

TRANSKEI.

John Whitfield

2.1.2

House

In the Cape Province, including the Transkeian Territories, all movable property belonging to a deceased Native person and allotted by him under Native custom to any wife or house, not disentitled under the provisions of proclamation No. 142 of 1910 in the Transkeian Territories, or accruing under Native law or custom to any woman with whom he lived in a customary marriage union, or to any house, shall devolve upon the eldest son of that wife or house, or, if he be dead, such eldest son's senior male descendant, according to Native custom. Under the Native law of succession, male descent means always descent through males only.

If there be no male descendant of the deceased's eldest son, the deceased's next son in that house or his senior male descendant succeeds, and so on through the deceased's sons in that house or their senior male descendants respectively.

If there be no son or male descendant of any son of deceased in that house, the right of inheritance passes in the case of a Qadi or Sitembu House, to the eldest son of the senior house to which such junior house is affiliated, and in the case of a senior (Great or Right Hand) house, to the eldest son of the Qadi or Sitembu junior house first affiliated to such senior house. The inheritance passes from such eldest son to his principal male descendants in order, and upon their failure, to his brothers and their male descendants in order according to Native custom. Upon failure of male issue in the first junior house, the succession passes to each in turn of the junior houses affiliated to the principal or senior house.

of house in 2 mts? (3) 4

If there be no son or male descendant of any son of the deceased in any of the Qadi or Sitembu houses affiliated to the Great House the inheritance of that House passes to the eldest son of Xiba House and his male descendants, and so on through his brothers and their male descendants in order and in turn.

If there be no son or male descendant of any son of the deceased in any of the Qadi or Isitembu affiliated to the Right Hand (sometimes designed the Kohlo) House, succession to the property of such Right Hand House passes to the eldest son of the Great House and his male descendants in order, thereafter to his brothers and their male descendants in order, and ultimately to the junior houses affiliated to the Great House in the order already described.

(Rural Left H)

If there be no son or male descendant of any son of the deceased in his Great House, in the junior houses affiliated to it, and in the Xiba House, the inheritance passes to the eldest son of the Right Hand House, and his male descendants, thereafter to his brothers and their male descendants respectively in order, and ultimately to the junior houses affiliated to such Right Hand House in the manner already described.

of house

If there be no son or any male descendant of any son of the deceased, the property passes to the father of the deceased. If the father of the deceased be dead, the inheritance passes to the deceased's eldest brother in the house from which he sprung or his male descendants in turn, and so on through the brothers of that house and their male descendants in turn respectively. The succession passes thereafter in the order already detailed through the various houses of the father of the deceased.

If the father of deceased be dead, and there be no male descendants of such father eligible to succeed to the estate of the deceased, the property passes to the paternal grandfather of the deceased, and, if he be dead, to the eldest brother of the house of deceased's father, and so on through the paternal uncles of deceased and their male descendants in that house. Thereafter the succession passes in turn through the various houses of the paternal grandfather of the deceased in the order already described in regard to the houses of the deceased himself.

Upon failure of the paternal grandfather and his male descendants, the succession passes to the paternal great grandfather of the deceased and his male descendants in order.

Upon failure of the paternal grandfather and his male descendants, the property passes in turn to more remote ascendants and their male descendants, and so on to infinity.

If there be no male heir of the deceased, formerly, the estate devolved upon the chief of the tribe to which deceased belonged, but latterly it would appear that it would vest in the Crown. In the case of *Madolo vs Nomawu* (1 N.A.C. 12), Major H.G. Elliot, Pres., N.A.C., said inter alia: "It is very clearly laid down by all authorities on Native law that no female can inherit property". Mr. J.C. Warner, in his notes embodied in *Colonel Maclean's Compendium of Kafir Laws and Customs*, p. 74, says: "Females can inherit nothing". And Mr. Charles Brownlee in the same *Compendium*, p. 120, says: "A daughter or her issue never inherits property". According to Native law in operation in the Cape Province a male is not entitled to claim an estate through his mother or other female.

