M E M O R A N D U M

Regarding Native Marriages

in the various Provinces

and the effect of such in relation to Property.

The question of Native marriages must in respect of each of the Provinces of the Union be considered in relation to:-

A. Marriages according to native custom, which may conveniently be referred to as customary unions;

B. Marriages according to Christian rites;

C. The contracting of a marriage by a native according to Christian rites during the subsistence of a customary union; and

D. The contracting by a native of a customary union during the subsistence of a marriage according to Christian rites.

Before proceeding to deal with each Province separately, it may be stated generally that only in the Province of Natal, Bechuanaland and the Transkeian Territories is marriage by native custom recognised in the courts. In other parts of theUnion such alliances are regarded as illicit. In the Transvaal, the Orange Free State and the Cape Province proper, natives actually do in the vast majority of cases contract customary unions, but, such not being recognised as valid and binding in the eyes of the law, the parties have no legal redress in matters arising therefrom.

TRANSVAAL PROVINCE.

A. Marriages by Native Custom:

Section two of Transvaal Law No. 4 of 1885 provided that:-

> "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 civilisation recognised in the civilised world."

Considering native marriages in the light of this provision the Supreme Court has held:-

(a) that such marriages are invalid as being inconsistent with the principles of civilisation (Nalana versus Rex, 407 T.S. 1907, and Rex vs. Mboko, 445 T.S. 1910);

(b) that lobola is not recoverable and that the mother is entitled to the guardianship of the children of these unions (Kaba vs. Ntela, 964 T.P.D. 1910);

(c) that the native custom under which the woman remains a perpetual minor cannot be recognised (Meesedoosa vs. Links, 357 T.P.D. 1915).

In the Transvaal then a marriage according to native custom is purely an illicit union and as such confers no enforceable rights in respect of property upon either of the parties.

It should be noted, however, that the children of such customary unions enjoy limited rights of succession, viz., in the circumstances described in section 70 of the Administration of Estates Proclamation No. 28 of 1902 reading as follows:-

> "If any native who shall not during his lifetime have contracted a lawful marriage or who being unmarried shall not be the offspring of parents lawfully married shall die intestate, his estate shall be administered and distributed according to the customs and usages of the tribe or people to which he belonged".....

Naturally in the administration of an estate according to native custom due cognisance would be taken of the rights of the issue of marriages according to native custom.

B. Marriages according to Christian Rites:

In the Transvaal valid marriages between natives can be contracted only in accordance with the provisions of Law No. 3 of 1897 as amended. Such marriages must be solemnised before marriage officers, who may be divided into two classes, viz:-

(a) Civil marriage officers appointed under Article 2 of the Law; and

(b) Ecclesiastical marriage officers appointed under Article 6 of the Law.

The essential formalities of such marriages are:-

(1) Submission by the parties to a marriage officer of an application for the celebration of the marriage together with a certificate either from their parents or guardians, their Kaptein or chief, or the minister of their Church, to the effect that there is no impediment to their marriage according to law.

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(2) The publication of banns or the production of a special licence.

(3) Civil or religious ceremony as the case may be which must take place before witnesses between 8 a.m. and 4 p.m. (Certain duties are placed upon civil and ecclesiastical marriage officers which need not be entered into here.)

Marriages solemnised between natives under the provisions of Law 3 of 1897 can only be dissolved by divorce in accordance with the general law.

In the Transvaal community of property and all the other incidents of a marriage according to Roman Dutch Law ensues upon the solemnisation of a marriage between natives under Law 3 of 1897 except in so far as such may have been excluded by ante-nuptial contract.

C. Contracting of a marriage by a native according to Christian rites during the subsistence of a customary Union.

It is quite open to a native in the Transvaal to contract a marriage according to Christian rites during the subsistence of a customary union, for, though article eleven of Law 3 of 1897 lays down that a coloured person who contracts a marriage before a previous marriage entered into by him has been dissolved shall be punishes by imprisonment with hard labour for a period not exceeding five years, yet a customary union not being recognised by the courts would not be regarded as a marriage within the meaning of that article.

The effect of a Christian marriage during the subsistence of a customary union would be to debar the issue of such customary union from rights of succession according to native custom in terms of section 70 of the Administration of,Estates Proclamation No. 28 of 1902.

