REPORTS OF CASES

DECIDED IN THE

NATIVE APPEAL COURTS

OF THE

TRANSKEIAN TERRITORIES

1894 TO 1909.

SELECTED AND REPORTED BY

BENJAMIN HENKEL.

CLERK OF THE NATIVE APPEAL COURT.

CAPE TIMES LIMITED.

1910.

These Reports should be cited as
N.A.C. (1894-1909).

NOTE.

THE place, date, and name appearing above each case refer to the place of session of the Native Appeal Court, the date of hearing of the appeal, and the name of the President of the Court, while the Court of origin is placed immediately below the names of the parties.

B.H.

Umtata, February, 1910.

PREFACE.

THE aim in compiling these reports has been to include all ruling cases decided by the Native Appeal Court since its establishment in the year 1894. For this purpose the whole series of records numbering five thousand cases has been carefully examined. The large majority disclose the treatment of no important points of law but appear to have been brought on appeal on the question of credibility of evidence. Thus it has been found possible to reduce the compass of the book to a selection of 252 cases without, it is trusted, loss of any value which more extensive compilation would have had. Duplication has been avoided by merely reporting the latest or the most comprehensive of decisions on the same issue.

Most of the decisions reported deal with Native law and custom but a few relative to points of practice and Colonial law have been inserted.

The cases are necessarily reported in a somewhat digested form but the *ipsissima verba* of judgments are given and, in several instances, the dissenting views of Magisterial Assessors.

The tribes of suitors are shown wherever the information could be gleaned from the records and the indexing of customs under tribal or Native names has been made a special feature.

Acknowledgment is made for invaluable advice given in the preparation of these Reports by Mr. A. H. Stanford, Chief Magistrate, Mr. W. T. Brownlee, Assistant Chief Magistrate, and Mr. Walter Carmichael.

B. H.

Chief Magistrate's Office,
Umtata, February, 1910.

INDEX OF CASES.

SUBJECT INDEX.

B.

C.

D.

J.

K.

NATIVE APPEAL COURT REPORTS.

Kokstad. 6 April, 1895. W. E. Stanford, C.M.

Patsana vs. Daniel.

(Matatiele.)

Procedure—Conflict of Native Customs—Application of Tribal Law to Defendant.

Daniel sued Patsana for the restoration of certain cattle paid to him as dowry on account of a proposed marriage between him—Plaintiff—and Defendant's daughter. The marriage arrangements having fallen through he claimed restoration of these cattle. From the evidence it appeared that Patsana was a Tembu but was brought up amongst Basutos, and that Plaintiff Daniel was a Fingo. Both Plaintiff and Defendant lived in a Basuto location in the Matatiele District.

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

The Magistrate's reasons were as follows:—"The question raised in this case is one that affects the whole district and has become a burning question among the Basuto Headmen. They claim that because a man lives in a location of which a Basuto is Headman, that therefore the case must be heard and settled by Basuto custom. Proclamation 112 of 1879, Section 23, provides that 'in case of there being any conflict of law by reason 'of the parties being Natives subject to different laws, the suit or 'proceedings shall be dealt with according to the laws applicable 'to the Defendant.' The Defendant in this case is a Tembu, and I hold that therefore this case must be decided by that custom. I have not taken any evidence upon Tembu Custom, but have gone entirely by Mr. Warner's Notes on Kafir Custom."

Pres.:—When the Magistrate is called upon to decide what law to apply in conflict by reason of the parties being Natives subject to different laws, he must be guided by the circumstances in each case. Here we find that the Defendant was brought up amongst the Basutos and is still resident in a Basuto Location.

The Court, while not accepting the Magistrate's view as to what Tembu Custom is in such an instance as this, directs that the proceedings be returned to the Magistrate for him to give a decision thereon based on Basuto Custom.

Kokstad. 26 April, 1895. W. E. Stanford, C.M.

Welapi vs. Mbango.

(Tabankulu.)

Dowry—Liability for restoration by Chiefs.

Welapi sued Mbango for the restoration of certain cattle, being the dowry he had paid to Defendant for his daughter, whom he had married. In his summons he stated that his wife had left him and had returned to Defendant, who had arranged to remarry her to another man.

Defendant admitted the marriage and receipt of dowry from Plaintiff, but contended that he was a petty chief and that according to Native custom neither chiefs nor any members of their family holding rank were liable for restoration of dowry.

The Magistrate gave judgment for Defendant with costs, basing his decision on the Native custom that chiefs are not liable for the restoration of any cattle paid to them as dowry.

Plaintiff appealed.

Pres.:—The point which the Court has to decide in this case is whether the Respondent, who is a petty chief in Pondoland, was entitled to refuse restoration of the dowry to which the Appellant would have been entitled had not the Respondent been a chief. This rule, if it be one at all, is exercised among independent tribes by chiefs of rank far higher than that claimed by the Respondent, and it is doubtful whether a chief of high rank in refusing restoration of dowry is not following the rule "might is right" rather than any recognised custom of the Native tribes. In this case the Court is satisfied that the Respon-

dent cannot claim such exemption and the judgment of the Magistrate is reversed to judgment for Plaintiff with costs.

NOTE.—In the case of *Mxonyo* vs. *Malinja*, from Libode, heard at the Umtata Appeal Court on the 12th November, 1909, a similar judgment was given.

Umtata. 8 July, 1895. H. G. Elliot, C.M.

Ndatambi vs. Ntozake.

(Willowvale.)

Dowry cattle—Increase and loss—Division of dowry when marriage dissolved—Impotent persons.

The wife of Plaintiff, Ndatambi, had obtained an order of dissolution of marriage because of her husband's impotency. Ndatambi now instituted this action against Ntozake for the recovery of the cattle paid to him as dowry for this woman.

The Magistrate's judgment was as follows:—From the evidence adduced, as also by Plaintiff's admission, eleven head of cattle were paid as dowry. The eleventh was a young calf, dying immediately on its arrival, reducing the number to ten. Of these, six died before marriage, leaving only four head, and of these four head Plaintiff is only entitled to one-half, the other two are adjudged to Defendant in consideration of his daughter having lived with the Plaintiff for twelve months.

Plaintiff Ndatambi appealed.

Pres.:—According to previous rulings of this Court the quantity of dowry involved is the actual number proved to have changed hands in connection with the contract of marriage, neither loss nor increase being allowed to rate in calculating actual dowry paid and received. In this case it has been proved to the satisfaction of this Court that ten head of cattle were paid and received, the death of the beast alleged to have occurred the day after delivery not being taken into account. Under ordinary circumstances, upon the dissolution of marriage, the Plaintiff would be entitled to receive back his full dowry, the parties having lived together so short a period and there being no issue of the marriage. But in this case both the dissolution of the marriage

and failure of issue are due to the impotency of the husband, and through that inability to discharge the duties of a husband the Respondent's daughter has sustained grievous wrong, for which Appellant is wholly responsible. Under these circumstances, the Court considers that the restoration of six head of cattle will be fair and such is its judgment, with costs of appeal. Defendant will doubtless obtain a subsequent dowry for his daughter, which the Court is bound to regard as a contingency.

Umtata. 8 July, 1895. H. G. Elliot, C.M.

Sikiti vs. Sinambu.

(Engcobo.)

Pound Laws—Trespass Fees—Native Custom.

Sikiti sued Sinambu for the sum of 3s., being the amount due to him under the Pound Regulations for trespass fees. He alleged that Defendant's horses had trespassed on his lands during the night and that when they were being driven out next day Defendant came and took charge of them. The Defendant pleaded that his horses trespassed during the day only and that he drove them out himself. He also pleaded that the provisions of the Pound Laws had not been followed as the trespassing stock was not taken to his kraal as required by Section 77 of Proclamation 387 of 1893.

The Magistrate dismissed the case on the ground that the owner of a land cannot recover damages for trespass unless he takes the trespassing stock to their owner.

Sikiti appealed.

Pres.:—The object of Rule 77, Trespass Regulations of 1893, was to prevent irritation that would naturally be caused by the removal of a man's stock for what might have been a very trifling trespass to a distance from his own kraal, thereby depriving him and his family of its use for perhaps several days; also in order that he might know as early as possible that his stock had committed trespass, and thereby be afforded the opportunity of paying the amount laid down in the Regulations, but it was never intended to be regarded as such a hard and fast rule as to give the

owner of stock which had committed trespass an opportunity of evading his liability for such trespass. Although the fact of taking stock that had been found trespassing to the owner's kraal and demanding trespass fees might in most cases be regarded as conclusive proof that the stock had actually trespassed, other proof equally conclusive can usually be produced which would be quite sufficient to establish Plaintiff's claim for damages. To establish proof of trespass is all that is legally required to receive the fees laid down in the Regulations. The appeal is allowed with costs and judgment in the Magistrate's Court altered to judgment for Plaintiff for 3s. and costs.

Kokstad. 27 August, 1895. W. E. Stanford, C.M.

Dweba vs. Sam.

(Tabankulu.)

Illegitimate children—Rights to Dowry of—Guardianship.

Sam sued Dweba for the restoration of his wife and three children or 12 head of cattle as dowry. He stated that his wife had left him and returned to Defendant, taking with her one child of the marriage. While with the Defendant two illegitimate children were born and he claimed all three children as his own.

The Defendant admitted receipt of dowry, but contended that Plaintiff was not entitled to the two illegitimate children born at his kraal. The evidence showed that the woman refused to return to her husband.

The Magistrate gave judgment for six head of cattle, and declared the three children to be under the guardianship of Plaintiff, who would be entitled to receive dowry for them.

Defendant appealed.

The Magistrate's reasons were as follows:—"It appears that Plaintiff married Defendant's daughter and paid 12 head of cattle. The woman had one child by Plaintiff and then left him, after which she has since had two illegitimate children. Plaintiff claims the restoration of the dowry paid and the three children of his wife. Defendant, in noting his appeal, states that he does not dispute his liability for the dowry, but maintains that the two children born of his daughter after she had left Plaintiff are

his according to Native custom. I understand, however, that the husband is the legal guardian of and is entitled to receive the dowry for all the children born of his wife, even after she has left him, if the dowry paid by him has not been restored. Should Plaintiff not be entitled to the guardianship of the two children, then I consider he should recover more than six of the cattle paid as dowry."

Pres.:—The Respondent in this case, seeing that the woman has not returned, has no claim to the two illegitimate chidlren born at Dweba's kraal. The Appellant states that he is willing to deliver to the Respondent his own child—the girl. The judgment of the Magistrate is, therefore, amended to judgment for Plaintiff for 10 head of cattle or their value—£20—and costs, and the legitimate child is declared to be under the guardianship of the Plaintiff, who will be entitled to receive dowry if paid for her.

Kokstad. 4 December, 1895. W. E. Stanford, C.M.

Matsabisa vs. Phoorie.

(Maclear.)

Dowry—Abduction—Liability for Dowry or Damages—Procedure.

Matsabisa sued John Phoorie (a Basuto) for 20 head of cattle and 10 sheep and stated in his summons that Defendant's son, Ali Phoorie, abducted and eloped with Plaintiff's daughter without having paid any dowry for her and that Defendant thereupon agreed to pay the stock sued for as dowry, but he now refuses to do so.

Defendant excepted to the summons on the ground that he was a Christian and is not bound by Native Customs.

The Magistrate upheld this exception and ruled that Colonial Law must apply to the case.

Plaintiff appealed against this ruling.

Pres.:—The circumstances in this case appear to be that a son of the Defendant in the Court below abducted the minor daughter of the Plaintiff, Matsabisa, and that dowry is now claimed from the Defendant, who is found by the Magistrate to be a man of civilised habits and not amenable to Native Law. On this ruling the appeal is founded.

The summons does not disclose that the girl is still with Defendant's son or that any marriage has taken place, upon which the claim for dowry is based. The man who should have been before the Court is Phoorie's son, and it would be absurd for this Court to review the ruling of the Magistrate with regard to Phoorie, seeing that he is not the man who abducted Plaintiff's daughter. An action lies, whether under Colonial or Native Law, against Phoorie's son and he is the man who should have been brought before the Court.

The Court, therefore, directs the Magistrate, to whom the proceedings will be returned, to dismiss the summons and direct that the case be brought in proper form.

There will be no order as to costs in this Court.

Umtata. 24 March, 1896. H. G. Elliot, C.M.

Sofika vs. Gova.

(Engcobo.)

Marriage—Agreement between Parents—Consent of Parties.

Sofika sued Gova for the restoration of his wife or the dowry paid for her. He alleged that the woman in question had been sent to him by Defendant to be his wife and dowry was duly paid, but when he attempted to assert his conjugal rights she absconded and returned to her father.

Defendant stated that his daughter had been sent to Palintiff's kraal to be the wife of Plaintiff's son. He admitted that neither he nor his daughter knew the intended bridegroom, who was away from home, but, in accordance with custom, he arranged the marriage of his daughter and Plaintiff's son with the Plaintiff and it was never intended that she should be the wife of Plaintiff. The marriage was performed by proxy, but the son's consent had never been obtained for he was away from his home and had left before the arrival of the girl.

The Magistrate found that the girl in question had been taken to Plaintiff's kraal to be the wife of Plaintiff's son and gave judgment for Defendant with costs.

Plaintiff appealed.

Pres.:—The Court cannot uphold a marriage where the consent of the husband to the contract is not given, where he is not even

at the kraal to which the girl was sent, and there is nothing to show that he is likely to be there within a reasonable time. Under the circumstances there seems nothing to be done but to let the father take home his daughter and give up the dowry he received for her. The judgment of the Court below is altered to judgment for the Plaintiff for the cattle claimed, with costs.

Umtata. 24 March, 1896. H. G. Elliot, C.M.

Mavanda vs. Sokana.

(Engcobo.)

Nqoma Custom—When Cattle in bona fide possession of Third Party—Procedure—Damages.

Mavanda sued Sokana for the restoration of a certain horse, alleging that this animal had been nqoma'd (lent) to him—Plaintiff—by a third person, and he in turn had lent it to the Defendant, who, however, refuses to restore it.

Defendant pleaded that the animal in question had been paid to him by Plaintiff in settlement of a debt, and the Magistrate found on the evidence that Defendant's plea was correct and gave judgment accordingly.

Plaintiff appealed.

Pres.:—The Court holds that when stock lent (nqonywa'd) is wrongfully disposed of by the person in whose charge it is it cannot be recovered by action against the person who has received it provided the action of the latter with regard to the transaction was *bona fide*. The person to whom the stock was lent is responsible to the owner for any wrongfully disposed of, not only for the value of the stock, but in damages for the wrong committed. In this case the Magistrate held that Defendant's conduct in the transaction was *bona fide*, he having received the animal in payment of a just debt. After very carefully considering the evidence this Court cannot find that there is such preponderance of evidence in favour of the contention that the filly was only lent to Defendant as would justify the Court in reversing the decision of the Magistrate on a question of fact. The appeal is, therefore, dismissed with costs.

Kokstad. 15 April, 1896. W. E. Stanford, C.M.

Ntseki vs. Ntseki.

(Matatiele.)

Dowry apportionment—"Matlala" Cattle—Basuto Custom.

Austin Ntseki sued Simon Ntseki for the restoration of certain seven head of cattle appropriated by Defendant.

From the evidence it appeared that the parties were brothers, Plaintiff being eldest son of the Great House and Defendant eldest son of the Right Hand House. After their father's death, one Mkadi was left in charge of the family, and when Defendant's two sisters were married the dowry received was apportioned. Plaintiff alleged that one cow out of each dowry was apportioned to the hut of his mother, Maaustin, and that the cattle now claimed were the progeny of these two head. The defence was that the cattle in dispute were the progeny of a certain white cow retained by Mkadi out of the dowries received for Defendant's sisters as "Matlala" and placed in Defendant Simon's house for the use of his mother, Masimon.

The Magistrate gave judgment for Plaintiff as prayed.

Defendant appealed.

The Magistrate furnished the following reasons:—"After consulting the Basuto headmen, I learn that Mkadi had no right to claim the "Matlala" beast on behalf of Simon. A "Matlala" beast is one given to a paternal grandfather; if the grandfather and grandmother are dead, then it is given to the eldest wife, in this case Maaustin—as she is called the grandmother of Masimon's children. I went fully into the whole case and read over all the evidence to the two chiefs, George and Tsita Moshesh, and they both said judgment should be for Plaintiff, and that the Matlala beasts having been given to Maaustin, Austin, as the eldest son, was entitled to their custody and also to any increase, as, at his mother's death, the "Matlala" beast, with increase, would go to him. On the evidence I find that the white cow and also the black and white cow were given as the "Matlala" beasts and that the cattle claimed are the increase of these two cows."

Pres.:—The Magistrate has gone carefully into the facts of the case and has stated clearly the Native Custom bearing on the point at issue. This Court finds no reason for interference with the judgment given, which will, therefore, be sustained, with costs.

Umtata. 14 July, 1896. H. G. Elliot, C.M.

Ndabeni vs. Ngqele.

(Umtata.)

Children—Ownership—Fingo Custom.

Ndabeni sued Ngqele for the custody of a certain female child, and he alleged in his summons that he had caused the pregnancy of Defendant's daughter, one Nondaba, and thereafter paid the damages demanded. He maintained that under Native custom the girl born of his intercourse with Nondaba belonged to him. The Defendant pleaded that the girl Nondaba was married and the child in question was born after her marriage, and in support of his plea led evidence to show that his daughter had been married to one Mtakati, who had paid dowry for her, and that one month after the marriage Mtakati discovered that his wife was pregnant, and he thereupon sent her to her father—the Defendant—in order that the usual damages might be obtained, but there was no repudiation of the marriage. Plaintiff, in reply, stated that he had caused the pregnancy before the marriage had been entered into, but he knew that cattle had at that time already been paid by Mtakati as dowry, but he had also offered dowry to Defendant for Nondaba, but this had been refused as "Mtakati was preferred." Both parties to the suit were Fingoes.

The Magistrate held that under Fingo custom in such cases the child does not belong to the seducer who pays damages, but either to the husband or to the guardian of the woman, and gave a judgment of absolution.

Plaintiff appealed.

Pres.:—The Court is satisfied that according to Fingo Law children born in wedlock belong to the husband, and the judgment of this Court is in accordance with that law. The appeal is dismissed with costs.

Umtata. 14 July, 1896. H. G. Elliot, C.M.

Sixakwe vs. Nonjoli.

(Umtata.)

Women's Earnings—Medical Fees—Ownership.

Sixakwe sued Nonjoli for the restoration of his wife or the dowry paid for her. In the course of his evidence, the Plaintiff alleged that his wife left him because he claimed the medical fees earned by her, and the whole ground of dispute was whether he or her people were entitled to the fees earned by his wife. He admitted that he did not pay the doctor's fees when she "twasa'd."

The Magistrate held that fees so earned belonged to the woman and her family and gave the following reasons:—"In all cases in which return of dowry is sought on the ground of the wife's refusal to reside at the husband's home it is a good answer to the husband's claim that the woman has reasonable cause for refusing to live with him. If the woman was right in her contention that her earnings as a medical practitioner belonged to her family and the husband insisted on appropriating to his own use these earnings I am of opinion that she would be justified in remaining at her parents' place until the point was judicially ruled against her. The balance of native decisions seems to be that when the woman was a doctor before her marriage and the expenses of her initiation into the profession were borne by her relatives her earnings after marriage would not belong to her husband.

Sixakwe appealed against this ruling.

Pres.:—It appears to the satisfaction of the Court that whatever a woman may earn after her marriage belongs to the husband subject to the condition that he cannot divert such earnings from the house to which she belongs or dispose of them in any way without consulting her. Any claim that her relatives may have upon her for costs incurred prior to marriage should be considered and adjusted when the matter of dowry is being arranged. The appeal is allowed with costs.

Butterworth. 28 July, 1896. H. G. Elliot, C.M.

Madolo vs. Nomawu.

(Nqamakwe.)

Property—Ownership by Women—Inheritance—Guardianship.

Nomawu sued Madolo for the restoration of certain stock, and from the evidence it appeared that she was the eldest daughter of the late Mpani and that Tuso, the only son of Mpani, was also dead. She had been married, but the marriage was dissolved, and she had three children, one of which was a boy. The property claimed was derived from the estates of Mpani and Tuso, neither of whom had left male issue living. The Defendant Madolo was the second cousin of Plaintiff and her nearest relation. She alleged that on Tuso's death she remained in undisturbed possession of the property for some years, when Defendant induced her to remove to his kraal. He afterwards began to ill-treat her and eventually seized all the property she had brought with her on the ground that he was the heir of the late Tuso.

The Defendant admitted the ill-treatment, but declined to lead any evidence.

The Magistrate gave judgment for Plaintiff as prayed, the stock to be held in trust for the family, and held that the Defendant, as second cousin of the deceased Tuso, could not be heir to the estate and dispossess a nearer relative in the person of the Plaintiff.

Madolo appealed.

Pres.:—The judgment of the Court below cannot be sustained. It is very clearly laid down by all authorities upon Native Law that no female can inherit property, and this Court is of opinion that the Appellant has clearly established his legal right to the property in dispute. The appeal is, therefore, allowed in so far as that the Appellant is declared to be the legal heir of Tuso's estate. It is, however, clear to this Court that Appellant has abused his position of guardian to Tuso's family by not providing for their support and by driving them from his home or rendering their position there so uncomfortable as to oblige them to leave. Respondent and the children of her brother Tuso were quite within their rights in applying to the Magistrate for protection, and the Court so far supports his judgment in that it approves of the property of the late Tuso being removed from the custody

presence of his wife. The woman Notawuli stated she was past child bearing, that she had two lovers,—Plaintiff and a man named Tibani—and that on one occasion these two " bulls " had a fight.

The Magistrate ordered Defendant to restore one beast and pay 7/6 damages for the use of the oxen and Plaintiff to pay one beast as damages for adultery set off in the judgment and adjudged costs against Defendant.

On the question of damages awarded, the Magistrate in his reasons said that as Notawuli was past child bearing whatever damage her husband has suffered can only be regarded as moral and intellectual and not material.

An appeal and cross appeal were noted.

Pres.:—In this case the Plaintiff claims the delivery of two head of cattle which he states Defendant has in his possession and consequently detains from him, and the sum of £1 for the unlawful use of the cattle. The Defendant does not deny that he has the two cattle in his possession but puts in a claim in reconvention for 3 head of cattle for damages for adultery on the part of the Plaintiff with his wife.

The Magistrate holding that adultery has been proved and holding also that because Defendant's wife is past child bearing the Defendant is only entitled to one beast as damages has given the following judgment: " The Defendant is ordered to restore to Plaintiff one head of cattle and to pay 7/6 damages for use of oxen. Plaintiff to pay one beast as damages for the adultery set off in this judgment, Defendant to pay costs of suit." On this judgment the Plaintiff appeals and the Defendant cross appeals. The cross appeal is brought in respect of the amount of damages allowed the Defendant in his claim in reconvention.

In this case in connection with the claim in reconvention there has been no catch made or Ntlonze taken such as is usual but the Defendant relies in proof of his claim mainly upon the fact alleged in evidence that there was a quarrel between Plaintiff and another man named Tibani over Defendant's wife. The various points involved in this case having been put before the Native Assessors they give the following statement of Native Law:

1. Where two married women quarrel over the husband of one of them, the husband of the other may regard it as a catch and may claim damages.

Umtata. 10 November, 1896. A. H. Stanford, A.C.M.

Magandela vs. Nyangweni.

(Mqanduli.)

Dowry Restoration—Illness of Wife—Leprosy.

In an action for the restoration of his dowry, Plaintiff Nyangweni alleged that he had married Defendant's sister some five years ago and that recently he found that the mother and sister of his wife had contracted the disease of leprosy. As soon as he discovered this he sent away his wife, suspecting that she also had the disease. The medical evidence showed that the wife had the disease in its first stages. The defence was that the woman did not have the disease when she married the Plaintiff, nor was the disease in any of the family, and consequently there was no liability for the restoration of the dowry, seeing Plaintiff had driven his wife away.

The Magistrate ordered the restoration of the dowry and Defendant appealed.

In the Appeal Court the case was submitted to Native Assessors, who stated:—"This case has no precedent. Men marry and wives get ill and men do not drive them away for that. The man may refuse to live with the woman, but is not justified in demanding the return of the dowry if he drives her away."

Pres.:—From the evidence it would appear that leprosy was unknown in the Appellant's family at the time of the marriage, which took place some five years ago, those affected being Defendant's wife and daughter. The Respondent then, in a very heartless manner, drove away his wife and now seeks to recover the dowry he paid. The Court holds that he is not entitled to this and the appeal is allowed with costs.

Kokstad. 18 December, 1896. W. E. Stanford, C.M.

Raqa vs. Qawe.

(Mount Ayliff.)

Adultery—Ukungena Custom—Dissolution of Marriage—Dowry Restoration.

Qawe sued Raqa for five head of cattle as damages for adultery.

From the evidence it appeared that the woman in question was the widow of Plaintiff's brother, and he had taken her for the

purpose of raising seed to his brother's house. About three years before she had deserted him and gone home, where she had cohabited with Defendant.

The Defendant admitted the intercourse, but contended that he was not liable in damages for adultery.

The Magistrate awarded the damages claimed and Defendant appealed.

The reasons for judgment were as follows:—"Judgment was given for Plaintiff on the grounds that the woman was legally taken over by Plaintiff to raise up seed for his late brother, and that she became pregnant by Defendant while Plaintiff's wife. No separation had been granted and Plaintiff was still paying hut tax for her hut, and lastly the dowry had not been returned. Therefore she was still Plaintiff's wife and Defendant was liable for his act of adultery."

Pres.:—A woman married according to Native rites and subsequently refusing to live with her husband cannot be forced to return to him, but his claim against her father or guardian for restoration of the cattle or portion of the cattle paid as dowry is acknowledged. A woman taken over under the custom of "raising up seed," as in this case by a deceased husband's brother cannot by that act be placed in a worse position regarding her personal liberty. The Magistrate's judgment is, therefore, wrong. The Plaintiff should first have sought to get his wife back in the ordinary course of procedure. Without the woman being with him as his wife, the action against Qawe cannot stand. The judgment must be reversed to absolution from the instance with costs.

Umtata. 9 March, 1897. H. G. Elliot, C.M.

Mqwashu vs. Mesana.

(Cofimvaba.)

Adultery—Damages—Contributory Negligence.

Mqwasha sued Mesana for six head of cattle as damages for adultery and stated that his wife left him in 1893 to visit her father's kraal, where she remained until 1896, when he fetched her, and it was during the period of her absence that the adultery took place. He based his claim solely on the Defendant's allegation that the woman Kazana was his wife, whom he had married and paid dowry for to her father, Ntshanga.

Defendant pleaded that he was not liable as he had married the woman from her father's kraal and had paid dowry for her.

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

Pres.:—The Defendant admits the adultery with Plaintiff's wife by claiming her as his own wife and alleging that she lived with him as such for several years. The appeal is allowed with costs and judgment in the Court below altered to one for Plaintiff for two cattle and costs. The Court does not consider the Plaintiff is entitled to heavy damages owing to his own contributory negligence in allowing his wife to remain with her parents away from his own protection for so long a period.

Umtata. 9 March, 1897. H. G. Elliot, C.M.

Ntshanga vs. Mesana.

(Cofimvaba.)

Dowry—Recovery after Illegal Marriage—Adultery.

Mesana sued Ntshanga for certain cattle, which he alleged he paid him—Defendant—as dowry for his daughter Kazana, whom he had married and who had deserted him and refused to return.

Defendant denied that he had ever received any cattle from Plaintiff on account of dowry, and stated that the woman Kazana was the wife of one Mqwashu, who had married her many years ago.

The Magistrate found that Mesana had married the woman as alleged and ordered the restoration of the dowry.

Ntshanga appealed.

Pres.:—The Respondent admits that he knew the woman Kazana was already a wife, and consequently she could not re-marry until the first marriage was annulled either by restoration of the dowry or by an order of Court. He can, therefore, have no claim for the woman or any cattle he may have paid, knowing the illegality of his so-called marriage. If cattle were paid, the injured husband is the person entitled to them. The Magistrate's decision is reversed and the appeal allowed with costs.

Kokstad. 29 April, 1897. W. E. Stanford, C.M.

Mpakanyiswa vs. Ntshangase.

(Tsolo.)

Dowry Division—Native Marriage—Ceremonies—Custody of Children.

Ntshangase sued Mpakanyiswa for the restoration of five head of cattle and for the custody of a certain child. He alleged that he paid Defendant six head of cattle as dowry for his—Defendant's—sister, that after living with the woman for about a year she returned to Defendant's kraal, where she died shortly afterwards, leaving one child the issue of the marriage.

From the evidence it appeared that the parties were Fingoes, that Plaintiff eloped with the girl, and certain cattle were paid Plaintiff alleged these cattle were paid as dowry, but Defendant contended they were paid as damages for seduction. Plaintiff admitted that no formal marriage ceremony was held.

Judgment was for Plaintiff and Defendant appealed.

The Magistrate, in his reasons, said that the question was whether the cattle were paid as dowry or as damages. Plaintiff eloped with the girl and Defendant followed up, returning with the cattle, but leaving the woman in question with Plaintiff. Had the cattle been paid as damages, Defendant would have brought the woman home instead of leaving her with Plaintiff, and on these grounds he held that the cattle were paid as dowry.

Pres.:—The old Native ceremonial marriage is not now frequently observed. Payment of cattle and the handing over of the woman are the essentials found to guide the Courts. The finding of the Magistrate on these two points is supported by the evidence, but, considering that the Respondent in the first instance eloped with the girl and that the burden of expense in respect of her illness and death fell on the Appellant, the number of cattle ordered to be restored is excessive; that order is amended to restoration of three head of cattle, and while the child is acknowledged to be the legitimate offspring of the Respondent, the usual course will be followed by this Court in respect of no order being given for its forcible removal. The costs of the appeal will be given to the Appellant.

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Umtata. 5 July, 1897. H. G. Elliot, C.M.

Dyalevana vs. Gqangqansholo.

(Engcobo.)

Pound Regulations—Trespass Fees—Native Custom.

This was an action for the refund of trespass and pound fees paid and for damages for wrongfully impounding stock. Plaintiff Gqangqansholo alleged that Defendant Dyalevana impounded his stock without following the custom or the pound laws of first bringing the cattle to his kraal in order that the matter might be settled. The defence was that this had been done, but Plaintiff was away from home and for this reason his wife refused to pay the amount demanded.

The Magistrate gave judgment in favour of Plaintiff, holding that Defendant was not justified in impounding the stock in the manner he did without giving Plaintiff an opportunity of settling the matter.

Defendant Dyalevana appealed.

Pres.:—Taking stock to the owner's kraal is regarded as delivery to himself as required by the Pound Regulations in the same manner as leaving a summons at the residence of a person summoned is valid service. To require that delivery must be made to the actual owner in person, who might either be in the Colony, Johannesburg, or elsewhere at the time the trespass was committed, would frequently cause vexatious and irritating delay. When an owner of stock or property absents himself from his kraal for even a short time he must make such arrangements as will meet all probable contingencies. In this case it appears that the Plaintiff allowed his horses to run at night, wholly regardless of the damage they might cause to his neighbours, and that even a first impounding did not deter him from this practice. The appeal is allowed with costs.

Butterworth. 29 July, 1897. H. G. Elliot, C.M.

Trobisa vs. Mbi.

(Idutywa.)

Property of Great House—Control—Separate Kraal.

Trobisa sued his son Mbi for the restoration of certain cattle. It appeared that Defendant was the only son of Plaintiff's Great

House and that he was ordered by his father to establish his own kraal, which he did. Soon afterwards Plaintiff's Great wife —mother of Defendant—left him, alleging that the stock of her house was being used for the maintenance of the Right Hand House. She complained to the headman and then went to live with her son, the Defendant. On the instructions of the headman, the property belonging to the Great House was handed over for her support. Trobisa now wanted his wife and property back because he said Defendant and his mother refused to recognise his right of control over the stock. At the hearing of the case, Plaintiff offered to allow the stock to remain at his son's kraal provided that kraal was looked upon as his Great Kraal.

The Magistrate absolved the Defendant on the grounds that Plaintiff had turned his wife away and the stock of the Great House was placed with Defendant for her support. It would be inimical to the rights of the Great House to order restoration.

Trobisa appealed.

Pres.:—In this case it would appear that the Appellant voluntarily handed over certain property to his Great wife in order that she might remove the same for her subsistence at her son's kraal, the separation being mutual and the handing over of the property voluntary. The Appellant cannot now claim its restoration, and this Court rules that it must remain at the kraal of the son of the Great House for the use and benefit of that House. The appeal is dismissed with costs.

Butterworth. 29 July, 1897. H. G. Elliot, C.M.

Klaas vs. Mqweqwe.

(Idutywa.)

Kraal Head Responsibility—Relationship—Age of Majority.

This was an interpleader action, in which Mqweqwe claimed certain cattle which had been seized by the Messenger of the Court from his kraal. Judgment had been obtained by Peter Klaas against Sofoso, nephew of Mqweqwe, for damages for adultery, and in this case it was admitted that the cattle seized belonged to Mqweqwe and not to Sofoso, but it was contended that as the latter lived at the kraal of his uncle Mqweqwe, the property of Mqweqwe, as kraal head, was executable for the inmate's debts.

Mqweqwe admitted that Sofoso lived at his kraal, but stated that he was a married man who paid hut tax and was of age and thus responsible for his own debts.

The Magistrate declared the cattle not executable and in his reasons said:—"I am of opinion that Sofosa, being of full age and himself *in loco parentis* and in occupation of his mother's hut and having lands and liability for hut tax, cannot be regarded as under the guardianship of his uncle. I think that in cases of this kind the liability, according to Native custom, should not be allowed to extend beyond the father and that an uncle should only be held liable in cases where the nephew is under age or unmarried."

Peter Klaas appealed.

Pres.:—It is a well-known principle of Native Law that the head of a kraal is responsible for penalties incurred by members of that kraal providing those committing them are not in a position to satisfy judgments recorded against them. The principle is thoroughly understood by all Natives and the Court cannot think any are ignorant of it. In this case the uncle of the Defendant accepted the guardianship of his nephew well knowing the liability that position entailed upon him, from which he was, doubtless, fully aware he might have been released by compelling his nephew to establish a kraal of his own. The question as to whether the father or the uncle is liable in such cases may be summed up by the simple answer that the legal guardian under whom a ward is living is liable irrespective of the degree of relationship subsisting between them. The Court, therefore, holds that the seizure of the uncle's property was in accordance with Native law and custom and the appeal is allowed with costs. This ruling does not apply to shop-debt cases which do not arise out of Native Law.

Butterworth. 29 July, 1897. H. G. Elliot, C.M.

Siduli vs. Nopoti.

(Idutywa.)

Ubulungu Custom—Disposal of Ubulungu Cattle.

Siduli sued Nopoti for certain cattle—an "ubulungu" beast and its progeny—which he alleged he had given to his sister, who had married Defendant's younger brother, Qwesha. Qwesha

had died without male issue and Defendant, as heir, had taken possession of these cattle when the widow went to live with Plaintiff.

The evidence established that an "ubulungu" beast was given as alleged and that the original animal and one of its progeny was alive. Defendant alleged that he had paid dowry on behalf of his younger brother for Plaintiff's sister and he was not willing to part with the ubulunga cattle until an arrangement had been arrived at with regard to return of dowry.

The Magistrate gave a judgment of absolution and Siduli appealed against this decision.

Pres.:—The Court holds that under all circumstances a married woman, whether continuing in bonds of matrimony or a widow, is entitled to possession of the "ubulungu" beast, which is presented to her at the time of her marriage and is regarded as a sacred pledge or protection of her interests, and that she is entitled to take it with her wherever she may elect to go. The appeal is allowed with costs and judgment altered to judgment for Plaintiff for two head of cattle and costs.

Kokstad. 9 September, 1897. W. G. Cumming, A.C.M.

Mazolo vs. Nyangiwe.

(Umzimkulu.)

Widows—Damages for Seduction—Mdikazi.

Nyangiwe sued Mazolo for six head of cattle as damages for seducing and causing the pregnancy of his daughter-in-law. The evidence showed that the woman in question was the widow of Plaintiff's son, whose kraal was with the Plaintiff. She had married the son some 20 years ago and since his death, nine years before, she had continued to live at his kraal. Defendant admitted the intercourse, but contended that as the woman was a widow he was only liable for one beast.

The Magistrate gave judgment for four head of cattle and furnished the following reasons:—"The only question to be decided in this case is that of the number of cattle which Defendant should pay Plaintiff, for the admitted illicit intercourse with the Plaintiff's daughter-in-law. The illicit intercourse resulted in the birth of a child, the paternity of which is admitted by

Defendant. Defendant argues that because the woman is a widow he should pay one beast. Plaintiff, on the other hand, claims that the woman, though the widow of his son, still remains at her husband's kraal (really his—Plaintiff's—kraal) and being capable of child-bearing is eligible for re-marriage; consequently, by Defendant's illicit intercourse, her chances of marriage are reduced, while Defendant himself cannot marry her on account of the affinity existing between them. The Court is of opinion that Plaintiff's contention should be upheld and, therefore, gives judgment for four head of cattle."

Defendant appealed.

Pres.:—The Appellant has admitted the allegations in the summons, and the only point to be considered is whether the damages awarded by the Resident Magistrate are excessive. According to Native Law a woman living with the friends of the deceased husband holds a responsible position and any man putting her in the family way is liable to pay substantial damages. The proper person to sue in such a case would be the head of the kraal under whose protection the woman is living. Appellant's contention that the woman is merely a "Mdikazi," by which term is meant a woman of no account and who has not an appreciable value from a matrimonial point of view, does not apply in this case. The Magistrate was perfectly right in his judgment. The appeal is dismissed with costs.

Umtata. 15 November, 1897. H. G. Elliot, C.M.

Fetana vs. Sinukela.

(Umtata.)

Dowry—Breach of Contract of Marriage—Recoverable when Breach is on Bride's side—Immorality of Bridegroom.

Fetana sued Sinukela for the restoration of the cattle he had paid as dowry for Defendant's daughter, whom he was to marry, and alleged that it was arranged that the marriage was to be under Christian rites, but on the day fixed for the ceremony neither Defendant nor his daughter appeared. Plaintiff was ready and willing to marry Defendant's daughter and as Defendant was not now agreeable to the marriage he demanded his dowry back. The Defendant pleaded that he was willing to

The Magistrate held it was the custom for the person who made good the damage to receive the carcase, and gave judgment in favour of Plaintiff.

Defendant appealed.

Pres.:—The points involved in this case being put to the Native Assessors, they state that under Native custom:—

1. The damages belong to the man who replaces the injured animal.

2. That there is no exception to this rule, even if there be delay in replacing the injured animal.

3. Nor is there any exception even if the animal paid is smaller and of less value than the one which it replaces, if the owner of the latter accepts it.

4. The original owner should not consume the carcase before the matter has been settled. If there is any dispute he should leave it to be eaten by the birds.

In view of the foregoing this Court is satisfied that the Plaintiff is entitled to the carcase of the animal that he injured, and sees no reason to interfere on the point of the value placed upon it by the Court below.

The appeal is dismissed with costs.

Umtata. 21 March, 1910. W. T. Brownlee, A.C.M.

Dledle vs. Nongabada.

(Mqanduli.)

Adultery—Evidence—Custom of Reporting Pregnancy of Woman Under Teleka.

This was an action for five head of cattle as damages for adultery committed whilst the woman was under teleka.

The Magistrate gave an absolution judgment, on the grounds of insufficiency of and discrepancies in the evidence.

Plaintiff appealed.

Pres.:—In this case the judgment seems to be against the weight of evidence. There is first of all the undisputed fact that the woman Nondamse has an illegitimate male child. Then there is the fact that various witnesses saw the Defendant cohabiting with her (Nondamse), and there is also evidence that a message

The Magistrate ordered the restoration of two head of cattle and Plaintiff appealed.

The Magistrate's reasons were as follows:—"I find the following to be the facts in this case. Defendant was the father of a girl for whom two men were proposing marriage and both of whom had paid cattle as instalments on account of dowry, when she was carried off by Plaintiff, with whom she remained for some weeks. Plaintiff's relations offered to pay dowry for her, and the negotiations for the first two marriages having been broken off, Defendant consented to entertain these proposals when the fine for abduction should have been paid. Certain cattle were paid, which Defendant received as fine, and then the payment of dowry was proceeded with. After a certain portion had been paid, Plaintiff and his relations stated no more could be obtained, and thereupon Defendant offered to return the stock paid as dowry and married his daughter to another man, retaining three head as fine for the seduction and abduction of his daughter. Though Plaintiff has not caused the girl to become pregnant, he was the cause of her prospective marriage being broken off, and in consequence of his action, Defendant has not obtained as much dowry as he would have received but for Plaintiff's action, and I, therefore, considered that he was entitled to receive what this Court decided he should retain of the cattle he received from Plaintiff.

Pres.:—According to Native custom, where a girl is carried off and seduced, there is a penalty of one beast, and in this case that is all the damages the Respondent is entitled to. The stock paid was taken as the equivalent of five head of cattle.

The judgment of the Resident Magistrate's Court is altered to judgment for Plaintiff for four head of cattle or their value—£12—and costs of suit, the appeal being allowed with costs.

Kokstad. 15 August, 1898. W. G. Cumming, A.C.M.

Notyabaza vs. Gxumisa.

(Qumbu.)

Adultery—Damages—Cleansing Beast—Incestuous Actions—Pondomisi Custom.

Notyabaza sued Gxumisa for four head of cattle as damages for adultery. Defendant admitted the intercourse, but contended that, being a Pondomise, he was only liable for one beast as

the parties were relations. The evidence showed that Defendant was Plaintiff's nephew.

Judgment was given for one animal only and Plaintiff appealed.

The Magistrate's reasons were as follows:—"The parties are related, Plaintiff being Defendant's uncle, and the Defendant urges on this account that he is only liable for one beast for cleansing purposes. Expert evidence was adduced in support of this contention; the Headman Plaatyi is an old and respectable man and he gives evidence on the point, but says he had not had a case before him of this nature. Amongst the old Natives of two or three generations ago, who are responsible for most of the customs governing the Natives of the present day, death was the punishment for "Umbulo," or incestuous relations, and not only this, but they were opposed to people getting rich out of their relatives' misfortunes, and an injury done by relatives to one another was redressed by the injuring party being fined to "heal the injured party's sore" and not to enrich him, and the fine in this case was merely nominal and generally of such a nature that the neighbours could benefit by it: this, I can only conclude, was the reason for the custom related by Plaatyi. Finding this so I am of opinion that the tender made by the Defendant was sufficient and good according to Kafir Law."

Pres.:—In this case Appellant (plaintiff in the Court below) sued Respondent (defendant in the Court below) for the recovery of four head of cattle for damages for adultery committed by him with Appellant's wife. Respondent, while admitting the adultery, set up a special plea to the effect that according to the Pondomisi custom he was only bound to pay one beast. In support of this plea a Headman was called, who stated that in cases of this kind the guilty party had to pay a beast, which was afterwards sacrificed in order to "cleanse him from his sin." So far the witness is right, but it must not be inferred from this that the guilty party is absolved from paying the ordinary fine generally exacted in adultery cases. As a matter of fact in all adultery cases one beast is looked upon as "the cleansing beast," to use the Native expression. It is clear then that the Magistrate has erred in his judgment. The Plaintiff was entitled to receive satisfaction for the wrong that had been done to him. The Magistrate's judgment will, therefore, be altered to judgment for Plaintiff for four head of cattle, or their value—£12—with costs in this Court and in the Court below.

Umtata. 15 November, 1898. H. G. Elliot, C.M.

Maseti vs. Maciti.

(Engcobo.)

Seduction—Paternity—Evidence of Woman—Credibility—Method of Fixing Dates.

Maseti sued Maciti for damages for seducing and causing the pregnancy of his daughter. In her evidence the girl swore that the Defendant had, at an Intonjane and previously, been intimate with her and had caused her pregnancy. Defendant, while admitting having "metsha'd" with her, accused another man as being the cause.

The Magistrate gave judgment for the Defendant on the grounds of the great discrepancies in dates in the evidence of Plaintiff and his witnesses, and also that under Native custom there is no fine for intercourse with an unmarried girl unless pregnancy follows.

Plaintiff Maseti appealed.

Pres.:—The Court attaches no importance to the alleged discrepancies in dates in the Plaintiff's evidence in the Court below. Natives usually fix dates by seasons, such as ploughing, harvesting, etc., which vary greatly in this country. The Defendant admits carnal intercourse with the girl, but denies that he is the author of pregnancy. It is a well-established fact that the only person who can positively state whether pregnancy ensues or not from an act of cohabitation is the woman. No sufficient reason has been advanced why greater benefit or advantage would accrue to the woman from charging the Defendant as the father of the child than if she had attributed that responsibility to any one else. It is a most unusual thing, as has been before pointed out in this Court, for an unmarried girl to deny the paternity of her child, such an act being considered as not only disgraceful to herself but to her off-spring. Natives consequently attach very great importance to a mother's evidence, and in that view this Court agrees. The appeal is allowed with costs and judgment altered to judgment for Plaintiff with costs.

Kokstad. 19 December, 1898. J. H. Scott, C.M.

Mnduze vs. Mdlimbi.

(Umzimkulu.)

Adultery—Wife married by Native Rites during Subsistence of Christian Marriage.

Mnduze sued Mdlimbi for damages for adultery. From the evidence it appeared that the woman with whom the act was alleged to have been committed was living with Plaintiff as his wife, although he had already one wife, whom he married by Christian rites. The Magistrate dismissed the case and Plaintiff appealed.

Pres.:—The Court holds that the Court below was quite right in its finding. If a Native is married by Christian rites, the law can acknowledge no rights to another woman based upon payment of dowry, seeing that the taking of this other woman and the payment of dowry for her are a clear breach of the solemn marriage contract already entered into.

The appeal must, therefore, be dismissed with costs.

Kokstad. 24 April, 1899. J. H. Scott, C.M.

Ngxakambana vs. Bokolo.

(Umzimkulu.)

Dowry Restoration—Division—Death of Wife in Child-birth—Baca Custom.

Bokolo sued for the restoration of 16 head of cattle, being dowry paid to Defendant on his—Plaintiff's—engagement to marry Defendant's daughter. He alleged in his summons that the girl died before the marriage could take place and he was, therefore, entitled to restoration of his dowry. The Defendant contended that the Plaintiff had married his daughter and he was, therefore, not liable for the restoration of the whole dowry.

The Magistrate gave judgment for 11 head and Defendant appealed.

The following were the Magistrate's reasons:—"Plaintiff alleges that he paid 16 head of cattle as dowry and claims restoration of all. Defendant alleges the 16th beast was "Inhlanza" and cannot be claimed, and pleads non-liability for any of the

lobola. Defendant is, in my opinion, justified in claiming one beast as "Inhlanza." It is admitted "Ingqutu" was paid, and that being so, it is usual, in fact follows, that a "cleansing" beast should also be paid. Defendant when giving his evidence admitted he should restore half the cattle to Plaintiff, but no more. I find that the Plaintiff was married according to Native custom to Defendant's daughter "Nombi," most of the essentials of a Native marriage were observed, that most of the lobola had been paid and the woman was handed over to Plaintiff as his wife; she lived at his kraal and became pregnant by him. The woman died a few months after living at Plaintiff's kraal from the effects of the premature birth of her child. Under all the circumstances I am of opinion four head should be allowed for that, leaving 11 head to be restored to Plaintiff."

Pres.:—In this case parties to suit are both Bacas. Plaintiff sued Defendant for restoration of dowry, alleging in his summons that he was engaged to marry Defendant's daughter, that she died before the marriage was completed, and that therefore he was entitled to recover all the dowry paid. Defendant denied the allegation of the summons that there was only an engagement and no marriage, affirming that there was a marriage and electing to defend the action on the ground that although there was a marriage he is not liable to return any dowry as his wife died as the result of a premature confinement. This action of Defendant disposes of the exception taken in this Court that, as Plaintiff alleged there was only an engagement and based his claim on that allegation and did not succeed in proving his allegation, Defendant is entitled to absolution from the instance. The Magistrate held there was a marriage. The Defendant admitted he should return at least half the dowry, although his daughter died as the result of her pregnancy, without leaving issue. The Magistrate held that the equivalent of 16 head of cattle was paid as dowry and apportioned 11 head to the Plaintiff, leaving five head with the Defendant. In some tribes, notably the Tembus, under the circumstances disclosed, no dowry is recoverable. There is reason to believe that in former times the Baca custom was the same, but of recent years and according to the practice in the Courts in this Territory the custom has been modified and the dowry is divided between the father and the widower. The apportionment by the Court below seems a fair one and the appeal is dismissed with costs.

Umtata. 26 July, 1899. H. G. Elliot, C.M.

Njobeni vs. Mzini.

(Engcobo.)

Dowry—When returnable—Leprosy—Deductions—Death of Wife.

Njobeni sued Mzini for the recovery of 10 head of cattle, being the dowry paid for his wife, and in his summons alleged that at the time of his marriage to the woman in question she was suffering from leprosy, of which fact he was ignorant, that shortly after the marriage she deserted him and returned to her people, where she died of the disease.

The Magistrate gave judgment for the Defendant and in his reasons said:—"It is quite clear from the evidence in this case that the Plaintiff's wife was quite healthy at the time of marriage and that she lived for some months after the marriage at his kraal and, considering that some of Plaintiff's relations were lepers, it is extremely probable that she contracted leprosy at his kraal. No claim for the restoration of the dowry of the deceased wife can therefore be made."

Njobeni appealed.

Pres.:—The opinion of the Native assessors with regard to the return of dowry is as follows:—Where the woman dies shortly after marriage and without issue the dowry is returned. Where the woman, having borne one or two children, dies the dowry is returnable, one beast being deducted for each child born, whether the child lives or not. There are special cases where the dowry is not returnable: When the death of the woman is attributable to the husband, such as death from child-birth. That the number of cattle returnable is decided by the merits of each case.

In the present case the Court agrees with the opinion of the Resident Magistrate that the disease of leprosy, from which Appellant's wife died, was contracted at his own kraal, but that the Respondent or his representatives were fully aware of the existence of the disease at the Appellant's kraal before the completion of the marriage by the payment of the dowry, and that by not withdrawing her when they should have done so they exposed her knowingly to the disease, from which she subsequently died. Taking this into consideration, the Court is of opinion that Respondent in some measure contributed to the unfortunate

woman's death and is, therefore, not entitled to retain the whole of the dowry. The appeal is allowed with costs and judgment altered to judgment for four head of cattle.

Umtata. 19 March, 1900. A. H. Stanford, A.C.M.

Rasmeni vs. Plaatji.

(Cofimvaba.)

Adultery—Native Marriage in Colony—Damages.

Plaatji sued Rasmeni for damages for adultery. Plaintiff in his evidence said that he had married his wife in the Cape Colony under Native custom and paid dowry for her there. He had been brought up in the Territories and immediately after his marriage he settled in the Territories and had lived there ever since. Defendant's attorney then took an exception to the claim on the ground that a so-called Native marriage according to Native customs celebrated in the Cape Colony is cohabitation only and not a legal marriage, and that therefore as the Plaintiff was not the husband of the woman in question he could not maintain the action.

The Magistrate over-ruled the exception and on the merits of the case awarded the damages claimed. Defendant appealed.

The Magistrate in his reasons remarked that it would be most unjust if anyone could commit adultery with Plaintiff's wife and for Plaintiff to have no right in law to recover damages. Plaintiff is a resident in these Territories and subject to the laws and customs in force here. He has paid dowry for his wife and, although this was paid in the Colony some years ago, he has the same right as if he had married according to Native customs in these Territories.

The Appeal Court dismissed the appeal.

(*Vide Jeke* vs. *Judge*, 11 Juta 125.)

Butterworth. 26 March, 1900. A. H. Stanford, A.C.M.

Ngxabisa vs. Ngcobitsha.

(Nqamakwe.)

Maintenance—Dowry-holder cannot claim for Support of Wife.

Ngcobitsha sued Ngxabisa for £70 as maintenance of Defendant's wife and child for nineteen months. He alleged

that the Defendant had married his sister by Christian rites, but some five years after the marriage she had deserted him on account of his ill-treatment of her and had come to live with him. He further alleged that he had sent her back to Defendant, but he had refused to have her and consequently he—Plaintiff—had been compelled to support her. Defendant in his evidence said that he never fetched his wife from Plaintiff's kraal as he had not married her by Native custom and, further, that as she had left him of her own accord she had abandoned her right to live at his kraal. The Magistrate awarded the sum of £32 as damages. Defendant appealed.

Pres.:—Respondent admits that cattle were paid as dowry for his sister, Appellant's wife, and dowry having been paid for this woman, Respondent, in accordance with Native custom, can have no claim for the maintenance and support of his sister, this being all covered by the dowry paid. The appeal is allowed with costs and judgment entered for Defendant with costs.

Kokstad. 24 April, 1900. J. H. Scott, C.M.

Mfenqa vs. Tshali.

(Mount Ayliff.)

Apportionment of Property—Rights of Kraal Heads—Disherison of Heirs.

Mfenqa sued Tshali for the restoration of certain stock. In his summons he alleged that he had apportioned stock to the second of his houses, of which Defendant is the representative, that the second house has now sufficient stock for its maintenance, and he now sought the restoration of that apportioned to it. Defendant admitted possession of the stock, but contended that as it was apportioned to his house by Defendant it was not now recoverable.

The Magistrate gave judgment for Defendant with costs.

Plaintiff appealed.

In his reasons the Magistrate said:—"Plaintiff, having handed over the stock to the second hut, merely retains his right over it as head of the family, but the part of this right has become vested, in accordance with Kafir Law, in the heirs of the house. Plaintiff has certain rights, such as to take certain animals in

moderate numbers for some specific purpose, provided it was for the benefit of the family in general, but to have given judgment as asked for—namely, for the unconditional return of the entire stock in the second kraal—would have been entirely in opposition to the principles which govern the law of property amongst Natives."

Pres.:—This case arises out of a family dispute. Appellant, Plaintiff in the Court below, apportioned certain property to one of his houses, of which Respondent claims to be the representative. Appellant apparently wished to remove from this house property that he had given to it and Respondent resists and claims that the gift was an irrevocable one and that Appellant has lost all right to it or the disposal of it. The Magistrate's judgment supports Respondent's claim. A Native marrying more than one wife establishes them in separate houses and apportions property as he sees fit for the support of each house, but during his lifetime he does not lose control of this property and each house is bound to contribute fairly to the reasonable requirements of the family as a whole. In each house there is a male representative to look after the interests of the house and to care for its property, but he is bound to report everything that happens to the head of the whole family, not to deal with the property without consulting his father, and to help his father in the general interests of the whole family. Very often these representatives begin to look upon themselves as owners and to lose sight of the fact that they are simply their father's agents and ignore the old man and his claims altogether. Then there is sure to be trouble. No old man likes to be treated as dead before he is in the grave. The protection the old men have is that while they may not utterly impoverish a house, and thus "kill their own children," they may for good cause shown repudiate a son who represents a house, disinherit him altogether and institute someone else in his place, and the refusal to treat the father fairly has over and over again been held good cause for this repudiation. Appellant altogether failed to prove the allegations of his summons, indeed, from his own evidence it is impossible to tell what he really claims, so he was not entitled to a judgment. Respondent is certainly not entitled to a judgment practically giving him unfettered control of what is still his father's property. The appeal is allowed with costs and the judgment of the Court below altered to absolution from the instance with costs.

Kokstad. 24 April, 1900. J. H. Scott, C.M.

Mehlomane vs. Nkwatsha.

(Kokstad.)

Nqutu Custom—Kraal Head Responsibility.

Mehlomane sued Mkwatsha for the restoration of two head of cattle, which he alleged Defendant had illegally seized.

The Defendant admitted having the cattle, but pleaded that they were held by him as security for an "Nqutu" beast owing by Plaintiff, and he stated that he was prepared to return the cattle upon payment of an "Nqutu" beast.

The evidence showed that a young man named Cayane, Plaintiff's nephew, had been visiting at his kraal for about a year, and while there Cayane carried off and seduced Defendant's daughter. The women of Defendant's kraal proceeded to Plaintiff's and there obtained possession of the two head of cattle in dispute.

The Magistrate absolved the Defendant and Plaintiff appealed.

The following were the Magistrate's reasons:—"It would appear that the cattle came into Defendant's possession under a custom peculiar to Natives, by which, when a man seduces a girl, the women of her kraal are entitled to exact compensation from the seducer. Usually the compensation is in the form of an ox, but it is allowable in cases where an ox is not forthcoming to compound by payment of an equivalent, such as a cow and calf or a cow and money or two head of small cattle. Native custom recognises the right of the women to seize a beast in such cases, but it appears to me very probable that the cattle were taken by the women with the Plaintiff's tacit consent, that is to say, his opposition was only of a formal nature. Plaintiff can recover the cattle by payment of an Nqutu beast.

Pres.:—Appellant in the Court below sued the Respondent for the recovery of two head of cattle, alleged to have been wrongfully seized and illegally detained by Respondent. Judgment was absolution from the instance. It appears that a young man, Cayane, staying at Appellant's village, ran off with and seduced a girl belonging to Respondent, that Respondent's women went to Appellant's kraal to demand the Nqutu beast and that, with some demur, but without efficient resistance on the part of Appellant, certain cattle were taken away. It is the restoration of

these cattle that is sought. The points in the case are whether the women are entitled to take the Nqutu beast and whether the Appellant is responsible for the acts of a young man visiting at his village. There can be no doubt that the Nqutu beast is recoverable, and by an action at law if necessary. Of course, it cannot be taken by force or surreptitiously, on the same ground that no other legal right may be so enforced. If resistance is made the remedy must be an appeal to the legal tribunal. The custom of the women going to demand this fine and settling the matter by discussion with the head of the offending village does not seem to be so objectionable as to call for active interference. A former case decided in this Court and referred to by Appellant on the same point simply states that eventually the custom must yield to the advance of civilisation, but that it would not be right to abrogate it without full notice to the Natives and until it has been shown to involve serious consequences. In that case the Nqutu beast was not taken according to custom, but secretly, and was killed before the owner had any opportunity of negotiating. This Court concurs that under those circumstances the Nqutu custom could not be successfully pleaded in answer to a claim for the property so taken. Appellant consented in the unwilling sort of way in which consent is always given in these cases to the taking of his cattle and took no legal steps for a very long time, and he is now too late. As to the responsibility of the head of a kraal for acts of a young man living with him, each case must be dealt with on its merits. In the present case, Cayane was a year or more with Appellant. As far as the neighbourhood could see, his home was at Appellant's. The girl was brought to the latter's kraal and he took no prompt or efficient steps to free his village from responsibility. Under these circumstances he was rightly held liable in the first instance for Cayane's misdeed, retaining his right to a refund from Cayane's people.

The appeal is dismissed with costs.

Umtata. 16 July, 1900. A. H. Stanford, A.C.M.

Mdodana vs. Ndwabuze.

(Ngqeleni.)

Dowry—Pondo Custom—Not Returnable when Widow re-marries if she has had Children.

Ndwabuze claimed from Mdodana the restoration of his mother or the dowry paid for her by his father, and two children, alleging that his late father had married the woman by Native custom and after his death she had left his kraal and taken the children with her to her father's kraal, where she had been re-married. Defendant admitted that the woman, who was his daughter, had been re-married and that he held two dowries for her, but contended that under Pondo custom he was entitled to retain them because she had borne children to her first husband.

The Magistrate ordered the restoration of the dowry and of the two children and Defendant appealed.

Pres.:—The Pondo assessors state that, according to Pondo custom, the dowry is not returnable on the death of the husband on the re-marriage of his wife if she has had children by the first marriage.

The appeal is accordingly allowed and judgment altered to restoration of the two children only.

Umtata. 16 July, 1900. A. H. Stanford, A.C.M.

Nzima vs. Hlahleni.

(Engcobo.)

Dowry—Ukufakwa Custom—Repayment out of Daughter's Dowry.

