

Draft

N O T E.

27. 1. 1935

The following is the draft declaration as revised.

The following words should be added to para (e) of the
draft:-

(X)

" Further the Proclamation does not make
provision as to whether a case is to be decided
by the person presiding over the Tribunal;
by all the members of the Tribunal or merely
by a majority of the members of such Tribunal "

In the matter between Tshekdi Khama and His Excellency Sir William Clark, in his capacity as High Commissioner of the Bechuanaland Protectorate.

Plaintiff's Declaration.

1. Plaintiff is Tshekdi Khama, Acting Chief of the Bamanwato Nation, of Serowe, Bechuanaland Protectorate.
2. Defendant is His Excellency Sir William Clark, in his capacity as High Commissioner of the Bechuanaland Protectorate.
3. On January 4, 1935, His Excellency Sir Herbert Stanley, in his capacity as High Commissioner of the Bechuanaland Protectorate issued Proclamations Nos. 74 and 75 of 1934 and promulgated same in the Gazette of 4th January, 1935.
4. On 14 October, 1935, the Defendant issued written instructions directing the Plaintiff to carry out certain duties imposed upon him by the said Proclamations. A copy of the said instructions is hereunto annexed marked "A".
5. The said Proclamations are of no legal force and effect inasmuch as they are ultra vires the Order in Council of May 9, 1891 in that:-
 - (a) The High Commissioner in issuing such Proclamations did not respect the Native Laws and Customs referred to in Section 4 of the said Order in Council, as will appear from Annexure "B" hereto.
 - (b) The said Proclamations are unreasonable inasmuch as duties are imposed on the Native Chiefs which it is not possible for such Chiefs to carry out. Particulars of such duties are contained in Annexure "C" hereto.

- (c) Proclamation 74 is void for uncertainty inasmuch as though it purport to set up a Tribal Council for the administration of Tribal matters, the said Proclamation nowhere makes it clear whether such Tribal Council is to be the sole administrative body for the whole Tribe: whether such Tribal Council is to take the place of the existing Chief's Khotla or whether such Khotla should continue to exist: whether Khotlas subordinate to the Chief's Khotla are superseded by the Tribal Council or whether such subordinate Khotlas are to continue to exist and be subordinate to the Tribal Council.
- (d) If Proclamation 74 has the effect of superseding both the Chief's Khotla and the existing subordinate Khotlas such Proclamation is void on the ground of unreasonableness inasmuch as it is impossible to administer all tribal matters by means of such centralised Tribal Council.
- (e) Proclamation 75 is void for uncertainty inasmuch as though it purports to set up an entirely new system for the Administration of Justice, it nowhere provides whether such new system shall supersede the existing system for the Administration of Justice through the various Khotlas or whether such new system shall exist side by side with the existing system.



(f) The said Proclamations take away the powers and jurisdiction of the Native Chiefs, which powers and jurisdiction were specially preserved to them by virtue of the verbal Treaty entered into between Sir Charles Warren, as representing Her Majesty the Queen, and the Bamanwato Nation in May 1885. The material portions of the said Treaty are set out in Annexure "D" hereto. The said Treaty was confirmed in England on November 7th, 1895 on the occasion of the visit to England of the Chief Khama at that time Chief of the Bamanwato Nation.

Wherefore Plaintiff claims:

- (a) An Order declaring that Proclamations 74 and 75 are of no legal force and effect.
- (b) Alternative relief.
- (c) Costs of suit.

27 November 1935.

ANNEXURE "B".

1. Proclamations 74 and 75 define a "Headman" as a person appointed as such by the Chief; whereas under Native law and custom though in certain areas the Chief may appoint representatives the position of headman is hereditary, and the Proclamations nowhere mention such hereditary headman.
2. In the Proclamations 'Khotla' is defined as a customary meeting in some, duly recognised place, whereas under Native Custom a 'Khotla' means also a customary meeting of a tribe or portion thereof in any place whatsoever.
3. Section 5 of Proclamation 74 sets up a tribal Council, whereas under Native Law and Custom such a Council is entirely unknown, there being no equivalent in Native Custom to the Councillor referred to in the Proclamation.
4. Section 5 of the Proclamation confers upon the Chief a power to appoint a person styled a Councillor, whereas under Native Law and Custom no such power of appointment has ever existed.
5. Section 6 (1) of the Proclamation contemplates that the functions of a Chief may be performed by a Council. Under Native Law and Custom such a position is entirely unknown, such law and custom making express provision as to the individual who exercise the functions of a Chief.
6. Section 13 provides for Consultation with a Council whereas under Native Law and Custom no authority can be exercised save in consultation with a Khotla.
7. Sections 1 and 3 of Proclamation 74 and sections 1, 2 and 3 of Proclamation 75 contemplate ,.....

that there may be a Chief of a tribe who by reason of his not having been appointed under section 10 of the Proclamation of 10th. June 1891 may not have any judicial powers, whereas under Native custom such judicial power is an essential attribute of a Chief.

