

23 July 1947
provisions regarding the mines - the fact that description

Adv. E. Kahn,
His Majesty's Bldgs.,
Commissioner Street,
JOHANNESBURG.

Dear Mr. Kahn,

I am returning to you a copy of your article on the Pass Laws, on which Dr. Hellmann has made a few minor amendments.

We shall be glad if you will consider the following suggestions:-
P. 2. Please say under what circumstances a Non-European was qualified to receive a certificate of citizenship. (On p. 10 you state that "exemption, as in the Cape, should be granted on the ground of long, good and faithful service", but in the section on the Cape there is not mention of this).

p. 3. Is not the sentence marked, misplaced? it not come in further on? ✓

p. 3. In pract as it just the contracts of Natives that had to be registered in Griqualand West? ✓

p. 4. Please be so kind as to state the definition of "coloured" as used in the Grondwet.

p. 4. "As in the Cape, there were cattle removal passes". There was not mention of this in the section on the Cape. ✓

p. 8. Please explain what a proclaimed area is, in using the term here, for the first time. ✓

p. 10. Please be so kind as to give the date of the deputation of Native Congress members to the Acting Prime Minister. What year was it? ✓

p. 13. Dr. Hellmann suggests that the section on ^{the} Native Service Contract Act be expanded, and that passes in the rural areas should receive more emphasis. ✓

p. 14. What was the Advisory Native Affairs Commission - the Native Affairs Commission? ✓

p. 16. Would you be so kind as to elaborate the reference to exemptions, discussing the reasons for granting exemptions. ✓

1917 p. 16. Would it be relevant to say something about the provisions safeguarding the mines - the fact that desertion is a crime.

p. 16. Please discuss the fact that special permission is required for foreign Natives to live here. This links up with the rural situation and the attempt to control movement so as to divert labour to the farms.

p. 21. Dr. Hellmann asks if you think that the liberal solution of identification certificates for all people - should be outlined here.

p. 20. Please be so kind as to explain the term "special" used here for the first time. Also, mention that this is often made out by a young child in the household, another source of resentment.

We shall be very grateful to have your article back with any alterations which you may make.

Yours sincerely,

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THE PASS LAWS
The Meaning of "Pass"

*Duplicate call
by Ellison Baker*

One of the major difficulties confronting of the would-be analyst of the Union's pass laws is the definition of the word "pass". Statutes, proclamations, regulations, and by-laws avoid definitions. Thus in the South Africa Act, 1909, the foundation of the Union's constitution, the schedule (which sets out the conditions regarding incorporation of the High Commission territories), contains the following:—

"18. There shall be free intercourses for the inhabitants of the territories with the rest of South Africa subject to the laws, including the pass laws⁽¹⁾ of the Union."

But no definition is given of "pass laws".

Nor is there any official pronouncement of any moment on this issue. The tendency was to equate a pass with a document controlling movement. Clearly, however, the pass has acquired a wider connotation today. Thus a document akin to the livret which Napoleon made all workmen carry would have to be covered by any adequate definition. And such a document exists in several forms in our laws.

The only conditions whose terms of reference make specific mention of the pass laws are the Inter-Departmental Committee on the Native Pass Laws 1920⁽²⁾ and the Native Laws Commission of Inquiry, appointed in 1946. Although in the first case

no/.....

(1) Author's Note

2. v.g. No. 41, 1922. Newspaper referred to as the Native Pass Laws Report.

no definition of pass was given, the Committee appears to have construed the word very widely, so as to cover not only documents controlling movement, but also those aiming at the enforcement of contractual relations, maintenance of order, and identification of bearer. (1) In the second case it would appear that documents of identification are considered as separate from passes. (2)

It would serve no purpose, in any event, to discuss whether the document evidencing registration of service contract and the poll tax receipt are passes. For they are so regarded by the Native population. The test as to whether a document is a pass, it is suggested, is whether it fulfills one or both of the following conditions: -

- (a) Is required for lawful movement into, out of, or within a specified area;
- (b) must be produced on demand of a specified person, failure of production constituting an offence.

Pass Laws up to the end of the Nineteenth Century

Cape: The first law was introduced in 1760; slaves moving between urban and rural areas had to carry passes from their masters. This travelling pass was extended to Hottentots in Swellendam in 1797. The first important and widespread law was Caledon's famous ^{cap} Proclamation of 1809 under which all Hottentots had to have a fixed abode from which they could not move/.....

