object of Ukungena is to obviate the difficulty of having no heir, an eventuality which is much dreaded in Bantu society, for the man who has no male heir cannot have his name perpetuated in the group to which he belongs; he leaves no one to sacrifice to the ancestral spirits; no one to settle the disputes that will arise out of the distribution of his estate and to act as guardian over his children. Thus every effort had to be made to circumvent the possibility of having no heir. It will be remembered that the death of the husband did not automatically terminate the marriage between himself and his wife, also that owing to his having paid lobola for his wife, all her children whatever their biological paternity, were regarded as his own. This would continue after his death, and so in order to prevent the woman from having children by outsiders, a close relative of the deceased "ngenae"ed her so that the off-spring should have the same blood as the deceased husband. To make an Ukungena union the man must be approved by the family as a whole, and a beast was slaughtered as an act of sacrifice and purification. Then the man had the full rights of a husband and could
sue for damages anyone having sexual intercourse with
the woman. The children born of such a union belong to
the house of the deceased husband, and the male issue of
the ukungena union are eligible as heirs of the house
of the deceased husband.

This custom has always been discouraged by the
governments in South Africa, perhaps largely under the
influence of the missionaries, but it has the advantage
of preventing a large establishment from being necess-
sarily broken up, the women dispersing and the children
being left without anyone to care for their wants on
the death of the head of the family. In view of the
Bantu themselves this custom was established for the
benefit of the bereaved family to whom the offspring of
the ukungena union belonged.

With regard to those natives who have contracted
Christian marriages, it has always been the policy of
the law, and rightly so, to disallow them to practise
Ukungena, for the custom is quite inconsistent with the
Christian conception of marriage, whatever material or
social advantages it may have. Thus in the case of
Simon Tsele vs Stephanus Moema (1930) N.A.C. (N & T)
the following statements were made concerning Ukumena:

"The court was not prepared to recognise a native practice which would encourage the widow of a Christian marriage, for the sake of bearing an heir to a deceased husband, to indulge in illicit intercourse under circumstances repugnant to the principles of a Christian marriage and which would perpetuate, in certain respects, the consequences of a contract which had absolutely and completely dissolved by the husband's death."

Ukuteleka is a custom according to which a married woman, when on a visit to the home of her father or guardian, might be impounded for the purpose of exacting unpaid lobola or further lobola from her husband. It is practised by some of the tribes in the Transkeian Territories. The payment of any portion of the balance entitled the husband to the return of his wife, who however may be "teleka"ed again in the future. * Sisa (Zulu) or Ngoma (Xosa) is a contract whereby cattle or other livestock are deposited by their owner with some other person on the understanding that such person shall enjoy the use of them, but that their ownership shall remain with, and increase accrue to, the depositor. In

* Paliso vs Madolo (1931) N.A.C. (C & O)
the case of Mandhlesile vs Bobojane (1917 N.W.C. 67) this contract was discussed by Mr. Justice Jackson, a noted authority on Native Law, who explained, inter alia, that the custom of Ukusisa carried with it certain obligations on both sides, and in some respects corresponded with the contract of bailment. One such obligation on the part of the person with whom the cattle were deposited was to report any deaths to the owner; and in self-protection to keep the skins in proof of such deaths. It is only the usufruct of the cattle which are vested with the person with whom they are placed; he had the milk of the cows and he might use oxen for ploughing or draught purposes; but he could have no dealing in them that might be prejudicial to the interests of the owner or jeopardise his dominium in them; they could not be sold or exchanged without the consent of the owner. If under stress of circumstances, there was a discretionary disposal of the cattle in the owner’s interests, when such consent could not first be obtained, the fact had to be reported as soon as possible to secure the endorsement of the owner. It is an interesting example of culture contacts that
Europeans, some even in important positions, entrust their cattle to Natives for the purpose of grazing under this Siza agreement, although the legality of such agreements between white and black is questionable.

3. Another common contract in Native Law is that of Ukwetula which is defined as follows in the Natal Code of Native Law of 1932: "Etula" in so far as it is enforceable at law means the custom whereby an obligation is imposed upon a junior house to refund lobola which may have been taken from a senior house to establish such junior house. The eldest daughter of such junior house is usually indicated as the source from which the liability is to be met but the custom is not recognised as extending to the handing over of the 'etula' girl as a pledge for payment." It will be seen therefore that "Etula" arises out of the establishment of a junior house with lobola provided by a senior house. Consequently the fact that a house A "etula"s to a house B raises a presumption that house B is senior to house A, a matter which is often of great importance in connection with the laws of succession and inheritance. It may be noted that the idea of a pledge was not entirely unknown among the Bantu. As a rule the pledge is merely pointed
out and is not then delivered, but it is explained to
the pledgee in the presence of witnesses that if the
contract in respect of which the pledge is made is not
fulfilled, the pledge will be taken. But in the case
of "Ukwetula" it is not contemplated that the girl
whose lobola is to go in satisfaction of the obligation
(i.e., the pledge) will be claimable by or handed over
to the senior house. Even if she is placed in the sen-
ior house, it is her lobola, not her person, which is
pledged, and thus she could not be sold into slavery
for example. To do so would undoubtedly be regarded as
contra bonos mores. 4. Sondlo. Sometimes a contract
arises where a person other than the natural guardian
of an individual has maintained him for a considerable
length of time, i.e., for a period extending beyond which
that would be regarded as ordinary hospitality, which
is accounted a great virtue among the Bantu. This con-
tract is known as Sondlo (from Ukwondla—to feed) and
gives rise to a claim enforceable at law against the
natural guardian of the person concerned. The usual fee
for Sondlo is one beast for each person maintained ir-
respective of the period of maintenance. 4 Sondlo is
See Mfanya vs Maqizana (3 N.A.C. 158)
not claimable in respect of wives or widows who leave
their husbands' kraals and return to those of their
fathers or guardians by whom they are maintained for
a time, as they are entitled to such maintenance by
virtue of the lobola paid for them by their husbands. It
is however claimable with respect to the children
of a man's wife born at his wife's guardian home and
maintained by the guardian for any length of time
whatever. So far we have been dealing with sondo
as it affects married people; but in cases of seduction
too, the seducer of a girl who gives birth to an illegitimate
child is liable for so ndlo for the mainten-
ance of his natural child. A husband is also liable
for so ndlo to anyone who has maintained the adulterine
child of his wife. As explained before, such a child
belongs to the husband of its mother, whoever its
physiological father may be, and it is his duty to sup-
port it; where this duty is carried out by another per-
son on his behalf, it gives rise to an obligation unless
the father repudiates irrevocably both his wife and the
child. # recognition of native contracts. It has not

