1929-1930

NATIVE APPEAL AND DIVORCE COURT

(CAPE AND O.F.S.)

V. 1-2

SELECTION OF CASES

DECIDED IN THE

NATIVE APPEAL AND DIVORCE COURT

(CAPE AND ORANGE FREE STATE DIVISION)

DURING THE YEAR

1930.

With Table of Cases and Alphabetical Index.

VOLUME II.

COMPILED BY

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ASSISTED BY

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ALPHABETICAL LIST OF LITIGANTS.

SUBJECT INDEX

SELECTION OF CASES

DECIDED IN THE

NATIVE APPEAL AND DIVORCE COURT

(CAPE AND ORANGE FREE STATE DIVISION, 1930).

NAUMA MOROKA v. MOROKA R. MOROKA.

(Thaba 'Nchu.)

1929. *December* 13. Before J. M. Young, President, V. E. P. Bradshaw and C. F. J. du Toit, Members.

Act No. 38 *of* 1927.—*Retrospectivity.—Barolong customary union in Orange Free State.*

Facts: Appeal from the Native Commissioner's Court, Thaba 'Nchu.

The parties to this appeal are Barolongs. They reside in the Thaba 'Nchu location in the District of Thaba 'Nchu in the Orange Free State Province.

The appellant, plaintiff in the Native Commissioner's Court, claimed:

1. The division of the joint estate according to Native custom.
2. Alternative relief.
3. Costs of suit.

She alleged: (*a*) That about the year 1899, she entered into a "customary union" with the respondent. (*b*) That in 1914 the respondent deserted her, that he has not cohabited with her since and that he has failed to maintain her.

No plea or answer to the summons was filed or recorded, nor was any evidence called or tendered by either side. After argument the Native Commissioner dismissed the summons with costs. He held, that the subject of the suit was not cognizable by his Court seeing that Act 38 of 1927 has no operative effect with regard to anything which arose prior to the date of its

commencement, and seeing that the alleged cause of action was (1) a "Native Customary Union" contracted in 1898 and (2) the desertion of the appellant by the respondent in 1914.

In his reasons for judgment he says that desertion is tantamount to dissolution of marriage amongst the Barolongs and that it is imperative that the appellant should be assisted by a male relative.

JUDGMENT: The first and most important question raised by the appeal is the effect of Act 38 of 1927. It has been argued on behalf of the respondent that the Act is not retrospective and that the "customary union" entered into by the parties in 1898 was not a binding or valid one because, at the time it was contracted, the laws of the Orange Free State Province did not recognise Native Custom and, that, as the union was dissolved in 1914 by the respondent's desertion, the appellant has no cause of action.

Now, it is undisputed law that no hardship or burden is created by an Act of Parliament except by the clearest and most direct and deliberate language and that, even when a hardship or burden has admittedly been created by such language, it will by interpretation, if permissible, be confined to the most limited scope consistent with such language. If the Act, No. 38 of 1927, creates burdens but is silent with regard to their incidence, the rules of interpretation limit them to such an extent that they have no effect prior to the date of the commencement of the Act, namely, the 1st of September, 1927. Our Acts, their authorisations, commands and prohibitions come into operation on the date of their promulgation in the *Gazette* unless a contrary intention is deliberately expressed in the Act itself with reference to the date of commencement of the Act or any part thereof. Chapter IV of the Act, which embraces secs. 9 to 21 inclusive, has been of force and effect since the 1st September, 1927, and, on that date it gave the protection of law to rights then existing and based on Native Custom. It also made cognizable by Courts of law obligations corresponding to such rights, subject to certain defined limitations. In other words, the authorizations, commands and prohibitions of Native Law theretofore ineffective came into effective existence simultaneously with the Act. If the appellant had certain rights in Native Law and Custom on the 1st September, 1927, she retains those rights and can enforce them under the provision of the Act.

In her summons the appellant claims a division of the " joint estate " according to Native Custom. Her claim is based on the supposition or assumption that the desertion by the respondent dissolved the " union " and that such dissolution took place in 1914. Now, in my opinion, the mere desertion by the respondent did not dissolve the " union." Such " union " subsisted on the 1st September, 1927, and still subsists although the desertion continues. If the appellant has a claim under Barolong Custom to any property of the " joint estate " she cannot enforce it during the subsistence of the " union "; and, until the " union " is dissolved in a formal and recognised way, her claim must fail.

It is contended for the appellant that a Native woman has the right to take away her property and it is suggested that what is meant by " joint estate " is that estate which resulted from the pooling or joining of appellant's property or assets and respondent's property or assets and that all the summons purports to claim is the property brought by her into the " union " with any increase or additions thereto. Now it seems to me that if such were the case the summons would have set forth clearly and specifically what property was brought into the " union " by the appellant or acquired by her during its subsistence and in the possession of the respondent at the time the cause of action as alleged in the summons arose. It may be that Barolong Custom permits the female partner of a " customary union " to hold property, but I am satisfied that no division of the " joint estate " can take place during the subsistence of the " union " and the appeal must fail. It is true that the summons contains a prayer for alternative relief but having regard to the fact that the whole claim as formulated is based on the supposition or assumption that the " union " was dissolved in 1914, I am not prepared to hold that the Native Commissioner erred in not going into the question of maintenance.

The remaining question is whether, according to Barolong Custom, the wife or female partner of a " customary union " can maintain an action against the husband or male partner without the assistance of her father or other male relative. It has been decided on several occasion that, notwithstanding the fact that it is usual for the father or the holder of the dowry of a Native woman to assist her in suits against her husband, there is nothing to prevent her from bringing an action arising out of the " union " without such assistance. She is the person who is mainly interested in

the " union " and the father or dowry holder is interested only in so far as questions of dowry are affected.

For these reasons I am of opinion that the appeal should be dismissed. Appellant to pay costs on the higher scale.

V. E. P. BRADSHAW, Magistrate of Bloemfontein, concurring.

Per C. F. J. DU TOIT, Magistrate of de Wet's Dorp: I agree that the appeal should be dismissed on the grounds set out by the PRESIDENT, with the following slight qualification.

The " union " entered into between the parties was, in my opinion, merely an immoral one, (Cf. Ch. LVI of the O.F.S. Law Book. No enforceable rights were created by it when it was entered into. Nothing happened thereafter to make that " union " a basis of such rights. To hold now that the provisions of Act 38 of 1927, apply to that " union " to the extent of making it a legal union, cognizable by a Court of law, is nothing short of holding that this Act is in fact retrospective in effect—which, it is common ground —it is not. It would be tantamount to saying that whereas at no time between 1899 and 1914, and between 1899 and 31st August, 1927, the appellant had any claim (i.e. any enforceable claim, which is the only kind of claim Courts of law take cognizance of) against respondent, and the respondent owed her not an iota, the promulgation of Act No. 38 of 1927, has reversed the whole position and that rights and obligations were on 1st September, 1927, established as between these two persons to wit, as from the inception of the so-called " union " in or about 1899. It would have been different if appellant and respondent had parted only some time after the coming into operation of that Act. The Act would have ratified existing relations between the parties.

I think the summons was rightly dismissed on the grounds of vagueness. It did not sufficiently inform the Court what the nature of the dispute was. It alleges that respondent has not cohabited with appellant since 1914, and thereby suggests that appellant expects the Court to regard her either as a divorced spouse, or one entitled to a divorce, (and to award her the relief which is awarded to such spouses). Furthermore, the summons fails to indicate what the elements are of the " joint estate."

Costs on the higher scale should go to the respondent.

(KINGWILLIAMSTOWN.)

1930. *February* 27. Before J. M. YOUNG, President, E. D. BEALE and C. P. ALPORT, Members.

Native estates.—Act 38 *of* 1927.—*British Kaffrarian Ordinance, No.* 10 *of* 1864.

FACTS: Appeal from the Native Commissioner's Court, Kingwilliamstown.

The parties to this action are natives. They reside in the District of Kingwilliamstown in the Province of the Cape of Good Hope. The appellant, defendant in the Native Commissioner's Court, is the father, and the respondent the widow, of the late James Mzolisa.

Rspondent claimed: (*a*) A declaration of rights. (*b*) The possession and division of the joint estate of her late husband and herself. (*c*) The delivery of her minor child. (*d*) An order of ejectment and the sum of £5 as damages.

The Native Commissioner awarded half the joint estate to the respondent and half to the minor children and declared the respondent to be the legal guardian of the children and entitled to their custody and control and the custody of all the property in the joint estate. He ordered the appellant to hand over the children in his care to the respondent and to deliver to her 32 sheep and their progeny, 13 goats and 5 fowls and certain household furniture and effects, clothing, etc., to replace the stuffing of certain mattresses or pay the sum of 10/-, to pay the sum of £5 damages, and to render an account of the proceeds of the sale of all wool and skins of the sheep of the joint estate since the institution of the action. He also declared the respondent to have the sole concontrol of the huts, kraal and homestead site where her husband left her and awarded her the costs of the action.

Against this judgment an appeal is brought on the following grounds:

That the Native Commissioner erred:

(*a*) In awarding half the estate to the minor children.

(*b*) In declaring the respondent to be the legal guardian of the children and the proper person to have the care and control of that portion of the estate awarded to them.

(*c*) In awarding certain four sheep (hamels) to the respondent.
(*d*) In awarding certain articles of furniture, etc., not claimed in the summons to the respondent.
(*e*) In declaring all the goats found at the kraal to belong to the joint estate.
(*f*) In ordering the appellant to replace the stuffing of certain mattresses or pay the value thereof, viz., the sum of 10/-.
(*g*) In awarding the sum of £5 as damages.
(*h*) In ordering appellant to pay the costs of the action.

JUDGMENT: The salient facts are that the respondent and the late James Mzolisa were married in community of property in 1921, that two female children were born of the marriage, that James Mzolisa died about June 1929, and that the appellant has possessed himself of the joint estate and one of the children and refuses to recognise the rights of the respondent and the children.

The appellant admits that the respondent is entitled to half the joint estate but claims that, as there is no male issue of the marriage, he, as father of the deceased is, according to Native Custom, entitled to the remaining half and that he is the guardian of the children and the proper person to have their custody and control.

The Additional Native Commissioner, finding for the respondent on the main issues, appears to have held that the provisions of Act 38 of 1927 and the regulations framed thereunder (Government Notice No. 1664 of the 20th September, 1929) apply, and that the rights of inheritance and succession of the parties are governed by these enactments.

Now, it seems to us, in view of sec. 22 (8) of Act 38 of 1927 which provides:

> "Nothing in this section or in sec. 23 shall affect any legal right which has accrued or may accrue as the result of a marriage in community of property contracted before the commencement of this Act."

and, in the absence of any evidence to show that the deceased was the holder of a certificate of citizenship granted to him under the provisions of Act 17 of 1864, or that he resided in a native location to which the provisions of Act 18 of 1864 applied, that the rights of the parties are governed by sec. 1, as qualified by sec. 6, of

British Kaffrarian Ordinance No. 10 of 1864. Sec. 1 of this Ordinance provides:

> " If any member of any of the Kafir tribes who now are or may hereafter be resident in these territories, or any Fingo or Tambookie domiciled herein, shall die leaving a widow to whom he shall have been married according to the form of Christian religion, or by a magistrate, duly authorised by law to celebrate marriages, or any children or other direct issue of such marriage, or both, and not leaving any widow to whom he shall have been previously married according to the customs of his tribe, or any children or other direct issue of such marriage, then any property which such Kafir, Fingo or Tambookie shall die possessed of, except any property which may have descended to him according to the customs of his tribe, shall be administered and distributed according to the ordinary law of these territories."

Sec. 6 reads:

> " All property of which any such Kafir, Fingo or Tambookie may now or hereafter be in possession or may prior to the passing of this Ordinance have been in possession by virtue of the customs of his tribe, shall be and continue subject to the said customs."

In order to ascertain the meaning of the words " Ordinary law of these territories " a reference to previous Ordinances is necessary. Up to the 6th November, 1860, when the first British Kaffrarian Ordinance (No. 1 of 1860) was promulgated, the Government was carried on by proclamation. Sec. 2 of this Ordinance (No. 1 of 1860) provided that in all cases not provided for by previous proclamations and regulations,

> the system, code or body of laws accepted and administered by legal tribunals as the laws of the Cape Colony shall be and the same is continued and established as the law for the time being in British Kaffraria."

By deduction from this and subsequent Ordinances (see for example B. K. Ordinance No. 9 of 1861, with special reference to secs. 28 and 29), it seems perfetly clear that, save for the proclamations between 1847 and 1860, the common law of British Kaffraria was that of the Cape Colony. None of these proclamations, as far as we have been able to ascertain from the records at our disposal, dealt with succession or estate matters and

the common law of the Cape Colony was not affected until the commencement on the 15th October, 1864, of Ordinance No. 10 of 1864.

At the time of the marriage in community of property of the respondent and the late James Mozilsa Ordinance No. 10 of 1864 was in force in the District in which the contracting parties resided or were domiciled and the marriage and rights of the parties were governed by the common law of the Cape Province; and by virtue of sec. 22 (8) of 38 of 1927, any legal right which had accrued or might accrue to the respondent or the children of the marriage as a result of such marriage in community of property would not be affected by Act 38 of 1927.

There was a contention by the appellant, which, however, he did not finally press, that the regulations contained in Government Notice No. 1664 of the 20th September, 1929, are *ultra vires* the powers of the Governor-General. In our opinion this contention is not well founded. Sec. 23 (10) (*a*) empowers the Governor-General to make regulations prescribing the manner in which estates of deceased Natives shall be administered and distributed, and sec. 23 (11) makes the Act and the regulations retrospective in regard to the administration of all estates other than those which prior to the commencement of the Act have been reported to the Master of the Supreme Court. This sub-section as well as sub-section 10 of sec. 23 of the regulations framed thereunder does not in view of the provisions of sub-sec. 8 of sec. 22, affect or in any way interfere with the rights of the respondent and her children which arise out of the marriage in community of property contracted in 1921.

For these reasons we are satisfied that the Additional Native Commissioner rightly awarded the respondent one-half of the joint estate and the minor female children the other half. He was also correct in declaring the respondent to be the guardian of the children and entitled to the custody of their share of the estate. In arriving at these decisions, however, he was incorrect in relying on the regulations framed under Act 38 of 1927.

Dealing with the third ground of appeal, the four sheep (hamels) were not claimed in the summons and they should not have been included in the award. The same remarks apply to the two goats and one kid sold by the appellant during the life-time of the respondent's husband. With regard to the remainder of the goats

there is considerable doubt whether they do belong to the estate. The respondent admits that they are the progeny of certain goats which were brought from the appellant's kraal and which bore his ear-mark.

On the question of the award of the 10/- the value of the straw or stuffing of the two mattresses, we think that in view of the fact that the late James Mzolisa died of a notifiable disease and that it is customary under such circumstances for all bedding to be destroyed, the appellant's action was not unreasonable and that he should not have been ordered to replace it or pay its value.

Coming to that part of the Additional Native Commissioner's judgment which declares certain articles, utensils, etc., to belong to the joint estate, many of these articles did not form part of the respondent's claim. This being so, it was not competent for the Additional Native Commissioner to adjudge them to belong to the estate.

The next ground for appeal is that the Additional Native Commissioner erred in awarding £5 as damages to the respondent. On this question we are not prepared to interfere. The appellant appears to have treated the respondent in a very arbitrary and high-handed manner; she was accused of witchcraft, compelled to leave her home and all her rights were ignored. It is abundantly clear from the appellant's plea what his attitude toward her was.

The remaining question raised on appeal is the question of costs. It is urged that as the appellant was successful as regards his own property and that of the minors, he was bound to defend the action and that if the respondent was not ordered to pay the costs, the only alternative order was that costs should be borne by the joint estate. Now it has been laid down on numerous occasions that in awarding costs a judge or magistrate has a discretion which must be exercised judicially and that a Court of Appeal has no right or power to disturb such award unless it is shown that he has acted arbitrarily and has refused a successful party his cost upon some ground which is neither just nor reasonable. In this case the respondent succeeded on the main issues. She was compelled to come to Court to establish her rights and those of the minor children and we are satisfied that in ordering the appellant to pay the costs, the Additional Native Commissioner acted neither

capriciously nor on any wrong principle and that his award was just.

The result is that the appeal will be allowed and the Additional Native Commissioner's judgment altered in accordance with the foregoing, i.e.:

(*a*) By excluding the 4 hamels, 2 goats and 1 kid from the award.

(*b*) By granting absolution from the instance in regard to the remainder of the goats.

(*c*) By striking out the order in regard to the contents of the mattresses, and

(*d*) By striking out from the Additional Native Commissioner's list of household articles, etc., such as were not claimed in the summons.

In regard to the question of costs in this Court, there will be no order, as the appellant, although partially successful on certain of the claims, has failed on the main issues.

ALFRED MEMANI v. ENOCH MEMANI

(And Cross-Appeal: ENOCH MEMANI v. A. MEMANI.)

(Butterworth.)

1930. *March* 6. Before J. M. Young, President, H. E. F. White and W. F. C. Trollip, Members.

Native law and custom.—Disinherison.—Death-bed dispositions.

Judgment: *Per* President: The plaintiff sued the defendant in the Native Commissioner's Court in an action in which he claimed:—

1. 12 head of cattle or their value £60.
2. 14 sheep or their value £10 10s.
3. The sum of £28 10s., being the value of certain crops.
4. Alternative relief.
5. Costs of suit.

The defendant counterclaimed for:—

(*a*) 31 sheep or their value £23 5s.

(*b*) The sum of £19 14s. 5d., being the amount of a criminal fine imposed on one Abel and paid by defendant on plaintiff's behalf.

(*c*) Costs of suit.

The plaintiff is the eldest son and heir of the late Henry Memani —the eldest son of the late Honono Memani—who died about the year 1920. The defendant is the second son of the late Honono Memani.

From the pleadings the defendant claims to be the heir of the late Honono Memani. He alleges that the late Honono Memani disinherited his eldest son Henry, and declared him, defendant, to be his heir. He goes on to say that, on his death-bed the late Honono, in his presence and that of other members of the family, instructed him to divide the estate cattle amongst his children and, acting on these instructions, he actually did so, but for various reasons the cattle have been left with him and are held by him until such time as the allottees claim them.

After the close of the pleadings it was agreed by the parties, through their respective attorneys, to submit the following issues for decision by the Court: Firstly, whether the late Henry Memani was legally disinherited by his father, Honono Memani; and secondly, whether there had been a death-bed disposition of the cattle.

A good deal of evidence was led and the Assistant Native Commissioner entered a judgment of absolution from the instance with costs on the issues raised.

In the course of his reasons for judgment he says: " Plaintiff's lineal descent creates a legal presumption that he is the heir to the estate of the late Honono. This presumption may be rebutted. Defendant has adduced evidence of facts strongly indicative of and pointing to a disinherison. Were these same facts consistent with plaintiff's case, defendant would fail. See Powell on *Evidence*, (9th ed., p. 159). But they are quite incompatible with plaintiff's case and the *onus* will shift again to him. He failed to produce to the Court any credible evidence. There was, therefore, no affirmative evidence in his favour to support the presumption of heirship. Though preponderating in his favour, defendant's evidence failed to gain full effect inasmuch as the Appeal Court has laid down that a disinherison is performed with certain formalities (4 N.A.C. Transkei 141) and no evidence to this effect was forthcoming. The

evidence is compatible with such an occurance having taken place but does not state so directly."

