XII

MARRIAGE BY CHRISTIAN OR CIVIL RITES.

It is now necessary to consider the marriage of natives by Christian or civil rites or by such customary forms as are assimilated to them. recognised e.g. registered unions in the Transkei.

In all the provinces marriage by Christian or civil rites is open to natives, but the legal effects ~~xfxxxxxxxxxxxxxxx~~ are not necessarily ~~identical with those resulting~~ the same as those which from such marriages when contracted by Europeans in the Union. In the latter case, ~~it results~~ ~~in~~ community of property unless excluded by anti-nuptial contract. automatically follows.

We must bear in mind that marriage by Christian rites is not identical with marriage by civil ~~law~~ rites. (Viz. ~~Roof~~ civil marriage etc.

NATAL AND ZULULAND.

In Natal provision for the celebration of Christian marriages is contained in Law 46 of 1887, (1)., as amended by Act 44 of 1903, both of which Statutes apply to Zululand as well as the rest of Natal.

The question of exemption affects the mode by which a native may marry. Unexempted natives, even if only one of the couple is unexempted, can only celebrate their marriage under the special procedure (2). The officiator in a Christian marriage ~~is~~ must be a duly authorised Minister of Religion (3). No provision is made for marriage by European Civil rites - in fact it is specially laid down in Section 1) Law 46 of 1887 that it shall not be lawful for any civil marriage officer, appointed by the Governor under Section 12) of Ordinance 17 of 1846, to solemnise marriages between any parties being natives and not exempted from the operation of native law.

As native women in Natal are minors in law, the consent of the father or guardian of an unexempted native woman is necessary, but where it cannot be obtained or is unreasonably withheld, the parties may petition the Governor who has power to authorise the issue of the License. An exempted native woman marrying an

(1) S.156 of Natal Code 1891.
(2) S.7 Law 46, 1887.
(3) S.12 Ord. 17 of 1846.

unexempted man according to Christian rites relinquishes her status of exemption, and native law as laid down in the Code applies. Where both parties are exempted they are in the same position as Europeans and may not marry by native custom, but only according to ordinary Civil or Christian rites. The legal effects of a marriage by Roman-Dutch law in the Union automatically results.

The position is the same if a husband is exempted from native law, the woman automatically coming under the same law as her husband.

It is interesting to notice that it is not marriage by Christian rites i.e. not the acceptance of a new religion, which brings natives under the ordinary civil law of the land, but exemption which is granted on other grounds.

TRANSKEI.

In the Transkei Christian marriages contracted between natives prior to annexation are legal, and the regulations promulgated upon annexation of the various territories expressly provided for the recognition of marriages between natives by Christian or civil rites and laid down that such should have the same effects upon the parties, their issue and property, as a marriage contracted under the marriage laws of the Cape Colony.

Proc. 142 of 1910, as amended, while safeguarding legal rights accruing as the result of such marriages, laid down that, for the future, no marriages between the natives should produce the consequence of community of property. 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. The same applied to marriages by native forms entered into in the territories and duly registered.

Here, as elsewhere, the Courts were faced with the problem of reconciling Christian marriage and the passing of Lobola. ~~They held that the form of marriage does not in any way affect the rules relative to the cus- of Lobola~~. Lobola was frequently given to the father of the girl, and there are various cases which show the attitude adopted towards the transaction. The courts have held that verbal contracts to pay lobola made before Christian marriages cannot be recognised and enforced under colonial law. (1). Further, they have held that such contracts between natives of tribes practising "Teleka" are to be dealt with according to Colonial law. (2). Naturally, no action lies where no promise to pay lobola is made and a marriage is by Christian rites. (3). Promises to pay lobola made after Christian marriages may, if in writing, (but not if verbal) be validly enforced by law, even among tribes which "Teleka", but such contracts cannot be enforced by "Teleka". In this case it is regarded as analagous to the ante-nuptial contract now generally recognised throughout Africa. New Par 11 The form of marriage does not in any way affect the rules relative to the return of Lobola, for the Court has held that, where lobola is paid in accordance with native custom, the question of its return must be decided by native law (4). This is consistent with the definition of lobola as a contract given in the case of Mbono v. Manoxweni, and also with the dictates of Colonial law in respect of the forfeiture of benefits of ante-nuptial contract by defaulting spouses. However, the Court has laid down that a native cannot accept all the advantages of Christian marriage and none of its disadvantages. Therefore, where a guardian pleaded that adultery was not sufficient cause in native law for the return of lobola and the dissolution of the marriage which was contracted by Christian rites, the Court said the plea could not be upheld (5).