As regards the disposal of an estate to which there is no male heir, in the case of *Myazi vs Nofenti* (1 N.A.C. 74), Nofenti claimed the estate of her grandfather alleging that she was his sole surviving relative. The Magistrate found that she was heiress and awarded the property in the estate. In giving judgment on appeal, Mr. A.H. Stanford, Acting Pres, N.A.C. said: "The case being referred to the Native Assessors, they state that respondent, having no male relative, by Native custom becomes the ward of the Paramount Chief and that the property in the estate goes with her, that as the Fingos have no Paramount Chief, the Government should hold it for the benefit of the woman. The Court concurs with the opinion expressed by the Native Assessors, and, in dismissing the appeal, directs that judgment in the Magistrate's Court shall be amended to the effect that respondent shall have the use of the property, but that the property shall not vest in her but that for purposes of the administration of this stock she shall be considered to be the Ward of the Headman of the location for the time being, but that no animal shall be sold or otherwise alienated from the estate without the previous authority of the Magistrate."

TABLE OF SUCCESSION IN THIRD SCHEDULE
IN PROCLAMATION 142. 1910

*Revising Left Hand
Signed [Signature]*

AS AMENDED BY PROCLAMATION 213/1913

TRANSKEI

1. Male descendant means a male descendant through males only.
2. His eldest son of the principal house, or such eldest son's senior male descendant.
3. If the eldest son had previously died without a male descendant, the next son or his male descendant, and so through the sons respectively, and through the several houses in their order.
4. If no son, or male descendant of any son, be living, then the father.
5. If no father, then the eldest brother of the deceased of the same house, or his male descendant, and so through the brothers of that house and their male descendants.
6. If no brother or male descendant of any brother of the same house be living, the eldest brother of the allied house of the next rank, or his male descendant.
7. If no brother or male descendant of such brother of the allied house be living, the eldest brother or his male descendant of the ~~left~~-hand house, where such is recognised, in case the deceased be of the principal house; or in case he be not of the principal house, the eldest brother or his male descendant of the house of the higher rank, and so on through the brothers and their male descendants.
8. If no brother or male descendant of any brother of any house, the eldest brother of the father of the deceased or his male descendants, and so on through the brothers of the father.
9. Failing brothers or their male descendants, then to the grand-father or his male descendants.
10. Whenever the deceased person is a woman who acquired land by virtue of holding the status of a wife or widow at her husband's kraal, the land after her death shall devolve upon the heir according to Native custom of the house to which she belongs and so on according to the order laid down in the preceding sections;
11. Whenever the deceased person is a married woman who, after having from any cause left her kraal and returned to her own people, had there acquired land, such land shall descend to her heir under Native custom.

1. Succession under Native Law is of two kinds:-

- General - to Kraal property.
- Special - to House property.

In the case of a monogamist (and the majority of Natives are monogamists) the two coincide.

In the case of a polygamist, the clue to the system is the recollection of the existence of three leading houses, viz:-

- The Great House;
- The Left Hand House;
- the Right Hand House.

in the order of priority given.

The first wife of an ordinary man is the Great Wife, other wives rank according as their kraal status is publicly announced at the date of marriage by their husbands. It is not common for an ordinary man to have a Right Hand House.

Any number of houses can be affiliated to the leading Houses, and it is possible for unaffiliated houses to exist, but succession to kraal property is restricted to the three houses already mentioned and their affiliated Houses.

The first wife of a Chief need not be, and usually is not the Great Wife. The test of who is or who is not the Great Wife in the case of a Chief is not priority of marriage, but whether or not the tribe provided the lobola. The Great Wife is frequently married late in life, this being productive of minorities and regencies.

2. The order of succession for House property is as under, it being understood as a preliminary:-

- (i) that all succession is intestate,
- (ii) that succession devolves on males only,
- (iii) that the rule of primogeniture applies,
- (iv) that succession is only to movable and rights dominium does not exist, but there is a succession to occupationis unless the Chief intervenes.

- (1) The Eldest son of the House.
- (2) In the event of the death of (1) his male descendants, according to the rule of primogeniture, and to the exclusion of his brothers.
- (3) The second son and his descendants, the third son and his descendants, etc., in accordance with rules (1) and (2).
- (4) Thence to the next affiliated House in accordance with rules (1) and (3).

Thence...

(5) Thence to all the affiliated Houses in order.

