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THE
LAWS OF SOUTH AFRICA
AFFECTING
WOMEN AND CHILDREN

BY

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TO THE MEMORY OF MY FATHER,
ABEL NEWMARK,
THIS BOOK IS LOVINGLY INSCRIBED.

FOREWORD.

Mrs. Geffen has kindly invited me to write a short preface to her work, and it is a pleasure to respond to the invitation. She is the first woman to have been called to the Bar in South Africa, and it is altogether appropriate that she should have devoted herself to the production of a work dealing with the law as it specially affects women and children in this country. This book will, I believe, apart from its professional value, prove of practical value to women. Hitherto they have been left to grope in the dark regarding their rights, and there are very many men who have the haziest notions about the law dealing with marital relations, the contractual rights of women, and responsibilities in relation to children.

The author, while supporting her statements of the law by adequate reference to authorities, has wisely embodied them in plain, simple language, so that any attentive reader may readily understand their purport. If the book is to be regarded as an introductory *hors d'oeuvre*, it will be by no means caviare to the general.

More than thirty years ago legal friends of mine published, in England, a work written in a somewhat satirical and cynical vein, entitled "The Legal Subjection of Men." They must have feared that their book might not commend itself

to those most interested in the subject, for they preferred to veil themselves in a decent guise of anonymity. At that period, many old-fashioned persons were alarmed at what was denominated "the rising tide of femininity"—a word still omitted from some dictionaries. Even "suffragette," since regarded in many quarters as a title of honour, had not been invented. The thesis of the writers in question was an admission that sex-injustice and sex-inequality existed, but "the facts show the said injustice and inequality to exist *wholly and solely* in favour of women as against men." This was a purely rhetorical and exaggerated statement. At that date, little more than a dozen years had elapsed since a woman, in England, had acquired contractual rights and the control of her own property. The position, as Mrs. Geffen shows, was much more advanced under Roman-Dutch Law. Nearly all the professions, too, were barred to women. Since that day, we have seen not only women doctors, but women advocates, women architects, women directors, and, as if women were not sufficiently skilled in dialectics, women preachers as well. England has advanced beyond South Africa in conferring the franchise on women; and it has been accepted as a principle of Government policy that it will be still further extended to them on the same terms as it is enjoyed (?) by men. In several countries women already possess the same voting rights as men. But the general mass of legislation affecting women which has been enacted during the last thirty years is testimony in itself that there was much to remedy, and that medieval conceptions of the position of women under the law were disappearing.

Still more important was the growth of a public conscience in regard to the care and treatment of children. It is unfortunately only too true that in many cases the dictates of natural affection have had to be replaced by the strong arm of the law. We shudder at the accounts of the exposition of children in Greek and Roman days, but the tales of fiendish cruelty which the records of modern police courts reveal indicate that there is still much room for improvement in human conduct. At the same time, much has been done of recent years. We have only to contrast the legal protection of children to-day with the position less than a hundred years ago, when Lord Shaftesbury and other humanitarians began their efforts on behalf of poor and ill-treated children.

Mrs. Geffen takes a generally favourable view of the law regarding women as it exists in South Africa at the present time. I am not sure, however, that it might not be improved in certain respects. A glaring instance which occurs to me is that, under the law as it stands, a woman cannot claim any share of her husband's property if he dies intestate, that is, without leaving a will. I have known several cases of hardship on this account.

Readers will find much in this work to enlighten and to guide them.

MANFRED NATHAN.

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LIST OF ABBREVIATIONS.

- A.C.*—*Appeal Cases (Privy Council).*
A.D.—*Appellate Division Reports.*
B.A.C.—*Buchanan's Appeal Court Reports (Cape of Good Hope and South Africa).*
Buch.—*Buchanan's Supreme Court Reports (Cape).*
(C).—*Affixed to Enactments of the Cape of Good Hope.*
C.L.J.—*Cape Law Journal.*
C.P.D.—*Cape Provincial Division Reports.*
C.T.R.—*Cape Times Reports.*
E.D.C.—*Eastern Districts Court Reports (Cape).*
E.D.L.—*Eastern Districts Local Division Reports.*
Food.—*Food's Supreme Court Reports (Cape).*
Grotius.—*Hugo Grotius: Introduction to Dutch Jurisprudence (Maas-dorp's Translation).*
K.B.D.—*Law Reports (King's Bench Division).*
Kotze—*Kotze's Transvaal High Court Reports.*
M.—*Menzies' Supreme Court Reports (Cape).*
(N)—*Affixed to Enactments of Natal.*
N.L.R.—*Natal Supreme Court Reports.*
N.P.D.—*Natal Provincial Division Reports.*
(O.F.S.)—*Affixed to Enactments of the Orange Free State.*
Off. Rep.—*Official Reports of the High Court of the South African Republic.*
O.P.D.—*Orange Free State Provincial Division Reports.*
P.H.—*Prentice Hall Weekly Legal Service.*
Roscoe—*Roscoe's Supreme Court Reports (Cape).*
S.A.R.—*Reports of the High Court of the South African Republic.*
S.C.—*Supreme Court Reports (Cape).*
S.R.—*Reports of the High Court of Southern Rhodesia.*
Searle—*Searle's Supreme Court Reports (Cape).*
(T)—*Affixed to Enactments of the Transvaal.*
T.H.—*Transvaal Witwatersrand High Court Reports.*
T.P.D.—*Transvaal Provincial Division Reports.*
T.S.—*Transvaal Supreme Court Reports.*
Van der Keessel—*D. G. Van der Keessel: Theses Selectae.*
Voet—*J. Voet's Commentarius ad Pandectas.*
W.L.D.—*Witwatersrand Local Division Reports.*

INTRODUCTION.

Throughout the Union of South Africa, Bechuanaland, Basutoland, Swaziland, Southern Rhodesia and the Mandated Territory of South West Africa, there prevails the system of law known as Roman-Dutch Law. It is only in the light of the history of South Africa, from the time of the settlement of the Cape of Good Hope in 1652 by the Dutch, to the establishment of union between the Cape Colony, the Orange Free State, the South African Republic or Transvaal, and Natal on May 31st, 1910, that this law, as it prevails in South Africa, can be understood. The only other part of the world where the principles of Roman-Dutch Law are now followed, is Ceylon, and for the same historical reason. It, too, was originally a Dutch colony, and naturally followed Dutch principles of law.

HISTORY AND SOURCES OF CAPE LAW.

In 1602 the great trading Dutch East India Company received its charter from the States-General of the United Netherlands, and established its seat of government in Batavia, in the island of Java. The charter made provision amongst other things for the establishment of courts of justice by the Company. Such courts were established at the Cape of Good Hope, and they accepted as the common law for that settlement the common law of the Province of Holland. The Cape was taken from the Dutch by the British

in 1795, given back in 1803, and in 1806 the Cape finally capitulated to the British, and the title of Great Britain to it was confirmed by the Treaty of London of 1814.

In accordance with its invariable constitutional practice, the British Government made no attempt to alter the laws and institutions in force in the conquered territory, so that the common law of the Cape Colony (as it was now called) remained the same.

This common law consists, in brief, of the system of law prevailing in Holland up to the end of the eighteenth century, and expounded in the text books of the great Dutch jurists of the golden period of Dutch jurisprudence. Chief among these were Grotius (1583 to 1645), Van Leeuwen (1625 to 1682), and Johannes Voet (1647 to 1713); while the last of its great exponents were Van der Keessel (1738 to 1816) and van der Linden (1756 to 1835). It was Van Leeuwen who gave this law its name of Roman-Dutch law.

The elements which combined to constitute this system of law were Roman law, the laws of Holland founded on old Germanic customs, the legislation of the towns (which were virtually small republics), the various legislative enactments of the Netherlands, and certain principles of the Canon Law.

After the French Revolution, the revolutionary party in Holland came into power, and in 1795 there occurred the Dutch Revolution. The Stad-

houder, William V, fled to England, and the Dutch welcomed the French. Holland then fell under the rule of the French, becoming eventually an integral part of Napoleon's Empire. The Code Napoleon was substituted for the former law of Holland, and van der Linden discontinued a work on Roman-Dutch law on which he was engaged in order to expound the new law. It is the law of Holland before the adoption of the Code Napoleon that constitutes the common law of the Cape of Good Hope and of other parts of South Africa.

At the time of the British occupation of the Cape, the law used in the courts of that Colony was to be found in the Roman-Dutch law of the text books, the Groot Placaat Boek (which contained much of the statute law of the Netherlands), the Statutes of Batavia, and the Cape local statutes.

Although the law of the Cape remained the same after its capitulation in 1806, British influence was at once felt, and there was a gradual attempt to bring the laws of the Cape into line with those of England. In 1827 what is known as the First Charter of Justice was promulgated, by which a Supreme Court was established. At the same time the old Dutch Raad van Justitie was abolished. The judges appointed within the first few decades after the Charter of Justice had been granted had been trained for the English, Scottish and Irish Bars. Naturally they decided largely according to the law they were best versed in. Further, instructions were given that the judges, in transmitting to the Governor drafts of proposed amendments of the civil and criminal laws, should make it their

constant aim to adhere as far as practicable to the spirit of the law of England. One of the regions wherein English influence was first manifested was in the law of criminal procedure and evidence, and in the introduction of trial by jury. This influence was early felt too in the laws relating to merchant shipping and insurance, and, in brief, whenever it was necessary to introduce a law referring to purely modern institutions, the English law on the subject was consulted as a model.

For these reasons, and also because of its archaic character in certain respects, and because its principles were not as well known to practitioners as those of English law, being much more difficult of access, the Roman-Dutch law could scarcely compete at the Cape with English law during the first half-century of English rule. The late Lord de Villiers, however, who was Chief Justice of the Cape from 1874, and later Chief Justice of the Union until his death in 1914, was largely instrumental in securing the definite reinstatement of the principles of the Roman-Dutch law. The bias in favour of the principles of English law became weaker. Where in earlier days it might have been sufficient to quote English cases and take it for granted that the Roman-Dutch principles would coincide with the English ones, it now became necessary wherever possible to find and apply the Roman-Dutch principle. English decisions are now followed, when they are followed, because they are reasonable. They are not authoritative in South Africa. American cases too, are quoted

INTRODUCTION

on occasion, and decisions on the Scottish common law are also used in argument, because that law is in certain respects akin to the Roman-Dutch law.

THE LAWS ELSEWHERE THAN IN THE CAPE.

Natal was annexed to the Cape by Letters Patent in 1844, and was constituted a separate colony by Royal Charter in 1856. The Supreme Court Act of Natal affirms that the Roman-Dutch law as accepted and administered by the legal tribunals of the Cape Colony up to the 27th August, 1845 (when an ordinance was passed establishing the Roman-Dutch law in the Colony of Natal) as modified by the laws passed in Natal by the Governor or Legislature is the common law of Natal [*Act 39 of 1896 (N), Sec. 21*]. British influences were predominant in Natal, and a very strong bias in favour of English law shows itself in its statute law, which is sometimes out of line with the general trend of legal development in South Africa. To take one example only, the law of Natal differs in several respects from that of the other Provinces with regard to marriage contracts.

In the Boer Republics of the Transvaal and Orange Free State, the Roman-Dutch law also obtained. The amended constitution of 1898 of the Orange Free State affirms that the Roman-Dutch law is the accepted law of that State in so far as it was found in force in the Cape Colony at the time of the appointment of the English judges in place of the previously existing Council of Justice. Similar provisions were made in the Transvaal

by a Volksraad Resolution of 1859. English influences were felt in these Republics also, particularly in the Transvaal, and the decisions of the Supreme Court of the Cape of Good Hope were considered of almost as great authority there as in the Cape. At the end of the Boer War (1899 to 1902), upon the annexation of these Republics to the British Crown, their legal systems were still more assimilated to the Cape system by the passing of statutes similar to those in force at the Cape. At the same time the decisions of their courts assumed an increased importance.

In Zululand, which became part of Natal in 1897, the law of Natal, with some reservations, obtains. In Basutoland the law to be administered, save between natives, is the Cape law as it existed in 1884. A similar provision was made with regard to Bechuanaland in 1909, and in Swaziland the Roman-Dutch law was in 1907 proclaimed to be the law in force. In Southern Rhodesia, which is independent of the Union and a British Colony with responsible government, the law of the Cape Colony as it existed in June, 1891, applies, save in so far as it has since been modified by enactments referring to Rhodesia [*Order-in-Council of Oct. 20th, 1898*]. In the Protectorate of South West Africa, for which a Mandate was given to the Union of South Africa by the Council of the League of Nations, in pursuance of Article 22 of the Treaty of Versailles, the common law is the Roman-Dutch law as it existed in the Cape Province on the 1st January, 1920 [*Proc. 21 of 1919 of the Administrator of the Protectorate*].

LEGAL SYSTEM OF THE UNION OF SOUTH AFRICA.

By virtue of the provisions of the Act of Union, or South Africa Act, 1909 (which is an Act of the Imperial Parliament of Great Britain), there is now one Supreme Court for the Union of South Africa, and the former Supreme or High Court of each colony is a Provincial Division thereof. All laws, however, which were in force in the respective colonies at the date of Union continue of force therein until repealed or amended by Parliament. Of chief importance is the Appellate Division of the Supreme Court, whose judgments are binding on all other Divisions. Appeals lie to this Court from the Provincial and Local Divisions of the Supreme Court, the Native High Court of Natal, the High Court of Southern Rhodesia, and the High Court of South West Africa. It is the ultimate court of appeal in the Union, for by the South Africa Act an appeal as a matter of course to the King-in-Council, *i.e.*, to the Judicial Committee of the Privy Council, is excluded. It is still possible, however, for the King-in-Council to grant special leave to appeal from a decision of the Appellate Division, but from recent cases it is evident that leave will generally be refused, save in matters of grave constitutional concern. Thus the decisions of the Appellate Division define the law for the whole of British South Africa south of the Zambesi, and for what was formerly German South West Africa.

The Union Parliament is the supreme legislative authority in the Union of South Africa, and practically has sovereign power; for although it is

possible for the Governor-General of the Union to refuse to assent to a bill passed by both Houses, it is highly improbable that he would do so. Since the Union is a real union, and not merely a confederation of States, each constituent colony is now but a province with very curtailed powers, for it can legislate only on certain matters specified in the South Africa Act, and on subjects in respect of which Parliament delegates to it the power of making ordinances.

The matters on which the provinces are given authority to legislate are: the raising of provincial revenues; the borrowing of money on the sole credit of the province; education other than higher (though only temporarily); agriculture, within defined limits; hospitals and charitable institutions; municipal and local institutions having functions in any area in respect of the local government of or the preservation of health in the area; local works other than railways and harbours, until they are declared national works by Parliament; roads, etc.; markets and pounds; fish and game preservation; punishments to enforce provincial laws; and generally all matters of a merely local nature in the province [*S. A. Act, Sec. 85, as amended by Act 1 of 1926*].

In addition to Acts of Parliament and Provincial Ordinances, and the Bye-Laws passed by subordinate legislative bodies, account must be taken of Proclamations, Regulations and Orders issued by the Governor-General or Ministers of the Crown by virtue of authority given in Acts of Parliament.

STATUS OF WOMEN.

In order to understand the position of women under the law of South Africa it is necessary to refer to the sources of that law: Roman rules, ancient Germanic customs, and enactments passed from time to time in accordance with the changing ideas of different eras.

In the early days of the Roman Law, women were always under tutelage, no matter what their status, single, married or widowed. The head of a family had extensive powers over his children and all his household, including even the right to put them to death, although this latter power was modified in very ancient times. A son on the death of his father, if the father were the head of the family, gained full independence, but a daughter came under the guardianship of her nearest male relative. On marriage, a woman fell under the power of her husband, and became a member of his family.

During the first centuries of the Christian era, the statutory guardianship of male relatives was abolished, and a woman could appoint a tutor selected by herself to assist her in her transactions, in place of the one formerly appointed for her. This tutor was expected to comply with her wishes, and his co-operation was therefore a mere matter of form. Further, a wife no longer became a member of her husband's family, and the husband's unlimited power over his wife and her property disappeared. During the same period a law was passed making release from tutelage a

reward to wives who bore children. Finally, by the time of the reign of the Emperor Diocletian, the tutelage of women totally disappeared. Husbands and wives had their separate estates (the common establishment being maintained by the husband with the assistance of the wife's dowry), and a woman could enter into valid transactions without her husband's consent. The ease with which divorces could be obtained by both men and women is a matter of notoriety.

There is no trace in Roman history of a law of primogeniture, and from earliest times unmarried daughters succeeded with their brothers to their father's inheritance. During the time of the Emperor Justinian (527 to 565 A.D.) women were given an equal standing with men under the law of succession, for the rules of inheritance were based by that Emperor solely on the basis of blood relationship, whether through males or females.

By the time the Roman Law had reached its full development, women were completely emancipated and independent.

The Roman-Dutch law, as far as marriage is concerned, does not find its inspiration in the Roman principles, but in the customs of the Franks, Saxons, Frisians and other Germanic races who occupied the Netherlands during the first centuries of the Christian era. In these military communities full privileges were reserved for the defenders of the clan, and just as many hundreds of years earlier in Rome, women were always under tutelage. An unmarried woman was under the guar-

dianship of her father, or failing him, of some other male relative; a married woman under that of her husband; a widow with her children under that of her nearest male ascendant.

Certain laws of the Netherlands passed in the fourteenth and fifteenth centuries show that women were still at that time under tutelage, though later in some places women of full age, just as in ancient Roman days, could choose their own guardians. The functions of the guardian were to assist the woman in Court, give consent to her dealings with her property, and generally to exercise the functions of the guardian of a minor. By the seventeenth century, however, these laws had fallen into disuse, and unmarried women and widows could lawfully act for themselves. With regard to married women, however, the principle of tutelage prevails to the present day in South Africa, so that a married woman is deemed to be under her husband's guardianship and cannot transact any business or appear in court without her husband's assistance, unless before the marriage is celebrated the husband's power is excluded by an antenuptial contract.

Further, women in South Africa do not yet possess the right to become members of nor to vote for the election of members of Parliament, though they are taxed.

Except in these two important respects women are in a favourable position under South African law. All children, male and female alike, succeed to their parents in equal shares. Divorce is granted

to women on the same grounds as to men. This is no innovation but forms part of the Roman-Dutch law. Numerous statutes aim at the suppression of immorality, and provide for the maintenance of a high standard of social life in South Africa. Although South Africa is not yet one of the great industrial countries of the world, statutory provisions exist for the preservation of the health of women in industry and other employment. In brief, though reforms mainly in the direction of the franchise are required, South Africa ranks with the most advanced European countries in the position and protection which the law accords to its women.

CHAPTER ONE.

NATIONALITY OF WOMEN AND CHILDREN.

The Union of South Africa is one member of the group of nations constituting the British Commonwealth of Nations, and its nationals are British subjects. At the same time it has an independent national status, and its nationals are distinguished from the nationals of the United Kingdom, Canada, or the other members of the British Commonwealth of Nations. No person can be a Union national without at the same time being a British subject, but every British subject within the Union is not necessarily a national of the Union. Two Union statutes regulate this dual status of the nationals of the Union, viz., the British Nationality in the Union and Naturalisation and Status of Aliens Act, No. 18 of 1926, and the Union Nationality and Flags Act, No. 40 of 1927. The latter Act comes into operation on May 31st, 1928. For the purposes of both these Acts the Union includes the mandated territory of South West Africa.

STATUS AS BRITISH SUBJECTS.

Act No. 18 of 1926 (to which the sections below refer) defines who are to be deemed British subjects within the Union and makes provision as to the naturalisation of aliens. It adopts, subject to certain modifications, Part II. of the British Nationality and Status of Aliens Act of 1914, of the United Kingdom [4 and 5 Geo. V., Ch. 17] as amended by the Act of 1918 [8 and 9 Geo. V., Ch. 38] and the Act of 1922 [12 and 13 Geo. V., Ch. 44], in pursuance of an Empire-wide endeavour to introduce uniformity into the law affecting British nationality and the conditions of naturalisation.

Unmarried women are, as regards their nationality, in the same position as men.

Married Women.—The wife of a British subject is in the Union deemed to be a British subject, and the wife of an alien, an alien [Sec. 12]. Where, however, a man ceases during marriage to be a British subject, his wife may make a declaration that she desires to retain her British nationality, and thereupon she is deemed in the Union to remain a British subject [*ibid.*].

Where an alien is the subject of a State at war with His Majesty, his wife, if she was a British subject prior to her marriage to such alien, may make a declaration that she desires to resume British nationality; and the Minister, if satisfied that it is desirable that she be permitted to do so, may grant her a certificate of naturalisation for any

period he deems desirable, and may extend that period on its termination [*ibid.*]. Except in this case, a married woman may not be granted a certificate of naturalisation [*Secs. 5 (3) and 30 (1)*].

Widows and Divorced Women.—A woman who was a British subject and has by her marriage become an alien, does not by reason only of the death of her husband or the dissolution of her marriage cease to be an alien; nor does a woman who by her marriage has become a British subject cease for the same reason to be a British subject [*Sec. 13*].

In the case of a woman who was a British subject previous to her marriage to an alien, and whose husband has died or whose marriage has been dissolved, the usual requirements as to residence do not apply on her making an application for naturalisation [*Sec. 2 (5)*].

Family of Person whose Certificate is Revoked.
—In the case of a person whose certificate of naturalisation has been revoked, the Minister may by order direct that his wife and minor children (or any of them) shall cease to be British subjects; but unless he so directs their nationality is not affected by the revocation, and they remain British subjects. It is provided, however, that the wife of such person within six months after the date of the order of revocation may make a declaration of alienage, and thereupon she and any minor children of her husband and herself cease to be British subjects and become aliens [*Sec. 8 (1) (a)*].

The Minister may not, however, on the revocation of a husband's certificate of naturalisation make an order directing that a wife who was at birth a British subject shall cease to be a British subject, unless he is satisfied that if she had held a certificate of naturalisation in her own right it could have been properly revoked. The provisions that exist for making enquiry into cases where it is proposed to revoke a certificate of naturalisation apply also to the making of any such order [*Sec. 8 (1) (b)*].

Minor Children of Persons becoming Aliens.—Where a British subject ceases to be such by declaration of alienage or otherwise every child of his under twenty-one years of age ceases to be a British subject, unless such child does not become by the law of any other country naturalised therein on that person ceasing to be a British subject [*Sec. 14 (1)*]. Any child who has so ceased to be a British subject may within one year after attaining the age of twenty-one years make a declaration that he wishes to resume British nationality and thereupon he again becomes a British subject [*Sec. 14 (2)*].

Where, however, a widow who is a British subject marries an alien, any child of hers by her former husband does not by reason only of her marriage cease to be a British subject, whether residing outside His Majesty's Dominions or not [*Sec. 14 (1)*].

Naturalisation of Minors.—Where an alien obtains a certificate of naturalisation the Minister may include in the certificate the name of any child

of the alien who is under twenty-one years of age, and that child, if not already a British subject, thereupon becomes one; but such child may within one year after attaining the age of twenty-one years make a declaration of alienage, in which case he ceases to be a British subject [*Sec. 5 (1)*].

Where the name of a child is included in a certificate of naturalisation granted to his parent, or where a child is deemed a naturalised British subject by reason of residence with his parent in pursuance of any prior law, such child for the purposes of the Act is deemed to be a person to whom a certificate of naturalisation has been granted [*Sec. 30 (2)*].

The Minister may in his absolute discretion in any special case grant a certificate of naturalisation to any person under twenty-one years of age whether or not the conditions required by the Act have been complied with [*Sec. 5 (2)*].

Except as above provided, a minor may not be granted a certificate of naturalisation [*Secs. 5 (3) and 30 (1)*].

STATUS AS UNION NATIONALS.

Act No. 40 of 1927, to which the sections below refer, defines Union nationality. The following persons are Union nationals:—

- (a) any person born in the Union who is not an alien or a prohibited immigrant;

- (b) any British subject who has lawfully entered the Union, and has been continuously domiciled therein for at least two years, so long as he retains such domicile;
- (c) any person domiciled in the Union who lawfully became a naturalised British subject in any part thereof and who has for at least three years after entry into such part been continuously domiciled in the Union, so long as he retains such domicile and does not become an alien;
- (d) any person born outside the Union whose father was at the time a Union national or would have been such national if this Act had at that time been in force, and who was not in the service of an enemy State [*Sec. 1*].

Provisions also exist for the renunciation of Union nationality.

Unmarried women are, as regards their status as Union nationals, in the same position as men.

Married Women.—The same principles as determine a married woman's status as a British subject within the Union, determine her status as a Union national. Thus the wife of a Union national is deemed to be a Union national, and the wife of a person who is not a Union national is not deemed to be a Union national [*Sec. 2*]. If, however, a man ceases during marriage to be a Union national,

his wife may, after making the declaration mentioned earlier in this chapter that she desires to retain British nationality, make a further declaration that she desires to retain status as a Union national, and thereupon she is deemed to remain a Union national [*ibid.*].

Widows and Divorced Women.—A woman who was a Union national, but who has lost that nationality owing to her marriage, does not by reason only of the death of her husband or the dissolution of her marriage regain her Union nationality, nor does a woman who became a Union national by reason of her marriage cease to be a Union national by reason only of the death of her husband or the dissolution of her marriage [*Sec. 3*].

Children of Persons Renouncing Union Nationality.—Where a Union national ceases to be such by renunciation of his Union nationality or otherwise, every child of such person who is under twenty-one years of age ceases to be a Union national. Any such child may, however, within one year after attaining the age of twenty-one years, make a declaration that he wishes to resume status as a Union national, and thereupon he again acquires his Union nationality [*Sec. 4*].

Where a widow who is a Union national marries a person who is not a Union national, any child of hers by her former husband does not by reason only of her marriage cease to be a Union national (*ibid.*).

CHAPTER TWO.

ELECTORAL RIGHTS OF WOMEN.

Women are not yet completely enfranchised in South Africa. They may not become members of nor vote for the election of members of Parliament (which has sovereign power in South Africa) nor of Provincial Councils, which, although they have but a limited sphere of action, rank next to Parliament in order of importance as legislative bodies. The qualifications of voters for parliamentary elections are those which obtained in the several colonies at the time of the establishment of Union [*S. A. Act, Sec. 36*]. In none of the colonies were women enfranchised. Parliament is, however, at liberty to amend the law defining the qualifications necessary to a voter [*ibid., Sec. 43*]. Provincial Councillors are elected by the parliamentary voters of the province [*ibid., Sec. 70*]. Women have electoral rights in respect of subordinate legislative bodies, considered below, save in respect of Natal Local Administration and Health Boards, which exercise functions similar to those of Cape Divisional Councils in areas outside boroughs or local townships. Voters for and members of these Boards are required to have the qualifications of parliamentary voters [*Ord. 4 of 1926 (N), Sec. 11*].

CAPE DIVISIONAL COUNCILS.

In the Cape Province wide powers are exercised by Divisional Councils. Their authority extends to all matters generally affecting the preservation of health outside municipal or village areas. They are also empowered to make grants to schools and colleges within the area of their jurisdiction, to agricultural societies, and for other purposes. Their powers and duties further extend to the making of roads and dams; the upkeep of these and other works; the rating of immovable property; and the levying of rates.

Women are not eligible for election as Divisional Councillors [*Ord. 13 of 1917 (C), Sec. 41*]; and wider powers of voting are given to men than to women.

The qualifications of voters differ in the Cape Division and in the other Divisional areas of the Cape Province.

Voters in Cape Division.—In the Cape division

- (1) in a municipality which constitutes the whole or part of a Divisional Council district, the municipal voters' roll is the roll for the Divisional Council district or for that part of the district which comes within the Municipal area;
- (2) beyond the limits of a municipality, every one is entitled to be put on the voters' roll who is of full age and who

is the owner or occupier of immovable property within the district (but not in any municipality) which is liable to be rated by the council, and is of the value of not less than £75.

In the case of joint owners or occupiers, all are owners or occupiers and entitled to be placed on the voters' roll if the value is £75 in respect of each owner or occupier, although not more than three persons may be enrolled in respect of any one such property.

Where a husband and wife, however, are in occupation of any one property or portion thereof, the wife is not deemed a joint occupier [*Ord. 13 of 1917 (C), Sec. 25 (1)*].

Voters in Other Divisions.—In other divisions than the Cape, in the case of any municipality with more than 10,000 inhabitants, after resolution by the Council, the municipal roll is taken as the voters' roll for the Divisional Council district or portion thereof. In all other parts of a Divisional Council district, all persons of full age are entitled to be placed on the voters' roll if they are

- (1) liable for payment of Divisional Council rates as owners of immovable property in the district of the assessed value of not less than £50, or

- (2) occupiers, and have been in occupation for not less than 12 months previous to the date of the framing of the voters' roll, of immovable property in the district valued at not less than £100, or, if not so valued, in respect whereof the occupier is liable to pay rent or its equivalent in kind or service at the rate of not less than £24 per annum. If two or more persons of full age have been in joint occupation, if the value of the property is not less than £100 for each occupier, each is entitled to be enrolled as a voter [*Ord. 4 of 1926 (C), Sec. 2*].

Sons of full age (including stepsons and adopted sons) who have been in joint occupation for 12 months with their father or mother who is the owner of any immovable property in the district are entitled to vote if the value of the property is not less than £100 for each such son. If the value does not entitle all to vote, so many may be voters as are entitled by the value, in order of precedence of age.

No corresponding provision exists giving voting powers on similar terms to daughters of full age.

No female is entitled to be placed on the voters' roll as owner or occupier unless the property giving title to vote be registered in her name, or she be personally responsible for the rent; but where a wife is registered as the owner of property of the value of £150 or more, and she and her husband

are in occupation thereof, the husband is deemed to be an occupier (and as such entitled to be placed on the voters' roll) [*ibid.*]. A husband, therefore, has much more extended powers of voting than his wife has.

TOWN COUNCILS.

Women are entitled to vote for and to become members of Town Councils on the same terms and conditions as men.

Cape.—Every person of full age (who is not disqualified) who has been resident in the municipality for six months and who is the owner or occupier of any immovable property therein is entitled to be enrolled on the voters' roll. "Immovable property" means property liable to be rated at the assessed value of not less than £100 in respect of owners and not less than £200 in respect of occupiers. When any immovable property is jointly occupied by husband and wife, one of whom is the owner thereof, the other is deemed the occupier [*Ord. 22 of 1925 (C), Secs. 4 and 7*].

Every person of full age qualified to vote for the election of Town Councillors, and who owns or occupies property within the municipality to the assessed value of £300, is eligible for election as a councillor [*Ord. 10 of 1912 (C), Sec. 44*].

Transvaal.—Every white person, male or female, of the age of twenty-one years or upwards, being a British subject who has resided in the municipality for six months immediately preceding

the notice that the voters' roll is lying open for inspection or his application to be registered on the voters' roll, may be enrolled as a voter [*Ord. 4 of 1927, (T) Sec. 8 (a)*]. Any person who is qualified in all respects save that of residence, and is the owner of rateable property within a municipality which he does not hold in undivided shares with other persons is entitled to be put on the voters' roll of the ward in which his property is situated. If he is registered in more than one ward he may elect in which ward he will vote [*ibid., Sec. 8 (b)*].

Among the persons not qualified to vote at an election of Town Councillors are white persons cohabiting with native or coloured persons [*ibid., Sec. 11 (2)*].

Any person, male or female, qualified to vote at the election of Town Councillors may be elected a Councillor [*ibid., Sec. 4*]. No person, however, who holds any office or place of profit under or in the gift or disposal of the Council, nor the spouse of such person may be elected or continue to be a Councillor [*ibid., Sec. 6*]. An exception to this rule is made in favour of medical practitioners and their spouses.

Natal.—The election of Town Councils is regulated in Natal by Ordinance 19 of 1924 (N) (to which the following sections refer). Every person male or female is entitled to be enrolled as a burgess, and to vote for the election of Councillors, (a) who is the owner of rateable property within any ward of the borough of the assessed value of £50, or who has occupied for a continuous period

of three months immediately prior to the first June in the current year, rateable property within any ward of a gross annual value of £10; and (b) who being a male is entitled to be registered as a Parliamentary voter, or being a female would be entitled to be so registered, save for her sex [*Sec. 13*].

A husband and wife may both be enrolled as burgesses in respect of the same property, if the assessed value or the gross annual value thereof is sufficient to qualify two persons as burgesses, otherwise the qualification extends only to the person in whose name the property is registered or by whom it is rented [*ibid.*].

Every person enrolled as a burgess is eligible to be elected a councillor [*Sec. 19*], unless such person's wife or husband is a councillor or holds any office or place of profit under or in the gift or disposal of the council [*Sec. 20*]. A councillor must vacate office until the next election if he or his wife is or becomes interested directly or through any partnership in any contract with the council, with the exception of certain classes of contracts [*Sec. 23*].

Orange Free State.—The election of Town Councils in the Orange Free State is regulated by Ordinance 11 of 1925 (O.F.S.), to which the sections below refer. Every householder (unless disqualified for some reason) is entitled to be enrolled on the voters' roll and to vote for the election of councillors [*Sec. 1*]. "Householder" means every person of full age, who (a) being resident in the municipality, is the registered owner

therein of immovable property assessed at not less than £25, or is the occupier of premises therein assessed at not less than £200; or is the occupier of any premises for the occupation of which he pays a rental of not less than £30 per annum, or (b) being resident outside the municipality owns immovable property within it valued at not less than £100 [*Sec. 256*].

Every householder who is enrolled on the voters' roll is eligible to be elected a councillor of a municipality [*Sec. 6*].

CAPE LOCAL BOARDS.

Any area in a Divisional Council district which does not come within the jurisdiction of a municipality or of a village management board may, if the density or character of the population, or sanitary or other conditions warrant it, be constituted a Local Board area.

Every person of full age who owns immovable property within the area may be enrolled as a voter by virtue of the same qualifications and on the same terms as voters for Cape Village Management Boards [*Ord. 11 of 1921 (C), Sec. 4*]. Women are not disqualified from membership of these Boards.

NATAL TOWN BOARDS.

Ordinance 11 of 1926 (N) provides that the Administrator may declare any area not included

in a borough to be a township. These townships are represented by Town Boards, replacing the previous Local Boards [*Sec. 10*].

The qualifications of voters are identical with those of the voters in a borough and with the same provisions as to husband and wife both being enrolled as voters in respect of the same property [*Sec. 11*]. In respect also of their membership of these Boards, spouses are in the position described above in the case of Natal Borough Councils [*Secs. 21 and 37*].

VILLAGE COUNCILS.

Women are entitled to vote for and become members of Village Councils on the same terms and conditions as men.

Cape.—Every person of full age is entitled to vote for the election of members of a Cape Village Management Board, who is the owner of immovable property within its area of the assessed value of £50 or more, in which case he has one vote; if the value be £500 or more, he has two votes; if it be £2,000 or more he has three votes. The occupier of immovable property of the assessed value of not less than £100 is also entitled to one vote, and so too is the occupier of any part of a property which itself is of that value. Not more than three persons may be voters in respect of the ownership of any one property. Where a property is jointly occupied by a husband and wife, one of whom is the owner thereof, the other is deemed to be the occupier [*Ord. 10 of 1921 (C), Sec. 7*].

Every person, male or female, qualified as a voter, who owns or occupies property within the area of the Board of the assessed value of £100 or more, is qualified for election as a member of a Village Management Board [*ibid.*, *Sec. 15*].

Transvaal.—The qualifications of voters for Transvaal Village Councils are the same as those necessary to voters for Transvaal Municipal Councils [*Ord. 4 of 1927 (T)*, *Sec. 3*].

Orange Free State.—In the Orange Free State all persons of full age resident within the area, who are occupiers of any land or premises for which a rental of not less than £20 per annum is paid, or who being resident within or outside the area, are the registered owners of immovable property within the area, are deemed to be householders and are qualified to vote at the election of Village Boards [*Ord. 11 of 1925 (O.F.S.)*, *Sec. 211*].

Any householder whose name appears on the list of voters may be nominated and elected as a member of the Village Management Board [*ibid.*, *Sec. 216*].

SCHOOL BOARDS.

Each province of the Union except Natal is divided into school districts. The School Board is the local body subordinate only to the Provincial Department of Education, which administers all school affairs within each such district. In addition to and subordinate to a School Board, many schools

have also School Committees. In Natal although schools in certain areas have annually elected advisory committees there are no school boards, the administration of school affairs being more directly controlled by the Education Department itself.

Cape.—In the Cape Province women may become members of school boards and vote at elections of members. In divisional council areas the divisional council voters' roll is the voters' roll for school board elections [*Ord. 5 of 1921 (C) Sec. 21*]. In magistraterial areas, that part of such roll as applies to a ward or wards coterminous with the magisterial area is the school board voters' roll. Where, however, no divisional council voters' roll exists in any school board area, the parliamentary voters' roll for that area is the school board voters' roll [*ibid.*]. In any municipal area that part of the divisional council voters' roll which applies to the area is the voters' roll for the school board [*ibid.*, *Sec. 22*].

It is specifically enacted that no person is disqualified from being a member of a school board by sex or by the fact that he is not a ratepayer or by the fact that he is a member of a school committee [*ibid.*, *Sec. 31*].

Transvaal.—In the Transvaal, although women are qualified to be members of school boards, no one being disqualified from membership on account of sex [*Act 25 of 1907 (T), Sec. 40*], there are difficulties in the way of their election, for—strange anomaly!—they are not qualified as voters at school board elections. The qualification

of voters is that of capacity to vote for Parliamentary elections [*ibid.*, *Sec. 41*].

Orange Free State.—In the Orange Free State women may be members of School Boards and vote at elections, which, however, are not conducted on the same system as in the other provinces. A school board consists of as many members as there are public schools in the district, not being more than nine [*Ord. 9 of 1920 (O.F.S.) Sec. 8*].

The members are elected by delegates nominated by the Committee of each public school in the district. Each Committee nominates three members as delegates. If there is no school committee the parents nominate three of their own number as delegates. Each delegate exercises one vote for each vacancy [*ibid.*, *Sec. 9*].

Any white person of full age is qualified to be appointed or elected a member of the school board of the district in which he resides, and no one is disqualified on account of sex [*ibid.*, *Sec. 10*].

CHAPTER THREE.

ESPOUSALS.

A promise to marry creates a binding obligation without the observance of any special formalities. All who are competent to marry may contract espousals, but a promise of marriage made by an unemancipated minor without the necessary consent of parents is wholly invalid [*Greeff v. Verreaux*, 1, M. 151]. As in every other contract it is necessary that both parties should consent thereto, and a girl cannot be betrothed without her consent. The parties must further both realise the nature of the contract they are entering into. The obligation created is to marry within a reasonable time, unless some condition is specified [*Voet* 23.1.12].

Formerly the courts had power to grant a decree of specific performance of marriage, and a person who broke his promise to marry might find himself ordered to enter on the marriage by decree of court, as the result of an action brought by the injured party. The action for specific performance of marriage has been abolished by the Marriage Statutes of the various colonies.

An action for damages for breach of promise still remains. Although agreements to marry admittedly arise from sentiment, the law recognises them as having a money value, and gives pecuniary redress to the injured party when the agreement is not fulfilled. The action for damages may be brought by persons of either sex. The plaintiff in the action is not entitled to succeed unless his or her testimony as to the promise of marriage is corroborated by some other evidence material to such promise [*Heunis v. Johnson* 1908 C.T.R.152; *Law 5 of 1870 (N)*, Sec. 2; and see *Ord. 11 of 1910 (O.F.S.)*, Sec. 62, and *Proc. 16 of 1902 (T)* Sec. 55].

GROUNDS FOR ACTION FOR DAMAGES.

A breach of promise is constituted by such behaviour as shows an intention to be no longer bound by the engagement to marry. Refusal to carry out the contract may be proved not only by words to that effect, but by the denial of the promise or the transference of courtship to another woman [*Triegaardt v. van der Vyver* 1910 E.D.L. 44]. By marrying another, a person disqualifies himself from fulfilling his agreement, so that he breaks his contract and may immediately be sued for damages. Further, if a married man makes a promise of marriage, the woman being unaware of his married state, he simultaneously commits a breach of his contract to marry which justifies the woman in bringing an action for damages [*Duncan v. Willson* 27 N.L.R. 624].

ESPOUSALS

A promise to marry one person does not disqualify the promissor from marrying another, so that it is no defence in an action for damages for breach of promise that either party is under a prior agreement to marry.

A promise to marry after divorcing wife or husband is not deemed binding in South African courts, as such bargaining offends public morality and is opposed to public policy. The ratification of such a promise, though made after the dissolution of the marriage, cannot be pleaded as a cause of action, since it is still the old promise that is the foundation of the claim [*Staples v. Marquard* 1919 C.P.D. 181]. For the same reasons, a promise to marry on the death of wife or husband would probably not be considered binding.

ASSESSMENT OF DAMAGES.

The elements that weigh in assessing damages are the monetary loss suffered by the plaintiff, the defendant's means, the social position of the parties, and the extent to which the plaintiff's feelings were wounded [*Radlof v. Ralph* 1917 E.D.L. 168].

The court does not readily award damages to a man for the refusal of a woman to marry him unless he can prove that damage has actually been sustained [*Descro v. Santich* 17 C.T.R. 165].

CAUSES JUSTIFYING WITHDRAWAL FROM CONTRACT.

Like every other contract an espousal may be terminated by mutual consent. One party may, however, recede from the contract with impunity, without the consent of the other, for any cause that impedes the objects of matrimony either wholly or in part, *e.g.*, if the other party suffers from some defect inconsistent with the consummation of the marriage, or from venereal disease or leprosy [*Voet 23.1.15*]. Unchastity on the part of either intended spouse whether prior or subsequent to the betrothal, justifies the other, who knew nothing thereof, in refusing to enter upon the marriage [*Voet 23.1.13*].

To these the older law added causes of whatever nature which might impede the hoped-for concord and felicity of matrimony [*Voet 23.1.15*]. Some of these might possibly be disallowed at the present day, since when these rules were in force a promise to marry could be specifically enforced, and consequently a slighter justification for breaking off an engagement might be permitted; and it has been held that if a person discovers only after he becomes affianced that a number of his fiancée's relatives have been guilty of crimes and of discreditable conduct, that does not justify him in breaking off his engagement [*Schnaar v. Jensen 1924 N.L.R. 218*]. Any person, however, who has been induced to enter into a betrothal by fraud or fraudulent representations or concealment, or who enters into it under a mistake of material fact, is at liberty to withdraw therefrom with impunity [*ibid.*].

SEDUCTION.

Claims for breach of promise and for seduction are often joined in one action.

Seduction is the overcoming of the chastity of a virgin [*Smitsdorf v. Horne*, 1 *Roscoe* at p. 33]. An action for damages for the seduction lies against the seducer by common law and its object is to secure to the woman compensation for the loss of her virginity [*ibid.*]. She has no action against the man if she stipulated with him for the payment of any reward [*Voet* 48.5.4]; but the fact that she was aware at the time of her seduction that the man was a married man does not debar her from bringing the action, as the sole foundation of the action is the seduction [*Bensimon v. Barton* 1919 *A.D.* 13].

In an action for seduction the man's oath has preference over the woman's if there is no corroborative evidence to support her statement [*Gleeson v. Durheim* 1868 *Buch.* 244; *de Klerk v. Drake* 1920 *C.P.D.* 511; and see *Chap. 13 "Affiliation Actions"*].

The amount of damages awarded is in the discretion of the court. The considerations that weigh in assessing damages are the means of the man, the social position of the parties, and the extent to which the woman's chances of marriage have been diminished. If the seduction was preceded by a promise of marriage, the damages are usually increased.

The action for seduction may also be brought together with an action for affiliation.

CHAPTER FOUR.

PRE-REQUISITES OF VALID MARRIAGE.

A large number of natives within the Union still live under the tribal system, and have therefore their own particular customs relating to marriage. There are special codes, both civil and criminal, and numerous laws, proclamations, and regulations referring to such natives. In Natal there are a large number of Indian immigrants and descendants of immigrants married according to their own marriage customs, and special laws refer to such Indians and their wives and families. A consideration of these codes and laws is beyond the scope of this work. Apart from their special provisions the polygamous unions of natives, Indians and Mohammedans do not create valid marriages and are not followed by the consequences of lawful wedlock [*Seedat's Exors. v. the Master (Natal) 1917 A.D. 302*]; and no marriage, even if it is a monogamous one, is recognised as lawful unless validated in the manner for which special provisions exist both in the case of natives [*Ngqobela v. Sihlele 10 S.C. 346*] and of Indians [*Indian Relief Act No. 22 of 1914*]; or unless celebrated in due legal form.

By marriage is meant the legal union and cohabitation of one man with one woman, to endure until

the death of the first dying, with the intention of having and rearing legitimate offspring [*Bronn v. Frits Bronn's Exors.* 3 *Searle* 313]. Since marriage creates a status, determining the legal position of the individual in the community, the law of every civilised country demands that certain conditions be fulfilled and certain solemnities be observed before the contract of the parties to marry becomes effectual. The marriage statutes which are of most importance in determining these conditions in South Africa are:—

Cape.—Marriage Order-in-Council of 7th September, 1838.

Natal.—Ordinance 17 of 1846, which repeals the existing marriage laws of Natal and adopts the above Cape provision.

Transvaal.—Law 3 of 1871, regulating the marriages of white persons.

Orange Free State.—Law 26 of 1899.

South Africa conforms to the general rule of international law that a marriage valid in the country of its celebration is valid everywhere, provided that it is not polygamous or against natural law [*Seedat's Exors. v. The Master, supra*]. Thus it recognises marriages validly contracted in any country. Complications may, however, arise when persons marry who are subject to the laws of different States, and one State has imposed restrictions on the marriages of its citizens which are not imposed by the other State, or when persons domiciled in one country marry in another country in

accordance with the law of the latter but not of the former country. Such difficulties have arisen in the case of marriages between citizens of different provinces of the Union [*Friedman v. Friedman's Exors.* 1922 N.L.R. 259; *von Abo v. von Abo* 1927 O.P.D. 10 P.H.B 6]; but the probability of conflicts of law arising in the case of marriages celebrated in the Union between citizens of the Union is being gradually eliminated by legislation [See Act 11 of 1920 and Act 41 of 1927]. The main points of variance that still exist in the marriage laws of the different provinces will appear from what follows.

The requisites necessary to create a valid marriage in South Africa are:—

- (1) physical and mental competence to marry;
- (2) absence of any impediment to the marriage by reason of too close relationship between the parties either by consanguinity (*i.e.*, blood-relationship) or affinity (*i.e.*, the connection by marriage subsisting between one spouse and the blood-relations of the other spouse);
- (3) absence of impediment by reason of a subsisting valid marriage of one of the intending spouses;
- (4) consent of the parties;
- (5) in the case of minors, consent of parents;

PRE-REQUISITES OF VALID MARRIAGE

- (6) in the case of a second marriage, the payment or securing of the portions due to the minor children of the former marriage, *i.e.*, *kinderbewijs*;
- (7) the observance of certain formalities.

PHYSICAL AND MENTAL COMPETENCE TO MARRY.

Children below the age of puberty, *i.e.*, boys under 14 and girls under 12 years of age, are incompetent to marry, and any alleged marriage of such persons is null and void [*Grotius 1.5.3*]. In the Orange Free State, amongst the marriages which a marriage officer is forbidden under penalty to solemnise, are those where the bridegroom has not attained the age of 18 years or the bride the age of 15 years, and no special licence to marry may be granted to such parties [*Law 26 of 1899 (O.F.S.) Secs. 13 and 9*].

Persons of unsound mind are incompetent to contract a marriage, but only while their infirmity continues and they are incapable of giving consent; *i.e.*, of entering into the contract voluntarily, understanding its significance [*Prinsloo's Curator v. Crafford 1905 T.S. 669*].

Persons who suffer from a permanent and incurable incapacity to procreate children cannot marry [*Ngwende v. Ngwende 8 E.D.C. 68*].

FORBIDDEN DEGREES.

Persons who stand to each other in certain degrees of relationship are forbidden to marry by common law and by statute.

Common Law Provisions.—In all cases the following are forbidden to marry:—

- (1) Ascendants and descendants (*i.e.*, parents and children) in the ascending and descending line *ad infinitum*.
- (2) Collaterals of whom one at least is related to a common ancestor in the first degree of descent. Hence there can be no marriage between a brother and sister, nor between a man or woman and a descendant of a brother or sister (*i.e.*, uncle and niece or great-niece; or aunt and nephew or great-nephew).

No distinction exists between the whole and the half blood.

Marriages were formerly forbidden within the same degrees of affinity as of consanguinity, but this rule has been altered by legislation.

Marriage between Persons Related through Affinity.—It is now lawful throughout the Union for any widower to marry his deceased wife's sister, or any female related to him in any more remote degree of affinity than the sister of his deceased

wife, except any ancestor of or descendant from such deceased wife. A man may not, however, marry the sister of his divorced wife, or of his wife by whom he has been divorced, during the lifetime of such wife. These provisions are contained in Act 11 of 1920, which applies to the Transvaal and Natal. The same provisions exist in the Cape Province, save that there a widower may not marry his deceased wife's sister, if she is the widow of his deceased brother [*Act 40 of 1892 (C)*]. Marriage between a man and his deceased wife's sister is not forbidden by the Orange Free State statute regulating the subject [*Ord. 31 of 1903 (O.F.S.)*]

In any province of the Union a widow may marry her deceased husband's brother or any male related to her through her deceased husband in any more remote degree of affinity than the brother of her deceased husband, save and except any ancestor of or descendant from such deceased husband. She may not, however, marry the brother of her divorced husband or of her husband by whom she has been divorced during the lifetime of such husband [*Act 17 of 1921*].

Marriages between Persons Related through Adoption.—With regard to those related only through adoption, the Adoption Act provides that no marriage is authorised thereby that could not lawfully have been contracted if the Act had not been passed, but that the adopting parent and the adopted child are not placed by the Act as against each other's relatives by consanguinity or affinity within the degrees within which marriage is prohibited [*Act 25 of 1923 Sec. 16*].

Transvaal and Orange Free State Provisions.— Apart from these provisions the Cape and Natal provinces leave the subject of the degrees within which marriage is prohibited to the common law. In the Transvaal the persons forbidden to intermarry are as follows:—

- (a) All persons in the ascending and descending line *ad infinitum* and in the collateral line to the third degree inclusive, including therefore uncle and niece, aunt and nephew, whether by blood or affinity;
- (b) own nephew and niece when both the parents of the one are related to both the parents of the other as own brothers and sisters (*i.e.*, double first cousins) [*Law 3 of 1871 (T) Sec. 4, as amended by Ord. 40 of 1903 (T)*].

In the Orange Free State marriage is prohibited in the following cases:—

- (1) In the ascending and descending lines between persons related by legitimate or illegitimate birth or by marriage;
- (2) In the collateral degree,
 - (a) between brother and sister by birth legitimate or not;
 - (b) between uncle or great-uncle and niece or great-niece by birth legitimate or not;

PRE-REQUISITES OF VALID MARRIAGE

- (c) between aunt and great-aunt and nephew or great-nephew by birth legitimate or not;
- (3) (a) between cousins whose fathers are brothers and whose mothers at the same time are sisters by birth legitimate or not;
- (b) between cousins of whom the father of one is brother of the mother of the other, and at the same time the mother of the one is sister of the father of the other by birth legitimate or not (*i.e.*, double first cousins).