(1) *op. cit.* para. 5
(2) See *terminology of reference* (c).

move without passes. It provided, too, for the registration of service contracts. (1)

When contact was firmly made with the Bantu, the Cape authorities in a series of laws, (2) applied the so-called Cape liberal policy in the field of passes. ~~The effect was that~~

The earliest laws, of 1828 and 1837, compelled Native foreigners living outside the Colony, to carry passes within the Colony. In 1857 an Act was passed to prevent "Colonial Fingoes and certain other subjects of Her Majesty for being mistaken for Kafirs, and thereby harrassed or aggrieved". This was the origin of the "^{Cape} Certificate of ^{Cape} Citizenship". The laws were consolidated in 1864 and 1867. The position then established, save for a change under the so-called "Hofmeyr Act" of 1887, remains the de jure position today. A Certificate of Citizenship ^{was} were to be issued to ^{each} Fingoes, stating the name and address of the worker, setting out that he was a subject of the Queen, and that he was not to be impeded on the supposition "that he is a Kafir" without a pass. A registry of such certificates was to be kept, and ^{production} ~~examination~~ of the document could be demanded by an authorized police officer. Native "foreigners" had to carry passes. A foreigner would ^{was} ~~be~~ ^{de} fined as a member of any tribe, other than the Fingoes, whose principal chief lived beyond the borders of the Colony. A foreigner who could prove he had lived for ten years/.....

(1) See J. C. Harris The Cape Coloured People - Layman London 1939. Pp. 116-117

I must acknowledge my indebtedness to the researches of Mr. D. A. Ellidge for much of the material used in the historical section of this article

(2) The main laws were: Ordinance 49 of 1827; Ordinance (Act) 20 of 1837; Act 17 of 1864; Act 22 of 1867; Act 39 of 1887 (the Hofmeyr Act)

years in the Colony, constantly in service, and with a blameless record, was entitled to a Certificate of Citizenship.

Certain Natives in the East of the Colony were treated as "foreigners", in the sense that they could not ^{move} out of their locations without passes. These were Natives resident in the ^{division} districts of Kingwilliamstown and East London, and the Tembooties of Queenstown. Any such Native, however, was entitled to obtain a Certificate of Citizenship if he was the owner of landed property of more ^{than £10} ten pound value; and the Governor had a discretion to grant a certificate on the grounds of industry, good conduct, and continued residence in the Colony for seven years. Initially certificates of citizenship had to be registered and revived each year; but this require^{ment} was done away with in 1867. And after the passing of the Hofmeyr Act (I) even the granting of the certificate fell into disuse, even though in strict law it merely removed the application of the pass laws (including the obligation to carry the certificate) to registered voters, teachers, clergymen and persons who had reached at least the fourth standard of education.

Even the pass laws applying to foreigners *fell into disuse* for there were local regulations in the Transkeian territories and Basutoland which required many Natives resident there, who were leaving or entering, to carry passes.

Finally, the administrative practice of making all

Natives/.....

(I) Act 39 of 1889

Natives in the Eastern districts of the Cape carry passes or certificates—a practise which was condemned by Native administrators as a burden on the Native which/the labour supply - fell into disuse. (I)

On paper the only pass that might be applicable to the resident Cape Native was Act 30 of 1895 which allowed a local authority to pass regulations prohibiting the presence of Natives in public places between 9 p.m. and 4 a.m. without a night pass. There were again liberal exemptions from the operation of this law. Use was made of its provisions by many local authorities.

The only other law (2) introduced after the turn of the century - made provision for passes for Natives leaving and entering urban locations. Its use was limited.

It would be misleading simply to leave the question of the Cape at this point. For in 1879 was passed a very strict vagrancy law (10), the application of which could, and indeed in practice did, effectively take the place of ~~immovable property~~ ~~rights~~ of movement passes in Natal and the Trekker states. The occupier of immovable property could summarily arrest anyone wandering about on his property without his permission. When brought before the nearest magistrate or special justice of the peace, the burden of proving his innocence rested on the accused. This shift of the onus probandi led to convictions. The Act is still in operation. Ostensibly colour-blind, it was clearly aimed at loitering, vagrant Non-Europeans. It is not surprising that many Natives, without being compelled to, carried passes - serving/...

(1) *Die Skerpe van der Hout. Natives Labour in South Africa.*
D. O. P. 1942

(2) Act 40 of 1902

3. Act 23 of 1879 as amended by Act 27 of 1889

-serving the purpose of passports - to show their bona-fides
There was yet another inducement to carry a pass, for a railway
concession from the reserves could only be obtained on production
of a pass. Otherwise the full fare would have to be paid.