(1) Adonis v. Zazeni K.1901. (Butterworth).
(2) Mongana v. Ntinteli. Kokstad 1908.
(3) Moerane v. Phakane. Kokstad. 1908.
(4) Zace v. Tekani. Kokstad. 1908.
Siyotula v. Mde Kokstad. 1902.
Maloyi v. Mlandandle. Umtata.1910.
(5) Faroe v. Moleko. Kokstad,1905.

Marriage by natives according to the law of the land can only be dissolved in a competent court; and even though lobola has been passed, the return thereof is not sufficient to dissolve the union in the eyes of the law, for it is not sufficient to establish such union. In the case of Jobela v. Gqitiwza (1) there had been two marriages, both by Christian rites. The dowry paid for the first marriage had not been returned, and the woman, upon her husband's death, had married again without her father's consent. This time no lobola had been given. In the case of Mbono v. Manoxweni the Court had held that death put an end to the marriage contract. There need be no return of lobola except in the case of a second lobola being received for the same woman. This is done, not to mark the dissolution of marriage, but in accordance with the principle that no two dowries can be held by the same person for one woman.

The question was whether the first lobola had to be returned to dissolve the first union.

In Jobela's case it was decided that

From the above cases it is clear that when lobola is passed in connection with a Christian or civil marriage, it does not play the same part as in a union by native custom, and is tending more and more to develop into an ante-nuptial contract pure and simple.

(1) Jobela v. Gqitiyiza. Umatata. 1929.

BRITISH KAFFRARIA. AND BRITISH BECHUANALAND.

In British Kaffraria and British Bechuanaland (1) marriages according to ordinary Christian or civil rites are followed by the same legal consequences for natives as for Europeans.

CAPE PROPER.

In the Cape proper, for marriages between natives to be legally valid they must be contracted in accordance with the ordinary marriage laws of the land, community of property ensuing 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 S.2 of Act 18 of 1864 or of S.19 of Act 35 of 1894. (2)

Community of property exists between the spouses, but as regards the right of the eldest son to succeed native law applies. (3)

The courts have only dealt with Lobola passed by natives in the province proper in connection with a marriage by Christian or civil rights. (see previous section on Cape Proper)

(1) Expressly authorised under S.42 of British Bechuanaland Proc. 2 of 1885.
(2) Kasa v. (Witfield page 279).
(3) Charles Majwamba v

(6)

TRANSVAAL.

In the Transvaal, valid marriages between natives can only be contracted 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:- 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: A) submission by the parties to a marriage officer of an application for the celebration of the marriage together with 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, B) the publication of bans or the production of special license, C) Civil or religious ceremony as the case may be, according to various statutory stipulations.

All the incidents of a marriage in community 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.

ORANGE FREE STATE.

Lawful and valid marriages between natives in the O.F.S. can only be contracted under the same law as is applicable to Europeans (1), and the incidents are likewise identical.

To sum up the position, even in those provinces where marriage by natives is permitted to be contracted according to the ordinary civil law of the land, the extension of such privilege is always contained in definite legislature. Natives are everywhere entitled to marry by Christian rites and except for Natal all natives may marry by Civil rites. Cognisance is taken of lobola removed from its context of an essential of unions in accordance with native tradition and custom. A marriage can only be dissolved by a competent court administering European law.

Until the passing of the Native Administration Act, there was no uniformity in the recognition of marriages by Christian or Civil rites between natives in the provinces. By this act, such marriages are permitted but "shall not produce the legal consequences

(1) Law 26 of 1899 (1899)

of marriage in community of property between the spouses: provided that, in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife, it shall be competent for the intending spouses at any time within one month previous to the celebration of such marriage to declare jointly, before any magistrate, native commissioner or marriage officer (who is hereby authorised to attest such declaration) that it is their intention and desire that community of property and of profit and loss shall result from their marriage, and thereupon such community shall result from their marriage except as regards any land in a location held under Quit-rent tenure, such land shall be excluded from community."

After The Native Administration Act.

Until the passing of the Native Administration Act, there was, as can be seen from the above, no uniformity in the recognition accorded marriage by Christian or civil rites between natives in the provinces. This Act permits such marriages, but declares that, if contracted after the commencement thereof, they"shall not produce the legal consequences

"Any legal right which has accrued or may accrue as the result of the marriage in community of property contracted before the commencement of this Act" shall be retained (2). This Act therefore alters the position in the Transvaal, Orange Free State, Cape (except for the Transkei) and Natal.