D. For the reasons given in C above there is apparently nothing to prevent a native in the Transvaal from contracting a customary union during the subsistence of a Christian marriage between him and some other woman. Such customary union would, however, confer no property rights upon either of the parties or on the issue of such union.

It is competent for a native to marry by Christian rites a woman with whom he has previously been cohabiting under a customary union, provided, of course, no Christian marriage subsists between him and some other woman.

As natives in the Transvaal have full rights of testamentary disposition there is nothing to prevent a native from bequeathing to a partner under a customary union his own estate (or his share of the joint estate) even though at the time a legal marriage subsists between him and another woman.

ORANGE FREE STATE

A. Marriages by Native Custom:

Marriages by native custom are not recognised under the Orange Free State law and consequently such unions confer no property rights upon the spouses.

Article 28 of the Orange Free State Marriage Law (Law No. 26 of 1899), however, affords relief to the children of such marriages in respect of succession to their parents and to the parents in respect of the custody and control of their children. It reads as follows:-

> "Nothing contained in this Law shall prevent children born of heathen parents, though the latter may not have been legally married, from taking by way of inheritance the lawfully acquired properties of such parents, where it shall be proved that such parents regarded one another as husband and wife, and lived with one another as such. And nothing contained in this Law shall prevent unmarried heathen parents as above from holding and exercising the same tights over their children that they would have had, if such children had been born in lawful wedlock, provided always that in the event of the mother being separated from or,deserted by the father, the mother shall alone have the right to dispose with regard to her own children, but should the mother have deserted the father, the father shall retain the right of control over his own children."

Further Chapter LVI of the Orange Free State Law Book relating exclusively to the estates of persons who were at the time of annexation of the Baralong territory, known as the Moroka ward, living in the said territory in a state of polygamy cntained special provisions recognising the rights of the children and wives of such polygamous unions.

B. Marriages according to Christian rites:

Lawful and valid marriages between natives in the Orange Free State can only be contracted under the ordinary marriage law of the land - Law No. 26 of 1899, the prescribed formalities being the same for natives as for Europeans.

The incidents of marriage are likewise the same for natives as for Europeans. In other words community of property follows upon a native marriage according to Christian rites unless specifically excluded by antenuptial contract.

C. The contracting of a marriage by a native according

to Christian rites by a native during the subsistence of a customary union.

As a customary union is not recognised as a valid marriage under the Orange Free State law, it is competent for a native during the subsistence of such a union to contract a marriage according to Christian rites with some other woman.

It seems doubtful however whether a subsequent Christian marriage so contracted would have the effect of depriving the issue of a previous customary union of the benefits contemplated in article 28 of Law No. 26 of 1899 quoted above.

A native may marry by Christian rites a woman with whom he is living or has lived under a customary union, provided, of course, that no Christian marriage subsists between him and some other woman.

D. The contracting by a native of a customary union during the subsistence of a marriage according to Christian rites.

As a customary union is not recognised as a marriage under the Orange Free State law, a native contracting such a union during the subsistence of a Christian marriage between himself and some other woman would not render himself liable to prosecution for bigamy.

It would seem however, that the issue of a customary union so contracted would not be entitled to the benefits contemplated in article 28 of Law No. 26 of 1899.

In the Orange Free State, as in the Transvaal, natives enjoy full rights of testamentry disposition. There is accordingly nothing to prevent a native married according to Christian rites from bequeathing his own estates or his share of the joint estate to a partner under a customary union.

(Here it may be noted that in the Orange Free State natives can only hold fixed property in the Noroka ward and that the privilege is limited to members of the Barolong tribe domiciled in the Orange Free State).

NATAL PROVINCE.

A. Marriages according to Native Custom.

Marriages according to native custom are recognised both in Natal proper and Zululand, but as regards Natal proper subject to the provisions of the Natal Code of Native law contained in the schedule to Law No. 19 of 1891 and as regards Zululand subject to the provisions

of the earlier Code of 1878 framedunder section ten of the Native Administration Law No. 26 of 1875, which the Appellate Division in the case "Ntuli vs. Ntuli" held to be in force in Zululand.

Before proceeding further, it should be noted that an exempted unmarried male, by virtue of the fact that he is deemed to fall outside the scope of native law, cannot contract a marriage according to native custom. The same apparently applies as regards an unmarried female native who has obtained a letter of exemption in her own right.

