

8. Legal effects of marriage (contd.) If an "exempted" man marries an "unexempted" woman she does not take his status but remains "unexempted". If on the other hand an "exempted" woman marries an "unexempted" man she loses her exemption and is reduced to her husband's status. This seems very inequitable. Either the woman should retain her status throughout or take her husband's status throughout. The latter seems preferable, with exemption being given automatically to the children of the marriage.

"Exemption" is exemption from the operation of the Code of Native Law of Natal. The above rule applies to Natal only. Exemption in the other Provinces is simply exemption from the Pass Laws.

"Exemption" in Natal is not a right. It is in the absolute discretion of the Governor-General. Usually it is not refused to a woman over 25 years of age who has passed Junior Certificate. To a woman exemption is very important as it enables her to inherit property in her own name and to be free from guardianship (see also paragraph 9).

9. Widowhood: We shall now proceed to consider the legal position of widows. (Remember that we are still speaking of marriage, i.e. Christian or civil marriage: customary unions will be dealt with later.) Outside Natal a widow, of over twenty-one years of age, is a major. In Natal the widow passes, immediately upon her husband's death, under the guardianship of the nearest male relative of full age, e.g. her own major son, her husband's eldest surviving brother. From this guardianship a woman can be freed in two ways (a) by exemption; (b) by emancipation.

The question of succession is complicated by these rules about guardianship. Much has been done in recent years, as will be indicated below, to improve the position for women as regards succession, but these improvements are vitiated if the woman remains under guardianship. In the old tribal life, public opinion and the watchful eye of the Chief prevented to some extent the abuse of powers by the guardian. Today these sanctions have gone. The guardian may be an almost unknown brother-in-law in Johannesburg who turns up, collects the money and disappears with it, to spend it on himself. In practice, except for exemption or emancipation, there is no effective legal protection against this.

10. Widowhood: Exemption and Emancipation:

(a) Exemption is in practice only a help to women of a considerable degree of education. While the law leaves the Government complete discretion about exemption the administrative practice is to demand the Junior Certificate and attainment of the age of twenty-five years as conditions. A woman must, as previously stated, be exempted personally - she cannot take exempted status because her husband is exempted - and she must marry an exempted man, for otherwise she does take her husband's status. Exemption is a complete answer to the problem of guardianship but the number of people helped by it is very small and likely to remain so.

(b) Emancipation. The provisions about emancipation are very little known, and it seems advisable to quote them in extenso (Natal Code of Native Law, section 28):-

"28(1) Any unmarried female, widow or divorced woman, who is the owner of immovable property or who by virtue of good character, education, thrifty habits or other good and sufficient reason, is deemed fit to be emancipated, may be freed from the control of her father or guardian by order of the Native Commissioner's Court and vested with the full powers of a kragl head or with full rights of ownership in respect of any property she may have acquired and with full power to contract or to sue or be sued in her own name. Any such widow or divorced woman may in the discretion of the Court be given control over the property of her minor children.

(2) Application by a woman for emancipation as in sub-section (1) provided shall be upon affidavit and motion to the Court of Native Commissioner having jurisdiction and upon notice to the applicant's father or guardian and the Court shall grant its order thereon."

This remedy is quite adequate for its purposes if granted. At present it is not as effective as it should be, owing to the facts (1) that women often do not know of its existence; (2) that the practice of Native Commissioners varies, some being readier to grant emancipation than others; (3) that delays are possible, owing to the fact that the Court having jurisdiction may be situated at the time at a place other than the place of residence at the time of the woman and/or the guardian, and that the guardian may be absent (e.g. working on the Mines) and thus delay may ensue.

It is suggested that (a) the existence of this remedy should be made known as widely as possible by missionary societies and other bodies having to do with Natives; (b) the Court at the centre where the woman is living should be enabled to act on behalf of the Court having jurisdiction; (c) a period, e.g. two months, should be fixed after which if the guardian had not been traced or has not presented himself, the Court proceeds in his absence.

It is possible to go further. If the law in Natal laid down that widows married by Christian or civil rites should be automatically exempted, it would be laying down no more than actually exists as law in the other Provinces. But lest this be thought to be going too far, would not the law be amended to provide that all widows of Christian or civil marriages shall be automatically exempted after the lapse of a period of two months unless within that period the guardian lodges an objection, in which case the Court shall proceed to judge the issue on its merits.

11. Succession: Testate. Subject to the remarks made under paragraph 9, a Native may devise by will any of his property except (i) movable property allotted by him or accruing under Native law and custom to any woman with whom he lived in a customary union or to any "house". (ii) land in a location or reserve held by a Native in individual tenure upon quit-rent conditions (e.g. the Glen Grey system). Apart from these two points a Native may devise his property freely by will, under the same conditions as a European. His freedom to do this is not limited by whether he is "exempted" or married by Christian or civil rites. ("House" is defined in the Natal Native Code as "the family and property, rights and status, which commence with, attach to, and arise out of the customary union of any Native woman or the marriage of any Native woman").

12. Succession: Intestate. This is covered by Government Notice No. 1664 of 20/9/29, which might well be read in full - see Appendix Q to Rogers: "Native Administration in the Union of South Africa". The most important section is section 2 which reads as follows:-

"2. If a Native dies leaving no valid will so much of his property as does not fall within the purview of section (1) or sub-section (2) of section twenty-three of the Act" (i.e. the exemption mentioned in paragraph 2 above) "shall be distributed in the manner following:-

"(a) if the deceased was at the time of his death the holder of letters of exemption issued under the provisions of Natal Law 3 of 1865, the property shall devolve as if he had been a European.

"(b) if the deceased had during his lifetime contracted a marriage in community of property or under antenuptial contract, the property shall devolve as if he had been a European.