No marriage within other degrees of consanguinity or affinity than those specified is deemed unlawful [*Ord. 31 of 1903 (O.F.S.), as amended by Ord. 27 of 1906 (O.F.S.)*].

Any person, burgher, or inhabitant of the Orange Free State who proceeds beyond the limits of the State, and there enters into a marriage with a person related to him or her within the degrees prohibited by the Orange Free State, is subject to a fine of not less than £100, or in default of payment, imprisonment for not less than one year [*Law 26 of 1899 (O.F.S.) Sec. 27*].

CONSENT OF PARTIES.

Free consent of the parties, as in other contracts, is essential to the validity of a marriage. Thus, if a girl were induced to take part in a ceremony of marriage through duress and deceit, she could have the marriage annulled [*Johnson v. Macintyre* 10 S.C. 318], and so too if she did not know it was a marriage she was entering into, but believed it was a betrothal [*Rubens v. Rubens* 26 S.C. 617].

CONSENT OF PARENTS.

In the case of minors, the consent of parents to the marriage is essential. This consent of parents is required by the common law, and marriage officers are forbidden by statute to celebrate the marriage of a minor where the consent of parents or guardians is withheld [*Marriage Order-in-Council* 1838 (C) Sec. 10; *Act* 9 of 1882 (C) Sec. 7; *Law* 7 of 1889 (N) Sec. 4; *Law* 3 of 1871 (T) Secs. 4 and 8; *Law* 26 of 1899 (O.F.S.) Secs. 9 and 13].

If both parents are living the consent of both is required, but where there arises a difference of opinion, the will of the father, as natural guardian of his minor child and head of the family, prevails. It is really, therefore, the consent of the father alone that is necessary [*Johnson v. Macintyre* 10 S.C. 318]. If the father is dead or unavailable the mother's consent is necessary and sufficient [*Solomon v. Hanna* 1903 T.S. 460].

When and How Consent is Required.—Consent may be express or implied. It is implied if a parent knew of the intended marriage and did not forbid it. In fact, in the absence of fraud on the part of one of the spouses, the publication of banns is taken to be notice to the parents [*Voet 23.2.18*]. This rule is adhered to in the case of a marriage by banns under the Marriage Order-in-Council, 1838 (C) (which also applies to Natal), for that enactment nowhere requires the production in such a case of the written consent of parents or guardians, though a marriage officer may not celebrate the marriage if the parents or guardians forbid it [*Willenburg v. Willenburg 3 B.A.C. 409*]. The same rule applies to marriages celebrated after notices read by the magistrate in open court—the equivalent of banns—under Act 16 of 1860 (C) (Secs. 11 and 28).

In the Transvaal and Orange Free State if any person admits being a minor, or if such appears to be the case from other information, and he or she cannot produce the consent of father or guardian, it is not lawful to solemnise the marriage of such person, and the marriage officer so doing is liable to a penalty [*Law 3 of 1871 (T) Sec. 8, as amended by Act 13 of 1909 (T) Sec. 5; Law 26 of 1899 (O.F.S.) Sec. 13*].

There is no presumption of notice to parents in the case of a marriage by special licence, which dispenses with notice to the public, and such a marriage is liable to be set aside at the instance of the parent, where the licence has been obtained by false declarations [*Solomon v. Hanna, 1903 T.S. 460*].

Before a special licence is granted, the magistrate must be satisfied that either of the intended spouses who is a minor has the necessary consent of parents, guardians or the court, as the case may be [*Act 9 of 1892 (C) Sec. 7; Law 7 of 1899 (N) Sec. 4; Law 3 of 1871 (T) Secs 4 and 5; Law 26 of 1899 (O.F.S.) Secs. 9 and 10*].

Ratification by Parents.—The subsequent ratification by parents of a secret marriage has the same effect as previous consent, so far as the validity of the marriage and the legitimacy of the offspring is concerned, and fresh solemnities are not required [*Voet 23.2.19; and see Willenburg v. Willenburg supra*].

Annulment of Marriages.—In the absence of consent or ratification, a marriage will be annulled by the court on the application of the parent whose consent was required (whether it be the father or the mother), if he or she avails himself or herself of the strict letter of the law [*Johnson v. Macintyre 10 S.C. 318; Solomon v. Hanna 1903 T.S. 460*]; and it has been held, even after the minor has attained the age of 21 years [*McCabe v. Moore, 1909 E.D.C. 161*]. With regard to this latter point, however, the law, it is submitted, may be open to question, as the minor on attaining majority himself ratifies the contract.

Marriages contracted by minors without consent are accordingly not absolutely void, but voidable at the suit of a parent. They are not voidable, however, by either of the parties to the marriage on the ground merely of minority, *i.e.*, no one can

recede from a marriage because at the date of its celebration he or she was a minor and had not obtained the necessary consent of parents. There is nothing in the Marriage Order-in-Council or in any later Cape statute from which it can be inferred that after the solemnization of a marriage, one of the parties thereto can have the marriage annulled merely because the requisite consent was not given [*Willenburg v. Willenburg, supra*]; nor can such an inference be drawn from the marriage statutes of the other provinces.

Penalties attaching to Secret Marriages.—Although nowadays ratification by parents after the marriage has the same effect as previous consent as far as the validity of the marriage and the legitimacy of the children are concerned, the consent of parents or guardians must still be given before the marriage to avoid the penalties imposed by the Perpetual Edict of Charles V. of the 4th October, 1540, which is the source of the present law on the subject [*Mostert v. the Master 3 Roscoe 59*]. This Edict was enacted because “daily many inconveniences are caused in the realm in consequence of secret marriages,” and it provided that if a major married a minor without obtaining the consent of the latter’s parents, he or she could derive no benefit from the minor’s estate.

The major spouse then can derive no benefit of any kind from the property of the minor spouse, whether at the present or at any future time, and whether by way of gift, legacy, or inheritance. No rights over the property of the minor spouse are passed by the marriage, either under the common

law community of property, or by virtue of any antenuptial contract [*Voet* 23.2.20]. If the marriage has been entered into without an antenuptial contract it is deemed and may be declared by the court to be a marriage out of community, unless community would be for the minor's benefit [*Mostert v. The Master* 1878 *Buch.* 83]. The husband of such minor is further excluded from the administration of or any control over the wife's property [*Mostert's Trustees v. Mostert* 4 *S.C.* 35].

Consent of Guardians or the Court.—The consent of grand-parents, step-parents, or other relations to the marriage of a minor is not needed [*Voet* 23.2.15]; but the consent of guardians where the parents are unavailable is required by the marriage statutes of all the provinces. A marriage without such consent is not, however, voidable at the suit of a guardian as it is at that of a parent [*Voet* 23.2.16; *Mostert v. the Master* 1878 *Buch.* 83]; for it is the injury done to the parents that entitles them to have the marriage set aside [*Willenburg v. Willenburg, supra*]. Where the consent of guardians is not given before the marriage (even though it is given afterwards) the penalties attaching to secret marriages, detailed above, apply [*Mostert v. The Master, supra*].

Under certain circumstances a magistrate or judge can give consent to the marriage of a minor. In the Transvaal and Orange Free State a magistrate has such power of consenting where the consent of parents or guardians is unobtainable owing to insurmountable difficulties, such as protracted

absence or other unforeseen impediments, if, after due investigation, he finds that no reasonable grounds for refusal exist [*Law 3 of 1871 (T) Sec. 16; Law 26 of 1899 (O.F.S.) Sec. 19*].

The Orange Free State provision enacts that a magistrate may not give consent if (a) the father, or (b) the mother after the father's decease, or (c) the guardian refuses consent. In such a case consent may only be given by the High Court or a judge thereof. The parents or guardians are cited to appear before the court in the name of one of the parties being a major, or in the name of the parent or guardian of a minor; and the court cannot give consent unless it is proved that the refusal of consent by the parent or guardian is wholly without reason and contrary to the interests of the minor.

In the Cape and Natal provinces, when the consent of parents or guardians cannot be had, owing to their being insane or absent or incapable in law or fact of consenting, or if they are induced improperly to withhold consent, or are dead, then the minor can apply to the Judge President of the Division, who, if he thinks it a proper marriage, gives permission for it to be solemnised. The marriage is then as valid as if the usual consent of parents or guardians had been given [*Marriage Order-in-Council (C) 1838, Sec. 17; and see Act 35 of 1896 (C) Sec. 55*].

In the Transvaal there exists no statutory provision whereby application may be made to the court if parents withhold consent, but it has been held that the Cape statute made no innovation upon

the common law, and that the Transvaal Supreme Court has jurisdiction under certain circumstances to sanction the marriage of a minor to which the father refuses his consent, *e.g.*, where the grounds of refusal are frivolous or foolish [*A. v. B. 1906 T.S. 958*].

KINDERBEWIJS.

It is a necessary condition attaching to the remarriage of a widow or widower, that the portions due to minor children out of the estate of their deceased parent have been paid over to the correct authority to be held in trust for such minors, or have been secured by Deed of Kinderbewijs, *i.e.*, a mortgage bond guaranteeing the children their shares, passed by the surviving parent. This subject is now regulated throughout the Union by the Administration of Estates Act No. 24 of 1913 (to which the following sections refer).

It is necessary for a widowed person intending to remarry first to obtain a certificate from the Master of the Supreme Court, if such widower or widow is the parent of a minor child entitled to claim from him or her any inheritance from the estate of his or her deceased spouse. Where the estate of the deceased spouse, or the joint estate of the deceased spouse and the surviving parent, is of the value of £100 or more, the certificate must state that the inheritances due to the minor heirs have been paid into the Guardian's Fund or duly secured, or that there is no inheritance due. Where any estate is of less value than £100 the certificate must state that fact [*Sec. 56 (1)*].

The security required is the hypothecation of sufficient immovable property of the surviving spouse to secure the amount of the inheritances and their due payment to the satisfaction of the Master. If there is not sufficient immovable property, the surviving spouse must find two sureties who bind themselves as joint principal debtors for the due payment of the inheritances, renouncing the usual exceptions [*Sec. 55 (1)*].

Any such widowed person marrying again without obtaining the aforesaid certificate, forfeits for the benefit of the minors, at the instance of the Master, or of any such minor on attaining majority, a sum equal to one-fourth of his or her own share in the joint estate of him or herself and the predeceased spouse. In addition, he or she is liable to a maximum penalty of £100 fine, or, in default of payment, six months imprisonment with hard labour [*Sec. 56 (3)*].

The certificate must be delivered to the marriage officer or minister of religion before whom the marriage is intended to be solemnised, and if he solemnises the marriage without first obtaining such certificate he is liable to the same maximum penalty in addition to any other penalty he is liable to incur [*Sec. 56 (4)*]. The Master's certificate is required whether the marriage is by special licence or by banns [*Sec. 56 (1)*].

ANNUS LUCTUS.

The old Dutch law, following the Roman law, prohibited the re-marriage of a widow within a

certain period, known as the year of mourning. This rule, the object of which was to do away with uncertainties as regards paternity, is not in force in the Cape or Natal. In the Orange Free State a marriage officer may not solemnise the marriage of a widower, should three months not yet have expired since the decease of his wife, nor of a widow should 180 days not yet have expired since the death of her husband [*Law 26 of 1899 (O.F.S.) Sec. 13*]. In the Transvaal, the marriage of a widow whose marriage is regulated under Law 3 of 1897 (T) (*i.e.*, a native widow), may not be solemnised within 300 days of the death of her husband [*Law 3 of 1897 (T) Sec. 4*].

FORMALITIES.

A marriage is considered as completed as soon as it has been duly celebrated by a marriage officer, and all the consequences of marriage, and all the rights and duties arising out of the marriage status, take effect at once [*Voet 23.2.93*].

Every magistrate is *ex officio* a marriage officer; an officer in the public service may be designated a marriage officer for specified races or defined areas; and ministers of religion or persons holding responsible positions in any religious community may be designated marriage officers in order to solemnise marriages according to Christian, Jewish or Mohammedan rites, or the rites of any Indian religion [*Act 43 of 1916 Secs. 1 and 2*].

Marriages are celebrated either after the publication of banns or by virtue of special licences.

Marriage by Banns.—In all the provinces provisions are made whereby banns of marriage may be published in a church. In such a case no marriage may be solemnised until the banns have been published in the usual manner on three successive Sundays during divine service, in the parish in which either of the parties to the intended marriage or both of them reside. The Cape and the Orange Free State provisions specifically state that should the parties reside in different parishes the banns are to be published in each such parish, and the Cape enactment (which applies also to Natal) adds that if they belong to different congregations, publication of banns must be made in each congregation. On production of proof that the banns have been so published, the parties may appear before a marriage officer for the purpose of the solemnisation of the marriage [*Marriage Order-in-Council 1838 (C) Secs. 2 to 5; Act 13 of 1909 (T) Sec. 2; Law 26 of 1899 (O.F.S.) Sec. 3*].

Banns may also be published in the court-house. In the Cape Province, in this case, fourteen days' residence in the magisterial area is required before the parties may give the magistrate notice of their intention to marry. Where the parties live in different districts, notice must be given to the magistrate of each district. Such notice is then affixed by the magistrate in some conspicuous place near his court-house and is read in open court three times at intervals of three clear days within twenty-one days of the receipt of the notice, so as to enable persons wishing to raise objections to do so [*Act 16 of 1860 (C), Schedule A*].

Any one who wantonly intending to subject the parties to ridicule or annoyance transmits to a magistrate a notice of or objection to an intended marriage, purporting to be given by some other person, is liable to punishment. This punishment is increased if wilfully false notices or objections are so transmitted [*ibid.*].

In the Transvaal, the banns are published by posting them up for a period covering three successive Sundays in a conspicuous place at the magistrate's offices, to which the public have access, in the district in which either of the parties to the intended marriage or both of them reside [*Act 13 of 1909 (T) Sec. 2*]. In the Orange Free State the banns are published by means of a notice affixed to the outside door of the courtroom during a period of three weeks [*Law 26 of 1899 (O.F.S.) Sec. 7*]. In Natal, the publication of banns is regulated in a similar manner.

The marriage may thereafter be celebrated by a marriage officer on the parties making a declaration before him that they know of no lawful impediment thereto.

In all provinces marriages must be solemnised with open doors, between the hours of 8 a.m. and 4 p.m. The Transvaal Law adds that only in exceptional circumstances is it lawful to solemnise marriages outside the time provided. If no marriage takes place within three months after the last publication of banns or after the expiration of the twenty-one days publication of notice in the Cape, the banns become void [*Marriage Order-in-*

Council 1838 (C) Secs. 9 and 21; Act 16 of 1860 (C) Sec. 13; Law 3 of 1871 (T) Secs. 7 and 13; Law 26 of 1899 (O.F.S.) Secs. 12 and 17].

Where the banns have been published in different places, whether one or both such places are in another province, or in a place outside the Union, any authorised minister of religion or marriage officer may solemnise the marriage after obtaining written proof that the banns have been duly published according to the law of such other province or place. At the time when the marriage is solemnised, however, not more than three months must have elapsed since the last publication of banns in such other province or place [*Act 20 of 1913 (Sec. 1)*].

When the provisions of the law of any province as to the publication of banns have not been strictly complied with, owing to (a) an error committed in good faith by either of the parties in interpreting them; or (b) any mistake, omission or oversight on the part of any officer authorised to solemnise marriages, but the marriage is in every other respect solemnised according to the law of the province, then, if there is no lawful impediment to the marriage, the marriage is as valid and binding between the parties as if the law had been strictly complied with [*Act 20 of 1913 Sec. 2*].

Marriage by Special Licence.—The publication of banns or marriage notices is not necessary where a special licence has been procured. In all the provinces magistrates are empowered to grant such special licences.

Special Marriage Licence Acts exist in the Cape and in Natal [*Act 9 of 1882 (C)*; *Act 7 of 1889 (N)*]. Both make the same conditions and impose the same penalties. The intending spouses are required to make a declaration before the magistrate to the effect that they do not know of any lawful impediment to their marriage, whether by reason of kinship or alliance, or the want of consent of parents, or of any other cause. A minor must produce a written consent to the marriage from the person whose consent is required. The magistrate may question the parties in order to satisfy himself on any point, and a penalty of five years' imprisonment with hard labour may be imposed on any one who makes any wilfully false statement either in the declaration or in reply to the questions of the magistrate, or who forges or alters any consent to the marriage of a minor, or any marriage licence.

In the Transvaal and Orange Free State, in order to obtain a special licence the persons who propose to contract the marriage must appear before a magistrate and answer any questions he deems fit to put to them in order to assure himself that all the requirements necessary for the celebration of a valid marriage in the province have been complied with. In the Orange Free State residence of the parties within the province during the preceding three months is a usual requirement, although it may be dispensed with. If the magistrate has a reasonable suspicion that there is anything illegal in the marriage, he may examine the parties or any other person under oath with regard thereto [*Law 3 of 1871 (T) Secs. 4 and 5*; *Law 26 of 1889 (O.F.S.) Secs. 9 and 10*]. In the

Transvaal Law it is specified that any one who knowingly makes a false statement in connection with any act done to procure the publication of banns or of a special licence is liable to the penalties prescribed by law for perjury [*Law 3 of 1871 (T) Sec. 7*].

A marriage licence becomes void in any province after three months. Within that period, however, on production of the special licence, a marriage officer may celebrate the marriage in accordance with the laws of the province.

Registration and Proof of Marriages.—Act 17 of 1923 (to which the following sections refer) regulates the registration of marriages in the Union and provides for the appointment of registrars of marriages. An original and duplicate original register of any marriage must be signed by the marriage officer officiating, the parties, and at least two competent witnesses, before they leave the premises where the marriage took place [*Sec. 39 (1)*]. The original register is kept by the marriage officer, who must within one week transmit the duplicate original duly stamped for record to the registrar of the province where the marriage took place [*Sec. 39 (2)*]. Every special licence, together with the duplicate original marriage register must also thus be transmitted for record to the registrar by the officer who solemnised the marriage.

Any registrar or marriage officer, on receipt of a written application from any person and on payment of the prescribed fee, must cause search to be

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made in any marriage register in his custody, and must issue a certificate of any entry contained therein or in any documents attached thereto [Sec. 40 (1)]. Every such certificate, duly signed, is *prima facie* evidence of the particulars set forth therein in all courts of law and public offices within the Union [Sec. 40 (2)].

It is an offence to give false information for insertion in a marriage register; or in any way to tamper with or counterfeit any part of a marriage register or certified copy thereof [Secs. 44 and 46].

CHAPTER FIVE.

CONSEQUENCES OF MARRIAGE.

Many of the duties and consequences entailed by marriage are derived not from the terms of any contract but from the law. They are the result of public policy, and have been evolved primarily with a view to the wellbeing of the State, and not for the benefit of the parties to the marriage, so that they cannot be altered by any bargaining between intended spouses. Among these necessary consequences of marriage the most important are the following:—

(1) By marriage both parties become entitled to the benefit of each other's society in the widest sense of the term. They owe each other a duty of comfort, love, and conjugal fidelity, and are bound to co-habit with each other [*Voet 5.1.101*]. No agreement, whether entered into in an antenuptial contract or verbally, to the effect that the parties should live apart and not co-habit, would be upheld in South African courts, such agreement being contrary to the very essence of marriage and against public policy.

(2) The husband cannot by his own will for any cause whatever, sever the bond of matrimony,

nor can the wife; nor can the parties put an end to marriage by mutual consent [*Bronn v. Frits Bronn's Exors.* 3 *Searle* 313]. A marriage can be dissolved only by a competent court for causes specified by law as sufficient [*Le Mesurier v. Le Mesurier* 1895 A.C. 517; *Mostert v. Mostert* 2 *Searle* 128].

(3) On marriage a wife acquires the domicile of her husband, for a wife's domicile is in law that of her husband. This result ensues regardless of the desires of the parties, and even if the wife lives apart from the husband [*Mason v. Mason* 4 *E.D.C.* 330]. This is a point of much practical importance when the jurisdiction of a court to grant divorce is in question [*Steyler v. Steyler* 1913 *C.P.D.* 725].

(4) The law of the matrimonial domicile, *i.e.*, the domicile of the husband at the time of the marriage, regulates the rights of the spouses regardless of any change of domicile, in regard both to property acquired in the original domicile, and to such property as may be acquired after the change from that domicile [*Est. Reeves v. Bowker* 1919 *N.P.D.* 258]. Thus the rights acquired by the law of the matrimonial domicile cannot be altered by any subsequent change of domicile [*Blatchford v. Blatchford and Others* 1 *Roscoe* 3].

Although the husband may change his domicile, and so cause a change in the wife's domicile, he cannot vary any rights to the ownership of property that she may have acquired under the law of the

matrimonial domicile, so that a change of domicile from South Africa to England has no effect on the rights of a wife, married in community, to her share in immovable property purchased in England by the husband in his own name after such change of domicile [*Chiwell v. Carlyon* 14 S.C. 61]. Conversely, where the matrimonial domicile is England, but the parties later become domiciled in South Africa, the wife continues to enjoy the rights she possesses under the Married Women's Property Act of England to hold as her separate property the earnings acquired by her after her marriage [*Brown v. Brown* 1920 N.P.D. 248].

The fact that a marriage was contracted in a particular place does not make that place the matrimonial domicile. Domicile is not constituted by mere residence. It is residence in a place together with an intention of permanently remaining in that place. Residence without such intention, and intention to settle in a place when there has been no residence therein, are alike ineffective to constitute domicile [*Webber v. Webber* 1915 A.D. 239].

(5) A husband is bound to support his wife in a manner suitable to his means and position. In the case of want, either spouse must contribute towards the maintenance of the other [*Voet* 25.3.8]; and both spouses are liable for the support of the children of the marriage. These duties are enforced whenever the occasion arises, nor is there any validity in an agreement that they shall not be enforceable. The question of support is dealt with in Chapter 13.

(6) By marriage the spouses, if minors, are freed from the control of their parents or guardians [*Voet* 23.2.17]. The consent of parents or guardians is thus not required in the case of the remarriage of a widow or widower under the age of 21 years [*ibid.*]. In the case of a man marriage puts an end to his minority absolutely and completely [*Voet* 23.2.23].

(7) On marriage, the status of a woman suffers diminution and she falls under the tutelage of her husband, even though she be advanced in years and the husband a mere youth. No contract will be permitted or position tolerated, whereby this condition is reversed. Thus a woman cannot be appointed curator to the person of her husband, even if he be insane [*in re de Jager* 1876 *Buch.* 228]. She may, however, on occasion be appointed curator to his property.

The husband's wish must prevail in all matters concerning the common life. Thus he has the right to decide where the domicile of the spouses shall be, and a wife who refuses to accompany her husband on his adopting a new domicile is guilty of desertion [*Voet* 5.1.101; and see *Webber v. Webber* 1914 *W.L.D.* 51].

The husband is the natural guardian of the children of the marriage, and is entitled to control the manner of their upbringing, though the interests of the children are the first consideration, and the mother has the right to apply to court to safeguard these interests [*Neethling v. Shock* 1869 *Buch.* 312]. The mother has, however,

certain rights of control over the persons of her children, and thus she may apply to court for an order restoring her children to her, if it is in their interest to be near her (as is generally taken to be the case), and the husband against her wish intends to remove them out of the country, *e.g.*, to England [*Ex parte Jensen* 18 S.C. 154]. Nevertheless it is the father and not the mother who is their natural guardian.

(8) The rule of Roman Law is still in force in South Africa, whereby donations may not be made between husband and wife. The parties to an intended marriage cannot exclude the operation of this law even by inserting a clause in an antenuptial contract that donations shall be permitted between them. Such a clause is null and void [*Hall v. Hall's Trustee* 3 S.C. 3].

The rigour of the rule making donations between spouses an absolute nullity was relaxed, when in the reign of the Emperor Caracalla a law was introduced (in 206 A.D.), whereby gifts between spouses were put on a similar footing to gifts made in view of death. If such gifts were made, though the donor was free to revoke them at any time, yet if he predeceased the donee without having revoked them they belonged to the donee as if they had been confirmed by the last will of the donor. This is the position in South African law too, with regard to such gifts. Donations between husband and wife are, until the death of the donor, of no force and effect as against the donor or his creditors [*Van der Byl v. Van der Byl* 5 S.C. 170]. If the donee dies before the donor,

the donation lapses, unless the donor subsequently ratifies the gift or confirms it in his last will [*Voet* 24.1.7]. If, however, the donor dies solvent without having revoked the gift, the gift is confirmed by death and becomes irrevocably the property of the donee [*Haines' Exors. v. Haines* 1917 E.D.L. 40]. With regard to the necessity for registration of gifts over £500 in value there is considerable conflict of opinion.

There are certain exceptions to the above rule forbidding donations between married persons. Policies of life insurance, up to a certain value, may be ceded by one spouse to another. This subject is dealt with in Chapter Eleven. Gifts of clothing and jewellery made by a husband to a wife in order to enable her to keep up her proper position in society, if not disproportionate to the husband's means, are also permitted [*Voet* 24.1.11]. So, too, any savings from her household allowance, if moderate, may be retained by a wife [*Voet* 24.1.11; *Linde v. Cohen* N.O. 1914 T.P.D. 369]. Nothing is deemed to be a donation whereby a spouse undertakes to give only that which he was under a legal obligation to grant to the other. A contract whereby a husband has agreed to pay a certain sum to his wife, living apart from him, for her maintenance is therefore enforceable [*Pugh v. Pugh* 1910 T.P.D. 792]. Further, testamentary bequests made by one spouse to the other are not forbidden. It is only to gifts made during the lifetime of the spouses that the prohibition extends [*Voet* 24.1.10].

There are, however, certain other results that follow on a South African marriage, which the

parties may successfully avoid by antenuptial agreement. These consequences relate primarily to the property of the spouses and are of much practical importance. They are dealt with in the following chapter.

CHAPTER SIX.

MARRIAGE IN COMMUNITY OF PROPERTY.

The South African law relating to the property of married persons preserves the ancient common law of Holland on the subject. As soon as a marriage is celebrated all the property of both spouses is taken to form one estate, and each spouse becomes the owner of one-half of this estate irrespective of the share he or she brought into the marriage. The administration of the entire estate is in the hands of the husband. This is known as marriage in community of property. All marriages are in community unless the parties before the celebration of the marriage enter into a special agreement excluding it, called an antenuptial contract [*Faure v. Tulbagh Divisional Council* 8 S.C. 72]. The Court has power to order the execution in due form, after marriage, of an antenuptial contract verbally entered into by the parties before marriage—such verbal agreement being binding between intending spouses [*Fisher v. Fisher* 1911 W.L.D. 71].

Natal Legislation.—To this rule, that all South African marriages are in community unless an antenuptial agreement provides otherwise, an exception

is made in Natal, by Law 22 of 1863 (N). Community of goods and the liabilities and privileges arising therefrom are not deemed to have attached to or existed between parties married out of South Africa; (although such spouses may, if they please, exempt themselves from this law by a writing signed by each of them before two witnesses and lodged with the Registrar of Deeds within six months of its execution) [*Sec. 2*].

It has been decided that the above provision is intended to apply only to those spouses married elsewhere than in the Union of South Africa, whose domicile at the time of the marriage was Natal. Such spouses would by the law of the matrimonial domicile, *i.e.*, of Natal, be married in community, but this provision frees such marriages from community, by the mere fact of their being contracted abroad [*Brown v. Brown* 1920 N.P.D. 248]. The reason underlying the rule appears to be that often Natal colonists went to Great Britain to marry, and they married under the misapprehension that their property rights would be governed by the law of England [*ibid.*].

COMMUNITY OF PROPERTY AND OF PROFIT AND LOSS.

Community of Assets.—On completion of a marriage, by operation of law and without the need for any delivery of corporeal or cession of incorporeal property, everything owned by either spouse becomes the common property of both [*Voet* 23.2.68]. This applies to immovable as well as to movable property, to rights *in personam* as well

as to rights *in rem*. Thus the ownership in one-half of all immovable property registered in a husband's name passes to the wife, after marriage in community, without any need for a formal transfer [*Rosenberg v. Dry's Exors.* 1911 A.D. 679]. Where the law of the place where the property is situated requires certain formalities in connection with its transfer, an action can be brought to compel transfer to be given in due form [*Chiwell v. Carlyon* 14 S.C. 61]. The only classes of property that do not fall into the community are the following:—

(1) Property situated outside South Africa of such a kind that the law of the country regulating the right thereto is opposed to its falling into community. Thus the interest of a wife in a trust estate in real property situated in England, it has been held, must be regulated by the law of England, and does not fall into the community [*Poppe v. Home, Eagar and Co.* 1 M. 212].

(2) Certain policies of life insurance (for which see Chapter Eleven).

(3) Property settled on or given or bequeathed to one of the spouses in such a way as to exclude it from the community; but only if the intention of the settler, donor or testator to do so be expressly stated [*Bosman v. Richter* 2 Searle 78; *Tesselaar's Trustees v. Blanckenberg's Exors.* 7 Buch. 54].

(4) Clothes and jewellery given for personal adornment by the husband to the wife during the time of betrothal [*Voet* 23.2.78].

(5) Fideicommissary property, *i.e.*, property settled on or bequeathed to one of the spouses with a trust over in favour of a third party [*ex parte van der Walt* 1924, O.P.D. 9]; or property not to be alienated by the spouse inheriting it, although the selection of the person on whom the property is to devolve at the expiration of the life interest is left to the choice of such spouse [*in re Myburgh* 13 S.C. 218; *ex parte Estate Orford* 1924 E.D.L. 316]. Only the income of such property falls into the community. If the condition is removed, however, the property itself falls immediately into the community [*Banks v. Clement* N.O. 1921 C.P.D. 197].

It makes no difference if the property be brought into the marriage or later acquired, for there is also established by operation of law, as a consequence of marriage, a universal community of acquests, or, as it is generally called, community of profits. This includes all property acquired by either spouse after the celebration of the marriage, such as the increase, interest or fruits of property belonging to either of the spouses or to the community, property bought with common monies, and all profits accruing through the work of either spouse, such as salaries and profits of trading [*Voet* 23.4.28; 32; 33].

The community established by law thus includes every kind of property, even property not reduced into possession before the dissolution of the marriage, but to which the right vested during the subsistence of the marriage [*Voet* 23.2.84]; save that if a husband has during the marriage purchased

land, of which he does not obtain transfer until after the wife's death, her estate has no title thereto [*Bekker's Exors. v. Bekker's Trustee* 1908 T.S. 553]. It does not matter in what way the property was acquired, whether in the name of one spouse or of both, nor from what source it was acquired, whether by earnings, inheritance, legacy, or donation [*Voet* 23.2.69].

Community of Liabilities.—Community of property extends not only to assets but to liabilities. There is a community accordingly of liability for the debts incurred before marriage by either spouse [*Johnston v. Powell* 26 S.C. 35]. Any part of the joint estate (whether it belonged originally to the husband or the wife) may be taken in execution during the subsistence of the marriage to satisfy the claims of a creditor for any such debt of either spouse [*Voet* 23.2.80]. Included in the category of debts incurred by one spouse before marriage, is the liability to maintain the children of a former marriage [*Voet* 23.2.81 and 82]. Once the marriage has been dissolved, however, the debts of either spouse incurred before marriage are chargeable solely against the spouse who contracted them [*Reis v. Gilloway's Exors.* 1 M. 186].

The community of losses includes all commercial losses, and liability for all debts incurred by the husband during the subsistence of the marriage, and for the debts arising from the contracts of the wife in those cases where she is competent to bind her husband and the community by her contracts. It also includes liabilities to third parties arising out of fraud or negligence on the part of the hus-

band. Even losses suffered only after the dissolution of the marriage fall into the community, if the cause of debt was incurred during the subsistence of the marriage, as in the case of liability for calls on shares, or of a surety undertaking [*Liquidators of Union Bank v. Kever*, 8 S.C. 147; *Brink v. Louw 1 Menzies 210*].

RESPECTIVE POSITIONS OF HUSBAND AND WIFE.

Marital Power of Husband.—The joint fund is solely administered by the husband, when marriage is in community, by virtue of his marital power or guardianship. This marital power differs from ordinary guardianship, which is a legal institution for the benefit of minors, insane persons, and persons otherwise incapable of managing their own affairs. A guardian, in exercising his functions, does so in order to fulfil his duty towards his ward, and to benefit him. The marital power of the husband, on the other hand, is a power secured to him as master of his family, and his rights to deal with the property contributed to the joint estate by the wife do not entail the duties imposed upon a guardian in dealing with the property of his ward [*Voet 23.2.63*].

The husband has complete control of the joint estate, and transacts all business in connection therewith. He may incur any debts he pleases, and these are chargeable to the joint estate. He may even make extravagant gifts to the detriment of wife and children. A gift made by a husband to a third party is accordingly valid, save where it

is made in deliberate fraud of the wife [*Voet* 23.2.54; *Davis v. Trustees of Minors Brisley* 18 S.C. 407].

Legal Capacity of Wife.—A woman married in community has no power to deal with any part of the joint estate, and if she does alienate any portion thereof, the husband may recover it from the possessor [*Voet* 12.6.19]. As a general rule she has no power to enter into any contract without her husband's knowledge and consent, and if she does so, the contract is not binding on her husband or herself unless it is acquiesced in or subsequently ratified by the husband [*Voet* 23.2.42]. The two main exceptions to this rule are (1) where the woman is a public trader, (2) where the contract is for necessaries [*Pretorius v. Hack* 1925 T.P.D. 646].

Further, matrimonial disputes apart, a married woman except in two or three cases has no *locus standi in judicio*. She is in the position of a minor, under the marital power of her husband, and cannot either sue or be sued [*Grobler v. Schmilg and Freedman* 1923 A.D. 501]. If the marriage is in community, the wife cannot contract save as agent for her husband. He is the person with whom the contract has been entered into and he must be brought before the court as defendant, when the contract is in question. It has been held not to be enough that he assists the wife [*Pretorius v. Hack supra*]. He has control of the common estate, and he it is who must be sued, even though the wife is temporarily absent from him and in a different jurisdiction [*Smith v. Bard* 1917 C.P.D. 616].

Where a wife is sued in tort, *i.e.*, when she has committed a wrong for which she can be compelled by the aggrieved party to pay damages, she may defend the action assisted by her husband, for the right party is before the court [*Smith v. Bard, supra*]. This case is somewhat analogous to a criminal case, where the only person punishable is the guilty party. A wife's contractual powers and her *locus standi in judicio*, are dealt with more fully in Chapter Eight.

A woman married in community has certain remedies, considered below, whereby she may protect herself from the consequences of her husband's recklessness, or intention to defraud her, or in the case of the absence of her husband; and in Natal a special provision safeguards the property of a deserted wife.

Curatorship of Estate when Husband Prodigal or Insane.—Where the husband is a spendthrift or a drunkard, the usual course is for the wife to apply to court for a declaration that he is a prodigal and for the appointment of a curator to take charge of the assets of the joint estate. Thus, where it was shown that the husband's brain was in a diseased state as the result of recent illness, and that he was squandering the assets of the common estate, the court, on application of the wife, appointed a temporary curator [*in re Filmer 5 Buch. 2*]. This curatorship of the joint estate may also be given to the wife [*Gradwell v. Gradwell 1924 E.D.L. 3 P.H.B 11*].

Provisions are made in Act 38 of 1916 for the detention of insane persons and for the appoint-

ment of curators to administer their estates. By this Act, a wife married in community is required to take charge of the assets of the joint estate, pending the appointment of a curator or the discharge of the patient [*Sec. 62 (3)*]. The Administration of Estates Act, No. 24 of 1913 (*Sec. 83*) provides that women may be appointed curators as well as men, and by common law a wife could be appointed to administer the joint estate of herself and her insane husband [*Voet 23.2.48*]. When insanity supervenes on the part of the husband, the wife then may apply to court and be appointed temporary curator of the joint property [*ex parte Ingram 1912 C.P.D. 569*].

Interdict Pending Matrimonial Suit.—An interdict against the husband is generally applied for when the wife institutes an action for judicial separation or divorce, and fears that the husband may meanwhile, with the intention of defrauding her, do away with part of the estate. When such an interdict is granted, the husband is restrained thereby from alienating the whole or some specified portion of the joint estate, pending the decision of the action [*Sture v. Sture 1 Roscoe 51; Umgulwa v. Umgulwa 7 E.D.C. 73*]. If no such interdict is sought and the husband fraudulently does away with the joint property, the wife, after divorce, may bring an action for the recovery of her share therein [*Voet 25.2.7*].

Order Protecting Property of Deserted Wife in Natal.—In Natal a woman is entitled to retain free from the control of her husband or his creditors any property she may earn or acquire during the

time she is deserted, and on *prima facie* evidence of desertion she is entitled to an order of a judge or magistrate protecting such property [*Law 13 of 1883 (N) Sec. 10*].

Relief Granted by Court in Husband's Absence.—In the case of the long-continued unaccountable absence of the husband, even though it is not possible to presume death from such absence, a wife's half-share in the community has been paid out to her and the annual interest on the other half of the joint property awarded to her for the support of herself and the children [*re Nelson 1876 Buch. 130*]; and under similar circumstances payment to the wife of her half-share in an inheritance has been decreed [*in re Miller 1874 Buch. 28*]. Similarly, where a husband who had four years previously taken all the joint estate and deserted the wife became entitled to an inheritance, the court granted a *rule nisi* calling on him to show cause why one-half thereof should not be paid to the wife and children for their maintenance [*ex parte Fourie 8 S.C. 115*]. So, too, the court, after advertisement in the Government Gazette, authorised the payment of a fideicommissary inheritance to a woman married in community when her husband had not been heard of for 25 years [*ex parte Meyer 1 Roscoe 285*].

In cases of urgency a wife may be appointed curator of the joint estate during her husband's absence, subject to conditions imposed by the order of court [*ex parte Kamfer 1918 C.P.D. 2*].

EFFECT OF DEATH ON THE COMMUNITY.

On dissolution of the marriage by death the partnership is extinguished [*Voet* 23.2.90]; and after payment of the debts due by the joint estate, the net joint estate is equally divided between the surviving spouse and the heirs of the deceased.

Rights and Duties of Surviving Spouse.—Certain of the rights and duties of a surviving spouse are dealt with in the Administration of Estates Act, No. 24 of 1913, to which the sections below refer.

The survivor must transmit an inventory of the joint estate within six weeks of the death to the Master of the Supreme Court [*Sec. 20*]. This inventory must be made in the presence of two witnesses and of anyone interested as heir or legatee who wishes to be present. Heavy penalties are prescribed for non-compliance with the law regarding inventories, and in addition to these a surviving spouse is liable to forfeit all his or her rights to any property omitted in the inventory, and to bear any loss caused to the joint estate by the destruction or deterioration of such property [*Sec. 110*]. The assets of the joint estate remain under the charge of the survivor until a curator or executor has been appointed to administer them [*Sec. 27*]. The executor liquidates the estate so far as is necessary in order to pay all the debts due by the joint estate, and the net joint estate is then equally divided between the survivor and the heirs of the deceased.

The survivor, if he is not the duly appointed executor, cannot transfer or mortgage any land belonging to the joint estate and registered in his own name unless he has first obtained a certificate from the Master authorising him to do so [Sec. 57]. Such certificate presumably can only be granted when the survivor has a legal right so to deal with the land; for the rule of law is that on death of the wife the husband has no longer any marital power to deal with her share of the community, and, in short, that a surviving spouse has no power to deal in any way, save as executor, with the deceased's share of the common estate [*Molle v. van den Berg's Exors.* 1 M. 209].

The Master may authorise the executor, instead of realising the property of the deceased, to make it over to the surviving spouse at a valuation made by a sworn appraiser or other approved person, where in the opinion of the Master no person would be prejudiced by such a course, and where there is no provision to the contrary in the will of the deceased [Sec. 51].

Where land registered in the name of the survivor, who is a duly appointed executor, has been purchased by him from the estate or from a legatee or an heir, or has been bequeathed to him by the will of the deceased spouse, or made over to him by the executor at a valuation as above, such survivor may deal with the land without first obtaining transfer of the share of the deceased spouse [Act 13 of 1918 Sec. 52].

Survivor's Liability to Creditors.—Although during the marriage the common estate is liable for

the debts of either spouse incurred before marriage, after its dissolution it ceases to be so liable, and such debts are chargeable solely against the spouse who contracted them [*Reis v. Gilloway's Exors.* 1 M. 186].

If any debts due by the joint estate have, for some reason, not been paid by the executor, creditors may sue the husband, if he is the survivor, for the full amount thereof [*Stevenson v. Alberis* 1912 C.P.D. 698], though he has recourse against the wife's heirs to the extent of one-half [*Voet* 23.2.52], but a surviving wife is liable to creditors for only one-half of such debts. It must be shown, however, that the debts were proved against the joint estate without success, before she becomes so liable [*Sichel v. de Wet* 5 E.D.C. 58; *Faure v. Tulbagh Divisional Council* 8 S.C. 72].

DISSOLUTION OF THE COMMUNITY.

The community established by marriage is ended by the dissolution of the marriage by death or by divorce. Also, when after seven years there seems to be no probability of an absent spouse's return, due regard being paid to his age, occupation and the perils to which he is exposed, the estate, it appears, may be distributed under security [*re Booysen* 1880 *Foord* 187]. This was done in one case after an absence of sixteen years, in circumstances pointing to death. One-half of the estate was paid to the wife and the other half distributed as if the husband had died intestate [*ex parte Storey* 3 E.D.C. 150].

Community of property may also be changed by the mutual will of the spouses, or by the last will of one of the spouses bequeathing the property of the other upon some new basis, and then that other adopting the will and accepting benefits under it. Such testamentary arrangements cannot affect the rights of creditors, however, and have no effect during the lifetime of the spouses. The survivor, further, has the right to repudiate the will entirely, and to adhere to the community [*Union Government v. Larkan* 1916 A.D. 212].

The community can be dissolved during the lifetime of the spouses only by a Deed of Separation either ratified or entitled to ratification under a decree of judicial separation [*ibid.*]. Apart from this case, the community once established by marriage cannot be terminated or altered by any subsequent agreement between the parties (save in certain circumstances in Natal, for which see Chapter Seven). A spouse injured by any such post-nuptial agreement to exclude community, to which he or she was a party, is not bound by such agreement during the marriage [*Coulthard v. Coulthard* 1922 W.L.D. 13], nor after its dissolution [*Scorey v. Scorey's Exors.* 1 *Menzies* 231]; and even though the agreement was a notarial one [*Danovitch v. Danovitch's Exors.* 1919 T.P.D. 198].

CHAPTER SEVEN.

ANTENUPTIAL CONTRACTS.

Each and all of the consequences of marriage dealt with in the preceding chapter, viz., community of property, community of profit and loss, and the husband's marital power over his wife's estate, may be avoided if the intended spouses enter before marriage into an agreement known as an Antenuptial Contract. Any such contract is strictly and literally interpreted, and any of these common law consequences of marriage that have not been expressly excluded therein still attach to the marriage [*Salz v. Waiggowsky* 1919 *W.L.D.* 90].

A verbal agreement to be married by antenuptial contract is binding as between the parties, and implies an agreement to be bound by an antenuptial contract executed in the ordinary form customary in the Union, excluding community of property and of profit and loss and the marital power. Either spouse may after marriage compel the other to execute such formal contract [*Fisher v. Fisher* 1911 *W.L.D.* 71]. (For form of antenuptial contract in common use, see appendix.)

In addition to modifying the common law incidents of marriage, antenuptial contracts also fulfil

other functions. There may be included in them marriage settlements or gifts, to which third persons, too, may be parties; and there may be included also clauses dealing with the devolution of property after the death of one or both of the spouses. These settlements, and the position that arises on insolvency are dealt with in Chapter Nine.

ANTENUPTIAL CONTRACTS WHICH DO NOT EXCLUDE THE MARITAL POWER.

Exclusion of Community.—The parties may contract with each other that there shall be no community of property between them. In this case community of profit and loss still attaches to the marriage, and the husband has the administration of the wife's property.

On dissolution of the marriage, each spouse is credited with his or her own property whether it has increased or depreciated in value during the subsistence of the marriage; with property the right in which had vested in him or her before the marriage, although the acquisition took place during the marriage [*Voet* 23.4.42; 47-49]; and with money contributed by him or her for the support of the marriage [*Minter v. Minter's Exors.* 1892 C.L.J. 246]. If the wife's property has been sold by the husband during the marriage its value must be placed to her credit before a division of the profits is made [*Voet* 23.4.35]. Thereafter each spouse is credited with one-half of the net balance of profits over losses, or debited with one-half of the net balance of losses over profits, as the case may be [*Voet* 23.4.48].

Opinions are divided as to whether property acquired by either spouse during marriage as a gift, legacy, or bequest where the intention of the donor or testator is not clear should come under the category of profits or not. Apparently if the property is derived from a stranger it is a profit; if from a blood relation it is the separate property of the spouse receiving it [*Voet* 23.4.43]. When it is desired that such property shall be retained exclusively by the spouse acquiring it, a special clause to that effect is usually inserted in the antenuptial contract.

Husband and wife are not liable for each other's debts contracted before the marriage [*Anderson v. Meyer* 1 M. 204]. If the husband has used the wife's property to pay such debts of his, this must be brought into account before a division of profits is made [*Voet* 23.4.50]; though this can be done only after all the husband's creditors have been satisfied. The same rules apply when the wife's property has been damaged in any other way through the husband's fraud or negligence [*Voet* 24.3.21].

Exclusion of Community of Profit and Loss.—The parties may contract that community of profit and loss be excluded as well as community of property. This does not exclude the administration by the husband of the wife's property, however. In such a case the spouses are not liable for each other's debts, whether contracted before or after marriage. An exception exists in the case of debts incurred for household necessities, for which both spouses are liable to creditors (see Chapter Eight).

On dissolution of the marriage each spouse takes what was his or hers originally plus any subsequent acquisitions he or she may have made. If the husband has encumbered or alienated his wife's property (as he may do), she is entitled to compensation, but only after his creditors have been satisfied [*Voet* 24.3.21].

The spouses may agree between themselves to share the profits while the husband alone shall bear the losses. Any such arrangement though valid between the parties does not affect the rights of creditors. As far as they are concerned the common law prevails and community of profits implies community of losses [*Voet* 23.4.48; *in re Chiappini* 1869 *Buch.* 143].

Even though community of profit and loss is not excluded in express terms, when it is agreed that in addition to the exclusion of community of property each spouse shall be answerable only for his or her own debts, this excludes community of loss [*Boyes v. Verzigman* 9 *Buch.* 229].

A clause may also be inserted in an antenuptial contract giving the wife the option on her husband's death to share in the profit and loss or to receive back her own property.

Prohibition of Husband's Alienation of Wife's Property.—In addition to the exclusion of community of property and of profit and loss it may be provided that the wife's property shall be secured to her and that the husband shall not alienate or encumber it without her consent.

Any alienation of her property by the husband is then void and the wife may recover it [*Voet* 23.2.63]. As in the cases mentioned above she has a claim for compensation out of her husband's estate, after his creditors have been satisfied.

Powers of Husband.—If the antenuptial contract contains only the provisions mentioned thus far, *viz.*, the exclusion of community of property and of profit and loss, the husband still retains his marital power, which gives him not only the administration of the joint estate in the case of community but the administration of the wife's separate estate when marriage is out of community. He may accordingly deal with his wife's property in any way and alienate and encumber it without her consent [*Steytler v. Dekkers 2 Roscoe* 98]. Save where the husband has been expressly prohibited from alienating the wife's property, her only remedy is a claim for compensation from her husband's estate after all creditors have been paid.

Legal Capacity of Wife.—As she is under the tutelage of her husband, a wife has no right to deal with her own property, for she cannot, without her husband's consent, enter into any valid contracts (save those specified in Chapter Eight) [*Kent v. Salmon* 1910 *T.P.D.* 637]. If she does so, her contracts bind neither herself nor her husband, either during the marriage or after its dissolution [*Voet* 23.2.42]. She has no more standing to appear in court than a minor has, and must always sue or be sued duly assisted by her husband [*van Eeden v. Kirstein* 1880 *Kotze* 184; *van Jaarsveldt v. Legg* 1913 *C.P.D.* 197].

A husband is of course bound by the contracts of his wife when she has acted as his agent, *e.g.*, in the conduct of his business [*James v. Central Drapers* 1913 E.D.L. 230].

Remedies Accorded to Wife.—A wife's only means of protecting her property against the maladministration of her husband are those which she enjoys even if married in community. She may have her husband declared a prodigal and his estate placed under curatorship [*ex parte Meyer* 1911 T.P.D. 643]; or else she may apply to be given the curatorship of her own or of both estates.

In the case of the husband becoming insane, the wife may apply for the curatorship of her own estate, and may also be appointed curator of her husband's property [*in re de Jager* 6 Buch. 228; *ex parte Elder* 1921 E.D.L. 318].

A wife married out of community may also apply for an interdict restraining the husband from alienating any of her property, or even his own property, pending an action for divorce or judicial separation [*Hayward v. Hayward* 6 E.D.C. 192]. Any alienation of her property by the husband after such an interdict has been granted is void, and the wife may recover her property from the alienee.

The mere incapacity or absence of the husband does not entitle the wife to act without the husband's consent, for his marital control is not thereby excluded, and if she wishes to enter into some

transaction, e.g., to transfer property, during such absence or incapacity, she must apply to court for the appointment of a curator to assist her, although in exceptional circumstances a curator may be dispensed with [*ex parte Lazarus 1925 W.L.D. 8*]. So, too, when it is impossible to obtain the husband's consent owing to his desertion, the court may give the wife leave to enter into a contract, or to transfer or mortgage her property without his assistance [*ex parte Westerdijk 1 Off. Rep. 286*]. Also, when a husband deliberately withholds his consent or assistance to his wife's appearance in a lawsuit in a matter beneficial to her, the court may give her leave to sue or defend without such assistance [*ex parte Lawson 1906 T.H. 169*].

ANTENUPTIAL CONTRACTS WHICH EXCLUDE THE MARITAL POWER.

In addition to the exclusion of community of property and of profit and loss, the antenuptial contract may and commonly does provide for the exclusion of the marital power. This may be done in express words or by words signifying that the wife shall retain the sole exclusive and uncontrolled administration of all her property as fully and effectually as if the marriage had not taken place, without the interference, control or assistance of her husband. By this means an independent position is given to the wife. The husband is no more entitled to deal with her property than a stranger would be. She has full powers to enter into contracts and to deal with her own property as she pleases, and to mortgage or transfer it without the assistance of her husband [*ex parte Kerr*

1911 O.P.D. 12]. If she allows her husband to alienate any of her property, or to become indebted to her in any other way, e.g., by lending him money for his business, she is in the same position as any other creditor of his [*Mostert's Trustees v. Mostert* 4 S.C. 35; *Rupert's Trustees v. Rupert* 4 S.C. 22].

There is no implied partnership between the spouses and their estates are entirely separate. The wife, further, has no interest direct or indirect in her husband's business so as to restrain her from practising as an advocate when the husband is an attorney, in a province wherein an advocate is forbidden to have any interest in an attorney's business [*ex parte Geffen* 1923 T.P.D. 373]. The common liability of husband and wife for household necessities, still, however, remains (see Chapter Eight). Further, the wife does not need her husband's assistance in instituting or defending actions [*van Eeden v. Kirstein* 1880 Kotze 184; and see *McCullough v. Ross* 1918 C.P.D. 389].