In Griqualand West Native male contracts were in practice
registered under a most unsatisfactory law, ⁽¹⁾ which was apparent-
ly covered all, irrespective of colour or sex, but in practice
applied only to Natives and a few Coloured males. A registration
fee and monthly renewal fee of one shilling was payable.

Natal: In Natal the earliest passes date from 1884,
when both - inward and outward passes, ⁽²⁾ were introduced. These had to be obtained
through the pass office if residence was to be temporary, otherwise
through the Secretary for Native Affairs. The Act was leniently
administered and does not seem to have affected the stream of
labour to the Gold fields after 1886. ⁽³⁾ It is still in force.

The inward and outward pass being only temporary, in
the nature of a passport, from 1904 ⁽⁴⁾ identification passes
had to be carried by Native servants. Masters had to keep a
register and enter a copy of each pass therein. Durban and
Pietermaritzburg already had power to frame by-laws for the
registration of service contracts. ⁽⁵⁾

Transvaal/.....

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- (1) Ordinance 14 of 1872. Ordinance 2 of 1874, Section 3.
Now repealed almost in their entirety. See Native
Pass Laws Report. U.9. No. 41, 1922. P. 29
2. Act 48 of 1884; Act 52 of 1887; Proclamation 120 of
1910.
3. See Sheila v. de Klerk. Native Labour in S.A., p. 124
4. Act 49 of 1901; Act 3 of 1904
5. Act 21 of 1888

Transvaal. A systematic pass law policy came about after the unification in 1860, of the small states that formed the South African republic. The raison d'être of the earliest far-reaching pass law was the loss of labour to the diamond diggings in the 'seventies.

But the first pass was introduced years before, for in 1846 the Volksraad of Andries Christstad (one of the tiny republics) produced a law aimed at reducing vagrancy, which required a Native moving to and from a burgher to have written authority of his chief at the one end and of his employer at the other. (14)

^{The} "Die Grondwet" of the South African Republic (1858) made clear that no equality between black and white would be tolerated. (17) The same year the field-cornets, the local administrative officers, were given instructions: no coloured person was to travel without a pass signed by his field-cornet; and no coloured ^{person} was to obtain a pass to leave the Republic. (18) It may well be doubted, having regard to the slack administration of the state, and the absence of a competing labour market, whether these provisions were effective.

In the late "sixties a more attractive form of work offered itself on the diamond diggings. Comparatively large numbers/.....

numbers of Natives began leaving the Republic from the South and the West. This threat to the Republican farmer's cheap labour supply was probably the cause of the passing of Law 9 of 1870 which ushered in the famous "One Shilling Pass". To travel, a Native had to be in possession of a pass made out on an official printed form costing one shilling, and signed by his employer or chief. There was a very heavy penalty for crossing the border without a pass, but there was no specific injunction to remain within the Republic.

This law apparently did not achieve its purpose. It was replaced in 1872 by new provisions, the effect of which was that any Transvaal Native who wished to proceed to the diamond fields had to pay the State £1.2.6. (14) Then a concession was made: a pass was free to a Native who produced proof that he had worked for a burgher for not less than six months. (20) Three years later the law was again changed. (21) A pass to leave the Republic cost £2/4 and would only be issued on production of a certificate of permission from an official or employer. Presumably this was true of a Native simply proceeding through the Republic. Strict penalties were imposed on vagabonds who, on failure to pay, could be drafted into service, but a free pass was issued to look for work within the Republic. It seems clear that the object of these early Transvaal laws was to encourage Natives to find work within the Republic. They might have met with some success /..

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success in dissuading workers from migrating to Kimberley, but it would appear that the laws were not in strict operation. (1)

When the British annexed the South African Republic in 1877, the pass law was greatly relaxed. (2) Natives were entitled to obtain the shilling travelling pass provided their taxes were paid; and foreign Natives were also entitled to a pass/^{as} of right.

When the Republic regained her freedom in the early 'eighties, she retained this new indulgent policy until the developing gold mine industry clamoured for control of Native labourers, many of whom came from Portuguese East Africa. The President and his Government expressed approval of the draft regulations framed by the Chamber of Mines, but at first did nothing except insert a few sections in the Gold Law, (3) under which the President could make regulations ~~inxx~~ for issuing passes to Natives on the diggings. Every such Native had to have a monthly shilling pass.

Deputations and memoranda from the Chamber of Mine followed: "Owing to the existing inadequate pass laws and regulations for the control of/^{Native} labour, it is impossible to secure such combination on the part of employers as would enable Native wages to be reduced to a reasonable level". (4) At that stage the Native mine labourer's cash/...