(6) Thence:-

(a) If the death is in the Great House or an affiliated House.

to the left-hand House and its affiliated Houses in order as per rules (1) to (5), and failing heirs, to the Right-Hand House and its affiliated Houses in order as per rules (1) to (5).

(b) If the death is in the Left-Hand House or an affiliated House

to the Great House and its affiliated Houses in order as per rules (1) to (5), and failing heirs to the Right-Hand House and its affiliated Houses in order as per rules (1) to (5).

(c) If the death is in the Right-Hand House or and affiliated House

To the Great House and its affiliated Houses in order as per rules (1) to (5), and failing heirs to the Left-Hand House and its affiliated Houses in order as per rules (1) to (5).

(d) If the death is in an unaffiliated House

direct from stage (3) to the Great House and its affiliated Houses in order as per rules (1) to (5), failing heirs therein to the Left-Hand House and its affiliated Houses, and failing heirs therein to the Right-Hand House and its affiliated Houses, as per rules (1) to (5).

(7) Thence, (i.e. in the failure of all direct descendants) to the Kraal Head's brother, in accordance with rules (4) to (6) beginning with the eldest brother of full blood and working through the house of his father's family in the order prescribed, and elder brother's male descendant taking precedence of an elder brother.

(8) Thence (i.e. failing descendants and brothers) recourse is had to ascendants, i.e. the Kraal-Head's father, then his father's brothers (in the order specified) and their descendants (the Kraal-Head's collaterals), finally to the Kraal-Head's grandfather, his grand-father's brothers and their descendants.

(9) Failing heirs under heads 1 to 8, the inheritance reverts to the Chief, or, if the deceased be a Chief, to the paramount Chief.

E X A M P L E S:

A dies, leaving the following male descendants:-

- (i) B and C, sons of the Great House.
- (ii) D, the son of the second affiliated House of the Great House.
- (iii) F and G, grandsons of E, son of the Left-Hand House.
- (iv) H, younger brother of E.
- (v) J and K, sons of the first affiliated House of the Left-Hand House.
- (vi) M. son of a daughter L of the Right-Hand House.
- (vii) O and P, sons of N, eldest son of the first affiliated Hut of the Right-Hand House.
- (viii) Q and R, younger brothers of N.
- (ix) S, son of an unaffiliated House.

(a) Give the order of succession to the House property of the Right - Hand House:-

1.	O	7.	D.
2.	P	8.	F.
3.	Q	9.	G.
4.	R	10.	H.
5.	B	11.	J.
6.	C	12.	K.

(b) Give the order of succession to Kraal property in the same case:-

1.	B.	7.	J.
2.	C.	8.	K
3.	D	9.	O
4.	F.	10.	P.
5.	G.	11.	Q.
6.	H.	12.	R.

- NOTE: (i) M and S are totally excluded. M. , as being a descendant in the female line only, and S as being in a non-affiliated House. Observe that S could succeed to his own House property, but M cannot even do that.
- (ii) F and G take precedence of H, and O and P take precedence of Q and R in accordance with rule (2) of the table.

In the Cape, the ^{old} ~~Frankish~~ rules & decided cases ~~in~~ ⁱⁿ ~~the~~ ^{no} doubt be followed.

Frankish. The eldest son of each house inherits the property assigned & belonging to his house. If the deceased has failed to declare "in a formal & public manner" the allotments he makes, the eldest heir of the Great House takes possession of all the property, but this places on him responsibility for the well-being of all the houses.

The heir of the Great House inherits all property not specially assigned - the Krual property - The lobolo of each house is inherited by the son of the house for whose daughters the lobolo was obtained - unless the deceased has previously allocated certain of the lobolo to another son of the house.

The general heir inherits the property of a house when there is no heir born in a place, unless deceased has previously allocated.

N.B. Exceptions to this last rule are:-
(a) The "Kohlo" ~~house~~ ^{house} inherits the property of its own heirless "gadi" or "isibemba" houses

The eldest son & a
(b) a Qadi house of a great house inherits the Kraal
property before the ^{Kraal} ~~house~~ ^{Kraal} house. (Among the Pardo
the opposite is the rule) unless the isikumbu
wife has ^{actually} been placed in the great house & bear
children.

