

By President: In the opinion of this Court the Magistrate erred in allowing the exception taken to the summons. There are several authorities which have decided that a guardian may sue in his capacity as such on behalf of a minor. The summons clearly shows that the Plaintiff was acting in his capacity as guardian of Madosha.

The appeal is allowed with costs, and the exception taken in the court below is overruled with costs.

Kokstad. 13th December, 1921. W. T. Welsh, C.M.

TAMARE NODADA vs. JOSEPH NODADA.

(Matatiele. Case No. 379/1920.)

Practice—Tort *by wife, assistance of husband in defending action —Certificate of occupation—Rights cannot be questioned until certificate set aside—Proclamation* 125 *of* 1903—*Proclamation* 195 *of* 1908.

Plaintiff sued Defendant, a married woman, assisted as far as need be by her husband, for £50 damages for trespass, and the removal of a certain mealie crop from the Plaintiff's lands, held by him under certificate of occupation. The Magistrate gave judgment for Plaintiff for £10 and costs. The Defendant appealed. The grounds of appeal are disclosed in the judgment of the Native Appeal Court.

JUDGMENT.

By President: In regard to the first ground of appeal, Maasdorp I., 43, states that in an action based on *tort* or injury committed by the wife it would appear that the wife should be sued, assisted by her husband, or if the husband is sued he should be sued in his capacity as the husband and guardian of his wife. See also *Snook* vs. *Bosman* (2 E.D.C. 201).

As the present Defendant was sued, assisted as far as need be by her husband, who signed, together with his wife, the power of attorney to defend the action, this ground must, in the opinion of the Court, fail.

In regard to the second ground of appeal, the Plaintiff holds a certificate of occupation granted on 1st November, 1916, under the provisions of Proclamation 125 of 1903, as amended by Proclamation 195 of 1908. Until this certificate is set aside the Plaintiff must, in the opinion of the Court, be held to be in lawful occupation of the land in question.

It has been argued on appeal that the action of the Defendant was not a *tort*. This point, however, is not included in the grounds of appeal and can thus not be considered.

The appeal will be dismissed with costs.

Umtata. 15th February, 1919. C. J. Warner, C.M.

NONTSHULANA vs. SIMANGA.

(Ngqeleni. Case No. 184/1920.)

Practice—Interpleader—Onus *of proof—Credibility.*

The principle involved is clearly stated in the judgment of the Native Appeal Court, and the facts of the case are immaterial.

JUDGMENT.

By President: This is an interpleader action to decide the ownership of certain cattle attached at the kraal of one Njungula to whom they had been lent by the judgment debtor.

In the case of *Schoeman* vs. *Bradfield and Another*, decided in the Eastern Districts Court on March 1st, 1916,† it was held that when an attached animal is found in the possession of the judgment debtor it is for the claimant to prove ownership. In this case the *onus* was therefore on Appellant to prove ownership. The Magistrate who had the witnesses before him was the best judge of the degree of credibility to be given to the evdience, and he found that Appellant had failed to establish his claim.

The Court sees no reason to disturb the finding, and the appeal is dismissed with costs.

†Not reported.

Kokstad. 4th April, 1922. W. T. Welsh, C.M.

FANA vs. JOHN MJIKWE.

(Umzimkulu. Case No. 421/1921.)

Interpelader—Onus *of proof—Attachment of stock in possession of claimant*—Onus probandi *on judgment creditor, who must produce convincing proof—Presumption of ownership—Writ of execution to be put in with record.*

The claimant Fana claimed a certain bay mare and its bay filly foal which had been attached on a writ issued in the case of *John Mjikwe* vs. *Mjodi*. The evidence showed that the mare and foal were attached while in possession of the claimant. The Magistrate declared the mare and foal to be executable, with costs, and the claimant appealed.

JUDGMENT.

By President: The writ of execution with the messenger's return of service is not with the record. It should always be attached in interpleader claims. It is however clear that the animals in question were attached while in the possession of Fana, the claimant. This placed the *onus probandi* upon the judgment creditor, John Mjikwe, who must fail in his claim unless he is able to rebut the presumption of ownership which possession gives, by satisfactory evidence.

It appears that the original mare was the property of the claimant. Ladamu admits that the claimant sold the first foal, and that the second is still in his possession. Mabasi, the wife of Mjodi, states that neither Fana nor his father paid a horse as dowry for her daughter Mdede. There are discrepancies in the evidence for the Respondent as to the manner in which the mare is alleged to have been paid over to Ladamu on behalf of Mjodi.

Where there is, as remarked by the Magistrate in his reasons for judgment, no great preponderance of evidence on either side, this Court is of opinion that full consideration and weight must be given to the presumption flowing from possession, and that the evidence for the Respondent is not sufficiently convincing to discharge the *onus* of proof. In the absence of specific grounds for rejecting the evidence adduced on behalf of the claimant, this Court is of opinion that he should have succeeded. The appeal will be allowed with costs, and the judgment in the court below altered to one declaring the property non-executable, with costs.

Umtata. 20th November, 1919. C. J. Warner, C.M.

TSHAKA BOLILITYE vs. MNTONINTSHI JEZILE.

(Engcobo. Case No. 298/1919.)

Practice—Interpleader—Onus *of proof—Costs, higher scale.*

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Respondent obtained judgment in the court of the Resident Magistrate, Engcobo, against Qumbini Ngqame and others, and a writ was issued to satisfy the judgment. Certain property in the possession of the Appellant was attached and interpleader proceedings in the Magistrate's Court followed. A difference arose between the parties as to the question on whom lay the *onus* of proof. The Magistrate hearing the case ruled that the *onus* lay on the Claimant. Claimant's attorney thereupon asked for time to consider the matter, and the hearing was postponed to a later date. On the second date of hearing the Messenger of the Court was called, and when he had produced the writ the Claimant's attorney held that as the cattle had been attached while in possession of the Claimant the *onus* was shifted to the judgment creditor to prove his case. The Magistrate ruled the *onus* was on the Claimant, and neither side calling any further evidence the Magistrate dismissed the summons, and the appeal is against this ruling.

In argument before this Court many authorities were quoted on both sides on the question as to on whom lies the proof of ownership in an interpleader action, but a careful study of the authorities shows that the trend of recent decisions, at any rate, is that if the property is attached while in the possession of the judgment debtor the *onus* of proof is on the Claimant, but if attached while in the possession of the Claimant then the *onus* of proof that it is the property of the judgment debtor lies on the judgment creditor. This was the view taken by this Court in the case of *Mtuyedwa* vs. *Siposo* (Meaker's Reports, 211), which is the Court of Appeal in Native cases in the Native Territories, and it is supported by many decisions of the Higher Courts.

The Magistrate, in his reasons for judgment, appeared to rely on the case of *Martin* vs. *Piliso*, but in that case the learned Judge laid stress on the fact that the property in dispute was attached while in the possession of the judgment debtor. The Magistrate further states, and it was also argued in this Court, that if in cases such as this the *onus* of proof lay on the judgment creditor, the debtor could hand over his goods and chattels to a third party, and when attached the third party could claim them as being in his possession. The converse is equally objectionable. If the *onus* of proof lay in all cases on the Claimant many judgment creditors would not hesitate to attach stock in the possession of third parties on very shallow grounds in the hope that the evidence of the Claimant may break down in cross-examination.

From the previous decisions of this Court based on judgments of the Higher Courts, this Court holds that the *onus* of proof in this case is on the judgment creditor and that the Magistrate erred in his ruling that it lay on the Claimant. But with regard to the first ground of appeal, as Appellant applied for a postponement the Magistrate was correct in ordering him to pay costs.

The appeal is allowed with costs. The ruling dismissing the summons is set aside, and the case returned to the court below to be heard on its merits. The Court allows the Appellant's costs in this Court to be on the higher scale.

Kokstad. 21st August, 1922. W. T. Welsh, C.M.

S. HUKU vs. MACOKOTO.

(Mount Frere. Case No. 51/1922.)

Practice—Irregularity—Magistrate must confine himself to issues raised in pleadings—Records of former proceedings cannot be taken cogniscance of unless properly put in—Exception—Res judicata.

The facts are immaterial.

JUDGMENT.

By President: The Defendant excepted that the Plaintiff's summons was *res judicata*. The Magistrate overruled this exception, but dismissed the summons on the ground that the action had been incorrectly brought, none of the grounds enumerated by the Magistrate were pleaded, and in the opinion of this Court he had no right to raise them himself or to travel outside the specific issue placed before him for decision.

There is nothing on the record to show how the previous proceedings came before the Court, and it was therefore irregular for the Magistrate to take cognizance of them.

The appeal is allowed with costs, and the Magistrate's ruling dismissing the summons is set aside with costs.

Umtata. 28th July, 1919. C. J. Warner, C.M.

NOAKILE vs. MVOTYO MJIKWA.

(Umtata. Case No. 312/1918.)

Practice—Setting aside of judgment obtained by false evidence—Criminal proceedings for perjury must first be instituted and disposed of.

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

JUDGMENT.

By President: Appellant instituted an action against Respondent in the Court below to have a certain judgment granted on the 28th June, 1918, in favour of Respondent set aside on the ground that it was obtained upon false evidence given by certain witnesses for Respondent who was Plaintiff in the original action. The Magistrate after hearing Appellant's and Respondent's witnesses gave judgment for Respondent on the ground that Appellant had failed to prove his allegations, and the appeal is against this ruling. This Court sees no reason to disagree with this finding Though the question has not been raised in argument this Court feels constrained to point out that in this case it is sought to set aside the judgment of the court below on an allegation of perjury by some of the witnesses, and that in the case of *Marillac* vs. *Bruyns* (14 S.C., 317) it was held that an allegation of perjury where there has been no criminal prosecution is not sufficient to found an action for setting aside a judgment, and in the case of *Jamalodien* vs. *Ajimudien* (1917, C.P.D., 293) it was ruled that an action for setting aside a judgment obtained on perjured evidence could not be brought until criminal proceedings for perjury have been finally disposed of.

The appeal is dismissed with costs.

Lusikisiki. 10th December, 1919. C. J. Warner, C.M.

ROBERT NONKWELO vs. JEREMIAH NGCAI.

(Ngqeleni. Case No. 7/1919.)

Practice—Setting aside of judgment obtained by fraud—Criminal proceedings for perjury must first be instituted and determined—Exception—At which stage to be taken—Plea in bar.

The facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: Appellants, who were Plaintiffs in the court below, sued Respondent, alleging that in June, 1918, the said Respondent

had obtained judgment against them in the Resident Magistrate's Court at Ngqeleni for £25 and costs for causing the pregnancy of Respondent's ward, Anna; that Appellants since ascertained that Anna's allegations with regard to her pregnancy were false and incorrect, as she was not pregnant at the time the said claim was made.

After certain pleas and counterclaims had been filed, and several postponements had taken place, a plea in bar was filed on the 1st August that the action was premature until proceedings for perjury had been instituted against the witnesses for the Plaintiff in the first action. The plea in bar was upheld and the summons dismissed with costs.

In this Court the Appellants rely on the cases of *Notatsala* vs. *Zenani* (1 Henkel, 209) and *Sobuwa* vs. *Tyelemoola and Another* (Meaker's Reports, 255). In the last mentioned case there is nothing in the report to show that the cattle sued for had been paid in terms of a judgment of the Court. In the former, the Court set aside a previous judgment holding Plaintiff responsible for the pregnancy of Defendant's wife.

To succeed in the present action, Appellants would have to show that the statements on which judgment was given against them, were false. In the opinion of this Court, the principle laid down in the later case of *Jamalodien* vs. *Ajimudien* (1917, C.P.D. 293) applies to this case, and Appellants are premature in bringing their claim before criminal proceedings for perjury have been determined.

With regard to the second ground of appeal that the Magistrate was wrong in allowing the exception to be taken at the stage reached in the proceedings, it is only necessary to refer to the case of *De Vos* vs. *Marquard & Co.* (1916, C.P.D. 551) where it was held that it was not too late to take an exception in a Magistrate's Court after pleadings, and after a day had been fixed for hearing under rule 449 (*b*).

The appeal must therefore be dismissed with costs.

Umtata. 8th July, 1918. C. J. Warner, A.C.M

BEJE vs. GXEVANXE.

(Umtata. Case No. 63/1918.)

Practice—Setting aside of judgment obtained by false evidence—Proceedings should be instituted in Court where judgment was obtained.

The point at issue is clear from the judgment of the Native Appeal Court.

Extract from Judgment

In the case of *Peel* vs. *National Bank of South Africa* (E.D.C. 1908, page 488) it was held that where it is sought to set aside a judgment obtained by fraud it must be by proceeding in the Court itself upon which the original fraud was practised. It was further

held in that case that a judgment obtained by fraud can like any other transaction be impeached, on that ground, and if the fraud be established, be set aside and declared null and void. This is the latest reported case touching this subject, and appears to have a distinct bearing on the case before this Court.

Butterworth. 7th July, 1920. W. T. Welsh, Ag.C.M.

MONGAMELI MAZWANA vs. MAHLULI MAZWANA, Assisted by NDIPANE MBUSO.

(Butterworth. Case No. 101/1919.)

Practice—Setting aside of judgment obtained by fraud.

The essential facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: In this case the Plaintiff sued the Defendants to show cause why the judgment given by the Magistrate of Butterworth, in the case of *Mahluli Maxwayebo Mazwana* vs. *Mongameli* on the 15th November, 1917, should not be set aside on the grounds that it was obtained by fraud, misrepresentation and perjured evidence. These allegations were denied. During the hearing of the application the original record was put in and also a criminal record, the latter proves that Ndipane Mbusi, a witness called by the Plaintiff in the original case, was subsequently convicted of perjury committed by him in the case of *Mahluli Maxwayebo Mazwana* vs. *Mongameli*.

On the application to set aside the judgment in question the Magistrate gave an absolution judgment. For the Appellant it is contended that this Court should set aside the original judgment and enter judgment for the Defendant in this case.

The main issue before the Court as disclosed in the summons and pleadings, is the application to set aside the judgment which, it is alleged, was obtained through perjured evidence, and this Court is of opinion that it can only deal with that point and not with the merits of the original case, which admittedly contains perjured, and therefore inadmissible evidence.

It is clear that a judgment obtained by fraud can be set aside, and Voet includes false evidence as fraud.

It is difficult to ascertain how far the Magistrate was influenced by the false evidence of Ndipane Mbusi, but as much of the other evidence was similar in certain respects to that given by him he cannot but have been influenced by it on arriving at his decision.

The appeal is allowed with costs and the judgment in the court below is altered to one for the Plaintiff, with costs. Setting aside the judgment in the case of *Mahluli Maxwayebo Mazwana* vs. *Mongameli*.

Rutterworth. 19th July, 1919. C. J. Warner, C.M.

SIXOLOZO MANXIWA vs. SINDELO MGQUTU.

(Willowvale. Case No. 149/1918).

Practice—Judgment—Setting aside of judgment obtained by fraud—Criminal proceedings for perjury must first be disposed of—Exception—Defect in summons.

The essential facts of the case are set forth in the judgment of the Native Appeal Court.

Judgment.

By President: An action was brought by Respondent in the court below to set aside a judgment granted in the same court in an interpleader action wherein Appellant was Plaintiff and Respondent Defendant. In that case the Appellant was successful and the ox in dispute was declared not executable. The present action was brought to set aside that judgment on the ground that the court was induced to grant the judgment it did by certain representations which are alleged to be false. Several exceptions were taken in the court below and relied on in this Court, but having regard to the view this Court takes of the case, it is only necessary to consider the first, fourth and fifth exceptions.

The first exception is that the Court is asked to set aside a final judgment of its own, which it has not the power to do. Numerous authorities were quoted during the argument, and this Court considers that the question is finally disposed of by the judgment in the case of *Peel* vs. *National Bank* (1908, E.D.C. 488), where it was held that when it is sought to set aside a judgment obtained by fraud the proper tribunal is the Court which granted the judgment to be set aside. Again, in the case of *Stewart's Assignee* vs. *Watt's Trustee* (3 S.C. 246), the Court held that a judgment may be set aside on any of the grounds upon which a "*restitutio integrum*" would be granted by our law—such as fraud or some other just cause—and the only other question is whether such a just cause is alleged in the declaration to exist. On these authorities this Court considers that the case was properly brought in the court of the Resident Magistrate.

The fourth exception is that the summons alleges that the Court was misled by false representations, but does not allege whether such representations were made on oath or otherwise that it was admissible evidence. In the opinion of this Court this is a fatal defect in the summons. In the case of *Stewart's Assignee* vs. *Watt's Trustee*, referred to above, it is laid down that the question is whether such a just cause is alleged in the declaration to exist. In the present case the summons alleges false representations, but does not specify what these are, but Respondent's attorney informs the Court they are perjury committed by Plaintiff in the interpleader case and a statement made to the Court by his attorney which had the effect of misleading the Magistrate. In the latter case the Respondent had his remedy by applying to have the judgment reversed on the ground of an irregularity committed by the Magistrate in basing his judgment on statements not on record

and inadmissible as evidence. If, however, the false representations relied upon are the perjury alleged to have been committed by Appellant, the principle laid down in the cases of *De Marillac* vs. *Bruyns* (14 S.C. 317), and *Jamalodien* vs. *Ajimudien* (1917, S.C. 293) apply. In the former case it was held that an allegation of perjury was not sufficient to justify the Court in reopening the case. In the latter it was ruled that an action could not be brought to set aside a judgment on the ground of perjury having been committed by the witnesses until criminal proceedings for perjury have been disposed of.

In the case before this Court a preliminary examination charging Appellant's witness with perjury was taken in the Resident Magistrate's court, and the Solicitor-General declined to prosecute. But as remarked by the learned Judge in the last case referred to above it is still open to Respondent to institute a private prosecution if he is advised.—The above also covers the fifth exception taken by Appellant in the court below.

For the foregoing reasons the appeal is allowed with costs, and the judgment in the court below is altered to judgment for Defendant with costs.

Umtata. 26th March, 1919. C. J. Warner, A.C.M.

MPANA GOVANA vs. JOBELA SIKILA AND ANOTHER.

(Mqanduli. Case No. 309/1918.)

Practice—Kraal-head responsibility—Setting aside of final judgment obtained against kraal-head in the absence of the tort-*feasor—Proclamation* 140 *of* 1885.

JUDGMENT.

By President: On the day set down for the first hearing of this case in the court below, the second named Defendant appeared in person and also by attorney.

The hearing was then postponed from the 6th November, 1918, to the 28th January, 1919, to give second Defendant an opportunity to communicate with first Defendant.

On the 28th January neither of the Defendants appeared in person, and the Magistrate, following the decision of the Supreme Court in the case of *Vos* vs. *Marquard & Co.* (C.P.D., 1916), granted a provisional judgment against first Defendant and final against second-named Defendant. In the case of *M. Mnyaka and Another* vs. *N. Mdutywa*, heard in this Court on the 21st March, 1917 (not yet reported) in which the issues were the same as in the present case, it was decided that the decision in *Vos* vs. *Marquard* must be followed, and that the judgment of this Court in *Gasa* vs. *Singo* (2, Henkel, 20), was overruled by the Supreme Court judgment referred to above.

The principle of kraal-head responsibility is entirely unknown to our law and it is only by going outside our law and relying on Native Law that an action of this nature can be maintained.

Section 22 of Proclamation 140 of 1885 states that the procedure to be observed in the Courts of Resident Magistrates in the Transkeian Territories shall, *as near as shall be and as far as circumstances permit*, be the same as those in the courts of Resident Magistrates in the Colony proper. These words were no doubt inserted in the Proclamation with the object of providing for Native cases where a rigid adherence to the Colonial procedure would be impracticable or result in hardship. The judgment of this Court of the 21st March, 1917, referred to above, did not take fully into consideration the injustices which may result from adopting a procedure which never contemplated conditions such as in the present case. Reluctant as this Court is to reverse its former decisions, especially when the judgment of such an able officer as the late Chief Magistrate is called in question, it feels that where a procedure is utterly unsuited to the conditions of Native life it cannot be supported by this Court. No judgment whatever could have been obtained against the Appellant had this case been tried under Colonial Law. It is only by applying Native Law that he can be made liable. It would not be in accordance with the principles of justice and equity to subject him to a procedure which is wholly inapplicable to Native Law. In the opinion of this Court the cases of *Nteteni* vs. *Ngantweni* (1, Henkel, 172), and *Gusa* vs. *Singo* (2, Henkel, 20) clearly state the procedure which should be followed in cases of this nature.

The appeal is accordingly 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. 2nd July, 1918. J. B. Moffat, C.M.

TOM MBITELA vs. JOHN SOBEKWA.

(Butterworth. Case No. 5/1918.)

Practice—Exception—Minor suing unassisted—Guardian.

The Plaintiff sued the Defendant for a certain title deed and the sum of £5 which he alleged the Defendant was unlawfully detaining. The Defendant excepted that the Plaintiff was a minor and could not sue without assistance, and pleaded over that he was the guardian of the Plaintiff and was prepared to hand over the title deed and the money to the Plaintiff on his attaining the age of 21 years. The Plaintiff replied that while admitting he was a minor he denied that the Defendant was his guardian. He alleged that his guardian was one Daniso who refused to assist. After hearing the evidence the Magistrate upheld the exception and dismissed the summons with costs. The Plaintiff appealed.

Judgment.

By President: Exception was taken to the summons on the ground that the Plaintiff, being a minor, should be assisted by his guardian. The Plaintiff's attorney stated that according to Native Custom Plaintiff's guardian is a man called Daniso.

Evidence was brought to show that Daniso refuses to assist the Plaintiff.

The Magistrate upheld the exception and dismissed the summons holding that sufficient pressure had not been brought to bear upon Daniso to attend the Court.

It is not clear, however, that Daniso, who is a cousin of Plaintiff's father is Plaintiff's guardian. According to the evidence there is brother of Plaintiff's father living in the Peddie district, who would appear to be Plaintiff's guardian.

The Defendant alleges that he was appointed guardian to Plaintiff by Plaintiff's father. He says a number of people were present but none of them are called to support his statement.

On the record this Court cannot decide who is the guardian. As far as the evidence goes Mhlakaza, Plaintiff's uncle who lives in the Peddie district would appear to be the natural guardian, but there is Defendant's allegation that he was appointed by Plaintiff's father.

Before the exception could be upheld evidence should have been led to prove, firstly, who is the guardian; and secondly, that such guardian refuses to assist the Plaintiff.

The appeal must be allowed with costs. The Magistrate's judgment is set aside, and the case is returned to the Magistrate to take further evidence as to who is Plaintiff's guardian and whether such guardian refuses to assist the Plaintiff and to give a decision on the exception after hearing such evidence.

Lusikisiki. 5th April, 1921. W. T. Welsh, C.M.

SITILIBELA AND MANYATI vs. MAGADE NGCUKANA.

(Tabankulu. Case No. 70/1920.)

Practice—When minor may sue without assistance—Act 20 of 1856—Kraalhead—Liability of heir for torts of inmates—Pondo Custom—Seduction—When fine paid by estate child does not belong to seducer—Seducer liable to estate for maintenance—Exception—Ownership of illegitimate child.

The judgment deals with principles, and it is not necessary to state the facts.

JUDGMENT.

By President: The appeal in this case is noted on two grounds:

(1) That Plaintiff who is a minor cannot sue assisted by his grandmother, who according to Native Custom is not his guardian.

(2) That any fine paid on behalf of him (Defendant) by the estate of the late Blayi (his elder brother) was paid for him as an inmate of Blayi's kraal and that therefore he is not liable to refund such fine to the said estate, and further that the female child born as a result of the seduction referred to in the Plaintiff's summons belongs to him.

In regard to the first ground of appeal the Court is of opinion that Plaintiff is entitled to sue Defendant without assistance. Section 51 of Act 20 of 1856 provides that minors and married woman may sue without assistance of their guardians or husbands, unless Defendant shows that they have a guardian resident within the district and even then they may sue if they shall make it appear that such assistance has been solicited and refused without just grounds. The Defendant is Plaintiff's guardian and he has not shown that there is any other male relative resident within the district whose assistance he could obtain. The fact that Plaintiff's grandmother assisted him does not in any way prejudice the Defendant, and the Court is of opinion that the exception taken in the court below was rightly overruled.

The questions raised in the second ground of appeal were put to the Native Assessors who stated:—

(1) The heir is responsible for torts committed by inmates of the kraal.
(2) If a fine for seduction is paid by the estate on behalf of any inmate of the kraal and the child is born as a result of the seduction, such child does not belong to the seducer.
(3) If under such circumstances the seducer claims the child he must reimburse the estate and must also pay maintenance and any other expenditure incurred if the child is brought up by the estate.

The Magistrate's judgment is supported by the evidence and is in accord with the opinion expressed by the Native Assessors.

The appeal is dismissed with costs.

Butterworth. 5th July, 1920. W. T. Welsh, C.M.

ROLINYATI vs. MPINYAMA.

(Kentani. Case No. 20/1920.)

Practice—Objection—Kraal Head responsibility for torts of children—Objection of non-joinder of children must be taken in limine.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

Judgment.

By President: The Plaintiff sued the Defendant for damages for assault and for damages by the latter's children to his crops.

On the claim for assault the Magistrate gave an absolution judgment and on the claim for damage to crops awarded the Plaintiff the sum of £2 and costs.

The appeal is brought on the ground that the damages are excessive, that the children should have been joined in the action, and that the summons should have disclosed that the second claim was based on Native Custom. If the Defendant was in doubt as to

the law under which the second claim was brought, he could have applied for particulars which the Court could have ordered to be furnished. Not having done so it was too late to raise the question after all the evidence had been taken, and this Court is therefore not in a position to give a ruling on this important point of practice, though it entirely agrees with the remarks made in the case of *Mdodana and Another* vs. *Nokulela* (2 N.A.C. 138).

The objection that the children should have been joined in the action should also have been taken *in limine*.

The Magistrate believed the Plaintiff, who stated a good deal of damage had been done—beans, pumpkins and mealies having been uprooted. The Defendant admitted that his children had done some damage to the Plaintiff's mealies. Though the damages awarded appear to be somewhat high, this Court is not in a position to say they are excessive.

The appeal is dismissed with costs.

Umtata. 10th November, 1920. W. T. Welsh, C.M.

N. COTOYI vs. FALITENJWA.

(Tsolo. Case No. 53/1920.)

Practice—Petition to set aside provisional judgment which has become final—Objection.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: This is a petition to set aside a provisional judgment of the court of the Resident Magistrate, Tsolo, which has become final. On behalf of the Respondent an objection *in limine* is taken on the ground that the petition—

(*a*) Is not one for leave to appeal, but an endeavour to obtain by way of petition the reversal of a judgment which has never been appealed against.

(*b*) That in effect the said petition is an application to this Court to review the proceedings referred to therein which can only be done by way of summons under Rule 190.

This Court has frequently granted leave to appeal after the period prescribed has elapsed and is of opinion that it also has power to hear and determine an application to condone a delay in taking steps to reopen, with a view to setting aside a provisional judgement of a Magistrate's Court which may have become final. That is the view taken by this Court in the case of *Geqevu's* petition (N.A.C. 3, 231). In the present case, however, this Court is not satisfied that sufficient grounds have been shown for granting the application.

The petitioner alleges that she left Tsolo for Matatiele in February last, leaving no one in charge of her kraal. It is difficult to conceive that she left these cattle without placing them in charge of some responsible person to safeguard her interests. It also appears that when the writ was issued seven of the cattle in question had already been paid on account, which fact has not been explained. These occurrences indicate negligence and acquiescence, if not by herself, then on the part of her representatives, and should not, in the opinion of this Court, be condoned. The application is refused with costs.

Kokstad. 29th April, 1918. J. B. Moffat, C.M.

BIVA, ASSISTED BY HIS GUARDIAN, MKUTSHANA, vs. SQOKO.

(Umzimkulu. Case No. 214/1917.)

Practice — Pleading — Minor — Assistance of guardian — Costs — Application for appointment of a curator ad litem*—Special plea—Estate.*

The Plaintiff, Biva, a minor, assisted by his guardian Mkutshana, claimed that he was heir to the late Chief Silwanyana, and that he was entitled to all the property of the late Chief Silwanyana with the exception of property specially belonging to the hut of Masotaka, and to the free and undisturbed possession of such property, and further, that as the eldest son of the Great House he was the rightful Chief of the Hlangweni tribe in the Umzimkulu district. He alleged that the Defendant was the eldest son of Silwanyana's wife Masotaka, the second wife of Silwanyana. The great wife Manzele, part of whose dowry was paid by the tribe, died without male issue. After her death Silwanyana married a third wife, Mazibini, mother of the Plaintiff, who alleged that his mother was placed in the great wife's hut to raise up an heir to the chieftainship, and he being born after his mother had been so placed in the great hut, claimed to be heir to Silwanyana. The Defendant denied that Mazibini was placed in the great hut, but stated that his mother, the second wife, Masotaka, was placed in that hut and declared to be the chief wife. Defendant, therefore, as eldest son of this wife claimed to be heir. Defendant further denied that Mkutshana was Plaintiff's guardian, but stated that he himself was his guardian and that in his absence Ntlabati, the eldest brother of the late Silwanyana, was his guardian. Plaintiff replied that Ntlabati refused to act as guardian and appointed Mkutshana in his stead. At the close of the Plaintiff's case the Defendant applied for absolution from the instance on the ground that Mkutshana was not the proper or legal guardian of the Plaintiff and therefore had no *locus standi*, and also that Plaintiff had failed to discharge the *onus* on him to prove his claim. The Magistrate dismissed the summons with costs. The Plaintiff appealed. The several grounds of appeal are dealt with in the judgment of the Native Appeal Court.

