

To speak for 20 minutes on a subject on which commissions have sat and numerous books have been written would be ridiculous so I will therefore confine myself to the Marriage Law as natives conceive it - and as it is viewed by the Legal Authorities in the Transvaal.

I do not propose to enter into details but to state my case generally in order that the leading conceptions may stand in greater relief. There are innumerable minor rulings on the Marriage Law and different tribes vary on minor points.

A native tribe may be said to be a large family. The chief is head of the tribe in his capacity as Father or Patriarch of his people. The people are divided into clans, tribes, sub-tribes, kraals and families. Each family has its men and each division has its own little coterie varying in importance according to the extent of its authority and the chiefs council is the highest court, with the chief as its head. Any case may be brought direct to the Chiefs court. In this way it will be seen that the whole tribe is practically a huge family with common interests. Theoretically all property is communal and vested in the chief and subject largely to his rule.

To make this clearer disputes arising in a kraal can be decided by the kraal head together with the men of that kraal. Disputes between kraals are decided by headmen of the sub-tribes and so on until the highest court is reached. In this way therefore it may be safely argued that their whole government is founded on family lines. This being so marriage becomes a most important factor and the natives therefore look upon marriage as the essence of their being.

Speaking generally all Native Law has its source in marriage. The whole fabric of the tribe is dependent on

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the fundamental principle of the lawful union of man and wife.

According to native custom no marriage is lawful unless dowry is paid for the wife. This is done by the payments of a number of cattle or some other equivalent consideration which is also invariably alluded to <sup>as</sup> "cattle" by all natives. If money is paid it is always alluded to as so many cattle. The essential requisite and legalising element in a marriage is the payment of cattle. The dowry is paid by the bridegroom or his family to the head of the bride's family. A great deal of ceremonial and etiquette is observed when this function takes place which differs in the various tribes but that need not be gone into here.

In the appointment of a native chief the dowry plays a most important part. The heir presumptive must be the eldest son of the chief wife's house or as it is commonly known the "Right hand house" and unless some unforeseen complication takes place he is almost invariably accepted by the tribe as chief. A chief wife's dowry is subscribed for by the whole tribe. Each family and section subscribe a certain amount according to their ability and the great wife becomes and is known as the "mother of the tribe". The heir to the chieftainship must be the son of the chief by the chief or great wife. The fact that the chief wife was paid for by the whole tribe gives her progeny the right to succeed. In this way the chief becomes the son of the tribe.

There is a well known saying among the natives and that is "the cattle beget the children" - that is to say that unless cattle are paid for a woman her progeny is illegitimate and also it means that the person who pays the cattle owns the children. The payment of cattle for a woman immediately gives her legal status as a mother and even if she bears adulterine children they are never illegitimate as they become the property of the man who paid the cattle and become part of his family. The consequences of these payments legalize the whole marriage and the benefits are many, e.g. through the cattle

- (1) The Chief succeeds to the chieftainship
- (2) The father becomes the legal guardian of his children.
- (3) The son succeeds his father and becomes the head of the kraal according to the manner of his mother's marriage.

- (4) The father controls his family and gets his parental power etc.

There is a good example in the Pietersburg district which will show to what extent the cattle are the ruling factor in a Native Marriage. According to native custom the present chief Patudi Mphabele<sup>hl</sup> is not the son of his father in this way. The Chief Matsubane before him married a great wife who was subscribed for by the whole tribe. The chief died however before a child was born and there was therefore no one to succeed to the chieftainship. A compromise was then made - Matime the late chief's half brother, by a lesser wife, was appointed regent for the chief who was yet to be born. He, (Matime) instructed by the tribe, took the chief wife to raise seed for his brother. Patudi the present chief was the issue of this union and Matime then virtually became regent for his own son. When Patudi was old enough Matime<sup>abdicated & Patudi</sup> became the chief who thus became the son of his uncle through the legal dictum that "the cattle beget the children".

Even in christian marriages under Law 3 of 1897 cattle are often paid by the husband to make his marriage more binding in the eyes of his fellow tribesman. You will see therefore that the predominating factor in a native marriage is the dowry. It is not purely a contract of sale but rather a guarantee of good faith on the part of the husband and compensation for the parents of the girl for loss of service. (This is the opinion of the S.A. Native Affairs Commission of 1903/4)

The reasoning of the native on this subject makes it hard for them to understand the attitude of the European courts in these matters. Native law in the Transvaal derives its validity from the terms of Law 4 of 1885; Article<sup>2</sup> of the Law reads: "The laws, habits and customs, hitherto observed among the natives shall continue to remain in force in this Republic as long as they have not appeared to be inconsistent with the general principles of civilization recognised in the civilised world". It was subsequently held by the Supreme Court of the Transvaal in 1907 and again<sup>at</sup> in 1910 that marriage according to native custom is invalid as being inconsistent with the principles of civilisation and in the case of Kaba vs. Ntela in the

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Transvaal Provincial Division it was held that "lobola" or dowry was not recoverable and that the mother is entitled to the guardianship of the children of these unions.

Mr. Gathorne of the Native Affairs Department sardonically sums up the position in his pamphlet on the application of Native Law in the Transvaal. He writes "This Law (4 of 1885) has been described from the bench as the charter of justice of the native population; and a charter which as interpreted by the Courts, has bastardized almost the entire native population of the Transvaal, has deprived practically every native father of guardianship or other rights to his children, has destroyed any equitable claim in property, the passing of which to the native mind alone differentiates marriage and prostitution and finally has so undermined the fundamental native customs that there is very little left as regards status.

In the Cape and Natal Provinces all native marriages are accepted as legal unions and a man may sue for the return of dowry etc., under Native Law. In the Transvaal however the result of the rulings of the Supreme Court have practically stultified the application of Native Law and this has made the administration of native affairs very difficult. Natives cannot understand why they cannot recover property which they have paid in accordance with Laws which have been in existence from time ~~immorial~~ immemorial as far as they are concerned. In the near future I believe and hope this matter is to be rectified by the introduction of legislation dealing with the whole question of Native Administration throughout the Union.

The present state of affairs has been in existence in the Transvaal for over 25 years and it is about time something was done to ameliorate the position.

Up to now officials have endeavoured to give effect to the native marriage law by a series of judicial bluffs treating each case in a summary way by arbitration. This has in some cases been effective but when you strike a wily member of the legal paternity the case is postponed "sine die".

To.....

To Epitomise position.

We annul native marriages because the payment of dowry is considered against civilised ideas.

Natives think nothing of our marriages because no consideration is paid, and you can therefore just imagine what confusion there is in the native mind on this most vital matter.

Mrs. Remond Jones.  
with Mr. Keys. Compliments

Johannesburg.  
7-1-26

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**Collection Number: AD1715**

**SOUTH AFRICAN INSTITUTE OF RACE RELATIONS (SAIRR), 1892-1974**

**PUBLISHER:**

*Collection Funder:- Atlantic Philanthropies Foundation*

*Publisher:- Historical Papers Research Archive*

*Location:- Johannesburg*

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