REGISTRATION OF ANTENUPTIAL CONTRACTS.

The Deeds Registries Act, No. 13 of 1918, to which the following sections refer, provides that no antenuptial contract executed in the Union has any force or effect in the Union as against the creditors in insolvency of either spouse, unless registered in a Deeds Registry within the prescribed time [*Sec. 28 (3)*]; i.e., within one month after execution or within such further period as the court may on application allow [*Sec. 28 (1)*].

Though an unregistered antenuptial contract is of no effect against creditors, its stipulations are still binding as between the parties themselves, and hold good in favour of children or others entitled to any benefits thereunder [*Steytler v. Dekkers 2 Roscoe 98*].

Antenuptial contracts executed in the Union must be executed before a notary public [*Sec. 28 (1)*] and they must be witnessed by two competent witnesses [*Meintjes v. Registrar of Deeds 1915 T.P.D. 228*]. Women are competent to witness notarial deeds [*Sec. 53*].

An antenuptial contract becomes effective throughout the Union, since notice of registration is transmitted to every other Registrar of Deeds for entry, together with the date of the contract, names of the parties and date of registration. Such entries are deemed to be registration of the contract throughout the limits of the registry wherein the entries are made [*Sec. 28 (2)*].

Contracts may be registered by order of court, on good grounds shown, even after the lapse of the prescribed time, if the terms thereof were agreed upon between the intending spouses before the marriage [*Sec. 30*]. Contracts will be thus registered because of some *bona fide* mistake on the part of the spouses or of the notary, or because of circumstances over which there was no control; but relief must be sought timeously. Corroboration of the allegations of the spouses will be required as to the fact that a contract was entered into and as to its terms. Thus, where parties believe that

they are being married out of community by virtue of some law other than that of South Africa, a contract to exclude community will not be implied [*ex parte Orford* 1920 C.P.D. 367].

An antenuptial contract executed outside the Union, whether notarially or not, may be registered at any time, provided that the contract itself together with a duplicate, certified by the Registrar of Deeds (or other officer authorised thereto) of the place where it was executed, or by a notary public, and also the duly authenticated marriage certificate of the parties, is lodged at the time of registration [Sec. 29]. The law of the place of execution determines whether the antenuptial contract has been executed in due form; the law of the matrimonial domicile as a general rule determines the effect of the contract [*Bosman's Trustee v. Bosman* 14 S.C. 323; *Blatchford v. Blatchford's Exors.* 1 E.D.C. 367].

Any person, on payment of a fee, may inspect the registers and records in a deeds registry, and obtain copies or extracts therefrom [Sec. 29].

POSTNUPTIAL CONTRACTS AND EXCLUSION OF COMMUNITY IN NATAL.

Only in Natal are there provisions for registering contracts entered into after marriage. By Law 22 of 1863 (N) community does not attach to marriages contracted outside South Africa. The operation of this Law is extended to any marriage celebrated in Natal or elsewhere in South Africa,

if the spouses signify their desire or intention that their marriage shall come under this Law. Their intention must be expressed by an instrument in writing or contract executed by them at any time during the existence of the marriage, signed by each in the presence of two witnesses [*Law 22 of 1863 (N) Sec. 7, as amended by Law 14 of 1882 (N)*]. This instrument is not binding if not registered in the Deeds Office within six months of its execution, and it has been held that it is not only not binding on third parties, but that it is void as regards the parties themselves [*Trustees of B. Sturrock v. Exors. J. T. Sturrock 18 N.L.R. 253*].

The combined effect of these provisions is to render valid postnuptial contracts excluding community. Once the postnuptial contract is registered, where the rights of creditors are not affected, the marriage is deemed to have been one out of community all the time [*Buller N.O. v. Linder 1925 N.P.D. 9*].

It has been decided that if parties marry in community in Natal and then adopt the Cape Province as their domicile, and thereafter enter into a postnuptial contract, such contract is of no force in the Cape Province [*Union Govt. v. Larkan 1916 A.D. 212*]. The position in the other provinces would probably be the same.

Earnings of Wife.—A further provision, also unknown elsewhere in South Africa, is introduced by this Law. The earnings of spouses who come under this Law which have been acquired during the marriage, are the property of the husband,

subject to any liability for debts that would have existed had not this Law been passed. The provision does not apply, however, to earnings gained during a separation of goods, or during a period when the wife has been maliciously deserted by her husband. Such earnings belong to the wife, unaffected by any rights of the husband or his creditors. The liability of a husband to maintain his wife is not affected by these provisions [*Sec. 6*]. It is open to the spouses, by a written agreement signed by them in the presence of two witnesses, to make other arrangements concerning such earnings, and to vary their arrangements, though they may not thus exempt from liability for debts any property which would otherwise have been liable therefor [*ibid.*]. The provisions of this section cannot affect the rights of persons not coming under this Law, *e.g.*, persons married out of community under some other law, such as that of England [*Brown v. Brown 1920 N.P.D. 248*].

CHAPTER EIGHT.

CONTRACTS OF MARRIED AND UNMARRIED WOMEN.

There is no distinction in South African law between the contractual capacity of unmarried women and of men, nor are unmarried women of full age under the necessity of obtaining assistance in order to institute or defend actions.

CONTRACTUAL CAPACITY OF MARRIED WOMEN.

The contractual capacity of married women has been dealt with in the preceding two chapters. To the general rules there enunciated, exceptions arise in the case of the following contracts: contracts for necessities; contracts made by a wife who is a public trader; and contracts beneficial to the wife.

Contracts for Necessaries.—“The contracts of the wife in the household management bind herself and her husband, as though established by the consent of the husband, who tacitly relinquishes the household affairs and entrusts them to his wife” [Voet 23.2.46]. A wife may accordingly pledge her husband’s credit whether he be present or temporarily absent from the home, for food and

clothes and such things as are necessary for the upkeep of the household. She is also entitled to dispose of movable property of the community of small value in order to obtain such necessaries [*Du Preez v. Cohen Bros.* 1904 T.S. 157]. The husband is also liable if the wife has borrowed money for these purposes [*Voet* 23.2.46]. To what extent a wife may incur obligations, and whether in any particular case goods purchased were necessaries or not, is to be judged by the court, having regard to the social standing and means of the parties and their habits of life in the past [*Reloomel v. Ramsay* 1920 T.P.D. 371]. A wife has this right of pledging her husband's credit whether the marriage is in or out of community.

It is an essential condition of marriage that the spouses should live together, and the wife pledges the husband's credit as manager of the common household. When spouses are living apart the husband's obligations to third parties on his wife's contracts is co-extensive with his duty to support his wife. Accordingly if the wife is not living with her husband through his misconduct or his desertion he will be held liable for her contracts for necessaries, since he continues to be liable for her support [*Coetzee v. Higgins* 5 E.D.C. 352; *Gannon v. McClure* 1925 C.P.D. 137]. The position is otherwise if the wife unlawfully and without just cause deserts or lives apart from her husband. He is not then liable for her contracts even for necessaries [*Bing and Lauer v. van der Heever* 1922 T.P.D. 279].

If the spouses are not living together but the husband makes the wife an allowance, the question

arises as to whether he still liable for necessary goods supplied to her. Since there is no common household, *prima facie* the wife's power to bind her husband ceases to exist [*Bing & Lauer v. van der Heever, supra; Janion v. Watson* 6 N.L.R. 234]. The tradesman is put on enquiry, as the court takes into account the circumstances under which the parties live apart before holding the husband liable. If the husband fulfils his duty of support by making the wife an adequate allowance when they live apart by mutual consent, the tradesman will not be able to recover from the husband any more than if the wife had deserted the husband [*Excell v. Douglas* 1924 C.P.D. 472].

If the husband is merely absent and the tradesman is not conversant with the fact or put on enquiry, he may still hold the husband responsible for purchases made by the wife which are reasonable according to outward manifestations from which he may judge, provided that he has acted reasonably in giving her credit. In this case the fact that the husband has made the wife an allowance is immaterial, as he cannot take away his wife's rights of pledging his credit by any secret act, such as forbidding her so to do. He can only take away this right by some public notice with which the vendor is expressly or impliedly conversant, although a judicial injunction against the wife, which was necessary under the older law, would probably not be required nowadays [*Reloomel v. Ramsay, supra; Frame v. Boyce* 1925 T.P.D. 353]. The Cape courts and Transvaal courts have thus emphasised different aspects of the situation in these cases.

A woman entering into a contract for necessities is *prima facie* the agent of her husband [*Mason v. Bernstein* 14 S.C. 504]. When the marriage is in community the husband is liable for the whole debt. Although the wife has power to bind the community for such necessities, her contract is really the husband's contract, and he is the person who must be sued thereon [*Smith v. Bard* 1917 C.P.D. 616]. If the creditor's claim is put forward only after the dissolution of the marriage, and has not been proved against the joint estate, the surviving wife is liable only to the extent of one-half, in accordance with the general rule concerning community debts [*Grassman v. Hoffman* 3 S.C. 282].

When the marriage is out of community and the marital power is not excluded, though a wife cannot usually create an obligation binding on herself, she may do so on her contract for necessities. If she makes the purchases in her own name and credit is given to her, she or her estate is liable to the vendor for the full amount of the debt both during the marriage and after its dissolution [*Hern & Co. v. de Beer* 1913 T.P.D. 721].

Although the vendor thus may look to the spouse with whom the contract was made for the satisfaction of his claim, yet husband and wife have a joint liability for debts for necessities for the common household purchased by either. The vendor may hold each spouse liable, when the marriage is out of community and even when the marital power is excluded, for one-half of the cost of necessities purchased from him during the mar-

riage, on the assumption that because of the nature of the things bought it is a joint purchase, whether the purchase was made by the husband or the wife in his or her own name and on his or her own credit. This liability attaches to the spouses both during the marriage and after its dissolution [*van Rensburg v. Swersky Bros.* 1923 T.P.D. 255]. If, however, by express terms the husband or wife assumes the whole responsibility for the purchase, and the vendor agrees to look only to him or her, he would probably not be allowed afterwards to sue the non-contracting spouse [*ibid.* at p. 259].

Contracts of Wife who is a Public Trader.—A married woman who is a public trader with the consent of her husband may validly enter into all the transactions necessary for the proper conduct of the business, and may enter into binding contracts, as if her husband had given her a mandate for the conduct of her own affairs [*Voet* 23.2.44]; but only within the scope of her business [*Holton v. Cato* 22 N.L.R. 152].

To constitute a woman a public trader, she must be engaged publicly and openly in some wholesale or retail branch of commerce, and when this is the case the husband cannot say that she carried on her trade without his consent [*Grobler v. Schmilg & Freedman* 1923 A.D. 496]. The husband's consent may be implied from other circumstances too, e.g., where the wife has a trading licence in her own name [*MacIntyre v. Goodison* 1877 Buch. 83]. If the husband withdraws his permission, the wife's power to enter into binding obligations ceases,

although the rights of third persons cannot be affected by this fact unless they had notice of the revocation of authority [*Voet* 23.2.44].

A married woman may sue and be sued personally on her trade contracts [*van Eeden v. Kirstein*, 1880 *Kotze* 182; *Grobler v. Schmilg & Freedman*, *supra*]. When the marriage is in community the wife's contracts in connection with her trade bind the community, and although the creditor may sue the wife, he is at liberty to sue the husband instead [*Matson v. Dettmar* 1917 *E.D.L.* 371].

When the marriage is out of community the husband's liability probably depends on whether the wife could be looked upon as the agent of the husband or not. It appears, however, that the wife is liable for the full amount of her trade debts both during the marriage and after its dissolution [*see Hern & Co. v. De Beer* 1913 *T.P.D.* 721].

Beneficial Contracts.—A wife entering into a contract without her husband's consent is in the position of a minor acting without the authority of his guardian. The contract is binding under certain circumstances, as follows:—

(a) A unilateral contract which is solely to the wife's advantage and places no obligations on her, is enforceable as against the other contracting party [*Voet* 23.2.44]. When marriage is in community payment of any debt must be made to the husband, as payment to the wife without the husband's knowledge does not release a debtor unless it be proved that the husband received the benefit of the payment [*Brath v. Mulder* 1 *Menzies* 207].

(b) A contract which has benefited the wife or the common estate cannot be treated as a nullity, and the husband and wife are effectually bound thereby [*Forster v. Becker* 1914 E.D.L. 193; *Karsten v. Forster* 1914 C.P.D. 919].

(c) While a married woman cannot be bound without her husband's consent by a contract involving mutual obligations, save as above, she can hold the other party thereto bound, after her husband's death, if she considers that the fulfilment of the contract is advantageous to her [*Voet* 23.2.43].

WIFE'S LOCUS STANDI IN JUDICIO IN SPECIAL CASES.

A wife whether married in or out of community may be sued alone if she has been deserted by her husband and he is absent from the jurisdiction, whether on contract [*Kunne v. de Beer* 1916 C.P.D. 667] or in tort [*Molemohi v. Bezuidenhuit* 1913 C.P.D. 756]. She may sue alone only if she obtains the leave of the court [*McCullough v. Ross* 1918 C.P.D. 389]. This leave will be granted to a woman if her husband is unavoidably absent [*ibid.*] or has deserted her [*ex parte Kloppe* 23 S.C. 445], whether the action be one on contract [*ibid.*] or for tort [*McCullough v. Ross, supra; MacGregor v. S. A. Breweries, Ltd.*, 1919 W.L.D. 22]. Leave may also be given to a wife to bring an action if the husband withholds his consent where the action is for her benefit, e.g., an action for damages [*ex parte Lawson* 1906 T.H. 169; *ex parte Meyer* 1920 E.D.L. 300].

A wife judicially separated from her husband may choose a jurisdictional domicile to regulate her separate contracts or the conduct of any business or trade [*Steytler v. Steytler* 1913 C.P.D. 725].

A wife has always a *locus standi in judicio* to institute or defend actions when the suit is between husband and wife [*Van Eeden v. Kirstein* 1880 *Kotze* 182].

WOMEN AS SURETIES.

There is one special protection which women, both married and unmarried, enjoy under South African law, and that is when they stand security for others. A woman who takes upon herself either wholly or in part the obligations of another, when action is brought against her on such contract, may plead special privilege under two rules of law dating from Roman times, *viz.*, the *Senatus-consultum Vellejanum* (A.D. 46), which applies to all women sureties, and the *Authentica si qua mulier* (A.D. 556), which specially exempts from liability a married woman who has stood as surety for her husband. If, then, she incurs a liability to a creditor to secure a third person against past or future advances, a woman is entitled to plead her privilege; but if she later receives value from the debtor, she is bound to account for the amount actually received by her, and may claim privilege only in respect of the balance [*Zeederberg v. Union Bank* 3 S.C. 290].

A woman may nevertheless be validly bound on her contract of suretyship if she expressly renounces one or both of these privileges as the case requires. It must be shown, to hold her liable, that she understood the nature of the rights and benefits she was waiving [*Oak v. Lumsden* 3 S.C. 144], even though she renounces them in writing [*Maasdorp v. Graaff Reinet Board of Executors* 3 B.A.C. 482]. The renunciation of benefits must be clearly made. This is best evidenced by a notarial instrument, though a notarial instrument is not essential to the validity of the renunciation [*Oak v. Lumsden, supra*; *Alport's Exors. v. Alport* 16 S.C. 317].

Even without renunciation of benefits a woman is bound by her suretyship undertakings in certain cases:—

- (a) A woman public trader is liable where she undertakes a suretyship for the benefit of her business [*Oak v. Lumsden, supra*].
- (b) A woman is liable who becomes a surety on good consideration [*Le Roux v. Brink's Exor.* 4 S.C. 74], or who leads the creditor to believe that this is the case [*Oak v. Lumsden, supra*].
- (c) Where a woman surety for her husband is herself indebted to her husband, or holds herself out as being so indebted, she is liable [*Maasdorp v. Graaff Reinet Board of Exors., supra*]. This

is the case too when she is indebted to any other debtor for whom she stands security (or holds herself out to the creditor as being so indebted), at any rate up to the amount of her indebtedness [*Thomas v. Baumann & Gilfillan* 1914 T.P.D. 197].

- (d) A woman is bound by her contract of suretyship if she obtains a real benefit from the transaction [*Bevern's Trustee v. Kretschmar* 11 S.C. 18]; releasing a husband from gaol, by giving bail for for him, has been held to be such benefit [*Richter v. Transvaal Government* 1906 T.S. 146].

Women Signatories to Negotiable Instruments.
 —The common law protection given to women is very wide, and it was not unusual for women who had signed as parties to notes and bills which were regular and complete on the face of them to deny liability on the ground that the obligation had been incurred on behalf of their husbands or other persons. This is no longer possible since the passing of the Bills of Exchange Acts [*Act No. 19 of 1893 (C)*; *Proc. 11 of 1902 (T)*; *Law 8 of 1887 (N)*; *Law 28 of 1902 (O.F.S.)*]. Sec. 20 of these Acts (Sec. 21 of the Natal Act) enacts that capacity to incur liability as a party to a bill is co-extensive with capacity to contract: provided that to the validity of a bill accepted or endorsed by a woman, the renunciation of the benefits *Senatus-consultum Vellejanum* and *Authentica si qua mulier* shall not be requisite.

A woman endorsing a note to which she is not a party, by signing on the back of it "as surety and co-principal debtor," without renouncing the benefits above-mentioned, can not be held liable on her suretyship [*Maasdorp v. Graaff Reinet Board of Exors.* 3 B.A.C. 482]. Any third person endorsing a note to which he is not a party before the payee or anyone else, is considered to have undertaken the obligations not of an endorser, but of an aval or surety [*Ullman Bros. v. Railton* 1903 T.S. 596]; so that a woman so endorsing a note and not renouncing her privileges is not liable in any way on such endorsement [*Maasdorp v. Graaff Reinet Board of Exors, supra*].

Sec. 26 of the Acts above-mentioned (Section 27 of the Natal Act) provides that an accommodation party is liable on the bill to a holder for value, whether the latter knew the former to be an accommodation party or not. The effect of this, together with Sec. 20 above referred to, appears to be that a woman who is really lending her name as an accommodation party cannot plead her privilege if she accepts or endorses a bill, or makes a note, or is the second or subsequent endorser of a note. If such woman draws a bill, or is the first endorser of a note, she can plead her privilege only if the holder is not a holder for value. If the holder does not know she is an accommodation party he can recover against her; if he does know, then he probably cannot [*Mackie Dunn and Co. v. McMaster* 9 S.C. 212].

CHAPTER NINE.

MARRIAGE SETTLEMENTS IN ANTE-NUPTIAL CONTRACTS.

GIFTS FROM HUSBAND TO WIFE.

The settlements most commonly made by antenuptial contract are those by spouses on one another. Most frequently they are gifts from the husband to the wife of money or furniture, or settlements of insurance policies (which are separately considered in Chapter Eleven). While the husband remains solvent, such settlements contained in a duly registered antenuptial contract cannot be disputed, but in the case of insolvency certain limitations as to their validity are encountered.

The Insolvency Act, No. 32 of 1916, consolidates the insolvency laws throughout the Union. The references below are to this Act as amended by Act No. 29 of 1926.

The general rule is that any disposition of his property made by a person when in insolvent circumstances, not for value, may be set aside on his

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insolvency [*Sec. 24 (1)*]. If such disposition has been set aside, it cannot give rise to any claim in competition with the insolvent's creditors [*Sec. 24 (2)*]. "For value" in this connection sounds in money, so that a settlement made on a wife by a husband in an antenuptial contract by way of a marriage gift is a disposition not made for value [*Silver v. Standard Bank 1923 O.P.D. 126; van Rensburg v. van Rensburg's Estate 1923 E.D.L. 200*].

Such settlements, then, are regulated by the same rules as apply to other dispositions not made for value, with the following important exception. No immediate benefit under a duly registered antenuptial contract, given in good faith by a person to his wife or any child to be born of the marriage is liable to be set aside as a disposition without value unless the sequestration of his estate took place within two years of the registration of that antenuptial contract [*Sec. 25*]. It follows that it is liable to be set aside if the sequestration of the husband's estate does take place within the period mentioned [*Silver v. Standard Bank, supra*].

An "immediate benefit" means a benefit given by transfer, conveyance, delivery, payment, cession, pledge, or special mortgage of property, completed within the three months immediately after the date of the marriage [*Sec. 25*].

Dispositions not made for value, if not completed by the insolvent, cannot give rise to any claim in competition with the insolvent's creditors [*Sec. 24 (2)*], so that a wife cannot claim to com-

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pete with her husband's creditors in the case of any gift to her made in an antenuptial contract, if it has not been duly completed before the date of sequestration. Thus a settlement of money payable to the wife on the husband's death does not give her a right to claim on her deceased husband's estate in competition with his creditors [*Van Rensburg v. van Rensburg's Estate, supra*].

A provision in an antenuptial contract whereby a husband settles money on the wife to be paid out to her on his insolvency is illegal and of no force and effect whatever [*Trustees of Leigh v. Leigh 1 S.C. 75*].

When a settlement is not an immediate benefit then the following provisions of the Insolvency Act relating to dispositions without value apply. Every disposition of his property made by an insolvent not for value, may be set aside—

- (a) if, having been made more than two years before the sequestration it is shown that immediately thereafter the insolvent's liabilities exceeded his assets;
- (b) if, having been made within two years of sequestration, the party claiming under or benefited by the disposition is unable to prove that immediately after the disposition was made the assets of the insolvent exceeded his liabilities [*Sec. 24 (1)*].

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Where it is shown that the liabilities of the insolvent at any time after the making of the disposition exceeded his assets by less than the value of the disposition, it may be set aside only to the value of such excess [*ibid.*]

OTHER DISPOSITIONS IN ANTENUPTIAL CONTRACTS.

To antenuptial contracts third persons, too, may be parties. A parent or some other person may make a settlement on one of the spouses, or on the issue of the spouses, or some appointed person may accept a settlement as trustee on behalf of one of the spouses, or of the issue of the intended marriage. Valid obligations are created by such stipulations, and compliance with them is enforced, so that if a wife has allowed a trust to be created over her property by antenuptial contract, she cannot later deal with the property herself, even with her husband's consent. The intervention of the trustee will be necessary in terms of the contract [*Buissine v. Mulder et Uxor 1 Menzies 162*].

In addition to providing for settlements having effect during life, antenuptial contracts may also provide for succession on death. In no other case than this are such agreements, relating to the inheritance of or the succession to living persons, allowed in South African law. Clauses may thus be inserted in an antenuptial contract stipulating for the succession of the spouses to one another, or of third persons to the spouses, or of the spouses to third persons.

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ALTERATION OF ANTENUPTIAL CONTRACTS.

Once an antenuptial contract has been entered into, it cannot, during the marriage, be revoked or altered save by judgment of the court, even by the mutual consent of the spouses [*ex parte de Zwaan* 1909 T.S. 676; *Buissine v. Mulder et Uxor*, *supra*]. All its provisions must be adhered to. Thus when a disposition of landed property in favour of a third party amounting to a trust has been created in an antenuptial contract, such land cannot thereafter be alienated by the spouses [*ex parte de Zwaan, supra*].

Alteration by Judgment of the Court.—The provisions of an antenuptial contract may, however, be altered during the marriage by a judgment of the court, on good grounds shown [*ex parte Smuts* 1914 C.P.D. 1034], on full information as to the reasons for and the effect of the alteration [*ex parte Craggs* 1915 T.P.D. 385], the rights of creditors becoming such before the new registration being always safeguarded.

The court has thus ordered the alteration of an antenuptial contract where the parties desired to substitute other land for that settled on the wife and children [*ex parte Tasker* 26 S.C. 587]. It has also consented to the cancellation of a trust in several cases, *e.g.*, where money was settled on the wife as her absolute property with a trustee in whom it was to vest, the wife being judicially separated from her husband, and the trustee having died [*ex parte Kerr* 1911 O.P.D. 12]: where the wife was in present need of money vested in trus-

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tees, the husband and trustees consenting thereto [*Marshall v. Marshall's Trustees* 5 Searle 144]: and where money so vested was needed for the education of the children [*ex parte Smuts, supra*].

The court may also in special cases authorise spouses to raise loans on the security of life policies settled by antenuptial contract, for necessary purposes, such as the education of children [*ex parte de Jongh* 25 S.C. 90], or business extensions [*ex parte Annear et Uxor* 1912 C.P.D. 362].

The court may, however, refuse to vary an antenuptial contract in regard to terms not agreed upon before the marriage between the spouses, following the same principles as those applied when an application is made to register an antenuptial contract postnuptially [*ex parte Baard et Uxor* 1926 C.P.D. 201].

Alteration by Mutual Last Will.—Antenuptial contracts may also be altered by mutual last will of the spouses [*Union Government v. Larkan* 1916 A.D. 212], though the revocation by will of a disposition in an antenuptial contract must be specifically made [*Ladies' Christian Home v. S. A. Association* 1915 C.P.D. 467]. Thus the spouses may depart from a clause providing for the succession of the one to the other: or they may introduce community to take effect after the death of the first-dying. Either spouse may, however, adhere to the provisions of the antenuptial contract by so stating in a later separate will, or by repudiating the joint will and not accepting any benefits thereunder [*Voet* 23.4.62]. The spouses cannot by

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their wills revoke any settlements made by third persons in the antenuptial contract [*Voet* 23.4.61].

Where the spouses have by antenuptial contract provided for the succession to themselves of third parties, this arrangement may be altered by mutual last will, or, as far as his or her own share is concerned, by the surviving spouse [*Voet* 23.4.63]. If the intended successor, however, was a party to the contract, and thus acquired a contractual right thereunder, the succession in his favour cannot be altered without his consent [*Voet* 23.4.66]. Conversely, where the succession of the spouses to a third person who as a party to the antenuptial contract is in question, such party cannot revoke his settlement in their favour, for his contract is a binding one [*Voet* 23.4.67].

The testamentary arrangements of the spouses only come into effect on death, however, and cannot affect the rights of creditors [*Union Government v. Larkan, supra*].

CHAPTER TEN.

SEQUESTRATION OF ESTATES OF MARRIED PERSONS.

The sequestration of insolvent estates is regulated by the Insolvency Act No. 32 of 1916. Additional provisions dealing specifically with the insolvency of married persons have, however, recently been introduced by an amending Act, No. 29 of 1926, in order to more effectually protect creditors against collusive dealings between husband and wife. The references below are to the Insolvency Act as thus amended.

The sum total of these provisions is that although spouses may be married out of community, the law tends to regard their property as one, as against third persons. The burden of proving that it is divided and the manner and origin of its division, is cast upon the spouses whenever the rights of creditors are in question.

EFFECTS OF SEQUESTRATION.

The effect of the sequestration of the separate estate of one of two spouses not living apart under a notarial deed of separation or a judicial order of

separation, is forthwith to vest in the Master, unless and until a trustee is appointed, and then to vest in the trustee of the estate of the insolvent spouse, all the property of the spouse whose estate was not sequestrated, as if it were property of the sequestrated estate, with power to deal with it accordingly [*Sec. 19 (2)*].

The trustee may not, however, save with leave of the court, realise any property ostensibly the solvent spouse's until after six weeks' notice given to such spouse. Such notice must also be published in the *Government Gazette* and in a newspaper circulating in the district where such spouse resides or carries on business, and must call on his or her separate creditors for value to prove their claims in the manner provided [*Sec. 19 (2) (b)*].

After the realisation of any of the solvent spouse's property, it bears a proportionate share of the costs of sequestration as if it belonged to the insolvent spouse [*Sec. 19 (2) (d)*].

Property Exempted from Trustee's Control.—The trustee is required to release such of the solvent's property as is shown (presumably by such spouse)—

- (1) to have been his or her separate property immediately before the marriage to the insolvent; or
- (2) to have been acquired by him or her under a marriage settlement; or

- (3) to have been acquired during the marriage with the insolvent by a title valid as against the insolvent's creditors; or
- (4) to be protected as an insurance policy under Sec. 26 of this Act or under the Insurance Act No. 37 of 1923; or
- (5) to have been acquired with any of the above classes of property, or with the income or proceeds thereof [Sec. 19 (2) (a)].

Release of Property by Spouse or by Trustee.—The solvent spouse may apply to court for an order releasing any of his or her property vested in the trustee, or for an order staying the sale of and releasing such property, or for an order declaring him or her entitled to the proceeds of such property, before their distribution [Sec. 19 (2) (c)]. The court thereupon makes such order as it thinks just [*ibid.*]

The trustee, too, may release and thereafter establish his title to any property alleged to be that of the solvent spouse. If he establishes his title, the creditors of the solvent spouse have no rights to that property under any of the provisions mentioned below [Sec. 19 (5)]; for the property in such case is that of the insolvent, and not of the solvent spouse.

Rights of Creditors of Solvent Spouse.—The separate creditors for value of the solvent spouse may prove against the insolvent's estate as if they

were creditors of such estate, and with the same rights, remedies and obligations. Such creditors rank on the proceeds of the solvent spouse's property in accordance with their legal priorities among themselves, and in priority to the separate creditors of the insolvent. They are not, however, entitled to rank upon the separate assets of the insolvent.

If the solvent spouse has obtained the release of any of his or her property, his or her creditors may only rank on the proceeds of the property realised after the property so released has been excused, as well as property acquired by the solvent spouse since the sequestration, but excluding property protected under the Insurance Act [*Sec. 19 (2) (d)*].

Meetings of Creditors.—No proved creditor of the solvent spouse may vote at a meeting of creditors (though he may apply to court to set aside any resolution of creditors interfering with his rights); nor is he liable to contribution [*Sec. 19 (2) (e)*].

Amongst the persons who may be examined at a meeting of creditors are the wife or husband of the insolvent, and any relatives of the insolvent within the fourth degree of consanguinity or affinity [*Sec. 55*].

Privileges of Solvent Spouse in Special Cases.—If the solvent spouse carries on business as a licensed trader apart from the insolvent, or is likely to suffer serious prejudice through the immediate vesting of his or her property in the Master or the

trustee, and is willing and able to make immediate arrangements whereby the interest of the sequestrated estate in his or her property will be protected without such vesting, the court, when making the sequestration order or later, may declare those assets or part of them to be excluded from the operation of the sequestration order for such period as it thinks fit. During this period, the solvent spouse may prove his or her claim to such assets, and the trustee must notify him or her whether he will release them. If the assets are not so released, on the expiry of the period they vest in the Master or trustee [*Sec. 19 (3)*].

When an application is made to court to sequester the solvent spouse's estate, on the ground of an act of insolvency committed by him or her since his or her estate vested in the Master or the trustee, and it is found that the act of insolvency is due to such vesting, the court may postpone the hearing of the application or make an interim order, if it appears that proceedings are being or will be taken by the solvent spouse to release the property, or that such property has been released since the sequestration order was made, and that the solvent spouse can now discharge his or her liabilities [*Sec. 19 (4)*].

EFFECTS OF ASSIGNMENT.

When a deed of assignment of the estate of one spouse is registered, an additional effect thereof is to vest in the assignee all the property of the spouse whose estate has not been assigned, in just the same

manner, to the same extent, and subject to the same conditions, rights, remedies, and obligations with regard to the assignee, the solvent spouse, and the creditors of both spouses, as is provided in regard to the property of a solvent spouse vested in the trustee of the estate of an insolvent spouse [Sec. 126 (2)].

CHAPTER ELEVEN.

INSURANCE POLICIES.

Policies of life insurance form an exception to certain general rules governing the property of married persons; *viz.*, that all the property of spouses married in community falls into the community; that the wife's property comes under the control of the husband, save where an antenuptial contract provides otherwise; and that donations are forbidden between spouses. They also form an exception to the rule that all the property of an insolvent vests in his trustee in insolvency, and to the provision vesting in the trustee of an insolvent spouse the property of the solvent spouse.

The law relating to insurance is consolidated throughout the Union by the Insurance Act No. 37 of 1923. "Life Policy" under this Act means a policy insuring payment of money on death (except death by accident only) or the happening of any contingency dependent on human life, and includes an instrument evidencing a contract which is subject to payment of premiums for a term dependent on human life or provides for the payment of an annuity for a term dependent on human life [*Sec. 57*].

Policies Excepted from Husband's Control.—Every married woman may effect a policy of insurance upon her own life, or upon the life of her husband. Every such policy, and every policy effected by a woman upon her own life before marriage, and the moneys payable in respect of every such policy are as between the husband and wife, her sole and separate property free from his control [Act 37 of 1923 Sec. 25]. In the case of a marriage in community, such policies enjoy special protection against the husband's creditors.

Subject to any rights reserved by the intended husband, a policy of insurance on his or her life effected in favour of or ceded to or for the benefit of an intended wife to whom he is afterwards married in community of property, is, as between the husband and wife, her sole and separate property, free from his control [*ibid.* Sec. 26]. In just the same way, a policy on his or her life, effected in favour of or ceded by a husband, after marriage, to or for the benefit of his wife is, as between the spouses, whether they be married in community or not, the sole and separate property of the wife, free from the husband's control, and is not void as a gift between spouses [*ibid.* Sec. 27].

The inference appears to be that as against creditors, except where protection is afforded specifically by either the Insurance Act or the Insolvency Act, such policies would be an asset in the common estate, were it to be sequestrated.

PROTECTION OF POLICIES UNDER INSOLVENCY ACT

Protection against the claims of creditors is afforded by the Insolvency Act, No. 32 of 1916, Sec. 26, to policies of life insurance effected by a husband for the benefit of his wife and children, both in the case of the wife's insolvency and of his own insolvency.

For the purposes of this section "Policy of Life Insurance" includes a contract for securing an insurance endowment, bonus, or annuity upon the death of the insured or on the expiration of any period or on the happening of an event, as well as a fully paid-up policy granted for the surrender or exchange of a policy of an equivalent value, but does not include any other property acquired in consideration of a surrender, pledge or cession of a policy [*Section 26 (2) (c)*].

The protection of the Insolvency Act has reference only to policies of this nature effected by a husband for the benefit of his wife or children. As far as other policies effected by a husband are concerned, or policies effected by some person other than the husband, the question of whether they are protected or not falls to be determined by the provisions of the Insurance Act, and is considered later.

Protection against Wife's Creditors.—When a person before or during marriage has effected in favour of or ceded to or for the benefit of his wife any policies of life insurance, these policies, up to an amount of £2,000 together with bonuses are

excluded from the wife's estate if she becomes insolvent [*Sec. 26 (1)*]; *i.e.*, they cannot be seized by the trustee of her insolvent estate.

Protection against Husband's Creditors.—Where anyone before or during marriage has in good faith effected in favour of, ceded to or for the benefit of his wife or child or both any policies of life insurance at any time more than two years before his estate was sequestrated, such policies up to an amount of £2,000, together with any bonus claimable in respect thereof, are excluded from his insolvent estate, or, if he be married in community of property, from the joint estate of himself and his wife [*Sec. 26 (2)*].

If the policies are settled on the wife under a duly registered antenuptial contract, and constitute an "immediate benefit," *i.e.*, if they are effected or ceded to the wife within three months of the date of the marriage, and insolvency does not supervene within two years of the registration of the antenuptial contract, there is no limit to the amount in respect of which the policy is protected from the control of the trustee of the husband's insolvent estate, for it is not then liable to be set aside as a disposition without value [*Act 32 of 1916 Secs. 25 and 26 (2)*].

Proof of Benefit or Cession.—It is not sufficient to protect a policy against the husband's creditors that the insurance was effected with the intention that it should be payable to the wife or children. Some act must have been done by which this intention was carried into effect. Thus where a man

takes out a policy on his life, payable to him, his executors, administrators or assigns, without any mention therein of his wife or children, they cannot claim that the policy was effected in their favour [*Wallach's Trustee v. Wallach* 1914 A.D. 202; *Dittmar v. Dittmar's Trustee* 1916 W.L.D. 71].

The fact, however, that a formal cession to the wife is not endorsed on the policy itself, will not invalidate the cession if it is otherwise complete. Where a policy settled by a husband on a wife in a duly registered antenuptial contract is delivered, though there is no endorsement on the policy, and no notice has been given to the insurance company, the cession to the wife is complete [*Morkel v. Holm* 2 S.C. 57].

Policies Ceded or Pledged to Creditors.—Every policy ceded or pledged to any person other than the wife or child of the insured or a trustee on their behalf at the time of sequestration, is not protected to the extent of such cession or pledge [*Sec. 26 (2) (a)*].

Where a policy is protected as to a part only, the person entitled to the unprotected part may apply to the insurance company to issue two policies, one for the unprotected part, and the other for the protected part, in favour of the parties respectively entitled thereto. These the company is required to issue, at the expense of the applicant, and the original policy thereupon becomes void [*Sec. 26 (2) (b)*].

PROTECTION OF POLICIES UNDER INSURANCE ACT.

The sections referred to below are those of the Insurance Act, No. 37 of 1923.

Policies that have Endured Three Years.—A policy of life insurance on his own life effected by any person, which has endured for three years from the date of payment of the first premium, is preserved to such person up to an amount of £2,000 plus any bonus claimable in respect thereof. To this extent the policy cannot during the lifetime of the insured be seized or taken in execution by his creditors, nor does it vest on the sequestration or assignment of his estate under the Insolvency Act in the trustee or assignee of the estate. A pledged policy, however, to the extent to which it is pledged, and the proceeds of a surrendered policy, are not protected [Sec. 23].

The insured may agree with the company to exchange his existing policy to the extent to which it is protected by this section, for a fully paid up policy, which is wholly protected [*ibid.*].

In addition, a policy protected as above, to the extent to which it is protected, is not available on the death of the insured for the payment of creditors as against the claims of—

- (a) the surviving spouse, if the marriage is in community, to one-half of the protected portion; or

- (b) the surviving spouse or any parent, child, or stepchild, under the will of the insured; or
- (c) any parent or child of the insured by right of intestate succession [Sec. 24].

The protection of these provisions [save only that of (a) above] is afforded also to a policy effected by a woman married in community of property, as against her husband's creditors. This is so whether the policy was effected by her on her own life before marriage, or on her own or her husband's life after marriage, provided that the policy has endured for three years from the date of the payment of the first premium [Sec. 25].

Policies for Benefit of Wife.—When a person before or during marriage has effected in favour of or ceded to or for the benefit of his wife any policies on his or her life, such policies up to an amount of £2,000, plus bonuses, are not liable to be seized or taken in execution by his or her creditors, except in so far as they have been pledged or ceded to a person other than the wife or her trustee [Sec. 28 (1)]. This provision does not prevent the policies being made available for payment of the husband's debts under the Insolvency Act [*ibid.*]; *i.e.*, unless they are protected by the terms of that Act.

If the unprotected part of a policy enuring to the separate benefit of a wife married in community be taken in execution by the creditors of the

community (and it may not be so taken unless the other available assets of the community are insufficient to satisfy the creditors' claims), she may be indemnified against such loss, as between herself and the community, out of any other policy which is protected against creditors by Sec. 23 above [*Sec. 28 (2)*].

Miscellaneous Provisions.—When a policy exceeds the amount for which it is protected, the company may be required, at the expense of the applicant, to issue substituted policies, one for the benefit of the assured, or whoever is thereto entitled, and the other for the unprotected residue [*Sec. 30*].

Where a policy was effected or premiums were paid with intent to defraud creditors, the court may order a sum equal to the premiums so paid, with interest thereon, to be a charge on the policy and payable out of the proceeds thereof [*Sec. 31*].

If anyone has effected, or by antenuptial contract or otherwise has lawfully ceded a policy for the benefit of his wife and his or her children or some or one of them, or if any trustee who holds a policy under any such antenuptial contract or otherwise cannot provide for the payment of the premiums, he may agree or join with any other person interested in the policy in agreeing with the company—

- (a) to accept in lieu thereof a paid-up policy for such sum as is its equivalent in value payable at the time and in the

manner and for the benefit of the person entitled to the sum assured by the original policy; or

- (b) to borrow on security of the policy the sums necessary to keep or put the policy in force, and any sum so borrowed and applied and any unpaid or accrued interest thereon is a first charge on the policy and value thereof; or
- (c) to commute any existing bonus additions for temporary or permanent reduction of premiums or for a cash payment for payment of any premiums which have fallen due [*Sec. 32*].

POLICIES EFFECTED BY MINORS.

Any minor of 18 years or over may effect a policy on his own life, and he is competent to exercise all the rights and privileges of a policy holder in relation thereto as if he were of full age, except the right to cede or pledge the policy [*Act 37 of 1923, Sec. 20*].

CHAPTER TWELVE.

INCOME TAX OF MARRIED PERSONS.

The Income Tax Act, No. 40 of 1925 (to which the following sections refer), determines the manner of taxation of the incomes of husbands and wives.

ABATEMENTS.

The abatement to be deducted from the taxable income of any person to determine the taxable amount thereof is the total of such of the following allowances as are applicable:—

- (a) £400 in the case of married, widowed or divorced persons to whom Sec. 14 (4) (a) below applies; £300 in other cases, to which Sec. 14 (4) (b) below applies;
- (b) Any sum not exceeding £50, paid during the period in respect of which a return of income is made, as premiums upon policies under which he, his wife, or minor children, is or are insured against death, accident or sickness;

- (c) Fees or subscriptions not exceeding £10 in the aggregate paid to any friendly or benefit society during any period in respect of which a return is made;
- (d) £60 for each child or stepchild maintained by him, who was or would have been if he had lived, under 18 years of age on the last day of the year of assessment in respect of which or any portion of which the assessment is made;
- (e) £30 for each dependent [*Sec. 14 (2) as amended by Act 36 of 1926 Sec. 6*].

“Dependent” means (a) any person incapacitated by old age, infirmity, or any other reason satisfactory to the Commissioner for Inland Revenue from maintaining himself; and (b) any child (other than the child or stepchild of the taxpayer) under the age of 18 years on the last day of the year of assessment, to whose maintenance during that year the taxpayer has contributed an amount of not less than £30, whether in cash or otherwise [*Sec. 72*].

The total of these allowances is subject to reduction by £1 for every completed £10 by which such person's taxable income exceeds £600, in the case of every person who (a) was married during any part of the period for which the assessment was made, or (b) during the whole of that period was widowed or divorced, but maintained during any part of that period a child of his own or a stepchild

who was, or would have been if he had lived, under 18 years of age on the last day of the year of assessment in respect of which the assessment is made [Sec. 14 (4) (a)].

In the case of any married person separated under a judicial order or written agreement of separation throughout the period in respect of which the assessment is made, who did not maintain during any part of such period a child of his own or a stepchild who was or would have been if he had lived under 18 years of age on the last day of the year of assessment, the reduction of the total allowances is the same as it is in the case of all persons to whom Sec. 14 (4) (a) does not apply, *viz.*, by £1 for every completed £1 by which the taxable income of any such person exceeds £300 [Sec. 14 (4) (b), *as amended by Act 23 of 1927 Sec. 5*].

The total of the allowances applicable, as reduced either under Sec. 14 (4) (a) or Sec. 14 (4) (b) above, is the abatement deducted for normal tax purposes.

ASSESSMENT OF THE INCOME TAX OF SPOUSES.

Any income received by or accrued to or in favour of a woman married with or without community of property, and not separated from her husband under a judicial order or written agreement of separation, is deemed, for the purposes of the Act, to be income accrued to her husband [Sec. 9 (2)].

The income of a woman married with or without community and not separated from her husband in the manner above-mentioned, must be included by him in the returns of income he is required to render under the Act [*Sec. 39 (1)*]. If, however, either the husband or the wife make written application therefor to the Commissioner, or the latter considers it desirable, returns of income may be required to be rendered by any such husband or wife separately [*ibid.*]. Such separate returns are separately assessed, and separate notices of assessment are sent to the respective spouses. The total tax payable in respect of such assessment, however, is not less than the total amount which would have been payable by the husband alone, if both incomes had been assessed as the income of the husband alone [*Sec. 46 (6)*]. Taxes are payable by the spouse on whom any such separate assessment notice has been served [*Sec. 63 (b)*].

In the event of the death of the husband, the income of the wife for the period between the date of death and the last day of the year of assessment must be returned as the separate income of the wife [*Sec. 39 (2)*].

Any amount payable by way of alimony or allowance under a judicial order or written agreement of separation, or order of divorce, must be returned as the separate income of the person to whom the amount is paid [*Sec. 39 (3)*].

INCOME OF MINORS.

The income of a minor is dealt with as falling into two classes:—

- (1) Income derived from a parent.
- (2) Other.

(1) Any income (other than *bona fide* remuneration for services rendered) of a minor child of any person, which is derived either directly or indirectly from such person, is, for the purposes of the Act, deemed to be the income of that person, notwithstanding that it or the capital from which it was derived is held in trust for the sole benefit of such child [*Sec. 9 (3)*]. Every parent must include in his return of income any income received by or accrued to any of his minor children either directly or indirectly from himself or his wife [*Sec. 39 (4)*].

Any person required by the Act to include in his income any income of his minor child, is, however, entitled to recover from the funds held by him on behalf of such child, such proportion of the taxation paid by him as is due to the inclusion in his income of the child's income [*Sec. 63 (c)*].

(2) With regard to any other income of a minor, the return must be made by his guardian, who is a representative taxpayer as far as such income is concerned. A representative taxpayer in respect of the income of any minor

or mentally disordered or defective person, or any other person under legal disability, means the trustee, guardian, curator, or other person entitled for the time being to the receipt, management, disposal or control of such income, or remitting or paying to or receiving moneys on behalf of such person under disability [*Sec. 48 (c)*].

Every representative taxpayer who as such pays any tax is entitled to recover from the person on whose behalf it was paid, or to retain out of any moneys that may be in his possession or may come to him in his representative capacity, so much as is required to indemnify him in respect of the payments of tax on behalf of those he represents [*Sec. 50*].

If the minor has no guardian, he is assessed direct, and the tax recovered from him personally.

CHAPTER THIRTEEN.

THE DUTY OF SUPPORT.

The law casts on the members of a family reciprocal duties of support, the primary duty resting on the husband and father.

HUSBAND AND WIFE.

A husband is bound to support his wife, even where she has left him owing to his misconduct [*Gannon v. McClure* 1925 C.P.D. 137]. The wife owes a reciprocal duty to her husband, and if he is in want she is required to contribute to his support [*Voet* 25.3.8]. So too husband and wife have a joint responsibility for the payment of necessaries purchased by either for the common household (see Chapter Eight). These obligations continue during the subsistence of the marriage, but cease on the dissolution of the marriage by divorce [*Voet, ibid.*]. The only obligations then resting on the former spouses are those imposed by the court when granting the decree of divorce.

PARENT AND CHILD.

Both parents are liable for the support of their children, the father naturally having the main responsibility. On the death of the father, or in the event of his being without means, the mother is solely responsible [*Voet 25.3.5 and 6*]. In the case of divorce, the court determines the extent of liability of each parent for the support of the children, according to the means of the parties [*Voet 25.3.6; Farrell v. Hankey 1921 T.P.D. 590*].

“Support” includes the provision of food, clothing, medical aid and lodging [*Voet 25.3.4*]. Any person having the custody, charge or care of a child under 16 years of age, who neglects the child by failing so to provide for it (unless the failure is due to lack of means and the lack of means is not due to idleness or misconduct) is liable to a maximum penalty of £100 and 12 months’ hard labour [*Act 25 of 1913 Sec. 3*]. Any one who is the parent or legal guardian of a child, or is legally liable to maintain it, is presumed to have custody, and as between father and mother, the father is not deemed to have ceased to have custody by reason only that he has deserted or otherwise does not reside with the mother [*Act 25 of 1913 Sec. 21*].

Included in the duty of support is the duty to provide a child with the necessary elementary education [*Voet 25.3.4*]. This duty is enforceable also under the laws relating to compulsory education.

The duty of support continues until the child is able to maintain himself by his own industry or from his own means [*Voet 25.3.14*] and probably continues without limit of age, for it may revive even after the child has reached an age at which he can maintain himself, if he is in distress and unable to work through bad health, and the parents are possessed of the requisite means [*in re Knoop 10 S.C. at p. 199*]. Though there is no longer any legal obligation on a parent to leave anything to his children by will, and a parent may bequeath everything to a stranger, yet the estate of a deceased father is liable for maintenance of his minor child as a debt that must be discharged before any payment of legacies is made [*Davis' Tutor v. Davis' Estate 1925 W.L.D. 168*].

So long as a child resides with his parents and is maintained by them, whatever he earns may be claimed by them as a contribution towards his maintenance [*van Rooyen v. Werner 9 S.C. at p. 429*], and where a child has property of his own, the parents are entitled to claim a reasonable part of the income therefrom for his support [*ibid.*]. The Administration of Estates Act, No. 24 of 1913, specifically provides that the parent of a minor child having money deposited in the Guardian's Fund, is not entitled to receive more of the interest due thereon than is reasonably necessary for the support and advancement in life of the minor, regard being had to his circumstances and condition in life [*Sec. 95*].

Parents are not allowed to apply a child's capital to his maintenance. If the child's income is in-

sufficient to maintain it, the deficiency must be made good by the parents, unless they are in very straitened circumstances, when they may apply to court for permission to draw on the child's capital [*Voet* 25.3.16]. The Administration of Estates Act provides that if it appears to be in the interests of any minor, the Master of the Supreme Court, after careful enquiries, may apply for the maintenance, education, or other benefit of the minor, an amount not exceeding £300 in all, standing to his credit in the Guardian's Fund. To so apply a larger sum the sanction of the court is required [*Sec. 96 (1)*].

A reciprocal obligation rests on children to aliment their parents [*Voet* 25.3.8]. It does not matter if the children are minors, for the obligation arises not out of any implied contract, but out of the sense of dutifulness that a child is presumed to entertain for his parents. If the parents, accordingly, are in distress and unable to work, the court may order maintenance to be paid to them by the child (or by his guardian); and in the same way it may order that maintenance be paid out of the estate of an insane child, where the means of the child are more than sufficient for his own support [*in re Knoop* 10 S.C. 198].

The method of obtaining maintenance is always by application to court [*Voet* 25.3.13], and the onus of proving that the respondent has means is cast on the applicant [*Riches v. Riches* 1910 E.D.L. 247].

REMOTER RELATIVES.

A grandparent, whether on the mother's or the father's side, is under an obligation to support his grandchildren, in the event of their parents being dead or indigent [*Voet* 25.3.7]. This obligation is reciprocal [*Voet* 25.3.11], the obligation and measure of support depending on the necessity for it on the one hand, and the ability to render it on the other [*Ford v. Allen and Others* 1925 T.P.D. 5].

The obligation to support extends to brothers and sisters, so that a brother who has sufficient means thereto can be compelled to support his indigent sister [*Union Government v. Warner* 1916 C.P.D. 436], the obligation being reciprocal [*Voet* 25.3.8]. The obligation does not extend to those related in the collateral line more remotely than brothers and sisters, so that an uncle is under no obligation to support his nephew [*Voet* 25.3.9].

No person is responsible for alimony merely on the ground of relationship by affinity, *i.e.*, through marriage, so that a son-in-law is not liable for the support of his indigent parents-in-law [*Ford v. Allen and Others, supra*]. This holds good also in the converse case [*ibid.*]. Only if two spouses are married in community can the legal necessity of supporting the parents of the one affect the other, for any liability of either spouse (here the need to support an indigent parent) might be held to be one of those losses that fall on the community [*ibid.*].