Nzima, heir of the late Mamba, sued Hlahleni, younger brother of the late Mamba, for certain cattle, alleging that Mamba had paid Defendant's dowry for him when he married and that Defendant in return had promised to repay him from the dowry of his first daughter on her marriage. The daughter was now married and dowry paid for her, but Defendant repudiated the agreement and declined to hand over any of the cattle.

The Magistrate gave a judgment of absolution.

Nzima appealed.

Pres.:—Respondent was a younger brother of Appellant's father, Mamba, and appears to have grown up with his mother's people, but after his circumcision was fetched by Mamba and, according to his own account, when he had been there two years he married and, being a younger brother, it is only reasonable to suppose that as a younger brother he was assisted in his marriage by Mamba under the usual conditions of Native custom, viz.: that when his eldest daughter married Mamba was to be refunded. Probably if Mamba had lived no difficulty would have arisen and he would have borne the "Intonjane" and marriage expenses of the daughter, which have been defrayed by the Respondent. The Court considers that the Appellant is entitled to a portion of the dowry paid for Respondent's daughter, and the appeal is allowed with costs and judgment in the Magistrate's Court altered to judgment for Plaintiff with costs.

Butterworth. 23 July, 1900. A. H. Stanford, A.C.M.

Nqakwana vs. Sixinti.

(Nqamakwe.)

Cattle Valuation—Pre-Rinderpest Cattle.

This was an action for the restoration of wife or dowry. The Magistrate ordered the restoration of the cattle and placed a valuation of £3 each on them. Plaintiff Nqakwana appealed against this valuation.

Pres.:—The dowry claimed was paid before Rinderpest, when cattle were of the value of only £3 per head. They are all admitted to be dead and Appellant is entitled only to the value of the dowry paid by him. The appeal is dismissed with costs.

Butterworth. 23 July, 1900. A. H. Stanford, A.C.M.

Noseki vs. Fubesi.

(Nqamakwe.)

Wives—Capacity to sue—Rights of—Diversion of Property from one House to Another.

Noseki, assisted by her eldest son, sued her husband, Fubesi, for the restoration to her house of certain cattle. In her summons

she alleged that she was the Great wife of Defendant and that she lived at his kraal, that Defendant had transferred certain cattle from her house to the house of his Right Hand wife without consulting her and that these cattle were being disposed of to the detriment of her house. She asked that Defendant be ordered to restore these cattle.

Exception to the summons was taken that the Plaintiff had no right to sue in her own name and the Magistrate in upholding this exception and dismissing the case said that the son should have brought this action.

Plaintiff Noseki appealed.

Pres.:—According to Native custom a woman has a right of action against her husband unassisted when the husband is alleged to be making an improper disposition of property belonging to her house. The appeal is allowed with costs and the case returned to be heard on its merits.

Butterworth. 26 November, 1900. A. H. Stanford, A.C.M.

Nosentyi vs. Makonza.

(Tsomo.)

Widows—Right of Action—Guardianship.

Nosentyi sued Makonza for the restoration of certain property alleged to have been appropriated by him.

The Defendant excepted to the proceedings on the ground that the Plaintiff had no right or status to sue as she was the widow of his late brother, of whom he was heir, and that she was living at his kraal and supported by him.

The Magistrate upheld the exception and dismissed the case.

Nosentyi appealed.

Pres.:—Every Native woman has a right of action unassisted against the guardian in her late husband's estate to protect herself and children and property from improper administration. If this were not so a woman so placed would have no remedy against the guardian, no matter how gross his treatment was of herself and property, or to restrain him from misappropriating property in which she had a life interest. In such a case there is a marked distinction in Native law from that of a case instituted to recover from a person not a guardian, in which case the guar-

dian's assistanee would be neeessary, and even in sueh a ease, if it were shown that the guardian unreasonably refused to assist, the woman could proeeed with the suit. The appeal is allowed with costs and the case returned to the Magistrate to be heard on its merits.

Kokstad. 18 Deeember, 1900. J. H. Scott, C.M.

Tetani vs. Mnukwa.

(Umzimkulu.)

Dowry Restoration on grounds of Adultery—Repudiation—Condonation.

Mnukwa sued Tetani for the restoration of the dowry paid by him for his wife to Defendant on the ground of his wife's adultery. The Defendant admitted receipt of the dowry and that his daughter had committed adultery, but contended that Plaintiff was not entitled to restoration because he drove away the woman

The Magistrate ordered the restoration of the dowry on the ground that Plaintiff was justified in repudiating his wife when he discovered her adultery.

The Defendant appealed.

Pres.:—Plaintiff married according to Native eustom Defendant's daughter. He found she had committed adultery, recovered damages from her paramour and, on the woman coming to his kraal, refused to have anything to do with her and practieally drove her away. He now seeks to recover his dowry, and the question is whether purely as a question of Native law he is entitled to do so. As far as this Court knows, no sueh action has been brought before Native Chiefs in the past or decided in either Native Appeal Court. It would appear that the recovering of damages from the paramour is a condonation of the offence as far as the woman is concerned and that if her huband sends her away he loses his claim to recover his dowry on the ground that he has repudiated her for what, from a Native point of view, is insufficient cause. The law may appear hard on the man and, of course, is repugnant to our ideas, but, on the other hand, if a woman does not wish to live with a husband who may be committing the most open and insulting adultery she can only free herself by returning his cattle. In the Court below great

stress was laid on the fact that after the woman had been sent away she again committed adultery. But this does not seem to bear upon the case. Plaintiff's claim to recover dowry arose, if at all, on his repudiation of the woman after the adultery, for which he got damages, and the question must be decided on the legal principles then applicable. The man's repudiation of his wife seemed quite complete. After she went to her father's kraal Plaintiff never visited her, sent any message to her, or sent for her (putuma'd).

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

Butterworth. 4 March, 1901. H. G. Elliot, C.M.

Jangumbona vs. Plati.

(Kentani.)

Dowry Restoration—Wife Dying soon after Marriage—Division of Dowry—Gcaleka Custom.

Plati sued Jangumbona for the restoration of six head of cattle, being the dowry he had paid for Defendant's daughter, whom he had married under Native custom. He alleged that she was ailing when brought to his kraal and two months afterwards she died. Under these circumstances he contended he was entitled to the restoration of the whole of his dowry. Defendant admitted the payment of dowry, but contended that by the death of the woman Plaintiff was not entitled to claim repayment of the cattle. The Magistrate ordered that five head be returned to Plaintiff.

Jangumbona appealed.

In his reasons, the Magistrate said that he considered himself bound by Native Law, under which the father is obliged in all such cases to restore the bulk of the dowry, hence his judgment for five of the six cattle paid.

Pres.:—In this case the judgment will follow the custom as it obtains among the Gcalekas, under which, in cases of this kind, one half only of the dowry cattle is paid. The appeal is allowed with costs and judgment altered to judgment for Plaintiff for three head of cattle and costs.

Butterworth. 15 July, 1901. A. H. Stanford, A.C.M.

Mzambalala vs. Silinga.

(Butterworth.)

Marriage—Dissolution—Repudiation—Dowries of Illegitimate Children—Consequences of Christian Marriage.

Silinga sued Mzambalala for the restoration of certain cattle received as dowry for the illegitimate daughter of one Nosenti, whom he—Plaintiff—had married by Native custom and whom he had afterwards sent away on his Christian marriage with another woman

At the hearing of the case in the Magistrate's Court the following points were agreed on:—

1. That Plaintiff had two wives, one of whom was Nosenti.
2. That upon becoming converted he put away Nosenti.
3. That after this Nosenti gave birth to an illegitimate daughter—one Pongwana.
4. That Defendant received dowry for this girl Pongwana on her marriage.
5. That Plaintiff did neither demand nor obtain return of dowry paid for Nosenti upon the occasion of his separation from her.

The ruling of the Court was asked for on the point whether or not Plaintiff has any claim to the dowry paid for the girl Pongwana.

The Magistrate, in ruling that the dowry was recoverable, gave the following reasons:—"The Court is of opinion that the Plaintiff, having paid dowry for his wife Nosenti and there having been no dissolution of this marriage by the repayment of dowry, is entitled to all the benefits arising from his marriage, among them being dowry for the children of his wife, and that all questions of dowry must be dealt with in accordance with Native law and custom. Plaintiff is, therefore, clearly entitled to claim the dowry paid for the girl Pongwana."

Defendant appealed.

Pres.:—It is admitted that when the Respondent became a Christian he married one of his two wives by Christian rites and sent the other, Nosenti, home to her people. By so doing, he dissolved the marriage which had been entered into between them

by Native custom. This act of sending her away also extinguished all claim for restoration of the dowry, and the woman Nosenti became, so far as he was concerned, freed from all ties. Consequently Respondent can have no claim for the children to which she gave birth after the separation. The appeal is allowed with costs.

Umtata 24 July, 1901. A. H. Stanford, A.C.M.

Kowe vs. Mbilini.

(Mqanduli.)

Dowry—Restoration after Wife's Death—Father's Consolation.

This was a claim by Mbilini for the restoration of four head of cattle, being the dowry he had paid to Defendant for his wife, on the ground that a few days after his marriage his wife had deserted him and returned to her people, where she died shortly afterwards. The Magistrate ordered the restoration of the whole dowry paid.

Kowe appealed.

Pres.:—It has not been the custom in the Courts of the Territories in cases of this nature to give over the whole of the dowry so that the entire loss should be borne by the father, and in the Chiefs' days he was always left something with which to "wipe away his tears." The appeal is allowed with costs and judgment altered to judgment for two head of cattle.

Umtata 24 July, 1901. A. H. Stanford, A.C.M.

Mketshani vs. April Reld.

(Elliot.)

Ukuteleka Custom—Damages for Detention of Wife.

April Reld sued Mketshani for the restoration of his wife and for £20 damages for her wrongful detention. He alleged that he had paid 11 head of cattle as dowry for her to Defendant and that he and his wife had lived together for many years, but a short while before the institution of this action she had left him and returned to Defendant. He also alleged that Defendant refused to allow her to return to him.

The Defendant pleaded that he had detained Plaintiff's wife under the custom of *ukuteleka* and that he was willing to allow her return if Plaintiff paid five additional head as dowry. The woman herself stated that she was willing to return to Plaintiff as his wife.

The Magistrate ordered the restoration of the woman within 14 days and awarded the Plaintiff £5 damages.

The Defendant appealed.

Pres.:—No action by Native law and custom can be maintained for damages for the detention of a man's wife under the custom of ukuteleka, and when a woman married according to Native rites leaves her husband his only remedy is to sue her father or other person to whom he paid dowry for her restoration or, failing that, the dowry. The appeal is allowed with costs and the amount of damages awarded by the Magistrate is disallowed.

Kokstad. 29 August, 1901. J. H. Scott, C.M.

Magwanya vs. Mtambeka.

(Mount Ayliff.)

Nqutu Custom—Dissolution of Marriage—Restoration of Nqutu Beast—Consummation of Marriage.

Mtambeka sued Magwanya for the restoration of one ox paid to him, together with dowry, as Nqutu. He alleged that his wife refused to cohabit with him and that on this ground his dowry was returned and the marriage dissolved, but Defendant refused to restore the animal paid as Nqutu. Defendant contended that the Nqutu beast was not returnable.

The Magistrate gave judgment for Plaintiff and in his reasons said:—"The Nqutu beast was paid in advance with the dowry—not paid in the usual way to the women as a fine for "damage" to the girl. Indeed, it seems that the woman was never damaged by him. I understand that the Nqutu beast can only be claimed as a fine, and if no offence has been committed there can be no fine. I think the beast in this case was clearly an advance in connection with arrangements for a marriage which did not take place and it should, therefore, be returned."

Defendant appealed.

Pres.:—Plaintiff got judgment in the Court of the Resident Magistrate, Mount Ayliff, against Defendant for the return of an ox or it value. From this judgment Defendant appeals. The facts are common cause. Plaintiff married a woman under guardianship of Defendant, paid dowry and the "nqutu" beast, and the woman was handed over to Plaintiff and remained a period variously stated by the witnesses, but admittedly for more than a month at Plaintiff's village. The "Nqutu" beast was, as is usually the case, killed by the bride's mother and female relatives and a portion of the beef sent to the bride. The woman was an unwilling bride and refused to have intercourse with Plaintiff, and he, finally despairing of winning her affections, let her go home and got all his dowry back, in which, under the circumstances, he may consider himself exceptionally fortunate. He now maintains that he ought to recover the "Nqutu" beast because the marriage was never consummated, and his contention was upheld by the Magistrate apparently from a misapprehension of what the "Nqutu" beast was given for. The "Nqutu" beast is given when a marriage ceremony is completed by the acceptance of dowry and the handing over of the bride, and is an acknowledgment to the mother-in-law of the care taken of the bride during her maidenhood. The Native law, like our own, presumes consummation where all ceremonies pertaining to valid marriage have been gone through. In this case Plaintiff had no claim on Defendant for the return of the "Nqutu" beast

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

Umtata. 13 November, 1901. H. G. Elliot, C.M.

Nolanti vs. Sintenteni.

(Mqanduli.)

Property—Women's Earnings—Widows—Dowry Cattle.

Sintenteni sued Nolanti for the restoration of certain stock. Nolanti, whilst in a state of pregnancy, deserted her husband, the father of Plaintiff, and went to her people. Whilst there she gave birth to a female child, Nongxazozo The girl eventually married and the dowry for her was paid to Nolanti instead of to her husband or his heir. During her separation from her hus-

band, Nolanti earned certain cattle as a doctress, and this property, as well as the dowry paid for Nongxazozo, Plaintiff claimed.

The Magistrate gave judgment for Plaintiff for all the property claimed on the ground that the marriage between Nolanti and her husband still existed, the original dowry paid for Nolanti never having been returned.

Nolanti appealed.

Pres.:—The Appellant Nolanti has been a widow for a number of years, during which she has acquired by her own labour and without any assistance from Respondent or from her late husband's family certain stock, of which the Respondent, her son by her late husband, is endeavouring to deprive her. By Section 38 of Proclamation No. 140 of 1885 the age of legal majority of both males and females is 21 years. It therefore follows that after the death of her husband the Appellant Nolanti became free of all control and is entitled to retain in her own right all property she may have acquired since her husband's death. The Court is aware that this is in conflict with Native custom, but where Native custom is repugnant to justice and equity and to special provisions in the Proclamations for the government of the Native Territories it must give way. The appeal is allowed with costs and the judgment in the Court below altered to judgment for the Plaintiff for the dowry of Nongxazozo, but the Appellant Nolanti to retain the fruits of her own earnings for her support during her lifetime.

Umtata. 13 November, 1901. H. G. Elliot, C.M.

Mlungisi vs. Dlayedwa.

(Engcobo.)

Marriage—How Constituted—Payment of Dowry—Tembu Custom.

This was an action for damages for adultery. From the evidence it appeared that the Plaintiff Dlayedwa was passing the kraal of one Dyantyi, driving six head of cattle, when Dyantyi offered him his daughter in marriage for the cattle. Plaintiff took his cattle home and afterwards came and saw the girl. He intimated to Dyantyi that he was satisfied and then went home to tell his father. Thereafter, in company with others, he fetched the girl

from her father's kraal and on their way to his own kraal about sunset Defendant Mlungisi appeared, stating he had been sent by Dyantyi to fetch the girl. Plaintiff thereupon gave the girl into his care and went home. Late that night Dyantyi sent the girl with her brothers to Plaintiff asking why he had "thrown her away." Plaintiff then explained how Defendant had taken her away, but Dyantyi denied that he had ever sent such a message by the Defendant. The cattle were then handed over to Dyantyi. Defendant had seduced the girl after she had been handed into his care by Plaintiff and Plaintiff claimed damages for adultery and for the abduction.

The Magistrate found that as the girl had been formally handed over to Plaintiff, even though no cattle had passed, yet a legal marriage had been entered into and he accordingly awarded the damages claimed.

Defendant Mlungisi appealed.

Pres.:—The Court is of opinion that, according to Native law, no marriage had taken place as no dowry or part of dowry had changed hands. It is not uncommon, even when a girl has been asked for in marriage, to send her to a kraal for that purpose, where she remains unmolested until the dowry or portion thereof agreed upon is paid. If an agreement is not come to she is returned to her guardian's kraal in the same condition as when she left it. As no cattle had passed, the woman in question was not a legal wife. In this view Dalindyebo and Assessors present unanimously agree. The Court having ruled that there was no marriage, Plaintiff has no right of action and the appeal is allowed with costs and judgment altered to judgment for Defendant with costs.

Umtata. 13 November, 1901. H. G. Elliot, C.M.

Hlatuka vs. Mhlonhlo.

(Cofimvaba.)

Maintenance—Male Children—Equivalent Service.

Mhlonhlo sued for the restoration of certain stock retained by Hlatuka. Defendant denied the claim and claimed in reconvention maintenance of Plaintiff for 25 years at £1 a year. From the evidence it appeared that Plaintiff's father had given him

when a child to Defendant's father as a herd boy and, after the death of Defendant's father, Defendant had retained his services. On the facts of the case the Magistrate gave judgment for Plaintiff in convention for the stock claimed and absolution in respect of the claim in reconvention.

Defendant appealed.

In dismissing the appeal with costs, the Appeal Court remarked that when a male child is borrowed or lent to another person it is not Native custom that maintenance should be paid for him, his services being equivalent to his maintenance.

Butterworth. 16 November, 1901. A. H. Stanford, A.C.M.

Adonis vs. Zazini.

(Butterworth.)

Dowry—Cannot be sued for—Christian Marriage—Teleka Custom.

Zazini sued Adonis for certain cattle, being dowry due by the latter for the former's daughter, whom he had married by Christian rites. Plaintiff alleged that there was an agreement to pay dowry, but before any was paid Defendant eloped with his daughter and married her by Christian rites. The Defendant admitted that he had eloped with the woman before paying any dowry and that he lived with her for some months before he married her. Also that the parties had had carnal intercourse before the elopement. He denied having agreed to pay dowry, but stated that he had given Plaintiff the sum of £10 as a gift.

The Magistrate awarded eight head of cattle as dowry and gave the following reasons:—"In this case the marriage is admitted by the Defendant, whose only defence is that he was married in church and is thus not liable for dowry. The Court is aware that in certain cases of marriage between Christian Natives dowry is not demanded and that in such cases, in deference to Native custom, a gift passes between the bridegroom and his father-in-law, but in this case the marriage was in church, yet the bridegroom is not a Christian. The Court came to the conclusion on the evidence that the Defendant eloped with the woman without her father's knowledge or consent and is of opinion that he is liable for dowry notwithstanding the Christian marriage."

Defendant appealed.

Pres.:—According to Native custom there is no action to compel the payment of dowry, the only remedy the father or guardian of a woman had was to "teleka" her and detain her until more dowry was paid, and if sued for the return of the woman this was sufficient defence if the parent or guardian could show that an insufficient dowry or the number agreed upon had not been paid. In that case the Chief would not order the return of the woman, but would direct the husband to pay more dowry, but an action to compel payment of dowry was unknown. In the present case the marriage was celebrated according to Christian rites, the contracting parties being both majors. By Section 39 of Proclamation No. 110 of 1879 the legal age of majority of all persons, male or female, is 21 years, consequently it was not in the power of the Respondent to have prevented the marriage. The appeal is allowed with costs.

(Mr. W. T. Brownlee, one of the Assessors, dissented from this judgment.)

Butterworth. 25 November, 1901. A. H. Stanford, A.C.M.

Colis vs. Matshawana.

(Nqamakwe.)

Illegitimate Children—How Legitimated—Heirship—Heritable Rights in Default of Legitimate Children.

Matshawana sued Colis for the restoration of his, Plaintiff's, sister or the dowry received for her by Defendant on her marriage. From the evidence it appeared that Plaintiff's father, Mhletywa, caused the pregnancy of Defendant's sister, Nozimanga, and Plaintiff was born. Mhletywa duly paid a fine of three head of cattle, and subsequently became the father, by the same woman, of the girl in dispute and again paid a fine. Mhletywa died soon after and the two children were brought up by Defendant.

The Magistrate gave judgment for the Plaintiff as prayed on the ground that fines having been paid for the illegitimate children they became the property of the late Mhletywa and that the Plaintiff, as his heir, was entitled to the dowry paid for his sister.

Defendant appealed.

Pres.:—The Plaintiff in the Court below was the illegitimate child of one Mhletywa, who left no legitimate issue. The ques-

tion now before the Court is whether in the absence of legitimate issue the Plaintiff can succeed to his father's estate and as heir of the estate be entitled to sue for the dowry paid for his sister by the same mother, also the illegitimate child of his late father. Upon the question being submitted to the Native Assessors, they are of opinion that unless the son was fetched by the father, the usual cattle being paid for his maintenance, and after being so fetched was properly established and declared by his father to be his heir he cannot succeed to his father's estate or maintain the present action. This being so the Respondent clearly has no right of action and the judgment in the Magistrate's Court must be altered to judgment for the Defendant with costs.

Butterworth. 3 March, 1902. H. G. Elliot, C.M.

Kokwe vs. Gubela.

(Idutywa.)

Adoption—Repayment of Dowry—First Daughter of Adopted Son.

Kokwe sued Gubela for four head of cattle, being half the dowry received by Defendant for his eldest daughter. In his summons he stated that his father Kokwe had adopted Gubela and on the latter's marriage had paid his dowry for him and, according to custom, a portion of the dowry of the first daughter born of the marriage was payable to the person paying his dowry or to his heirs. Defendant's daughter had now been married and eight head received for her and Plaintiff claimed the half.

Defendant took the following exception:—That the summons discloses no cause of action on the ground that there is no Native law or custom as mentioned in the summons. The payment of dowry, as stated in the summons, appears to be a gift and, if not, Plaintiff's only course would have been to sue for the return of the dowry as a loan.

The Magistrate upheld this exception and Kokwe appealed.

Pres.:—It appears from the evidence of Native experts upon Native law that the person who pays dowry for the wife of an adopted boy, or his heir, has the right, under Native law, to claim a portion of the dowry paid for a girl born to the adopted son, or if more than one daughter is born of the marriage he might

claim the eldest daughter. Under these circumstances the appeal is allowed with costs and the case remitted to the Magistrate to be tried upon its merits.

Umtata. 12 March, 1902. H. G. Elliot, C.M.

Sidubulekana vs. Fuba.

(Engeobo.)

Illegitimate Children—Rights of Inheritance—Tembu Custom.

Sidubulekana sued Fuba for the restoration of the sum of £20 cash and five oxen, and in the summons stated that he was the eldest son and heir of the Right Hand House of the late Gwicana and Defendant was the eldest son and heir of the Great House of the said Gwicana, that Gwicana took this money and the oxen from the Right Hand House and, at the request of Defendant, lent the same to him, that about four years afterwards Gwicana died and now Defendant refuses to return the loan made to him.

Defendant pleaded specially that Plaintiff was illegitimate and could not inherit the property of the Right Hand House. In support of his plea he led evidence showing that Plaintiff's mother was the wife of the late Gwicana and that Plaintiff was born during the subsistence of this marriage, one Mqina being his father, who paid two cattle to Gwicana as damages. Plaintiff was born at Gwicana's kraal and grew up there. The late Gwicana had provided Plaintiff with a wife, but Defendant said this was at his (Fuba's) special intercession. There were no legitimate sons in the Right Hand House and Defendant contended he was the sole heir to all the property.

The Plaintiff contended that he was always recognised as the son of Gwicana, who had provided him with a wife, and stated that he was in possession of the rest of the property of the Right Hand House. He admitted that damages were paid to Gwicana by Mqina, but he denied that Mqina was his father.

The Magistrate held that Plaintiff was illegitimate and as there was nothing to show that he was appointed heir to the Right Hand House he could not succeed to any of the property.

Sidubulekana appealed.

Pres.:—It has been conclusively proved that the Appellant is the illegitimate son of Gwicana's wife by Mqina, who paid

fine for causing her pregnancy. The Assessors are unanimously of opinion that such an illegitimate son cannot inherit in the estate of his mother's husband. The appeal is dismissed with costs.

Umtata. 21 July, 1902. A. H. Stanford, A.C.M.

Nosaiti vs. Xangati.

(Engcobo.)

Widows—Women's Earnings—Conflict of Native Customs with Colonial Law and Equity.

Nosaiti was the widow of Nyameli and Xangati his eldest son and heir. Nyameli died and the widow Nosaiti removed from her late husband's kraal and, in practice as a doctress, earned certain cattle. She also had an illegitimate child born since the death of her husband. Xangati claimed that the widow and her child, with the stock earned by her, should return to his kraal and that he, as heir of his late father Nyameli, was the proper guardian.

The Defendant in her evidence stated that she was now married and that the stock claimed was her own property and not property of the estate of the late Nyameli.

The Magistrate ordered the woman to return to Plaintiff with the stock.

Nosaiti appealed.

Pres.:—The Magistrate's judgment is in conflict with the ruling of the E.D. Court in the case of *Mbono* vs. *Manxoweni* (6 E.D.C. 62) and also the decision of the Native Appeal Court in the case of *Nolanti* vs. *Sintenteni* (November, 1901). By Section 38 of Proclamation No. 140 of 1885 the age of legal majority for both males and females is fixed at 21 years, the Appellant being a widow it therefore follows that after the death of her husband, being a major, she became free of all control and is entitled to claim in her own right all property she may have acquired since her husband's death. The Court is aware that this is in conflict with Native custom, but when Native custom is repugnant to justice and equity and to the provisions of the Proclamations for the government of the Native Territories it must give way. There is also some evidence to show that since

the death of Nyameli the Appellant has entered into another marriage and this, if correct, even according to Native custom, would be an effectual bar to Respondent's claim for his mother's earnings. The appeal is allowed with costs and judgment altered to judgment for Defendant with costs.

Umtata. 21 July, 1902. A. H. Stanford, A.C.M.

Tikolo vs. Simanga.

(Engcobo.)

Dowry—Valuation—Equivalent of Horses and Sheep to Cattle.

Simanga sued Tikolo for the restoration of the dowry paid for his wife, who had deserted him. He alleged that he had paid the following as dowry: —

36 mixed sheep at 12s. each	£21	12	0
1 gelding horse	20	0	0
1 filly	15	0	0
1 saddle...	3	10	0
	£60	2	0

He allowed for payment of £15 cash and a further allowance of £9 as deduction for one child born of the marriage and sued for the balance of £36 2s.

The Defendant admitted payment of the dowry, but objected to the valuation and claimed in reconvention £6 for a beast killed at Plaintiff's request and £3 medical expenses in connection with the birth of the child.

The Magistrate gave judgment for £36 2s., less £9 for the wedding outfit and the child.

Tikolo appealed.

Pres.:—The dowry paid by the Plaintiff may be regarded as the equivalent of six head of cattle, viz.: 36 sheep and one saddle as four cattle, two horses as two head. From this must be deducted one beast, say, 10 sheep at 10s. each, for the child born of the marriage, and 10 sheep at the same rate for the wedding outfit, leaving a balance of four cattle in favour of the Plaintiff, which the Court values at £12 10s. per head, making the sum of £50. From this must be deducted the sum of £15 already paid and £3 for midwifery attendance on Plaintiff's wife, leaving a

balance of £22, to which judgment in the Magistrate's Court is altered, the appeal being allowed with costs. It is noted that in this case an attempt has been made to deviate from the usual custom of regarding horses when paid as dowry as the equivalent of one beast.

Butterworth. 26 July, 1902. W. E. Stanford, C.M.

Sidubulekana vs. Fuba.

(Nqamakwe.)

Illegitimate Children—Rights of Inheritance—Fingo Custom.

Fuba sued Sidubulekana for certain stock, property in the estate of the late Gwicana, and in his summons alleged that he was the eldest son and heir of the late Gwicana and that after Gwicana's death Defendant possessed himself of this property.

The Defendant pleaded the general issue. From the evidence it appeared that the late Gwicana was a resident of the Nqamakwe District. Plaintiff Fuba was the eldest of three sons of the Great House and Defendant was the only issue of the Right Hand wife and born during the subsistence of the marriage, but his father was a man named Mqina, who had paid damages to Gwicana. Plaintiff had removed to Engcobo District and Defendant was left in the Right Hand Kraal and grew up there and eventually the dowry for his wife was paid by Gwicana out of the property of the Right Hand House. Gwicana never formally appointed an heir to the Right Hand House and Defendant contended that Gwicana had always treated him as his son and he was, therefore, the heir.

The records of the case heard on appeal at Umtata on the 12th March, 1902, were put in.

Judgment was given for Plaintiff as prayed, the Magistrate holding that Sidubulekana was illegitimate and, in his reasons, said he based his judgment on the decision given by the Umtata Appeal Court in the case of *Sidubulekana* vs. *Fuba*.

Sidubulekana appealed.

Pres.:—In this case Plaintiff sued Defendant for property in the estate of Gwicana in the possession of Defendant, which he claimed as the heir of the Right Hand House. After the marriage of Sidubulekana's mother she became pregnant

Gwicana had doubts as to the paternity of the child born and enquiry ensued. For purposes of this case it is taken that the child was not the child of Gwicana, but born in lawful wedlock. Gwicana died and then Sidubulekana sued Plaintiff for certain property to be restored. He got judgment* in the Resident Magistrate's Court at Engcobo but, on appeal, the judgment was reversed on the advice of Native assessors that an illegitimate son could not succeed to the property of his father. Presumably this is under Tembu custom. The points in dispute are the same as those which were in dispute in the case referred to. The Court has given careful attention to the points of this case, the issues being important, and the view it takes is that in all such matters effect should be given to the intention of the deceased. Where a will is left and it is obscure the intention of the testator is considered and this view accords with advice given by old men on Fingo custom. There are certain circumstances which go to show the intention of Gwicana. He never repudiated Sidubulekana. He had no son in the Right Hand House except Sidubulekana. In the Great House Fuba was son and heir—besides Fuba there are other sons. If Gwicana had decided that Sidubulekana should not succeed to the property of the Right Hand House he would have selected one of the other sons as heir to that house. He paid dowry out of the Right Hand House for Sidubulekana's wife. All this shows that Sidubulekana should succeed to the property. Sidubulekana was also administering the property and remained in charge of it after Gwicana's death.

This Court declares Sidubulekana to be the rightful heir of the Right Hand House of Gwicana and the judgment of the Resident Magistrate is reversed with costs.

It must be understood that this judgment does not in any way affect the judgment given in the Chief Magistrate's Court at Umtata in respect of Tembu custom. The case was there rightly decided according to Tembu custom. Here it must be dealt with according to Fingo custom.

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

* NOTE.—In the case referred to Sidubulekana was *not* successful in the Engcobo Court—*vide* previous case.

Butterworth. 28 July, 1902. W. E. Stanford, C.M.

Godongwana vs. Runeli.

(Tsomo.)

Seduction—Scale of Damages—Fingo Custom.

Runeli sued Godongwana for three head of cattle as damages for seducing his daughter. The Defendant admitted the intercourse, but stated that he was not liable in damages as there had been no pregnancy.

The Magistrate awarded the three head of cattle claimed and Defendant appealed.

In the Appeal Court, Headman Veldtman gave the following evidence:—"Amongst us Fingoes there are two fines for seduction unaccompanied by pregnancy. In case of seduction at an Intonjane the fine is one beast. Should the man creep and take the girl from her kraal and seduce her he has to pay two or even three head of cattle. In cases followed by pregnancy the fine is three head of cattle."

Pres.:—In this case the only question is the number of cattle paid as fine for seduction unaccompanied by pregnancy. It seems that the general practice among the Fingos is to pay one beast in such cases, but in a measure each case should be tried on its merits Veldtman states that when a girl goes wrong at an Intonjane the fine is one beast, but where there are aggravated circumstances the fine would be higher. The position generally is then that the fine where there is no pregnancy is one beast, but where there are circumstances of aggravation the fine would be higher. From the evidence of the girl herself it appears that she was ready to meet Appellant in the veldt and she says he was her sweetheart, that they had connection several times and always in the veldt, where she went to meet him. From a moral point of view she was, therefore, much to blame and the circumstances that Church discipline was exercised in her case can hardly be brought in as aggravation against the seducer. In the opinion of this Court there are, therefore, no circumstances which justify departure from the ordinary rule. The appeal is allowed with costs and judgment altered to judgment for one beast or £5 and costs.

he says the eldest son of the first wife is the heir to the chieftainship. The custom appears to be so undoubted that it is obvious the Appellant cannot succeed in his claim. The appeal is dismissed with costs.

Kokstad. 17 December, 1902. R. W. Stanford, A.C.M.

Mohlakula vs. Elizabeth.

(Matatiele.)

"Breast" Cattle—Basuto Custom—Interpleader Suit.

In an interpleader action, Elizabeth claimed two head of cattle which had been seized at the instance of Mohlakula to satisfy a judgment against her son Smit. From the evidence it appeared that the cattle in dispute were paid to claimant as "Breast" cattle when her daughter married, and it was contended that these cattle were not executable for the debts of her husband or his heir.

The Magistrate declared the animals not executable.

Mohlakula appealed.

Pres.:—Appeal dismissed with costs. From the evidence it appears that a writ was issued by the Magistrate empowering the Messenger to raise certain sums of money out of the property of Smit and Dayiman Stemmer and certain cattle were seized. Of these, two are claimed by the Respondent on the ground that they are "Breast" cattle, or the progeny of "Breast" cattle, and the Magistrate found in her favour and this Court agrees with his finding as "Breast" cattle are the wife's property.

Kokstad. 17 December, 1902. R. W. Stanford, A.C.M.

Sohodi vs. Teku.

(Mount Fletcher.)

Adultery—Damages—Catching—Basuto Custom.

Sohodi sued Teku for damages for adultery. From the evidence it appeared that Plaintiff was away at the time the adultery was alleged to have been committed and never himself actually caught his wife. The adultery was proved, but the Magistrate

gave judgment for Defendant with costs on the expert evidence of a Basuto Headman that it is essential, according to Basuto law, for the husband to catch the adulterer himself.

Plaintiff appealed.

Pres.:—Appeal allowed with costs in this Court and the Court below, and the Magistrate's judgment is altered to one for Plaintiff for three head of cattle or their value—£15. In this case Appellant sues Respondent in the Court below for five head of cattle or their value as damages for Respondent's adultery with his wife. The Magistrate found against him as he had not caught the parties in the act. Under Native law in cases of this nature, the best evidence is undoubtedly that of the husband, if he should find his wife in the act of sexual intercourse with another man, but that there is no hard and fast rule about this is proved by the fact that when a wife is visiting her people and there commits adultery, the husband sues and produces her relatives as witnesses. In this case the adultery is fully proved, the husband being away at the time, and this Court is of opinion that under all Native law, Basuto included, he has a perfect right to claim damages, and the Magistrate's judgment is altered accordingly.

(Mr. Alwin Rein, Resident Magistrate of Qumbu, Assessor, dissented.)

Butterworth. 4 March, 1903. A. H. Stanford, A.C.M.

Nojiwa vs. Vuba.

(Nqamakwe.)

Dowry Restoration—Engagement to Marry—Default on Bridegroom's part—Forfeiture.

Vuba sued Nojiwa for the restoration of ten head of cattle, paid by him on account of a marriage to be contracted between his son and Defendant's daughter, and in his summons said that before the marriage could be contracted the engagement was broken off mutually by his son and Defendant's daughter.

It appeared that Defendant's son had written to the girl that he had misconducted himself and could no longer carry out his engagement. In her letter in reply the girl expressed her resentment and stated that the matter was now in her parents'

hands. In his evidence Plaintiff's son stated that he considered the engagement at an end because the girl had become abusive to him

The Defendant refused to restore the cattle on the ground that both he and his daughter were ready and willing that the marriage should proceed.

The Magistrate awarded eight head of cattle and in his remarks said:—"The Plaintiff's son was unwilling to marry the girl after receiving the letters. As the young people broke off the engagement I consider the Plaintiff entitled to the return of his cattle, but as the Defendant states that he killed sheep and bought the girl's outfit I consider he is entitled to part of the dowry. I therefore allowed him two head of cattle."

Nojiwa appealed.

Pres.:—The engagement entered into was broken off, not mutually, but by the intended bridegroom, the Plaintiff's son, by his letter of the 14th January, in which he says distinctly that on account of misconduct with another girl he cannot fulfil his engagement and this is again repeated in his letter of the 28th January. Under these circumstances the Plaintiff is not entitled to recover the stock paid on account of dowry. The appeal is allowed with costs and judgment entered for Defendant with costs.

Kokstad. 21 April, 1903. R. W. Stanford, A.C.M.

Dobeni vs. Baka.

(Umzimkulu.)

Widows—Remarriage—Recovery of Dowry—Chiefs' Widows—Hlangwini Custom—Tribal mourning.

Dobeni sued Baka for the restoration of the dowry, which he alleged he had paid for his wife, Manyavini. In his summons he alleged that he had married the woman, who was the widow of the Chief Mdingazwe, and paid 11 head of cattle as dowry for her, that she had deserted him and was now remarried by Defendant to another man.

Defendant denied the marriage and stated that the 11 head of cattle were paid as fine for Plaintiff's intercourse with the widow of the late Chief Mdingazwe.

The Magistrate gave judgment for the Defendant with costs, stating that he found the cattle in question were paid as fine and not as dowry.

Plaintiff appealed.

Pres.:—In this case Plaintiff in the Court below sued the Defendant for 11 head of cattle, three pots, three pigs and the custody of four children, and the Magistrate found for the Defendant, and against this decision Plaintiff appeals. From the evidence it appears that some nine or ten years ago a woman, named Manyavini, the widow of a Chief named Mdingazwe, became pregnant by the Plaintiff (now Appellant) and that 11 head of cattle were paid by him, whether as dowry or fine is in dispute, and that she subsequently lived with him as wife or concubine for many years. Evidence was also lead to show that amongst the Hlangwinis a Chief's widow is not allowed to marry, and had the issue hinged on this custom, I may here say that this Court would not perpetuate it, seeing that Section 39 of Proclamation No. 112 of 1879 provides that all persons, male or female, who have attained the full age of twenty-one years shall be deemed to have attained the full age of majority, and it follows that a widow could marry again, provided that she wished to do so. Section 30 of the same Proclamation provides that no woman shall be compelled to marry against her wish, and it is therefore very certain that chiefs' widows cannot be forced to cohabit with "seed raisers," as is frequently the case. In addition to the evidence adduced there are several circumstances in connection with the case which support the Defendant's contention that the 11 head of cattle were paid as fine and not as dowry. The first is that a widow is never given in marriage by the relatives of her late husband, and this applies to all tribes in the Territories. When a widow wishes to marry she invariably returns to her people and is given by them to the second husband; the heirs of the deceased then claim from the father or other guardian the dowry which had been paid for her. In this case the Plaintiff declares that the cattle were paid as dowry to the late husband's people, which is not likely. It is also in Defendant's favour that, at the time of the alleged marriage, the Hlangwini tribe was in mourning for its Paramount Chief, and when this is so, dowry cattle are never paid by this tribe and others, though marriages are allowed. There is also another point in Defendant's favour: it is that of the behaviour of the woman Manyavini, who swears positively

that she was never Plaintiff's wife, and that she ran away from her late husband's kraal and went and lived with him when she found that she was pregnant on the second occasion. Taking these facts into consideration, this Court is of opinion that the Defendant has fully proved his contention that the eleven head of cattle were paid as fine and not as dowry, and the Magistrate's finding must be upheld and the appeal dismissed with costs.

Butterworth. 6 July, 1903. A. H. Stanford, A.C.M.

Peko vs. Matanzima.

(Nqamakwe.)

Qadi Wives—Inheritance—Status of Qadi Wives.

Peko sued Matanzima for the property left by one Ludziya, who had died without male issue. He alleged that his late father, Mpeta, had married three wives. First the Great wife—Plaintiff's mother—then the mother of Ludziya and finally the mother of Defendant. In his evidence in cross-examination, Plaintiff stated that Ludziya's mother was too old to be made the Right Hand wife and she was made the Qadi wife of the Great House. Defendant's mother was married after Ludziya's mother died and she was made the Right Hand wife.

The defence was that Ludziya's mother was the Right Hand wife and, on her death, Defendant's mother was then married and became the Right Hand wife and, on the death of Ludziya, Defendant became his heir.

The Magistrate gave a judgment of absolution and Plaintiff appealed.

Pres.:—The main question in this case is whether the mother of Ludziya was appointed to the Right Hand House of the late Mpeta or not. The Appellant contends that as she was not a girl at the time of her marriage this was not done. From the frequent mention in the evidence that she was old at the time of her marriage it is probable that she was what is termed an "idikazi." The mother of Defendant states that at the time of her marriage Ludziya's mother was living and then the wife of the Right Hand House and that she was put into that house, and on the death of Ludziya's mother become the Right Hand wife. She was thus made the Qadi of the Right Hand House although, according to her evidence, there was no Qadi to the

Great House, which would be entirely contrary to Native custom. The appeal is allowed with costs and judgment altered to judgment for Plaintiff with costs.

Butterworth. 6 July, 1903. A. H. Stanford, A.C.M.

Yapi vs. Ngayi.

(Nqamakwe.)

Dowry—Engagement to Marry—Physical Defect.

Ngayi sued Yapi Tole for the restoration of certain stock paid to him as dowry on his engagement to Defendant's daughter, and he alleged that since his engagement a physical defect in himself had arisen rendering it impossible for him to contract any marriage. The dowry paid was five cattle, 16 sheep and £5 cash.

Defendant contended that Plaintiff's action under Native custom constituted a refusal and he, therefore, forfeited his right to a refund of the dowry.

The Magistrate gave judgment for Plaintiff.

Yapi appealed.

Pres.:—The engagement having been broken off by the Respondent, although for a reasonable cause, being a defect in himself, the Magistrate should have taken this fact into consideration, as well as the expenses the Appellant has been put to. The appeal is allowed with costs and judgment in the Magistrate's Court altered to judgment for four cattle, 16 sheep and £5 cash.

Butterworth. 6 July, 1903. A. H. Stanford, A.C.M.

Mzama vs. Xekana.

(Butterworth.)

Dowry Cattle—When Paid by Father—By Whom Recoverable.

This was an action for the recovery of dowry cattle paid on account of a marriage to be contracted by Plaintiff with Defendant's daughter, but the marriage never took place owing to Defendant's refusal to allow it. The Defendant pleaded that the proper person to sue was Plaintiff's father, who had paid the dowry for his son—the Plaintiff. The Magistrate upheld the plea and dismissed the case.

Mzama appealed.

Pres.:—By Native custom as administered by Chiefs and headmen an action for the recovery of dowry could be maintained

by either the father who paid it or by the son on whose behalf it was paid. In the present action the son is entitled to claim the dowry paid on his behalf. The appeal is allowed with costs and the case returned to be dealt with on its merits.

Umtata. 20 July, 1903. A. H. Stanford, A.C.M.

Sihuhu vs. Ntshaba.

(Cofimvaba.)

Dowry—Agreement to Pay—Christian Marriage.

Ntshaba sued Sihuhu for certain cattle, which he alleged were due to him as dowry in consideration of a marriage entered into by Defendant with Plaintiff's daughter by Christian rites, and for the payment of which a written undertaking was entered into by Defendant.

Defendant excepted to the summons that in Native law Plaintiff has no right to maintain the action as the only right existing to a father in connection with payment of dowry after the marriage of his daughter is the right of "ukuteleka," and that under Colonial law the contract was void.

The Magistrate upheld the exception and dismissed the case.

Plaintiff appealed.

Pres.:—In this case the first point which the Court has to decide is whether a contract to pay dowry cattle notwithstanding the Christian marriage was entered into between the Appellant and the Respondent. In support of the contract a written document signed by the Respondent has been produced, in which he distinctly undertakes to pay dowry as demanded by Ntshaba, irrespective of the Christian marriage, and from the wording of this document it would appear to have been signed after the celebration of the marriage. The second point for decision is whether the contract is opposed to public morality. The payment of dowry is in the nature of a guarantee of good conduct on the part of both husband and wife and unquestionably amongst the Native people tends to uphold the best aspects of their domestic life. It also furnishes a means of support to the woman and her children in the event of their falling into necessitous circumstances. There is, therefore, no good reason why the contract, which, in this instance, was deliberately entered into, should not be upheld. The marriage having been entered into by

Christian rites, the Appellant is debarred from resorting to the custom of ukuteleka, and it was probably the knowledge of this which led to the written agreement to pay dowry being entered into. The appeal is allowed with costs.

Umtata. 20 July, 1903. A. H. Stanford, A.C.M.

Marman vs. Magwanyana.

(Cofimvaba.)

Procedure—Withdrawal of Action after part hearing.

In an action for the restoration of dowry the Plaintiff Magwenyana had closed his case. After part of the defence had been heard, the Plaintiff asked to be allowed to withdraw the case. The Magistrate gave the following decision:—The Court is of opinion that on payment of costs a Plaintiff may at any time before a case is fully heard withdraw his case. In this case, although evidence has been led for the defence, it has not been fully heard, and as Plaintiff wishes to withdraw and agrees to pay costs absolution from the instance is granted.

Marman appealed.

Pres.:—Plaintiff having closed his case and the evidence for the defence being partly heard it was not competent for the Plaintiff's attorney to withdraw the case, and the Court should certainly have refused the application and allowed the Defendant to complete his evidence and then have given its decision, which might have been absolution or otherwise, according to the whole of the evidence adduced. Such a practice, if permitted, would be open to the grossest abuse. The appeal is allowed with costs and the case returned for the evidence for the defence to be taken and judgment given on the merits of the case.

Umtata. 20 July, 1903. A. H. Stanford, A.C.M.

Mrwebi vs. Msindo.

(Cofimvaba.)

Dowry—Not Recoverable when Wife Lives with Eldest Son.

Mrwebi claimed from Msindo the restoration of his wife, Defendant's daughter, or the dowry paid for her, alleging that she had deserted him.

The Magistrate, in granting absolution from the instance with costs, said:—"Plaintiff claims the restoration of his wife and four children or 11 head of cattle, the dowry paid for her. The Court found that the woman in question is at present residing with her eldest son, Solomon, in the Cala district, and not with Defendant, and that her life with Plaintiff has been most unhappy. Solomon, owing to Plaintiff's ill-treatment of him, struck out for himself and started his own kraal, and his mother, for the same reason, naturally followed him. Defendant offers to pay a beast and so dissolve the marriage, but the Court considered it would not be in the interest of the children, who are still small, that their present home, where they are under their mother's care and influence, should be broken up and they ordered to return to their father. The woman and children being undoubtedly Plaintiff's, the Court, while finding Defendant not liable for their being away from Plaintiff, would not enter a final judgment which might be construed into a finding that Plaintiff has no claim for them."

Plaintiff appealed.

Pres.:—The circumstances disclosed in the case show that Appellant's wife on leaving him did not return to her people, but is living at the kraal of his eldest son with her children. By Native custom, when the eldest son of a house establishes a kraal of his own his mother usually accompanies him. The case being submitted for the opinion of the Native Assessors they are unanimously of opinion that under such circumstances the Appellant is not entitled to recover the dowry.

Umtata. 20 July, 1903. A. H. Stanford, A.C.M.

Flara Silo vs. Mdloyi.

(Cofimvaba.)

Dowry—Marriages by Native Custom in the Colony—Residence in the Territories.

Flara Silo, of Glen Grey, in the Cape Colony, sought to recover his wife, whom he had married by Native custom, or the dowry paid to Defendant for her, alleging that she had deserted him and Defendant refused to return her.

Exception to the summons was taken that the marriage was one by Native custom in the district of Glen Grey in the Cape

Colony, that the parties never lived together in the Territories as man and wife and that Plaintiff is still a resident in the Colony, and that, following the decisions in the cases of *Kolyo* vs. *Sibara* (E.D.C. 1892) and *Ngqobela* vs. *Sihele* (15 Juta 346) the dowry was not recoverable.

The Magistrate sustained the exception and dismissed the case.

Plaintiff appealed.

Pres.:—The facts in this case are not in dispute. A Native girl, living with her parents in the Transkeian Territories, was married under Native custom at or near Glen Grey in the Colony Proper to the Appellant. After living together for a number of years the woman left her husband and returned with her children to the Transkei. The Appellant now claims restoration of his wife and her children or, in default of the wife's return, the dowry paid for her. If he were a resident in the Transkei and the allegations in the summons were established, he would be entitled to succeed, but being a resident of the Colony proper the woman's return to the Transkei does not place him in any better position than that afforded him by the law operating in the Colony. Decisions in the Eastern Districts' and Supreme Courts clearly lay down that he can recover neither wife, children nor dowry. No doubt it is a hard case, especially bearing in mind that apparently Appellant is not a polygamist. The hardship appears all the greater inasmuch as the Native Succession Act, which is still in force in the Glen Grey District, recognises that the children of this so-called immoral or illicit connection have just claims upon the father's estate. How far conversely the Superior Courts of the Colony would recognise the father's claim to dowries paid for any of the female children has not, so far as we can ascertain, been decided.

With the decisions before-mentioned before it, this Court must dismiss the appeal with costs.

Umtata. 21 July, 1903. A. H. Stanford, A C M

Mafaka vs. Dyaluvana.

(Engcobo.)

Marriage—Dissolution—Witchcraft Accusation.

Mafaka sued Dyaluvana for damages for adultery. The Defendant pleaded that the woman in question was his own wife, he

having married her and paid dowry for her to her father. In evidence it transpired that the woman had formerly been married to the Plaintiff, but he had accused her of witchcraft and burnt her hut. She had fled to her father's kraal, where she was afterwards given in marriage to the Defendant.

The judgment of the Magistrate was for Defendant with costs and Plaintiff appealed.

Pres.:—According to Native custom, any man driving away his wife on a charge of witchcraft lost all further claim upon her, the marriage by this act being regarded as dissolved. In the present case there is no reason to doubt the evidence given by the woman, which is strongly corroborated. The Appellant admits that he burnt his wife's hut and it is clear that after this act he fled from the district and has been absent for about fifteen years, and he gives no account whatever for such unreasonable conduct. No cause has been shown for altering the judgment and the appeal is dismissed with costs.

Umtata. 22 July, 1903. A. H. Stanford, A.C.M.

Magwaxaza vs. Nomkazana.

(Ngqeleni.)

Widows—Children—Guardians—Deposition or Replacement of,

Nomkazana, the Qadi widow of the Right Hand House of the late Undi, sued Magwaxaza, heir of the Great House, for the restoration of certain cattle, the property of her House, which Defendant had seized, alleging that her minor son was the heir of the Right Hand House and she was the proper guardian. She alleged that she had left her late husband's kraal and, by permission of the Chief Bokleni, established one of her own and that the Defendant had seized and claimed the stock in question as guardian of the property of the Right Hand House of his late father. Defendant admitted having possession of the stock, but claimed his right of guardianship during the minority of the heir. The Magistrate gave judgment in favour of the Plaintiff widow as the Chief Bokleni had removed the Defendant from the guardianship.

Defendant appealed.

Pres.:—By Native custom the nearest male relative being a major becomes the guardian of the minor children on the decease

of their father, but it must also be remembered that the Chiefs, when independent, had the power to alter or vary the law to meet the circumstances of each particular case and frequently did so. In the present case the Respondent, not being satisfied with the treatment she was receiving at her late husband's kraal, applied to the Chief Bokleni some years ago to be allowed to occupy a separate kraal and have another guardian appointed, which was done apparently without opposition on the part of the Appellant, but now that Respondent seeks to remove the stock of her House—to which her son is heir—to this kraal, he opposes. The woman, having been allowed to establish a separate kraal, is entitled to have the use of the stock of her House at it. The Court is of opinion that the interests of the heir will be best served by this course. The numerous cases which come before the Courts of the Territories between heirs on attaining majority and their guardians frequently show that the latter misappropriate the property of minors under their guardianship. In dismissing the appeal with costs, the Court directs that Appellant shall have access at reasonable times during the minority of the heir to see that the stock is not being improperly disposed of and, in such event, may apply to the Court for such further order as to its custody as may be necessary under the circumstances.

Flagstaff. 7 December, 1903. R. W. Stanford, A.C.M.

Daniso vs. Mzingeli and Others.

(Flagstaff.)

Estates—Intestate Succession—Division of Property.

Mzingeli, Samuel, and Hlakayane sued Daniso for certain property in the estate of their late father, Matambo. From the evidence it appeared that the late Matambo had one wife and had issue four sons, of whom Defendant Daniso was the eldest, the three Plaintiffs being younger sons, and four daughters. The Plaintiffs alleged that Daniso had appropriated the whole of the estate and had retained the dowries paid for his sisters, the four girls. They contended that the girls should have been apportioned to the several sons and they now asked that the dowries received in respect of them be distributed. It appeared further that the father, Matambo, left no property, nor did he allot the daughters to his sons. After his death Daniso became head of

the kraal and the family lived at his kraal. He received the dowries paid for his sisters and with some of the cattle he helped his brothers in paying dowry.

Defendant Daniso contended that a division of the estate could not be claimed and that moreover he had performed the duties appertaining to the head of a family.

The Magistrate ordered the payment of three head of cattle to Plaintiff Mzingeli, and one head to Plaintiff Hlakayane, but dismissed Plaintiff Samuel's claim on the ground that Daniso having provided his dowry he had really received his portion of the estate.

Daniso noted an appeal against this decision and the Plaintiffs cross-appealed.

Pres.:—The Native law is clear as regards intestate succession and estates. The eldest son inherits and he is also responsible for all debts due by the estate. He has certain duties to perform, such as providing the wedding outfit where there are daughters, killing a beast or sheep at the Intonjanes, providing part of the dowries when his brothers marry, etc., etc. All this the Defendant has done and his brothers have now no legal claim on him.

The appeal is allowed with costs and judgment altered to one for Defendant with costs. The cross-appeal is dismissed with costs.

Kokstad. 14 December, 1903. W. R. Stanford, A.C.M.

Ntili vs. Mncisana.

(Mount Ayliff.)

Apportionment of Property—Seed Bearers—Allotment of Wives—Xesibi Custom.

Ntili sued Mncisana for five head of cattle, being the dowry paid for a girl, named Sebenzani, which Defendant had appropriated. From the evidence it appeared that the parties to the suit were sons of the late Qwayede, Plaintiff being the eldest son of the Great House and Defendant eldest son of the 3rd House. Sebenzani was a daughter of the 4th House. Plaintiff claimed the cattle on the ground that as there was no special apportionment of the girl to anyone he was, as son of the Great House, entitled to the dowry received for her. Defendant contended that

when his father married the 3rd wife—his mother—he married her as a seed-bearer to one Umbi, his brother, and paid her dowry out of property of Umbi's estate and placed her as a "support" to Defendant's mother in Umbi's kraal. Sebenzani was the daughter of the 4th wife and Defendant claimed that he was legally entitled to her dowry.

The Magistrate found for the Defendant with costs, basing his judgment, firstly, on the credibility of evidence as to the marriage of the last two wives to Umbi's kraal and, secondly, on the Xesibi custom on the right of a person to marry extra wives and place them at the kraal of a deceased brother to raise up seed for the house of that brother.

Plaintiff appealed.

Pres.:—In the Court below, the Plaintiff (present Appellant) sued the Defendant (now Respondent) for five head of cattle, Sebenzani's dowry, and to show cause why he, Plaintiff, should not be declared heir to his late father's property. From the evidence it appears that one Qwayede had four wives, Mamboniso, Mancandula, Mamrwebi and Madlabomi, and that Plaintiff is the eldest son of Mamboniso, the Great Wife, and Defendant eldest son of Mamrwebi, the 3rd wife, and consequently heir to the property of his mother's hut. The 4th wife, Madlabomi, had two daughters and no son. The Defendant's mother was placed by her late husband at Umbi's kraal, and later he also placed the 4th wife at Umbi's kraal, as a support to Mamrwebi's hut. In doing so, Qwayede was quite within his rights, and it follows that Defendant, who is the heir of this "house," is entitled to the dowry of Sebenzani, one of the 4th wife's two daughters. The Magistrate's finding is therefore correct and the appeal is dismissed with costs.

Kokstad. 14 December, 1903. R. W. Stanford, A.C.M.

Mgabadeli vs. Mciteki.

(Matatiele.)

Dowry—Replacement of Wife—Death of Wife in Child-birth—Hlubi Custom.

Mciteki sued Mgabadeli for certain cattle being the balance of dowry due to him for his daughter who had married Defendant's son, Morosi. In his summons he alleged that only portion

of the dowry agreed upon was paid, that shortly after the marriage Morosi died and Defendant was liable for the payment of the balance of the dowry, that after the death of Morosi his wife was "Ngena'd" by Morosi's brother and she thereafter died in child-birth, and that, according to Hlubi custom, the Defendant was liable for the balance of the dowry.

Defendant admitted the facts in the summons, but stated that he was liable for the balance of the dowry only if Plaintiff sent a girl to replace the deceased wife. In replication it was denied that it was the Hlubi custom to replace a wife who had died shortly after marriage.

Expert evidence on the custom was lead and the Magistrate awarded Plaintiff the cattle claimed, stating that the custom as contended for by the Defendant could not be perpetuated.

Defendant appealed.

Pres.:—In this case Respondent (Plaintiff in the Court below) sued the Defendant (now Appellant) for 14 head of cattle or their value, £140, balance of dowry, and the Magistrate found in his favour for the full claim and the Defendant then appealed.

From the record it appears that about three years ago the Appellant's son, Morosi, married the Respondent's daughter, Ntombizonke. Morosi died some months after the marriage, and before the woman had borne a child to him, and she was then "Ngena'd" by Morosi's brother, one Mnewendu, and she became pregnant by him, and subsequently died in child-bed. Appellant had paid Respondent, on account of Ntombizonke's dowry, 11 head of cattle and £4, the full dowry having been fixed at 24 head of cattle, a horse, and one Mqobo beast, and the claim is for the balance of this dowry. According to the ordinary Native law, the Respondent could not claim this stock, his daughter having died in child-birth so soon after the marriage, and the fact of her having been "Ngena'd" by her late husband's brother does not alter this. To obtain it, it would be necessary that he should place another girl in the deceased wife's hut, and this is usually done by most tribes under similar circumstances. It is contended, however, that this is not the Hlubi custom, and that consequently the Respondent is entitled to, and should receive, the full dowry which the Appellant agreed to give for his daughter, the late Ntombizonke. This Court, which had the advantage of hearing Mr. W. P. Leary, one of the Assessors, on the point raised, and who is well acquainted with Hlubi custom,

does not agree with this view, and holds that there is no difference between it and ordinary Kafir law. The appeal will, therefore, be allowed with costs in both Courts and the Magistrate's judgment altered to one for the Defendant.

Butterworth 21 March, 1904. A. H. Stanford, A.C.M.

Gwente vs. Smayile.

(Idutywa.)

Widows—Re-marriage—Division of Dowry.

Smayile, heir of Qalani, sued Gwente for the return of eight head of cattle, being the dowry paid by his father for one Nojaji, widow of one Mpinda. After the death of Qalani, Nojaji returned to the kraal of her first husband. On the second marriage of Nojaji the dowry paid by the first husband had never been returned to the Defendant and on this ground Plaintiff claimed the restoration of the dowry paid by his father for the widow. The Defendant admitted that the first husband's dowry had never been returned, but alleged that Nojaji was never married to Qalani nor was any stock paid by him for her.

The Magistrate found that the marriage to Qalani had taken place and awarded the Plaintiff seven head of cattle.

The Defendant appealed.

Pres.:—The case before the Court has aspects peculiar to itself which have not previously arisen in this Court and which the Native Assessors admit to be novel. The woman Nojaji was a widow when married by the late Qalani and the dowry paid by her first husband, Mpinda, has never been returned. Since the death of the second husband, Qalani, Nojaji has returned to the kraal of her first husband, thus, from a Native point of view, reviving that marriage. The Appellant's position is also peculiar inasmuch as he is holding two dowries for the same woman, which is distinctly contrary to Native custom, and he is consequently liable for the return of one of them. The heirs of the first husband have not claimed theirs and, as the woman has returned to them, they are now precluded from doing so. Consequently the Respondent's claim at any rate for a portion of the dowry appears to be a just one. In cases where the return of dowry is sued for on account of the death of the husband it has become custom

ary in this Court not to restore more than half. In the present case, although Nojaji had no children, she lived with Qalani for a period of fourteen years, which must be taken into consideration and for which one beast is deducted. The appeal is allowed with costs and judgment in the Magistrate's Court altered to judgment for Plaintiff for three head of cattle and costs.