If a native married according to native custom subsequently obtains a letter of exemption (and he can only do so if he is not living in polygamy) such letter of exemption extends to his wife and thereafter should either of the parties to such marriage become a widower or widow, as the case may be, should they be divorced by process of law, neither of them can contract a further marriage by native law. An unmarried native female, who is exempt from the provisions of native law not by virtue of the issue of a letter of exemption to her in her own right but by virtue of the fact that she has been included under a letter of exemption issued to her father, may contract a marriage according to native law with an unexempted native but by doing so she relinquishes her status of exemption.

(1) Marriages according to native custom in Natal proper, that is under the Natal Native Code.

Section 146 of the Natal Native Code provides that every marriage entered into in the Natal proper according to native law and custom shall be valid and binding,

Marriage in native law is defined as a civil contract entered into by and between intending spouses assisted where necessary by their respective fathers or guardians. The contract is for life, unless valid cause for divorce or for annulling the marriage intervenes.

The essentials of a marriage according to native law are laid down in section 148 of the Code as follows:-

(a) The consent of the father or guardian of the intended wife. Such consent may not be withheld unreasonably;

(b) The consent of the father or kraal head of the intended husband, should such be legally necessary;

(c) The declaration in public by the intended wife to the official witness (i.e. a person specially appointed to attend at the celebration of native marriages) on the marriage day that the proposed marriage is with her own free will and consent.

Kraal heads must report any intended marriage to the Chief or Headman who must direct the Official Witness to be present at the celebration.

The official witness must prohibit the marriage unless satisfied that it is with the free will and consent of the bride.

The official witness and the husband must within thirty days report the marriage to the magistrate for registration, upon which a certificate is given to the parties.

Certain declarations regarding "lobola" are required which are placed on record with a view to minimising future disputes in this connection.

Parties married according to native law can only be divorced or their marriage annulled by order of a competent court and for specific reasons set forth in sections 163, 164, 173 of the Code e.g. (divorce) adultery, wilful desertion, etc., (nullity) insanity at the time of marriage, the absence of any of the essentials of marriage, etc.

There is nothing to prevent an unexempted native male who has been married according to Christian rites from contracting any number of marriages according to native law but no woman who is the lawful wife of one man can during the subsistence of the marriage legally marry another.

(ii) Marriage according to native custom in Zululand, that is under the Code of 1878.

The essentials to a marriage by native rites under the Native Code of 1878 are:-

(i) Payment of lobola by Bridegroom to father or guardian of bride.

(2) Consent of both parties and of the bride's father or guardian.

(3) A marriage feast attended by the husband or his duly appointed representative, the bride and an official witness.

(4) The official witness must make public enquiry of the bride at any early part of the ceremony whether the marriage is of her own free will and consent.

(5) The bride must be handed over by or on behalf of the father to or for the husband.

It is the duty of the Chief to see that no marriage takes place within his tribe unless attended by the official witness.

The official witness must prohibit any marriage unless satisfied that it is with the full and free consent of the bride. In such cases he must report the circumstances to the magistrate.

As soon as practicable after the celebration of any marriage the official witness must report it with the requisite particulars to the magistrate who must register ~~fee~~ it.

As in Natal proper marriages by native rites as defined in the Code of 1878 can only be dissolved by order of a competent court. The grounds on which divorce may be granted are specified in sections 19 and 20 of the Co e.g. desertion, inability or refusal to render conjugal

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rights, adultery on the part of the wife, cruelty on the part of the husband, etc.

Native men may contract any number of marriages by native rites under the Code of 1878 but a woman only one in accordance with native custom.

Effect as regards property of marriages according to native custom under the respective codes in Natal and Zululand.

In both Natal proper and Zululand under native law females are considered as perpetual minors. Married women are subject to their respective husbands and in all kraal matters to the kraal head. A married woman may acquire and hold property for the use of her house (e.g. by gift from her father) but females may neither inherit or bequeath. The property of each particular house devolves according to native custom.

Under these circumstances,it is obvious that marriage according to native custom in Natal and Zululand confers no property as between the spouses.

B. Marriages according to Christian rites.

Provision for the celebration of marriages between natives according to Christian rites in Natal is contained in Law No. 46 of 1887 as amended by Act No.44 of 1903, both of which statutes apply to Zululand as well as to Natal proper.