As to how far there is any obligation cast on step-parents and step-children to furnish mutual aid, is a subject of doubt, because of the rule that those related by affinity only are under no obligations to one another [*ibid.*]. In every case of course where marriage is in community, the liability to maintain the children of a former marriage is a charge on the common estate [*Voet 23.2.81*]. After the dissolution of the marriage, however, a stepmother or stepfather is under no duty of maintaining a step-child [*Voet 23.2.82; 25.3.10*], but if a step-parent has the charge, care, or custody of a child, and neglects to support him, he or she is liable to a conviction under the Children's Protection Act, No. 25 of 1913, Sec. 3.

ILLEGITIMATE CHILDREN.

The father as well as the mother of an illegitimate child is liable for his support, and though children born as the result of incest labour under certain harsh disabilities as regards succession to their father, they are entitled to claim maintenance from him [*Voet 25.3.5 and 6*]; for there is an equal obligation cast on both a father and a mother to support all his or her children.

After a father's death, this obligation to support all his children rests on his estate, so that where a man dies intestate maintenance will be allowed out of the estate to the illegitimate children where there are no legitimate children surviving [*ex parte Levengeld 4 S.C. 64*], or where the estate is more than sufficient to pay for the support of the

legitimate children according to their station in life [*Carelse v. Estate de Vries* 23 S.C. 532]. The amount allowed will be so much as is required to maintain them until they can support themselves. To allow them more than this is against the policy of the law, which discourages illicit relations between the sexes [*ibid.*].

The Roman-Dutch law favours the rights of destitute children, legitimate or not, to proper maintenance, so that children born as the result of adultery have a claim for maintenance against the common estate of spouses married in community, as against the innocent wife [*Voet* 23.2.82]. Further, there is no presumption in South African law that the word "child" occurring in a statute means legitimate child, and unless the contrary appears, the policy and objects of legislation affecting children apply to illegitimate as well as to legitimate children [*Davies v. Rex* 1909 E.D.C. 149; *Adams v. Abrahams* 1918 C.P.D. 24]. By common law further, the obligation cast on grandparents extends to the support of their illegitimate as well as their legitimate grandchildren [*Voet* 25.3.7], and certain authorities are of opinion that a man is bound to supply maintenance to his natural brother [*Voet* 25.3.8].

Affiliation Actions.—The purpose of an action for affiliation is to establish the paternity of an illegitimate child, and to obtain maintenance for the child, not compensation or support for the mother. The woman may make a claim in this action for all the expenses attendant on her confinement, such as medical expenses and clothing for the child, and

for maintenance for the child. Even where the father dies before the birth of issue, his estate is liable for the lying-in expenses of the mother and maintenance of the child [*Spies' Exor. v. Beyers* 1908 T.S. 473]. Maintenance being in the discretion of the court, the amount decreed to be paid by the father will depend on the special circumstances of each case, such as the means of the parties, or the social position of the woman.

The name of the father of an illegitimate child may not be registered on its birth certificate without his consent [*Act 17 of 1923 (Sec. 9)*].

In an action to establish paternity, as in any action for seduction, the woman's story will not prevail against the defendant's denial unless it is corroborated, *i.e.*, some evidence must be adduced in addition to the woman's which is in some degree consistent with her story, and inconsistent with the innocence of the defendant [*McKay v. Ballot* 1921 T.P.D. 432; *and see Nolte v. Rowe* 1926 T.P.D. 615; *and Jacobs v. Hennings* 1927 T.P.D. 9 P.H.M. 26]. Where it is simply oath against oath, the benefit of the doubt will be given to the defendant [*Kemp v. van Rensburg* 1911 C.P.D. 290]. The court exercises its discretion with regard to the credibility of witnesses and the weight of evidence, but if the defendant admits having had intercourse with the plaintiff, the mother's oath as to the paternity of her child is preferred to the defendant's denial, for the law presumes a woman capable of pointing out the father of her child [*Voet* 48.5.6]. The probable origin of this rule was the attempt to suppress immorality. It is not

followed, however, where the mother's evidence is otherwise untrustworthy [*Smitsdorf v. Horne* 1 *Roscoe* 32].

With the action for affiliation and maintenance may be included, when the circumstances warrant it, an action for seduction and an action for breach of promise.

The question of paternity may, it appears, also be determined in criminal proceedings under the Children's Protection Act [*see R. v. van der Westhuysen* 1924 *T.P.D.* 370].

MAINTENANCE ORDERS.

There is an enactment in each province dealing with the issue and enforcement of maintenance orders, known as the Deserted Wives and Children Protection Act or Ordinance, as the case may be, *viz.*, Act 7 of 1895 (C); Ord. 44 of 1903 (T); Act 10 of 1896 (N); and Ord. 51 of 1903 (O.F.S.) The sections below refer to the Transvaal Ordinance, but the provisions of all these statutes are to a similar effect, save where the contrary appears from the context below.

Failure to Support, as an Offence.—A penalty is imposed on everyone wholly or in part able to maintain himself or herself or his or her family by work or other lawful means, and neglecting so to do, so that he or she or any of his or her family have become destitute [*Sec. 1*]. The maximum fine for this offence varies in the different

provinces, the alternative being three months' imprisonment with hard labour in each case. It is £25 in the Transvaal and Orange Free State; £15 in the Cape and £5 in Natal. In the Cape and Natal the offender is "deemed to be an idle and disorderly person." In the Natal statute the penal obligation is not expressly imposed on a woman, but the same effect results, in view of the provision of the Interpretation Act that words importing the masculine gender include females, save where the contrary intention appears [*Act 5 of 1910 Sec. 7*].

A man is liable to a conviction under this section for failing to support his illegitimate children [*Davies v. R. 1909 E.D.C. 149; Adams v. Abrahams 1918 C.P.D. 24*].

Issue of Orders.—When a man unlawfully deserts his wife or his child under 15 years of age, or leaves them without adequate means of support, the magistrate may issue summons against such husband or father on complaint being made by the wife or mother or any reputable person [*Sec. 2*]. A mother has a remedy under this provision against the father of her illegitimate child for maintenance for the child [*Adams v. Abrahams, supra*].

"Desertion" is defined as follows in the Transvaal and Orange Free State Ordinances:—

"A married woman or child shall be deemed to have been deserted within the meaning of this Ordinance when such wife or child is living apart from the husband or

father because of repeated assaults or other acts of cruelty, or because he is an habitual drunkard, or because of his refusal or neglect without sufficient cause to supply such wife or child with food and other necessaries of life, when able so to do."

The Natal and Cape Acts omit a definition.

On the day appointed for hearing, whether the defendant is present or not, the magistrate, if satisfied that the defendant is able to maintain or contribute to the maintenance of the wife or child, makes such order as he thinks fit, directing the defendant to pay weekly or monthly, and to such person and in such manner as he decides, a reasonable sum for the use of the wife or child, and such order has the effect of an ordinary judgment of the court [*Sec. 3*].

The Natal Act uses the phrase "moderate sum" in place of "reasonable sum." The Cape and Natal Acts do not in special terms refer to the powers of discharge or variation of the order by a magistrate, mentioned in the Transvaal and Orange Free State Ordinances, which are exercisable when the means of the party against whom the original order was made have altered.

In the Transvaal and Orange Free State no order against a husband must be made in favour of a wife who is proved to have committed adultery, unless the adultery has been condoned by him; and any existing order must be discharged by the magis-

trate by whom it was made, or by one sitting in his stead, on proof that the wife has been guilty of adultery since the making thereof [*Section 4*].

Miscellaneous Provisions.—A case decided in the absence of the defendant may be re-opened within two months of the defendant's return to the province, if it is proved that he did not absent himself in order to avoid the service of the summons [*Sec. 5*].

All cases tried under these Ordinances in the Transvaal and in the Orange Free State may at the discretion of the magistrate be heard in private [*Sec. 6*]. In Johannesburg such cases are tried in the Juvenile and Domestic Relations Court, which is held in a separate building from the other magistrates' courts.

Sales in execution as the result of maintenance orders, and appeals from orders, are regulated by the ordinary rules of the magistrate's court. Provisions exist for the enforcement of orders in different magisterial districts and reciprocal regulations for the enforcement of orders prevail throughout the Union.

MAINTENANCE ORDERS MADE OR SENT ABROAD.

The British Maintenance Orders (Facilities for Enforcement) Act of 1920 (10 and 11 Geo. 5 c. 33) provides for the enforcement in England

and Ireland of maintenance orders made by a court in any part of His Majesty's dominions outside the United Kingdom.

The Union Act No. 15 of 1923 (to which the sections below refer) is reciprocal with this and facilitates the enforcement in the Union of maintenance orders made abroad, and provides for the transmission abroad of orders made in the Union.

“ Maintenance Order ” for the purposes of this Act is an order (other than an order of affiliation) for the periodical payment of sums of money towards the maintenance of the wife or other dependants of the person against whom the order is made; and “ dependants ” are such persons as the person against whom the order is made is liable to maintain in accordance with the law of the country in which the maintenance order is made [*Sec. 10*].

The Act applies in respect of—

- (a) any part of the United Kingdom;
- (b) any part of His Majesty's dominions outside the United Kingdom and the Union;
- (c) any territory under the protection of His Majesty;
- (d) any territory in respect of which a mandate is being exercised by the Government of any part of His Majesty's dominions;

wherever the Governor-General has by proclamation declared that in such part or territory there is in force a law providing for the enforcement therein of maintenance orders made by the courts of the Union [*Sec. 1*]. Such part or territory is referred to below as "a proclaimed country." The Act applies at the present time in Basutoland, Bechuanaland Protectorate, Swaziland, and to England, Northern Ireland, the Isle of Man, Northern Rhodesia, Southern Rhodesia, New South Wales, Mauritius, the Straits Settlements, South West Africa, New Zealand and Nyasaland [*Procs. 176 and 226 of 1923; 4, 50, 72, 87 and 126 of 1925*].

Transmission Abroad of Union Orders.—Maintenance orders made in the Union may be transmitted to the correct authority in a proclaimed country when it is proved that the person against whom the order was made is resident in that country [*Sec. 3*].

An order may be made in the Union against a person resident in a proclaimed country, as if a summons had been duly served on him, and he had failed to appear at the hearing of the case; but such order is provisional only, and has no effect unless and until confirmed by a competent court in the proclaimed country [*Sec. 4*]. The deposition of any witness examined at the application for the order must be transmitted with the order, and so too must a statement of the grounds on which the making of the order might have been opposed if the defendant had appeared at the hearing [*Sec. 4 (3)*]. Provision is made for a rescission or variation of the order in suitable cases [*Sec. 4 (5)*], and

the applicant for the order also has a right of appeal against a refusal to grant a provisional order [Sec. 4 (6)].

Enforcement of Dominion Orders in England.

—The order as made in the dominion may be confirmed by an English court, even though it exceeds the maximum amount which such court, originally trying a maintenance case in England, is given authority to impose [*Peagram v. Peagram K.B.D. vol. 135 Law Times Reports p. 48*]. In South Africa magistrates while enjoined to decree a reasonable or moderate sum as maintenance are not limited to any specific amount.

Enforcement in Union of Orders made Abroad.

—Whenever a copy of a maintenance order made in a proclaimed country has been duly transmitted to the Governor-General of the Union, a copy of the order is registered in a magistrate's court in the Union having jurisdiction where the person against whom the order was made is believed to be resident for the time being, and is of the same force and effect as if it were an order originally obtained in the court where it is so registered [Sec. 2].

Provisions also exist for the confirmation by a Union court of a provisional order made in a proclaimed country on the same terms as in the converse case [Sec. 5 (1)]. The court may confirm the order with or without modifications, as seems just [Sec. 5 (4)]. The case may also be remitted for further evidence to the court which made the provisional order [Sec. 5 (5)]. When a provisional order has been confirmed, it may be

varied or rescinded by the confirming court at a later date, or, on application for variation or rescission, remitted for further evidence to the court which made the order [*Sec. 5 (6)*].

Every maintenance order registered or confirmed as above, is enforceable as if it were a judgment of the court in a civil action for the payment of the amount specified in the order [*Sec. 6 (2)*].

COMPULSORY WORK COLONIES.

In order to aid and enable persons to fulfil the legal obligation of supporting both themselves and their families, provision has been made in Act No. 20 of 1927 (to which the sections below refer) for the establishment of work colonies wherein persons may be detained and trained in habits of work and receive training in agricultural and other industry [*Sec. 1*]. The period for which any person may be committed to such colony is not less than one nor more than five years [*Secs. 5 and 6*]. For each colony there is an advisory board whose functions, amongst others, are to visit the colony and advise on all matters connected therewith. There are from three to five members on a board, one of whom at least must be a woman [*Sec. 3*].

Persons Liable to Committal to Colonies.—The persons liable to be committed to a colony fall into two classes: (1) persons over 21 years of age who beg or refuse to work; (2) persons over 18 years of age who have been convicted of certain offences [*Secs. 4 and 6*].

- (1) Any person over 21 years of age may be thus committed, who—
- (a) habitually begs for money, food or clothing, or sends or employs others so to beg; or
 - (b) appears to have no adequate means of subsistence and fails to provide his wife or any child whom he is legally bound to maintain with reasonable food and clothing, and has refused work suitable to his circumstances and capacity offered him through an officer or inspector appointed under the Act.

Such person may be summoned before the court by a magistrate or a justice of the peace, on written information presented by a public prosecutor, commissioned police officer, or any inspector, or on information given on oath by any person; or else the magistrate on the application of a public prosecutor or commissioned officer of police, may issue a warrant for such person's arrest [*Sec. 4*]. These summonses and arrests, and the general procedure connected therewith, are governed by the Criminal Procedure Act, No. 31 of 1917 [*ibid.*]

If such person is found to be physically and mentally capable of working in a colony, he may be committed thereto, if he shows no

cause against such committal. The proceedings may be held in open court or *in camera*, as the magistrate decides (a record being kept in either case), but they are not deemed to be proceedings in a criminal case [*Sec. 5*].

(2) Any person over 18 years of age may be sent to a colony who has been convicted in any court of—

(a) contravening any law relating to vagrancy; or

(b) contravening any law relating to the supply of intoxicating liquor; or

(c) any of the following offences under the Children's Protection Act No. 25 of 1913 (Secs. 3, 4, 6 and 7); cruelty towards or neglect of a child; allowing a child to beg or be in a brothel, or to be seduced, abducted or prostituted or to commit immoral acts; or

(d) theft.

Such committal may be ordered, in lieu of sentence, when the offence was committed entirely or largely as the result of conditions under which the offender was living, and if it is in the interest of his wife or any child or of himself that he should be detained in a colony [*Sec. 6*].

Committal orders may be appealed against as if they were convictions by a magistrate's court, and are subject to review under the Magistrate's Courts Act No. 32 of 1917, Chapter 14 (Sec. 7).

Admission to Colonies of Wives and Children.

—The wife of a person who has been committed to a colony may, at the time when the order is made, or at any later date, apply for the admission of herself and any child to such colony. The magistrate, after enquiry, may recommend the admission, in which case the wife and children may be given permission to reside in the colony, subject to any conditions stated, and subject to the regulations governing the colony, for a specified period not exceeding the husband's period of detention [Sec. 8]. Before the expiry of this specified period they are not permitted to leave the colony without authority [Sec. 10 (2)], though they may obtain such authority at any time [Sec. 11 (5)]. Further, they are liable on conviction for breach of the colony regulations to be dismissed from the colony [Sec. 10 (2)].

“Wife” in this Act includes any woman with whom the person detained cohabits; and “child” is any person under 18 years of age whom such person or his wife is legally bound to maintain, and includes a step-child or an adopted child [Sec. 17].

Suspension of and Release from Committal Orders.—An order of committal may be suspended at the request of an inspector or officer, or for any reason that appears good to the court, if the person

committed proceeds to a Government labour training station or farm for the unexpired portion of his period of detention. If he is dismissed therefrom for breach of regulations, however, he may be arrested and conveyed back to the colony to remain there till the date on which his period of detention expires [*Sec. 9*].

On the recommendation of the advisory board, a person may be released from the colony either unconditionally or on probationary or other conditions. On breach of these conditions, the offender may be arrested and brought before a magistrate and ordered to return to the colony to complete his period of detention [*Sec. 11 (1-4)*].

Conduct of Colonies.—Persons detained in a colony are not entitled to vote at any elections during their period of detention [*Sec. 10 (3)*].

Provisions are made for the trial and punishment of persons not complying with the regulations [*Secs. 10, 12, 13 and 14*], and regulations may be made (among other things) for the payment of wages to persons detained in a colony whose behaviour is satisfactory, and for the training and education of the children in a colony [*Sec. 16*].

CHAPTER FOURTEEN.

JUDICIAL SEPARATION.

A judicial separation is a separation of spouses, ordered by the Court, which relieves them of the personal consequences of marriage, so that neither party can compel the other to live with him or her, or enforce any of the other rights that flow from marriage [*Wessels v. Wessels* 12 S.C. 465]. It does not loosen the marriage tie, however, so that the parties may not enter upon another alliance [*Voet* 24.2.16]. The obligation of mutual fidelity remains, and on proof of adultery, however long the separation may have lasted, a divorce may be obtained by the innocent spouse [*Barker v. Barker* 1 *Menzies* 265; *Cook v. Cook* 1912 C.P.D. 290].

So long as the spouses are judicially separated, however, the one may not claim a divorce from the other on the ground of malicious desertion [*Smit v. Smit* 1909 T.S. 1067], and the first step before an order for restitution of conjugal rights can be granted must be to set aside the existing decree of separation [*ibid.*; *Yeld v. Yeld* 1919 C.P.D. 103].

The court when decreeing a judicial separation decrees also the terms and conditions attached

thereto, as far as the apportionment of the spouses' property, alimony, and the custody of the children are concerned. An order for judicial separation is frequently made in terms of a consent paper, or of a notarial, *i.e.*, a private and non-judicial, deed of separation. This is not done, however, unless the court is satisfied that there are adequate grounds (those specified below) for the separation [*Du Preez v. du Preez* 18 S.C. 438; *Watson v. Watson* 1909 T.H. 294]. The existence of a notarial deed of separation does not debar the injured spouse from bringing an action for judicial separation, if there is just cause for such separation [*Ziedeman v. Ziedeman* 1 M. 239].

Preliminary Applications. — On sufficient grounds shown, a wife may claim from her husband a reasonable sum to enable her to institute or defend an action for judicial separation, or to counterclaim for separation in an action for divorce, and she may also apply for alimony pending the trial. The alimony allowed is in proportion to the wife's necessary requirements according to the means of the husband and the mode of life of the spouses, and the costs allowed are proportionate to the probable expenses of the action [*Kaplan v. Kaplan* 1913 C.P.D. 782].

If the wife has independent means, although the court may still order the husband to contribute alimony and costs (for the matter is one in the discretion of the court) it is less likely to do so. In the case of a marriage in community, on the wife's making out a case which has a good chance of success, her application is seldom refused.

Where a wife is justifiably afraid that before the hearing of an action for separation her husband may dispose of certain property in order to injure her, she may obtain an interdict restraining him from alienating such property pending the trial, whether the assets in question be those of her husband or herself [*Hayward v. Hayward* 6 E.D.C. 192], or assets of the joint estate, in the case of community [*Umgulwa v. Umgulwa* 7 E.D.C. 73].

GROUNDS FOR JUDICIAL SEPARATION.

Judicial separations are granted on various grounds, but no ground is held sufficient unless it falls under one of two categories, *viz.*, unlawful conduct of one spouse which makes it either (1) dangerous or (2) intolerable for the other to continue cohabitation [*Wentzel v. Wentzel* 1913 A.D. 55]. Conduct that the court will recognise as amounting to such dangerous or intolerable behaviour can generally be brought under one of the following classes: (a) conduct that would give grounds for a divorce, (b) violence, (c) cruelty, (d) drunkenness, (e) quarrelsomeness.

(a) As a general rule for either of the causes for which a person can obtain a divorce, *viz.*, adultery and malicious desertion, he or she can obtain a separation [*Jooste v. Jooste* 1926 W.L.D. 9 P.H.B. 1]. Where both spouses have been guilty of adultery, though the plaintiff might not be entitled to succeed in an action for divorce, he or she may yet succeed in an action for separation.

When a divorce is claimed on the ground of malicious desertion, it is necessary for the plaintiff first to obtain a preliminary order for the restitution of conjugal rights. When a separation on the same ground is sought it is granted immediately, without any preliminary order [*Johnstone v. Johnstone* 1917 A.D. 290].

(b) Personal violence of one spouse towards the other is ground for separation [*Voet* 24.2.16; *Van der Berg v. Van der Berg* 1 M. 241].

(c) Cruelty receives an extensive interpretation, so as to cover various crimes against a wife [*Kat v. Kat* 1910 T.P.D. 436], and it need not necessarily be of a physical nature. Constructive and moral cruelty, such as coolness or neglect, which renders cohabitation intolerable, is also just cause for separation [*du Toit v. du Toit* 1920 C.P.D. 613]. So, too, cruel taunts may be an aggravating circumstance in other intolerable behaviour [*Wessels v. Wessels* 12 S.C. 465]. The cruelty must, however, be of a nature which makes further cohabitation intolerable under the circumstances of the case. Thus gross insults or public taunts may make life intolerable [*van Niekerk v. van Niekerk* 14 S.C. 178], but a mere accusation of infidelity may not necessarily do so without aggravating circumstances [*Thelland v. Thelland* 3 B.A.C. 528; *Wentzel v. Wentzel* 1913 A.D. 55].

Prenuptial misconduct, too, may be ground for separation, where it is of a nature to make cohabitation intolerable on its being discovered [*Theron v. Theron* 1924 A.D. 244].

(d) Habitual intemperance without prospect of reform is a ground for separation [*Poggenpoel v. Poggenpoel* 15 S.C. 37]; and so too are outbursts of excessive drinking [*Taylor v. Taylor* 1906 T.S. 358], and intemperance accompanied by occasional assaults, however slight [*Goldsworthy v. Goldsworthy* 10 S.C. 139].

(e) Protracted quarrels afford another ground for separation [*Myers v. Myers* 1920 W.L.D. 120] and so too does incompatibility of temper [*Richards v. Richards* 1908 E.D.C. 28], even where there are faults on both sides [*Manton v. Manton* 30 N.L.R. 387].

The court will not grant an order for separation where the acts complained of are not intentional, but are due to mental derangement either permanent or temporary [*Reid v. Reid* 1919 T.P.D. 388]; but the fact that a spouse has become insane is no bar to an action for judicial separation any more than to one for divorce, if the acts complained of were committed before insanity supervened [*Donaldson v. Donaldson* 1911 T.P.D. 758].

With regard to venereal disease, it has been held that the fact that one spouse had contracted the disease before or after the marriage is not a ground for separation [*Masekoemeng v. Masekoameng* 1919 T.P.D. 405].

EFFECTS OF JUDICIAL SEPARATION.

Effects on Property.—Where the marriage is one in community, the decree generally applied

for, and to which the successful plaintiff is entitled, is a separation from bed, board and community of goods. Where such a decree is granted the community is cancelled, and the estate, *i.e.*, the remainder thereof after deduction of the debts, is divided between the spouses [*Luzmoor v. Luzmoor* 1905 T.H. 74]. When the parties cannot agree on a division the court may make such apportionment as it thinks fit. The spouses are further each freed from liability for future debts contracted by the other [*Ziedeman v. Ziedeman 1 Menzies* 238]. The marital power is suspended, and the wife has the management of her own property, as the court may interdict the husband from dealing with the assets allotted to her. [*Neale v. Neale* 20 S.C. 198], or authorise the wife to deal with her separate assets without her husband's consent [*ibid.*].

The division of the joint estate is not a final dissolution of the community, in the sense that if the parties come together again, the community as well as the other marriage relations is revived [*Neale v. Neale, supra*]. The decree is always indeed granted in the hope that the spouses may at some future time be reconciled.

If the marriage is one by antenuptial contract, forfeiture of benefits may be asked for together with the prayer for separation, and it is in the power of the court to cancel any promises made in the contract which have still to be fulfilled, subject to renunciation by the plaintiff of a reciprocal promise made in his or her favour [*Wessels v. Wessels* 12 S.C. 464]. Forfeiture of benefits already

accrued would probably not be ordered by the court, since a separation is not a final order terminating the marriage, and there is always time for a reconciliation of the parties [*ibid.*].

All the incidents of the marriage contract not dealt with in the decree for separation remain in force, so that where no order regarding the property is asked for, each spouse retains his or her rights to property unimpaired, whether the marriage be one in or out of community [*ibid.*].

Alimony.—During the separation, if the wife is the innocent party, she is entitled to receive maintenance from her husband in accordance with his position [*Voet 24.2.18; Hausberger v. Hausberger 1912 W.L.D. 121*]; but if the separation is due entirely or partly to her own fault she is entitled to recover only her own property or her share of the community from which to maintain herself [*ibid.*].

Alimony is always a matter in the discretion of the court, though where at the time of separation the parties have come to an agreement regarding the amount, this may guide the court in its decree [*Braude v. Braude 16 S.C. 565*]. Where the wife had contributed all the property to a marriage in community the court ordered that she should retain the property she had brought into the estate, in lieu of alimony [*Gericke v. Gericke 14 E.D.C. 113*]. In any case the wife's financial position is taken into account in decreeing alimony; and whatsoever be the merits of the case as between the spouses, the husband may always be compelled to maintain his children.

Custody of Children.—Custody of the children may also be dealt with in an action for judicial separation. This too is a matter in the discretion of the court, which is chiefly guided by a consideration of what is best for the welfare of the children, both moral and material, in view of their years and the character and position of the respective parents [*Simey v. Simey* 1 S.C. 171]. Where custody had been given to the mother, who was the successful plaintiff in an action for judicial separation, and the child's education and training were later shown to have been badly neglected, custody was transferred to the father on his application, as nothing had been proved against his morals, and by common law a father is entitled to the custody of his children [*Simey v. Simey* 3 S.C. 1]. The usual order gives custody to one parent, with right of reasonable access to the children to the other.

TERMINATION OF SEPARATION.

Separated parties may come together again tacitly [*Gibbon v. Gibbon* 2 E.D.C. 280], or they may obtain from court an order terminating the separation. An order of separation can be set aside or varied by the court on good grounds shown [*ex parte van der Spuy* 1910 C.P.D. 347; *Smit v. Smit* 1909 T.S. 1067]. It will be thus set aside if both parties consent [*Turner v. Turner* 1918 C.P.D. 130], even if the ulterior motive of the parties is to obtain a divorce, there being no more hope of reconciliation between them [*van Zijl v. Van Zijl* 1925 T.P.D. 130]. It will also be set aside where the innocent spouse evinces a desire for

reconciliation [*Yeld v. Yeld* 1919 C.P.D. 103]. One spouse may have the order set aside if the other is unwilling and opposes the application, only if he or she shows that the grounds on which the separation was decreed have ceased to exist [*ibid.*], but not merely because he or she does not wish any longer to be bound by the separation [*Van Hulsteyn v. Van Hulsteyn* 1911 T.P.D. 644]. Thus an offending spouse must show that he has reformed or that the causes for the separation no longer exist [*Van der Spuy v. Van der Spuy* 1911 C.P.D. 292].

A decree of separation will also be set aside where one of the parties has deliberately disregarded it [*Smit v. Smit, supra*], and divorce proceedings may be instituted by the innocent spouse for malicious desertion [*ibid.*]. So, too, where one spouse has been unfaithful to the other a deed of separation is no longer binding and divorce proceedings may be instituted by the innocent spouse on the ground of adultery [*Cook v. Cook* 1912 C.P.D. 290].

JURISDICTION.

A judicial separation may be granted by a court which has not the power to grant a divorce. A divorce can only be granted by the court of the place where the husband is domiciled at the time the action is instituted. A judicial separation, however, as it does not entail the far-reaching consequences of a dissolution of marriage, may be granted by a court when the spouses are merely

resident and not domiciled within the area of its jurisdiction [*Murphy v. Murphy* 1902 T.S. 179]; *Stewart v. Stewart* 1919 C.P.D. 225], so that a wife may obtain a separation from her husband in any place where he is residing for the time being, although without any intention of permanently remaining in such place.

PRIVATE AGREEMENTS FOR SEPARATION.

It is a frequent practice for parties who wish to separate to enter into a voluntary extra-judicial agreement of separation, usually before a notary. Such agreements have only a limited sphere of validity, and no undertaking for a future voluntary separation can be enforced [*Braude v. Braude* 16 S.C. 565]. The grounds of separation need not be stated in such a private deed, and are immaterial, for persons may separate thus for any reason [*Pugh v. Pugh* 1910 T.P.D. 792]. Money promised to a wife by way of maintenance under such circumstances is recoverable by her, as it would be her due if she resided with her husband [*ibid.*].

Private agreements of separation have validity only as between the spouses or their representatives, such as heirs, but cannot affect the rights of creditors [*Ziedeman v. Ziedeman* 1 M. 238]. To free a spouse from liability for the other's future debts a judicial separation is necessary [*ibid.*], unless the creditor is aware that he is dealing with a separated spouse and is acquainted with the terms of the deed of separation [*Scholtz v. Felmore* 4 S.C. 192].

Antenuptial contracts cannot be altered by mutual consent of the spouses without an order of the court, and so too, save in one special case, a private division of property held in community is not binding even between the spouses. A spouse injured by any extra-judicial agreement to exclude community, to which he or she was a party, is not bound by the agreement during the marriage [*Coulthard v. Coulthard* 1922 *W.L.D.* 13], and on the dissolution of the marriage may claim to share in the community [*Scorey v. Scorey's Exors. I Menzies* 231], even though the agreement was a notarial one [*Danovitch v. Danovitch's Exors.* 1919 *T.P.D.* 198]; for persons marrying in community are entitled to as much security with regard to the proprietary consequences of their marriage as persons marrying out of community [*ibid.*]. By a private division of the common property one spouse must be enriched to some extent at the expense of the other, thus receiving a donation from that other [*Voet* 23.4.59], and the law forbidding donations between spouses is aimed partly at preventing any disputes over property being added to the list of causes that may cause discord between husband and wife [*Voet* 24.1.1].

The special case in which a private division of the joint estate binds the spouses, arises when a spouse entitled to a decree of judicial separation owing to the unlawful conduct of the other spouse enters instead into a private or notarial deed of separation [see *Union Government v. Larkan* 1916 *A.D.* 212]. In such a case he or she is entitled also to a division of the joint estate, and to be freed from liability for the other's future debts, as his

or her due, so that there can be no question of any donation [*Ziedeman v. Ziedeman* 1 M. 238]. If it is proved to the court when the matter comes before it that just causes existed for the separation at the time it was entered into, the private division as then made is held binding on the spouses, and will be ratified by the court [*ibid.*], and it may be used as a defence to an action brought by one spouse claiming to share in the community, as against the other's heirs [*Albertus v. Albertus' Exors.* 3 Searle 202].

That a notarial separation enjoys a certain amount of legal recognition, appears from the fact that it affords a defence to an action for divorce on the ground of malicious desertion. It may be pleaded in bar to the claim for restitution of conjugal rights [*Stone v. Stone* 1917 C.P.D. 143], unless the parties or the party relying on it have treated it practically as a nullity, or the defendant has not observed all its terms [*Gibbon v. Gibbon* 2 E.D.C. 280]. Before the court can order restitution of conjugal rights, the deed of separation must be set aside, as will be done when the causes that led to the separation have ceased to exist [*Smit v. Smit* 1909 T.S. 1067; *Stone v. Stone* 1917 C.P.D. 143; *Fischer v. Fischer* 1911 T.P.D. 1082].

CHAPTER FIFTEEN.

DIVORCE.

A divorce is a decree of the court which completely and finally dissolves a marriage. It leaves the parties free to marry again, the only restriction imposed specially on divorced persons being that a man may not marry his divorced wife's sister, during the lifetime of such wife [*Act 11 of 1920 Sec. 3; Act 40 of 1892 (C) Sec. 4*], and that a woman may not marry her divorced husband's brother, during the lifetime of such husband [*Act 17 of 1921, Sec. 3*]. If the parties wish to resume conjugal life they must re-marry, for otherwise any children born of their union will be illegitimate [*Voet 24.2.14*]. The court may include in its decree of divorce an order as to the apportionment of the spouses' property, alimony, and custody of the children.

Men and women are judged by identical moral standards whenever the dissolution of marriage is in question, and under whatever circumstances a man may obtain his divorce, a woman may obtain hers. The evidence of both husband and wife is admissible in an action for divorce.

Divorce is granted only for some cause that frustrates the due fulfilment of the purposes of the marriage relation, and South African law recognises but two such causes, *viz.*, adultery and malicious desertion [*Voet* 24.2.5]. A cause that many people consider might well be included in this category, *viz.*, incurable insanity supervening after marriage, is no ground for divorce [*ex parte Malan* 1920 C.P.D. 275].

All the effects of a divorce take place immediately on the decree being pronounced, save in Natal. In that province any judgment for divorce is provisional until a day named therein, being not less than three nor more than six months later, after which day it becomes absolute without further order unless the court orders otherwise or the Attorney-General intervenes in the manner described below. No marriage of the divorced spouses during this provisional period is valid even though the judgment afterwards becomes absolute [*Law* 13 of 1883 (N) Sec. 3]. The usual practice, however, is to require the successful plaintiff to make a special application for the provisional order to be made final, so that there may be on record a final decree for divorce [*Grainger v. Grainger* 23 N.L.R. at p. 8].

Collusion—Natal Legislation.—The law of South Africa forbids divorce by consent, and collusion between the parties to obtain a decree is not tolerated [*Juhre v. Juhre* 4 E.D.C. 357]. The court has always the right, by common law, to enquire into the motives for or *bona fides* of divorce proceedings, and so where collusion was alleged

by the brother of the wife who was the defendant in an action for divorce, the Cape Court, on his application, appointed him curator *ad litem*, i.e., guardian for the case, to the minor children of the marriage, with permission to intervene as co-defendant [*Louw v. Louw* 1874 *Buch.* 41]. In the Transvaal a stranger is not permitted to intervene in a suit to establish collusion, but the court takes notice of facts brought before it by records or by witnesses [*Knight-Bruce v. Knight-Bruce* 1911 *W.L.D.* 135].

Natal has special legislation on the subject of collusion, contained in its Divorce Law [*Law No. 13 of 1883 (N)*]. At any time before a judgment for divorce becomes absolute, anyone can give information to a clerk of the peace on any matter material to the due decision of the case, and if from this or otherwise the clerk suspects that the parties are in collusion, he can intervene in the suit, under the direction of the Attorney-General, and with leave of the court, alleging collusion or some other sufficient reason why the divorce should not be granted [*Sec. 4*]. Also, whenever the court considers it necessary for the disposal of any action for divorce or nullity, it can direct that the case be laid before the Attorney-General so that he may determine whether he will intervene or not [*Sec. 5*]. Costs of the intervention are not claimable by or against the Attorney-General [*Sec. 7*].

Preliminary Applications.—A wife may claim from her husband, on her making out a good *prima facie* case, a sufficient sum to enable her to institute an action for divorce [*Stage v. Stage* 2 *S.C.* 229],

or to defend such action [*Bloem v. Bloem* 1869 *Buch.* 68], and for alimony during the trial [*ibid.*], even where the marriage is out of community [*Botha v. Botha* 21 *S.C.* 543]; but the existence of a deed of separation may bar her claim [*Scholtz v. Felmore* 4 *S.C.* 192]. The amount decreed is in the discretion of the court, as in an action for judicial separation.

Provisions also exist for the bringing of pauper suits for divorce where a *prima facie* case is disclosed, affidavits as to the poverty or destitution of the applicant having been duly furnished [*Bester v. Bester* 1912 *E.D.L.* 221].

In divorce actions, as in actions for judicial separation, where a wife has just cause to fear that her husband intends disposing of certain property, she may apply for an interdict restraining him from so doing, whether the assets be those of the joint estate in the case of community [*Bester v. Bester, supra*], or belong to herself or her husband [*Liebertrau v. Liebertrau* 12 *S.C.* 274].

Proof of Marriage.—In any action for divorce marriage must be proved to the satisfaction of the court [*Schlechting v. Schlechting* 5 *Buch.* 24; *Hill v. Hill* 1906 *T.S.* 101]. The most satisfactory proof is the production of a duly authenticated copy of the marriage register. It is also necessary in case of doubt to identify the parties with those named in the marriage register by some external evidence [*Rykie v. Rykie* 1868 *Buch.* 144].

DIVORCE ON THE GROUND OF ADULTERY.

Both husband and wife are required by law to observe perfect conjugal fidelity, and one breach of this obligation entitles the innocent spouse to a decree of divorce [*Gibbon v. Gibbon* 8 E.D.C. 91]. The commission of an unnatural crime is included under the heading of adultery as a ground for divorce.

Proof of Adultery.—The acts of adultery complained of must be definitely alleged in the plaintiff's declaration [*Launspach v. Launspach* 1905 T.S. 7], and proved to the satisfaction of the court by sufficient evidence [*Wylde v. Wylde* 1 M. 269; *Vos v. Vos* 1905 T.S. 553; *McDougall v. McDougall* 1908 E.D.C. 455]. Since the law forbids divorce by consent, an admission of adultery by the defendant even on oath or on the pleadings, and much more so an extra-judicial confession, may not be sufficient proof thereof without corroborative evidence [*Wylde v. Wylde, supra*], though such evidence is accepted when free from the taint of collusion [*Bleeker v. Bleeker* 1927 C.P.D. 9 P.H.B. 37; *Koopman v. Koopman* 1927 C.P.D. 10 P.H.B. 3]. The unsupported evidence of the woman with whom the adultery is alleged to have been committed may be held to be insufficient proof [*Weyers v. Stopforth* 1 M. 273]. It is also insufficient evidence of adultery that a spouse is found to be suffering from venereal disease some five or six years after marriage [*Huggins v. Huggins* 1925 W.L.D. 139]. (The contrary has, however, also been held [*Howell v. Howell* 1909 T.S. 675]).

The evidence of adultery tendered must in every case be admissible. No evidence of non-access tendered by either spouse is admissible either to bastardise a child born during wedlock or to prove adultery in proceedings for divorce [*Williams v. Williams* 1925 T.P.D. 538; *Surmon v. Surmon* 1926 A.D. 47].

The person with whom adultery is alleged need not be joined as co-defendant except when sued for damages; but such person may himself intervene as co-defendant, and if he disproves the adultery he is awarded his costs [*Trenoweth v. Trenoweth* 1907 E.D.C. 268; *Brister v. Doxey* 1917 W.L.D. 14]. In Natal only the Attorney-General may intervene in a divorce suit to disprove the adultery [*Law No. 13 of 1883 (N) Sec. 5*; *Grainger v. Grainger* 23 N.L.R. 4].

Defences.—The only defences that will debar the plaintiff from being successful in his action are the following:—

- (1) Condonation of the offence by the plaintiff, *i.e.*, complete forgiveness by the innocent spouse of the guilty one [*Voet* 24.2.5]. The reconciliation is what must be proved to the court by the defendant [*Bell v. Bell* 1909 T.S. 500; *Elliott v. Elliott* 1925 C.P.D. 286], the most definite evidence that it is full and complete being the resumption of cohabitation [*Young v. Young* 25 S.C. 428; *Niemand v. Niemand* 15 S.C. 217]. Mere delay in

bringing the action does not of itself constitute condonation [*ibid.*], particularly where the parties are judicially separated [*Van Dyk v. Van Dyk 1 M. 278*].

- (2) Connivance on the part of the plaintiff; *i.e.*, where the plaintiff being aware of the adultery has raised no objections and in fact has consented thereto [*Voet 24.2.5*]. Here too the mental attitude of the plaintiff is the point at issue, his mental assent to the defendant's behaviour debarring him from obtaining a divorce [*Bell v. Bell 1909 T.S. 500*]; but his mere negligence or delay in bringing the action not doing so [*ibid.*; *Seaward v. Seaward 1 Searle 247*].
- (3) Adultery on the part of the plaintiff. Where the plaintiff has been guilty of adultery even after the commencement of the divorce proceedings a divorce will generally be refused, for the law requires a plaintiff to come into court with clean hands [*Wiesel v. Wiesel 7 Buch. 92*; *Heathershaw v. Heathershaw 5 Searle 35*]. The court may, however, in exceptional circumstances grant a divorce to a plaintiff guilty of adultery, but in such case it makes a special order as to costs or as to division of the property of the spouses, in order to mark its condemnation of the plaintiff's conduct [*Alkaster v. Alkaster 1921 C.P.D. 39*].

None of the following causes afford a defence to a wife who is sued for divorce on the ground of her adultery: desertion by the husband [*Farmer v. Farmer 1 Searle 227*]; being left by the husband without means of support [*Goodison v. Goodison 4 Buch. 143*]; nor any cause that would entitle her to a decree of judicial separation [*Voet 24.2.7*].

Unchastity of the wife before marriage is, however, no ground for divorce [*Nel v. Nel. 1 M. 274*].

It is no defence to a claim for divorce on the ground of adultery that the parties are separated either judicially [*Barker v. Barker 1 M. 265*] or by private agreement [*Cook v. Cook 1912 C.P.D. 290*]; that either refuses to cohabit with the other [*Hasler v. Hasler 13 S.C. 377*]; nor that owing to the long-continued absence of the one spouse the other spouse considered himself or herself justified in entering into a marriage with another person [*Voet 23.2.99*]; nor that the guilty spouse has become insane since the commission of the adultery [*ex parte A.B. 1910 T.P.D. 1332*].

Action for Damages.—In addition to having an action for divorce against the wife, a husband has an action for damages against the person who committed adultery with her, to compensate him for the injury he has suffered and for the loss of his wife's society [*Grotius 3.35.9*]. A wife, however, is not correspondingly entitled to damages against a female co-respondent [*De Bruyn v. De Bruyn and Raynor 1916 O.P.D. 221*; *Wait v. Wait*].

1913 E.D.L. 519]. [A case has however recently been reported from England in which a woman co-respondent was ordered to pay costs out of her separate estate (*Pepper v. Pepper and Baker* 9 P.H.B. 20)].

The actions for divorce and for damages are generally joined, the person with whom the adultery is alleged being summoned as co-defendant; but they may be brought separately. Damages may be sought even when no action for divorce is brought, and when the husband has condoned his wife's misconduct [*Viviers v. Kilian* 1927 A.D. 9 P.H.B. 27]. The condonation deprives the husband of any claim for loss of his wife's society, but in particular cases substantial damages may be awarded for the insult and injury. The amount of damages to be decreed depends on the facts of each case, and where the character of the wife is of a low standard they would not be awarded [*ibid.*].

The behaviour of the husband towards the wife previous to the adultery is also taken into account when assessing damages, and a husband was held not to be entitled to monetary compensation where he had abandoned his wife several years before [*Michael v. Michael* 1909 T.H. 292].

Costs of the divorce and of the action for damages may be decreed against the co-defendant. In Natal it is specially enacted that in proceedings by a husband for divorce on account of the wife's adultery damages and costs may be claimed against the co-defendant [*Law 13 of 1883 (N) Sec. 2*].

DIVORCE ON THE GROUND OF MALICIOUS DESERTION

Malicious desertion is the deliberate desertion of a spouse without that spouse's consent, or without lawful or necessary cause, without any intention of returning. The same tests as determine what is desertion by a husband determine what is desertion by a wife [*Webber v. Webber* 1915 A.D. 239].

By extensive interpretation lifelong imprisonment is held to be tantamount to malicious desertion [*Jooste v. Jooste* 24 S.C. 329], although a life sentence in modern times rarely means more than twenty years' imprisonment [*ibid.*]; and a divorce has been granted on this ground to a wife whose husband has been declared a habitual criminal and given the indeterminate sentence [*Van der Nest v. Van der Nest* 1925 W.L.D. 12]. In Natal, however, leave to sue for a divorce *in forma pauperis* was refused to a wife where though her husband had been convicted of murder his sentence had been commuted to ten years' imprisonment [*in re Gibson* 1912 N.P.D. 204].

Refusal of the marital privileges is also held to be tantamount to malicious desertion and thus a ground for divorce [*Brown v. Brown* 1905 T.S. 415].

Length of Absence—Natal Legislation.—The most important factor in determining whether there has been malicious desertion or not, is the intention not to return and cohabit. If this be

proved, the malice of the desertion is inferred. Though length of absence may be an important element in deciding whether desertion is malicious, it is not essential, save in Natal, that the desertion shall have continued for any specified period in order that it may ground a divorce. Divorces are on occasion granted after very brief periods of desertion, on clear proof of the intention not to return [*Mostert v. Mostert 2 Searle 128*].

In Natal no divorce may be granted on the ground of malicious desertion unless such desertion has, at the time of the commencement of the suit, continued uninterruptedly for eighteen months [*Law 13 of 1883 (N) Sec. 1*].

Defences.—To a claim for divorce on the ground of malicious desertion the following defences alone will avail:—

(1) That there has been no desertion. Mere departure is not desertion, and it is the duty of a wife to follow her husband to whatever new domicile he adopts [*Voet 24.2.13*].

(2) That the plaintiff's conduct was such as to entitle the defendant to a decree of judicial separation whether on the ground of cruelty or of some other matrimonial offence [*Theron v. Theron 1924 A.D. 244; Du Toit v. Du Toit 1920 C.P.D. 613*]. In such a case the desertion is robbed of its malice.

(3) That there is in existence a judicial or private deed of separation between the spouses. As a general rule an existing decree

or deed of separation must be set aside before either party can sue for a divorce on the ground of desertion, unless the deed has been disregarded by the defendant [*Hill v. Hill* 1906 T.S. 101]; or by both parties [*Gibbon v. Gibbon* 2 E.D.C. 280; *Barnard v. Barnard* 1926 W.L.D. 137]; whether the separation is judicial [*Smit v. Smit* 1909 T.S. 1067] or private [*Gibbon v. Gibbon, supra*].

Restitution of Conjugal Rights.—The first step in an action for divorce on the ground of malicious desertion is for the plaintiff to prove the desertion to the court, and to apply for a decree ordering the defendant to restore conjugal rights, *i.e.*, to return by a date named, and declaring that if by the date named (*i.e.*, the return day) the defendant has not complied with the order to return, a final decree of divorce will be pronounced against him or her. To this order the court may add orders as to other matters pertaining to the case, *e.g.*, forfeiture of the benefits of the marriage, and costs.

A divorce is occasionally granted forthwith at the hearing of the action for restitution of conjugal rights when there is clear proof that the order to return will not be obeyed [*Gerlach v. Gerlach* 1920 E.D.L. 262; *Friedlander v. Friedlander* 1925 C.P.D. 363]; but this practice is not considered desirable save in exceptional circumstances [*Mitchell v. Mitchell* 1922 C.P.D. 435]; and the procedure whereby an order for the restitution of conjugal rights is insisted on is the approved one [*ibid.*; and see *Johnstone v. Johnstone* 1917 A.D. 292].

The action for restitution of conjugal rights is a more or less fictitious preliminary to the order for divorce, and the plaintiff's claim does not fail because he admits that his object is to obtain a divorce and that he does not desire the return of the offender or the resumption of cohabitation. The mental attitude of the plaintiff is not the point at issue and does not affect his or her right to relief. Malicious desertion entitles a plaintiff to claim not only restitution but divorce, and the rights of the parties turn on the question of whether the defendant's desertion is malicious or not, *i.e.*, on the defendant's state of mind [*Gibbon v. Gibbon* 2 E.D.C. 280; *Mitchell v. Mitchell* 1922 C.P.D. 435; *Krantz v. Krantz* 1906 T.S. 750].

The purpose of the restitution order is to test the defendant's state of mind, and to give the parties an opportunity to become reconciled [*ibid.*]; hence the return day of the order may be fixed a long time or a short time ahead, in the discretion of the judge, according to the prospects of reconciliation.

If on the defendant's expressing willingness and offering to resume cohabitation the plaintiff repudiates the offer and still claims a right to divorce, the court enquires into the *bona fides* or genuineness of the offer to return, and may scrutinise the defendant's past conduct in order to test it; and if it is proved that the offer is not made with a genuine intention of returning, the plaintiff succeeds in obtaining the divorce prayed for [*Connor v. Connor* 1912 N.P.D. 399; *Rygor v. Rygor* 1909 T.S. 943; *Derby v. Derby* 1921 W.L.D. 27].

If the offer to return is genuine, it is a complete answer to the claim for divorce and the plaintiff's action fails [*Kalifa v. Kalifa* 1911 E.D.L. 363]. The malicious desertion is ended, and the plaintiff is bound, however reluctantly, to take back the defendant. If he refuses to do so, he himself becomes a deserter.

If a restitution order is not complied with, the court on the return day grants a final decree of divorce, after having satisfied itself, whether from affidavits or from other evidence, that the defendant has not complied with the order.

EFFECTS OF DECREE OF DIVORCE.

Order's as to Property.—A special order regarding the property of the spouses is generally prayed for together with the prayer for divorce. Where this is not done the position is the same as if the marriage had been dissolved by death. All debts up to the time of the decree (including the costs of the divorce suit) fall upon the joint estate in the case of a marriage in community [*Hablutzel v. Hablutzel* 1 M. 276], and the net estate is then divided into two equal portions. If the parties cannot agree on the division of the joint property, the court may appoint a liquidator [*Gillingham v. Gillingham* 1904 T.S. 609]. In the case of a marriage out of community each spouse is entitled to retain his or her own separate property.

The innocent spouse is in addition entitled to claim that the guilty spouse shall forfeit all the

benefits of the marriage, whether already accrued or still to be derived [*Wessels v. Wessels* 12 S.C. 470; *Higgins v. Higgins* 5 E.D.C. 344]. If the marriage is in community, the defendant is then entitled to retain only so much of the joint property, being less than half, as he or she contributed to the marriage [*Dieperink v. Dieperink* 7 *Buch.* 92; *Celliers v. Celliers* 1904 T.S. 926]. The remainder of his or her half share is liable to be forfeited to the plaintiff, as a benefit derived from the marriage [*Celliers v. Celliers, supra*]. In the case of a marriage out of community forfeiture may be decreed of any marriage settlements. In the category of benefits are included any gifts made during or in contemplation of the marriage, as well as settlements of life policies. Once the action is closed, however, and the division of the property decreed, one spouse cannot claim anything further from the other [*Nortje v. Nortje* 6 S.C. 9], save in Natal.

It is specially provided by the Divorce Act of Natal, that after judgment for divorce, on the application of one party or of someone interested the court may alter the terms of a marriage settlement, in order to make provision for the innocent spouse and children out of any property as far as the guilty spouse is interested in it. The court retains its powers of making orders regarding property in reference to the divorce [*Law 13 of 1883 (N) Sec. 9*].

Alimony.—It is a moot point whether an innocent wife is entitled to claim alimony from her husband after divorce, in view of the fact that the

divorce puts the spouses in the relation of strangers to one another, by completely dissolving the marriage tie [*Barnett v. Barnett* 1917 E.D.L. 218]. A guilty spouse, however needy, is in no case entitled to claim alimony from the innocent spouse after divorce [*Voet* 25.3.8].

Where the innocent wife is indigent, it has been decided that she is entitled to be awarded alimony [*Toms v. Toms* 1920 C.P.D. 455; and see *Barnett v. Barnett, supra*], and alimony has also been awarded to a wife claiming it where the husband, in spite of notice, has not appeared to object [*Clausen v. Clausen* 1919 C.P.D. 13]. Leave is given in such cases to move the court for a variation of the order [*Toms v. Toms, supra*; *Clausen v. Clausen, supra*].