Butterworth. 21 March, 1904. A. H. Stanford, A.C.M.

Lupuwana vs. Lupuwana.

(Nqamakwe.)

Dowry—Claim by Widow—Community of Property—Christian Marriage.

This was an action for the recovery of certain stock paid as dowry for a girl named Lilian, daughter of Sarah Lupuwana, the Plaintiff. Sarah alleged that she sued as executrix of the estate of her late husband, to whom she was married by Christian rites, and that the property claimed formed part of that estate. She stated that her daughter Lilian was married some time after her husband's death and that the dowry cattle received for her was handed over to her son Sifuba, who represented Joel Lupuwana, the Defendant. She admitted that Joel, according to Native law, would be the heir of her late husband. Some of the dowry was distributed at Plaintiff's instance on account of contributions to the wedding outfit, etc., of the girl Lilian, but she alleged that Joel appropriated the remainder and refused to give it up to her, and she contended that she was entitled to this property as it was an asset of her late husband's estate.

The defence was that, under Native law and custom, Defendant Joel was heir to his late father's estate and was thus entitled to the property in dispute.

Judgment was given in favour of the Plaintiff Sarah, the Magistrate remarking that the case was one of credibility of evidence.

Joel Lupuwana appealed.

Pres.:—Respondent states that her husband, Lupuwana, died ten years ago and at the time of his death had no property whatever. His daughter Lilian was given in marriage between two and three years ago and the dowry paid for her was distributed under Respondent's directions by Sifuba in accordance with

Native custom. After a considerable lapse of time Respondent entered an action on her own behalf against Sifuba for return of a portion of the dowry on the grounds stated in the summons that by reason of the community of property which existed between Respondent and her late husband she was entitled to half the estate. Failing in this she obtained Letters of Administration and instituted the present action. At the time of Lupuwana's death his daughter Lilian was unmarried and could not in any sense be regarded as an asset in the estate. That being so the estate can have no claim for the dowry paid for her, which goes in accordance with Native custom to the nearest male heir of the late Lupuwana. The appeal is allowed with costs and judgment in the Magistrate's Court altered to judgment for Defendant with costs.

Butterworth. 21 March, 1904. A. H. Stanford, A.C.M.

Siyekile vs. Qike.

(Tsomo.)

Dowry Restoration—Impotent Persons—Abduction.

Qike sued Siyekile for the restoration of his wife or six head of cattle, the dowry paid for her.

The Defendant admitted marriage and payment of dowry, but stated that the wife left Plaintiff because he was impotent and he pleaded that Plaintiff was not entitled to restoration of the dowry on the ground mentioned.

In his evidence Qike admitted that he had abducted the girl and that he then found that he was impotent, but he alleged that his defect was since cured.

The Magistrate in his judgment ordered the restoration of five head of cattle, deducting one for the abduction.

Siyekile appealed.

Pres.:—In this case the Respondent admitted that he was impotent. Notwithstanding this he carried off Appellant's daughter. The Native Assessors express the opinion that an impotent person is not entitled to recover the whole of the dowry paid by him as the marriage is annulled on account of his defect, and that where such a person has carried off the girl this adds to the number of cattle to be awarded to the father. The appeal is allowed with costs and the Magistrate's decision altered to judgment for the Plaintiff for two cattle or £20 and costs.

Butterworth. 22 March, 1904. A. H. Stanford, A.C.M

Zali vs. Bala.

(Willowvale.)

Exceptions—Native form of Proeedure.

Paul Bala sued Solomon Zali for the restoration of certain dowry cattle, and in his summons alleged that during his absence and without his knowledge or consent his father arranged with Defendant for a marriage to take place between him—Plaintiff—and Defendant's daughter, and a number of cattle belonging to Plaintiff were paid by his father to Defendant as dowry. Also that on his return home he immediately repudiated the transaction and declined to marry Defendant's daughter.

On the day of hearing Defendant's attorney excepted to the proceedings on the grounds that when a marriage is arranged according to Native custom by a father for his son and dowry is paid such an arrangement is binding, and if the engagement is broken off by either the father or the son without misconduct on the girl's part the dowry paid is not returnable. In reply to this exception it was contended that the cattle did not belong to the father, but to the son, and that the arrangement was entered into without the son's consent.

The Magistrate overruled the exception on the ground that as the Plaintiff was of age his father had no right to dispose of his property without his consent and in the circumstances the case should be heard on its merits.

The Defendant appealed.

Pres.:—The Magistrate rightly dismissed the exception. By Native form of procedure before their own chiefs an exception is unknown. The case is heard on its merits and then decided in accordance with custom. The appeal is dismissed with costs and the case returned to the Magistrate to be heard on its merits.

Butterworth. 23 March, 1904. A. H. Stanford, A.C.M.

Myazi vs. Nofenti.

(Butterworth.)

Inheritance—Females—In Default of Males.

Plaintiff Nofenti, assisted by her husband, sued Myazi for the restoration of certain stock retained by him, alleging that she

was the sole surviving relative of her late grandfather, Neuku, who died without male issue and having no male relatives, and that Defendant, who was merely a servant of her grandfather, on the latter's death, seized the cattle. Defendant contended that he was a brother of the late Neuku and therefore the heir. The Magistrate found that Plaintiff Nofenti was the heir to the estate of the late Neuku and awarded the property to her.

Myazi appealed.

Pres.:—The case being referred to the Native Assessors they state that Respondent, having no male relative, by Native custom becomes the ward of the Paramount Chief and that the property in the estate goes with her, that as the Fingos have no Paramount Chief the authorities should hold it for the benefit of the woman. The Court concurs with the opinion expressed by the Native Assessors and, in dismissing the appeal with costs, directs that judgment in the Magistrate's Court shall be amended to the effect that the Respondent shall have the use of the property, but that the ownership in it shall not vest in her but that for purposes of the administration of this stock she shall be considered to be the ward of the headman of the location for the time being, but that no animal shall be sold or otherwise alienated from the estate without the previous authority of the Resident Magistrate.

Kokstad. 26 April, 1904. R. W. Stanford, A.C.M.

Bokwa vs. Ntambo and Jantyi.

(Mount Fletcher.)

Dowry—Kraal Head Responsibility—Second Wives—Basuto Custom.

Bokwa sued Ntambo and Jantyi for certain cattle being balance of dowry due for his daughter whom Jantyi had married. He alleged in his summons that Defendants agreed to pay a certain dowry for his daughter on her marriage to second Defendant, Ntambo's son, that part was paid and first Defendant now denied that he was liable for the balance.

Defendant Jantyi admitted liability, but Defendant Ntambo stated that he had already provided his son with a wife and was not responsible for the dowry of any other wife he may wish to marry.

The Magistrate upheld second Defendant's plea and dismissed the summons in so far as he was concerned.

Plaintiff appealed.

Pres.:—In this case Plaintiff claimed from the Defendants 11 head of cattle and one hamel, and the Defendant Jantyi confessed judgment as regards the cattle but not the sheep.

An exception was taken on behalf of the Defendant Ntambo on the ground that he was not responsible for this dowry, seeing that it was for his son's, Jantyi's, second wife, and the Magistrate allowed the exception, and the Plaintiff now appeals.

Under ordinary circumstances a father, under Native law, is not responsible for more than one dowry; in this case it is, however, alleged in the summons that he (Ntambo) agreed to pay Plaintiff a dowry of 20 horned cattle and a horse for the girl. If this is so he would, of course, be liable for the stock as he would be bound by his contract. The appeal will, therefore, be allowed with costs in this Court, and the case is remitted to the Magistrate to be heard and decided on its merits.

Kokstad. 20 April, 1904. R. W. Stanford, A.C.M.

Makalima vs. Tswyi.

(Maclear.)

Dowry Restoration—Christian Marriages—Dowry not Returnable until Marriage Dissolved.

Makalima sued Tswyi for the restoration of the dowry paid for his wife, and he alleged in his summons that his wife had deserted him and refused to return. Defendant excepted to the summons on the ground that Plaintiff had married his wife by Christian rites and that the action was premature as the marriage had never been dissolved by a competent Court.

In replication, Plaintiff contended that the dowry was paid under Native custom and that under that custom it was returnable on the desertion of the wife.

The Magistrate held that the dowry was not returnable until the marriage was properly dissolved and he dismissed the summons.

Plaintiff appealed.

Pres.:—Plaintiff in the Court below claimed from the Defendant 11 head of cattle or their value, £33, and the Magistrate found against him and he now appeals. From the record it

appears that some years ago Plaintiff married Defendant's daughter, Mary Jane, in accordance with Christian rites and paid as dowry certain cattle. That about the year 1896 the said Mary Jane left her husband's kraal and refuses to return thereto, that up to the present the marriage has not been dissolved and, seeing that this is so, this Court agrees with the Magistrate's finding and the appeal is dismissed with costs.

Umtata. 7 July, 1904. W. E. M. Stanford, C.M.

Vikilahle vs. Zulualiteti.

(Ngqeleni.)

Native Succession—Amanqanda Tribe—Pondo and Tembu Customs—Nomination of Great Wife.

In this case Zulualiteti sought an order of Court declaring him to be the rightful heir of the late Ngonyama, a Chief in Pondoland of the Amanqanda tribe. He stated that he was the eldest son of the first wife married by Ngonyama and that Vikilahle was the eldest son of the second wife. He asserted that the Pondo law of succession was that the eldest son of the first wife married always succeeded and on this ground claimed to be the rightful Chief of the clan and heir to the property left by the late Ngonyama.

The defence was that the mother of Vikilahle, although the second wife married, had been publicly installed as the Great Wife and that the tribe had contributed her dowry, this being done under the Tembu custom practised by the tribe of nominating the great wife.

From the evidence it appeared that the Amanqanda tribe formerly lived in Eastern Pondoland, but owing to the wars in Tshaka's time was forced into Western Pondoland and eventually over the Umtata River into Tembuland. Tribute was paid to the Tembu Chief Gubencuka and Tembu customs were adopted. These included the customs of circumcision and "ukungulwa," *i.e.*, the custom of nominating the Great Wife. During the war between Gangelizwe and Kreli (1875) the clan returned to Western Pondoland, retaining, however, the customs adopted while in Tembuland. A tribute was paid to the Paramount Chief of Western Pondoland, who it was stated allowed the tribe to follow their adopted customs.

The Magistrate's judgment was in favour of the Plaintiff, and his reasons were as follows:—"The judgment in this case is based upon the judgment of the Native Appeal Court in the case of *Sigidi* vs. *Lindinxiwa*. All the headmen present were of opinion that the judgment was entirely in accordance with the Pondo customs. The Assessors sent by the Chief Bokleni state that he (Bokleni) says that Zulualiteti is heir to the property of the late Ngonyama. An attempt was made by the defence to prove that the Amanqanda tribe is a separate clan and does not abide by the customs of the Pondos, but, in my opinion, it is only an attempt to introduce Tembu customs because the Defendant is the grandson of a Tembu Chief."

Vikilahle appealed.

Pres.:—In this case it is common cause that the late Ngonyama, Chief of the Amanqanda tribe in Western Pondoland, married first the mother of Plaintiff in the Court below and afterwards the mother of Defendant. With the sanction of the tribe, he appointed the latter to be "Great Wife" and she held this position up to the date of her husband's death. The Plaintiff now asks that the Defendant's claim to be "Great" Son shall be set aside and that he, as eldest son of the first wife, be declared the legal representative of the "Great" House of the late Chief Ngonyama. This he bases on the custom of the Western Pondos, which, he asserts, allows only the Paramount Chief to allocate rank to his wives and the case of *Sigidi* vs. *Lindinxiwa* is relied upon in support. The power to nominate the Great Wife is very widely recognised throughout the polygamous Native tribes of South Africa. The restriction of the custom in Western Pondoland may in some measure be due to the fact that the Chief Ndamase, who established the Western Pondos as a distinct tribe, was himself the eldest but not the "Great" son of the Paramount Pondo Chief Faku. Ndamase in turn was succeeded by his eldest son Nqwiliso, and the same rule applied in the succession upon the death of Nqwiliso. The abrogation mentioned is thus one of local practice begun within a limited period of time and while it is just in general to recognise the change exceptional cases will occur which must be dealt with on their merits. The case now before the Court is one of these. The Amanqanda clan migrated into Tembuland, and while there Ngonyama married Plaintiff's mother under Tembu custom. She could not in Tembuland claim without the authority of her hus-

band to be regarded as the "Great" Wife, and since the return of the clan to Pondoland, where the second wife was married by Ngonyama, these people have continued to practice Tembu customs, differing from those of the Pondos. By public act and ceremony the mother of the Defendant was installed as the Great Wife. This imposed upon her duties and obligations towards the people of the tribe, which it is not denied she has faithfully fulfilled. In Native phraseology she is termed the "mother" of the people. Now, as already remarked, the installation was a public act. It was undertaken at a time when Nqwiliso was Chief of the Western Pondos and the action of Ngonyama and his tribe was emphasised by contributions towards the dowry from the people. Thus it must be accepted that Nqwiliso had knowledge of these proceedings—so important in Ngonyama's family and tribe. Had Nqwiliso chosen to do so he might have forbade Ngonyama from recognition of his second wife as the chief woman of his household, but Nqwiliso refrained from any interference and thus rights became established and have been maintained without dispute for many years. In the opinion of this Court it is now too late for any one to assail Ngonyama's regulation of his family affairs tacitly approved as it was by his Paramount Chief. The Paramount Chief Sigcau has been quoted as upholding the Plaintiff's view. In his statement Sigcau is not supported by his leading Councillors, and it is within the knowledge of this Court that in the case of the succession to the late Chief Sigijimi of the Amandela tribe, Sigcau acknowledged the claim of a younger against that of the eldest son. For these reasons the judgment of this Court will be to reverse that of the Resident Magistrate of Ngqeleni and to declare that the Defendant Vikilahle is the lawful representative of the "Great" House of the late Chief Ngonyama. This judgment will, of course, carry costs with it.

Umtata. 25 July, 1904. A. H. Stanford, A.C.M.

Nkwana vs. Nonqanaba.

(Mqanduli.)

Slander—No Action under Native Law—Polygamy—Status of Native Wives.

This was an action instituted against Nkwana for damages for defamation of character, in that the Plaintiff—a wife of the Chief Holomisa—was accused of being an immoral person.

Defendant pleaded that under Native custom there was no action for defamation of character and as both parties to the suit were Natives the case should not be tried under Colonial law: that if Colonial law were applied then Plaintiff has no cause of action as Colonial law does not recognise Native marriages and Plaintiff, as a polygamous wife, must be taken as living in adultery and thus has no character to vindicate.

The Magistrate held that the case should be heard on its merits under Native law and, after evidence, gave judgment for £6 damages.

Defendant appealed.

Pres.:—According to Native custom as in force in the Tembu and Gcaleka tribes prior to their coming under the control of the Colonial Government, the person of each individual of a tribe was the property of the Chief and any injury to the person or character of such individual was an offence against the chief punishable as a crime by fine. The chief of grace could award a portion of the fine to the injured person, who, however, had no right of civil action for damages.

There being no remedy now according to Native custom it follows that in such cases Colonial law must apply, and the Magistrate was in error in saying that the case could be heard according to Native custom. The Magistrate's judgment will be set aside and the case returned to be heard in accordance with Colonial law on the evidence already recorded and such further evidence as either party to the suit may wish to adduce.

The Court further places on record its opinion that a woman married according to Native custom to a man having more than one wife cannot on that account be regarded as an immoral person.

Umtata. 25 July, 1904. A. H. Stanford, A.C.M.

Kinki vs. Tonise.

(Engcobo.)

Adultery—Prescription—Action for Damages.

Kinki sued Tonise for damages for an act of adultery committed some twenty months before the date of issue of summons.

The Defendant's attorney asked for the dismissal of the summons on the ground that the alleged adultery took place more

than a year before action was taken, it being a rule of the Court not to entertain cases of adultery in which the alleged act took place more than a year before the issue of summons.

The Magistrate upheld the exception and dismissed the case.

Plaintiff appealed.

Pres.:—Under Native custom there is no time limitation with regard to actions for adultery nor is it competent for any Magistrate to make such a rule in his Court as that alleged in the exception. The appeal is allowed with costs, the exception set aside, and the case returned to be heard on its merits.

Umtata. 21 November, 1904. A. H. Stanford, A.C.M.

Mankayi Renqe vs. Kleinbooy Maart.

(Cala.)

Costs—Dismissed Summons—Rehearing—Absolution.

In a previous case between these parties the summons had been dismissed with costs. On a second summons being issued, Defendant's attorney asked for dismissal on the ground that the costs in the first case had not been paid. Plaintiff thereupon tendered the costs, but stated that no bill of costs had been produced. The Magistrate ruled that as the Plaintiff had tendered costs and as Defendant was not prejudiced the case might proceed and quoted the case of *Thacker* vs. *Fourie*, Cape Law Journal Digest p. 139.

Renqe appealed.

Pres.:—Section 32, Schedule B, Act 20 of 1856 expressly provides that when a judgment of absolution from the instance is given the Plaintiff can only commence a new action upon payment of the costs awarded against him, and it has been ruled in the Supreme Court that dismissal of a summons is the same in effect an absolution from the instance. Van Zyl, page 770, 2nd edition, says Plaintiff may begin his action *de novo* provided he first pays Defendant's costs incurred.

The case of *Thacker* vs. *Fourie* does not apply in this case as the discretion of the Supreme Court is not limited by statutory law as is the case in the Resident Magistrate's Court.

The appeal is allowed with costs and the Magistrate's ruling set aside, the exception taken by the Defendant in the Court below being sustained with costs.

Butterworth. 28 November, 1904. A. H. Stanford, A.C.M.

Mangqalaza vs. Mangqalaza.

(Nqamakwe.)

Isondlo Custom—Illegitimate Children—Inheritance.

Aaron Mangqalaza sued Ludidi Mangqalaza for nine head of cattle and in his summons stated that these cattle were the dowry of his sister Nozinqa, which was paid to their grandfather, Mangqalaza, that on Mangqalaza's death Defendant appropriated the stock. From the evidence led by Plaintiff it appeared that the parties to the suit were sons of one Zazi, but the Plaintiff Aaron was illegitimate, his mother being Sarah. Nozinqa was also the illegitimate daughter of Zazi and Sarah who had never been married. Fines were paid by Zazi for both pregnancies. Plaintiff was brought up by the grandfather and Nozinqa by her mother's people. She was taken to Mangqalaza's kraal when marriageable, but no maintenance fee had been demanded or paid. After this evidence was heard, Defendant excepted to the proceedings that as Plaintiff was illegitimate he had no claim to the dowry of his sister and the Magistrate upheld the exception and dismissed the case.

Plaintiff Aaron appealed to the Appeal Court held on the 18th July, 1904 (M. W. Liefeldt, President), and the judgment was as follows: —

It is not stated either in the summons or in the evidence whose daughter Sarah is or whose son Zazi is. The parties being in Court, however, it is elicited that Zazi was the son of Mangqalaza and Sarah the daughter of Nqolo. The case having been submitted to Native experts as to whether the Plaintiff, who is an illegitimate son of Zazi, can succeed as against Defendant, who is the lawful heir of Mangqalaza, the father of Zazi, the experts state that neither party should claim through Mangqalaza as neither he nor his heirs have any claim upon the dowry of the illegitimate daughter of Sarah until cattle have been paid for her "isondlo." Had such maintenance cattle been paid then Defendant would be entitled to succeed in his case, but none having been paid the girl is the property of Sarah's guardian and he or the Plaintiff, failing all other male representatives of Sarah's family, would be entitled to recover the girl or her dowry from Mangqalaza and his heirs. Briefly, in effect, this Court finds

that no isondlo having been paid, and in the event of there being no other male representatives of Sarah, Plaintiff is entitled to sue. The appeal is therefore allowed with costs and the case remitted to be tried upon its merits. This case is not on all fours with the case of *Colis* vs. *Matshavana* (Appeal Court, Butterworth, 25th November, 1901) referred to in argument, inasmuch as in the latter the claim of Plaintiff was for the estate of his putative father, while in the case now before the Court the claim is for property which really belongs to the family of Plaintiff's mother and to which neither Mangqalaza nor his heirs have any title or claim until the payment of isondlo.

———

On the evidence subsequently led, the Magistrate gave judgment for four head of cattle as being those alive of the original dowry and at Defendant's kraal.

Aaron appealed on the number of cattle awarded him and Ludidi cross-appealed on the judgment.

Pres.:—In the reasons given for allowing the previous appeal and remitting the case to be tried on its merits it was stated that in the event of there being no male representative of Nqolo's family the Plaintiff is entitled to sue. In the subsequent proceedings this very important point has been overlooked. It has now been elicited from the Appellant (Plaintiff in the Court below) that Nqolo, the father of his mother Sarah, left two sons, Beya and Zondi, living at Keiskama Hoek. Consequently, in terms of the opinion given by the Native Assessors, the Appellant has no right of action. His appeal must be dismissed and the cross appeal allowed with costs.

Kokstad. 12 December, 1904. R. W. Stanford, A.C.M.

Phirimana vs. Khetsi.

(Umzimkulu.)

"Litsoa" Cattle—Not Claimable by Action—Basuto Custom.

Phirimana sued Khetsi for six head of cattle, being balance of dowry due by Defendant on his marriage with Plaintiff's daughter, and also for 16 head of cattle, being "Litsoa" cattle due by Defendant in respect of the marriages of Defendant's two daughters, ten for the first and six for the second.

Defendant excepted to the summons with regard to the "Litsoa" cattle that the claim is merely a moral one and not enforceable at law.

In replication Plaintiff contended that these cattle were recoverable after a reasonable amount of dowry had been paid for the girls.

The Magistrate upheld this exception and Plaintiff appealed.

Pres.:—Most experts on Basuto law and custom hold that the claim to "Litsoa" cattle is simply a moral one, and cannot be enforced, and this Court is of opinion that the Magistrate was right in sustaining the exception, and the appeal will be dismissed with costs.

Umtata. 16 March, 1905. A. H. Stanford, A.C.M.

Ndaba vs. Kutu.

(Ngqeleni.)

Dowry Division—Return of after Death of Wife—Suicide—Pondo Custom.

Kutu sued Ndaba for the restoration of the dowry paid for his wife on the grounds that shortly after his marriage she committed suicide. The Magistrate ordered the return of the whole dowry.

Ndaba appealed.

Pres.:—The question having been submitted to the Pondo Assessors, they state that when a woman dies shortly after marriage, not having borne children, the dowry is returnable: formerly the whole of it, but in Nqwiliso's time it became customary to divide it, a portion being left with the father to console him for the loss of his daughter. If the woman leaves a child no portion of the dowry is returnable. In a case such as the present, where the woman commits suicide, the Assessors state that they are unable to give an opinion as they have no knowledge of any similar case being dealt with.

The Tembu Assessors on being consulted state that in cases where the father or guardian of the woman forces her against her will to the husband and as a result she commits suicide the dowry is returnable.

In the present case the Court is of opinion that the merits of the case will be most fairly met by the dowry being divided after allowing one beast for the wedding outfit.

The appeal is allowed with costs and the Magistrate's judgment altered to judgment for Plaintiff for three head of cattle with costs.

Butterworth. 27 March, 1905. A. H. Stanford, A.C.M.

Mfanekiso vs. Mpakana.

(Nqamakwe.)

Son's Liability for Father's Debts—Kraal Heads—Interpleader.

In an interpleader action Mfanekiso claimed a certain beast that had been seized to satisfy a judgment against his father. The Magistrate declared the animal in dispute to be executable and gave the following reasons for his judgment: —

The Plaintiff claims a beast, which was seized as his property, but it will be seen from the evidence taken that he resides at his father's kraal and is still unmarried, and he admits that, according to Native custom, an eldest son's stock belongs to the father while the son lives at the father's kraal, and as the claimant in this case is a younger son residing at his father's kraal his property would therefore, according to Native custom, belong to his father and under these circumstances I considered the beast to be executable.

Mfanekiso appealed.

Pros.:—Under Native law and custom as originally administered by the independent Native Chiefs the property of a son living at the father's kraal was undoubtedly liable to attachment on a judgment given against the father, but Native custom in this respect is in conflict with Section 39 of Proclamations Nos. 110 and 112 of 1879 and of Section 38 of Proclamation No. 140 of 1885, which especially provide that the age of majority in the Native Territories shall be twenty-one years. This being so it follows that a father has no legal right to property owned by his sons who are majors and consequently such property is not executable on judgment given against the father.

The appeal is allowed with costs and the judgment in the Magistrate's Court altered to the effect that the animal attached is declared to be not executable with costs for Plaintiff.

(1) Among all Native Races it is the custom to return dowry and the only persons who are exempt from this custom are Chiefs.

(2) There are however two cases in which dowry is not returned.

(*a*) When a man is killed in battle the dowry paid by him is not returned.

(b) When a woman dies in childbirth dowry is not returned; she has died under the spear of her husband.

(3) When a man or woman dies a natural death dowry is returnable except where a woman dies being old and a wife of long standing and in such a case no dowry is returned whether she die at her own kraal or at the kraal of her people.

(4) When a woman's dowry is returned under the above circumstances and she has borne children a beast is deducted for each child and for the Ubulunga beast if any and for the wedding outfit if any, and the remaining cattle are returned to the husband.

(5) If the woman had lived three years with her husband and then died dowry is returnable.

(6) In a case where four head of cattle had been paid as dowry and there is one child and there was a wedding outfit two cattle would be retained by the father and two would be returned to the husband.

(7) In a case such as that now before the Court two cattle should be paid out and the father of the woman should retain only two.

In view of the pre-going statement it would appear that the decision of the Court below is in accordance with Native custom and the appeal is dismissed with costs.

Umtata. 11 November, 1910. W. T. Brownlee, A.C.M.

Dlakiya vs. Dlakiya.

(Engcobo.)

Christian Marriages—Inheritance—Right of Widows.

(The grounds of Appeal are disclosed in the Appeal Court judgment.)

Pres.:—In this case the Plaintiff is the widow of the late Mshweshwe Dlakiya and Defendant is the son and heir to the late Mshweshwe Dlakiya and Plaintiff was married to Mshweshwe in Church prior to 1885 (about 1877-8) and she states that some four

Butterworth. 28 March, 1905. A. H. Stanford, A.C.M.

Daniso vs. Makinana.

(Butterworth.)

Kraal Head Responsibility—Married Sons.

Daniso sued Fontain and Makinana, the latter as head of the kraal and as such liable for the former's debts, for damages for seduction. Fontain admitted his liability, but Makinana pleaded that he had already provided his son with a wife and is now no longer liable for his son's torts. The pleadings showed that Fontain lived at his father's kraal.

The Magistrate gave judgment against Defendant No. 1, but absolved Defendant No. 2 on the ground that Makinana had already set up his son in life by providing him with a wife and that the son was a major.

Daniso appealed.

Pres.:—The question as to whether under Native law and custom the head of a kraal is liable for the torts committed by members of his kraal has already been affirmatively decided on more than one occasion by the Appeal Court, and the reasons upon which its decision is based are fully set forth in the case of *Peter Klaas* vs. *Mqweqwe* heard in this Court on the 29th July, 1897. The appeal must be allowed with costs and the judgment in the Magistrate's Court altered to judgment as prayed with costs.

———

The Resident Magistrate of Butterworth *(W. T. Brownlee)* as Assessor gave the following dissenting judgment:—

I am of opinion that this appeal should not be allowed. The Native custom in matters of this nature is indisputable, but in my opinion the Native custom here is overruled by Section 39 of Proclamation No. 110 of 1879, which declares all persons to have attained legal majority at the age of 21 years and all such persons are therefore responsible for their own torts. This Court has at this sitting affirmed this view in the case of *Mfanekiso* vs. *Mpakana* and in other cases, but in these cases there is, however, this difference that while in this case it is sought to hold the father liable for the torts of his son in those it was sought to hold a son liable for his father's. The principle is, however, the same

Kokstad. 12 April, 1905. R. W. Stanford, A.C.M.

Juleka vs. Sihlahla.

(Mount Ayliff.)

Marriage Dissolution—Witchcraft Accusation—Desertion of Wife —Ownership of Children born after Separation.

Juleka sued Sihlahla for the restoration of his wife or the dowry paid for her and for the dowry received by the Defendant for his (Plaintiff's) daughter Magiligwane.

The Defendant pleaded that about 25 years before, Plaintiff had driven away his wife on a charge of witchcraft and had since never sent for her or asked her to return to him. He contended that by this act the marriage was dissolved and as the girl Magiligwane was born some two years after the desertion Plaintiff could have no right to the dowry.

The Magistrate on the evidence upheld the Defendant's plea and gave judgment for Defendant with costs.

Plaintiff appealed.

Pres.:—Plaintiff in the Magistrate's Court claimed from the Defendant (1) the return of his wife, or 10 head of cattle, (2) eight head of cattle and £6, (3) £10 as and for damages.

From the record it appears that some 30 years ago or more the Plaintiff married the woman Maliyofele, and that about 25 years ago she returned to her people on the plea that her husband ill-treated her and that he had caused her to be "smelt out," and the point to be decided is whether or not this ill-treatment was such as to deprive him of the dowry cattle he had paid for her.

The Magistrate found that this was so, and with this finding this Court agrees, as it is clear from the evidence that the Plaintiff did have the woman "smelt out," and it was for this reason that she returned to her guardian. Now with regard to the dowry paid for the girl Magiligwane, this Court agrees with the Magistrate in his finding that she was born some two years after her mother had been separated from Plaintiff and when the marriage had been practically dissolved. It has been generally held by experts in Native law that when a wife deserts her husband he must follow her within a reasonable time and endeavour to recover her or the dowry he paid for her. If he neglects to do so the marriage is considered as dissolved from the time she left him,

and he would then be entitled to recover his dowry cattle only, or the portion of them due to him. He would not have any right to the children born to the woman after she had left him unless he had kept the case "alive" by making repeated efforts to get her back. In this case Plaintiff must have been pretty certain that he had no case, or he would not have allowed 25 years to pass before taking steps to establish his claim.

The appeal will be dismissed with costs.

Umtata. 24 July, 1905. A. H. Stanford, A.C.M.

Pungwana vs. Mini.

(Umtata.)

Isondlo Custom—Maintenance Fee for Children—Divorce.

Mini sued Pungwana for the restoration of his child and stated that he had married Defendant's daughter and the child in question was the issue of the marriage. His wife had deserted him and taken the child with her to the kraal of her father, the Defendant. In consequence of this desertion he had obtained a refund of his dowry, thus dissolving the marriage, but Defendant kept the child with its mother and refused to restore it to him.

The Defendant pleaded that he was willing to restore the child provided Plaintiff paid a beast as isondlo. The child was three years old and not old enough to leave its mother.

The Magistrate ordered the restoration, but refused isondlo (maintenance) on the ground that the child was very young at the time of the dissolution of marriage and was only now old enough to leave its mother and be brought up by the father.

Pungwana appealed.

Pres.:—The question whether the Appellant is entitled to any maintenance allowance for the period during which the child was at his kraal having been submitted to the Native Assessors, they state that an allowance for isondlo is customary when a child is being fetched after dissolution of the marriage has taken place no matter the age of the child. The appeal is allowed with costs and judgment in the Magistrate's Court altered to judgment for Plaintiff in convention for the child as prayed with costs of suit and for judgment in reconvention for Defendant for £3 with costs.

Umtata. 24 July, 1905. A. H. Stanford, A.C.M.

Rubulana vs. Tungana.

(Engcobo.)

Kraalheads—Responsibility for Inmates Torts—Procedure.

Rubulana had sued John John for damages for adultery and had obtained a judgment. Subsequently Rubulana sued Tungana for the amount of the unsatisfied judgment, alleging that John John was an inmate of Tungana's kraal and therefore the latter was liable for the judgment. Tungana filed the following plea: "Defendant admits that a judgment was given against John John in favour of the Plaintiff but pleads that although he lives at his kraal he (John John) is a married man and a major and that Defendant is not his guardian nor is he liable for his debts or for the debt sued for, and Plaintiff, not having sued Defendant in the first instance, is now estopped from doing so.

Judgment was entered for the Defendant with costs and the Resident Magistrate gave the following reasons:—

Plaintiff sued the Defendant for the amount of an unsatisfied judgment against one John John, alleging that he is liable for the sum. Exception was taken that John John was a married man, a major, that Defendant was not his guardian nor related to him and that Plaintiff not having sued Defendant in the first instance was now estopped from doing so as it would be asking damages twice over for the same thing. Sufficient evidence was taken to support the exception (*inter alia* it was shown that John John had been married for five years), which was sustained and the case dismissed. The case has passed out of the region of Native custom and become only one of legitimate judicial procedure. The Appeal Court has already laid down "that when Native law and custom is in conflict with law and equity the former must give way" (*Nosaite* vs. *Nangati*). Mayne on damages and Taylor on evidence support the decision.

Pres.: (16 March, 1905)—Under Native law and custom the head of the kraal is liable for any torts which may be committed by members of his kraal and formerly his property was attached, although he had not been joined in the summons. The position of the head of the kraal in such cases is not that of a wrong doer but rather that of a surety responsible for the good behaviour of the members of his kraal. The Court is of opinion that the argu-

ments advanced do not apply, the point at issue being one which can only be decided in accordance with Native custom. The appeal is allowed with costs and the case returned to be heard on its merits.

———

On the further hearing judgment was again given for the Defendant, and the following were the Magistrate's reasons: —

Tungana is not joined in the summons and there is nothing in it to indicate that he resides near or has any connection with John John. When the case came on to be heard on its merits the Plaintiff declined to call any evidence and there is nothing on record therefore to sustain the case in general, and that paragraph of the summons which alleges that a writ had been issued and was unsatisfied. This is the crux of the whole matter and the Court had no alternative but to dismiss the case. The Appeal Court remarks "Formerly his (the head of the kraal) property was attached, although he had not been joined in the summons." The logical implication would, therefore, be that now he should be joined in the summons. And rightly so, otherwise the correct judicial procedure now required by law and custom would go for nought. The case of *Nosaite* vs. *Xangati* defined the principle that customs formerly recognised are now inapplicable. Apart from these points there is no getting over the fact that there is nothing on record in this case to sustain the principal allegation in the second summons.

Rubulana appealed.

Pres.:—The Court has previously ruled that the property belonging to the head of a kraal cannot be attached on a judgment against a member of the kraal if he was not joined in the summons. In the action brought by *Rubulana* versus *John John*, the Plaintiff in the Magistrate's Court elected to sue John John only, and by a subsequent action against the Respondent seeks now to make him liable for the judgment obtained against John John. The Court is of opinion that the Appellant, having failed to join the Respondent in the original action, is not now entitled to succeed. The appeal is dismissed with costs

Umtata. 24 July, 1905. A. H. Stanford, A.C.M.

Mlotana vs. James Rundwana.

(Libode.)

Damages—Adultery—Condonation—Native Custom.

Mlotana sued Rundwana for damages for adultery. The parties were married by Christian rites and the Magistrate elected to try the case under Colonial law. Defendant pleaded that the marriage being a Christian one and the husband having condoned the offence by continuing to live with his wife and not instituting an action for divorce the Plaintiff Mlotana was now debarred from claiming damages.

The Magistrate upheld the plea and dismissed the case, relying on the decision in the case of *Bicard* vs. *Bicard and Another* (9 S.C.R. 473).

Mlotana appealed.

Pres.:—There is no authoritative ruling by the higher Courts that a man who condones his wife's adultery thereby forfeits his right of action against the adulterer to recover damages. In the case of *Bicard* vs. *Bicard and Fryer* the Chief Justice says:—"Unless there is complete breach between husband and wife I should not be inclined to award damages. There is not that complete loss of the wife's society which constitutes the main element in the estimation of damages."

"Although the fact of a husband not suing his wife for divorce is not an absolute bar to his claim for damages against the adulterer it raises a presumption of collusion which ought to be rebutted by satisfactory evidence to the contrary."

Mr. Justice Buchanan in the same case says:—"Our law does not require divorce to be obtained prior to an action for damages against a co-defendant though in cases where there is no divorce the Court must be satisfied as to the *bona fides* of the Plaintiff. . . Damages are chiefly a solatium for the loss of affection caused by the conduct of the adulterer."

To go back to recognised authorities on Roman Dutch law, *Gortius* says:—"A man who commits adultery with a married woman inflicts an injury on the husband and is consequently liable for the same to the husband." *Van Leeuwen* says:—"We have said upon the prayer of the injured spouse because the dissolution of marriage is not founded upon the mere fact of adultery and not incurred as a penalty, for it can only take place upon

the request of the innocent spouse and not against his or her will and the innocent party, having acquired the right of divorce, may waive the same and condone the adultery."

In the case of *Hansen* vs. *Ringham*, heard in the Supreme Court in 1881, damages were awarded against the adulterer although divorce was never sued for nor was it shown that a final separation had taken place between the husband and wife.

It is highly conceivable that a man loving his wife and not wishing to deprive his children of the mother's care may forgive her, but it by no means follows that this lessens his just resentment against the adulterer or that he has suffered no injury by the offence, for in addition to the loss of the wife's society which, according to the Chief Justice, constitutes one of the main elements in the estimation of damages, there are other elements, such as the dishonour to the husband and the breach it must occasion, if only for a time, between the wife and himself.

Again, the action for damages by the husband who has forgiven his wife may be regarded as a protective measure against the adulterer with the object of putting on him a penalty which will deter him from attempting to continue his criminal intimacy. If such an action cannot be maintained then the wives in such cases would be subject to the attempts of dissolute men and the husbands be without a remedy, except that which has already been resorted to in a recent case where a similar ruling to that of the Resident Magistrate of Libode was given, namely, of taking the law into his own hands.

This Court is of opinion that an action can be maintained by the husband although he has condoned the wife's offence, but the Court, before awarding damages, must be satisfied that there was no collusion between the husband and wife and that the object of the husband is not merely to benefit by the wife's infidelity.

The appeal is allowed with costs and the Magistrate's ruling set aside and the case returned to be heard on its merits.

Flagstaff. 4 August, 1905. R. W. Stanford, A.C.M.

Dliwako vs. Makonco.

(Lusikisiki.)

Dowry Restoration—Increase—Not Returnable.

Makonco sued Dliwako for the restoration of four head of cattle paid by him to Defendant as dowry for his wife, who had deserted

him and refused to return. He stated that the four head of cattle paid had increased to eight, that four had been returned to him and he now sought to recover the increase.

The Magistrate gave judgment for three head of cattle, stating in his reasons that as the woman deserted the man without cause and as there was no issue of the marriage Plaintiff was entitled to recover the original cattle paid, together with their increase.

Defendant Dliwako appealed.

Pres.:—The Court holds that the increase of dowry cattle are not claimable after the marriage has taken place. The appeal is allowed with costs and the Magistrate's judgment altered to judgment for Defendant with costs.

Kokstad. 28 August, 1905. W. P. Leary, *Pres.*

Kakana vs. Qorana.

(Qumbu.)

Ukutwala Custom—Damages for Elopement—Earnest Cattle.

Kakana sued Qorana for eight horses and 50 goats, being the dowry he had paid to Defendant some eight years previously in connection with a marriage arranged between Plaintiff's nephew and Defendant's daughter. In his summons he alleged that Defendant refused to carry out his agreement and has since given his daughter in marriage to another man. The parties were Hlubis.

The Magistrate absolved Defendant and gave the following reasons:—

"I am given to understand that the only point appealed against in this judgment is whether, according to Native custom, a beast paid for damages for "Twala" is returnable or not in the case of an engagement or marriage being broken off. As it is customary to pay damage for "Twala" before anything is said of marriage this claim has to be satisfied whether marriage takes place or not. I consequently held that the beast is not returnable and gave judgment accordingly."

Plaintiff appealed.

Pres.:—This is an appeal from the Resident Magistrate, Qumbu. The facts are briefly these:—Plaintiff's nephew carried off Defendant's daughter and proposed marriage to her and, as

is customary amongst Natives, sent two horses (mare and foal) as dowry; the foal was refused as being sick and the mare retained as a fine for the carrying off of the girl. Subsequently 25 sheep and goats are alleged to have been paid as dowry and no further action was taken by either party for some years. The foal died shortly after it was taken to Defendant's kraal and was reported to Kleinklaas, who had paid it.

The question as to whether a beast paid for carrying off a girl is returnable has been raised by the Magistrate in his reasons for judgment. According to Native custom, when a girl is carried off she is reported to her parents with one or more cattle as an earnest that marriage is intended. If the parents or relatives of the young man are unable to pay dowry for any reason, a beast is returned with the girl as an apology for his having taken her from her home. In this case the negotiations were evidently broken off by the Plaintiff and his nephew not paying dowry. In addition he has damaged the girl and, according to Native custom, this beast, which would have been counted as dowry had the marriage been complete, is not returnable.

In view of the conflicting nature of the evidence and especially that of the witnesses for the Plaintiff, the Magistrate could come to no final decision. The appeal is dismissed with costs.

Kokstad. 28 August, 1905. W. P. Leary, *Pres.*

Pike vs. Madi.

(Mount Fletcher.)

Adultery—Damages—Collusion—Dikazi—Remarriage.

Pike sued Madi for damages for adultery with his wife whom he alleged he had married by Native custom.

Defendant admitted intercourse, but alleged that the woman in question was not Plaintiff's wife but the wife of one Mhlontlo, who has, however, been away for some years.

The Magistrate gave judgment for the Defendant with costs.

Plaintiff appealed.

The following were the Magistrate's reasons:—

"The woman was first married to a man named Umhlontlo, who was arrested and sent away and has apparently not been seen

since. Plaintiff states he put the woman in the family way and then offered to marry her. According to his story he did marry her. The Court believed that the £10 paid by Plaintiff was a fine for adultery and not for dowry. The Court was further fully satisfied that the woman was a "dikazi" and that Defendant looked upon her as such. The Appeal Court has frequently held that damages cannot be claimed for connection with a dikazi, and that a husband should not trade upon the unchastity of a wife. The Court was satisfied from the evidence before it that the woman Yakazi was of loose character—witness the fact that while she is still Umhlontlo's wife she lives with Plaintiff and then has connection with Defendant!"

Pres.:—In this case Plaintiff sues the Defendant for three head of cattle or their value, £30, and the Magistrate who tried the case found for the Defendant, believing the £10 paid by Plaintiff was for a fine and not for dowry and that the woman was a dikazi.

There is ample evidence on record to show that the £10 could not have been paid as a fine; had this sum been paid as a fine the woman would not have been allowed to live with Plaintiff as his wife for the last five years.

There seems some misapprehension about the work "dikazi," which does not always mean a woman of loose character. This Court has held that a husband may not trade on the unchastity of a wife, or the relatives on that of any female relation, and is therefore very careful that there must be clear proof and no collusion between the parties, but it has never been held that a woman, in consequence of the desertion by her husband or his death may not as a "dikazi" marry again according to their custom.

The finding of the Court below does not appear to be supported by the evidence. The fact that Pike reported to the relatives of the woman shows his intention and theirs. The appeal must be allowed with costs, and the judgment of the Court below altered to one for Plaintiff for three head of cattle or their value, £9, and costs of suit.

Umtata. 6 November, 1905. A. H. Stanford, A.C.M.

Mqolora vs. Jim Meslani.

(Umtata.)

Widows—Dowry—Second Marriage—Return of First Dowry.

This was an action by Mqolora against Jim Meslani for damages for adultery. Defendant admitted the act, but pleaded that the woman was not the wife of Plaintiff. The Magistrate, in dismissing the summons, said:—"The Plaintiff states that he married the woman as a widow, that he knew her first dowry had never been returned when he married her and that he, notwithstanding this, claims her as his wife. The Appeal Courts have frequently ruled that a woman cannot legally be married a second time according to Native custom until the dowry of her first husband has been returned. This principle has been followed to the extent of depriving a second would-be husband of children born to him after due payment of stock (dowry) without knowledge of the existing impediment.

Plaintiff appealed.

Pres.:—The Magistrate is incorrect in his reasons for judgment with regard to the decisions of the Appeal Court; the principles he mentions apply to cases where a woman is given in marriage to another man on payment of cattle as dowry during the lifetime of her husband and not in the case of a widow. In a case on appeal to the Eastern Districts Court it was held that a widow could not be ordered to return to the kraal of her deceased husband as on his death she was freed from tutelage and was a major under the provisions of Proclamation No. 140 of 1885 and that her refusal to live at the kraal of her deceased husband or with his heir was not sufficient cause for the return of the dowry. After this decision it became impossible in the Courts of the Territories for these actions to be maintained, but if the woman was remarried after the death of her husband then the first dowry was returnable on the principle that no man was entitled to retain two dowries for the same woman. The Native custom that the woman, after the death of her husband, still remained the property of his kraal or heir and could not contract a second marriage is in conflict with the law in force in the Territories and contrary to good policy and public morals. If the Plaintiff is able to

establish his marriage he is entitled to damages. The appeal is allowed with costs and the case returned to be dealt with on its merits.

Umtata. 6 November, 1905. A. H. Stanford, A.C.M.

Nowata vs. April.

(Elliot.)

Illegitimate Children—Rights for Dowry Received for—Payment of Cattle by Other than Father.

Nowata sued April for five head of cattle, and in his summons stated that Defendant had married his daughter Julia and paid seven head of cattle as dowry. At the time of the marriage Julia had an illegitimate daughter named Lily, who was afterwards married from Defendant's kraal, and dowry received for her by Defendant, and Plaintiff now claimed this dowry.

Defendant in his plea stated that he paid six head of cattle as dowry for his wife Julia and also paid Defendant an additional beast for the girl Lily, who thus became, by Native law, his own child and he was entitled to the dowry received for her.

Plaintiff in his evidence said that at the time of Julia's marriage to Defendant nothing was said about Lily and she was left at his kraal. Defendant afterwards obtained possession of her and gave her away in marriage without his consent. No one had ever paid damages for Lily and consequently she belonged to him and Defendant was not entitled to the dowry received for her.

The Magistrate gave judgment for Defendant on the ground that the evidence supported Defendant's plea.

Nowata appealed.

Pres.:—This case being submitted to the Native Assessors for opinion on custom the Chief Dalindyebo states:—"We do not know any such custom as that stated that a man on contracting marriage with a woman who already has a child by another man should, by payment of a beast, obtain that child."

In the ordinary course of Native custom such a child, being illegitimate, would belong to the woman's father and a deviation from this must be supported by the clearest evidence, which in this case is not forthcoming. Such an arrangement as stated by the Respondent should be supported by other evidence than that of himself and his wife only. The appeal is allowed with costs.

judgment being altered to judgment for Plaintiff for three cattle and costs, two cattle being allowed the Respondent for maintenance of the girl and wedding expenses.

Umtata. 6 November, 1905. A. H. Stanford, A.C.M.

Maxayi vs. Tukani.

(Port St. John's.)

Marriage—Pondo Custom—Celebration—Ceremonies.

Maxayi sued Tukani for damages for adultery. The defence raised was that Plaintiff had never married the woman, but that she was Defendant's wife.

The Magistrate in giving judgment for the Defendant gave the following reasons:—"The facts which I find proved are that Plaintiff ran off with the girl and subsequently stated his intention to marry her, but paid nothing by way of fine or dowry, nor did any ceremony take place to show that a marriage had occurred. Plaintiff says he killed a goat, but no one from the girl's kraal was there. Subsequently the girl was taken back to her people and thereafter Defendant ran off with her. There is nothing on the record to satisfy me that any marriage is subsisting between Plaintiff and the girl and consequently Plaintiff has no claim on Defendant. I cannot accept the mere statement by Plaintiff and the girl's people that they were married as constituting a marriage.

Maxayi appealed.

Pres.:—This case being one of purely Pondo custom, the matter was submitted to the Pondo Assessors, who said:—"According to Pondo custom a marriage is complete when the father or legal guardian gives his consent and the girl goes to the intended husband, even if no dowry passes. It is also customary after this for the father or legal guardian to demand dowry and there should be a killing of something at the husband's kraal, but a marriage is consummated upon the consent of the girl's parents."

In this case the Assessors are of opinion that although there was a consent of the parents to the marriage between Maxayi and the woman, yet, owing to neglect in not following up the consent by demanding dowry or any killing, they are of opinion

that the marriage was not completed, and therefore the Plaintiff (Appellant) cannot succeed in an action for adultery until the whole obligations have been fulfilled. With this view the Court agrees and sees no reason to disturb the Magistrate's decision. The appeal is dismissed with costs.

Umtata. 6 November, 1905. A. H. Stanford, A.C.M.

Blayi vs. Hlobo.

(Ngqeleni.)

Costs—Re-opening Summons—Provisional Judgment.

Blayi sought to re-open a summons in which a provisional judgment had been given and the Magistrate refused the application on the grounds that the costs in the previous case had not been paid.

Blayi appealed.

Pres.:—There is nothing in Section 29, Schedule B, of Act 20 of 1856 requiring that the costs incurred by default must be paid before a re-hearing of the case can be granted; in fact, the contrary is to be inferred as the Section provides that the Magistrate shall first order the judgment to be opened and then make the order as to costs, presumably in the same manner as costs for the day would be dealt with. The decisions in the Supreme Court in the cases of *Van Niekerk's Assignee* vs. *Rousseau* (Buchanan's reports, Vol. 8, page 9) and *Van Heerden* vs. *Verster* (2 Juta, 408) place a very liberal construction on the section of Act 20 of 1856 dealing with the question of issue. The appeal is allowed with costs and the case returned to be dealt with as provided in Section 29 of the Act.

Butterworth. 20 November, 1905. A. H. Stanford, A.C.M.

Mtshotshisa vs. Mtshotshisa.

(Willowvale.)

Disposition of Property during lifetime—Transfer of Daughters.

Daniel Mtshotshisa sought an order of Court again t his father, Songqevu Mtshotshisa, in respect of certain cattle and the allegations in his summons were as follows:—

That he is the eldest son of the Great House of Respondent.

That besides Applicant there are five daughters and one son of Respondent's Great House.

That Respondent married a second wife (paying dowry for her from the property of the Great House) and placed her in the Right Hand House.

That there are four sons and no daughters born to the Right Hand House of Respondent.

That Respondent wrongfully and against Native law and custom placed one of Applicant's sisters (Nomangesi) in the Right Hand House and replaced her in the Great House by a son (Nyingindwe) from the Right Hand House.

That Applicant's sister Nomangesi is now married and her dowry has been paid to Mkutshwa, the eldest son of Respondent's Right Hand House.

That Respondent's action in so disposing of a daughter of the Great House is opposed to Native law and custom. Applicant prays an order of this Court directing Respondent to restore to the Great House certain five head of cattle received as aforesaid by the said Mkutshwa.

The Defendant admitted the allegations set forth in the summons, but contended that as owner of the property he can, during his lifetime, dispose of it as he deems best and that this was not contrary to Native law and custom.

The Magistrate gave the following ruling on the plea:—"Neither by the law of the Colony nor by Native law and custom can Respondent be barred from disposing of his property in whatever manner he may deem best unless injustice can be proved. It is not contrary to Native custom where there are no daughters in the Right Hand House to place one there from the Chief House or *vice versa*. Judgment must therefore be for Respondent.

Daniel appealed.

Pres.:—The case having been submitted to the Native Assessors on the question of Native custom, Lindinxiwa and Mabala, (Gcalekas) say that the transfer of a daughter from the Great House to the Right Hand House is in accordance with Native custom and instance cases in Hintza's and Kreli's families in which this was done.

Mbovu and Mboxana (Fingos) state that a transfer of a daughter from a junior house to the Great House is in accordance with custom, but not from the Great House to a junior house.

Veldtman (Fingo) states that the transfer from the Great to a smaller House can be done, but it must be after consultation with the leading members of the family.

In the opinion of the majority the action of the Respondent is in accordance with custom. The appeal is dismissed with costs.

Umtata. 12 March, 1906. M. W. Liefeldt, A.C.M.

Qakamfana vs. Nkolonzi.

(St. Marks.)

Ukutwala—Marriage—Tacit Consent.

This was an action for damages for adultery. Defendant Nkolonzi admitted the act but denied that the woman was the Plaintiff's wife as he (Plaintiff) had "twala'd" her. It appeared that Plaintiff had paid dowry for the girl and had then carried her off and she lived with him at his kraal for some months. The girl's father admitted having received the dowry, but stated that he had never handed her over to Plaintiff in marriage.

The Resident Magistrate absolved Defendant and Plaintiff appealed.

In altering the decision to judgment for the Plaintiff as prayed, the Appeal Court said:—"The payment of dowry and subsequent carrying off of the girl is a recognised form of marriage. The fact that the woman was left with the Plaintiff for several months proves tacit consent.

Umtata. 12 March, 1906. M. W. Liefeldt, A.C.M.

Monelo vs. Nole.

(Engcobo.)

Property—Women's Earnings—Services of Qadi Wife.

Plaintiff Nole, a widow who supported herself and family and had her own lands though she lived at the Defendant's kraal, sued the Defendant for the restoration of certain stock, which she alleged was hers by gift. Plaintiff was the Qadi of the Right Hand House of her husband and Defendant is heir of that House.

Defendant's mother had died and Plaintiff had reared her children, and in recognition of her services her husband gave her a cow from one of the dowries of these children. Defendant, on the death of her husband, retained this cow and its increase on the ground that they were only "nqoma'd." The Magistrate gave judgment for the Plaintiff and Defendant appealed.

Pres.:—It is very unusual for a husband to pay a Qadi for services rendered in rearing the children of the House to which she belongs, but the Court sees no reason to disturb the Magistrate's decision.

Umtata. 14 March, 1906. M. W. Liefeldt, A.C.M.

Siduli vs. Dlamanzi.

(St. Marks.)

Appeal—Provisional Judgment—Procedure—Power of Attorney.

Dlamanzi sued Siduli for damages for adultery. On the day of hearing Defendant was absent at work in German S.W. Africa but was represented in Court by his father and an attorney, who appeared under a power of attorney signed by the father of Defendant, "who has general control over Defendant's affairs during his absence at work." The Magistrate awarded a provisional judgment and an appeal was noted by the father. In the Appeal Court Respondent objected to the case being heard as Section 24, Proclamation No. 140 of 1885 made no provision for an appeal from a provisional judgment.

Pres.:—The Court is of opinion that the Magistrate might have in the circumstances made the judgment final as the Defendant was represented by his father and a legal adviser, but as he has not done so the question now to be decided is whether an appeal lies against a provisional judgment.

Section 24 of Proclamation No 140 of 1885 makes no provision for appeals against provisional judgments. It seems clear from this Section that appeals lie only against final judgments or against judgments of absolution. The exception raised by Appellant's attorney is upheld.

Umtata. 12 March, 1906. M. W. Liefeldt, A.C.M.

Jonginamba vs. Mva Jonginamba.

(Xalanga.)

Ixiba or Little House—Status—Heritable Rights.

Mva Jonginamba, who described himself as the only son and representative of the "Little House" of the late Jonginamba, sued David, eldest son of the Great House of the late Jonginamba, for certain stock and its increase, which were apportioned to him by his father before his death out of the dowry received for his (Plaintiff's) sister, and also for the dowries received for his other sisters, which the Defendant David had retained.

Defendant pleaded that Plaintiff's house is attached to the Great House and subject to it, that the property sued for was never apportioned to Plaintiff's house but was to Defendant's house, that any property not specially apportioned to any house became the property and under the control of the Great House.

From the evidence it appeared that the late Jonginamba had had four wives, viz.: The Great, Qadi, Right Hand and Ixiba Houses. The Ixiba wife was the last one married and Jonginamba's father paid the dowry for her and thus, it was contended, this House belonged to the grandfather and was subject to his control, and after his death it would pass to his eldest son, but the son of the Ixiba house would have the right to the dowries of his sisters.

The Resident Magistrate gave judgment for the Plaintiff, and in his reasons said that the Ixiba House was an independent one, subject, however, to control by the grandfather. It was under the protection of the Great House, but that house would not have control over it as in the case of a Qadi. The husband would be justified in distributing the dowries of the Ixiba house, but it would be proper for him to consult his father, and the dowries not apportioned would belong to the Ixiba son.

Defendant David appealed.

Pres.:—The Court is of opinion that the Ixiba House is a separate house, the dowry for it being provided by the grandfather and it is not under control of either the Great or the Right Hand House according to Native custom. The Ixiba house is rarely found outside the families of persons of rank. The house is described as the "House of the ancients," the dowry being

with one beast, a beast of any kind. This beast is paid as dowry. This beast is a gift, and there is no liability to return it. The parties might quarrel about other matters, but about this beast never. It is help, and the foot is kissed in satisfaction.

"As regards *ukufakwa*, no thanks is given for the beast, which must be replaced, no matter if all the cattle die. We are surprised to hear of this claim. Plaintiff did not hesitate in saying his father called them together, and that it was *ukwenzelelele*. The two customs are quite distinct. If you mix them up you get no beast at all. If a man accept a beast after asking for it, and promises to return another in its place, it is loan."

The Magistrate gave judgment for Defendant, and Plaintiff appealed.

Pres.:—In this case the claim is brought under the Native custom of *ukufakwa*, and the defence is that the animal in respect of which the claim arises was given to Defendant, not under the custom of *ukufakwa*, but under that of *ukwenzelelele*, and the two are distinct, for the one, that of *ukufakwa*, applies where contributions are made in connection with the ceremonials connected with the puberty or marriage or other circumstances of women in which the contributor is *fakwaed* or put into the dowry of the woman; the other, that of *ukwenzelelele*, applies to the affairs of men, and is the contribution of one man to another, usually a relation, who is about to take to himself a wife, and requires cattle with which to pay dowry. Both these customs, however, have the same effect, for in the case of each the contributor expects to receive some return for the contribution made by him; in the case of *ukufakwa*, from the dowry of the woman in respect of whom he has been "put in," and in the case of *ukwenzelelele*, from the dowry of the first girl to be born of the marriage in respect of which the contribution has been made.

The point in dispute in this case has been put to the Native Assessors, and they state that under the custom of *ukwenzelelele* the contributor expects a return, and may recover it by action at law, Assessor Bam, however, differing in this respect, that he holds that there is no action at law under this custom, and that should action be resorted to, this would be the destruction of friendship. The Native Assessors further state that there is this peculiarity in connection with the custom of *ukwenzelelele*, that when contributions under it are made to the dowry to be paid

Court and obtained judgment for his three children and a return of three of the dowry paid by him and thereafter Nofelite returned to her first husband, who now claims the three children and also damages for the alleged adultery.

The matter being referred to the Native Assessors they are unanimous that, according to Tembu law, Nqeneka is entitled to the children as they were born of his wife while his marriage with her still subsisted, he having never claimed the return of his dowry, but that no claim lies for adultery as the second marriage, though not legal, was entered into *bona fide* by Mditshwa. With this opinion the Court agrees and the appeal is allowed with costs, judgment being altered to judgment for the Plaintiff for the three children with costs.

Butterworth. 27 March, 1906. A. H. Stanford, A.C.M.

Nosenti vs. Sotewu.

(Willowvale.)

Costs—Absolution Judgments—Set-off.

In an action entered by Nosenti against Sotewu an exception was taken that the costs in a previous action between the same parties, in which a judgment of absolution had been given, were not paid. Set-off was pleaded as the costs of appeal in that case had not been paid. It was stated that the costs in neither case had been taxed. The Magistrate upheld the exception and dismissed the case.

Nosenti appealed.