It has been criticised as retrogressive and unjust by denying to the native the benefits which automatically result to Europeans marrying in exactly the same way./ It is undoubtedly true that community of property does not fit in with early tribal organisation, but the majority of natives who marry to-day according to civil rites have emerged or broken away from those conditions and can understand and appreciate the advantage of the European law of the land. The Native Administration Act does not seem to consider the eventual emergence of the Bantu.

It was introduced by the Administration who judged from the Transkeian experiment that natives did not desire such legal consequences.

(1) N.A. Act S.22 (6)
(2) N.A. Act S.2 (8)

Ch. IV

INTERPENETRATION OF MARRIAGE BY NATIVE FORMS AND BY EUROPEAN OR CHRISTIAN RITES.

The problem of dealing with marriage between natives would be considerably simpler if one could divide them into the two distinct straightforward categories of a) marriage by native forms b) marriage according to recognised European modes. Unfortunately, the Bantu are in a transitional stage ~~and neither the one nor the other is entirely suitable,~~ 2 forms and we frequently find them impinging upon each other. ~~We must therefore see how this problem has been faced by the administratio~~ Most Africans marry by Christian law by civil rites, but the forms are often modified to native customs [insert p 6]

NATAL.

In Natal there is nothing in the Code to prevent a native who has contracted one or more marriages according to native rites from marrying one of his wives or even some other woman by European rites. If, however, a native who has contracted a marriage according to native law subsequently obtains a letter of exemption, he cannot marry a second woman by European rites. Exemption is never granted to polygamists.

As far as property is concerned, a Christian marriage during the subsistence of a customary union or unions is governed by native law, in other words the wife thereof would merely rank as an additional wife.(1).

The Natal codifiers have attempted to retain the sanctity of Christian marriage regardless of its effect on native institutions by prohibiting a native from contracting any further union during the subsistence of such a marriage. Section 13 of Law 46, 1887, reads as follows: "Any native having contracted marriage under the provisions 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 committed bigamy, and shall be liable to be prosecuted and punished accordingly under the ordinarly laws of the colony".

(1) S.11 Law 46 of 1887.

Once a native has been married according to Christian rites he may never again contract a marriage according to native law even though his first marriage was dissolved, and children of such marriages are likewise debarred from marrying according to native law.

In their attempt to retain the sanctity of Christian marriage, the codifiers have been guilty of a ~~flagrant~~ logical inconsistency. ~~There is~~ There is no justifiable reason why a marriage by native law contracted during a Christian union should be ~~punished~~ considered as bigamous, if there is no similar stricture on a man taking a wife by Christian law during the subsistence of a recognised customary union.

TRANSKEI.

In the Transkei it has not been directly decided as to whether a native man having married by Christian rites before annexation could then contract a second polygamous marriage by native custom, but seeing that the annexing proclamations are not retro-active, there appears no reason why he could not have done so (1). Moreover, it has been held (2) that such a native could, after contracting a Christian marriage, re-instate a wife whom he had married by native custom prior to his Christian marriage. In this case it was also held, however, that by contracting a Christian marriage even prior to annexation a native "practically divorced his other wife" for by his Christian marriage he bound himself to keep one wife and one only. A contrary decision held that (3) a prior marriage by native forms was not dissolved by reason of the husband contracting another marriage by Christian rites where the first wife had remained at his kraal and no steps had been taken to effect a separation.

Subsequent to annexation and prior to the promulgation of Proc. 142 of 1910 it was competent for a native to take a wife by Christian rites during the subsistence of a marriage by native rites, unless such marriage had been duly registered. In that case he could be convicted of bigamy.

A marriage according to Christian or Civil rites during the subsistence of unregistered unions was followed by the ordinary instance of a marriage according to the law of the Colony proper.

Proc.142 of 1910 made it unlawful for any male native to contract a marriage according to the law of the Colony if he was previously married by traditional forms, without first upon oath declaring the various details in connection with such marriage before the magistrate of the district. It was further laid down that no minister or civil marriage officer should solemnise the marriage of any male native without first having taken a statement from him as to whether there subsisted at the time any marriage according to native custom and if such were the case unless there should be produced the certificate signed by the magistrate. Substantial penalties were laid down for the punishment of persons contravening these provisions.