Section 156 of the Natal native Code (Schedule to Law No. 19 of 1891) specifically provides that the marriages of natives (i.e. unexempted natives) according to Christian rites shall be subject to the provisions of Law 46 of 1887.

Marriages of unexempted natives by Christian rites can then be celebrated only under the special procedure laid down in this law and this special procedure, by virtue of section seven of the Law, must be observed also in cases in which one of the parties is unexempted and the other exempted from native law.

Here it is important to notice that the law defines a marriage by Christian rites as one solemnised before any duly authorised minister of religion but makes no provision for the celebration between natives of a marriage by European civil rites. In fact it is specially laid down in section one that it shall not be lawful for any marriage officer appointed by the Govenor under section 12 of Ordinance No.17 of 1846(i.e. a civil marriage officer) to soleminise marriage between any parties being ~~nati~~ natives and not exempted from the operation of native law.

It is important to note too that native marriages, where both parties are exempted from the operation of native law, are not subject to the special provisions of Law No. 46 of 1887 (vide section 9). The parties to such marriages are in the same position as Europeans and can only be married according to ordinary civil or Christian rites.

- Natives -

Natives desirous of contracting a marriage according to Christian rites under Law 46 of 1887 must apply to the magistrate of their district for a licence, sign declarations giving particulars of their names, ages tribe etc., and pay a fee of 10/-,whereupon the magistrate explains the nature and obligation of the contract to them and issues the requisite licence which is valid for three months.

The consent of the father or guardian of an unexempted native woman is necessary prior to the issue of a licence but where such cannot be obtained, e.g. on account of death insanity or absence, or is unreasonably withheld, the parties may petition the Govenor who may authorise the issue of the licence.

No minister of religion may soleminise a marriage between natives, one or both of whom may be subject to native law, except on production to him of the necessary licence. If the licence is forthcoming the marriage may be solemnised in the ordinary way.

An exempted native woman marrying an unexempted man according to Christian rites relinquishes her exempted status.

Effect of marriages between natives by Christian or civil rites in Natal in relation to property.

(1) If both parties are exempted natives (and only such can contract marriages by civil rites) the effects are the same as in the case of Europeans. In other words community of property ensues unless specifically excluded by ante-nuptial or post-nuptial contract.

(2) If the husband is exempted from native law, the ordinary incidents of marriage according to Roman Dutch law follow, in other words community of property ensues. Such may, however, be specifically excluded by ante-nuptial contract.

(3) If the husband is an unexempted native, native law as laid down in the Code applies and no rights of property pass to the wife. In the event of the death of the husband the estate is administered according to native custom, except in so far as the husband may have had the right to make a will.

C. The contracting by a native of a marriage according to Christian rites during the subsistence of a customary union.

There is apparently nothing in the law to prevent a native who has contracted one or more marriages under native law from contracting during the subsistence of any such union a Christian marriage either with one of the parties of such unions or with some other woman. It would seem however, that a native who has contracted a marriage according to native law and subsequently obtains a letter of exemption could contract no further marriage during the sub-

sistence of that union vide sections 24 and 28 of Law 28 of 1865. (Had there been more than one such union he could not have obtained letters of exemption).

A Christian marriage contracted during the subsistenceof a customary union or unions would as regards property be governed by native law. In other words in so far as property rights are concerned such a marriage would merely be regarded as if it were a further marriage according to native law(vide section eleven of Law No. 46 of 1887).

D. The contracting by a native of a customary union during the subsistence of a marriage according to Christian rites.

Section 13 of Law No. 46 of 1887 reads as follows:-

"Any native having contracted marriage under the provi-
"sions of this Law who shall during the lifetime of his
"or her spouse, unless legally divorced under the
"ordinary Laws of the Colony, contract any marriage in
"accordance with Christian rites or under the Native
"Laws, customs or usages, shall be held to have com-
"mitted bigamy, and shall be liable to be prosecuted and
"punished accordingly under the ordinary Laws of the
"Colony."

It may be added that even after the dissolution of a native marriage according to Christian rites, the parties can contract no further marriage according to native law while the children of natives married according to Christian rites are likewise debarred from marrying according to native law.

It is important to note that in Natal exempted natives have full rights of testamentary disposition while Those not exempted from the operation of native law may under the provisions of Act 7 of 1895 dispose of immovable property by will.