Pres.:—Section 32, Schedule B, Act 20 of 1856 provides that where the Defendant has been absolved from the instance the Plaintiff may commence a new action for the same cause upon payment of the costs awarded against him. This clearly implies that the costs must be paid before fresh process is issued. In the case of *Smuts* vs. *Poole*, heard in the Supreme Court on the 31st May, 1905, Mr. Justice Buchanan stated:—"All that was required was that the costs must be paid before the case was heard." In this case there had been a tender of the costs before the hearing. The contention by the Appellant's attorney that he could set-off the costs of appeal due to his client in the opinion of this Court is not good, inasmuch as these costs had not been taxed, and until that was done they were not legally recoverable

from the opposite party. It is true that the costs incurred by the judgment of absolution had also not been taxed, but the wording of the Section of the Magistrate's Court Act dealing with the question places the onus of getting the costs paid on the Plaintiff. The cases quoted by the Appellant's attorney in support of his contention do not apply, that of *Duys* vs. *Stoffberg* having been heard in 1828, years before the passing of the Act of 1856, and in the case of *Makubalo* vs. *Mkenya* the previous costs arose out of a criminal action and not from the same cause as that now being dealt with. In the absence of a clear ruling of any Superior Court being shown deciding that the Bill of costs must be taxed and demanded before being pleaded as a bar this Court is of opinion that the provisions of Rule 32 of the Magistrate's Court Act should be strictly followed, and for these reasons the appeal is dismissed with costs.

Butterworth. 27 March, 1906. A. H. Stanford, A.C.M.

Jama vs. Veldtman.

(Butterworth.)

Widows—Seduction and Pregnancy—Damages.

Veldtman sued Jama for damages for causing the pregnancy of his brother's widow, named Sara, whose guardian he was. The Defendant admitted that he was the father of the child, but pleaded that under Native custom he was not liable for damages. At the hearing several Native experts gave evidence on either side as to the custom and the Magistrate came to the conclusion that a fine was payable and awarded £20 damages. He stated in his reasons that he could not agree with the experts' evidence that a widow became a "dikazi" and common property because she happened to lose her husband.

Defendant Jama appealed.

Pres.:—The Court cannot but express surprise that an action of this nature should have been instituted by the Respondent. It is a well known maxim of Native law that damages are not recoverable for intercourse with a widow even though it results in pregnancy. It is marvellous that if such a right of action exists there has not previously been a single case of this kind before the Appeal Courts since their establishment. The appeal is allowed with costs and judgment entered for Defendant with costs.

Butterworth. 28 March, 1906. A. H. Stanford, A.C.M.

Ndevu vs. Bikani.

(Willowvale.)

Medical and Pharmacy Act—Native Practitioners—Recovery of Fees.

Bikani sued Ndevu for one beast or its value, £10, and alleged that at Defendant's request he had attended Defendant's son, who had been gored by an ox, and had dressed the wound and effected a cure. In his evidence he said that Defendant had promised him a beast if he cured his son.

The Defendant admitted that he had called in Plaintiff, but alleged that he had paid him a fee of 5s., which was all that was agreed upon. He further stated that the boy had not been cured by Plaintiff who, he said, had admitted that the case was too difficult for him.

The Magistrate awarded Plaintiff £2 and Defendant appealed.

The following reasons were given:—"Presumably the appeal is noted on the ground that the Plaintiff is not a medical practitioner duly licensed. However, instead of recording an exception on these grounds Defendant's attorney pleads the general issue and thereupon Plaintiff proves a special agreement, showing that the injury was so severe as to endanger life, that if he effected a cure he would be handed the beast that caused the injury, and that he did effect the cure. Defendant's contention is that his son was not cured by Plaintiff, but I believe Plaintiff's version and, considering the latter entitled to some remuneration, reduced his claim from £10 to £2, which, I think, adequate payment for his services.

Pres.:—In view of the clearly-expressed provisions of Section 60 of the Medical and Pharmacy Act, the Court, whilst fully sympathising with the Respondent, must allow the appeal. The case is no doubt a hard one and the action of the Appellant is such as will tend to deprive other sufferers of assistance, but there can be no question that claims of such a nature cannot be recovered in the Courts of these Territories. The appeal is allowed with costs and the Magistrate's decision altered to judgment for Defendant with costs.

Kokstad. 9 April, 1906. R. W. Stanford, A.C.M.

Bokolo vs. Mavune.

(Qumbu.)

Dowry Cattle—Restoration of, on Desertion of Wife—Person to be Sued.

Bokolo sued Mavune for the restoration of five head of cattle which he alleged he had paid to Defendant for his wife. He stated that at the time of the marriage he paid the cattle to Defendant, who represented that he was the woman's guardian. Plaintiff's wife had now deserted him and was living with her brother Silwanyana, her rightful guardian, who refused to allow her to return to Plaintiff until he had received the dowry cattle.

Defendant admitted having received the cattle, but contended that as he had maintained the girl from infancy he was the proper person to receive the dowry. He stated that the cattle paid had all died.

The Magistrate gave judgment for Defendant with costs and gave the following reasons: —

"In this case I held that there could be no action against Defendant, he being merely an agent of Silwanyana, and that, although Defendant received the dowry, Plaintiff should take action against Silwanyana for the return of his wife Cikizwa or restoration of dowry paid. Silwanyana can in turn proceed against present Defendant for the cattle received by him."

Plaintiff appealed.

Pres.:—In this case the Plaintiff claims five head of dowry cattle from the Defendant and the Magistrate entered judgment against him and he now appeals.

From the record it appears that the Plaintiff received a girl named Cikizwa in marriage from the Defendant, paying him five head of cattle as dowry. Subsequently it was found that Defendant is not the girl's guardian and consequently had no right to give her in marriage and receive her dowry, and she left her husband and joined her brother Silwanyana, who is her natural guardian, who will not allow her to return to her husband unless he receives her dowry.

The point to be decided is, who is the proper person to sue the Defendant Mavune—the Plaintiff Bokolo or the woman's guardian, Silwanyana. The Court is of opinion that the Plaintiff having paid the cattle to him, and his wife having left him, he (Plain-

tiff) is the right man to do so, and the appeal is allowed with costs in both Courts, and the Magistrate's judgment is altered to one for the Plaintiff for five head of cattle or their value at £3 each.

Umtata. 18 July, 1906. A. H. Stanford, A.C.M.

Baatje vs. Mtuyedwa.

(Cofimvaba.)

Illegitimate Children—Rights of Inheritance.

Mtuyedwa sued Baatje for a declaration that he is heir of his late father, Mtshauli, and as such entitled to the property of his estate. In his summons he alleged that his father, Mtshauli, had married Defendant's mother, but Defendant was not a son of this marriage and that Mtshauli before his death had twice repudiated the Defendant. Plaintiff therefore claimed the estate and certain three head of cattle which had been handed to Defendant on an Order of Court in a spoliation case.

The Magistrate gave judgment for Plaintiff as prayed and gave the following reasons:—"Plaintiff brings this action to establish his right to the three head referred to on the ground that he is the eldest son and heir of Mtshauli according to Native custom and is entitled to inherit all property of his late father's estate. The evidence of Plaintiff and his witnesses appears to me to be both clear and circumstantial, from which it appears that Defendant is an illegitimate son of Nofasi—Mtshauli's chief wife—born during the period, stated to be about 10 years, that she was away from her husband's kraal and residing with her own people. It is alleged that Defendant was brought to Mtshauli's kraal when his mother returned to it, and lived there up to the date of his marriage, that he was regarded as a younger son of the Chief House, and dowry was paid for him on his marriage. There is ample evidence to prove that at least on two important occasions, viz.: (1) the death of Sigidi, the eldest son of the house, and (2) the occasion of the circumcision of Plaintiff and Defendant, that Mtshauli announced at a meeting of his relatives that Plaintiff was his eldest son and heir and not Defendant, as the latter was not his own son. It is also proved that Mtshauli obtained damages from Ngcuka, the man whom Nofasi admitted was the father of Defendant, for adultery with his wife.

Against Plaintiff's evidence there is but little adduced by Defendant. Two of Defendant's witnesses, sisters of Plaintiff,

contradict each other in more than one important point, and the evidence of Defendant himself and other of his witnesses consists principally of a denial of the evidence of Plaintiff and his witnesses, or an admission of ignorance as to what transpired on various occasions, such as "I never heard that" or "I don't know that." Mr. Walker for Defendant raised an exception to the summons on the ground that this Court had no jurisdiction in such cases, but was overruled after evidence was heard. This Court has such jurisdiction."

Mtuyedwa appealed.

Pres.:—The evidence of the brothers of the late Mtshauli and of his eldest son of the Right Hand House, a man many years senior to the litigants, shows that the Appellant was a son of Mtshauli's Great wife, not by her husband, but born by her during a period in which she was separated from her husband. According to Native custom such a child cannot inherit where there is legitimate male issue of the marriage as in the present case. The appeal is dismissed with costs.

Umtata. 18 July, 1906. A. H. Stanford, A.C.M.

Tshetsha vs. Mavolontiya.

(Engcobo.)

Adultery—Action for Damages by Husband when Tort Committed before Marriage.

Mavolontiya sued Tshetsha for damages for adultery. In the evidence it appeared that Mavolontiya married the woman and immediately after all the ceremonies had been concluded he discovered that his wife was pregnant, whereupon she absconded. Her people admitted that when she was given in marriage to Mavolontiya that they thought she was a vergin. The Defendant admitted having caused the pregnancy, but pleaded she was not the wife of anyone and he was therefore not liable to Plaintiff.

The Magistrate awarded the damages asked for and his reasons were as follows:—"Before giving judgment in this case I obtained the views of the headmen who were present at the hearing, and they stated that, according to Native custom, when a girl is married and it is discovered that she was pregnant at the time of marriage the husband can claim full damages from the person who caused the pregnancy."

Tshetsha appealed.

Pres.:—This case having been submitted to the Native Assessors they state that when a girl is taken by a wedding party in marriage to a man and it is discovered after the dowry has been paid and the wedding party is left that she was pregnant when given in marriage, then the husband has a right of action against the seducer precisely the same as if the pregnancy had been caused after marriage; that when a man concludes a marriage, at the time knowing the girl is so pregnant, he has no such right of action.

In view of this statement of custom the appeal is dismissed with costs.

Umtata. 19 July, 1906. A. H. Stanford, A.C.M.

Ndlanya vs. Mhashe.

(Mqanduli.)

Adultery during Wife's Desertion—Damages not Claimable by Husband when Order of Return of Dowry made.

Mhashe sued Mdlanya for damages for adultery. Plaintiff's wife had gone back to her people and he had obtained a judgment for her return or the restoration of the dowry. The woman had not returned to Plaintiff nor had the dowry been restored. During her stay at her people's kraal and before the judgment referred to was given Defendant caused her pregnancy and was fined a beast by her father. Plaintiff now claimed damages for adultery, but Defendant contended that the marriage had been dissolved and Plaintiff had no right of action. The Resident Magistrate awarded the damages claimed, holding that Defendant had admitted the act of adultery and payment of a beast to the father instead of to the husband.

Ndlanya appealed.

Pres.:—The case having been submitted for the opinion of the Native Assessors they state that when a man enters an action for the return of his wife and gets a judgment for the return of the woman or of the dowry, if the woman does not comply with the order to return the marriage is dissolved: that the re-establishment of the marriage is not substantiated as the woman has not returned to her husband, but is still with her people, and in such circumstances the Respondent has no right of action for acts of adultery committed by the woman while still his wife, the dissolution of the marriage cancelling such claims.

This expression of opinion of the Native custom coincides with the views held by the Court.

The father of the woman has certainly offered to return his daughter to the Respondent, but she has not notified her willingness to comply and has not yet done so, and having in mind her refusal to return to her husband, the Court is of opinion that the marriage has not been revived.

The appeal is allowed with costs, the judgment in the Magistrate's Court being altered to absolution from the instance with costs.

Umtata. 20 July, 1906. A. H. Stanford, A.C.M.

Gqamse vs. Stemele.

(Umtata.)

Adultery—Damages—Legitimatisation of Children—Marriage by Christian Rites.

Gqamse sued Stemele for £50 damages for adultery and for the restoration of seven children borne by his wife, Nosayile, while living with Defendant. The Defendant pleaded (1) that Nosayile was not the lawful wife of Plaintiff as she was married to Defendant by Christian rites; (2) that the Plaintiff, not having brought his action during the subsistence of his marriage, has now no right of action and (3) general issue.

The Magistrate found that Gqamse had married Nosayile by Native custom many years ago and that the dowry paid by him for her had never been returned, that the woman then lived in adultery with the Defendant, who had subsequently married her by Christian rites, thus legitimating the children previously borne, and that the Plaintiff was negligent in not bringing the action earlier. He awarded £15 damages for adultery.

Gqamse appealed on this judgment and Defendant cross-appealed on the award of damages.

Pres.:—According to Appellant's evidence he married the woman Nosayile by Native custom in the Tembu-Gcaleka war (1872). She left him in the year 1880 or 1881 and returned to her own people. The Respondent states he married her by payment of dowry about the year 1884 and by Christian rites in 1899. Had it not been for the latter marriage there is no question that, under Native custom, Appellant would have been entitled to succeed in his claim for the children.

The validity or otherwise of the Christian marriage is a question which this Court has no jurisdiction to determine. Under this marriage by Colonial law the children are legitimatised and consequently the Appellant cannot succeed in his claim for them. The appeal must therefore be dismissed with costs.

On the cross appeal on the damages awarded, the Respondent, Appellant in the cross appeal, admits that when he took the woman he was told that she was Gqamse's wife and he knew therefore that he could not legally marry her according to Native custom. The amount of damages awarded is moderate, the Magistrate having taken into consideration the fact that the Respondent in the cross appeal had known for years and before the celebration of the Christian marriage that the Appellant was living with his then wife and had taken no action. The cross appeal is dismissed with costs.

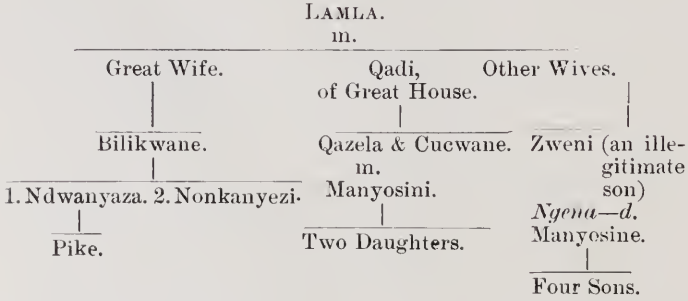
Umtata. 21 July, 1906. A. H. Stanford, A.C.M.

Manyosine vs. Nonkanyezi.

(Ngqeleni.)

Ukungena Custom—Heritable Rights of Children—Status of Ukungena Husband—Pondo Custom—Dowries of Eldest Daughter of Subsidiary House—Widow's Rights.

(In order that this case may be followed the following genealogical tree of the house of Lamla is given:)



Nonkanyesi, as uncle and guardian of the minor Pike, sued Manyosine, widow of the late Qazela, assisted by her "ukungena" husband, for certain property, which he alleged had been

appropriated by her. He alleged that Pike was the great grandson and heir of the late Lamla's Great House, and he claimed two dowries paid for the eldest daughter, named Cucwane, of the Qadi wife of the Great House of Lamla, which had been retained by the late Qazela, heir of the Qadi House. He also claimed the dowry of the eldest daughter of Qazela as well as all increase.

In the evidence it appeared that Cucwane had been twice married and, on the death of her first husband, the dowry was not returned, she having borne children. He (Nonkanyezi) claimed these dowries on the ground that the eldest daughter of the Qadi house became the property, by Native custom, of the Great House, and likewise the eldest daughter of Qazela.

The Defendant Manyosini claimed the property as that of the house of Qazela, the heir of which was the eldest son of her "ukungena" union with Zweni.

The Resident Magistrate gave judgment for 15 head of cattle, being the dowries of Cucwane, and ordered that the remainder of the stock remain with the Defendant for her maintenance.

Manyosine appealed.

In the Appeal Court the following statement of the custom of "Ukungena" was given by the Native Assessors, Chief Mangala, Vela, Mapasa, Gxidido and Jiyajiya:—

Jiyajiya states:—The first word is that a child who is born from an ukungena union does not become heir. If the woman is ngena'd by a younger brother of the deceased man, there being elder brothers, the male issue does not inherit; the inheritance would go to the rightful heir, the eldest brother of his heirs who would have succeeded in the ordinary course, the sons of the ukungena union being treated as younger brothers: the property is not taken away from the widow, they, the cattle, are eaten in that kraal by the heir who, in the disposal of them, consults the widow and the wife married becomes a child of the widow's house: the woman cannot do anything with the property without consulting the rightful heir; the day the rightful heir will get sole control of the property is after the death of the widow. The male issue of an ukungena union becomes the heir when the rightful heir of the deceased man takes his wife and goes into her himself then the male issue of such an ukungena union inherits the property of that house. In cases where there are two widows and the heir of the deceased man were to take the younger woman, and the younger brother the senior wife,

the son of the junior woman would inherit, being the son of the heir. The object of the ukungena custom is to prevent the woman from having children by outsiders so that the offspring shall have the same blood as the deceased husband. To mark an ukungena union the man must be approved of by the relations and an animal slaughtered to cleanse the utensils, the man then has all the rights of a husband, and if he finds another man committing adultery with the woman he has a right of action against him for damages.

Vela states:—Nongidlana went into Ruba's wife, he being the younger brother, five children resulted, two sons and three daughters, the inheritance went to Nonceya, the son of Nohaje. Ruba's elder brother. This case was decided by Ndamas.

Jiyaza ngena'd the wife of Tselu, the result was a son, Sibeko. Jiyaza was younger brother of Tselu. Bangani, a son of Tselu, by a "dikazi" (thus illegitimate), inherited. This case was tried by Ndamas.

Mtyako's wife was ngena'd by Norasi and had a son. Norasi was a cousin of Mtyako. The inheritance went to Mbozani, elder brother of Mtyako. This case was tried by Nqwiliso.

Pres.:—The custom of "ukungena" is one of great antiquity in the Pondo tribe and also obtains with the Bacas and Hlangweni's. It probably originated in former times owing to the preponderance of females over males caused by the frequent inter-tribal wars and the desire to keep the same descent or blood in the families.

Considerable difference of opinion exists with regard to the heritable rights of the children resulting from "ukungena" unions, but the statement of the custom given by the Pondo Assessors in this Court is generally supported by the opinions obtained from Eastern Pondoland; from the latter it is to be inferred that where the deceased man leaves no male issue and seed is raised up by a brother, the issue, being a male, inherits the property of the deceased man.

In the present case several important points have to be decided apart from this question. By Native custom the dowry received for the eldest daughter of a Qadi house invariably goes to the Great House to replace the dowry paid for the Qadi wife of that house. The Respondent, therefore, is clearly entitled to the dowries paid for Cucwane. If Lamla provided the dowry paid when Qazela married from the Great House then that house would be entitled to the dowry paid for his eldest daughter.

We now come to the main issue in the case whether the son of the Appellant Manyosini by her ukungena union with Zweni is heir to the estate of the late Qazela or not. Zweni, according to his own evidence, was not a brother of Qazela of the same house, but an illegitimate son of Lamla by an unmarried woman. He, therefore, has not the status which, in the opinions we have before us, would confer heritable rights on his issue by Manyosini. This being the case the property in the estate of Qazela devolves on the heir of the late Lamla, Pike, who is declared to be heir of all the property left by Qazela, but which, in accordance with the opinion expressed, will still remain in the house of the Appellant, Manyosini, so long as she does not make an improper use of it. The appeal is dismissed with costs.

Butterworth. 30 July, 1906. A. H. Stanford, A.C.M.

Nosenti vs. Sotewu.

(Willowvale.)

Qadi Wives—Seed-bearers—Ubulunga Cattle—Widows' Rights.

Nosenti, widow of the Right Hand House of one Mpiyana, on behalf of the minor Tubeni, heir of the house, sued Sotewu, son of the Great House, for certain property of the Right Hand House. An exception was first taken that Nosenti had no *locus standi*. The Resident Magistrate dismissed this exception and, on appeal (July, 1905), his ruling was confirmed. From the evidence given when the case was continued it appeared that Tubeni was the son of a woman named Noseyi, who had been placed in the Right Hand House by Mpiyana as seed-bearer to Nosenti, who had no male issue. Some of the cattle claimed were the progeny of a beast given by Mpiyana to Nosenti to replace her ubulungu beast, which had died. The remainder of the cattle claimed were dowries received for Nosenti's daughters. The Resident Magistrate's judgment was absolution from the instance with costs and Nosenti appealed.

On the 30th July, 1906, the Appeal Court gave the following judgment: —

The question having been submitted to Headman Veldtman, he states that circumstances may arise in the family which will

lead the husband and father to set aside one of his own cattle for use as an ubulungu beast by a particular house, and that this animal and its progeny then become the property of that house. Also that it is in accordance with Native custom to place a wife in a house as a seed-bearer to the wife of that house without giving this woman so placed the rank of Qadi. The evidence in this case clearly shows that there is property belonging to the Right Hand House of the late Mpiyana and, in the absence of sworn testimony rebutting the evidence produced in the Court below, it should have been accepted by the Magistrate and, as the Respondent elected to stand or fall on the Plaintiff's evidence, this Court would be fully justified in giving judgment for the Appellant for the stock claimed. The appeal is allowed with costs, but in order to give the Respondent an opportunity of being heard in his defence the Magistrate's judgment is set aside and the case returned to him to take the evidence for the defence and to give judgment.

The case was then called in the Magistrate's Court, when the Defendant Sotewu refused to lead evidence on the ground that his legal adviser was not in Court.

The Magistrate thereupon gave judgment for Nosenti, the Plaintiff, and Sotewu appealed.

On the 6th November, 1906, the Appeal Court refused an application to have the case returned for the evidence for the defence to be taken on the ground that the Court had previously as an act of grace returned the case for the purpose and the Defendant Sotewu had deliberately refused to lead his evidence. In dismissing the appeal with costs, the Court remarked as follows:—"The evidence taken in the several actions between the parties shows that the Respondent had certain cattle, being the increase of an animal given to her by her late husband, and it is also clear that there are cattle in the estate of the Right Hand House of Mpiyana accruing from the dowries paid for the daughters of that house, of which the minor Tubeni is the heir; this boy, although he is unable to give the exact details of the cattle, states that they now number 26 head, and there is no reason, in the absence of any rebutting evidence, to discredit his statement."

Note.—Sotewu thereafter moved in the Supreme Court to set aside these proceedings as irregular, but the application was refused. (*Sotewu* vs. *Nosenti*, 27th February, 1907.)

Butterworth. 30 July, 1906. A. H. Stanford, A.C.M.

Maseti vs. Meme.

(Willowvale.)

Marriage Dissolution—How Marked—Husband's Desertion.

Maseti sued Meme for the restoration of his wife or five head of cattle, paid as dowry for her, and also for five head of cattle, being dowry received for his daughter Lahliwe. Defendant admitted the marriage and the receipt of the dowry, but pleaded that about twenty years ago Plaintiff had deserted his wife and daughter and was not therefore entitled to the return of the dowry. He also admitted having received four head of cattle as dowry for the girl Lahliwe, but stated those cattle were dead, except one cow, and that the girl Lahliwe is also dead and that the woman (Plaintiff's wife) was married again. In reconvention he claimed four head of cattle as maintenance and other expenses.

Judgment was given for the Defendant on the ground that by his desertion Plaintiff had forfeited his rights to the woman and child.

Plaintiff appealed.

Pres.:—The evidence shows that for nineteen years the Appellant has allowed his wife to remain away without any effort being made to obtain her return. He is therefore not entitled to much consideration. The woman states that she is now married to another man, who has paid dowry for her; there is, therefore, no probability that she would return to Appellant even if he were to pay more cattle. To mark the dissolution of the marriage the return of one beast is necessary. The Appellant is also entitled to the dowry paid for his daughter, less the usual deductions. The appeal is allowed with costs, the judgment being altered to judgment for Plaintiff for one beast or value, £5, on the claim for the return of his own dowry, and for the brown cow which Defendant admits that he still has of the cattle paid for Lahliwe or its value, £12, and costs of suit.

Butterworth. 31 July, 1906. A. H. Stanford, C.M.

Jumba vs. Dubulukwele.

(Nqamakwe.)

Dowry Restoration—Death of Wife—Division of Dowry

Jumba sued Dubulukwele for the return of his dowry on the ground that six months after his marriage his wife died.

The Resident Magistrate upheld an exception that the summons disclosed no cause of action and Jumba appealed.

Pres.:—Under Native law and custom, where the wife dies shortly after marriage without issue or having borne one or two children only, the dowry or portion of it is recoverable, hence the custom of a father frequently sending another girl to replace his deceased daughter.

There are circumstances under which the dowry is not recoverable, such as death of the wife from child-birth, but the conditions of each particular case govern the number of cattle, if any, to be restored.

As a rule it is not usual for more than half of what was paid to be returned, it being held by Native jurists that the father is also entitled to consideration on account of the loss of his daughter and that such loss should be shared.

The appeal is allowed with costs, the Magistrate's ruling on the exception set aside and the case returned to be heard on its merits.

Butterworth. 31 July, 1906. A. H. Stanford, A.C.M.

Nonafu vs. Pike.

(Nqamakwe.)

Divorce—Dissolution of Marriage at instance of Wife—Jurisdiction—How Dissolution Marked.

Nonafu sued Pike for divorce and in her summons stated that she had married Defendant under Native custom before Rinderpest, that about eight years ago he ill-treated her and finally drove her away. She returned to her people and Defendant had never sought her return. She now desired a dissolution of the marriage.

The Magistrate dismissed the case and gave the following reasons:—

Section 23 of Proclamation No. 110 of 1879 states that questions of divorce in Native marriages celebrated before the promulgation of the Proclamation may be tried before the Resident Magistrate. As this marriage took place long after that date I have no jurisdiction and dismissed the summons.

Nonafu appealed.

Pres.:—Section 23 of Proclamation 110 of 1879 directs how questions of divorce or separation arising between parties married

by the Christian religion or by a Civil Marriage Officer, or entered into by Native custom and registered as provided in the 31st Section are to be dealt with. This Section has, however, since been amended by Act 35 of 1904, and Section 33 directs the manner in which marriages entered into by Native custom prior to the Proclamation coming into force are to be dealt with. The registration of marriages entered into by Native custom as provided for in Section 31 is not compulsory nor are such marriages if not registered forbidden or in any sense prohibited, and the Sections of the Proclamation dealing with marriages make no special provision for their treatment. Excepting for the restrictions contained in Section 32, the jurisdiction of magistrates in the Transkei is unlimited—*vide* Section 23—no express provision having been made with regard to Native marriages entered into subsequent to the promulgation of this Proclamation and not registered it follows that the Magistrates must deal with them under Section 23, and by this Section where the parties to the suit are both Natives he is empowered to determine the suit by Native law. Under Native law and custom a woman married according to Kafir or Fingo forms by payment of cattle as dowry is, upon showing just and reasonable cause, entitled to have such marriage annulled. Native marriages entered into in the manner mentioned are dissolved by the dowry or some portion of it paid by the husband being returned and this can be. and is, frequently effected without the parties coming into Court. Had the Respondent in the present case brought an action against his wife's father for the return of his wife or the dowry paid for her the Magistrate probably would have had no hesitation in adjudicating, and in the present action it is only necessary for him to determine what portion of the dowry the father is to restore in order to annul the marriage. The appeal is allowed with costs, the Magistrate's ruling set aside and the case returned to him to be heard under the provisions of Section 23 of Proclamation No. 110 of 1879.

Butterworth. 1 August, 1906. A. H. Stanford, A.C.M.

Takayi vs. Mzambalala.

(Butterworth.)

Isondlo Custom—Illegitimate Children—Ownership

Takayi sued Mzambalala for the restoration of his daughter and said that about fourteen years ago he caused the pregnancy

of Defendant's daughter and paid a fine of three head of cattle. When the child was about nine years old he alleged he had paid Defendant £3 10s. as maintenance fee.

The Defendant pleaded that he was willing to give up the girl on payment of six head of cattle as "lobola" or "isondla." He claimed these cattle because he had brought up the girl and could only look to her dowry for repayment of the expense. He denied that any money was paid for maintenance and admitted that there was no arrangement between them when the fine was paid as to the ownership of the child.

The Magistrate gave judgment for Defendant and said in his reasons that Defendant was within his rights in claiming isondlo, but in the absence of any agreement that the child should belong to the Plaintiff and the latter not having paid a reasonable amount for maintenance he could not now succeed in his claim.

Takayi appealed.

Pres.:—The Appellant's right to the girl under Native custom is clear and the Magistrate was wrong in giving a final judgment against him. Appellant was not entitled to get the custody of his daughter until he had paid the customary claim for the maintenance of the girl, and the alleged payment of £3 10s., which has not been proved, was not in any case sufficient payment. The appeal is allowed with costs and the judgment in the Magistrate's Court altered to absolution from the instance with costs.

Flagstaff. 6 August, 1906. R. W. Stanford, A.C.M.

Mtuyedwa vs. Tshisa.

(Bizana.)

Marriage Dissolution—Desertion and Re-marriage of Wife—Recovery of First Husband's Dowry—Children of Second Marriage.

Tshisa, representing his father, Mbulawa, sued Mtuyedwa for the restoration of two girls or the dowries received for them From the evidence it appeared that a woman named Mandinja had been married to Defendant's father, Jebeze, and subsequently left him and returned to her people, saying she had been "smelt out." She was then given in marriage to Mbulawa, by whom she had the children in dispute. These girls had gone on a visit to Defendant and he then claimed them and received their dowries

when they married. The woman's first husband—Defendant's father, Jebeze—had not been repaid his dowry when she remarried.

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

Pres.:—Plaintiff in this case claimed from Defendant two girls or twenty head of cattle and the Court ruled that Mbulawa, the father of Plaintiff, is entitled to the three girls he had by Mandinja and to all dowry paid and still to be paid for them and Defendant now appeals.

From the evidence it appears that a woman named Mandinja was first married to one Jebeze, by whom she had a son, Defendant in this case. After living with her husband, Jebeze, for a few years she left him and returned to her people and alleged that she was smelt out and driven away. After remaining with her people some years she was again given in marriage to one Mbulawa, who paid dowry for her and by whom she had several children. Six children appear to have been born to Mbulawa, two of whom, girls, came into possession of Defendant, who refused to give them up on the plea that the woman was his father's wife, the dowry cattle paid by him not having been returned. It has been laid down, however, by the several Native Appeal Courts that when a wife leaves her husband he must take steps within a reasonable time to get her back, and that if he does not do so and the woman is again given in marriage to another man by her guardian, she ranks as wife to the second husband and the former husband loses all claim to her and to the children of the second marriage, but would have a claim against her guardian for the return of the dowry cattle he paid for her.

The appeal is, therefore, dismissed with costs and the Magistrate's judgment sustained.

Flagstaff. 6 August, 1906. R. W. Stanford, A.C.M

Mampondo vs. Congota.

(Lusikisiki.)

Dowry Restoration—Death of Wife in Child birth—Pondo Custom.

Mampondo sued Congota for the restoration of seven head of cattle, being the dowry he had paid to Defendant for his wife. In his summons he alleged that some years previously he had

married Defendant's daughter, that about a year after the marriage she returned to Defendant under the custom of "Ukuteleka" and there died in child-birth. He, therefore, contended that he was entitled to restoration of his dowry.

Defendant stated that the woman died at her husband's kraal in child-birth and pleaded non-liability for restoration of any part of the dowry.

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

The following reasons were furnished by the presiding Magistrate:—"Defendant admits that he received two head of cattle and the Court believes this to be the truth. The only point which the Court had to consider was whether the Plaintiff would be entitled to the return of these two head of cattle or not.

"The Court consequently adjourned the case in order that the Native custom on the point might be ascertained. After consulting several influential Natives, including Headman Bodweni, the Court was informed that in cases of this kind it was a matter of etiquette that the husband should not claim the return of the dowry paid, but that if he did so he would be entitled to a refund of a portion only and that the father of the girl would have preference in regard to the number of cattle paid to compensate for the damages sustained in the loss of his daughter, that if one or two head of cattle are paid as dowry the husband would not be entitled to a refund, but if three were paid then he could claim one beast and the other two would be retained by the father. If four head were paid two would go to the husband and two to the father. If five head were paid then three would be retained by the father and two go back to the husband and so on. As the Court believed that only two head were paid in this case judgment was accordingly given for Defendant."

Pres.:—From the record it appears that some years ago (the time is in dispute) Plaintiff married the Defendant's daughter and alleged that he paid eight head of cattle as dowry for her, and that within a year of the marriage she died in child-birth at her father's kraal. The Defendant contends that only two head of cattle were paid for her about Rinderpest time and that the woman did not die until some four years after and that the death took place at her husband's kraal.

Amongst Gaikas, Fingos and Gcalekas dowry cattle are not returned when the wife dies in child-bed. The Pondo custom,

however, appears to be different and, according to the expert evidence adduced before the Magistrate, should a large dowry have been paid the husband would be entitled to the return of part of it. In this case the Magistrate found that two head only had been paid and, seeing that the evidence and the circumstances connected with it support his finding, the appeal is dismissed with costs.

Flagstaff. 6 August, 1906. R. W. Stanford, A.C.M.

Mangceza vs. Dlangani.

(Tabankuku.)

Marriage Dissolution—Return of Wife after Judgment—Revival of Marriage—Satisfaction of Judgment—Permanent Return.

Mangceza sued Dlangani for the recovery of certain cattle, which had been seized by Dlangani under a writ of attachment, and in his summons stated that the judgment on which the writ was issued had been satisfied. (The judgment in the previous case between the parties was:—"Judgment for Plaintiff for the return of the woman within one month from date, failing which for five head of cattle or their value, £40, and costs of suit.")

Defendant pleaded that although the woman in respect of whom the first action was instituted had returned she remained with him as his wife for only six days and without the intention of remaining permanently.

Plaintiff contended that the return of the woman satisfied the judgment and that the Defendant should have instituted a fresh action for her restoration after the second desertion. He stated moreover that she stayed with the Defendant for two months and not six days as pleaded.

The Magistrate entered judgment for the Defendant with costs, and in his reasons said that the intention of the former judgment was that the Defendant's wife should remain permanently with him as his wife and failure on her part to do so would bring into operation the alternative judgment for the cattle.

Plaintiff appealed.

Pres.:—It appears from the record that in a previous case between the parties to the suit the Defendant obtained judgment against the Plaintiff for the return of his wife within a month,

or her dowry, and the woman returned to her husband's kraal within the stipulated time and remained there for a short while only and then returned to her guardian. Defendant then issued a writ and the alternative judgment was satisfied and Plaintiff now contends that this course was wrong and holds that the woman having returned to her husband the judgment was satisfied.

This Court is of opinion that he is wrong in his contention, as the spirit of the judgment intended that she should remain permanently with her husband, which she failed to do. There is nothing on record to show that her husband was in any way to blame for her second desertion. The appeal must, therefore, be dismissed with costs and the Magistrate's judgment sustained.

Flagstaff. 6 August, 1906. R. W. Stanford, A.C.M.

Dingezweni vs. Ndabambi.

(Lusikisiki.)

"Calabash" Cattle—Isipipa—Pondo Custom.

Dingezweni, assisted by his father, Xoki, sued Ndabambi for fifteen head of cattle. In his summons he alleged that both Defendant and himself were sons of Xoki by the same wife, Defendant being the eldest son, that before annexation Xoki gave to his wife, mother of Plaintiff and Defendant, a certain cow as a "Calabash" beast and this animal increased to fifteen head, that these cattle were, by Native law and custom, the property of the youngest son (the Plaintiff) and that Defendant had possessed himself of them and refused to restore them to Plaintiff.

Defendant stated that only seven head of cattle were in existence and excepted to the summons that the father, Xoki, should have been sued for them.

The Magistrate obtained the expert evidence of Headman Pikane as to the custom and then dismissed the summons. The evidence given was to the effect that the "Calabash" beast and its increase belong to the father and, on his death, they go to the eldest son.

Plaintiff appealed.

Pres.:—In this case the Plaintiff Dingezweni, assisted by his father, Xoki, sued his brother Ndabambi for fifteen head of cattle or their value, £150, and on the case being called for hearing

the Defendant excepted to the summons on the ground that he was not the proper person to be sued. The Magistrate then took expert evidence on the point raised and, on hearing it, dismissed the summons, for what reason is not very clear. The Court takes it, however, that he was of opinion that a "Calabash" beast and her progeny cannot be claimed by a man's son during his father's lifetime. In this case the younger son is assisted by his father, which shows that the elder son, Ndabambi, refuses to surrender certain stock which should most certainly be in possession of the father.

The Headman Pikane is entirely wrong in his views with regard to the "Calabash" or "Isipipa" beast. These cattle are invariably inherited by the youngest son of the house and the elder has no right whatever to retain them.

It is clear that the father Xoki, who should be in possession of the cattle, is willing that the younger son should receive them.

For these reasons this Court is of opinion that the exception must be over-ruled and the appeal is allowed with costs and the case returned to the Magistrate to be heard on its merits.

Butterworth. 6 November, 1906. A. H. Stanford, C.M.

Mfayize vs. Mqukuse.

(Nqamakwe.)

Dowry Restoration—Set-off of Damages for Seduction—Procedure.

Mfayize sued for the return of four head o cattle, which he alleged he had paid to Defendant as dowry on his engagement to Defendant's daughter. He stated that before the marriage could be celebrated the girl died. Defendant admitted payment of three head as dowry, but contended that he was entitled to them as fine for the girl's pregnancy, caused by Plaintiff. He had advised Plaintiff's messengers of the state of the girl and as the fine demanded was not paid he contended he was entitled to retain the dowry cattle as fine. The Resident Magistrate gave judgment for the Defendant and in his reasons said:—

It is a question of law whether Plaintiff or Defendant is entitled to the cattle in dispute. It is clear they were paid by Plaintiff and accepted by Defendant as dowry and it is a question of law

whether in view of the facts Defendant can convert them into a fine for pregnancy. In Native law if a girl for whom a man is paying dowry is discovered to be pregnant by him a fine is demanded in addition to the dowry, and if this marriage had been broken off by either of the parties before the death of the girl the Defendant would have been entitled to demand a fine for the pregnancy of his daughter, and the fact that the girl and her child died in child-birth does not, in my opinion, invalidate Defendant's claim he would have, according to Native law, to a fine, and I therefore came to the conclusion that Plaintiff could not succeed.

Mfayize appealed.

Pres.:—It might have been more in accordance with Colonial procedure had the Respondent formally put in a claim in reconvention for the pregnancy, but he is clearly entitled to three head of cattle as damages for it.

Under these circumstances the Court sees no reason to disturb the judgment and the appeal is dismissed with costs.

Umtata. 1 December, 1906. A. H. Stanford, A.C.M.

Maqukanya vs. Kobesi.

(Mqanduli.)

Marriage—Revival of Great House—Qadi Wives.

This was an action by Kobesi, eldest son of Defendant, for a declaration of rights. He alleged that his father, Maqukanya, the Defendant, had married one Bitshi and the issue was himself and two girls, but Bitshi had died and Defendant then married Nofanti to replace Bitshi as Great wife, that Defendant now sought to depose Nofanti from the Great House and make her the Qadi wife of that house. It was to this proposal that Kobesi objected.

The Resident Magistrate referred the case to Native Assessors for investigation and merely recorded their decision in favour of the Plaintiff Kobesi. The Appeal Court set aside these proceedings as irregular and returned the case to be heard on its merits.

At the re-hearing Defendant stated that Bitshi was his Great wife and when she died the children had been brought up by the

Right Hand wife until he married Nofanti as the Qadi of the Great House. Nofanti's dowry had been paid out of the Great House and when her eldest daughter married it was replaced and then distributed by him, part of this dowry being given to Plaintiff, who had established his own kraal at Cacadu, where all the property of the Great House had been taken.

The Magistrate gave judgment for Plaintiff as prayed and gave the following reasons:—"According to Native custom, when the Great wife is dead then a husband cannot marry a Qadi house before marrying a woman to replace the Great wife. Had this woman Nofanti been a Qadi wife her eldest daughter's dowry would all have been given to Plaintiff, which was not done in this case."

Defendant appealed.

In the Appeal Court the Chief Dalindyebo made the following statement:—"When a wife has left male issue it is not usual to place another woman in that house to revive it. If there is no male issue by the Great wife then this is done. If there is male issue the wife married would be a Qadi. Even if Maqukanya had placed Nofanti in the place of the Great wife there is nothing to prevent him altering that arrangement and making her a Qadi if he considered it advisable."

Pres.:—Where a wife dies leaving male issue it is not customary to place another woman in that house in place of the deceased wife as by reason of the existence of a son the house is not dead, but is represented by the son. Even if the arrangement contended for by the Respondent has been made by the Appellant, which this Court does not believe, there is nothing to prevent Appellant altering that arrangement. If Nofanti was substituted for his mother in the Great House the Court is at a loss to understand why, when Respondent removed to Cacadu with all the property of the Great House, he did not take Nofanti with him. The Court is satisfied that Nofanti would never have accepted a position so detrimental to her own children by which the dowries for all her daughters would have gone to the Respondent, while her own sons would only have ranked as younger brothers to the Respondent. For these reasons the appeal is allowed with costs and judgment in the Magistrate's Court altered to judgment for the Defendant with costs.

Umtata. 4 December, 1906. A. H. Stanford, A.C.M.

Qingqe vs. Mpikilili.

(Ngqeleni.)

Adultery Damages—Headmen—Scale of Damages.

Mpikilili sued Qingqe for seven head of cattle or £70 as damages for adultery.

He established his case and the Magistrate awarded the sum of £30 as damages on the ground of his being a man of rank. Qingqe appealed on the question of the amount awarded.

Pres.:—The question raised in argument is whether the Respondent is entitled to the higher damages awarded to persons holding the rank of minor chiefs. On the matter being submitted to the Pondo Assessors they state that the Respondent is only a common man and entitled only to like damages.

The Respondent in this Court admits that he has no claim to the position of chief. The appeal is allowed with costs but, in reducing the amount of damages, the Court takes into consideration that he is a headman appointed by Government and for this reason not on an equality with common men. The Magistrate's judgment is altered to £20 and costs of suit.

Umtata. 4 December, 1906. A. H. Stanford, A.C.M.

Mfeketo vs. Madondile.

(Ngqeleni.)

Assault—Damages—Criminal and Civil Proceedings.

This was an action for damages for assault. Madondile had been prosecuted for assault and fined £5, out of which £2 10s. was to be paid to Scale Mfeketo as damages. The fine was not paid and Scale then instituted the present proceedings and the Resident Magistrate awarded him £2 10s. as damages, being the amount he would have received had the fine been paid.

Plaintiff appealed.

Pres.:—At Cala, before Mr. Justice Shiel, at the last Circuit Court, an analagous case was heard. In a criminal case tried by the Resident Magistrate there the Magistrate fined the accused £6 and awarded to the Complainant, who had suffered an injury

causing a stiff finger-joint, the sum of £3. It was pleaded in the civil suit for damages that as the Complainant had been awarded and had received compensation in the Magistrate's Court he could make no further claim. The judge ruled that compensation in the Court below could only be taken as in abatement of any claim Plaintiff might have and awarded him the further sum of £25.

This ruling of a Higher Court on an award made under Section 17 of the Penal Code disposes of the argument by the Respondent's attorney that the Magistrate's award was a final settlement. The evidence shows that the Appellant has received permanent injuries and incurred medical expenses in excess of the amount awarded, and this Court is of opinion that he is entitled to heavier damages. The appeal is allowed with costs and the amount awarded by the Magistrate altered to £15 and costs of suit.

Note.—The case referred to is *Gagela* vs. *Ganca*. In the Supreme Court on 29th April, 1907, the judgment of the Circuit Court was confirmed.

Kokstad. 13 December, 1906. R. W. Stanford, A.C.M.

Ramakoala vs. Kapari.

(Matatiele.)

Matlala Custom—Ditsua Stock—Not Recoverable at Law—Basuto Custom.

Ramakoala sued Kapari for the delivery of certain two head of cattle which he alleged were due to him from the Defendant. In his summons he alleged that Defendant was his cousin and had received certain "Ditsua" cattle out of the dowries of his two nieces, and that he (Plaintiff) as head of the family was entitled to two head of cattle, called "Matlala," from this "Ditsua" stock.

Defendant pleaded that the payment of Matlala stock is voluntary and not obligatory.

The Magistrate gave judgment for Defendant with costs, holding that "Matlala" cattle were not recoverable by action at law, being merely a voluntary gift made to the grandparents of a girl or to their heirs out of the dowry received for the girl.

Plaintiff appealed.

Pres.:—In this case Plaintiff claims from the Defendant two head of cattle, which he alleges to be due to him under the "Matlala" custom, and the finding was against him and he now appeals. The point to be decided is whether or not Plaintiff has a legal claim to "Matlala" stock, and seeing that "Ditsua" cattle are not claimable at law, and that George Moshesh, who is now an elderly man, has never had such a case before him, though a chief of some standing, this Court is of opinion that the payment of "Matlala" stock is purely a moral obligation, and cannot be enforced at law, and the Magistrate's judgment is sustained and the appeal is dismissed with costs.

Butterworth. 12 March, 1907. A. H. Stanford, A.C.M.

Mdinga vs. Mxozana.

(Idutywa.)

Seduction Damages—Suicide of Female—Extinction of Claim.

Mxozana sued Peri Mdinga for damages for seduction and pregnancy. It was stated in evidence that after the girl had admitted her pregnancy she committed suicide, but before the usual steps were taken. Judgment was given in Plaintiff's favour, the Magistrate stating that he was satisfied the pregnancy had been caused by Defendant.

Defendant appealed.

Pres.:—The case having been submitted to Native Assessors they state that the girl having committed suicide before the charge had been taken to the Defendant's kraal in the usual way, the Respondent had no right of action; that by the custom of olden time the death of the female under such circumstances extinguished the claim.

The evidence in support of the deceased girl having been pregnant is entirely hearsay, and may or may not be true. The girl's mother states that after the men had questioned her, instead of at once sending her under escort to the Defendant with the formal charge, they went to the lands, which seems unusual if the girl had admitted her pregnancy and throws a doubt on her alleged statement to them. There being no available evidence to prove that the deceased girl was pregnant and by the Defendant Peri Mdinga, and in view of the opinion expressed by the Native

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

Butterworth. 12 March, 1907. A. H. Stanford, A.C.M.

Poni vs. Memani.

(Idutywa.)

Estates—Distribution of Property during Lifetime of Father.

Memani had obtained a judgment against Hlaba and certain stock was seized. Poni thereupon claimed these cattle as his property as being devised to him by his late father, Mtomboti. From the evidence in the interpleader action which ensued it appeared that Hlaba was the eldest son of the Great House of the late Mtomboti and Poni was his younger brother of the same house. Cetyana was the son of the Qadi wife of this house and had died, leaving a widow and two children and some stock. The late Mtomboti had married one of his other wives by Christian rites, and at the time made a distribution of his property in the presence of his family. The sons of the different houses were given property and they removed from Mtomboti's kraal. After Cetyana's death, Poni alleged, his father called another meeting of the family, and gave to Poni Cetyana's family and property on the ground that at the first distribution he had received nothing. The stock now seized formed part of Cetyana's estate and Memani, the interpleader Respondent, claimed that they became the property of Hlaba on Mtomboti's death.

The Resident Magistrate declared the property executable and gave the following reasons:—"All are agreed that Hlaba is Mtomboti's heir, and that Cetyana is the son of the Qadi of Hlaba's house. The property left by Cetyana is therefore Hlaba's."

Poni appealed.

Pres.:—The evidence discloses that the late Mtomboti, immediately before or at the time he contracted his Christian marriage, distributed his estate amongst his several houses, giving his eldest son Hlaba all the property of the Great House, from which it is to be inferred that it was his intention that Hlaba should have no further claim on him or his estate. Appellant's con-

tention that his father subsequently, at a meeting of the members of the family and near relations, gave him the family and stock of Cetyana is strongly supported by a number of witnesses, and there is nothing in such a disposition inconsistent with Native law. The Magistrate in his reasons has given no opinion on this evidence, but bases his decision entirely upon a legal point, viz., that Hlaba, as the Great son of Mtomboti's principal house, is entitled to succeed to any property left by Mtomboti, but this Court is of opinion that he has not sufficiently considered the very strong evidence that Mtomboti disposed of the property in Cetyana's estate during his lifetime. For these reasons the appeal is allowed with costs and judgment in the Magistrate's Court altered, the property being declared not executable.

Umtata. 25 March, 1907. A. H. Stanford, A.C.M.

Namse vs. Notywaku Ndatana.

(Engcobo.)

Dowry Restoration—Marriage of Widows—Recovery of Original Dowry.

Namse, heir of the late Maqayiya, sued for the return of six head of cattle which were paid as dowry for his late father's wife. Defendant's attorney contended that there was no action known under Native law whereby it is competent for an heir to sue for the dowry paid to her relatives for his late father's wife on her re-marriage after the death of her husband, the proper course being to sue for the dowry originally paid by the father. Namse claimed that either dowry was recoverable and declined to amend his summons. The exception was upheld and the case dismissed.

Plaintiff appealed.

Pres.:—The Appellant has mistaken his action. On the re-marriage of a widow the heir of a deceased husband can claim the return of the dowry paid by such husband subject to the usual deductions, but has no right of action with regard to the dowry paid by the second husband. The appeal was dismissed with costs.

Umtata. 25 March, 1907. A. H. Stanford, C.M.

Conana vs. Dungulu.

(Engcobo.)

Adultery—Divorce on the Grounds of—Repudiation of Wife—Dowry not Recoverable—Passing of Cattle.

Dungulu sued Conana for eight head of cattle and the delivery of his daughter, and in his plaint said that he had married his wife—Defendant's sister—in 1897, paying 11 head of cattle as dowry for her, that during 1906 his wife committed adultery, and that by reason of this adultery he was unwilling to have her as his wife. He therefore asked for the restoration of his dowry.

Defendant admitted the marriage and receipt of seven head of cattle as dowry. He also admitted that adultery took place, but alleged that four head of cattle had been paid to Plaintiff by the adulterer, and consequently Plaintiff has condoned the adultery.

In his evidence Plaintiff said that he turned his wife away because of the adultery, but admitted that the fine was paid before he sent away the woman to her people.

The defence was that Plaintiff had himself brought his wife to her people and discarded her, but the woman objected to a dissolution of the marriage.

The Magistrate's reasons and judgment were as follows:—

Maclean's Compendium, pages 72 and 73, says:—"Husband cannot demand dowry if his wife has borne him children": page 119: "No legal process for divorce, a man may repudiate his wife for any reason. If a wife leaves her husband he can reclaim his dowry." It would seem that while a man may divorce his wife for the most trivial reason he cannot claim back his dowry, especially if his wife has borne him children, but as it has been repeatedly laid down that a marriage cannot be dissolved without the passing of cattle it will follow that in order to grant a divorce Plaintiff must be given some cattle. The Court finds that 10 head were paid as dowry and that two children were born of the marriage. Deducting two for the children and one for the outfit will leave seven head. But as Plaintiff is repudiating his wife, who has borne him children, he is not entitled to the balance after making deductions. To mark the dissolution of the marriage or extinguishing the house the Court will order the return of three head of cattle or £30 and declare the marriage dissolved with costs. The child belongs to Plaintiff.

Conana appealed.

Pres.:—This case being the first of this nature which has come before the Appeal Court the question at issue was submitted for the opinion of the Native Assessors. They state that adultery on the part of the wife is not a sufficient cause for the dissolution of the marriage, but the husband may, if he wishes, repudiate his wife, but if he does so he is not entitled to the dowry paid by him. This opinion follows the well-defined principle of Native custom that if the husband rejects or drives away his wife or so ill-treats her as to make it impossible for the woman to live with him he is not entitled to recover the dowry paid. The appeal is allowed with costs and the judgment in the Magistrate's Court altered to judgment for the return of one beast or its value to mark the dissolution of marriage and costs of suit.

Umtata. 26 March, 1907. A. H. Stanford, A.C.M.

Luvukuvu vs. Mbambanduna.

(Umtata.)

Interpleader Action—Jurisdiction—Procedure.

This was an appeal in an interpleader action and Mbambanduna's attorney in the Court below raised an exception to the jurisdiction of the Court in that the writ was issued at Engcobo, where the original case was tried and, although property was seized in the Umtata District, the Applicant Luvukuvu should have proceeded in the Engcobo Court.

The Magistrate upheld the exception and Luvukuvu appealed.

Pres.:—The issue raised in this appeal has already been ruled upon in the case of *Wille* vs. *Sakavula*, heard at Butterworth on the 14th November, 1899, and in other cases. Section 68 of Schedule B, Act 20 of 1856, states in clear terms that the interpleader action shall be heard in the Court of the Resident Magistrate out of which such process issued, and the Court, following the ruling of the Chief Justice in the case of *Van Wezel* vs. *Foster* (4 Juta, 382) supported that principle.

In the present case the process issued from the Court of Engcobo, the Umtata messenger in attaching the property in dispute acted as deputy of the Engcobo Court Messenger, and the claim by the Appellant should have been reported to the Resident Magistrate of Engcobo.

At first sight this may appear to inflict hardship on the claimant of the stock seized, but when it is considered that he can sue the Messenger who took his property for the recovery of the stock attached, and need not resort to the interpleader process, the hardship disappears.

The appeal is dismissed with costs.

Kokstad. 15 April, 1907. R. W. Stanford, A.C.M.

Maria and Solomon Mbono vs. Sifuba.

(Qumbu.)

Marriage Dissolution—Forfeiture of Dowry—Disherison of Sons—Maintenance.

Maria Mbono and her son Solomon sued Defendant Sifuba to show cause why he should not be ordered to establish a kraal for them, and provide stock for their maintenance. In the summons it was stated that Maria was Defendant's Great wife and Solomon was the only son of the marriage: that she had been compelled to leave Defendant and was now supporting herself; and that the stock of the Great House should be handed over for their support.

Defendant pleaded that the woman should look for maintenance to the person who received her dowry, which was 13 head of cattle, and that Solomon had no claim on him as, for his repeated misconduct, he had expelled him from his kraal.

The Magistrate gave judgment for Defendant with costs.

Plaintiffs appealed and asked for a ruling as to whether Defendant had a right to discard his Great wife after she had children and at the same time disinherit the son of the Great wife.

The Magistrate in his reasons remarked the Defendant was prepared to forego the dowry paid by him for the woman.

Pres.:—It appears from the record that the parties simply want a ruling on the point raised in the pleadings as to whether or not, under Native law, a husband can discard his Great wife and disinherit his son. This Court is of opinion that a Native husband can refuse to keep his Great, or any other wife, provided that he is willing to forfeit the dowry cattle he paid for her, and it is also of opinion that a father may disinherit any of his sons on showing good cause for so doing at a public meeting of

the Chiefs and people of his clan. In this case no just cause to disturb the Magistrate's finding has been shown, and the appeal is dismissed with costs.

Kokstad. 15 April, 1907. R. W. Stanford, A.C.M.

Talase vs. Mfanta.

(Qumbu.)

Inheritance—Illegitimate Children—Pondomise Custom.

Mfanta sued Talase for the restoration of certain property which he (Plaintiff) claimed in the estate of the late Nqatshana. In his evidence he stated that his mother was Nqatshana's wife; that Nqatshana was not his father; that he was born at Nqatshana's kraal, but after his death; and that Defendant became his guardian and had appropriated the property.

Defendant contended that Plaintiff was illegitimate and that he, as the brother of Nqatshana, was the heir and entitled to the property.

The Magistrate gave judgment for the Plaintiff and furnished the following reasons:—

"In this case I understand the appeal is based on the point that Mfanta, being an illegitimate son of Nqatshana's wife, born after his death, could not be heir to his estate. My own knowledge of Pondomisi law is that in the absence of any other male issue, such son succeeds to his father's estate, and in that view I was confirmed by Pondomisi Headmen who were in Court."

Defendant appealed.

Pres.:—From the record it appears that a Pondomise, named Nqatshana, died some time back and left no son, and that after his death his widow gave birth to a son, the Plaintiff in this case, and the point to be decided is whether or not he can inherit the property of his mother's hut, seeing that he was not begotten by his reputed father—the deceased Nqatshana.

The Magistrate, who consulted some of the Pondomise Headmen, found that under their custom he could so inherit and this Court sees no just cause to disturb his finding, and the appeal is dismissed with costs.

Kokstad. 15 April, 1907. R. W. Stanford, A.C.M.

Tshobisa vs. Gugushe and Ntantiso.

(Matatiele.)

Dowry Cattle—From whom Recoverable—Agency.

Tshobisa sued Gugushe and Ntantiso for the restoration of his wife or the dowry paid for her. In his summons he alleged that the late Pikinini, father of Gugushe, had received the dowry as agent for Ntantiso.

Gugushe excepted to the summons that as the father only acted as agent of Ntantiso there was no case against him.

Defendant Ntantiso pleaded that one Ntsali, the brother of the woman in question, was the proper person to be sued, as he should have received the dowry for the woman from Pikinini. He denied ever having authorised Pikinini to receive the dowry and, moreover, he was absent from the district for many years, both before and after the marriage.

Plaintiff in his evidence stated that he paid the dowry to Pikinini as agent for Ntantiso, who was away. It was represented to him that the woman was the daughter of one Njavuta, whose heir Ntantiso was.

The Magistrate upheld the exception and plea and dismissed the case.

Plaintiff appealed.

Pres.:—In this case the Plaintiff claims from the Defendant his wife, Nooffice, or the dowry he paid for her, six head of horned cattle and a horse, and on the case being called the Defendant Gugushe excepted to the summons on the ground that it disclosed no cause of action against him, as section 5 thereof shows that his late father, Pikinini, was acting as agent for Ntantiso, the second-named Defendant, and this exception was sustained by the Magistrate. The Defendant Ntantiso then filed a plea, which is to the effect that the summons should be dismissed on the ground that he had never authorised the late Pikinini to receive dowry on his behalf and that one Ntsali is the proper person to be sued. The Magistrate then took some evidence and, after doing so, dismissed the summons with costs and the Plaintiff now appeals.

After hearing the arguments, the Court is of opinion that the Magistrate was wrong in allowing the exception, seeing that the dowry was paid to the late Pikinini, whose heir would be liable

to Plaintiff in regard to the dowry if his late father falsely represented matters in reference to the girl Nooffice. If exceptions and pleas of this nature were allowed the Plaintiff would be referred from one member of the family to another until his substance was wasted before his claim could be heard. Under Native law a man has the right to claim dowry cattle from the person to whom he handed them, and it is for that person to show that he is not responsible for their return.

The appeal will be allowed with costs and the Magistrate's ruling set aside and the case sent back to be decided on its merits.

Kokstad. 15 April, 1907. R. W. Stanford, A.C.M.

Matshana vs. Noju and Mfanonina.

(Umzimkulu.)

Dowry—Agreement to Pay—Hlangweni Custom.

Matshana sued Noju and Mfanonina, of the Hlangweni tribe, the former as responsible for the dowry of the latter, for certain cattle, being the balance of dowry due for his daughter, whom second Defendant had married. In his summons he alleged that six head had been paid and that as regards the balance Defendant undertook to hand over the dowry to be received for one of his daughters; that nine head had been paid on account of dowry for her, but these Defendants refused to hand over. He, therefore, claimed that Defendants pay him nine head and that an order be granted declaring him to be entitled to the balance to be paid for Defendant's daughter. In the alternative he claimed 24 head of cattle, which is the fixed dowry under Hlangweni custom.

The Magistrate granted absolution and in his reasons said that the alleged agreement was not proved and that there was nothing to show that the Hlangweni custom is recognised.

Plaintiff appealed.

Pres.:—The point at issue is whether or not balance of dowry can be claimed under Hlangweni custom where no contract is proved, and the Court is of opinion that there is no such Hlangweni custom and that the Magistrate was right in his finding, and the appeal is dismissed with costs.

Butterworth. 8 July, 1907. W. T. Brownlee, A.C.M.

Tole vs. Ndumiso.

(Willowvale.)

Dowry Restoration—Fine merged with Dowry—Repudiation of Marriage—Fingo Custom.