He says further: "The question of a death-bed allotment being subsidiary to that of disinherison, the Court confined itself to a ruling on the issue whether the late Henry Memani was disinherited by Honono and replaced by Enoch Memani."

An appeal and a cross-appeal have been brought against this judgment. The grounds of the appeal are:—

1. That the judgment is not in accordance with law or with the Court's findings as to the facts.
2. It is admitted in pleadings that plaintiff is the eldest son of the late Henry Memani, and that the late Henry Memani was the eldest son of the late Honono Memani, and consequently, the appellant would be the heir according to Native Law to the estate of the late Honono, unless either appellant or the late Henry Memani had been disinherited. As the defendant failed to discharge the *onus* on him regarding the alleged disinherison, judgment should have been entered in favour of plaintiff on this issue.
3. The Court erred in holding that the issue involved the plaintiff's right to sue. No exception or objection by defendant in respect of plaintiff's right to sue was ever raised.

The cross-appeal is on the following grounds:—

(*a*) "That the evidence overwhelmingly showed both that the late Henry Memani was disinherited by his father Honono Memani and that the present cross-appellant was instituted as his father's heir, and further that the evidence clearly and overwhelmingly showed that the late Honono Memani made a death-bed disposition of his property, which he directed the cross-appellant to carry out.

(*b*) That such disinherison and disposition of property was made in sufficient compliance with Native Law and Custom.

(*c*) That the Assistant Native Commissioner's judgment of absolution from the instance in favour of the defendant was not a sufficient judgment in view of the evidence, and that he should have given an absolute judgment for the defendant on the two special issues raised as a defence in the court below by the present cross-appellant."

Now the procedure observed by Natives in cases of disinherison was fully outlined by me in the case of *Jokoqela* v. *Busika*, p. 354 of Mr. Whitfield's *South African Native Law*, and I do not desire to add anything to what I said then. There is no evidence that this procedure was followed, nor is there anything to show that the provisions of sec. 11 of Proclamation No. 142 of 1910 were complied with. It is true that there was an estrangement between the late Honono and his son Henry, that he reported to the magistrate of Nqamakwe that he was "shifting his son" and that the magistrate sent Headmen Sokopase and Binase to endeavour to effect a reconciliation between father and son, but nowhere in the evidence is there any proof that Henry was regularly and formally disinherited. It seems quite clear from the Assistant Native Commissioner's reasons that he found that the defendant, on whom the burden rested of establishing that the late Henry Memani was disinherited, has not discharged that *onus*. He says that there is a "legal presumption" that plaintiff is the heir of the late Honono. He would have be justified in holding that the fact that Henry Memani was the eldest son of Honono Memani was conclusive proof that he was the heir in Native Law, unless it could be shown that he had been legally and regularly disinherited.

As already stated the defendant has failed to prove this and from a careful consideration of all the evidence I am satisfied that no disinherison ever took place.

With regard to the question whether the late Honono made a death-bed disposition of the cattle in his estate, I do not agree with what the Assistant Native Commissioner says relative to "death-bed dispositions." The Native Law on the question was fully considered in the cases of *Mfanekiso* v. *Maggabaza*, and *Mfanekiso* v. *Nohempe* (N.A.C. 3, p. 51). The statements of the Assessors, which form part of the judgments in those cases, leave no room for doubt that a Native man would be acting within his rights and in conformity with Native Custom in allotting portion of his stock to his family on his death-bed. Such apportionment would not necessarily mean the disinherison or removal from his position of the eldest son.

In my opinion the defendant has failed to prove that his grandfather, the late Honono Memani, made any death-bed disposition of his stock. Had he done so it is most improbable that the fact would have been kept secret or that the persons to whom the stock

had been allotted would have allowed it to remain in the defendant's possession.

For these reasons I am of opinion that the appeal must be allowed with costs and the cross-appeal dismissed with costs.

Messrs. WHITE and TROLLIP concurred.

Appeal accordingly allowed with costs and the judgment of the trial Court altered to judgment for plaintiff with costs on both the isues raised. Cross-appeal dismissed with costs.

STENA NGCONGOLO v. WILSON NGCONGOLO.

(BUTTERWORTH.)

1930. *March* 6. Before J. M. YOUNG, President, H. E. F. WHITE and W. F. C. TROLLIP, Members.

Native law and custom.—Succession.—Status of wives or partners. —Nomination of rank of wives by commoners.

FACTS: Appeal from the Native Commissioner's Court: Tsomo.

JUDGMENT: The plaintiff, now respondent, claimed from the appellant, defendant in the Native Commissioner's Court, a declaration that he is the eldest son and heir of the late Charlie Ngcongolo and as such entitled to all the property left by him and that he is the guardian of the three minor daughters of the said late Charlie Ngcongolo. The facts are:—

1. That the late Charlie Ngcongolo entered into Customary Unions with (*a*) No-office; (*b*) Nofali; (*c*) Nolam.
2. That about the year 1903 he married a woman named Eleanor.
3. That there is no male issue of the union with No-office.
4. That respondent is the eldest son of the union with Nofali.
5. That appellant is the only surviving son of the union with Nolam.
6. That Eleanor bore three daughters but no son.

JUDGMENT: The respondent contends that when the union with Nofali was entered into his father declared her to be the Qadi of the Great House, and there being no male issue in the Great House, he

is heir to that House. He contends further that the appellant's mother, Nolam, was not the wife or partner of the late Charlie Ngcongolo, but his concubine and that the appellant is illegitimate.

The Assistant Native Commissioner has found against the respondent on the question of the legitimacy of the appellant and there is no appeal against this finding.

The only question for consideration by this Court is the relative status of the women Nofali and Nolam and that of their sons.

It has been decided on numerous occasions that a commoner has not the right to nominate the rank or position of his wives and that their rank and status follows the order of their priority of marriage.

The late Charlie Ngcongolo, although a headman, was not a chief and had not the right to nominate the status of his wives or partners. In the ordinary course of Native Custom Nofali would be the right hand wife and Nolam the Qadi of the Great House.

The parties are Fingoes and according to Fingo custom the eldest son of the Qadi of the Great House is the heir of the Great House in default of male issue in that House.

The appellant is the only surviving son of the Qadi of the Great House and as such is the heir of the Great House.

The appeal is allowed with costs and the judgment of the court below altered to judgment for defendant with costs.

SEMSEM NONTSHIKWE v. JOHNSON MATENTOMBI.

(Umtata.)

1930. *March* 10. Before J. M. Young, President, R. D. H. Barry and F. N. Doran, Members.

Appeals.—Native Commissioner's reasons for judgment.—Section 12 of Government Notice No. 2254 of 1928.

Facts: Appeal from the Native Commissioner's Court, Engcobo.

Judgment: In this case the evidence supports the finding of the Assistant Native Commissioner that a Customary Union subsists between the respondent and the woman Nomayiti. At the time of the appellant's misconduct he himself regarded her as the wife or

partner of the respondent and he actually tendered payment of damages. The fact that the dowry was paid for Nomayiti, that she had lived with the respondent since 1910, and had borne him 12 children is conclusive proof that a Customary Union subsists.

The appeal is dismissed with costs. The Assistant Native Commissioner's attention is drawn to the fact that he has not complied with sec. 12 of the Native Appeal Court rules. It is not sufficient for a Native Commissioner in his reasons to this Court to say merely that he believes one set of witnesses in preference to another. It is his duty to give his reasons for his findings of fact and for believing or disbelieving a witness.

MKOLWANE AND 6 OTHERS v. NOBEFU.

(Umtata.)

1930. *March* 13. Before J. M. Young, President, R. D. H. Barry and F. N. Doran, Members.

Injury causing death.—Claim by mother of deceased.—Damnum.—*Calculable pecuniary loss.*

Facts: Appeal from the Native Commissioner's Court, Umtata.

Judgment: In this case the appellants were sued by the respondent, a widow, for the sum of £100 damages alleged to have been suffered by her in consequence of the wrongful and unlawful acts of the appellants in assaulting and killing her son.

The Assistant Native Commissioner found that the appellants, acting in concert, attacked the deceased and some of his companions and killed him, that the respondent was partially dependent on him and that she suffered, and has proved, calculable pecuniary loss. She was awarded the sum of £30 damages. Against this judgment this appeal is brought.

It is contended on behalf of the appellants that there is no evidence to warrant the award of any measure of damages, and this is the only question at issue between the parties—the other grounds of appeal not having been pressed. In the opinion of this Court this contention must be upheld.

The facts emerging from the evidence show that the respondent is the surviving partner of a Customary Union and that the deceased was the younger of her two sons—the elder being the heir of her late partner and as such responsible in Native Law for the support of his mother. She has endeavoured to show that the deceased son contributed towards her maintenance and that in consequence of his death it has become necessary to engage the services of a herd and to employ some person to assist in the ploughing and cultivation of her land. It is also suggested that, as the deceased son had been to labour at the mines on three occasions, his wage or any part thereof will not be available to his mother.

Dealing with the last point, there is nothing on the Record to indicate how much the deceased earned, how much he brought home, and how much, if anything, he contributed towards the maintenance of his mother.

With regard to the employment of a herd there is no evidence that the deceased herded the stock; and, as he was in the habit of proceeding to the mines, the employment of a herd was a necessity. Furthermore, it was the duty of the heir, and not that of the respondent, to make arrangements for the tending of the estate stock.

Coming to the question of the ploughing and cultivation of the respondent's allotment, she says that these services were performed by the deceased with the voluntary assistance of one Shadrach, but she admits that she has always had to hire oxen and a driver for this purpose.

It is not possible on such evidence to assess the *damnum* actually suffered by the respondent through the loss of the services of her son. This is borne out by the award made in the court below which apparently is based not on the evidence but on the scale prescribed by the Native Labour Regulation Act as compensation in respect of death by accident of Native labourers.

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

(Kokstad.)

1930. *March* 19. Before J. M. Young, President, H. E Grant and F. H. Brownlee, Members.

Section 11, *Act* 38 of 1927.—*Discretionary powers of Native Commissioner's Courts.—Prescription.—Act No.* 6 *of* 1861 (Cape).

Facts: Appeal from the Native Commissioner's Court, Mount Ayliff.

The appellant, plaintiff in the trial court, sued the respondent for the sum of £16 10s. cash lent and advanced during the years 1918 and 1919. The respondent objected to the summons on the ground that the appellant's claim was prescribed by virtue of the provisions of secs. 2 and 3 of Act No. 6 of 1861 (Cape), which was extended to the territory of East Griqualand by Proclamation No. 80 of 1890. The objection was upheld and the summons dismissed with costs. Against this decision an appeal is brought.

Judgment: It is urged on behalf of the appellant that a Native Commissioner's Court has absolute discretion to apply either Roman Dutch law or Native law because the wording of sec. 11 of Act 38 of 1927, is equally consistent with the view:—

(*a*) That Native Custom must be primarily invoked and Roman Dutch law only resorted to when Native law does not affect the matter, or,

(*b*) That Roman Dutch law should be primarily applied and Native Custom only invoked in matters peculiar to Native Customs falling outside the principles of Romna Dutch law.

The appellant admits that if a true construction of sec. 11, quoted above, favours either (*a*) or (*b*), then to that extent the Court's discretion is not absolute.

It is further contended that, in the exercise of its absolute discretion, if it has one, the Native Commissioner's Court should and ought to have applied Native Custom to this case so as to avoid the effect of an Act of Procedure (Act No. 6 of 1861, Cape) upon an entirely new and distinct creature of the law, namely, a Native Commissioner's Court, which has its own separate and simplified mode of procedure. The Act of 1861, which bars the doors of the common law Courts, does not forsee this special Native Court and the application of laws which know no prescription.

Now in the opinion of this Court, the discretion given to a Court of Native Commissioner by sec. 11 of Act 38 of 1927, is not an absolute discretion. We think that the true construction to be placed on this sec. is that set forth in (*b*) above, namely, that the common law of the Union should be primarily applied and Native Custom only invoked in matters peculiar to Native Custom falling outside the principles of Roman Dutch law.

In this case the transaction was not peculiar to Native Custom, but was one common to the daily affairs of European and Native alike and we have come to the conclusion that the Native Commissioner was correct in allowing the plea of prescription, which is one of the objections that may be taken under Order XII (2) (*g*) of the rules of procedure governing Native Commissioner's Courts in the Transkeian Territories. The appeal is dismissed with costs.

REID LUTSHABA v. CITANI MENZIWA.

(Kokstad.)

1930. *March* 18. Before J. M. Young, President, H. E. Grant and F. H. Brownlee, Members.

Native Custom.—Dowry, claim for return.—Whilst woman living with husband or partner.

Facts: Appeal from the Native Commissioner's Court, Mount Fletcher.

In this case the plaintiff, now respondent, claimed the return of certain cattle paid as dowry, together with their progeny and one "Mqobo" beast. Judgment was entered in his favour as prayed.

The facts are that about the year 1924, the plaintiff entered into a Customary Union with one Noztolotolo, the ward of Ben Dini, who at the time was absent and whose whereabouts were and are still unknown. At the time of the union Noztolotolo and her mother were living with the defendant, a kinsman of theirs. The plaintiff contracted to pay the usual Hlubi dowry and actually paid to defendant ten head of cattle and one "Mqobo" beast. He now claims the return of these animals, contending that defendant had no authority from the guardian of the girl to receive the dowry.

Defendant admits that he received the cattle but maintains that, in the absence of the guardian, he was the proper person so to do.

JUDGMENT: In the opinion of this Court the defendant's contention is well founded and is in accordance with Native Custom. The cases of *Mamakontsa* v. *Suta* (5 N.A.C. Trans. 66), *Siswenye* v. *Sikaka* (5 N.A.C. Trans. 37) and *Ntantiso Jonas* v. *Nqwadla Vutangqele* (4 N.A.C. Trans. 96) are distinguishable from the present case. Plaintiff cannot claim the dowry paid whilst the woman for whom he paid it is living with him. Only in the event of her desertion could he call upon the defendant, the holder of the dowry, to restore it.

The facts of the case having been submitted to the Native Assessors they state that, under the circumstances, no action lies against the defendant. The appeal is allowed with costs and the Assistant Native Commissioner's judgment altered to judgment for defendant with costs.

XWANTHU SANTANA v. MANTWANA NGQEBELELE.

(LUSIKISIKI.)

1930. *March* 24. Before J. M. YOUNG, President, R. H. WILSON and H. M. NOURSE, Members.

Pound regulations.—Acceptance of trespass fees bar to claim for damages.

FACTS: Appeal from the Native Commissioner's Court, Tabankulu.

JUDGMENT: In this case the appellant elected to impound the animals which had trespassed and accepted trespass fees. It is, therefore, not competent for him to seek redress by legal process, and his claim for damages must fail. The appeal is dismissed with costs.

(Lusikisiki.)

1930. *March* 25. Before J. M. Young, President, R. H. Wilson and H. M. Nourse, Members.

Illegitimate son of woman cannot succeed to her husband or partner's estate.

Facts: Appeal from the Native Commissioner's Court, Tabankulu.

The respondent, plaintiff in the Native Commissioner's Court, sued the appellant in an action in which he claimed:—

(*a*) An order declaring him to be the heir of the late Posiwe.

(*b*) The delivery of 3 head of cattle and 20 sheep or payment of their value £25.

The Native Commissioner entered judgment for the respondent on the first claim and for the appellant on the second claim.

Judgment: This appeal is brought against that part of the judgment declaring the respondent to be the heir of the late Posiwe.

The facts are that Posiwe, appellant's son, contracted a Customary Union with a woman named Mangcukwana, that at the time the union was entered into Mangcukwana was pregnant with the respondent by another man, that two months after the union Posiwe died and that within a month or two after Posiwe's death the respondent was born. The respondent was brought up by appellant who provided him with a wife and built a kraal for him.

These facts having been submitted to the Native Assessors they state that the respondent, having been begotten by a stranger and not by Posiwe, is not of the blood of Posiwe and cannot succeed to Posiwe's estae. This Court concurs in the opinion expressed. The appeal is allowed with costs and the judgment of the Native Commissioner altered to judgment for defendant on both claims with costs.

(Lusikisiki.)

1930. *March* 26. Before J. M. Young, President, R. H. Wilson and H. M. Nourse, Members.

Widow's rights.—Duties of heir.—Guardian cannot dispose of estate stock.—Guardian appointed by chief cannot claim remuneration for services.

Facts: Appeal from the Native Commissioner's Court, Tabankulu.

Judgment: The plaintiff, now appellant, claimed from the defendant, now respondent, 3 head of cattle and 1 horse or their value the sum of £20.

In his particulars of claim he alleged that:—

1. He is the son and heir of the late Paula Mdutshana.
2. Defendant is the widow of the late Paula Mdutshane in his Great or Chief House.
3. He is the guardian according to Native law of the defendant.
4. Defendant resides at a separate kraal from him and has in her possession certain cattle belonging to the estate of the late Paula Mdutshane.
5. Defendant wrongfully, unlawfully and contrary to Native law and custom disposed of or paid away to one Mbuzweni certain 3 head of cattle belonging to the estate.

The defendant in her plea admits that the plaintiff is the heir of the late Paula Mdutshane and that she lives in a kraal other than that of the plaintiff or her late husband. She denied that plaintiff is her guardian and that she has any property belonging to Paula's estate. She admits that she paid 3 head of cattle to Mbuzweni but says that she was acting within her rights in so doing.

She pleaded specially that, at a meeting of relatives and kinsmen and before Chief Sigidi, the plaintiff publicly declared that he abandoned all his rights to her and her illegitimate children Hetsu and Nkazanyana and gave out that she was at liberty to do as she wished with the dowry of Nkazanyana.

It is common cause that during the lifetime of the late Paula, and, owing to differences which arose between Paula's mother and

defendant, the defendant left Paula's kraal and went to her own people, that whilst residing with her people she bore three illegitimate children one of whom died, that she subsequently returned to Paula's kraal with the other two, namely, Hetsu and Nkazanyana, and that she lived with Paula until his death two years afterwards.

The defendant states that, after the death of Paula, the plaintiff drove her away, that she appealed to the Chief Sigidi for protection, that in the presence of the Chief and others the plaintiff publicly declared that he had abandoned all claim to her and her children, Hetsu and Nkazanyana, that she was granted a homestead allotment by the Chief near Paula's kraal and that Mdaga and Palampela were appointed to be her guardians. She further states that during her residence at this kraal no provision was made by the plaintiff for the maintenance of herself and her illegitimate children, and especially denies that any cattle belonging to the estate of the late Paula were sent to her by the plaintiff for this purpose. The plaintiff denies that he abandoned the defendant and her children and that he made any declaration before the Chief to that effect. He states that Mdaga was a paramour of the defendant, that the homestead at which she resides was erected by Mdaga and Palampela and that she left Paula's kraal to live with her paramour.

The Native Commissioner found that the plaintiff had abandoned defendant and her children and that certain stock belonging to Paula's estate was handed to defendant by plaintiff and that this stock was taken to the kraal at which she resides. He also found that Palampela and his son, Mamatu, had performed certain services for the defendant—services for which the plaintiff, as heir, was responsible but which he refused to render—that, under the circumstances, the estate was liable and that the cattle paid to Mbuzweni as dowry for Mamatu could lawfully be regarded as having been paid to Palampela and Mamatu for their services.