CAPE PROVINCE.

As the law relating to native marriages varies in various parts of the Cape Province, it is necessary to deal with the Province under the following heads:-

I. Cape Province Proper.
II. British Kaffraria.
III. British Bechuanaland.
IV. Transkeian Territories.

I. Cape Province Proper.

A. Marriage according to native custom.

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In the Cape Province proper marriageby native custom is not recognised by the law, though special statutory provisions exist giving the widows and offspring of such unions in certain cases rights in respect of property.

These special statutes are:-

(1) Act No. 18 of 1864. Under the provisions of this Act the estates of persons holding certificates of citizenship under Act 17 of 1864 and of persons resident in locations proclaimed from time to time under the Act are to be administered according to the usages of their tribes. In administering such estatesdue cognisance would of course, be taken of the rights of widows or children of customary unions contracted by the deceased during his lifetime. It should be noted that under the Native Registered Voters Relief Act, No. 39 of 1887, registered voters are exempted from the operation of Act No. 18 of 1864.

(2) The Glen Grey Act, No. 25 of 1894.

Section nineteen of this Act lays down that:

"On the decease of any person who shall, at the "time of his death, be the holder of a quitrent title is- "sued under the provisions of this Act, all property be- "longing to such deceased persons at the time of his "death shall, subject to ~~his~~ the provisions of section "twenty-four of this Act, and subject to the terms of "any testament executed in accordance with the law of "the Colony, be administered and distributed according "to the customs and usages of the tribe or people to "which the deceased person belonged, relative to the "administration and distribution of property left by "deceased persons at their death: Provided that nothing "in this section contained shall restrict or interfere "with the power and authority hereinafter by the twenty- "second section of this Act conferred upon the Governor. "In case such person shall have died leaving such a "legally executed will, his property save and except "the allotment and other immovable property, shall be "administered and distributed according to the law of "the Colony relating to testate succession."

Under section twenty-three of the Act the provisions of seetion nineteen are made to apply to all natives resident in any location in the district whether allotment holders or not.

Section twenty-four of the Act, as amended by Act 14 of 1905, prohibits registered holders from devising their immovable property by will, lays down that such property s shall devolve according to primogeniture in terms of a prescribed table of succession based upon native custom and definitely recognises the right of any widow of a deceased registered holder, whether by law or by native custom, to the usufruct of his immovable property during her lifetime or until re-marriage.

B. Marriages according to Christian rites:

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In the Cape Province proper for marriages between natives to be legal and valid they must be contracted in accordance with the ordinary marriage laws of the land.

Community of property ensues upon such marriages in the ordinary course unless specifically excluded by ante-nuptial contract. This would appear to be the case even if the estate of one or other of the parties subsequently falls to be administered in terms of section two of Act 18 of 1864 or of section nineteen of Act No. 25 of 1894.

C. Contracting by a native of a Christian marriage during the subsistence of a customary union.

As customary unions are not recognised by the law as valid marriages in the Cape Province proper, the existence of any such union or unions does not legally bar a native from contracting a further marriage in accordance with the ordinary law of the land.

A marriage by Christian rites so contracted would result in community of property between the spouses in the ordinary course.

For the purposes of succession to the estate of either of the parties under section two of Act 18 of 1864 or of section nineteen of Act 25 of 1894 such a marriage would presumably rank as a further marriage under native custom.

D. Contracting by a native of a customary union during the subsistence of a marriage according to Christian rites.

A native who contracts a customary union during the subsistence of a Christian marriage between him and ~~his~~ some other woman would not lay himself open to prosequtions for bigamy having regard to the fact that a customary union is not recognised by the law as a valid marriage in the Cape Province proper.

Such a union would however confer no property rights as between the spouses but for the purposes of succession under section two of Act 18 of 1864 or section nineteen of Act No. 25 of 1894 would be regarded as an additional marriage under native custom.

II. British Kaffraria.

A. Marriagess according to native custom.

Section four of the British Kaffrarian Ordinance No.10 of 1864 lays down that no native marriage according to native custom shall be held to be valid if either of the parties has previously contracted a marriage according to Christian or civil rites with some other person and that marriage still subsists.