Ndumiso sued Tole for the restoration of three head of cattle, which he alleged he had paid to the Defendant on his claim for them as damages for causing the pregnancy of his (Defendant's) daughter. He asserted that after the payment of this fine he went away to work and on his return found that no child had been born. On this ground he claimed the return of the stock paid as damages.

The Defendant denied that he ever claimed or received payment of any stock as damages for pregnancy, but he admitted the receipt of two head of cattle—one for the abduction and one for the seduction of his daughter—and seven goats as dowry.

The Magistrate ordered the restoration of the seven goats and gave the following reasons:—

In his plea the Defendant admits that he received two cattle for the abduction and seduction of his daughter and seven goats towards dowry. By law, the goats having been received as dowry, the cattle paid as fine also became dowry. I know of no hard and fast rule as to when a Native marriage in accordance with heathen rites may be considered consummated. Dowry having been paid and received for the girl she was by law, prior to the institution of this action, to all intents and purposes Ndumiso's wife, but this institution must be taken as a desire on Ndumiso's part to cancel the marriage or intended marriage, and cancellation of marriage becomes legal only upon cattle passing back from the father of the girl to the husband. Hence my judgment that the father retain the two cattle for the abduction and seduction, but return the seven goats.

Tole appealed.

Pres.:—In this case the Magistrate in the Court below finds that part of the stock paid was paid as fine, yet when subsequently seven goats were paid they were paid as dowry. In this finding the Court concurs. In the case of *Nojiwa* vs. *Tuba* it is, however, laid down that where a suitor breaks off his proposed marriage he is not entitled to recover any portion of the dowry paid by him.

and applying the judgment in that case here this Court is of opinion that Appellant, who is a Fingo, is entitled to succeed. The appeal is allowed with costs and judgment altered to judgment for Defendant with costs.

Butterworth. 9 July, 1907. W. T. Brownlee, A.C.M.

Ndabeni vs. Tingatinga.

(Willowvale.)

Dowry Restoration—Dissolution of Marriage—Ukuteleka Custom.

This was an action by Tingatinga for the restoration of his wife or the dowry paid for her. The Defendant admitted the marriage and payment of the dowry and that the woman was with him, but he pleaded that she was there under the custom of Teleka. The Plaintiff said he was unable to pay further dowry. Judgment was given for the return of the woman or the cattle, less one for dissolution of marriage, which the Magistrate in his reasons stated was tantamount to the payment of the teleka fee.

Ndabeni appealed.

Pres.:—The Court is satisfied that the defence set up was a good one. The custom of impounding, or "ukuteleka," a wife is a well recognised one and is the only one under which a father may enforce payment of dowry should a husband be dilatory in doing so; it is also a means under which the father may obtain redress for any wrong which may be inflicted upon his daughter by her husband. In this case five head of cattle were paid as dowry, and Appellant cannot be regarded as being exorbitant in his demand when he asks for more, and in the opinion of this Court the Respondent's reply that he is unable to pay more is under the circumstances not sufficient, and that his inability to pay does not provide grounds for dissolution of marriage. The appeal is allowed with costs.

Butterworth. 9 July, 1907. W. T. Brownlee, A.C.M.

Siwangobuso vs. Ngindana.

(Willowvale.)

Interpleader Suits—Xqoma—Ubulunga Custom.

Siwangobuso interpleaded for a certain cow which Ngindana had caused to be seized in execution of a judgment obtained

against one Gamnca. The animal had been seized at Gamnca's kraal and the interpleader claimant alleged that it was one he had lent to his sister, the wife of Gamnca. The defence was that the animal was an "ubulunga" beast and therefore executable.

The Magistrate found that the beast was executable and gave the following reasons: —

The onus of proving that the beast belonged to him is on the Plaintiff. The evidence he produces is very contradictory. In the case of "Nqoma" it is well known that no owner allows his beast to leave his kraal without first having placed his mark on it. This the Plaintiff never did. It is also the duty of the person to whom it is nqoma'd to report any increase or decrease in its progeny, and with regard to this question the Plaintiff and his witnesses give different versions. Plaintiff's story was so often contradicted by his own witnesses that I was not inclined to believe him.

Siwangobuso appealed.

Pres.:—In this case the property claimed by the Appellant, the Plaintiff in the Court below, is described as being a loan under the Native custom of "Nqoma." The Magistrate in the Court below has come to the conclusion that the property was not Nqoma, but he does not say what he considers it to be, Nqoma or Ubulunga. It must be the one or the other. Appellant and his witnesses say it was Nqoma, and though there may be discrepancies in their testimony yet there is no evidence of any sort on the other side to contradict the statement made by them. The Defendant does certainly say the animal in question was an ubulungu beast, but he goes on to say this is only hearsay and this being so the only evidence before the Court as to the nature of the animal in question is that of Plaintiff and his witnesses and, in the absence of any contrary evidence on the other side, should have been accepted. The Court, though very reluctant to interfere with any finding upon fact, is of opinion that the Magistrate has erred in his decision and that the Appellant is entitled to succeed. The appeal is allowed with costs and the cattle are declared not executable.

In answer to questions put by the Court, the Assessors state that an ubulungu beast is liable to attachment for the debts of the husband. In case of dissolution of marriage the ubulungu beast follows the woman. If the husband disposes of it he has to make it good on dissolution of marriage.

Butterworth. 10 July, 1907. W. T. Brownlee, A.C.M.

Tshaka vs. Buyesweni.

(Idutywa.)

Dowry Restoration—Stock Killed at Ceremony of Marriage—Allowance or Set-off—Ubulunga Cattle.

Buyesweni sued Tshaka for the restoration of his wife or the dowry paid for her.

It was admitted that 13 head of cattle was the dowry paid and the evidence of the wife showed that 10 children were born during the subsistence of the marriage, of whom three were still alive. The Defendant stated that two cattle were killed at the wedding feast and an ubulunga beast was afterwards given to the woman and he claimed a set-off of these.

Judgment was given for Plaintiff for nine head of cattle and Defendant appealed.

The Magistrate furnished the following reasons:—"The appeal is on the grounds that no deduction has been made from the dowry for expenses incurred by the Defendant at the wedding of his daughter to Plaintiff and for the ubulunga cattle he alleges he gave to his daughter. With regard to the expenses incurred at the wedding no allowance is ever made for the other side incurs equal if not greater expense. With regard to the ubulunga cattle, these belong to the woman and she may put in her claim for them. Again, it is not proved satisfactorily that there are any of the progeny of the ubulunga cattle in Plaintiff's possession.

Pros.:—Substantial justice appears to have been done. The appeal is apparently on the point that no allowance has been made by the Magistrate in his judgment for cattle said to have been killed by the Appellant for the wedding party or for ubulungu cattle given by him to his daughter.

With regard to compensation for cattle killed, though this appears at one time to have been customary, yet this custom is one which is not now observed and the Court does not feel itself justified in ordering that it shall be done in this case.

With regard to the ubulungu cattle, while it is quite competent for the father in paying out dowry cattle upon dissolution of marriage to claim the return of any ubulungu cattle given by him to his daughter, it is yet necessary to prove what number of these cattle are in existence, and in this case there is no evidence

upon this point. The Magistrate in the Court below therefore rightly refused to give any decision upon the point, but left it a matter open to settlement upon any claim to be brought forward by the Appellant, and to which the decision in this case is no bar. The appeal is dismissed with costs.

Butterworth. 10 July, 1907. W. T. Brownlee, A.C.M.

Nogqala vs. Kohliso.

(Butterworth.)

Ubulungu Cattle—Giver entitled to receive Dowry—Created Relations—Umhlobo.

Kohliso sued for the return of a certain heifer and its increase, which he alleged he had paid to Defendant on his representation that he was sent by his wife's relatives to demand more dowry. The Defendant pleaded that some time before he had given Plaintiff's wife an ubulungu beast, and the beast now in dispute was the one paid to him by Plaintiff to replace it. In evidence it appeared that Nogqala was the cousin of Plaintiff's wife and he had given her the ubulungu beast on her statement that her father had no cattle.

The Magistrate ordered the return of the heifer and its increase on the ground that the beast sued for was dowry, to which the Defendant had no claim, and that the husband could not be held liable to repay ubulungu cattle.

Pres.:—The Native Assessors state that it is quite permissible under Native custom for any married woman to go to a friend—whether related to her father or not—in the event of her father having no cattle, and ask for an ubulungu beast. Should such friend give her an ubulungu beast, he then, if not a blood relation, becomes a relation or, as the Native has it, "umhlobo." This person is then entitled to go and demand dowry from the woman's husband, and such dowry, if paid, belongs to him. In the event of the dissolution of the marriage of the woman and return of dowry, such person, if not a blood relation, would not have to return the dowry paid to him, if however he were a blood relation he would have to return the dowry—as he is a brother—but not its increase. There is thus a distinction drawn between the man who is a blood relation and the one who is not.

In this case the Magistrate in the Court below seems to have come to the conclusion that the animal given to the woman was given as ubulungu, and in this view the Court concurs. It seems clear, however, that the gift of such a beast entitles the giver to obtain and hold dowry, and the Appellant is thus entitled to retain the animal handed him by Respondent, and its progeny, and that the only circumstance under which he could be called upon to refund would be that of the dissolution of the marriage between the woman and the Respondent. The appeal is, therefore allowed with costs and judgment altered to judgment for Defendant with costs.

Umtata. 22 July, 1907. W. T. Brownlee, A.C.M.

Somdaka vs. Tshemese.

(Elliotdale.)

Seduction—Right of Action by Father after Marriage of Girl.

Tshemese sued Somdaka for damages for seduction and pregnancy. In the course of the evidence it appeared that, subsequent to the seduction, the girl had been married to another man, who was aware of her condition at the time. The Defendant's attorney thereupon asked for a dismissal of the case as the Plaintiff, having married his daughter, has no cause of action. The Magistrate held that Plaintiff, having taken action before arranging the marriage of his daughter, did not part with his right of action. On the merits of the case he gave judgment as prayed, and in his reasons said:—"The ground for appeal appears to be the attorney's contention that Plaintiff, having married his daughter shortly before the birth of the child, parted with his right of action. I am not, however, aware of any such custom. The Plaintiff took action against Defendant, who promptly went to work, before any marriage was arranged and even before the girl was asked for, and, as he pointed out, her value was much depreciated and her dowry much smaller than it would have otherwise been. Defendant went away in October and only returned in March on learning that the girl was married."

Somdaka appealed.

Pres.:—In this case the only point raised in appeal is whether the Respondent—the Plaintiff in the Court below—is entitled, in

view of the marriage of his daughter subsequent to the alleged action, to recover damages.

The case having been submitted to the Native Assessors they express their opinion that he is entitled under the circumstances to recover damages.

The appeal is dismissed with costs.

Umtata. 23 July, 1907. W. T. Brownlee, A.C.M.

Langa vs. Malandela.

(Elliotdale.)

Provisional Judgment—Re-opening—Time Limit—Levy.

Malandela applied for the re-opening of a provisional judgment, but Langa's attorney excepted on the ground that the time limit had passed, it being argued that the Messenger's return of *nulla bona* amounted to a levy, and as some four months had passed since the date of that return it was not now competent to move for a re-opening. The Magistrate allowed the case to be re-opened and gave the following reasons:—

A writ was issued on the 15th November, 1906, the terms of which, *inter alia*, are:—"You caused to be levied or raised the debt and costs." The Messenger was unable to raise or levy anything and made a return of *nulla bona*. The application was opposed on the ground that the mere issue of a writ is tantamount to a levy, but this is an illogical and incorrect, as well as a very narrow, interpretation of the term levy, and the test in the present case as to there being no levy is a very simple one. There being a return of *nulla bona*, the levy has yet to be made, for which purpose an *alias* writ can at any time be issued and the debt levied and raised, and the Defendant would then be entitled —one month after levy—to re-open the case as decided in *Van Heerden* vs. *Vorster* (2 J. 408). The terms of Rule 29, Act 20 of 1856, are obviously even wider than the above-quoted case, as the Supreme Court has decided where "Provisional judgment obtained by default and *judgment satisfied* Plaintiff ordered to go into the principal case, where Defendant entered appearance to defend" (Buchanan, Part 3, 1895, page 97). On these clear legal grounds, apart from those of equity and justice, I gave judgment for the provisional judgment to be set aside and the case re-opened and gone into on its merits.

Pres.:—Section 29, Schedule B, Act 20 of 1856, says:—Defendant may at any time within one month after levy made under any writ . . . take out a summons, etc. The terms of the writ are " . . . that you cause to be levied and raised the debt and costs." It thus becomes necessary in this case to define the meaning of the word levy, and in Chamber's Dictionary the word levy is thus translated: "To raise: to collect by authority, as an army or a tax." This Court is of opinion that in this case there has been no levy within the meaning of the Section 29, above quoted, and that the Respondent is, therefore, not barred.

Umtata. 26 July, 1907. W. T. Brownlee, A.C.M.

Gotywa vs. Isaac Jiba.

(Ngqeleni.)

Children—Restoration after Dissolution of Marriage—Isondlo.

Isaac Jiba sued Gotywa for the restoration of his two children. He stated in his summons that some months previously he had obtained a judgment against Defendant for the restoration of his wife or her dowry, one beast being deducted for each child of the marriage, and that the Defendant restored the dowry as adjudged, but refuses to restore the children.

Defendant pleaded that he was willing to restore the two children provided maintenance fees were paid.

From the evidence led it appeared that the children were aged seven years and one year respectively and that Defendant had supported them for the time he had detained Plaintiff's wife under the custom of ukuteleka.

The Magistrate ordered the restoration of the children, the younger to be handed over when three years of age, and said that he considered Defendant himself was responsible for their detention and could not, therefore, claim any maintenance fees.

Gotywa appealed.

In the Appeal Court the Native Assessors made the following statement:—In cases of this kind, if a woman runs away secretly and goes to her people, the husband is not compelled to pay maintenance unless he wishes. He may do so if there is an agreement and it has been arranged between them that the father-in-law is to maintain the son-in-law's children. Should the woman

have been allowed by her husband to go to her friends and then has a child, the husband sends a beast to support the child, but if the woman goes away secretly no beast is sent. If in every case we had to pay cattle when a woman goes to her friends no one would own cattle.

The appeal was dismissed with costs.

Kokstad. 12 August, 1907. R. W. Stanford, A.C.M.

Tala vs. Elliot Matobane.

(Mount Fletcher.)

Dowry—Marriages in Colony—Enforcement of Contract.

Tala sued Elliot and Pitso, the former as guardian of Pitso, for certain cattle, being the balance of dowry due by Pitso in respect of a marriage entered into by him with Plaintiff's sister. The Defendants were in default and provisional judgment was granted. Elliot thereafter re-opened the case and pleaded that as the marriage was entered into in the Colony neither of Defendants were liable for dowry, and that in so far as he (Elliot) was concerned he was not the guardian of Pitso, nor was he consulted by Pitso with regard to the marriage, and he was not, therefore, liable in his representative capacity.

The Magistrate gave judgment for Elliot and Tala appealed.

In his reasons the Magistrate stated that he gave judgment for Defendant on the ground that the marriage by Native custom having been entered into in the Colony proper, where such marriages were not recognised, the payment of the dowry could not be enforced in the Territories. He quoted the case of *Ngqobela* vs. *Sihele*.

Pres.:—From the record it appears that some little time back the Defendant, Pitso Matabane, was married to Plaintiff's sister Nkabo in the Colony and paid part of the dowry which her guardian asked for her. After the marriage, Pitso returned to the Mount Fletcher District, and now resides there, and the Plaintiff's claim is for the balance of the dowry.

On the 22nd day of January, 1907, provisional judgment was entered in his favour, and on the 11th April, 1907, this judgment was set aside in regard to Defendant, Elliot Matabane, and the case was re-opened to be decided on its merits, when it was held

that the Defendant, Elliot, was not liable to Plaintiff for the stock claimed, and the Magistrate based his finding on the fact that Pitso's marriage took place in the Herschel District, which is part of the Colony proper, and that the Supreme Court has ruled that any promise in regard to the payment of dowry cattle cannot be enforced in the Courts of the Colony.

After hearing the arguments and carefully considering the point, this Court cannot agree with the Magistrate's reasons for judgment and holds that all cases arising between Natives residing in the Territories must be decided in accordance with the laws and customs which obtain there.

As regards Elliot's liability to Plaintiff, in his capacity as guardian to his younger brother Pitso, this Court is of opinion that it has been fully proved that he was not a party to the marriage and that Pitso was not residing at his kraal when he negotiated with Plaintiff for his sister and that, therefore, he cannot be held responsible for the stock claimed.

The appeal is dismissed with costs.

Kokstad. 12 August, 1907. R. W. Stanford, A.C.M.

Madevana vs. Kuna.

(Umzimkulu.)

Widow's Re-marriage—Restoration of Dowry—Receipt of Dowry by Heir.

Madevana sued Kuna for the restoration of certain cattle, being the dowry paid by his father to Defendant for his wife, Defendant's sister. He alleged that he was the heir of his late father, that the widow lived at her husband's kraal for some time after her husband's death and then went to live with a man named Nozatu, who paid a fine for causing her pregnancy.

Defendant pleaded not liable, as Plaintiff had received dowry for the woman in question.

The Magistrate gave judgment for Defendant, finding that Plaintiff had received dowry for the widow and was, therefore, not entitled to claim a refund of his father's dowry, especially as the Defendant had never been consulted as regards the second marriage.

Plaintiff appealed.

Pres.:—In this case the Plaintiff claimed from the Defendant 14 head of cattle or their value and the finding was against him, and he now appeals. It appears from the record that some years ago the Plaintiff's deceased father was married to the Defendant's sister, Marubela, and that after her husband's death she remained with her husband's people under the guardianship of the Plaintiff. Some little time back she left the Plaintiff's kraal and went to live with one Nozatu, who paid cattle for her to the Plaintiff, and the point to be decided is whether or not this stock was paid as fine or dowry, and this Court is of opinion that the evidence fully supports the Magistrate's decision that it was paid as dowry, and that the Plaintiff, having accepted it as such, cannot now claim the return of the cattle paid by his late father for the woman, and the appeal is dismissed with costs.

Kokstad. 12 August, 1907. R. W. Stanford, A.C.M.

Ngamle vs. Nozinqane.

(Umzimkulu.)

Gifts under Custom of "Paka"—Not Recoverable—Baca and Hlangweni Custom.

Ngamle sued Nozinqane for the restoration of one ox, certain blankets and dresses, and a goat, which he alleged were paid to Defendant as "Paka" on the occasion of the marriage of his sister with Defendant's son, the dowry having been returned.

An exception was taken that cattle or property paid under the custom of "Paka" were a gift and not recoverable.

This exception was upheld and the summons dismissed.

Plaintiff appealed.

(In the course of his evidence, Chief Pata said:—"Paka is paid by the girl's father when he receives dowry. The custom of "Paka" does not differ amongst the various tribes. Oxen are paid as Paka when a considerable dowry has been paid, *e.g.*, 20 head. What is paid as Paka varies and corresponds to the amount of dowry fixed. Should 20 head have been fixed and paid as dowry, the usual Paka would be one ox, 10 mixed goats and a kapater, £5 in money, and a beast for slaughter for the bridegroom's party, and killed the day dowry is fixed. If the dowry

is not fixed this beast is not killed. The goats are distributed by the bridegroom's father to the members of the kraal. The ox goes to the bridegroom's mother's hut, *i.e.*, the hut that has provided the dowry. The recipients of the beast can do what they like with the ox, so far as the girl's father is concerned. The gifts I mention are not fixed. A man pays according to what he is able to do when he receives the dowry. It therefore varies. What shall be paid as Paka is discussed when the dowry is fixed. The bridegroom's father is entitled to ask for certain things to be paid as Paka. If the parties cannot agree a meeting is called to decide the matter. What is paid as Paka depends on the wealth and inclination of the girl's father and public opinion. Paka is to decorate the daughter, and if Paka is not paid the girl feels insulted. Paka is paid by the girl's father to show his gratitude for the payment of dowry." . . .)

Pres.:—In this case Plaintiff claimed from the Defendant certain articles paid many years ago as "Paka" on the marriage of Defendant's son to Plaintiff's sister, and the case came before this Court at its last sitting and the record was sent back to the Magistrate in order that expert evidence should be taken as to whether or not goods and cattle paid under this custom on the completion of a marriage are claimable at law. A deal of contradictory evidence has been recorded and this Court is of opinion that the weight of this evidence shows that the return of "Paka" is simply a moral obligation. For instance, the Chief Pata, who has some fifteen years' experience in settling disputes, could only remember one case coming before him, and the Chief Msingapantsi, too, could only remember one case which he decided, and he has been in charge of a tribe for many years, and he stated that a "Paka" gift was simply an arrangement between the parties. The Chief Hlupo stated, *inter alia*, "'Paka' is never "sued for, but if a man does not pay Paka after he has received "a large number of cattle, he is influenced to pay by his friends, "who tell him he must pay 'Paka'"; and he also states: "I "have tried many dowry cases, personally I have never ordered "a refund of 'Paka,' but I have known of cases where the 'Paka' "was ordered to be restored."

The Magistrate's ruling is sustained and the appeal dismissed with costs.

Kokstad. 12 August, 1907. R. W. Stanford, A.C.M.

Bunge vs. Ndlanya.

(Umzimkulu.)

Agreement to Pay Dowry—Death of Wife—Purposes of Dowry.

Garner Ndlanya sued Isaiah Bunge for 14 head of cattle, which he said were due to him as balance of dowry owing by Defendant in respect of a marriage contracted between Plaintiff's daughter and Defendant's son, and which Defendant had, by written agreement, promised to pay when his (Defendant's) daughter married. He alleged that Defendant had now received dowry for his daughter, but repudiates the contract.

Defendant pleaded that the woman, Plaintiff's daughter, had died shortly after the marriage and, accordingly, unless she was replaced by another daughter, the contract lapsed.

The Magistrate gave judgment for Plaintiff, and in his reasons said that the fact of the woman's death could not affect Defendant's liability under the agreement.

Defendant appealed.

Pres.:—In the Magistrate's Court Plaintiff claimed from the Defendant 14 head of cattle, balance of dowry alleged to be due for his daughter Eliza, who was married to Defendant's son, Adonijah, and the finding was in his favour and the Defendant now appeals.

From the record it appears that when this marriage took place Defendant agreed to pay Plaintiff 20 head of cattle as dowry, six of which were paid, and he bound himself to pay the balance on the marriage of his daughter Mary, and he signed a written agreement to this effect. After hearing the arguments the Court is of opinion that the payment of dowry is to secure good treatment for the wife and to support her should she return to her guardian. To uphold an agreement of the nature of the one now before the Court would reduce the matter of a Native marriage to one of purchase and sale.

It is the custom amongst nearly all tribes, should the wife die within a few years of her marriage, for the husband to claim a return of part of the dowry cattle, and in this case had the full dowry been paid there is no doubt that he would have done so. When the bargain was made neither party would contemplate the death of the woman, consequently this case must be treated as

an ordinary one and the agreement cannot be taken into consideration as it was practically cancelled by her decease. The appeal is allowed with costs in both Courts and the Magistrate's judgment altered to one for Defendant.

Flagstaff. 19 August, 1907. R. W. Stanford, A.C.M.

Gxonono vs. Skuni.

(Bizana.)

Fines Merged with Dowry—Elopement Fee—Marriage Dissolution Allowance for Woman's Services.

Skuni sued Gxonono for four head of cattle, being the dowry paid by him to Defendant for his wife, who had deserted him.

Defendant admitted that four head of cattle had been paid, but contended that none were returnable as there were two children of the marriage, for each of whom a beast should be deducted, that one was an elopement fine and one Nqutu, neither of which were recoverable.

The Magistrate found that two head were paid as dowry, one as elopement fee, and one as Nqutu, and gave judgment for one beast.

Defendant appealed.

Pres.:—The Magistrate has allowed the Defendant two head of cattle for the children born to Plaintiff by the woman and he has also allowed him one beast as an elopement fee. This Court is of opinion that when a marriage takes place all stock paid by way of fine merges in the dowry, and it is also of opinion that under Native custom there is no such thing as an elopement fee. Defendant has, however, received substantial justice, as he was entitled to one head of cattle for the woman's services to Plaintiff. The appeal is dismissed with costs.

Butterworth. 4 November, 1907. A. H. Stanford, C.M.

Makaza vs. Mbeki.

(Willowvale.)

Costs—Review of Bill of Costs—Procedure.

Makaza appealed against the ruling of the Resident Magistrate in confirming a bill of costs taxed by the Clerk of his Court

In the Appeal Court the following exception was taken:—

Respondent objects to the appeal on the ground that it is from a decision of the Magistrate sitting as a reviewing officer and that the Appellant, if not satisfied with his decision, should have taken the matter before a higher Court in manner provided for under Rule 190. Wherefore Respondent prays that the appeal be dismissed with costs.

Pres.:—The Clerk of the Court is the Taxing Officer for costs in civil cases in the Courts of Resident Magistrates. His ruling is subject to review by the Resident Magistrate on application by either of the parties to the suit. In deciding on the issue brought before him calling in question the taxation of costs in the case of *Makaza* vs. *Mbeki*, the proceedings before the Resident Magistrate were in the nature of a review and cannot be regarded as a judgment in a civil case. Section 10 of Proclamation No. 391 of 1894 provides that the rules and regulations with regard to the forwarding of records and with regard to the prosecution of appeals to the Courts constituted by Section 3, Act 26 of 1894 shall be the same as those in existence in the Courts of Resident Magistrates in the Colony, and as the Magistrate's decision in reviewing the costs allowed by his taxing officer can only be brought before this Court in the way of review it follows that the directions of the 190th Rule of Court should have been observed and the process have been by summons as provided in the said Rule. The exception taken is, therefore, sustained with costs.

Butterworth. 4 November, 1907. A. H. Stanford, C.M.

Gqili vs. Siqangwe.

(Tsomo.)

Ukungena Custom—Heritable Rights of Children—Effects of Christian Marriage.

William Siqangwe, as eldest son and heir of the late Mbabala, and, as such, heir to his grandfather, the late Siqangwe, sued Gqili for certain two head of cattle, due for the maintenance of his (Defendant's) daughter, who was brought up by Plaintiff's grandfather, Siqangwe, at Defendant's request, and who shortly after Siqangwe's death was removed by Defendant and married

Defendant excepted to the summons on the ground that Plaintiff is not the heir of Siqangwe and has, therefore, no right to maintain the action, and that the heir is Simakamaka, Siqangwe's second son. Plaintiff, in reply, stated that Mbabala died, leaving female issue only and that Sihlahla, the younger brother of Mbabala and third son of Siqangwe, thereafter raised up seed to the house of Mbabala (ukungena) and that he (Plaintiff) is the son of Mbabala's widow by Sihlahla and born at Mbabala's kraal, and that moreover he had previously been successful in an action as heir of Mbabalo, in which his status had been in question, which decision had been upheld by the Appeal Court. Evidence led on the exception showed that Sihlahla had been instructed by his father, Siqangwe, to raise up seed to the house of his elder brother, Mbabalo, under the custom of ukungena and, after several children had been born, of whom Plaintiff was the eldest, he married the widow by Christian rites and still lives with her.

The Magistrate overruled the exception, stating in his reasons that the subsequent Christian marriage did not affect Plaintiff's status in the case.

Defendant appealed.

Pres.:—The evidence shows that about thirty years ago one Mbabalo, married by Native custom to a woman named Nosenti, died. Siqangwe, the father of Mbabalo, then instructed his third son, Silahla, to take his late brother's wife and raise up seed to the deceased man, and as a result the Respondent, William Siqangwe, was born. In 1896, in an action between the Respondent, then called Gungubele, and his mother, Nosenti, his right to succeed as heir to the late Mbabalo was called in question and, on appeal to the Native Appeal Court, sitting at Butterworth on the 14th December, 1896, the Court held that Gungubele was heir to the estate of Mbabalo, which decision has not been set aside by any Superior Court. In the present action the Appellant's attorney relies on the effect of the Christian marriage between Silahla and the woman Nosenti. The Supreme Court has ruled that marriages entered into between Natives according to Native custom prior to the issue of Proclamation No. 110 of 1879 are valid marriages, and similar marriages after that date, although not registered, not being polygamous, are also valid, it follows, therefore, that, the marriage between Mbabalo and Nosenti having been valid, Silahla could not, according to the Colonial law, marry his deceased brother's wife.

Under Native law and custom the Respondent is unquestionably the heir of his late grandfather, Siqangwe, and the Magistrate very rightly overruled the exception.

The appeal is dismissed with costs.

Umtata. 18 November, 1907. A. H. Stanford, C.M.

Madolo vs. Hoza.

(Engcobo.)

Revival of Marriage—Part Restoration of Dowry—Actions for Damages for Adultery.

Hoza sued Madolo for three head of cattle or £15, damages for adultery. The act was admitted, but Defendant denied Plaintiff's right to sue as the woman was no longer his wife, his dowry having been returned. From a record put in it appeared that Plaintiff, Hoza, obtained judgment against his wife's father in 1904 for the restoration of the woman or the dowry paid, valued at £31 10s., that on a writ being issued two head of cattle were seized and that, after paying costs, £6 was handed to the Plaintiff. Thereafter the woman returned to Plaintiff and has been living with him ever since. The question to be decided was whether repayment of dowry on account could be taken as dissolving the marriage between the Plaintiff and the woman seeing that before the judgment was satisfied the woman returned to Plaintiff.

The Magistrate gave judgment as prayed, and in his reasons stated that as the dowry had not been completely restored the woman remained the wife of Plaintiff.

Defendant appealed.

Pres.:—The case having been submitted to the Native Assessors they express the opinion that the woman, having returned to her husband before the restoration of the dowry had been completed, the marriage was revived and that he has an action for the adultery committed by the Appellant.

The Court being satisfied that the opinion is in accordance with Native custom dismisses the appeal with costs.

Umtata. 18 November, 1907. A. H. Stanford, C.M.

Tyaliti and Others vs. Sindiwe.

(Engcobo.)

Spoor Law—Civil Action—Collective Liability.

This was an enquiry held under the Spoor Law, Act 41 of 1898. Sindiwe lost an ox and, hearing rumours of a beast having been found killed in a forest near Respondents' kraals, went there and identified the horns and skin as those of the beast he had lost. In the evidence it appeared that all of the Respondents (34) lived in the vicinity of the spot and the Magistrate held that they were jointly liable for the value of the beast, viz., £10.

Pres.:—In the case of *Queen* vs. *Mbalo*, heard in the Supreme Court on the 23rd August, 1892, the Chief Justice said:—"The finding of the carcase at the spot would, I am inclined to think, be quite equivalent to finding the spoor there and if this is so there would be as good grounds for fixing the heads or owners of the kraal with civil liability under the Code as if the spoor had been found at the same spot."

Clause 4, Section 1, of Act 41 of 1898 provides that when a spoor cannot be traced to any specific kraal or kraals, but is lost or becomes obliterated on any lands then the responsibility of the value of such stolen animal shall devolve upon the heads of the kraals adjacent to or surrounding the spot where such spoor has been lost or obliterated.

From the evidence it is clear that no further spoor was traced after the carcase was found and that the names given by the headman are those of the heads of kraals adjacent to and surrounding the spot where the carcase was found. At the enquiry, although some of the Appellants were represented by an attorney, this was not disputed or any evidence led to show non-liability. In dismissing the appeal with costs in order to make the judgment clearer each owner of kraal mentioned is assessed at six shillings.

Umtata. 18 November, 1907. A. H. Stanford, C.M.

Fanteso vs. Ncapa Mkangaza.

(Cofimvaba.)

Costs—Withdrawal of Partly-heard Proceedings—Practice.

Fanteso claimed the restoration of his wife or the dowry paid for her. At the first hearing of the case the Plaintiff's attorney

applied for a postponement to enable him to adduce further evidence. This application was granted and, on the second hearing, he applied to be allowed to withdraw the proceedings as in the interim he had found that the woman in question was the wife of another man and his client had wrongly instructed him on that point. The Defendant thereupon applied that his evidence and that of his two witnesses be taken and judgment entered for Defendant with costs.

The Magistrate allowed the proceedings to be withdrawn on payment of the costs and the expenses of Defendant's two witnesses, holding that although these two witnesses were not subpœnaed, yet they were brought from another District to prove that the woman in question was not the Plaintiff's wife, that they were necessary witnesses and were entitled to their expenses from the Plaintiff, and that in face of the withdrawal it was unnecessary to record their evidence.

Fanteso appealed.

Pres.:—The Defendant, having been brought into Court by the Plaintiff and the case heard in part by the Magistrate, it was in his hands to determine and the Plaintiff cannot in such a case claim a right of withdrawal, the Defendant under such circumstances having a claim that the suit shall be determined. The Defendant's attorney opposed the application and applied for final judgment.

In allowing the withdrawal, the Magistrate's ruling was conditional that the Defendant's and his witnesses' expenses should be paid. If the Plaintiff did not like this condition it was optional for him to have proceeded with the case when the matter of costs would have been decided in due course.

The appeal is dismissed with costs.

Umtata. 19 November, 1907. A. H. Stanford, C.M.

Ngonyama vs. Gxekabantu.

(Mqanduli.)

Provisional Judgment—Re-opening—Reasonable Cause—Final Judgment.

Gxekabantu sued for the return of certain stock wrongfully appropriated by Defendant and for damages. On the day of

hearing Defendant was in default, but was represented by an attorney and, by consent, the case was postponed. At the second hearing the Defendant Ngonyama was again in default and his attorney applied for postponement owing to his absence, and also because a witness was in quarantine for small-pox. The Plaintiff gave his evidence and the Resident Magistrate granted provisional judgment.

Ngonyama then sought to re-open the case and gave as his reason for not attending the previous hearing that his witness was in quarantine and could not come. He admitted he knew the date of hearing, but he had been away from home and only returned to his kraal on the date of trial.

The Resident Magistrate refused his application for re-opening, and he appealed.

Pres.:—In the first case, the Defendant being represented in Court by his duly authorised attorney, the judgment should not have been a provisional one. The Magistrate should either have granted the postponement asked for or given a final judgment.

The appeal is allowed and the Magistrate's judgment in the provisional case and in the one for re-opening the judgment are both set aside and the case returned to be heard on its merits.

On the question of costs, the Court is of opinion that the Appellant deliberately absented himself with the object of delaying the case and, as the necessity for the appeal has arisen through his own action, no order will be made as to costs.

Umtata. 19 November, 1907. A. H. Stanford, C.M.

Mondli vs. Buza.

(Mqanduli.)

Adultery—Repeated Acts—Scale of Damages.

Buza sued Mondli for three head of cattle as damages for adultery. Plaintiff had, a short time before, obtained a judgment for three head against Defendant for another act of adultery committed with his wife. The offence was admitted and Defendant tendered one beast, having satisfied the previous judgment. The Magistrate gave judgment for the full amount claimed.

Mondli appealed.

Pres.:—One of the objects under Native custom in awarding damages for adultery is to deter the adulterer from repeating the offence, and to reduce the amount of damages, especially in such a flagrant case, would tend to encourage immorality. There are cases, however, where, through the husband leaving his wife for long periods with her own friends, and it appears to the Court that he does so to profit by her immoral conduct, in which nominal damages only are allowed, but the present instance is not one of these. The appeal is dismissed with costs.

Umtata. 19 November, 1907. A. H. Stanford, C.M.

Ramba vs. Pumani Dwe.

(Mqanduli.)

Abduction—Seduction—Scale of Damages—Headmen's Judgments—Acceptance of Award.

This was an action instituted by Pumani for the recovery of three head of cattle as damages for abduction. In the evidence it transpired that the case had been previously heard by the headman, who awarded a fine of £2 or four goats for harbouring. Plaintiff admitted having received two goats. The Magistrate gave judgment for Plaintiff for one beast or £10.

Defendant appealed.

Pres.:—According to Native custom no damages are awarded for ordinary abduction where the girl is returned intact to her own people. If seduction has taken place damages are usually assessed at one beast.

In the present case the Respondent elected to take the case to the headman and accepted his award by receiving two goats, which he admits. If he was not satisfied with the decision of the headman he should not have received any portion of the award, but have proceeded at once against the Appellant in the Resident Magistrate's Court, having first notified this to the headman.

The Court holds that by acceptance of the two goats he has accepted the headman's decision and has no further right of action. The appeal is allowed with costs and judgment entered in the Magistrate's Court for Defendant with costs.

Umtata. 19 November, 1907. A. H. Stanford, C.M.

Mdange vs. Xam Stokwe.

(Mqanduli.)

Adultery—Bona-fide Marriage—Damages for Adultery.

Xam Stokwe sued Mdange for damages for his adultery with his wife Nokilam.

The Defendant pleaded non-liability as Nokilam was his own wife. He admitted that she had been married to the Plaintiff, but contended that this marriage had been dissolved by the return of dowry.

The evidence led for the Plaintiff showed that he had married Nokilam and had paid dowry for her, and after the marriage he went away to work and was absent for about four years. During his absence his wife returned to her people, who tendered cattle at Stokwe's kraal in dissolution of the marriage. Stokwe's representatives refused to accept these cattle and it was contended that the marriage still subsisted.

For the defence, the guardian of the woman stated that he had tendered restoration of Stokwe's dowry and though this was refused he was still ready to return the cattle. He stated that he had allowed the Plaintiff two years in which to pay more dowry and as he had not done so he had dissolved the marriage and given Nokilam in marriage to the Defendant. The Defendant alleged that when he married the woman he had made enquiries and satisfied himself that her marriage with Stokwe had been dissolved.

The Resident Magistrate awarded the damages claimed, holding that the marriage between Stokwe and the woman Nokilam had never been dissolved, and that as the Defendant was a neighbour of Stokwe he was bound to have known of this fact.

Mdange appealed.

Pres.:—The marriage of the woman Nokilam to the Respondent is not in dispute, and that marriage has never been dissolved, consequently it is not possible for the woman to be given in marriage to the Appellant. The appeal is dismissed with costs.

Umtata. 20 November, 1907. A. H. Stanford, C.M.

Poselo vs. Mtangayi.

(Mqanduli.)

Adultery—Ntlonze—Evidence—Admission of Woman.

Mtangayi sued Poselo for three head of cattle as damages for adultery committed with his wife, Nohantom. In support of his case he produced one of his wives, who alleged that she had witnessed acts of adultery between Defendant and the woman Nohantom and that she had also acted as a go-between. In her evidence, Nohantom denied ever having had intercourse with Defendant. The Defendant stated that he was away from home at the time the acts were alleged to have taken place and asserted that the charge was a made up one.

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

Held.:—There is an element of doubt in this case arising from the fact that two things commonly regarded under Native custom as essential for establishing a charge of adultery are lacking—the catching of the adulterer by the husband is usually accompanied by the production of material proof (the Ntlonze) in support of such catching, and the admission of the woman. While the Court has no desire to lay down as a hard and fast rule that without these proofs it is not possible to maintain a charge of adultery, their absence is always a ground for requiring the most convincing evidence in order to prevent the possibility of faked cases being brought. In the present case the evidence is open to doubt, and for these reasons the appeal is allowed with costs and judgment entered in the Magistrate's Court for Defendant with costs.

Umtata. 20 November, 1907. A. H. Stanford, C.M.

Maqetseba vs. Mgwaqaza.

(Mqanduli.)

Wills—Jurisdiction—Applicability of Colonial Law—Dispersion—Rights of Natives to make Wills.

Mgwaqaza, the eldest son of the late Ncani, sued Maqetseba, the second son of Ncani, for the property in Ncani's estate. Ncani

had, by a will, disinherited his eldest son and devised his property to his second son. Mgwaqaza alleged that as eldest son he was heir of all the property and he disputed Ncani's right to make a will, and further contended that there is no provision in the Territories for making and executing wills or testaments applicable to uncivilised Natives, and that Ncani had never disinherited him according to the usual customs followed by Natives. He prayed that the will might be declared null and void.

The Magistrate ruled that he had no jurisdiction and dismissed the summons. On appeal, this ruling was reversed by the Appeal Court on the grounds that Section 23 of Proclamation No. 140 of 1885 gave jurisdiction in all civil cases over and against persons residing in the Magistrate's District, which was affirmed in the case of *Bietje* vs. *Venter* (C.T L.R., Vol. 16, p. 2). The case was returned to be heard on its merits.

On re-hearing, the Magistrate gave judgment for the Plaintiff Mgwaqaza, holding that he was heir to the estate and that he had never been disinherited under Native custom.

Maqetseba appealed.

Pres.:—The contention on behalf of the Respondent is that a Native married under Native custom cannot dispose of his property otherwise than in accordance with Native custom, and that the ordinary Colonial law does not apply to such a case. The Tembuland Annexation Act provides that from the date of annexation, to be stated in the Governor's Proclamation, the Territories therein mentioned were to become part of the Cape Colony and subject to the laws in force therein, but that no Act of the Cape Parliament should be in force unless specially extended.

The judgment in the Eastern Districts Court in the *Estate Dugmore* decided that the Common law of the Cape Colony and the Ordinances in force prior to the establishment of the Cape Parliament, were by the Annexation Act extended to East Griqualand and the wording of the Tembuland Annexation Act is identical. Section 36 of Proclamation 140 of 1885 clearly provides that in the event of the death of a person leaving a will or other testamentary writing made according to the law of the Colony of the Cape of Good Hope, the administration of the estate and property of such person shall be regulated by the provisions of Ordinance 104 or any other law of the Cape Colony having reference to the disposition of property. This Section, taken together with the terms of the Annexation Act, places beyond doubt the right of

any person, Native or other, to dispose of his property by will in accordance with Colonial law and without regard to Native custom: but the latter also allowed a father to disinherit his heir observing certain customs. These, however, have now been in a measure superseded or added to by the power of making a will.

The Magistrate has taken an erroneous view of the law in force in the Territory of Tembuland and the appeal must be allowed and judgment in the Magistrate's Court is altered to judgment for the Defendant.

On the question of costs, the will being so clear, the Court is of opinion that the Respondent had no reasonable grounds for contesting it and he must pay the costs in both Courts.

Kokstad. 9 December, 1907. R. W. Stanford, A.C.M.

Dlokova vs. Ngayitini.

(Qumbu.)

Adultery—Absence of Husband—Personal "Catching."

Dlokova sued Ngayitini for three head of cattle as damages for adultery, and in his summons said that the adultery was committed during his (Plaintiff's) absence in Johannesburg.

Plaintiff in his evidence said that he did not personally catch Defendant committing the act, but he said the adultery was witnessed by one of his other wives.

Defendant's attorney then asked for a judgment of absolution on the ground that Native custom requires the husband to actually catch the parties in adultery before proceeding in an action for damages.

The Magistrate granted absolution, and in his reasons stated that, unless the adultery is followed by pregnancy, it is essential that the husband must personally catch the parties in the act.

Plaintiff appealed.

Pres.:—In the Lower Court the Plaintiff sued the Defendant for damages for his adultery with Plaintiff's wife, which is said to have occurred while Plaintiff was away in Johannesburg. On the case being called for hearing exception was taken to the summons that in accordance with Native custom Plaintiff must himself catch the parties in the act of adultery (where pregnancy does not follow), otherwise he is not entitled to compensation.

After hearing the arguments, this Court is of opinion that in cases where the adultery is fully proved the husband is entitled to compensation, though he may not have caught the guilty parties in the act. The appeal will, therefore, be allowed with costs, and the exception set aside and the case sent back to be decided on its merits.

Kokstad. 9 December, 1907. R. W. Stanford, A.C.M.

Mphomane vs. Mphomane.

(Qumbu.)

Distribution of Property after Death of Father—Basuto Custom.

Nqala Mphomane sued Tseiso Mphomane to show why an order of Court should not be granted declaring him entitled to one-half of the property left by the late Khaeane, and in his summons alleged that Plaintiff and Defendant were sons of the Great House of the late Khaeane and Defendant was the eldest; that prior to his death the father, Khaeane, at a public meeting called according to custom declared it his wish that, after his and his wife's death, the property should be equally divided between Plaintiff and Defendant; that both their father and mother were dead, but that Defendant refuses to divide the estate.

Exception was taken that under Basuto custom a father had no power to make provision for the distribution of his property after his death.

The Magistrate upheld the exception and dismissed the case.

Plaintiff appealed.

Pres.:—In the Magistrate's Court, Plaintiff applied for an order of Court declaring him to be entitled to half the property of one Khaeane Mphomane, now deceased, and the finding was against him, seeing that, according to Sesuto custom, a person cannot arrange the distribution of his estate during his lifetime.

After hearing the arguments this Court is of opinion that Native law allows a Basuto, and Natives of other tribes, to arrange how his stock shall be divided after his death. The usual way in these cases is for the owner of the stock to call a meeting of his relatives and friends and inform them of his wishes. The appeal will, therefore, be allowed with costs and the case sent back to the Magistrate to be decided on its merits.

Kokstad. 9 December, 1907. R. W. Stanford, A.C.M.

Ma-Auwa vs. Maganikehle.

(Mount Frere.)

Widow's Marriage—Restoration of First Dowry—Consent to Re-marriage.

Maganikehle sued Ma-Auwa for 17 head of cattle, being the proportion of dowry returnable to him on the re-marriage of his father's widow. It appeared that Plaintiff's father paid 20 head of cattle to Defendant as dowry for the woman, that after his father's death the woman continued to live at his kraal but afterwards entered into another marriage by Christian rites without Plaintiff's consent.

The Defendant contended that as the widow had never returned to his kraal and had re-married while under the control of Plaintiff, he was not liable for the restoration of any of the first dowry.

(No dowry had been paid by the second husband to either party.)

The Magistrate gave judgment for 16 head of cattle, basing his decision on expert evidence that the receiver of dowry is always liable on a widow's marriage.

Defendant appealed.

Prrs.:—In the lower Court, Plaintiff claimed from the Defendant 17 head of cattle and the finding was in his favour for 16 head, and Defendant now appeals.

This is a case in which a widow left the kraal of her late husband and married again against the wishes of her own people, and the point to be decided is whether or not, under these circumstances, the Plaintiff would be entitled to the return of the dowry cattle paid by her deceased husband, and this Court decides that under Native law Plaintiff has a good claim, and the Magistrate's finding is sustained and the appeal is dismissed with costs.

Kokstad. 9 December, 1907. R. W. Stanford, A.C.M.

Molife vs. Ntebele.

(Matatiele.)

Inheritance—Illegitimate Children—Ngoni Custom—Basuto Custom.

Molife sued Ntebele for certain stock, property in the estate of the late Morokoane. He alleged that the late Morokoane had

several wives, that the Great wife had no male issue, that Defendant was eldest son of the second wife, that dowry for a third wife was paid out of the stock of the Great House, and she was placed in the Great House to raise an heir to that House, the Great wife being past child-bearing age, that Plaintiff was the son of this third wife and, therefore, heir to the property of the Great House, and that Defendant had appropriated the Great House property and refused to hand it over to Plaintiff.

Defendant denied that Plaintiff was a son of Morokoane.

From the evidence it appeared that Plaintiff was born some time after the death of Morokoane, but it was not known who his father was.

Letsie, Paramount Chief of Basutoland, in the course of his evidence by Interrogatories, stated the Basuto custom as follows: —"When there is no male issue in the first hut, a woman is specially married so as to raise a son to the first hut. If, however, a male child is subsequently born to the first hut he takes the inheritance from the son of the woman specially married and that son is withdrawn.

If a man has no male child by the first wife, marries a second wife and places a man with her in the hut, to beget a male child for him, and then subsequently marries a third wife and has a male child by her, the child of the second wife is withdrawn and the child of the third wife becomes the heir.

It is an essential point that this heir, if not begot by the husband of the woman, must be begot by a blood relation of the husband. Therefore, if a male child is born three or four years after the death of the husband, and it cannot be proved that he was begot by a blood relative of the deceased husband, he has no right to the inheritance.

Children born of women after their husband's death, being natural sons of other men, have no right to inherit property if there are sons by the husband. They come under the guardianship of the son who inherits the property of the hut to which their mother belongs.

I do not know of any case where children begotten years after the death of the husband of their mother have inherited unless they are begotten by a blood relative of the deceased husband and there are no surviving male children by the husband. Ngena affects the matter in this respect that, if a blood relative is placed in a hut to raise male children, male issue born of him take the inheritance to the exclusion of children born of other men.

The fact that there are legitimate sons will exclude sons begotten by other men."

The Magistrate gave judgment for the Defendant with costs.

Plaintiff appealed.

Pres.:—In this case the parties are half-brothers and the Plaintiff sued the Defendant for 10 head of cattle on the ground that he is heir to the Chief Hut of the late Morokoane, and that it was arranged by his late father that he should also be heir to the second hut, and the finding was against him and he now appeals.

The record shows clearly that the Plaintiff was born long after the death of Morokoane and that his father was not appointed to "Ngena" the woman for the purposes of raising up seed for her house, nor was his father a blood relation of the deceased, and, after hearing the arguments, the Court holds that the Chief Letsie's views on the "Ngena" custom are correct and that consequently the Magistrate's judgment is right.

The appeal is dismissed with costs.

Umtata. 9 March, 1908. A. H. Stanford, C.M.

Malusi vs. David Dandi.

(Umtata.)

Dowry Restoration—Set-off of Damages for Seduction—Exceptions—Death of Intended Husband.

Dandi, as heir of his brother Mayeza, sued Malusi for certain cattle paid on account of dowry to him by Mayeza for Malusi's sister, alleging that Mayeza died before the marriage could be consummated. Payment of dowry was admitted, but a set-off was claimed for seduction. Exception to the set-off was taken that by the decision in the case of *Meyer* vs. *Gericke* (Foord 14) the death of a party before *litis contestatio* puts an end to an action for personal injury.

The Magistrate upheld the exception and Malusi appealed against the ruling.

Pres.:—The question having been put to the Native Assessors, they state:—

(1) That as the marriage was not entered into an action lies for the recovery of the cattle paid on account of dowry.

(2) That if the intended wife was made pregnant by the man to whom she was to be married such a case would be treated as if a marriage had taken place and one beast be deducted from the dowry.

(3) That if the deceased man was not formally notified of the pregnancy this would be a strong factor in determining whether the pregnancy was caused by him or not.

It is not competent in a case being heard under Native law and custom in which the question at issue depends wholly on Native custom to take an exception based entirely on Roman Dutch law. The appeal is allowed with costs, the Magistrate's ruling on the exception is set aside and the case returned to be heard on its merits.

Umtata. 9 March, 1908. A. H. Stanford, C.M.

Xabelana vs. Mpongwana.

(Umtata.)

Distribution of Property by Head of Kraal during Lifetime.

Xabelana sued Mpongwana for certain cattle, which he claimed as the property of his House. He stated that he was heir of the Right Hand House and Defendant the heir of the Great House of their father, the late Mutomela.

The facts were not disputed that Mutomela shortly before his death disposed of the greater part of the property of the Right House, some to members of the Great House, and one to the minor son of the Right Hand House, leaving two head of cattle in the Right Hand House. Plaintiff disputed his father's right to distribute the property of the Right Hand House and contended that the cattle should be refunded by the heir of the Great House.

The Resident Magistrate ordered the return of the two head of cattle which had not been distributed, and stated that in coming to this decision he was guided by the judgments of the Appeal Court in the cases of *Mtshotshisa* vs. *Mtshotshisa*, *Poni* vs. *Memani*, and *Mgwagaza* vs. *Maqetseba*, in which it seemed to be clearly indicated that a man may dispose of his property during his lifetime as he may deem fit.

Xabelana appealed.

Pres.:—It is not in dispute that the late Mutomela during his lifetime made the distribution of the property now complained of by the Appellant. There is nothing before the Court to show that the distribution was an improper one or that Mutomela had no legal right to dispose of his property in the manner in which he did. The appeal is dismissed with costs.

Umtata. 10 March, 1908. A. H. Stanford, C.M.

Kele vs. Keti.

(Cofimvaba.)

Dowry Restoration—Ill-treatment of Wife—Deductions—Repudiation.

Keti sued Kele for the restoration of his wife or six head of cattle, her dowry. A tender of four head was made, but a judgment was given for five, one having been deducted for the wedding outfit.

Kele appealed.

Pres.:—The Defendant in the Magistrate's Court pleaded "that inasmuch as the woman named in the summons is pre-"vented from living with the Plaintiff owing to his persistent ill-"usage, and inasmuch as the Plaintiff did undertake and agree "to pay Defendant a beast as fine for this ill-usage, the Defendant "doth say the tender of four head of cattle is sufficient."

The evidence discloses that the Respondent has been guilty of the most gross ill-treatment of the woman, in which he rather glories. There can be no doubt that he was intentionally doing all he could to make his wife leave him in order that he might have grounds for the recovery of the dowry because she did not bear children, and where a husband deliberately drives his wife away for no reasonable cause it is, under Native custom, a bar to the recovery of the dowry paid or reasonable grounds for a portion of it being withheld. In view of the Respondent's conduct the Court is of opinion that the tender of four head was amply sufficient. The appeal is allowed with costs, and the Magistrate's judgment altered to judgment for Plaintiff for four head of cattle or value at £5 each with costs up to the time of tender, costs after that being in favour of the Defendant.

Umtata. 10 March, 1908. A. H. Stanford, C.M.

Zigebe vs. Jack.

(Engcobo.)

Damages—Injuries caused by Stallion—Culpa—Neglect.

Jim Jack sued Zigebe for £18, being the value of a horse which had been killed by Defendant's stallion.

The Magistrate awarded the amount claimed and Defendant appealed.

(The grounds of action are indicated in the judgment.)

Pres.:—The judgment of the Chief Justice in the case of *Parker* vs. *Reid* (21 Juta, 496) clearly implies that for a Plaintiff to recover damages for an injury caused by a domestic animal there must be some element of *culpa* on the part of the Defendant. In the case of *Hall* vs. *Mosea* (23 Juta, 746), the Chief Justice said:—"A full-grown bull is ordinarily an animal with vicious pro-"pensities, and if the owner allows it to wander abroad and "injure the cattle of others on a public road there is such a "degree of *culpa* as to render him liable for damages." This Court is of opinion that the same rule should apply in the case of a stallion. The evidence shows that the Appellant's stallion was grazing on the commonage, not being in charge of a herd, and wantonly and without provocation attacked the horse of Respondent, which was tethered near a kraal, and caused its death, and consequently there is such neglect on the part of the Appellant in allowing his stallion to wander on the commonage unherded as to render him liable for the loss sustained by the Respondent.

On the question of valuation, the Court sees no reason to disturb the Magistrate's finding that the amount claimed is not excessive. The appeal is dismissed with costs.

Umtata. 10 March, 1908. A. H. Stanford, C.M.

Nteteni vs. Ngantweni Nkohla.

(Engcobo.)

Kraal Head Responsibility—Joint Tort Feasors.

In a previous case Ngantweni had sued Ngalipi Shweni and Nteteni, the latter as head of the kraal, in an action for damages for seduction and Nteteni was absolved, judgment being given

against Shweni. In the present case Ngantweni sought an order declaring Nteteni liable for the tort committed by Shweni; Nteteni excepted to the summons on the grounds that he had been previously sued as a joint tort feasor and that it is not now competent to make him liable for Shweni's tort after judgment had been given against Shweni, and in support he quoted the case of *Rubulana* vs. *Tungana* (24 July, 1905). This exception was overruled. A second exception that the summons was bad as it contained no allegation that the principal debtor had been excussed was also overruled. A further exception was taken that the costs in the previous action had not been paid and the case of *Mankayi Renge* vs. *Kleinbooy Maart* (Warner, p. 39) was quoted in support. This exception was allowed.

Nteteni appealed on the first exception.

The Magistrate in his reasons stated that Defendant's agent was in error in saying that Ngalipi Shweni and present Defendant were sued originally as "joint tort feasors." Nteteni was joined in the original case specifically as head of the kraal. This does not make him a joint tort feasor or, in other words a joint debtor, nor was it alleged that he had committed any tort. The allegation was clear that Shweni had committed the tort and the present Defendant was joined in accordance with Native custom as the responsible head of the kraal, and he was absolved from the instance in the original case because no evidence was led to show that he was the head of the kraal. In the case of *Rubulana* vs. *Tungana*, the Appeal Court laid it down that when the head of the kraal is not originally joined in the summons he cannot thereafter be sued. This ruling was confirmed in the case of *Buza* vs. *Ggenya*, Appeal Court, July, 1907, but the facts in the present case were entirely different. In his opinion the rulings quoted did not apply to this case and that as the Defendant was absolved it was competent for Plaintiff to bring the present action.

Pres.:—Although the Appellant gained his point in having his third exception sustained and the summons dismissed, he has seen fit to appeal on his first exception, which the Magistrate overruled. The responsibility of the head of a kraal for the torts committed by the members of his kraal is a condition peculiar to Native custom and there is no corresponding position to be found in Colonial law.

The term "joint tort feasor" is wholly inapplicable to such cases, as it cannot be maintained or shown in any of these cases that the head of the kraal is a participator in the tort committed.

In the original action the Appellant was joined in his capacity as head of the kraal with Malipi Shweni, from whom damages for seduction were claimed, and the judgment of absolution from the instance in that case leaves it open to the Respondent to bring a fresh action if so desired as provided for in Section 32, Schedule B, Act 20 of 1856. The appeal is dismissed with costs.

Umtata. 11 March, 1908. A. H. Stanford, C.M.

Nohafisi vs. Yekani Jali.

(Mqanduli.)

Widows—Residence—Removal of Estate Property.

Nohafisi, widow of the late Solani, had removed three female children and the property in the estate of her late husband to the kraal of her brother, Gidini Gili. Solani had left no male issue, but it appeared in evidence that his late elder brother had a minor son living who would be heir of the estate. Yekani, as younger brother, sued for the return of the property to his kraal. The Magistrate ordered the return of the property to the kraal of the late Solani's brother, the Plaintiff, as he is the proper guardian during the minority of the heir.

Nohafisi appealed.

Pres.:—It is an established principle of Native law that a widow cannot remove the children and property of her late husband and take them to her own people. The Respondent, if as stated by him that the son of Solani's elder brother is a minor, is the natural guardian of Solani's family and proper custodian of his property. The appeal is dismissed with costs.

Umtata. 12 March, 1908. A. H. Stanford, C.M.

Mncedi vs. Njokwana.

(Mqanduli.)

Costs—Provisional Judgment Re-opening—Costs Payable by Defendant in Default.

Mncedi had obtained a provisional judgment against Njokwana and the latter re-opened the case and succeeded in having the

provisional judgment altered to one of absolution with costs. Njokwana then put in a bill of costs as follows:—

	£	s.	d.
Original and Copy of Summons	0	6	6
Drawing Power of Attorney	0	1	0
Attendance in Court, 2 days at 10s. 6d....	1	1	0
Drawing Bill of Costs	0	1	6
Drawing Writ	0	1	6
Stamps on Summons	0	3	9
Stamps on Power	0	1	0
Stamps on Bill of Costs	0	1	0
Stamps on Writ	0	1	0
Paid Messenger of Court:			
Service of Summons	0	17	0
Herding Fees	0	10	9
Total	£3	6	0

The bill was taxed by the Clerk of the Court as above and, on review by the Magistrate, Mncedi objected to the items 6s. 6d. 3s. 9d. and one attendance fee 10s. 6d. The Magistrate overruled the objections as regards the items 6s. 6d. and 3s. 9d., but struck out the one attendance fee of 10s. 6d., reducing the bill by that sum.

Mncedi appealed against the Magistrate's ruling in respect of the two items objected to but allowed, and Njokwana appealed on the point of the deletion of the charge of 10s. 6d.