In the opinion of this Court neither the defendant nor Palampela had any right to dispose of any portion of the dowry of Nkazanyana which formed part of the estate stock. If the heir fails to make adequate provision for the widow and her children or otherwise neglects or illtreats them the Chief, on sufficient grounds being shown, might allow her to establish a separate kraal with stock taken from the estate for her maintenance and place her under the guardianship of another guardian, usually a relative. The widow would only have the use of estate stock the ownership

being vested in the heir. In this case we are satisfied that there was no intention on the part of the plaintiff to divest himself of his rights of inheritance. Had such been his intention he would never have consented to any of the estate stock being taken to the kraal established for the defendant. The guardian appointed by the Chief is not entitled to claim remuneration for any services rendered by him as guardian but the heir might make a gift to him. If the defendant intended to abandon her rights as the widow of the late Paula she would have returned to her own people and not sought the protection of the Chief. The appeal is allowed with costs and the judgment of the trial court altered to judgment for plaintiff for 3 head of cattle or their value £15 and costs.

WILSON MZINYATI v. ELY MZINYATI.

(Kingwilliamstown.)

1930. *June* 13. Before J. M. Young, President, C. W. Crawford and C. P. Alport, Members.

Defamation: Privilege.—Witness in enquiry held by Native Commissioner appointed under Act 38 *of* 1927.

Facts: Appeal from the Native Commissioner's Court, Alice.

The plaintiff, now appellant, instituted an action in the Native Commissioner's Court in which he claimed the sum of £100 as damages for defamation. He complained that the respondent at a public meeting at the Auckland school room in the district of Victoria East, and in the presence of a number of persons, four of whom are mentioned, made use of the following malicious and defamatory words of and concerning him:—

> "Intlanganiso make ime elifa lika bawo malingabalelwa kule ndoda eteta u Wilson Mzinyati kuba Ngumngqakwe."

The translation of these words is:—

> "The meeting must stop for a while. My father's estate must not be written to this man Wilson Mzinyati because he is illegitimate."

The defendant in his plea admits using certain of the words complained of, alleging that the plaintiff was not his father's child.

He denies making use of the words " Mngqakwe." He denies that he spoke any false, slanderous, malicious or defamatory words and that he referred to the plaintiff as a " Bastard or picked up child."

He says that he was justified in stating that the plaintiff was not his father's child and that the occasion was a privileged one in that a official enquiry was being held by the Native Commissioner in terms of Act 38 of 1927.

He pleads further that the words used were true and that they were spoken for the special benefit of the Native Commissioner and those present at the meeting.

JUDGMENT: Now in our opinion it is immaterial whether the actual words complained of were used. The defendant admits that he referred to the plaintiff as " illegitimate " that being so, the words spoken are clearly defamatory *per se* and therefore actionable and the *onus* was upon the defendant to establish one or other of his pleas.

It is necessary to consider the circumstances under which the words complained of were uttered. It is common cause that the statement was made at an enquiry held by the Native Commissioner of Victoria East for the purpose of investigating and determining the rights of occupation or ownership of Natives claiming to own land in respect of which a deed of grant or title had been issued.

Sub-sec. 4 of sec. 8 of Act 38 of 1927, provides that witnesses called by the Commissioner at such an enquiry shall be subject to all the duties and liabilities, and shall be entitled to all the privileges of witnesses called to give evidence in a magistrate's Court.

The witness Barbour Bokwe who acted as Interpreter at the enquiry states *inter alia*: " In November last year Mr. A. T. Schorn, Commissioner under Act 38 of 1927, proceeded to Auckland location to determine the ownership of lands. I accompanied him as Interpreter. Poni's land was enquired into, two claims being put forward, one by the plaintiff and one by the defendant. Wilson (plaintiff) addressed the Commissioner in support of his claim. He claimed the land as being the son of Poni. Defendant asked permission to address the Commissioner. This was granted." It was then that the alleged defamatory words were used. This evidence is corroborated by that of Elias Madubedube.

It has been urged in argument that the statement was not made by the defendant whilst giving evidence and that the protection

afforded to witnesses cannot be extended to him and that the statement was therefore not made on a privileged occasion.

We are not prepared to subscribe to this view for it seems to us that whether the statement was made on oath or not it was made during the course of the investigation and after the defendant had sought and obtained the consent of the presiding Commissioner to speak. He was therefore in the position of a witness giving evidence at the enquiry and the statement he then made was privileged to the same extent as that of any witness. As the son of the late Poni Mzinyati he had an interest in making the communication to the Commissioner who had a corresponding interest in receiving it in order to enable him to determine the ownership of the land. Having found that the communication was published on a privileged occasion the ordinary presumption as to *animus injuriandi* is rebutted and the existence of such *animus* must be affirmatively established by plaintiff. This he has failed to do. The evidence discloses that the defendant made the communication *bona fide* in the full belief, based on reasonable grounds, of its truth.

With regard to the question whether the Assistant Native Commissioner should have allowed the plaintiff to call evidence to rebut that given by the headman it is pointed out that the plaintiff himself, his mother and other witnesses called by him had already given evidence as to what transpired at the headman's enquiry and it is difficult to see how any further evidence on that point would have altered the position. The evidence of the headman appears to have been called not to establish the illegitimacy of the plaintiff but rather in support of defendant's contention that he had reasonable grounds for believing his statement to be true. In any case we are satisfied that no substantial prejudice has resulted from the refusal of the Assistant Native Commisioner to accede to the plaintiff's request.

For these reasons the appeal will be dismissed with costs.

(Kingwilliamstown.)

1930. *June* 12. Before J. M. Young, President, C. W. Crawford and C. P. Alport, Members.

Succession.—Christian marriage.—Native Customary Union during subsistence of.—Immoral union.

Facts: Appeal from the Native Commissioner's Court, Alice.

The claimant, Sipo Mlumbi, a minor, assisted by his mother Evelina Mhlubulwana, claimed in an interpleader action two head of cattle attached in the case of Dodo Salayi versus Lundi Mlumbi and Alfred Mlumbi. The Native Commissioner declared the cattle executable and the claimant has appealed.

The claimant is an illegitimate son of Evelina and the animals attached are part of the dowry paid for Alice, another illegitimate child of Evelina, and a half sister of claimant. The judgment debtor, Alfred Mlumbi, is the eldest son of the late Mlumbi and Evelina is his half sister.

The Record reveals that the late Mlumbi married by Christian rites and that during the subsistence of this marriage he contracted a Customary Union with another woman. The judgment debtor, Alfred Mlumbi, is the eldest son of the marriage. A son named Oliver, and Evelina are children of the Customary Union. Sipo, the claimant, and his sister Alice, are the illegitimate children of Evelina by different men, born before her marriage. No damages were paid for the seduction and pregnancies of Evelina.

Judgment: According to Native Custom the illegitimate children of a woman belong to her father, or if the father is dead, to the heir of the House of which the woman is a daughter, provided no fines have been paid for the pregnancies.

Assuming that the marriage or union of the late Mlumbi and the mother of the judgment debtor, Alfred Mlumbi, was a customary one, the House established would be the Great House, and Alfred would be the heir. The union of Mlumbi and the mother of Oliver and Evelina, would establish the Right Hand House of which Oliver would be the heir. Evelina's illegitimate offspring would belong to the Right Hand House and any dowry paid for the offspring would be the property of the Right Hand House and on Mlumbi's death, would belong to Oliver and not to Alfred.

In this case, however, the marriage of Mlumbi and Alfred's mother was a Christian or civil one and the subsequent Customary Union of Mlumbi and Evelina's mother entered into during the subsistence of the marriage, was an immoral union and Oliver and Evelina are adulterine or illegitimate children. This being so, they belong not to the family of Mlumbi, but to the family of their mother's father and any dowry paid for Alice, the illegitimate daughter of Evelina, would accrue to and form part of the estate of her maternal great-grandfather or his heir under Native Law. In default of such heir, Sipo would be entitled to the dowry cattle paid for his half sister, Alice. He has, therefore, a sufficient interest in the stock attached, to institute interpleader proceedings.

For these reasons we are of opinion that the cattle should not have been declared executable. The appeal is accordingly allowed with costs and the judgment of the Native Commissioner altered to one declaring the two head of cattle not executable with costs.

BEN GUGWINI AND SIX OTHERS v. AMMIE GUGWINI.

(Kingwilliamstown.)

1930. *June* 12. Before J. M. Young, President, C. W. Crawford and C. P. Alport, Members.

Native estates.—Act 38 of 1927.—Section 23.—Government notices Nos. 2257 of 1928, and 1664 of 1929.

Facts: Appeal from the Native Commissioner's Court, Alice.

Judgment: This is an appeal from the decision of the Native Commissioner of Victoria East in an enquiry held under the provisions of part 1 of the regulations published in Government Notice No. 2257 of the 21st December, 1928, (subsequently repealed by Government Notice No. 1664 of 1929) framed under the provisions of sec. 23 of the Native Administration Act, 1927, (Act No. 38 of 1927).

Several grounds of appeal have been noted but it seems to us that, in view of this sub-sec. 11 of sec. 23 of the Act, there is no

need for this Court to consider any of these grounds. This subsection reads as follows:—

> "Any native estate which has, prior to the commencement of this Act, been reported to a Master of the Supreme Court shall be administered as if this Act had not been passed, and the provisions of this Act shall apply in respect of every native estate which has not been so reported."

The estate, concerning the distribution or administration of which the dispute which led up to the enquiry arose, is the estate of the late Henry Gugwini, who died on the 14th November, 1927. This estate was reported to the Master of the Supreme Court and Letters of Administration were granted by him prior to the 1st January, 1929, the date of the commencement or taking effect of chapter V of Act 38 of 1927. This being the case, the provisions of the Act do not apply and the enquiry, which purports to have been held under the regulations made under the Act, was irregular and must be set aside.

There will be no order as to costs.

LOLIWE MBENDE v. SOBANI MKENGWANA.

(Butterworth.)

1930. *July* 9. Before J. M. Young, President, H. E. F. White and E. F. Owen, Members.

Irregularity in noting appeal.—Condonation of.—Non-compliance with rules.

Facts: Appeal from the Native Commissioner's Court, Kentani. Mr. *Webb*, for respondent, objects to the hearing of this appeal on the following grounds:—

1. "No notice of appeal has been given against the judgment in the suit, the letter of the 29th April, 1930, written by the plaintiff's attorney and attached to the Record of the case, not being a notice of appeal."
2. "The letter referred to does not comply with the requirements of Rule 10 as required by Rule 8 (1) in that it

(Butterworth.)

1930. *July* 10. Before J. M. Young, President, H. E. F. White and E. F. Owen, Members.

Pound regulations.—Section 77.—Owner.—Tender.

Facts: Appeal from the Native Commissioner's Court, Nqamakwe.

In this case the appellant, plaintiff in the Native Commissioner's Court sued for 8/- by way of damages for the wrongful impounding of a certain horse. The summons sets forth that the impounding was unlawful by reason of the fact that the defendants both knew when they caused the animal to be impounded that it was the property of the plaintiff and that, notwithstanding this, they failed to comply with the provisions of sec. 77 of Proclamation No. 387 of 1893 as amended by Proclamation No. 60 of 1910.

The defendants' plea is to the effect that the impounding was lawful and that the provisions of the section of the Pound regulations referred to were complied with, and a report made to one Velabahlekwa in whose care and control the animal was. Sec. 77 reads:—

> "The Native Custom that the proprietor shall take the trespassing stock or notify the trespass to its owner when known and the said owner being in the same or an adjoining location or immediate neighbourhood, shall continue to be in force in the Native Locations aforesaid, provided that if such owner refuse to pay the damages claimable under sec. 76, the said proprietor may impound the said stock."
>
> "Owner" is defined as "the proprietor of any animal or the agent or caretaker for the proprietor."

Judgment: The Native Commissioner has found on the evidence that, at the time of the trespass, the horse was running at the right hand kraal of the plaintiff, that Velabahlekwa lives at this kraal and is in charge of it, and that the animal was in his care. He also found that the trespass was reported to him and that he refused or neglected to pay or tender any sum as damages. With these findings the Court sees no reason to differ. The appeal is dismissed with costs.

does not state whether the whole or part only of the judgment is appealed against, and if part only then what part, and in that it does not clearly and specifically set forth the grounds of appeal, to say that the judgment of the Court is not in accordance with Native Law and Custom, without saying in what respect, not being a sufficient setting out of the grounds of appeal."

3. "There was no service of the said letter or any other notice of appeal upon the respondent or the respondent's attorney, or any copy thereof, either by the messenger of the Court or personally by the appellant or his attorney upon the respondent or his attorney personally in the presence of a witness as required by Rule (9) (1), and the appellant or his attorney did not notify, and has not notified, to the clerk of the court of the Native Commissioner of Kentani the time, manner, and place of such service as required by Rule 9 (2)."

Mr. *Pattle* on behalf of appellant admits these irregularities. He states they are due to his lack of familiarity with the rules an asks the Court to condone them. No written application has bee filed as required by Rule 19. A copy of the respondent's objection was served on the appellant's attorney on the 5th July, 1930.

JUDGMENT: The proper course to be observed by the appellant is to approach this Court by means of a separate written application, setting forth the grounds of the application, and the circumstances under which the omission to comply with the rules took place, so that this Court may judge whether the justice of the case would require it to exercise its jurisdiction in condoning irregularities.

The objecton is allowed and the appeal struck off the roll, with costs.

(Butterworth.)

1930. *July* 10. Before J. M. Young, President, H. E. F. White and E. F. Owen, Members.

Native custom.—Return of wife or partner without articles taken by her on desertion not a compliance with order and tantamount to rejection.

Facts: Appeal from the Native Commissioner's Court, Tsomo.

On the 8th November, 1929, the appellant obtained judgment in the Native Commissioner's Court at Tsomo for the return of his wife within one month, failing which the return of nine head of cattle or their value £45. On the 7th December his wife was taken to him but as she was brought without certain household articles and clothing belonging to her husband's kraal and which had been supplied by him, he refused to receive her and she immediately returned to her father, the respondent. On the 27th January, 1930, the appellant caused a writ to be issued for the dowry cattle. On the 28th January, 1930, application was made to the Native Commissioner's Court for an order setting aside the writ on the ground that his wife was tendered to appellant who refused to receive her. The Assistant Native Commissioner granted the order and held that the respondent had fully complied with the judgment of the 8th November, 1929. The appeal is against this order.

Judgment: The facts having been placed before the Native Assessors they state that the return of the woman without the articles removed by her when she left her husband did not amount to a compliance with the judgment and that her failure to take them with her was tantamount to non-return.

This Court concurs in this expression of opinion. The appeal is accordingly allowed with costs and the order of the trial court altered to one refusing the application with costs.

(Butterworth.)

1930. *July* 11. Before J. M. Young, President, H. E. F. White and E. F. Owen, Members.

Gcaleka custom.—Intercourse by man with brother's widow amounts to incest "Ukungena" custom not practised by Amagcaleka.

Facts: Appeal from the Native Commissioner's Court, Willowvale.

The plaintiffs in this case sued the defendant in the Native Commissioner's Court in an action in which they claimed a declaration that the defendant had forfeited all his rights to all dowry paid by him to the second-named plaintiff for his daughter, the first-named plaintiff. The Assistant Native Commissioner entered judgment for the plaintiffs in terms of their prayer and the defendant has appealed.

The facts, briefly stated, are that about seven years ago the defendant entered into a Customary Union with the first-named plaintiff, and paid the equivalent of six head of cattle to the second-named plaintiff for her, that during the subsistence of this union the defendant cohabited with and rendered pregnant his brother's widow and that in consequece of this act of adultery on his part the first-named plaintiff left him.

Judgment: The parties are Fingoes who have been domiciled in a Gcaleka location for many years.

The plaintiffs contend that the sexual intercourse of the defendant with his brother's widow is incestuous and that such intercourse on his part entitles them, under Gcaleka custom, to dissolve the union and to an order declaring that he has forfeited all claim to dowry paid by him.

It has been urged on behalf of the defendant that, the parties being Fingoes, Fingo Custom should apply. With this contention this Court does not agree. The parties are domiciled in a Gcaleka location and are governed by the customs obtaining there. It has also been urged that the intercourse of the defendant with his brother's widow was not incestuous and even if it was, it is not a sufficient ground to entitle the plaintiffs to claim the dissolution of the union and the retention of all the dowry paid.

The facts of this case having been placed before the Native Assessors, three of whom are Gcalekas and two Fingoes, they unanimously state that the custom of "ukungena" is not practised by the Gcalekas and that any sexual relations by a man with his brother's widow is regarded as incest and justifies dissolution of a Customary Union with forfeiture of all dowry. The Fingo Assessors state that even among Fingoes, where the custom of "ukungena" is practised, such intercourse would be regarded as incestuous unless previously sanctioned by a family council and the observance of other formalities, such as the killing of a beast. The Court accepts the expert opinion of the Native Assessors and will not disturb the finding of the trial court. The appeal is dismissed with costs.

MCEKECWA QAKA v. RICHARD QAKA.

(Lusikisiki.)

1930. *July* 15. Before J. M. Young, President, R. H. Wilson and C. R. Norton, Members.

Pondo custom.—Dowry cattle of eldest daughter of minor house belong to house from which dowry of wife of minor house taken.

Facts: Appeal from the Native Commissioner's Court, Bizana.

The parties to this case are sons of the late Qaka. The defendant is the eldest son and heir of the Great House, and the plaintiff the eldest son and heir of the Right Hand House.

The plaintiff claimed four head of cattle, the property of the Right Hand House. The defendant admitted being in possession of these cattle but said they had been paid to him by the plaintiff in part payment of a debt due by the plaintiff to him. He counterclaimed for five head of cattle and alleged that the late Qaka paid nine head of cattle, the property of the Great House, as dowry for his Right Hand wife and undertook to refund these cattle from the property of the Right Hand House; that, after his death, the plaintiff as heir of that House, confirmed the arrangement and paid four head of cattle on account and promised to pay the balance

of five head of cattle when Nozikotshi, the eldest daughter of the Right Hand House, was married. He said that Nozikotshi was married and that six head of cattle had been paid as dowry for her. The plaintiff in his plea to the counterclaim admitted that the dowry of the Right Hand wife was paid with the stock belonging to the Great House. He denied that the late Qaka ever promised to replace this stock, that he himself ever made any such promise and that he paid the four head of cattle claimed in the summons on account.

After argument and without hearing any evidence, the Native Commissioner entered judgment in the following terms:—

"For plaintiff in reconvention for five head of cattle or £25 their value and costs. Claim in convention fails."

Against this judgment the plaintiff in convention has appealed.

JUDGMENT: Now, notwithstanding the decision in the case of *Mrulwa* v. *Seketwayo* (5 N.A.C. Trans. 40), with which this Court does not agree, it is sound Native Custom that the cattle paid as dowry for the eldest daughter of a minor house belong to the house from which the dowry of the wife of such minor house was taken. In this case there is nothing on record beyond the statement of the defendant in his counterclaim that Nozikotshi has contracted a Customary Union and that six head of cattle have been paid as dowry for her. This statement is neither admitted nor denied by the plaintiff and is inconsistent with the plea to the claim in reconvention. It was not competent therefore, for the Native Commissioner to decide the issue without hearing evidence thereon.

It is common cause that the four head of cattle claimed by the plaintiff are not dowry cattle and there is no evidence to show that the plaintiff paid them to the defendant as alleged by him.