Custody and Support of Children.—The question of custody of the children is determined by a consideration of what is in the best interests of the children, just as in the case of judicial separation. Although the successful spouse is as a general rule entitled to be given custody, the custody may be awarded to the other spouse where owing to the criminal tendencies of the former, or for other reasons deemed sufficient by the court, the welfare of the children will be better assured if they remain with the divorced spouse [*Cronje v. Cronje* 1907 T.S. 871; *Klass v. Klass* 1924 W.L.D. 136]; and even where the successful father is held entitled to the custody, children may be left in charge of the mother so long as they are of tender age [*Blatherwick v. Blatherwick* 1925 C.P.D. 5 P.H.B. 7].

The parent having custody has the right to regulate the children's upbringing, and to have them with him or her as the case may be, and to direct the lines upon which their education should proceed [*Mitchell v. Mitchell* 1904 T.S. at p. 130]; but since the other parent is entitled to have convenient access to them, such other parent may apply for an interdict restraining the parent in charge of the children from removing them out of the country, [*ex parte Jensen* 18 S.C. 154]. An interdict may, however, be refused, if the parent in charge genuinely intends to adopt a new domicile, and is not merely attempting to defeat the other parent's right of access [*Van Wijk v. Creighton* 1925 W.L.D. 5 P.H.B. 21].

When the children are in the custody of the mother, the court will order the father to contribute towards their support; but whether an order is made or not both parents are liable to contribute according to their means [*Farrell v. Hankey* 1921 T.P.D. 590]. The amount and mode of maintenance is a matter in the discretion of the court. A parent may, when change of circumstances or the age or earning capacity of the children warrants it, apply to court for a variation of the order [*Hausmann v. Hausmann* 1925 C.P.D. 5 P.H.B. 14].

JURISDICTION IN DIVORCE ACTIONS.

The only courts in South Africa that have jurisdiction in matrimonial suits, whether for judicial separation, divorce, or nullity, are the various divi-

sions of the Supreme Court. A magistrate's court has no jurisdiction in these matters (save in certain Indian and Native cases).

Arbitration is not permitted with regard to matrimonial suits without special leave of the court [*Act 29 of 1898 (C) Sec. 7; Ord. 24 of 1904 (T) Sec. 7; Act 24 of 1898 (N) Sec. 8*]. Such leave would perhaps be given in order to decide the terms of a separation, but not in any matter involving the status of the spouses.

The Forum.—There is only one court in any given case that has jurisdiction to decide an action for divorce, or one wherein the status of married persons is in question, and that is the court of the place wherein the parties are domiciled at the time of the commencement of the action. On this point the law of South Africa, *i.e.*, the Roman-Dutch law, and international law coincide [*Le Mesurier v. Le Mesurier 1895 A.C. 517*]. The domicile of a wife being in law that of her husband, it follows that an action for divorce can be brought only in the court of the place where the husband is domiciled at the time of the action [*ibid.*; *Mason v. Mason 4 E.D.C. 330*]. This rule applies even where the wife is as a matter of fact living apart from her husband [*Mason v. Mason, supra*], and even where a judicial separation is in existence [*Steytler v. Steytler 1913 C.P.D. 725*].

Consent of the parties cannot give a court jurisdiction if it does not possess it otherwise [*Weatherley v. Weatherley Kotze 66*]. Thus when the husband is the defendant and is in default, the

court will itself raise the question of whether or not it has power to adjudicate [*Whipp v. Whipp* 12 S.C. 174]. Conversely, if the court has jurisdiction, it may grant a divorce whether the wife or the husband be absent at the time the action is brought. Thus the court may make an order for restitution of conjugal rights, failing which divorce, on the application of a wife resident abroad, who was deserted abroad, if the husband is at the time of the action domiciled within the jurisdiction [*Molyneux v. Molyneux* 1907 T.S. 585]. Even if the wife has never been in the jurisdiction she may sue or be sued therein [*Cooke v. Cooke* 1906 C.T.R. 719].

When an absent spouse's address is unknown, or such spouse is out of the country or out of the jurisdiction or cannot be found, the court may grant leave to sue by edictal citation, *i.e.*, by summons inserted in the *Government Gazette* or in a newspaper circulating in the area where the absent spouse is believed to be.

Proof of Domicile.—The principles regulating the law of domicile have developed on similar lines in England and Holland. Domicile is not constituted by mere residence. It is residence coupled with an intention of permanently remaining in the place [*Webber v. Webber* 1915 A.D. 239].

The court requires no more than *prima facie* proof of domicile in order for it to assume jurisdiction to grant divorce, and will permit either spouse to sue the other by edictal citation on such

prima facie evidence being afforded [*Knox v. Knox* 24 S.C. 441]. The fact that a man has left his wife (and children, if any,) within the jurisdiction is presumptive evidence that he is domiciled therein, for there is a maxim of the Roman-Dutch law "*ubi uxor ibi domus*" [*ibid.*; *Whipp v. Whipp*, *supra*; *Hawkes v. Hawkes* 2 S.C. 109; *Blair v. Blair* 1914 S.R. 111].

It is essential, however, that some *prima facie* proof of domicile be afforded by the wife in these cases. If the husband was never actually domiciled in the jurisdiction, although he may have married therein, and even perhaps intended to take up residence therein, there is no *prima facie* proof of domicile to enable the court to assume jurisdiction [*Walker v. Walker* 13 S.C. 363]. It was held, however, in a recent case, that the court was entitled to assume, in the absence of evidence to the contrary, that the parties were domiciled in the place where the marriage took place [*Dyus v. Dyus* 1926 D.C.C. and L.D. 8 P.H.B. 5], in accordance with the principle that the court is justified in certain circumstances in departing from the strict rule in order to do justice to the injured party [*see Hudson v. Hudson* 1907 E.D.C. 189].

It is always competent to the defendant in the cases in which the maxim "*ubi uxor ibi domus*" applies, as in every other case, to deny that he is domiciled in the jurisdiction, or to assert change of domicile [*Knox v. Knox*, *supra*; *Adams v. Adams* 2 S.C. 24], and the maxim loses much of its force where the gulf between husband and wife has so widened as to have become impassable [*Webber v. Webber*, *supra*].

There is a presumption against abandonment of domicile of origin, *i.e.*, the domicile a person acquires at birth [*Voet 5.1.97 and 99; Webber v. Webber, supra*]; and when the husband's whereabouts are unknown, *e.g.*, when he travels about in order to earn a livelihood, his domicile of origin survives, and he may be sued therein [*in re Sandberg 1912 T.P.D. 805*].

There is also a presumption against change of domicile, and where change is alleged, the burden of proving it is cast on the person who alleges it [*see Webber v. Webber, supra*]. Domicile is established not by mere assertion, but by conduct, although if a witness is credible his own evidence as to his own intention is acceptable [*ibid.*]. Further, change of residence, in order to amount to a change of domicile, must be made with a genuine intention of change, and in good faith, and not with the intention of defeating the action for divorce.

Under exceptional circumstances, *viz.*, if the husband is proved to be a vagabond, or vagrant, with no fixed abode or certain domicile, the court of the place where the wife is domiciled may assume jurisdiction to grant her a divorce [*Mason v. Mason 4 E.D.C. 330; Hudson v. Hudson 1907 E.D.C. 189*]. This rule will not apply, however, where the husband travels from country to country in order to earn a livelihood [*in re Sandberg, supra*].

Natal Legislation.—By virtue of Law 18 of 1891 (N), any spouse who has resided in Natal for four years may obtain an edictal process for matri-

monial relief, if he or she has been deserted in Natal for 18 months, and if the deserting spouse is absent from Natal at the date of the institution of the legal proceedings [*Sec. 1*]. The plaintiff's suit is not defeated by any change in the domicile of the deserting spouse following such desertion [*Sec. 2; Wright v. Wright 1905 N.L.R. 651*].

CHAPTER SIXTEEN.

ANNULMENT OF MARRIAGE.

There are certain circumstances occurring prior to a marriage which render the marriage invalid from the beginning, and by reason of which a decree of nullity may be pronounced by the court. Such decree acts retrospectively [*Voet* 24.2.15], the parties being placed by law in the same position as if they had never been married, and any children born of the union being considered illegitimate.

Marriages liable to annulment may be divided into two classes, void and voidable marriages. A marriage is void if it is good for no legal purpose. It is voidable if there is in its constitution some imperfection that will invalidate it on proceedings being taken to set it aside. Until set aside, however, all the incidents of marriage attach thereto [*Wells v. Dean Willcocks* 1924 C.P.D. 89]. Doubt may exist as to whether specified marriages should be classed as void or voidable, but the grounds on which a marriage will be annulled are well defined.

GROUNDS OF ANNULMENT.

The following causes will ground an action for nullity:—

1.—Absence of the formalities requisite to the celebration of a valid marriage. Mere cohabitation never constitutes a marriage [*Voet* 23.2.5], nor do other modes of marrying than the prescribed ones. All such marriages are *ipso jure* void [*Voet* 23.2.3].

2.—The existence of a prior valid marriage between one of the spouses and a third person which has not been duly dissolved by death or by a decree of the court. The bigamous marriage is entirely void [*Wells v. Dean Willcocks, supra*].

3.—Want of age. Boys below the age of 14 and girls below the age of 12 years are absolutely incompetent to marry.

4.—Too close relationship between the spouses. A marriage within the prohibited degrees may be decreed null whether the parties were aware or ignorant of their relationship [*Voet* 24.2.15].

5.—Insanity at the time of the marriage. The consent and not the mere formal coming together of the parties is an essential requirement of marriage [*Voet* 23.2.6]. Where, however, the marriage of the alleged lunatic was entered into quite voluntarily, with an understanding of what the ceremony signified, it is valid [*Prinsloo's Curator v. Crafford* 1905 T.S. 669]. Intoxication so pro-

found as to deprive the mind of reason has the same effect as insanity in invalidating a marriage [*Voet* 23.2.6].

6.—A mistake in the identity of the person married. Such mistake completely negatives the consent necessary to the marriage [*Voet, ibid.*].

7.—Error induced by fraud. A mistake induced by deceit as to the nature of the ceremony performed is ground for annulment of a marriage. Hence if a child or a foreigner is entrapped into a valid form of marriage in ignorance of its meaning, the marriage is invalid and may be annulled [*Johnson v. McIntyre* 10 S.C. 318; *Rubens v. Rubens* 26 S.C. 617].

When anyone has been compelled to marry by force the marriage may be annulled; but in view of the public nature of the marriage ceremony marriages under duress cannot occur, save under very exceptional circumstances.

8.—Want of consent of parents. This renders the marriage voidable at the suit of the parent [*see Chapter Four "Consent of Parents"*]. The marriage is also voidable at the suit of a minor who was fraudulently inveigled into the marriage, if he sues within a reasonable time [*Haupt v. Haupt* 14 S.C. 39]. The marriages of minors where the necessary consent of parents is lacking are accordingly valid until set aside [*see Willenburg v. Willenburg* 3 B.A.C. 409].

9.—Pregnancy of the wife at the time of the marriage. A husband is entitled to have the marriage annulled if the wife, unknown to him, was pregnant by another at the time the marriage was celebrated [*Horak v. Horak* 3 *Searle* 389; *Pansegrow v. Pansegrow* 1910 *O.P.D.* 51], even though he himself is guilty of adultery, and whatever were the relations between the spouses before marriage [*Reynecke v. Reynecke* 1927 *O.P.D.* 9 *P.H.B.* 18]. This right is lost if the husband condones the offence [*Pansegrow v. Pansegrow, supra*]. Such marriages, then, are not void, but voidable.

10.—Impotence. Permanent impotence or incapacity to procreate children existing at the date of the marriage gives the other spouse the right to apply for a decree of nullity of marriage [*Ngwende v. Ngwende* 8 *E.D.C.* 68]. The marriage in such a case has been held to be merely voidable, and valid until set aside [*ibid.*]. Unreasonable delay in bringing the action bars the plaintiff's claim, as delay is evidence of ratification [*S. v. S.* 1916 *C.P.D.* 109; *Wells v. Dean Willcocks* 1924 *C.P.D.* 89].

Unchastity of the wife previous to marriage not followed by pregnancy at the time of marriage is no ground for a decree of nullity [*Horak v. Horak, supra*], and neither can an annulment of the marriage be claimed where one of the spouses has contracted a venereal disease before marriage [*Masekoameng v. Masekoameng* 1919 *T.P.D.* 405].

No cause that supervenes after marriage is ground for annulling a marriage.

JURISDICTION TO ANNUL A MARRIAGE.

In the case of a voidable marriage, since the incidents of marriage attach thereto until the marriage is set aside, the wife acquires the domicile of her husband and retains it until the marriage is declared null. The action for nullity where the ground of annulment is impotence must accordingly be brought in the court of the husband's domicile [*Wolter v. Wolter* 11 E.D.C. 89]; although the effect of the decree is to render the marriage void from its inception [*Wells v. Dean Willcocks* 1924 C.P.D. 89]. The same rules as regulate the question of jurisdiction in divorce apply also in the case of suits for the annulment of a voidable marriage.

In the case of an entirely void marriage the incidents of marriage never attach thereto, and the "wife" never acquires the domicile of the "husband." Thus in an action for annulment on the ground of bigamy, the correct forum is that of the place where the invalid ceremony was performed, if that be the deceived person's domicile. What is being sought is a declaration of such person's status, and this such court is competent to declare, even though it might not have jurisdiction over or be competent to demand any performance

from the defendant who is not within its jurisdiction. In addition, it is the only court that can rectify the marriage register of the province [*Wells v. Dean Willcocks, supra*].

CHAPTER SEVENTEEN.

INTESTATE SUCCESSION.

Intestate succession is that system of succession to the property of a deceased person which takes effect whenever such person has died without leaving a valid will. It also comes into operation when although a valid will exists no one accepts a benefit thereunder, or when the deceased has died partly testate and partly intestate.

The right to inherit *ab intestato* depends on relationship by blood existing between the heirs and the deceased. The order of priority of succession among relatives is determined by the terms of a Charter granted by the States-General of the United Netherlands in 1661 to the Dutch East India Company, fixing the law of succession *ab intestato* to persons dying in the East Indies or on the voyage there or back [*Raubenheimer v. Exors. of van Breda*, *Foord* 111; *Fitzgerald v. Green* 1914 A.D. 88; and *in re Estate Gledhill* 12 N.L.R. 43]. This Charter embodies, with certain modifications, the rules of succession laid down in the Political Ordinance of April 1st 1580 as interpreted by an Ordinance of May 13th, 1594, of the States of Holland.

The Order of Succession.—Those in the direct line of descent have first right to inherit from their ancestor. If there are no descendants, those in the direct line of ascent inherit, and failing both descendants and ascendants, those related to the deceased collaterally through an ancestor succeed to the inheritance. The order of succession, in more detail, is as follows:—

(1) Children, male and female alike, succeed in equal shares to the entire inheritance of their deceased parent. If a child has died before the parent whose inheritance is in question, such child's children step into his or her place, and together take his or her share, *i.e.*, the grandchildren by a deceased child together represent such child. This process of representation applies *ad infinitum* in the case of descendants in the direct line; and such succession is known as succession by representation.

(2) On failure of descendants, the estate goes to the parents of the deceased in equal shares, if both be alive. If only one be alive, he or she succeeds to one-half of the estate, and the brothers and sisters of the deceased who are at the same time the children of the deceased parent, and their children and grandchildren by representation, to the other half. If no such brothers or sisters or their children or grandchildren survive, the surviving parent takes the whole estate.

(3) Failing descendants and both parents, the estate is divided equally between the deceased's brothers and sisters, and their children and grandchildren by representation. Half-brothers and

sisters succeed with the half hand only, *i.e.*, the full brothers and sisters and their children and grandchildren by representation first take one-half of the estate, and the other half is then divided between them and the half-brothers and sisters and their children and grandchildren by representation.

Where no brothers or sisters or their children or grandchildren survive, further descendants of such brothers or sisters succeed, priority being determined by closeness of relationship to the deceased, without representation.

(4) On total failure of all the relatives mentioned heretofore, the estate is divided into two equal portions, the one going to the relatives on the father's side and the other to those on the mother's side, whether or not there are more of them on the one side than on the other. Those first entitled to succeed to the half share coming to their side of the family are the grandparents and their children and grandchildren by representation, *i.e.*, uncles and aunts and first cousins. Failing these, remoter descendants of the uncles and aunts succeed, without representation. Failing these the great-grandparents and their descendants inherit. If there are no relatives whatever on the one side, the surviving side takes the whole estate.

(5) On total failure of relatives, the inheritance goes to the Government Treasury [*ex parte Leew* 22 S.C. 340]; (but see for dicta to the contrary, *viz.*, that in such case the surviving spouse

takes the inheritance, *in re Booyesen Foord* 188; and *in re est. Taylor* 12 C.L.J. 34). The Crown may seize the inheritance only after the lapse of 50 years; and it may be claimed by heirs within that period [*Act 24 of 1913 Sec. 98*].

Succession of Adopted Children.—An adopted child is for all purposes whatsoever deemed in law the child born in lawful wedlock of the adopting parent [*Act 25 of 1923 Sec. 8*]. Thus he or she may succeed as intestate heir to the adopting parent. Such child cannot, however, succeed *ab intestato* as a natural brother or sister does to the inheritance of the adopting parent's child, for it is specially provided that unless the contrary intention clearly appears from any instrument, testamentary or otherwise, an adopted child does not by the adoption acquire any right, title or interest in any property devolving on the heirs *ab intestato* of any child of lawful wedlock of the adopting parent; nor does he become entitled to any succession, whether by will or *ab intestato*, by right of representation of his adopting parent [*ibid. Sec. 8 (1)*].

Although adoption terminates all other rights and legal responsibilities existing between the child and his natural parents, the child still has the right to take property as heir or next-of-kin of his natural parents either directly or by right of representation [*ibid., Sec. 8 (2)*]. Further, neither the adopting parent nor his next-of-kin acquires any right in immovable property which has become vested in joint ownership in the adopted child and any blood relation of such child, on the death in-

testate of such child while still a minor. The right, in such a case, accrues to the person who would have been entitled thereto if no adoption had taken place [*ibid.*].

Succession of Illegitimate Children.—Full rights of inheritance are enjoyed only by those born in lawful wedlock. An illegitimate child for the purposes of the law of intestate succession has no father, and there are no rights of succession between such father and child nor between those related through such father or child [*Voet 38.18.8, 19, 21*].

It is a maxim of South African law, however, that “een moeder maakt geen bastaard” [*see Fitzgerald v. Green 1914 A.D. 88*]; and illegitimate children succeed to their mother and her relatives (including thus their legitimate and illegitimate brothers and sisters), and *vice versa*, on exactly the same terms as her legitimate children [*in re Russo 13 S.C. 185; Jassiem v. The Master 8 S.C. 259*]. This rule applies also to children born as the result of adultery [*Fitzgerald v. Green, supra*].

Succession of Legitimated Children.—A child who has been legitimated is in the same position and enjoys the same rights of succession to both parents and their relatives as one legitimate by birth [*Voet 38.18.10, 21*].

Legitimation is brought about by the subsequent marriage of the parents, and if parents thus marrying could have lawfully married each other at the

date of the child's birth, the child born out of wedlock may be registered in the prescribed manner as if it had been born in wedlock [*Act 17 of 1923 Sec. 10*]. This provision enunciates the necessary condition that had to be present before legitimation through subsequent marriage was brought about by common law, *viz.*, the possibility of marriage between the parents at the time of the child's birth [*see Fitzgerald v. Green 1914 E.D.L. 432*]. A child born as the result of incest can thus never be legitimated, since its parents could not at the time of its birth and never can marry each other. A child born as the result of adultery cannot be registered as legitimate under the above provision: but it is questionable whether its rights are entirely unaffected by the subsequent marriage of its parents.

Formerly the parents of such child could not marry each other even after the dissolution by death or divorce of the marriage which rendered a marriage between them impossible at the date of the child's birth; but such marriages are valid in the modern law [*Heinmann v. Est. Heinmann 1919 A.D. 99*]. Adultery is no longer considered a crime, nor visited with penal consequences, so that an adulterine child may take under the will of its father as well as under that of its mother [*see Fitzgerald v. Green 1914 A.D. 88*]. It is doubtful therefore whether after the marriage of its parents such child would be debarred from succeeding *ab intestato* to the father and the father's relatives.

Succession of Spouses—Natal Law.—From the order of succession outlined above it is apparent

that no provisions exist for the mutual succession of husbands and wives (save possibly in the case of total failure of blood-relations of the deceased spouse). When marriage is in community a surviving wife is to a considerable extent protected against destitution, and so too when community of profit and loss attaches to the marriage although community of property is excluded. Where, however, an antenuptial contract entirely excludes community, and no marriage settlement is made on a wife who has no private estate, and no means of acquiring property, such wife, on the death intestate of her husband, may be reduced to a condition of extreme poverty.

This position has been remedied in Natal by legislation. In the case of spouses from whose marriage community has been excluded by virtue of Law 22 of 1863 (N), when the husband dies intestate his widow is entitled to receive and have one-half of his property, both movable and immovable, unless he leaves lawful issue surviving him; in which case the widow is entitled to one-third of the property [*Law 22 of 1863 (N) Sec. 5; in re Curley's Estate 7 N.L.R. 79*].

CHAPTER EIGHTEEN.

WILLS.

A will is a declaration made by a person during his lifetime stating how he wishes his property to be disposed of after his death.

PRE-REQUISITES OF A VALID WILL.

For a will to have validity it must be executed by a competent person and in a manner recognised by law. A presumption of validity arises from the production of a will regular on the face of it [*Kuntz v. Swart* 1924 A.D. 618], and the burden of proving his allegations is cast on the person who affirms that it is a forgery or that it has not been executed in due form [*ibid.*] or that it has been executed by an incompetent testator [*Voet* 28.1.35].

Competency to Make a Will.—All persons are competent to make a will except—

- (a) boys below the age of 14 years and girls below the age of 12 years [*Voet* 28.1.31]. In Natal, however, no will or codicil is valid unless the testator at

the time of its execution or re-execution has attained the age of 21 years, or is otherwise entitled to the privileges of majority (by emancipation from paternal power by *venia aetatis* or otherwise) [*Law 2 of 1868 (N) Sec. 6*].

- (b) persons mentally incapable at the time the will is made. In this category are included not only those suffering from a mental disease, but also persons bereft of reason through severe intoxication [*Voet 28.1.34 and 35*]. A will made by a mentally afflicted person during a lucid period is valid [*Voet 28.1.34; in re Kemp 2 M. 435*].

All persons, however, who are competent to make a will, may do so freely, so that a married woman does not require the authority, consent or assistance of her husband in making her will [*Voet 28.1.38*], nor a minor that of his guardian [*Voet 28.1.43*].

Due Execution.—There are three recognised types of will, *viz.*, (1) underhand, (2) notarial, and (3) privileged wills.

(1) Underhand wills are those in most frequent use and are of the English type. The formalities necessary to their execution are laid down by statute in each province. All that is necessary for the due execution of such wills is that they must be signed by the testator, or by some person in his presence and by his direction, in

the presence of at least two competent witnesses present at the same time, who also sign the will [*Ord. 15 of 1845 (C) Sec. 3; Ord. 14 of 1903 (T) Sec. 1; Ord. 11 of 1904 (O.F.S.) Sec. 1; Law 2 of 1868 (N) Secs. 1 and 5*]. In the Cape the signatures are required to be affixed to every leaf; in the Transvaal and O.F.S. to every sheet.

Every person male or female above the age of fourteen years who is competent to give evidence in a court of law is competent to attest a will [*Act 22 of 1876 (C) Sec. 3; Ord. 14 of 1903 (T) Sec. 2; Ord. 11 of 1904 (O.F.S.) Sec. 2*]. This statutory regulation of the qualification of witnesses is omitted in the Natal Act, and any person may attest a will made in Natal, provided that he is not disqualified by nature, as is a child of tender years or a lunatic who does not understand the nature of the act in which he is taking part [*Momololo's Exor. v. Upini 1919 A.D. 56; Voet 28.1.7*].

(2) The validity of notarial wills depends on the common law, and is specially reserved in the Wills Act of each province and in the Transvaal by Act 14 of 1920. These wills are executed in the presence of a notary and two witnesses, by a testator known to the notary or witnesses [*Voet 28.1.24*], and also require the signature of all the above-mentioned parties. They no longer require to be read over to the testator by the notary in the presence of witnesses [*Act 3 of 1878 (C) Sec. 3; Ord. 14 of 1903 (T) Sec. 5; Ord. 11 of 1904 (O.F.S.) Sec. 5*], but if so read are valid even though not signed, if the testator, after approv-

ing the will, suddenly becomes ill and thereafter dies [*re Proctor's will* 5 S.C. 159; *Horak's Heirs v. Horak* 2 M. 402].

(3) Privileged wills are valid although executed without the usual formalities, their validity being specially reserved by the Wills Acts of each province [*Ord. 15 of 1845 (C) Sec. 3*; *Ord. 14 of 1903 (T) Sec. 1*; *Ord. 11 of 1904 (O.F.S.) Sec. 1*]. The following types of wills are privileged by common law:—

- (a) The will of a soldier on active service (or of a non-combatant attached to an army on active service in the enemy's country) [*Voet* 29.1.10]. This will does not require any formalities at all in its execution. It is only necessary that the declaration alleged to be a will shall come within the legal definition of a will [*in re Leedham* 18 S.C. 450]. Such will holds good for one year after the return of the soldier from active service [*Voet* 29.1.11].
- (b) A will made in a time of pestilence or epidemic disease. This is valid although imperfectly executed if thus executed through necessity [*ex parte de Wet* 1919 O.P.D. 61].
- (c) The will of a parent or other ascendant in favour of children or other descendants. This holds good, provided that it is wholly in the testator's hand-

writing, although not executed in the presence of witnesses. Such will is known as a holograph will. The privilege attaches to a mother's will, whether she benefits her legitimate or her illegitimate children [*Voet* 28.1.16]; to a father's will only so far as he benefits his legitimate children [*Voet* 28.1.16; *Wilkinson v. Est. Wilkinson* 24 S.C. 602].

An adopted child is for all purposes deemed the child born in lawful wedlock of the adopting parent, but unless the contrary intention clearly appears from any instrument, such child does not acquire any right, title, or interest in any property devolving on any child of the adopting parent by virtue of an instrument executed prior to the date of the adoption [*Act 25 of 1923 Sec. 8*].

In Natal the persons to whose wills privilege attaches are specially enumerated in the Law regulating the execution of wills in Natal. The following persons may dispose by will of their property without observing the formalities required by that law in the execution of wills: any person in actual military service; anyone being in Africa, but not in Natal, on a journey or a trading exploring or hunting expedition or the like; and any marine or seaman at sea [*Law 2 of 1868 (N) Sec. 3*]. In Natal, accordingly, a holograph will is not privileged [*in re Est. Lalla* 1922 N.P.D. 18].

In the Cape Province, the validity of wills made by virtue of a "reservatory clause" is specially

reserved by statute [*Ord. 15 of 1845 (C) Sec. 4*]. A reservatory clause is a clause inserted by a testator in his will (whether it be a notarial or an underhand one), reserving to himself the right to alter or add to his will, either at the foot thereof or in a separate deed [*in re Sir John Wylde's Will 3 Buch. 193*]. A codicil thereafter executed and signed by the testator alone without witnesses is deemed to be part of the will and has validity if it specifically purports to be executed under and by virtue of the reservatory clause, but not otherwise [*ibid.*; *Van der Walt v. Van der Walt's Exors. 13 S.C. 316*; *Erasmus v. Erasmus' Guardians 1903 T.S. 843*].

Codicils.—There is no longer any essential distinction between a will and a codicil, although the former is generally the main testamentary instrument, and the latter the subsidiary one, used to effect alterations. The Wills Acts of each province require the same formalities in the execution of an underhand codicil as in that of an underhand will, and notarial codicils require the same formalities as notarial wills [*Voet 29.7.5*]. Any provision that may be inserted in a will may be inserted in a codicil [*Brink v. Voigt 1 M. 537*].

MUTUAL WILLS.

It is a common practice in South Africa for two spouses to make their wills in the same written instrument. In such a case the formalities of execution need be observed only once, and the will

is known as a joint or mutual will. It is also permissible, though not commonly done, for two persons not being spouses to execute a mutual will.

By mutual will the terms of an antenuptial contract may be altered to any extent, so far even as to introduce community; and conversely a community of property existing during lifetime may be done away with by mutual will as from the date of death of the first-dying spouse [*Union Government v. Larkan* 1916 A.D. 212]. These testamentary arrangements only take effect upon death, and the surviving spouse is at liberty to repudiate the joint will and to adhere to the provisions of the antenuptial contract or to the community [*ibid.*; *McDaniel v. Twentyman Jones* 1925 C.P.D.; 5 P.H.G. 2].

A joint or mutual will is deemed in law to be two separate and distinct wills, and accordingly either spouse may without the consent or knowledge of the other revoke his or her share thereof, as if it had been contained in a separate instrument [*S. A. Association v. Mostert* 1873 Buch. 31]. This revocation may be made by the surviving spouse even after the death of the other, unless he or she has accepted benefits under the will of the deceased. This indicates an election to be bound by that will, and the survivor is then bound to allow any property of his or hers disposed of by that will to devolve as the deceased therein directed [*ibid.*; *Upton's Exor. v. Upton* 2 Roscoe 42; *Union Government v. Larkan, supra*].

Thus where either of two spouses has reciprocally benefited the other by mutual will, and has

directed how the disposition of the property of their joint estate is to be regulated after the death of the survivor, the survivor, if he or she has enjoyed or wishes to enjoy the benefit, cannot make any other disposition or will of his or her half share unless the benefit bestowed has been repudiated [*S. A. Association v. Mostert, supra*]. (This rule applies to the massing of the whole joint estate, or to the massing of a portion thereof.) The benefit frequently takes the form of a life-interest in the deceased's estate. Such massing of the joint estate by mutual will is a frequent practice. The rights of heirs under a mutual will which confers on the surviving spouse fiduciary, usufructuary, or other limited interest in the massed estate are, after adiation by such spouse, the same in respect of such survivor's half share of the property as in respect of the half share which belonged to the deceased spouse [*Act 24 of 1913 Sec. 115*].

VALID DISPOSITIONS.

The Principle of Free Testation.—There has been an unmistakeable trend in South African legislation towards the principle of free testation, and certain restrictive rules of the Roman law, whereby a testator was compelled to leave a proportion of his estate to children and other specified persons, which formed part of the Roman-Dutch common law, have been abolished by statute in each of the provinces [*Act 26 of 1873 (C) Sec. 1; Act 23 of 1874 (C) Sec. 2; Proc. 28 of 1902 (T) Secs. 126 and 127; O.F.S. Law Book 1901 Chap. 92, Secs. 1 and 2; Law 7 of 1885 (N), which abolish*

the Portio Legitima, the Quarta Falcidia, and the Quarta Trebelliana].

Since the abolition of the former restrictions, a parent may totally disinherit all or any of his children, without assigning reasons; but the estate of a deceased parent, it appears, nevertheless remains liable for the maintenance of a minor child (although possibly only where the means of the surviving parent are insufficient to suitably provide therefor); and the court may order a sufficient sum to be secured or paid out from the estate in order to provide such maintenance before any payment of legacies is made [*Davis' Tutor v. Est. Davis* 1925 *W.L.D.* 168; and see *Shearer v. Shearer's Exors.* 1911 *C.P.D.* at p. 821].

In addition to this right to disinherit whom he pleases, a testator has the right to benefit whom he pleases, and to any extent, with but few exceptions, many of the former restrictions no longer applying. Thus the rule forbidding a testator to leave more to his or her second wife or husband than the smallest portion left by him or her to a child of the former marriage (the *Lex Hac Edictali*) has been abolished by statute [*Act 26 of 1873 (C) Sec. 2; Proc. 28 of 1902 (T) Sec. 126; O.F.S. Law Book 1901 Chap. 92 Sec. 2; Law 7 of 1885 (N)*].

Also, since adultery is no longer a crime in South African law, persons guilty thereof are no longer penalised by not being allowed to benefit each other by will [*Heinamann v. Est. Heinamann* 1919 *A.D.* 99]. Those guilty of incest, however, are presumably still thus penalised, as formerly.

In the Roman law burdensome restrictions were imposed on a testator wishing to benefit his or her illegitimate children. In the Roman-Dutch law these rules were modified, and in South Africa certain of them are definitely obsolete. Since "a mother makes no bastard," illegitimate children may be benefited to any extent under the will of their mother [*Fitzgerald v. Green* 1914 A.D. 88]. Furthermore, in view of the tendency to permit free testation, it is doubtful whether or not there is still any force in the Roman rule forbidding a father who had legitimate issue from leaving more than one-twelfth of his estate to his illegitimate children [*van der Keessel Th.* 287].

A distinction was drawn by the Roman-Dutch law between children born as the result of adultery or incest and other natural children. To the former class parents might not leave by will more than sufficed for their bare maintenance (although in part of the Netherlands the prohibition probably did apply to the mother). In South Africa, adultery not being a penal offence, an adulterine child may inherit freely under the will of the mother [*Fitzgerald v. Green, supra*], and is in the same position as any other natural child with regard to its power of benefiting under the will of the father [*ibid.*]. A child born as the result of incest may probably benefit by the mother's will [*ibid.*], but whether it may take more than mere maintenance under the father's will is more doubtful.

Another restriction on testation imposed by the law of Holland is to be found among the penalties attaching to secret marriages. A person marrying

a minor without the necessary consent of parents or guardians is prohibited from benefiting under the will of such minor spouse [*Perpetual Edict, 1540; Mostert v. the Master 3 Roscoe 59*].

Incompetency to Accept Benefits.—In addition to those persons mentioned above, whom a testator may not benefit, there are other persons who may not accept benefits conferred on them in a will, because of their own position in relation thereto, or because of their conduct towards the testator.

(1) Witnesses to a will cannot accept a benefit thereunder. In the Cape, Transvaal and Orange Free State if a person who witnesses a will is benefited therein, he or she forfeits any interest or appointment (as executor, administrator or guardian) conferred on him or her by the will, as well as any interest conferred on his or her wife or husband [*Act 22 of 1876 (C) Sec. 4; Ord. 14 of 1903 (T) Sec. 3; Ord. 11 of 1904 (O.F.S.) Sec. 4*]. In Natal, although any benefit given or directed in a will or codicil to a witness thereto or his or her spouse is utterly null and void, being appointed trustee, executor, guardian, curator or the like, or the receipt of the usual remuneration as such, or the payment of a legal debt or demand is not deemed a benefit. A witness benefited by the will is not rendered incompetent to give evidence in respect thereof [*Act 2 of 1868 (N) Sec. 7*].

(2) The notary before whom a will is executed cannot take a benefit under it, nor can any person closely related to such notary.

(3) No person who writes out the will of another can derive any benefit for himself from such will. Being appointed executor in a will is a benefit within the meaning of the rule [*Benischowitz v. the Master* 1921 A.D. 589]. The rule does not apply, however, where there is no suspicion of fraud, and subsequent confirmation of the will by the testator, proved by independent evidence, may rebut the presumption of fraud [*Smith v. Clarkson and Bird* 1925 A.D. 501]. Whether the rule applies to mutual wills of husband and wife written out by one of the spouses is not certain [*ibid.*; *Van Renen v. Brink's Trustees* 5 Searle 281]. The prohibition applies in any case only to the person actually writing the will, and thus a person who dictates or hands a draft of the testator's will to another to write or type may take a benefit under the will, even if that other be his own employee [*Smith v. Clarkson and Bird, supra*; *Van Deemter v. the Master* 1914 C.P.D. 9].

(4) "A blood-stained hand takes no inheritance," *i.e.*, no one who has caused or contributed indirectly by his discreditable conduct to the death of the testator is allowed to benefit by the latter's will [*Grotius* 2.28.42; *Taylor v. Pim* 24 N.L.R. 484].

(5) No one who has brought undue influence to bear on the testator in the making of the will can benefit thereunder, a will being liable to be set aside on this ground [*Cerfontein's Exors. v. O'Haire* 3 Buch. 47].

The tendency of South African courts is to restrict and not extend the list of those not entitled

to succeed, and to uphold wills, in the absence of proof of fraud [*Smith v. Clarkson and Bird* 1925 A.D. 501].

Heirs and Legatees.—A testator may in his will in addition to bequeathing legacies institute an heir or heirs. An heir is in the position of a residuary legatee, and the executor hands over to him the net balance of the estate left after paying the debts of the deceased and the legacies bequeathed in the will [*Oosthuizen v. Oosthuizen* 1868 *Buch.* 51]. A will is valid, however, even though no heir is instituted therein [*ibid.*] In this case, if a balance remains after the legacies are accounted for, the heirs *ab intestato* of the deceased succeed thereto [*Voet* 29.2.40].

A person may be instituted as heir or may be left a bequest either conditionally or unconditionally. When the conditions are immoral, illegal or impossible they are considered as not written, and the institution or bequest takes effect unconditionally [*Voet* 28.7.9-16].

Bequests must be definitely accepted or repudiated, and so too must inheritances [*Theunissen v. Theunissen* 1 *Roscoe* 107]. Acceptance of an inheritance is known as adiation. Once an heir has made his election to adiate, he is bound by the terms of the will, even though the inheritance prove burdensome [*ibid.*]. A married woman cannot adiate or repudiate an inheritance without the consent of her husband save where the marital power is excluded by antenuptial contract [*Voet* 29.2.34], nor may a minor without the consent of his guardian [*ibid.*].

On failure of an heir or legatee to adiate or accept, the inheritance or bequest falls back into the estate or passes to the co-heirs or co-legatees or their children or other persons in accordance with the intention of the testator [*Potgieter v. van der Heever's Exors.* 11 S.C. 40]. Any undistributed portion of the inheritance passes *ab intestato*.

In the case of intestate succession or when there is nothing in the will to show an intention to the contrary children or descendants who wish to share as heirs in the inheritance of their parent or ancestor must bring into account any sums received from him during his lifetime as a portion of their inheritance, or as a marriage gift, or for the purposes of their business, or as a loan [*Jooste v. Jooste's Exor.* 8 S.C. 288]. This is known as collation. It operates also in favour of a surviving parent married to the deceased in community of property [*ibid.*, *Scheepers v. Scheepers' Executrix* 1873 *Buch.* 1], but never in favour of strangers [*ibid.*].

Fideicommissa.—A fideicommissum is a bequest made to a person known as the fiduciary with a trust over in favour of another person known as the fideicommissary heir or legatee. The choice of the latter may even be left to the former [*in re Myburgh* 13 S.C. 218], but some person must be indicated in the will for such a trust to take effect [*Drew v. Drew's Exor.* 1876 *Buch.* 203]. Property may by this means be tied up through succeeding generations, but unless the testator makes it definite that he wishes the burden to continue for a still longer period, a general prohibition not to alienate out of the family will not take effect

beyond the fourth generation [*Ryklief's Heirs v. Ryklief's Exors.* 13 S.C. 64]. When the fideicommissary dies before the fiduciary heir, the latter takes the property free from any obligation [*re Woutersen* 24 S.C. 115].

An adopted child acquires no right, title or interest in any property burdened with a fideicommissum in favour of the descendants of the adopting parent unless the contrary intention clearly appears from any instrument [*Act 25 of 1923 Sec. 8 (1)*].

Executors.—A person may by will appoint executors to administer his or her estate, and may give such executors power to assume co-executors. Where no such testamentary executors are appointed, or fail, the Master of the Supreme Court may appoint others, known as executors dative. Where there is competition for the office of executor dative, the surviving spouse must be preferred by the Master [*Act 24 of 1913 Sec. 35*].

Executors derive their authority from letters of administration granted them by the Master. Such letters may be issued to a woman, but not, without the consent in writing of her husband, to a woman married in community or to a woman married out of community when the marital power is not excluded [*ibid.*, *Sec. 31 (4)*].

Guardians to minor children and curators to property may also be appointed by will. The rights of a mother in these respects are dealt with in Chapter Twenty.

REVOCATION OF WILLS—NATAL LAW.

A person may revoke his or her will at any time, in spite of any agreement to the contrary (with the exception mentioned above under "Mutual Wills") [*S. A. Association v. Mostert* 1873 *Buch.* 31]. There must be a definite intention to revoke, however, expressed either in a duly executed will [*see Horak's Heirs v. Horak* 2 *M.* 402] or by the destruction of the revoked will. A will that was in the testator's possession and cannot be found on his death is presumed to have been destroyed with the intention of revocation [*in re Beresford* 2 *S.C.* 303], but this presumption may be rebutted [*ex parte Slade* 1922 *T.P.D.* 220].

In Natal a will or codicil is tacitly revoked by the subsequent marriage of the testator, unless it expressly refers to that marriage in a manner which shows an intention that the will shall not thereby be revoked and save in so far as it disposes of property which would not go to the other spouse or issue of the marriage if the testator were to die intestate. No joint will, however, is revoked by the marriage of the surviving spouse [*Act 2 of 1868 (N)* *Sec. 8*].

In other provinces, however, a will is not revoked by subsequent marriage, even in community, nor by the birth of children [*Shearer v. Shearer's Exor.* 1911 *C.P.D.* 813; *Ludwig v. Ludwig's Exors.* 2 *M.* 449].

MISCELLANEOUS PROVISIONS.

Every person who has a will in his possession at the time of or after the death of the testator, must immediately transmit it to the Master; if there is no Master in the district, it must be transmitted to the magistrate, together with a true copy thereof. A notary too must transmit to the Master, when required by him, the original minute of any will passed before him [*Act 24 of 1913 Sec. 16*]. It is an offence not to comply with these provisions.

Any person may lodge his will (accompanied by a duplicate or true copy thereof) for safe custody with the Master; and may obtain re-delivery thereof at any time [*ibid.*, *Sec. 15*].

CHAPTER NINETEEN.

ADOPTION.

Adoption was legalised in South Africa by Act 25 of 1923 (to which the sections below refer). An order of adoption confers the surname of the adopting parent on the adopted child, unless otherwise provided, and terminates all the rights and legal responsibilities existing between the child and his natural parents [Sec. 8]. The adopting parent and the child are for all purposes deemed in law parent and child as if their relation arose out of lawful wedlock [*ibid.*]. The only exceptions to these rules arise in connection with certain principles of the laws of succession, an adopted child *e.g.* not being able to succeed as intestate heir to the relatives of the adopting parent, and with the laws prohibiting inter-marriage between relatives, and are considered in previous chapters. The fact of adoption may be recorded on the original birth information form filed in the Births Register of any province or district [Sec. 13].

Valid Adoptions.—Any child under the age of 16 years may be adopted [Sec. 4]. The adopting

parent, or both parents when husband and wife jointly adopt, must be over the age of 25 years [Secs. 2 and 3]. A husband and wife jointly may adopt a child of either sex. A person who is unmarried or widowed, or whose spouse has been judicially declared insane, or who is judicially separated from his or her spouse, may adopt a child of his or her own sex. A widowed or unmarried person may adopt a child of the opposite sex, but only if he or she is at least 25 years older than such child [*ibid.*]. Except by husband and wife, no child may be adopted by more than one person [Sec. 6]. Where, however, a child has already been adopted, it may subsequently again be adopted. All the legal consequences of the former adoption then determine, except in so far as any interest in property may have vested in the adopted child [Sec. 11].

A formal written application for leave to adopt must be made. The magistrate, before granting an order of adoption, must be satisfied that the applicant is of good repute and is a fit and proper person to have care and custody of the child, and is of sufficient ability to bring up, maintain and educate him, and that the welfare and interests of the child will be promoted by the adoption [Sec. 4 (1)]. The magistrate may compel witnesses to attend before him, and take evidence on oath concerning anything that requires to be proved [*ibid.*].

Provisional Orders.—Instead of deciding forthwith as to the grant or refusal of an order of adoption, the magistrate may make a provisional order

committing the child to the care of the applicant for a period not exceeding two years. Such order has the same effect and is subject to the same provisions as an order committing a child to the care of a relative or other fit person made under the Children's Protection Act (for which see Chapter 29). Conditions may be attached to the order, including conditions as to supervision over, reports on and residence of the child. The order may be renewed from time to time for further periods not exceeding two years in all. The hearing of the application for adoption may be adjourned till any date before the provisional order expires [*Sec. 5*].

Consent to the Adoption.—A child over 10 years of age must himself consent to the adoption. Before a magistrate makes any order he must also have the consent in writing of the parents of the child whether they are in or out of the Union, or of the surviving parent, or of one parent alone where the other has deserted the child, or of the child's legal guardian, where both parents are dead [*Sec. 4 (1)*].

The consent of a guardian appointed for the purposes of the adoption proceedings is also necessary. Such guardian is appointed when both parents are dead, and there is no legal guardian, or when the child is deserted (*i.e.*, has ceased to be cared for or maintained by his parents or surviving parent or guardian, if legitimate, or by his mother if illegitimate [*Sec. 1*]), and in other suitable cases

[*Sec. 4 (1) and (2)*] Any fit person, or any society or body corporate established for the reclamation or protection of children or the prevention of cruelty to children may be thus appointed guardian, and has the right to visit and inspect the child while the adoption proceedings are pending and during the currency of a provisional order [*Sec. 4 (2)*].

The consent of any parent or legal guardian may be dispensed with where the magistrate is satisfied that he or she is unfit to have custody or control of the child, and has received notice of the application [*Sec. 9*].

Discharge of Adoption Order.—An application for the discharge of an adoption order or of a provisional order may be made to the Supreme Court of the province where such order was obtained, by a parent or guardian whose consent was dispensed with within three months, and by one whose child or ward was dealt with as a deserted child, within twelve months of such order. In the latter case, the ground of the application is that the child was not deserted at the date the order was made. Where this allegation is proved, but the applicant is for any reason unfit to have custody or control of the child, and it is in the child's interests that the adoption order should remain in force, the court may confirm the order, although the applicant's consent is not given [*Secs. 9 and 10*].

Under special circumstances the court may extend the period within which the application must

be brought. Notice of the application must always be given to the adopting parent or to the person to whose care the child was committed under a provisional order [*ibid.*]. Any notice required under the Act to be given may be given by advertisement in such manner as the magistrate directs, where the address of the person to be notified is unknown [*Sec. 14*].

Whenever the court grants the discharge of an order of adoption, it may do so on any terms it thinks fit. Subject to these terms, the child and its natural parents are deemed for all purposes restored to the same position as existed immediately before the order of adoption was made. Nothing lawfully done while the order was in force is, however, affected [*Secs. 9 and 10*].

Offences Connected with Adoption.—An adopting parent may not give, nor, except with the consent of the magistrate, receive any premium or other consideration in respect of the adoption (maximum penalty £100 fine or six months' imprisonment). It is not unlawful, however, for the person giving the child in adoption nor for anyone else, to make a settlement for the benefit of the child, nor for anyone to leave by will any inheritance or bequest to the adopting parent [*Sec. 7*].

Advertisements for the adoption of infants are prohibited. A publisher of any newspaper in the Union may not without written permission from

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the magistrate insert therein an advertisement or intimation that anyone desires any infant to be adopted or given into the care or custody of another person, or that anyone is willing to adopt or undertake the care of any infant [*Act 26 of 1921 Sec. 6*].

CHAPTER TWENTY.

MINORITY AND GUARDIANSHIP.

The principles governing the subject of guardianship are to be found in the common law, but the appointment of guardians and certain of the rights and duties of guardians are regulated by the Administration of Estates Act, No. 24 of 1913, to which the sections quoted in this chapter refer.

Guardianship or tutorship is the authority exercised over minors by parents, who are the natural guardians of their children, or by duly appointed persons. It may extend to the custody and control of both the ward's person and property, or to the control of his person alone or of his property alone. In the last mentioned case the more specific term "curatorship" is generally employed.

All minors are subject to guardianship until they reach the legal age of majority, which is now fixed throughout South Africa at 21 years for both sexes [*Ord. 62 of 1829 (C)*; *Resolution of 22nd Sept., 1866 (T)*; *Ord. 4 of 1865 (N)*; *O.F.S. Law Book 1901 Chap. 89 Sec. 14*]; or marry [*Grotius 1.6.4*], or become emancipated in the manner described below.

The court is the upper guardian of all minors, and it may order the appointment or removal of guardians.

THE APPOINTMENT OF GUARDIANS.

All guardians, save parents, derive their authority to act as such from letters of confirmation of their appointment issued to them by the Master of the Supreme Court. It is specifically provided that a father or mother does not require such letters [Sec. 73 (2)].

A woman may validly be appointed guardian, but letters of confirmation may not, without the written consent of her husband, be issued to a woman married in community or to a woman married out of community when the marital power of her husband is not excluded [Sec. 83].

No letters of confirmation may be issued to a guardian appointed by will who is disqualified by law from acting as guardian [Sec. 73 (2)]. Persons who witnessed the will and their spouses are thus disqualified, save in Natal. Further, no one himself under guardianship, such as a minor or lunatic, may hold the office of guardian [Voet 26.1.4].

Guardians are most conveniently classified according to the source of their appointment, as follows:—

(1) *Testamentary Tutors*.—These are appointed by will or other deed of the father, or where it is permitted, by will or other deed of the mother [Sec. 72]. (The cases in which a mother may appoint a tutor are considered later, under "Guardianship of Parents"). Every such tutor must conform to and obey every lawful direction regarding his duties given in the will or deed by which he was appointed, or in any other document duly executed by the person who made the will or deed [Sec. 86 (b)].

(2) *Curators Nominate*.—These are appointed by persons who give or bequeath property to a minor, and authorise the curator to administer and manage the property during the minority of the donee or legatee [Sec. 71]. No curator has any power or authority in respect of the maintenance, education or custody of the person of any minor, except in so far as it has specially been conferred on him by order of a competent court [Sec. 86 (a)].

(3) *Assumed Tutors or Curators*.—Any tutor testamentary or curator nominate may assume another person as tutor or curator by virtue of any power thereto given him by the will of or any other deed duly executed by the person by whom he himself was appointed. No one may act as assumed tutor or curator, however, unless he has received letters of confirmation during the lifetime of the person assuming him [Sec. 77 (1)]. All provisions that relate to tutors or curators dative apply to assumed tutors or curators [Sec. 77 (3)].

(4) *Tutors Dative*.—Whenever any estate or property within the Union devolves on any minor within the Union who is not under the guardianship of a parent or of a tutor testamentary, or whose property is not under the care of a curator nominate or dative, the Master, after calling a meeting of the relatives of the minor, appoints to such minor a tutor (or tutors) known as a tutor dative [*Sec. 76 (1)*]. The Master may, when he deems it expedient, call on the relatives to attend before a magistrate and state their objections (if any) to any of the next-of-kin or any other person being appointed tutor dative, or to propose some person to be recommended to the Master by the magistrate for the office [*Sec. 76 (1) (a)*]. In either event, or if there is no attendance, the Master appoints such person as he considers fit and proper to be tutor to the minor, unless he postpones the appointment and calls another meeting [*ibid.*]. Relatives of the minor thus have no legal preference. Unless they are fit and proper persons to be the minor's tutors, a stranger may be appointed.

If the minor has no property and no claim to property or money save property under the control of a curator nominate, or money paid over to the Master by the executor of a deceased estate, the Master need not, but may, take proceedings as above for the appointment of a tutor dative [*Sec. 76 (1) (b)*]. If the property of a minor which is not already being administered by an authorised person does not exceed £300, the Master may appoint a tutor summarily [*Sec. 76 (2)*].