The order of inheritance ^{provided for in}
follows: - (cf Whitfield pp 336/8) ^{Proc 142/1910}
^{Secs 8}
^{to A as + Third}
^{Schedule}
^{Supposed}
^{pp 105/6}

The eldest son of the house concerned, or,
if he be dead, his eldest male descendant.

[Insert Quote from Whitfield pp
336/8] ^{in Appendix pp 105/6}
(see also Willsch's Notes p. 24)

All before Inheritance of Quit-rent land
under Sec 23(2) & Act 38/1927 is governed
in the Cape & the Regulations Part II (and
accompanying ~~Table~~ Table of Succession)
published in G.N. 2257. dd. 21/12/28.

{ Quote }

The transitional regulations are
contained in Proc. 142/1910 Schedule.

nb. Under Glen Grey Amendment - - - - -
(see Willsch top page 36)

SUCCESSION, cont.

sec 9. Under the Glen Grey Amendment Act (14 of 1905) and the Transkeian Proclamation 142 of 1910 the widow surviving has the use of the immovable property of the deceased until remarriage, or during her lifetime if she does not re-marry.

"Widow" covers a sole widow, great or principal widow, or failing these, the widow next in rank according to the native custom.

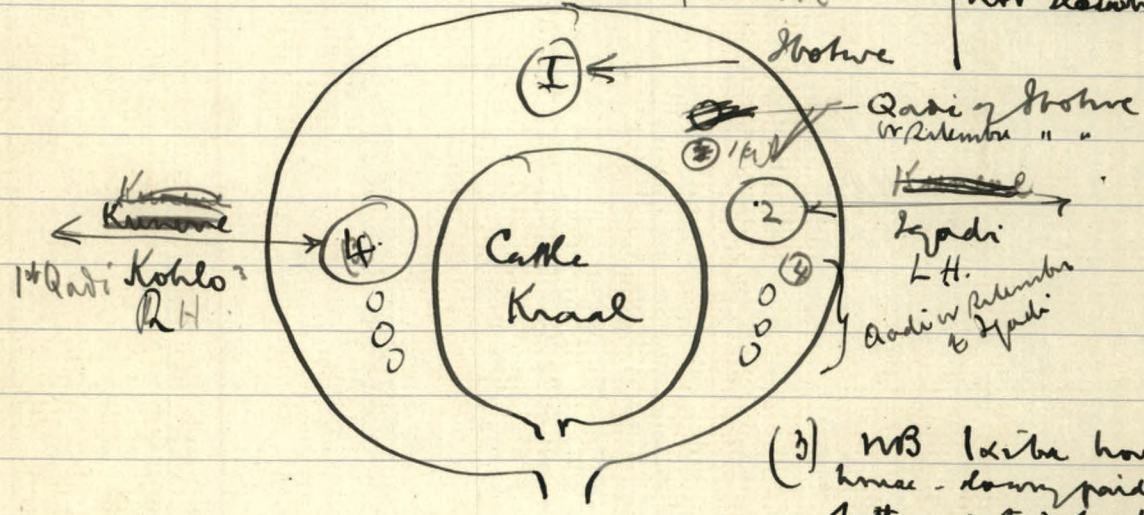
Bantu Inheritance

Xhosa (NB Definition of this term)

Commoner	Chief Hut - Native	1st Wife married	Zembe see Mac 1910/11 p. 156 see also Legume wrong p 73 et seq
Left ^{Right} Hand	Kumene Kohlo	2nd " "	
Left ^{Right} Hand	Kumene Kohlo	3rd " "	

Chief - Chief Hut - Native Tribal Wife chosen by
 tribe pays dowry
~~first~~ 1st wife
 Right Hand - Kumene
 Left Hand - Qadi
 (Kohlo/Pulamba)

!t. wisdom: first wife is first wife not elsewhere



(3) NB Xiba house = independent house - dowry paid by husband's father - not subject to major houses - only found in chief's kraal (Legume p 75)