By President: The first ground of appeal is that the question of Mkutshana's status should have been taken as an exception, and been decided before the merits of the case were gone into.

In support of this Nathan's Common Law of South Africa (vol. IV, p. 2146) is quoted.

On the other hand, two cases are quoted, one in the Natal Supreme Court and one in the Transvaal Supreme Court, both heard in 1908 (4 Bisset & Smith, 746), in which it was decided that where an objection of misjoinder or as to capacity of a plaintiff to sue is taken, and in order to decide it evidence must be heard, the point must be raised by way of plea, not exception.

Nathan, on page 2150, says " But where want of qualification is relied upon as a ground of exception, the defect must appear upon the face of the declaration; for if the objection depends upon evidence to show the Plaintiff's want of title to sue it must be taken by way of special plea, so that evidence may be taken on the question at issue."

In view of these authorities the first ground of appeal cannot be upheld.

It is not necessary to rule on the second ground of appeal which is that the minor might have sued unassisted.

The minor has not sued unassisted, and the question before the Court was whether he was properly assisted.

The third ground of appeal is that Mkutshana appears from the evidence to have been appointed or deputed to act as guardian and has done since the death of Plaintiff's father.

The evidence does not support the claim that Mkutshana was so appointed or deputed.

It is true that the allegation in plaintiff's replication as to his having been so deputed is not denied by a formal rejoinder by defendant, but defendant had already denied in his plea that Mkutshana was Plaintiff's guardian.

On the third ground the appeal must fail.

The Plaintiff failed to prove his allegation as to Mkutshana's claim to the guardianship.

The Defendant pleaded specially as to Mkutshana's capacity to assist Plaintiff. It was competent for Plaintiff to have applied for this plea to be dealt with before going into the merits of the case. Instead of doing so he proceeded to call evidence on the merits and the Defendant cannot be held responsible for the costs thus incurred. He, moreover, had to have his witnesses ready to reply to the Plaintiff's case.

On the fourth ground, as to costs, the appeal must fail.

The last ground of appeal is that the Magistrate should have allowed the application for the appointment of a *curator ad litem*.

On the summons and the proceedings before the Magistrate it was not competent for him to deal with such an application assuming he had the power to appoint a curator.

The appeal having failed on all the grounds put forward, it must be dismissed with costs.

Kokstad. 21st August, 1922. W. T. Welsh, C.M.

MSIYA vs. W. J. MNCADI AND ANOTHER.

(Umzimkulu. Case No. 93/1922.)

Practice—Pleadings—Proof—Material disagreement between summons and evidence.

The essential facts are clearly stated in the judgment of the Native Appeal Court.

JUDGMENT.

By President: Plaintiffs in the court below sued Defendant for the sum of £3 3s. 6d. for, *inter alia*, goods sold and delivered on the 27th June, 1919.

Defendant denied the purchase of the goods. Plaintiffs, in variance of their summons, state in evidence that the goods were sold to Defendant in the year 1910.

No amendment of the summons was applied for. Judgment was for Plaintiffs for £3 2s. 6d. and costs of suit.

Defendant appealed and, *inter alia*, contends:—

(1) That the judgment is wrong and bad in law, inasmuch as Plaintiffs alleged that certain goods were sold and delivered to him (Defendant) on the 27th June, 1919, whereas the evidence adduced alleges that they were sold and delivered to him in the year 1910.

(2) That no amendment of the summons was asked for on behalf of Plaintiffs, and until the summons had been amended, he (Defendant) was unable to plead that the Plaintiffs' claim was prescribed.

Pleadings being intended to apprise the parties of the specific questions to be tried, this object would be defeated if either party were at liberty to prove facts essentially different from those stated on the record, as constituting the claim on the one side, or the defence on the other. Every material disagreement, between the allegation and the proof, constitutes a variance, which, in strictness, is as fatal to the party on whom the proof lies as a total failure of evidence (Taylor on Evidence, para. 218, and *Dickson & Co* vs *Levy*, 4 C.T.R. 51; 11 S.C. 33).

This Court accordingly holds that as there is a material variance between the summons and the evidence, the appeal is allowed with costs, and the judgment in the court below altered into one of absolution from the instance, with costs.

Flagstaff. 8th April, 1919. C. J. Warner, C.M.

MBALEKWA vs. PATEKILE.

(Lusikisiki. Case No. 348/1918.)

Practice—Postponement—Absence of Defendant's attorney.

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

JUDGMENT.

By President: Plaintiff sued Defendant for a declaration of rights in respect of a certain girl. After several postponements the case came on on the 20th February, 1919, when Defendant filed his plea. The Magistrate then set down the case for hearing on the 6th March, 1919. On the latter date both the parties appeared in person and the Plaintiff as assisted by his attorney. Defendant applied for a further postponement owing to the absence of his attorney. The application was refused by the court, which proceeded to the trial of the case. The Defendant did not cross-examine any of the witnesses and made no defence, giving as his reason that he could not speak in the absence of his attorney

The Magistrate thereupon gave judgment for the Plaintiff.

Defendant appeals on the ground that he was not given an opportunity of defending himself through an attorney.

The higher Courts have ruled that litigants should be permitted to avail themselves of legal assistance should they require it, and this Court has invariably followed this ruling, but there is no rule of law under which any party to a suit can insist on a postponement of a case owing to the absence of his attorney.

Though it may have been that the court below should have granted appellant's request, this Court cannot hold that the Magistrate erred because he did not do so.

The appeal is dismissed with costs.

Umtata. 20th March, 1918. J. B. Moffat, C.M.

XALISILE TSHEMESE vs. NOMBEZU MANGNOBO ASSISTED BY HIS GRANDFATHER.

Mqanduli. Case No. 296/1917.)

Practice—Postponement sine die.

The relevant facts of the case are clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: This is an appeal against the decision of the Magistrate to postpone *sine die* the hearing of the case at the request of the Defendant.

The Magistrate erred in granting the request and his order must be set aside.

The appeal is allowed with costs. The case is returned to the Magistrate who is order to fix an early date for the final hearing of the case, allowing reasonable time to give notice of the date fixed to the parties.

Note: See Rule 3 (2) of Order No. XXXII of Proclamation No. 145 of 1923.

Umtata. 23rd July, 1920. W. T. Welsh, Ag.C.M.

MAGWEBU NQONDOVANE vs. SIGWINTA AND NSETENI NGWELO.

(Umtata. Case No. 98/1920.)

Practice—Postponement, application for—Refusal of Magistrate to grant—Application for alteration of final judgment to one of absolution.

The relevant facts of the case are clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Plaintiff, now Appellant, applied for a postponement in order to call certain two witnesses whom he specified. This application was refused, and is not questioned on appeal.

The Appellant, however, contends that as Plaintiff had further evidence to call, the judgment should have been one of absolution and not a final one for the Defendant.

There is nothing on the record to show that the Plaintiff was not aware when he opened his case of the need for calling the witnesses in question, nor that he was prevented from having them in attendance.

It was laid down in the case of *Logan* vs. *Colonial Government* (10 S.C. at 125), that it is in the interests of justice to complete a case at one sitting and that an application for an adjournment is to be regarded with disfavour.

An order altering the present judgment to absolution would place the Defendant at a greater disadvantage in meeting the evidence than would have been the case had the postponement been granted before the evidence for the Defendant was gone into, which postponement it is not contended was improperly refused.

It is not desirable that the Defendant should be kept with a serious charge hanging over him when there is nothing to show that it could not have been fully investigated in the initial suit.

The Magistrate's remark as to the effect of hypothetical evidence on his mind was unfortunate, but in all the circumstances this Court is of opinion that the Plaintiff has not shown sufficient cause for altering the judgment of the court below to absolution.

Umtata. 18th March, 1918. J. B. Moffat, C.M.

MAQAVANA vs. SIGIDI.

(Umtata. Case No. 391/1917.)

Practice—Provisional judgment, when final—Levy—Nulla bona *return—Act* 20 *of* 1856—*Application for reopening—Judgment obtained in one Magistrate's Court can be sued on in another Magistrate's Court.*

Application to reopen a case in which the provisional judgment had become final. The relevant facts are stated in the judgment of the Native Appeal Court.

JUDGMENT.

By President: In the case of *Dawood* vs. *Friedlander* referred to in argument, the main point was whether a judgment obtained in one Magistrate's Court can be sued on in another Magistrate's Court. In that case a provisional judgment had been obtained in the Magistrate's Court at Cape Town. A writ had been issued and a return of *nulla bona* had been made.

Subsequently some years afterwards Plaintiff sued Defendant in the Magistrate's Court at Wynberg on the judgment obtained in the court at Cape Town. Judge Hopley said he agreed that the practice is that a final judgment of a Magistrate's Court can be sued on in another Magistrate's Court.

In holding that the judgment in that case could be sued on, the Court must be taken to have decided that the judgment had become final although there had only been a return of *nulla bona*. In the case of *Marnewick vs. Sapiero* (8 C.T.R. 393†), although it was an application to the Supreme Court and not to the Magistrate's Court for reopening, the Chief Justice refers to the fact that the Defendant wanted to reopen the case after the time for doing so had expired. In that case there had been a return of *nulla bona*, and the Chief Justice must be regarded as being of opinion that a month after such return the judgment became final. If owing to there having been only a *nulla bona* return the judgment had not become final, the period for reopening would not have expired as stated.

In this case provisional judgment was given on 31st July, 1917. A writ was issued on 15th August and was executed on 22nd August. The judgment became final a month from that date, and Appellant could not therefore apply for a reopening in October as he attempted to do.

The appeal is dismissed with costs.

Butterworth. 7th July, 1920. W. T. Welsh, C.M.

MDODASE NDLEBE vs. BUNGANE MATUMBU AND BUNGANE MATUMBU vs. MDODASE.

(Idutywa. Case No. 104/1919.)

Practice—Re-opening—Judgment must be final when Defendant has appeared—Act 20 *of* 1856—*Rule* 29, *Schedule B—Exception—Proclamations* 142 *of* 1910 *and* 213 *of* 1913.

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

JUDGMENT.

By President: It has been agreed that cases No. 16 and 17 be heard together.

It appears from the proceedings that Bungane Matumbu was sued by Mdodasi Ndlebe for certain dowry cattle. On the day of hearing, 12th June, 1919, the Defendant appeared and pleaded,

† 16 S.C. 26.

making certain admissions. The case was then postponed to 10th July, 1919. On that day the Defendant was in default and after hearing evidence, provisional judgment was given for the Plaintiff for five cattle or their value.

On the 14th July, 1919, Bungane Matumbu issued a summons calling upon Mdodasi to show cause why the judgment in question should not be set aside. To this an exception was taken that that judgment, though erroneously described as a provisional judgment, was legally final. This exception was dismissed and the original case was then proceeded with and eventually an absolution judgment was given.

It is now contended that the exception should have been allowed as the Defendant having appeared and pleaded only a final judgment could and should have been given, and further that the procedure laid down in Rule 29 of Schedule B to Act 20 of 1856, which requires that cause shall be shown, on oath, was not followed.

In the case of *De Vos* vs. *Marquard & Co.* (1916, Supreme Court Reports, 551) it was decided that when once a Defendant had appeared the Court is bound to give final judgment. That ruling has been followed by this Court. It is clear therefore that the original judgment could have been a final one only, and that even though described as provisional, it must be treated as final.

However, even assuming that a contrary view might be held possible, the re-opening order could not have been granted without the procedure laid down in Rule 29 of the Schedule to Act No. 20 of 1856 being followed. In the opinion of this Court the Magistrate was wrong on both points in allowing the case to be reopened, and should have sustained the exception which was properly taken.

The allegations made by the Plaintiff were admitted by the Defendant in his plea and it was therefore not necessary to lead evidence to prove the payment of the dowry. Had the payment been denied it would have had to be proved in terms of Proclamation No. 142 of 1910, as amended by Proclamation No. 213 of 1913.

The Court will therefore, in allowing the appeal, exercise its powers of review and set aside all the proceedings, subsequent to the dismissal of the exception.

The appeals are accordingly allowed with costs, and the original judgment of the Magistrate altered to judgment for Plaintiff for five cattle or their value at £5 each with costs of suit.

Butterworth. 3rd July, 1918. J. B. Moffat, C.M.

MATSAYIMANI vs. VELDTMAN MATSAYIMANI.

(Willowvale. Case No. 305/1917.)

Practice—Res Judicata—*Kraal Head*—*Apportionment of property.*

The Plaintiff sued his eldest son of the Right Hand House for certain stock at the Right Hand House kraal, which he stated he wished to distribute according to Native Law. The Defendant pleaded *res judicata* on the ground that on the 4th April, 1917, he was sued in the Magistrate's Court for the delivery of the stock

now claimed, and the Court by Judgment dated 19th April, 1917, ordered that this stock should remain at the Plaintiff's Right Hand kraal, of which Defendant was in charge, for the use and benefit of the Right Hand House. The Magistrate upheld this plea and dismissed the summons with costs.

JUDGMENT.

By President: The first case between the parties was a claim by Plaintiff for delivery of seven head of cattle, four horses, forty-eight sheep and ten goats which were in Defendant's custody at the Right Hand kraal.

The Defendant admitted that he had in his possession three head of cattle, three horses, seventeen sheep and ten goats belonging to the Right Hand House.

The Defendant having stated that he laid no claim to the custody of the Qadi kraal of the Right Hand House, the Plaintiff confined his claim to the Right Hand House property only, *viz.*, four head of cattle, seventeen sheep and ten goats.

In the evidence it was shown that Defendant had sold a horse belonging to the Right Hand House, and the Plaintiff said that in the four head of cattle he included a heifer which he (the Plaintiff) had already paid away as a fine, but which was still at the Right Hand kraal. The Magistrate in his order giving Defendant possession included this one.

The Court held that no apportionment had been made of the property of the Right Hand House to Defendant and that the property still belonged to Plaintiff and ordered that three head of cattle, three horses, seventeen sheep and ten goats were to remain at that kraal and that Defendant was to pay into the Right Hand kraal £10, the value of one horse sold by him. Defendant was further ordered not to dispose of the property without consulting the Plaintiff.

The second case was brought for the delivery of the stock on the ground that Defendant refused to carry out the order of the Court and had assumed exclusive control of the stock and refused to allow Plaintiff to exercise his right of ownership.

The Plaintiff, however, in his evidence stated that he wished to get possession of the stock in order to make a distribution.

The Magistrate dismissed the summons on the ground that the Plaintiff had not proved his allegations and on appeal this decision was upheld.

The Plaintiff now asks for the delivery of the same stock which was dealt with in the first case, stating that he wishes to get possession of the stock in order to distribute it.

In the first case the Magistrate ordered that the stock claimed excepting one beast and one horse were to remain in the Right Hand kraal. The one beast not included in the order was apparently the heifer which Plaintiff said he had paid as a fine, and the Defendant was ordered to replace the horse by paying £10 to the Right Hand house.

This case has been brought for the same stock dealt with in the first case on which a final judgment was given. In this instance the Plaintiff says he wants to get possession of the stock in order to distribute the property according to Native Law. It is not necessary for him to obtain possession in order to make the distribution, and whatever distribution he may make of the property

the stock in respect of which the claim was made and dealt with in the first case must remain in possession of the Right Hand House so long as the conditions laid down by the order of Court are complied with.

The plaintiff can make an apportionment in accordance with the usual procedure in such matters. Whatever apportionment may be made the Magistrate's judgment given in the first case having decided that the stock was to remain in possession of the Right Hand House for the support of that House, the Plaintiff cannot ask for a judgment for possession on the same claim as the one dealt with in the first case.

The question of possession having already been decided in that case the Defendant is entitled to plead *res judicata* on the Plaintiff's present claim. The exception taken was therefore rightly upheld by the Magistrate and the appeal must be dismissed with costs.

Lusikisiki. 1st April, 1921. W. T. Welsh, C.M.

ZIDLO, Assisted by MQOKWENI vs. GONGWANA QONA.

(Tabankulu. Case No. 107/1920.)

Practice—Res judicata—*Maintenance.*

Plaintiff claimed certain cattle, small stock and money which he alleged was paid by his father, the late Mqokweni, on behalf of certain five illegitimate children, of whom Defendant had by order of court been declared the legal guardian, but whom had been brought up by Plaintiff's deceased father. Defendant pleaded that the Appeal Court at Lusikisiki on 10th August, 1920, had ruled that Plaintiff was only entitled to one beast for each child for maintenance and that Plaintiff was therefore barred from bringing the present action. The Plaintiff's claim was made up as follows: —

Account of cattle, small stock and money paid on behalf of five illegitimate children.

Seven head of cattle paid as dowry for Zimanga for his first wife Matshweleni	£35	0	0
Three head of cattle paid on behalf of Zimanga to settle Court judgment for adultery and costs	16	10	9
Five head of cattle paid for Zimanga's second wife	25	0	0
Paid for treatment of Zimanga's first wife ...	4	0	0
Eight goats paid to one Xoluputi for treatment of one girl Vingcani	8	0	0
One cow and ten small stock for "intonjane" ceremonies for Vingcani and Nomalawu	14	0	0
Ten small stock paid for Gogoyi for seduction of Wayiti's daughter	10	0	0
Two cattle and six small stock paid on behalf of Gogoyi as dowry for his wife Mapoko	16	0	0
Ten small stock paid as Nyoba for Sintwini	10	0	0
	£138	10	9

The Magistrate upheld the plea of *res judicata* and dismissed the summons. Plaintiff appealed.

JUDGMENT.

By President: The question to be decided is whether the Magistrate was justified in upholding the plea of *res judicata*. The principles applicable were fully discussed in the cases of *Msiegeleli* vs. *Edward and Mahasha* (3 N.A.C., 237) and *Mpemwa* vs. *Kili* (3 N.A.C. 238).

In the case of *Nygono* vs. *Nkonkile*, the Defendant was awarded a beast for each of the five children in question. The present Plaintiff is a minor and is assisted by Nkonkile, Defendant in previous case, and claims from Qona, the Plaintiff in that case, various property, containing items some of which were involved in the previous action, when maintenance was awarded. The usual amount for maintenance having been recovered it follows that any claim properly included therein cannot now be adjudicated upon.

There are however certain items to which the plea of *res judicata* whatever other defence the Defendant may put up cannot apply, and the question as to whether any claim lies thereon against the Defendant has still to be decided. In the opinion of this Court the ruling of the Magistrate on the exception must be set aside except in regard to the items of £8 for the treatment of Vingcani, and £14 for the "intonjane" ceremonies of Vingcani and Nomalawu. The appeal is allowed with costs, and the ruling upholding the plea of *res judicata* is set aside except in respect of the items for £8 and £14, and the case remitted to be heard on its merits.

Umtata. 25th March, 1919. C. J. Warner, C.M.

MLUNGU YIWANI vs. JEJANE YIWANI.

(St. Mark's. Case No. 228/1918.)

Practice—Slander—Persons in whose presence the slander is alleged to have been uttered must be stated in the summons—Exception.

The relevant facts are stated in the judgment of the Native Appeal Court.

JUDGMENT.

By President: Plaintiff in the court below sued Defendant, claiming £20 for damages for slander. Exception was taken that the summons did not disclose the names of the persons in whose hearing and presence the slander was uttered.

The Magistrate in the court below allowed the exception and the appeal is against this ruling.

The third ground of appeal was mainly relied upon in argument in this Court. Appellant's attorney relied chiefly on the cases of *Webster* vs. *Muller* (1913, E.D.C., 482) and *National Mutual Life Assurance Society* vs. *African Life Assurance* (26 Supreme Court, 141). But in the opinion of this Court this case is governed by

the principles laid down in *Konigsberg* vs. *Stanislaus and Another* (21 S.C., 663) and *Pretorius* vs. *The State* (1 Bisset & Smith, 726), from these cases it would seem that the names of persons in whose hearing the slander complained was uttered must be given in the summons. The case of the *National Mutual Life Assurance Society* referred to a publication in a newspaper. In the present case as Plaintiff's summons failed in an essential particular the exception in the opinion of this Court, was a good one, and the appeal is dismissed with costs. The Appellant did not offer or express his readiness to supply the particulars required by Respondent when the exception was taken.

Note: The grounds of appeal were (1) that the summons was good, (2) that the exception was badly taken, and should not have been allowed by the Court, (3) that the procedure by exception was not the proper procedure to follow where particulars are required, (4) that the Defendant did not allege nor did he contend that he was in any way prejudiced by the want of the names referred to.

Umtata. 25th March, 1919. C. J. Warner, C.M.

SHADRACK S. MATOTI vs. ARCHIBALD KUSE.

(Cofimvaba. Case No. 35/1919.)

Practice—Copy of summons unsigned by clerk of court—Exception—Slander—Imputation of theft—Principles of South African Law apply.

The essential facts of the case are clear from the judgment of the Native Appeal Court.

Judgment.

By President: Plaintiff in the court below sued Defendant in an action for damages for slander, and second, for damages for illegally detaining Plaintiff's cattle. On the return day, an exception was taken by Defendant's attorney that the copy of the summons served on the Defendant did not bear the signature of the clerk of the Court. This exception was overruled, but the Magistrate, in his reasons for judgment, states he is aware of the fact that the Supreme Court has held that the service of an unsigned copy of a summons on Defendant was not a good and sufficient service, but that the parties to the action are Natives, and this Court has held that exceptions are unknown in Native Law and practice.

It has been the consistent practice of this Court to discourage the taking of exception in Native cases, that is, cases founded in Native Law and Custom. In the present case the summons contains a claim for damages for slander accusing the Plaintiff of being a thief. Such an action is unknown in Native Law where no action for slander lies unless an aggrieved party has been accused of being a sorceror or practising witchcraft. An action for damages for slander can be maintained only under

South African Law, and not under Native Law. If, therefore, a Native seeks redress which is denied him by his own laws, and which he can claim only under South African Law, he must be prepared to accept the consequence of invoking the aid of the law under which he seeks redress.

It is quite clear from the authorities and particularly in the case of *Pretorius* vs. *Van Heerden* (1911, C.P.D. 915), that the copy of a summons served on Defendant must be a true copy of the original and when the copy left with Defendant is not a true copy the service is held to be insufficient and the summons dismissed.

The exception taken in the court below was therefore a good one and must be allowed.

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

Note: This decision was followed in the case of *Jeremiah Tyaliti* vs. *George Mcoyana* (Xalanga; case No. 6/1923), heard on appeal at Umtata in March, 1923. The copy of summons served on the Defendant did not state where the Court was to be held. The Defendant excepted to the summons on that ground, and the Magistrate overruled the exception. On appeal, the Native Appeal Court held that the Magistrate was wrong in overruling the exception.

Umtata. 21st July, 1921. T. W. C. Norton, A.C.M

IDA KUMALO vs. ESAU KUMALO.

(Tsolo. Case No. 103/1921.)

Practice—Summons—Status *alleged in summons may not subsequently be waived—Exception—Christian and Native marriages.*

In this case the Plaintiff claimed (1) that she and the Defendant were originally married according to Native Custom and subsequently according to Colonial Law; (2) that after the marriage Defendant took unto himself a concubine and from time to time diverted certain property of the Plaintiff's house to that of the concubine; (3) that certain stock "nqomaed" to the Defendant had also been diverted to the house of the concubine. Plaintiff therefore claimed that the stock should be declared to be her property or that of her house, for the use and maintenance of herself and her family. The Defendant excepted to the summons as disclosing no cause of action. The Magistrate upheld the exception and dismissed the summons with costs. The Plaintiff appealed.

Judgment.

By President: The appeal is against the Magistrate's ruling upholding an exception that the summons discloses no cause of action inasmuch as Appellant alleges that she is married according to Christian rites.

Appellant, in her summons, waives her rights under the alleged marriage in community, and in answer to the exception withdraws the allegation that she is married according to Christian rites, stating that she is not prepared to prove it at present.

She has chosen to come into court as a wife according to Civil Law, but her summons, as far as this Court can ascertain, is based on Native Custom.

While it is competent for Appellant to waive her own rights or to expunge claims from her summons, in the opinion of this Court she cannot waive a matter of *status* or withdraw such allegation from her summons.

The appeal is dismissed with costs.

Umtata. 6th November, 1922. W. T. Welsh, C.M.

MCAPU vs. QONDANI DAYIMANI and DAYIMANI.

(Qumbu. Case No. 57/1922.)

Practice—Tender—Costs—Tender need not be repeated at the time of pleading if already made prior to issue of summons—Plaintiff successful to extent of such tender only may be muleted in costs—Seduction and pregnancy.

Action for damages for seduction and pregnancy. The sum of £10 and eight goats had been paid by Defendant No. 2, and he had tendered, prior to the issue of summons, a further two head of cattle to make up the damages to five head, the damages payable under Native Law and Custom. The Plaintiff claimed a balance of two head of cattle and two goats, and claimed a further three head of cattle for an alleged subsequent pregnancy. The Plaintiff's attorney subsequently withdrew the claim for the two goats, and the Magistrate gave judgment for the Plaintiff for two head of cattle, and awarded costs to the Defendants. The Plaintiff appealed.

Judgment.

By President: The record shows that the Plaintiff claimed from the Defendant two cattle of the value of £5 each, and two goats of the value of 10s. each, being the balance alleged to be due to him by the Defendants for damages on account of the first Defendant having seduced and rendered pregnant his sister Nozomela. It is admitted that the Plaintiff had claimed five head of cattle as damages, and that a sum of £10 and eight goats had been paid which the Defendants plead the Plaintiff accepted as representing three cattle. The Defendants further pleaded that two additional cattle had, prior to the issue of summons, been tendered to the Plaintiff, being the balance due to him according to Native Law and Custom for seduction and pregnancy. The Plaintiff's attorney after evidence had been led withdrew the claim for the two goats and the Magistrate gave judgment for the Plaintiff for two cattle or their value at £5 each, with costs for the Defendants.

The Plaintiff has appealed against this order on the ground that the Plaintiff should have been awarded his costs on the claim in convention inasmuch as the tender of the two cattle was withdrawn, and that it is clear from the Defendants' plea that he contested Plaintiff's claim for the payment of such cattle. The Magistrate, in the course of a careful and lengthy judgment has referred to numerous authorities in support of his decision ordering the Defendant to pay the costs. The Appellate Court, in its judgment in the case of *Gross* vs. *Crofton* (1920, A.D., 5) in discussing various decisions distinguishes the earlier cases of *Marcusson* vs. *Skibbe* (7 C.T.R. 174)* and *Corlett* vs. *Dawson* (20 S.C. 445) from the later cases of *Van Geem* vs. *Brand* (1918, C.P.D., 440) and *Fagan and Mostert* vs. *Ernstzen* (1918, C.P.D., 572). In the opinion of this Court the latter cases cannot in any case be regarded as being in point as they were decided in accordance with Order XV of Act 32 of 1917, which has been specifically precluded from these Territories.

In the case of *Marcusson* vs. *Skibbe*, the Supreme Court refused to interfere where the Magistrate had exercised his discretion in depriving a successful Plaintff of his costs were a tender had been made before action, but had not been pleaded.

In *Corlett* vs. *Dawson*, the Defendant admitted his liability for a portion of the sum claimed, and though there had not even been a tender before action, the Court dismissed an appeal against the Magistrate's decision, ordering the Plaintiff to pay the costs of the day of hearing.

The Plaintiff in the case now before this Court finally accepted two head of cattle in settlement of his claim for the balance of the damage claimed by him. Had he acted as a reasonable man and accepted the tender, when made, prior to the issue of summons the litigation would have terminated without any costs being incurred and indeed this is the very essence of a tender. The Appellate Court in the case of *Gross* vs. *Crofton* held that the evidence in respect of the plea, which it was argued was inadmissible, was important in regard to the conduct of the Plaintiff on the question of costs and would have been admitted even if there had been no plea of tender on the record.

This Court is therefore of opinion that the Magistrate was justified in dealing with the tender as a legal one and that in ordering the Plaintiff to pay the costs he exercised his discretion judicially.

In regard to the appeal against the judgment of absolution in respect of the damages claimed for the second pregnancy of Nozomela this Court is of opinion that the appeal must fail. The Magistrate states he was not satisfied with the evidence adduced on behalf of the Plaintiff and it was therefore, as decided in the case of *Sibaca* vs. *Myburgh* (1917, E.D.C. 1) competent for him, without calling upon the Defendant to adduce any further evidence, to decide that the Plaintiff had not made out a *prima facie* case. The appeal will be dismissed with costs.

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* 2 Bisset & Smith 2740.

Butterworth. 12th March, 1918. J. B. Moffat, C.M.

ISAAC DUDUMASHE vs. NOWANTI KONDILE.

(Nqamakwe. Case No. 140/1917.)

Practice—Widow's right to sue for property belonging to her late husband's estate—Guardian's assistance necessary—Plea in bar—Widow's usufruct.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: In this case the Plaintiff, a widow, sues Defendant for 13 head of cattle the property of the estate of her late husband Kondile, to the use of which she claims she is entitled during her lifetime.

The Defendant pleaded in bar that the Plaintiff is not the right party to maintain the action, that it should be in the hands of the guardian of the estate and that Plaintiff's remedy for her rights should be against such guardian.

In the case of *Nosentyi* vs. *Makonza* (1 Henkel, 37) it was laid down that every Native woman has a right of action unassisted against the guardian of her late husband's estate to protect herself and children and property from improper administration. The Court went on to say that in a case instituted against a person not a guardian, the guardian's assistance would be necessary, but in such a case if it were shown that the guardian unreasonably refused to assist, the woman could proceed with the case.

In this case there is no allegation in the summons nor does the Plaintiff in her evidence say that the guardian refuses to assist her. The only evidence on the point is a statement by the Defendant that the guardian is against these proceedings. He says that he does not know whether he refuses to assist the woman. The Defendant admits that he has nine head of cattle belonging to the late Kondile's estate and offers to hand them over to the guardian.