"(c) when any deceased Native resident at the time in an urban or industrial area, is not survived by any wife, partner or child under a

marriage or customary union and was at the time of his death living with any woman as his putative wife under such conditions as in the opinion of the Minister to render the application of Native Law and custom to the dissolution of his property inequitable or inappropriate, such property shall devolve as if the deceased and such putative wife had been married;

"(d) if the deceased does not fall under any of the classes described in paragraphs (a), (b) and (c) the property shall be distributed according to Native Law and custom."

It would appear that in the interests of the woman provision (b) should read:- "If the deceased had during his lifetime contracted a marriage" deleting the words "in community of property or under antenuptial contract". (A "marriage" is by definition a marriage by Christian or civil rites). Otherwise the estate may be disposed of by Native law and custom excluding the widow from succession.

13. Divorce: Divorce takes place under the same conditions as in the case of Europeans, but as an alternative to expensive Supreme Court proceedings special Native divorce courts with a cheaper procedure are provided.

14. Guardianship of Children in the case of Widowhood or Divorce: A widow is not automatically the guardian of her own children, except in cases where both she and her late husband were exempted.

Emancipation may give her (a) personal custody over her children, (b) control over the property rights of the children. Sometimes (b) is given without (a).

The same applies to an order of divorce.

Otherwise the guardianship rests in the nearest male heir. Denys Shropshire in "The Bantu Woman under the Natal Code of Native Law" suggests that the Native Wills Act of Southern Rhodesia (No.12 of 1933) should be applied, by which, in the case of a Christian marriage, the husband may "make provision by will for the guardianship of his children".

15. Customary Unions: Preliminaries: We now pass from marriages, strictly so-called, to customary unions. It may be agreed that hard cases will not so often arise here. That is true, but they do arise because while cases of customary unions where both parties are Christians may not be frequent,

- (a) one party may be Christian;
- (b) both parties may subsequently become Christians;
- (c) the conceptions of individual freedom are beginning to influence even non-Christian Bantu society.

The prerequisites for customary union form a most fascinating study of social anthropology and law, but need not detain us here. No attempt is made in this Memorandum to deal exhaustively with the whole status of women, but only with the transitional cases which lack legal remedy at present.

Under European influence, the woman's personal consent is required to a customary union. This is occasionally evaded, e.g. consent is extorted by a preliminary beating and by threats. Such a woman would be protected if she does appeal to the magistrate, but it takes courage to do so.

16. Customary Unions: Dissolution: Outside Natal, customary unions may be dissolved by the husband's action in driving away or abandoning his wife. In Natal there must be a dissolution by the Court (Native Commissioner's Court).

The grounds for dissolution are:

- (a) adultery
- (b) continued refusal to render conjugal rights;
- (c) wilful desertion;
- (d) continued gross misconduct;
- (e) imprisonment of the other partner for five years or more;
- (f) conditions such that continued living together is insupportable or dangerous.

In addition the female partner may sue for divorce on the grounds of :

- (a) gross cruelty or illtreatment,
- (b) accusations of witchcraft.

In the case of such dissolution a woman may be given personal custody of her children either while they are very small or for a longer period, but never controls their property rights.

17. Widowhood: It is almost impossible to imagine in practice the entering into customary union of two exempted Natives. The remedy of exemption would thus not apply. Emancipation is however possible, but in the nature of the case the chance of a woman who had been a partner in a customary union getting emancipation would be less on the facts than that of a widow of a Christian marriage.

Unless emancipation is obtained the surviving partner remains subject to the disabilities enumerated in paragraph 1.

18. Succession: Testate succession in the case of a customary union is governed by the same law as in the case of marriage. (see paragraph 2). Intestate succession is governed by Native Law.

19. Summary of reforms suggested:

(a) In all cases where the guardian's consent is required to a marriage he should be allowed to report to the Native Commissioner's Office nearest to him, and that the period of "unreasonable delay" be defined administratively as two months, or alternatively that the law (Transvaal and Natal) be amended to state two months as the maximum period of delay.

(b) That the procedure for obtaining the Governor-General's consent, where required, be simplified, so as (i) to avoid delay; (ii) to avoid the expense of consulting a lawyer, through the provision of printed forms of petition at every Native Commissioner's Office.

(c) Natal Law 46 of 1887 should be amended so that the contracting of a customary union after marriage in Natal should as in the other Provinces simply be regarded as an extra-legal relationship, recognised by the Courts, not as the crime of bigamy.

(d) Natal Law 46 of 1887 preventing the children of Christian marriages from contracting customary unions should also be repealed.

(e) A woman, exempted or unexempted, should take her husband's status on marriage, and the children should be automatically exempted if the father is exempted.

(f) As regards emancipation (Natal Code, Section 28) :-

- (i) the law regarding emancipation should be made known more widely,

- (ii) the Court at the centre where the woman is actually residing should be a Court of jurisdiction,
- (iii) a period, e.g. two months, should be fixed after which if the guardian has not been traced or presented himself, the Court proceeds in his absence.

Alternatively to (i), (ii) and (iii) above, the Code of Native Law should be so amended that widows of a marriage by Christian or civil rites should be automatically exempted, after the lapse of a period of two months unless within that period the guardian lodges an objection in which case the Court shall proceed to judge the question on its merits.

(g) Government Notice 1664 of 20/9/29 should be amended by the deletion in section 2(b) of all words after "marriage" (i.e. succession shall be by European law in the case of a marriage by Christian or civil rites, even if that marriage is not accompanied by a Declaration of Community of Property or an Antenuptial contract.

(h) In the case of a Christian or civil marriage, the husband may by will make provision for his widow to assume guardianship of his children after his death. (On the analogy of Act 12 of 1933, Southern Rhodesia).

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