Pres.:—The question to be determined in this case is what costs are meant in Section 29 of Schedule B, Act 20 of 1856 in the sentence "upon the terms nevertheless of payment of the costs incurred by his default" and to arrive at a correct understanding of this Sections 28, 29 and 30 have to be considered as a whole. Section 28 provides that no execution shall issue on a provisional judgment unless satisfactory security is given for the full restitution of the amount to be levied and raised under such judgment should the same be reversed and the form of security is that set forth in the 34th Section of the Rules. Another very important feature in this matter is the provision in Section 29 that upon the re-hearing, the case, except as aforesaid, shall proceed as if the Defendant had appeared on the original summons. It is unfortunate that the question at issue in so far as can be ascertained

has never been before the Higher Courts of the Colony, and there is no authoritative ruling to be found upon it, but the case of *Adams* vs. *Botes*, heard in the Supreme Court on the 12th February, 1908—although the security there given was in a case of appeal—has an important bearing on this case as the subsequent procedure on provisional judgments and in execution when an appeal has been noted is identical.

From this judgment and the conclusions to be arrived at from the Sections themselves, the costs incurred by default are:—Fee for attendance of Plaintiff's attorney in the provisional case, and the costs of again bringing the Plaintiff into Court. After that the case proceeds as if the Defendant had appeared on the original summons, and the costs in the case then become dependent on the final issue. This being so, the following items must be disallowed from the Respondent's Bill of Costs:—

	s.	d.
Original and Copy of Summons	6	6
Stamps on Summons	3	9
Service of Summons	17	0
Herding Fees	10	9

The first three items are expenses incurred in re-opening the judgment, and the fourth should not have been included as it is covered by the indemnity bond. The bill is reduced to the sum of £1 8s. 0d.

On the cross appeal the Appellant must succeed. He attended Court during the hearing of the case after the provisional judgment was re-opened and also on the following day when judgment was given. As each of the parties has gained and lost a point the Court is of opinion that no order as to costs should be made.

Umtata. 12 March, 1908. A. H. Stanford, C.M.

Zondani vs. Nine.

(Ngqeleni.)

Ubulungu Custom—Dowry Cattle not Qualified—Ngoma.

Nine sued Zondani for the restoration of a certain animal which he alleged had been nqoma'd to the Defendant by his (Plaintiff's) father Cekiso.

The Defendant contended that this beast had been given to his wife as ubulungu and that, therefore, it was not returnable.

From the evidence it appeared that the animal in question was one of the increase of the dowry cattle paid by Defendant to Cekiso for his wife.

The Magistrate gave judgment for Plaintiff as prayed with costs, stating that he was guided by Native law which does not permit of dowry cattle or their increase being given as ubulungu.

Zondani appealed.

Pres.:—The matter having been submitted to the Native Assessors they state that it is contrary to Native custom to give an ubulungu beast from the cattle received as dowry for the woman or from their increase. If a man, wishing to give an ubulungu beast, had no cattle he would exchange an animal with a relative in order to obtain one suitable to be given for the purpose.

In this case the Respondent's claim is supported by the fact that Cekiso removed one of the increase of the cow alleged to be the ubulungu beast and paid it away as dowry. The appeal is dismissed with costs.

Butterworth 23 March, 1908. A. H. Stanford, C.M.

Mali vs. Adam Busakwe.

(Nqamakwe.)

Dowry Restoration—Engagements—Receipt by Father of Several Dowries.

Charles Mali sued Busakwe for the recovery of certain cattle paid as dowry on his engagement to Defendant's daughter. He broke off the engagement because Busakwe was also receiving dowries from two other suitors for the same girl.

The Magistrate gave judgment for Defendant with costs, and in his reasons stated that under Native law a parent could hold several different instalments of dowry, and their return to the unsuccessful suitors only takes place when the girl is married.

Plaintiff appealed.

Pres.:—The parties to the suit are Christian Natives. It would appear that first it was arranged by the Respondent to give his daughter Julia in marriage to one Josiah, who paid five head of cattle as dowry. While this agreement was still in existence Respondent received two cattle as dowry from the Appellant for the same girl and later four more from another suitor, named Solomon. Under such circumstances the Court is of opinion that

sufficient grounds have been shown by the Appellant for breaking off his engagement and recovering his cattle.

The appeal is allowed with costs and judgment in the Magistrate's Court altered to judgment for Plaintiff for the two cattle claimed or value assessed at £7 10s. each, and costs of suit, the Plaintiff having the right to recover the actual cattle paid by him.

Butterworth 23 March, 1908. A. H. Stanford, C.M.

Mnyateli vs. Mnyateli.

(Tsomo.)

Estates—Certificates of Citizenship—Act 18 *of* 1864—*Proclamation No.* 227 *of* 1898—*Letters of Administration—Procedure.*

Samuel Mnyateli, in his capacity as Executor Dative in the estate of the late Plaatje Mnyateli, sued Jacob Mnyateli for the recovery of certain stock and grain, the property of the estate. He stated in his summons that Defendant, as one of the sons of the deceased Plaatje— who had died on the 20th December, 1904 —was one of the heirs *ab intestato* in the estate, but he had appropriated a portion of the property without authority and without consulting the heirs. Samuel now sued for the restoration of this property and for damages.

Defendant Jacob excepted to the summons as follows:—The late Plaatje was the holder of a certificate of citizenship under the provisions of the Native Successions Act, No. 18 of 1864, and his estate should, therefore, have been administered under Native law without the interference of the Master of the Supreme Court. The said Plaatje was a resident of the Tsomo District and, therefore, in terms of Proclamation No. 227 of 1898, proclaimed in the District by Proclamation No. 22 of 1904, his estate should be administered according to Native law and custom without the interference or control of the Master of the Supreme Court. Under Native law the Plaintiff, being a younger son of the late Plaatje, would have no *locus standi*. Defendant therefore prayed for dismissal of the summons.

From the evidence taken on the exception it appeared that the late Plaatje was married by Christian rites at Kamastone, in the Cape Colony, that Plaintiff's father, David—who was absent at work and whose whereabouts were unknown—was his eldest son, and that Jacob Mnyateli, the Defendant, was a younger brother of David.

The Magistrate overruled the exception on the ground that Plaintiff was duly appointed the executor by the Master of the Supreme Court and he remained so until the appointment was set aside.

The Defendant Jacob appealed against this ruling.

In his reasons, the Magistrate said that Section 20 of Proclamation No. 227 of 1898 did not forbid the appointment of an Executor Dative nor the issue of Letters of Administration, and in this case, where the heir under Native law was not forthcoming, it was well that the estate should be collected and protected under Letters of Administration.

Pres.:—The late Plaatje, according to the evidence, was a Fingo formerly living at Kamastone in the District of Queenstown and was the holder of a Certificate of Citizenship under Act No. 17 of 1864 and, under the provisions of the second Section of Act 18 of 1864, had he died within the Cape Colony Native law would have applied in the administration of the estate. At the time of his death, stated in the summons to have taken place on the 20th December, 1904, he was living in the District of Tsomo, to which the provisions of Proclamation No. 227 of 1898 have been extended by Proclamation No. 22 of the 5th February, 1904, in which similar provision to that in Act 18 of 1864 is provided for the administration of movable property of Natives dying without having legally executed a will. The Letters of Administration therefore appear to have been granted in error by the Master of the Supreme Court, but, taking the case of *Sekeleni* vs. *Sekeleni* as a guide, in which the same conditions obtained, the Appellant appears to have mistaken his remedy. His proper course, as indicated by the Chief Justice in the case quoted, is to get the Letters of Administration set aside. The appeal is dismissed with costs.

Butterworth. 25 March, 1908. A. H. Stanford, C.M.

Pumlomo vs. Mbusi.

(Willowvale.)

Dowry—Fine for Abduction merged with Dowry—Illegitimate Children—Gcaleka Custom.

Mbusi sued Pumlomo for the return of his wife and child or the restoration of his dowry. He alleged that he paid five head

of cattle as dowry for Defendant's sister, that there was one child of the marriage, and that while he was away at work his wife returned to Defendant's kraal and there gave birth to an illegitimate child. Defendant pleaded that the woman had been abducted and that Plaintiff paid four head as dowry, but claimed in reconvention one beast for the abduction. He stated that he had tendered the four cattle to Plaintiff, but they had been refused.

The Magistrate gave judgment for the return of two head of cattle and of the two children and dismissed the claim in reconvention.

Defendant appealed.

The Magistrate furnished the following reasons:—"I am satisfied that this marriage actually took place with dowry of five head of cattle, one of which, however, never left Plaintiff's possession. As the woman refuses to return to her husband I consider that he is entitled to the two children born during the duration of marriage, for although the one is an illegitimate child, it is considered by Native law to be that of Plaintiff, especially as the woman refuses to divulge the name of her paramour, hence my judgment for the two cattle and two children, thus allowing two head for the children born of the marriage.

"With reference to the matter of costs, upon which I am given to understand the appeal is lodged, Plaintiff claimed his wife and child and, according to the strict letter of the law, was entitled to their restoration. I consider he was justified in refusing the tender, especially as the matter of the second child was in dispute: and, taking the whole of the circumstances into consideration, I consider he was entitled to his costs."

Pres.:—Certain questions having been submitted to the Native Assessors they state that the Gcaleka custom differs from the Fingo with regard to the abduction of a girl when followed by marriage. In such circumstances a beast, if paid for the abduction, becomes merged in the dowry and is recoverable on the dissolution of the marriage as dowry. That when a woman leaves her husband and returns to her own people and gets with child, then, if on the husband claiming the return of his wife, this is refused and the refund of the dowry offered, he has no claim for the illegitimate child.

The Court is satisfied that a marriage took place, but the Magistrate has in his judgment included the second child, which was not

prayed for in the summons and to which, by Native custom, Plaintiff was not entitled. With regard to the tender, as it did not include the first child which the Plaintiff claimed and obtained judgment for, he was not entitled to costs.

The appeal is allowed with costs and the Magistrate's judgment amended to exclude the second child by the woman, but as the Magistrate deducted a beast from the dowry on this account the number of cattle to be returned is altered to three or value, £15.

Butterworth. 26 March, 1908. A. H. Stanford, C.M.

Yangayi vs. Ndarana.

(Kentani.)

Provisional Judgment—Re-opening—Time Limit—Jurisdiction—Practice.

On the 30th April, 1907, Ndarana sued Yangayi for three head of cattle and obtained a provisional judgment. A writ was issued on the 10th May, 1907, and the judgment was satisfied. On the 2nd March, 1908, Yangayi sued Ndarana to show cause why this judgment should not be set aside and the stock seized returned to him, and he alleged that he was out of the country when the first case was heard and that he had had no opportunity of defending himself. The case was re-opened and, after re-hearing, the Magistrate sustained his original judgment.

Yangayi appealed.

Pres.:—The first question arising in this action is "Can a Magistrate set aside or alter a judgment of his Court which has become final?" Unfortunately, no decisions of the Higher Courts bearing on this issue are to be found. The first of the precedents quoted by the attorney for the Appellant does not apply as it deals with a provisional judgment in a Magistrate's Court, which had not become final. The second is one dealing with the issue of a writ of execution from one of the Higher Courts, and the conditions are not the same as in the present action, nor the powers of the relative Courts the same. The Magistrate presumed that he had jurisdiction to re-open the case and has re-heard it. The second issue then is (if this procedure was correct) whether it has been shown that the provisional judgment got by the

Respondent against the Appellant was obtained by fraud or misrepresentation. The presiding Magistrate did not believe this to be the case and has sustained his original judgment. On the first question this Court is of opinion that the Appellant has mistaken his remedy, that he should have moved in a Court of higher jurisdiction for leave to re-open the case, or for such relief as could be given, and that it was not competent for the Magistrate to allow the re-hearing of the case on a summons praying for the setting aside of a final judgment of his Court. Holding this view, it is not necessary to express an opinion on the second issue mentioned. The appeal must be dismissed with costs.

Flagstaff. 13 April, 1908. R. W. Stanford A.C.M.

Mlotya vs. Mnqayi.

(Qumbu.)

Seduction—Seizure of Cattle by Women under Xqutu Custom—Spoliation.

Mnqayi sued Mlotya for the sum of twelve pounds, the value of a beast unlawfully seized by Defendant and slaughtered.

The facts were admitted: that Plaintiff's younger brother carried off and seduced a girl of Defendant's kraal, and Defendant's women thereupon followed up and seized a cow which they took away to their kraal and in spite of his (Plaintiff's) protests the animal was slaughtered.

The Magistrate gave judgment for Plaintiff, and in his reasons said that the Native custom in such cases was no longer recognised as the law of spoliation made it inoperative.

Defendant appealed.

Pres.:—From the record it appears that the women of Defendant's kraal slaughtered the beast under an old Native custom, which formerly allowed them, when a girl had been deflowered, to take a beast from the seducer's kraal and kill it.

After hearing the arguments the Court is of opinion that a custom of this sort cannot be supported by the authorities and the Magistrate's finding is sustained and the appeal dismissed with costs.

Flagstaff. 18 April, 1908. R. W. Stanford, A.C.M.

Mkutu vs. Mtengana.

(Tabankulu.)

Seduction and Pregnancy—Scale of Damages.

Mtengana sued Mkutu for six head of cattle as damages for seducing and causing the pregnancy of his sister on two separate occasions.

Defendant admitted the acts and stated that he had paid six goats on account.

The Magistrate gave judgment for four head.

Defendant appealed.

Pres.:—In this case the Plaintiff claimed six head of cattle from the Defendant on the ground that he had twice made his sister pregnant, and the Magistrate found in his favour for four head and the Defendant appeals on the amount of the award.

Under Native law the Defendant is liable for the first pregnancy only, and the appeal is allowed with costs and the judgment is altered to one for Plaintiff for three head of cattle or their value, £15.

Umtata. 7 July, 1908. W. T. Brownlee, A.C.M.

Humana vs. Xakaza.

(Engcobo.)

Dowry Restoration—Acceptance of Part—Dissolution of Marriage Re-payment by Holder of Dowry—Allowance for use of Woman.

Xakaza sued Humana for four head of cattle or £30, less £3 for wedding outfit, and in his summons alleged that he had married Defendant's daughter, paying six head as dowry, that shortly after the marriage his wife deserted him and returned to Defendant, that thereafter the marriage was dissolved by agreement and Defendant returned two head to Plaintiff, leaving a balance of four to be paid, less an allowance of £3 for the wedding outfit.

Defendant admitted payment of four head of cattle as dowry and pleaded that the matter had been fully settled by the return of two head, two being retained for the spoiling of the girl and for the expenses incurred. The Magistrate's finding and judgment were as follows:—"The Court is of opinion that six head

of cattle were paid as dowry; no children were born of the marriage and the woman has left her husband without cause. Two cattle have been already returned and, deducting one to mark the dissolution of marriage, leaves three due to the Plaintiff. Defendant is entitled to £3 for wedding outfit. Judgment for Plaintiff for three head of cattle or £22 10s., less £3 for wedding outfit and costs."

Defendant appealed.

Pres.:—In this case the Respondent—the Plaintiff in the Court below—claimed the return of four cattle, balance of dowry paid by him for his wife, who has since marriage left him and returned to Appellant—the Defendant in the Court below—and in doing so alleges that he paid in all six head of cattle and that two have been returned to him.

The Appellant, in admitting the payment of dowry and the return of the woman to him, alleges that only four were paid, that two were returned to Respondent and that he has retained the remaining two, one for the use of the woman and one for the wedding outfit. The Magistrate has, upon the evidence, come to the conclusion that six head of cattle were paid, and on this ground gave judgment for the Respondent for three head of cattle or their value, £22 10s., less £3 for wedding outfit, and has allowed the Appellant—the Defendant below—one beast to mark dissolution of marriage. It is argued for the Appellant that the Respondent, having in the first instance accepted two head of cattle, it is clear that he has taken all he is entitled to. The matter, upon being submitted to the Native Assessors, they state that ordinarily in matters of this kind if the husband take cattle he must be considered as having settled conclusively, unless he report to the Headman that he has still to receive more cattle, but that matters of this kind must be settled on the evidence. They further state that no beast is deducted for the use of the woman where no children have been born. In this case it is clear that the Appellant has detained at least two cattle which he is not entitled to, and in any case Respondent would be entitled to recover these. The Magistrate, however, believes upon the evidence that six head of cattle were paid and has given judgment accordingly, and this Court will not lightly interfere with any finding upon the evidence.

The Magistrate has erred in the matter of the beast which he has allowed for dissolution of marriage. Such payment for

dissolution of marriage is made by the holder of dowry—the woman's father or guardian—and not by the husband, who pays dowry to contract marriage. As, however, there is no cross appeal the decision on this part will not be disturbed. The appeal is dismissed with costs.

Umtata. 7 July, 1908. W. T. Brownlee, A.C.M.

Mnyulwa vs. Saliman.

(Engcobo.)

Adultery—Marriage in good faith—Damages for Adultery.

Mnyulwa sued Saliman for damages for adultery and alleged that he had been absent from home for some four years, and on his return found his wife with a child, of whom Defendant was the father.

Defendant pleaded that he had married the woman in good faith and paid dowry for her, that subsequently he found that she still had a husband living and he thereupon took steps to have his marriage annulled and obtained a refund of his dowry.

The Magistrate found on the evidence that the plea was correct and gave judgment for Defendant with costs, following the decision in the case of *Mditshwa* vs. *Nqeneka*.

Mnyulwa appealed.

Pres.:—In this case the claim is for damages for adultery and, while intercourse on the part of the Defendant with Plaintiff's wife is not denied, the defence is that the woman in question was given in marriage to Defendant by her guardian and was married by Defendant in good faith. This Court is satisfied that this is so because as soon as Defendant ascertained that there was any question of a previous marriage he at once repudiated the woman and claimed the return of his dowry. In argument, the following cases have been cited:—*Mdange* vs. *Stokwe*, *Mhlola* vs. *Mgqadaza* and *Mditshwa* vs. *Nqeneka*. The first case cited has no bearing upon the case now under consideration, as in that case it was clear that the defendant knew that the woman in question was the plaintiff's wife; in the case of *Mhlola* vs. *Mgqadaza* it is not clear whether the defendant was aware or not of the existence of any previous marriage, and in deciding this case this Court relies upon the decision in the case of *Mditshwa* vs. *Nqeneka*, which was based upon the opinions of the Native Assessors, who state what the Tembu custom is. In that case Nqeneka sued for

certain children born in adultery to Mditshwa and Nqeneka's wife and for damages for adultery, and the Assessors say:—

"According to Tembu law, Nqeneka is entitled to the children "as they were born to his wife while his marriage with her "subsisted, he having never claimed the return of his dowry, "but that no claim lies for adultery as the second marriage, "although not legal, was entered into *bona fide* by Mditshwa."

In this case, as already indicated, this Court is satisfied that Respondent contracted a marriage in good faith and is, therefore, not liable for damages. The appeal is dismissed with costs.

Umtata. 9 July, 1908. W. T. Brownlee, A.C.M.

Nomdenge vs. Xontani.

(Ngqeleni.)

Abduction and Seduction—Damages—Bopa Fee—Pondo Custom.

Nomdenge sued Xontani for eight head of cattle, less one paid on account as damages, for seducing and causing the pregnancy of his daughter. He alleged that some two years before Defendant eloped with his daughter and he followed and demanded a fine; that Defendant said he had no cattle and the girl was then brought home; that thereafter Defendant again abducted her, and a beast was paid as "Bopa" because Defendant would not marry her. She was again brought home and again abducted, and remained with Defendant about two years. Since the issue of summons Defendant had paid three head.

Defendant admitted eloping with the girl, but contended that first one beast was paid by his father to Plaintiff as dowry and subsequently three head were paid, and thereafter the girl in question became his wife.

The Magistrate gave judgment for Defendant with costs, stating that he found that a marriage was agreed upon and that the cattle were paid as dowry.

Plaintiff appealed.

Pres.:—In this case this Court is of opinion that the Magistrate in the Court below erred in his finding upon the evidence. The evidence of the Defendant and his witnesses is not consistent with the custom and practice in cases of this kind and the evidence of the Plaintiff and his witnesses is.

The matter has been submitted to the Native Assessors, and they say the custom is this:—"When a girl is carried off and the

father follows up, if the suitor wish to marry, the father demands payment of dowry. Should the suitor not be in a position to pay dowry, the father of the suitor then pays out a beast to bopa, or bind the girl, and that should the suitor thereafter continue to carry off the girl and pregnancy ensue, the father may then institute an action for damages, and such damages would be paid quite irrespective of the original bopa beast paid."

In this case the suitor's father said he had no cattle. The girl's father demanded a fine if the girl were not taken in marriage. One beast was paid and during the two years that have elapsed nothing more has been paid. The girl's father (the Appellant) states that the animal was paid to bopa; the Respondent states it was paid as dowry. The custom and practice are consistent with the contention of Appellant, and not with that of the Respondent. Further than this, it is clear that the three cattle since paid were paid after issue of summons and when the Respondent knew that the claim against him was one for damages and not for dowry. Under all these circumstances this Court is of opinion that Appellant was entitled to succeed in his action. The appeal is allowed with costs and the judgment of the Court below altered to judgment for Plaintiff for two head of cattle or their value, £10, and costs of suit.

Umtata. 9 July, 1908. W. T. Brownlee, A.C.M.

Mtambayahlaba vs. Sambata.

(Umtata.)

Fees—Messenger's Services in Recovering Damages.

Mtambayahlaba sued Sambata for the recovery of one beast, or £4, its value, which he alleged was due to him in consideration of his acting as a messenger for Defendant in recovering four head of cattle due to Defendant as a fine for adultery. Defendant pleaded not liable and, after the case for Plaintiff was closed, the Magistrate gave judgment for Defendant with costs. In his reasons he said that taking the evidence of Plaintiff it did not appear at all clear that any definite terms of service had been agreed upon between the parties, and the allegation by Plaintiff that he was promised a beast as well as Arosi is contradicted by Arosi—his only witness—who swears definitely that they were offered a beast between them.

Plaintiff appealed.

Pres.:—In this case the Magistrate in the Court below has erred in giving judgment without having heard the Defendant. The Plaintiff has established a *prima facie* case, and it then becomes necessary for the Defendant to show cause why judgment should not be given against him. The Magistrate has apparently been misled by the fact that there was no specific contract and that there are two messengers employed. This does not, in the opinion of this Court and of the Native Assessors, to whom the point has been submitted, present any difficulty, for with regard to the first point it is not customary in cases such as this to enter into any specific contract, but a messenger is employed and is paid according to the success of his mission; if he fail in recovering anything then he also is paid nothing. Should a subsequent messenger be instituted and be successful, then he is rewarded by the person for whom he was messenger, and the original messenger has no claim, but may apply to the second messenger for a portion of his reward.

In this case the first messenger, Arosi, failed to recover anything, and so has no claim upon Respondent. Both he and Appellant, however, state that he acted in the latter instance as the assistant of the Appellant, so that the only person he can look to for reward is the Appellant.

From the evidence it would appear that the Appellant acted as messenger of Respondent, and that he was successful to the extent of recovering four head of cattle and, in the opinion of this Court, one beast is not, under Native custom, an excessive demand. The appeal is allowed with costs, the judgment of the Court below set aside and the case remitted to the Court below for further hearing and decision, the Plaintiff to be allowed to produce further evidence if he so desire.

Umtata. 9 July, 1908. W. T. Brownlee, A.C.M.

Goxo vs. Fredi Njiva.

(Ngqeleni.)

Illegitimate Children—Ownership—Inheritance—Dowry Restoration—Fines—Dowries Paid by Chiefs—Revival of Houses—Pondo Customs.

Fredi Njiva sued Goxo, guardian of the minor Nobomvu, for the restoration of certain three children, whom he (Fredi Njiva) claimed as eldest son and heir of his father, Gola.

(The grounds of action appear fully in the Appeal Court's judgment.)

The judgment of the Court below was that Fredi Njiva is heir and, as such, entitled to the custody of the three children.

Goxo appealed.

The Magistrate in his reasons stated that he gave judgment according to Native law that at the death of a father the son does not become disinherited and can claim all children that his mother may have.

Pres.:—In this case the Respondent, the Plaintiff in the Court below, claimed what amounts to a declaration of rights in respect of three illegitimate children—females—named Ncanyiwe, Nozimanga and Nomahlahla, born to his mother after the death of his late father Njiva, otherwise known as Gola. The issues in this case have been somewhat obscured by the fact that the Appellant, the Defendant in the Court below, has sued Nosirweqe, the mother of the Respondent and the three girls in question, and one Mjacu, and has in that case obtained a judgment giving him the custody, as the representative of a minor, named Nobomvu, of the three girls in question, and it thus becomes necessary to give a short statement of the whole circumstances.

It appears that a man named Noniya had as issue in his Right Hand House two sons, Goxo, the Appellant, and Ncokwana, of whom the latter was the elder, and a daughter named Nosirweqe. It is not very clear whether these children were born to Noniya himself or to a man named Mgoduka, who "went in" to Noniya's widow, but it is clear that after Noniya's death Mgoduka had for some time the charge of the Right Hand House of Noniya. Ncokwana died, leaving a son named Nogwam, and Nogwam died, leaving a son named Nobomvu, now a minor some ten years of age. Nosirweqe had in all seven children—two boys, the eldest of whom is the Respondent, and five daughters, and it is claimed by the Appellant on behalf of the minor Nobomvu that these seven children are illegitimate and, therefore, the property of the Right Hand House of the late Noniya, and, therefore, the property of Nobomvu as the direct successor to that house, and an action was accordingly instituted by the Appellant, on behalf of the minor Nobomvu, against Nosirweqe and Mjacu for the recovery of these children.

Upon the hearing of this case, however, it transpired that the woman Nosirweqe had been lawfully married to Njiva, the father

of the Respondent, and that dowry had been paid for her: that part of the dowry had been paid by the Chief Nqwiliso to Mgoduka, the representative of the kraal of Noniya, and that subsequently, upon Mgoduka leaving Pondoland and migrating to Bacaland, Nqwiliso had taken from him the cattle he had paid and their increase; that four children—two boys and two girls—had been born of this marriage, and that after the death of Njiva the woman Nosirweqe left Njiva's kraal, taking with her her four small children, and went to the kraal of Mjacu, her maternal uncle, where in due course the three illegitimate children now in question were born to her. The Appellant, the Plaintiff in that case, despite the fact that a marriage had taken place between Njiva and Nosirweqe, still maintained his claim to their four children on the ground that the marriage between them had been dissolved by the return to Nqwiliso of the dowry cattle paid by him.

Unfortunately in that case nothing seems to have been said of any claim which Respondent might have to these children, and the case was decided wholly and solely on its bearings between the Appellant and Mjacu, and as the latter could in the nature of things have no claim whatever to the children or their dowry, judgment was given in favour of Appellant, but apparently in view of the marriage that had taken place he was given only the three illegitimate children, and of these he has now possessed himself, and it is only upon his doing so that the Respondent has instituted the present claim, and in the opinion of this Court he is entitled to succeed in his claim, and the decision of the Court below is right.

The various points at issue have been carefully placed before the Native Assessors, and they have made the following statement of Pondo customs:—

(*a*) Dowry is not returnable if upon the death of a man his widow returns to her people should she have borne him children.

(*b*) Should she so return she may re-marry.

(*c*) If she remain at her father's kraal and illegitimate children be born to her

1. The children belong to their putative father if he pay cattle for them.
2. If he pay no cattle for them, then they belong to the woman's late husband's heir if he pay cattle for them.

3. Should no cattle be paid by either then the children are the property of the woman's father.
4. Should a fine be paid by the putative father, such fine belongs to the woman's father.

(*d*) If upon a man marrying, the dowry for his wife be paid by the Chief and the Chief subsequently take back such dowry, the man must pay out cattle of his own to keep the house standing, otherwise it falls and the marriage is dissolved.

In the present case the following facts seems to be clearly established: —

A. Marriage between Njiva and Nosirweqe and payment of dowry.

B. Resumption by Chief Nqwiliso of dowry paid by him.

C. Repayment of such dowry by Njiva. This is averred by Nosirweqe, and otherwise the failure of the Appellant for such a lengthy period to institute his claim and the failure of the woman Nosirweqe to return to her father's people on her husband's death cannot be understood.

D. The illegitimate children were not born at the kraal of Noniya, but at that of Mjacu, where Nosirweqe had gone with her late husband's children.

E. No fine was paid by either of the putative fathers.

This Court then is of opinion that the putative fathers having paid no fine they have no claim upon these children, and that as the children were not born at the kraal of Noniya, his representatives can have no claim on them, and it is very clear to this Court that throughout the woman Nosirweqe has been very careful to safeguard the interests of her son, the Respondent. She has not returned to her father's kraal, but has remained with her late husband's children and, with the assistance of her maternal uncle, Mjacu, has found her own means of supporting them and keeping the family together.

These conclusions do not appear to this Court to be in any way in conflict with the decision given in the first case, for while the Appellant is not in a position to resist the claim of the Respondent, the Defendant in the first action was equally unable, in his own right, to resist the claim made by Appellant, and upon the evidence there adduced the Magistrate could have given no other judgment than that recorded.

This Court is of opinion that Respondent is entitled to the three girls in question and the appeal is dismissed with costs.

Umtata. 10 July, 1908. A. H. Stanford, C.M.

Mangaliso vs. Nomanti and Another.

(Elliotdale.)

Children—Restoration—Maintenance Fees.

Plaintiff, Mangaliso, claimed the return of his two children, born of his marriage with one Nohantam, daughter of Nomanti. His marriage had been dissolved and the usual deductions made for the children, but they had remained with their grandmother, Nomanti, and he now sought their restoration.

The Magistrate refused the application and gave the following reasons: —

In this case the Plaintiff claimed the delivery of two children from their grandmother. The Plaintiff's marriage with their mother was dissolved by a judgment of this Court in his favour for the restoration of his dowry. At that time the children he now claims were living with their grandmother and he then made no claim for their return, and in his evidence in that case he admitted sending the eldest child in its infancy to her. The second child went with its mother, also in its infancy, to its grandmother, when she left Plaintiff in consequence of ill-treatment. It was therefore clear that he was satisfied with that arrangement and that the grandmother had reared these children. Section 27 of Act 15 of 1856 says that "if it will be for the manifest benefit of the said child to remain with the person with whom it is residing rather than to be delivered to the parent applying, then the Magistrate shall refuse to order the delivery of the said child and may authorise the person rearing such child to retain possession thereof." Under these circumstances, the grandmother having reared the children, the Court decided not to disturb the arrangement existing previous to and after dissolution of marriage. It was, however, explained to the Plaintiff that he has not lost his rights in respect of any future dowries which might be paid for these children.

Mangaliso appealed.

Pres.:—The Magistrate in dealing with this case is confusing Colonial law with Native custom. In the present action Native custom alone applies, and the Appellant is undoubtedly entitled to obtain the custody of his children upon payment of the usual fees for maintenance. The appeal is allowed with costs and judgment entered for the restoration of the children upon payment of two head of cattle and costs of suit.

Umtata. 10 July, 1908. W. T. Brownlee, A.C.M.

Mguzazwe vs. Betyeka.

(Ngqeleni.)

Adultery—Bona Fide Marriage—Damages for Adultery—Pondo Custom.

Betyeka sued Mguzazwe for damages for adultery, and in his evidence stated that he had paid dowry for his wife to her uncle, Mkalali, with whom she was staying at the time, and that shortly after his marriage with her she left him and went to her father to undergo Intonjane ceremonies. He stated that her father, Mtsheme, subsequently gave her in marriage to Defendant, receiving dowry from him for her. The dowry paid by Plaintiff had been recovered by Mtsheme from Mkalali, who thus held two dowries for the same woman.

The Defendant pleaded *bona fide* marriage and, in support of his case, called the woman's father, who asserted that Plaintiff had not married his daughter, but had paid a fine for seduction.

The Magistrate found that Plaintiff's marriage had been established and, as the second marriage of the woman to Defendant was admitted, awarded the damages claimed.

Mguzazwe appealed.

Pres.:—In this case it is quite clear from all the evidence that there was a marriage between the Respondent and the girl Notayi. The evidence of her uncle Mkalali is explicit upon this point, and her father, Mtsheme, was evidently also aware that a marriage had taken place, for in his claim against Mkalali he sues for cattle paid as dowry, not as damages. The case being submitted to the Pondo Assessors, they state that under Pondo law and custom

(*a*) A girl may be married from the kraal of her mother's people, and any dowry paid for her there may be claimed by her father.

(*b*) In a case such as this, if it be clear that the first marriage actually took place, the first husband has a claim for damages against the second husband, and in such a case the damages are the same as in ordinary cases of adultery and pregnancy.

(*c*) The foregoing holds good even though the second husband knew nothing of the first marriage, as the general appearance of the woman ought to show him that she had been a married woman and, further, a man proposing to marry should make minute enquiries as to the status and even as to the age of his intended wife.

It will be seen that in these matters the Pondo custom differs from that of the Tembus as set forth in the case of *Nqeneka* vs. *Mditshwa*. The appeal is dismissed with costs.

Mr. J. A. F. Gladwin, Resident Magistrate of Tsolo, Assessor, dissented and gave the following reasons:—

In this case the woman Notayi is an illegitimate daughter of Mtsheme, out of a sister of Mkalali. She grew up at Mkalali's and was given in marriage to Respondent by Mkalali, who received four cattle for her. Mtsheme sued and recovered these cattle—less one for maintenance—from Mkalali, and she then returned with Mtsheme to Pondoland. She has been given in marriage by Mtsheme to Appellant, and both Mtsheme and the girl are called as witnesses and declare that there was no marriage with Respondent. This, of course, is not true, but it is evident that when Appellant married her she was represented to him as an unmarried woman and he *bona fide* and innocently took her to wife as such. The adultery sued for is the intercourse which has followed this marriage. The Magistrate, in finding for Respondent (Plaintiff in the Court below) has been guided by the judgment in the case of *Mhlola* vs. *Mgqadaza* (Warner, page 47).

In the Penal Code it is laid down that a person contracting a subsequent marriage must inform the person to whom he or she is to be married of the true state of facts, and there is also a proviso in the Section making bigamy a crime (Section 168) that a Native marriage is not to be considered a previous marriage; in finding for Plaintiff, therefore, the Magistrate has punished Defendant when he would not have been liable criminally had the second marriage been a proper Christian marriage. According to general Native custom second marriages are not considered *adulterous;* they are frequently regarded as null and void and

the second husband must give up the children if any of his alliance, but the first husband would not recover damages for adultery before a Native chief; he would in such cases be instructed to claim his dowry from his father-in-law. In this view I am in agreement with the dicta in the case of *Nqeneka* vs. *Mditshwa*, but I do not agree with the opinion of the Pondo Assessors expressed in the judgment of the Court and I emphatically dissent from such judgment.

Butterworth 20 July, 1908. A. H. Stanford, C.M.

Mnyateli vs. Mnyateli.

(Tsomo.)

Jurisdiction—Administration of Estates—Letters of Administration.

The Plaintiff Jacob Mnyateli in his summons asked that Letters of Administration granted by the Master of the Supreme Court to Samuel Mnyateli be set aside, and his plaint was as follows:—

1. That he is one of the sons of the late Plaatje Mnyateli.
2. That Defendant is a grandson of the late Plaatje.
3. That the said Plaatje died a resident of this District after the promulgation of Proclamation 227 of 1898 in this District.
4. That as the said Plaatje died intestate his estate should be administered according to Native law and without the interference of the Master of the Supreme Court and without the issue of Letters of Administration.
5. That notwithstanding the provisions of the above-mentioned Proclamation, the Master of the Supreme Court did on or about the 14th December, 1906, issue Letters of Administration to the said Defendant.
6. That some time previous to the death of the said Plaatje he was an invalid and Plaintiff assisted him in the administration of his affairs, which were administered according to Native custom.

Exception was taken that the Magistrate had no jurisdiction in this case. It was contended, in reply, that the jurisdiction conferred on Magistrates in the Transkeian Territories by Section 23 of Proclamation 112 of 1879 was unlimited, and the case of *Sekeleni* vs. *Sekeleni* (S.C.R. 21, p. 118) was referred to.

The Magistrate held that he had no jurisdiction to set aside actions of the Master of the Supreme Court.

Jacob Mnyateli appealed against this ruling.

Pres.:—The question before the Court is whether, with the jurisdiction conferred by Section 23 of Proclamation 112 of 1879, it is competent for a Magistrate in the Transkei to set aside Letters of Administration granted by the Master of the Supreme Court. The question also arises whether or not in such an action the Master should be joined with the holder of the Letters of Administration. If so the case could not be determined by the Magistrate's Court, the Master not being within his jurisdiction.

It is unquestionable that a Magistrate in the Colony proper would have no jurisdiction in such a case, and the Court is of opinion that, wide as the provisions of the Section quoted are with regard to civil cases in the Territories, it was not contemplated by His Excellency the Governor and his advisers in Council that it should apply to acts of an officer of the Supreme Court, which would appear to be subject to review by judges of that Court only.

The Court therefore inclines to the view that the action has been wrongly brought in the Court of the Resident Magistrate, Tsomo, and the appeal is dismissed with costs.

Butterworth. 20 July, 1908. A. H. Stanford, C.M.

Ndaba vs. Ngalankulu.

(Nqamakwe.)

Procedure—Default of Plaintiff—Postponement—Dismissal of Summons.

Ngalankulu had entered an action against the Defendant in the Magistrate's Court and on the day of hearing he was in default. His attorney was also absent, but he had sent a telegram applying for a postponement owing to his client's absence at the General Council. The Defendant objected to a postponement and asked for dismissal of the summons with costs, and also for witness expenses. The Magistrate allowed a postponement and gave the following reasons:—"In granting a postponement in this matter I had in view the discretionary power vested in the Magistrate by Section 19 of Act 20 of 1856. The attorney for the Plaintiff in his telegram made it appear to me that the Plaintiff, the

principal and material witness on his side, was required to be present at the General Council at Umtata, and on that account could not attend this Court on the day of hearing. I, therefore, allowed the postponement, giving costs of the day, inclusive of witness expenses, against Plaintiff. It has always been the practice of this Court to keep down expenses in litigation by granting postponements when applied for by either side provided the application can be reasonably entertained."

The Defendant appealed.

Pres.:—In deciding legal questions the Court is bound to observe the strict construction of the law and cannot take into consideration hardship which may arise in individual cases from its enforcement. Section 13, Schedule B, Act 20 of 1856, as amended by Rule of Court No. 413, says it shall be permitted to any Plaintiff or Defendant to appear and conduct his case in person or by a duly enrolled agent, or by an attorney of the Supreme Court, and in Section 31, Schedule B, of the Act it is enacted that if the party complaining make default the Court shall judge the said plaint to be dismissed. In the present case there was no appearance by the party making complaint, or by anyone authorised on his behalf, and as the Defendant objected to postpone, the Magistrate should have been guided by the Statute. The appeal is allowed with costs and judgment entered for dismissal of summons with costs.

Butterworth. 21 July, 1908. A. H. Stanford, C.M.

Maseti vs. Sinxoto.

(Kentani.)

Dowry Restoration—Harbouring—Whom to Sue.

Sinxoto sued Maseti for the restoration of his wife Nojoyine or five head of cattle paid for her. His wife had deserted him and gone to reside with her mother, who was now the wife of Defendant. Plaintiff had paid the dowry to Boyisana, the guardian of Nojoyine, but he sued Maseti because his wife was at his kraal.

The Magistrate ordered the woman to be returned, stating in his reasons that Maseti was responsible for his wife's tort in harbouring Nojoyine.

Maseti appealed.

Pres.:—When a woman married under Native custom leaves her husband his only remedy upon failing to secure her return is to sue the person to whom the dowry was paid for the return of the woman or failing that of the dowry. Actions against other persons for harbouring are unknown under Native custom. The appeal is allowed with costs and the judgment of the Court below altered to one for Defendant with costs.

Butterworth. 21 July, 1908. A. H. Stanford, C.M.

Sibozo vs. Notshokovu.

(Idutywa.)

Inheritance—Institution of Heirs where no Male Issue—Adoption.

Notshokovu sued Sibozo for the recovery of four head of cattle, and in his summons said that he was heir of the late Gangatela and that the stock sued for were cattle received by Defendant as dowry for a daughter of the late Gangatela.

From the evidence it appeared that Defendant was the younger brother of Gangatela, who was the son of the Qadi of the Great House of the late Nyikini. Plaintiff was one of the sons of Tonono, the heir of the Great House of Nyikini. Gangatela had died without male issue, leaving daughters only and Plaintiff Notshokovu alleged that before his death Gangatela had called a meeting of the whole family and had appointed Plaintiff—with the consent of Tonono—to be his heir. Defendant denied that such a meeting was held in which Plaintiff was instituted as heir, and contended that in default of male issue to Gangatela he, as his younger brother, was his heir.

The Magistrate found that Notshokovu had been properly instituted as heir and gave judgment for the cattle claimed.

Sibozo appealed.

Pres.:—It is not unusual for a Native having no male issue to adopt an heir or if a polygamist and having no male issue in one house taking a son from another house and putting him in as his heir to that house. In the present case it seems beyond doubt that Gangatela instituted the Respondent as heir to his house and that he did so at a properly convened meeting of his relations and notified his chief of the step taken, and the man so appointed became the heir to the property left by him. The appeal is dismissed with costs

Butterworth. 21 July, 1908. A. H. Stanford, C.M.

Roji vs. Jongola.

(Idutywa.)

Adultery—Repudiation of Wife—Restoration of Dowry.

Roji sued Jongola for the restoration of his dowry and in his summons said that he had married his wife—Defendant's daughter—about sixteen years ago, and that subsequently, during his absence at work, his wife gave birth to two children of whom he was not the father, that his wife could not produce sufficient evidence to enable him to discover the adulterer and he therefore returned her to her people and claimed that he was entitled to refund of his dowry.

An exception was taken that the summons showed no cause of action, and the Magistrate dismissed the case on the ground that before return of dowry can be demanded the husband must first sue for his wife. On appeal (28 March, 1908) the Appeal Court overruled this judgment and sent the case back for trial on its merits.

At the subsequent hearing Plaintiff said he had been away at work for four years and on his return he found his wife with her people. He then paid a beast as additional dowry and she returned to him. She had had two children while he was away and neither his wife nor her relatives would disclose the name of the adulterer. On these grounds he sent his wife back to her people and claimed refund of dowry.

The defence was that the Plaintiff had driven away his wife.

The Magistrate gave judgment for Defendant and Plaintiff appealed.

Pres.:—The Appellant allowed his wife to live away from him for a number of years during which time she had two children not by him. He then paid additional dowry and got her back, but after she had been with him three months he drove her away and demanded restoration of the dowry, giving as a reason that the woman and her relatives would not produce sufficient evidence to enable him to obtain damages from the adulterer. The case having been submitted to the Native Assessors they state that the dowry is not recoverable under such circumstances, and with this opinion this Court agrees. The appeal is therefore dismissed with costs.

Butterworth. 21 July, 1908. A. H. Stanford, C.M.

Rafu vs. Madolo.

(Willowvale.)

Marriage—Rights of Widows—Recovery of First Dowry—Age of Majority.

Rafu sued for a declaration of rights in respect of his wife, Nojoyine, and his three children. In his summons he alleged that he had married Nojoyine and paid dowry for her to Defendant Madolo who now denies the marriage. He asked for the restoration of one of the children, who had been living with Madolo, and for an order declaring the marriage of full force and that the children are his. Nojoyine and two of the children were living with him (Plaintiff).

In his plea the Defendant Madolo denied that a marriage ever took place between Rafu and Nojoyine and admitted receiving three head of cattle from Rafu, but as a fine.

From the evidence it appeared that Nojoyine was a widow when the alleged marriage took place. Her late husband's father, in evidence, admitted that the dowry paid by his son had never been returned, but stated that he had no intention of ever claiming it, as he maintained that the widow and whatever children she might bear were his property. He asserted that the marriage between his son and the woman in question was still, according to Native custom, in existence.

The Defendant's attorney claimed dismissal of the summons on the ground that the first marriage had never been dissolved, and quoted in support the case of *Ngeneka* vs. *Meditshwa*.

The Resident Magistrate dismissed the summons and Rafu appealed.

Pres.:—The question whether a widow who was married according to Native custom could re-marry was decided in the E.D. Court in the case of *Mbono* vs. *Manxoweni*, heard on 13th August, 1891. By Proclamation No. 140 of 1885 the age of majority for both males and females is fixed as 21 years. By the death of her husband the woman Nojoyine was free to contract a second marriage. The precedent quoted in the Magistrate's Court does not apply in the present instance, as in that case the woman's husband was still living and the marriage subsisting. She could not, therefore, contract a second marriage

during the lifetime of her husband. The appeal is allowed with costs and the Magistrate's ruling in the Court below set aside and the case returned to be heard on its merits.

Kokstad. 5 August, 1908. A. H. B. Stanford, C.M.

Cakile vs. Tulula.

(Mount Ayliff.)

Inheritance—Illegitimate Children—Baca Custom.

Cakile sued Tulula, in his capacity as heir to the late Mkotshana, for the restoration of certain stock.

Tulula asked for dismissal of the summons on the ground that he was not the proper person to be sued, as the late Mkotshana had left a son and heir, named Mboyi.

From the evidence it appeared that the parties were Bacas and the late Mkotshana had two wives, neither of whom had male issue, and that Mboyi was an illegitimate son for whom Mkotshana had paid a fine. This boy grew up with his mother's people but he was sent for by Mkotshana who provided a wife for him.

The Magistrate dismissed the case and furnished the following reasons: —

"The exception in this case has been taken on a question of Native custom and the facts are not disputed. Mkotshana having died without male issue by his two lawfully-married wives, the son of Xaxashe, for whom he has paid a substantial fine, is entitled to succeed to the property. Had the sons of the two wives lived, Mboyi could not inherit the property, but he would, according to Native custom, rank as a younger son of one of the houses and dowry would be provided for him from the hut in which he was placed on return to his father's kraal."

Plaintiff appealed.

Pres.:—The reasons given by the Resident Magistrate cover the Native custom applicable to such a case. It is not in dispute that Mboyi is the son of the late Mkotshana, who paid the usual fine for causing the pregnancy of his mother, that he fetched Mboyi to his kraal and provided him with a wife, treating him in all respects as a son.

In the absence of male issue by the wives of the late Mkotshana, Mboyi is the rightful heir and proper person to be sued.

The appeal is dismissed with costs.

Kokstad. 5 August, 1908. A. H. B. Stanford, C.M.

Zace vs. Siman Tukani.

(Mount Frere.)

Dowry Restoration on Death of Wife—Christian Marriage.

Tukani sued Zace for the restoration of certain cattle and in his summons alleged that he married Defendant's daughter by Christian rites and paid 10 head of cattle as dowry for her, that the woman died shortly afterwards from natural causes and on this ground he claimed the restoration of his dowry.

An exception was taken that the marriage having been celebrated by Christian rites Plaintiff could not recover the dowry paid.

The Magistrate overruled the exception and Defendant appealed.

Pres.:—The dowry was paid in accordance with Native custom. The form of celebration of the marriage is immaterial where dowry has been paid; the question whether it or any portion of it is returnable or not must be determined under Native law.

The appeal is dismissed with costs and the case is returned to the Magistrate to be heard on its merits.

Flagstaff. 14 August, 1908. A. H. B. Stanford, C.M.

Mkohlwa vs. Mangaliso.

(Flagstaff.)

Dowry—Action to Compel Payment—Possession of Children—Pondo Custom.

Mkohlwa sued Mangaliso in an action for a declaration of rights in regard to a certain child and for certain cattle due to him as dowry by Defendant.

The Magistrate dismissed the summons and gave the following reasons:—

"It appears that six or eight years ago the Defendant married Plaintiff's sister according to Native custom, but, although demanded, never paid anything as dowry for her at the time. After the woman had been living with the Defendant for six or eight years and had three children by him, two of whom died, Plaintiff demanded dowry again, which the Defendant refused to pay. He therefore "telekwaed" the woman and took her home with him, where she is now. Plaintiff now sues for a declaration of

rights in regard to the female child living and for three head of cattle—one head for each of the children that died and one for the services of the woman during the time she was with the Defendant.

"This being tantamount to suing for dowry, which is contrary to Native law and custom, the Court dismissed the summons with costs on the ground that it disclosed no cause of action. (*Vide* case of *Adonis* versus *Zazani*, Warner's Reports, page 9.)"

Plaintiff appealed.

Pres.:—The case having been submitted to the Native Assessors they state:—

"That under Pondo custom there is no action to compel payment of dowry.

"That where a woman has been given in marriage but no cattle were paid as dowry, the father's right in the woman remains and he may take her from the husband until he pays.

"The father is also entitled to have possession of any children which may have been born of the marriage until such time as the husband pays dowry."

It is admitted that a marriage was arranged some eight years ago between the Respondent and Appellant's sister, but that no dowry was paid. Under the statement of Native custom given it is clear that Appellant is entitled to have the custody of the child until such time as the Respondent pays a reasonable dowry.

The appeal is allowed and judgment in the Magistrate's Court altered for the Plaintiff to have custody of the child until such time as the Respondent shall pay a reasonable dowry or sufficient cattle to enable him to claim the child.

Respondent to pay costs in both Courts.

Flagstaff. 14 August, 1908. A. H. B. Stanford, C.M.

Jakalase vs. Nobongo.

(Bizana.)

Marriage Dissolution on Ground of Adultery—Dowry Restoration—Repudiation of Wife.

Jakalase sued Nobongo in an action in which he claimed the restoration of the dowry he had paid Defendant for his daughter and for an order cancelling the marriage between himself and the woman. In his summons he alleged that his wife had committed adultery and left his kraal.

The Magistrate dismissed the summons and gave the following reasons:—

"In this case Plaintiff sues for cancellation of marriage and return of dowry. The Defendant pleads that he is willing to restore the woman, and states that Plaintiff has not demanded her return, and further states that he does not wish to have her back, but only desires the return of his dowry and cancellation of the marriage. Plaintiff further admits having ill-treated the woman. The Court was therefore of opinion that as Plaintiff refused to have the woman back he was in the same position as a man who had driven his wife away and was not entitled to the return of his dowry. The Court was further of opinion that adultery could not be sufficient cause, according to Native custom, to entitle Plaintiff to succeed in his claim for cancellation of the marriage; and as Plaintiff had not sued for the return of his wife or dowry paid by him—the only action which he would have against the Defendant—the summons was dismissed with costs."

Plaintiff appealed.

Pres.:—In ordinary circumstances under Native custom adultery on the part of the wife is not a sufficient ground for obtaining a dissolution of the marriage and return of the dowry. The evidence shows clearly that it is the husband who is repudiating the wife, and under such circumstances he is not entitled to the return of the dowry.

The appeal is dismissed with costs.

Flagstaff. 14 August, 1908. A. H. B. Stanford, C.M.

Tsibiyana vs. Ngceni.

(Tabankulu.)

Widows—Re-Marriage—Illegitimate Children—Smelling Out—Pondo Custom.

Tsibiyana sued Ngceni in respect of the guardianship of certain children and for certain dowry cattle. In his summons he alleged that his late father, Galeni, had married Defendant's sister, Masigwiji, and the issue was himself and one girl; that later the woman returned to her people and there gave birth, after the death of Galeni, to two girls, illegitimate children, and later on four female children and one boy were born, their father being a man named Sipungu; that two of the girls were married

and dowry was received for them, and he now asked to be declared guardian of the children and entitled to the dowry already received.

Defendant admitted the marriage of his sister to Galeni, but stated that after Galeni's death the widow was smelt out and she returned to him and, further, that no attempt was ever made to get her back. He also stated that she had married Sipungu, who had paid dowry for her.

The Magistrate gave judgment for Defendant, believing that the widow had been smelt out.

Plaintiff appealed.

Pres.:—The case having been submitted to the Native Assessors they state that when a woman who has borne children on the death of her husband returns to her own people, and there has children, such children do not belong to the heir of the deceased husband, but to her father or his heir, and under such circumstances it is competent for the father to again give her in marriage. If on the death of her husband a widow is smelt out, the husband's family has no further claim on her.

In the present case all the circumstances indicate that on the death of her husband the woman Masigwiji was smelt out and driven away. This view is strongly supported by the fact that for a great number of years no effort has been made to get her back, and when Malawa, her husband's brother, fetched away the children of his deceased brother he left her. This being so the Appellant can have no claim for the dowries of the two girls born to the woman since the death of her husband, or, under any circumstances to the children resulting from her second marriage.

The appeal is dismissed with costs.

Umtata. 10 November, 1908. A. H. Stanford, C.M.

Njoko vs. Gqozombana.

(Umtata.)

Procedure—Exceptions—Declaration of Rights—Premature Action.

Njoko, in an action against Gqozombana, made the following allegations in his summons:—

(1) That after the death of his father, the Defendant—who is a relative of the Plaintiff—came to live with him and was regarded as the adopted son of Plaintiff.

(2) That about the month of July, 1907, the Defendant being desirous of marrying the daughter of Lumkwana, asked the Plaintiff, as his adopted father, to contribute towards his dowry.

(3) The Plaintiff accordingly contributed three head of cattle for the dowry.

(4) The Defendant's engagement was broken off and the cattle returned to him.

(5) That about November, 1907, the Defendant left the Plaintiff's kraal, taking the three head of cattle with him, without the consent of Plaintiff.

(6) That Defendant now denies that Plaintiff contributed the said three head of cattle, but alleges that he purchased them from Plaintiff, which, however, Plaintiff denies.

(7) That having so contributed the three head of cattle, the Plaintiff, by Native law and custom, would be entitled to the dowry of the first daughter of Defendant, which right the Defendant refuses to recognise.

Njoko prayed for a judgment of Court declaring him to have contributed these cattle as a dowry contribution, and by reason of such contribution to be entitled to the dowry or a portion thereof of the first daughter of Defendant.

The Defendant excepted to the summons that the action was premature as it is not asserted that Defendant is married and has a daughter. He stated that he was not married and tendered evidence in proof.

The Magistrate upheld the exception and dismissed the summons on the ground that the action was premature, the claim being one for a declaration of rights in respect of the dowry to be paid for a person not yet born.

Njoko appealed.

Pres.:—This is a claim in which Native custom only can apply. In cases dealt with by Native chiefs there are no such things as exceptions, each case being heard and dealt with on its merits. In the present case, if the Plaintiff can establish the allegations in his summons he is entitled to a declaration of rights. The appeal is allowed with costs, the Magistrate's ruling set aside and the case returned to be heard on its merits.

Umtata. 10 November, 1908. A. H. Stanford, C.M.

Mapango vs. Zuma.

(Cofimvaba.)

Dowry Cattle—Valuation—Restoration of Cattle.

Zuma sued Mapango for the restoration of his wife or three head of cattle, the dowry paid for her. Receipt of the three head was admitted. There was one child of the marriage and the Magistrate gave judgment for two head or their value, £20, deducting one beast for the child.

Mapango appealed on the point of valuation.

Pres.:—In this case the Magistrate has given a correct judgment as to the number of cattle to be returned, viz., two head, and if any of the original dowry is still in Appellant's possession these are the proper cattle to be returned and which the Respondent cannot refuse to accept. If Appellant offers other cattle these are subject to the approval of the Magistrate—*vide* previous decisions of the Appeal Court, and more particularly the decision in the Supreme Court in the case of *Siggimi* vs. *Manise and Another*, reported in the "Cape Times" of the 5th June, 1908. The alternative value to be placed on the cattle should be a fair market price. In most of the Courts of the Territories at the present time £5 is usual.

As the Appellant has two other alternatives besides paying money, first, of restoring Respondent's wife and, second, of paying cattle, this Court sees no necessity for varying the judgment.

The appeal is dismissed with costs.

Umtata. 10 November, 1908. A. H. Stanford, C.M.

Tumana vs. Smayile and Mankayi Renqe.

(Xalanga.)

Kraal Head Responsibility—Civilised Natives—Damages for Seduction—Application of Colonial Law.

Tumana sued Smayile (*alias* Norman Renqe) and Mankayi Renqe, the latter as responsible for the former's torts, for twelve head of cattle or their value, £100, as damages for seducing and causing the pregnancy of his daughter Maria, and for £6 9s., the costs incurred by him in connection with the confinement of his daughter.

Smayile pleaded that his family, as well as Plaintiff's family, had for many years abandoned all Native customs and had adopted civilised usages, and prayed that the case be tried under Colonial law and, should the plea be upheld, he excepted to the summons on the ground that Plaintiff is not the proper person to sue.

Mankayi put in the following plea in abatement:—

(1) That he resides on his farm, and not at a Native kraal or Native location.

(2) That he, as well as the Plaintiff, is married according to Christian rites, and for many years they have abandoned all Native customs and have observed and conformed to civilised usages.

(3) That first-named Defendant lives on his farm, but he is of the age of majority and not under his control.

(4) That Maria is of age and no longer under Plaintiff's guardianship.

He prayed that the case be tried according to Colonial law, and not under Native custom.

The following note appeared on the record:—Plaintiff admits paragraph 1 of the plea in abatement. As to paragraph 2, admits marriage by Christian rites, but denies the rest of the paragraph. Admits paragraph 3 that first Defendant is of the age of majority, but that under Native law and custom he is under the control of second-named Defendant, who is responsible for his torts. As to paragraph 4, admits that Maria is above the age of twenty-one years, but, according to Native law, she is under the control and guardianship of Plaintiff.

The Magistrate upheld the pleas and dismissed the summons. He gave the following reasons:—"The position of the parties is well known to me. Both have for many years past abandoned Native customs and both were married according to Christian rites. The Defendant Mankayi resides on his farm, where he has a well-built and furnished house, which clearly indicates that he has adopted civilised ways and customs, and it does not seem right under these circumstances that he should be compelled to defend a claim of this kind according to Native law. The first Defendant is of full age and is a civilised Native. There appears to be a good deal of doubt in some quarters as to how these cases should be dealt with, but I maintain that Section 22 of Proclamation No. 140 of 1885 leaves it optional for the Court to decide

whether the case shall be dealt with according to Native custom or otherwise, according to the circumstances and manner of living adopted by the parties to the suit."

Tumana appealed.

Pres.:—By Section 22 of Proclamation No. 140 of 1885 it is intended that civil cases shall ordinarily be dealt with according to the law in force at the time being in the Cape Colony, but where both parties to the suit are Natives the Magistrate has discretion to deal with the case according to Native custom. In the present case it has been shown that all the parties to the suit are civilised as well as Christian Natives who do not conform to Native custom. Further, the summons includes a claim for lying-in expenses, which is not known under Native custom. Under these circumstances the Court finds that the Magistrate has not made an improper use of the judicial discretion vested in him in deciding to try the case under Colonial law. The appeal is dismissed with costs.

Umtata. 11 November, 1908. A. H. Stanford, C.M.

Notatsala vs. Zenani.

(Engcobo.)

Adultery and Pregnancy—Miscarriage—Procedure.

On the 21st July, 1908, Notatsala sued Zenani for the restoration of five head of cattle paid by him to Zenani as damages for adultery and pregnancy, alleging that a judgment for these cattle had been obtained against him by fraud, inasmuch as the woman in respect of whom the fine was paid had never been pregnant, either by him or by anyone else. In his evidence the Plaintiff said that when judgment had been given against him the previous December, Defendant's wife stated positively that she was in her fourth month of pregnancy by the Plaintiff. As the birth of a child had never been reported to him he instituted enquiries and found that this woman had never been pregnant. On these grounds he claimed the restoration of the fine already paid. The Defendant said that shortly after the judgment had been obtained he sent away his wife—in company with other women—to a doctress for treatment as she said she was ill. After some weeks the women reported a miscarriage. In their evidence these women

said that this happened in the fifth month of pregnancy and that the foetus was not buried, but disposed of by being scattered on the veldt and trampled into the ground.

The Magistrate was satisfied that a miscarriage had occurred and gave judgment for the Defendant Zenani.

Notatsala appealed.

In the Appeal Court the case was submitted to Native Assessors and their statement was as follows: —

The custom as we know it in such cases is that when a miscarriage takes place within two months of conception it is treated as blood, in the third month it is regarded as having the form of a person, in the fourth month the child quickens, in the fifth month it is regarded as being a person. We cannot believe that on a miscarriage taking place in the fifth month after conception the foetus would be treated by any Native in the manner described in the case by trampling it into the ground. In such a case the foetus is always buried. Where a pregnancy has been the subject of an action and a miscarriage takes place it has always been our custom to report this where the case was tried and also to the person who has been condemned in damages for causing the pregnancy.