The Magistrate gave judgment in favour of Plaintiff for these cattle with costs. On the evidence on the record this Court is not prepared to uphold this judgment which means that the cattle are to be handed over to the woman. If she had alleged and shown that the guardian unreasonably refuses to assist in protecting the estate property the Court might have been justified in handing the property over to her. She has not done so and this Court cannot say on these proceedings that the property is to be handed over to her without the guardian having any voice in the matter.*

The appeal is allowed with costs and the Magistrate's judgment is altered to summons dismissed with costs.

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* Followed in the case of Mamakontsa *vs.* Suta, (*cr.* Mount Ayliff) Native Appeal Court, Kokstad, August, 1923.

Kokstad. 21st August, 1918. J. B. Moffat, C.M.

MADUNZELA vs. JOHAN YOSE.

(Qumbu. Case No. 11/1918.)

Practice—Widow sued in respect of Estate Property—Estate must be represented in the action—Exception—Guardian—Ownership of illegitimate children.

Johan Yose sued one Madunzela, a widow, and mother of one Mantsikwe, for six head of cattle received by her on account of the dowry of one Manayaku, daughter of Mantsikwe. Plaintiff alleged that he married the said Mantsikwe and had two children by her, namely, the said Manayaku and one Cukulwa. The Defendant excepted that she had no *locus standi*, and if any action lay against her she should be assisted by her guardian Kambatshe, heir to the property of her kraal, who resided at Corana in the Libode District, and who was the only person against whom an action lay in respect of the cattle in dispute. Defendant also pleaded over denying the Plaintiff's marriage to Mantsikwe, but stated that he seduced her and caused her pregnancy on two occasions resulting in the births of the children in question. The Magistrate gave judgment for Plaintiff as prayed, on the ground that the stock claimed was in her possession and that the guardian was outside the jurisdiction of the Court, and that on the authority of the ruling of the Court in the case of *Mgodla* vs *Galela* (Native Appeal Court, Kokstad, 21st August, 1917) the Defendant was rightly sued. He further held that the marriage of Plaintiff to Mantsikwe was proved.

The Defendant appealed on the ground that she was wrongly sued and that the marriage of Mantsikwe to Plaintiff was not proved.

Judgment.

By President: The first ground of appeal is that the Defendant was wrongly sued and that the exception taken to her being sued should have been upheld.

In the case heard in this Court on 21st August, 1917, referred to by the Magistrate, a minor was sued assisted by his uncle at whose kraal he lived. The minor's guardian lived outside the jurisdiction of the Magistrate's Court but had notice of the proceedings. The Native Assessors, who were referred to, stated that under the circumstances the uncle was the proper person to assist the minor.

In this case the cattle in respect of which the action is brought are held by the Defendant on behalf of the estate of her deceased husband.

The estate having an interest in the cattle, the estate should be represented in any action in respect of them.

Even on the merits it is extremely doubtful whether the Plaintiff has proved his marriage to Mantsikwe.

The appeal is allowed with costs. The Magistrate's judgment will be altered to summons dismissed with costs.

Butterworth. 8th July, 1919. C. J. Warner, C.M.

NOELI SILINGA vs. NOWAKA.

(Butterworth. Case No. 56/1919.)

Practice—Widows suing and being sued unassisted—Exception—Conflict of Colonial Law and Native Custom.

The Plaintiff alleged that she was the Great House widow of the late Mhlahlwa, and married in place of the former Great Wife, the Defendant, whom Mhlahlwa had driven away. After the death of Mhlahlwa Defendant returned and took possession of certain property of the deceased, of which Plaintiff claimed the use. Defendant denied that her marriage with Mhlahlwa was ever dissolved, and excepted that as both parties were Native females, they should be joined and assisted by their respective guardians and that the summons was therefore bad in law and should be dismissed. The Magistrate upheld the exception, stating that it is entirely opposed to Native Custom and practice to allow a woman to be sued, she herself being in effect part of the estate. The Plaintiff appealed on the ground that the parties were widows and therefore majors and entitled to sue or be sued unassisted.

Judgment.

By President: Appellant, who from the summons appears to be a widow, sued Respondent, also a widow, for the return of a certain bay mare. Exception was taken "that both parties to the summons are Native females, and should be joined and assisted by their respective guardians, and that the summons is therefore bad in law, and prays that the same may be dismissed." This exception was upheld.

In the form in which this case has come before this Court the only question the Court has to decide is whether a Native female can sue in a Magistrate's Court unassisted by her guardian according to Native law.

It is a well-known principle of Native Law that a woman remains a chattel all her life, but it has been ruled in numerous cases both in this and the higher courts that when Native Laws are in conflict with justice and equity, and opposed to proclamations for the government of the Native Territories, Native law must give way. The legal age of majority for both males and females is fixed by section 39 of Proclamation No. 110 of 1879 at 21 years. Further according to the common law of this country which is in force in the Native Territories, a widow is a major. The procedure of the Cape Act 20 of 1856 which is followed in the Native Territories allows women who are unmarried and not minors to sue in their own right.

In view of these authorities this court considers that the court below erred in upholding an exception that a Native female who is a major cannot sue unassisted by her guardian.

The appeal is allowed with costs, and the ruling in the court below is altered to "Exception overruled with costs."

Umtata. 13th November, 1920. W. T. Welsh, C.M.

ELIZABETH KUTUKA vs. CHARLES BUNYONYO.

(Xalanga. Case No. 10/1920.)

Practice—Action—Unmarried women have no locus standi *to sue in cases under Native Custom—Exception—Application of Native Law.*

Plaintiff, an unmarried woman, sued Defendant, father of one Lucas Bunyonyo, who was the father of her illegitimate child, for the delivery of her child, certain two blankets, her property, detained by Defendant, and damages.

The Defendant excepted that Plaintiff's father was the proper person to sue, and pleaded that he had paid damages for the seduction and pregnancy of Plaintiff. He denied that he had Plaintiff's blankets in his possession. The Magistrate found that the fine for seduction had actually been paid, and gave judgment for Defendant. He believed Defendant on the question of the blankets. He further stated that the case would have been dismissed on the exception raised.

The Plaintiff appealed.

JUDGMENT.

By President: It is clear from the circumstances surrounding this case that the parties intended to act in accordance with Native Custom, and in the opinion of this Court the Magistrate correctly decided to apply Native Custom.

If women were allowed, in cases of this nature, to bring actions in their own names, the result would be such an interference with the customs of the people as would sweep away one of their most widely recognised principles.

Whether the payment made was dowry or fine the mother has no right of action.

The appeal is dismissed with costs.

Butterworth. 4th November, 1919. C. J. Warner, C.M.

GXWALINTLOKO MPAHLWA vs. NOLAM MCWABA.

(Nqamakwe. Case No. 42/1919.)

Practice—Exception—Woman suing unassisted for husband's property which has never been in his possession—Negotiorum gestor—*Act* 20 *of* 1856—*Overruling of exception not appealable before conclusion of case.*

The Plaintiff, Nolam Mcwaba, stated she was the wife by Native Custom of one Mnyaka Ncwaba, whose whereabouts were unknown. She alleged that some 14 years previously her husband sent £4 to the Defendant with which to buy a beast for him. He bought a heifer, which had now increased to nine head of cattle. The

Plaintiff claimed these cattle on the ground that she was entitled to support from her husband's estate. The Defendant excepted that the Plaintiff could not sue unassisted, and that the proper person to sue was Mnyaka, the husband. He admitted receiving the £4 and buying a beast with it, but alleged that it had died without increase. The Magistrate overruled the exception on the ground that the woman should be heard as a *negotiorum gestor*. He gave judgment of absolution from the instance. Defendant appealed.

JUDGMENT.

By President: Nolam Mewaba, Plaintiff in the court below, sued Defendant for certain cattle which she stated belonged to her husband who has been absent for many years and whose whereabouts are unknown. The summons alleges that her husband some 14 years ago remitted £4 to the Defendant to purchase a beast, and the cattle claimed are the beast so purchased and its progeny.

Exception was taken that she could not sue without being duly assisted according to law. This exception was overruled and the appeal is against this ruling. It is objected in this Court that this being an appeal against the overruling of an exception cannot be heard, but it was decided in the case of *McLaren* vs. *Musser* (1915, E.D.C., 153) that though the dismissal of an exception is not a final order and not appealable, yet when the case has been heard to its conclusion and a final order is given, then the point may be taken on appeal. It would therefore appear that the overruling of the exception taken by the Defendant is appealable, the case having been heard to its conclusion.

Section 51 of Act 20 of 1856 states that married women and minors may sue for any cause of action accruing to them without being assisted by their husbands or guardians unless it shall be shown that such married woman or minor has a husband or guardian resident within the district. In Native Law a woman may not sue for any property belonging to her husband's estate unless the Court is satisfied her husband is absent and the assistance of her male relatives is not obtainable.

This Court has held that Native women may sue for the return of their husband's property which has been spoliated, or may interplead for their husband's property attached under a writ when the husbands are absent and the wives have been left in charge of the kraal, but the right of a woman to sue for property belonging to her husband and which has never been in his possession has never been recognised in this Court.

This Court therefore holds that the exception taken was sound, and should have been allowed with costs, and the ruling on the exception altered to "Exception allowed and summons dismissed with costs."

Kokstad. 14th April, 1921. T. W. C. Norton, A.C.M.

T. NODADA vs. J. NODADA.

(Matatiele. Case No. 379/1920.)

Practice—Tort feasor—*Married woman—Capacity in which sued—Non-service on husband—Exception—Domicile of married woman.*

Plaintiff sued the Defendant in the Magistrate's Court at Matatiele, assisted as far as need be, by her husband, who was living in Lusikisiki, for £50 damages for the alleged wrongful ploughing of Plaintiff's land and the reaping of a mealie crop which grew thereon.

Defendant excepted (1) that she was married in community of property and that her marriage still subsisted, her domicile was in the Lusikisiki district, where her husband lived, and that she was therefore outside the jurisdiction of the Court; (2) that the summons was vague and embarrassing, inasmuch as it did not state in what capacity she was sued; (3) that no copy of the summons had been served on the husband.

The Court overruled these exceptions: (1) On the ground that the husband was a registered hut tax payer of the Matatiele district and that Defendant resided at his kraal in that district. Further, Defendant was the *tort-feasor* and principal Defendant. The Court therefore held it had jurisdiction (2) on the ground that the summons was sufficiently clear, the allegations amounting to a *tort;* (3) on the ground that the non-service of summons on the husband did not invalidate the summons, his signature to the power of attorney having cured the defect.

The Defendant appealed.

JUDGMENT.

By President: The appeal in this case is on the decision of the Magistrate overruling an exception to—

(1) Jurisdiction.

(2) That the summons is vague and embarrassing in that the capacity in which the woman is sued is not stated.

(3) That no copy of the summons was served on the husband.

Defendant (Appellant) is joined with her husband, " assisted as far as need be," is the actual expression, and resides in the district of Matatiele, where they have a kraal and where she lives, the husband being employed at Lusikisiki.

The Defendant (Appellant) is the alleged *tort-feasor*, not her husband, and she resides in the district of Matatiele.

The summons does not allege any capacity, but describes her as the wife of her husband. It is true that in the body of the summons the words "in her aforesaid capacity " are used, but as no capacity is alleged, they are mere surplusage and may well be struck out of the summons without any prejudice to Defendant. The test is, where does Defendant, *i.e.*, the woman sleep? *Beadle* vs. *Bowley* (12 Juta, 401), (Meaker, 131-133), where numerous cases on the question of jurisdiction are cited.

The Court does not accept Respondent's explanation of the meaning of summons, but places its own construction thereon.

The final exception is that no copy of the summons was served on the husband. He is not joined as a co-defendant, and it is clear that the summons came to his notice as he signed the power of attorney to defend as assisting his wife.

On the authority of *Blom* vs. *Brand* (Bisset & Smith, vol. v., 336), the non-service on the husband is cured by his having signed the power of attorney.

The appeal is dismissed with costs.

Umtata. 26th July, 1920. W. T. Welsh, A.C.M.

MPAMBANISO QOTYIWE vs. HALOM YONA.

(Umtata. Case No. 226/1920.)

Purchase and sale—Eviction—Rei vindicatio—*Exception—Action for refund of purchase price may be instituted even though criminal proceedings on which eviction depends are not concluded.*

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

Judgment.

By President: The Plaintiff sued Defendant for £13 10s., the purchase price of a mare which he had bought from the latter, and for £5 damages, alleging that the mare had recently been taken from him by the police and that Defendant had failed to vindicate his right to the mare. To this claim the Defendant excepted that the summons was bad in law and set out no cause of action.

The Magistrate upheld the exception and dismissed the summons with costs.

For the Appellant, the case of *Nunan* vs. *Meyer* (22 S.C. 203) had been referred to. In that case it was decided that certain cattle which the Plaintiff had purchased from the Defendant were claimed by McDonald, from whom they had been stolen, whereupon Plaintiff handed them over to McDonald and informed Defendant what he had done. It was held that upon proof by the Plaintiff in an action against the Defendant for a refund of the price, that the cattle had been stolen, and that the Defendant would have no valid defence to a suit at the instance of McDonald, the Plaintiff was entitled to succeed, although there had been no judicial eviction.

In the opinion of this Court the summons sufficiently discloses to the Defendant that the Plaintiff's rights had been disturbed by the police, who had arrested the Defendant for theft of the mare. The record shows that the Plaintiff asked for a postponement until after the criminal trial. Had the Plaintiff wished to proceed with the case before the criminal trial was concluded an objection on the part of Defendant to the proceedings on the ground of prematurity and prejudice might, perhaps, have been reasonable.

But so far from desiring a postponement, the Defendant unconditionally opposed it, and had the exception been overruled in the court below he would have been estopped from claiming a stay of proceedings till after the trial. On the authority of *Nunan* vs. *Meyer*, had Plaintiff surrendered the mare to the real owner he would have divested himself of an action against the Defendant. In the summons it is alleged the mare was taken from him by the police as stolen property, and the questions on whose instance, for what parties the police took action, would best have been determined after taking evidence.

The appeal will accordingly be allowed with costs, the ruling on the exception is set aside with costs, and the case returned to be heard on its merits.

Umtata. 17th March, 1920. C. J. Warner, C.M.

NOMGA TANGO vs. NGQONGO.

(Engcobo. Case No. 339/1919.)

Prescription—Act 6 *of* 1861 *is applicable to Natives as well as to Europeans in the Territories—Special plea—Proclamation No.* 140 *of* 1885—*Application of Native Law—Proclamation No.* 142 *of* 1910—*Conflict of Colonial Law and Native Custom—Act No.* 3 *of* 1885—*Proclamation No.* 80 *of* 1890.

The essential facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: Respondent sued Appellant in the court below for the sum of £15 lent by his late father to the Appellant in 1907, the sum of £19 advanced by Respondent's late father to Appellant in 1910, and £15 the value of a certain horse belonging to Respondent of which Appellant had possessed himself and failed to return.

Appellant pleaded specially that the claim for money lent is prescribed under Act 6 of 1861, and further denied that the late Sindiwe (Respondent's father) had lent Appellant the sums of money alleged in the summons.

The Magistrate in the Court below overruled the special plea on the authority of *Thomas Gubauza* vs. *Nkatazo Makalima*, heard in this Court on the 17th November, 1917 (Meaker, 217), and gave judgment for the money claimed with costs, and absolution from the instance as regards the claim in respect of the horse.

The first ground of appeal is that the special plea should have been upheld, and the question for decision is whether the Act No. 6 of 1861 applies to this case.

The same argument is advanced in this case which was undoubtedly argued in the case of *Thomas Gubauza* vs. *Nkatazo Makalima*, and had the effect of inducing this Court to override its decision in the previous case of *Magadla* vs. *Mvcunza* (Meaker, 217), viz.: that the parties being Natives the case must be heard

under Native Law in which prescription is not known. In support of this argument section 22 of Proclamation No. 140 of 1885 is relied on, and it is further submitted that in the case of *Sekelini* vs. *Selekini* (21 Juta, 118) the Court held that the word "may" should be interpreted as meaning "shall." A reference to the report however shows that the learned Chief Justice stated, in referring to that particular case, "although the words used in the section are that the Magistrate may decide the case according to Native Law, yet it is practically certain that he would have read the Act as if the words had been "shall" be dealt with according to Native Law." This certainly does not in the opinion of this Court imply that only Native Law is to be applied to every case between Natives regardless of its nature. But even if it be held that Native Law "shall" and not "may" apply in cases between Natives this Court does not consider this to be a case of Native Custom arising as it does out of a money lending transaction, which is not a purely Native Custom but one known and observed throughout the world.

Act No. 3 of 1885 enacts that the Laws then in force in the Cape Colony shall be in force in the Territory of Tembuland, and empowers the Governor to extend by Proclamation to the said Territory any Act of Parliament. In terms of this Section the Prescription Act, No. 6 of 1861, was extended to the Territory of Tembuland by Proclamation No. 80 of 1890. There is no reservation in the extending proclamation, which would justify the view that it was intended to apply only to the European section of the community, which is the only possible view if it is correct that it does not apply to money lending transactions between Natives and Natives. Moreover it has been ruled in several cases not in this Court only but also in the Higher Courts that when Native Law conflicts with laws introduced to these Territories by the Legislature, Native Law must give way.

In support of this it is only necessary to refer to the cases of *Mbono* vs. *Manoroweni* (6 E.D.C.) and *Mazamisa* vs. *Mazamisa* (1909 E.D.C. 222). The first of these cases decided that a Native woman over the age of 21 years is a major, and the second that community of property is established between Natives domiciled in the Transkei who contract a marriage by Christian rites. It is true that Proclamation No. 142 of 1910 abolishes community of property in marriages between Natives, but that does not affect the principle that Native Law cannot prevail against Laws introduced by the Legislature.

For these reasons this Court is of opinion that the law was correctly followed by this Court in the case of *Magadla* vs. *Mncunza* and that the judgment in the latter case of *Gubanxa* vs. *Makalima* (Meaker 217) cannot be sustained.

The appeal is accordingly allowed with costs, and the judgment of the court below altered to read "Special Plea upheld, and judgment given for Defendant with costs on the claim for £34."

Absolution from the instance with costs with regard to the horse claimed.

Kokstad. 8th April, 1920. T. W. C. Norton, Ag.C.M.

SAMSON NDLELA vs. LUDZIYA NDLELA.

(Matatiele. Case No. 43/1920.)

Prescription—Act 6 of 1861 applies to such suits in the Territories which come within its terms, even though parties may be Natives—Payment on account after a debt is prescribed does not revive the debt—Plea in bar.

Plaintiff alleged that about 27 years ago he sent the Defendant £10 with which to purchase cattle. Defendant failed to do so and used the £10 for other purposes. In or about 1915 the Plaintiff sent a letter of demand to the Defendant, whereupon the latter paid him one yearling heifer of the value of £2. Defendant neglected to pay the balance. Defendant pleaded in bar that the claim was prescribed according to law. The Magistrate overruled the plea on the authority of the judgment of the Native Appeal Court in the case of *Thomas Gubanxa* vs. *Nkatazo Makalima* (3, N.A.C. 217). The Defendant appealed on the ground that section 3 of the Prescription Act, No. 6 of 1861, applied.

JUDGMENT.

By President: Respondent sues Appellant for £8 with interest from November, 1915.

Appellant pleaded prescription and quotes 3 N.A.C. (Meaker) 217.

The point is taken in this Court that as in terms of section 3 of summons an amount of £2 was paid on account about November, 1915, the case has been taken out of the operation of the Prescription Act of 1861.

In *Bell & Moore* vs. *Swart* (16 S.C. 404) it was ruled that a payment on account after a debt has been prescribed will not revive a debt which is already completely barred, unless some acknowledgment is made in writing signed by the party chargeable thereby.

This Court is of opinion that the Prescription Act, 1861, which is in force in these Territories does apply to such suits as come within its terms even though the parties may be Natives, and, indeed, has already so ruled at the session of the Native Appeal Court, Umtata, in March last.*

In this ruling this Court adheres to the decision in *N. Magadla* vs. *A. Mncunza* (Meaker 217).

Butterworth. 5th November, 1919. C. J. Warner, C.M.

TSHISA CEKISA vs. KOLOLO ASSISTED BY XUBUZANA.

(Willowvale. Case No. 157/1919.)

Prescription—Act 6 of 1861—Provisions of Act not applicable to trust moneys—Exception—Admission of attorney made in error of law.

The Plaintiff alleged that in or about July, 1907, whilst at the works, he entrusted the sum of £10 with one Jekem for safe

* Nomga Tango *vs.* Ngqongo, Native Appeal Court, Umtata, 17th March, 1920, page 306 of these Reports.

custody pending their return home. On their return Plaintiff sent for his money, but Jekem absconded and remained away for many years; he returned home the year previous to the case, but died without discharging his trust. The Defendant was the eldest son and heir of the late Jekem, and Plaintiff alleged that he (Defendant) had received sufficient benefit from the deceased's estate to enable him to pay Plaintiff's debt. The Plaintiff claimed the sum of £10 plus interest at six per cent. per annum from July, 1907. Defendant excepted that "money and interest were unknown to Native Custom under which the Plaintiff is bringing his case, and under European Law he is debarred by prescription." Defendant admitted that he was the heir of the late Jekem and that he had inherited certain property from him. The Plaintiff, in reply to the exception, stated that "the parties to this suit are both Natives to whom the European Law of prescription is unknown and does not apply; there is no law to debar Natives from suing each other for money lent." The Magistrate upheld the exception and dismissed the summons with costs. The Plaintiff appealed.

JUDGMENT.

By President: Appellant sued Defendant in the court below for the sum of £10 and interest thereon and stated that in July, 1907, he entrusted the sum of £10 to one Jekem for safe custody, that thereafter Jekem absconded and returned home last year, but died without having discharged his trust; that Defendant as heir of the late Jekem is liable for his debts.

Exception was taken that money and interest are unknown to Native Custom under which custom the action is brought, and that the claim would be prescribed under South African Law.

Appellant's attorney thereupon admitted the claim was prescribed by European Law, and after argument withdrew the claim for interest.

The exception was upheld and the summons dismissed with costs.

From the form of summons it is clear that the action is brought under Native Law, but whether a claim of this nature is brought under Native or South African Law is immaterial as the Prescription Act No. 6 of 1861, which is in force in these Territories makes no reference to trust money. The admission by Appellant's attorney in the court below that the claim would be prescribed by European Law cannot affect the actual state of the law.

The appeal is allowed with costs, the ruling on the exception is set aside and the case returned to the court below to be heard on its merits.

Umtata. 22nd November, 1921. W. T. Welsh, C.M.

VIZARD BOOI vs. SAMUEL XOZWA .

(Umtata. Case No. 370/1921.)

Seduction—Separate actions by father or guardian of the seduced girl under Native Law and by the seduced girl herself under Colonial Law—Where Defendant has paid damages under Colonial Law to the girl herself he cannot subsequently be sued by the father or guardian of the girl for damages under Native Law—Proclamation No. 140 *of* 1885*—Conflict of Colonial Law and Native Custom.*

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

Judgment.

By President: In this case the Plaintiff, now Respondent, sued the Defendant, now Appellant, for £25 on a summons wherein he alleged:—

(1) That Plaintiff is the heir, according to Native Law and Custom of his later father Falafala Xozwa.

(2) That in or about the winter season of 1920 the Defendant seduced and rendered pregnant Plaintiff's sister Amelia Xozwa.

(3) That the said Amelia gave birth to a still-born child about April last of which Defendant is the father.

(4) That by reason of the aforegoing Plaintiff is entitled to and hath suffered damages to the extent of £25, which Defendant neglects or refuses to pay.

To this claim Defendant pleaded:—

Defendant has no knowledge of Paragraph 1, and admits Paragraphs 2 and 3.

Defendant further says:—

(1) That in or about July, 1920, he seduced and rendered pregnant the said Amelia who was then in domestic service in Umtata earning her own living.

(2) That in or about March, 1921, the said Amelia claimed damages for seduction from him.

(3) That thereupon it was settled between Defendant and Amelia that she accept the sum of £25 in full settlement of her claim which said amount she agreed to receive in monthly instalments of 30s.

(4) That Defendant has regularly paid such instalments and denies being in any way liable to the Plaintiff.

Wherefore Defendant prays for judgment and costs.

In his replication the Plaintiff stated:—

> Plaintiff has no knowledge of the allegations contained in Paragraphs 2, 3 and 4 of Defendant's plea, and says that even though such allegations be correct they afford no answer or defence in law to Plaintiff's claim; and inasmuch as Defendant admits that he did seduce the said Amelia and render her pregnant he (Plaintiff) is now entitled to judgment against Defendant for the damages claimed in the summons or the equivalent in cattle (*i.e.*, five head of cattle).

At the trial Paragraph 1 of the summons was admitted on behalf of the Defendant, and on behalf of the Plaintiff it was stated that he was not prepared to dispute Paragraph 3 of the plea, but said this was done without reference to him and that such arrangement was not binding on him.

No evidence was called and the Magistrate, after citing the case of *M. J. Cebisa* vs. *D. Gwebu* (page 330 of these Reports), heard at Kokstad in December, 1920, gave judgment for the Plaintiff as prayed.

It is admitted that no case similar to the one now under consideration has previously been before this Court and no analogous case of any other tribunal has been brought to the notice of the Court.

In the case of *Cebisa* vs. *Gwebu* (*supra*) the appeal was brought and argued almost entirely on the question of the liability of a married man for damages for seduction and on this being decided in favour of the Plaintiff it was agreed that the damages to be awarded should be the difference between what her guardian, with her knowledge, had already received and the usual damages awarded in Native cases. Moreover, in the present case, the Plaintiff is seeking to recover damages to himself through the seduction of his sister after she had herself recovered full damages from her seducer. The principles governing the two cases are thus different.

It is quite clear that this Court has held by a long series of decisions that a Native woman may recover in her own right under Colonial Law damages for seduction, and that a guardian may recover under Native Custom damages for the seduction of his ward, and the question for this Court now to decide is whether, when a woman has fully exercised her personal rights, the seducer is also liable to pay her guardian the damages otherwise claimable by him according to Custom. The record is unfortunately silent as to whether Amelia is a minor or a major, but having compelled the Defendant to agree to pay her damages it can, as stated on behalf of the Appellant and in the absence of any information to the contrary, be assumed that she is a major.

Section 22 of Proclamation No. 140 of 1885 provides that when all the parties to a civil suit are what are commonly called Natives, the case may be dealt with according to Native Law. It was argued for the Respondent, relying on the case of *Edmund Ntikinca* vs. *Xamawa Mzikikazo* (Meaker 250), that the word "may" should be construed as meaning "shall." This Court is not prepared to accept that interpretation, for apart from the case of *Willie Nquma* vs. *Jemima Koni* (Meaker 252) and other decisions, even this case itself clearly indicates that Magistrates are vested

with full discretion in the application of Native Law in cases between Natives, and that as a general principle such cases should be decided according to Native Law. There have been numerous decisions in which the Courts have not applied Native Law to cases between Natives, and its application is therefore, in the opinion of this Court, merely permissive and not obligatory.

Though the damages claimable by a woman or her guardian can hardly be mathematically computed there are several interests in common, and the Court must guard against a decision which might easily open the door to collusion and mulct a Defendant in damages to each of two parties, where payment to the one might compensate for the damage or expense incurred. The basic principle of a guardian's claim for damages is that his ward's marriageable value for dowry purposes has been depreciated and that appears to be the ground upon which the Magistrate founded his judgment. But can it be said that he has any remedy if she chooses to contract a marriage without the payment of dowry. There is nothing on record to show that the Plaintiff in any way whatever exercised his rights of guardianship over his sister or made any attempt to recover the damages to which he now lays claim until after she had herself sued. It is clear that if the Defendant were a European the Plaintiff would have no ground upon which to base the present action, and the former's rights or obligations cannot be rigidly excluded in determining those of the Plaintiff. The question seems to be not so much whether the one act can be two wrongs, but who can recover for the one wrong? As this Court took occasion to remark in the recent case of *Gasa* vs. *Gasa* anomalies arising out of a dual system of administration cannot be avoided, but when Colonial Law clashes with Native Custom, as seems now to be the rule rather than the exception, it is the duty of the Court to hesitate before establishing new principles imposing burdensome obligations which hitherto have not been recognised. It was urged in argument that the decision in this case concerns the rights of thousands of Natives, but the Court feels constrained to point out that no similar action has previously come before it, which fact would indicate that these rights, if extant, have been very consistently neglected.

Though not referred to during argument the Court has consulted the case of *Gwayi* vs. *Gwija* (1 N.A.C. 235) in which the Plaintiff a girl, assisted by her mother and guardian sued her seducer for £50 damages. In the course of an exception to the form of the action it was stated the Defendant had paid two cattle to the Plaintiff's brother in connection with the action, which cattle, it was admitted, had been paid on account of dowry. This Court held that whether the action was brought according to Colonial or Native Law the Plaintiff or her guardian would be entitled to recover damages from the Defendant, and the most the Defendant could urge under Native Law in respect of the two cattle paid was that they should be a set-off against the claim for damages Though not analogous, the underlying principle there involved, based as it was on Native Custom, is not without considerable significance. Amongst the rules which Van der Linden lays down for the interpretation of laws are the view which equity most strongly urges and a consideration of the consequences which would result from the construction. In the opinion of this Court the equities are against the Plaintiff. To compel the Defendant

to pay him the full damages claimable when these have already been paid to his ward who apparently does not recognise the authority which a Native guardian exercises would be placing the Plaintiff in an unduly privileged position which, in this Court's opinion, was not contemplated, and could well lead to consequences which would be contrary to the principles of justice. If the Plaintiff is exercising his guardianship wisely he has certain well-defined rights under Native Custom to such property as his ward may acquire while if he has failed in his duty he has himself to blame. After careful consideration of the issues involved this Court is of opinion that the Plaintiff was not entitled to succeed in the court below.

