

18058

No 51 2-1931

1941

Previous

17216/31

Subsequent

See 22/26/32
Uganda

Room 297

16.

[illegible]

16/2

Libraire

7/2

(R/C) Grestina

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The President

2012

D. J. C. Knowlton

163
173

16. 10/11/1944
17. 10/11/1944

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Allen

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P. H. H. H. H.

Lehany (Kaye) ¹⁴⁴ ¹⁴⁵

Run 297

Specimen
to Library

1. Kenya ————— 20/1/51
No. 2 authenticated & 12 plain copies
of the Native Christian Marriage & Divorce
Ordinance, 1931 together with Legal
Report

Library

Will you please attach a copy
of Africa for Jan. 1932 (under
Mr. Allen's minute of 4/2/32 & 17/2/31)

H. S. Priskin
16/2/31

H. R. Priestman

File copy herewith

17/2

No. 1

The ordinance as enacted has since
been amended by the insertion of the amendments
shown at 8 & 17/2/31 & 16.

- (a) Clause 5 now provides for appeal to a
Provincial Commissioner see pattern & booklet
(pencil)
- (b) Clause 11 now excludes sub-clause
subordinate to the former & re-enacting
jurisdiction and provides the necessary
means of dealing with cases where
the marriage has been celebrated under
Cap 168 now repealed by section 13.
- (c) Clause 10 now limits the vesting in the
widow of the Guardianship of the children to
the period as she
remains a Christian.

The clause however remains
otherwise unchanged and still incorporated

Specimen
to Library

No. Kenya ——— 207/53
No. 2 authorized & 12 plain
of the Native Christian Marriage & Divorce
Ordinance ——— by the with legal
Report

Library

Will you please attach a copy
of Africa for Jan. 1932 (under
Mr. Allen's minute) 4/2/32 17216/31

H. S. P. M. S. M.
1/12/31

H. R. P. M. S. M.

Will copy herewith

Ref. 172

No. 1

The ordinance as amended has been
improved by the insertion of the amendments
shown at 8 in 17216/31 & 18.

(a) Clause 5 now provides for appeal to a
Principal Commissioner see portion in booklet
(b) Clause 11 now excludes 2nd class
subordinate courts from exercising
jurisdiction and provides the necessary
means of dealing with cases where
the marriage has been celebrated under
Cap 168 now repealed by section 13.

(c) Clause 10 now limits the vesting in the
ward of the Guardianship of the children &
the mother to such period as she
remains a Christian.

The clause however remains
otherwise unchanged and still incorporates

Understands that in
his own private affairs
the Mission has
not taken a number
which case is settled
with them & the law
1919

*Kotale - he is the
chief of the tribe
1919

the provision for the maintenance
of the widow by the brother-in-law to
which reference is made in
each of the 1911. In
regard to this please see also
Sir to Borthwicks minute of 4/1/32 in
accordance with which the former
was requested at 7 in 1721/31 to
report fully on this point.

It is quite clear from the report
now received from the
Report under this - that the brother
in law is deprived of his rights while
his obligations are not decreased -
he not only does not inherit the widow
but is deprived of the children of the
children. As regards A it does
not follow that the property interested
is an equitable consideration for
compulsory insurance of the widow -
in fact B advocates this.

It seems unfortunate that an Ordinance
of this kind should now be regarded as
pressing - when it was not so in 1925
and has apparently been shelved for
some time. It smacks of the mismanaging
element, with which the Committee was
apparently overloaded and must assist
the process of deterioration.

This is presumably too late to
suspend the operation of this ordinance
as a whole until the machinery
advocated in paras 87 and 101
of the Joint Committee's Report has been

Strongly being advised
advised.
Appreciation of the
in the 1919

to operate but it seems desirable to
eliminate the provision for the maintenance of
the widow which goes beyond what seems
equitable at present.