Pres.: —This Court finds it utterly impossible to believe the statements made by the witnesses for the Defendant in the Magistrate's Court that the foetus of a five-months-old child was disposed of in the manner described by them. Clearly the reason why such an obviously false statement was made was because, if these women stated they had buried it, they feared they might be called upon to point out the spot for examination. The statement given by the Native Assessors in this Court on the custom followed by Natives in such matters is wholly at variance with the evidence of these women. It is also singular that the Defendant did not produce his wife to give evidence concerning her alleged miscarriage. The Court is forced to the conclusion that Defendant's wife never was pregnant and that the judgment in the first instance was wrongly obtained by him and the Appellant is entitled under Native law and custom to obtain a refund of what he has paid. The appeal is allowed with costs and judgment in the Magistrate's Court altered to judgment for Plaintiff with costs.

Umtata. 13 November, 1908. A. H. Stanford, C.M.

Nonkobo vs. Ndunya.

(Ngqeleni.)

Illegitimate Children—Inheritance—Pondo Custom.

Nonkobo sued Ndunya for the property in the estate of the late Ludidi, and in his summons alleged that the late Ludidi died without male issue, except Plaintiff, who was illegitimate, and that Defendant, son of Ludidi's elder brother, had appropriated the property. Plaintiff contended that although illegitimate he was the heir of the estate.

The evidence led on Plaintiff's behalf was to the effect that his mother was staying at Defendant's kraal and there gave birth to Plaintiff, Ludidi being his father. The woman was at the time the wife of another man and Plaintiff was left at Defendant's kraal, where he grew up. It was also alleged that Ludidi duly paid a fine for causing the pregnancy of Plaintiff's mother.

The defence was that Ludidi was not the father of Plaintiff, nor had he ever been recognised as his son, that no fine had been exacted for the pregnancy of which Plaintiff was born and that therefore Plaintiff was not the heir of Ludidi.

On the evidence the Magistrate found that Plaintiff was not the son of Ludidi and gave judgment for Defendant with costs.

Nonkobo appealed.

Pres.:—In this case the Pondo Assessors on being consulted say that where a man, not having male issue by his own wife or wives, has a son by another woman even though such woman may be the wife of another man when the child is begotten, under certain conditions such son may succeed to his property, if such son is either fetched by the man in question during his lifetime or after his death by his relatives and placed in his kraal as heir, or, failing this, if he can conclusively establish that he is the son of such man.

In this case Ludidi never at any time recognised the claimant as his son, nor on his decease did the members of the family fetch him to inherit, and they strongly deny that he is the son of Ludidi.

Even according to the evidence brought forward on Appellant's behalf his position is not made clear, as his chief witness, besides his mother, says that Mahlokoti was blamed for causing the

pregnancy of his mother at the time and a fine was demanded from him, thus corroborating the evidence given for the defence Under such circumstances the Court is forced to the conclusion that Appellant is not the son of the late Ludidi and the appeal is dismissed with costs.

Butterworth. 23 November, 1908. W. T. Brownlee, A.C.M.

Toko vs. Nzanzana.

(Kentani.)

Jurisdiction—Absence of Defendant from District.

Nzanzana sued John Toko and Toko, the latter as head of the kraal, in a seduction case. John Toko was in default and Toko took an exception to the summons that he was not the guardian of John, who was of age, and who had left the kraal of Toko some years before and had since then been a resident of East London, where he was in employment.

The Resident Magistrate overruled the exception, stating in his reasons that he was satisfied that John was simply at work in East London and had no kraal there, but was domiciled at the kraal of Toko.

Toko appealed against this ruling.

Pres.:—In this case the appeal is upon the ruling on an exception as to the domicile of Defendant No. 1, and this Court is of opinion that it is bound by the decision in the case of *Mgadi* vs. *Temba*, heard in the Supreme Court on the 19th October, 1905. That case was practically identical with this except for the fact that in that case the domicile of the Native in the Territories was undisputed and undisputable. In that case the learned Chief Justice remarked:—"The Defendant might have a residence in two districts and between them he could spend his time, but if he was to be summoned in one or other district he must be residing in that district for the time being." In this case it is clear that Defendant No. 1 is absent at East London, where he has been regularly employed for the last four years, and it would thus appear, applying the ruling above laid down, that the Court of the Resident Magistrate of Kentani has no jurisdiction over him. The appeal is allowed with costs, and the ruling of the Court below set aside. The exception taken in the Court below is sustained and the summons dismissed with costs.

Butterworth. 23 November, 1908. W. T. Brownlee, A.C.M.

Gontsana and Others vs. Konzana.

(Kentani.)

Spoor Law—Procedure—Valuation—Collective Responsibility.

In an enquiry under Section 200 of Act 24 of 1886 Konzana claimed the sum of £12 from the Respondents, Gontsana and ten others, for the loss of a cow, and stated that this animal had been lost while in his possession and he had traced its spoor to Defendants' kraals, where it had become obliterated.

The Magistrate held the Defendants liable for the lost animal and ordered the payment of £12, its value, to the claimant.

The Defendants appealed.

Pres.:—The appeal in this case is founded upon three points, viz.: (1) That the action has been brought under the provisions of Section 200 of Act 24 of 1886, and not under the provisions of Act 41 of 1898, which repeals this Section. (2) That the complainant is not the proper person to sue as he is not the owner of the animal in question. (3) That an excessive value has been placed upon the animal.

This Court is of opinion that as this is a purely civil action (*vide Queen* vs. *Mbalo*, 10 Juta, 380) it was not in any way necessary to quote the Act under which it has been laid, and that the Defendants have in no way been prejudiced by this reference to a wrong Act. (2) That in cases of this nature the procedure is summary and without pleadings and may be instituted either by the owner of the animal or animals stolen or by any person authorised by such owners. In this case it cannot be held that the complainant was authorised by the owner. The stolen animal was in the complainant's lawful possession and he is, under such circumstances, justified in taking action. (3) This Court cannot say that the amount awarded the complainant is excessive. There is evidence—that of the owner—to fix the value, and as against that there is no evidence on the part of the Defendants to show that too high a value has been fixed, and under these circumstances the Court does not find any ground upon which it would be justified in disturbing the decision of the Court below.

This Court would, however, point out that the Magistrate in the Court below has fixed a collective responsibility, whereas Subsection 4 of Section 1, Act 41 of 1898 directs that it shall be

lawful for the Resident Magistrate to fix such responsibility by an assessment not exceeding two head of cattle or their money value, to be by such Magistrate levied in each kraal. In dismissing the appeal with costs, the judgment in the Court below is so amended as to fix the responsibility of each of the Defendants at the sum of £1 2s.

Butterworth. 25 November, 1908. W. T. Brownlee, A.C.M.

Noseyi vs. Siyo Gobozana.

(Idutywa.)

Illegitimate Children—Inheritance—Widows' Rights—Son born subsequent to Death of Father—Ousting of Heirs.

Noseyi sued Siyo Gobozana in connection with certain property of her husband, the late Gladile. Defendant was the father of the late Gladile, Noseyi the wife of Gladile's Great House and Nojam Qadi wife of that House. Noseyi alleged that the minor son of Nojam, named Mdlungu, was the heir of the Great House, she herself having no male issue. She alleged that after her husband's death the stock in the estate remained in her possession until her hut was burnt down, that she then sent the cattle to Siyo until she was able to built a new one, and that when her hut was built Defendant refused to part with the stock which she required for her maintenance. She said that Mdlungu would receive the estate after her death.

An exception was taken that Nojam was the proper person to sue, she being the guardian of Mdlungu. The Magistrate sustained this exception, stating that Noseyi should live at a kraal appointed by Siyo before proceedings could be instituted.

Noseyi appealed, and the Court reversed this decision and sent the case back to be heard on its merits, stating that the Great wife had a right of action in respect of the property of the House to which the minor son of Nojam was alleged to be the heir.

On the re-hearing, the Defendant pleaded that Mdlungu was illegitimate and therefore not the heir of Gladile, and that Daniso, one of the sons of the Right Hand House of Gladile, had been

instituted as heir of the Great House. He stated that Mdlungu was born at Gladile's kraal, but some time after his death.

The Magistrate absolved Defendant, stating that the number of stock in the Great House had not been proved, nor was he satisfied that an illegitimate child could inherit.

Noseyi appealed.

In the Appeal Court, the Native Assessors made the following statement: (1) Where the son is born in the house of his mother's husband he is a legitimate son and can inherit. The only son that can be called an illegitimate son is one who is brought by the mother from elsewhere. (2) Should a Right Hand son in the absence of heirs in the Great House assume the property of the Great House he may be ousted from that inheritance should a son subsequently be born as in the foregoing to one of the Great House wives, but he could not be made to disgorge what he has already spent. (3) The widow may have a separate kraal built for her and she must then have the assistance of some person of her husband's family. Should there be a disagreement between the widow and the husband's friends the family is collected and a place is appointed for her where she may live, but the stock is not taken out of the charge of her husband's friends, even though it should go with her to the place appointed. Some relation of the husband must be in charge.

Pres.:—The Assessors are of opinion that an illegitimate child can inherit and this opinion is in accordance with the decision in the case of *Sidubulukana* vs. *Fuba* (Butterworth Appeal Court, 26th July, 1902) and with the unreported case referred to by Mr. Warner in the foregoing (see page 14 of the Digest). They are further of opinion that a widow has a life interest in the property of her late husband in her House, also that she may remove from the kraal of her late husband with such property upon disagreements arising between her and his representatives, but that she may not remove property beyond the control of her late husband's representatives without their consent.

This Court is thus of opinion that Mdlungu is entitled to inherit the property of the Great House of Gladile and that the Appellant has a life interest in it, and that she has not removed to such a distance or in such a manner as to be regarded as being beyond the control of the Respondent.

The appeal is allowed with costs here and in the Court below and the judgment of absolution set aside and the case remitted

to the Court below for evidence to be taken and judgment to be given on the point of the number of stock to be handed to the Appellant.

On the further hearing the Magistrate again gave an absolution judgment on the ground that from the evidence it was impossible for him to come to a conclusion as to what stock, if any, belonged to Gladile's Great House.

Noseyi appealed and the Appeal Court (13th July, 1909) referred the case to the Native Assessors who found that Gladile had left no property whatever in his Great House. The appeal was therefore dismissed.

Butterworth. 26 November, 1908. W. T. Brownlee, A.C.M.

Sunduza vs. Mayigongo.

(Willowvale.)

Isondlo Custom—Scale of Maintenance Fees—Christian Natives.

Mayigongo sued Sunduza for nine head of cattle being the dowry received by Defendant for his (Plaintiff's) daughter. The Defendant made a tender of five head of cattle in settlement, but this was refused.

From the evidence it appeared that Sunduza had brought up the girl and had received nine head of cattle for her on her marriage. When she was about twelve years old Plaintiff obtained possession of her and paid to Defendant one beast and the sum of £3 as maintenance fee. Subsequently the girl returned to the Defendant and, when she became of age, he arranged her marriage and received the dowry paid for her. One of the dowry cattle had since had progeny.

The Resident Magistrate awarded Plaintiff eight head of cattle, allowing to the Defendant one beast out of the dowry and one out of the increase—which had not been sued for—as maintenance fee.

Sunduza appealed on the point of Isondlo.

In the Appeal Court the Native Assessors made the following statement:—The usual isondlo fee is one beast, irrespective of the period of maintenance. Should the maintainer marry the girl and receive dowry he may then ask for another beast out of

the dowry if he has been authorised to give the girl in marriage. The one beast will cover the puberty expenses and maintenance and the other will be for the expenses of marriage. This would apply to Christian Natives also, except when special expenses have been proved.

Pres.:—In this case the appeal is only on the point of the number of cattle awarded the Appellant, and this Court is of opinion, in view of the statement of the Native Assessors, that he has been very liberally dealt with by the Court below. The appeal is dismissed with costs.

Butterworth. 26 November, 1908. W. T. Brownlee, A.C.M.

Samson vs. Mnyateli Mbanga.

(Tsomo.)

Dowry Restoration—Divorce—Christian Marriages.

Samson had obtained a divorce in the Chief Magistrate's Court and now sought to recover the dowry paid for his wife to Defendant.

The Defendant excepted as follows:—Defendant doth except to the summons on the ground that the marriage between the Plaintiff and the Defendant's sister Mary being a Christian one and a divorce being granted against the said Mary, Plaintiff has no action against her father or his heirs for the return of her dowry as is allowed in marriage according to Native custom.

The Magistrate upheld the exception, and in his reasons made the following remarks:—Dowries, as usually known between aboriginal natives can have no part or connection with Christian marriages. Yet we find that the payment of dowry with regard to Christian marriages is very usual, but not with any idea of reclaim. I found that as dowry he has no status of claim and upheld the exception with costs. It seems to me that in equity his claim would be just. Had he sought and recovered damages against his wife Mary in the Divorce Court, the Defendant might be held liable therefor to the extent of dowry value received by him.

Samson appealed.

Pres.:—The point at issue in this case has already been decided in this Court in the case of *David Kweza* vs. *Samuel Mahla-*

manzana, heard at Butterworth on the 22nd November, 1897. That case was precisely similar to this one and in that case it was decided that under circumstances such as those disclosed in the present case dowry is returnable. Dowry is paid under Native custom, and all questions regarding dowry must be dealt with in accordance with Native custom.

The appeal is allowed with costs and the ruling in the Magistrate's Court set aside and the case returned to the Court below to be heard on its merits.

Kokstad. 3 December, 1908. A. H. Stanford, C.M.

Manqana vs. Ntintili.

(Mount Frere.)

Dowry—Action to Compel Payment—Baca Custom—Marriage Contract—Colonial Law.

Josiah Ntintili sued Longden Manqana for five head of cattle being balance of dowry due by Defendant in respect of his marriage to Plaintiff's sister by Christian rites and which Defendant had agreed to pay.

Exception was taken that under Native custom there was no action to compel payment of dowry.

The Magistrate overruled the exception on the ground that there was an agreement to pay the dowry.

Defendant appealed.

Pres.:—Under Native law and custom, as it obtains amongst the Baca tribe in the Mount Frere District, no action lies to compel payment of dowry.

The present suit appears to be based upon the condition of an alleged agreement or contract which would remove the case out of the operation of Native law and custom.

In dismissing the appeal with costs the Court directs that the further hearing shall be under Colonial law and not Native custom.

At the continued hearing the Magistrate granted absolution on the ground that there was no legal consideration in the contract and that the agreement was *contra bonos mores*.

Plaintiff appealed.

Pres. (7 December, 1909):—Many of the Natives of these Territories, who have become Christians, follow the Colonial form

for the celebration of marriages, but at the same time have continued to observe the Native custom of paying dowry. The present action is brought to compel payment of dowry under a marriage contract entered into according to Christian rites on a verbal promise, which does not appear to be in dispute, that the balance of dowry, five head of cattle, would be paid after the marriage had been solemnised.

With the exception of the Basuto tribe and one or two others who have adopted Basuto practice under Native custom, the payment of dowry cannot be enforced. The remedy available for a parent or guardian is to "teleka" and detain the woman until the demands for more dowry have been satisfied. It follows, therefore, that under Native custom the Appellant would not be entitled to succeed.

The marriage having been entered into according to Colonial law, the case appears to have been heard and argued under the provisions of the laws applying to marriage contract in the Colony, and the Court is of opinion that the Magistrate has rightly held that an agreement of the nature of the one upon which this action is based cannot be enforced.

The appeal is dismissed with costs.

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Kokstad. 3 December, 1908. A. H. B. Stanford, C.M.

Mdungazwe vs. Mabacela.

(Qumbu.)

Widows—Guardianship—Smelling Out—Procedure.

Mdungazwe, in his capacity as guardian to the estate of the late Nojaji, sued Mabacela in an action in which he sought a declaration of rights. He stated that the late Nojaji on his death-bed had appointed him guardian, that Defendant had come forward and claimed to be the Right Hand wife of Nojaji, and as such entitled to certain privileges and benefits from the estate, and he sought an order of Court as to whether Defendant was or was not the widow of the late Nojaji.

In his evidence Plaintiff said that he was appointed the guardian by the late Nojaji, that the woman had been smelt out previous to her husband's death, and that, although there were brothers alive of the late Nojaji, the relations wished him to have the appointment.

Defendant stated that she was accused of witchcraft and driven away by Nojaji's relatives after his death, and that she claimed the property in the estate for her minor son. She contended that one of Nojaji's brothers should have been appointed guardian.

The Magistrate declared Defendant to be the Right Hand wife of Nojaji and gave costs against Plaintiff.

Plaintiff appealed.

Pres.:—On the death of the late Nojaji, by Native custom his eldest son, if a major, would be the guardian of the family and estate: if a minor, then the eldest surviving brother of the deceased man of his own house. As Appellant was not appointed guardian by will or by order of the Resident Magistrate he has no right of action in this case.

The question of the rank of the Respondent as a wife of the late Nojaji can only be decided, if in dispute, by action between the Respondent, if she is so advised, and the proper guardian in the estate.

The fact that Respondent was smelt out and driven away does not deprive her of her rights, and it is competent for her to enter action in the interests of her minor son to recover the property of her house of which he is the heir.

In dismissing the appeal with costs the Magistrate's judgment will be altered to dismissal of the summons with costs.

Kokstad. 3 December, 1908. A. H. B. Stanford, C.M.

Ngawana vs. Makuzeni.

(Umzimkulu.)

Adultery—Not Grounds for Dissolution of Marriage—Exceptions to this Rule.

Ngawana sued Makuzeni for the restoration of the dowry paid by him to Defendant on his marriage under Native custom with Defendant's sister, and in his summons he alleged that during his absence from home his wife committed adultery with some person unknown, and on his return home he (Plaintiff) repudiated his wife on account of her adultery and informed Defendant of this fact and demanded restoration of his dowry.

Exception was taken to the summons as disclosing no cause of action, adultery not being a sufficient cause for dissolution of marriage.

The adultery was admitted and Defendant pleaded that the woman was prepared to return to her husband.

The Magistrate dismissed the case, being guided by the ruling in the case of *Jakalaza* vs. *Mbongo*, Flagstaff Appeal Court, 14th August, 1908.

Plaintiff appealed.

Pres.:—Ordinarily adultery on the part of a wife married according to Native Custom is not a sufficient cause for the husband to divorce his wife and recover the dowry, but there are exceptions to this rule. Where after remonstrance the wife is guilty of repeated acts of adultery, or when a wife, who becomes pregnant by another man refuses to divulge his name or obstructs the husband in an action against the adulterer for damages.

For these reasons the Court is of opinion the case should have been fully heard, the Magistrate's ruling is therefore set aside and the case returned to be heard on its merits.

The appeal allowed with costs.

Kokstad. 3 December, 1908. A. H. B. Stanford, C.M.

Moerane vs. Phakane and Another.

(Mount Currie.)

Dowry—Contract to Pay—Marriage by Christian Rites—Basuto Custom.

Isaac Moerane sued Petros Phakane and his father, Phakane, for the payment of 20 head of cattle, one horse, one Ngcoba beast, and 10 small stock, being the customary dowry under Basuto custom, and he alleged that the parties to the suit were Basutos, that the first Defendant eloped with his (Plaintiff's) daughter and married her according to Colonial law, and that both the Defendants were liable for the payment of the dowry due for the girl.

Petros Phakane admitted liability for the dowry, but contended that Plaintiff had no right to sue for it. Phakane excepted to the summons that there was no contract, but that, on the contrary, he repudiated any liability before the marriage took place.

The Magistrate dismissed the case on the ground that the summons disclosed no stipulation that dowry should be paid, and moreover as the marriage was celebrated according to Colonial law and the second Defendant had told Plaintiff that he would not be responsible for the dowry, Plaintiff could not now seek to make him liable.

Plaintiff appealed.

Pres.:—The summons discloses no right of action against the second Respondent. Prior to the marriage he notified the Appellant that he would not be responsible for payment of dowry.

As regards the first Respondent, the summons alleges no contract to pay dowry, the marriage having been entered into by Christian rites is removed out of the operation of ordinary Native custom.

The appeal is dismissed with costs.

Umtata. 2 March, 1909. W. T. Brownlee, A.C.M.

Sifuba vs. Mbaswana and Ntleki.

(Engcobo.)

Kraal Head Responsibility—Torts—Contracts—Shop Debts.

Sifuba sued Mbaswana and Ntleki, the latter as head of the kraal, and as such responsible for the former's actions, for two head of cattle due to him for "Isondlo," he having brought up Defendant's sister, and the agreement being that he would receive payment of "Isondlo" from the dowry of this girl on her marriage. She was now married and the Defendant refuses to pay the cattle agreed on.

Defendant Ntleki excepted that the head of a kraal is responsible for torts only and has no liability as regards contracts, and he asked for dismissal of summons against him.

The Magistrate upheld the exception and stated that the question in this case was not one of tort but of contract and, therefore, the personal estate of second Defendant would not be liable should a judgment be obtained against first Defendant.

On the merits of the case judgment was given for Defendant with costs.

Sifuba appealed.

Pres.:—The judgment of the Court below is based on the evidence, and this Court sees no reason to disagree with the finding on the evidence. The Court is asked for a ruling on the question of kraal head responsibility, and the following points were put to the Native Assessors:—

(1) Is a kraal head responsible for the contractual liabilities as distinct from the tortious liabilities of a minor inmate of his kraal?

(2) If such kraal head is so liable is he personally responsible for the liabilities of such minor who is not his son, and which have been contracted elsewhere than at his kraal and prior to the residence of the minor at his kraal?

Assessors' Statement:—According to our custom, if a person, whether a minor or a major, lives at the kraal of another, the head of the kraal is responsible for his torts, whether a son or not. Any profits he may bring in belong to the head of the kraal therefore the head is liable for his debts, even for debts contracted elsewhere and before he came to this kraal. This, however, does not apply to shop debts.

Umtata. 3 March, 1909. W. T. Brownlee, A.C.M.

Zenzile vs. Roto.

(St. Marks.)

Dowry Restoration—Plea of Impounding—Ukuteleka Custom.

Roto sued Zenzile for the return of his wife or four head of cattle paid as dowry for her. In his summons he stated that he had paid dowry to Defendant for his wife and that about a month after the marriage she deserted him and is now detained by Defendant, who refuses to restore her.

Defendant admitted payment of four head as dowry, but pleaded that the value of the woman was not less than eight head and, having obtained peaceable possession of her, he was entitled to detain her under the custom of "Ukuteleka" until further dowry was paid.

The evidence established that when the marriage was arranged the number of cattle eventually to be paid as dowry was not specified. Plaintiff had carried off the girl and the marriage was

permitted on payment of four head. The woman in question had paid a short visit to her mother and returned to her husband's kraal. She afterwards went back to nurse her mother, who was ill at Defendant's kraal, and she remained there. The woman had only stayed about a month at her husband's kraal and there were no children. The case had first been heard by the Headman and no mention was made of Teleka until after the judgment for the restoration of the wife had been given. Plaintiff in his evidence said that his wife was good looking and might be worth 10 head.

The Magistrate ordered the restoration of the wife or three head of cattle.

Defendant appealed.

The Magistrate in his reasons said that when the case was heard by the Headman no plea of Teleka was raised, thus showing that Defendant knew it would not be entertained by Natives knowing the circumstances of the case. The woman had not enhanced her husband's estate by bearing children or even by working for him, nor had it been shown that her value had increased since the marriage to justify the payment of further dowry.

In the Appeal Court, the Assessors made the following statement: —

(1) When a man gives his daughter in marriage he specifies the number of dowry he wants, eight or ten or more or less, but the number is specified. When the "duli" party returns without the specified number it generally follows that when the woman returns to the father he impounds her. She is not usually impounded on the first visit to her home, but on the second visit.

(2) The second occasion for impounding is in the case of ill-treatment of the woman by her husband or the inmates of his kraal. The father may in such a case demand a beast. This beast may be in excess of the dowry originally specified.

(3) When a woman is impounded for non-payment of dowry, the demand is not restricted to payment of only one beast and the woman may be impounded repeatedly.

(4) If upon impounding a woman for non-payment of dowry, the husband does not pay, the marriage may be dissolved by the father by taking the matter to the authorities for enquiry, and if upon enquiry it is found that the husband has cattle but does not pay.

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(5) Should the husband refuse to pay more cattle he is, by his own action, repudiating his wife, and he is then not entitled to recover his dowry.

Pres.:—In this case the Court is of opinion that the Plaintiff is not entitled to succeed. He admits that he has not completed payment of dowry, and the defence set up by the Defendant—that of impounding his daughter—is, under the circumstances, a good one and the Plaintiff is not entitled to receive his wife till he has paid further dowry for her.

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

Umtata. 4 March, 1909. W. T. Brownlee, A.C.M.

Sidliki vs. Godwana.

(St. Marks.)

Interpleader Actions—Jurisdiction—Parties Resident in Different Districts.

In this case Rosa Godwana, who resided in St. Marks, as Execution Creditor had seized some property in the Xalanga District on a writ issued at Cofimvaba and endorsed by the Magistrate of Xalanga. Sidliki, who lived in the Xalanga District, claimed this property and the interpleader summons was issued by the Magistrate of Cofimvaba. At the hearing, Sidliki excepted to the case being tried at Cofimvaba as he contended the Court there had no jurisdiction, he being a resident of Xalanga District. The Magistrate overruled the exception and Sidliki appealed.

Pres.:—In this case I am satisfied that the ruling of the Court below is correct.

Section 12 of Act 20 of 1856 makes provision for the issue of a writ by any Magistrate giving judgment for the payment of money, and Section 13 of the Act makes provision for the endorsation of such writ by the Magistrate of any other District than that in which the original process was issued.

Section 53 of the same Act provides that it may be lawful for the Resident Magistrate to issue an interpleader summons upon being informed by the Messenger of the Court that notice has

been given him that any property attached under writ of execution issued by him has been claimed by a third party, and may issue such interpleader either before or after any action has been taken against the Messenger, and upon issue of the interpleader summons all other actions are stayed upon notice given to the Court in which they are instituted of the issue of the interpleader summons.

Section 58 of Schedule B of Act 20 of 1856 directs that the Resident Magistrate of the Court out of which process issued shall, upon report by the Messenger that such claim has been made by a third party, issue an interpleader summons to the parties to appear before him. This Section is directory and peremptory and is not merely permissive, and under it the Magistrate has no option.

So peremptory is this that in the case of *Olivier* vs. *Keating* (Webb's Digest, page 690, No. 192) the Messenger of the Court was held liable for damages to a third party even though such third party did not give him notice when the judgment debtor gave notice of the claim of the third party and the Messenger did not have interpleader process issued, but sold the property attached. The same principle was laid down in the case of *Myekulu* vs. *Simkins* (Webb, page 691, No. 205).

In the case of *Louw* vs. *Fife* (Webb, page 691, No. 202) it is laid down that it is the duty of the Resident Magistrate to issue interpleader, and in the case of *Van Wezel* vs. *Foster* (4 J. 382) it is laid down that where interpleader actions arise after endorsation of the writ by the Magistrate of the District other than that of issue of process, the Court of issue of process is the proper Court to hear the interpleader action, as the person to execute such writ is the person to whom it was originally directed, and the Messenger of the Court of endorsation is merely the deputy of the original Messenger. This is a judgment of the full bench of the Supreme Court.

The case of *Tyfman* vs. *Pinkerton* (11 E.D.C. 43) is relied upon by the Appellant, and in that case it is laid down that it was never the intention of the Legislature to confer upon a Magistrate jurisdiction outside his own district or to remove any case out of the jurisdiction of the Court of the district in which it arises, and that the Court of endorsation and of the District where property has been attached is the proper Court to issue interpleader summonses. But this is merely a passing dictum on

a side issue and is not upon the issue there before the Court, which was one of damages, and in this case—be it noted—the learned judge lays down the same rule as that enunciated in the case of *Van Wezel* vs. *Foster*, that the second Messenger is the deputy of the first.

It certainly seems to be an anomaly of the law that one Magistrate is ousted from his jurisdiction and that another should have jurisdiction conferred upon him which he could exercise in no other case than that of an interpleader summons, but that such is the state of the law I am satisfied.

In the case of *Cholwich* vs. *Penny* and *Simkins* vs. *Penny* (5 E.D.C. 270), Mr. Justice Buchanan says: "I do not think that a person whose property has been illegally seized and removed has necessarily no other remedy than that supplied by the interpleader proceedings, but by the 53rd Section of the Magistrate's Court Act No. 20 of 1856, I think it is intended that upon the issue of an interpleader summons any other action in respect of a claim to the goods so seized is stayed, pending such interpleader proceedings." In the same case Judge-President Barry says:—"It is clear from the evidence that on the 3rd August and before the expiration of the return day, Penny's agent claimed the property in this furniture, and requested that this claim should be decided by an interpleader writ. This claim was renewed on the 2nd September, after he knew of the extension of the return day. In doing so he appears to me to have adopted the writ, which had been extended to the 23rd August, for an interpleader suit implies an attachment under a valid writ, and only questions the ownership of the property attached. If Penny's agent had intended to raise the question now raised, he ought not, after the 15th August, to have claimed to have the right of property determined in an interpleader writ, which admitted the validity of the writ or at least waived all invalidity in it, but he should have sued for the recovery of his property and treated the writ as a nullity; or at least have claimed in his action that the writ be treated as such. This is no mere technicality. The principle of waiver is known to our law and is constantly applied."

In this case it is to be observed that Cholwich obtained judgment against Amos and an attachment was made of property claimed by Penny and Penny's agent at once gave the Messenger of the Court notice that he claimed the property and asked that an interpleader summons be issued, and, as has been done in this

case, handed the Messenger the summons duly stamped. Penny had meanwhile given security to produce the property attached, but, upon the Messenger later demanding the delivery of the property, Penny claimed it as his under a bond. The Messenger nevertheless removed the property from Penny's store. Penny then sued Simpson, the Messenger, for £20 damages for unlawfully removing the goods.

The above dicta are in my opinion quite sufficient to justify the Magistrate in the Court below in holding that he has jurisdiction in this case, but there is even further confirmation of this view. In the case of *Lepheana* vs. *Temple and Another* (Cape Times, 12 August, 1908), Temple, an attorney, obtained judgment in the Court of Matatiele against two Natives named Paulina and Joseph, and attached property in that District. The property was claimed by Lepheana, a Native of Basutoland, who interpleaded and described himself as a Basuto residing in Basutoland, and therefore not domiciled in the Colony. Mr. Justice Laurence, in giving judgment, said that Lepheana was clearly not domiciled in the Colony, but he submitted to the jurisdiction of the Court in taking the proceedings he did. Mr. Justice Hopley concurred.

It would thus seem that the explanation of the apparent anomaly lies in the principle of waiver. Any person claiming attached property would seem to have the option of following the ordinary course and issuing an ordinary summons claiming his property from the Messenger, or of having an interpleader summons issued, and in this latter case he waives his right to any other action pending the result of the interpleader summons, and submits himself to the jurisdiction of the Court.

The appeal is dismissed with costs.

C. A. King, Resident Magistrate of Elliotdale, Assessor, dissenting:—My reasons for dissenting from the President's judgment are:—

1. Section 8, Act 20 of 1856, and Rule I, Schedule B, of the same Act define a Magistrate's civil jurisdiction as exercisable only over or in respect of any person residing within the District assigned to such Magistrate.

2. Section 13 of same Act is clear and explicit with regard to writs or warrants when endorsed by the Magistrate of any other District (who is authorised and required, on production, to do

so), which, *inter alia*, says:—"Any such writ shall have the like force and effect . . . , within the District of such Magistrate by whom it has been endorsed, as if it had been issued by such last-mentioned Magistrate for any judgment of his Court."

3. The judgment of Mr. Justice Jones in the case of *Tyfman* vs. *Pinkerton* is also very clear on this point—the learned Judge's dictum in that case being:—"When a writ of execution is issued in one Magistrate's Court District and executed in another Magistrate's Court District, after endorsement by the Magistrate thereof, and a third party claims the goods or portion of the goods taken in execution under the writ, the proper officer to issue an interpleader summons is the Magistrate who had endorsed the writ, and in whose District it has been executed."

Regarding execution, the learned Judge's dictum was also laid down: "there was no necessity for Messenger of original Court to formally appoint a substitute for the execution of a writ."

4. Mr. Justice Jones' judgment is not in conflict with the decision in *Van Wezel* vs. *Foster*, delivered ten years previously, which merely laid down the principle that when the claimant resided in the same District as the office of origin of the writ he would not be debarred from setting up his claim in his own District.

5. I do not consider that the case of *Lepheana* vs. *Temple* has any bearing on this matter. In that case the property was attached in the same District as judgment was given in, and the claimant had no other course but to interplead there. In the present case the claimant was no party to the issue of the interpleader summons from the Cofimvaba Court. This is obvious as no party could or would object to the hearing of his own summons; therefore the principle of waiver in his case does not apply.

P. G. Armstrong, Resident Magistrate of Ngqeleni, Assessor, also dissented and gave the following reasons:—*Actor Sequitur forum rei.* This cardinal rule finds an exception only in such cases in which attachments *ad fundandam jurisdictionem* are permitted. I see nothing which prevents the maxim *actor sequitur forum rei* from operating in the case before us. Rule 1, Schedule B, Act 20 of 1856, reads as follows:—"The jurisdiction in regard to civil cases belonging to any Court of Resident Magistrate is exercisable over or in respect of any person residing or inhabiting within the District assigned to or apportioned for such Resident

Magistrate." Clearly, therefore, the Magistrate has no jurisdiction to summon the resident of another District before his Court.

The two cases, *Van Wezel* vs. *Foster* (4 S.C. 382) and *Tyfman* vs. *Pinkerton* (11 E.D.C. 43), are the only ones decided in *pari materia*. *Van Wezel* vs. *Foster* is not well reported. If I understand the case correctly, Van Wezel, who was also the Defendant, was resident in the Stellenbosch District and he sought to defeat Plaintiff by challenging the attachment. The case, as reported, does not assist us in the least, but *Tyfman* vs. *Pinkerton* is directly in point, part of the headnote reads:—"When a writ of execution is issued in a Magistrate's Court and executed in another Resident Magistrate's Court District after endorsement by the Magistrate thereof, and a third party claims the goods or portion of the goods taken in execution under the writ, the proper officer to issue an interpleader summons is the Magistrate who has endorsed the writ and in whose District it has been executed."

Umtata. 5 March, 1909. W. T. Brownlee, A.C.M.

Ndamase vs. Sokwilibana.

(Umtata.)

Jurisdiction—Spoliation.

Sokwilibana sued Ndamase for the restoration of certain cattle, and in his summons alleged that these cattle were in his lawful possession and were wrongfully seized and driven away by Defendant without Plaintiff's consent.

The Magistrate treated the case as one of spoliation and ordered the restoration of the stock, giving no ruling on the point of ownership.

Defendant appealed.

Pres.:—In this case the Appellant took out of the possession of the Respondent a certain black cow and its calf and upon the Respondent suing him in the Court below he got judgment for the return of the cattle in question to him, the Court below, treating the case as one of spoliation, did not decide the ownership in the cattle in question.

On appeal, the argument, among others, that the Court below has no jurisdiction in a case of spoliation and so cannot order the return of the cattle is made use of, and it is also argued that the animals in question are the lawful property of the Appellant.

In dealing with this case the Court is guided by the decision in the case of *Ncotama* vs. *Ncume* (10 Juta 207) and the case of *Erasmus* vs. *Nxenye* (reported in the "Cape Times" of the 3rd December, 1906). In the former the principle is laid down that no person who has acquired cattle peaceably and lawfully shall be dispossessed of them otherwise than by civil process of law and in the latter it is laid down that Courts in the Transkei have jurisdiction in cases of this nature.

In this case it is clear from the evidence that the Respondent was in peaceable possession of the cattle in question and that the Appellant removed them by stealth, if not by force, from his possession. The Respondent states that he was in lawful possession of them and the Appellant has failed to show that he was not and so was not justified in removing them without the Respondent's consent.

The question of ownership does not appear to have been gone into very fully, at least on the side of the Respondent, but even upon this the Respondent appears to have made out a very strong case. The appeal is dismissed with costs.

Umtata. 5 March, 1909. W. T. Brownlee, A.C.M.

Gqumayo vs. Ziyokwana.

(Umtata.)

Women—Allotment of Children to—Usufruct of Property when residing at Husband's Kraal.

Gqumayo sued Ziyokwana for the restoration of the dowries paid for his grandmother, Nohalafu, and for her daughter Nqonfazana, which Defendant had appropriated. In his summons he alleged that he was grandson and heir of Nobala, who had married the woman in question, and the girl was the daughter of this marriage; that shortly before the death of Nobala the woman Nohalafu returned to her father, the Defendant, taking the girl Nqonfazana with her; that thereafter both women were married and the dowries paid to Defendant. He now claimed restoration of the dowry paid by his grandfather for Nohalafu and also the dowry paid for Nqonfazana.

Defendant denied the second marriage of Nohalafu and pleaded that the girl was given to Nohalafu by her father Nobala as a recompense for Plaintiff having made away with the property of

her house, and she was allowed to live at Defendant's kraal and have the usufruct of her daughter's dowry. In reply to the plea, the Plaintiff stated that it is contrary to Native custom to assign property to a woman. She may have the usufruct provided she remains at her husband's kraal. The Magistrate found there was no second marriage of the woman Nohalafu and gave judgment for Defendant, and as regards the prayer for the dowry of Nqafazana absolution on the ground that the woman had the usufruct of the dowry on express direction of Nobala.

Plaintiff appealed.

In the Appeal Court, the question having been submitted to the Native Assessors, they state:—"There is no such thing under Native custom as giving a child to a woman and allowing her to take such child to her people and there to appropriate the dowry of such child. Even should a woman be smelt out she is never given property. It is a common thing when a woman is ill-treated for her to go to her parents, but even she herself belongs to her husband. There is no custom under which the woman may use the cattle of her husband's kraal at her father's kraal. She may have the use of them at her husband's kraal.

Pres.:—It is quite clear that the woman Nohalafu had no right to remove property from the kraal of her husband to that of her father. If she claims maintenance out of the estate of her late husband she must live at his kraal or at some kraal established for her by the representatives of her late husband.

The appeal is allowed with costs and the judgment of the Court below in respect of the second prayer altered to judgment for Plaintiff for the five head of cattle or £25 and costs, and as the judgment of the first prayer may, as it stands, be a bar to any action to be raised in the event of the woman Nohalafu being married, it is altered to absolution from the instance.

Kokstad. 2 April, 1909. W. T. Brownlee, A.C.M.

Nqwala vs. Sutiko.

(Qumbu.)

Marriages—Dowry Restoration—"Ukugana" Custom—Baca and Pondomisi Custom.

Nqwala sued Sutiko for the restoration of 10 head of cattle, and in his summons alleged that some four years ago he entered

into an agreement to marry Defendant's sister and paid as part dowry for her four head of cattle, that afterwards the girl refused to marry Plaintiff and is now married to another man, and that on these grounds he was entitled to a refund of the cattle paid as dowry, together with increase.

Defendant pleaded that a marriage had actually been entered into between Plaintiff and the girl and that therefore he was liable for four head of cattle only on the dissolution of the marriage.

The Magistrate gave judgment for four head and Plaintiff appealed.

The following reasons were furnished by the Magistrate:—"In this case the only point to be decided is whether a marriage was or was not consummated. In the former case the Plaintiff is entitled to receive cattle to the number of those originally paid, in the latter case the property in the stock has remained with him and he can recover the cattle paid with their increase.

The woman was taken to the Plaintiff's kraal under the "ukugana" custom, *i.e.*, with a view to marriage should the Plaintiff accept her. I am satisfied that the woman never consented to the marriage and that she left on the fourth day after the departure of the duli party, that she subsequently became pregnant by another man, and that the pregnancy was never reported to the Plaintiff. On the other hand no report was made to the Plaintiff of the death of certain of the dowry paid.

To my mind the "Baca" custom (the Plaintiff being a "Baca") will be found to furnish the key. I am, however, quite ignorant of the customs of that tribe. If the Baca custom admits of girls being left by their friends "on approval," so to speak, then, in view of Defendant having failed to report the pregnancy of the woman, it is probable that no marriage took place and the failure to report the death of any of the dowry stock was simply an omission on Defendant's part so as not to prejudice any future defence he might have been minded to set up. I could not assume the existence of such a custom among the Bacas and so I decided the case on the broad lines that the woman was taken to the Plaintiff's kraal by the duli party, that she remained there a certain time, and that the duli party returned with cattle. I therefore took the marriage as proved, in the absence of proof of a Baca custom recognising the somewhat advanced idea that a wife should be taken on approval."

Pres. :—In this case the Magistrate in the Court below is apparently unaware of the custom which is commonly practised among the Bacas and Pondomisi, under which a woman is taken to the kraal of any given man on the chance of a marriage being arranged between them. It often happens that the woman is left at the man's kraal and that a part of the dowry is paid, but there is no marriage until it has been ascertained by the prospective bridegroom that the woman is content to become his wife and it is not till then that the woman is formally handed over to the bridegroom as his wife and that full dowry is paid.

In this case it would appear that though the woman was left at the kraal of the Plaintiff she never consented to become his wife, and she left his kraal four days after she was taken there and has persistently refused to return there, and this Court is of opinion that there was no marriage—and this view is strengthened by the fact that when the woman was got with child her condition was not reported to the Plaintiff—and that the Plaintiff is entitled to recover, not only the four cattle paid by him, but also their increase. Plaintiff claims that the increase brings the total number of cattle to ten head, but he has produced no proof of this, and the only evidence upon this point is that of the Defendant's witness, Mhlangiswa, who says that there has been an increase of three head.

The appeal is allowed with costs and the judgment of the Court altered to judgment for Plaintiff for seven head of cattle or their value at £3 each and costs.

Butterworth. 13 July, 1909. W. T. Brownlee, A.C.M.

Mfanyana vs. Mbesi.

(Idutywa.)

Kraal Head Responsibility—Joining of Defendants—Procedure.

Mbesi sued Mfanyana for the amount of a judgment he had obtained against Mpakati, an inmate of Defendant's kraal. Mpakati had no property and it was sought to make Defendant liable for the amount of the judgment.

Defendant appealed against the ruling of the Magistrate on an exception.

(The Appeal Court judgment indicates the grounds of appeal.)

Pres.:—In this case the Defendant is the father of one Mpakati, who was convicted of theft of sheep and who was subsequently sued by the Plaintiff for the value of the stolen sheep and damages, and judgment for £11, the value of the sheep, and £10 damages was given against Mpakati. The Plaintiff has failed to recover anything from Mpakati, and now sues the Defendant, whom he did not join with Mpakati in the original action to have him declared liable for the amount of the judgment given against Mpakati. Upon the hearing of the present case, the Defendant, through his attorney, took exception to the action on the ground that as Defendant had not been joined in the original action it is not competent for the Plaintiff now to make him liable. This exception was overruled, and it is upon this ruling that the appeal is brought here.

There have been various judgments of this Court on the point at issue and, in support of his views, the Plaintiff's attorney has quoted the case of *Dick John* vs. *Bangani* (Warner, p. 4) and *Booy* vs. *Ngqitipi* (Warner, p. 27, 1906), while on the other side Defendant's attorney has quoted the case of *Rubulana* vs. *Tungana* (Umtata A.C., 24 July, 1905). The latter seems to be the leading case on the point, for it was followed by the Native Appeal Court sitting at Umtata in July, 1907, in the case of *Buza* vs. *Ggenga*, in which it was laid down that if the kraal head were not joined in the original action with the tort feasor he could not subsequently be sued separately, and in the case of *Nteteni* vs. *Ngantweni*, heard at Umtata in March, 1908, where, though the kraal head was sued separately, the Appeal Court allowed this to be done only because he had in the first instance been joined with the tort feaser and had been in that action absolved. This Court is, therefore, of opinion that the Defendant is entitled to succeed in his exception and the appeal is allowed with costs, and the Magistrate's ruling set aside, and the exception allowed with costs.

Butterworth. 14 July, 1909. W. T. Brownlee, A.C.M.

Gwayi vs. Gwija.

(Willowvale.)

Breach of Promise—Seduction Damages—Application of Colonial Law—Dowry Contract.

Amelia Gwayi, assisted by her mother and guardian, Ida Gwayi, sued Abel Gwija for £50 damages for breach of promise

of marriage and for seduction. In her summons she alleged that she and Defendant had embraced Christianity, that Defendant had promised to marry her by Christian rites, that, under cover of this promise, Defendant seduced her and a child was born, and that Defendant now refuses to marry her. An exception was taken that the summons was bad and that as Defendant had paid two head of cattle to Plaintiff's brother in connection with this action the case should be tried by Native law. It was admitted that two head of cattle were paid as part dowry—15 head being agreed upon.

The Magistrate upheld the exception and dismissed the case on the ground that as part dowry had been paid the case should be tried by Native law, notwithstanding that there was an agreement to marry according to Christian rites.

Plaintiff appealed.

Pres.:—In this case the Defendant entered into an engagement to marry the Plaintiff and paid two head of cattle on account of dowry, it having been, as is alleged in the summons, stipulated that the marriage was to be according to Christian rites. Under cover of this engagement the Defendant seduced the Plaintiff and got her with child, and he now apparently declines to carry into effect the proposed marriage with the Plaintiff. The Plaintiff, duly assisted by her guardian, has therefore sued the Defendant for damages for breach of promise and seduction and for lying-in expenses

The Defendant has taken an exception to the summons on the ground that it is bad in law and that the case should be tried according to Native law and not according to Colonial law, because two head of cattle have been paid by the Defendant on account of dowry, and this exception has been upheld and the summons has been dismissed with costs, and it is upon this ruling upon exception that the appeal is now brought.

This Court is of opinion that the Magistrate in the Court below is wrong in his ruling. The question of payment of dowry does not seem in any way to affect the claim now before the Court as whether it be brought according to Colonial law or whether it be according to Native law, the Plaintiff or her guardian would be entitled to recover damages from the Defendant under the circumstances set forth in the summons, and the most that the Defendant could have urged under Native law in respect of the two cattle paid would be that they should be a set-off against the claim for damages.

Under Native law there is no specific action for damages for breach of promise of marriage, such damages being arranged for when the matter of repayment of dowry is under consideration, and the principles governing this matter under Native law are that should the prospective bridegroom break off the proposed marriage without sufficient cause he cannot recover the dowry paid by him in respect of such marriage.

There is nothing, however, to compel any person to institute any claims under Native law. Section 23 of Proclamation 110 of 1879 and corresponding Sections of Proclamations 112 of 1879 and 140 of 1885 provide that in any suit where both parties are what are commonly called Natives, such suit may be dealt with according to Native law. This proviso is, however, merely permissive and not directory, and does not prevent any person from instituting proceedings under Colonial law.

The appeal is allowed with costs, and the ruling of the Court below set aside, and the case is remitted to the Court below to be heard upon its merits.

Umtata. 26 July, 1909. W. T. Brownlee, A.C.M.

Madalane vs. Mqoboli.

(Ngqeleni.)

Ukuhlama Custom—Loans and Repayment—Pondo and Tembu Custom.

Mqoboli sued Madalane for certain stock, and in his summons said that some time before he gave a horse, saddle and bridle to Defendant under the "Ukuhlama" custom, and Defendant in return promised to give him certain stock, but he now refuses to do so.

Defendant admitted the receipt of the horse, saddle and bridle under the custom of Ukuhlama, but denied that there was any agreement as to repayment, and pleaded that under this custom Plaintiff cannot sue.

Plaintiff in his evidence said that after he had sent a demand to Defendant, the latter admitted owing a beast and promised to pay in January. In his evidence Defendant said that under the custom there are no terms or conditions of repayment and he did not refuse to give Plaintiff the beast, but Plaintiff had to wait until he chose to pay. Expert evidence in the Magistrate's

Court corroborated his statement of the custom. The Magistrate gave judgment for one beast and Defendant appealed.

The Magistrate's reasons were as follows:—"Had the beast been given to Defendant under the custom of Ukuhlama without any stipulation as regards repayment, judgment would have been given for Defendant on the ground that a person cannot be sued under this custom; but although both parties allege that the beast was given under the custom of Ukuhlama I think that the transaction was practically in the nature of an ordinary agreement. It will be seen from the Defendant's letter that he not only admitted liability after receipt of letter of demand, but promised to satisfy the claim in January. I am convinced that when Defendant received the horse, saddle and bridle he agreed to give Plaintiff a heifer in calf."

Pres.:—The matter of the custom of Ukuhlama being put to the Native Assessors they state that the following is the custom:—"A man may make a gift to a friend in connection with his daughter. He then expects to get something out of the dowry of his daughter. The gift is also made irrespective of any daughter, and in the latter case the giver expects to get back something from the person to whom he gave it. Should the receiver not pay back the gift no action lies. There is no stipulation as to the time within which the gift is to be repaid."

In this case the Plaintiff made a gift to the Defendant under the custom of Ukuhlama and now seeks to recover from the Defendant, and this, in view of the statement of custom, he may not do.

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

Note.—The Pondo and Tembu Assessors are in agreement on their statement of custom.

Umtata. 26 July, 1909. W. T. Brownlee, A.C.M.

Makosonke vs. Mapikwana and Mda.

(Libode.)

Jurisdiction—Service of Summons—Absence of Defendant from District—Acceptance by Head of Kraal.

Makosonke issued a summons against Mapikwana and Mda, the latter as head of the kraal, for damages for adultery. The

Messenger's return of service of the summons was as follows:—"I certify that I served a copy of this summons on the within-named Mda personally, and on Mapikwana's place of residence on the 16th day of June, 1909, at Siqikini, Mapikwana being at Gold Fields, his brother Mda accepted service, stating his brother was absent at Gold Fields and that I explained the nature and exigencies thereof."

On the date of hearing the first Defendant was in default and the second Defendant, Mda, applied for dismissal of the summons on the ground that the first Defendant was not in the District and no service of summons was effected. The Magistrate dismissed the summons and Makosonke appealed.

The following were the Magistrate's reasons:—"In this case the return on the summons shows that the Defendant No. 1 was away at the Gold Fields and so beyond the jurisdiction of the Court. Further, it was impossible for the summons to come to his knowledge. As it was impossible to establish in this Court that Defendant No. 1, who it alleged in the summons "seduced Plaintiff's wife," had committed a tort, it was held that Defendant No. 2 could not be called upon to answer for his liability for an unproved tort alleged to have been committed by a member of his kraal. The summons was, therefore, dismissed. (*Toko* vs. *Nzanzana.*)"

Pres.:—In this case the summons has been dismissed on the ground that the principal Defendant is beyond the jurisdiction of the Court, and the case of *Toko* vs. *Nzanzana* (Native Appeal Court, Butterworth, November, 1908) is cited. In that case it was quite clear to the Appeal Court that the Defendant was not a resident in the District of Kentani, where the case was originally heard, while in this case it is not clear that the Defendant was not within the jurisdiction of the Court. It is true the return endorsed upon the summons states that the Defendant No. 1 is away at the Gold Fields, but the Defendant No. 2 appears to have accepted service for him and there is no evidence adduced as to the domicile of Defendant No. 1 to show that he is not in the jurisdiction of the Court.

The appeal is allowed with costs and the decision of the Court below set aside and the case remitted to the Magistrate for evidence to be taken and the case to be heard upon its merits.

Umtata. 26 July, 1909. W. T. Brownlee, A.C.M.

Dlelani vs. Mkwayi.

(Ngqeleni.)

Widows—Re-Marriage—Dowry Restoration—Seduction Damages —Pondo Custom.

Dlelani sued Mkwayi for the restoration of two cattle and his plaint was as follows:—

"1. That Defendant is the eldest son and heir of one Mtshinga, now deceased.

2. That during, or about, the year 1900 Plaintiff married one Kahlule, daughter of Mtshinga, and has paid four head of cattle as dowry for her.

3. That Plaintiff has thereafter paid hut tax for such woman Kahlule.

4. That about July, 1907, Kahlule left Plaintiff and failed to return, although demanded.

5. That there are two children of Plaintiff's marriage with Kahlule.

Wherefore Plaintiff claims return of his wife or repayment of dowry (four head), less deductions two head for the children, leaving two head of cattle, for which Plaintiff claims judgment."

The plea was as follows:—"Defendant admits clause 1; denies clause 2 and states that two head and a horse were received as damages for seduction of his sister and that his sister was at the time the wife of one Joyi. Defendant admits clause 4. Defendant admits clause 5 in so far that two children were born at Plaintiff's kraal, but denies that there was a marriage."

Plaintiff in his evidence alleged that he first eloped with Kahlule from Defendant's kraal and then paid dowry for her to Defendant. There were two children of this marriage and they were at his (Plaintiff's) kraal.

Defendant alleged that Kahlule was the widow of Joyi, and after Joyi's death she came to him with her children. Plaintiff eloped with her and caused her pregnancy and a fine was exacted, which was used for the support of Kahlule and her children. He also said that the woman still belonged to Joyi's kraal and denied that she was married to Plaintiff.

The Magistrate granted absolution on the ground that the weight of evidence was in favour of Defendant's contention that the stock had been paid as damages for seduction and that no marriage had taken place.

Dlelani appealed.

Pres.:—The circumstances of this case having been put to the Pondo Assessors they state that the following is Pondo custom:—

(*a*) If a widow remains at the kraal of her late husband and there has children, there is no fine for cohabitation with her.

(*b*) If she return to her father's kraal she is no longer a widow. She is now a daughter and a fine is paid for cohabitation with her.

(*c*) Should such a woman contract a second marriage and dowry be paid for her and she bears children to the second husband and then return to the kraal of her first husband no dowry is returnable to the second husband. But should she in such a case return to her father's kraal and remain there dowry would be returnable, for in the latter case it would be said that the father is wrongfully detaining the man's wife from him.

(*d*) In the case of a widow returning to her father's kraal and a fine be then paid to her father, such fine belongs to the father and not to the late husband's kraal.

(*e*) The marriage with the second husband is not necessarily cancelled by the woman leaving him, for if the children of the first husband ill-treat her she may return to the second husband.

(*f*) If she now have children they will belong to the kraal of the first husband, but if the woman be pregnant to the second husband the child is his.

This statement of custom is quite in accord with that made in the case of *Goro* vs. *Fredi Njiva*, Umtata Appeal Court, 9th July, 1908.

The Magistrate in the Court below is of opinion that the cattle paid by the Plaintiff were paid as fine and not as dowry, and though this decision seems to be against the weight of the evidence, yet, in view of the statement of Pondo custom by the Native Assessors, it does not seem to be a point of very great importance whether the cattle claimed were paid as fine or dowry. In neither case may the Plaintiff have them paid back to him.

The appeal is dismissed with costs.

Umtata. 26 July, 1909. W. T. Brownlee, A.C.M.

Mkeqo vs. Matikita.

(Libode.)

Kraal Head Responsibility—Ejectment of Inmates—Disherison —Establishment of Separate Kraals.

Matikita sued his father, Mkeqo, for delivery of certain cattle which he alleged in his summons were the increase of two head of cattle donated to him by his father out of his sister's dowry, and also the cattle received for another sister who was allotted to him from his father's Great House, and his father was wrongfully disposing of these cattle. Defendant pleaded the general issue and made a claim in reconvention for an order of ejectment against Matikita from his kraal. In his evidence, Mkeqo said his son lived with him at his kraal and had three wives, and the dowry of each was provided partly out of the dowries received for the two girls—Matikita's sisters—and partly out of his (Mkeqo's) own stock. He and his son had disagreed and he had ordered him to leave and establish his own kraal, but Matikita refused. He also stated that he had no intention of disinheriting his son, but contended he had the right to turn him out of his kraal without consulting his relatives.

The Magistrate gave absolution from the instance on the claim in convention and made no order on the claim in reconvention.

Mkeqo appealed.

The Resident Magistrate gave the following reasons:—"In this case the Defendant (Plaintiff in reconvention) appeals against the judgment given on his claim for an order of ejectment. The Defendant in reconvention is the only son and heir of his father (Plaintiff in reconvention). The latter has taken no steps to establish a kraal for him, nor has he in any way repudiated or disinherited him, and there is no evidence of misconduct justifying such extreme measures.

It is a well-known principle of law that an order for ejectment cannot be made unless the applicant's right is clear and has been infringed. The evidence on which the order of ejectment is asked for is extremely meagre and discloses no more than that the parties are not on good terms.

I submit the circumstances and evidence do not warrant such an order and that the Plaintiff in reconvention has not taken the preliminary steps required by Native custom."

Pres.:—In this case the Plaintiff is the son of the Defendant and is an inmate of the Defendant's kraal, and sues his father for certain cattle, which he alleges were apportioned to him by his father and which he alleges his father is disposing of without reference to him. The Defendant brings a claim in reconvention for an order compelling the Plaintiff to leave his kraal and to set up a kraal for himself. The Court below in deciding the case has given a judgment of absolution in the claim in convention, and has made no order in the claim in reconvention, and it is against this decision upon the claim in reconvention that this appeal is now brought.

This Court is of opinion that the Respondent ought to succeed in his claim. It is a very common practice for a father to order any of his sons to set up an establishment for himself, and such an order does not in any way necessarily imply that the father is thereby disinheriting his son. In this case the Defendant has provided his son with three wives and has done all that could reasonably be expected of him.

As long as the Plaintiff is an inmate of his kraal the Defendant is responsible for the torts of the Plaintiff, and the only way in which the Defendant can relieve himself of this responsibility is by formally disinheriting his son or by making him set up an establishment for himself.

The appeal is allowed with costs and the judgment of the Court below, in so far as the claim in reconvention is concerned, is altered to judgment for Plaintiff as prayed with costs.

Umtata. 28 July, 1909. W. T. Brownlee, A.C.M.

Binqela vs. Sifile.

(Mqanduli.)

Adultery—Damages—Condonation—Native and Christian Marriage.

Binqela sued Sifile for three head of cattle as damages for adultery, and in his evidence said that he had married his wife by Christian rites and admitted that after he had discovered the facts about the adultery he still cohabited with her. The adultery was clearly proved, and the Magistrate awarded the damages claimed.

Sifile appealed, and in the Appeal Court he argued that Plaintiff had condoned his wife's adultery and was therefore not entitled to any damages.

Pres.:—In this case the Plaintiff sued Defendant for damages for adultery, for the value of a sjambok and for £20 damages for destruction of property. These two latter claims were, however, disposed of and, upon the first hearing of the case, the Defendant pleaded the general issue in respect of the claim of damages for adultery. The case was gone into, and when the Plaintiff was under examination he admitted that he had not followed the usual Native practice of sending his wife to the Defendant with a message to formally demand damages, and he then explained that he claimed the privilege of prosecuting his action according to Colonial law, and stated that he had married his wife in accordance with Colonial law. The Defendant's attorney then argued that as Plaintiff had failed to comply with Native custom and wished to have Colonial law applied to his case he must fail in his action, and the Magistrate upheld "this exception" with costs and refused to allow further examination of the witness. Upon appeal, this Court held that the summons was a good one, whether the case was to be heard under Native or Colonial law, and sent the case back to the Court below to be tried upon its merits. Upon the re-hearing it was mutually agreed between parties that the case should be heard under Colonial law, and the judgment of the Court below is now for Plaintiff for three head of cattle or £15 and costs, and the Defendant appeals against this decision.

In support of his case the Appellant's attorney has quoted the following authorities:—

Hansen vs. *Ringham* (Van Zyl, 514-516);

Bicard vs. *Bicard and Fryer* (9 Juta, 476);

Mlotwana vs. *Rundwana* (Warner, 40); and

Nanto vs. *Malgas* (5 Juta, 108);

and argued from these that under Colonial law no action for damages lies unless there has been a final and complete breach between husband and wife and that the husband, by receiving back his wife, condones the injury and cancels his right of action against the adulterer.