This would appear to infer that a marriage according to native custom not contracted during the subsistence of a marriage by Christian or civil rites might be regarded as valid. The Eastern districts Court, however, in the case "Matshobongwana vs. Mpambani" (ED.C 1916 - page 235) held that British Kaffrarian Ordinance No. 10 of 1864 recognises native marriages solely for purposes of succession and

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does not render such marriages valid, for example, so as to legalise an action for the return of lobolo by a plaintiff married by native custom whose wife has been taken from him by her father.

Under the Ordinance it is provided that if a native die, who has been married only in accordance with native custom, his property shall devolve according to the customs of his tribe.

B. Marriage according to Christian rites.

In British Kaffraria marriages according to ordinary Christian or civil rites entail community of property in the ordinary way unless such has been excluded by ante-nuptial contract.

Ordinance 10 of 1864 lays down that if a native dies who has been married according to ordinary Christian or civil rites only and not in accordance with native custom, his property, except such as may have decended to him according to the customs of his tribe, shall be administered according to the ordinary law of the land.

C. Contracting by a native of a marriage according to Christian rites during the subsistence of a customary union.

It is competent for a native in British Kaffraria to contract a marriage according to ordinary Christian or civil rites during the subsistence of one or more customary unions to which he is a party.

Further such a marriage so contracted would apparently be followed by community of property between the spouses in the ordinary course.

Ordinance 10 of 1864 lays down that the estate of a native (i.e. his personal estate or his share of the joint estate) shall, if he die leaving a widow whom he has married by ordinary Christian or civil rites and likewise having a widow or widows whom he has previously married according to native custom/or other issue of such marriage or marriages, devolve in accordance with the custom of his tribe. The marriage by Christian rites would for the purposes of the administration of the estate rank as a further marriage by native custom.

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D. Contracting by a native of a customary union during the subsistence of a marriage by Christian rites.

Section 4 of Ordinance 10 of 1864 lays down that a customary union so contracted shall not be held to be valid (i.e. considered in the light of the E.D.C. judgment previously referred to, for the purposes of succession).

No penal clause is provided and accordingly, as a customary union is not regarded as a valid marriage, a native could contract such a union, despite section four of the Ordinance, without rendering himself liable to prosecution for bigamy.

A customary union so contracted could however co fer no property rights whatever as between the spouses or any rights of succession upon the issue.

III. British Bechuanaland.

A. Marriages according to Native Custom.

Section forty-two of British Bechuanaland Proclamation 2 of 1885 lays down that a marriage between natives according to native custom shall in all respects be as valid and binding and shall have the same effect upon the parties, their issue and property as a marriage contracted under the marriage law of the Cape Colony provided that it be registered by the ~~xxxxxxxx~~ magistrate within three months from the date of celebration.

Under section forty-four natives are debarred from registering any but the first marriage entered into by them according to native custom so long as the first registered wife is living.

No other marriage by native custom other than the first such union entered into by a native provided it be duly registered is recognised under the law of Bechuanaland. Further and subsequent unions according to native custom are not prohibited but are not regarded as marriages and have no validity or binding effect.

The effect of the recognition of a first duly registered marriage according to native custom is to exalt it t the status of a marriage contracted in accordance with the ordinary marriage laws of the country with the result that co munity of property and the other incidents of ordinary marriage would ensue. Presumably such community could be excluded by ante-nuptial contract though the proclamation is silent on this point. This, however, is a matter which is hardly likely to arise in practice, as natives sufficiently advanced to wish to contract a legal marriage with exclusion of community of property would doubtless celebrate their marriage according to Christian or civil rites.

Unrecognised customary unions in British Bechuanaland confer no rights of property as between the partners nor any rights of succession to the estate of the father upon the issue thereof. Succession in British Bechuanaland is governed by the ordinary laws of the Cape Province.

In practice, however, unregistered customary union are doubtless taken cognisance of seeing that cases are tried in Bechuanaland by native chiefs who exercise unlimited juris diction in civil matters between members of their own tribes.

B. Marriages according to Christian rites.

Native marriages by Christian or ordinary civil rites in Bechuanaland are expressly authorised under section

forty-two of British Bechuanaland Proclamation 2 of 1885 which provides that such marriages shall be taken to be in all respects as valid and binding and to have the same effect upon the parties, their issue and property as a marriage contracted under the marriage laws of the Cape Colony.

Community of property unless excluded by ante-nuptial contract accordingly ensues upon such marriages.