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cash wage was about £3 a month.

In 1895 two laws were passed setting out in detail a new, stricter policy. Firstly, (1) there was a general pass law, under which a Native required a pass from his master if moving in his district of residence, and from a State official (the shilling pass) if moving beyond the district and over the border. The penalty was to be treated as a vagabond, placed in service, and to pay a fine, which included a reward for any burger who took part in the capture.

Then there was a special law (2) to apply to proclaimed gold areas, which were to be divided into labour Districts. On entering such a district a Native was to exchange his travelling pass for a district pass, authorising him to search for work for three days. When he found employment, his master was to retain the district pass and provide the Native with an employer's pass. When discharged he received back his district pass. If unsuccessful, he was given another type of pass to leave the district. In addition, he had to carry an arm badge - a provision which was soon dropped.

The object of this special law was to prevent and to maintain control of Native labour, particularly on the gold mines. Indeed, it was framed by persons connected with the gold mining industry. (3)

A law/....

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A law so complicated required efficient administration, and this the Republic could not supply. The penalties were made more severe the next year.⁽¹⁾ But in the first half of 1897 there were 14,000 desertions from thirty-three mines.⁽²⁾

The Mining Industry Commission of 1897 wanted the law "applied more stringently". An Executive Council resolution made provision for certain exemptions from the operation of the law on the gold fields. Then the Executive Council tightened up the penalties once more, and introduced a new travelling pass: the leave of ~~Absence~~ Pass, valid for three days.

Lastly, a town pass⁽³⁾ was introduced, to be carried by "every male coloured person above the age of twelve years residing in any town or village". It is doubtful whether the regulations dealing with this pass were ever supplied, for the South African war broke out almost immediately.

The old South African Republic certainly had succeeded in making the pass laws complicated. The administration of the laws was notoriously inefficient. Milner wrote of the "very bad administration".⁽⁴⁾ Sir Geoffrey Lagden, Commissioner for Native Affairs in the Transvaal, gave alarming cases of official abuse of the Native applying for a pass.⁽⁵⁾

Orange Free State/.....

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Orange Free State:

By the end of the nineteenth century, the other Trekker Republic, the Orange Free State, had evolved a pass system even more far-reaching than that of the Transvaal. There were inward and outward passes; ³⁶ (I) travelling passes for all coloured persons ³⁷ (2) (the term 'coloured person' included Natives); urban residential passes under a law giving local authorities very wide powers which were at times abused; ³⁹ (3) and rural residential passes. ⁴⁶ (4) Railway tickets could not be obtained without production of the proper passes. ³⁸ (5) Women driving stock required a permit. ⁴¹ (6) Apparently there were no exemptions possible until provision therefore was made by the British authorities in 1903.

From 1900 to 1902:

Milner soon made it clear that his objection to the old system was not based on principle. He accepted its necessity for
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the purposes of identification and the observance of contractual relations. (1) The administration, not the law, was at fault. It might be that penalties were rather harsh, and there ^{fore} lashes were abolished. (2) But the old labour district system was retained. The new ~~Identification Labour Passport~~ was simply an old dish under a new name: the former district pass. The leave of absence pass was retained. Exemptions were extended, especially in the case of Coloured persons other than Natives. (3) A night pass had to be carried by all unexempted Natives in urban areas between 9 p.m. and 4. a.m. (4) The new system was rounded off with a monthly pass in the ~~Labour Districts~~.

Then Milner, as High Commissioner for South Africa, appointed a ~~Native Affairs Commission~~ to enquire generally into the status and conditions of Natives in all four colonies. Stock was to be taken of the situation in the new territory acquired by Britain through the South African war; and it was to be compared with the situation in the older British territories. The ~~Commission~~ found that a pass system was necessary in "most of the colonies and possessions"; it recommended less hindrance to Natives by local regulations, less irritating and needless delay at border stations and other points, and better railway facilities. (5)

Apparently/....

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Apparently the ~~Pass Laws~~ ^{had} ~~was~~ different effects in the various colonies; For whereas in the Transvaal one commission was of opinion that Native labour was preferred to white labour because the pass laws enforced labour contracts, (1) in Natal two commissions found that the laws were hardly of any protection to the employer. (2)

The ~~Pass Laws~~ in the Transvaal became even more involved in the few years of responsible government before Union. In 1906 the Transvaal Native Congress petitioned the House of Commons for simplification, and recommended the free issue to every tax-paying Native of a life-long ~~Identification Certificate~~ to replace all passes. (3) This recommendation has been repeated by numerous bodies ever since. But the law in the Transvaal was made more complex. The tax receipt now became a pass, as it had to be produced on demand. (4) And control of the pass system in municipalities passed from the local authorities to the central administration. (5) In the urban areas proclaimed under the Act service contracts were to be registered instead of a labour identification passport being issued; otherwise the law in labour districts and proclaimed urban/....