This Court, after careful perusal of all the authorities quoted, is not satisfied that in no case may an injured husband recover damages against an adulterer apart from a complete breach with

his wife, as even in the case of *Bicard* vs. *Bicard and Fryer*, upon which Appellant's attorney lays great stress, the Chief Justice says that the case must be very exceptional indeed which would justify any Court or jury in giving damages for the wife's adultery unless it is quite clear that there is a final breach between the parties and the wife was not to live again with the husband nor the husband to reap the fruits of her unchastity. From this it would seem to follow that there are cases in which damages may be awarded even where there is no final breach.

This Court is of opinion that it must be guided by its decision in the case of *Mlotwana* vs. *Rundwana* (Umtata Appeal Court, 24th July, 1905), which was given in the light of all the authorities alluded to by Appellant's attorney, and it is of opinion that the judgment then given is in harmony with the judgment of the Acting Chief Justice in the case of *Madolo* vs. *Mnukwa* (11 Juta, 181). In this case it was clearly shown that after the act of adultery complained of, the wife returned to the injured husband before the action against the adulterer was instituted. It is true that in this case the marriage was a Native marriage, but it was, nevertheless, regarded as a legal marriage and the principles of Colonial law applied in giving judgment upon it, and there the decision of the Court was that the return of the woman to her husband did not prevent his obtaining damages and did not necessarily constitute collusion, and in fact the concluding remarks of the Acting Chief Justice are "There has been a marriage, there has been adultery, there has not been collusion."

In this case this Court is satisfied that there has been no collusion between the husband and wife and that his condonation of her act does not debar his action against the adulterer.

The appeal is dismissed with costs.

Umtata. 29 July, 1909. W. T. Brownlee, A.C.M.

Ndabeni vs. Kwanqa.

(Elliotdale.)

Procedure—Service of Summons—Jurisdiction—Absence of Defendant from District—Provisional and Final Judgment.

Kwanqa sued Ndabinjani and Ndabeni, the latter as head of the kraal, for damages for causing the pregnancy of his daughter.

The return of service on the summons was as follows:—"I certify that on the 5th February, 1909, and at Mtsotso's Location I duly served copies of this summons on Ndabeni (2nd within-named Defendant) at his kraal, 1st Defendant being away at work, that I handed a copy of the same to him personally and that I fully explained the nature and exigency thereof to him."

On the day of hearing Ndabinjani was in default and Ndabeni appeared and pleaded that first-named Defendant had gone away to work. Plaintiff's reply was that he had left to avoid the action after a demand was served on him personally. The Magistrate gave provisional judgment against Ndabinjani and final judgment against Ndabeni as head of the kraal.

Ndabeni appealed.

Pres.:—In this case the appeal is two-fold. First on the ground that there has been no proper service of summons upon the 1st Defendant such as would justify the Court below in giving even a provisional judgment against him, and second on the ground that even if there has been a good service on the 1st Defendant the judgment against the 2nd Defendant should have been only provisional.

This Court is of opinion that there was a good service upon the 1st Defendant. It is not, however, satisfied that the final judgment as to the 2nd Defendant should stand. The point at issue has already been decided in the case of *Toyise* vs. *Soviti*, heard in this Court in July, 1908, where it was laid down that in cases of this nature it is not competent for any Court to give a greater judgment against the kraal head in his capacity as such than against the actual tort feasor.

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

Umtata. 29 July, 1909. W. T. Brownlee, A.C.M.

Nompondo vs. Gempe.

(Elliotdale.)

Procedure—Amendment of Summons—Prejudice to Defendant.

Nompondo sued Gempe for the restoration of his wife or the dowry paid for her, and in his plaint said that he married his wife in *November, 1908*, and that she deserted him in *August,*

1908. Defendant asked for the dismissal of the case on the ground that the summons alleged marriage in November, 1908, and there is no allegation of desertion since then. Plaintiff asked to amend the summons, but the Magistrate dismissed the case.

Plaintiff appealed and the Magistrate gave the following reasons:—

(1) In this case a provisional judgment was re-opened. On re-opening, the attorney for the Defendant took exception to the summons on the grounds that it disclosed no ground of action, inasmuch as it alleged that the Plaintiff married the woman in November, 1908, and that there was no allegation that she deserted him since that date.

(2) In the Court's opinion this exception was a good and sound one. It was sustained, and the case dismissed, as Section 50, Act 20 of 1856, only makes it lawful for the Court to amend any summons in regard to the misdescription of any written instrument or paper writing relating to such action. It makes no provision for the amendment of the plaint or summons itself. The reason for this is obvious: no line could be drawn as to the extent of amendments allowable, and there would practically be no finality as to their scope. In this case the very essence of the case was the dates.

Pres.:—In this case the Plaintiff sues the Defendant for the return of his wife or for the return of the dowry paid for her, and by a clerical error the date of the marriage of the Plaintiff and his wife was made to appear as subsequent to the date upon which the desertion complained of by the Plaintiff took place, and the Defendant's attorney accordingly took exception to the summons on the ground that "It was vague, embarrassing and bad in law as it is alleged that the Plaintiff married the woman Noveyile in or about the month of November, 1908, and there is no allegation that she deserted him since that date."

In reply to the exception, the Plaintiff's attorney applied for permission to amend the summons. The particular form of amendment desired is not stated in the record, but, in response to a question put by this Court, the Plaintiff's attorney states that he proposed to amend the summons by altering the date of alleged marriage from November, 1908, to November, 1903, which was the actual date of Plaintiff's alleged marriage.

The Defendant's attorney objected to the amendment, which was not allowed by the Magistrate, who then sustained the ex-

ception and dismissed the case with costs and the Defendant has appealed on this exception.

It is quite competent for a Magistrate to amend a summons in any respect that is not material to the issues, and that will not in any way prejudice the Defendant, and this Court refers to the following cases:—

Thompson vs. *Barkly East Municipality* (C.T.R., Nov. 1897). In that case, one of the Defendants having been described as Civil Commissioner instead of Resident Magistrate and an amendment being applied for and refused, the Supreme Court held that the amendment should have been allowed in the absence of any proof that the Plaintiff would be prejudiced.

Schaeffer vs. *Tweedie* (E.D.C. 3, 349). In that case the Defendant had not been served with a correct copy of the document sued upon and the Defendant's attorney excepted to the summons. The Plaintiff's attorney applied for permission to amend the summons. The Magistrate refused permission and the Judge President ruled that he ought to have allowed the amendment "as the Defendant could not in any way have been prejudiced in his defence."

Field vs. *Steytler* (7 J., 60). There the summons alleged that the Defendant had caused a writ to be issued under Act 20 of 1856, Section 26, and upon exception being taken the Plaintiff applied to amend. The Magistrate upheld the exception on the ground that the Defendant was entitled to know what unlawful act was alleged against him and refused the amendment. The Chief Justice remarked:—"For myself I am bound to say the summons appears to be somewhat informal and there is much force in the Magistrate's remarks that the Plaintiff does not allege what the unlawful acts are. I think the Defendant was entitled to know in what particular the proceedings he had taken were irregular and unlawful. But an application was made for the amendment of the summons and the Magistrate refused to allow it. There could have been no possible injustice to the Defendant in allowing it. All the parties were in Court with their witnesses."

In the case now before the Court it was quite clear that the date of marriage was not material to the issues of the suit as the act complained of, and which formed the ground of action, was not the marriage, but the desertion of the Plaintiff by his wife, the date of which was correctly stated, and the Defendant could

not possibly have been prejudiced by an amendment of the summons so as to show the correct date of the marriage and, in the opinion of this Court, the amendment should have been allowed and the exception overruled.

The appeal is allowed with costs and the ruling of the Court below set aside. The amendment of the summons as regards date of marriage allowed and the exception overruled.

The case is remitted to the Court below to be tried upon its merits.

Umtata. 29 July, 1909. W. T. Brownlee, A.C.M.

Qubenge vs. Hoya.

(Elliotdale.)

Jurisdiction—Actions arising before Annexation.

Qubenge sued Hoya for five head of cattle, the dowry received by Defendant for Defendant's daughter on her marriage, alleging in his summons that in 1875 Plaintiff's late father assisted Defendant in his marriage by contributing three cattle towards his dowry and, in consideration of this, Defendant agreed to pay these cattle from the dowry received for his first daughter when she married. This girl had now been married and dowry paid for her, but Defendant refuses to carry out his agreement.

The Magistrate dismissed the case, ruling that he could not adjudicate in the matter as the cause of action arose before the annexation of the country and before the birth of Plaintiff.

Plaintiff appealed.

Pres.:—In this case the Court below has ruled that as the circumstance out of which this case has arisen took place prior to the annexation of the District of Elliotdale, the Court of that District has no jurisdiction and dismissed the case.

This Court is not satisfied that the decision of the Court below is correct, and in any case, though the delivery of the three head of cattle, upon which this action is founded, took place prior to annexation, yet the handing over of these cattle was contingent upon certain events to follow thereafter, and these events have as the summons alleges taken place since annexation.

This Court is of opinion that the Court below has jurisdiction in this case and should at any rate have taken evidence before dismissing it.

The appeal is allowed with costs, and the Magistrate's ruling set aside, and the case returned to the Court below to be heard upon its merits.

Umtata. 29 July, 1909. W. T. Brownlee, A.C.M.

Dingiso vs. Mazula.

(Cofimvaba.)

Costs—Substantial Judgment.

Lydia Dingiso sued Mazula for £20 as damages for assault. The Magistrate awarded £3, but made no order as to costs. Lydia appealed on the question of costs. The Magistrate gave the following reasons for his judgment:—"Plaintiff sued for damages for injury to the person. The Court found that, although an assault had been committed, no physical injury calling for damages had been inflicted, but awarded Plaintiff damages for *contumelia*. No claim was made in the summons on this account and no tender was made. Although two doctors had been in attendance on Plaintiff not one was called to give evidence on her behalf, though one is a resident of this village and, failing this evidence, the Court was bound to assume that her claim was a fraudulent one and, to mark its feeling, ordered her to pay her own costs. (See *Kremer* versus *Bennet and Webster*, Supreme Court (Mr. Justice Lawrence) and *Malooi* versus *Windvogel*, Supreme Court 21st April, 1909.)"

Pres.:—In this case the Appellant, the Plaintiff in the Court below, had prosecuted the Respondent, the Defendant in the Court below, for assault and he was convicted and fined the sum of 2s. 6d. Thereafter she instituted an action against him in the Court below for £20 damages for assault, and the Magistrate in the Court below, while finding that no physical injury calling for damages had been inflicted, yet awarded the Appellant £3 damages for *contumelia*, and because he was of opinion that the Appellant's claim was a fraudulent one he has refused to allow the Appellant her costs, and it is upon the point of costs that this appeal is laid. The decisions in the case of *Kremer* versus *Bennet and Webster* and *Moloi* vs. *Windvogel* (C.T.L.R. 21st April, 1909) are relied upon to support the decision as regards costs.

The Court is of opinion that the Magistrate in the Court below has erred in his decision on this point. It is true that a Magistrate is allowed to exercise his discretion in the matter of

awarding of costs, but this discretion must be judicial. This has been very frequently laid down by the Supreme Court, notably in the case of *Van Dyk* vs. *Braunde* (C.T.R. 23rd June, 1909) and in this case the case of *Maloi* vs. *Windvogel* is referred to.

With the decision in this case before it, this Court is of opinion that the Appellant should have been allowed her costs. The Respondent made no tender, but resisted the Appellant's claim. She has succeeded upon the main principle of the case and has recovered substantial damages against the Respondent.

The appeal is allowed with costs and the judgment of the Court below altered to judgment for Plaintiff for £3 and costs of suit.

Kokstad. 4 August, 1909. A. H. Stanford, C.M.

Tibe vs. Joseph Tibe.

(Mount Currie.)

Allotment of Daughters to Sons—Rights to Dowry.

Joseph Tibe sued Tibe for the restoration of two horses and one cow and calf, and in the summons alleged that he was Defendant's eldest son of the first hut, that many years before Defendant apportioned to him his sister, Eleanor, with full rights to her dowry, that for several years Plaintiff and his mother and the children of the first hut have lived apart from the Defendant and been supported by the Plaintiff, that some three years ago Eleanor was married and the dowry was paid to Plaintiff, and that Defendant had now taken possession of this dowry and refused to return it.

Defendant admitted the allegations in the summons, but stated that, while he had lived apart from the first hut, he had constantly visited that hut and had left stock for its support. He contended that he had a perfect right to take the stock sued for.

The Magistrate's judgment was for Plaintiff with costs, and the following reasons were furnished: —

"The Court holds, Plaintiff being a major, that the dowry paid or to be paid for the girl, Eleanor, is the absolute property of the Plaintiff to do with as he likes, the Defendant, under Native custom, being entitled to claim a certain proportion of the dowry, more especially to reimburse himself for any outlay at the girl's wedding or at her Intonjani feast. If Plaintiff were a

minor Defendant would have the right to the charge of the cattle, but would not dispose of them without consulting the minor and his mother."

Defendant appealed.

In the Appeal Court the Native Assessors gave the following opinion:—

"The father having allotted the girl to his son had no right "to take the cattle away and not place them at the kraal of the "mother of the girl. If he was in difficulty he should have "consulted his son, and the son, as long as he had his mother, "should not have deprived her of the use of them.

"The cattle belong to the son."

Pres.:—The facts in this case are not in dispute. It is admitted that the girl Eleanor was given to the Respondent with full rights to her dowry. The girl was given in marriage three years ago and the Respondent has been in the undisturbed possession of the two horses, cow and calf, paid as dowry, until the seizure complained of was made. This being so it is now too late for Appellant to put forward any lien which he may have had for a portion of his daughter's dowry, and his action in taking possession and removing the cattle without consultation with his son and the wife of the house is wholly opposed to Native custom.

When a father allots a daughter to a son the object is that the son should have the benefit of the dowry paid for the girl usually to be devoted to the purpose of getting a wife for himself.

It is customary on the payment of dowry for the father to make the distribution; this done, the stock so disposed of becomes the absolute property of the persons to whom it is given, and a refund can only be obtained, and that in certain cases only, when the marriage of the girl is broken off and the dowry has to be refunded.

In this case the Court sees no reason to vary the judgment of the Resident Magistrate and the appeal is dismissed with costs.

Kokstad. 5 August, 1909. A. H. Stanford, C.M.

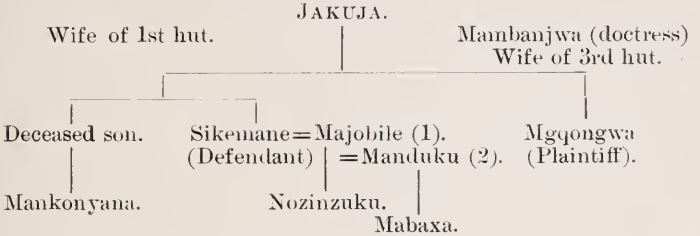
Mgqongwa vs. Sikemane.

(Mount Ayliff.)

Inheritance—Seed Raisers—Guardianship—Xesibi Custom.

Mgqongwa sued Sikemane in an action in which he claimed a declaration of rights in regard to the dowry of a girl named Nozinzuku.

[From the records the position of the parties appeared to be as follows:—]



Plaintiff, Mgqongwa, alleged that after the death of his father, Jakuja, Sikemane, as head of the family (guardian of the minor, Mankonyana), was selected to be the "bull" for the purpose of raising seed to the hut of Mambanjwa, the third wife of Jakuja, and that Majobile was married for this purpose, the dowry for her being paid partly by Mankonyana and partly by Mambanjwa, who was a doctress and had earned the cattle in her profession; that after the birth of the girl Nozinzuku, the woman Majobile returned to her people and her dowry was restored, and this dowry was returned to Mambanjwe's hut and was subsequently paid away for Manduku, who was married to replace Majobile as "seed raiser"; Mabaxa, a boy, was the result of this union between Sikemane and Manduku: Nozinzuku had followed her mother when she returned to her people and was married there, and this marriage was reported to Defendant, who, in turn, reported to Plaintiff: maintenance fees were paid and the dowry was handed over and placed in Manduku's hut. Plaintiff further alleged that Defendant Sikemane was using these cattle for his own purposes, and he (Plaintiff) contended that, as the eldest son of Mambanjwe's hut, he was entitled to them.

Defendant contended that he had married both women as his wives and denied that he was merely a "bull" to raise seed for Mambanjwa's hut. He stated that the arrangement was that Mambanjwa should pay the dowry so that the wife married could work for her.

The Magistrate gave judgment for Defendant with costs and furnished the following reasons:—

In this case the only questions to be decided, in my opinion, are: Did Defendant marry the woman Majobile as his wife or

was dowry paid by Mambanjwa in order that she (Majobile) might be the womb of her (Mambanjwa's) hut, and bear children for her? In the event of Majobile being put into Mambanjwa's hut who would be Nozinzuku's guardian and entitled to her dowry?

The Defendant's story is that, owing to Mambanjwa being a doctor, she was very often away from home, and therefore unable to attend to her children and matters connected with her house, his dowry or portion of it was paid by her so that the woman Majobile, with whom he had eloped, might live in that hut and act as the mother of the young children and generally attend to matters which Mambanjwa, by her calling, would not have time to see to.

The Court believed this story for the following reasons:—(*a*) There is no suggestion that Mambanjwa was past the age of child-bearing, and there is every reason to believe that she was not seeing she had a lot of young children and is alive to-day. (*b*) Why was the usual custom of ukungena not followed? This could very easily have been done without any of the cattle belonging to Mambanjwa's hut being paid away. (*c*) There was a son, viz., Plaintiff, in Mambanjwa's hut. (*d*) Defendant eloped with the woman Majobile.

The Chief Mbizweni in his evidence states that what is alleged by the Plaintiff is a customary thing amongst the Xesibis, and quotes the case of *Mfenqa* vs. *Tshali*. A reference to this case will show that it has no bearing whatever on this matter. This, to my mind, clearly indicates that the position was not understood by Mbizweni. I have not heard of such a custom. The nearest approach to it is the "Xiba" house, but in the Xiba house the position of a grandfather is given by a father to a younger son, that is, the dowry is provided by the grandfather and a separate house is established.

Plaintiff appealed.

Pres.:—The facts of this case having been submitted to the Native Assessors they state:—

"Such a practice as stated in the case for the Appellant is "known amongst Natives. That the proper heir to the house "constituted by the marriage of the woman Majobile is Mabaxa, "the son of Manduku, the woman who replaced Majobile after "she left, and that marriage was dissolved by the return of the "dowry paid for her; that Mabaxa ranks as a younger brother to

"Mgqongwa, who, as the head of the family, has the right, under "Native custom, to maintain this action; that Sikemane, as the "natural father of the children, should receive a beast from each "of his daughter's dowries."

The Court, while agreeing mainly with the views of the Native Assessors, is also of opinion that the Magistrate's finding is against the weight of evidence and that the contention of the Plaintiff in the Court below has been clearly established. But, on careful consideration of the summons, it is clear that in the present action Appellant is acting in his own name and on his own behalf, Mabaxa's name being nowhere mentioned. The Court is therefore of opinion that the suit cannot be maintained in its present form, but, in dismissing the appeal with costs, the judgment in the Magistrate's Court will be altered to one of absolution from the instance with costs.

Kokstad. 6 August, 1909. A. H. Stanford, C.M.

Gunyani vs. Modesane.

(Mount Fletcher.)

Kraal Head Responsibility—Married Sons—Basuto Custom.

Gunyani sued Modesane for three head of cattle, and in his summons alleged that he had obtained judgment against one Hlari, the younger brother of Defendant, for three head of cattle as damages for the seduction of his sister, that Defendant is head of the kraal at which Hlari resides and is responsible for the torts of Hlari, that Hlari had been excussed, but had not satisfied the judgment, and Plaintiff now sought to have Modesane held liable for the amount of the judgment obtained against Hlari.

Defendant took exception to the summons that Hlari was a married man at the time the tort was committed, that the summons does not allege that Hlari was a minor, and that the head of the kraal is not liable for the torts of a married inmate.

The Magistrate upheld the exception and dismissed the case on the ground that the parties being Basutos under Sesuto custom the head of the kraal is not liable for the torts of the major residents at his kraal.

Plaintiff appealed.

Pres.:—In this case, involving the responsibility of the head of a kraal for torts committed by any members of his kraal, the matter was submitted to the Native Assessors, who were unanimous in giving the following opinion:—

"The father is responsible for torts, such as seduction and "adultery committed by his unmarried sons living at his kraal.

"The same principle applies in the case of younger brothers "living with an elder brother, who is head of the kraal. When "a man has paid dowry for his son, or brother, he is no longer "liable for his torts."

In this case it is admitted that the tort feasor Hlari was a married man at the time the tort was committed; consequently, under the opinion given by the Native Assessors, with which the members of the Court concur, the Respondent, Modesane, in his capacity as head of the kraal of which Hlari is a member, is not liable.

The appeal is dismissed with costs.

Flagstaff. 12 August, 1909. A. H. Stanford, C.M.

Tsweleni vs. Nyila.

(Bizana.)

Marriage—Status of Wives—"Ikohlo" House—"Isitembu" House—Widows—Dowry of First Daughter of Subsidiary House—When Dowry not Returnable—Replacement of Wives—Illegitimate Children—Inheritance—Pondo Custom.

In an action against Tsweleni, Nyila claimed a declaration of rights and the payment of four head of cattle. The allegations in his summons were as follows:—

(*a*) That the parties hereto are Pondos. (*b*) Plaintiff is the eldest son of the late Langa in his first hut and is his heir. (*c*) Tsweleni is the eldest son of the late Langa in his third hut. (*d*) That the said Langa had three daughters in his third hut, viz., Noswe, Tshanda and Nomasoyi. (*e*) That Langa paid dowry for his third wife with cattle belonging to his first hut, and by reason thereof Plaintiff is entitled, according to Native custom, to the first daughter of the third hut, viz., Noswe. (*f*) That the said Noswe was married while Plaintiff and Defendant were living together, and Plaintiff received the dowry paid for her, viz.,

three head, two of which were killed or disposed of by him. (*g*) That when Defendant separated from Plaintiff about three months ago he took with him the remaining one beast belonging to Noswe's dowry without the consent and against the will of Plaintiff. (*h*) That since Plaintiff and Defendant have been separated Defendant has received a further three head of dowry from Noswe's husband.

He asked to be declared the rightful guardian of the said Noswe and entitled to all dowry received or which hereafter may be received for her and that Defendant be ordered to deliver to him the four head of Noswe's dowry now in his possession or pay their value, viz., £20.

Defendant's plea was as follows:—

He admitted paragraphs (*a*), (*b*), (*c*) and (*d*), and with regard to paragraph (*e*) he denied that Langa paid dowry for the third hut with cattle belonging to the first hut. As regards paragraph (*f*) he admitted that three head were received as dowry for Noswe, but denied that Plaintiff received them, and admitted that two head were disposed of, but denied that Plaintiff disposed of them. As regards (*g*) he admitted that he took the remaining beast when separating, but stated that he took it as his own property. He admitted paragraph (*h*) and pleaded that the four head are his own property according to Native custom

The Magistrate gave judgment for four head of cattle and Defendant appealed.

[In the Appeal Court the Native Assessors made the following statement of Pondo customs:—

When a wife dies and another woman is married and put in her place failing male issue by the first wife, the son of the wife substituted for her will inherit the property of the house. The first wife married is the Great wife, the next wife's house is called "ikohlo," the next woman married is called "isitembu" of the Great House, a fourth woman would rank as isitembu of the Kohlo House.

Failing male heirs in the Great House the son of the Kohlo House would inherit the property of the Great House as well as his own. The son of the Isitembu House would only inherit if his mother was especially placed in that house to bear children for that house. The Isitembu House is an inheritance to the Great House, or Kohlo House, as the case may be, the dowry of the eldest daughter of the Isitembu House going to the

Great House or the Kohlo House, as the case may be, but one or more of the dowry cattle from the dowry of the first girl is usually given to the Isitembu House; at the same time this is at the option of the Great House.

If a woman, having borne children to her husband, on his death returns to her father she may be given in marriage, and the first dowry is not recoverable; if there is only one child and the dowry has been large, the heir may ask for some of it back and a portion may be returned. If a widow returns to her own people and does not marry, but bears children, these children belong to the house of the husband, but such children, being sons, will not inherit as against the sons of the deceased man. Where a woman dies shortly after marriage without issue, the dowry is recoverable, but a portion is left with the father, but if she grows old with her husband the dowry is not recoverable.]

Pres.:—The case having been submitted to the Native Assessors they state:—"The Isitembu House is an inheritance to the Great House and it is not unreasonable that the dowry of the eldest daughter should go to the Great House, but the house to which the girl belongs should get at least one beast."

The judgment in the Magistrate's Court is altered to judgment for Plaintiff for three cattle of value £15, and the Plaintiff declared to be entitled to any subsequent dowry which may be paid for the girl Noswe, Defendant paying costs of suit.

The alteration in the judgment is not of so substantial a nature as to entitle the Appellant to costs of appeal, and as he has failed in the main issue, the Court will make no order as to costs.

Umtata. 8 November, 1909. A. H. Stanford, C.M.

Mnyamana vs. Bangani Fihlo.

(Umtata.)

Kraal Sites—Proclamation 125 *of* 1903—*Jusisdiction.*

Bangani Fihlo sued Mnyamana to show why he should not be condemned to deliver to Plaintiff possession of a certain kraal and huts, the property of Plaintiff, but occupied by Defendant.

Defendant excepted to the jurisdiction of the Court in regard to the delivery of the kraal and huts claimed by Plaintiff as such should be dealt with by the Magistrate not in his judicial but in his administrative capacity.

The Magistrate overruled the exception and on the merits gave judgment for Plaintiff.

Defendant appealed.

Pres.:—In unsurveyed Districts in the Native Territories in communally-occupied Native Locations land for both occupation and cultivation is now held under the provisions of Proclamation 125 of 1903, and the Court is of opinion that the Respondent had the right to vindicate his claim to interests acquired under that Proclamation or the one for which it was substituted—No. 19 of 1899—by civil action and that the Magistrate rightly dismissed the exception.

It is not contested that the Respondent Bangani Fihlo was not in lawful possession of the kraal site now in dispute and it has been shown that when he left the District in or about the year 1902 to go to service it was his intention to return and occupy, he having left his huts in the charge of Nomfazwe, which he was entitled to do under the provisions of Proclamation No. 19 of 1899, for which Proclamation No. 125 of 1903 with a similar provision has been substituted. During his absence Appellant obtained permission from Respondent's agent, Nomfazwe, to use the huts temporarily, but he now claims the site alleging a re-allotment to himself by the Chief Dalindyebo. This the Chief denies, and as the Appellant has not produced the Office Register in support of his claim, the Court can only conclude that no such re-allotment was made, and consequently Appellant is either occupying as a tenant of Respondent or else is in illegal occupation. Of the two claims, that of the Respondent is the stronger and must succeed.

The appeal is dismissed with costs.

Umtata. 8 November, 1909. A. H. Stanford, C.M

Bacela vs. Nqwakuzayo.

(Umtata.)

Dowry Restoration—Guardian and Minor—Whom to Sue

Bacela sued Nqwakuzayo for the recovery of certain cattle, and in his summons he alleged that he paid dowry to Defendant in respect of his wife, named Nomayite; that after the marriage the woman deserted him; that it was incumbent on Defendant to restore her, but he refuses to do so; and that on these grounds he was entitled to the restoration of his dowry.

Defendant admitted the marriage, but stated that the girl belonged to Mayilwana, a minor who was living at the kraal of Defendant at the time and who is now away at work: that the proper person to be sued is Mayilwana or in any case Defendant ought to be sued in his representative capacity.

In his evidence Defendant said he was holding the dowry for Mayilwana, that when marriage proposals were made, he introduced Plaintiff to Mayilwana as the brother of the girl and her guardian. The woman in question was now in Gcalekaland and not at his kraal.

The Magistrate absolved the Defendant and furnished the following reasons:—

I am satisfied upon the evidence that Plaintiff was quite aware when he married the woman Nomayite that her natural guardian and the person to whom her dowry was to be paid is the man Mayilwana, who was then a minor, and that the Defendant received dowry on account and on behalf of Mayilwana. It is quite clear from the evidence both for the Plaintiff and for the Defendant that Plaintiff was introduced to Mayilwana as his future brother-in-law. This being so the action should, in my opinion, have been brought against Mayilwana and that Defendant should, if sued at all, have been sued jointly with Mayilwana.

Plaintiff appealed.

Pres.:—It has been fully proved that when contracting the marriage Appellant was informed that the Respondent was not the father of the girl, but that she was the daughter of one Buya, who son and heir Mayilwana was, and introduced to him as such. Appellant must have known that he was paying the dowry to Mayilwana and not to Respondent, and consequently his action should have been directed against Mayilwana.

The appeal is dismissed with costs.

Umtata. 10 November, 1909. W. T. Brownlee, A. C. M.

Tabankulu vs. Dyarashe.

(Mqanduli.)

Illegitimate Children—Rights to Dowry of—Payment for—Tembu Custom.

Dyarashe sued Tabankulu in an action for a declaration of rights in regard to a certain girl and for the delivery of certain dowry cattle.

The Magistrate gave judgment for Plaintiff for 10 head of cattle and declared Plaintiff the guardian of the girl in question.

The following were the reasons furnished:—

"In this case the Plaintiff sues the Defendant for a Declaration of Rights in regard to a certain girl and for 10 head of cattle paid as dowry for this girl. It is common cause that the woman Kemete, daughter of Plaintiff, is at present married to Defendant, and that before this marriage she was married to one Nkovu. During her marriage with Nkovu one girl, Nonesi, was born. The marriage was subsequently dissolved and Plaintiff returned Nkovu's dowry in full, which left him as guardian of Nonesi. The defence set up was that before marriage Defendant had made the woman Kemete pregnant and that Nonesi was born as the result. Nkovu, notwithstanding that he knew of this at the time, married the woman, but subsequently rejected her on that account, and thereupon Defendant married the woman and paid eight head of cattle, six as dowry and two for this child Nonesi. It is quite clear that the girl Nonesi had been born during the subsistence of the marriage of Nkovu to the woman Kemete, and that he rejected her and the child and received the dowry paid in full, thus waiving his right to the child, which then became the property of Plaintiff until such time as the former has paid a sufficient number of cattle for her. It is a most unusual procedure for a Native to pay dowry for his wife and get the child born before marriage, unless of course he was the father and paid the full fine of five head of cattle, which was not done in this case. I was altogether satisfied that Plaintiff had established his claim and gave judgment accordingly."

Defendant appealed.

Pres.:—In this case the Defendant has married a woman named Kemete, the daughter of the Plaintiff, and he and Kemete have given in marriage a girl named Nonesi, whom the Plaintiff claims as his property and in respect of whom and the dowry paid for her the Plaintiff claims a declaration of rights.

The statement of Plaintiff is that many years ago he gave his daughter Kemete in marriage to one Nkovu and that the girl Nonesi is the issue of this marriage; that this marriage was dissolved by suit before the Chief Dudumayo and that all the dowry paid by Nkovu was restored to him and that in consequence the issue of this marriage—the girl Nonesi—became his property.

Plaintiff further states that he later on gave the woman Kemete in marriage to Defendant and that they in 1907 borrowed the girl Nonesi and then, without his knowledge and consent, gave her in marriage as above stated and exacted dowry for her.

The Defendant, while admitting that the girl Nonesi was born during the subsistence of the marriage between Kemete and Nkovu, states that before this marriage was entered into he (Defendant) seduced Kemete and got her with child and that Nonesi is the child so begotten. He further states that the marriage of Kemete and Nkovu was dissolved by the latter in consequence of his discovery that the woman was with child and that in consequence of this dissolution of the marriage and the attendant repudiation of the child born by Nkovu, this child, upon Defendant's subsequent marriage with Kemete, became his property; and he furthermore states that when he paid dowry for Kemete he paid two additional head in respect of the child Nonesi, who thus became his, not only by virtue of the fact that she is the offspring of his body, but by virtue of the fact that he has paid cattle for her. He admits however that he paid no fine in respect of the seduction and pregnancy of Kemete. The Plaintiff denies that cattle were paid by Defendant for Nonesi and that she is his putative child.

The decision of the Court below is that it is quite clear that the girl Nonesi was born during the subsistence of the marriage of Nkovu to the woman Kemete, and with this decision this Court entirely concurs.

This case having been submitted to the Native Assessors they state that Tembu Custom is that if a woman be seduced and got with child and be subsequently married before confinement to some man other than the seducer the child when born belongs: (*a*) If the seducer has paid a fine, to the seducer; (*b*) if he has paid no fine, to the woman's husband. It follows then that whoever may have procreated the child Nonesi, she being born during the subsistence of the marriage of Kemete and Nkovu, would be, under Tembu law and custom, the child of Nkovu, even supposing that her mother had been seduced and got with child by Defendant, no fine having been exacted or paid in respect of such seduction. And upon Nkovu's repudiation of the marriage and receipt of the whole dowry paid by him she would belong to Plaintiff, the father of her mother, and not to Defendant, who paid no fine for her mother's seduction.

With regard to the contention that the girl Nonesi became the property of Defendant by virtue of the payment of two head of cattle for her when he married her mother, this Court is of opinion that it must be guided by the decision in the case of *Nowata* vs. *April*, heard on appeal from Elliot, in Umtata, in November, 1905, in which the judgment is as follows:—

"The case being submitted to the Native Assessors for opinion, "the Chief Dalindyebo states:—'We do not know any such "custom as that stated that when a man on contracting a mar- "riage with a woman who already has a child by another man "should by payment of a beast obtain that child.' In the "ordinary course of Native Custom such a child, being illegiti- "mate, would belong to the woman's father and a deviation "from this must be supported by the strongest evidence, which "in this case is not forthcoming. Such an arrangement as that "stated by the Respondent should be supported by other evi- "dence than that of himself and his wife only. The appeal is "allowed with costs, judgment being altered to judgment for "Plaintiff for three cattle and costs, two cattle being allowed the "Respondent for maintenance of the girl and wedding expenses."

Under the whole of the circumstances of this case this Court is of opinion that the Magistrate in the Court below is correct in his judgment, and the appeal is dismissed with costs.

Umtata. 11 November, 1909. W. T. Brownlee, A.C.M.

Zidlele vs. Matshamba.

(Elliotdale.)

Seduction and Pregnancy—Damages—Dikazi—Tembu Custom.

Matshamba sued Zidlele for six head of cattle as damages for seducing and causing the pregnancy of his daughter. From the evidence it appeared that the girl in question had previously had a child by another man, who had paid damages.

The Magistrate awarded one beast as damages and Defendant appealed.

The Magistrate in his reasons said that it transpired during the hearing of the case that the girl in question had previously had a still-born child, and, being only about 18 years of age, she could hardly be called a "dikazi," and he therefore thought the father was entitled to the small damages awarded.

Pres.:—This case has been submitted to the Native Assessors, and they state that according to Tembu custom, no fine is paid in the case of a second pregnancy of an unmarried woman unless she is a Chief's daughter.

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

Umtata. 11 November, 1909. W. T. Brownlee, A.C.M.

Mboniswa vs. Gasa & Gasa.

(Mqanduli.)

Kraal Head Responsibility—Civilised Natives—Application of Colonial Law.

Mboniswa sued William Gasa for five head of cattle as damages for the seduction of his daughter by William Gasa and the consequent pregnancy, and in his summons he joined Renton Gasa as being the father and guardian of William and as head of the kraal responsible for the torts of his son.

The Defendant William was in default and the Defendant Renton pleaded that he was not liable for his son's torts on the grounds that his son was of the age of majority and had lived away from him for the past three years: that he is a duly ordained deacon of the Church of England and had abandoned Native customs and conformed to civilised usages as has also Plaintiff and his daughter: that his son having been given a good education was employed as a Government teacher and is now engaged in a solicitor's office in East London: that his son being no longer a resident of the District is out of the jurisdiction of the Court; that under Native law he would not be liable for his son's tort as at the time of its commission his son was emancipated and not living at his kraal. For these reasons Defendant Renton asked for the case to be tried under Colonial law.

The replication was that Plaintiff is suing under Native law and does not elect to proceed according to Colonial law: that at the time the Defendant William was taxed with the tort he was resident at his father's kraal and his last known place of residence was that kraal: that while a teacher in Bomvanaland Defendant William seduced the girl and afterwards returned to his

father's kraal, where he was charged with the act; that he then left for East London; and that during Defendant William's temporary residence in Bomvanaland he always returned to Defendant Renton's kraal for the week's end.

The Magistrate's judgment was provisional against the first Defendant William but final for second Defendant Renton.

Plaintiff appealed.

The Magistrate's reasons were as follows:—

From the evidence adduced it appears that first Defendant seduced Plaintiff's daughter when he was living away from his father's kraal. First Defendant is a major. He left his father's kraal for good in February, 1909, and took up an appointment as a teacher in Elliotdale District. Since then he appears to have lived away from his father's kraal and earned his own livelihood. From these facts I came to the conclusion that first Defendant was emancipated and the second Defendant could not be held, under these circumstances, to be liable for his torts. Moreover it is further apparent that both the parties are Christian Natives and have abandoned their customs. Colonial law would, therefore, apply to this case, and also for this reason Plaintiff could not succeed against Defendant No. 2. For these reasons I gave judgment for Defendant No. 2 with costs, and first Defendant being in default, I gave provisional judgment against him as prayed with costs.

Pres.:—In this case the Court is of opinion that the decision of the Court below is correct. The Defendant No. 2 cannot be regarded as being amenable to Native law only. It does not appear that he is living on his own property as in the case of the Defendant in the case of *Tumana* vs. *Smayile and Mankayi Renge*, but it is clear that he is the son of a Christian marriage, that he holds the status of deacon in the Church of England, and that he has educated his son, the first Defendant, and provided for him in life by giving him the education enabling him to become a certificated teacher. It is thus very doubtful whether, even in the event of the second Defendant being amenable to Native law, he would under the circumstances be responsible for the torts of the first Defendant. It is further clear that at the time the act which forms the ground of this action was committed, the first Defendant was not an inmate of the kraal of the second Defendant, which is in the District of Mqanduli, but was earning his own living as a teacher in the District of Elliotdale.

Following the decision of this Court in the case already referred to above, this Court is of opinion that the Magistrate has not made an improper use of the judicial discretion vested in him by the provisions of Section 22 of Proclamation 140 of 1885 in deciding to apply Colonial law, at any rate in so far as the second Defendant is concerned.

The appeal is dismissed with costs.

Umtata. 12 November, 1909. W. T. Brownlee, A.C.M.

Ntsangwana vs. Sityebi.

(Ngqeleni.)

Dowry—Allotment of Daughters—Division—Increase—Pondo Custom.

Sityebi sued his brother Ntsangwana for 17 head of cattle, being the dowry and its increase received by Defendant for his (Plaintiff's) sister, who had been allotted to him by his elder brother, the Defendant.

The Magistrate awarded eight head of cattle and Defendant appealed.

(The grounds of action appear fully in the Appeal Court judgment).

Pres.:—In this case the Plaintiff claims 17 head of cattle and says that about the year 1890 his elder brother, the Defendant, apportioned him a girl named Ketiwe, and that in or about the year 1893 the girl Ketiwe was abducted and the Defendant received as dowry for her certain three head of cattle. He further states that he went away in search of work and that for 14 or 15 years he did nothing for the girl, that he returned from work five years ago and that on his return he found that the three cattle had increased to 17 head. These he now claims and the Defendant refuses to hand them to him. The Defendant admits the allocation of the girl Ketiwe to the Plaintiff and the receipt of three head of cattle as dowry for her and that they have increased to 11 head, but he states that the Plaintiff is not entitled to any of them as two of the dowry were due to himself under custom as his portion of Ketiwe's dowry and one is due to himself for maintenance of the girl, and that the three head of cattle paid thus all appertain to him.

The Plaintiff admits that the Defendant is entitled under custom to one beast as his portion out of Ketiwe's dowry and to one beast for maintenance, but argues that Defendant was not justified in appropriating them to himself and should have waited for Plaintiff to make a distribution of Ketiwe's dowry.

The Court below finds on the evidence that there are at least 11 head of cattle, and allowing the Defendant three, gave judgment for Plaintiff for eight head and costs, and the Defendant appeals.

The Defendant's attorney argues that the Defendant was quite within his rights in appropriating two of the dowry cattle to himself and that as these two would have increased to him he should have been allowed a larger number than three head and he is quite willing that an order should be given in Plaintiff's favour for four head.

The case being put to the Native Assessors they state that the Defendant would be entitled according to custom to have received two head of cattle out of Ketiwe's dowry and that though under ordinary circumstances he should not have apportioned the dowry in the absence of Plaintiff, yet in the special circumstances of this case and because of the Plaintiff's prolonged absence the Defendant was justified in making a distribution without waiting for the Plaintiff, he being the proper person as head of the family to make the distribution of this dowry even had Plaintiff been present.

This Court is of opinion that under all the circumstances of the case a larger number of cattle should have been awarded to Defendant, and that the apportionment of cattle proved to be in existence should have been made on the basis of two to Defendant and one to Plaintiff, and the appeal is allowed with costs and the judgment of the Court below altered to judgment for Plaintiff for four head of cattle and costs.

Umtata. 12 November, 1909. W. T. Brownlee, A.C.M.

Swelindawo vs. Myekeni.

(Ngqeleni.)

Seduction and Pregnancy—Damages—Dikazi—Pondo Custom.

Myekeni sued Swelindawo for four head of cattle, being the balance of damages due by Defendant for seducing and causing

the pregnancy of his (Plaintiff's) daughter, one beast having already been paid on account.

The act was admitted, but Defendant raised the defence that this was not the woman's first pregnancy.

Plaintiff admitted that a previous marriage of the woman had been dissolved and dowry returned and that she had borne other children.

The Magistrate awarded three head of cattle as damages and Plaintiff appealed.

Pres.:—In this case the appeal is brought on the ground that the woman in question having had various illegitimate children it is not competent for the Plaintiff to demand damages in respect of her seduction, and the point having been put to the Native Assessors they state that under Pondo Custom a father may demand damages for the pregnancy of his daughter up to the last child, and if the seducer refuse to pay he may sue him.

The appeal is dismissed with costs.

Butterworth. 22 November, 1909. W. T. Brownlee, A.C.M.

Lupuzi vs. Sontondoshe.

(Tsomo.)

Illegitimate Children born in Wedlock—Fines received by Holder of Dowry.

Mvolwana Sontondoshe sued Lupuzi for the restoration of his wife or the dowry paid for her, one child of the marriage, and three head of cattle received by Defendant as a fine for the seduction of the woman by one Tolo during his (Plaintiff's) absence at work.

The Magistrate awarded seven head of cattle and the custody of the child and Defendant appealed.

(The grounds of action are fully disclosed in the Appeal Court judgment.)

Pres.:—In this case the Plaintiff arranged to marry Regina, the daughter of Defendant, and paid dowry for her. Some time seems to have elapsed between that payment of dowry and marriage, and during this period one Tolo seduced Regina and got her with child.

The marriage was eventually carried out, and after some time Regina was delivered of the child whom she had gotten by Tolo, who had in the meantime paid fine of three head of cattle to Defendant in respect of the seduction of Regina.

Plaintiff then went off to work, and on his return found that Regina was cohabiting with Tolo, and he at once sued Tolo for damages and recovered one beast. The woman Regina had meanwhile returned to her father, the Defendant, and Plaintiff sues for the recovery of his wife or, failing this, for the return of the dowry paid by him, five head of cattle, and for delivery to him of the child born and of the fine paid for the seduction of Regina The judgment of the Court below is for Plaintiff for the return of his wife or for the return of the dowry paid for her, five head, less one deducted in respect of the child, the delivery of the child and the fine paid in respect of Regina's seduction, and this Court sees no reason to disturb the decision.

The act of seduction having taken place during the period of payment of dowry, the proper person to receive any fine is the intended husband. This was laid down in the case of *Macingwane* vs. *Sipila* by this Court sitting at Butterworth on the 15th July, 1901, where the judgment of the Court is as follows:—"As "the Court is of opinion that the three head of cattle were not "paid to the father of the girl as principal, but were collected "by him and handed over to the husband for the damage he had "sustained by the seduction and pregnancy of his intended wife, "no action lies against the Appellant." The child having been born in wedlock is the property of Plaintiff, Regina's husband, and Plaintiff is therefore entitled to receive both child and fine.

The appeal is dismissed with costs.

Butterworth. 22 November, 1909. W. T. Brownlee, A.C.M.

Lobi vs. Noyo.

(Idutywa.)

Dowry—Refund on Marriage of Widow—Division.

Noyo sued Lobi for eight head of cattle, being the dowry paid to Defendant on the marriage of Defendant's daughter to his son. He alleged that almost immediately after the marriage his son died, that the widow returned to Defendant and was married again and dowry received for her, and on these grounds he claimed a refund of eight out of the nine head paid.

The Magistrate awarded five head of cattle and Defendant appealed. The reasons furnished were as follows:—

"I came to the conclusion that six head of cattle were paid "as dowry, and as Plaintiff's son had only been married a month "when he died and the girl then returned to her people, and as "the deceased had the services of his wife for only a month, I "considered that Defendant should only be entitled to one beast, "and I therefore gave judgment for five head or value, £25, "with costs."

Pres.:—In the case of *Noante* vs. *Ngoyoto*, heard in this Court at Butterworth on 22nd March, 1904, it is laid down that in cases such as this, when a woman leaves her husband's kraal on account of the death of her husband, the heir of the latter is not entitled to recover the whole of the dowry which is usually divided; and in the case of *Gwente* vs. *Simayile* (Warner, p. 18) it is laid down that in such cases it has become not customary in this Court to order the return of more than half the dowry paid. In this case the Magistrate in the Court below has found on the evidence that six head of cattle were paid and that there is no child of the marriage, and has ordered the return of five head. The appeal will be allowed with costs, and the judgment of the Court below altered to judgment for Plaintiff for three head of cattle, and as there was a tender of three head of cattle Plaintiff to bear all costs subsequent to tender.

Kokstad. 6 December, 1909. A. H. Stanford, C.M.

Mkatazo vs. Mkatazo.

(Mount Frere.)

Married Women—Actions against—Guardians' Assistance—Procedure.

Mkatazo sued his wife, Katje Mkatazo, to show why an order of Court should not be granted declaring Plaintiff to be the rightful owner of all dowries paid or to be paid for all or any of the six daughters born to Plaintiff by Defendant of their marriage; also why Defendant should not be ordered to account to Plaintiff for and to hand over to him the dowry received by her for Plaintiff's eldest daughter, Sophia, whom Defendant gave away in marriage and received dowry for, without Plaintiff's consent or knowledge. He alleged that he married Defendant some time before Rinderpest according to Native custom, paying 10 head of cattle as dowry for her, and the marriage was still in existence.

Exception was taken that the Defendant is a married woman and that she cannot be sued unless assisted by her guardian.

This exception was overruled and Defendant appealed.

The Magistrate's reasons were as follows: —

The exception taken is that the woman should have been summoned, duly assisted by her guardian, but as she is a married woman and Plaintiff is her guardian this is impossible. She is living at present near some relative in this District, her dowry has not been returned and her brother, who I understand holds it, lives in Butterworth. Section 51 of Act 20 of 1856 lays down under what conditions a married woman may sue, and I take it by implication, that under the same conditions she may be sued.

In any case the woman is in the position of a *femme sole* at present, and as she has acted without her husband, and declines to account to him or acknowledge him, he may sue her to compel her to do so.

Held:—The Appellant is a major, and in an action brought against her by her husband does not require the assistance of a guardian. The reasons given by the Magistrate justify his decision.

The appeal is dismissed with costs.

Kokstad. 6 December, 1909. A. H. Stanford, C.M.

Gqezi vs. Nzaye.

(Umzimkulu.)

Dowry Completion—Dissolution of Marriage—Seduction.

Gqezi sued Ngaye for the restoration of eight head of cattle paid as dowry to Defendant in respect of his daughter, and he alleged that the girl broke off the engagement and refused to have anything to do with Plaintiff, and on this ground he claimed the restoration of his dowry or in the alternative the delivery of the woman and her child.

Defendant pleaded that Plaintiff eloped with his daughter and seduced her, that the child was born at his (Defendant's) kraal, that he is prepared to hand over his daughter to Plaintiff in marriage on the receipt of more dowry, and that if Plaintiff cannot pay further dowry then Defendant is entitled to retain the cattle paid.

The Magistrate awarded one beast and declared Plaintiff entitled to the child.

Plaintiff appealed.

The Magistrate's reasons were as follows:—

In this case Plaintiff became engaged to Defendant's daughter and paid as dowry six head of cattle and one horse. Before this payment Plaintiff eloped with the girl and rendered her pregnant, and she was in this condition when she was accompanied back to Defendant's. Subsequently it would appear that the girl went to Plaintiff to have certain ceremonies on the birth of the child performed and then returned home. Defendant now demands further payment of dowry before he will allow the girl to go and live with Plaintiff, and this Plaintiff appears to be unable to comply with, hence the deadlock. It is not within the power of this Court to compel Defendant to give his daughter to Plaintiff before full dowry is paid, hence that part of Plaintiff's prayer is futile; with regard to the alternative prayer for the return of dowry paid, the Court is of opinion that it is owing to Plaintiff's inability to complete dowry that the engagement has fallen through and considers Plaintiff would be amply recompensed by an award of one head and the right to the child and costs of suit.

Pres.:—The case having been submitted to the Native Assessors they express the opinion that the Appellant after having carried off Respondent's daughter and caused her to become pregnant is now, by his failure and refusal to complete the dowry, responsible for the dissolution of the marriage and that he was not entitled to recover any portion of the dowry paid.

This Court sees no reason for disturbing the Magistrate's judgment. The appeal is dismissed with costs.

Kokstad. 7 December, 1909. A. H. Stanford, C.M.

Matee vs. Njongwana.

(Qumbu.)

Marriage—Colonial Law and Native Custom—Polygamy.

Jeremiah Matee sued Njongwana for the restoration of his wife or the dowry he had paid for her.

During the hearing of the case it transpired that at the time Plaintiff entered into the union with the woman now in question he already had a wife married under Colonial law, and that this wife was still alive and living with him.

The Magistrate thereupon dismissed the case and Plaintiff appealed.

Pres.:—The Appellant having married under Colonial law cannot contract any other marriage during its subsistence, the arrangement he entered into is an immoral contract, the woman is not his wife nor can he recover the cattle paid.

The appeal is dismissed with costs.

Kokstad. 7 December, 1909. A. H. Stanford, C.M.

Magwaxaza vs. Nqanqane.

(Qumbu.)

Adultery—Contraction of Disease—Higher Damages.

Nqanqane sued Magwaxaza for five head of cattle as damages for adultery and five head as damages for communicating the disease of syphilis to his (Plaintiff's) wife.

The Magistrate awarded the 10 cattle claimed, finding that both adultery and communication of the disease by Defendant were proved.

Defendant appealed.

Pres.:—The Native Assessors having been consulted state they are of opinion that the husband is entitled to additional damages on account of his wife having been infected with syphilis and that five cattle is not excessive.

The Court holds that where a man in addition to committing adultery communicates syphilis to a man's wife the case is an aggravated one, and one in which higher damages should be awarded.

The appeal is dismissed with costs.

Kokstad. 8 December, 1909. A. H. Stanford, C.M.

Maxobongwana vs. Funda and Another.

(Tsolo.)

Witchcraft—Smelling Out—Payment of Fines—Dissolution of Marriage.

Funda and Mahlabedlula sued Maxobongwana in an action for a declaration of rights. It appeared that many years before, Defendant had a wife named Gxotiwe, whom he caused to be "smelt out." This woman was "picked up" by the father of Plaintiff

Funda and while at his kraal a girl named Salasi was born, and mother and daughter were maintained at Funda's kraal. The girl Salasi was eventually given in marriage to Mahlabedlula and Defendant afterwards obtained possession of her on the pretext that she was his own daughter. While at Defendant's kraal Salasi had two illegitimate children.

Funda asked for a declaration of rights, stating that if the girl Salasi could not be considered as his daughter he would be liable to refund Mahlabedlula's dowry; and Mahlabedlula claimed the restoration of all the children born by her.

The Magistrate gave the following judgment:—The Court finds that Plaintiff is entitled to call himself the father of the woman Salasi, and entitled to her dowry, and that Mahlabedlula is entitled to Salasi's children. Defendant to pay costs of suit.

The Magistrate's reasons were as follows:—

The Courts finds that Maxobongwana married Gxotiwe and that some time afterwards he caused her to be smelt out. That was at the time when the penalty of being a witch was death. Gxotiwe was picked up by the head of the clan Dazana (Plaintiff's late father), and has been maintained and cared for by him, her daughter Salasi being born at Dazana's and brought up by him. Defendant, by his action in having his wife smelt out, gave up his claim to her; he moreover placed her in such a position that she might have been killed. It is immaterial whether he is the natural father of Salasi or not because if the custom had been carried out Salasi would obviously never have been born even if she was being borne by her mother at the time. The Court found, therefore, that Defendant had absolutely no claim to Salasi.

Defendant appealed.

Pres.:—According to Native custom the smelling out of a wife dissolved the marriage unless it was followed within a reasonable time by the payment to the father or guardian of the woman of a fine usually fixed by such father or guardian, when the woman would be returned to the husband.

In the present case it is not in dispute that the woman Gxotiwe was smelt out by the Appellant and that he never recovered her.

It is clear from the evidence of the Appellant that the girl Salasi was not his own child, and he can have no claim for the dowry paid for her. The marriage of Mahlabedlula is not in dispute.

The appeal is dismissed with costs.

Kokstad. 8 December, 1909. A. H. Stanford, C.M.

Setlaboko vs. Lekhoasa Setlaboko.

(Mount Fletcher.)

Estates—Inheritance—Administration—Christian and Native Marriages—Marriages before Annexation—Executors.

The Executor in the Estate of the late Silas Setlaboko sued Lekhoasa Setlaboko for the delivery of all the stock and property in the Estate and a full and true account thereof.

From the records it appeared that the late Silas and Lekhoasa were brothers, and on the death of Silas in 1890 the Defendant Lekhoasa took charge of all the property. Silas had left two sons, Molau, the son of the first of his wives married by Native custom named Mamosila, and Alfred, the son of a woman named Rachel, his third wife, whom he had married by Christian rites in the spring of 1879, Alfred being the elder.

The Executor claimed all the property in the Estate for distribution to the heirs. He alleged that no assignment of any property took place to huts of previous wives of the late Silas, and consequently claimed all the property for Alfred.

Lekhoasa contended that he was the proper guardian under Native custom to take charge of the property. He contended that Molau being the son of the first wife married was heir to the property and that Alfred only ranked as a younger brother to Molau.

The Magistrate granted absolution and Plaintiff appealed.

In his reasons the Magistrate said that although a ceremony of Christian marriage had been gone through with Rachel, this marriage was not valid because of the existing legal marriages with the two wives married under Native custom, both having been entered into years before annexation, and it followed that the election of an Executor by Alfred Austin and Rachel was not in order. But supposing the Christian marriage to be valid he was not prepared to support the contention in the summons that the son of the Christian marriage is the sole heir to the exclusion of the other members who are heirs by Native custom.

Pres.:—From the evidence it would appear that Silas Setlaboko married first as his chief wife Mamosila and then Kheletsu under Native custom, about the year 1872 and long prior to the Colonial Government exercising any control in East Griqualand.

Subsequently to this a quarrel ensued between Silas and his father, which resulted in Setlaboko demanding from his son his wives as he had paid the dowries for them, as well as all other benefits Silas had received from his father, with the result that Silas sent his two wives to his father and left for the Colony to go to school. This act cannot in itself be regarded as an annulment of these marriages.

In the year 1879 at Pabillong, in the present District of Mount Fletcher, Silas Setlaboko contracted a marriage by Christian rites with a woman named Rachel. The question whether this marriage was entered into before or after the 1st October, 1879, on which date Proclamation 112 of 1879 became operative, is of great importance in the distribution of the estate. If it was before that date Colonial law would not apply to it.

The only witness, Abner Molife, who has any knowledge on this point is uncertain as to the date. In his evidence in chief he says it took place in November, 1879, but later qualifies this and says it was in the spring. The spring, according to Native idea, commences with the change of the season from winter and usually dates from the beginning of September; as there is no entry in the Marriage Register of Pabillong or in the Colonial Office records there is a presumption that this marriage took place prior to the 1st October, 1879.

In any case this marriage would not deprive the houses of the two wives previously married of their rights or of the stock which had been before allotted to them, but by this marriage Silas Setlaboko bound himself to keep to one wife only and thus this marriage practically divorced the other two women, who at this time had returned to and were living with their own people.

Some years later he fetched back Mamosila and re-established her with the result that she gave birth to a son who, according to Native custom, would be his chief heir, and in any circumstances heir to his mother's house.

So long as he holds the appointment of Executor Dative, the Appellant is the proper person to administer and distribute the estate and is entitled to obtain possession and to realise and distribute the property of the estate.

The appeal is allowed in this Court and the Court below with costs and the record returned to the Magistrate to determine the number of the stock in the possession of the Respondent to be handed over to the Executor Dative for his administration.

Flagstaff. 15 December, 1909. A. H. Stanford, C.M.

Mfuti vs. Nkohla.

(Flagstaff.)

Actions arising before Annexation—Jurisdiction.

Mfuti sued Nkohla in an action for a declaration of rights in regard to a certain girl and the dowry paid for her. In his summons he alleged that during the lifetime of the Chief Mqikela he assisted Defendant in paying dowry for his wife, and in return Defendant promised him the first daughter born of the marriage.

The Magistrate gave judgment for the Defendant on the ground that Plaintiff's right of action arose long before annexation and he is now too late to proceed with his case.

Plaintiff appealed.

Pres.:—The Magistrate having ruled the Appellant out of Court on a misconception of law, the appeal is allowed and the case returned to be heard on its merits.

Flagstaff. 15 December, 1909. A. H. Stanford, C.M.

Matwa vs. Marexe.

(Flagstaff.)

Dowry Restoration by Chiefs—Pondo Custom.

In this case Marexe sued Matwa for certain cattle, being dowry paid to Defendant in respect of his daughter, whom Plaintiff had married.

A defence was set up that by Pondo custom Chiefs do not return dowry, but the Magistrate gave judgment in favour of Plaintiff and Defendant appealed.

Pres.:—A defence has been set up that Chiefs do not return dowry, and this is so where the parties interested in the marriage are Chiefs of high rank, but does not apply in cases where one of them is a commoner. The Appellant, after giving his daughter in marriage to Respondent, has taken her away and given her to another man. Respondent is therefore entitled to recover his cattle. The appeal is dismissed with costs.

Flagstaff. 15 December, 1909. A. H. Stanford, C.M.

Mgogo vs. Lajama Jan.

(Tabankulu.)

Dowry—Action to Compel Payment of Balance—Nqutu—Basuto Custom.

Mgogo sued Lajama Jan for certain cattle, being balance of dowry due to him. He alleged that the parties to the suit were Basutos; that Defendant married his sister in 1898 and paid 10 head of cattle, one horse and 10 sheep on account of the marriage; that by Basuto custom the fixed dowry is 20 head of cattle, one horse and 10 sheep, and one Nqutu beast; that there was a balance of 11 head due and these he now sued for.

Defendant admitted marriage, but denied that Plaintiff could sue for the cattle. He also admitted that Plaintiff could demand up to 20 head of cattle, but only after receipt of dowry for one of the daughters of the marriage.

The Magistrate granted absolution on the ground that it is contrary to Basuto custom to sue for balance of dowry.

Plaintiff appealed.

Pres.:—The Basuto tribe has a fixed dowry of 20 cattle, one horse and 10 sheep, and in addition there is the Nqutu beast always paid by the bridegroom to the bride's mother—the marriage is usually celebrated when a portion of the dowry has been paid, and if the dowry is not completed within a reasonable time the father or guardian of the woman has a right of action to sue for the balance. In the present case a sufficient period has passed to justify this suit being brought.

The appeal is allowed with costs and the judgment in the Magistrate's Court altered to judgment for Plaintiff as prayed with costs of suit.