For these reasons the appeal will be allowed with costs, the Native Commissioner's judgment is set aside and the case returned to him to enable either party to lead such evidence as he may deem necessary both on the claim in convention and the claim in reconvention. When this evidence has been heard a judgment thereon should be given.

(Lusikisiki.)

1930. *July* 16. Before J. M. Young, President, R. H. Wilson and C. R. Norton, Members.

Adoption.—Repayment of dowry.—First daughter of adopted son.

Facts: Appeal from the Native Commissioner's Court, Port St. John's.

The plaintiff, now respondent, sued the defendant for 12 head of cattle or their value £60, the dowry, with increase, of a girl named Mantombi *alias* Mampiyonke, the daughter of Xishibane, now deceased. In his particulars of claim he alleged that many years ago, and before 1897, he adopted Xishibane, the son of Nkohla Pakiya, that Xishibane married Maradebe, that his dowry was provided by him, plaintiff, that defendant gave the said Mantombi *alias* Mampiyonke in marriage to Jozi Mdukiswa who paid three head of cattle for her, that these three cattle increased to 14, that the union of Mantombi and Jozi Mdukiswa was dissolved by an order of Court and two head of cattle were returned to Jozi by defendant.

Xishibane died without male issue and plaintiff claimed to be his heir.

The defendant in his plea admitted that Xishibane was the adopted son of plaintiff. He denied that Xishibane was dead, that plaintiff was his heir and that Xishibane entered into a Customary Union with Maradebe. He admitted that Mantombi is the daughter of Xishibane and Maradebe and said that she is illegitimate. He said further that Mantombi was brought up by him, that he, as her guardian, gave her in marriage and received her dowry of three head of cattle. He denied that these cattle increased to 14 and said they increased to 7 only. He admitted that the union of Mantombi and Jozi was dissolved and that he refunded two cattle to Jozi and said that, in any case, he is entitled to retain the balance to reimburse him for expenditure incurred in the maintenance and in connection with the wedding of Mantombi.

No evidence was led and the Native Commissioner was asked to give a ruling on two questions namely:—

1. Whether a father by adoption could inherit the estate of his adopted son.

2. Whether plaintiff could in respect of dowry paid by him on behalf of his adopted son and contributions made by him in connection with such son's daughter bring a claim against the holder of the daughter's dowry.

On the first question the Native Commissioner's ruling was in the negative and against the plaintiff. On the second question his ruling was in the affirmative and in plaintiff's favour.

On these rulings being given the defendant through his attorney offered two head of cattle in settlement of plaintiff's claim subject to his right to contest on appeal the correctness of the ruling on the second point. The Native Commissioner thereupon entered judgment in plaintiff's favour for the two cattle offered and costs of suit.

JUDGMENT: An appeal has now been brought. The ruling on the first point is not questioned by either party and appears to have been accepted as correct. The appeal is against the ruling on the second point. Several grounds are stated, but practically all of these raise questions which were never before the trial court and which have no bearing on the question which was submitted to the officer there presiding. This Court will not consider these matters but will confine itself to the position as it was placed before the Native Commissioner.

It seems perfectly clear from the cases of *Kokwe* v. *Gubela* (1 N.A.C. Trans. 48) and *Ladodana* v. *Ntlanganiso* (2 N.A.C. Trans. 135) that where a man has adopted another and has paid dowry on his behalf he has a claim to a portion of the dowry of his son's eldest daughter, or if more than one daughter is born of the marriage, he might claim the eldest daughter.

Following these decisions the appeal is dismissed with costs.

(KOKSTAD.)

1930. *July* 21. Before J. M. YOUNG, President, F. H. BROWNLEE and F. N. DORAN, Members.

Section 11 (2) *of Act* 38 *of* 1927, *parties residing in areas where different laws in operation.—Law to be applied.*

FACTS: Appeal from the Native Commissioner's Court, Matatiele.

The parties to this suit are Tembus. The plaintiff resides in a Basuto Location and the defendant in a Hlubi Location in the district of Matatiele. The Basuto dowry is fixed at 20 head of cattle, 1 horse, 10 sheep or goats and one Mqobo beast. The Hlubi dowry is 25 head of cattle, 1 horse and 10 sheep or goats.

The second defendant, who is a son of the first defendant, entered into a Customary Union with the plaintiff's daughter about the month of September, 1928, and seven head of cattle were paid on account of dowry.

The plaintiff claims 13 head of cattle, one horse, and 10 small stock and alleges that, at the time the union was entered into, it was agreed that Basuto Custom would obtain. The defendant denies this and says that the arrangements were in conformity with Tembu Custom and that no fixed dowry was agreed upon.

The Assistant Native Commissioner entered judgment for plaintiff in terms of his prayer. He disregarded the evidence recorded and held that, as defendant resided in a Hlubi Location, the law or Custom to be applied was Hlubi and not Basuto or Tembu Custom, relying on sec. 104 of Proclamation No. 145 of 1923, which reads:—"Where parties to a suit reside in areas where different laws are in operation, the Law, if any, to be applied by the Court shall be that prevailing in the place of residence of the defendant." This section is identical with sec. 11 sub-sec. (2) of Act 38 of 1927, under which Act the Native Commissioner's Court in which the case was heard was constituted.

In his reasons for judgment the Assistant Native Commissioner says "the essential of the claim is balance of dowry" and that it is immaterial whether the liability is one under Basuto or Hlubi Custom. He goes on to say that instead of being prejudiced the defendant has actually benefited to the extent of 5 head of cattle and that he was justified in entering a final judgment in plaintiff's

favour notwithstanding the fact that his claim was based on an agreement to pay a Basuto dowry.

JUDGMENT: Now it is true that where the law of the plaintiff's domicile differs from that of the defendant's and when no special agreement has been made, the law to be applied is that prevailing in the area in which the defendant resides, but there is nothing to prevent the parties from entering into an agreement to pay the dowry fixed by the custom obtaining in plaintiff's place of abode, nor is there anything which would preclude the parties from agreeing that the custom of the tribe of which they are members should apply.

In the opinion of this Court the Assistant Native Commissioner erred in disregarding the evidence. We are also of opinion that the plaintiff has not discharged the *onus* which rested upon him of proving a special agreement to pay dowry in accordance with Basuto Custom.

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

ABRAM MTIMKULU v. MLINDINI.

(KOKSTAD.)

1930. *July* 21. Before J. M. YOUNG, President, F. H. BROWNLEE and F. N. DORAN, Members.

Record.—Incomplete or defective.

FACTS: Appeal from the Native Commissioner's Court, Matatiele.

The record in this case is defective, in that it gives no indication whether the plaintiff closed his case, whether application was made for an absolution judgment and whether or not the defendant was afforded an opportunity of leading evidence.

The appeal is allowed, the Assistant Native Commissioner's judgment set aside and the case returned to him to enable either party to lead such evidence as he may consider necessary. Costs of appeal to abide the final issue.

(Kokstad.)

1930. *July* 22. Before J. M. Young, President, F. H. Brownlee and F. N. Doran, Members.

Native Custom.—Estate stock.—Earmarking.—Alteration of earmark of head of kraal contrary to custom.

Facts: Appeal from the Native Commissioner's Court, Matatiele.

Judgment: The plaintiff in this case claimed six head of cattle or their value £42. He is the heir of his uncle, the late Tole, to whose estate he alleged the animals belong. His case is that many years ago, Tole acquired a black cow from Hotolo, the father of the defendant, in exchange for a brown heifer which had been purchased by Tole from one Moswakeli for six bags of grain and which Hotolo gave to one Albert in settlement of a debt. The animals claimed are the progeny of the black cow. The defendant on the other hand contends that Tole and his wife Paulina, had no kraal or property of their own, that they lived at the kraal of Hotolo and while they were so resident, Hotolo "nqomaed" to or lent them for milking purposes the black cow in question and that the progeny of this cow are his, the defendant's property, as heir of Hotolo.

The evidence discloses that Tole and his wife lived for many years at Hotolo's kraal, that after Tole's death his widow, Paulina, continued to reside with Hotolo, that Hotolo died about two or three years ago and that Paulina remained at his kraal with the defendant, that shortly before the commencement of this action (October, 1929) the defendant drove her away and earmarked five of the six cattle claimed, that Paulina complained to the Headman of the defendant's action, that the defendant denied having earmarked any of the full-grown stock, that the stock was examined by the Headman and found to have been freshly marked, that the defendant claimed it as his and stated it was his intention to allot one of the animals to the widow as her share of the "nqoma."

Apart from the evidence of Paulina there is no direct evidence of the purchase of the brown heifer from Moswakeli, nor is there any corroboration of the story of the witness Paniwe that Hotolo gave this heifer to Albert and replaced it with a black cow. On

the other hand the defendant's evidence in regard to the " nqoma " stands alone.

The usual practice is to perpetuate the earmark of the head of the kraal and the defendant's action in earmarking the stock with his own earmark, if such stock was the property of his father's estate, would be inconsistent with and opposed to Native Custom. The fact that he did so at the time of the quarrel with Paulina, lends credence to her story that the cow was Tole's property and that the defendant earmarked its progeny with the object of defeating the plaintiff's claim. The defendant at the Headman's enquiry told a deliberate falsehood with regard to the earmarking. This is a further factor in the plaintiff's favour.

The appeal is allowed with costs and the judgment of the court below altered to judgment for plaintiff for six head of cattle or their value £30, and costs.

MHLEKA NTENZA v. SAM CHERE NTSOLO, N.O.

(Kokstad.)

1930. *July* 22. Before J. M. Young, President, F. H. Brownlee and F. N. Doran, Members.

Native Customary Union.—Main essentials.

Facts: Appeal from the Native Commissioner's Court, Matatiele.

Judgment: It has been decided on numerous occasions that the three main essentials of a Native Customary Union are, the consent of the contracting parties, the payment of dowry and the formal handing over of the bride by her people to those of her husband. Certain other ceremonies are sometimes observed but these are not essential and their non-observance in no way affects the validity of the contract.

In this case the plaintiff and his witnesses state emphatically that the girl was never handed over and that at no time did she live with the plaintiff.

This evidence has not been refuted, and, in the opinion of this Court, the Assistant Native Commissioner was not justified in entering an absolution judgment.

The appeal is allowed with costs, the judgment set aside and the case returned to the court below to be gone into on the merits.

(KOKSTAD.)

1930. *July* 22. Before J. M. YOUNG, President, F. H. BROWNLEE and F. N. DORAN, Members.

Dowry of illegitimate daughter of woman born during subsistence of Customary Union belongs to husband or male partner of union.

FACTS: Appeal from the Native Commissioner's Court, Mount Fletcher.

The appellant, plaintiff in the Native Commissioner's Court, claimed eleven head of cattle or their value the sum of £55. The parties are Basutos and the cattle claimed are the balance of the dowry of a girl named Makhala. In his particulars of claim the plaintiff alleges that he is the father and guardian of Makhala, that about the year 1920, Tillard, the 1st defendant, entered into a Customary Union wth Makhala, and he and his father Plaatje, the 2nd defendant, promised and agreed to pay the usual Basuto dowry, namely: 20 head of cattle, one horse, 10 small stock and one Mqobo beast and that nine head of cattle and ten sheep have been paid on account leaving the balance now claimed.

JUDGMENT: The defendants admit that Tillard and Makhala contracted a Customary Union and that the usual Basuto dowry is as stated by plaintiff. They say that 13 head of cattle, one horse, ten small stock and a Mqobo beast were paid to plaintiff. They deny that plaintiff is the father and guardian of Makhala and say that the stock paid to him was paid in error owing to misrepresentations on his part that he was the proper person to receive it. They deny liability for the balance and counterclaim for the stock, or its value £65, already paid. At the conclusion of the trial the counterclaim was withdrawn.

Very little evidence was led but the records of certain cases between plaintiff and Letaba, heard during the years 1896, 1897 and 1898, were put in.

From these cases it would appear that Letaba had a wife or partner named Mantoteng who had a daughter named Hlalana, that the plaintiff abducted both, that he married the latter by

Basuto Custom and was ordered by a judgment of the Magistrate's Court of Mount Fletcher, dated 18th February, 1898, which judgment was subsequently confirmed on appeal, to pay 21 head of cattle and ten sheep as dowry. Thereafter plaintiff continued to live with the mother, Mantoteng, and her daughter, Hlalana, as his wives or partners. The marriage of Mantoteng and Letaba does not appear ever to have been dissolved. Letaba is still alive and lives in the Quthing District, Basutoland. Whilst she was living with plaintiff, Mantoteng, who is now dead, bore a daughter, Makhala, whose dowry forms the subject of this action. The plaintiff claims that he married Mantoteng and also her daughter Hlalane and that Makhala is his daughter. The defendant's contention is that at the time that Makhala was born Mantoteng was the wife of Letaba and that he, Letaba, is the proper person to receive her dowry.

After a very careful persual of all the evidence this Court is unable to find any proof that any marriage or Customary Union was entered into by plaintiff with Mantoteng. The plaintiff, who in his younger days was a doctor, appears to have made a practice of seducing and leading astray other men's wives. He also appears to have kept Mantoteng in payment of a claim for 8 head of cattle which he considered he had against Letaba for medical services rendered to Mantoteng and her children.

Makhala may be plaintiff's child, but she was begotten by him while Mantoteng was the wife or partner of Letaba. In Native Custom she belongs to Letaba and he, and not plaintiff, is entitled to her dowry.

For these reasons the Native Commissioner's judgment will be upheld and the appeal dismissed with costs.

44 BUTINYANA AND ROSA FENTON v. MOTHEKETHEKE LESUTHA.

(Kokstad.)

1930. *July* 22. Before J. M. Young, President, F. H. Brownlee and F. N. Doran, Members.

Ukutwala Custom.—"Ukuyitwala intombi."—Meaning of.

Facts: Appeal from the Native Commissioner's Court, Mount Fletcher.

Judgment: In this case there is abundant proof that the 1st defendant twalaed and seduced the plaintiff's daughter. In fact he admits that on two occasions he took her to his parents' home with the intention of marrying her and that his parents objected and sent her back to her own people. The girl says that on both occasions he had sexual relations with her and that she permitted him to have these relations because she loved him and he had promised to make her his wife. He says "I regarded Maria as my wife."

The phrase "Ukuyitwala intombi" means to carry off a girl secretly without her parents' consent, or the consent of any other person having the lawful care and charge of her. It is immaterial whether she is taken with her own consent, or at her own suggestion or against her will, or whether she is decoyed or enticed away.

The appeal is dismissed with costs.

ANNA MGABUSHE v. NKASAIYA DINGALIBALA.

(Kokstad.)

1930. *July* 23. Before J. M. Young, President, F. H. Brownlee and F. N. Doran, Members.

Customary Union.—Long cohabitation creates presumption of Customary Union.—Legitimacy of children.

Facts: Appeal from the Native Commissioner's Court, Mount Fletcher.

This is an interpleader action in which the claimant, Nkasaiya Dingalibala, in his capacity as guardian of a woman named Mangwanya Dinglibala, asks for an order declaring that certain eleven head of cattle attached by virtue of a warrant of execution issued at Maclear in the case of *Anna Mgabushe* v. *Stemmer Macotoza* are non-executable.

The following facts are common cause:—

1. That the animals attached are cattle paid as dowry for two of the daughters of Mangwanya by Stemmer the judgment debtor.
2. That they were attached at the kraal at which Mangwanya lives in the district of Mount Fletcher.
3. That Mangwanya lived with Stemmer from 1900 to about 1918 and had 8 children by him, six of whom have died.
4. That Stemmer, who is a constable in the South African Police, lived with Anna, the judgment creditor, from 1918 until 1928.

JUDGMENT: The claimant's contention is that no marriage or Customary Union was entered into between Mangwanya and Stemmer and that the children born of the irregular intercourse between them are illegitimate and in consequence the dowry cattle of the girls do not belong to Stemmer but to their mother or her people. The respondent on the other hand, maintains that a marriage or Customary Union between Stemmer and Mangwanya subsists, that the girls are the legitimate daughters of Stemmer and that the cattle paid as dowry for them belong to Stemmer and are executable.

The main question for determination is whether or not Mangwanya is the wife or " partner " of Stemmer.

In the case of *Quza* v. *Maselana* (3 N.A.C. Trans. 196) the principle was enunciated that "where a man and a woman have for many years lived together as man and wife and have had children this Court will always lean to the view that there has been a marriage and that the children are legitimate and very strong proof will be required to the contrary." In the present case there is no evidence to show that Mangwanya's people interfered with her alliance with Stemmer which it might be expected they would do had the alliance been irregular. This fact coupled with long cohabitation and the birth of no less than eight children is strongly presumptive of marriage.

In the opinion of this Court the evidence led on behalf of the claimant is unsatisfactory, inconclusive and insufficient to rebut the presumption of marriage.

The appeal is allowed with costs and the Native Commissioner's judgment altered to one declaring the cattle executable with costs.

OGELE XUBA v. PIOSE XUBA.

(Umtata.)

1930. *July* 29. Before J. M. Young, President, D. Barry and E. W. Bowen, Members.

Appeal.—Irregularity in notice of.—Condonation.—Extension of time.

Facts: Appeal from the Native Commissioner's Court, Engcobo.

This is an application for an extension of time in which to note an appeal from the finding of the Native Commissioner of Engcobo in an enquiry held by him under the provisions of Government Notice No. 1664 of 1929.

Judgment: Judgment was given on the 28th January, 1930, and under Rule 6 the appeal should have been noted within twenty-one days, i.e. before the 18th February, 1930. The application was not forwarded until the 31st March, 1930, six weeks after the period prescribed had lapsed. Under Rule 6 this Court may extend the time within which an appeal may be noted but only on just cause being shown. If just cause is not shown this Court is not justified in excusing non-compliance with the rule. The question of what is meant by just or sufficient cause was considered in the case of *Cairn's Executors* v. *Gaarn* (1912, A.D. 180). It was then pointed out that "It would be quite impossible to frame an exhaustive definition of what would constitute sufficient cause to justify the grant of indulgence" and that "all that can be said is that the applicant must show something which entitles him to ask for the indulgence of the Court. What that something is must be decided upon the circumstances of each particular application." The first

question to be considered therefore is whether a satisfactory explanation has been given for the delay. The reasons, briefly stated, are that the applicant was not represented at the enquiry by a legal practitioner, that he was ignorant of the fact that he was entitled to such representation, that he notified the Native Commissioner verbally of his intention to appeal and asked him whether he might avail himself of the services of an attorney, that he thereafter retained the services of a firm of attorneys and instructed them to note an appeal but discovered that the time prescribed for doing so had lapsed. It is not clear from the documents filed with the application when the applicant first interviewed his attorneys, but if the statement contained in the reply of the respondent's attorney is correct—and it is not rebutted—then it would seem that there was sufficient time for the appellant's attorney to have complied with the rule and to have noted an appeal.

In the case of *Cairn's Executors* v. *Gaarn*, already referred to, Solomon, J. said "After all, the object of the rule is to put an end to litigation and to let parties know where they stand. It would be intolerable, if there were no reasonable limit within which appeals might be brought, and it is in the interest of the public that the time should be limited. When a party has obtained judgment in his favour and the time allowed by law for appealing has lapsed, he is in a very strong position, and he should not be disturbed except under very special circumstances.

In the opinion of this Court no just or sufficient cause has been shown for granting the indulgence sought and the application must be refused with costs.