Notes

- Light hand house only succeeds to 1st house property & status after ~~Qadi~~ ^{Qadi (and Xiba when pure)} ~~Qadi~~ But amongst Pondo, ~~Qadi~~ ^{Kumene (R Hand)} succeeds in absence of heir to great Hut (Legume p. 104. (Bentley Hall R 20. 1930)
- Some authorities consider No. 1 (1st Qadi) to be more independent than other Qadi & to have his own subsidiary houses. (But see Knox Bokerve 1883 Com p 36.)
- Knox Bokerve says only 2 ^{principal} houses amongst Xhosa but Maclean (1883 Com sec 21., p. 41 p. B. p 19) says three principal houses.
 Maclean & Pundonici only 2 principal houses other was Qadi to one or other (1883 Com Left p. 19)

4. Husbands, ^{usually} only appointees cattle to just three major houses - rarely beyond.
 5. In absence of "allo" his to motive succeeds to whole estate & responsibility & he must provide for dependents
 6. Women do not inherit.
 7. The youngest son among Pando & Parlomise inherits "calabash cattle" i.e. cattle paid to & sometimes chosen by married women from dowries of daughters - they are inherited only after death of both father & mother
- Seymour p 50

Special Instances of Bantu Inheritance

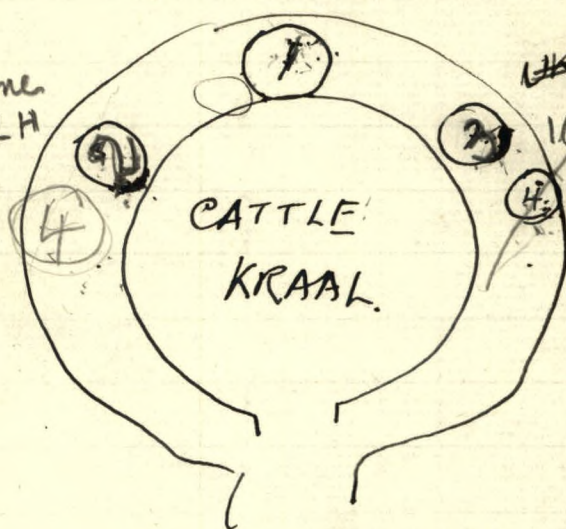
3. Xosa.

IBOTWE or Inle Inle

~~Inle Inle~~

1/4. Ukunene
~~IQADI~~ LH
UKUNENE
R.H. ?

~~UKUNENE~~
IQADI R.H.
Subsidiary to Iqadi
IQADI & UKUNENE.



IBOTWE HOUSE

Great wife (except with chief's family) is 1st wife.
 2nd wife (^{Ukunene} ~~UKUNENE~~ house) is ^{LH} ~~R.H.~~ & semi independent
 3rd wife (IQADI HOUSE) is ^{R.H.} ~~L.H.~~ & subject to IBOTWE. ^{Houses}
 following ^{men} are subject to IBOTWE or UKUNENE as
 chief allots.

① Some authorities consider no. 3. 1st IQADI (L.H.) to be
 more independent than other IQADIS. & to have her
 own subsidiary houses. ~~(See Kin Bokwe's evidence 1883)~~
 On the other hand Maclean Compendium. 1883 Sect 21
 App. B. p. 19. "There are three principal houses & minor
 houses are attached to one of the three." ^{Kin Bokwe's statement}

Real difference of opinion as to status of IQADI,
 & as to position of no. 4. ^{K.B. 38.}
 It is usual for husband to apportion cattle to ^{three}
 first major houses but rarely beyond. Minor houses are dependent
 on these. Eldest son of each house inherits property
 allotted to each house (Sect. 22 Maclean)

In absence of his allocation, eldest son of
 IBOTWE succeeds to whole estate & responsibility

Ukunene is established with kraal power - are refundable

③ 1st wife named is 1st wife
 2nd " " R.H.
 3rd " " Iqadi 1st house
 R.H. succeeds in absence here 1st house } nac
 Kin Bokwe's statement
 R20 1930

Special Instances of Bantu Inheritance

Xosa (cont.)

In the absence of male issue the father inherits if still living, if not the eldest brother of same house, if not the eldest son of father's great wife &c.

If no collaterals then eldest surviving father's ^{full} brother follows this father's eldest brother of IDOTWE &c.

Wives are not necessarily inheritable in Xosa Law - at any rate according to recent Xosa custom.

① "Xosa" is used for many tribes of fairly common language & customs inhabiting the S.E. corner of Africa. Naturally customs would vary somewhat & generalisations must be cautious.