In the first instance the views
of the legal adviser may be obtained on the
equity of this provision - and on the
1919

1919
24/1/32

The Ordinance is in force, and no one
has protested except the Editor of "East Africa".
However much we may sympathize with
that protest, there are no sufficient grounds
for doing so - even suggesting an
immediate amendment of § 10.

1919

The Ordinance, before enactment, received
the blessing of the Secretary of State and hence
no question of disallowance can possibly arise.
The only point therefore is whether the Governor
should be asked to make some amendment to Section 10
in order to ensure that the brother-in-law of a
Christian woman whose husband has died has not, so
far as his rights under native law and custom are
concerned, received inequitable treatment by
reason of this Ordinance. Under native law and
custom he takes possession of the wife as one of
the chattels inherited from his brother and, as
such, can demand the right of cohabitation. In
return for this right the burden of her support is
imposed

J. C. Johnson 1931

J. Allen
12/3/32

I think there is no question at issue
except the obligation. I say that,
I should be inclined to ask to contribute
rather than to make the Gov. to
see that any such protest is repeated
China - & through him to the S. of S.

2.3.32

I agree; but I have seen Mr. Macgregor
who informs me that native councils were,
he always understood, fully consulted by P.C.'s
with regard to the proposals in the Bill.

0.7.0

This does not agree with the Gov's telegram
 (6 in 17316). If native opinion has in fact
 been consulted and accepted the position without
 protest, we can only visit & see how the law
 works in practice. As to the importance of
 consultation in such matters prior to legislation
 there can be no question.

— Nelt

16.3.32

Mr. Nelt

16.3.32

17.3.32

Coming to the Sudo details & Eske I
 see my new law on opposition
 because with the Constitution
 draft submitted for comment.

Trille

28/3/32

Mr. Nelt

How was meant the case?

17.3.32

29.3.32

for

Nelt

30.3.32

Letter
 17.3.32
 2

To Gov 253 (1 answer)

2 APR 1932

✓ P. 299 N.A.D. Chalen. Date. 13/4/32
 Registered for record.

Nath

76.3 32

Highland

6-2-2

17. 2. 21

Coming to the books debate & Book 1
 we say we have no opportunity of
 discussion with the Chairman
 except submitting for consideration.

10-11-12

4/2/92

S. H. ...

14. one and the same

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27.3.32

10

Red

20.3.32

✓ 2 To Gov 253 (Amended) 2 APR 1938
✓ R. C. G. A. A. C. C. C. - dated 13/4/12
Received for record.

1

NATIVE AFFAIRS DEPARTMENT,

Nairobi.

13th June 1952.

Ref. No. NLEO. 66.

URGENT NO. 3g.

All Provincial Commissioners, (with copies
for District Commissioners).

NATIVE CHRISTIAN MARRIAGE AND DIVORCE
ORDINANCE, 1931.

The Secretary of State, while not
anticipating native protests against the
liability for maintenance imposed by Section
11 (1) of the Native Christian Marriage and
Divorce Ordinance, has asked that any such
protest may be reported to him.

I shall be glad therefore if any
unusual instances of such protest
occur in the application of this section, may
be reported to me with a full explanation of
the relevant circumstances.

A. DELV. WADE.

ACT. CHIEF NATIVE COMMISSIONER.

ASG/HL.

3 5
NATIVE AFFAIRS DEPARTMENT,

Nairobi.

13th June 1966.

Ref. No. NLD. 65.

CIRCULAR NO. 3c.

All Provincial Commissioners, District Commissioners,
~~and~~ District Commissioners.

NATIVE CHRISTIAN MARRIAGE AND DIVORCE
ORDINANCE, 1951.

The Secretary of State has been informed that some Provincial Commissioners are anticipating native protests against the liability for maintenance imposed by Section 15 of the Native Christian Marriage and Divorce Ordinance, and noted that any such protest may be reported to him.

It shall be glad therefore if any particular instances of such protest may occur in the application of this section, to be reported to me with a full explanation of the relevant circumstances.