OGELE XUBA v. XELO XUBA.

(Umtata.)

1930. *July* 29. Before J. M. Young, President, D. Barry and E. W. Bowen, Members.

Evidence.—Admission of record of case not between same parties.—Irregularity prejudice.

Facts: Appeal from the Native Commissioner's Court, Engcobo.

This appeal arises out of an action for damages claimed by reason of the alleged wrongful actions of the appellant in refusing to allow the respondent access to certain mealie pits.

After the pleadings had been closed the respondent's attorney applied for leave to put in the record of the case of *Pios Xuba* v. *Ogele Xuba*. The application was opposed by the appellant's attorney, but notwithstanding this opposition the Assistant Native Commissioner allowed the Record to be put in. The case proceeded and after all the evidence tendered had been heard judgment was entered for plaintiff, respondent in this Court, for £10 damages and costs of suit.

One of the grounds of appeal is that the action of the Assistant Native Commissioner in admitting the Record was irregular and that the appellant was prejudiced thereby.

JUDGMENT: Now it is perfectly clear from the reasons for judgment furnished by the Assistant Native Commissioner that he was influenced by the evidence in the case put in. The procedure adopted by him was irregular. He had no right to admit the Record so as to form part of the present case. This being so the appeal must be allowed with costs and the judgment of the trial court altered to absolution from the instance with costs.

MTI QOMBOTI v. NYOMBO HLOBO.

(UMTATA.)

1930. *July* 31. Before J. M. YOUNG, President, D. BARRY and O. M. BLAKEWAY, Members.

Pound regulations.—Sec. 77.—Onus *of proof.*

FACTS: Appeal from the Native Commissioner's Court, Engcobo.

In this case the plaintiff claimed the return of a yellow mare or it value the sum of £8 and £5 17s. 6d. as damages alleged to have been suffered by him by reason of the wrongful impounding of certain four horses. The defendant admitted impounding the four horses and pleaded that he acted lawfully in so doing. He said that the yellow mare was dead but denied that its death was due to any negligence or fault on his part. The Assistant Native Commissioner entered judgment for plaintiff for £5 17s. 6d. and costs and the defendant has appealed.

Section 77 of the Pound Regulations provides:—

"The Native Custom that the proprietor shall take the trespassing stock or notify the trespass to the owner when known, and the owner being in the same or adjoining location or immediate neighbourhood, shall continue to be in force in the Native Location aforesaid. Provided that if such owner refuse to pay the damages claimable under the preceding clause the proprietor may impound the said stock."

JUDGMENT: In this case it is not denied that the animals were impounded, nor does the plaintiff seriously contend that they did not trespass, and the first question to determine is whether the owner of the animals was known to the defendant. The defendant denies that he knew to whom the horses belonged. He says that before driving them to the pound he proceeded to the Headman's kraal and in the absence of the Headman he made enquiries of several people but was unable to ascertain the name of the owner. The plaintiff is the owner of a number of horses some of which are branded, but there is no proof that the defendant knew the plaintiff's brand. The plaintiff and his witnesses say that the horses usually graze on the mountains some distance from the defendant's kraal and that they had been brought down because some of them were sick. The *onus* of proving that the defendant knew when he found the animals trespassing that they were plaintiff's is on the latter and in the opinion of this Cour he has not discharged that *onus*.

With regard to the claim for the return of the yellow mare or its value £8 it is quite clear from the evidence that whilst it was being driven to the pound it was sick and that it was left by the defendant at the kraal of Peter Zibi with instructions to take care of it. It is also clear from the evidence of the Poundmaster that one of the other horses was sick and that the defendant reported what had happened to the yellow mare to him. This Court is satisfied that the yellow mare died and that its death was in no way due to any act or fault of the defendant. He appears to have acted as any reasonable man would have done in the circumstances.

The appeal is allowed with costs and the judgment of the court below altered to judgment for defendant with costs.

(Umtata.)

1930. *July* 30. Before J. M. Young, President, D. Barry and O. M. Blakeway, Members.

Finding of Native Commissioner not entirely consistent with pleadings.—Discretion of Appeal Court.

Facts: Appeal from the Native Commissioner's Court, Umtata.

Judgment: The respondent (plaintiff in the court below), sued the appellant (the defendant) for an order declaring him to be the guardian of a girl named Nosisi, and as such, entitled to her custody and to all cattle paid, or to be paid, for her whether as dowry, damages or otherwise.

In his plea the defendant denied that the plaintiff is Nosisi's guardian and stated that she is his daughter by his wife Nonotisi.

The Native Commissioner entered judgment for the plaintiff as prayed with costs and declared the defendant to be entitled to one beast for maintenance and one beast for wedding outfit or their value £10.

This judgment is appealed against on the following grounds, viz.:—

1. That the judicial officer having found as a fact that the girl in question was not conceived by Nofam of the late Koyi during the lifetime of the latter, judgment either of absolution from the instance, or for the defendant should have been entered.
2. That there is no proof whatsoever that the girl in question is the issue of illicit intercourse between defendant and Nofam, and such finding of fact besides being contrary to the contention relied upon by plaintiff, goes beyond the purview of the issues raised in the case.
3. That the judgment is contrary to the evidence and therefore bad in law.
4. That no reliance can be placed either upon the evidence given by Nofam or Dayimani as they both denied on oath sworn testimony previously given by them in the same case.
5. That the trial court, having disbelieved and rejected the contention put forward for the plaintiff upon whom the *onus probandi* lay, defendant was entitled to a verdict in his favour, or to a judgment absolving him from the instance.

The dispute between the parties has been a protracted one. In November, 1928, in the court below a judgment of absolution from the instance with costs was granted. The matter was re-opened and after a further hearing a similar decision was recorded and against the latter an appeal was noted,

The result of the appeal was to set aside the judgment and return the case for rehearing and with certain definite directions not germane to the consideration of the present action.

As a result the present case was adjudicated upon, the decision being as above stated.

The status of the plaintiff has never been challenged and the sole point to be determined is whether the girl Nosïsi is the daughter of the plaintiff's mother Nofam or whether, as alleged by the defendant, she is the daughter of his late wife Nonotisi.

The Native Commissioner has found:—

(1) That the girl Nosisi is not the daughter of the plaintiff's late father, Koyi, and Nofam.

(2) That she is not the daughter of the defendant by his late wife Nonotisi.

(3) That she is the daughter of Nofam and Nkabi, the defendant.

(4) That she was born to Nofam after the death of plaintiff's father, Koyi, and before payment of dowry, if any, by Nkabi for Nofam.

(5) That the late Koyi's dowry has not yet been returned.

Apart from the merits, the appellant has attacked the judgment chiefly on the ground that the Native Commissioner has gone beyond the pleadings in that having definitely found that the plaintiff had not substantiated his contention that the child was born of Nofam by plaintiff's father Koyi, and having found that she was born of Nofam by the defendant, a judgment in favour of the defendant, or, alternatively, an absolution order was the proper one in the circumstances.

After a careful study of the evidence recorded in the three cases between the parties, this Court has come to the conclusion that the contention by the defendant that the girl is his child by his late wife Nonotisi, has not been sustained but, on the contrary, that she was born of Nofam shortly after the death of Koyi and before dowry had been paid for her by the defendant. Indeed, it is questionable whether the defendant has paid any dowry for Nofam

and certainly the evidence establishes that the dowry paid for Nofam by Koyi, has never been returned.

Having come to these conclusions, it is a matter of no consequence whether the father of the girl was Koyi or whether the defendant is the natural father, as in either event she or any cattle paid for her would accrue to the estate of the late Koyi to which the plaintiff is the admitted heir.

In view of the protracted litigation in respect of the girl in question and the fact that on the evidence recorded this Court finds itself in a position to determine the question of her guardianship, it is of opinion that although the Native Commissioner has recorded a finding not entirely consistent with the pleadings, this Court should exercise its wide powers in the direction of a settlement which is substantially consistent with the fundamental contention of the plaintiff, as embodied in the plea, viz:—that the girl or cattle paid for her accrue to his late father's estate, and which is so fully supported by evidence.

The appeal is accordingly dismissed with costs.

ELIMINAH MAJEZI v. ZACHARIAH SITUNDA.

(Umtata.)

1930. *July* 30. Before J. M. Young, President, D. Barry and O. M. Blakeway, Members.

Seduction.—Woman cannot recover damages for seduction unless she was a virgin at the time relations commenced.

Facts: Appeal from the Native Commissioner's Court, Umtata.

The plaintiff sued the defendant for £100 damages for seduction and pregnancy. The only fact which is not disputed is that the plaintiff is pregnant.

The summons alleges that during the period September, 1927, to September, 1929, and at divers times and places in the district of Umtata, but more particularly at Esikobeni, the defendant wrongfully and unlawfully seduced and had carnal relations with the plaintiff and that by reason of these relations the plaintiff was rendered pregnant about the month of September, 1929. The

plaintiff's own evidence alleges that the first intercourse took place in September, 1927. She says that the defendant, who was the principal of the Esikobeni School at which she was an assistant, made love to her at the end of the June, 1927 quarter, that in September she accepted him as her lover and that by arrangement he came to her home and slept with her but did not have connection, that two weeks later he met her at 8 o'clock at night near some aloes in the neighbourhood of her home and seduced her and that from that time onwards he had connection with her at several places until September, 1929, when she discovered she was pregnant.

The defendant's case is a denial of the seduction and the intercourse. He has endeavoured to fix the paternity of the child on one Lolwana and has brought evidence to show that from December, 1926, until August, 1929, she has been on intimate terms with Heathcote Tembani, another teacher.

Heathcote Tembani has given evidence to the effect that he has known plaintiff since 1918, that he seduced her in December, 1926, and that on many occasions right up to August, 1929, he has had intercourse with her. Certain letters which have been put in, and which the plaintiff admits having written to Tembani, clearly show that very intimate relations existed between them. The Native Commissioner credited Tembani's evidence and has found that at the time of the alleged seduction by defendant, namely, September, 1927, the plaintiff was not a virgin. Lolwana at whose door the defendant has endeavoured to place the authorship of the plaintiff's condition, also gave evidence. He denied any intimacy with the plaintiff and the Additional Native Commissioner believed him. He, the Additional Native Commissioner, found that the defendant has had sexual relations with the plaintiff and that he is, in all probability, the father of her child. He has also found that the defendant went to Lolwana and tried to bribe him to accept responsibility.

JUDGMENT: This Court is satisfied that there have been illicit relations between the plaintiff and the defendant and that the defendant is the cause of the plaintiff's pregnancy. The question to be decided however is whether or not the plaintiff was a virgin at the time these relations commenced. Heathcote Tembani has stated that he has had intercourse with her over a period extending as far back as December, 1926. The plaintiff denies having had

any relations with Tembani, but the letters put in afford strong corroboration of his testimony and satisfy this Court that the plaintiff is not to be believed when she says that Tembani has at no time had intercourse with her. Under the circumstances this Court feels bound to accept Tembani's evidence rather than that of the plaintiff. This being so there is a grave doubt as to the truth of the plaintiff's assertion that she was deflowered by the defendant in September, 1927.

For these reasons the appeal is dismissed with costs.

ELLEN MAGWENTSHU v. GEORGE MOLETE.

(Umtata.)

1930. *July* 30. Before J. M. Young, President, D. Barry and O. M. Blakeway, Members.

Seduction.—Damages.—Damnum *due to connection subsequent to Defloration.—Loss of Earnings.*

Facts: Appeal from the Native Commissioner's Court, Umtata.

In this case the plaintiff, a teacher, sued the defendant, a clerk, for (1) the sum of £125 damages for seduction and (2) maintenance of a child born as the result of intercourse between plaintiff and defendant. The defendant denied the seduction and that he was the father of plaintiff's child.

The Additional Native Commissioner found that defendant had seduced the plaintiff and that he was the father of her child and awarded the plaintiff the sum of £25 damages for seduction and £5 as maintenance for the child.

Against this judgment an appeal and a cross-appeal have been brought. The defendant has appealed on the ground that the evidence does not support the finding that the defendant deflowered the plaintiff and that he is the father of her child.

Judgment: In the opinion of this Court the appeal must fail. There is ample evidence on the Record to justify the conclusions arrived at by the Additional Native Commissioner.

CROSS-APPEAL.

The cross-appeal is brought on the ground that the damages awarded are inadequate and also that the sum of £5 was not a sufficient sum to assess as maintenance for the child and that maintenance should have been awarded on a monthly basis. The plaintiff was a teacher at the Moravian Mission School, at Tabase, in receipt of a salary of £13 10s. a quarter. She lost her position in December, 1929, on account of her pregnant condition. In January, 1930, she became engaged to be married to a man who paid eight head of cattle for her as dowry and who was aware of her condition when he became engaged to her.

It has been urged on behalf of the cross-appellant that higher damages should have been awarded in view of the fact that the plaintiff has lost her employment and the salary attaching to it.

In the case of *Els* v. *Mills* (1926, E.D.L. at p. 349), PITTMAN, J., said:—

> "In the case of *Carelse* v. *Estate de Vries* (1906, 23 S.C.), DE VILLIERS, C.J., is reported to have said at p. 538: The cause of action (for seduction) arose when she was deprived of her virginity and (the seducer's) subsequent intercourse with her did not add to his liability; and though the facts of the case were peculiar, differing very much from those before us, still the principle enunciated by the learned CHIEF JUSTICE is equally applicable here."

"The passage cited is an authority for the proposition that the loss in respect of which a seduced woman can claim compensation must flow from her deflowerment itself, not from intercourse subsequent thereto. It is urged on behalf of respondent that her subsequent intercourse with appellant and resulting pregnancy and loss of employment did in fact flow from the initial act of connection, but even if this is in one sense true, still in a seduction action the very nature of the wrong complained of precludes us from taking such *damnum* into account. It is the being deprived of her virginity, on which alone her claim for damages can rest, and it is impossible to allow that respondent's loss of employment, which extended from June, 1925, up to March, 1926, was in such manner the result of her being seduced in September, 1924, as would justify its being taken into consideration in the assessment of damages."

In the present case the plaintiff, according to her own evidence, was seduced in May, 1928, and she only became pregnant in June,

1929, more than a year after her defloration. Applying the principle enunciated in the case above quoted, the plaintiff is not entitled to any damages in respect of loss of salary.

In view, however, of the fact that the plaintiff is an educated Native girl having held the position of a teacher, this Court is of opinion that damages should have been assessed on a higher scale than that usually applied in cases between uneducated and uncivilised Natives and that, under all the circumstances, the sum of £50 would have been a more equitable award.

With regard to the question of maintenance the plaintiff has been awarded the sum of £5 by the court below. This Court does not regard this as a complete extinguishment of the defendant's liability and will therefore not disturb the order.

Both parents are responsible for the maintenance of this child and should the defendant at any time fail to fulfil his share of the obligation, the plaintiff has her legal remedy.

The result is that the appeal is dismissed with costs and the cross-appeal allowed with costs, the judgment of the court below altered to one for plaintiff for £55 and costs.

TYANTYATU v. SANCXU.

(Butterworth.)

1930. *November* 3. Before J. M. Young, President, H. E. F. White, and W. F. C. Trollip, Members.

Interpleader action.—Estoppel.—Res judicata.

Facts: Appeal from the Native Commissioner's Court, Idutywa.

The plaintiff, Sangxu, sued the defendant, Tyantyatu, in an action in which he claimed an order of ejectment from his, plaintiff's, kraal. He alleged that he is the eldest son and heir of the Great House of the late Wayiti, who was the eldest son and heir of the late Nqolowa, and that he has, therefore, inherited the kraal of Nqolowa. He said that the defendant is the son of the Qadi House of Wayiti and that he is residing at the kraal in question where he is interfering with the people and stock and that living together has become impossible.

The defendant pleaded that the plaintiff was an illegitimate son of Nosanti, the Great Wife of Wayiti, and was born after the dissolution of the union of Nosanti and Wayiti, which dissolution took place in 1904, by Nosanti being accused of causing the illness of Wayiti and being driven away from his kraal. He pleaded further that, there being no legitimate male issue in the Great House, he, as the eldest son of the Qadi House of Wayiti, is the heir of his father, Wayiti, and of his grandfather, Nqolowa. He counterclaimed for an order declaring him to be the heir of Wayiti and Nqolowa and as such entitled to the transfer of the building lot of Nqolowa to his name, and to the possession of the estate of Nqolowa, consisting of 24 head of cattle, 38 sheep and 5 goats.

To this plea and counterclaim the plaintiff objected on the ground that, in an action heard in the Court of the Magistrate of Idutywa in which Alexander Mather, an European, was the respondent and the plaintiff was the claimant, it was held that the plaintiff was the heir of Wayiti and Nqolowa, and that judgment, being a judgment *in rem*, is binding on all parties, and that the defendant is now estopped from claiming to be the heir and denying that the plaintiff is heir. The record of the case of *Sangxu* v. *Mather* was put in by consent of the parties as proof of the judgment only. The Native Commissioner upheld the objection, struck out the vital portion of the defendant's plea and dismissed the counterclaim with costs.

The appeal is against this ruling.

JUDGMENT: In the opinion of this Court the ruling of the Native Commissioner cannot be supported. The sole question for decision in the case of *Sangxu* v. *Mather* was whether or not certain six head of cattle attached in the case of *Mather* v. *Sijadu Mgqobozi* were the property of the claimant, Sangxu, and as such liable to execution. The judgment declaring the cattle non-executable did not declare that the plaintiff, Sangxu, was the heir of the late Wayiti and Nqolowa and is not binding on the present defendant. He was not a party to that cause and any ruling then given would not estop him from setting up the present claim.

The appeal is allowed with costs, the Native Commissioner's judgment set aside and the case returned to him to be heard on the merits.

(Butterworth.)

1930. *November* 3. Before J. M. Young, President, H. E. F. White, and W. F. C. Trollip, Members.

Assault.—Damages.—Appeal on damages.

Facts: Appeal from the Native Commissioner's Court, Idutywa.

The appeal in this case is brought on the ground that the amount of damages awarded is inadequate. The plaintiff, now appellant, claimed £50 as damages for assault. Prior to the issue of the summons the defendant tendered the sum of £8, which amount he paid into Court. In his plea he admitted the assault and stated that he found the plaintiff trespassing in the vicinity of his kraal at night and, having reasonable grounds for believing that he was there for an unlawful purpose, he was to a certain extent, justified in assaulting him. The facts, as stated by plaintiff are that, on the night of the 8th of April, 1930, he went to the kraal of the late Wata where defendant lives to visit his "metsha," Nohopi, the widow of Wata, that he entered the kitchen or store hut with Nohopi, that Nohopi left the hut to get a lamp and, that during her absence, the defendant came in, and asked him who he was and assaulted him with a stick, fracturing his left arm and jaw. He was attended by a medical practitioner whom he paid the sum of £1 for treatment. Neither Nohopi nor the doctor was called, and there is no evidence beyond that of the plaintiff as to the extent of his injuries.

The story of the defendant is that hearing the dogs bark, he went out and saw two people near the stock kraal, that he asked who they were and, on receiving no reply, he assaulted plaintiff, not knowing who he was. He says the other person ran away and that he did not recognise her as Nohopi. The defendant was convicted of the assault and ordered to pay a fine of £4. He admits that in the criminal case Nohopi gave evidence and that she said the assault took place in the hut.