The appeal will accordingly be allowed with costs and the judgment altered to "judgment for the Defendant with costs."

Umtata. 19th November, 1919. C. J. Warner, C.M.

THOMPSON MADALANE vs. MATILDA MARTHA KIVIET.

(Umtata. Case No. 266/1919.)

Seduction—Application of Colonial Law—Evidence—Woman's oath as to the paternity of the child—Affiliation—Law of.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: Respondent sued Appellant in the court below for £60 (subsequently reducing her claim to £25) for damages for seduction and pregnancy resulting in the birth of a child. Appellant admitted having intercourse with Respondent up to August, 1918, but denies the paternity of Respondent's child or that he has been intimate with her since then. The Magistrate found for Respondent and awarded £10 damages.

The appeal is on the ground that the Magistrate having found Respondent untruthful on certain points should not have accepted her evidence. Respondent elected to institute proceedings under ordinary South African Law. The case must therefore be treated entirely as a case between Europeans.

The law of South Africa governing cases of affiliation was laid down by the Supreme Court of the Cape Colony in the case of *Smitsdorff* vs. *Home* when the presiding Judge stated:—

> "While the law presumes in favour of the oath of the woman, presuming she has knowledge of the father of the child, although she may have had connection with others . . . . . this can only be if the Court finds that she is worthy of belief."

The principle was followed in the recent case of *De Wit* vs. *Uys* heard in the Cape Provincial Division of the Supreme Court on the 12th August, 1913 (1913, C.P.D. 653).

In the present case the Respondent swears that she has had no intercourse with any other man than Appellant. Appellant admits intercourse but seeks to prove that he is not the father of her child and that Respondent has been intimate with other men. To support this contention a letter is put in written to him by Respondent in which she confesses to have been unduly intimate with one Poswa. Her explanation is that Appellant forced her to write the letter by beating her. This is denied by Appellant, and the Magistrate in the court below considered Appellant's explanation that the letter was written with a view to regaining his affection much more probable. The second letter put in which Respondent admits she received from one Ntintili, in view of the fact that the writer is a married man, certainly indicates undue intimacy between them and the fact that Respondent first swore that Ntintili was married to her sister Jane and when recalled was obliged to admit that Jane was not related to her indicates beyond doubt that she deliberately attempted to mislead the Court in a point of great importance to the issue of the case.

Following the decisions of the Supreme Court referred to above this Court holds that the Respondent having been found to be untruthful on issues relevant to the determination of the case, her whole evidence is untrustworthy and should be rejected.

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

The cross-appeal is dismissed with costs.

Note: See also case of *James Noroto* vs. *Nathaniel Monakali* on page 329 of these Reports.

Kokstad. 7th April, 1920. T. W. C. Norton, Ag.C.M.

JESSIE FUNDA, ASSISTED BY SARAH ANN FUNDA vs. ALFRED NOMPUMZA.

(Mount Currie. Case No. 3/1920.)

Seduction—Application of Colonial Law—Right of seduced girl to sue for damages under Colonial Law—Breach of promise—Guardian—Conflict of Colonial Law and Native Custom—Plea in bar.

The Plaintiff, a minor, assisted by her mother, sued the Defendant for breach of promise of marriage or alternatively for her seduction by the Defendant, and her resultant pregnancy. The Defendant pleaded that as he was a Native and the Plaintiff also a Native he desired the case to be tried according to Native Law and Custom; he further denied that her mother was Plaintiff's guardian, but alleged that one Bly was her guardian. He further asserted that he had paid three head of cattle, £8 and £2 10s. in connection with this matter, and was willing to marry the Plaintiff, but was prevented from doing so until he had paid further dowry. Plaintiff replied that she was suing under Colonial Law for a cause of action unknown in Native Law, and that under

Colonial Law her lawful guardian was her mother. The Magistrate upheld Defendant's plea in bar, finding (1) that as both parties were Natives the case should be tried under Native Custom, and (2) that Plaintiff was not the right person to sue. The Plaintiff appealed on the ground that the action was brought under Roman-Dutch Law for breach of promise of marriage, an action entirely unknown in Native Law, and that she had complete *locus standi in judicio* in such an action. The Magistrate, in his reasons, stated that he had exercised the discretion vested in him by law and had decided that the action should have been brought under Native Law and Custom.

JUDGMENT.

By President: The appeal in this case is against the ruling of the Magistrate upholding the contention of Defendant that the case should be tried according to Native Law.

The case of *Willie Nquma* vs. *Jemina Kole* (Meaker 252) appears to be on all fours with the present case, and was decided according to Colonial Law.

The Appeal Court has in many decided cases admitted the principle which is unknown to Native Custom, that the injured girl may sue (1 N.A.C. 207;* 2 N.A.C. 140).†

The appeal is allowed with costs. The ruling of the court below is set aside and case returned to the Magistrate to be heard on its merits.

Kokstad. 8th April, 1920. T. W. C. Norton, A.C.M.

RASELO PHAROE vs. LETLATSA MOHLAHLI.

(Matatiele. Case No. 184/1919.)

Seduction—Acceptance of cattle from seducer, who at the time notifies his refusal to pay any more, is a bar to further proceedings.

In this case the Plaintiff, Raselo, claimed ten head of cattle or their value, £50, as damages for the seduction by the Defendant, Letlatsa, of his daughter, and her resultant pregnancy. The girl had died at the Defendant's kraal during her pregnancy. The Defendant pleaded that before issue of summons he had paid Plaintiff three head of cattle as a fine for the seduction and pregnancy, and that Plaintiff accepted the three head, but asked for seven more, which Defendant refused to pay.

The Magistrate gave judgment for Plaintiff for three head of cattle in addition to those already paid. The Defendant appealed.

JUDGMENT.

By President: Respondent sues Appellant for ten head of cattle for the abduction and seduction and pregnancy of his daughter.

* Tumana *vs.* Smayile and Mankayi Ranqe.
† Ndungane *vs.* Jessie Nxiweni.

Appellant admitted the facts, but pleaded that he had paid Respondent three head of cattle before issue of summons, and the receipt of these cattle is admitted.

Three head of cattle is the usual fine allowed in these cases (Seymour, 1903, 158).

Appellant accepted these cattle which Respondent offered in settlement, refusing to pay more. By his acceptance on the face of Appellant refusing to pay more Respondent placed himself out of court.

Appeal is allowed, and judgment altered for Defendant with costs.

Kokstad. 16th August, 1921. W. T. Welsh, C.M.

TEMPI AND GUSHU vs. FANI MKALALI.

(Mount Ayliff. Case No. 23/1921.)

Seduction—Damages—Alternative value placed on cattle in judgments for damages for seduction—Damages where girl has been previously seduced by another man.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: In this case the first Defendant, Tempi, rendered the Plaintiff's daughter Julia pregnant, and judgment was given against him for three head of cattle or their value, £21. It appears that on a previous occasion Julia was seduced by another man, against whom damages were awarded, but the amount is not disclosed. In the opinion of this Court the award of three cattle is not, in the circumstances disclosed, excessive.

In regard to the alternative value placed upon the cattle, this Court is of opinion that the Magistrate has erred. It has been established by a long series of decisions of this Court that the alternative value to be placed upon cattle in *torts* of this nature is £5. There is nothing on record to justify the established practice being departed from.

The appeal will be allowed with costs, and the judgment in the court below will be amended by reducing the value of the cattle from £21 to £15.

Umtata. 22nd July, 1919. C. J. Warner, C.M.

RAXOTI vs. MVEYITSHI AND MPETSHWA.

(Ngqeleni. Case No. 82/1919.)

Seduction—Damages—Higher damages where the Plaintiff is of the royal blood, and where the girl contracts syphilis as a result of the seduction—Damages for a second pregnancy caused by a man other than the first seducer—Damages in discretion of Magistrate.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Plaintiff in the court below sued Defendant for twenty head of cattle for causing the pregnancy of his daughter and infecting her with syphilis, and claims that as he is of the Royal Blood he is entitled to heavier damages than would be awarded in the case of an ordinary Native.

The Magistrate gave judgment for eight head of cattle less one paid on account, or £35.

Defendant appealed against this judgment on the ground (1) that the Plaintiff is not entitled to excessive damages; (2) that he could not claim higher damages for a second pregnancy than for a first; and (3) that to give full damages for each pregnancy is *contra bonos mores* and tends towards immorality.

Plaintiff cross-appealed on the ground that the damages awarded are insufficient for one of his rank.

This Court has already ruled in the case of *Ngina* vs. *Ntlupeko and Another* that the family of which Plaintiff is a member is of sufficient rank to entitle its members in cases of this kind to damages above the ordinary scale. With regard to the second ground of appeal the argument that because Plaintiff could not, owing to the poverty of the seducer obtain what he could lawfully demand for the first pregnancy of his daughter he is prevented from claiming what he is justly entitled to from a second seducer who is in a better position than the first is unsound.

The third ground of appeal has been disposed of in several cases previously decided in this Court.

To come to the cross-appeal on the insufficiency of damages the Magistrate, having regard to Plaintiff's rank and position in the tribe, awarded him eight head of cattle. There does not appear to be any fixed scale of damages claimable when the daughters or wives of Chiefs are seduced. Moreover, the question of damages is one very largely in the discretion of the Magistrate.

In this case the Court is not prepared to say the Magistrate has exercised his discretion unreasonably.

The appeal is dismissed with costs.

The cross-appeal is dismissed with costs.

Butterworth. 25th November, 1918. J. B. Moffat, C.M

MEHLOMANE vs. GXEKUNGI, ASSISTED BY DAVONDILE.

(Idutywa. Case No. 100/1918.)

Seduction—Damages—Relationship to Royal House must not be too remote if higher damages are claimed—No special damages where seducer is not circumcised.

Action for five head of cattle as damages for seduction and pregnancy. Subsequent to issue of summons the Defendant tendered three head of cattle, which Plaintiff refused. The Magistrate gave judgment for Plaintiff for three head of cattle or £15, with costs to date of tender. The Plaintiff appealed on the ground

that he was entitled to higher damages: (1) because he was of the Royal Blood and a Chief; and (2) because the Defendant was uncircumcised.

JUDGMENT.

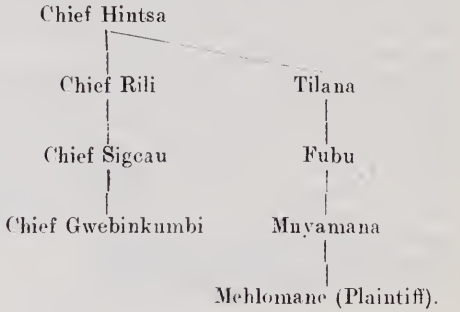
By President: The appeal is brought on the question of the amount of the damages awarded on the ground that the Plaintiff is entitled to special damages: (1) because he is of Royal blood; and (2) because the seducer was not circumcised.

The Plaintiff is a descendant of the Gcaleka Royal House, but his relationship to the Paramount Chief is too remote to entitle him to more than ordinary damages.

Moreover, special damages were not claimed in the summons and the girl seduced was only his niece.

The Native Assessors state that they have never heard of any rule or custom under which special damages are awarded on account of seducer being uncircumcised. Nor has any authority in support of this been quoted.

Note: Gwebinkumbi, Paramount Chief of the Gcalekas gave evidence of the relationship of the Plaintiff to the Royal House of the Gcalekas, in accordance with the following table:—



Kokstad. 18th August, 1921. W. T. Welsh, C.M.

ORIEL QHU vs. SCANLEN LEHANA.

(Mount Fletcher. Case No. 100/1920.)

Seduction—Damages—Illegitimate daughter of a Chief's widow is regarded as of royal blood, and higher damages are claimable for her seduction—Damages—Magistrate's discretion.

Action for damages for seduction, the girl being the illegitimate child of a Chief's widow. The Magistrate awarded six head of cattle or £30 as damages, taking into consideration the Plaintiff's position as a Chief in the Mount Fletcher District. The Defendant appealed.

JUDGMENT.

By President: The Native Assessors having been consulted unanimously state:—

> "When the widow of a Chief is rendered pregnant and bears a daughter to some man unknown or to a commoner the child is regarded as the daughter of the deceased Chief and of royal blood, and that in the event of her seduction her guardian, the son of the deceased Chief, and himself a Chief, would be entitled to claim the damages claimable by the Chief for his own issue.

They further state that the damages in such cases may be assessed at 10 head.

The Magistrate was satisfied that the Plaintiff had proved his allegations, and on account of his position as a Chief in the Mount Fletcher District, awarded six head of cattle or £30 as damages.

The evidence of the girl Motsilisi is corroborated, more particularly by the admissions sworn to by several witnesses. This Court is not in a position to say the Magistrate was not justified in believing the evidence for the Plaintiff in preference to that of the Defendant.

Though the damages appear to be somewhat high, this Court is not prepared, in view of the statement made by the Native Assessors, and the surrounding circumstances of the case, to say that the Magistrate did not exercise his discretion judicially in assessing the damages at six cattle.

The appeal is dismissed with costs.

Lusikisiki. 1st April, 1921. W. T. Welsh, C.M.

MNDINDWA TSHIKITSHWA vs. PAKAMILE RANAYI.

(Tabankulu. Case No. 18/1921.)

Seduction—Damages—Higher damages awarded where the girl is the great-granddaughter of a Chief—Magistrate's discretion.

In this case the Plaintiff claimed 10 head of cattle or £50 for the seduction and pregnancy of his daughter by the Defendant. The Plaintiff was the grandson of Chief Ndamase, of Western Pondoland, and claimed that as such he was entitled to higher damages. Defendant admitted that the Plaintiff was the grandson of Chief Ndamase, but denied that he was entitled to higher damages. The Magistrate gave judgment for Plaintiff as prayed, and the Defendant appealed.

JUDGMENT.

By President: In the opinion of this Court the Magistrate was justified in granting the higher damages awarded, and it is not prepared to interfere with his discretion.

The appeal is dismissed with costs.

Umtata. 20th November, 1919. C. J. Warner, C.M.

JAMESON D. OBOSE vs. AMELIA MGCANGA.

(Engcobo. Case No. 303/1919.)

Seduction—Damages—Higher damages where the seduced girl is a school teacher—Magistrate's discretion.

In this case the Plaintiff, a Native schoolmistress, claimed £100 as damages for her seduction and pregnancy by the Defendant, as a result of which she was dismissed from her post. The Magistrate found that Plaintiff had proved her case and awarded her £100 damages. The Defendant appealed.

JUDGMENT.

By President: The appeal in this case is on two grounds. As regards the first, that the evidence does not support the finding this Court considers that there is sufficient evidence and this ground must fail.

The second is that the amount of damages awarded is excessive. The Appellant is a school teacher and there must be very few, if any, Native school teachers drawing salaries of £100 a year.

In the case of *Ndungane* vs. *Jessie Nxiweni* (II. Henkel, 140), this Court held that £35 damages were not excessive in a case where a Native school teacher had been seduced under a promise of marriage, though it does not appear that pregnancy resulted. This Court is loth to interfere with the discretion of Magistrates on a question of damages awarded, but in this case, having regard to the position of the parties the sum awarded seems unduly high and therefore unreasonable.

The appeal is allowed with costs, and the judgment of the court below altered to judgment for Plaintiff for £50 and costs.

Butterworth. 7th July, 1920. W. T. Welsh, A.C.M.

DANIEL vs. SOCINSI.

(Idutywa. Case No. 39/1920.)

Seduction—Damages—No fine for intercourse with a woman who has previously had a child by another man, unless pregnancy caused.

In this case the Court accepted the following statement of Native Custom by the Native Assessors:—

> "The Native Assessors . . . . state that no fine is payable for the seduction of a woman who has previously had a child by another man, but . . . . a fine is due if pregnancy has been caused."

Butterworth. 3rd March, 1921. W. T. Welsh, C.M

NJOVANE NKOHLA vs. NGAMLANA RAKANA.

(Willowvale. Case No. 203/1920.)

Seduction—Dikazi—Damages—Damages where girl has previously had a child by another man—Transkei.

The Plaintiff, Njovane Nkohla, sued the Defendant, Ngamlana Rakana, for 5 head of cattle or their value £25, as and for damages for the seduction and pregnancy of his (the Plaintiff's) daughter, Veniwe, with costs of suit.

Defendant admitted that he had carnal intercourse with the girl, but he could not say whether she was pregnant or not. He also alleged in his plea that she was a dikazi, in that she had previously had a child by another man, and asserted that no fine was payable in respect of a "dikazi."

Plaintiff admitted that the girl had previously had a child by one Somtyido, but no fine had been paid, the said Somtyido having absconded. The Defendant agreed that this was so.

The Magistrate gave judgment for Defendant with costs, saying that although a man might claim damages for a second pregnancy according to Pondo Custom, this was not so in Tembuland or the Transkei.

The Plaintiff appealed, quoting the case of *Joel Maqungu* vs. *Mvakwendlu and Elijah Baleni*, Meaker's Reports, page 259, in support of his appeal.

Judgment.

By President: The matter having been placed before the Native Assessors, C. Veldman, D. Mala, P. Makapela, Mabala Nqakwe, and J. Sibidla, they state that:—

> "According to Native Custom in the Transkei a fine is recoverable for seduction and pregnancy even though the girl may previously have had a child by another man."

They also state that the fine would be one or two cattle, according to circumstances.

This opinion is entirely consistent with the case of *Joel Maqungu* vs. *Mvakwendlu and Elijah Baleni*, 3 N.A.C., 259.

This Court is therefore of opinion that the Magistrate has erred, and that damages are recoverable under the circumstances disclosed.

The appeal is allowed with costs, and judgment altered to one for Plaintiff for one beast or value £5 with costs of suit.

Umtata. 14th February, 1919. C. J. Warner.

KILATILE vs. MXOXELWA AND MTUTI.

(Port St. John's. Case No. 39/1918.)

Seduction — Pondoland — Damages — Kraalhead responsibility— Irregularity—Practice—Grounds of Appeal—Proclamations Nos. 391 *of* 1894 *and* 144 *of* 1915—*Abduction—Reopening.*

Kilatile sued Mxoxelwa and Mtuti for 5 head of cattle or £25 as damages for the pregnancy of his daughter and for one beast or £5 as damages for the abduction of his daughter by Mxoxelwa. Mtuti was sued as being the "brother and guardian" of Mxoxelwa and liable for his torts. On the day of hearing (25th April, 1918), both Defendants were in default and the Magistrate postponed the hearing till 7th May, 1918. Both Defendants were again in default, but an uncle of the Defendants, one Kezinknku appeared and stated that Mxoxelwa was away and could not be found, and that Mtuti was away working at the mines. The Magistrate took evidence for Plaintiff and gave provisional judgment against both Defendants. On 16th July, 1918, Mtuti issued summons against the Plaintiff to show cause why the provisional judgment given against him should not be set aside and the principal case re-opened and gone into on its merits. On the 15th August, 1918, the application for re-opening was granted, and the case set down for hearing on 5th September, 1918. On that day Mxoxelwa was again in default; evidence was led to show that Mxoxelwa had been driven away from Mtuti's kraal long before the seduction complained of. The Magistrate then gave the following judgment:—"Provisional judgment in case 39/1918, altered to "For Plaintiff for three cattle or £15 and costs against Defendant 1, and for Defendant 2 as against Plaintiff with costs."

The Plaintiff appealed on 12th September, 1918, on the ground that Mtuti was liable for the torts of Mxoxelwa, who was an inmate of Mtuti's kraal. On the 27th November he submitted four further grounds of appeal (1) that the procedure followed by the Magistrate on 5th September, 1918, was irregular; (2) that Kezinkuku's statement, which was inadmissible and not on oath, was recorded; (3) that Plaintiff was entitled to judgment for five head of cattle or £25; (4) that hearsay evidence was admitted, and the evidence showed that the Magistrate had previous knowledge of the case and should have recused himself.

Judgment.

By President: At the first hearing of this case in the Court below, the Defendants were in default and Provisional Judgment was granted against both Defendants for three head of cattle or £15, on 7th May, 1918.

Subsequently the second Defendant Mtuti instituted proceedings to have the Provisional Judgment set aside against himself on the ground that the first named Defendant was not an inmate of his kraal.

On the 5th September, 1918, the Magistrate gave judgment against the first named Defendant for three head of cattle or £15 and costs, and against the Plaintiff with costs as regards the second named Defendant.

The Plaintiff through his Attorney noted an Appeal against this judgment on 12th September, 1918, on the grounds that judgment should have been against both Defendants, and on the 27th November, Appellant submitted further grounds of appeal.

It is doubtful whether, in view of the provisions of Section 6 of Proclomation No. 391 of 1894, as amended by Proclamation 144 of 1915, the latter grounds could be urged at the hearing of the appeal, but as Respondent raised no objection the Court did not limit the hearing of the Appeal to the grounds given at the time the appeal was noted.

This Court considers:—

(1) That the procedure followed by the Magistrate in dealing with the case to set aside the Provisional Judgment was not such an irregularity as to justify this Court in setting aside the Judgment on that ground.

(2) The Court considers it has been satisfactorily proved that the Respondent ejected the first mentioned Defendant from his kraal.

(3) The Pondo Assessors state that the charge for damages for the seduction and pregnancy of a virgin is five head of cattle.

The appeal is therefore allowed with costs against the first named Defendant Mxoxelwa and the judgment in the Court below altered to "Judgment for Plaintiff as prayed with costs."

The appeal against the Respondent Mtuti is dismissed with costs.

Umtata. 21st November, 1921. W. T. Welsh, C.M.

JEREMIAH RUNE vs. MERCY MDWEBU.

(Umtata. Case No. 345/1921.)

Seduction—Right of Native girl to the damages paid by a European for her seduction—Substituted agreement—Maintenance—Girl not liable for maintenance under a contract to which she was not a party.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

Judgment.

By President: The Plaintiff in this case was seduced by a European M, who agreed to pay her the sum of £3 per mensem for the maintenance of her child until it reached the age of 21 years. This was in addition to five cattle paid to her father Mdwebu as a fine for the Plaintiff's seduction. Subsequently this agreement was substituted by another in which M agreed to pay the Plaintiff, Mdwebu and Rune jointly £150, the sum of £86 in cash and two promissory notes for the balance.

It is argued that the use of the word "jointly" in paragraph 5 of the agreement entitled the Defendant to share equally with the Plaintiff and Mdwebu in the sum of £150 therein referred to. It is admitted that the promissory notes, at any rate, were made out in favour of the Plaintiff. M's liability was to the Plaintiff alone, and in the opinion of this Court she was entitled to succeed in her claim upon the Defendant for the moneys paid and promised to her by M. M was liable to the Plaintiff under Colonial Law, under which Defendant had no claim upon him, and this Court is of opinion that the agreement does not deprive the Plaintiff of any portion of the sum M contracted to pay her.

The Plaintiff's natural guardian is her father Mdwebu, who placed her in the care and custody of the Defendant, and the question of her maintenance is one between Mdwebu and Rune. Whatever claim a father might have upon his child's resources for her maintenance this Court is of opinion that Rune can, in the circumstances disclosed, have no such claim upon the Plaintiff. The Plaintiff is no party to any contract express or implied, which might subsist between the Defendant and Mdwebu, the Plaintiff's father and natural guardian. As in the opinion of this Court the Plaintiff is not liable to the Defendant for maintenance his claim to be reimbursed by her must fail. The appeal is accordingly dismissed with costs.

Umtata. 17th July, 1922. W. T. Welsh, C.M.

APOLIS NGQUZU vs. SIHOBE SIXISHE AND ANOTHER.

(Engcobo. Case No. 143/1922.)

Seduction—Seduction unaccompanied by pregnancy—Damages payable—Tembu Custom—Abduction—Exception.

The essential facts of the case are clearly stated in the judgment of the Native Appeal Court.

Judgment.

By President: The Plaintiff, now Appellant, sued the Defendant, now Respondent, for one beast or its value £5 as damages for the seduction of his daughter. To this claim the Defendant excepted to the Plaintiff's summons upon the ground that it disclosed no cause of action inasmuch as the claim was for simple seduction (unaccompanied by pregnancy) which is not actionable under Native Law and Custom as administered in the Courts of Tembuland wherein the Court of Engcobo stands.

The Magistrate upheld the exception and dismissed the summons with costs on the grounds that according to Tembu Custom no action lies for seduction not followed by pregnancy and where no abduction has taken place.

The Native Assessors P. Nkala, Ngqele Langa, Luswazi Holomisa, A. Ludidi and Atanzima Xayimpi having been consulted unanimously state that an action does lie for seduction, *i.e.*, for deflowering a virgin.

The first three Assessors represent the Tembu districts of Umtata, Engcobo and Nqanduli respectively.

In the case of *M. Ludidi* vs. *S. Nonganga* (3 N.A.C., 246), it was held that the seducer is liable to a fine for seduction.

In the case of *Godongwana* vs. *Runeli*, Warner's Report 18, a similar ruling was given by this Court sitting at Butterworth. See also Seymour 86.

In view of the statement of custom by the Native Assessors this Court is of opinion that the Magistrate has erred.

The appeal will accordingly be allowed with costs, the exception taken in the Court below will be overruled with costs and the case returned to be heard on its merits.

Butterworth. 3rd November, 1919. C. J. Warner, C.M.

JOHNSON MPUMLO vs. PATULENI MAQULO.

(Nqamakwe. Case No. 31/1919.)

Seduction—Child—Illegitimate—Ownership of—Waiver of claim for fine in consideration of a marriage being agreed upon.—Maintenance not payable before birth of child.—Dowry.

The Plaintiff claimed a declaration of rights in a certain male child, or alternatively, the return of four head of cattle paid to the Defendant on his behalf, together with £10 damages for the loss of the use of these cattle. He said that some nine years previously he was called upon to pay a fine for the seduction and pregnancy of the Defendant's daughter, and that he paid three head of cattle for the seduction, and one head for maintenance. Defendant now denied that he (Plaintiff) was the father of the child. The Defendant pleaded that the Plaintiff was charged with seducing his daughter and causing her pregnancy, and that four head of cattle were paid as *dowry*. Subsequently it was discovered that the Plaintiff was not the father of the child and by mutual agreement the engagement was dissolved on Defendant returning two of the four head of cattle paid as dowry.

The Magistrate found that the Plaintiff never admitted the paternity of the child, that no fine was paid, that Plaintiff had no claim to the child, and that the four head of cattle were paid as dowry; also there was a subsequent agreement under which the Defendant returned two head of cattle to Plaintiff's father, retaining two head and the child. In his demand Plaintiff tendered an "isondlo" beast, although both in his summons and in his evidence he alleged that he paid "isondlo" before the child was born. The Magistrate gave judgment for the Defendant, and the Plaintiff appealed.

Extract from Judgment.

By President: . . . . There is nothing improbable in Respondent's version that is was agreed between the parties that no fine should be paid in view of a marriage having been agreed upon, and seeing that Appellant always denied being responsible for the

pregnancy of the girl, though he admitted seducing her he would be liable to pay one beast as fine for seduction. The Native Assessors to whom the question is referred, state that there is nothing inconsistent with native law in such an arrangement as described by Respondent and further that Appellant could only succeed in his claim for the child if he paid a fine of three head of cattle for the pregnancy, and one for the maintenance. They also state that the payment of "isondlo" before the birth of a child is unknown to Native Custom.

. . . . The appeal is therefore dismissed with costs.

Dissenting judgment by Mr. D. S. Campbell, Resident Magistrate of Willowvale.

"I do not agree with the judgment of the President of this Court.

"It is clear that the Plaintiff did seduce the girl and paid a fine. There was then an agreement of marriage, which subsequently fell through, and the parties then reverted to their former position.

"A fine having therefore been paid, the person paying the fine is entitled to the child, and the appeal should therefore be allowed."

Butterworth. 8th July, 1919. C. J. Warner, C.M.

JOHN SONJICA vs. SIMAKUDE.

(Kentani. Case No. 53/1919.)

Seduction—Death of seducer prior to action—Actio personalis moritur cum persona.

The facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: Respondent sued Appellant in the Court below for damages for the pregnancy of his daughter Jessie, which he alleges was caused by Appellant's son Zinyusile, who died before institution of the action.

The statement of Jessie is to the effect that she is a school teacher, and that she was intimate with Zinyusile for three years, and that he deflowered her and caused her pregnancy in July, 1918. She also states that she informed Zinyusile of her condition when she had been pregnant four months. It appears that Zinyusile died from the effects of Spanish Influenza in October or November, 1918. Jessie states that she was afraid to tell her people of her condition, though she knew that Zinyusile was dying, and it was not until she had been twice to the doctor that her father became aware of her pregnancy. This was subsequent to the death of Zinyusile.

In the form in which this case is brought it can be determined only by Native Law.

The question is submitted to the Native Assessors whether in the circumstances disclosed by the evidence, Respondent can succeed in his claim against the Appellant, and they state that as

the girl had ample time to inform her people of her condition in order to enable them to make a claim against Appellant's son, and failed to do so, she "threw away her case" and that consequently no action now lies against the relatives of the deceased young man.

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

Kokstad. 25th August, 1919. C. J. Warner, C.M.

NKUNZI vs. NDLAWUZO ALIAS MTSWAKALALA.

(Mount Currie. Case No. 84/1919.)

Seduction—Elopement—"Nqutu" beast—Damages for causing subsequent pregnancies of the same girl—Payment of dowry by word of mouth.