④ Mpondomisi almost certainly had only two ^{main} great houses. Ukunene & Agny subordinate houses were IQADI & one or other of these (N.L.C. 1883 App. I p. 409),

~~An instance of Mpondomise irregular succession illustrating the point that a powerful person keeping chieftainship cattle may be accepted as ruler though quite irregular~~

~~Also illustrating the point that the IRASI cattle make the marriage the heir.~~

~~Royal line following chief PATHO.~~

- ~~IBOTWE HOUSE. 1 ♀ chief~~
- ~~IQADI - 2 ♂~~
- ~~UKUNENE - 1 ♂ (ditto)~~
- ~~UMSOKO (House of youth) 1 ♂
(cannot succeed unless no male heir)~~

Women do not inherit

If no male heirs then chief inherits.

note ~~the~~ Cattle of mother's calabash go to second son (1883 Com. Bokoire p. 39)

The law relating to native marriage varies in the Cape Province, making it necessary to deal with the four districts - The Transkei, British Kaffraria, British Bechuanaland and the Cape proper - separately.

TRANSKEI.

It would be difficult to ^{include in} have one code for all the tribes of the Transkei, for the native population ^{consists of} includes Xosas, Griquas, Fingos, Pondos, Pondomise, ^{Xhosis, Tembus - others} etc., and though there are certain fundamental similarities in the marriage laws of all the ~~Southern Bantu~~ there are ^{as} many variations in detail.

The courts of the Transkeian territories were authorised by Proc. 112 of 1879 to apply, according to their discretion, native law and custom "except in so far as it shall have been repealed or modified by Act of Parliament or Governor General's proclamation". This system is ^{Xhosis} one of implicit recognition of the binding nature of native law. As it is not codified it can develop freely and in accordance with the ~~upward~~ trend of native culture influenced by European civilisation, but it has the inevitable drawback of making law dependent upon the will of individual magistrates with the result that there are a number of conflicting judgments.

Native marriages, polygamous as well as monogamous, were recognised as valid, whether contracted before or after ^{of the native territories to the Cape.} 1. annexation. The essentials required by the court were in accordance with true native custom for, if in doubt, native assessors were called in to state whether such formalities as had been performed constituted marriage.

The passing of Lobola and the formal handing over of the woman were regarded, as a rule, as the two main essentials by the Court. 2. In certain instances, however, ^{e.g.} the court decided that Lobola was not necessary, ^{For example a marriage was held to be complete} marriage being complete when the father ^{sent} gives his consent and the girl ^{sent} goes to the intended husband. 3. with this permission. ③

- 1. Nqobele v. Sihele 10.S.C. 346.
Lutsati v. Ben.
- 2. Welsh: Gibarabayi v. Vargidzi. N.A.C. 1925.V.P.M.6.
- 3. Macy v. Tekani. N.A.C. 99.

The assessors have also considered a marriage as valid where the ceremonies have been lacking, but the father, by his acceptance of part of the lobola, [↑] has tacitly acknowledged the union and also allowed ^{by} his daughter to live with the suitor. (1).

The court decided that, if a woman had borne many children even though the father claimed that the cattle ~~which the man had given~~ ^{been given} were a fine and not lobola, a marriage had taken place. (2).

Abduction is considered a crime under the Penal Code, ^{under} Section 269, ⁽³⁾ which states that any crime or offence committed in the Cape Colony ~~would~~ ^{constitutes} a crime or offence in the Native Territories, ⁽⁴⁾ but Ukutwala marriage which is practised by many of the Transkeian tribes is definitely recognised as a form of marriage in the Courts of the Territories. ⁽⁵⁾

Native marriage after annexation was placed in an entirely different category if ~~it were~~ registered, ~~for~~ the law stated that any such marriage "according to ordinary kafir or Fingo forms" ⁽⁶⁾ shall have the same effect "upon parties to the same and their issue and property as a marriage contracted under the marriage laws of the Cape Colony." ^{ie. civil law} In this connection the Supreme Court held that only first marriages according to native custom could be registered. The aim was to give natives an opportunity of bringing the first of native unions under the law of the land, and gradually wean ^{ing} the people from polygamy. The actual effect was otherwise, for women who ~~before hand~~ ^{formerly} held the honourable position of wives were lowered to the status of concubine; and registration ~~was held~~ ^{became} a dead letter since the Supreme Court of the Cape had declared that these ~~proclamations~~ did not recognise the validity of ^a union subsequent to the one first registered, and that in the absence of specific recognition they were no more valid in the Transkei than in the Cape proper (7).