Judgment: Now, whatever may be the view which this Court might have taken had this case come before it in the first instance, the question now before it is whether it should interfere with the finding of the court below by increasing the amount of the damages

awarded. There is no doubt that on principle a person who is legally entitled to damages which are not awarded to him by the court below, may appeal to this Court in vindication of his legal rights. The question, however, is what principles should guide this Court in considering whether or not we interfere with the finding of the court below. The Assistant Native Commissioner has taken into consideration, judging by his reasons, various elements which should be considered in assessing damages. He had the advantage over this Court of seeing the plaintiff and judging of his appearance and injuries and has awarded what are not merely nominal damages. In the case of *Ngcayicibi* v. *Gada Maboza and Another*, heard in the Native Appeal Court at Butterworth in July, 1928, it was held that before an appellate Court will interfere with the assessment made by a magistrate, it must be satisfied that the damages awarded are grossly inadequate.

Under the circumstances this Court is not disposed to interfere. The appeal is dismised with costs.

STEPHEN MZWAKALI v. ENOCH MONWABISI.

(Butterworth.)

1930. *November* 5. Before J. M. Young, President, H. E. F. White, and W. F. C. Trollip, Members.

Native Customary Union.—Dissolution.—Claim for restoration of dowry without claiming the return of partner, tantamount to rejection.

Facts: Appeal from the Native Commissioner's Court, Nqamakwe.

Judgment: In this case the plaintiff claimed from the defendant the return of the dowry paid for his wife or partner, Angelina, the defendant's sister.

It is clear from the evidence that a Customary Union was entered into by the plaintiff with Angelina and that this union still subsists. It is also clear that Angelina has deserted the plaintiff and is living with another man in the district of Engcobo,

and that she has no intention of returning to the plaintiff. Under the circumstances the plaintiff is entitled to an order dissolving the union and the return of the dowry paid less the customary deductions. The summons does not specifically ask for a dissolution of the union nor does it contain a prayer for the return of the woman.

In cases of this nature Native Custom requires that, where a woman deserts her husband or partner, he must demand her return failing which the restoration of the dowry paid for her. If he does not ask for her return before claiming the repayment of the dowry, his action is regarded as tantamount to a rejection of her.

As already stated, it is abundantly clear that Angelina has no intention whatsoever of returning to the plaintiff. The Native Commissioner has found as a fact that she has contracted a second union or marriage.

In the case of *Liwani* v. *Batakati* (5 N.A.C. Trans. P. 57), it was decided that where a woman without cause deserts her husband and elopes with another man with whom she persists in living in adultery and will not return, her huband is entitled to an order dissolving the marriage and to the return of his dowry.

Although there is no prayer for the woman's return or for an order dissolving the union, this Court is satisfied that substantial jutice has been done and that no prejudice has resulted from this defect.

The appeal is dismissed with costs.

RADEBE SANDUKWALUKA v. NAKILE MNTUMNI.

(Lusikisiki.)

1930. *November* 18. Before J. M. Young, President, R. H. Wilson and W. C. H. B. Garner, Members.

Pound regulations.—Trespassing stock.—Proclamation No. 143 *of* 1919, *section* 6.

Facts: Appeal from the Native Commissioner's Court, Libode.

The plaintiff in the Native Commissioner's Court claimed the sum of £1 15s. as damages sustained by him by reason of the trespass of 30 head of cattle, the property of the defendant, on his cultivated land.

The defendant denied the trespass and stated that the land trespassed upon was not the defendant's.

The Native Commissioner entered judgment for the defendant and furnished the following reasons for the judgment:—

"FACTS FOUND PROVED:— That plaintiff has never received a certificate from the magistrate, in terms of sec. 4 (1) (*a*) of Proclamation No. 143 of 1919 authorising him to occupy the land in respect of which damages are sought. Since plaintiff's right to occupy the allotment in question has been determined by sec. 6 (4) of Proclamation No. 143 of 1919, he cannot be said to have suffered damages by reason of the trespass of cattle thereon."

The plaintiff appealed.

Judgment of the Native Appeal Court:—In the opinion of this Court the judgment of the Assistant Native Commissioner cannot be supported. His reference to sec. 6 (4) of Proclamation No. 143 of 1919, is not understood. Sec. 6 of the Proclamation reads:—

(1) It shall be lawful for the Chief Magistrate whenever he may deem it necessary to order an inquiry into the distribution of homesteads or arable allotments in any location.

(2) The resident magistrate thereupon shall call upon all or any allotment holders in the location to submit applications for registration of such allotments in their occupation as they desire to be granted permission to occupy under section four, and lists of persons in occupation of allotments, together with the number and approximate extent of the same in such location, shall be submitted to the Chief Magistrate, with the recommendation of the resident magistrate thereon.

(3) Upon receipt of the Chief Magistrate's directions thereon, the resident magistrate shall comply with the provisions of sec. two.

(4) From and after a day fixed by the Chief Magistrate all rights to occupy unregistered allotments in such location shall, notwithstanding to the contrary in this proclamation, be determined and the said allotment shall revert to commonage.

There is nothing on record that any enquiry into the distribution of allotments in the location in which the plaintiff resides, and in which the land is situated, has ever been ordered by the Chief Magistrate. Under the circumstances the provisions of that section do not apply.

Sec. 3 of the Proclamation provides that:—

"All land occupied as a homestead or cultivated for growing crops by any person at the date of taking effect of Cape Proclamation No. 195 of 1908 (namely, the 9th May, 1908), and in his continuous occupation from that date until the date of inquiry mentioned in sub-sec. (1) of sec. six or prosecution shall be deemed to be in his lawful occupation, unless proof to the contrary shall be adduced."

The plaintiff has testified that he has been in occupation of the land trespassed upon since before East Coast fever and that it was allotted to him by the Headman Ginga and a Native Constable. He must, therefore, be presumed to be in lawful occupation unless the contrary is proved.

The appeal is allowed with costs, the Native Commissioner's judgment set aside and the case returned to be dealt with on the merits.

PAYENDANA v. ZWELIBE.

(Lusikisiki.)

1930. *November* 19. Before J. M. Young, President, R. H. Wilson and F. C. Pinkerton, Members.

Allotment of daughters of Right Hand House by eldest son of Great House during minority of eldest son of Right Hand House not in accordance with custom.

Facts: Appeal from the Native Commissioner's Court, Ngqeleni.

In this case the plaintiff claimed from the defendant (1) A black ox, white face. (2) A black and white cow and her two black and white heifer calves. (3) One head of cattle or its value £5. (4) 2 goats or their value £1. (5) The sum of £1.

The defendant in his plea admitted liability for one beast or its value £5, 1 goat or its value 10/- and the sum of £1. In his evidence he admitted further liability for one heifer and a second goat.

The Assistant Native Commissioner entered judgment for plaintiff on all claims with costs and the defendant has appealed. The

disputed items are the claim for the black ox, white face and the black cow and 1 of her heifer calves.

The late Gobenqa, the father of the parties, had 2 wives or partners. Zibindi is the eldest son of the Great House. In the Right Hand House there were 5 sons and 5 daughters. The sons are:—Payindana, Ndlanya, Zwelibi, Mbetele and another. The daughters are:—Noruda, Nogqiki, Nokinqa, Nomtu and Lomane. The plaintiff alleges that, after his father's death an allotment of the daughters was made by Zibindi, the defendant and his mother, that Nokinqa was allotted to Ndlanya, that she was married twice, that the black ox with white face is one of the animals paid as dowry for her and that he purchased this ox from Ndlanya. The defendant admits that Nokinqa was twice married and that the ox is part of her dowry. He denies the allotment and sale.

Judgment: The *onus* of proving the allotment is on the plaintiff. In the opinion of this Court he has not discharged that *onus*. The allotment of the daughters of the Right Hand House by the eldest son of the Great House during the minority of the heir of the Right Hand House would not be in accord with Native Custom. The evidence which the plaintiff has adduced is not sufficient to satisfy this Court that the custom was departed from and on this point the appeal must succeed.

With regard to the cow and her calves there is ample evidence on the Record to support the Assistant Native Commissioner's finding that the defendant used a sum of £4 belonging to plaintiff, that he pointed out a yellow heifer, one of the dowry cattle of his sister Lomane, as the animal which he was giving to plaintiff for his money, that plaintiff accepted the heifer, that the defendant, with the plaintiff's consent, paid away the heifer as dowry, that it was replaced by the black and white cow and that this cow has since had two heifer calves.

The appeal will be allowed with costs, and the judgment of the trial court altered to judgment for plaintiff for (*a*). The delivery of the black and white cow and her 2 black and white heifer calves or their value £15. (*b*). One head of cattle or its value £5. (*c*) 2 goats or their value £1. (*d*). The sum of £1, and (*e*). Costs of suit.

(Lusikisiki.)

1930. *November* 18. Before J. M. Young, President, R. H. Wilson and W. C. H. B. Garner, Members.

Pondo Custom.—Liability of kraalhead for torts of married sons who are inmates of his kraal.

Facts: Appeal from the Native Commissioner's Court, Port St. John's.

In this case the plaintiff claimed £25 as damages for adultery and pregnancy.

The first defendant denied the intimacy and that he was the father of the plaintiff's wife's child. The second defendant admitted that he was the father of the first defendant and that the first defendant was an inmate of his kraal, but said that he was not liable for his son's torts as the son was a married man and that he had provided him with a wife.

The Native Commissioner, after hearing the evidence, entered judgment as prayed against both defendants and they have appealed.

On the facts there is no doubt that the first defendant committed adultery with the plaintiff's wife and rendered her pregnant.

With regard to the question of the second defendant's liability as kraal head, this Court is of opinion that a kraal head is responsible for torts committed by all his sons who are inmates of his kraal, whether such sons are married or not, and that the only way in which a father can free himself from this responsibility is by making his son set up a separate establishment.

The Court is aware that there are conflicting decisions on this point, but it is satisfied that those decisions in which a contrary view has been expresed are not in conformity with the custom as observed generally throughout Pondoland.

The appeal is dismissed with costs.

(Umtata.)

1930. *November* 11. Before J. M. Young, President, F. N. Doran and E. W. Bowen, Members.

Evidence to contradict witness.—When prior inconsistent statement admissible.—Criminal record, admissibility of.

Facts: Appeal from the judgment of the Native Commissioner's Court, Umtata.

In this case the plaintiff claimed from the defendant £15 as damages for adultery alleged to have been committed by defendant with the plaintiff's wife on the night of the 2nd March, 1930.

The plaintiff's case is that on the night in question his wife was found in the act of adultery with defendant in a donga near the plaintiff's kraal by the plaintiff's sons, Gamalaziwo and Mbatshobonke, that on being discovered the defendant ran away and was pursued and assaulted by them. The defendant denies that he was caught with the plaintiff's wife and alleges that, whilst searching for his horses some distance from plaintiff's kraal, he was attacked by Gamalaziwo, Mbatshobonke and Ntlakanyana, plaintiff's sons, and severely assaulted without any reason or provocation.

Gamalaziwo, Mbatshobonke and Ntlakanyana were tried for and convicted of assault. They all gave evidence at the criminal trial. Nomaki, their mother, plaintiff's wife, also gave evidence at that trial. During the hearing of the present case Nomaki, Gamalaziwo and Mbatshobonke gave evidence on behalf of the plaintiff. In cross-examination they were asked whether they had made certain statements at the criminal trial inconsistent with their testimony then given and they admitted that, in certain respects, their evidence was inconsistent with what they had said at the criminal trial.

At the conclusion of the defendant's case Mr. *Hemming* on behalf of the defendant, applied to have the proceedings of the criminal case put in through the clerk of the court. This was objected to by the plaintiff's attorney. The objection was upheld and judgment was entered for plaintiff in terms of his prayer.

Judgment: Against this judgment an appeal is brought on the grounds:—

(1) That the Native Commissioner erred in refusing to allow the clerk of the court to put in the record of the criminal

trial for the purpose of proving that the witnesses had made statements inconsistent with their testimony in the present case;

(2) That the judgment is against the weight of the evidence and probabilities of the case.

With regard to the first of these grounds the rule applicable to the point is thus stated by *Stephen* (Article 131):—

"Every witness under cross-examination, in any proceeding, civil or criminal, may be asked whether he has made any former statement relative to the subject-matter of the proceeding and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion, and if he does not distinctly admit that he has made such a statement, proof may be given that he did in fact make it."

The gist of the matter lies in the words "Relative to the subject-matter of the proceeding" and "if he does not distinctly admit that he has made such a statement." A reference to the evidence of the witnesses Nomaki and Mbatshobonke shows that they admitted that they had made certain statements at the criminal trial which were not consistent with their present testimony, and the witness Gamalaziwo does not specifically deny that he made the statement that he expected to find his mother with some one in the garden.

Under the circumstances it does not appear that the defendant has suffered any prejudice by the refusal of the Assistant Native Commissioner to allow the Record of the criminal trial to be put in. If any irregularity has been committed by the exclusion of the Record, it is not such an irregularity which would influence this Court to set aside the judgment, if there is evidence to justify it.

A great deal of evidence was given for the plaintiff, and no doubt there are certain contradictions and inconsistencies, but on the whole, if the evidence was believed by the Assistant Native Commissioner, as it was—and he has furnished sound reasons for his belief—this Court cannot see any ground why it should interfere with his decision. There is sufficient evidence upon the Record to justify the finding of the Assistant Native Commissioner, and the consequence is that the appeal must be dismissed with costs.

(Umtata.)

1930. *November* 11. Before J. M. Young, President, F. N. Doran and E. W. Bowen, Members.

Adultery.—Absence of Ntlonze.—Clear and convincing proof of misconduct required.

Facts: Appeal from the judgment of the Native Commissioner's Court, Engcobo.

Judgment: The evidence in this case is extremely meagre and insufficient to establish the plaintiff's case. There is nothing on the Record to show when the plaintiff went away to work, nor is there any proof that he could not have had access to his wife at a time when he might have been the father of her child. The parties are natives and it has been laid down on innumerable occasions that in the absence of a catch, the production of "Ntlonze" and the other elements which are usually present in cases of this nature, very strong evidence of adultery is required. Proceedings of this kind have always been regarded as of a quasi-criminal character and clear and satisfactory proof is necessary to establish the misconduct.

The only evidence of adultery is that of the plaintiff's wife. Nowayiti, another wife or partner of the plaintiff, was called to support her. Her evidence in regard to the payment of the "Nyoba" fee is inconsistent with Native Custom and in the opinion of this Court, it would be dangerous to accept it.

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

(Umtata.)

1930. *November* 11. Before J. M. Young, President, F. N. Doran and R. D. H. Barry, Members.

Illegal contract.—Illegality of.—Not pleaded but raised in argument before trial court and subsequently made a ground of appeal.—Judicial cognisance.—Native herbalist.—Payment of fee to.—Claim for return of.—Act 13/1928, *section* 34.—Potior est conditio defendentis.—Ex dolo malo non oritur actio.

Facts: Appeal from the judgment of the Native Commissioner's Court, Engcobo.

Judgment: In this case the plaintiff, now respondent, sued the defendant for the recovery of a black cow and her calf or their value £7 10s. The summons alleges that about the year 1927, the defendant represented himself to the plaintiff as a herbalist able and qualified to cure the plaintiff's daughter, Nomkwa, who was suffering from fits, and undertook and guaranteed to cure her on payment, in advance, of one heifer, which the defendant agreed to return to the plaintiff should he fail completely to cure the said Nomkwa; that, in pursuance of the said agreement, the plaintiff delivered a certain black heifer to the defendant, which heifer has since had a calf, that the defendant treated and failed to cure the said Nomkwa and neglects and refuses to return the said heifer, now a cow, with her increase.

To this claim the defendant pleaded:—

1. Except for admitting that he is a herbalist, Nomkwa's ailment, delivery of the heifer in question and refusal to return it, defendant specifically denies the remaining allegations of the particulars of claim.
2. Defendant says that about five years ago plaintiff took his daughter Nomkwa to him (defendant) and left her with him (defendant) for medical attendance. That about the same year Nomkwa recovered from her ailment, defendant took her back to plaintiff who paid him (defendant) Mlandu beast—the beast in question, then a heifer tollie—for his services. Defendant denies therefore that plaintiff has any claim to the beast and its increase.

The Assistant Native Commissioner found for the plaintiff and entered judgment for the cow and calf or their value £7 10s., and costs.

In his reasons for judgment he says:—"I was quite satisfied that the agreement as alleged was made between the parties, while being aware that a herbalist has no action at law to claim fees, but the agreement between the parties which was sufficiently proved was to my mind sufficiently binding on the parties. It was clear that defendant did not cure the girl. I therefore held that defendant had to return the beast and its increase in terms of the original agreement."

The defendant has appealed on the following grounds:—

1. That the agreement alleged by the plaintiff in paragraph 1 of the particulars of claim being illegal on the face of it, and the trial court's attention having been drawn to its illegality by defendant's attorney in argument, the proper judgment was one dismissing the summons with costs.
2. That even though defendant' attorney had not raised the question of illegality in the course of the trial it was the duty of the trial court to have done so *mero motu*.
3. That plaintiff being a party to an agreement which was illegal on the face of it cannot recover from the defendant (who was in possession and in the better position in law) the animal paid by plaintiff to defendant in respect of such illegal agreement.
4. That the agreement alleged by plaintiff in paragraph 1 of the particulars of claim is contrary to the provisions of Act 134 of 1928, and to the provisions of Act 34 of 1891, which the former repealed.
5. That the judgment is against the weight of the evidence and the allegations relied upon are wholly improbable.

Even if we accept the Assistant Native Commissioner's finding on the facts it remains necessary to consider whether the agreement was a valid one which could in law be enforced. The illegality has not been pleaded but pleadings are intended for issues of fact and not for contentios in law; and, if there be any illegality manifest on the face of the agreement it is not only competent for but it is the duty of this Court to consider it.

The Medical, Dental and Pharmacy Act makes it unlawful for any person, not registered as a medical practitioner, for gain, to practise as a medical practitioner or to perform any act specially

pertaining to the calling of a medical practitioner, or pretend or by any means whatsoever hold himself out to be a medical practitioner.

It will thus be seen that the defendant, not being registered as a medical practitioner, and not being in possession of a degree, diploma or other qualification as a medical practitioner, doctor of medicine or physician, contracted and undertook to do and did something which was clearly illegal. The question then is, can the plaintiff succeed? Is he entitled to invoke the assistance of the Court to enable him to recover the possession of the cow and her calf delivered to the defendant in pursuance of the agreement?

In the opinion of this Court he cannot. The law covering contracts tainted with illegality was fully considered in the case of *Brandt* v. *Bergstedt* (1917, C.P.D. p. 347). In that case KOTZE, J. said:—" The general principle of law in regard to illegality is well stated by Lord MANSFIELD in *Holman* v. *Johnson* (1 Cowp. p. 343) in the following terms:—

'The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded on general principles of policy which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this, *Ex dolo malo non oritur actio*. No Court will lend its aid to the man who founds his cause of action upon an immoral or illegal act if from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causa* or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Courts go, not for the sake of the defendant but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides and the defendant was to bring his action against the plaintiff the latter would then have the advantage of it; for where both are equally at fault *potior est conditio defendentis*.' "

As already stated, what the defendant contracted to do was unlawful and the principles above set out must apply.

The result is that the appeal will be allowed and the judgment of the court below altered to judgment for defendant with costs.

(KOKSTAD.)