The above proceedings for the appointment of a tutor dative are also resorted to in order to fill

up the vacancy that occurs when a tutor dative dies or becomes incapacitated or is removed from office; or when a tutor testamentary or assumed tutor or a curator nominate or assumed curator so fails, and no tutor or curator remains in respect of that appointment; or when there are not as many tutors or curators as are necessary to form a quorum in terms of the will or other deed of appointment [Sec. 78]. Every appointment made by the Master is subject to appeal or to review by the court, at the instance of any person aggrieved thereby [Sec. 107].

THE GUARDIANSHIP OF PARENTS.

Father as Guardian.—The father is the natural guardian of his legitimate children, and is entitled to have custody and control of them during their minority [Boswell v. Johnson 1 Roscoe 16]. He directs their education and his consent is necessary to their marriage [Van Rooyen v. Werner 9 S.C. 425]. He has the entire management of their property, unless he allows them to live apart from him and openly to engage in some trade or calling, or unless anyone, in giving or bequeathing property to them, has excluded the father from its administration, and appointed a curator nominate thereto [ibid.]. When this has been done, the father's consent to any acts or accounts of the curator does not relieve such curator from liability for maladministration, nor prevent the minors from objecting to the accounts on their reaching majority [Munnik v. Neethling 3 M. 80]. The father assists the minor in his contracts, in court, and in

all other matters wherein a minor requires assistance. He also has the right during his lifetime to appoint tutors to take his place after his death [*Van Rooyen v. Werner, supra*]. In the absence of special circumstances minors have the domicile of their father, and their domicile follows that of the father whenever he makes a change of domicile, provided that such change does not prejudicially affect their interests [*Hull v. McMaster 5 Searle 225*].

Mother as Guardian.—A mother, during the lifetime of the father, has no legal guardianship over her legitimate children. She has, however, certain rights of control by natural law, and may apply to court in the interests of her children. On her application custody of her child will be granted to her where the father has entrusted it to unsuitable persons [*Neethling v. Shock 1869 Buch. 312*]. As a rule it is in the interests of children not to be separated from their mother, and she may obtain an interdict restraining any person, acting under the instructions of the father, from removing her children out of the country, when there is no good cause for such removal [*ex parte Jensen 18 S.C. 154*]. A mother's consent is also required to the marriage of her minor child, but in the case of a difference of opinion between the father and the mother, the father's decision must prevail [*Johnson v. McIntyre 10 S.C. 318*].

A mother may not nominate any person to administer and manage the estate of or take care of the person of her minor child after her death, unless the father is dead or has abandoned the

minor or unless she has been awarded custody of the minor by a competent court [Sec. 71]. Though a mother thus cannot appoint even a co-guardian to act together with the father, she may, if she gives or bequeathes any property to her minor child, appoint a curator nominate to administer such property [Sec. 71; *Van Rooyen v. Werner*, 9 S.C. 428].

After the death of the father, the mother acquires only those rights of guardianship which the father has not devised by will to testamentary tutors, who are bound to carry out all the lawful instructions of the father. It is only on failure of the father to appoint such tutors that the mother acquires her full rights [*Van Rooyen v. Werner*, *supra*]. She is then entitled to the custody of her children in preference to a tutor dative [*in re Dolphin's Est.* 15 N.L.R. 343], and may nominate persons to act as guardians to her children after her death [Sec. 71]. Further, save in Natal, the mother is then deemed the natural guardian of her children, with all the powers that her husband enjoyed until his death [*Van Rooyen v. Werner*, *supra*; *the Master v. Castellani* 1911 T.P.D. 764].

This natural guardianship of the mother appears to be recognised also by the Administration of Estates Act, which provides that the survivor of two spouses is entitled, as natural guardian, to receive from the executor on behalf of his minor child any money due to that child from the estate of the deceased spouse, unless the will otherwise directs, and provided that such sum is secured by

bond to the satisfaction of the Master. (If this security is not found, the executor pays the money over to the Master.) [Sec. 54 (1)]. Further, provision is made under the Act for the appointment of a tutor dative to "a minor who is not at the time under the natural guardianship of his father or mother" [Sec. 76].

In Natal the doctrine that a surviving mother becomes the guardian of her children for all purposes has not been accepted in its entirety, and it is the practice to apply to court for the appointment of a curator or guardian to assist the minor children of such mother in the execution of antenuptial or other contracts [*ex parte Cumming* 1923 N.L.R. 405].

The court as upper guardian of all minors may in suitable cases interfere with the guardianship of either the father or the mother. Thus it may declare a surviving mother a prodigal, on the ground of intemperance and neglect of the children, or for other good cause, and appoint a tutor to the children, taking away the administration of the estate from her at the same time [*The Master v. Farrer* 1906 T.S. 748]. Similarly it may place the father under curatorship as a prodigal, depriving him of the control of his own and his minor children's property [*Combrink v. Combrink and Wilson* 7 Buch. 72].

Illegitimate Children.—An illegitimate child has no father for the purposes of the law of guardianship, and the mother is sole guardian [*Van Rooyen v. Werner, supra; Hatch v. Hatch* 9 S.C.

1]. All children born at any time during the subsistence of a marriage are considered legitimate, in accordance with the maxim "*Pater est quem nuptiæ demonstrant,*" until the contrary is clearly proved by an action at law [*Van der Keessel Th. 169*]. This presumption in favour of legitimacy is very strong, and the declaration of a wife that her husband is not the father of her child is not sufficient to establish its illegitimacy [*Abrahams v. Adams 1878 Buch. 85*]. Neither husband nor wife can give evidence of non-access so as to bastardise a child born during wedlock [*Surmon v. Surmon 1926 A.D. 47*]. Legitimated children are for all purposes in the same position as those legitimate by birth, the father thus being their guardian.

THE DUTIES OF GUARDIANS.

Every appointed guardian is entitled to remuneration for his services, at a fixed tariff, out of the estate he administers [*Sec. 90*]. On the other hand, guardians are bound to perform the following duties:—

Statutory Duties (1)—Every tutor and curator must find security for his due and faithful administration before he enters upon the management of the estate and thereafter as the Master may require, unless he be the parent of the minor, or the testator has in the will nominating him directed the Master to dispense with security, or the Court otherwise directs [*Sec. 82*].

If a tutor testamentary is insolvent or has assigned his estate, the Master may refuse to grant him letters of confirmation until he has found sufficient security [*Secs. 73 (2) and 32*].

(2) All tutors and curators must make an inventory of the estate they are to administer within 30 days of entering upon office, and additional inventories of property later accruing to such estate [*Sec. 85*]. The penalties that may be imposed for the making of false inventories are heavy, the maximum being £500 fine and five years' imprisonment with hard labour [*Sec. 109*]. In addition to any other punishment, a guardian who fails to make an inventory is liable to £20 fine or three months' imprisonment with hard labour [*Sec. 108*].

(3) Subject to the provisions of any will or deed appointing them, all tutors or curators must forthwith pay over to the Master all monies subject to their administration which are not immediately required for the payment of the debts of the estate or the maintenance of the person to whom the money belongs [*Sec. 88*]. A guardian who makes default in so doing, is liable to forfeit interest at the rate of 12 per cent. as from the commencement of the default [*Sec. 101*].

There exists a fund, known as the Guardian's Fund, which consists of any moneys paid to the Master under this or any other law or under an order of court, or accepted by him in trust for persons known or unknown. In the books of this fund an account is opened with the person to whom

or the estate to which the money belongs. In the case of minor heirs, if it is more convenient, the account may be opened in the name of the estate from which the money is derived [*Sec. 91*].

The amount due to be paid out to a minor as a dependant, under the Workmen's Compensation Act, must be paid over to the Master [*Act 25 of 1914 Sec. 28*].

(4) Every tutor and curator, except the survivor of two spouses to whom the predeceasing spouse has entrusted the administration of the joint estate during their children's minority, must lodge with the Master by the 15th February in each year an exact account of his administration up to the 31st December last preceding. If he fails to do so without adequate excuse, the whole or part of his remuneration for the preceding year may be disallowed [*Sec. 89*].

A guardian who fails to render such accounts may be ordered to do so by the court, on application being made by the Master or some person interested in the administration. Any costs adjudged against him must be paid by the guardian out of his own private means [*Sec. 100*].

Maintenance and Education of Minor.—On assuming his duties, the first step of the guardian must be to take possession of all the property of which he has been given the administration, and to provide for the maintenance and education of his ward, in accordance with the directions given in the will by which he was appointed [*Van Rooyen v.*

Werner 9 S.C. 428]. His expenditure must keep within the annual income of the minor, unless the court authorises the expenditure of a greater amount [*ex parte Est. Smith* 1910 C.P.D. 402]; and such annual income should not be used if it is not required [*in re Trueman* 3 M. 76]. Even parents whose children have money in the Guardian's Fund are not entitled to draw more of the interest on such money than is reasonably necessary for the support and advancement of such children, regard being had to their circumstances and condition in life [*Sec. 95*]. If, however, on careful enquiries it appears to be for the interest of any minor, the Master may apply for the maintenance, education or other benefit of the minor an amount not exceeding £300 standing to his credit in the Guardian's Fund. To so apply a larger sum the sanction of the court is needed [*Sec. 96 (1)*].

Administration of Ward's Estate.—A guardian holds a position of trust, and must exercise the utmost good faith in his dealings with the ward's estate. If his administration is negligent or dishonest, he is liable in damages to his ward for any loss caused to his estate by reason of such negligence or dishonesty [*Munnik v. Neethling* 3 M. 80]. The action that lies against a guardian for maladministration is not barred until 30 years after the ward attains majority [*Voet* 27.3.16]. A guardian is not, however, liable for any losses sustained by his ward through accident [*Grotius* 3.26.8].

In the course of his administration a guardian may perform acts and enter into transactions on behalf of his ward which are valid and binding on third parties and on the ward, saving to the ward his right of restitution in respect of disadvantageous contracts [*Van der Keessel Th. 133*].

Moneys not required to be paid over to the Master may be lent out at interest on good security only, or invested in the purchase of land [*ibid. Th. 155*]. The Master may, after consulting the guardian, withdraw from the working balances in the Guardian's Fund any sum belonging to a minor for the purchase of immovable property in the Union, if such purchase is for the benefit of the minor [*Sec. 96 (3)*]. Transfer of property to a minor is effected directly into the name of the minor, not into that of the guardian [*Deeds Regulation No. 15 (1)*].

A guardian may sell movable property of the ward for good reasons [*Van der Keessel Th. 129*]. No guardian, however, unless he be a tutor testamentary or a curator nominate duly authorised thereto by the will or other deed appointing him, may alienate or mortgage any immovable property belonging to a minor, unless he has the sanction of the court if the property exceeds £300 in value, or of the Master, if it be below that value [*Sec. 87*]. It is provided that the Master may authorise the mortgage of immovable property to an extent not exceeding £300 if it is necessary for the preservation or improvement of the property, or the payment of necessary expenses connected therewith, or for the maintenance or education of the minor [*ibid.*].

A guardian is not entitled to make donations out of the ward's property, nor to remit any debts due to the ward [*Mummik v. Neethling, supra*].

An account must be rendered to the ward himself at the termination of the guardianship [*Van der Keessel Th. 157*] and no guardian will be released from his guardianship until he has rendered such final account [*in re Clydesdale 1 Roscoe 258*].

Legal Assistance of Minors.—A guardian must interpose his authority and assist the minor whenever such assistance is required by common law or by statute.

A guardian's consent to the marriage of his minor ward is requisite in order to avoid the penalties attaching to secret marriages, although a guardian who is not a parent cannot have a marriage annulled because it was contracted without his consent [*Mostert v. the Master 1878 Buch. 83*].

His consent is also necessary to give validity to the contracts of a minor, for the unauthorised contracts of a minor are, with certain exceptions which are considered in the following chapter, invalid [*Van der Keessel Th. 474*].

Finally, it is the duty of a guardian to represent or assist his ward in court in civil cases, whether as plaintiff or defendant [*ibid. Th. 127*]. A guardian, however, who rashly enters into litigation concerning the property of the minor, or otherwise on the minor's behalf, without first obtaining the

leave of the court, may be held personally liable for the costs if he is unsuccessful [*Prince q.q. Dieleman v. Anderson* 1 M. 435; *Standard Bank v. Jacobsohn's Trustee* 16 S.C. 352; *Claasens v. Naude* 1911 C.P.D. 725]. Where a ward and his guardian are involved in a dispute, a special curator, known as a *curator ad litem* is appointed to assist the ward in the conduct of the case [*Sec. 81 (1)*; *Grotius* 1.8.4].

RELEASE AND REMOVAL OF GUARDIANS.

A guardian may cease to exercise his functions as such on special circumstances arising, as follows:—

Insolvency of Minor.—On the sequestration of a minor's estate, such estate ceases to be subject to the administration of the guardian thereof, but vests in the minor's trustee in insolvency.

Removal at Own Request.—Any guardian, provided he has submitted his final accounts in due manner, may be allowed to withdraw from office on good grounds shown, such as ill health, or change of domicile [*Voet* 27.1.7]; and probably for any of the statutory causes stated below, for which his removal may be ordered.

Insolvency of Guardian.—If a tutor testamentary is insolvent or has assigned his estate, the Master may refuse to confirm his appointment until he has found sufficient security [*Secs. 73 (2) and 32*]. Every appointed tutor or curator immediately ceases to hold office when the final order for

the sequestration or assignment of his estate is made, unless before such final order he finds security to the satisfaction of the Master [Sec. 84]. The Master, on learning that a tutor or curator has become insolvent or has assigned his estate, may take steps for the appointment of another person in his stead [Sec. 7 (3) (b)].

Removal by Court.—Every tutor or curator may be suspended or removed from office by order of the court if by reason of his absence from the Union, other avocations, failing health or other sufficient cause, the interest of the estate would be furthered thereby. A substitute may be appointed to act during the period of suspension. [Sec. 99].

Among such sufficient causes is the fact that the guardian has himself been placed under guardianship whether as being of unsound mind or as being a prodigal [see *Combrink v. Combrink and Wilson* 7 Buch. 72]; or that he is addicted to habitual intemperance [*Nettleton v. Kilpatrick* 1 Roscoe 190]; or that he has been guilty of fraud or neglect of duties [*Grotius* 1.10.4; *ex parte Fleck* 1908 T.S. 743]. A tutor (and co-executor) will not be removed, however, on the ground merely of disagreement with his co-executors [*re Hewson* 1902 T.S. 123].

EMANCIPATION FROM TUTELAGE.

A minor is freed from the control of parents and guardians on reaching the age of majority, or

on marriage. He is also released from the consequences of minority when he is tacitly emancipated or freed from parental control. This tacit emancipation occurs when a minor is permitted by his father to carry on some trade, business or calling on his own account [*Venter v. Burghersdorp Stores* 1915 C.P.D. 252; *Pleat v. Van Staden* 1921 O.P.D. 91], or is so permitted to do by the mother, if she is the natural guardian [*Smit v. Styger* 25 S.C. 697]. Where the minor also lives apart from the parents, the presumption is very strong that he is emancipated [*Dama v. Bera* 1910 T.P.D. 930]. Emancipation, however, is a matter of fact, and can exist even where the minor resides in the house of his parents [*ibid.*; *Venter v. Burghersdorp Stores, supra*].

A special dispensation, known as a decree of *venia aetatis*, was in former times granted by the sovereign to minors over the age of 20 years in the case of males, and over the age of 18 years in the case of females, and gave such minors the status of persons of full age [*Van der Keessel Th.* 161].

In the Orange Free State the grant of *venia aetatis* is regulated by statute. Application must be made to the Supreme Court to recommend to the Governor-General the grant of *venia aetatis* to the minor desirous of emancipation, who must be over the age of 18 years. If the court decides to make the recommendation, it advises also whether the right to alienate or encumber immovable property be included in or excluded from the decree. If it is not included, the person emanci-

pated has no right to alienate or encumber his immovable property without leave of the court [*O.F.S. Law Book 1901 Chap. 89*]. Since such decree brings about an alteration of status, it is only given in exceptional circumstances, and when there is a pressing need for such procedure, such as danger to the applicant's career or estate if the dispensation is delayed [*ex parte Akiki 1925 O.P.D. 211*].

In the other provinces the grant of *venia aetatis* in this form is not applied for. In the Transvaal it has been decided that the court has no power to grant a decree of *venia aetatis* [*ex parte Moolman 1903 T.S. 159*]. It is, however, in the power of the court to authorise payments to minors from the Guardian's Fund [*Sec. 96 (1)*]; and the court has thus sanctioned the payment of moneys to minors of 19 or 20 years of age in special cases, and on specified conditions as to securing such moneys [*ex parte Reinecke 1906 T.S. 797*].

In the Cape Province, on an application for *venia aetatis* being made, the court has authorised similar payments on similar conditions, and ordered that the minor be released from tutelage [*in re Cachet 15 S.C. 5; ex parte Louw 1920 C.P.D. 7*].

CHAPTER TWENTY-ONE.

THE LEGAL CAPACITY OF MINORS.

THE CONTRACTS OF MINORS.

The interests of minors are carefully protected by the court, which is the upper guardian of all minors, and arbitration is not permitted in matters wherein minors are concerned without special leave of the court [*Act 29 of 1898 (C) Sec. 7; Ord. 24 of 1904 (T) Sec. 7; Act 24 of 1898 (N) Sec. 8*].

Unassisted Contracts.—The general rule of law is that no contract entered into by a minor without the consent of his guardian binds him in any way [*Auret v. Hind 4 E.D.C. 283*]; so much so that he does not require any special action at law to relieve him of its consequences [*Van der Keessel Th. 128*]. Where a minor makes a payment in pursuance of such an unauthorised contract, he is entitled to sue for its return [*Van der Keessel Th. 529*]; and for the same reasons an antenuptial contract entered into by a minor without the assistance of his or her guardian may be treated as

invalid by the court where it is not to his or her advantage [*de Beer v. Est. de Beer* 1916 C.P.D. 125].

A contract advantageous to the minor may, however, be enforced against the other contracting party. The minor may ratify the contract on attaining majority either expressly or tacitly as by making a payment thereunder. In this case he is himself bound to carry out the contract [*Auret v. Hind, supra; de Villiers v. Liebenberg* 17 C.T.R. 867]; and the same rule applies if during minority the guardian ratifies the contract.

To this rule that a minor is not bound by his unassisted contracts, there are the following important exceptions:—

(1) There is a maxim of Roman-Dutch law that no one may be enriched at the expense of another. Where the contract has been in the minor's favour, *i.e.*, if under all the circumstances of the case the contract has been for his benefit, he is as much bound to fulfil his obligations thereunder as the other party to the contract is. The burden of proving advantage or benefit is on the minor's adversary [*Nel v. Divine, Hall & Co.* 8 S.C. 16]. A minor is always thus liable when he has purchased necessaries, or borrowed money to make such purchases.

(2) An emancipated minor is bound by his contracts in connection with the trade, business or calling that he carries on on his own account, and

he cannot plead minority as a defence on such contracts [*Nangle v. Mitchell* 18 E.D.C. 56; *Orkin v. Lyons* 1908 T.S. 164].

(3) A minor is also bound by his unauthorised contracts when he has represented himself to be and has deceived the other party to the contract into believing that he is of full age [*Vogel v. Greentley* 24 N.L.R. 252; *Pleat v. van Staders* 1921 O.P.D. 91].

Assisted Contracts.—Where a minor has entered into a contract duly sanctioned by his guardian, he is bound by such contract both during minority and after reaching majority [*Van der Keessel Th.* 133; *Skead v. Colonial Banking and Trust Co.* 1924 T.P.D. 497]. The only exception to this rule is where the contract is yet to be carried out, and is not for the minor's advantage. If on reaching majority the minor does not ratify such contract, he is not bound thereby [*ibid.*; *Van der Byl v. Solomon* 1877 Buch. 25].

A special remedy, known as "*restitutio in integrum*," is granted to a minor in respect of contracts to which his guardian gave his sanction, but which seriously prejudice the minor. This remedy consists of an order of the court which restores as equitably as possible the position existing before the contract was executed both in the minor's case and in the case of the other party to the contract. It is only granted when the minor has suffered some serious loss and when no other means of redress is adequate [*Breytenbach v. Frankel* 1913 T.P.D. 300; 1913 A.D. 390]. This action for restitution

is barred after four years after the minor has attained majority. When a minor's land has been improperly alienated without leave of the court, he still retains his ownership thereof, and may bring a vindicatory action for its return [*ibid.*].

Sureties for Minors.—If any person competent to contract on his own behalf becomes surety for a minor, *i.e.*, undertakes that the minor's obligation will be fulfilled, then even where the minor is entitled to repudiate liability on the principal contract as having been entered into without authority, the surety will be bound to fulfil his obligation [*Voet 44.7.2*].

Minor as Donee.—Where anyone makes a donation to a minor, it may be validly accepted on his behalf by his guardians. There is nothing, however, to prevent a minor receiving a donation from his father, if the father by some overt act makes it clear that he is transferring the property to the child; or the gift may be registered in the Deeds Registry, or accepted by the court of the Master [*Slabber's Trustee v. Neezer's Exor. 12 S.C. 163*].

WRONGS COMMITTED BY MINORS.

A minor who has passed the age of infancy (which for this purpose is not definitely fixed, but will probably normally be taken at seven years as in the criminal law), may be held civilly liable for his delicts [*Grotius 3.32.19*]. A delict is a wrongful act which entitles the person injured to bring an action for damages or compensation against the wrongdoer. Among such wrongs are injuries to

person, property or reputation. Thus a minor is personally liable for seduction [*ex parte Greeve* 24 S.C. 202] .

Parents are not as a rule liable for the offences of their children [*Van der Keessel Th.* 476; *Rex v. Gobelani Dyan* 1906 E.D.C. 33]. They are thus not liable in a civil action for damages for the delicts of their children save where such delicts were committed within the scope of the children's employment by the parents [*Conradie v. Wiehahn* 1911 C.P.D. 704]. Where, however, the parent could have prevented the wrong, the position is otherwise [*Philpott v. Whitall* 1907 E.D.C. at p. 207].

CHAPTER TWENTY-TWO.

JUVENILE OFFENDERS.

In this chapter, unless inconsistent with the context, "child" means any person under the age of 16 years.

In any criminal proceedings, if the age of a person apparently a child cannot be ascertained and is a material fact, it may be judged of by the court, and no error thus made in good faith affects the proceedings [*Act 31 of 1917 Sec. 386*]. The court may also presume that a child who is alleged in a charge to have been of a certain age when an offence under the Children's Protection Act was committed by or against him, was of such age, in the absence of evidence to the contrary [*Act 25 of 1913 Sec. 58*].

Child's Responsibility for Crimes.—A child under seven years of age is conclusively presumed to be incapable of criminal conduct, since its mind is too undeveloped for it to be able to discern right and wrong, or to harbour criminal intentions. Children between the ages of seven and fourteen years are also presumed to have no guilty intention when committing a wrongful act, but the contrary may be proved in evidence [*R. v. Lourie 9 S.C.*].

432]. When such a child commits a crime in the presence of an older person who stands to him in a position of authority, the court may apply the maxim: "He is free from blame who is bound to obey," and may presume that the child was coerced by such older person; unless the offence is so heinous as to have absolved the child from the duty of obedience [*R. v. Albert* 12 S.C. 272].

Guardian's Liability.—Where a child under 16 years of age has been tried before any court for an offence for which a fine has been imposed or an order to pay compensation given, whether with or without other punishment, the court may in any case, and must if the child is under 14 years of age, order that the parent or guardian instead of the child pay the fine or compensation, unless such parent or guardian cannot be found or has not concurred to the commission of the offence by neglecting to exercise due care of the child [*Act 25 of 1913 Sec. 15 (1)*]. The court may make such order without proceeding to the conviction of the child [*ibid. Sec. 15 (3)*].

Such order may be made against a parent or guardian who has failed to attend at the hearing though required to do so, but not unless he has been given an opportunity of being heard; and the sums in question may be recovered from him as though he had himself been convicted of the offence, while he has the same rights of appeal as from a conviction [*ibid., Sec. 15 (4), (5) and (6)*]. These provisions apply also in the case of an order to give security for the good behaviour of a child with

respect to the recovery of such security if it becomes forfeited, and with respect to an appeal against the order [*ibid.*].

In Natal responsibility is attached to the father or guardian or a native or Asiatic child under 14 years of age convicted of cattle stealing or of cattle killing [*Act 1 of 1899 (N) Sec. 63*].

Save as above provided, a vicarious liability does not attach to the parent or guardian of a child guilty of an offence [*R. v. Gobelani Dyan 1906 E.D.C. 33*].

TEMPORARY DETENTION BEFORE AND AFTER TRIAL.

A child charged with an offence may not without special authority be detained in a prison, gaol or police lock-up, unless there is no other accommodation available, but must be kept in a special place of detention or by a temporary custodian [*Act 25 of 1913 Sec. 53 (1) and (2)*]. These provisions apply also to any person convicted and sentenced to serve any period in a reformatory or to be apprenticed, and to any person committed to an industrial school or certified institution, while awaiting conveyance or apprenticeship [*ibid. Sec. 53 (3)*].

Not many special places of detention have as yet been established, however.

When anyone apparently under 21 years of age is charged with an offence, the judge, magistrate

or court, on application being made, may order him while awaiting trial, verdict or sentence, to be detained in a certified hostel, instead of in a prison or gaol [*Act 46 of 1920 Sec. 6*].

A child awaiting trial may be released from custody by any policeman above the rank of sergeant, if anyone enters into recognisances (whether with or without sureties) for his appearance at the trial, unless the charge is homicide or some other serious crime or offence, or unless it is necessary to detain the child in order to remove him from the society of persons of bad character, or unless the ends of justice are likely to be defeated [*Act 25 of 1913 Sec. 53 (2)*].

A child under 16 years of age who has been committed for trial on a charge of murder, may be admitted to bail by the magistrate [*Act 39 of 1926 Sec. 16*]. This is contrary to the usual rule in murder charges.

CHILDREN'S COURTS.

In any criminal proceedings against a child, except where the child is charged jointly with a person not a child, a magistrate's court must sit in a different building or room from that in which the ordinary sittings of the court are held, and no person may be present save the members and officers of the court, the parties to the case, their legal advisers and other persons directly concerned in the case, except by leave of the court [*Act 25 of 1913 Sec. 57 (2)*]. Press representatives, however, are not excluded [*ibid. Sec. 57 (3)*].

On his trial before an inferior, *i.e.*, a magistrate's court, a child may be assisted by his natural or legal guardian [*Act 31 of 1917 Sec. 218*]. (Any accused person who, in the opinion of the court, requires the assistance of another person, may, with the permission of the court, be so assisted [*ibid.*]).

A juvenile court is not intended to have the atmosphere of a police court. In Johannesburg, which furnishes a good example of a well-developed children's court, there is one central court for dealing with juvenile affairs, which has its own separate building and is known as the Juvenile and Domestic Relations Court. All cases under the Children's Protection Act are heard in this court, as well as cases of offences committed by juveniles up to the age of 18 years, and maintenance cases under the Deserted Wives' and Children's Protection Ordinance (T).

A probation officer is in constant attendance, so that every juvenile passing through the court comes under supervision. Such juveniles are submitted first to medical examination, and any treatment recommended by the medical adviser is carried out with the assistance of the hospitals. In addition a weekly psychiatric clinic is held at the court, and presided over by two specialists from the Pretoria Mental Hospital.

The appointment of probation officers is provided for by the Criminal Procedure Act [*Act 31 of 1917 Sec. 362 (c)*]. The probation system has so far been developed only in certain of the larger towns of South Africa, *viz.*, in Johannesburg, Cape Town, Pretoria and Durban.

EVIDENCE OF CHILDREN.

There is no fixed rule as to the age at which a child's evidence becomes admissible, but whenever a child appears to have sufficient intelligence to appreciate the distinction between right and wrong, truth and falsehood, and to recognise the wrongfulness of saying what is not true, he is generally allowed to give evidence.

Where a child is too young to understand the nature or religious obligation of an oath or affirmation, the judge or magistrate may administer to him any form of admonition which appears (either from his own statement or from other sources of information) to be calculated to impress his mind and bind his conscience, and which is not unfitted to be administered as being of an inhuman, immoral or irreligious nature. A child thus admonished may be held guilty of perjury, just as if he had given his evidence on oath [*Act 31 of 1917 Sec. 267*]. These rules apply whether the child gives evidence on his own behalf or on behalf of some other person, or of the prosecution.

In addition to any other powers that a court has of hearing cases *in camera*, where a person who appears to be a child is called as a witness in any criminal case or in any proceedings under the Children's Protection Act, the court may direct that all or any persons be excluded during the taking of such child's evidence, except members or officers of the court, parties to the case and their legal advisers, or persons otherwise directly concerned in the case. Press representatives, however, are not excluded [*Act 25 of 1913 Sec. 57 (1) and (3)*].

FIRST OFFENDERS.

All first offenders, whether juveniles or adults, may in the discretion of the court be granted certain indulgences, unless their offence be one of the following: public violence, murder, rape, assault with intent to do grievous bodily harm, indecent assault, robbery, forgery or uttering a forged instrument, any offence relating to insolvent or assigned estates punishable by imprisonment exceeding one year, offences relating to the coinage, an offence in respect of which a minimum punishment is imposed by law, or conspiracy, incitement or attempt to commit any of the above-mentioned offences [*Act 31 of 1917 Sec. 360 as amended by Act 39 of 1926 Sec. 42*].

A person is deemed to be a first offender who has been convicted previously only of an offence against a statute or statutory regulation, for which the maximum penalty is £15 fine or imprisonment in default of payment [*ibid. and Act 31 of 1917 Sec. 358 as amended by Act 39 of 1926 Sec. 41*].

The indulgence granted is as follows:—

(1) The offender may be discharged with a caution or a reprimand, in which case he is deemed to have been discharged without a verdict being taken, and the discharge has all the effects of an acquittal.

(2) Sentence may be postponed for a period not exceeding six months and the offender released on such conditions as to compensation to be made

by him for damage or pecuniary loss or as to good conduct or as to other matters as the court orders to be inserted in his recognizances to appear at the expiration of the period. If all the conditions thus imposed upon him are observed, the court may at the end of the period discharge the offender without passing sentence.

(3) Sentence may be passed, but its operation in whole or part suspended for not more than three years on conditions as in (2) above. If these conditions are observed, the sentence is not enforced.

(4) In a case where a fine is imposed or in default of payment imprisonment is ordered, the offender may be allowed to pay the fine in instalments or otherwise within a period not exceeding twelve months.

If through circumstances beyond his control the offender cannot fulfil a condition of the suspension of sentence, or obey the conditions attached to the deferred payment of his fine, the court may further suspend the sentence or further defer payment subject to any conditions that it could have imposed at the time of passing sentence [*Act 31 of 1917 Sec. 360 as amended by Act 39 of 1926 Sec. 42*].

Part of the duty of probation officers is to make investigations on occasion into the history of first offenders and to advise the magistrate as to whether the case is one suitable for suspended sentence or not. Persons who are feeble-minded cannot as a rule benefit by a suspended sentence, and the great majority of such persons, if left at large, once they have drifted into crime become recidivists and a

continual charge on the community because of the expenses attendant on their arrest, trial and re-incarceration. (According to the statistics of the Prisons Department, which do not vary much on this point from year to year, about 21 % of the total number of prisoners become recidivists). This sorting out of the feeble-minded is carried out at the Juvenile Court by psychiatrists with the assistance of the probation officers. There are special institutions for such feeble-minded delinquents.

In the case of offenders whose sentences have been postponed or suspended, and who still thus retain their liberty, much good work is done by probation officers, under whose supervision they may be placed.

TREATMENT OF JUVENILE OFFENDERS.

Where a magistrate's court is of opinion that a charge against a child is proved, it may, without proceeding to the conviction of the child, order the parent or guardian to give security for the good behaviour of the child (which order may also be made when the child is charged with any offence) [*Act 25 of 1913 Sec. 15 (2) and (3)*].

The judge or magistrate may order the child to be left in the care and custody of the person in whose custody he was when brought before the court, on such probationary or other conditions, and subject to such supervision by any person or society working for the welfare of children as the court deems fit [*Act 25 of 1913 Sec. 34 (1) (i)*].

and (3) (e), as amended by Act 26 of 1921 Sec. 8]. (As to the nature and incidents of such an order see Chapter 29).

A juvenile offender is, however, liable to any of the following types of correction:—

Whipping.—Any male child under 16 years of age may in lieu of any other punishment, and as well in the case of a first conviction as of any subsequent one, be sentenced to receive in private a moderate correction of whipping, not exceeding 15 cuts. The parent or guardian of the child has the right to be present at such whipping [Act 31 of 1917 Sec. 353]. Six cuts has been approved of as the maximum number that should be imposed on a child under 12 years of age [*R. v. Gray* 1917 C.P.D. 104].

No female may be sentenced to whipping [Act 31 of 1917 Sec. 354].

Apprenticeship.—The court may order the apprenticeship of an offender until he attains the age of 18 years, under the provisions of the Children's Protection Act [Act 25 of 1913 Sec. 34 (1) (i) and (3), as amended by Act 26 of 1921 Sec. 8].

Committal to care of Relative or Other Fit Person.—The court may order the removal of a child from the care of the person in whose custody he is and commit the child to the care of a relative or other fit person until he attains the age of 18 years [*ibid.*] (As to the nature and incidents of this order see Chapter 29).

Committal to Industrial School or Certified Institution.—A child charged with an offence may be committed to a government industrial school or to a certified institution until he attains the age of 18 years [*ibid.*]. (These schools and institutions and the conditions of detention therein are also considered in Chapter Twenty-Nine). The children thus committed are those who for only minor offences appear before the juvenile courts, and who, for various reasons, do not appear to have an opportunity of acquiring moral habits at home.

Committal to Certified Hostels.—When anyone apparently under the age of 21 is convicted of any crime or offence save murder, the court may in lieu of punishment order that he be detained in a certified hostel for not less than two and not more than five years; or it may pass sentence but suspend its operation on condition that for not less than two and not more than five years the offender resides in a hostel and is of good conduct [*Act 46 of 1920 Sec. 7*].

Any institution or hostel which exists or is established for the reception, training and supervision of young persons may apply to be certified as a place to which young persons may be committed under Act [*ibid. Sec. 5 (1)*]. If it is conducted in an unsuitable manner its certificate may be revoked, and it is at all times subject to inspection [*ibid. Sec. 5 (1) and (2)*].

The purpose of these hostels is to subject a young person living therein to an influence similar to that of home life. In some cases the inmates

attend government schools, in others they go out to work, or are apprenticed. There are at present six hostels under the Act in South Africa; three of them are in Johannesburg, two being for European youths and one for European girls; there are two at Durban, one for European youths and one for European girls, and one at Cape Town for coloured youths.

A juvenile or juvenile adult may be released from a reformatory on condition that he resides in a certified hostel; and a child may be transferred to such hostel from a government industrial school or certified institution [*ibid. Sec. 8 (1)*].

The managers of a hostel may refuse to accept any person proposed or ordered to be sent thereto; but once he has been received, they are deemed to have undertaken to lodge, clothe and feed him and to keep him under due supervision and control for the whole period of his detention, or to the limit of age that has been fixed and approved of for the hostel, or until the hostel ceases to be a certified one [*ibid. Sec. 10*].

A court having jurisdiction may at any time until 12 months after the expiry of the order of committal, order any parent, step-parent or guardian of the person committed to the hostel to pay immediately or by weekly or monthly instalments such contribution towards the maintenance of such person as after enquiry appears reasonable. The order is liable to be varied, set aside, or revived; and it has the effect of an ordinary judgment of the court [*ibid. Sec. 11*].

A person may be transferred from one hostel to another; if under 16 years of age he may be transferred from a hostel to a government industrial school or certified institution; and a person discharged from a reformatory on condition of residence in a hostel may be transferred therefrom to a reformatory [*ibid. Sec. 9 (1)*].

On conviction of anyone detained in a hostel of an offence, or on proof that he is by reason of his ill-behaviour or evil influence unsuitable for detention therein, a magistrate having jurisdiction may order him to be transferred to a reformatory to complete the period of his detention [*ibid. Sec. 9 (2)*].

It is an offence to desert from a hostel, and on conviction the offender may be returned and punished, or else committed to a reformatory for the unexpired portion of his period of detention [*ibid. Sec. 8 (2)*]. It is also an offence, punishable by a maximum fine of £50, knowingly to induce or assist anyone to desert from a hostel, or to harbour a deserter [*ibid. Sec. 12*].

Good work is done by probation officers in connection with persons placed in hostels under supervision.

Committal to Juvenile Reformatories—Apprenticeship.—A distinction is drawn for the purpose of committing offenders to reformatories, between juveniles, *i.e.*, persons who at the time of their conviction are under the age of 16 years, and juvenile adults, *i.e.*, persons who at such time are over 16 but under 21 years of age.

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Before a child is sentenced to detention in a reformatory, the court is bound to make enquiries into the question of whether reformation is needed, since such detention is a drastic mode of correction [*R. v. de Jongh* 1926 O.P.D. 246].

A juvenile may be sentenced to detention in a reformatory only in the following cases and under the following conditions:—

- (a) His offence must be one punishable by imprisonment which is not in default of payment of a fine.
- (b) Detention thereat is in lieu of and not in addition to any other punishment.
- (c) The period of detention must be for not less than two and not more than five years, and must in any case expire when the child attains the age of 18 years [*Act 31 of 1917 Sec. 350, as amended by Act 39 of 1926 Sec. 40; R. v. Wheel* 1915 C.P.D. 371; *R. v. Plaatje* 1915 C.P.D. 542].

The court may further order that at the expiration of any sentence of imprisonment or of detention at a reformatory, or in lieu thereof, the juvenile be apprenticed to some useful occupation until he has attained the age of 18 years. In such case, if the juvenile cannot be apprenticed for any reason, he must be detained in the reformatory for the period for which he was ordered to be apprenticed [*ibid.*].

It is an offence for a juvenile thus apprenticed to desert from the service of his master, and on conviction the court may order him to be returned to the master, or else order that the apprenticeship be cancelled and that he be detained in reformatory till he has attained the age of 18 years; or alternatively he may be sentenced to imprisonment not exceeding two years [*ibid.*].

If the apprentice proves intractable or refractory or worthless, any court on proof of the facts may order the contract of apprenticeship to be cancelled, and if it is not practicable that he be apprenticed to another master, the court may order the juvenile to be detained for the unexpired portion of his contract, until he attains the age of 18 years in a juvenile reformatory, and after that age in a juvenile adult one [*ibid.*].

If the master or apprentice has broken a material condition of the apprenticeship, or the master has died or left the district, any court trying the matter may cancel the contract and return the juvenile to the reformatory, or transfer the contract for the unexpired portion thereof to another person ready to undertake the obligations of the master under the contract [*ibid.*, *Act 13 of 1911 Sec. 70*].

With the consent of an inmate of a juvenile reformatory, his period of detention therein or his period of apprenticeship under the Prisons and Reformatories Act may be extended to the age of 21 years [*Act 13 of 1911 Sec. 67*].

On authority being given, a juvenile may be removed from a gaol to a reformatory until the

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age of 18 years, or until his sentence expires; and a juvenile may be removed from a reformatory to a gaol to complete his sentence of detention or imprisonment [*ibid.* Sec. 57].

The conduct of reformatories is governed by Act 13 of 1911 Chapter 7, and by Regulations, but the success of reformatory treatment must be largely influenced by the personality of the superintendent.

Provisions exist for the detention in Union reformatories of juveniles from adjacent British territories [*Act 46 of 1920 Sec. 14*].

Committal to Juvenile Adult Reformatories.— Any person over the age of 16 years, but under the age of 21 years, if his offence is one which is punishable by imprisonment which is not in default in payment of a fine, may be sentenced to detention in a juvenile adult reformatory for a period of not less than two and not more than five years [*Act 31 of 1917 Sec. 351*]. A person who is between the ages of 21 and 25 years may be classified as a juvenile adult, if expressly sanctioned by the Director of Prisons [*Act 13 of 1911 Sec. 2*].

The provisions relating to juvenile reformatories apply also to juvenile adult reformatories [*Act 13 of 1911 Sec. 73*].

CHAPTER TWENTY-THREE.

OCCUPATIONS AND EMPLOYMENT OF WOMEN.

No woman as yet has occupied any important administrative post in South Africa, nor are there any women magistrates or police.

The universities of South Africa freely admit women to all their degrees, and women are eligible for scholarships and bursaries. In addition to becoming university and school teachers, women have qualified themselves for and entered various professions. Thus there are numerous women medical practitioners, there are women chartered accountants, and women advocates and attorneys, although women have been admitted to the legal profession only since 1923; but there are not as yet any women ministers of religion ordained as such in South Africa.

Women are now admitted freely to the public service. Their scale of pay, however, just as in the teaching service, is lower than that of men who hold the same posts or have the same qualifications.

Any woman is liable to be discharged from the public service on her marriage (although before persons occupying certain classes of posts may be discharged, a recommendation on the matter must be made by the proper authority, *i.e.*, the Public Service Commission) [*Act 27 of 1923 Sec. 19 (1)*], and regulations also exist restricting the rights of married women to hold permanent positions in the teaching services.

Women are debarred from prospecting for precious stones save on their own land, and they may not participate in "rushes" or dig on an alluvial digging. Any person who wishes to prospect for precious stones save on his own land, or to peg claims or dig on an alluvial digging, must first obtain a digger's certificate; and such certificate is granted only to persons over the age of 18 years who in all respects save that of age are entitled to be enrolled as voters at an election of members of the House of Assembly [*Act 44 of 1927 Secs. 6, 8, 50 (3) and 57 (1)*].

Women may be employed in any industrial, commercial or other occupation from which they are not specially excluded. No female may be occupied underground in any mine [*Act 12 of 1911 Sec. 8*]; and, in the Transvaal, no woman or girl may be employed by a retail licence-holder to serve at a bar in selling or supplying liquor [*Ord. 32 of 1902 (T) Sec. 50*].

CONTRACTS OF SERVICE.

The law relating to masters and servants is regulated to a large extent by provincial statutes. Any person employed by another for wages or a salary is a servant at common law, no matter what is the importance of the position he occupies. His contract is on the same footing as a lease, for he is considered to have let his services to his employer. Reference here, however, is intended only to persons defined by the statutes as servants, *i.e.*, persons employed for hire, wages or other remuneration to perform any handicraft or other bodily labour in agriculture or manufacture or domestic service, and in other specified occupations.

The principal statutes relating to such servants are Act 15 of 1856 (C); as amended by Act 18 of 1873 (C); Law 13 of 1880 (T); Ord. 2 of 1850 (N); as amended by Act 13 of 1898 (N); Ord. 7 of 1904 (O.F.S.) and Act 40 of 1894 (N) dealing with native servants in Natal. The sections below refer to the Transvaal statute, but save where otherwise stated the law is to a similar effect in all the provinces. A remarkable feature of these Acts is that they impose on the master or the servant committing certain breaches of the contract of service a liability to prosecution and punishment, in addition to the usual civil liability for breach of contract.

Nature and Duration of Contract.—Where no period of service is specified, the contract is deemed to be for one month, and is subject to a month's

notice on either side, calculated from and inclusive of the day on which notice is given. In the case of a trade or handicraft where the servant does not reside on the master's premises the contract endures weekly, reckoning from the first Saturday night, and is subject to a week's notice [*Chap. 2 Secs. 8 and 13*].

It is, however, always competent to stipulate that notice shall not be required, or to waive notice.

Contracts stipulating for the services of his wife and children together with those of any servant become void in respect of such family one month after the death of the servant [*ibid. Sec. 19*].

When the rate of wages agreed on is not proved in any action for non-payment of wages, the court fixes it at that usually paid in the district, taking into account the skill and ability of the servant [*ibid. Sec. 16*].

A master must provide his servants residing on his premises with lodging and sufficient food of good and wholesome quality [*ibid. Sec. 15*].

Illness of Servant.—Where a servant cannot work owing to sickness or accident not due to his own fault, he is entitled, unless it was otherwise agreed, to full wages for the first month and every other benefit of the contract for himself or his family up to two months, unless the contract naturally expires sooner. At the end of two months the

master acquires the right to treat the contract as rescinded. If he does not do so, the servant can claim only food and lodging. Servants in any trade or handicraft are not entitled to wages during their incapacity, but only to food and lodging, and the master may after one month treat the contract as terminated [*ibid. Sec. 17*].

In the Orange Free State statute there is no provision for illness, and by common law a servant can claim wages only for the period actually served [*Boyd v. Stuttaford & Co. 1910 A.D. 101*]; and the master may, after what is an unreasonable period of absence from his point of view, cancel the contract [*Myers v. Sieradzki 1910 T.P.D. 869*].

Marriage and Pregnancy of Female Servant.—When a female servant marries, her husband may dissolve the contract and remove her. He may claim whatever is due to her, but is liable to the master in damages not exceeding the amount of the wages she would have earned from the time of her marriage to the time of the expiration of her service [*Chap. 4 Sec. 12*].

If a servant residing or performing domestic service on the master's premises marries or enters into a reputed married state, the master may at any time thereafter dismiss her; in other cases he may dismiss her whenever by reason of her pregnancy or delivery of a child she becomes disabled from performing her services [*ibid. Sec. 13*]. These provisions are not included in the Orange Free State statute.

Offences and Dismissal.—The principal offence of which a master may be convicted is withholding wages without reasonably believing they are not due. (In Natal, however, withholding wages gives rise to civil proceedings only; although after judgment if the master does not comply with the order made against him, he may be committed to prison). The magistrate at the time of the trial gives judgment for any wages found to be due, whether or not the master is convicted [*Chap. 5 Sec. 21*]).

The principal offences of which a servant may be convicted are absenting himself from work; intoxication during work; using insulting language to the master or anyone put in authority over him; disobedience; neglect and improper performance of work; and endangering or failing to preserve or losing his master's property through neglect or breach of duty [*ibid. Sec. 8*]. Severer penalties are imposed on agricultural or farm servants, and on certain native servants in Natal, than on other servants. In the Orange Free State coloured servants may be sentenced by a magistrate to the full extent of his powers in criminal cases.

Where a servant has caused loss or damage to his master, instead of being sentenced to imprisonment or fined he may be ordered to make compensation to the master [*ibid. Sec. 12*].

Where a magistrate gives judgment against a master, who then appeals or applies for review of

the judgment, the Attorney-General, when called upon to do so, arranges that the case is conducted for the servant free of charge [*ibid.* Sec. 28].

On conviction of either the master or the servant for a statutory offence, the magistrate may order the cancellation of the contract; and generally he may do so if the servant so desires whenever it appears to him that the master has not fairly and faithfully fulfilled his share of the contract [*ibid.* Sec. 24].

In the case of masters and servants who do not come under the above statutes, similar offences to the above justify either party to the contract in treating it as ended, the chief causes for dismissal being fraud, misconduct and negligence [*Wallace v. Rand Daily Mail* 1917 A.D. 478]. The master cannot prosecute the servant, but he has an action for any damage he has suffered through the misconduct [*Blake v. Hawkey* 1912 C.P.D. 817]. The servant, on the other hand, has a claim for damages in the case of wrongful dismissal before the expiry of his period of service [*Wallace v. Rand Daily Mail, supra*].

DETERMINATION OF WAGES.

The wages to be paid by any employer to any employee are regulated throughout the Union by the Wage Act, No. 27 of 1925 (to which the sections below refer). The Act does not apply to persons in farming pursuits or in forestry, nor to

domestic servants in private households, nor to persons whose wages are regulated under any Act relating to the public services [*Sec. 1*].

Every person is deemed to be in employment, for the purposes of the Act, when performing any work at the request of any person (unless it is voluntary and not carried on for profit, or part of the worker's education, such as a scholar's or apprentice's, or compulsory work in any Government or Provincial institution) [*Sec. 18 (2)*].

The Wage Board established for the purpose recommends to the Minister of Labour the wages and rates to be fixed for any employment, whenever the matter has been referred to it for enquiry by the Minister or by a representative body of employers or employees. It also makes recommendations on any other matter connected with such employment [*Sec. 3 (1)*]. The Minister thereupon publishes the minimum wage to be paid to any class of employee, and determinations on other matters affecting the trade, after giving due notice and opportunity for objections [*Sec. 7*]. The maximum penalty for not complying with such determinations is £100 fine, and the offender may also be sentenced to refund to the employee the difference due to him for any period during which underpayment took place [*Sec. 8 (2)*]. Any agreement between an employer and an employee whereby the latter is to receive less payment or be in a less favourable position than that determined, is void, and the persons so agreeing are guilty of an offence [*Sec. 8 (3)*].

WORKMEN'S COMPENSATION.

If a workman is injured in the course of his work, compensation for his resulting incapacity or death may be claimed from his employer, under Act 25 of 1914. Any person is a workman under the Act who works under a contract of employment or apprenticeship save persons whose remuneration for work done is over £500 per annum; persons in certain public and other services for whom compensation is otherwise provided; persons employed for casual work unconnected with the employer's business; outworkers, who do work on articles given out to them on premises not under the management of the employer; and persons who contract for the carrying out of work and themselves engage other persons, independently of the employer, to do such work [Sec. 2]. By work is meant employment at or about any trade, industry, business or public undertaking in the Union, but not in domestic service or on a farm, unless it be in connection with any engine driven or machine worked by mechanical power [Sec. 41]. Special rules apply to seamen [Sec. 6].

The dependants of a deceased workman who are entitled to be awarded compensation are those members of his family who were wholly or in part dependent on his wages at the time of the accident causing his death. They include:—

- (a) the widow and any legitimate child of the deceased under the age of 14 years, including a posthumous child;

- (b) the husband; a child, whether legitimate or not, not included under (a); step-child; parents; step-parents father's or mother's sister; brother or sister; half-brother or sister; grandparents; grand-children; an adopted child under 14 years of age who was adopted by and dependent on the deceased for at least one year prior to the accident.

The persons mentioned in (a) may be awarded compensation in preference to those in (b) in the discretion of the magistrate [Sec. 41].

WOMEN IN FACTORIES.

The conditions of employment in factories are regulated by the Factories Act No. 28 of 1918, to which the following sections refer.

Any premises constitute a factory—

- (a) if steam, electrical, or other mechanical power or appliance is used in connection therewith to prepare or make goods for trade or sale, or articles of food or drink for human consumption; or
- (b) which are used for washing, laundering, cleaning or dyeing any article for pecuniary gain, or wherein there is carried on for gain any manufacture, or the making, packing or preparation of

goods for sale or transport, if in connection therewith three or more persons are employed on whole-time work [*Sec. 1*].

The Act does not apply, however, to the making or preparation on farms of goods for human consumption, from the produce or animals on such farms [*Sec. 2*].

Protection of Health.—No female may be employed in any room in which is carried on the silvering of mirrors by the mercurial process or the making of white lead or the grinding of paints or articles containing white lead [*Sec. 20 (c)*].

No female may be allowed to take a meal in a room whilst any handicraft or manufacturing process is being carried on therein, nor to do any work during her meal-intervals [*Sec. 19*].

Provisions are laid down for preserving health and cleanliness in all factory premises [*Sec. 29*].