C. Contracting by a native of a marriage according to Christian or civil rites during the subsistence of a customary union.

It is not competent for a native in British Bechuanaland to contract a marriage according to Christian or civil rites during the subsistence of a registered marriage by native custom between him and some other woman.

If he did contract such a marriage he would commit bigamy.

He may however contract a marriage by Christian or civil rites during the subsistence of a customary union or customary unions to which he is a party ~~se~~ if such unions have not been afforded recognition by registration as provided in the Proclamation.

A Christian or civil marriage so contracted would be followed by community of property (unless excluded by Ante-nuptial contract) and the other incidents of marriage in the ordinary course.

D. Contracting by a native of a customary union during the subsistence of a marriage according to Christian rites.

There is nothing to prevent a native from contracting a customary union with some other woman during the subsistence of a marriage according to Christian or civil rites to which he is a party. Such a union could, however, not be registered nor could it receive recognition in the eyes of the law by which it would be regarded merely as illicit cohabitation. For this reason a customary union so contracted would neither render the native liable to prosecution for bigamy nor confer any property rights as between the partners nor any right of succession upon the children in respect of the estate of the father.

IV. Transkeian Territories.

A. Marriages by Native Custom.

In the Transkeian territories marriages by native custom are valid and recognised by the courts.

The general regulation issued in respect of the various territories upon annexation recognised marriages contracted according to native forms prior to annexation and provided that all questions arising out of such marriages should be tried according to native law.

As regards marriage after annexation the following provision was made in the regulations issued in respect

of each territory upon annexation:-

> "Any marriage celebrated by any minister of the Christian religion, according to the rites of the same, or by any civil marriage officer, duly appointed by the Governorto solemnise marriage, or according to ordinary Kafir or Fingo forms, provided such last mentioned marriage shall be registered within three months from the date of such marriage in a book to be kept for that purpose by the Resident magistrate of the district, shall be taken to be in all respects as valid and binding, and to have ~~to have~~ the same effect upon the parties to the same and their issue and property, as a marriage contracted under the marriage laws of the Cape Colony."

The regulations contemplated then the legal recognition as a marriage contracted under the ordinary laws of the Cape Colony of a duly registered customary union and in this connection the Supreme Court held that under this section only first marriages according to native custom could be registered. (November vs. Napini, 7. J.3, 1892).

The effect of a duly registered marriage according to native custom was to produce community of property between the spouses and all the other incidents of a marriage by the ordinary law.

In actual practice natives did not avail themselve to any degree of the privilege of registration but went on contracting polygamous unions in the ordinary course.

The Native Appeal Court in the case "Lutsati vs Ben"went fully into the questions of polygamous unions contracted after annexation and held that such were valid in law when contracted by natives according to native forms. All rights of property in respect of such unions would of course be governed by native custom.

Proclamation No. 142 of 1910, which superseded the regulations regarding native marriages promulgated upon annexation of the various territories, provided that all questions relating to any marriage according to native custom except any such marriage registered under the old regulations prior to the promulgation of the Proclamation and involving community of property should likewise be determined by nativel law.

Section three of the same proclamation lays down that no marriage according to native custom which takes place during the subsistence of any such marriage registered under the old regulations prior to the promulgation of the proclamation shall be recognised as conferring any status or rights whatever upon any party to such marriage or upon any issue thereof.

Section four deals with the converse case and provides that no registered native marriage according to native custom contracted during the subsistence of any unregistered customary marriage shall in any way affect the rights of property under the Proclamation of any wife of such marriage or any issue thereof. Such registered marriage would merely rank as a further marriage under native custom and would therefore not be followed by community of property.

B. Marriages according to Christian rites.

Christian marriages contracted between natives prior to annexation are legal.

The regulations promulgated upon annexation of the various territories expressly provided for the recognition ofmarriages between natives by Christian rites or civil rites and laid down that such should have the same effects upon the parties, their issue and property as a marriagecontracted under the marriage laws of the Cape Colony.

Such marriages then were followed by community of property between the spouses(unless excluded by ante-nuptial contract) in the ordinary way.