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urban areas became very similar.

In the Orange Free State certain categories of Natives were exempted from the Pass Laws in 1903. (1) Then the law took an unfortunate turn. Municipalities were given power to levy charges for residential passes, which were also extended to women. (2) Certain local authorities began to regard the Natives as a source of revenue. (3) There were "stand permits, residential permits, visitors' passes, seeking work passes, employment registration certificates, permits to reside on employer's premises, work-on-own-behalf certificates, domestic service books, washerwomen's permits, and entertainment permits". (4) These produced revenues for local administration; but the Natives felt there were less exasperating ways of collecting monies. And they objected on principle to passes for women. Petition followed petition, deputation followed deputation. Native women in certain Free State towns started a passive resistance movement which was rewarded with fines and imprisonment. For many years nothing was done. It was only in 1917, after the African Political Organisation, (a body representing the Coloureds who were under similar disabilities as the Natives) had taken up the matter, that as an administrative measure the police in the Free State did not impose the pass laws on Native women.

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The first thirteen years of the Union produced remarkably few pass laws, in comparison with the plethora of legislation before. The labour district system was now controlled by a Union-wide Act, the Native Labour Regulation Act of 1911, in practice confined to the Transvaal and a few areas of the Orange Free State. Otherwise changes were of a minor character.

But if this period was empty of legislation, it was full of complaints by the Natives. The South African Native National Congress, formed in 1912, may have had a small membership, but it had a loud voice. Its avowed object was the abolition of the pass laws.

The pass laws were bewildering, vexatious and incomprehensible to the Native, leading to unwitting contraventions with consequent punishment. This was the opinion of the Commission ^{ensuring} into the "Black Peril", (1) which advised the simplification of the pass law and uniformity throughout the Union as far as practicable. Municipalities should not have the power of making pass regulations; the curfew should apply to both sexes; ascribing of a false character to a Native on a pass should be a punishable offence.

The next year a select Committee reported that it was inadvisable at that stage to consolidate "the complex and diverse pass laws in force in different Provinces". (2) The
Government/....

Government at the time was concerned with the question of Native land and a Native Administration Bill; until these fundamental problems were solved, the pass laws would have to wait. Then the drums of war rolled, and all matters were left in abeyance for the duration.

On the gold mines in 1913 certain Native workers followed the example of European miners and went on strike. Both movements were rapidly quelled. A Commissioner was appointed to enquire into the grievances of the mine Natives, but apparently could find no source of grievance in the pass laws. (1) Once more, in 1918, Native workers followed the example of Europeans and struck. These were Johannesburg Municipal employees, hard hit by the war-time rise in the cost of living. Once more the movement was suppressed; once more an investigation took place. This time the Commissioner was more sympathetic. He felt that, with two to three hundred thousand Natives on the Witwatersrand, a pass system was essential; that the regulation as administered did not impose a hardship on an honest work-seeker; but that there should not be a charge of one shilling levied on the applicant for a travelling pass, and that women should not have to carry a night pass; and that exemption, as in the Cape, should be granted on the ground of long, good, and faithful service. (2) By administrative action the first two recommendations were implemented; and/.....

it was directed that
and the exemption regulations were to be construed in the most liberal manner possible. (1) By the end of 1918, 916 letters of exemption had been issued in the Transvaal since Union. (2)

Representatives of the Native Congress, which was naturally dissatisfied with the turn of events, saw the Acting Prime Minister in 1918, who made it clear that the Government would not contemplate removal of the pass law at the existing stage of development of the Native population. A passive resistance movement was set afoot, passes collected in sacks and burned. Disturbances followed, and criticism of police action led to an enquiry which, while upholding the police measures adopted, urged a general enquiry into the pass laws of the Union. (3)

This led to the appointment of the Inter-departmental Committee of Inquiry in 1920. Had the recommendations of the Committee been carried out the pass law system would have been considerably modified in the following ways:

- (a) There would have been free movement for a Native male subject to his carrying a permanent Registration Certificate, provided to him without fee at the age of 18; women would not require such a document;
- (b) a monthly renewal of the service contract pass would not have been required;

(c)/....

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