Prevention of Sweating.—It is an offence for regular employees to be employed on factory work elsewhere than at the factory, unless from its nature the work cannot be performed at the factory, or consists of repairs more conveniently performed at the place where the article to be repaired happens to be [*Sec. 23*].

Piece-work may be given out to other than regular employees, however, by an occupier of a

factory; but he must keep an outwork register of the persons to whom it is given, the place where it is to be performed, its quantity and nature, and the remuneration therefor [*Sec. 22*]. In this connection "occupier of a factory" is extended to include every merchant, wholesale dealer, shop-keeper, agent or distributor who lets or gives out textile or shoddy material to be made up into garments or other articles for sale [*ibid.*].

No person to whom such work is given out may sublet any part thereof, or allow it to be performed otherwise than on his own premises and by himself or his workpeople or by a member of his family to whom he himself pays wages therefor [*ibid.*].

Childbirth.—No female may be employed in a factory during the four weeks prior to the expected date of her confinement, and for eight weeks thereafter [*Sec. 18*].

On the report of an Inspector of Factories a sum not exceeding £1 per week for not more than 12 weeks may be paid to a woman while thus prohibited from working, out of a fund provided by Parliament [*ibid.*]. It must be shown, however, that she is solely dependent on her wages, and that the father of the child born or to be born is unable to provide such amount. If he is able but refuses to make such provision during the period aforesaid, an inspector may apply to the magistrate's court for an order compelling him to do so; whereupon the court makes such order as seems just [*ibid.*].

Hours of Work.—Females may not be employed between 6 p.m. and 7 a.m., save where these hours are varied on special authority of the Minister of Labour, but under no circumstances may they be employed between 9 p.m. and 5 a.m. [Sec. 15].

No worker may be employed, exclusive of meal times, for more than 50 hours in one week or $9\frac{1}{2}$ hours in one day, or for more than 5 hours continuously without one hour's interval, save where for specified classes of work exemption is granted in certain cases by the Minister, in others by an inspector; but these hours do not apply to unskilled work carried on in the open air [Sec. 13]. Work of whatever kind done elsewhere for an occupier of a factory by an employee, is deemed to be done in the factory for the purpose of these rules [Sec. 16].

Overtime must not be worked by females for more than 3 hours in one day, 3 consecutive days in one week, and 60 days in one year; or on any holiday or half-holiday; unless the inspector, on the employee expressing willingness, grants permission [Sec. 17 (2)]. The inspector may forbid overtime to be worked by any person if a medical officer considers it injurious to such person's health [Sec. 17 (6)]. Notice that overtime is required must be given a female before the midday interval, or a sufficient meal must be provided for her at the factory between closing time and the commencement of overtime, or an allowance of 1s. must be paid her before closing time [Sec. 17 (7)].

The pay for overtime work is not less than one-fourth as much again as the ordinary rate of pay [Sec. 17 (4)].

No person may be employed in a factory on a Sunday or on a public holiday (unless some other day is allowed annually in place of the latter). No female may be employed after 1 p.m. on the weekly half-holiday [Sec. 26].

SHOP ASSISTANTS.

The maximum number of hours exclusive of meal times during which an assistant may be employed in a shop (save where under special conditions the time is specially extended) are as follows:—

- (a) in the Cape: 52 hours per week [Ord. 14 of 1915 Sec. 14 as amended by Ord. 22 of 1919 Sec. 4];
- (b) in the Transvaal: 48 hours per week [Ord. 5 of 1923 (T) Sec. 7];
- (c) in the Orange Free State: 52 hours per week, which may be extended to 60 per week in butcher, baker and fishmonger shops [Ord. 6 of 1925 (O.F.S.) Sec. 20];
- (d) in Natal: 48 hours per week [Ord. 12 of 1919 (N) Sec. 10].

OCCUPATIONS AND EMPLOYMENT OF WOMEN

In the Cape Province, sitting accommodation must be provided for female assistants [*Act 20 of 1899 (C)*], and no female under 16 years of age may be employed in a shop after 9 p.m. [*see (a) above*].

In the Transvaal no person under 18 years of age may be employed as assistant for more than 8½ hours in any one day comprised within a period of 10 hours, nor after 6 p.m. [*Ord. 5 of 1923 (T) Sec. 7 (2) (e)*].

Holidays.—In addition to the usual cessation of work when a shop is closed on Sundays, public holidays and the weekly half-holiday, in the Cape, Transvaal and Orange Free State provinces for each year of continuous service under the same employer an assistant is entitled to leave of absence for 12 clear working days, or in the case of restaurants or similar establishments which are open on Sundays for 14 such days, to be taken in a consecutive period. "The same employer" includes on his death his legal representative, heir or legatee; on his insolvency, the trustee or liquidator of his estate. A proviso not included in the Transvaal Ordinance, is that by mutual agreement between the employer and the assistant leave may be accumulated and taken in a consecutive period after two years' continuous service.

The employer may fix the time of leave for different assistants with reasonable regard to the exigencies of his business. Unless leave has been granted earlier, however, it must be granted within one month of the termination of any year's or two

years' service, as the case may be [*Ord. 22 of 1926 (C) Sec. 6; Ord. 5 of 1923 (T) Sec. 8; Ord. 6 of 1925 (O.F.S.) Sec. 21*].

It has been held that an employee is not entitled to pay while absent on leave under a similar provision to the above [*Casserley v. Stubbs 1916 T.P.D. 310*].

CHAPTER TWENTY-FOUR.

OFFENCES AGAINST WOMEN AND GIRLS AND AGAINST SEX MORALITY.

OFFENCES AGAINST WOMEN AND GIRLS.

Rape, Attempted Rape and Indecent Assault.— Rape is committed by any male over 14 years of age who has unlawful carnal knowledge of a female without her consent [*State v. Jeremy* 12 C.L.J. 231]. Anyone assisting the offender is also guilty of rape.

A child under 12 years of age is conclusively presumed to be incapable of consenting to an act of carnal connection, so that any alleged willingness on her part is no defence to a charge of rape [*Socout Ally v. R.* 1907 T.S. 336]. In default of other evidence the court may judge the child's age from her appearance [*Act 3 of 1916 Sec. 2 (3)*; *Act 31 of 1917 Sec. 386*].

Evidence of a complaint made by the woman or girl attacked is admissible in corroboration of her evidence, although this is contrary to the general rule excluding hearsay evidence. The

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complaint must, however, have been made at the first reasonable opportunity to the person to whom she might have been expected to complain [*R. v. Gannon 1906 T.S. 114*].

The crime of assault with intent to commit rape, or attempted rape, is governed by the same rules as to consent and complaint as apply in the case of rape.

Indecent assault is an attack (or a threat of attack which the victim reasonably believes may be accomplished), of an indecent character [*R. v. Abrahams 1918 C.P.D. 590*]. Here, too, as in all similar cases of sexual attacks on women, the same rules as to evidence of complaint apply, as apply in the case of rape [*Dray v. R. 1925 A.D. 554*].

On a charge of rape, assault with intent to rape, or indecent assault, the offender may be found guilty of any different and lesser type of criminal assault, or of an offence specified below under the Girls' and Mentally Defective Women's Protection Act, provided it does not in its nature imply elements not included in the offence charged [*Act 39 of 1926 Sec. 28 (1-3)*].

The punishment for rape is death or any lesser penalty [*Act 31 of 1917 Sec. 338 (1)*].

Offences Against Girls and Mentally Defective Women.—It is a crime for any male person to have unlawful carnal connection with, or to commit immoral or indecent acts with, or to solicit or entice

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to such acts, any girl under the age of 16 years [Act 3 of 1916 Sec. 2]. In default of evidence as to age, the girl's age may be judged of as in the case of rape.

It is a defence to a charge of any of the above offences that the accused was at the time of the commission of the offence under the age of 16 years, or that the girl at such time was a prostitute [*ibid.*].

It is a crime for any person who knows that a female is an idiot or an imbecile, to have or attempt to have unlawful carnal connection with her, or to commit or attempt to commit with her immoral or indecent acts, or to solicit or entice her to commit such acts [*ibid.* Sec. 4].

The maximum penalty for the above offences is £500 fine, six years' imprisonment with hard labour and 24 lashes [*ibid.* Secs. 2 and 4].

These provisions do not impair the law of rape on girls or imbeciles. A person charged with any of these offences may be found guilty of indecent assault or of assault, if such be the facts proved [Act 39 of 1926 Sec. 28 (4)].

Abduction.—Any person who illegally removes a minor from the custody of and against the will of her parents or guardians, in order that either he or some other person may marry or have illicit intercourse with her, is guilty of abduction. A woman thus may be guilty of abduction [*R. v. Adams and*

Ibrahim 1911 C.P.D. 863]; and so too may a male person even where the girl admits previous intercourse with him, or his taking has not been by force but by persuasion [*ibid.*; *Barnard v. R.* 1907 T.S. 270]. Where a girl is not a virgin and consents, the punishment inflicted on the accused is, however, a light one. (It is possible also to abduct a youth.)

In the Transvaal, anyone abducting a girl under the age of 18 years in order that she may be unlawfully carnally known by any man is liable to 5 years' imprisonment with hard labour [*Ord. 46 of 1903 (T) Sec. 17*]. This does not interfere with the common law of abduction in that province [*R. v. Clark* 1914 T.P.D. 50].

Seduction is not a crime, but gives rise to a civil action for damages.

Detention of Women for Immoral Purposes.— If there is reasonable ground to suspect that a woman or girl is being unlawfully detained for immoral purposes, on a complaint made by a parent, husband, guardian, relative or other person acting in good faith, a magistrate may issue a warrant to search for and take her to a place of safety. (A warrant may at the same time be issued for the arrest of the person detaining her). When she is thereafter brought before a magistrate, he may cause her to be delivered up to her husband or guardians or dealt with as circumstances demand [*Act 31 of 1917 Sec. 57*]. If the complainant so desires, he may accompany the police officer executing the warrant, unless the magistrate otherwise directs [*ibid.*].

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A woman is deemed to be thus detained where the purpose is that she may be unlawfully carnally known by any man, if the detention is—

- (a) against her will or not, where she is under 16 years of age;
- (b) against her will or that of her parents or of any other person having lawful charge or care of her, if she is between the ages of 16 and 21 years;
- (c) against her will, if she is over 21 years of age [*ibid.*].

In the Cape and Transvaal a woman is deemed to be thus detained if, with intent to compel or induce her to remain, any property or wearing apparel of hers is withheld; and no legal proceedings may be taken against her for being in possession of any apparel that was needed to enable her to leave the premises [*Act 25 of 1893 (C) Sec. 3; Ord. 46 of 1903 (T) Sec. 16*].

Offences Against Decency.—Any conduct whether in public or in private that is insulting towards or injurious of the dignity of a respectable woman, is punishable as a criminal injury, in the discretion of the judge [*R. v. Kobi 1912 T.P.D. 1106*]. A proposal of marriage made by a married man to a woman to whom he had held himself out as a widower has been held to be injurious conduct [*R. v. Howard 1917 N.P.D. 192*]; although this is an extreme case and stands alone.

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Addressing or following a woman in an insulting manner is such injury [*R. v. Jungman* 1914 *T.P.D.* 8], and is punishable in the Transvaal as a breach of statute when it occurs in any public place or place of public resort [*Act 38 of 1909 (T) Sec. 2*]. Public breaches of decency by word or action are punishable in every province.

It is an offence to put into the post any indecent letters or other matter [*Act 10 of 1911 Sec. 96 (1)*]. It has been held in the Transvaal that a letter to a woman containing immoral proposals when there has been no accompaniment of familiar intercourse, and when there are no mitigating circumstances, is indecent matter [*R. v. Griezel* 1917 *T.P.D.* 16]. In Natal a statutory offence is committed by anyone who uses lewd language or gestures towards or in the presence of a woman, or who sends any indecent letter or drawing or the like to a woman, or who exhibits such writings or drawings in a manner likely to give offence to women [*Act 22 of 1898 (N) Sec. 9, as amended by Act 22 of 1904 (N)*].

Sending an indecent letter to a woman is also a punishable wrong at common law [*See R. v. Kobi, supra*].

A superior court may direct that the public generally or certain classes of person leave the court during any trial [*Act 31 of 1917 Sec. 220 (4)*]; and a magistrate also may exclude women or minors or the public generally when holding a preparatory examination, or when hearing a case, in the interests of good order or public morals [*ibid.*].

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Sec. 85 (b); Act 32 of 1917 Sec. 5 (3)]. In the Transvaal the publication of evidence given thereafter, as well as that of detailed evidence of an immoral or indecent character is a punishable offence [*Act 38 of 1909 (T) Sec. 7*].

OFFENCES CONNECTED WITH PROSTITUTION.

The principal statutes dealing with the suppression of brothels and immorality are Act 36 of 1902 (C); Ord. 46 of 1903 (T); Ord. 11 of 1903 (O.F.S.); and Act No. 31 of 1903 (N). The references throughout this section, under (C), (T), (O.F.S.) and (N) are to these enactments.

Any prostitute or any person, male or female, who lives or has lived on or knowingly received any part of the earnings of prostitution, or who procures or who has procured women for immoral purposes, is a prohibited immigrant into the Union [*Act 22 of 1913 Sec. 4 (1) (e)*].

Any such person who being lawfully resident in one Province enters or is found in another Province in which he is not lawfully resident, is a prohibited immigrant in respect of such other Province [*ibid.*; *Ord. 20 of 1905 (T) Secs. 3 and 6; Act 29 of 1909 (O.F.S.) Secs. 3 and 6*].

Any person not born within the limits of the Union who has been sentenced to imprisonment for keeping a brothel, or procuring a woman for immoral purposes, or for living on the proceeds of

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prostitution, and who, by reason of the circumstances connected with the offence is deemed by the Minister of the Interior to be an undesirable inhabitant of the Union, may be removed from the Union [*Act 22 of 1913 Sec. 22 (a)*].

A prostitute is a woman who indiscriminately consorts with men for gain.

Offences Concerning Children.—The Children's Protection Act makes it an offence for any person having the custody, charge or care of a child between the ages of 4 and 16 years to allow such child to reside in or frequent a brothel. An offender charged with an offence under any other law relating to the suppression of immorality may be found guilty of this offence, when such verdict accords with the facts proved [*Act 25 of 1913 Sec. 6*].

It is an offence under the same Act for any person having the custody, charge or care of a child under 16 years of age to cause or encourage his or her seduction, abduction or prostitution, or the commission by him or her of immoral acts; and a person is deemed to have acted thus in the case of a girl who has been seduced or abducted, or who has become a prostitute, if he has knowingly allowed her to consort with or to enter or continue in the employment of any prostitute or person of known immoral character [*ibid. Sec. 7*].

When, on any person's complaint, it is shown that a girl under 16 years of age is with or without

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her parent's or guardian's knowledge exposed to the risk of seduction or prostitution, or is living a life of prostitution, the court may order her parent or guardian to enter into recognizances to exercise due care and supervision over her, and he may be imprisoned for not more than one month until he does so [*ibid.* Sec. 8].

In the Cape and Transvaal provinces any owner or occupier or person assisting in the management of any premises who induces or knowingly suffers any girl under 16 years of age to resort to or be therein to be unlawfully known by any man is liable to a maximum penalty of, in the Cape 4, in the Transvaal 5 years' imprisonment with hard labour. If the girl is under 12 years of age the period is extended to 7 years in the Cape and to life imprisonment and whipping in the Transvaal [*Act 25 of 1893 (C) Sec. 2 as amended by Act 3 of 1916 Sec. 3; Ord. 46 of 1903 (T) Sec. 15*]. In the Cape, it is a defence if the accused reasonably believed the girl to be over 16 years of age.

Procuration.—It is an offence to procure or attempt to procure—

- (a) any woman or girl to become a prostitute within or without the colony; or
- (b) a woman under 21 years of age not being a prostitute or of known immoral character to have unlawful intercourse with any person within or without the colony; or

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- (c) any woman or girl to leave the colony to become a prostitute elsewhere. (It has been held in Natal that this offence may be committed even if the woman is already a prostitute [*R. v. Fien* 24 *N.L.R.* 472]); or
- (d) Any woman or girl to become the inmate of a brothel within or without the colony. It has been held unnecessary that there should have been an established brothel in existence at the time of the commission of this offence [*R. v. Wilson* 1917 *T.P.D.* 709; (C) *Sec.* 31; (T) *Sec.* 13; (O.F.S.) *Sec.* 11; (N) *Sec.* 13].

In the Transvaal provision there is no age limit set under (b) and (c) is omitted; but it is specified to be an offence to inveigle into a brothel for immoral purposes a woman or girl who is not a prostitute or of known immoral character, or knowingly to conceal in such place a woman so inveigled. Further, all the provisions save the Transvaal one specify that the uncorroborated evidence of a single witness is not enough to secure a conviction.

It is an offence—

- (a) to procure or attempt to procure a woman by threats or intimidation to have unlawful intercourse within or without the colony; or

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- (b) by false pretences or representations to procure a woman not being a prostitute or of known immoral character to have unlawful intercourse within or without the colony; or
- (c) to apply, administer to, or cause to be taken by a woman any drug, matter or thing to stupefy or overpower her, so as to enable any person to have unlawful intercourse. Here too, save in the Transvaal, it is provided that the uncorroborated evidence of a single witness is not sufficient to secure a conviction [(C) *Sec. 32*; (T) *Sec. 13*; (O.F.S.) *Sec. 12*; (N) *Sec. 14*].

In the Transvaal the parent or guardian of a woman who procures her to have unlawful intercourse with any other person, or orders, is party to, permits or receives any consideration for her defilement, seduction or prostitution, is liable to a maximum penalty of 5 years' imprisonment with hard labour, which is increased to whipping and lifelong imprisonment if the girl is under 12 years of age. "Guardian" includes any person who has in law or fact the custody or control of the woman or girl [(T) *Sec. 12*].

In the same province conspiracy to fraudulently induce a woman or girl to allow anyone to have unlawful intercourse with her is also specified as an offence [(T) *Sec. 14*].

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Living on Proceeds of Prostitution.—It is an offence for any male person knowingly to live wholly or in part on the earnings of prostitution; and he is presumed to do so if he lives with or is habitually in the company of a prostitute, and (in all the provinces save Natal) has no visible and honest means of subsistence. (The reference to "honest means" is omitted in the Transvaal provision.) [(C) Sec. 33; (T) Sec. 21; (O.F.S.) Sec. 13; (N) Sec. 15].

Brothel Keeping.—To keep a brothel is an offence at common law, when it creates a nuisance. The statutes mentioned at the beginning of this section make it an offence in every case, without qualifications [(C) Sec. 22; (T) Sec. 3; (O.F.S.) Sec. 2; (N) Sec. 3].

Any person is deemed to be the keeper of a brothel who is associated in any way with premises used as a brothel whether as owner, landlord, manager or occupier, or who knowingly receives any share of the money taken therein. A woman found therein who fails to disclose the managers, any male resident therein, and the husband of any woman resident therein who is not judicially separated from her, are *prima facie* deemed to be keepers [(C) Secs. 24 and 25; (T) Sec. 4; (O.F.S.) Sec. 4 and Act 19 of 1908 (O.F.S.); (N) Secs. 5 and 6].

In Natal the holder of a retail liquor licence who permits his premises to be used by disorderly persons is guilty of an offence [Act 38 of 1896 (N) Sec. 77]. In the other provinces any liquor licence

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holder is guilty of an offence who permits his premises to be a brothel or the resort or habitual meeting place of reputed prostitutes [*Act 28 of 1883 (C) Sec. 73; Ord. 32 of 1902 (T) Sec. 56; Ord. 8 of 1903 (O.F.S.) Sec. 51*].

Soliciting.—In the Cape and Orange Free State any prostitute or night walker who is in any public place for the purpose of prostitution or solicitation to the annoyance of inhabitants or passengers is guilty of an offence; and in the Transvaal and Natal any person who in any public place importunes for immoral purposes commits an offence [*Act 27 of 1882 (C) Sec. 5 (29); Ord. 21 of 1902 (O.F.S.) Sec. 7; Act 16 of 1908 (T) Sec. 4; Act 31 of 1903 (N) Sec. 15*]. In the Transvaal it is an offence to entice or solicit by words or signs or in any other way, or to aid or facilitate the commission of immoral acts [*Ord. 46 of 1903 (T) Sec. 20*].

MISCEGENATION.

The Immorality Act of 1927 makes it an offence in every case for white persons to have illicit intercourse with natives.

By provincial statutes which have not been thereby repealed, and which differ in point of penalty from that Act, it is an offence for a white woman to have illicit intercourse with a native. In the Transvaal alone it is not a necessary ingredient of the offence that the intercourse should be for gain. In Natal, instead of "native," "coloured person" is used, in the sense defined by Law 15 of 1869 (N), *viz.*,

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Hottentots, Coolies, Bushmen, Lascars and Kaffirs. In the Transvaal a "native" is a person manifestly belonging to any of the native or coloured races of Africa, Asia, America or St. Helena. To procure or attempt to procure a woman for such purposes is also an offence [*Act 36 of 1902 (C) Secs. 34 and 35; Ord. 46 of 1903 (T) Sec. 19; Ord. 11 of 1903 (O.F.S.) Secs. 14 and 15; Act 31 of 1903 (N) Secs. 16 and 17*].

In the Transvaal and Natal the native concerned is also punishable.

A keeper of a brothel (in the Transvaal the owner or occupier of any premises) where to his knowledge any such illicit intercourse takes place, is guilty of a special offence. (The condition as to knowledge is not specified in the Natal Act). [*See Acts quoted above: (C) Sec. 36; (T) Sec. 19; (O.F.S.) Sec. 16; (N) Sec. 18*].

The Immorality Act No. 5 of 1927 (to which the sections below refer) provides an equal punishment for European males having illicit intercourse with native females and for native males who so act towards European females [*Sec. 1*]. (A native is defined as a member of any aboriginal race or tribe of Africa.) It is also an offence for anyone to procure a native or European female for the purposes of such illicit intercourse, or to help to bring about such intercourse, or to permit any premises which he owns or occupies to be used for such purposes [*Secs. 3 and 4*].

A person convicted of any of the above-mentioned offences, who was not born within the

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limits of the Union, may be removed from the Union, and is thereafter deemed an undesirable immigrant [Sec. 6].

An equal punishment is also provided for native females permitting illicit intercourse on the part of European males and for European females so doing in the case of native males [Sec. 2].

Whenever, in proceedings under this Act, the question in issue is whether a female was married to a male, the burden of proving marriage is on the accused, the presumption being against it [Sec. 5].

MARRIAGE OFFENCES.

Bigamy.—Bigamy is committed by anyone bound by a valid marriage who goes through the form of marriage with some third person. Before a charge of bigamy can be upheld, the prior valid marriage must be proved.

Any marriage is deemed lawful when a duplicate original or certified copy of a marriage register is produced to the court (the signature of the person certifying being duly authenticated in the case of marriages solemnised outside the Union) [Act 31 of 1917 Sec. 304 (1)]. The identification of the accused with the person named in the register may be made by the other spouse, who is competent and compellable to give evidence for the prosecution without the accused's consent [ibid. Sec. 263, as amended by Act 39 of 1926, Sec. 29].

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A proved marriage ceremony solemnised within the limits of the Union is deemed to have been valid at the date thereof unless the parties were within the prohibited degrees of relationship, or one of them then committed bigamy [*ibid.* Sec. 304 (2)]. A marriage wherever solemnised is *prima facie* deemed valid if shortly before the bigamous ceremony was performed the accused was cohabiting with the person alleged to be his or her lawful spouse, and treated her or him as such, if there is also evidence of the performance of a marriage ceremony between them [*ibid.* Sec. 304 (3)].

Where these presumptions do not arise it is probable, though not certain, that the English law would be followed, which requires proof that the ceremony did actually in the country where it was performed effect a valid and binding marriage. This proof is usually furnished by a witness expert in the law of such country [*McIntyre v. R.* 1904 T.S. 804].

No person is punishable for bigamy who reasonably believed his or her spouse to be dead, at the time of the second marriage. Such belief would probably be deemed *bona fide* and reasonable if the absent spouse was exposed to peril, and was not heard of by the other for over 7 years, in spite of enquiries [*in re Booysen 1 Foord* 187].

Incest.—Incest is the unlawful union of two persons who may not marry because they are related to each other within the degrees of rela-

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tionship within which marriage is forbidden. Persons related through consanguinity even from an illegitimate source having such intercourse, are also guilty of incest. This has been definitely established in the case of ascendants and descendants [*R. v. Arends* 8 S.C. 176].

Intercourse with a wife's sister is not incest, whether the wife be alive or dead [*R. v. Delpont* 18 S.C. 355]; and probably the same rule now applies regarding intercourse with a husband's brother.

Ignorance of the relationship is a defence to a charge of incest, but the presumption is that the accused had knowledge thereof [*Act 31 of 1917 Sec. 305*]. It is enough for the prosecution to prove that the woman concerned is reputed to be the lineal ascendant, descendant, sister, stepmother, or stepdaughter of the other party to the incest [*ibid.*].

PROCURING ABORTION.

In the Transvaal it is specified as an offence in the law relating to indecent publications to advertise any means for the prevention of conception or the procuring of abortion [*Act 38 of 1909 (T) Sec. 2*].

Procuring abortion is a crime at common law. Any person is guilty thereof who, in order to defeat the natural course of gestation wilfully applies to a pregnant woman any means where the foetus may

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be expelled (unless he be a medical practitioner who removes a foetus in order to save the mother's life), and so too is the woman who allows it to be done.

If death results, where there was knowledge that the act might result in death or serious bodily harm, the crime is murder; if this knowledge was absent, it is culpable homicide [*R. v. Hine* 1910 C.P.D. 371].

Attempt to commit abortion is also a crime, and may be committed even where the woman is not in fact pregnant [*R. v. Freestone* 1913 T.P.D. 758].

The woman permitting the offence to be committed on herself is an accomplice of the person committing the offence [*R. v. Thielke* 1918 A.D. 373]. A conviction can thus be secured on her evidence only if there is other evidence as well that such offence was committed [*ibid.*; *Act 31 of 1917 Sec. 285*].

OFFENCES CONCERNING HEALTH.

Neglect at Childbirth.—In the Orange Free State no woman may within the limits of any municipality having a population of over 2,000 white inhabitants attend women in childbirth for gain, hire or hope of reward, except under the direction of a registered medical practitioner, unless she be a registered midwife [*Ord. 4 of 1907 (O.F.S.) Sec. 7 (1)*]. Otherwise, and in the other provinces, there is no regulation preventing an uncertificated

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person who does not hold herself out as certificated, from acting as a midwife or taking payment therefor.

Contravention by a medical practitioner or by a certificated midwife of the rules concerning the steps to be taken by them to prevent the spread of puerperal fever or any similar disease is an offence [*Act 34 of 1891 (C) Sec. 28; Ord. 1 of 1904 (O.F.S.) Sec. 11*]. In the Cape any medical practitioner or any midwife acting for profit, and in the Transvaal any midwife, who causes injury or serious illhealth to any lying-in woman through uncleanness or failure to take the proper precautions against puerperal fever or any similar disease is guilty of an offence [*Act 7 of 1899 (C) Sec. 9; Ord. 29 of 1904 (T) Sec. 29*].

Spread of Venereal Disease.—Measures to combat the spread of venereal diseases are contained in the Public Health Act, No. 36 of 1919. Every person suffering from any such disease must have himself cured or treated till free from the disease in a communicable form [*Sec. 54*]; and penalties are imposed on those who wilfully or by culpable negligence infect others [*Sec. 59*]. It is the duty of a medical practitioner to point out to his patients the infectious nature of the disease, to warn them that to infect others is an offence, and to warn them against contracting marriage till free from the disease in a communicable form [*Sec. 55*].

Any person suffering from such disease and having knowledge of that fact, who accepts employment in any capacity entailing the care of

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children, or the handling of food or of food utensils is guilty of an offence. The employer is also guilty unless ignorant of the facts [Sec. 57].

Proceedings for these offences are conducted *in camera* [Sec. 64].

CHAPTER TWENTY-FIVE.

WOMEN IN CRIMINAL CASES.

Trial by jury no longer exists in South Africa in civil cases. Women are not entitled to be jurors since jurors must be registered parliamentary voters [*Act 31 of 1917 Sec. 167*].

Coercion of Wife by Husband.—Every person is responsible for his or her criminal actions, and a wife is not presumed to be acting under the coercion of her husband, whatever the nature of the crime she commits in his presence [*R. v. Albert 12 S.C. 272*]. If, however, the husband was present, and intimidated her into committing a crime, she may use this fact as a defence if the compulsion was so great as to have induced in her a reasonable and substantial fear that death or serious bodily injury to herself or those protected by her would result if she refused to commit the crime [*R. V. Shaïamunda et Uxores 1916 S.R. 33*].

Wife as Accessory after the Fact.—Persons who have harboured or assisted an offender after the commission of the offence may be charged with substantive offences [*Act 31 of 1917 Sec. 139*]. It is the custom, however, not to prosecute as an

accessory after the fact a wife who receives and performs reasonable duties to her husband, knowing him to have committed a crime.

The position is different of course if she furthers his crime in any way. Thus a wife assisting her husband to dispose of stolen property would be more than an accessory after the fact, and rather an accomplice, since theft is a continuing offence [*R. v. Brett and Levy* 1915 T.P.D. 53].

Privilege of Communications during Marriage.—No spouse may be compelled to disclose any communication made to him or her by the other spouse during the marriage; and no person whose marriage has been duly dissolved or annulled may be compelled to give evidence as to any matter or thing that occurred during the subsistence of the marriage or supposed marriage, as to which he or she could not have been compelled to give evidence during that period [*Act 31 of 1917 Sec. 296*].

Spouse as Witness for the Defence.—The wife or husband of an accused person is a competent witness for the defence at every stage of the proceedings, whether the accused is charged solely or jointly with another person; but he or she cannot be called as a witness except on the application of the accused [*Act 31 of 1917 Sec. 264*]. When giving evidence a spouse is not compelled to answer a question or give evidence on any point if under the circumstances his or her wife or husband might lawfully decline to answer such question or give such evidence [*ibid. Sec. 297*].

Spouse as Witness for the Prosecution.—The spouse of an accused person is competent without the accused's consent to give evidence either for the prosecution or the defence in proceedings for an offence against a child under Chapter 1 of the Children's Protection Act [*Act 25 of 1913 Sec. 18*].

The spouse of an accused person is competent and compellable without the accused's consent to give evidence for the prosecution where the accused is prosecuted for an offence against the person of either of them, or any of the children of either of them, or for any of the following offences: bigamy; incest; abduction; contravening any provisions of Sections 22 to 36 of Act 36 of 1902 (C), or of Act 31 of 1903 (N), or of Ord. 46 of 1903 (T) as amended by Act 16 of 1908 (T), or of Ord. 11 of 1903 (O.F.S.) as amended by Act 19 of 1908 (O.F.S.), all of which deal with the suppression of brothels and immorality, and are considered earlier [*see Chapter Twenty-four*]; perjury and the statutory offence of making a false statement in any affidavit or solemn or attested declaration in connection with or for the purposes of any judicial proceedings instituted or contemplated by one spouse against the other, or of any criminal proceedings in respect of the above-mentioned offences [*Act 31 of 1917 Sec. 263, as amended by Act 39 of 1926 Sec. 29*].

The spouse of an accused person is competent but not compellable to give evidence for the prosecution without the consent of the accused where the offence charged is one against the separate property of such spouse [*ibid.*].

When giving evidence for the prosecution a spouse is entitled to no more privilege than an ordinary witness, and cannot claim the privileges accorded to a spouse who is a witness for the defence.

In no other cases than those specified above may the spouse of an accused person give evidence for the prosecution. Even in the case of a joint trial for some other class of crime, the spouse of one of the accused is not a competent witness against the others, for the trial is regarded as one and indivisible [*R. v. Mapatassa* 1912 T.P.D. 91].

Native Marriage and Evidence.—Every person married in accordance with native law or custom is for the purposes of the law of evidence in criminal cases in the position of an unmarried person despite the registration or other recognition under any law of such a union as a valid and binding marriage [*Act 31 of 1917 Sec. 263, as amended by Act 39 of 1926 Sec. 29*].

Arrest of Women on Criminal Charges.—Whenever a woman is searched on her arrest, the search may be made only by a woman, and with strict regard to decency. If there is no woman available who is a member of the police or a prisons officer, the search may be made by any woman specially named for the purpose by a peace officer [*Act 31 of 1917 Sec. 43*].

On the order of a peace officer, medical officer of a prison, or district surgeon, steps may be taken to ascertain whether the body of a person arrested

on any charge bears any mark, characteristic or distinguishing feature, or shows any condition or appearance [*Act 39 of 1926 Sec. 2 (1)*]. From this examination women are exempted [*ibid.*]. Once a woman is on trial, however, she is not exempted from such examination ordered by a magistrate holding any preparatory examination or by the court trying any charge [*ibid. Sec. 2 (2)*].

Women Prisoners.—Male and female prisoners must be confined in separate parts of any convict prison or gaol, and in such manner as far as possible to prevent those of one sex from seeing or holding any intercourse with those of the other sex. White and coloured prisoners are also separated [*Act 13 of 1911 Sec. 91 (1)*]. The same rule, separating males and females, and white and coloured persons, applies to reformatories [*ibid. Sec. 52*]. For every prison or gaol in which females only are detained, and for every portion of a prison or gaol appropriated for the detention of females only, there is a matron, who is in the position as the case may be of a superintendent or chief warder [*ibid. Sec. 5 (3)*].

No female may under any circumstances be subjected to corporal punishment at any such prison or gaol, nor may she, while undergoing sentence thereat, be compelled to labour outside its precincts [*ibid. Sec. 46*]. No court may ever impose a sentence of whipping on a female [*Act 31 of 1917 Sec. 354*].

If sentence of death has been passed on a woman, she may at any time apply for a stay of execution

on the ground that she is with child of a quick child. She is in that case examined by one or more medical practitioners appointed by the court, and if any of them reports that her statement is correct, execution must be respited till she is delivered, or until it is no longer possible in the course of nature that she should be delivered [*ibid.* Sec. 340].

CHAPTER TWENTY-SIX

PROTECTION OF INFANT LIFE.

REGISTRATION OF BIRTHS.

Notice of the birth of a child must be given by the father within seven days in urban areas and within thirty days in other areas, to the district registrar of births, or, outside urban areas, to a justice of the peace or police officer. If the father is dead or absent, or unable for any reason to give such notice, it must be given by any person, other than the mother, who was present at the birth, or by the occupier of the dwelling where the child was born, or, failing such occupier, by the person having charge of the child [*Act 17 of 1923 Secs. 18 and 29*].

Illegitimate Children.—The father of an illegitimate child is not required to give notice of its birth. Further, a registrar may not enter in any register or other book the name of any person as father of such child except at the joint request of the mother and of the person who in the presence of the registrar acknowledges himself in writing to be the father. This acknowledgment is em-

bodied in the certificate or register, which is then signed by the father and mother [*ibid.* Sec. 9].

Abandoned Children.—If any living new-born child or the dead body of a new-born child is found abandoned, the person finding it must as soon as possible give notice of the fact to a justice of the peace or to a police officer. Notice or information must be given to the district registrar of births by such justice or officer, and by any person in whose charge the child is placed, and by any person holding an official enquiry into or being aware of any circumstances connected with the abandonment [Sec. 11].

Still-born Children.—In the case of a still-birth, any medical officer or registered midwife who was in attendance, or any medical officer who examined the body of the child, must sign and give, without reward, a certificate that the child was still-born to one of the persons required to give information of the birth. Such person must forthwith deliver the certificate to the registrar of births.

When no medical practitioner or registered midwife was in attendance, or no medical practitioner examined the body, the person required to give notice of the birth must make a solemn declaration that the child was not born alive, and deliver such notice within 24 hours of the birth to the district registrar.

Whenever a person not registered as a midwife assisted at the birth, the information to be furnished must include such person's name and address [*ibid.* Sec. 19].

Outside urban areas, the certificate or declaration must be delivered within thirty days to the person to whom information of a live birth might be given [*ibid. Sec. 31*].

No order authorising burial may be given by a registrar if he is not satisfied that the child was still-born, but he must report such facts as are known to him to the magistrate [*ibid. Sec. 20*].

OFFENCES AGAINST THE LIFE OF INFANTS.

Abandonment and Exposure.—Cruelty towards, abandonment and exposure of children (including infants) are crimes punishable under the Children's Protection Act, even when suffering or injury to the health of the child did not actually result owing to the action of some person, though there was a likelihood of their resulting [*Act 25 of 1913 Sec. 3*].

In addition, it is a crime at common law wilfully to abandon or expose a child in such a manner that it may die of hunger, thirst, heat, cold or neglect [*R. v. Adams 20 S.C. 556*].

Where death results, the crime is murder if there was knowledge that death might ensue, culpable homicide if such knowledge was absent.

Murder, Infanticide and Concealment of Birth.—A person accused of the death of a new-born child is usually charged with the murder of such child. In Natal the accused may be charged with

either murder or infanticide, which is defined as the unlawful killing of a child within one week after its birth, and for which a maximum penalty of 5 years' imprisonment with hard labour is prescribed [*Act 10 of 1910 (N) Sec. 9*].

If there is gross neglect of an infant, which results in death, even though there was no intention to cause death, the crime charged would be culpable homicide.

When any person is charged with the murder or culpable homicide of a newly born child, the child is deemed to have been born alive if it breathed, whether or not it had an independent circulation, and it need not be proved whether at the time of death it was entirely separated from the body of its mother [*Act 31 of 1917 Sec. 306*].

A woman committed for trial on a charge of the murder of her newly born child may be admitted to bail (contrary to the usual rule in trials for murder) [*Act 39 of 1926 Sec. 16*]; and on her conviction the court may in its discretion impose a sentence other than that of death [*Act 31 of 1917 Sec. 338*]. A woman charged with such murder may be found guilty of the crime of concealment of birth, if that accords with the facts proved [*ibid. Sec. 235*].

Any woman delivered of a child, who by secret burying or otherwise disposing of the dead body of the child endeavours to conceal its birth is guilty of the crime of concealment of birth. The Transvaal statute regulating the subject specifies that the

woman must be unmarried or deserted [*Ord. 10 of 1845 (C)*; *Law 4 of 1892 (T)*; *Ord. 10 of 1845 (N)*; *O.F.S. Law Book 1901 Chap. 141*]. On the trial of a person charged with this crime it is not necessary to prove whether the child died before, at, or after the birth [*Act 31 of 1917 Sec. 306*].

PROTECTION OF INFANTS.

The Children's Protection Act, No. 25 of 1913 (to which the sections below refer) makes special provision for the protection of infants, *i.e.*, children under the age of seven years.

Advertisements for Adoption.—No publisher of a newspaper in the Union may insert therein without written permission from the magistrate an advertisement or intimation that anyone desires any infant to be adopted or given into the care of another person, or that anyone is willing to adopt or undertake the care of an infant. The person charged with this offence may be ordered by the court to reveal the name and address of anyone concerned with the advertisement, and may be imprisoned for a period not exceeding one month or until he complies with the order, whichever is the shorter time. The maximum penalty for this offence is £100 fine or 6 months' imprisonment with hard labour [*Sec. 30 as amended by Act 26 of 1921 Sec. 6*].

"Protected Infants."—Anyone keeping an infant to nurse or maintain it apart from its parents for more than three days must within two days of

receiving the infant in municipal areas, and within one week in other areas, transmit to the magistrate or field-cornet of the district a written notice stating the child's Christian name, age and sex; his or her own name; the dwelling where the child is being kept; the name and address of the person from whom the infant was received; and any reward being received by any person for its maintenance. The name and address of both parents must be given in the case of a legitimate child; that of the mother only, if the child is illegitimate [*Sec. 22 (1-2)*].

Notice is not required from any grand-parent, brother, sister, uncle, aunt or guardian of any infant who undertakes the nursing or maintenance of such infant; nor from any institution established for the protection and care of infants and conducted in good faith for charitable purposes; nor from any hospital or convalescent home so conducted [*Sec. 22 (7) as amended by Act 26 of 1921 Sec. 4*].

Any infant kept by a person required to give notice is a "Protected Infant" whether notice has in fact been given or not [*Sec. 22 (8)*].

No insurance may be effected on the life of a protected infant [excepting as under the provisions of the *Friendly Societies Act of 1892 (C) Sec. 23*]. It is a punishable offence to take out such insurance, and the insurance is void [*Sec. 29*].

Notice of Death or Removal of Protected Infants.—If a protected infant dies, the person nursing or maintaining it must immediately notify the

magistrate or field cornet; and in the notice must state specifically whether any other protected infant has at any time previously died while in his or her care or custody [Sec. 22 (4)].

Notice of removal of the infant from the care of a person required to give notice of maintenance must also be transmitted to the magistrate or field-cornet, together with notice of the name, address and residence of the person to whom the infant has been transferred.

Notice of change of address on the part of a person maintaining an infant and required to give notice must be given to both the magistrate of the district left and of the district entered [Sec. 22 (3)].

Supervision of Protected Infants.—It is the duty of a magistrate to enquire from time to time if there are any protected infants in his district, and if so, under what conditions they are kept. He may further authorise the medical examination of any such infant, and may fix the number of infants who may be kept in any dwelling in which such infant is kept [Secs. 23, 25].

He has power to appoint persons of either sex who volunteer for the purpose as Infant Protection Visitors, to assist him with regard to these duties. Such visitors, as well as field-cornets and members of the police force, may from time to time inspect any protected infant and the premises on which it is kept, in order to secure its proper treatment [Sec. 24].

The magistrate may grant a certificate of exemption from visits of inspection to a person who has undertaken the care or control of a protected infant without reward, where the *bona fides*, character and circumstances of such person satisfy him that there is no reasonable prospect of the infant being neglected or ill-treated. The certificate may, if cause arises, be cancelled [Sec. 32].

If the magistrate is satisfied that it is not in the best interests of an infant to remain with the person under whose charge it is, he may order the removal of the infant to some other person or institution willing to undertake the care of it, unless the parents of the child within three days suitably provide for such care. In urgent cases immediate removal of the infant to a place of safety may be ordered. The order may be enforced by an infant protection visitor or by a police officer [Sec. 23 (1) and (3)].

A protected infant may not be kept without the written sanction of the magistrate by any person from whose care any infant has been removed in connection with these provisions, nor by any person convicted of an offence under Chapter One of the Children's Protection Act (which has reference mainly to the prevention of cruelty and neglect of children) [Sec. 26].

Lying-In Homes.—No protected infant and no infant born therein may be removed out of a lying-in home unless in charge of the mother, without the written consent of the magistrate. A register with particulars of births and deaths of infants in

the home and of infants nursed therein and removed therefrom, must be kept and be open to inspection by the magistrate or any person authorised by him, or by an infant protection visitor [*Sec. 27 (1-2)*].

For the purpose of these provisions any maternity home and any premises kept to accommodate women during their confinement in consideration of any remuneration, whether by way of rent or fees for attendance or otherwise, is deemed to be such home [*Sec. 27 as amended by Act 26 of 1921 Sec. 5*].

Penalties for Offences.—An infant may be removed from the custody of any person convicted of an offence against any of the provisions mentioned in this chapter. The maximum penalty prescribed for any such offence is £100 fine and six months' imprisonment with hard labour [*Sec. 31*].

Any person who fails to give within the specified time any notice required of him or who makes or procures to be made any false or misleading statements in any such notice, if he has received any sum of money for the nursing or maintenance of the infant, is, in addition to any other penalty, liable to forfeit that sum or such lesser sum as the court deems just for the benefit of the infant [*Sec. 28*].

CHAPTER TWENTY-SEVEN.

EDUCATION AND EMPLOYMENT OF CHILDREN.

COMPULSORY SCHOOL ATTENDANCE

Provisions exist for free primary education and for the compulsory school attendance of European children throughout the Union.

Grounds for Exemption.—Every child of school going age must attend school unless he is receiving regular and efficient instructions elsewhere or cannot attend owing to constant ill-health or other unavoidable cause, or has no facilities for reaching school.

In the Cape, Transvaal and Orange Free State provinces if the child lives more than three miles by the nearest road from a school, the parent is excused from sending him to a school where no facilities for free transport or boarding exist, but only if he is unable to defray the costs of transport and boarding. If such facilities are partly free and

he can bear part of the expense, he is not excused. The same rules apply in the Orange Free State in the case of a child under nine years of age living more than one mile from a school. [*Ord. 5 of 1921 (C) Sec. 238; Ord. 16 of 1916 (T) Sec. 4; Ord. 9 of 1920 (O.F.S.) Sec. 36; Act 6 of 1910 (N) Sec. 1*].

A parent in any province who neglects to send an unexempted child to school, or who refuses to supply to an attendance officer information lawfully required by him is guilty of an offence.

Period of Compulsory Attendance.—In all the provinces a child over 7 years of age must attend school until attaining a certain age, or alternatively, achieving a certain standard of education and becoming engaged in a regular occupation. The standard prescribed is one four or five years below the matriculation standard.

In the Cape Province the child must attend school until he completes his sixteenth year or passes standard six [*Ord. 5 of 1921 Sec. 238*].

In the Transvaal he must attend school until he completes his fifteenth year or passes the fifth standard [*Act 25 of 1907 (T) Sec. 19, as amended by Ord. 7 of 1912 (T) Sec. 6*]. In any district, however, when the Administrator of the Transvaal so directs, the school going age may be prolonged, or the entrance age lowered, or the standard to be passed raised [*Ord. 16 of 1916 Sec. 5*].

The Administrator may further direct that in any specified area children exempt from attendance at a primary school shall attend continuation classes (usually held in the evenings) until they reach the age of 18 years or complete the course for the seventh standard or a two years' course prescribed for continuation classes, or are otherwise exempted according to the regulations. No child required to attend these classes may be employed, whether for remuneration or not, for more than 6 hours in any day, or for more than 42 hours in any week during which he must attend such classes [*Ord. 16 of 1916 (T) Secs. 6 and 7*].

In the Orange Free State a child must attend school until he completes his sixteenth year or passes the sixth standard [*Ord. 9 of 1920 (O.F.S.) Sec. 36*]. The School Board may, however, exempt from regular school attendance a child who has passed the fourth standard, if he is apprenticed for three years to a trade, and is released for two hours every day to attend day school. The employer need no longer so release him when he has passed the sixth standard in Dutch, English, reading, writing and arithmetic. If the employer breaks his contract, the child is again subject to the usual rules of school attendance [*ibid. Sec. 38*].

The Administrator has similar powers of varying the limits of age or standard of attainment that may be made compulsory to those possessed by the Administrator of the Transvaal.

In centres where provision is made for evening continuation classes the parents of any white youth under 18 years of age must cause him to attend

regularly at a school, even if he has passed the sixth standard, until he obtains regular employment or completes the course prescribed for the leaving certificate of an intermediate school (*i.e.*, a school whose purpose is to instruct pupils in those subjects which will be most useful to them in later life) or some equivalent course. When in regular employment, he must attend evening classes until he completes such course or attains the age of 18 years [*ibid.* Sec. 39].

In Natal a child must attend school until he has passed his fifteenth year or passes standard six [Act 6 of 1910 (N) Sec. 1, as amended by Ord. 9 of 1915 (N)].

It is a punishable offence to employ whether for remuneration or not during class hours any child whose attendance at school or classes is compulsory (unless, in the Cape Province, the School Board gives permission) [Ord. 5 of 1921 Sec. 242].

Industrial Training of Indigent Children in Cape and Natal.—In the Cape and Natal provinces, the parents or guardians of a child who receives free maintenance at a school hostel must permit such child to be detained after the usual school leaving age in order to undergo training in industry.

In the Cape Province a child who was maintained in an indigent boarding home must be indentured in an industrial department for not less than two years, and in any case until he attains the age of 18 years, unless specially exempted. He is entitled meanwhile to free board and lodging in the indi-

gent boarding home, as before. It is an offence to remove a child from, or to assist him to desert from, or to harbour a deserter from such department [Ord. 5 of 1921 Secs. 130, 280 and 289]. Children left destitute through a formidable epidemic disease, with whose maintenance the Administrator is charged under the Public Health Act, may be placed in such department [*ibid.* Sec. 281].

In Natal, the boy or girl who received an indigent boarding grant or was maintained free of charge in a Government School Hostel, is, on leaving school, sent to an agricultural or trades school where he may be maintained and clothed until he completes his eighteenth year or is otherwise lawfully discharged. If the parent shows that he can maintain the child in a school or other place where he will earn or be trained to earn a livelihood, the order placing the child in the trades school may be suspended [Ord. 5 of 1916 (N)]. It is an offence for a child to desert from such school or for the parent to fail to cause him to attend at the school [*ibid.*].

Non-European Children.—Provisions exist for the education of native and other non-European children in all parts of the Union, but an enquiry into these systems is outside the scope of these chapters.

APPRENTICESHIP.

In Designated Trades.—Apprenticeship to certain trades in specified industries is regulated by Act 26 of 1922. These industries include boot-

making, building, clothing, carriage-building, electrical and mechanical engineering, trades connected with food, furniture, leather-working and printing. The trades to which the Act applies are designated by the Minister administering the Act after consultation with an Apprenticeship Committee. These committees are appointed for different areas, and consist of an equal number of representatives of employers and employees, and of an appointed chairman [Sec. 11]. They exercise many important functions.

Any child who has passed the age or standard for compulsory school attendance, or, if no law of attendance applies to him, any child who has attained the age of 15 years, may, with the assistance of his guardian, bind himself as an apprentice, though not usually beyond the age of 26 years. If he has no guardian, a magistrate may assist him, the magistrate of the district being *ex officio* deemed his guardian throughout the period of the contract, or until he attains the age of 21 years. No one may employ a minor for more than six months unless a registered contract is entered into, and signed by the master, the apprentice and his guardian [Secs. 8, 6 and 4].

The Inspector of Apprenticeship may refuse to register a contract which he does not think is for the minor's benefit, but his refusal must be approved of by the Apprenticeship Committee for the area [Sec. 6 (2)].

The payment or acceptance of a premium or bonus in respect of the employment of an appren-

tice is unlawful, without special authority; and summary judgment may be given for its return [Sec. 7].

The Minister, after consultation with the Committee, determines all matters connected with apprenticeship, e.g., wages (which may not be based on output of work done), qualifications of candidates, period of service, number of apprentices, educational classes to be attended by apprentices, and course of training in the trade [Sec. 13].

Provisions are made for the cancellation or transfer of a contract of apprenticeship, and for enquiry into disputes in any matter affecting apprenticeship.

Anyone bringing pressure to bear on an apprentice to break the conditions of his contract is liable to a penalty [Act 15 of 1924 Sec. 2].

Otherwise than in Designated Trades.—The apprenticeship of delinquents is governed by special rules and so is apprenticeship under the Children's Protection Act and so is that in the Government Air Service.

Other apprentices, in all the provinces save the Orange Free State, come under the provisions of the Masters and Servants Statutes.

Subject to the laws of compulsory education, a minor below the age of 16 years and over the age of 10 years may be apprenticed by his natural or legal guardian until the age of 21 years or for some

lesser period. No child may, however, be apprenticed as an agricultural or domestic servant beyond the age of 16 years in the case of a female, or 18 years in the case of a male.

Any child over 16 years of age may with his or her own consent be apprenticed for not more than five years to any trade in the practice of which any peculiar art or skill is required. This includes domestic service in the case of females. The contract must be signed by the master, the parent or guardian, and the apprentice himself, if over the age of 16 years.