A. DELV. WARE.

ACT. CHIEF NATIVE COMMISSIONER.

ADCVJ/EL.

59
2100

C. O.

Mr. Allen 3/3

18058/32 Kenya.

Mr.

Mr.

Mr. Parkinson.

Mr. Tomlinson.

Sir C. Bottomley, 29-3

Sir J. Shuckburgh.

Parli. U.S. of S.

Parli. U.S. of S. 20.3.32

Secretary of State,

for session. v. minutes.

DRAFT.

KENYA

No. 253

C.D.
R 37MAF
10 April

Downing Street,

2 April
March, 1932.

Sir,

I have the honour to acknowledge

the receipt of your despatch No. 34 of the

(1) 20th January, and to inform you that His

Majesty will not be advised to exercise

his power of disallowance in respect of

Ordinance No. 51 of 1931 of the Legislature

of Kenya entitled "An Ordinance to

Provide for the Marriage of Native

Christians and for the Dissolution of such

Marriages."

2. In your telegram No. 394 of the

31st December, 1931, you stated that progress

sive native opinion, particularly that of

permanent members of the Christian Church

was freely consulted on the Ordinance and

is definitely favourable to Section 10,

but that uninformed pagan opinion was

not

not consulted as such opinion would be
valueless on this issue. If, as I
understand was the case, local Native
Councils, at any rate those most closely
concerned, were fully consulted by the
Provincial Commissioners in regard to
the proposals, in the Ordinance, there
would seem no reason to anticipate
~~native~~ protests against the liability
for maintenance imposed by Section 10(1).

but I should be glad if you would
ensure that any such protest is
reported to you, and through you to me.

I have, etc.

(Sgd.) P. CUNLIFFE-LISTER,

not consulted as such opinion would be
valueless on this issue. If, as I
understand was the case, local Native
Councils, at any rate those most closely
concerned, were fully consulted by the
Provincial Commissioners in regard to
the proposals, in the Ordinance, there
would seem no reason to anticipate
native protests against the liability
for maintenance imposed by Sect. 20(1),
but I should be glad if you would
ensure that any such protest is
reported to you, and through you to me.

I have, etc.

(Sgd.) P. CUNLIFFE-LISTER.

NOTE

1a

Calculated

I have consulted Mr. Macgregor as regards the last paragraph of Mr. Howard's minute. As pointed out in the report of the Acting Attorney-General, a woman is in law a chattel, and the question of the rights of the heir is justiciable by a Native Tribunal which hitherto would not have hesitated to make an order and see that it was carried out. Any such decisions are reviewable, and most, if not all, D.C.'s would undoubtedly quash any such order as repugnant to natural justice and morality. But there may be some interval before the matter came to the notice of the District Commissioner, in which case the order would ^{ought} ~~as~~ doubt have actually been enforced in the interval.

Since the passing of this Ordinance a circular has been issued with a view to Native Tribunals being warned not to make such orders in the future, but even if such a tribunal were disposed to do so the District Commissioner would be bound to quash it if made, and the possibility of ^{early} ~~early~~ intervention would be much greater. D

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1a
NOTE

I have consulted Mr. MacGregor as regards the last paragraph of Mr. Howard's minute. As pointed out in the report of the Acting Attorney-General, a woman is in law a chattel, and the question of the rights of the heir is justiciable by a Native Tribunal which hitherto would not have hesitated to make an order and see that it was carried out. Any such decisions are reviewable, and most, if not all, D.C.'s would undoubtedly quash any such order as repugnant to natural justice and morality. But there may be some interval before the matter came to the notice of the District Commissioner, in which case the order ^{might} ~~would~~ ~~no doubt~~ have actually been enforced in the interval.