1. Unzundula v. Bokquano. N.A.G.2.
2. Gelba v. Dakolwana K.1906.
3. Rex v. Mzovo. 1906. E.D.C. 71.
4. Act 24, 1886, Section 77b; 169 and 269 Cape.
5. Quakopfana v. Nkolonzo. 1. N.A.C. 102.
6. Later extended by Proc. 140 of 1885 Section 30 to Tembuland and Bombaloland.
- 7.

After this judgment was given, appeals in cases between natives were removed from the E.D.C. to a native appeal court established in the Transkei, where it was decided that unions ^{said} if contracted in accordance with native requirements were valid. (1) It considered that a) Section 34 of Proc. 140 of 1885 (which was applicable in this particular case) recognised the ^{customary} unions by providing for the registration of the first ^{of} such ^{unions} - b) There was no legislation preventing such recognition - c) Section 45 of the same Proc. recognised native marriages by providing for the taxation of the huts of polygamists, mentioning specifically that the tax was due for each wife. Although this judgment was not upset on review in the Cape Supreme Court, the first argument advanced does not appear to be a sound interpretation of the purpose for which registration of native unions was introduced, i.e. to bring such unions under colonial law and make them analogous to marriage by Civil Christian rights. The position was cleared up by Proc. 142 of 1910, Section 61 of which provides that subject to certain exceptions all questions relating to any marriage according to native custom and all questions of divorce or separation arising out of any such marriage shall be tried and determined in accordance with the native law. ^{Therefore since} After annexation, the legal effects of a customary union, even though ^{it is} registered, ^{is} not similar to those resulting from Civil or Christian marriages. ^{are} No customary union which takes place during the subsistence of a native registered marriage or an ordinary marriage can ^{on the other hand} give any standing whatsoever to any party ^{or} of issue of such union. (2). There is no specific and direct recognition of unregistered customary unions in the Statute Book, (3)., despite ^{the} terms of Section 61 of Proc. 142 of 1910 although Proc. 142 of 1910 and the Native Administration Act of 1927 recognised these marriages by implication.

Community of property is definitely excluded because it was considered alien to the Bantu conception of the legal position of woman, ~~who was not allowed to own or inherit property in Bantu law.~~

- (1) Lutsati v. Ben.
- (2) Section 3 Procl. 142 of 1910.
- (3)

(4)

The Transkeian Territories Native Appeal Court has on many occasions refused to recognise a native custom which it considers to be opposed to the principles of public policy or natural justice. Proclamation 110 of 1879 and Section 38 of Proc. 140 of 1885 directly affected a number of customs practised by the natives by conferring legal majority upon males and females respectively when they reach the age of 21. It was therefore declared that a widow was free to remarry without first obtaining the consent of her father or guardian⁽¹⁾. Similarly, no woman could be forced to marry against her will. (2)

~~From this~~ We see that in the territories native marriage was recognised to a very large extent, and the attitude of the Native Appeal Court is summarised in the words of Mr. H.T. Welsh "the basic principles of native law and custom have long been recognised ^{as} and valid by this court, and though it may be contended that these principles do not reach the ethical standard which more civilised people have attained, this court, which was established in order to preserve and give judicial recognition and effect to native law and custom feels that

The same attitude has naturally been adopted towards Lobola which has always been ^{recognised} dealt with in the Transkei courts. For example, the family nature of the transaction is as a rule acknowledged, and the duty of the father, if alive, and ^{the} the elder son, if the father is dead, to provide a dowry for a son's first wife is enforced by law. (3). The Transkeian courts ~~naturally~~ reflect the ^{changing} attitude of the native towards cattle, which has resulted from his impact with European civilisation, and ~~does not~~ insist upon ^{cattle as} the medium for Lobola. ~~having any ritual value~~. Money is frequently used, though the amount is regulated according to the current value of cattle. (4).

(1) Nosaiti v. Xangtai 1. N.A.C. 50.