The magistrate of the district is *ex officio* guardian of and may indenture such minors as have no other guardian within the province [*Act 15 of 1856 (C) Chap. 3; Law 13 of 1880 (T) Chap. 3; Ord. 2 of 1850 (N) Chap. 2*].

EMPLOYMENT OF CHILDREN.

Wages and Conditions of Employment.—Matters affecting the employment, training, welfare and supervision of juveniles under 18 years of age who were subject to the laws relating to compulsory education are dealt with by Juvenile Affairs Boards, which consist of equal numbers as nearly as possible of representatives of employers and employees in the area, and of persons specially skilled in educational matters and in social conditions [*Act 33 of 1921 Sec. 1*]. There are women members of such boards.

The principal of every school within the area of a board must every term supply to the board information as to the pupils who are permitted and about to leave school or who have failed to return to school [*ibid.* *Sec. 3*].

Any person who takes a juvenile into his employment, whether for remuneration or not, must notify the board of this fact, and if required, must inform the board of the nature of the juvenile's occupation, of his educational attainments, and of any continuing educational course he is pursuing. When the juvenile ceases to be in his employment he must notify the board of that fact too [*ibid.* *Sec. 4*].

Provisions exist for the co-ordination of the work of the different boards, and for the expansion of the system as a whole. In view of the fact that accredited educationists and sociologists have a secured place on such boards, they may prove to be one of the most powerful forces in shaping the economic destiny of South Africa.

The wages and conditions of labour of juveniles, as of other employees, are determined in accordance with the provisions of the Wage Act No. 27 of 1925. For the purposes of that Act, a juvenile is any person over the age of 14 and under the age of 21 years [*Sec. 18*].

The Minister of Labour, on the recommendation or report of the Wage Board established to investigate labour conditions, determines for any particular trade the scales of pay for male and

female juvenile employees, according either to age or length of experience; the maximum number of juveniles to be employed in proportion to adults; the conditions applicable to the employment of juveniles as learners in any trade in which special learning is necessary, and their wages; the trades and sections of trades in which it is unlawful either generally or in a particular area to employ anyone under the age of 14 years [Sec. 7].

Apprentices in designated trades, persons in the public services, and agricultural and domestic employees do not come within the Act [Sec. 1]; nor is work done in an educational institution as part of the worker's education, or work done by an apprentice in terms of his apprenticeship under any law, deemed to be employment within the meaning of the Act [Sec. 18 (2)].

Contracts of Service.—The nature and consequences of contracts of service are considered earlier, in Chapter Twenty three. Where the employment is one that falls under the Masters and Servants statutes, the father, or if he is absent or dead, the mother, of any child under 16 years of age may contract for such child's services together with his or her own. (These provisions in the Orange Free State apply only to coloured servants). The master cannot claim the child's services beyond the period for which he was engaged, however, nor after he attains the age of 16 years [Act 15 of 1856 (C) Chap. 2; Law 13 of 1880 (T) Chap. 2; Ord. 2 of 1850 (N) Chap. 2; Ord. 7 of 1904 (O.F.S.) Part 3].

Servants or apprentices under 16 years of age cannot be convicted of offences under these statutes, but those over that age may be; for a minor over 16 years of age may himself enter into a contract of service [*ibid.*]. Such contract binds both himself and the master, and the minor will readily be presumed to be emancipated, so as to be able to sue on the contract without assistance [*Dama v. Bera 1910 T.P.D. 930*]. In the Orange Free State the minority of a servant does not bar him from prosecuting any claim against his master without the intervention of a guardian [*Ord. 7 of 1904 Sec. 29*].

Any contract entered into by a minor, even without the assistance of his guardian, is binding on him if it is for his benefit. It is for the benefit of any person to earn or be trained to earn his own livelihood, and accordingly a contract of service entered into by a minor over the age of 16 years, without assistance, whose terms were in no way prejudicial to him, was held to be valid, and the minor was held to be liable to the penalties imposed by statute for breach of the contract [*R. v. Koning 17 S.C. 541*]. (For a contrary opinion, that to render a minor criminally liable on a contract of service the contract must have been entered into with the consent of his guardian see *Groene-wald v. R. 1907 T.S. 47*).

The rule that the criminal liability of a minor on a contract of service depends on whether the terms of the contract are beneficial or prejudicial to him has been applied even where the contract was entered into with the assistance of the minor's guardian [*Nchaka v. R. 1905 O.R.C. 58*].

Employment to Sell Intoxicating Liquor.—In the Cape Province no holder of a retail licence for the sale of intoxicating liquor may knowingly permit any child under 15 years of age to sell, handle, deal in, deliver or supply any such liquor. In the Transvaal no holder of any licence to sell intoxicating liquor may employ a person under the age of 16 years to sell or in any way dispose of such liquor. In the Orange Free State there is a provision similar to the Transvaal one, but the age limit is raised to 18 years [*Act 28 of 1898 (C) Sec. 14; Ord. 32 of 1902 (T) Sec. 50; Ord. 8 of 1903 (O.F.S.) Sec. 45 as amended by Ord. 10 of 1905 (O.F.S.) Sec. 9*].

Further, no person licensed to sell intoxicating liquor may permit any child under 16 years of age to be in the bar of his licensed premises save when the bar is closed, except his own child or a child resident but not employed on the premises, or a child who is merely passing through the bar. These rules do not apply to railway refreshment rooms or premises made for any purpose to which the holding of a licence is merely auxiliary [*Act 25 of 1913 Secs. 49 and 50*].

Employment on Mines.—No female of any age and no boy under the age of 16 years may be employed underground in any mine [*Act 12 of 1911 Sec. 8*].

No one apparently under the age of 16 years may work in or upon any mine for more than eight hours in one day, or for more than 48 hours during any consecutive seven days, except to perform

necessary repairs that cannot be delayed without causing damage or danger to life, health or property [*ibid.*].

Appearance at Entertainments.—No child under 14 years of age, unless special permission is granted, may take part in any entertainment in premises licensed for public entertainment or in any circus, theatre, or public place of amusement.

The magistrate of the district on application being made, may grant such permission by a licence authorising the child to appear during such hours and subject to such restrictions and conditions as he thinks fit. It must be shown to him that the child is physically fit, that there is no risk to life or limb, and that proper provision has been made by the applicant for securing the health, education and kind treatment of all the children taking part. The magistrate may vary, add to or rescind the licence [*Act 25 of 1913 Sec. 52, as amended by Act 26 of 1921 Sec. 15*].

These provisions do not apply to any entertainment for church, school or charitable purposes, or where no remuneration is given to the children taking part or to their parents, guardians or relatives [*ibid.*].

In the Transvaal it is an offence in any place of public resort to permit any child under 16 years of age to take part in any dangerous act or performance [*Act 38 of 1909 (T) Sec. 3*].

Employment in Factories.—The employment of children in factories is regulated by the Factory

Act, No. 28 of 1918, to which the sections below refer (As to what constitutes a factory see above, Chap. 23).

In no case may a child under 12 years of age be employed in a factory, nor may a child under 14 years of age be so employed unless special written authority is given by an inspector of factories. This authority may not be given if an offence would thereby be committed against any law relating to public elementary education, and an annual return to parliament is made of children thus employed, and of their race and age and of the locality and nature of their employment [*Sec. 20*].

No child under 16 years of age may be employed in a factory for more than 14 days unless the occupier thereof, *i.e.*, the person having the general management and control of its business, obtains from a medical officer a certificate of such child's physical fitness for the particular employment. This certificate is surrendered to the inspector on the child ceasing to be employed by the holder thereof [*Sec. 21*].

No child under the age of 16 years may be employed—

- (1) as a typesetter in any printing works or in any room where bronzing is being carried on, or where type or type-metal is being cast or melted;
- (2) in any room wherein is carried on continuous dry grinding in the metal

trade or the dipping of matches in the manufacture of which white or yellow phosphorus is used;

- (3) in any factory in the actual making or finishing of bricks or tiles (save ornamental ones) or in the making or finishing of salt;
- (4) in any room wherein is carried on the process of melting or annealing glass [Sec. 20].

No boy under 18 years of age and no female of any age may be employed in any room wherein is carried on the silvering of mirrors by the mercurial process, or the making of white lead, or the grinding of paints or articles containing white lead [Sec. 20].

No female or boy under 16 years of age may take a meal in a room whilst any handicraft or manufacturing process is being carried on therein, or do any factory work during his or her meal interval [Sec. 19].

No boy under 16 years of age may be employed in a factory between 6 p.m. and 6 a.m. and no female of any age may be there employed between 6 p.m. and 7 a.m. In special cases these hours may be varied, but in no case may such boy or female be employed between 9 p.m. and 5 a.m. [Sec. 15].

The maximum number of hours, excluding meal times, for which a child under 16 years of age may be employed in a factory are 45 hours in one week;

eight hours in one day; five hours continuously on half-holidays and $4\frac{1}{2}$ hours continuously on week-days. Such child may not be employed after 1 p.m. on the weekly half-holiday [*Sec. 14*]. For specified classes of work exemption from some of these provisions may be granted in certain cases by the Inspector, in certain cases by the Minister. All work done elsewhere by an employee on behalf of the occupier of a factory, whether or not it is connected with the factory business, is deemed to have been done while employed in the factory for the purposes of these rules as to hours [*Sec. 16*]. The same rules as to working overtime apply to persons under 16 years of age as apply to females, save that no such child may normally work overtime on more than 20 days in one year [*Sec. 17*].

Whenever in the Act any rule is laid down or any duty is imposed in respect of a factory, and the occupier fails to cause it to be complied with or observed, he is guilty of a punishable offence [*Sec. 32*]. In addition, whenever the employment of a child under 16 years of age constitutes an offence against the Act, the parent is also guilty and is liable to a fine of £5 and a further fine of £1 for every day the offence continues unless he satisfies the court that it was committed without his authority, connivance or knowledge [*Sec. 34*].

In this connection "parent" means father, or if there is no father, the mother, or if both parents are dead or absent, the person having actual custody or control of the child [*Sec. 34*].

CHAPTER TWENTY-EIGHT.

OFFENCES AGAINST AND CONCERNING CHILDREN.

Offences connected with the unlawful employment of children (save as beggars) are dealt with in the preceding chapter, those connected with the sexual demoralisation of children and those against girls in Chapter Twenty-four and those connected specifically with infants in Chapter Twenty-six. It is here proposed to deal with other types of offences against children.

CHILDSTEALING.

The crime of childstealing is committed by any person who wrongfully leads or takes or entices away a child in order to deprive it of its liberty or in order to remove it from the lawful possession of any person, or who detains or harbours a child so taken or enticed away [*R. v. Buchenroeder* 13 S.C. 173].

CRUELTY TO AND NEGLECT OF CHILDREN.

It is the usual practice for crimes of cruelty to and neglect of children to be charged as offences

of cruelty under the Children's Protection Act No. 25 of 1913, although in certain circumstances they constitute offences at common law; and the description and sections given below refer to that Act. A child by that Act is any person below the age of 16 years [Sec. 2].

An Offence of Cruelty.—Any person having the custody, charge or care of a child who wilfully assaults, ill-treats, neglects, abandons or exposes such child in a manner likely to cause unnecessary suffering or injury to health (*i.e.*, to senses or limbs, and including mental derangement), or any person who causes or procures such treatment of a child, is guilty of an offence of cruelty, even if the suffering or injury or likelihood of suffering or injury is obviated by the action of another person. The maximum penalty prescribed for such offence is 12 months' imprisonment with hard labour and £100 fine [Sec. 3 (1), (2) and (8)].

Neglect, for the purpose of these provisions, consists of failure to provide the child with adequate food, clothing, lodging and medical aid [Sec. 3 (1)]. It is the aid of a qualified medical practitioner that is thus required, not merely the intercession by prayer of faith missionaries [*R. v. Botha* 1918 T.P.D. 133].

No person is guilty of an offence against these provisions who fails to provide adequate food, clothing, lodging or medical aid for a child, if it is proved that the failure is due to lack of means, and the lack of means is not due to idleness or misconduct [Sec. 3 (1)].

Incidence of Responsibility.—Responsibility for cruelty or neglect attaches to any person having the custody, charge or care of the child.

Any person is presumed to have custody of a child who is the parent or legal guardian of, or who is legally liable to maintain the child [*Sec. 21 (2)*]. It is specially provided that as between father and mother, the father is not deemed to have ceased to have custody of the child by reason only that he has deserted or otherwise does not reside with the mother [*ibid.*; *R. v. Hendricks* 1915 *C.P.D.* 821]. Where, however, the mother had deserted the father, who was a cripple and unable to support the child, it was held that “father” did not include “mother,” and that as she did not in fact have custody of the child she could not be convicted under these provisions [*R. v. Engelbrecht* 1926 *C.P.D.* 344].

The father of an illegitimate child is legally liable to support such child and comes within the intention of these provisions, and may thus be convicted of an offence against them [*see Adams v. Abrahams* 1918 *C.P.D.* 24; and *R. v. Davies* 1909 *E.D.L.* 149]. The question of paternity may be determined in criminal proceedings under these provisions [*see R. v. Van der Westhuysen* 1924 *T.P.D.* 370; *Pather v. R.* 1924 *N.P.D.* 280].

Any person to whose charge a child is committed by anyone having the custody of the child is presumed to have charge of the child, and any other person having actual possession or control of a child is presumed to have care of the child [*Sec. 21 (2)*].

When Child Insured.—When a person convicted of an offence of cruelty was directly or indirectly interested in any sum of money accruing or payable on the death of the child, and had knowledge of that fact, the fine imposed on him may be increased to £200, or, in lieu of any other penalty, he may be sentenced to five years' imprisonment with hard labour [Sec. 3 (5)].

A person is deemed to be so interested in a sum of money if he has any share in or any benefit from that money, although he is not a person to whom it is legally payable. A copy of an insurance policy certified by an agent or officer of the company granting it is *prima facie* evidence that the child therein stated to be insured was so insured, and that the person in whose favour the policy was granted was the person to whom the money insured was legally payable [Sec. 3 (6-7)].

When Death of Child Ensues.—Where cruelty towards or neglect of a child results in death, the crime is murder if there was knowledge that death might ensue, and a reckless disregard as to whether it would do so or not, and culpable homicide in other circumstances, where there was no intention to cause death. It is nevertheless permissible, in suitable cases, notwithstanding the death of the child, to charge an offence of cruelty under the Children's Protection Act [Sec. 3 (3)]. On a charge of culpable homicide when the circumstances warrant it, an accused person may be found guilty of an offence of cruelty, instead of the offence charged or the common law of crime of assault [Sec. 3 (4)].

The right of a parent, teacher or other person having lawful control or charge of a child to administer punishment to such child is specially reserved by the Act [*Sec. 19*]. Where, however, corporal punishment is excessive, a charge of cruelty or assault may be brought; and where death ensues the crime is charged as culpable homicide [*R. v. Janke 1913 T.P.D. 382*].

PERMITTING BEGGING AND STREET-TRADING BY CHILDREN.

Any person having the custody, charge or care of a child under 16 years of age, who allows such child to be in any street, premises or place in order to beg or induce alms, whether or not there is any pretence of singing, playing, performing, offering anything for sale or otherwise, and any person who causes or procures the child to act thus, commits an offence and is liable to a maximum penalty of £25 fine and three months' imprisonment with hard labour.

If the child thus begging was allowed to be in the place aforesaid by the person in whose custody, charge or care he was, the presumption is that he was allowed to be there for such purpose, unless the contrary is proved. The incidence of responsibility is here the same as in an offence of cruelty [*Act 25 of 1913 Sec. 4*].

In the Transvaal an offence is committed by anyone who gives way to the use of intoxicants or drugs, or to gambling and idleness, so that he or those dependent on him become destitute or obtain

or have to seek relief from others, or who begs or neglects to restrain his children from begging, vagrancy, truancy, theft, or contravention of the Liquor Law [*Act 38 of 1909 (T) Sec. 4*].

Local authorities with powers to make bye-laws may make bye-laws prohibiting or regulating and restricting street-trading by children, and prohibiting any person having custody, charge or care of a child from procuring, causing, or allowing that child to engage in street-trading, and they may impose for breach of such bye-law a maximum penalty of £10, or, in default of payment, imprisonment for one month, with or without hard labour [*Act 25 of 1913 Sec. 5*].

SUPPLYING INTOXICANTS AND TOBACCO TO CHILDREN.

It is an offence for any person licensed to sell intoxicating liquor to sell or knowingly permit such liquor to be delivered or supplied to any child under the age of 16 years, or to permit any such child to drink intoxicating liquor upon his licensed premises, or to be in the bar of such premises except during the hours for which the bar is closed. If a child is found in such bar at any other time, the licence holder is deemed to have committed an offence, unless he shows that he has used due diligence to exclude the child, or that the child was apparently over the age of 16 years.

These rules do not apply to a child of the licence-holder, nor to a child resident but not employed on the licensed premises; nor to a child who

is merely passing through the bar when there is no other convenient means of access to or egress from some other part of the premises; nor do they apply to railway refreshment rooms or to other premises constructed, fitted or intended to be used for any purpose to which the holding of a licence is merely auxiliary [*Act 25 of 1913 Secs. 48-50*].

These provisions repeal the previous Cape and Transvaal enactments and more fully cover the ground of the Natal provision on the subject [*for which see Act 38 of 1896 (N) Sec. 77 (6)*].

In the Orange Free State there is a general prohibition against supplying children under the age of 17 years with intoxicating liquor, and the offence is not confined to licence-holders. Such liquor may, however, be drunk by or delivered to any person below the age of 17 years with the consent of and in the presence of his parent, guardian or other person of full age under whose care he is at the time [*Ord. 8 of 1903 (O.F.S.) Sec. 47*].

No person may sell, lend, give, supply or deliver to a child under 16 years of age any tobacco, cigars, cigarettes or cigarette papers, or offer to do so, except on production of a written order signed by the parent, guardian or employer of the child, who is known to the seller; and no other person than a parent, guardian or employer may give such written order [*Act 25 of 1913 Sec. 45, as amended by Act 26 of 1921 Sec. 14*].

On complaint of any person to a magistrate's court, if it is proved that an automatic cigarette

machine is being extensively used by children, the owner of the machine or the person on whose premises it is kept may be ordered to take specified precautions against its being so used, or to remove the machine. (An appeal may be lodged against such order). Failure to comply with the order entails a maximum penalty of £5 fine and a further fine of £1 for every day the default continues [*Act 25 of 1913 Sec. 47*].

Policemen in uniform who find any child smoking in a street or public place, and teachers who find a pupil of the school in possession of any appurtenances of smoking or using tobacco in any form within the precincts of the school, may seize such articles, which must be handed over by the police or school authorities to the parent of the child [*ibid. Sec. 46*].

BETTING WITH AND ADMISSION TO RACES OF CHILDREN.

Provisions exist in all the provinces for the suppression of gaming, wagering and lotteries, and for the regulation of horseracing and of the betting on such races.

In the Cape Province it is an offence to bet at any time or place with anyone apparently under 21 years of age, or to invite or induce such person to bet on the result of any event [*Ord. 8 of 1914 (C) Sec. 7 (d)*].

In the Transvaal any person over the age of 21 years who bets at any time or place with anyone

under that age is guilty of an offence; and he is deemed to have known the latter to be an infant unless he proves that he had reasonable grounds for believing him to be of full age [*Ord. 9 of 1927 (T) Sec. 11 (1) (c)*].

In the Transvaal it is a condition attached to a licence to hold race-meetings that no one under the age of 21 years other than a jockey may be admitted to a racecourse on a race day [*Ord. 9 of 1927 Sec. 3 (b)*]. This provision does not apply, however, in the case of racecourses situated outside a radius of 25 miles from the General Post Office, Johannesburg, and outside the municipality of Pretoria [*ibid.*].

In Natal, no one under 18 years of age, not being a jockey taking part in a race, may be admitted to a racecourse on a race day unless accompanied by his parent or guardian [*Ord. 17 of 1922 Sec. 9*].

In the same province, persons over 18 years of age may bet on races at a racecourse on a race day [*ibid. Sec. 11*]; and male persons over that age may bet at a licensed club room [*ibid. Sec. 21*]. No person under 18 years of age, however, may bet on any race, and no person may enter into such a bet with anyone under that age [*ibid. Sec. 10 (2)*].

In the Cape Province, any person in charge of a totalisator (or his assistant) who accepts money from or who issues a ticket or pays any money or dividend to anyone apparently under 21 years of age, commits an offence [*Ord. 8 of 1914 (C) Sec. 8 (3)*].

In the Transvaal anyone who makes a bet with or sells or delivers any ticket, card or thing mentioned in the Racing and Betting Ordinance of 1927, or receives such ticket, card or thing for anyone apparently an infant, is guilty of an offence. He is deemed to have known the other to be an infant unless on reasonable grounds he believed that other to be of full age [*Ord. 9 of 1927 (T) Sec. 18*]. No person save male white persons over 21 years of age may bet at a licensed club room [*ibid. Sec. 20*].

OFFENCES AGAINST HEALTH AND SAFETY MEASURES.

The medical inspection of school children, school premises and of teachers (if there is reason to believe that their employment may be a source of danger to the scholars) is provided for in all the provinces, and provisions also exist in many centres for the attendance of school children by school nurses, and there are school clinics in many of the larger towns.

Neglect of Cleanliness.—A local authority (which includes for these purposes a school board) may direct a medical practitioner to examine the person and clothing of any child under 16 years of age, and if he reports that either of these is infested with vermin or is in a foul condition or is the subject of contagious disease, notice may be given by the authority to the person liable to maintain the child to cleanse the person and clothing of such child within a specified time.

If the notice is not complied with the medical practitioner may cause the person and clothing of the child to be properly cleansed on suitable premises, and may if necessary convey the child to such premises without special warrant and there detain him till the cleansing is effected, or may direct suitable medical treatment to be carried into effect.

After such cleansing, on a second offence, or if the medical treatment ordered is not carried out, the person in charge of the child is liable to £5 fine or fourteen days' imprisonment.

The medical officer may demand admittance at any reasonable hour to the premises whereon he believes the child to be, and any person who refuses him admittance or makes unreasonable delay in granting it, or obstructs him in examining the person and clothing of the child, is guilty of an offence [*Act 25 of 1913 Sec. 16 as amended by Act 26 of 1921 Sec. 1*].

Offences Relating to Contagious Diseases.—The Public Health Act No. 36 of 1919 (to which the sections below refer) makes provisions for the notification of infectious diseases by medical practitioners and by persons residing on the same premises as the patient. It also provides for the restriction of the school attendance of, and for the duties of parents in respect of children suffering from or exposed to the infection of an infectious disease [*Secs. 19, 20, 22 and 36*]. Any person not complying with these regulations is guilty of an offence. For the purposes of this Act "parent"

means and includes the father and mother of a child, whether legitimate or not. A child is any person under 16 years of age [*Sec. 159*].

The parent or guardian of every child in the Union must cause him to be successfully vaccinated by a medical practitioner unless he is unsusceptible or unfit or has already had smallpox; and must transmit a certificate stating what has been done to the Registrar of Vaccination within 13 months of the birth of the child [*Sec. 92*]. These provisions may be extended by proclamation in any area, and for the races or classes of person specified, so as to provide for the re-vaccination of children of twelve years of age. A child who has been successfully vaccinated within five years before attaining the age of 12 years is, however, exempt [*Sec. 95*]. No unvaccinated child may attend any school [*Sec. 103*].

Every unvaccinated adult, or the parent or guardian of an unvaccinated child entering the Union, must cause himself or such child to be vaccinated within 12 months of entering the Union [*Sec. 96*].

Every parent or guardian of a child who knows or has reason to believe that the child is suffering from a venereal disease, must cause him to be treated by a medical practitioner till cured or free from the disease in a communicable form [*Sec. 56*]. Any female over the age of 12 years may, on request, be examined by a woman medical practitioner if there is one reasonably available [*Sec. 62*]. Any person suffering from such disease who

accepts employment in any capacity entailing the care of children is guilty of an offence, and so is the employer unless ignorant of the facts [Sec. 57]. All proceedings in connection with this subject are held *in camera* [Sec. 64].

Overcrowding at Entertainments.—Every person in occupation of premises licensed for public entertainments, or used as a circus or theatre, if an entertainment is to be given for children, or where the majority of persons attending are likely to be children, must keep stationed wherever necessary a sufficient number of adult attendants to prevent more children or other persons being admitted to any part of the premises than that part can accommodate, and to control the movements of persons entering and leaving the premises, and to take all other reasonable precautions for the safety of the children. A police officer may enter and make an inspection either at or before the entertainment. Breach of these rules constitutes an offence, and in the case of a second or subsequent conviction in addition to an increased fine or period of imprisonment being imposed the authority which granted the licence may revoke such licence [Act 25 of 1913 Sec. 51].

CHAPTER TWENTY-NINE.

PROTECTION AND CARE OF DESTITUTE AND ILL-USED CHILDREN.

The measure which is of most importance in connection with and which chiefly regulates the subject of the protection and care of destitute, neglected and ill-used children is the Children's Protection Act, No. 25 of 1913. When reference is made in this chapter to "the Act" it is this Act that is intended, and the sections quoted also refer thereto. Several amendments to the Act are included in Act 26 of 1921.

The former laws of the Cape and Transvaal provinces relating to the apprenticeship of destitute children have been repealed by the Act. In the Orange Free State, although there is a law [*Law 3 of 1899*] which makes provision in general terms for the care of destitute white children, in practice it is the Children's Protection Act that is applied; so that throughout the Union there prevails a uniform system relating to child protection; the Act being indeed a "*Children's Charter*."

The Public Health Act imposes on the Administrator of every province where no special provision

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exists by Ordinance for the maintenance of destitute children, responsibility for the maintenance up to the age of 16 years of every child whose parents, parent or guardian has while resident in the province, died of a formidable epidemic disease and left him destitute. He may place or apprentice any such child with persons and institutions fixed by regulations [*Act 36 of 1919 Sec. 49*]. (In the Cape Province such children may be placed in Indigent Boarding Departments established in connection with any school [*Ord. 5 of 1921 (C) Sec. 281*]). There has been a tendency, however, for the Union Education Department to assume charge of all destitute children, and that Department, indeed, may to-day be regarded as the guardian of all the destitute and neglected children in the Union.

The Minister of Education was assigned the administration of the Children's Protection Act in 1917 [*G. N. 1112 of 1917*]; and when reference is made in this chapter to the Minister, it is that Minister that is intended.

A child for the purposes of the Act means any person under 16 years of age.

PROTECTION OF CHILDREN OFFENDED AGAINST.

Refuges for and Temporary Detention of Children.—Places of safety have been established under the Act wherein children against whom offences were committed may be temporarily detained, and wherein any child may seek refuge [*Sec. 10*].

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A policeman or any person authorised by a magistrate or justice of the peace may take to such place any child in respect of whom there has been committed (or there is reason to believe has been committed) any of the following offences: abduction, child-stealing, assault, any sexual offence, any offence involving bodily injury, an offence of cruelty or neglect, allowing the child to beg to engage in unlawful street trading, allowing the child to be in a brothel, or causing or encouraging the commission by or against the child of immoral acts [*Sec. 10 (1)*].

Any child thus taken to a place of safety, or who has sought refuge therein, may be detained there till brought before the magistrate's court, *i.e.*, the juvenile court, wherever one exists.

If it appears to the court that any such offence has been committed, and if it is in the interests of the child, it may without prejudice to its powers of making other orders, make such order as circumstances require for the care and detention of the child until a reasonable time has elapsed for a charge to be laid against the offender. If a charge is laid within such time, the order may be prolonged until the date of trial, and, on conviction of the offender, the order may be further extended for a period not exceeding twenty-one days, notwithstanding that any person claims the custody of the child [*Sec. 10 (3)*].

Instead of making such order, the court may cause the child to be dealt with as circumstances may admit and require until the conviction or acquittal of the accused [*Sec. 10 (2)*].

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Arrest of and Search for Offenders.—A policeman may take into custody, without warrant, any person whose name and address he does not know and cannot ascertain, who commits within his view any of the above-mentioned offences. He may also arrest without warrant any person who has committed, or whom he has reason to believe has committed any of the first six above-mentioned offences, if he reasonably believes that the offender will abscond, or if he cannot ascertain the offender's name and address [*Sec. 9 (1)*]. The person arrested may be released on bail unless the inspector of police or policeman in charge of the station to which he is brought is of opinion that such release would tend to defeat the ends of justice or cause injury or danger to the child in question [*Sec. 9 (2)*].

If information is laid with a magistrate which causes him to believe that an offence of cruelty or neglect or any other of the above-mentioned offences has been or is being committed in respect of a child within his jurisdiction, he may issue a warrant authorising any policeman to remove such child to a place of safety, or authorising a police officer to enter on premises and search for such child, and, if an offence has been or is being committed, to remove the child to a place of safety [*Sec. 14 (1)*]. By the same warrant he may authorise the person accused to be apprehended and brought before a magistrate's court, and proceedings to be taken against him according to law [*Sec. 14 (2)*].

Any institution for the reception of poor children may be visited and inspected from time to time by persons specially appointed for the purpose. It is an offence to obstruct any such person in the execution of his duties, and if admission is refused him, that is deemed reasonable cause for suspecting that an offence is being committed in respect of a child in the institution; and a warrant to search the premises, as above described, may be issued [Sec. 17].

Committal of Child to Care of Relative or Fit Person.—Where any person having the custody, charge or care of a child has been convicted of any of the above-mentioned offences against a child, or has been committed for trial for such offence, or has been bound over to keep the peace towards the child by any court, the court may order the child to be taken out of the custody of such person and committed to the care of a relative of the child or of some other fit person who is willing to undertake such care, if satisfied on enquiry that it is expedient so to deal with the child [Sec. 11 (1)]. One of the most important functions of a probation officer or of a society working for the welfare of children is to undertake the investigation of such cases, and to advise the magistrate as to the expediency of an order, in view of the particular circumstances of any given case.

“Fit person” includes any society or body corporate established for the reception or protection of children, or the prevention of cruelty to children [Sec. 21]. A local authority may during any year contribute to any such society within the area of its

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jurisdiction, a sum not exceeding one-half of the amount expended on its work during the year by the society [*Sec. 20*].

An order committing the child to the care of a relative or fit person may be made at the time when the offender is convicted, committed for trial, or bound over, without requiring any new proceedings to be instituted for the purpose, or at any other time, and may be made by any magistrate's court before which any person may bring the case [*Sec. 11 (1)*].

No such order may, however, be made where the child has a parent or guardian willing and able to take care of him, unless such guardian is the offender or party or privy to the offence [*Sec. 11 (2)*].

Instead of making an order as above, the magistrate may in the cases wherein he is authorised to do so, commit the child to any industrial school or certified institution to which such child may be committed under the Act [*Sec. 11 (7)*]. (For such cases see below, "Children Liable to Detention in Industrial Schools").

Here again the investigations of a probation officer of a child welfare society are of the greatest assistance to the magistrate in deciding upon the most suitable order to make.

Rights and Duties of Person Given Care of Child.—Every order committing a child to the care of a relative or other fit person must be made in

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writing, and the consent of any person to undertake the care of the child must be proved in a manner the court thinks sufficient to bind him. The order may be made in the absence of the child [*Sec. 11 (3)*].

In determining on the person (or institution) to whom a child shall be committed the court must, if possible, select a person of the same religious persuasion as the child, or else a person who gives a sufficient undertaking that the child will be brought up in its own religion, which must be specified in the order. In the latter case, any court having jurisdiction may, on the application of any person in that behalf, order the child to be transferred to a fit person of the same religion as the child, who is willing to undertake the care of the child [*Sec. 13*].

The person to whose care a child has been committed has the same control over the child as if he were a parent, and is responsible for the maintenance of the child. The child must continue in his care although claimed by his parent or any other person [*Sec. 12*].

It is an offence knowingly to assist a child to escape from the care of the person to whom he was committed, or in any way to induce him to escape; or knowingly to harbour, conceal, or prevent from returning to such person any child who has escaped, or to assist in so doing [*ibid.*].

Rules may be made under the Act as to the duties of persons to whose care children are committed,

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and as to other matters affecting the children concerned, and a child may, in the discretion of the Minister be discharged from such care either absolutely or on approved conditions [*Sec. 11 (5)*].

No person to whose care a child is committed may take or send the child outside the Union, or allow it to be thus taken or sent, without the written consent of the Minister [*Sec. 11 (6)*].

Duration of Committal Order.—The order committing the child to the care of any person may be made to endure until the child attains the age of 18 years or for any lesser period. A court having jurisdiction may, however, on its own motion or on the application of any person, from time to time renew, vary, or revoke such order [*Sec. 11 (1)*].

Where an order has been made in respect of a person committed for trial, then if such person is subsequently acquitted, or if the charge is dismissed for want of prosecution, the order is void save as to what has meanwhile been lawfully done under it [*Sec. 11 (4)*].

A child may, in the discretion of the Minister, be discharged at any time from the care of the person to whom he was committed, either absolutely or conditionally [*Sec. 11 (5)*].

Parents' Contribution to Support of Child.—The parent or other person liable to maintain the child may be ordered to contribute towards his maintenance during the period for which he is com-

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mitted to the care of any person [*Sec. 12 (2)*]. The order may be made by any court before which the parent or other person is charged with the offence, and without regard to the place in which the person to whom payment is ordered may reside [*Sec. 12 (5)*]. No such order may, however, be made against a person committed for trial before the date of such trial [*Sec. 12 (3)*].

The contribution thus ordered is of like nature and enforceable in the same manner as a contribution ordered by a magistrate when committing a child to an industrial school or certified institution [*Sec. 12 (2)*].

A magistrate when committing a child to an institution (or making any of the alternative orders he may make in respect of a child liable to be committed to an institution) may order the parent, step-parent or guardian of the child to contribute towards its maintenance during the currency of the order, such sum as on enquiry into the circumstances appears reasonable. The payments may be ordered to be made immediately, or by weekly or monthly instalments to the person named in the order. Any such order for payments if not made at the time of the order of committal, may be made at any time during the currency of the committal order or within 12 months of its expiration [*Sec. 35 as amended by Act 26 of 1921 Sec. 9*]. Any court having jurisdiction may at any time set aside, vary, or revive such order after it has been set aside [*ibid.*].

The court may further order that part of any attachable income payable to the person against

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whom the order is made, be attached and paid to the person named by the court. The person by whom the income is payable must first be given an opportunity of being heard; but if an order is made, it is an authority for such person to make the payment ordered, and a receipt signed by the person ordered to be paid is a good discharge to him [*ibid.* and *Sec. 12 (4)*].

Either of the above orders has the effect of an ordinary judgment of the court. It is an offence for any person to fail or neglect to pay any contribution ordered; but inability to make the contribution is a good defence to a charge of such offence [*Sec. 35, supra*].

Any person who fails to notify the court which made an order for contribution against him of any change of his address during the currency of the order is guilty of an offence [*ibid.*].

CHILDREN LIABLE TO DETENTION IN INDUSTRIAL SCHOOLS.

Children liable to be detained in an industrial school need not necessarily be so detained, but may be dealt with in one of the ways described below under "Alternative Orders as to Care of Children."

Any child who comes within any of the categories below enumerated may be sent to an industrial school or certified institution by order of a judge or of a magistrate's court sitting *in camera*

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(save where the order is a result of a trial held in public) at the instance of any person, or of any society working for the reclamation of children, or, in the case of a child who habitually deserts from or refuses to attend school, of a school-board. The child, before he is brought before the court, may be taken by a policeman to a place of safety [Sec. 34].

The children who may be dealt with thus are: (1) destitute children and children without guardians; (2) beggars and street-traders; (3) children under the charge of unfit persons; (4) children in criminal and immoral surroundings; (5) uncontrollable children and offenders. These categories comprise the classes of children enumerated by the Act, which are as follow:—

(1) any child without sufficient means of subsistence, or whose parent or guardian or other person legally liable for his support is indigent and therefore cannot support him, or is dead or unknown or cannot be found, who through lack of training and control, is, in the opinion of the judge or magistrate's court, in danger of falling into crime or becoming a charge on the State; any child found having both parents or the surviving parent, or in the case of an illegitimate child, the mother, undergoing imprisonment; any child found wandering, who has no home or settled place of abode or visible means of subsistence, or no parent or guardian exercising proper guardianship.

(2) any child under 14 years of age found begging in any public place or place of public resort

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(whether or not there is a pretence of street-trading) or being in such place for such purpose; any child engaged in street-trading in contravention of any law or bye-law.

(3) any child nursed or maintained apart from his parents or legal guardian under such domestic circumstances as may be deemed detrimental to his interests; any child under the care of a parent, guardian or other person who habitually neglects him in a manner likely to cause him unnecessary suffering or injury to health, or who, by reason of criminal, drunken or immoral habits is unfit to have the care of the child; any daughter, legitimate or not, of a father convicted of a sexual offence against any of his daughters.

(4) any child who frequents the company of any reputed criminal or of any known or reputed prostitute, or lodges or resides in a house or room used by such prostitute, or is otherwise living in circumstances calculated to cause, encourage or favour the seduction, corruption of prostitution of the child.

(5) any child who cannot be controlled by his parents or guardians, or who habitually refuses to attend or deserts from school; any child lawfully bound as an apprentice otherwise than under the Prison and Reformatories Act or this Act, who has broken any provision of the contract of apprenticeship; any child who is being, or within the six months immediately preceding has been charged with any crime or offence [*Sec. 34 as amended by Act 26 of 1921 Sec. 8*].

DETENTION IN INDUSTRIAL SCHOOLS AND
CERTIFIED INSTITUTIONS.

There are three types of institution (excluding uncertified institutions dealt with under "Protection of Children Offended Against") to which a child may be committed under the Act, *viz.*, Government Industrial Schools, Certified Institutions, and Auxiliary Homes. An order committing a child to any of these is made to endure until the child attains the age of 18 years; but where in any case the managers of an institution only undertake to train children up to a less advanced age, the court may make any other order permitted under the Act for the subsequent detention or committal of the child after he reaches such limit of age [*Sec. 34*]. Auxiliary homes are only for the reception of children above the age of 15 years. "Institution" in this section refers only to these three types of institution.

Government Industrial Schools.—These are schools specially established at different centres in the Union for the reception of children detained under the Act. It is specially provided that in such schools males are to be separated from females, and white persons from coloured. There are at present about a dozen such schools, but their number is constantly increasing. The principal of the school has the disciplinary powers of a parent and is in all other respects in *loco parentis* to the pupils [*Sec. 33 as amended by Act 26 of 1921 Sec. 7*]. These schools are now administered by the Union

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Education Department and the pupils are given the usual education and taught the rudiments of a trade.

Certified Institutions.—Institutions which exist for the reclamation of children of criminal or immoral habits or for the maintenance of poor children may, after enquiry, be certified as institutions to which children may be committed under the Act [*Sec. 38*].

The managers of an institution may decline to receive any child proposed to be sent to them under the Act; but if they accept a child they are deemed to have undertaken to teach, train, lodge, clothe and feed him during the whole period of his detention therein [*ibid.*].

In selecting the institution to which to commit a child, the court must, wherever practicable, select one conducted in accordance with the religion of the child. The detention order must, wherever practicable, specify what the court finds the child's religion to be. A minister of the child's religion may visit the child at the institution, in order to afford him religious assistance and to instruct him in his religion [*Sec. 38 (4-5)*].

Certified institutions are subject to periodical inspection, and if conducted in an unsuitable manner, their certificates may be revoked [*Sec. 38 (1) and (7)*]. There are at present about 67 such institutions in South Africa.

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Auxiliary Homes.—Any persons establishing a home for the reception, supervision and training of young persons, may apply for a certification thereof as an auxiliary home to which children above the age of 15 years may be committed under the Act [*Act 26 of 1921 Sec. 10*]. All the provisions above described relating to certified institutions, apply also to these homes [*Act 26 of 1921 Sec. 10 (2)*].

Contribution by Parents to Support of Children.—A parent, step-parent or guardian of a child detained in any of the above-mentioned institutions may be compelled to contribute towards his maintenance in the manner described above, under "Protection of Children Offended Against."

Offences Connected with Desertion.—Every child sent to an institution must remain there until he reaches the age of 18 years, unless he is apprenticed or placed out on licence, as described below, or transferred or discharged. Any child who deserts may be apprehended without warrant and brought before a magistrate's court either at the place where he is found or where the institution deserted from is situated. On conviction he may be returned to the institution, and, in the case of a child deserting from a Government industrial school, he is further subject to the punishment prescribed by regulation [*Sec. 40*].

Any person commits an offence who directly or indirectly counsels, incites, or induces any child to desert, whether by written communication or other-

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wise, or who conceals or assists a child who has deserted, or who prevents such child from returning to the institution [*Sec. 41*].

Boarding Out of Young Children.—Any child under ten years of age who has been committed to an institution under the Act, may, when due authority has been obtained, be boarded out with any suitable person until he reaches the age of 12 years, and for such longer period thereafter as the managers of the institution, again after obtaining authority, deem advisable in the interests of the child.

The managers of the institution exercise powers of supervision and recall and other powers prescribed by regulation over a child thus boarded out, and the child is for all the purposes of the Act deemed to be detained in the institution.

Such amount, not exceeding the maximum prescribed by regulation, may be paid in respect of the child, as the managers and the person with whom the child is boarded may agree upon [*Sec. 39*].

Apprenticeship and Placing Out of Pupils.—A child detained in an institution, after he has completed two years of his period of detention (or at any time, when the Minister consents thereto) may, by licence, be permitted by the managers of the institution to live with or be apprenticed to any trustworthy and respectable person willing to receive and take charge of him, on such terms and for such period as may be agreed, but not after the

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child attains the age of 21 years [*Sec. 42*]. In nearly all cases such licences are granted under the supervision and care of the nearest probation officer or society working for the welfare of children.

This licence may be forfeited on breach of the conditions attached thereto, or revoked by the managers, who may then order the child to return to the institution. Such order is, however, subject to an appeal to the Minister.

A child who escapes from the person with whom he was placed, or who refuses to return to the institution on revocation or forfeiture of his licence, is dealt with as if he had escaped from the institution itself.

Where after such revocation or forfeiture of a licence the child refuses or fails to return to the institution, and a magistrate's court is satisfied from information given on oath that his parent or guardian could produce him, it may by summons require such parent or guardian to attend at court at a specified time and produce him. If he fails to do so without reasonable excuse, he is liable on conviction to a maximum fine of £5 [*Sec. 42 as amended by Act 26 of 1921 Sec. 12*].

Pupils Exercising Evil Influence in Institution.
—Any child over the age of 12 years detained under the Act in an institution (which here includes an uncertified institution), who is found to be exercising an evil influence over the other children

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therein detained, may be ordered by the Minister to be apprenticed to some useful calling or occupation until he attains the age of 18 years, or, after consultation with the Minister of Justice, to be transferred to a juvenile reformatory. The total period of detention of the child may not, however, be increased by such transfer, nor may such transfer be made without consulting the managers or inspector of the institution [*Sec. 43 (3) as amended by Act 26 of 1921 Sec. 13*].

Transfer of Pupils.—A child detained under the Act in an institution (which here also includes an uncertified institution), or who has been committed to the care of a relative or other fit person, may be transferred, on order of the Minister, to any other institution or person. The total period of detention may not, however, be increased by the transfer, nor may a transfer be made from an institution without consulting the managers or the inspector thereof [*Sec. 43 (3) as amended by Act 26 of 1921 Sec. 13*].

Discharge of Pupils.—The Minister may at any time order the discharge of a child from an institution on a recommendation made to him by the managers, or after consultation with the managers and after consideration of any report on the case submitted by them.

The managers must make a special report when any child who has already been three years in the institution attains the age of 14 years, or when any child over 14 years of age who has not been so

detained, completes the first three years of his detention, and advise the Minister as to whether his detention should continue.

If the detention does continue, the managers must report on such child at the expiration of every additional year of his detention [*Sec. 43*].

Supervision Over Children After Discharge.— Every child who was detained in an institution remains under the supervision of the managers from the expiration of the period of his detention until he attains the age of 21 years, or until the Minister terminates such supervision. So long as he continues to be under supervision, however, his parents or guardians may not interfere, as regards his person, with the control of the managers [*Sec. 44 (1), (4) and (5)*].

The managers may grant to any person under their supervision a licence as described above under "Apprenticeship and Placing Out of Pupils." Such licence may, on occasion, be revoked, and the person recalled to the institution, although for not longer than three months, and only when the managers deem it necessary for his protection. He must again as soon as possible be placed out on licence. The Minister must be notified of any recall and of the reasons therefor; and as soon as he is again placed out on notice [*Sec. 44 (2)*].

Any licence granted to a person before the expiry of the period of his detention continues of force during the period for which he is liable to be super-

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vised. Such licence may be revoked in the manner described above under "Apprenticeship and Placing Out of Pupils" [*Sec. 44 (3)*].

ALTERNATIVE ORDERS AS TO CARE OF CHILDREN.

A child liable to be sent to an industrial school or certified institution may instead be committed to the care of a relative or other fit person, in the manner and according to the provisions described above under "Protection of Children Offended Against" [*Sec. 34 as amended by Act 26 of 1921 Sec. 8*].

Alternatively, such child may be dealt with in one of the ways described below; but whichever way he is dealt with, the liability of his parent, step-parent or guardian to contribute towards his maintenance, as described above under "Protection of Children Offended Against," remains [*Sec. 35 as amended by Act 26 of 1921 Sec. 9*]. The child may be boarded out, or apprenticed, or left where he is, under conditions.

Boarding Out.—The court may order the child to be boarded out, and in that case the provisions described above under "Boarding Out of Young Children" apply, as if the judge or magistrate's court were the managers there mentioned [*Sec. 34 as amended by Act 26 of 1921 Sec. 8*].

Apprenticeship.—The child may be ordered to be apprenticed to some useful calling or occupation until he attains the age of 18 years [*ibid.*]. The

provisions of the Prisons and Reformatories Act No. 13 of 1911, Chapter 7, and of the regulations referred to therein relating to apprenticeship, punishment and otherwise, which do not conflict with the Act may be applied to a child thus apprenticed [Sec. 36]. Where, however, a juvenile apprenticed under the Act had run away from his master, and on being apprenticed to another master was convicted of being refractory and intractable in terms of the Prisons and Reformatories Act (Sec. 62) and was sentenced to be sent to a reformatory in terms of that Act, the sentence was set aside and the case remitted to obtain information as to whether the youth was originally apprenticed because of his having committed a criminal act, or merely because he had been left destitute by his parents [*R. v. de Jongh* 1926 O.P.D. 246].

Probation, Supervision, and Assistance to Widows.—The child may be left in the care and custody of the person in whose custody he was when brought before the judge or magistrate's court, on such probationary or other conditions, and subject to such supervision by any person or society working for the welfare of children as the judge or court deems fit.

Such order may be made to endure until the child attains the age of 18 years. At any time during the currency of the order, however, the judge or magistrate who made it, either of his own motion, or on the application of any person or society above-mentioned, may vary its terms and conditions, or cancel it and substitute any other

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order that might competently have been made at the time the original order was made [*Sec. 34 (3) as amended by Act 26 of 1921 Sec. 8*].

If the mother, step-mother, or grand-mother of a child regarding whom such order is made, is a widow or the wife of a husband unable through ill-health or through circumstances beyond his control to support the child, and if such woman is unable to provide for the proper support and maintenance of the child, the Minister, on report of the judge or magistrate's court trying the case, or on other satisfactory evidence, may pay to her from time to time out of monies voted by Parliament, according to regulations and subject to any conditions he may impose, such sums as he deems necessary to supplement the provision made by her for the care and maintenance of the child [*Act 26 of 1921 Sec. 11*].

If any condition of the payment is not fulfilled, or any regulation not complied with, the matter may be reported to the magistrate of the district wherein the child resides, who may then make any order respecting the child that he is entitled to make in respect of any child liable to detention who is brought before him [*ibid*].

APPENDIX.

FORM OF ANTENUPTIAL CONTRACT IN COMMON USE IN SOUTH AFRICA.

Protocol No......

ANTENUPTIAL CONTRACT.

BE IT HEREBY MADE KNOWN:

That on this the First day of September, in the year of Our Lord, One Thousand Nine Hundred and Twenty-Seven, before me, THOMAS JONES, of JOHANNESBURG, in the Province of the Transvaal, Notary Public, by lawful authority, duly sworn and admitted, and in the presence of the subscribed witnesses, personally came and appeared JOHN BROWN, a Bachelor of full age, of Johannesburg, and MARY WHITE, a Spinster of full age, of Johannesburg.

And these Appearers did declare, that whereas a marriage hath been agreed upon, and is intended to be forthwith had and solemnized between the said JOHN BROWN and the said MARY WHITE, they have contracted and agreed, as by these Presents they do contract and agree, each with the other, as follows, to wit:—

FIRST.—That there shall be no community of Property between the said intended Consorts, but that he or she shall respectively retain and possess all his or her estate and effects, movable and immovable, in possession, expectancy or contingency, or to which he or she has or may have any eventual right or title, as fully and effectually as he or she might or could have if the said intended marriage did not take place.

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SECOND.—That the one of them shall not be answerable for the debts and engagements of the other of them; but that each shall be answerable for his or her own debts, contracted before and after the said intended marriage.

THIRD.—That all inheritances, legacies, gifts, or bequests, which may devolve upon, or be left, given, or bequeathed to either of the said intended Consorts, shall be the sole and exclusive property of him or her upon or to whom the same shall devolve or be left, given, or bequeathed.

FOURTH.—That each of the said intended Consorts shall be at full liberty to dispose of his or her property and effects, by will, codicil or other testamentary disposition, as he or she may think fit.

FIFTH.—That there shall be no community of profit and loss between the said Consorts, but that each of them shall respectively retain the profits made by or accruing to him or her, and shall in like manner separately and solely bear and sustain the losses happening to him or her during the subsistence of the said intended marriage.

SIXTH.—That the said MARY WHITE shall have and continue to hold, possess, and enjoy the sole exclusive and uncontrolled administration and alienation of all the property and effects which she is now possessed of, and entitled to, and of all other property which she may hereafter acquire during the subsistence of the said marriage without the interference, control or assistance of the said JOHN BROWN and every marital power which the said JOHN BROWN shall, or may have, or be entitled to acquire by virtue of the said marriage, shall be and the same is hereby excluded from all the property, estate and effects of the said MARY WHITE as fully and absolutely as if the said intended marriage had not taken place.

Hereafter may follow clauses containing marriage settlements, *e.g.*;

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SEVENTH.—That in consideration of the said intended marriage and by way of gift before marriage, the said JOHN BROWN hereby settles upon the said MARY WHITE and free from her husband's marital power, the sum of £1,000 (One Thousand Pounds) Sterling, which gift is hereby gratefully accepted by the said MARY WHITE.

UPON all which conditions and stipulations it is the intention of the said intended spouses to solemnize the said intended marriage and they mutually promise and agree to allow each other the full force and effect hereof under obligation of their persons and property according to law.

THUS DONE and EXECUTED at JOHANNESBURG on the day, the month and the year first aforesaid in the presence of the undersigned Witnesses.

J. BROWN.

M. WHITE.

AS WITNESSES:

1.—T. KELLY.

2.—C. SMITH.

QUOD ATTESTOR:

THOMAS JONES.

Notary Public.

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