Since the passing of this Ordinance a circular has been issued with a view to Native Tribunals being warned ~~not~~ to make such orders in the future, but even if such a tribunal were disposed to do so the District Commissioner would be bound to quash it if made, and the possibility of ^{early} ~~early~~ intervention would be much greater.

No. 34



GOVERNMENT HOUSE,
NAIROBI,
KENYA

20th January 1932.

GCL

Sir,

I have the honour to forward herewith two authenticated and twelve printed copies of an Ordinance intitled "The Native Christian Marriage and Divorce Ordinance, 1931" which duly passed its third reading in the Legislative Council on the 3rd December 1931, and to which I assented in His Majesty's name on the 17th December 1931, together with a copy of the Legal Report by the Attorney General. In paragraphs 5, 6 and 7 of this Report the question of maintenance, as requested in your telegram No. 10 of 12th January 1932, is fully discussed.

2. This Ordinance has turned the subject of previous ~~reference~~, existence terminating with my ~~resignation~~ No. 394 of the 31st December last.

I have the honour to be,

31.

Your most obedient, humble servant,

~~BULGARIAN-GENERAL.~~

G O V E R N O R.

THE RIGHT HONOURABLE

THE RIGHT HONOURABLE
MAJOR SIR PHILIP COWLISS-LISTER, P.C., G.B.E., M.C., M.P.,
SECRETARY OF STATE FOR THE COLONIES,
DOWRY STREET,
LONDON, S. W. 1.

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[illegible]

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4. Clause C deals with the difficulty mentioned above. It provides for a ceremony of Christian marriage between parties who are already married in accordance with the law and custom which were in force at the time of their marriage of native law and custom and who are not bound by the parties to that marriage out of which the marriage of the Christian faith.

The purpose of this clause is to provide that a native woman who is married to a Christian man and who is not bound by the parties to that marriage out of which the marriage of the Christian faith is entered into, shall be entitled to the same rights and privileges as a Christian woman who is married to a Christian man. The Supreme Court have said that a native woman never attains her majority, that she is to be treated as a child, and that she is to be treated as a child in her husband's house, and that she is to be treated as a child in her husband's house. The reason for this is that she is to be treated as a child in her husband's house, and that she is to be treated as a child in her husband's house. This clause is, therefore, in the interests of the offspring of these Christian marriages, and in the interests of the influence which they have on the native population. At the present moment if a native woman who is a Christian and who is a party to a Christian marriage is left a widow, the children will be inherited by her relatives, and will be under the influence of her relatives, and will be removed from the Christian influence and will not have the same chance of continuing to live a Christian life.

The provision as to maintenance in clause 10 (1), to which the Secretary of State refers in his telegram No. 10 of the 12th January, is intended to ensure so far as possible that a Christian widow shall not be left destitute on the death of her husband by reason of her majority conferred

upon her by this Bill.

12/16/31
As was explained in the Governor's Despatch No. 260 of the 8th May, 1931, it is a general rule among the native tribes of Kenya that a widow is inherited together with the rest of her late husband's property by his next-of-kin, and by native law and custom she has little or no voice in the disposal of her person. The section under consideration removes from the next-of-kin the power to dispose of the widow's person and it is probable that in many cases the next-of-kin might argue that as he had been deprived of what were his rights under native law and custom he was also relieved of his obligations under that same law and custom. The provision to which the Secretary of State refers is intended to meet any such argument. The retention of the obligation to maintain the widow is believed to be a reasonable one in consideration of the inheritance of the deceased's property.

It is realised that this section involves a definite departure from native law and custom which could be justified only by the fact that such law and custom in this particular matter is opposed to morality and humanity to an extent which is intolerable, and it is not expected that this particular provision will operate without difficulty in all cases. It is believed, however, that these difficulties will lessen in the course of time.