Nkunzi sued Ndlamvuzo for 10 head of cattle or their value £50, as and for damages for the seduction and two resultant pregnancies of his daughter, one Gqolo, with whom Ndlamvuzo was alleged to have eloped in 1914, and with whom he was still living at the time of the action. Ndlamvuzo pleaded that he eloped with the girl under Native Custom and with the intention of marrying her, and that he had paid a "Nqutu" beast and also 10 head of cattle as dowry. The Magistrate did not believe the Defendant's story as to the payment of the 10 head of cattle as dowry, and gave judgment for Plaintiff for eight head of cattle or value £40, holding that the Plaintiff was entitled to the fine for more than one pregnancy. The Defendant appealed, on the grounds that the weight of evidence was to show that the Defendant had paid Plaintiff 10 head of cattle as dowry, and further that the damages awarded were excessive.

JUDGMENT.

By President: Respondent sued Appellant in the Court below, claiming 10 head of cattle for damages by reason of Appellant having eloped with Respondent's daughter, Gqolo, and twice caused her pregnancy.

Appellant admitted the pregnancies, and that he had eloped with Gqolo, but pleaded that he had paid "Nqutu" beast and 10 head of cattle as dowry for her. His evidence however discloses that he only paid the cattle by word of mouth to one Matshwila, Respondent's discarded wife, and Respondent denies that he ever received any dowry for his daughter.

Until Appellant pays dowry for Gqolo to her lawful guardian, the Respondent, he cannot be married to her by Native Custom, and consequently his action in eloping with her and causing her to bear children renders him liable in damages, and there are reported cases to show that Native law holds a man liable for causing subsequent pregnancies of the same girl.

In this case this Court does not consider the amount of damages awarded is excessive, and the appeal is dismissed with costs.

Lusikisiki. 23rd August, 1921. W. T. Welsh, C.M.

MRANGENI QANQISO vs. MAKENKE MNQWAZI.

(Libode. Case No. 164/1921.)

Seduction—Engaged girl—Prospective husband cannot claim fine—His remedy is to cancel engagement and to claim return of dowry—Pondo Custom.

The facts of the case are immaterial.

JUDGMENT.

By President: The Native Assessors, having been consulted unanimously state that according to Pondo Custom:—

> "When a girl for whom dowry has been paid, the marriage not yet having taken place, is seduced and rendered pregnant by another man, and damages are recovered against him by the girl's father, these are the property of the latter, and that under no circumstances can they be claimed by the prospective husband."

They further state that the latter's remedy is to cancel the engagement and claim the return of his dowry cattle.

In view of this statement of Pondo Custom, the appeal is allowed with costs, and the judgment altered to judgment for the Defendant with costs.

Umtata. 29th July, 1919. C. J. Warner, C.M.

PHILEMON NTLOKO vs. ALFRED MBIZA AND JADEZWENI MBIZA.

(Umtata. Case No. 475/1918.)

Seduction—Seduction during engagement and prior to marriage by man other than prospective husband—Husband has no claim, but father can sue and hand over the fine.

The essential facts are clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: Appellant became engaged to one Sarai and paid dowry for her. He then went to work and on his return discovered she was pregnant, but in spite of this he married her by Christian rites and then sued Respondent for damages for the pregnancy.

The Magistrate in the Court below relying on *Tshetsha* vs. *Mavolontiya* (1. Henkel, 111), gave judgment for Respondent and the appeal is against this ruling.

The question whether a man can sue for the pregnancy of his wife before she became his wife, is put to the Native Assessors,

and they state that if an engaged girl becomes pregnant by another man than the man she is engaged to, her father can maintain an action for damages and may pass the damages on to the husband, but a man has no right of action for damages for pregnancy which occurred before his marriage.

In view of this statement of Native Law and Custom the appeal is dismissed with costs.

Umtata. 19th March, 1918. J. B. Moffat, C.M.

CHARLES MZAMO vs. GEORGE GQOZA MDINWA.

(Engcobo. Case No. 458/1917.)

Seduction—Evidence—Lack of usual Native evidence is no bar where there is sufficient evidence otherwise to support the Plaintiff's case.

This was an action for damages for seduction. The Magistrate found that the parties were Christian Natives and that the usual evidence produced in Native cases was wanting. He gave judgment for the Plaintiff, but admitted that the evidence was not very strong. The Defendant admitted he had been carrying on with the girl. The Defendant appealed, but in view of his admission, the Court did not feel justified in interfering with the Magistrate's decision. *Inter alia*, the President said: "In questions as to evidence this Court has frequently held that where there is sufficient evidence to support a case that has been accepted as sufficient although the evidence usual in Native cases has been wanting."

Butterworth. 14th March, 1922. W. T. Welsh, C.M.

JAMES NOXOTO vs. NATHANIEL MONAKALI.

(Willowvale. Case No. 305/1921.)

Seduction—Pregnancy—Evidence—When woman's oath as to paternity should not be accepted.

Plaintiff claimed five head of cattle or their value £25 for the alleged seduction and pregnancy of his sister Fanny, by the Defendant, whereby she gave birth to a female child. Defendant denied the allegations. The Magistrate after hearing the evidence found that Defendant had had intercourse with Fanny and that he was the father of her child. He gave judgment for the Plaintiff as prayed with costs. In his reasons for judgment the Magistrate stated *inter alia*:—

> "In the opinion of the Court this girl Fanny is undoubtedly a very bad character and had the case been brought under Colonial Law, the Court would have been constrained to hold that she was a common prostitute, but under Native Custom a woman is not a prostitute unless she has previously had children."

JUDGMENT.

By President: There can be no doubt that Fanny is a female of very bad character. It is clear that she has had intercourse with other men besides the Defendant and yet she states she has had connection with no other man. Reuben Tamela admits he had intercourse with her in October, 1920.

Fanny states she became aware that she was pregnant in December, 1920. There are numerous discrepancies in the case for both the Plaintiff and the Defendant.

In view of this and the fact that Fanny's evidence is most unreliable, her statement that the Defendant caused her pregnancy cannot be accepted, and if she cannot be believed on that point it would be dangerous to place any reliance whatever on her evidence.

This Court is of opinion that the Magistrate erred in finding for the Plaintiff. The appeal is allowed with costs and the judgment in the Court below will be altered into absolution from the instance with costs.

Note.—See also case of *Thompson Madelane* vs. *Matilda Martha Kiviet*, on page 313 of these Reports.

Kokstad. 2nd December, 1920. W. T. Welsh, C.M.

MARY JANE CEBISA vs. DANIEL GWEBU.

(Umzimkulu. Case No. 213/1920.)

Seduction—Engagement—Action for damages for seduction and pregnancy and for breach of promise of marriage—Action for damages by woman for seduction by married man—"Nqutu" beast.

In this case the Plaintiff claimed £50 as damages for seduction under a promise of marriage, the resultant pregnancy, and for breach of promise. She alleged that she became engaged to the Defendant in September, 1917, and that he seduced her under promise of marriage. She became pregnant and was delivered of a child in June, 1918, which died at the age of nine months. Defendant broke off the engagement and refused to marry her. Defendant admitted the engagement and having caused the pregnancy, but stated that at the time he proposed engagement according to Native Custom, he was already married to another woman by Christian rites, of which the Plaintiff was well aware. He further alleged that he had paid one beast and a saddle as dowry, in addition to a "nqutu" beast. He further stated that he was quite prepared to go on with the engagement and to marry Plaintiff according to Native Custom, but she had broken off the engagement without cause. The Magistrate found the facts to be as stated by the Defendant, and that no seduction took place prior to Defendant's marriage by Christian rites. He entered judgment for Defendant with costs, and the Plaintiff appealed.

JUDGMENT.

By President: It was decided by the Appellate Division in the case of *Bensimon* vs. *Barton* (1919, A.D., 13), that in an action against a married man for damages for seduction the knowledge of the Plaintiff of the marriage at the time of her seduction was not a bar to her action.

In the present case the Defendant admits having seduced and rendered Plaintiff pregnant and the Magistrate finds seduction was proved. The Plaintiff is therefore entitled to damages for seduction irrespective of whether the breach of promise of marriage has been proved.

The equivalent of three cattle has been paid to Kuku, who was acting on behalf of Plaintiff's guardian. These must be taken into consideration in arriving at the damages, which this Court will assess in order to save further costs.

The appeal is allowed with costs and judgment entered for Plaintiff for £10 damages for seduction with costs.

Kokstad. 29th April, 1918. J. B. Moffat, C.M.

CHARLES FENNER vs. WALTER WHITE.

(Umzimkulu. Case No. 19/1918.)

Seduction—Griqua Custom—Agreement to pay father in consideration of his consent to marriage with minor daughter is void—Consideration illegal and against public policy—Exception.

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

JUDGMENT.

By President: Plaintiff sues on a contract said to have been made between him and Defendant under which Defendant is said to have promised to give Plaintiff certain stock and goods in consideration of which Plaintiff was—

(*a*) to refrain from proceeding with an action which he and his minor daughter had threatened to take against Defendant's adopted son, who had seduced Plaintiff's daughter;

(*b*) to consent to the marriage of his daughter to Defendant's adopted son.

Eight exceptions were taken by Defendant. The Magistrate upheld three of these and dismissed the summons. The first of these exceptions was that as under Griqua Custom no action for damages for seduction is maintainable by a father the consideration which Plaintiff proposed to give did not exist.

Although under Griqua Custom a father may have no action against a seducer's father for seduction of his daughter, the daughter would under Colonial Law have a ground for action against the seducer for damages.

According to paragraph 4 of the declaration the Plaintiff and his daughter who is a minor threatened to bring an action against the seducer, Defendant's adopted son.

It is alleged in paragraph 5 that after discussion Defendant agreed to pay Plaintiff the stock and goods specified in consideration of the Plaintiff not proceeding with the threatened action. This action is said to have been threatened by Plaintiff and his daughter against the Defendant's adopted son. The Plaintiff in agreeing not to proceed with this action must be taken to have been acting for his minor daughter who could not sue without assistance.

The daughter assisted by her father had ground of action against the Defendant's son. It was to the Defendant's interest that the action should not be brought, and it cannot be said that the Defendant derived no consideration from the abandonment of the action. The exception should therefore have been over-ruled.

The second exception upheld is that a contract to pay anything in order to obtain Plaintiff's consent to the marriage is void, illegal and against public policy.

The case of *Duma* vs. *Pumene* quoted on behalf of the Appellant does not affect the point raised in this exception, which is whether a contract under which a payment is to be made in consideration of a father giving his consent to his minor daughter's marriage can be enforced.

It has been laid down that a promise to give a father something in consideration of his consenting to the marriage of his daughter is void.

Portion of the consideration alleged by Plaintiff being illegal and against public policy the agreement must be held to be void and the Magistrate rightly upheld the exception and was therefore correct in dismissing the summons.

This exception being upheld is not necessary to deal with the remaining exception upheld by the Magistrate. The appeal must be dismissed with costs. No sufficient cause has been shown for varying the Magistrate's order as to costs.

Lusikisiki. 9th December, 1919. C. J. Warner, C.M.

MATEVU AND ANOTHER vs. VELA VAVA.

(Ngqeleni. Case No. 277/1919.)

Seduction—Res judicata—*Recovery of damages for seduction no bar to subsequent action for damages for pregnancy—Parties are not bound by the admissions of their attorneys when these admissions made under a misapprehension and are obviously wrong—Elopement—Exception.*

In this case the Plaintiff, a man of Royal Blood, claimed 15 head of cattle or value £75 as damages for the pregnancy of his

daughter. The Plaintiff had previously sued the Defendant for seduction and had recovered damages. The Magistrate gave judgment for 15 head of cattle or £75, less two head of cattle paid on the previous judgment.

JUDGMENT.

By President: The facts in this case appear to be that Appellant eloped with Respondent's daughter and took her to his house in January or February, 1919, and seduced her.

Respondent sued him for damages, summons being issued on the 6th of June and the case set down for hearing on the 11th June. On the 10th of September judgment was given in favour of Respondent as prayed.

On the 7th October, 1919, Respondent sued Appellant for £75 damages for causing the pregnancy of his daughter about the months of June and July, 1919. Exception was taken that the matter was *res judicata*. This exception was over-ruled and judgment given for Respondent.

When the case came on for final hearing on the 5th November, 1919, it was argued by Parties (presumably the Attorneys appearing for them) that Respondent's daughter was returned to him between the 22nd and 29th August, during the hearing of the first case, but the evidence of Appellant, as well as that of Respondent and his daughter, shows that she returned after the judgment in the first case had been given and therefore when the first case was tried, Respondent could have no knowledge that his daughter was pregnant.

It is argued that the parties are bound by the admissions of their Attorneys, but it is clear these admissions were made under a misapprehension and should not be upheld in the face of strong evidence that they are wrong.

With regard to the 3rd and 4th grounds of appeal, it would seem that the girl was with Appellant from January to October, 1919. Respondent sued for her return and for damages for her seduction in June and obtained judgment. This would not debar him from suing for damages for her pregnancy which he did not discover until after obtaining the first judgment, seeing he had no knowledge at the time of her condition nor was he in a position to obtain such knowledge.

The appeal is dismissed with costs.

Butterworth. 9th November, 1921. T. W. C. Norton, C.M.

SIKOKO NEKE vs. BOMVANA CANTI.

(Willowvale. Case No. 112/1920.)

Seduction—Damages awarded for pregnancies subsequent to the first—Desertion of wife—Return of dowry.

In this case the Plaintiff claimed the return of his wife and a female child or otherwise three head of cattle or £30. Plaintiff stated that he had paid to Defendant as dowry 20 goats one ox

and 10 sheep, and that about a year after the marriage the wife deserted him and returned to Defendant. Upon going to fetch her Defendant demanded further dowry, and he tendered the equivalent of one beast, but Defendant refused the tender.

Defendant denied Plaintiff's claim, but stated that Plaintiff had seduced and caused his sister to become pregnant and had paid as fine one young bull and 19 goats, representing three head of cattle and had promised to work for the balance of two head of cattle. He further stated that before paying the balance, the Plaintiff again seduced and caused his sister to become pregnant. Two children had been born of these pregnancies, of whom one was alive. Defendant still claimed seven head of cattle or £35. The Magistrate gave judgment for Defendant with costs on the claim in convention and in reconvention for the Plaintiff (Defendant in convention) for eight head of cattle less three head paid on account, or their value £8 each and costs of suit. The Plaintiff appealed.

JUDGMENT.

By President: The ruling of the Court below is challenged on the grounds that it is against the weight of evidence and probabilities, and further that the damages are excessive.

In the opinion of this Court the evidence supports the Magistrate's finding on the first point.

With respect to the second, in a case from the Transkei quoted on page 259 Meaker, it was stated by the Native Assessors that in circumstances such as the present, not more than three head of cattle should be allowed for a second seduction and pregnancy. It appeared in that case that the second seduction was by a man other than the first seducer.

In the case *N. Nkohla* vs. *N. Rakana*, May, 1921 Circular (page 321 of these Reports), a case from Willowvale, the Native Assessors stated that from one to two cattle should be allowed whether the girl was seduced twice by the same man, or by two different men.

The latter is the latest ruling on the question.

The appeal is allowed with costs, and the judgment altered to "judgment for Plaintiff in reconvention for six head of cattle less three paid on account, with costs."

Kokstad. 1st April, 1919. C. J. Warner, C.M.

A. GWABALANDA AND MSINGELELI vs. J. GQADA.

(Matatiele. Case No. 264/1918.)

Slander—Accusation of immorality is per se defamatory, and the principles of South African Law apply—Defence of "in rixa"—Amendment of summons.

The Plaintiff sued the Defendant in an action for defamation, alleging that the Defendant had said to him in the presence of witnesses "You sleep with Lahliwe. You get between her legs,

she being a widow and her husband being dead," thereby imputing that the Plaintiff was guilty of immoral conduct. The Plaintiff was a member of a Christian Church and was married by Christian rites. The Magistrate gave judgment for the Plaintiff, and the Defendant appealed.

JUDGMENT.

By President: The appeal is brought on five grounds:—

(1) That the words are *per se* not defamatory.
No action lies in Native Law for an action for slander unless the accusation is one of practising witchcraft or sorcery. Consequently an action of this nature can only be maintained under the ordinary South African Law. There can be no doubt that under such law the words are *per se* defamatory, and there is nothing to show in the present case that the Respondent is of so low a level that an action of this sort would not defame his character.

(2) No damages were proved.
The evidence shows that the Respondent is a Christian Native and the church to which he belongs is watching the result of his action. If Respondent allowed the slander to pass unnoticed it is possible his church may take action which may result in his excommunication.

(3) The Magistrate allowed a material amendment of the summons by adding the words "slanderous" after "malicious."
The summons states the action is a claim for damages for slander. No exception was taken in the Court below to the summons. The Appellant knew what she had to meet, and filed her plea, and having done so she waived her right to this exception. No attempt has been made to show she has suffered any prejudice by the amendment, and on this ground the appeal must fail.

(4) If uttered the words were uttered "in rixa." The authorities clearly show that before a defendant can be protected by the plea of rixa, he must show that the words complained of were uttered after he had received some provocation, see case of *Norton* vs. *Crooks* (1914, E.D.C. 532), Appellant has not shown that the provocation preceded the slander complained of.

(5) The fifth ground of appeal is that there is nothing on the record to justify the Magistrate in deciding that appellant and certain witnesses are untruthful. There is ample evidence on the record to support the Magistrate's finding.

For these reasons this Court considers that the appeal must fail, and the appeal is accordingly dismissed with costs.

Kokstad. 4th May, 1918. J. B. Moffat, C.M.

NOPAYITI MQONGOSE vs. DIONGWANA GWEJA.

(Matatiele. Case No. 303/1917.)

Slander—Accusation of witchcraft is per se defamatory—Exception—Defence of "in rixa"—Innuendo.

The Plaintiff sued the Defendant for £5 damages for defamation, alleging that the Defendant had used the following words in the presence of witnesses; "Uligqwirakazi watakata wabulala abantu bomzi wakwa Dala," meaning in English "You (meaning the Plaintiff) are a witch and you (meaning Plaintiff) have bewitched and killed people belonging to Dala's kraal." The Defendant excepted that the summons disclosed no cause of action, inasmuch as (1) That the words complained of were not defamatory *per se*, (2) that they were not susceptible of the meaning placed upon them by the Plaintiff, and (3) that the use of pretended knowledge of so-called witchcraft is no crime. He further pleaded over denying that he made use of the words, and if it were proved that he did, then he made use of the words "in rixa" after the Plaintiff had abused him. The Magistrate disallowed the exceptions and heard evidence, giving judgment for Plaintiff for £3 and costs. The Defendant appealed on the grounds that the exceptions should have been upheld and further that the evidence did not support the judgment.

JUDGMENT.

By President: The Defendant excepted to the summons on the ground that it discloses no cause of action by reason

(1) That the words complained of are not defamatory *per se*.

(2) That they are not susceptible of the meaning placed upon them by the plaintiff.

(3) The use of pretended knowledge of so-called witchcraft is no crime.

The Magistrate over-ruled these exceptions and the first ground of appeal is that the exception should have been upheld.

The imputation of witchcraft amongst Natives is a very serious one, and words used in making such an imputation must be held to be *per se* defamatory.

The authorities show that an innuendo is not essential in all cases, though such may be inserted, especially if the defamatory meaning of the words is evident on the face of them. (See Maasdorp, book 3, p. 118).†

In this case the defendant is alleged to have said to the Plaintiff "You are a witch." Such a statement by one Native to another is defamatory on the face of it. The words being defamatory it is not necessary to allege an innuendo, or if alleged, to prove it.

The exceptions were rightly over-ruled.

The second ground of appeal is that the evidence does not support the judgment. There is ample evidence to support the Magistrate's judgment.

The appeal is accordingly dismissed with costs.

† 2nd edition, page 124.

Umtata. 12th July, 1918. C. J. Warner, A.C.M.

SIMANGA MANKAYI vs. NOSAWUSI MBI-MASELANA.

(Engcobo. Case No. 70/1918.)

Slander—Imputation of witchcraft is injurious and actionable.

The Plaintiff sued the Defendant for £20 damages for defamation alleging that the Defendant had made use of the following words in the presence of certain witnesses; "U Simanga umbuleleni nina umntana wam, u Mboxo, ngokuti ngenxa yenkomo kayise akuba engayifumani," which in English means "Why has Simanga killed my child, Mboxo, by means of witchcraft, for the sake of its father's beast because he has been unable to get it?" Subsequently Plaintiff alleged that the following words were used in the presence of other witnesses :" Umntana wam lo ubulewe ngu Simanga ngokuti ngenxa yokusike angayifumani inkomo kayise ebefuna ukuyitenga," which in English means "This my child is killed by Simanga, by means of witchcraft, because he could not get its father's beast which he wanted to buy." At the conclusion of the Plaintiff's case the Defendant applied for absolution on the ground that the words alleged to have been used had caused the Plaintiff no injury. The Magistrate granted the application, referring to the case of *in re du Plooy*, Nathan, Volume III, page 1622. The Plaintiff appealed.

Judgment.

By President: Appellant sued Respondent in the Court below for £20 for damages by reason of the Respondent having accused him of causing the death of her child by means of witchcraft. Respondent denied using the words complained of, and when Plaintiff's case was closed, applied for absolution from the instance which was allowed on the ground that the words alleged to have been used had caused Plaintiff no injury.

In Native Law and Custom the most serious charge that could be made against anyone, and the gravest crime that anyone could be accused of, was that of causing the death of any person by means of witchcraft, and in Native Law the only action that could be entertained for defamation was if a person was said to have practised witchcraft.

In the case of *ex parte du Plooy* (3 Cape Times Law Reports, p. 11)† the learned Judge before whom the matter first came, remarked that a charge of witchcraft made against a man in the Native Territories might seriously damage him in the eyes of his neighbours. It would thus seem that the Appellant has good grounds for an action.

The Appeal is allowed with costs. The judgment of the Court below is set aside, and the case returned to be dealt with on its merits.

† 10 S.C. 7.

Umtata. 12th July, 1918. C. J. Warner, A.C.M.

STOFFEL BEBA vs. TYLDEN TYUTU.

(Xalanga. Case No. 9/1918.)

Spoliation—When damages claimed evidence of ownership may be led—Burden of proof.

In this case the Plaintiff claimed a certain ox which he alleged had been spoliated from him by the Defendant, or the value £12 sterling, and a sum of £5 as damages for such spoliation. The Magistrate found that the ox was the property of the Plaintiff, but stated in his judgment that there was no necessity to give judgment for its recovery or value thereof, as it was in the possession of the Plaintiff at the time of judgment. He further found that no damages had been proved. The Defendant appealed on the ground that the Magistrate was wrong in allowing the Plaintiff to call rebutting evidence of ownership, inasmuch as the plea specially raised the issue that the ox was the property of the Defendant, and that the Defendant had been greatly prejudiced by the Magistrate allowing further evidence on behalf of the Plaintiff.

JUDGMENT.

By President: Plaintiff in the Court below sued Defendant for the return of an ox taken possession of by Defendant who thereby committed an act of spoliation, and also for £5 damages. Defendant pleaded the ox was his property.

It is laid down in Maasdorp's Institutes of Cape Law, Vol. II, page 27, 28, that in these circumstances the defence of ownership may be raised, and that the burden of proof is then on the Defendant to show he has a better title to possess.

This was also laid down in the case of *Loots* vs. *van Wyk* (16 S.C.R. 419), and the same principle seems to have been followed in the case of *Ngqulu* vs. *Gatya* (Native Appeal Court 1918) not yet reported.

In the case before the Court, Appellant pleaded ownership. It was therefore incumbent on him to show he had a better title than Respondent to the ox in question. This he has failed to do and the Appeal is dismissed with costs.

Lusikisiki. 10th December, 1919. C. J. Warner, C.M.

NGWAPULE vs. NOMATSEKE.

(Bizana. Case No. 53/1919.)

Spoliation—Ownership—When evidence of ownership may be led—Onus of proof.

In this case Plaintiff claimed certain two cattle or their value £30, which he had alleged had been forcibly taken from him.

The Defendant claimed the cattle as his property, but the Magistrate refused to hear evidence to this effect, and gave judgment for Plaintiff as prayed. The Defendant appealed.

JUDGMENT.

By President: The first ground of appeal is that the Magistrate in the Court below refused to hear or record evidence tendered on behalf of Appellant (Defendant in the Court below), which was relevant to the issue. The Magistrate in his reasons states that he rejected this evidence on the authority of *Qashiwe* vs. *Sipele* (Meaker's Reports 265).

In this Court Respondent relies on the case of *Thys* vs. *Nikam* (E.D.C. Monthly Reporter, February, 1916, p. 159). This case however, came before the Court by petition, and Maasdorp's Institutes of Cape Law, volume 2, p. 27, distinguishes between actions of this nature brought by petition and those brought as an ordinary action, holding that in the former the question of ownership may not be enquired into, but in the latter case the defence of ownership may be set up and proved.

It was held by the Supreme Court in the case of *Loots* vs. *van Wyk* (16 S.C.R. 419), that in an action for the recovery of a horse seized by Defendant, the onus of proving ownership lay on Defendant.

It would, therefore, appear that the Magistrate erred in rejecting the evidence of ownership tendered by Appellant.

The appeal is allowed with costs. The judgment of the Court below is set aside, and the case returned to the Court below for such further evidence as either of the parties may wish to adduce and thereafter a judgment to be given.

Umtata. 22nd July, 1920. W. T. Welsh, A g. C.M.

MANUNDU SIDIKI vs. TOTWANA SIDIKI.

(Mqanduli. Case No. 58/1920.)

Spoliation—When alternative value of cattle is claimed in the summons evidence of ownership may be led—Spoliatus ante omnia restituendus est—*Costs on higher scale*—Mandament van spolie.

The essential facts of the case are sufficiently disclosed in the judgment of the Native Appeal Court.

JUDGMENT.

By President: In this case Manundu Sidiki sued Totwana Sidiki, now Appellant, for the return of a filly and five head of cattle or their value, alleging that Defendant had spoliated them while in Plaintiff's lawful possession.

The Defendant pleaded ownership and a right to take this property alleging that it belonged to the Great House of his late father Sidiki, that he is the heir to that house, while Defendant is heir

to the Qadi of the Right Hand House, and that it was only at the Qadi kraal for temporary purposes. Admissions were subsequently made by Plaintiff that the horse belonged to his brother for whom he was looking after it during his absence, and by the Defendant that the cattle had been in the Plaintiff's constructive possession for eight years.

No evidence was led, but, upon argument on the pleading and admissions, the Magistrate gave judgment for the Plaintiff, holding as it appears, that on the doctrines of "*Spoliatus ante omnia restituendus est*" Defendant could set up no plea of ownership. Against this ruling the Defendant now appeals.

Numerous cases have been quoted before this Court in support of and against the contention that the plea of ownership was good. In considering these it is necessary to distinguish between two main classes of suits arising out of spoliation, and when this is done, much of the apparent conflict between the judgments falls away. An injured person may proceed by way of application for *mandament* or writ *van spolie* or he may take out a summons for the restoration of his property or its value.

The first remedy was introduced, as pointed out by Van Zijl (Judicial Practice, 2nd ed., p. 343) "for the purpose of meeting a case of emergency, and of protecting a person in his property where otherwise, by the tedious process of an action at law, this could not be done with the same speedy result and satisfaction." It is here, in the opinion of this Court, that the *ante omnia* rule operates; it is indeed the very *raison d'etre* of the emergency application. But where the original possessor elects to sue for restoration or value in the ordinary way, presumably no such necessity exists, and while the onus is upon the spoliator to prove ownership or right of possession, in the opinion of this Court he may be upheld if he establishes his claim.

There have, it is true, been instances, notably the case of *Ncotama* vs. *Ncume* (10 S.C. 207) where the *ante omnia* rule seems to have been applied to suits by way of summons for restoration of the property or its value brought before Magistrates' Courts in the Cape Province under their former limited jurisdiction which precluded treatment by way of application for *mandament van spolie*. There is also the case of *Qashiwe* vs. *Dayeni Sipele* (3 N.A.C. 265) from a Territorial Court where the same ruling was followed. But the point does not seem to have been raised in any of those cases, whether the suit was a spoliation case or not. It was raised, however, in the case of *Bester* vs *Grundling* (1917 T.P.D. 492) as quoted in Buckle & Jones' Civil Practice in Magistrates' Courts, p. 50, which decided it in the negative, and this implication really underlies the decisions or *obiter dicta* in the cases of *Loots* vs. *van Wijk* (16 S.C. 419); *Reed* v. *Gumenke* (19 S.C. 312); *Miller* v. *Harris* (1912 C.P.D. 203) and *Stoffel Beba* vs. *Tylden Tyutu*, (Case No. 149 of 1918, heard in this Court, not yet reported). † Appeals from Magistrates' Courts on summonses for the restoration or value of spoliated property, in all of which the Court of Appeal explicitly or inferentially admitted the plea of ownership. Also it may be remarked that on a summons for the restoration of property or its value, a tender of the latter would presumably hold good.

† Page 338 of these Reports.

This is not a claim for damages on account of trespass or spoliation, nor is the Court asked to decide whether the *ante omnia* rule would apply in an action by way of summons for restitution without an alternative claim for value. The suit is one for restoration of property of alternatively its value, and it must be decided on the issue of ownership or lawful custody.

The appeal is allowed with costs, the judgment in the Court below is set aside, and the case is returned to be gone into on its merits, the costs in the Court below to abide the issue.

Costs in this Court may be taxed on the higher scale.

Kokstad. 13th April, 1921. T. W. C. Norton, A.C.M.

S. NKO vs. N. PAKKIES.

(Matatiele. Case No. 135/1920.)

Spoliation—Plea of ownership—Evidence of ownership may be led where alternative value of cattle is claimed in summons.