(2)

(2a) Dunalitshona Mcinukewe v. Mraji Mcinukewe. 1927.

(3) Qasikanza v. Msuzo 1928 T.K. N.A.C. 12. P.H.M. 4.

(4) Pakkies vs Boloko Kokstad 1904. Cattle = £5 per hd. Horses £5-£6 Small stock 10/-.

All questions of divorce relating to marriages are tried (1) "according to native law enforced at the time of their celebration." Before a second marriage can be valid, the previous union must have been dissolved either by a return of all or some of the Lobola or by order of a competent court. (2). Any second marriage by native forms entered into by women without the above formality is void, even though her second husband be unaware of the previous nuptials. (3) Unfortunately in East Griqualand the courts have held that when a woman leaves her husband and has no intention of returning, the marriage is dissolved from the day on which she left him. (4). In other words, contrary to the usual native custom, a man may marry a woman though her previous Lobola has not been returned. The natives of East Griqualand, knowing of these decisions of their Appeal Court, have contracted such marriages, which it follows, cannot now be considered as invalid^d in any province of the territory. ^{New P} It has been laid down that a native man or woman may at any time ^{secure a divorce} ~~divorce himself or herself~~ either with or without cause, so long as the divorce is carried out in a proper and recognised manner, i.e., by the return of all or some of the Lobola. If, however, action is taken in court, then due cause must be alleged and proved. The courts will not otherwise interfere.

Grounds for divorce follow native custom, e.g., ordinary adultery on the part of a woman married according to native custom is not sufficient cause for a native to divorce his wife and recover his Lobola. (5). But there are exceptions: Incest on the part of the wife is one of such exceptions and justifies the husband in claiming the dissolution of the marriage and the restoration of the cattle, (6), Ignorance of a wife's previous stuprum, though not sufficient grounds for dissolution of marriage in pure Bantu law, has been held to be sufficient grounds for divorce in the Courts, (7)

- (1) Proc. 140 of 1885 Section 32.
- (2) Mesana v. Notshanga U.1897.
- (3) Ibid.
- (4) Juleka v. Sehlahle 1905.H.88. M
Moeti v. Nthako Xobeniso v. Dwayi. 1906.
- (5) Nquawana v. Makuzeno. N.A.C.220.
- (6) Mongaliso v. Nkamakasi v. Fedada Mata & Another. 1926.
Tk. M.A.C. 9 P-H M.17.
- (7)

(6)

The courts ^{holding} ~~have held~~ that a man is entitled to consider that he is marrying a virgin and to divorce her if he finds this is not the case.

Lobola must be returned if a woman ~~deserts~~ her husband without due cause and refuses to return, (Lowani Mlaleti v. Batakti Dlundla 1926 Tk. N.A.C. 9 P-H M.19.

and on any other ground recognised by native custom, even though it ~~is~~ ^{be} but a tribal variation. For example, ^{she} ~~is~~ a Fingo woman ^{leaves} her husband and ^{later} ~~then~~ returns ^{to him} but without ^{the} household articles ~~of~~ and clothing belonging to her husband's kraal, ~~and~~ which had been supplied by him and removed ~~by~~ by her, her failure to bring them back ~~is~~ ^{was} tantamount to desertion and ^{a ground} ~~grants~~ for the dissolution of the marriage and return of Lobola (Lezeli Aondka v. Marangana Kenono 1930 2. N.A.C. C & O 32. 16 P-H R.89.

To sum up, the position in the Transkei is as follows:

- 1) Polygamous unions, if all are contracted in accordance with native rites, are recognised by the Transkeian courts.
- 2) A first customary union may be registered; ^{and then} when ~~it~~ has the same effects as a Christian or Civil marriage, including the non-recognition of subsequent customary unions, but community of property is definitely excluded.

(1)

The original customs have not been ^{as directly} modified by the courts as by other European influences & the judgments, given by magistrates but aided by native assessors, reflect rather than determine native development in the first instance. Although some customs arising from marriage have been refused recognition, the basic principles of native marriage have not been considered as opposed to national justice. Naturally ^{however,} & inevitably, this selection of 'repugnant' elements in an institution & their summary removal by a court decision cannot but alter the institution itself.

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