The nature and extent to which a widow has a right under native law and custom to maintenance for herself and her children from her husband's heir varies among different tribes and in different conditions of widowhood. In framing the law, therefore, it was not possible to be more exact as to the nature of the support to which she is to remain entitled, and all that was possible

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to do was to ensure that in this respect her position would not suffer by reason of her having embraced Christianity and having obtained the right to the disposal of her own person. Disputes as to the nature and extent of maintenance to which a Christian widow will be entitled under this Ordinance will be determined on their merits and in accordance with the customs of the tribe to which her deceased husband belonged.

6. Clause 11 follows from the provisions of the first nine clauses. The native and indigenous system of marriage has for many years been in vogue in the Colony in the case of natives and when it comes to the dissolution of those marriages there is no means open except recourse to the Supreme Court. It is now provided here that marriages celebrated under the Native Christian Marriages Ordinance, which is repealed by this Bill or which have since then been dissolved by a magistrate of the district.

7. In my opinion His Excellency the Governor may properly assent to this Bill in the name and on behalf of His Majesty.

T. D. H. Munn.

Mairori.

ACTING ATTORNEY GENERAL.

16th December, 1911.

No. LI.

1931.



Colony and Protectorate of Kenya.

IN THE TWENTY SECOND YEAR OF THE REIGN OF
HIS MAJESTY KING GEORGE V.
JOSEPH ALOYSIUS STONE K.C.M.G., K.B.E., C.B.,
Governor

Assented to by His Majesty
this 17th day of December
1931

J. BYRNE.
Governor

AN ORDINANCE TO PROVIDE FOR THE
MARRIAGE OF NATIVE CHRISTIANS AND
FOR THE DISSOLUTION OF SUCH
MARRIAGES

14

No. 51 of 1931.

An Ordinance to Provide for the Marriage of Native Christians and for the Dissolution of such Marriages.

ENACTED by the Governor of the Colony of Kenya, with the advice and consent of the Legislative Council thereof, as follows:—

1. This Ordinance may be cited as the Native Short title.
Christian Marriage and Divorce Ordinance, 1931."
2. This Ordinance shall apply only to the marriage of Application.
natives one or both of whom profess the Christian religion and to the dissolution of such marriages. Nothing herein contained shall prevent any native marrying under the provisions of the Marriage Ordinance, but if one or both parties to a marriage under this Ordinance are natives professing the Christian religion the provisions of this Ordinance relating to dissolution of marriage shall apply to such marriage as if it were a marriage under this Ordinance. Cap. 167.
3. Except as otherwise provided in this Ordinance the Saving.
provisions of the Marriage Ordinance shall apply to all marriages celebrated under this Ordinance. Cap. 167.
4. The formalities preliminary to marriage, established, Formalities.
usual, or customary for native Christians in the denomination to which one or both of the parties belong, shall apply to marriages under this Ordinance, and sections 7 to 18 inclusive of the Marriage Ordinance shall not apply, but no minister shall celebrate any marriage under this Ordinance unless he considers that adequate notice has been given of the intended marriage. Cap. 167.
5. Where the consent of any person to the intended marriage is necessary, the minister to celebrate the intended marriage shall be deemed to be a registrar of marriages for the purpose of such consent; and if there be no parent or

guardian in any particular case capable of consenting, then such minister upon being satisfied after due inquiry that the marriage is a proper one may consent in writing to such marriage. If any person whose consent is required refuses his consent, a Provincial Commissioner may, on application being made, consent to the marriage, and the consent of the Provincial Commissioner so given shall have the same effect as if it had been given by the person whose consent is so refused.

Marriages may be contracted before registrar.

6. Whenever any persons already married or purporting to be married to each other by native law and custom desire to convert that marriage into a marriage by which they are legally bound to each other as man and wife so long as both shall live they may, subject to the provisions of sections 4 and 5 of this Ordinance, contract a marriage before a registrar in the presence of two witnesses in his office, with open doors, between the hours of 8 o'clock in the forenoon and 6 o'clock in the afternoon and in the following manner:—

Form to be observed.