The Plaintiff claimed the return of a cow and calf which he alleged had been spoliated, or the value thereof, £20. The Defendant pleaded ownership. The Magistrate refused to allow evidence of ownership to be led. The Defendant's attorney then closed his case and the Magistrate gave judgment for the Plaintiff as prayed with costs. The Defendant appealed on the ground that the Magistrate erred in refusing to allow evidence of ownership to be led, inasmuch as the Plaintiff in his summons claimed an alternative value for the animals alleged to have been spoliated, and it was therefore quite competent for the Defendant to lead evidence of ownership.

JUDGMENT.

By President: Appellant quotes *M. Sidiki* vs. *T. Sidiki*, Umtata Appeal Court (September, 1920, Circular).* In reply Respondent quotes *Erasmus* vs. *Nxonge*, 16 C.T.R., 1084.

In the opinion of this Court the question of ownership must be gone into in this case and in terms of *M. Sidiki* vs. *T. Sidiki*, the appeal will be allowed with costs, the judgment in the Court below is set aside and the case returned to be gone into on its merits, the costs in the Court below to abide the issue.

Umtata. 8th July, 1918. C. J. Warner, A.C.M.

NCAKISWA AND NINE OTHERS vs. MAGWETYANA.

(Ngqeleni. Case No. 66/1918.)

Spoor Law—Act 24 of 1886—Section 200—Interpretation of term "any lands."

In this case the Plaintiff claimed the sum of £3 15s. sterling the value of certain sheep, under the Spoor Law. It was common

* Page 339 of these Reports.

cause that the spoor became obliterated in or near the Dolosini Bush and on common grazing ground adjacent to the kraals of the Defendants. The Magistrate found for Plaintiff and gave judgment for 4s. 6d. against each Defendant, with costs. The Defendants appealed.

JUDGMENT.

By President: (1) The appeal is brought first on the ground that other kraal-owners in the vicinity of the Defendants should also have been made liable and the sum assessed in each of the Defendants proportionately reduced accordingly. The Spoor Law is founded entirely in Native Law, and it has never been the practice either in Native Law or in Magistrates' Courts to make the heads of kraals which are in the opposite direction to which the spoor is traced, liable under the Spoor Law.

(2) The second ground of appeal is that the spoor was traced to a bush over which Defendants have no control. If the Legislature had intended to restrict the term "any lands" to cultivated lands or any other specific lands it would have stated so and not have used the general term "any lands" which is wide enough to embrace all the lands in a Native Location.

(3) That there is no proof the sheep in question were stolen.

This Court considers that there is ample proof that the sheep were stolen.

The appeal is dismissed with costs.

Umtata. 20th July, 1920. W. T. Welsh, C.M.

MDITSHWA SOLANI vs. NAMBA MANXIWA.

(Cofimvaba. Case No. 94/1920.)

"Teleka" Custom—Right to "teleka" until full dowry recovered—Payment of any portion of balance of the dowry entitles husband to return of wife, but she may again be "telekaed" and so on until full dowry paid.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: Plaintiff in Court below (now Appellant) sues for return of his wife. The defence set up is that the dowry agreed upon, namely 20 head, had not been fully paid, and that the woman is being detained under the custom of teleka against payment of the balance.

It would appear that a summons on similar lines was before the Court in December, 1919, when it was admitted that Defendant had paid 13 cattle. The judgment in that case was one of absolution. Since that date further two head have been paid, making 15 in all. The Plaintiff contends that he has sufficiently complied with the custom of "ukuteleka" to entitle him to the return of his wife.

The Magistrate granted absolution from the instance holding that the Plaintiff was not entitled to his wife until the whole of the dowry agreed upon is paid, and quotes in support of his ruling the cases of *Monghayelana* vs. *Msongelwa* (Meaker 292) and *Nodange Mkupiso* vs. *Dick Myenqana* (Meaker 293). In the opinion of this Court these cases do not bear the construction put upon them by the Magistrate. The matter having been put before the Native Assessors they state that where an agreement to pay a certain number of cattle is entered into before marriage and where a substantial portion has been so paid, and the woman is "telekaed" for the payment of the balance, the payment of any portion of that balance, entitles the husband to the return of his wife who may again be "telekaed" and so on until the full amount due has been paid. This expression of opinion is consistent with the view taken by the Court of the construction which should be placed upon the case of *Nodange Mkupiso* vs. *Dick Myenqana* above referred to.

In the opinion of this Court the Plaintiff had complied with the custom of "ukuteleka" and is entitled to the return of his wife.

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

Lusikisiki. 5th April, 1921. W. T. Welsh, C.M.

MBUZWENI TIYEKA vs. NOPEKULA FEJA.

(Flagstaff. Case No. 234/1920.)

"Teleka"—Children under "teleka"—Right of mother's people to maintenance fee and reimbursement for wedding outfit provided.

Plaintiff asked for an Order of Court declaring him to be the guardian of certain two girls detained with their mother under the custom of "teleka," and also claimed for the dowry received in respect of one of the girls. The Defendant pleaded that he was entitled to fee for maintenance and reimbursement of wedding outfit provided for the girl who had married. He claimed two head for maintenance of the two girls, and one beast for wedding outfit. The Magistrate gave judgment for Plaintiff, declaring him to be guardian of the girls, and awarded him two head of cattle or £10 from the dowry paid for the girl Kalani. He allowed the Defendant to retain two head for maintenance. The Plaintiff appealed on the grounds that the Magistrate had erred in awarding maintenance for children detained under the custom of "ukuteleka," and also in placing an alternative value of £5 on the cattle, seeing that Plaintiff was claiming specific cattle. The Defendant cross-appealed on the ground that the Magistrate, by declaring the Plaintiff to be the guardian, had deprived him (Defendant) of his rights under the custom of "ukuteleka," and also on the ground that the Magistrate had made no deduction for the wedding outfit of the girl Kalani.

JUDGMENT.

By President: The Native Assessors having been consulted state: —

(1) That according to Pondo Custom, when children are "telekaed" with their mother and are kept for a long time and grow up with their mother's people, maintenance is payable.

(2) That if, while so detained, a girl marries and a wedding outfit is provided by her maternal relatives, the latter are entitled to deduct a beast from her dowry.

In view of this statement of Pondo Custom the Magistrate was in the opinion of this Court correct in awarding maintenance.

In regard to the value which the Magistrate has placed upon the cattle, this Court is not prepared to interfere. The appeal is accordingly dismissed with costs.

In the cross-appeal the Defendant claims one beast to reimburse him for the wedding outfit which he provided. In view of the custom, as stated by the Native Assessors, he is entitled to do so. The cross-appeal is allowed with costs, and the judgment of the court below will be amended to read: "For Plaintiff, declaring him to be the guardian of the girls Kalani and Noanyiwe, and for one beast or its value, £5, with costs. The other three cattle to be retained by the Defendant for maintenance and wedding outfit expenses.

Flagstaff. 27th August, 1918. J. B. Moffat, C.M.

BALENI vs. SIDLO.

(Flagstaff. Case No. 154/1918.)

"Teleka" Custom—Right to "teleka" may be enforced by action—Not competent for Magistrate to fix amount of dowry to be paid—Costs—Plaintiff entitled to costs when forced into Court to maintain his right—Pondo Custom.

The facts are stated in the judgment and in the footnote below.

JUDGMENT.

By President: In the case of *Mkohlwa* vs. *Mangaliso* (1 Henkel, 202) the Pondo Custom in regard to "teleka" is set forth.

In that case the Court allowed the father of the woman to have the custody of her child until such time as the woman's husband paid reasonable dowry or sufficient cattle to enable him to claim the child.

In this case the Magistrate has found that six head of cattle were paid as dowry, and that Plaintiff is entitled to further three head and has a right to "teleka" one of the girls until the three head are paid.

It is not competent for the Magistrate or this Court to fix the amount of dowry to be paid, and thus to enable a father to recover dowry by order of the Court.

The appeal is brought on the ground that the Plaintiff having succeeded to some extent in his claim was entitled to costs.

The Magistrate states that as the Plaintiff had the right to "teleka" the girl he could have done so without coming into Court. It is clear, however, from the record that the Defendant is resisting Plaintiff's right, and it was therefore necessary for Plaintiff to come to Court to get a declaration as to his right.

The appeal is therefore allowed with costs.

The cross-appeal is brought by the Defendant on the ground that the Magistrate was wrong in declaring that Plaintiff was entitled to further three head and to "teleka" the girl.

As pointed out above the Magistrate could not fix the amount of dowry to be paid. To that extent the cross-appeal succeeds and the cross-appeal is allowed with costs.

The Magistrate's judgment is altered to "Plaintiff is declared to be entitled to the custody of one of the girls mentioned in the summons until such time as defendant shall pay a reasonable dowry or sufficient cattle to entitle him to claim the child. Defendant to pay Plaintiff's costs."

Note: The Plaintiff claimed a declaration of rights regarding certain four children of the Defendant. Plaintiff stated that Defendant had married his (Plaintiff's) sister, Nomadume, before rinderpest, but had only paid one beast and seven goats as dowry. Plaintiff stated that Defendant had frequently promised to pay further dowry, but had neglected to do so. Plaintiff now claimed the right to claim possession of one of the four children (girls) under the custom of "ukuteleka" unless further dowry consisting of a reasonable number of cattle was paid. The Defendant pleaded that he had paid five head of cattle and seven goats, being equivalent to six head of cattle. The Magistrate found that six head of cattle were paid as dowry and held that Plaintiff was entitled to "teleka" one of the girls until the three head were paid. Plaintiff appealed on the question of costs, the Magistrate having ruled that Plaintiff should pay costs. The Defendant cross-appealed on the grounds that the Magistrate's judgment, declaring Plaintiff entitled to a further three head of cattle and entitled to "teleka" one of the girls till these cattle were paid, was contrary to Native Custom.

Postea, Lusikisiki, 10th December, 1919. See below.

Lusikisiki. 10th December, 1919. C. J. Warner, C.M.

SIDLO NTLEKWINI vs. BALENI MAQOKOLO.

(Flagstaff. Case No. 76/1919.)

"Teleka" Custom—Daughters may not be impounded indefinitely though further dowry may be asked for—Cattle Alternative value in dowry cases fixed at £5 a head—Pondo Custom.

The Appellant, Baleni, in the case of *Baleni* vs. *Sidlo* (*vide* page 344), impounded one of the daughters, one Zeze, then the

wife of one Layini. Sidlo then tendered the sum of £15 as representing the three head of cattle additional dowry awarded by the Magistrate. Baleni refused this tender on the ground that £15 did not represent the value of three head of cattle, and alleged that Sidlo had no right under Native Law and Custom to tender money in settlement of dowry. Sidlo then sued Baleni in the Court of the Resident Magistrate at Flagstaff in an action in which he claimed an order that Baleni restore the woman Zeze to her hubsand Layini, and also an order that Baleni had no right to detain any of his (Sidlo's) daughters under the Native Custom of "Ukuteleka" or under any other custom. The Magistrate gave judgment that: "The Court holds that £15, tendered in addition to the dowry already paid, is a reasonable dowry. Judgment is entered for Plaintiff as prayed with costs." Baleni appealed on the grounds, *inter alia*, that the Court had no right to fix dowry between Pondos and so intrude upon the rights of "teleka," that Sidlo could not tender any number of cattle in *final* settlement of such dowry, that to release a woman held under "teleka" a beast must be tendered, and that it was not competent for him to tender £5 as being the equivalent of such beast.

JUDGMENT.

By President: The question at issue having been submitted to the Pondo Assessors, they state that Appellant having received six head of cattle as dowry for his sister, and having impounded her daughter to enforce the payment of additional dowry, cannot continue to impound the daughters indefinitely, though he may ask for further dowry.

In dowry cases it has been the practice of the Court to place an alternative money value on the cattle awarded, which for some time past has been fixed at £5, and in the absence of any expressed general desire on the part of the Natives for an increase in the alternative cash valuation, this Court is not prepared to depart from the practice followed in the past.

The appeal is dismissed with costs.

Butterworth. 9th July, 1919. C. J. Warner, C.M.

MURU vs. PIKI.

(Idutywa. Case No. 36/1919.)

"Tombisa" Custom—Man may "tombisa" his granddaughter, and when this is done any beast he may have obtained for the purpose must be replaced by a beast from the dowry—Exception—Where the issue depends entirely on Native Custom it is not competent to take an exception based entirely on Roman-Dutch Law—"Intonjane"—Guardian.

The Plaintiff claimed a beast or its value £12 in return for a beast he had killed at the "intonjane" of the Defendant's sister

Nonkanti, whose guardian he (Defendant) now was. He stated that the beast had been killed at the request of one Kanyiwe, the grandfather of Nonkanti, who was her guardian at the time. Defendant admitted that he was the guardian of Nonkanti, but denied that Kanyiwe had ever been her guardian. Further, he stated that if the girl had been "tombisaed" and an ox slaughtered at the request of Kanyiwe, the Plaintiff's action would be against the heir of Kanyiwe.

The Magistrate found that Defendant's father had died, and that the Defendant was the guardian of his sister Nonkanti. Defendant, who was married, went away to work, leaving another married brother at his kraal. The question was whether the married brother or the grandfather would act as guardian, no arrangement having been made. There was no evidence that Kanyiwe had authority to act, and if he did act, Kanyiwe's heir would be responsible. It so happened in this case that the Defendant himself was Kanyiwe's heir, but he was not sued in that capacity. The Magistrate gave judgment of absolution, it not having been proved that Kanyiwe was acting as guardian at the time. The Plaintiff appealed.

JUDGMENT.

By President: Appellant sued Respondent for a beast he alleges he supplied at the request of Respondent's grandfather for the "tombisa" ceremony of Respondent's sister and ward, on the promise of the grandfather that he would be awarded a beast out of the dowry to be obtained for the girl in question.

At the conclusion of Appellant's case the Respondent's attorney applied for absolution from the instance on the ground that the action should have been brought against the heir of the late grandfather. This was granted in the court below, and the appeal is against this ruling.

On the question being put to the Native Assessors they state that a man has the right to "tombisa" his grand-daughter, and when this is done any beast he may have obtained for the purpose must be replaced by a beast from the dowry.

This is a case which can only be dealt with under Native Law, and this Court, in the case of *Malusi* vs. *David Dandi* (1 Henkel, 169), held that it is not competent in a case being heard under Native Law and Custom in which the question at issue depends wholly on Native Custom to take an exception based entirely on Roman-Dutch Law.

The appeal is accordingly allowed with costs. The judgment in the Court below is set aside, and the case returned for the Magistrate to give judgment after hearing the whole of the evidence tendered by both parties.

Kokstad. 3rd May, 1918. J. B. Moffat, C.M.

NKAMANE NDAMANE vs. L. AND M. MPANDO.

(Mount Fletcher. Case No. 168/1917.)

Trespass—No claim lies for trespass against persons occupying land under certificate of occupation until the certificate is set aside.

Claim for £30 damages for trespass.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The Plaintiff claims damages for trespass on certain land allotted to him in 1896.

In 1898 the Plaintiff was sued for the land. The Magistrate gave judgment against the present Plaintiff, who was then Defendant, but his decision was altered by the Appeal Court to absolution from the instance.

The Plaintiff appears to have remained in possession of the land until about 1903, when he was told by the Magistrate to discontinue cultivating it. According to the Plaintiff he has not cultivated it since then until recently.

The land was allotted to the Defendants in May, 1916, and they entered upon it after Plaintiff had recently ploughed it and ploughed over his seed.

The Defendants have been granted permission to occupy the land and are legally in possession of it. They cannot be sued for damages for occupying it.

If the Plaintiff considered that he had a right of occupation, his proper course was to take proceedings to have the Defendants' certificates of occupation set aside. The circumstances under which the certificates were granted could then have been enquired into.

Until these certificates are formally set aside, the right of occupation is vested in the Defendants, who were rightly absolved from the claim for damages for trespass.

The appeal is dismissed with costs.

Kokstad. 13th April, 1921. T. W. C. Norton, A.C.M.

N. MLONYENI vs. E. MAHLATI.

(Mount Frere. Case No. 156/1920.)

Trespass—Communal locations—Wrongful impounding after tender of amount due in accordance with tariff—Recovery of money paid to poundmistress—Notification to owner in terms of section 77 of Proclamation No. 387 of 1893, as amended by Proclamation No. 60 of 1910.

The essential facts are fully set forth in the judgment of the Native Appeal Court.

JUDGMENT.

By President: Respondent sued Appellant for £5 damages for the wrongful and unlawful impounding of 48 sheep.

The Magistrate finds:—

(1) That the sheep in question trespassed upon Appellant's land in a communally occupied location in the day time.

(2) That Appellant made no proper notification as required by Regulation 77 of Proclamation 387 of 1893, as amended by Proclamation 60 of 1910.

(3) That Appellant did not demand trespass fees as laid down in the Proclamation, nor did the owner refuse to pay.

(4) That Appellant suffered practically no damage.

As regards the first finding it is common cause that the sheep trespassed as alleged.

In the opinion of this Court the notification made by Appellant was sufficient, as it is clear that Respondent acted on it, but there is no evidence of a demand for payment at the time Appellant reported the trespass, nor of Respondent's refusal to pay.

It is admitted that at Mount Frere, before the stock was impounded, Respondent offered the tariff amount.

The evidence as to the damage is conflicting, but the Magistrate finds as a fact that practically no damage was done, and this Court sees no reason to differ on this point.

As Respondent offered the amount due according to tariff and as Appellant did not comply with sections 28 and 67 of the Regulations, the impounding was unlawful (Meaker, 280).

This Court sees no reason to interfere with the amount awarded as damages.

As regards the rights of parties living under communal tenure, to which the Magistrate has devoted considerable attention in his reasons, this Court is not called upon to express an opinion as the point was not raised in the pleadings nor in the grounds of appeal.

It appears clear from paragraph 3 of the Magistrate's reasons that he included in his award to Respondent the sum of 24s. which he had paid to the poundmistress, in addition to the sum of 6s. awarded in terms of section 65 of the Regulations. The words used seem to leave no doubt on the point, viz.: "It is also urged on behalf of Appellant that damages should have been assessed in terms of Regulation 65 at 6s., and that the sum of 24s. paid by the Respondent to the poundmistress by way of damages (which were claimed by the poundmistress) should not have been included in the award."

These words certainly mean that the 24s. *was* included in the amount awarded to Respondent. But as the Magistrate goes on to say that the Appellant alone can draw the sum in the hands of the poundmistress, the actual effect of his judgment will be that Respondent will get back the sum he paid to release his sheep, viz., 24s. and 6s. for damages, and as Appellant is stated to be alone able to recover the 24s. from the poundmistress, it follows that the real amount which Respondent will receive from Appellant will be 6s.

Paragraph 8 of the grounds of appeal challenges the Magistrate's ruling that Appellant alone can draw the amount in the hands of the poundmistress.

It was decided in the case *Town Council of Cape Town* vs. *Jorgensen*, heard in C.P. Division and reported in Department of Justice Summary for August, 1920 (C.P.D., 1920, 479), in circumstances similar to these, that the person paying to the poundmaster is the person entitled to recover.

The Magistrate would have arrived at the same result had he given Plaintiff (Respondent) judgment for 6s. and authorised him to withdraw the amount in the hands of the poundmistress. This would leave the parties in the same relative positions financially as they were by the judgment actually recorded.

To clear up the ambiguity therefore, in dismissing the appeal with costs, the judgment will be altered to read:

For Plaintiff in convention for 6s. and costs, and for Plaintiff in reconvention for 2s. The amount of 24s. in the hands of the poundmistress to be refunded to Plaintiff.

Note: In this case the Appellant did go to Respondent as owner of the sheep and spoke about the sheep, but Respondent denied that Appellant told him they had trespassed. The Magistrate, in in his reasons for judgment, stated that he had come to the conclusion that sections 21 to 45 of the Pound Regulations applied only to trespass on private property, and not to land held under communal tenure. He therefore held that Appellant was not entitled to claim special damages, but was limited to the fee laid down in Schedule G to the Regulations. The £1 4s. mentioned in the judgment was the amount which Respondent had to pay the poundmistress to release the sheep, viz., 48 at 6d. a head.

Kokstad. 16th August, 1921. W. T. Welsh, C.M.

MTOLIKI DLAVA vs. CHARLES NONTSHI.

(Mount Ayliff. Case No. 29/1921.)

Trespass—Communal locations—Actual damages sustained may be claimed—Pound Regulations—Section 28 *of Proclamation No.* 387 *of* 1893—*Owner not called upon to be present at assessment of damages.*

Action for the sum of £8 as damages sustained by reason of the trespass of Defendant's stock on Plaintiff's cultivated lands in a communal location. The Magistrate gave judgment for Plaintiff for £5 and costs. The Defendant appealed on the grounds that only damages at tariff rates as laid down in Schedule G of Proclamation No. 387 of 1893 could be claimed as damages in locations not provided for in the Proclamation, and further, if the Appeal Court held that damages could be claimed under section 28 of the Proclamation, then Appellant was given no opportunity of being present at the assessment, and that the same was not carried out in the manner laid down in the said section. The Magistrate held that the assessment of damages was not essential.

JUDGMENT.

By President: This Court is not in a position to say that the amount of damages awarded by the Magistrate is excessive.

No authority has been produced to this Court laying down that a Native in a communal location is not entitled to sue for the actual damage caused. On the contrary, it was decided in the cases of *Jika Kubela* vs. *Annie Scheepers* (Meaker, 209), and *G. Bukweni* vs. *D. Gwagwa*† heard in this Court last April, that an action in this form is competent.

The appeal is accordingly dismissed with costs.

Note: *Vide* case of *Thompson* vs. *Schietekat* (10 S.C. 46).

Kokstad. 14th December, 1921. W. T. Welsh, C.M.

NGQETU MAKAULA vs. MAFUKWANA.

(Mount Frere. Case No. 110/1921.)

Trespass—Pound Regulations—Communal locations—Residents in communal locations not bound to sections 76 *and* 77 *of Pound Regulations, but may proceed under sections* 28 *and* 67.

The facts are fully stated in the judgment of the Native Appeal Court.

JUDGMENT.

By President: The cause of action instituted by the Plaintiff, now Appellant, against the Defendant, now Respondent, is stated in the summons as follows:—

> " The Defendant is called upon to show why he hath not paid to Ngqetu Makaula, Headman of Dangwana Location aforesaid (hereinafter styled the Plaintiff) the sum of £5, which the said Plaintiff complains that he owes him and claims from him as and for compensation in damages sustained by Plaintiff by reason that Defendant, on or about the 2nd day of June, 1921, wrongfully and unlawfully and without just and reasonable cause impounded, or caused to be impounded, in the pound at Mount Frere, in the district of Mount Frere, a certain mare, the property and in the lawful

† Kokstad 11th April, 1921, T. W. C. Norton, A.C.M. President. Gana Bukwini *vs.* Dick Gwagwa, Umzimkulu Case No. 232/1920, claim for value £1/10/0 of a pig killed by Defendant; Defendant counterclaimed for £14 damages for trespass. The Magistrate gave judgment for Plaintiff in convention for £1/10/0 and costs, and for Plaintiff in reconvention (Defendant in convention) for £4 and costs. The Plaintiff (Bukwini) appealed, on the grounds that Defendant (Gwagwa) should have had the damages for trespass assessed, and that not having done so he was only entitled to damages according to tariff. The President of the Appeal Court pointed out that the Pound Law provided that any person may have his claim judicially decided, and he is not obliged to have damages assessed. The appeal was accordingly dismissed with costs.

possession of Plaintiff, whereby Plaintiff suffered inconvenience and also incurred expense in releasing the said mare from the said pound; which sum of £5 has been demanded from Defendant, but which said sum the Defendant neglects or refuses to pay, wherefore the said Plaintiff prays that he may be adjudged to pay the same with costs of suit."

To this claim the Defendant pleaded:—

"Defendant denies that he wrongfully and unlawfully impounded the mare in question, but states that the mare trespassed on his land on several occasions, and that he had warned Plaintiff of the trespasses, and especially on the day in question, but Plaintiff took no notice of such trespasses nor would he pay damages for such trespasses, whereupon Defendant impounded the said mare."

After hearing evidence on these issues, the Magistrate absolved the Defendant from the instance with costs.

To succeed it is necessary for the Plaintiff to show that his mare was illegally impounded by the Defendant.

It is contended for the Appellant that Natives living in a location commonly known as Native Locations are limited, when impounding stock, to the provisions of sections 76 and 77 of Proclamation No. 387 of 1893, and that section 67 is not applicable to them. There is nothing in sections 76 and 77 explicitly excluding the operation of section 67, which makes provision for any person to claim damages, and also provides that the owner of an animal may release it on giving security for damages and costs. This course was not followed by the Plaintiff.

That special damages are claimable by Natives living in locations appears to have been the view taken by this Court in the case of *Milizo* vs. *Maqolo* (Meaker, 280), when it remarked that 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."

That case also indicated that a person has the option of proceeding under sections 28 or 67 of the regulations, or otherwise of claiming trespass fees according to tariff. Reference to the record shows that the parties in that case were Natives living in a location.

As, in the opinion of this Court, the Defendant was entitled to impound the mare, the Plaintiff cannot succeed upon the allegations set forth in his summons that the impounding was wrongful and unlawful and without just and reasonable cause.

In the opinion of this Court the appeal must fail, and is dismissed with costs.

Umtata. 19th November, 1919. C. J. Warner, C.M.

MOSHI MBANBONDUNA vs. LUHANI LYONASE.

(Engcobo. Case No. 147/1919.)

Trespass—Destruction of growing crops—Claim for trespass fees and damages in the same action—Claim for trespass fees prior to action debars claim for damages—Native Law superseded by the Pound Regulations—Proclamation No. 387 *of* 1893.

The essential facts are clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: Respondent sued in the court below for £2 16s. as trespass fees and £10 as damages for destruction of his growing crops by Appelant's cattle.

The Magistrate awarded £5 as damages, and the appeal is against this judgment.

The first ground of appeal is that the judgment is against the weight of evidence. There is sufficient evidence to establish the trespass and this ground of appeal must fail.

The second ground of appeal is that Respondent having claimed trespass fees was debarred from claiming damages. The law on this subject was laid down by this court in the case of *Jika Rubela vs. Annie Scheepers* (Meaker's N.A.C. Reports, 209). If, therefore, Respondent had made any demand for trespass fees before instituting these proceedings he would have been debarred from claiming damages; but there is no evidence that any demand for trespass fees was ever made. The evidence only shows that the trespass was reported to Appellant, who was asked to examine the land, but did not do so. The fact that Respondent combined a claim for trespass fees with one for damages in the same summons does not, in the opinion of this Court, invalidate his claim to what the Court might consider is due to him though he could not be entitled to both trespass fees and damages. The ground of appeal also fails.

The third ground of appeal that under Native Law damages are not recoverable for day trespass was not pressed in argument before this Court, and in any case Native Law on the subject is superseded by the Pound Regulations.

The evidence tendered by Respondent as to the extent of damages done was not rebutted in any way, and the Court was correct in accepting it.

As regards the claim in reconvention, the Magistrate who had the witnesses before him found that Plaintiff in reconvention had failed to prove his claim, and this Court sees no reason to disagree with this finding.

The appeal is dismissed with costs.

Umtata. 12th November, 1920. W. T. Welsh, C.M.

SAMUEL NJILO vs. NQUNGU MAQUME AND JINI XANI.

(Mqanduli. Case No. 155/1920.)

Trespass—"Igadis" situated among homestead allotments must be sufficiently fenced.

The Plaintiff, Samuel Njilo, sued the Defendants, Nqungu Maqume and Jini Xani, jointly and severally, the one paying the other to be absolved, for damages for the alleged trespass of 241 mixed sheep and goats on his cultivated land, by which damages to the extent of £3 5s. were done to the crops growing thereon, consisting of beans, cabbages, sweet potatoes, mealies and pumpkins. The Defendants admitted that 42 of the first Defendant's sheep and 15 of the second Defendant's sheep trespassed on the Plaintiff's "Igadi," but denied that they were liable in damages as the "Igadi" was not sufficiently fenced. The Magistrate gave judgment for Plaintiff for 12s. trespass fees against Defendant No. 1, and 8s. trespass fees against Defendant No. 2. The Defendants appealed.

JUDGMENT.

By President: The main grounds of appeal in this case are:

(1) The Magistrate found that the Plaintiff's ground trespassed on was an "Igadi" and insufficiently fenced. He should, therefore, have refused in terms of the Defendants' plea to grant damages against Defendants and dismissed Plaintiff's summons or given judgment for the Defendants with costs.

(2) When it was proved and admitted by the Plaintiff that the land was granted to him by the Magistrate of Mqanduli as a garden on the special condition that he fenced it; and as the Magistrate held that the condition had not been complied with, *i.e.*, not sufficiently fenced, he should have upheld the Defendants' application to have the Plaintiffs' summons dismissed or should have given judgment for Defendants with costs.

The Magistrate, in his reasons for judgment, states that the land in question must be regarded as an "Igadi" in any action brought against stock owners residing in its vicinity, and the defence to such an action that the land was insufficiently fenced would be a good one.

This Court has frequently ruled that "Igadis" situated amongst homestead allotments must be sufficiently fenced. The land referred to was granted to Plaintiff on the express condition that it was fenced, the Magistrate finds that the fence is not sufficient to keep out sheep or goats. In the opinion of this Court the Magistrate was wrong in holding that the "Igadi" had to be fenced only as against residents in its immediate vicinity, and is at a loss to understand how the decided cases could have led him to that conclusion.

The appeal is allowed with costs, and the judgment of the court below altered to one for the Defendants with costs.

Butterworth. 2nd March, 1921. W. T. Welsh, C.M.

CAPU vs. M. BENYA.

(Butterworth. Case No. 106/1920.)