1930. *November* 26. Before J. M. YOUNG, President, E. G. LONSDALE and F. H. BROWNLEE, Members.

Public holiday.—Sunday.—Process returnable on.—Act 38 *of* 1927 *and rules of Native Commissioners' Courts.*

FACTS: Appeal from the judgment of the Native Commissioner's Court, Matatiele.

On the 25th day of April, 1930, an order was made in the following terms:—" It is ordered that the messenger of the Court do take from the respondent, Mpondo Mantshule, or from any other person in whose possession it may be found, a certain black gelding which he wrongfully and unlawfully spoliated from the applicant, and that the messenger do restore the said horse to the possession of the applicant; and further the said respondent be called upon to show cause on Thursday the 29th day of May, 1930, at 10 o'clock in the forenoon why this order should not be made final with costs.

The 29th day of May, 1930, was a public holiday (Ascension Day). On the 30th day of May, in the absence of respondent, this order was made final with costs.

The respondent now appeals on the following grounds:—

1. The return day of rule *nisi*, namely, the 29th May, 1930, was not a Court or business day but a public holiday, when the magistrate's office was closed, and the presiding magistrate acted wrongfully and illegally and committed a gross irregularity in making the said rule final with costs against respondent, upon applicant's application, on the 30th May, 1930.
2. The applicant was not, in any event, entitled to a spoliation order as he failed to institute spoliation proceedings timeously and delayed action for a period of five weeks, during which time a third party had become possessed of the horse forming the subject of the spoliation proceedings instituted against respondent.

JUDGMENT: In the opinion of this Court, there being no provision either in the Native Administration Act, 1927 (Act 38 of 1927) or in the Rules of Procedure applicable to Native Commissioner's Courts authorising Native Commissioners to hear on the following

day any cause or matter in which the process is returnable on a Sunday or public holiday, the proceedings lapsed and the order made on the 30th May, 1930, was therefore irregular.

The appeal is allowed with costs and the Native Commissioner's judgment or order is set aside.

JOHN DUBE v. TOM APRIL.

(Kokstad.)

1930. *November* 27. Before J. M. Young, President, E. G. Lonsdale and F. H. Brownlee, Members.

Defamation.—Privilege.—Witness in court proceedings.

Facts: Appeal from the judgment of the Native Commissioner's Court, Mount Fletcher.

In this case the plaintiff claimed from the defendant the sum of £100 as damages for defamation. The defendant in his plea denied liability. He admitted that in the course of his evidence under oath in a criminal case, in which he was the accused, and which was heard before the magistrate's court of Mount Fletcher, he did make certain statements under oath of and concerning the plaintiff. He said that such statements were made to the presiding magistrate whose duty it was to receive them and that a corresponding duty lay upon him to make a full disclosure in the premises. He pleaded further that such statements were made without malice in his own defence on a privileged occasion and that the communication was a privileged one.

The facts of the case are that on the 26th February, 1930, the defendant was tried for and convicted of the theft of certain clothing, groceries, etc., the property of Mr. J. S. Moffet of Mount Fletcher. Both the plaintiff and the defendant were in the employ of Mr. Moffet, the plaintiff as a salesman and the defendant in a subordinate capacity as a storeman. The plaintiff gave evidence for the Crown. At the conclusion of the Crown case the defendant, who had pleaded guilty, elected to give evidence on his own behalf and in the course of his evidence he made certain statements implicating the plaintiff in the theft.

The Native Commissioner entered a judgment of absolution from the instance with costs. In his reasons for judgment he says that he did not know which of the parties to believe. The plaintiff has appealed. It has been urged on his behalf that the occasion was not a privileged one, that there was no necessity for the defendant to make any statement and that it must be presumed that in making the statement he was actuated by malice. It has also been urged that the statement was made voluntarily and not in answer to a question and that the *onus* of proving that the words were not spoken maliciously was on the defendant.

JUDGMENT: Now in the opinion of this Court the defendant had the right to give evidence on his own behalf whether he had entered a plea of guilty or not and having elected to do so, it was his duty to place the true facts before the Court to enable the Court to arrive at a correct conclusion and impose a suitable penalty. It is true that the law of this country differs from the English law in that there is no authority to the effect that there is an absolute privilege attaching to the utterance of a witness, yet it has been laid down that a certain substantial protection should be accorded to witnesses and that the privilege of a witness is one which exists *prima facie*, but is defeasible on proof of express malice on evidence being produced that the witness using the words, when using them was prompted by *animus injuriandi*. In the case of *van Rensburg* v. *Snyman* (1927, O.P.D. p. 123), DE VILLIERS, J. said:—

"We are prepared, as I have already indicated, to accept that the words were spoken in answer to a question, but even if this was not so, even if they had been volunteered, I am not prepared to say that that would affect the result. One has to bear in mind that the privilege must not be construed in a limited spirit, and it may well be contended that the words used were sufficiently germane to the proceedings as a whole, whether on a point of credibility or as bearing on the sentence, to keep the matter within the privilege that the witness was not going without the limits of the privilege in a case like the present. Under the circumstances the plaintiff's case fails unless he can satisfy the Court that there was *animus injuriandi*. And here we may expediently refer to the words already referred to in the case of *McGregor* v. *Sayles*: 'according to the authorities it was necessary under such circumstances to the success of the plaintiff that he shall satisfy the Court of three things:— First, that the witness was actuated

by express malice; second, that the words spoken were false, and third, that the witness who uttered them had no reasonable ground for believing them to be true.' ''

Applying these principles to the facts of the present case this Court has come to the conclusion that the occasion was a privileged one and that the plaintiff has failed to prove that the evidence given by the defendant was false, that when he gave that evidence he had no reasonable ground for believing it to be true and that he was actuated by express malice.

The appeal is dismissed with costs.

NYWEBA DLANGAMANDLA v. NTUTA GALI.

(Kokstad.)

1930. *November* 25. Before J. M. Young, President, E. G. Lonsdale and F. H. Brownlee, Members.

Baca custom.—Fines paid for elopement do not merge in dowry until after Customary Union complete.

Facts: Appeal from the judgment of the Native Commissioner's Court, Mount Frere.

In this case the plaintiff claimed four head of cattle or their value £20. In his particulars of claim he alleged that he became engaged to marry the defendant's daughter and paid three head of cattle on account of dowry, that these cattle have now increased to four and that the defendant's daughter, without just cause, rejected him and married another man.

The defendant denied the alleged engagement and stated that the plaintiff eloped with his daughter on three different occasions and that one head of cattle was paid as a fine for each elopement.

Judgment: It seems clear from the evidence that the plaintiff eloped with the defendant's daughter and that a red and white heifer, which has since had two increase, was paid as an elopement fee and two head of cattle were subsequently paid on account of dowry. One of these animals has died. It is also clear that the defendant's daughter has rejected the plaintiff.

The question for decision is whether the plaintiff is entitled to the return of all the cattle paid or whether the defendant is justified in retaining the beast paid as elopement fee.

The facts being put to the Native Assessors they are unanimous in stating that fines paid for elopement do not merge in dowry until after marriage. This expression of opinion is consistent with the decisions in the cases of *Makwenkwe Qoqa* v. *Langa,* heard in this Court on the 23rd May, 1929, and *Gqilipela Tanyana* v. *James Mabija* (3 N.A.C. 260).

The appeal is acordingly allowed with costs and the judgment of the court below altered to judgment for plaintiff for one beast or its value £5 and costs.

MANTANTA v. PUNGULA.

(Kokstad.)

1930. *November* 27. Before J. M. Young, President, E. G Lonsdale and F. H. Brownlee, Members.

Native Custom.—Customary Union of man and brother's widow prohibited by Hlangwini Custom.

Facts: Appeal from the judgment of the Native Commissioner's Court, Umzimkulu.

The plaintiff in this case claimed:— A declaration of rights in regard to three girls named Nonkohlwane, Cotshiswa and Matuswana and to the dowries paid for them.

In his particulars of claim he alleged:—

1. The parties hereto are Natives.

2. Some years ago plaintiff married Mastulumani, according to Native Custom, and he paid dowry for her to her father.

3. There were several children of the aforesaid marriage, several of which died leaving 3 girls surviving, named Nonkohlwane, Cotshiswa and Matuswana.

4. Plaintiff's wife subsequently deserted him and she went to defendant's kraal taking with her the aforenamed 3 female children.

5. The said Nonkohlwane has become engaged to one Mtshibeni Mpepa and defendant has received the sum of £9 as dowry for her, in addition to which certain stock has also been paid to defendant by description as dowry for her, to all of which plaintiff is entitled.

6. Defendant disputes plaintiff's right to the custody and the dowry of the aforenamed 3 girls and defendant wrongfully and unlawfully claims to be entitled thereto.

The defendant pleaded as follows:— Paragraphs 1 and 6 of the summons are admitted. Save for admissions hereinafter contained, defendant denies the allegations contained in paragraphs 2, 3, 4 and 5 of the summons and states:—

1. "That his father Rolobile and the plaintiff were half brothers—Rolobile being younger son of Miliso in the latter's first hut, and plaintiff being eldest son in Miliso's second hut.

2. That Mastulumani, mother of the girls in question, was the wife of defendant's late father Rolobile, to whom she was married according to Native Custom; 12 head of cattle were paid as dowry for her prior to Rolobile's death and two children were born, defendant and a girl Nomtsheba, issue of the said marriage.

3. Defendant denies that plaintiff was ever married to Mastulumani and states that it would have been in direct conflict with custom for him to enter into a marriage with her after his brother, Rolobile's death.

4. After Rolobile's death an ngena union was arranged between his widow Mastulumani and his brother the plaintiff, the latter being appointed to raise seed to Rolobile's hut, of which defendant is the heir.

5. The three girls in question were issue of this ngena union and plaintiff has no right to them or to their dowry.

6. Defendant contends that as heir of Rolobile he is entitled to the custody, control and dowries of the three girls in question.

7. After Rolobile's death a further five head of cattle were paid as dowry for Mastulumani by Rolobile's eldest brother, who was at the time the kraal head. These cattle Fani (the brother in question) borrowed from plaintiff, and plaintiff actually sued Fani for these five head of cattle and a sixth as his ngena fee, before headman Rasmeni. The headman gave judgment against Fani, ordering him to pay plaintiff the 6 head of cattle claimed."

Wherefore defendant prays that plaintiff's claim (*a*) and (*b*) may be dismissed and judgment be entered thereon for defendant with costs of suit.

Evidence at considerable length was heard and judgment in the following terms was entered: "For plaintiff for dowry paid and to be paid for Nonkohlwana and costs of suit."

Against this judgment the defendant has appealed and the plaintiff has brought a cross-appeal. The cross-appeal is brought on the following grounds:—

1. That no marriage or Customary Union between the late Rolobile and Masitulumani ever subsisted.
2. That even assuming that the late Rolobile had been married to Masitulumani that marriage was dissolved by the death of Rolobile.
3. That the defendant failed to prove the "ukungena" union between plaintiff and Masitulumani.
4. That all the essentials which are necessary to constitute an "ukungena" union are absent.
5. That the evidence does not support the judgment.
6. That the evidence and surrounding circumstances support the plaintiff's contention that a Customary Union was entered into by him with Masitulumani.

JUDGMENT: With regard to the first of these grounds there is ample evidence to prove that a Customary Union was consummated between Rolobile and Masitulumani. It is common cause that Rolobile paid twelve head of cattle as dowry, that there was cohabitation between him and Masitulumani, that they lived together for a period of from two to four years and that she bore him two children, one of whom is the defendant.

Dealing with the remainder of the grounds advanced on behalf of the cross-appellant, the Assistant Native Commissioner has found as a fact that the plaintiff "Ngenaed" Masitulumani, Rolobile's widow. The evidence and the surrounding circumstances support this finding. In reply to the question whether it is in accordance with custom for a man to contract a Customary Union with his brother's widow, the Native Assessors unanimously state that Native Custom prohibits such a union. This Court accepts this as a correct statement of the custom.

For these reasons the cross-appeal must fail and is dismissed with costs.

The main point raised in the appeal is that the Assistant Native Commissioner has gone outside the pleadings in awarding the dowry paid and to be paid for Nonkohlwana (one of the daughters of the "ukungena" union) to the plaintiff. The Assistant Native Commissioner admits that he went beyond the plaintiff's claim in giving the judgment recorded. He says that he did so because he considered that in justice and equity the plaintiff was entitled to some consideration. In the opinion of this Court he has erred. It was not competent for him to make the award he did. It was not prayed for nor is it consistent with Native Custom.

The appeal is allowed with costs and the judgment of the court below altered to judgment for defendant with costs.

HOLLAND BAKACU v. HOCKLY MBUWANA.

(Kingwilliamstown.)

1930. *February* 2. Before J. M. Young, President, E. D. Beale and C. P. Alport, Members.

Adultery, damages for.—Christian rites marriage, effect of.—Consortium, *loss of.—Condonation.*

Facts: Appeal from the Native Commissioner's Court, Kingwilliamstown.

In this case, appellant, the defendant in the court below, was sued by respondent for five head of cattle as damages for adultery, resulting in pregancy, committed by him with respondent's wife. The admitted facts are that, during respondent's absence at the goldfields, appellant caused the pregnancy of respondent's wife, to whom he was married by Christian rites; that on damages being demanded from him by respondent's father, on his son's behalf, the appellant tendered three head of cattle; and that this tender was refused as inadequate. The respondent was awarded five head of cattle in the court below. From this judgment an appeal was brought on the grounds that the damages awarded was excessive as it was common cause that respondent and his wife were married by Christian rites and that they lived together subsequent to the act of adultery and that, for these reasons, the tender was sufficient.

JUDGMENT: In the opinion of this Court the respondent by entering into a marriage by Christian rites has contracted himself out of the operation of Native Custom and any action for damages for adultery must be dealt with according to common law. In *Viviers* v. *Killian* (1927, A.D. 449) and *Bradshaw* v. *Bradshaw and Hecker* (W.L.D. 1927) it was held that, although condonation was no bar to a claim for damages, it operated in mitigation of damages, and that plaintiff having suffered no loss of *consortium* was not entitled to damages under that head, but was entitled to compensation for *contumelia* inflicted upon him. In those cases nominal damages were awarded. If the present case might be appropriately viewed in the light of theses decisions then the tender of three head of cattle was ample. We are also satisfied that in the particular circumstances of the case the tender was sufficient. The appeal is allowed with costs and the judgment of the trial court altered to judgment for plaintiff for three head of cattle or £15. Plaintiff to pay costs.

JAMES SOLOMON v. KOLOSILE FABA.

(KINGWILLIAMSTOWN.)

1929. *June* 5. Before J. M. YOUNG, President, E. D. BEALE and C. P. ALPORT, Members.

Seduction.—Damages for.—Ordinary amount of.—Minor.—How sued.

FACTS: Appeal from the Native Commissioner's Court of Albany. In this case the appellant sued respondent in the court below for (*a*) £12 10s. balance of damages for the seduction and pregnancy of a girl named Maggie, the minor daughter of plaintiff, and (*b*) £4 10s. being an amount expended in connection with the confinement and lying-in expenses of Maggie.

At the trial respondent excepted to the summons that he was a minor, and, that his father being dead, the summons should have been directed against his guardian, James Valtein. The Commissioner overruled the exception holding that as there was no provision in the regulations under which an exception or objection could be taken the case must proceed.

It does not appear from the Record whether the respondent was called upon to answer or plead to the summons. No answer or plea is recorded.

After the evidence of the plaintiff and two witnesses had been taken and apparently without the plaintiff having closed his case and before any evidence was led on behalf of the defendant judgment was entered in the latter's favour with costs.

Against this judgment plaintiff has appealed on the ground that it is not in accordance with Native Custom for the reason that plaintiff should have been awarded the customary damages of six head of cattle or their equivalent.

JUDGMENT: The evidence recorded is to the effect that Maggie was seduced and made pregnant, that she gave birth to a male child during the month of July, 1928, that defendant, on being taxed, admitted having seduced her and being the father of her child, that, on damages being demanded, James Valtein paid, from time to time, three head of cattle on account, that the child died soon after birth and that Maggie has since had a child by another man.

The Native Commissioner in his reasons for judgment states that, in the absence of information as to what the custom is under the circumstances in which plaintiff's daughter is placed, he relied on the rule that plaintiff must come into Court with clean hands and, as his daughter is a girl of loose character, he was of opinion that the claim should not succeed. Further, the defendant being a minor would not in any case be liable for damages in the premises. Although the claim in the summons is for money including disbursements for lying-in expenses it seems clear both from the evidence and from the grounds of appeal that the action is based on Native Custom and that being so, Native Law must be applied.

Accordingly defendant, being a minor, should have been sued assisted by his guardian. The latter should also have been cited in his personal capacity as being liable under Native Custom for the torts of his ward.

There appears to be a diversity of practice in the various districts of the Cis-kei in regard to the number of cattle claimable in cases of seduction followed by pregnancy. This Court is of opinion that it is desirable to bring these differing practices into line and to lay down what damages should be ordinarily awarded.

In the Transkeian Territories where Native Law has been preserved it is customary to allow five head of cattle or their value at £5 each in such cases, and whilst not wishing to interfere with the discretion of Courts of Native Commissioner in assessing damages when very special circumstances are present, this Court is of opinion that an award of five head of cattle is reasonable.

In the present case there is nothing on the Record to show that when plaintiff's daughter was rendered pregnant by defendant she was not a virgin, and the fact that she has since had a child by another man should not therefore affect the amount of damages claimable for her defloration by defendant.

The appeal is allowed, and in order to enable the plaintiff to take further action as he may be advised the Native Commissioner's judgment is altered to absolution from the instance with costs. Having regard to all the circumstances of the case and the manner in which it was dealt with in the court below there will be no order as to costs in this Court.

JOHNSON NONDLEKAZI v. MILDRED NONDLEKAZI AND MFOLOZI NTSIMANGO.

(Lusikisiki.)

1930. *March* 25. Before J. M. Young, President of the Native Divorce Court (Cape & O.F.S.).

Native Divorce.—Adultery, grounds for divorce.—Damages against co-respondent.—Jurisdiction of Court.—Section 10 *of Act* 9 *of* 1929.

Facts: Native Divorce suit from the District of Lusikisiki.

In this suit, applicant claimed the dissolution of the marriage subsisting between himself and his wife (respondent) by reason of her adultery with one Mfolozi Ntsimango (co-respondent) and £25 as damages against the latter for such aforesaid adultery.

All the parties to the suit were natives in term of Act 38 of 1927 (amended by Act 9 of 1929), and applicant and respondent were married by Christian ceremony, out of community of property, as provided by Proclamation 142 of 1910.

Co-respondent excepted to applicant's claim for damages on the ground that such a claim was not cognisable by the Native Divorce Court by reason of the fact that under sec. 10 of Act 9 of 1929 such claims are cognisable by Native Commissioner's Courts and should therefore be brought therein.

Co-respondent further claimed in reconvention from applicant the delivery of a horse, saddle, bridle, and saddle cloth, the former's property, which he alleged applicant had wrongfully and unlawfully taken from him, or alternatively, payment of their value £18 10s.

Applicant pleaded that he had taken these articles when he had caught co-respondent in adultery with his wife, that in accordance with well established Native Custom the articles were intended as "ntlonze," and that they were retained as payment on account of damages.