The registrar shall, either directly or through an interpreter, address the parties thus:—

"Do I understand that you, A.B., and you, C.D., have been heretofore married to each other by native law or custom, and that you come here for the purpose of binding yourselves legally to each other as man and wife so long as both of you shall live?"

If the parties answer in the affirmative he shall proceed thus:—

"Whereas you, A.B., and you, C.D., profess that you have been heretofore married to each other by native law or custom and whereas that marriage does not bind you by law to each other as man and wife so long as both of you shall live, and whereas you desire to bind yourselves legally each to the other as man and wife so long as both of you shall live, and that by the public taking of each other as man and wife so long as both of you shall live, in my presence and in the presence of the persons now here, and by the subsequent attestation thereof by signing your names to that effect, you become legally bound to each other as man and wife so long as both of you shall live although no other rite of a civil or religious nature shall now take place, and that hereafter your marriage cannot be dissolved during your lifetime, except by a valid judgment of divorce; and if either of you before

the death of the other shall illegally contract another marriage while your marriage to each other remains undissolved, you will be thereby guilty of bigamy, and liable to punishment for that offence."

Each of the parties shall then say to the other:—

"I call upon all persons here present to witness that I, A.B., do take thee, C.D., to be my lawful wife (or husband) so long as both of us shall live."

7. The Governor may prescribe the forms of marriage certificates for marriages celebrated under this Ordinance. Marriage certificate.

8. For the purposes of this Ordinance the Governor shall appoint ministers to be registrars, and they shall be deemed to be registrars of marriages within the meaning of the Marriage Ordinance, except that it shall not be necessary for them to transmit to the Registrar-General a certified copy of the entries made by them in any marriage register book more than once in three months. Ministers to be registrars. Cap. 107.

9. Notwithstanding anything contained in the Marriage Ordinance there shall be chargeable in respect of marriages under this Ordinance the fees set out in the Schedule hereof. Cap. 107.

10. (1) Any native woman married in accordance with the provisions of this Ordinance or of the Marriage Ordinance or of the Native Christian Marriage Ordinance, whether before or after the commencement of this Ordinance, shall be deemed to have attained her majority on widowhood and shall not be bound to cohabit with the brother or any other relative of her deceased husband or any other person or to be at the disposal of such brother or other relative or other person, but she shall have the same right to support for herself and her children of such marriage from such brother or other relative as she would have had if she had not been married as aforesaid. Cap. 107.

(2) Any such woman shall upon the death of her husband become the guardian of any children of this marriage and shall, so long as she remains a Christian, continue to be the guardian of such children until such children, if males, attain the age of sixteen years, or, if females, attain the age of sixteen years or marry, and shall be competent to dispose of such children in marriage, but in such event the customary bride price shall on demand be paid to such person as is entitled thereto by native law and custom. Cap. 107.

No. LI

Native Christian Marriage and Divorce 1981

Jurisdiction
of subordinate
courts of first
class.
Cap. 168.
Cap. 170.

11. Subordinate courts of the first class shall have the same jurisdiction, in the case of marriages solemnized or contracted under the provisions of this Ordinance, or of the Native Christian Marriage Ordinance, as is vested in the Supreme Court by virtue of the Divorce Ordinance.

Appeals.

12. An appeal shall lie from the decrees or from any part of the decrees, and from the orders of subordinate courts under the last preceding section of the Supreme Court.

Repeal.

13. The Native Christian Marriage Ordinance (Chapter 168 of the Revised Edition) is hereby repealed.

SCHEDULE.

For registering a marriage, including certificate ... Sh. 2.
For certifying an extract from the register ... Sh. 2.

Passed in the Legislative Council the third day of December, in the year of Our Lord one thousand nine hundred and thirty-one.

This printed impression has been carefully compared by me with the Bill which passed the Legislative Council and is presented for authentication and assent as a true and correct copy of the said Bill.

H. E. BADER

Acting Clerk of the Legislative Council.