Trespass—Surveyed districts—Trespass on surveyed building allotments held under title deed in terms of Proclamation No. 227 of 1898—Proclamation No. 408 of 1906—Proclamation No. 22 of 1913—Sufficient fence—Exception.

The Plaintiff claimed £5 damages for the trespass of Defendant's sheep on his "cultivated" lands on various occasions. The Defendant excepted that no cause of action was disclosed, inasmuch as if the trespass was on the Plaintiff's homestead site granted to him in terms of Proclamation No. 227 of 1898, he referred the Court to the provisions of Proclamation No. 22 of 1913. The Plaintiff admitted that the land in question was his building allotment, but alleged that the whole land was properly fenced at the time of the trespass. The Magistrate held that in terms of a notice issued by the Magistrate of Butterworth in 1909, under section 2 of Proclamation No. 408 of 1906, the words "sufficient fence" as applied to wire fences in the district of Butterworth meant a fence of not less than six wires, with poles not more than thirty feet apart, and laced at intervals of not more than six feet, and that from the evidence of Plaintiff and his witnesses the fence in question did not satisfy these requirements. The exception was upheld and the summons dismissed with costs. The Plaintiff appealed.

JUDGMENT.

By President: This Court has decided on several occasions that damages for trespass on gardens on homestead sites cannot be recovered unless they are enclosed by a sufficient fence conforming to the requirements of the Pound Regulations.

It has not been contested on appeal that the Magistrate's finding as to the insufficiency of the fence was not justified.

In view of the Plaintiff's admission that the land was on a homestead allotment, this Court is of opinion that the exception was properly upheld.

The appeal is dismissed with costs.

Umtata. 9th November, 1922. J. M. Young, Ag.A.C.M.

MPOHLO VELAPI vs. THEOPHILUS QANGULE.

(Umtata. Case No. 726/1922.)

Trespass—Proclamation No. 227 of 1898—Winter grazing—Action lies for trespass on unfenced land held under title under Proclamation No. 227 of 1898—No right of winter grazing thereon—Proclamation 22 of 1913—Proclamation 291 of 1911 Proclamation 152 of 1903—"Buqisa"—Special plea.

Action for £20 as damages for trespass of eleven head of cattle on Plaintiff's land, on which was growing a crop of forage and

wheat and for the forcible rescue of the cattle from the Plaintiff's possession. Defendant pleaded that by long-established custom no damages were claimable in respect of trespass in Native locations in winter, and further that as Plaintiff's land was unfenced he could not recover for trespass, and he had no right to detain the cattle. The Court held that Plaintiff had a right of action. The Defendant appealed.

JUDGMENT.

By President: The Respondent is the holder of an unfenced arable allotment granted in terms of section 4 of Proclamation No. 227 of 1898.

The Appellant's stock are alleged to have trespassed upon this allotment on the 27th of August, 1922, and damages claimed by the Respondent.

The Appellant pleaded specially that no trespass fees are claimable for a trespass in winter upon unfenced land.

The Magistrate ruled as follows:—

> "The Court rules Umtata being a surveyed district to which the provisions of Proclamation 227 of 1898, apply, the holder of an arable allotment granted in terms of section 2 of that Proclamation is specially exempt from the provisions of Proclamation 22 of 1913, which requires that a private holding must be fenced, before an action for damages on account of trespass by animals shall lie. A private holding means a church, trading or other site held under 227 of 1898. The inference seems to be that arable allotments need not be fenced, and that if a trespass takes place on such land, which is held under title an action for damages shall lie. This, of course, would override the Native Custom of "Buqisa," *i.e.*, of allowing cattle to graze on the common lands of a location after reaping has taken place. Attention is directed to Proclamation 291 of 1911 whereby provision is made in respect of grazing of livestock on agricultural lands after reaping in communally occupied areas in districts of the Transkeian Territories to which the provisions of Proclamation 152 of 1903 apply. This being so, the Court holds that Plaintiff has a right of action."

By agreement of the parties, the hearing of the case on the merits was postponed pending an appeal upon the Magistrate's ruling.

In the opinion of this Court the ruling, which is based upon the provisions of section 3 of the Schedule to Proclamation No. 22 of 1913, is correct.

The appeal is dismissed with costs.

Butterworth. 1st November, 1920. T. W. C. Norton, A.C.M.

BONWANA PEKUZA vs. MONI MANGA, ASSISTED BY HIS GUARDIAN, GEZANA.

(Kentani. Case No. 126/1920.)

Trespass—Award by Headman—Payment under duress—Tender.

Claim for £4 damages for trespass and the return of £1 paid under judgment of Headman in respect of one pig killed by Plaintiff while in the act of trespassing. Defendant pleaded tender of 11s. prior to summons and also that Plaintiff had paid the £1 ordered by Headman voluntarily and without protest. The Magistrate gave judgment for the Plaintiff for the sum of 16s. 6d., together with return of the £1, and costs. The Defendant appealed.

JUDGMENT.

By President: The appeal is brought on the question of the damages allowed for trespass, and also as to the £1 paid under alleged duress.

The Magistrate states that he has been misled on the question of trespass fees by reading the wrong tariff, and the excess 5s. 6d. which he allowed was abandoned after the appeal was noted.

As regards the second point this Court has to consider: whether the fact that after Respondent's protest the arrival of the Headman's messenger to execute judgment would have such an effect on the mind of Respondent as to amount to duress. It is well-known that Headmen can and do cause inconvenience or detriment (*Benning* vs. *Union Government*, S.A. Law Reports, 1914),† to men living under their authority, and in the opinion of this Court the Magistrate rightly held that the fact as above stated amounted to duress owing to Respondent being a Native.

The appeal is allowed with costs to date of abandonment of the 5s. 6d. by Respondent, and the judgment altered to read "Judgment for Plaintiff for 11s. and £1 with costs."

Kokstad. 14th December, 1921. W. T. Welsh, C.M.

MOTSIKI PEPENENE vs. ISAIAH MORAI.

(Mount Fletcher Case. No. 98/1921.)

Trespass—Proclamation No. 143 of 1919—Trespass fees only claimable by persons in lawful occupation.

Action for damages for trespass on land loaned to the Plaintiff subsequent to the death of the lawful holder.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

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† (1914 C.P.D. 425.) The reference is to duress generally and makes no mention of Headmen.

JUDGMENT.

By President: The Defendant was sued by the Plaintiff for damages for trespass on land alleged to be lawfully occupied by the latter.

It appeared that the land in question was allotted to Joseph Morai who is deceased; that after his death, Jonathan Morai ploughed it for the widow, and that last year Jonathan Morai lent it, with the Headman's consent, to the Plaintiff.

Section 9 (2) of Proclamation No. 143 of 1919 enacts that upon the death of an allotment holder his rights of occupation are *ipso facto* cancelled. Section 14 (2) penalises any person who unlawfully cultivates or ploughs commonage as defined in the Regulations.

In the case of *Mafumana Tyumre* vs. *Solomon Ndinisa Bam* (3, N.A.C., 276) it was held that trespass fees are not claimable unless the Plaintiff is in lawful occupation.

In the opinion of this Court the question submitted for a ruling must be answered in the negative. The appeal will be allowed with costs, and the Magistrate's ruling that the Plaintiff has a right of action to sue for trespass fees will be reversed with costs.

Note: This decision was followed by the Native Appeal Court sitting at Umtata in March, 1923, in the case of *Sitwayi Sindiwe* vs. *Zake Fihlani* (Engcobo, Case No. 486/1922).

Umtata. 19th July, 1921. T. W .C. Norton, A.C.M.

MAPOLOMPO SIYATA, ASSISTED BY MKAZI SIYAZI vs. ISAAC NTONGA.

(Umtata. Case No. 211/1921.

Trespass—Pound regulations—Stock belonging to unknown owner—Persons seizing stock with view to impounding must exercise reasonable care—Trespass by stock on land of another person while under detention of person who intends to impound them for trespass on his own land—Exception—Plea—Costs—Postponement.

The Plaintiff in this action, Mapolompo Siyata, complained that on the 9th March, 1921, certain eight cattle, her property, trespassed on the land of Defendant, Isaac Ntonga, who took possession of the cattle and detained them for payment of trespass fees. While the cattle were so detained and out of the Plaintiff's possession two of them trespassed on the land of one Foloti, who impounded them for the trespass and took them to the Qunu Pound. Plaintiff paid the trespass fees claimed by Defendant and received back the cattle with the exception of the two impounded by Foloti, which Plaintiff thereupon claimed from the Defendant. Thereafter Defendant delivered one cow, but failed to deliver the remaining beast, viz., a cow in calf. Plaintiff now claimed this beast or its value £20, and for all damages sustained by the Plaintiff by reason of the impounding of the two cattle

while under detention by Defendant, which Plaintiff estimated at £5. Defendant denied liability for the cow, which had died in the Qunu Pound; he denied that he was liable as principal or agent in the premises or that he was liable for the death of the beast in the Qunu Pound. One paragraph of the plea contained the Defendant's version of the affair. The Plaintiff excepted to the plea as being vague, embarrassing and bad in law, inasmuch as no reason was given for his denial of liability as principal or agent, and the facts alleged did not constitute any defence in law. He further stated that he was unable to ascertain from the plea what defence he had to meet and was prejudiced thereby. The Magistrate found that Plaintiff had suffered no loss or damage through Defendant's action in the matter, and gave judgment for Defendant with costs. The Magistrate gave the following reasons for judgment: —

Reasons.

In this case Plaintiff claims delivery of certain cow or its value £20, and £5 damages sustained by reason of the impounding of two cows while under detention by Defendant. Defendant denies liability as principal or agent.

In short the case is that Defendant seized amongst other cattle two cows for trespassing in Notaviti's cultivated land: all the cattle so seized were temporarily placed at one Fetu's kraal before being taken to the Pound; that whilst the cattle were so detained the two cows in question broke out of Fetu's kraal and thereafter were seized by one Foloti for trespassing in his land. Plaintiff admits these two cows were brought to her by Foloti to pay [illegible] trespass in his land, but she refused to release them, alleging the cattle were Isaac's in that she had paid trespass fees to him and that he should release them on her behalf. Thereafter Foloti rightly removed them to the pound whereat one of the cows died.

The Court finds that the seizure of the cows by Defendant was legal; that he acted with due care in placing the cattle at Fetu's kraal, which Plaintiff admits to be substantial. That the breaking out of these two cows from Fetu's kraal was not due to any negligence or want of care on Defendant's part or for that matter on Fetu's part, who must be taken to have acted for Defendant in keeping these cattle pending their release by Plaintiff or their removal to the pound by Defendant. That up to the time Foloti took the cattle to Plaintiff she had not sustained any damage and that as owner of the cattle, in terms of the Pound Proclamation, they were rightly taken to her to be released, which she refused to do. That these two cows were legally impounded by Foloti, who was acting for himself and not for Defendant. That it is not necessary to find so far as Defendant is concerned, what the cause of death of the one cow was, but the Court does find that Plaintiff has failed to show that it was due to any negligence on the part of Foloti, and that the evidence of Mr. Smith that it died from natural causes is accepted. The plea may not be artistically drawn, but it answers the summons sufficiently to enable Plaintiff to conclude that Defendant whether as principal or agent was detaining these cattle. There was therefore no prejudice.

From the evidence I think it is clear that Defendant acted as a principal in detaining these cattle in the first instance. This

Court also finds that in releasing the one cow from the pound, Defendant was not accepting liability for the action of Foloti in impounding the cattle or for not having released them from Foloti's control after they had broken out of Fetu's kraal, but that he was acting on instructions from Headman Joseph Bulo.

Another point to be considered in this case is that Defendant released the two calves and four large cattle to Plaintiff in the morning without receiving payment for the trespass on the land he was in charge of and at that time Plaintiff met Foloti driving the two cows that had escaped. She could have and should have released these two cows instead of paying the Defendant the full 4s. he had claimed for the trespass of the eight cattle. She made the payment of 4s. in the afternoon she having released the four cattle and met Foloti with the other two cows in the morning.

By paying Foloti for the two cattle and refusing to pay Defendant for them this litigation could have been avoided and she would have sustained no loss.

With regard to the costs of postponement for expert evidence, Plaintiff knew at the time she took action that the cow had died in the Qunu Pound and Plaintiff should have been prepared with such evidence. The case was specially postponed at the instance of Plaintiff and she should bear the costs.

JUDGMENT.

By President: Appellant claims £20 value of a cow which died in the Qunu Pound, and £5 damages for the impounding of cattle by one Foloti while these cattle were under detention by Respondent.

The facts as found by the Magistrate are not in dispute, and this Court is asked to rule:—

(1) That exception to the plea was wrongly overruled as a result of which Appellant was prejudiced.

(2) That the Magistrate was wrong in making Appellant pay costs of postponement asked for to enable Appellant to call expert evidence.

(3) That as Respondent knew that the cattle seized by Foloti were those which had escaped from Fetu's where he had placed them, and stood by instead of releasing them, therefore he is liable for what followed.

(1) As regards the first question raised, this Court is of opinion that while the plea is overloaded with detail, it is a sufficient compliance with the rule.

(2) Appellant was aware from the plea that the cow had died at the Qunu Pound, and that Respondent denied liability for the death of the cow, but it was only after Respondent's case was closed and evidence led for defence that an application for postponement was made to call expert evidence. This Court sees no reason to differ from the Magistrate, who ordered Appellant to pay costs of that postponement.

(3 The crux of Appellant's case is stated to be the fact that after Foloti had seized the cattle Respondent took no steps to release them although admitting that these were the cattle which had been placed by him at Fetu's for safe keeping.

The point is not without difficulty. Section 77 of Proclamation 387 of 1893 (substituted by Proclamation 60, 1910) lays down that the proprietor shall take trespassing stock, or notify the trespass to the owner when known, and should that owner refuse to pay the damages claimable he may impound the stock. The Proclamation is silent as to the rights and obligations of third parties as in this case.

In the E.D. Court in case *Molefe* vs. *Mdibe* (E.D.C., 1919, p.p. 112-121) it was laid down that it is incumbent on a person who seizes animals trespassing in lands with a view to take them to the pound to bestow proper and reasonable care in regard to them. Respondent placed the cattle he had seized in the care of Subheadman Fetu, whose stock enclosure is admittedly sound, and this Court considers that in doing so he exercised proper and reasonable care, and is not prepared to say that he is liable because he failed to release them when seized by Foloti. To do so would mean that he had a legal right to demand them from Foloti on payment of the damages claimed. This Court can find no authority in the Proclamation to support this view. Foloti was exercising his legal rights. Had Respondent, who was not the owner any legal right to insist on the release of a third person's cattle, to himself merely because they had trespassed in his land. Can he be held liable because he did not release the stock unless he was legally entitled to claim that release? This Court considers that both these questions must be answered in the negative.

The impounding of the cattle by Foloti was not the natural consequence of any act of Respondent's, but is rather the result of Appellant's failure to comply with the obligations placed upon him by the Pound Regulations in neglecting to release the cattle when called upon to do so.

The appeal is dismissed with costs.

Umtata. 18th July, 1922. W. T. Welsh, C.M.

FUNDA NISELO vs. MPEMNYANA NAMBA.

(Engcobo. Case No. 62/1922.)

Trespass—Pound Regulations—Owner unknown—No liability for impounding stock where the owner of the stock is unknown.

The essential facts of the case are clearly stated in the judgment of the Native Appeal Court.

Judgment.

By President: In this case the Plaintiff sued the Defendant for the sum of £25 as damages, alleging that Defendant had impounded his horse without his knowledge and without reference to the Headman of the parties which the law requires in the case of stray stock.

In his plea the Defendant states that the horse trespassed in his cultivated lands and that after enquiry he was unable to ascertain to whom it belonged and that he then impounded it.

The Magistrate gave judgment in favour of Plaintiff for the sum of £10 and costs, and against this decision Defendant has appealed. It is clear that the Defendant impounded the horse for having trespassed on his cultivated land.

In the reasons for judgment the Magistrate says that if the Defendant knew who the owner was he should have taken the animal to him before impounding it and if he did not know he should have taken it to the Headman.

The Defendant was under no obligation to take the horse to the Headman.

There is no specific finding by the Court below that at the time of the trespass the Defendant knew the owner of the horse. In fact it is clear from the Magistrate's reasons that he, the Magistrate, entertained some doubt as to the Defendant's knowledge of the ownership at that time.

In the opinion of this Court the Plaintiff has failed to prove that the Defendant knew to whom the horse belonged. He was therefore justified in impounding it.

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

Umtata. 16th March, 1920. C. J. Warner, C.M.

SIMON MARAFANE vs. GEORGE SITOLE.

(Umtata. Case No. 9 1920.)

"Ubulunga" custom—Christian Natives—"Ubulunga" cattle driven by man from kraal of sender—"Xoma" cattle—Credibility.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: The sole question for decision in this case is whether the cattle in dispute are "ubulunga" cattle or whether the original cow of which they are the progeny was merely lent to Appellant's daughter for milking purposes.

The evidence on this point is conflicting, and this Court is very averse to disturbing the judgment of a lower court on a question of credibility of evidence, especially when the judgment of a Magistrate of considerable experience, as in this case, is challenged.

There are however some factors in this case which, apart from the evidence, lend colour to the Appellant's contention that the cattle are not "ubulunga."

The first of these is that all the parties concerned are Christian Natives, and would not readily indulge in the Native superstition for which "ubulunga" cattle are supposed to be the remedy. The Native Assessors who have been consulted state they know of no case in which a Native Christian has given his daughter an "ubulunga" animal.

Another point is that it is admitted the cattle were driven from Appellant to the Respondent's kraal by the father of the latter during the absence of the Respondent, and soon after Respondent's wife had visited her father.

The Native Assessors state that an "ubulunga" beast is invariably driven by a man of the kraal of the sender of it; and the fact that in this case Respondent's father drove the cattle indicates they were "nqoma" and not "ubulunga."

For these reasons this Court considers that Respondent failed to satisfy the onus which was in him to prove that the cattle in dispute are ubulunga.

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

Lusikisiki. 20th August, 1919. C. J. Warner, C.M.

MBALEKWA vs. SAM.

(Flagstaff. Case No. 81/1918.)

"Ubulunga" custom—Known and practised in Pondoland—"Nqakwe" beast.

In this case the Plaintiff sued the Defendant for certain three head of cattle which he alleged were the increase of a certain cow handed to Mambovane, the wife of one Mditshwa, deceased, to whom Defendant was alleged to be nephew and heir. The cow was said to have been handed to Mambovane as "temporary 'ubulunga.'" Defendant admitted that the cow in question was handed over to Mambovane, but denied that it was an "ubulunga" beast. He stated that it was a "nqakwe" beast. The Plaintiff in this case was the brother of the woman, Mambovane, and the cow had been handed over to her by her late father, Sirapu, to whom the Plaintiff was heir. The Magistrate gave judgment for the Plaintiff as prayed with costs. The Defendant appealed on the ground that the "ubulunga" custom was unknown in Pondoland, and that the beast in question was a "nqakwe" beast, which became the absolute property of the husband.

JUDGMENT.

By President: The appeal is on the ground that the custom of handing a beast to a woman as "ubulunga" is unknown in Eastern Pondoland, and that the beast described in this case was a "nqakwe" animal. On the question being put to the Native Assessors they state that the custom of "ubulunga" is known amongst the Pondos and practised, and that "nqakwe" is not a beast but a younger sister of the bride, who accompanies her on her marriage as a companion.

The appeal is dismissed with costs.

Note: According to Kropf's Kafir-English Dictionary, "i-nqakwe" is "dowry given by parents to a daughter going to her new home."

Butterworth. 26th November, 1918. J. B. Moffat, C.M.

ELIZA MALINDE vs. ISAAC MPINDA.

(Tsomo. Case No. 5/1918.)

"Ubulunga"—"Ubulunga" cattle are the property of the husband, and on his death become the property of the heir—Wife's disposal of progeny by will invalid—Earnings of unmarried woman of full age—Estate.

Action for a declaration of rights in connection with the estate of the deceased father of the Plaintiff. The Plaintiff was the eldest son and heir of the Right Hand House of the late Mpinda Malinde, the Defendant being a spinster of full age, a daughter of the Great House of the deceased. The Defendant pleaded that the stock claimed was her late mother's property, and was left to her by will dated the 30th November, 1908. The Plaintiff replied that even if this were so the will would be void inasmuch as the Defendant's deceased mother had no power or right in law to bequeath such property. It was admitted that the property in question was (1) the progeny of an "ubulunga" beast handed to the deceased woman, and (2) the progeny of sheep purchased from the earnings of the Defendant and handed by her to her deceased mother. It was further admitted that Defendant earned the money with which the sheep were bought after the death of her father and when she was of the full age of 21 years. The Magistrate gave judgment for Plaintiff for 10 head of cattle, and for the Defendant in respect of the sheep claimed. The Defendant appealed as regards the judgment for the cattle.

Judgment.

By President: The Plaintiff in this case is the son and heir in the Right Hand House of the late Mpinda Malinde.

There is no heir in the late Mpinda's Great House. Consequently the Plaintiff is heir to the estate of the late Mpinda.

It is admitted that the cattle in question are the progeny of an "ubulunga" beast handed to Sarah, wife of the Great House. Defendant is Sarah's daughter, and contends that the cattle are her property having been bequeathed to her by her mother.

The Magistrate decided that the progeny of the "ubulunga" beast belong to the estate of the late Mpinda, and gave judgment for Plaintiff for the cattle.

This decision is in accord with the judgment of this Court in the case of *Nomanti* vs. *Zangginggi* in July, 1913 (3 N.A.C., 283), in which the Court held that on the death of the husband the "ubulunga" beast and its progeny become the property of his heir.

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

Umtata. 21st July, 1921 T W. C. Norton, A.C.M.

MANTYI DYANTYI vs. PIPI DINISO.

(Engcobo. Case No. 58/1921.)

Ubulunga custom—Temporary ubulunga beast—Property in—Ukufakwa.

In this case the Plaintiff sought to recover a certain heifer delivered to his daughter, widow of Defendant's father, as a temporary "ubulunga" beast, on the ground that Defendant had wrongfully taken possession of the beast after his father's death.

The Defendant pleaded that on the death of the husband the beast became a permanent "ubulunga" beast and that if removed it should be replaced by another beast. The Magistrate gave judgment of absolution, and the Plaintiff appealed.

JUDGMENT.

By President: Appellant sues Respondent for a cow alleging that some years ago he delivered this animal to his daughter as a temporary "ubulunga."

Respondent denies this and claims that this beast was allotted to his late father under custom of "ukufakwa," and further pleads that even had the beast been given as a temporary "ubulunga" it became a permanent "ubulunga" on the death of the husband to whose wife it had been given.

The Native Assessors state:—

(1) A temporary "ubulunga" does not become permanent on the death of the husband.

(2) A temporary "ubulunga" beast cannot be removed until it is replaced by a permanent beast.

(3) The only person who can claim restoration of a temporary "ubulunga" beast in the circumstances such as arise in the present case is the widow.

In view of the statements made by the Assessors it is clear that Appellant cannot succeed.

In these circumstances the appeal will be dismissed with costs.

Kokstad. 1st September, 1919. C. J. Warner, C.M.

NOMBUYANA vs. NTUNTU AND MTYIBILI.

(Tsolo. Case No. 70/1919.)

Ubulunga Custom—Widow's rights to ubulunga cattle—Pondomise Custom—Exception—Plea—Estate.

The Plaintiff, Nombuyana, a widow, sued the Defendant, Ntuntu, a minor, assisted by his guardian, Mtyibili, heir to the estate of her late father, Mhlati, for certain cattle alleged to be the progeny of an "ubulunga" beast given to Plaintiff by her

late father, Mhlati. Plaintiff stated that Mhlati originally gave her a black and white heifer as an "ubulunga" beast, and that this beast had increased to five at the time of her husband's death, when she returned to her father's kraal with the cattle. In or about the year 1908, the late Mhlati gave her a black and white heifer from this five head of cattle, and she alleged that this beast according to Pondomise Custom became her absolute property, together with the increase thereof. This heifer had since increased to four. In 1918 Mhlati died, and the Defendant, his son and heir, took possession of these cattle and refused to restore them to her. Defendant excepted to the summons as being vague and embarrassing, and further that if an "ubulunga beast was given to Plaintiff by her late father such beast would become the property of Plaintiff and her late husband, together with its increase, and in these circumstances it would not be possible for the late Mhlati to have "given" Plaintiff the black and white heifer from the increase. Defendant also pleaded over denying that a beast was ever given to Plaintiff by Mhlati, but admitting the Pondomise Custom as stated. He further stated that it was contradictory to Pondomise Custom to give a widow (who has returned to her father's kraal) an "ubulunga" beast. The Magistrate gave the following judgment after hearing evidence:—

(*a*) The cattle are declared to be increase of "ubulunga" cattle, and the property of the plaintiff's late husband.

(*b*) The Plaintiff is entitled to custody of the cattle claimed jointly with her minor son, the heir of her husband in accordance with law.

(*c*) Judgment will be for Plaintiff for the cattle or their value £15 each with costs.

The Defendant appealed.

JUDGMENT.

By President: The Native Assessors, to whom the issues in this case are submitted, state that if a widow returns to her father with her "ubulunga" cattle and her children, she may keep the cattle for the maintenance of herself and her children, or if her father retakes possession of the cattle he may allot one or more to her, and any cattle so allotted become the absolute property of the widow for the support of herself and her children.

The Magistrate was therefore correct in holding that Respondent is entitled to the custody of the cattle claimed, and as that portion of the judgment declaring the cattle to be the property of the estate of Respondent's late husband does not affect the rights of Appellant who has no right whatever in the cattle in dispute, but is a matter affecting the Respondent and the heir to her late husband's estate this Court does not understand the reasons for the third ground of appeal.

The appeal is dismissed with costs.

Note: The third ground of appeal was as follows: "The judgment is bad in law in that as the Magistrate found that the cattle were increase of "ubulunga" beast, they are not the property

of Plaintiff, but of her late husband's estate, and Plaintiff could not be declared entitled to such cattle, Plaintiff could only sue in her own name for the actual 'ubulunga' cattle."

Note that in the above case the woman was claiming against the heir to *her father's estate*, not the heir to *her husband's estate*. The Magistrate found that the cattle claimed, being "ubulunga" cattle were the property of the woman's late husband (see case of *Eliza Malinde* vs. *Isaac Mpinda* on page 364 of these Reports), but that the woman was entitled, with her husband's heir, to the custody of the cattle. In the case which follows (*Noziquku Gobo* vs. *Honone Mpiyabo*, reported below), where a woman similarly sued her father's heir, an exception was taken that the woman was not the correct person to sue, and that the correct person was the heir to the estate of her late husband. The Plaintiff then applied for leave to join the heir as co-Plaintiff. This was refused by the Magistrate, but on appeal it was held that the application, having been made before the exception was ruled upon, should have been granted.

Umtata. 24th July, 1920. W. T. Welsh, Ag.C.M.

NOZIQUKU GOBO vs. HONONE MPIYABO.

(Umtata. Case No. 184/1920.)

Ubulunga cattle—Woman's rights in ubulunga cattle are limited—Practice—Exception—Application to join eldest son of widow as co Plaintiff.

This was an action by a widow, Noziquku Gobo, to recover a certain cow and calf, originating from a beast which Plaintiff stated had been given to her by her father as an "ubulunga" beast a few years before rinderpest. The Defendant was sued as the son and heir of Plaintiff's late father, Mpiyabo. The Defendant excepted that inasmuch as the cattle claimed were alleged to be the progeny of an "ubulunga" beast, such cattle would belong to the estate of the late Gobo, husband of the Plaintiff, and that the correct person to maintain the action would be the heir or administrator of the late Gobo's estate. He further pleaded over, and denied that the cow claimed was the progeny of an "ubulunga" beast given to Plaintiff. The Plaintiff's attorney then applied to have Plaintiff's son joined in the action as co-Plaintiff The son was in Court when the application was made, and he made no personal application to be joined in the action. The Magistrate held that he could not entertain the application, failing application by the son himself. The Magistrate then upheld the Defendant's exception with costs, and the Plaintiff appealed on the grounds that the Magistrate erred in allowing the exception, and that he should have allowed the application for leave to amend the summons by joining the Plaintiff's eldest son as a co-Plaintiff. The Magistrate supported his ruling on the exception by reference to the case of *Nomantyi* vs. *Zanggingqi* (3 N.A.C., 283).

JUDGMENT.

By President: The Plaintiff appeals on two grounds:—

(1) That the Magistrate erred in allowing the exception taken by the Defendant that the proper person to maintain the action is the heir or administrator of the estate of the late Gobo, the Plaintiff's husband.

(2) That the application for leave to amend the summons by joining the Plaintiff's eldest son as Co-Plaintiff should have been allowed.

According to the opinion of the Native Assessors the Plaintiff's rights in the "ubulunga" cattle are limited, and she would have to consult her husband or his heir before dealing with them.

In the view however which this Court takes of the appeal against the first ruling it is unnecessary to decide the appeal against the second ruling of the Magistrate, *viz.*:

On the exception. On the application for leave to join the heir which was made before the exception was ruled upon the Magistrate appears to have taken the view that this was made on his behalf, and that he not being before the Court such request could not be entertained. It would appear, however, that the application was on behalf of the Plaintiff, and that all that was required was a short adjournment in order to obtain and file a power joining the heir of Gobo's estate. This the Respondent's attorney admits was applied for and refused though it does not appear on the record.

In the opinion of this Court it would have been only in reason to have allowed the Plaintiff an opportunity of joining her heir, if he consented.

This application having been made before the exception was ruled upon should in the opinion of this Court have been granted, in which case the exception might have fallen away.

This Court is of opinion that it is in the interests of justice and will save costs to send the case back.