JUDGMENT: In ordering a dissolution of marriage, the Court dismissed both the applicant's claim against respondent for damages as well as the co-respondent's counterclaim against applicant, with costs, holding that in as much as both these claims are cognisable by a Native Commissioner's Court, as established under sec. 10 of the principal Act, this Court has no jurisdiction to hear and determine such matters.

NELLIE LULU FORTUIN v. ALEXANDER FORTUIN.

(KOKSTAD.)

1930. *March.* Before J. MOULD YOUNG, President of the Native Divorce Court (Cape & O.F.S.).

Native divorce.—Griqua, whether Native in terms of Act 38 *of* 1927.—*Jurisdiction of Court.*

FACTS: Divorce suit from the District of Matatiele.

In this case, applicant, a Griqua, sued her husband, respondent, also a Griqua, for, *inter alia*, a dissolution of marriage on the ground of respondent's alleged adultery. Both parties were domiciled in the municipal area of Matatiele.

Respondent excepted to the jurisdiction of the Court by reason of the fact that Act 38 of 1927, as amended by Act 9 of 1929 (whereunder the Native Divorce Court is constituted) empowers this Court to try suits of nullity and divorce between " native and native " only. " Native " is defined by the Act as " any person who is a member of any aboriginal race or tribe of Africa," provided that any person residing within a proclaimed area " under the same conditions as a native shall be regarded as a native for the purposes of this Act." Respondent contended that a Griqua is not a person falling within the aforesaid definition and is therefore not a native for the purposes of the Act.

On behalf of applicant it was argued that the tests to be applied were genealogy, facial appearance, habits of life, and associations, and in support thereof quoted several decisions of the Supreme Court, including the case of *Rex* v. *Ellis* (7 S.C. 68) wherein DE VILLIERS, C.J., held that the Griquas were a Hottentot tribe and that the infusion of European blood was not sufficient to take them out of the category of natives. It was further contended that it was never intended by the Legislature to exclude Griquas from the scope of the Act for under its provisions a Headman was appointed over them. Under the Cape Liquor Licensing Act, No. 28 of 1898 (as amended by Act 1 of 1916) Griquas are specifically included under the class of persons called a " native." In the Transkeian Liquor Proclamations (Nos. 104 of 1903, sec. 33, 254 of 1923, amended by No. 301 of 1925, 250 of 1926 and 332 of 1926) Griquas are also treated as Natives.

In reply, respondent contended that the cases cited dealt with liquor laws and as such were distinguishable and that the history and genealogy of the tribe was not scrutinised. In *Rex* v. *van Niekerk and Others* (C.P.D. 1912, p. 580) it was held by BUCHANAN, J., that Griquas did not fall within the definition of " native " in the then Cape Liquor Laws. Moreover, in *Davids* v. *The Executors of Davids* (1906, 25 S.C. 237) it was found that the Griqua law of succession is the Roman Dutch Law; and that Griqua mariages were and are in community. And finally, it was pointed out that their estates are administered under the provisions of the Estates Act, 1913, and not under sec. 23 of the Act 38 of 1927.

JUDGMENT: In allowing the exception and dismissing the summons, the Court relied on the dictum of GANE, A.J., in *Rex* v.

Le Fleur (1927, E.D.L. 340) who held that true Griquas are more or less non-existent and that the so-called Griquas of to-day are an aggregate of persons of different colours, only remotely related to the original tribe, and who would fall within the broad definition of "coloured people." The Court further stated that even if the original Griqua was considered a "Native" the present generation could not be so classified.

LENNOX MAMBA v. GLEN.

(Butterworth.)

1930. *March* 6. Before J. M. Young, President, H. E. F. White, and W. F. C. Trollip, Members.

Contributory negligence.—Volenti non fit injuria.—*Damages.*

Facts: Appeal from the Native Commissioner's Court for Idutywa.

In this case respondent (plaintiff in the court below) residing in the Location of appellant (Lennox Mamba), sued the latter for the sum of £50 as damages alleged to have been sustained by reason of appellant's wrongful and unlawful action in preventing respondent's stock from grazing on certain portions of land where he was entitled to graze such stock. Respondent further alleged that in consequence thereof four of his stock had died through poverty and that others were in a poor condition

Appellant (defendant in the court below) denied liability alleging that respondent was a consenting party to the closing of the grazing ground, and that, even if he was not a consenting party, he was guilty of contributory negligence inasmuch as he had failed to report the conduct of appellant to the Magistrate timeously.

The Commissioner found that appellant did act irregularly in closing the grazing ground, that respondent was not a consenting party, and that his rights had been infringed. But respondent did not prove conclusively that the deaths of his cattle were caused by appellant's action and granted him only nominal damages in the sum of £1. His reasons for granting such damages were that appellant was the local authority, that he alone had power to act under

Proclamation No.183 of 1920, which had been applied to Idutywa district by Government Notice No. 1855 of 1925, and that he failed to carry out the requirements of secs. 1 and 2 of the Proclamation.

Appellant contended that the claim was for actual loss sustained, that the action was not brought to establish a right, and as no damages were proved the Commissioner erred in awarding nominal damages. He maintained that respondent was a consenting party and that the maxim *volenti non fit injuria* should have been applied. Moreover, respondent cannot recover damages which were caused by his own negligence, *vide Matatiele* v. *Situlane* (5 N.A.C. (Transk.) p. 32) and *Davids* v. *Mendelsohn* (15 S.C. pp. 343 and 367), and also Addison on *Torts* (6th ed., pp. 23 and 40).

JUDGMENT: In dismissing the appeal, the Court held that appellant's contention could not be sustained, for the action, although in form for damages, was in substance for the establishment of a right, that is, the right of respondent to graze his stock on the common grazing ground. His rights were undoubtedly violated and that being the case the Commissioner rightly awarded him nominal damages.

MASIPUTU MOHLAOLI v. TOLMAN S. NCONYELO.

(KOKSTAD.)

1930. *March* 18. Before J. M. YOUNG, President, H. E. GRANT and F. H. BROWNLEE, Members.

Estate.—Locus standi *of widow.—Heir to bring or defend actions.*

FACTS: Appeal from the Native Commissioner's Court of Matatiele. In the court below the appellant, a native widow, assisted by her guardian " as far as needs be " brought an action, in her capacity as the usufructuary of her late husband's estate, against the respondent claiming from him the return of certain horses with their increase alleged to have been " nqomaed " to him by her late husband.

Respondent pleaded that appellant being a widow was not the proper person to maintain this action and that she could not sue in her capacity as usufructuary of the estate in that the action

should have been brought by the heir of her late husband who was a major and the administrator of the estate.

The Commissioner upheld the plea with costs. He stated that the *onus* was on appellant to show that her guardian, the heir, refused to assist her, and that she had failed to discharge this *onus*. Against this ruling an appeal was brought.

For the appellant it was argued that the Commissioner had misapplied the law laid down in the cases of *Dudumashe* v. *Kondile* (4 N.A.C. Transkei, p. 299) and *Mamakontsa* v. *Suta* (5 N.A.C. Transkei, p. 66) where merely the principle that when the guardian or heir refuses to assist the widow she has a *locus standi* was enunciated. And it was further argued that a widow also has a *locus standi* if the guardian or heir joins issue with her

On behalf of respondent the case of *Mpahlwa* v. *Mowaba* (4 N.A.C. Transkei, p. 302) was cited where it was held that a widow cannot sue for property which had never been in her possession.

JUDGMENT: In dismissing the appeal, with costs, the Court held that on the death of a Native the property in his estate vests in the heir who is the proper person to bring or defend any action in connection therewith.

LILLIAN QWEMESHE v. ZACHAEUS.

(BUTTERWORTH.)

1930. *March* 6. Before J. M. YOUNG, President, H. E. F. WHITE and W. F. C. TROLLIP, Members.

Tender.—Costs.—Judicial discretion.

FACTS: Appeal from the Native Commissioner's Court of Nqamakwe. In this case the issue between the parties was the number of cattle and sheep, and the amount due by respondent, in the court below, to the estate of the late Elliot Qwemeshe.

Appellant claimed, *inter alia*, five head of cattle and thirty sheep.

Respondent admitted liability only for three head of cattle and twenty-seven sheep and tendered these animals. He further

admitted that there were five head of cattle in the estate but denied liability for two which he pleaded were never in his possession.

The Commissioner entered judgment for respondent, with costs, and ordered him to deliver to appellant five head of cattle at £6 each and twenty-seven sheep at 15/- each.

Against this judgment an appeal was brought, *inter alia*, on the grounds that appellant was awarded more than was admitted and tendered before or during the action and that therefore the judgment should have been for appellant for so much as the Court found due to him, with costs. Furthermore the form of the judgment was one foreign to law Courts, and the withholding of costs from the appellant and ordering her to pay the costs of respondent was not a proper exercise of judicial discretion.

JUDGMENT: In allowing the appeal with costs, the Court held that respondent having admitted liability for three head of cattle only, and not for five head as claimed by appellant, and as this was one of the issues which the parties came to Court to contest, the appellant having succeeded in his claim for five head should have been awarded his costs, in the absence of any ground for withholding them.

The appeal was accordingly allowed, with costs, and the Commissioner's judgment altered to one for appellant, with costs.

EMMA DUNA v. MANGWAI DUNA.

(KOKSTAD.)

1930. *March* 18. Before J. M. YOUNG, President, H. E. GRANT and F. H. BROWNLEE, Members.

Widow, power to contract.—Agreement between widow and guardian.—Native Custom.

FACTS: Appeal from the Court of the Native Commissioner for Mount Fletcher. In this case appellant (plaintiff in the court below) sued respondent (defendant in the court below) for delivery of four head of cattle or payment of their value £20, and alleged

that she was the widow of the late Pupu Duna and as such entitled to the usufruct of any estate cattle belonging to her late husband: that on the 5th November, 1928, plaintiff and defendant entered into a written agreement whereby defendant undertook to deliver to plaintiff eight head of cattle in settlement of her claims upon him in respect of estate stock; and that defendant had, after demand, paid four head of cattle but neglected to pay the balance.

To this defendant pleaded that he was the guardian of plaintiff and denied that she was entitled to the usufruct as claimed unless she resided at her late huband's kraal or at such kraal as he, defendant, approved of: that the agreement is invalid because (*a*) it concerns estate stock and plaintiff should have been assisted by her guardian, and (*b*) if he signed the agreement (the signature being by a mark) he did so in ignorance of the terms which had never been put to him; that plaintiff as a woman has no *locus standi in judicio* and must be assisted by her guardian; and, finally, that the four head of cattle paid by him were paid in full settlement of his liability to plaintiff.

The Native Commissioner dismissed, with costs, plaintiff's summons holding that defendant was the heir to the estate of the late Pupu Duna and therefore the guardian of plaintiff; that the agreement relied on was loosely drawn and in conflict with Native Custom; and that following the case of *Sekeleni* v. *Sekeleni* he was satisfied that this case should be decided in accordance with Native Custom.

Against this judgment an appeal was brought.

For the appellant it was argued that the case should have been decided according to common law (*vide Nobulawa* v. *Joyi*, 5 N.A.C. Trans., p. 159), and the point was raised as to whether a woman could acquire property after the death of her husband.

Respondent contended that a woman could not acquire property in her own name and cited the case of *Guluse* v. *Zuka* (4 N.A.C. Trans., p. 156).

JUDGMENT: In the opinion of this Court the Native Commissioner has erred. The agreement sued upon appears to be a perfectly valid one and we are satisfied that when it was entered into it was fully explained to and understood by both parties.

The appeal is allowed with costs and the judgment of the Native Commissioner altered to judgment for plaintiff for four head of cattle with costs.

(Kingwilliamstown.)

1930. *June* 12. Before J. M. Young, President, C. P. Alport and C. W. Crawford, Members.

Evidence, dismissal of summons without taking.—Judicial officer travelling outside issues pleaded.

Facts: Appeal from the Court of the Native Commissioner of Sterkspruit. In this case plaintiff (now appellant) sued defendant (now respondent) for certain goods, or their value £9 4s. 3d., directing the summons to defendant as "Kraalhead" and alleging that some three years ago plaintiff's wife deserted him and took with her these goods, plaintiff's property, to the kraal of defendant who refuses to return them.

No written plea was filed, but at the hearing defendant's attorney excepted to the summons on the grounds of *res judicata* and splitting of claims, and referred to two cases, Nos. 45/1929 and 32/1929, heard at Sterkspruit, between the same parties.

Appellant's attorney contended that case 45/1929 had not been adjudicated upon as it had been dismissed on exception and that therefore *res judicata* could not be pleaded.

There was nothing on the Record to show that these two cases had been put into Court by either party—although the Record of case 45/1929 subsequently figured as part of the record for appeal—and no evidence was adduced on either side.

The Native Commissioner dismissed, with costs, the summons, and in his reasons for judgment stated, *inter alia*, that he considered the proper person to be sued was plaintiff's wife, assisted by her guardian, and that it would be inequitable to hold defendant solely liable merely because the woman was living at his kraal.

Against this ruling an appeal was brought.

For appellant it was argued that the Native Commissioner had erred in dismissing the summons without taking evidence and that he had no power or right to go past the pleadings and dismiss the summons on grounds which, according to the record, had not been placed before him for decision. For respondent it was contended that as on the face of the summons the action was a vindicatory one it was apparent that the defendant had been wrongly sued and that the Native Commissioner was entitled to dismiss the summons without taking evidence.

JUDGMENT: (*per* President): In this case the defendant excepted to plaintiff's summons on two grounds, (1) that the matter was *res judicata*, and (2) splitting of claims. The Native Commissioner dismissed the summons on the ground that the action had been incorrectly brought. None of the grounds enumerated by the Native Commissioner in his reasons were pleaded and no evidence was led and in the opinion of this Court he had no right to raise them himself or travel outside the specific issues 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 Native Commissioner to take cognizance of them.

The appeal is allowed with costs, and the ruling of the Native Commissioner dismissing the summons set aside with costs.

NKWENKWE NDELA v. MTAKATA BUQA.

(BUTTERWORTH.)

1930. *July* 9. Before J. M. YOUNG, President, H. E. F. WHITE and E. F. OWEN, Members.

Appeal.—Rules 10, 9 (1) *and* 8 (1).—*Condonation, requirements of.*

FACTS: These appear from the judgment. Appeal from the Court of the Native Commissioner of Butterworth.

JUDGMENT: The respondent objects to the hearing of this appeal on the following grounds:—

1. The notice of appeal does not comply with the requirements of Rule 10 as required by Rule 8 (1) in that it does not state whether the whole or part only of the judgment is appealed against, and if part only then what part.
2. There was no service of a copy of the notice of appeal upon the attorney for the respondent, either by the messenger of the court or personally by the appellant or his attorney upon the respondent or his attorney personally in the presence of a witness as required by Rule 9 (1), and the appellant or his attorney did not notify, and has not notified, the clerk of the court or the Native Commissioner of Butterworth the time, manner and place of such service.

The appellant admits these irregularities. He states that they are due to his lack of familiarity with the Rules and asks the Court to condone them. No written application has been filed as required by Rule 19. A copy of the respondents' objections was served on the appellant's attorney on the 5th July, 1930.

The proper course to be observed by the appellant is to approach this Court by means of a separate written application, setting forth the grounds of the application and the circumstances under which the omission to comply with the rules took place, so that this Court may judge whether the justice of the case would require it to exercise its jurisdiction in condoning the irregularities.

The objection is allowed and the appeal struck off the roll with costs.

MABILIKWANA v. JAKENI.

(Butterworth.)

1930. *July* 11. Before J. M. Young, President, H. E. F. White and E. F. Owen, Members.

Dowry.—Stale claim.—Dilatory action.

Facts: Appeal from the Court of the Native Commissioner for the District of Idutywa. In this case, the respondent (plaintiff in the court below) claimed from appellant (defendant in the court below) ten head of cattle or their value £50, alleging that he was the eldest son and heir of the Great House of the late Mfuxwa and, as such, entitled to the dowry of the eldest daughter of the Qadi House, of which the defendant was the heir, to replace the dowry paid for the defendant's mother.

Defendant denied that plaintiff was the heir of the Great House and claimed that he himself was heir. He pleaded that the dowry in dispute had been distributed by his father during his lifetime and that any claim the Great House might have had was disposed of then.

The Native Commissioner found that plaintiff was the heir of the Great House, that the dowry of the Qadi Wife, the defendant's mother, had been paid with stock belonging to the Great House, that the dowry of the eldest daugther of the Qadi House, namely,

ten head of cattle, was the property of the Great House, that no distribution thereof had been made by the late Mfuxwa and that no portion of it had been paid over to the Great House. He entered judgment for the plaintiff in terms of his prayer, and the defendant appealed on the following ground, *inter alia*, namely, that the claim was a stale one and should have been dismissed on that ground.

JUDGMENT: Dealing with this second ground of appeal this Court is of opinion that the appellant should succeed.

Nopokati, the eldest daughter of the Qadi House was married over thirty years ago. Mfuxwa died some fifteen or twenty years later. Since his death no steps have been taken by the plaintiff to prefer any claim nor has he done anything to keep his case alive.

It would be inequitable at this stage to expect the defendant to account for his sister's dowry and interfere with a state of affairs which the plaintiff has brought about by his own dilatoriness. Having come to this conclusion it is unnecessary to consider the remaining grounds of appeal.

The appeal is allowed with costs and the judgment of the court below altered to judgment for defendant with costs.

RALEHLUTI MCINGI v. LUMONYO.

(LUSIKISIKI.)

1930. *July* 16. Before J. M. YOUNG, President, R. H. WILSON and C. R. NORTON, Members.

Dowry.—"Tomba"—Right to retain dowry for marriage disbursements.

FACTS: Appeal from the Native Commissioner's Court, Nqgeleni. On the 26th February, 1929, the plaintiff, now respondent, obtained an order of court against one Palintaba Mposeli in the following terms:— "For plaintiff as prayed with costs, in addition one beast to be paid in respect of maintenance by plaintiff. "The cattle valued at £5 each."

In that case the claim was for a declaration that the plaintiff was entitled to the guardianship of a girl named Butume and entitled to all cattle paid or to be paid in respect of her.

Prior to the making of that order the plaintiff had sued Palintaba before the Headman Dywili and had obtained a favourable verdict. After the enquiry before the Headman and, being well aware of the plaintiff's claim, the defendant in the present case obtained possession of the girl from Palintaba, "tombaed" her and gave her away in marriage and received six head of cattle as dowry for her. These six head of cattle are now claimed by plaintiff. The defendant admits being in possession of the six head of cattle and says that having "tombaed" the girl and arranged her marriage and provided her wedding outfit, he is entitled to retain the dowry paid until he has been paid one beast for the "ntonjane" ceremony and one beast to reimburse him for his outlay in connection with the marriage. He admits liability for four head and tenders these.

JUDGMENT: The only question for consideration by this Court is whether the defendant has the right to retain the dowry paid for the woman, Butume, until his demands are met.

In the case of *Wana* v. *Zokozoko and Another* (5 N.A.C. Trans., p. 94) where the circumstances were similar to those in this case, it was held that the appellant had no right to reimburse himself out of the girl's dowry for having provided her wedding outfit and for arranging to undergo the "ntonjane" ceremony, but allotments might be made out of the dowry by her guardian to the person who incurred the outlay purely as a matter of grace.

Following the decision in that case the Court is of opinion that the Assistant Native Commissioner correctly disallowed the defendant's claim, and the appeal is accordingly dismissed with costs.

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