Proclamation No.142 of 1910 , as amended, while safe-guarding legal rights accruing as the result of marriages in community of property contracted prior to its promulgation, laid down that for the future no marriages between natives celebrated in the Transkeian Territories should produce the legal consequence of community of property between the spouses. It was provided, however, that in the case of a marriage contracted according to the law of the Colony and not during the subsistence of a marriage according to native custom it should be competent for both the parties at any time within one month previous to the celebration of such marriage to declare before the magistrate of the District within which the marriage was to be celebrated their intention and desire that community of property should follow upon and have force and effect in relation to their union and that thereupon such community should apply except as regards any immovable property held by the husband under title granted ~~and~~ under ~~title granted~~ the provisions of Proclamation No. 227 of 1898. (N.B. Such immovable property must devolve upon the heir of the registered holder determined in accordance with a prescribed table of succession based upon native law and custom.

C. Contracting by a native of a marriage according to Christian rites during the subsistence of a customary union.

(1) Prior to annexation it was competent for a native to contract such a marriage.

(2) Subsequent to annexation and prior to the promulgation of Proclamation No. 142 of 1910, it was competent for a native to contract such a marriage unless there subsisted between him and some other woman a duly registered marriage according to native custom.

If such duly registered marriage did subsist,a native contracting a marriage according to Christian or civil rites would commit the crime of bigamy.

A marriage according to Christian or civil rites contracted during the subsistence of an unregistered union or unions according to native custom was followed by the ordinary incidents of a marriage according to the law of the Cape Colony,i.e. community of property ensued between the spouses unless specifically excluded by ante-nuptial contract

(3) Proclamation No. 142 of 1910 made it unlawful for any male native during the subsistence of any marriage or marriages according to native custom to contract a marriage according to the law of the Colony without first declaring upon oathebefore the Magistrate of the District of his domicile, the name of the wife or wives and the names of the children of such subsisting marriage or marriages; the nature and amount of the movable property allotted by him to each such wife or house under native custom, and such other information relating to such marriage or marriages as the Magistrate might require.

It was further laid down that no minister of the Christian religion or civil marriage officer should solemnise the marriage of any native male without first having taken a declaration from him as to whether there subsisted at the time any marriage according to native custom contracted by such person, and in the event of any such marriage subsisting, unless there should be produced to him a certificate under the hand of the Magistrate that the requirements indicated in the predeeding paragraph had been complied with. Substantial penalties were laid down for the punishment of persons contravening these provisions.

Subject then to the procedure indicated, it is competent for a native today to contract a marriage according to the ordinary law during the subsistence of a customary ~~any~~union between himself and some other woman, unless such customary union is one duly registered under the regulations framed upon annexation of the various territories. Such a registered customary/has the same effect as marriage under the ordinary law and consequently it would be bigamy for a native during the subsistence of such a union to contract a further marriage under the ordinary law.

/ union

As regards the effect of a Cheistian or ordinary civil marriage contracted during the subsistence of an unregistered customary union or unions, Proclamation No. 142 of 1910 lays down that no such marriage shall in any way affect the rights of property under the proclamation of any wife ofsuch marriage by native custom or any issue thereof and that the widow of such Christian or civil marriage and any issue thereof shall have no greater rights in respect of the ~~issue~~ property of the deceased spouse than she or they would have, had the said marriage been a marriage by native custom. Under these circumstances such further Christian or civil marriage would merely rank as an additional customary union and could not be followed by community of property between the spouses.

D. Contracting by a native of a customary union during the subsistence of a marriage according to Christian rites.

(1) Prior to annexation there was nothing to prevent a native from contracting a customary union or unions during the subsistence of a marriage by Christian rites between him and some other woman.

(2) After annexation but prior to the promulgation of Proclamation No. 142 of 1910, a native could not during thesubsistence of a marriage by Christian or

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civil rites contract a marriage by native custom and have it registered as provided in the regulations issued in respect of the various territories upon annexation.

There was however nothing to prevent him contracting one or more unregistered customary unions under these circumstances and the effect of such union or unions so contracted upon the spouses and the issue would be governed by native custom except that the rights accruing to the wife or the issue of such marriage in community of property could not be prejudiced by such subsequent customary union or unions.

(3) It is still competent for a native during the subsistence of a marriage contracted under the ordinary law to enter into a further customary union or unions but such union or unions would confer no status or property rights whatsoever upon any party thereto or the issue thereof. (Vide section 3 of Proclamation 142 of 1910). Customary unions so contracted would therefore be regarded merely as illicit cohabitation.