The appeal will accordingly be allowed, the proceedings subsequent to the application to join the Plaintiff's son set aside and the case returned for the application to be dealt with afresh. The costs in the court below to abide the issue. There will be no order in regard to the costs of appeal.

Umtata. 15th March, 1920. C. J. Warner, C.M.

MTAKATYA NKETHLENI vs. BOKOLO MLANJENI.

(Umtata. Case No. 340/1919.)

Ukufakwa Custom—Not contrary to custom for a contributor to receive more than one beast from a girl's dowry if his contributions exceed the value of one beast—Alternative value of cattle in dowry cases.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: Respondent sued Appellant in the court below for two head of cattle which he alleged the Appellant owed him for certain advances made by him from time to time for which the Appellant contracted to give him two head of cattle when his daughter should be married. This is a common form of contract among Natives and is well known and recognised in our courts, and in case of any dispute requires to be proved in the same manner as any other kind of contract.

The Respondent's claim and the circumstances of the case are somewhat unusual, but the Magistrate who tried the case and had the witnesses before him, found that the Respondent had proved his claim.

This Court sees no reason for holding a different view and considers the Respondent has proved his claim to two head of cattle, and so far as this Court is aware,it is not contrary to Native Custom of "Ukufakwa" for a contributor to receive more than one beast from a girl's dowry if his contributions exceed the value of one beast.

As regards the fourth ground of appeal the evidence shows that Appellant has received eight head of cattle as dowry for his daughter, consequently if he considers the valuation placed upon the cattle claimed by Respondent excessive he may hand over some of the cattle which are in existence.

The circumstances of the case of *Solani Mangolo* vs. *Madumba Mpesheya* heard in this Court, and quoted by Appellant's attorney in argument on the 24th July, 1916,† were different from this.

In that case the contract was made between the parties in 1909 when cattle were valued at £5 each, and of the three head of cattle received as dowry two head died.

With regard to the 5th, 6th, and 7th ground of appeal the Magistrate who tried the case did not accept the evidence of Appellant as to the spoliation and this Court agrees with his finding.

The appeal is therefore dismissed with costs.

Umtata. 16th March, 1920. C. J. Warner, C.M.

NOGQALA TITI vs. MANYOSI TITI.

(Mqanduli. Case No. 452/1919.)

Ukufakwa Custom—When girl dies before marriage claim to dowry under the ukufakwa custom may be enforced against the dowry of the next sister and so on.

The essential facts of the case are set forth in the judgment of the Native Appeal Court.

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† Not Reported.

JUDGMENT.

By President: This is a case arising out of the Native Custom of "ukufakwa."

The parties are brothers, and after summons and pleadings had been been filed the following statement of facts agreed upon by the parties was submitted to the judgment of the Magistrate.

(1) It is admitted that Defendant received the value of four cattle from Plaintiff, and placed Plaintiff under "ukufakwa" custom to one Nombukucane.

(2) That when Nombukucane was married Defendant paid Plaintiff four cattle out of her dowry in settlement of his claim.

(3) That subsequently Nombukucane's marriage was dissolved and her husband's (Zikata) dowry was returned, Plaintiff restoring the four cattle paid to him by Defendant, keeping one of the increase.

(4) That on this dissolution Plaintiff and Defendant agreed that as the said Nombukucane was to be remarried to Ngquze, Plaintiff should get four cattle out of the dowry to be paid by Ngquze.

(5) That it is admitted that Defendant had two other daughters at that time for which he has lately received dowry, but it was not agreed that Defendant should at any time repay Plaintiff out of the dowry of these two girls.

(6) That before the marriage of Nombukucane to Ngquze could be consummated she died.

The Court is therefore asked to decide on the foregoing admitted facts, whether Plaintiff has according to Native Custom any claim against Defendant or not in respect of the dowries of the two mentioned girls, and to enter judgment in terms of its ruling.

The Magistrate gave judgment for Defendant and the appeal is against this ruling.

The points at issue were put before the Native Assessors (six) who unanimously state that a man who has been put into the dowry ("fakwa") of a girl, if the girl dies before marriage, can enforce his claim against the dowry of the next sister and so on to the last child.

In view of this opinion this Court holds that Appellant is entitled to be reimbursed from the dowries obtained for Respondent's remaining daughters.

The appeal is allowed with costs and the judgment of the court below is altered to judgment for Plaintiff for four head of cattle or £40 and costs.

Umtata. 18th March, 1918. J. B. Moffat, C.M.

MPURWANA TYATUZA vs. MZONDENI VINJWA.

(Umtata. Case No. 384/1917.)

Ukufakwa Custom—Formalities—Question whether contract is ordinary contract of loan or an ukufakwa contract.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

Judgment.

By President: The claim is for three head of cattle or their value said to be payable by Defendant in respect of an "ukufakwa" contract entered into about 1896, between Defendant's father Vinjwa and Plaintiff.

The Defendant admits that Vinjwa received three head of cattle from Plaintiff, but he denies that there was an "ukufakwa" contract, and states that shortly after about 1897 he paid Plaintiff £9 in full settlement of his claim.

The Plaintiff alleges in his summons that two head were given as ordinary loans, and that it was only when the third animal was given that Vinjwa agreed to repay the three head out of the dowry of the elder daughter from his marriage with Mantondo for the dowry for whom the third beast was paid.

The Magistrate in giving his reasons says the Court had to be guided by the probabilities.

So far as the alleged "ukufakwa" contract is concerned the probabilities are against such a contract.

The witness Ndabayitetwa says Vinjwa called him to help him in persuading Plaintiff to lend him the third beast, and that Plaintiff was unwilling to do so as Vinjwa already owed him two head, and that on Vinjwa saying that he would pay the three head out of the dowry of the child of the woman he was marrying. Plaintiff consented and gave the beast. He says that no one else was called to hear the argument.

It is most unlikely that an "ukufakwa" contract would have been entered into with only one person present besides the parties.

Reviewing all the circumstances this Court can come to no other conclusion than that the transactions were ordinary loans and that there was no "ukufakwa" contract.

As regards the alleged repayment, as there was no "ukufakwa" contract the Plaintiff would not have waited twenty years without claiming repayment.

The evidence in support of the alleged repayment in spite of certain minor discrepancies supports Defendant's allegation as to repayment sufficiently to justify a judgment in his favour.

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

Lusikisiki. 1st April, 1921. W. T. Welsh, C.M.

LANGAKA MPONGOMO vs. LUVOBANA.

(Lusikisiki. Case No. 168/1920.)

Ukufakwa Custom—Custom obtains in Pondoland—Exception.

Claim for 14 head of cattle or their value £70. Plaintiff alleged that he was the son and heir of the late Mpongoma, who in turn was the son of the late Mgingana, and that the Defendant was the son and heir of the late Mhlubulwana. The late Mgingana assisted the late Mhlubulwana in the payment of dowry for one Magqwaru, on the usual condition that he would be reimbursed upon the marriage of a daughter born of the marriage with Magqwaru. The late Mgingana had also assisted the late Mhlubulwana in the payment of dowry for another woman, Mazangela, on the same conditions. From both these marriages there were daughters who had grown up and married, but the late Mhlubulwana had not reimbursed the dowry, and Plaintiff now held the Defendant liable as Mhlubulwana's son and heir. The Magistrate gave judgment for Plaintiff as prayed. The Defendant appealed on the ground "that the Defendant excepts to Plaintiff's summons on the grounds that it discloses no cause of action there being no custom amongst Pondo nation whereby the heir of an eldest son can claim any dowries paid by the grandfather or the dowries for the girls springing from marriages for which the grandfather has paid dowries."

JUDGMENT.

By President: It is argued that the custom of "ukufakwa" does not obtain in Pondoland. It has frequently been decided that it does, and in the opinion of this Court the Magistrate came to a correct conclusion. The appeal is dismissed with costs.

Butterworth. 2nd March, 1921. W. T. Welsh, C.M.

S. PEME vs. D. WAQU.

(Kentani. Case No. 142/1920.)

Widow—Seduction and pregnancy—No damages for intercourse with widow—Isinyaniso.

In this case the Plaintiff claimed the return of a certain horse which he alleged he had paid to Defendant as "isinyaniso," or as portion of the dowry for one Nonteto, a widow. He alleged that the Defendant had since given the widow in marriage to another man. The Defendant denied that the horse had been paid on account of dowry, but as a fine for the seduction and pregnancy of the woman by the Plaintiff. He also counterclaimed for the balance of the fine, viz., two head of cattle.

The Magistrate found that Nonteto had been previously married and that her husband had died shortly after marriage. She then returned to her people, but no dowry was restored. The Magistrate gave judgment for the Plaintiff, and the Defendant appealed.

JUDGMENT.

By President: It was laid down in most emphatic terms in the case of *Jama* vs. *Veldman* (1 N.A.C., 107) that damages are not recoverable for intercourse with a widow.

The Magistrate found that the horse was paid as dowry and not as a fine, and this finding which is supported by evidence, is consistent with Native Custom as stated by this Court in the case quoted.

The appeal is accordingly dismissed with costs.

Flagstaff. 27th August, 1918. J. B. Moffat, C.M.

NOBULONGWE MASIPULA vs. MAKAWINI MASIPULA.

(Flagstaff. Case No. 46/1918.)

Wives, ranking of—Pondo Custom—Paramount Chief has right to nominate his Great Wife—In all other cases the first wife married is the Great Wife—Estate—Guardianship.

The Plaintiff stated that he was the eldest son of the late Masipula, a Chief by birth and a Headman by appointment, and that the Defendant was his half brother by a different house. He alleged that on the death of the late Masipula, the Defendant took possession of certain articles, the personal property and the insignia of rank of the deceased. Plaintiff also claimed to be entitled to the guardianship of certain girls and the dowries paid for them. Defendant denied that the Plaintiff was eldest son and heir of the Great House or that he was entitled to the guardianship of the girls in question or their dowries. He (Defendant) claimed that he was son and heir of the Great House and therefore entitled to the property claimed. From statements put in it appeared that the late Masipula was a son of the Paramount Chief Mqikela by a minor hut, and that the first wife married was Madobe, mother of the Plaintiff. Defendant admitted that Masipula married Madobe first, but asserted that at this time negotiations were in progress for the marriage of Masipula to his (Defendant's) mother, Matyali, and that on Matyali's arrival she was regarded as the Great Wife. The Magistrate held that the first wife married was the Great Wife. The Defendant appealed on the ground that the Magistrate was wrong in holding that the first wife of a man of the late Masipula's standing (a son of the then paramount Chief Mqikela) should be regarded as the Great Wife irrespective of the circumstances under which she was married and irrespective of the declared intentions of the parties at the time.

JUDGMENT.

By President: In this case Plaintiff claims from Defendant certain property belonging to the Great House of the late Chief Masipula.

The parties are sons of Masipula by different wives.

On the case coming on for hearing Defendant's attorney admitted that Defendant's mother arrived at Masipula's kraal after Plaintiff's mother, but stated that negotiations for the marriage of Defendant's mother were commenced first, and that it was arranged that she should be the Chief Wife, that she was married as Chief Wife and treated and regarded as such up to Masipula's death, and that when she arrived at the Chief's kraal the Plaintiff's mother was already there and married to Masipula.

A written statement containing allegations and replies by the parties was then put in by the attorney for the Plaintiff, and a reply on behalf of the Defendant was put in by his attorney. No evidence was taken in support of these statements or denials The Plaintiff's attorney then asked the Court to rule whether the first wife married is the Great Wife irrespective of circumstances. The Court, after recording that Masipula is the son of Mqikela in a minor hut, held that the first wife married is the Great Wife.

The appeal now brought is against this ruling. While the general rule is as stated by the Magistrate there are instances in which it has been departed from, one of which in Eastern Pondoland is mentioned in the judgment of *Vikilahle* vs. *Zulwaliteli* (1 Henkel, p. 77).

Whether the present case is one which an exception was made or not can only be decided on evidence as to the circumstances under which the marriages were arranged. There is no evidence before the Court to enable it to deal with the allegations made in this case.

In view of the question put to the Magistrate, and from his reasons for judgment it must be taken that he intended to rule that under no circumstances can the second wife be the Great Wife.

In view of what is stated above, this ruling must be set aside and the case is returned to the Magistrate to be heard on its merits.

The Respondent is order to pay costs of appeal.

Postea, Lusikisiki, 19th August, 1919.

The Magistrate, after hearing evidence in the above case, gave judgment for the Plaintiff, and the Defendant appealed on the grounds that the judgment was against the weight of evidence and not in accordance with Native Custom. The appeal was heard at Lusikisiki on the 19th August, 1919, before Mr. C. J. Warner, Chief Magistrate. The appeal was dismissed with costs, the judgment stating, *inter alia*:—

> "The Court does not appear to have considered the Native Assessors on the Pondo Law affecting this case in coming to the decision recorded above (viz., the Native Appeal Court judgment of 27th August, 1918).
>
> A great deal of evidence on Pondo Customs bearing on this case has been led.

The Native Assessors, to whom the questions at issue were submitted, are emphatic that in Pondo Law only the Paramount Chief has the right to nominate his Great Wife, that in all other cases the wife first married is the Great Wife, and that even if a Paramount Chief in a case of this nature nominated another wife as the Great Wife such nomination would be of no effect, as contrary to law. This view is in accordance with previous reported decisions of this Court."

Under these circumstances the appeal is dismissed with costs.

Note: As far as Pondo Law is concerned the later judgment of the Native Appeal Court must be taken as upholding the Magistrate's ruling in the original case, and that there are no exceptions to the rule that with persons other than the Paramount Chief the first wife married is the Great Wife.

Kokstad. 8th April, 1920. T. W. C. Norton, Ag. C.M.

TYELINZIMA vs. SANGQU.

(Mount Frere. Case No. 96/1919.)

Wives, ranking of—Great Wife of Chief chosen by the tribe—Xesibe Tribe—Xiba Custom—Seed raiser—Family traditions Evidence of elders—Chief cannot move his Great Place.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

Judgment.

By President: In this case Tyelinzima, Appellant, sued Sangqu, his father, for a declaration of rights, claiming that he is Respondent's chief son and heir and successor to Respondent as Chief of the Xesibe Tribe in the Mount Frere District.

The defence is that Appellant is merely the eldest son of a minor house.

From the evidence adduced on behalf of Appellant it would seem that, according to custom, he claims actually to be the Chief and that his father, Respondent, was merely a seed-raiser and nothing more.

There is considerable conflict between the various witnesses for Appellant, who gave several versions of custom and also of Appellant's position.

The facts seem to indicate the existence amongst the Xesibes of the Xiba Custom known to other tribes, where a grandson is provided with a wife from his grandfather's stock and succeeds to the property of the kraal (*Jonginamba* vs. *Mva Jonginamba*, (1 N.A.C. 104).

It has been laid down as a principle that the Great Wife of a Chief is chosen by the tribe and her dowry provided by them. She is seldom the first wife. In the case of a commoner the first wife is the Great Wife. Appellant's mother's dowry was not

provided by the tribe but by Sodlala after Sangqu had abducted her. Plaintiff alleges in his summons that his mother is the Great Wife of Sangqu.

If a Chief be without an heir he would marry a seed-bearer to his Great House or transfer a son from a minor house to the Great House.

In the opinion of this Court the evidence establishes the fact that Hawu was placed in the Great House as heir, and that Sangqu (his son) succeeded to the Chieftainship.

The Court considers that the following facts are established.

(1) That Mamkizani is the Great Wife of Sangqu and consequently Mbuyiswa is his heir.

(2) That Appellant has failed in his claim, and in fact that claim as revealed in the evidence is not as alleged in the summons, but is a claim to be the direct heir of the late Sodladla.

This latter claim fails entirely owing to evidence of Plaintiff's own witnesses.

The details of custom appertaining to the tribe in question have been exhaustively gone into by the Magistrate, and this Court sees no reason to disagree with the conclusions he deduces therefrom.

The evidence of Mngem and Mfeti, the elders of the family, was properly accorded great weight by the Magistrate: family traditions are usually honestly stated by such men . . . .

The question as to whether a Chief can remove his Great Place was put to the Assessors, who state that this cannot be done. As the Chief in question is only of very minor rank and of little importance, his chief kraal can scarcely be designated a Great Place.

Appeal is dismissed with costs.

Umtata. 13th February, 1919. C. J. Warner, C.M.

NZONDA KWAZA vs. NDALANA KWAZA.

(Engcobo. Case No. 94/1918.)

Wives, ranking of—Unusual for a wife to be placed in a house where there is already an heir.

The facts of the case are immaterial.

EXTRACT FROM JUDGMENT.

By President: . . . . The Native Assessors state it is most unusual for a wife to be married into a house where there is already an heir, and when this is done the wife so married to replace a dead wife who has left an heir is invariably taken from the family of the late wife. The Court agrees with this view . . . .

The remainder of the judgment is immaterial.

Butterworth. 11th March, 1919. C. J. Warner, C.M.

JACOB MATSHAYI vs. NKWENKWE NGCATU.

(Tsomo. Case No. 191/1918.)

Wives, ranking of—Not customary to marry a wife into a house where there is already a son—Appeal—Grounds of appeal must be explicitly stated—Dikazi—Postponement to procure services of attorney.

Plaintiff, Jacob Matshayi, as heir of his father, the late Matshayi, sued the Defendant, whom he alleged to be an illegitimate son of one Nosara, whom the late Matshayi married by Native Law and Custom in or about 1896, and who deserted Matshayi in or about 1902, and who took up her residence with Defendant, for six head of cattle or their value, £45, being the dowry paid to Defendant for one Gxotiwe, a daughter of the late Matshayi's marriage with Nosara. That Defendant denied the marriage between the late Matshayi and Nosara, and stated that Gxotiwe was the daughter of his (Defendant's) father: he claimed the six head of cattle paid for Gxotiwe as the property of his father, who was still alive. The Magistrate believed the Plaintiff, and gave judgment accordingly for the six head of cattle or their value, £45. The Defendant appealed.

JUDGMENT.

By President: No grounds of appeal are stated in Appellant's letter noting an appeal. Section 6 of Proclamation No. 391 of 1894, as amended by Proclamation No. 144 of 1915 reads: "Any person intending to appeal to the Court shall, by notice in writing, signed or marked by the Appellant or his authorised agent, and duly stamped in manner hereinafter provided, within 14 days after the decision complained of, make known his intention to the Clerk of the Court in which the case has been decided, and shall explicitly state in writing the special grounds on which his appeal is based . . . . provided further, that the hearing of the appeal, except where the Appellant is not represented in the Appeal Court or in the court below." The meaning of this is clear: that the Appellant must state in writing his grounds of appeal even if not represented in the court below. As, however, no exception was taken this Court allowed the appeal to proceed.

The first ground of appeal taken in this Court is on the refusal of the Magistrate to allow Appellant's application for a postponement in order to procure the services of an attorney. This Court does not consider that the appeal should be allowed on this ground.

The second ground of appeal is that the summons does not allege nor does the evidence disclose, on what grounds Plaintiff claims to be heir to Nosara's house, and further that the marriage between Plaintiff's father and Nosara has not been satisfactorily proved.

Even assuming there was a marriage between Plaintiff's father and the woman Nosara it does not follow that Plaintiff is entitled to the dowry of Nosara's daughters as heir to his father.

It is not Native Custom to marry a wife into the house of a deceased wife if there is a son in such house, and the fact that one of the Plaintiff's witnesses states that he was engaged to build a hut for Nosara indicates that she was not married into the house of Plaintiff's deceased mother.

To succeed in his claim the Plaintiff would therefore have to show on what grounds he seeks to establish his claim. This he has failed to do. The appeal is accordingly allowed with costs, and the judgment in the court below is altered to absolution from the instance, with costs.

Note: The record shows that Defendant's application for a postponement in order to procure the services of an attorney was made at the close of the Plaintiff's case. Plaintiff's attorney opposed the application and the Magistrate refused it.

Plaintiff in his evidence stated that when his mother died his father married Nosara, and had two children by her. When his father married Nosara she already had children: she was suckling the Defendant at the time. His father paid three head of cattle for her: she was a "dikazi."

Butterworth. 12th March, 1918. J. B. Moffat, C.M.

MGUDHLWA vs. PALISO.

(Kentani. Case No. 318/1917.)

Qadi House—Appointment of Qadi Wife—Dowry paid by Great or Right Hand House for third wife—Formalities required for appointment of third wife as Qadi of the Right Hand House.

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

JUDGMENT.

By President: The Native Assessors, being asked whether the custom of not placing a "qadi" wife in the Right Hand House before a "qadi" has been placed in the Great House is ever departed from, they reply that where the great house has no cattle and the Right Hand House has cattle, if they are paid for a third wife such third wife would be a "qadi" of the Right Hand House.

They state however that the placing of a "qadi" in the Right Hand House before there is one in the Great House would have to be formally and specially done at a meeting of the members of the family.

They state further that if both houses contribute to the dowry the woman would belong to the Great House, while if the Right Hand House paid the whole dowry she would belong to the Right Hand House subject to the necessary formalities of placing her there having been complied with.

The Magistrate states that he is satisfied that the Plaintiff's brother as his representative has paid hut tax and dipping fees for the Right Hand House and has had control of the cattle.

The woman has until recently lived at her late husband's kraal where the cattle have apparently been although the latter point is not quite clear.

The points to be considered are first, whether the proper formalities of placing the third wife in the Right Hand House were observed, and second, which house paid the dowry.

There is no evidence on the record of the first point.

On the second point the Plaintiff and Mohala simply say that the dowry, without specifying any number, was paid by the Right Hand House.

Defendant and the third wife of the late Puqenge say that eight head were paid, and Defendant says four were paid by each house.

Whatever may be the truth on this point in the absence of any evidence that the woman was formally placed in the Right Hand House this Court cannot support the Magistrate's decision that the woman is a " qadi " of the Right Hand House.

The appeal is therefore allowed with costs. As it is possible that the Plaintiff may be able to bring stronger evidence than that on the record to support his claim the Magistrate's judgment will be altered to absolution from the instance with costs.

Butterworth. 9th November, 1921. T. W. C. Norton, A.C.M.

NGWENDUNA vs. DUBULA.

(Idutywa. Case No. 164/1921.)

Wives, ranking of—Not customary for the Right Hand House to have a Qadi wife before the Great House is provided with one —Estate—Mere absence of heirs for a long period does not create a presumption of death.

The Plaintiff, Ngwenduna, stated that he was the eldest son of the " qadi " of the Great House of his late father (Mqatane), the eldest son of the Great House having disappeared some 20 years previously. There was no surviving son in the Great House; Defendant was the eldest son and heir of Mqatane's Right Hand House. Plaintiff alleged that Defendant had possessed himself of the property of the Great House, to which Plaintiff was entitled as heir to that house. The Defendant alleged that there were two sons of Mqatane's Great House. They resided at Rode, but he had not heard of them for over 20 years, and could not say whether they were alive or dead. He further alleged that Plaintiff's mother was not married into the Great House but into the Right Hand House. He denied that Plaintiff was heir to the Great House. The Magistrate held that in the circumstances of the case the Plaintiff's mother could not be considered as " qadi " of the Great House, and in any case he could not say that Plaintiff was heir of the Great House without further proof of the absence of issue in the Great House itself. He gave judgment of absolution from the instance with costs. The Plaintiff appealed on the grounds that

the Magistrate erred in holding that the mother of the Plaintiff was the " qadi " of the Right Hand House instead of " qadi " of the Great House, and that he also erred in refusing to presume the death of the heir of the Great House of the late Mqatane, he not having been heard of for a period of over 30 years.

JUDGMENT.

By President: Two points arise for decision in this case: —

(1) Is Appellant the eldest son of the "qadi" wife of the Great House of late Mqatane or of the Right Hand House?

(2) Is the Court justified in presuming the death of the heir of the Great House of late Mqatane?

The Magistrate has absolved the Defendant, but in his reasons finds that Appellant's mother was a " qadi " of the Right Hand House. Appellant contends that in so finding the Magistrate has put him out of Court in case he should be able to satisfy the Court by evidence that presumption of the death of the heir to the Great House is justified.

From Respondent's own evidence and that of his witness Zilani, it is clear that after paying for the dowry of the admitted Right Hand Wife Mqatane still possessed some stock, that is Great House stock, as is was acquired before he married a Right Hand Wife, and that this stock was used to pay the dowry of the Appellant's mother.

As is laid down in 1 N.A.C., 60 (*Peto* vs. *Metanzima*) and Meaker, 301 (*Peter Foywana* vs. *Tsomo Foywana*), it is not in accordance with custom for a Right Hand House to have a " qadi " until the Great House is provided with one. There can be no doubt in this case that Appellant is correct in his contention that he is the eldest son of the " qadi " to his late father's Great House, and to this extent this Court does not agree with the finding of the Magistrate as set out in his reasons.

With respect to the second point this Court, following the ruling in *Maranuka* vs. *Somdakakazi*, heard at the last sitting of this Court, considers that as there is only evidence that the heirs of the Great House have not been heard of for years, it is not justified in presuming death merely because of prolonged absence, even for a period extending, as in this case, to 20 or 30 years, as it is certain that when a son of the Great House visited his father, the late Mqatane, and obtained a cow and calf to assist him in his marriage, the family must have known where this man resided at that time.

While Rode is, as has been pressed in argument, a vague locality, so large as to make it practically impossible for Natives to trace a lost relative therein, evidence could and should be obtainable from the locality to which that cow and calf were to be taken.

Respondent's contention that Appellant had no right to claim a declaration against one who did not challenge his rights is incorrect, as Respondent put Appellant to the proof that he was heir

of the "qadi" of the Great House by denying that allegation in the summons.

In allowing the appeal with costs the judgment in the court below will be altered to "Plaintiff declared heir to the "qadi" of the Great House of late Mqatane with costs," and as regards the rest of the claim the judgment of absolution will stand.

Umtata. 19th March, 1920. C. J. Warner, C.M.

NTLANGWENI vs. MKWABANE.

(Qumbu. Case No. 96/1919.)

Wives, ranking of—Seed-raiser—Conflict between Tembu and Pondomise Custom.

The essential facts of the case are sufficiently clear from the judgment of the Native Appeal Court.

Judgment.

By President: The question at issue in this case is whether the woman Mamco was married as Right Hand Wife of the late Rougwana or was married as seed-raiser to his first wife.

The Magistrate found on the evidence that she had been married as seed-raiser, and there is very strong evidence to support this finding.

It is argued in this Court that it is contrary to Native Custom for a native to marry a wife as seed-raiser into a house where there is already an heir.

The question is submitted to the Native Assessors, who are divided in opinion. The Tembus state that if it is sought to marry a seed-bearer into a house where there is an heir the girl so married as invariably of the same kraal as the first wife. The Pondomise Assessors state that their custom differs in this respect from that of the Tembus in that a woman who is a stranger to the first wife may be married as seed-raiser to the first wife.

This latter opinion agrees with the judgment in the case of *Mbangwa* vs. *Simungumungwana*, heard on appeal from Qumbu in the Native Appeal Court sitting at Kokstad on the 12th May, 1913 (3 N.A.C., 271).

It would then seem that the judgment of the Court below is supported both by evidence and also by Pondomise Custom, and the appeal is dismissed with costs.

Note: The Tembu Custom stated above by the Tembu Assessors agrees with that stated by the Tembu Assessors in the case of *Nzonda Kwaza* vs. *Ndalana Kwaza*, on appeal from Engcobo, heard at the Native Appeal Court, Umtata, on 13th February, 1919 (page 376 of these Reports).

Umtata. 28th July, 1919. C. J. Warner, C.M.

JAMES FODO vs. NGOMBO FODO.

(Umtata. Case No. 443/1918.)

Wives, ranking of—Change of status—Dowry—Replacement of dowry paid by Great House for wife of subsidiary house—Isizinda wife—Allegations of fact contrary to Native Custom require conclusive proof.

The essential facts are sufficiently clear from the judgment of the Native Appeal Court.

JUDGMENT.

By President: Respondent sued Appellant in the Court below for (1) ten head of cattle, the dowry of one Nomahobe, and (2) two head of cattle he states are his property, and were unlawfully removed from his kraal by Appellant during his absence on active service.

Appellant and Respondent are the sons of the "qadi" of the Right Hand House and the Great House respectively of their late father, and Respondent alleges that his house was entitled to the dowry of the eldest daughter of Appellant's mother to replace the dowry cattle which were paid for her from the Great House, but that owing to this dowry being disposed of for other purposes an agreement was made that the Great House should have the dowry of Nomahobe the second daughter. The Magistrate gave judgment for Plaintiff on both these claims, and the appeal is against this judgment.

It is admitted by both parties that the dowry cattle obtained for the first daughter were paid as dowry for Appellant's wife. It is also admitted by Respondent that his father received the dowry cattle for the eldest daughter and passed them on to the Right Hand House, which paid them away as stated above about a year after.

Respondent's chief witness states in evidence that Appellant's mother was married as an "isizinda" wife, and almost immediately after marriage transferred to the house of the "qadi" of the Right Hand House when there were three children, their mother having left her kraal.

The Native Assessors state that the status of a wife may be changed, and that she may be assigned to another house than that to which she was married if there are good reasons for the change, and if the change of status or house is made at a public meeting of relatives.

The evidence in support of Respondent's claim to the dowry of Nomahobe is scanty and in the opinion of this Court insufficient to establish a claim principally based on allegations of facts which are contrary to Native Custom and in the opinion of this Court, Respondent has failed to prove his claim to these cattle.

The claim for the white cow and calf is on altogether a different footing, and in the opinion of this Court there is sufficient evidence to support the Magistrate's finding.

The appeal is allowed with costs and the judgment of the Court below is altered to read judgment for Plaintiff for the white cow and calf, or their value £12 10s. and £7 10s. respectively, and costs. Absolution from the instance in respect of the rest of Plaintiff's claim.