(1) Seymour Native Law page 3.
(2) Setlaboko v. Setlaboko.
(3) Hlupeko v. Masukenya. Kokstad 1903.

upon property
The effect/of a Christian or ordinary Civil marriage before Proc.142 of 1910 is entirely different from the effect after the passing of this Proc. Instead of community and the other legal incidents resulting from Christian or Civil marriage, there is definite protection of the wives and children of customary unions. No such marriage by European modes shall in any way affect their property rights, and the widow of the Christian or Civil marriage and any issue thereof shall have no greater right than if also
her marriage had/been one by native custom.

The converse i.e. contracting of a customary union during the subsistence of a marriage according to Christian rites must now be dealt with.

Prior to annexation there was nothing to prevent such a union. After annexation, but before 1910, such unions could also but
be contracted if not registered. The effect upon the wives and children was to grant them the privileges accorded them by native custom so long as they did not prejudice the property and other rights of the wife married by Christian law in community of property. Therefore upon his death half his property would go to his wife and children of the Christian marriage and the remaining half would devolve in accordance with native custom to the wives and children of the customary unions.

Since 1910, it was competent for natives to enter into a further customary union or unions during the subsistence of a ~~recognised~~ Christian marriage, but such union or unions confer no status or property rights whatsoever upon any party thereto or the issue thereof (1). Unions so contracted are regarded merely as Christian
illicit cohabitation but not bigamy and the/wife could divorce her husband on the grounds of adultary.

(1) S. 3 Proc. 142 of 1910.

BRITISH KAFFRARIA.

It is competent for a native in British Kaffraria to contract a marriage according to ordinary Christian or Civil rites during an existing marriage by native law. If he died, his estate would devolve in accordance with the custom of his tribe.(1). The marriage by Christian rites would rank for the purposes of administration of the Estate as a further marriage by native custom.

If the later marriage were one by native rites it is not considered valid,(2) [illegible] As no penal clause is provided and as a marriage by native rites is not regarded as a valid and binding marital union, a native who does marry by native law during his Christian marriage does not render himself liable to prosecution for bigamy.

(1) Ord. 10 of 1864.
(2) Ibid.

BRITISH BECHUANALAND.

The position in British Bechuanaland is again very similar to that in the Transkei. A native may contract a marriage by Christian or Civil rites during the subsistence of unregistered customary unions. Community of property, unless excluded by ante-nuptial contract and the other incidents of marriage, automatically results.

If he marry during a registered customary union he is guilty of bigamy.

There is nothing to prevent a native from contracting a marriage by native law during the subsistence of his already existing marriage according to civil or Christian rites. Such a union, however, could not be registered nor receive recognition in the eyes of the law. It was regarded merely as illicit cohabitation and for this reason neither renders the native liable to prosectuion for bigamy nor confers any property rights as between the partners nor any right of succession upon the children in the estate of the father.

ORANGE FREE STATE, TRANSVAAL AND CAPE PROPER.

In the Transvaal, Cape and Orange Free State, as customary unions were not recognised as valid marriages it was competent for natives to marry according to Christian rites during the subsistence of such unions.

A marriage so contracted would result in community of property between the spouses in the ordinary course.(1).

In the O.F.S., however, it seems doubtful whether such a marriage would have the effect of depriving the issue of a previous customary union of the benefits contemplated in Art.28 Law 26, 1889 (See page) which affords relief to the children of parents married by native custom in respect to succession.

In the Cape Province such a marriage would presumably rank as a further union under native custom for the purposes of succession in the estate of either parties.(2).

A native who contracts a customary union during the existence of aChristian marriage between him and some other woman would not lay himself open to prosecution for bigamy owing to the fact that a customary union is not recognised by the O.F.S., Tvl or C.P. law as a valid marriage.

Natives are legally permitted to marry by Christian rites a woman ~~with~~ whom he ~~xxx~~ previously ~~xxxxxxx~~ he had taken regarded as a wife in native law provided, of course, no Christian marriage subsists between him and some other woman.

It would seem that in the O.F.S. the issue of a customary union contracted during a marriage by Christian rites would not be entitled to the benefits contemplated in Art.28 of Law 26 of 1899.

In the Transvaal such a subsequent customary union would confer no property rights upon either of the parties or on the issue of such union. In the Cape, however, though it would confer no property rights as between the spouses it would be regarded as an additional marriage under native custom for the purposes of succession.(2)

(1) Tvl S.70 of Administration and Estates Proc. 28 of 1902.
(2) S.2 of Act 18 of 1864 or
S.19 of Act 25 of 1894.

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