8. Proclamation 75 sets up a number of nominated Senior Tribal Tribunals and Junior Tribal Tribunals for the administration of Justice ^{whereas under Native Law & Custom the administration of justice} is carried out by persons occupying their positions by right of birth. In every case whether civil or criminal such persons consult in public with their respective khotlas, at which every adult member of the tribe may speak, before giving their decision. The Proclamation eliminates the vital part played by the members of the tribe in the administration of Justice.

9. Proclamation 75 eliminates the system under Native Law and Custom of trial by lineage Khotlas and appeals therefrom in the case of a Clan Chief's village to the clan Chief's Khotla. It also eliminates the right of appeal to the Divisional Khotlas and to the Chief's Khotla.

10. The payment of a salary to Judicial Officers as provided for in section 7 (5) of the Proclamation is not known under Native Custom.

11. The Senior Tribal Tribunals are constituted Courts of first instances whereas under Native Custom every case whether Civil or Criminal originates in the Lineage Khotlas and only comes to the higher Khotlas and eventually to the Chief's Khotla after being tried or investigated by such lineage Khotlas.

12. A Senior Tribal Tribunal is given power to appoint Junior Tribunals and to delegate to them any powers it pleases, whereas such a delegation ~~of jurisdiction~~ of jurisdiction is entirely unknown to Native Law and Custom.

13. The said Proclamation provides for the decision of a case of
of...../

~~decided~~ of a case by the members of a Tribunal, whereas under Native Law and Custom a decision is given by the hereditary head alone after the matter has been publicly discussed in his Khotla.

ADD TO ANNEXURE "B"

14. The Proclamations as a whole more especially in regard to the appointment, suspension and powers of a Chief; the request to make a Tribal levy and the request to use regimental labour disregard Native Law and Custom and transfer powers heretofore exercised by the Chief and his Tribe to the Administration, leaving such powers to the unfettered discretion of the Administration.

 15. The Proclamations concentrate all ultimate power in the hands of a Chief, a Tribal Council and the Administration; none of whom are bound to follow the wishes of the Tribe as a whole; whereas under Native Law and Custom the ultimate power is always in the hands of the Tribe as a whole and not in any individual or limited body of persons.
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ANNEXURE "C"

1. Section 5(1) of Proclamation 74 requires the Chief to designate the persons who under native custom are entitled to advise him as Councillors, whereas under Native custom there are no such Councillors or persons who are solely entitled so to advise him, every adult member of his tribe being so entitled to advise him.
2. The said section requires the Chief to consult with the Councillors designated by him who with him shall be styled the Tribal Council.. For the reasons set out in para. I hereof, the designation of such Tribal Council is impossible.
3. The whole system of administration set up under the Proclamation depends upon the existence of such a Tribal Council which as stated above cannot be brought into existence.
4. Section 7 (1) of Proclamation 75 requires the Chief to nominate from among the members of the Tribal Council referred to in Section 5 of Proclamation 74 certain Tribal Tribunals whereas for the reasons set out above such Tribal Council cannot be brought into existence.
5. Section 7 (2) of Proclamation 75 contemplates the appointment of Junior Tribal Tribunals and requires the Senior Tribal Tribunals in such cases to appoint a headman to preside over each such Junior Tribunal and such Headman is to be responsible for nominating certain persons to act with him in the trial of cases. For the reasons set out above such Senior Tribal Tribunals cannot be brought into existence.
6. The whole system for the Administration of Justice set up under Proclamation 75 depends upon the existence of the said Tribunals which as stated above cannot be brought into existence.

ANNEXURE "D"

Treaty of 1885.

The territory of the Bamanwato Nation is to become a Protected State whose Chief is, in general, to retain his Sovereignty in internal affairs; to retain full power to decide cases among his own people, and to administer the government of his people, in accordance with custom in the separate area retained for the exclusive use of such people.