See Naroqokasi vs Mjaro (4 N.A.C. 136)

Nqese vs Samente C.H.Cir.d/222.4.27 No.3. quoted by

Whitfield, W.N. Ibid page 394

See Ntwanambi vs Poti (2 N.A.C. 110)
been the policy of the Colonial, and later the Union, Governments in South Africa to recognise Native contracts indiscriminately. Wherever it has been felt that a contract, although recognised in Native law, was contra bonos mores, the courts have refused to give legal effect to it. Thus in the case of Mbanjwa vs Goduka (1920 E.D.C. 91) the court refused to recognise a contract according to which a woman had in return for a consideration given over her illegitimate child to a man on the understanding that he should maintain it, and should recompense himself the lobola cattle that would be forthcoming upon her marriage. This arrangement must not be confused with that in which the anticipated lobola of a girl is pledged to meet a lawful claim. Here the natural guardian retains all his or her natural rights to the child, and it is only the anticipated lobola which is the subject of the transaction which has been held to be quite consistent with natural justice in South Africa. Finally it may be pointed out that trading, especially on a large scale, was unknown among the Bantu in South Africa. Purchase and Sale were not practised to any great extent, although

* See Ndabankulu vs Pennington (4 N.A.C. 171)
exchange or barter was common. Each community was a self-sufficient unit which grew its own food and made most of the articles which it needed to carry out its work both at home and abroad. The idea of money is still foreign to the Bantu who even today live under a system of subsistence economy. A form of trading which had considerable vogue among them was that of medicine. There were herbalists and medicine men of different kinds who undertook to effect cures for a consideration; naturally where they did this obligations came into existence between them and the persons who employed them. Even today the sale of medicines is perhaps the most profitable trade among them and many Europeans and Natives whose business acumen is much greater than their genuine desire to benefit the Native have discovered the possibilities of selling Native medicines and derived huge profits from it. It is significant that more than half of the advertisements in most native newspapers are for patent and other medicines. It may be in point to mention at this juncture the contract of lobola which has been discussed before in connection with marriage. One of the most controversial points regarding lobola is whether it amounts to a sale or not. The essentials of
a sale are: (I) A thing which forms the subject of the transaction. (II) A price sounded in money. (III) A making over of the thing by the seller to the buyer.

This definition does not cover the contract of lobola, because in the first place women are not things in native society. They cannot be bought or sold, destroyed at will or given away at will in the way things can. Furthermore, inasmuch as money was unknown in native society the second essential of the definition is not fulfilled. It might be argued that where the price is not fixed in terms of money the contract becomes one of barter or exchange. But we never find men exchanging a woman for another woman, as they exchange cattle or sheep or goats or any other form of property. The third essential is the one which is most important in the mind of the Native—the loosening of the ties binding a woman to her own group and her gradual incorporation into that of her husband, a religious affair, the spiritual nature of which is missed by those who try to clothe this custom in the garb of western ideas. The words "ukutenga" and "ho reka" meaning "to buy" are never used to describe it, and whatever its
external practice which alone is observable by outsiders appears to be, where foreign influence has not contam-
inized those who adhere to it, its religious and spiritual significance is of greater importance than the "goods" that go with it. It is noteworthy that cattle which play a large part in the religious practices of the Bantu constitute the form of lobola which is most high-
ly favoured, and even where other forms of lobola have been introduced, the unsophisticated Native still re-
gards them more from a ritualistic rather than a mater-
ialistic point of view.

It must be admitted, however, that in modern times, the contract is abused, and it is clung to in many cir-
cles, as the Native Economic Commission found, for its material concomitants rather than because it still re-
tains its spiritual meaning for the persons concerned.**

Women still regard it as an earnest of their worth and those who have given it for their own wives are loth to let their daughters go without it. The fixing of minimum amounts for lobola, as in the case of Natal Native Code, has also tended to impress upon the people the idea of a sale, and where in the old days many a man

* For the ritual significance of cattle in Bantu society see J. H. Boggs 'Amasota Life and Customs' NA. 385-387
** Report of Native Economic Commission 1930-1932 para. 714
might have been willing to a marriage of his daughter for two or three cattle according to the circumstances of the suitor, the tendency is for the full legal maximum to be claimed. This leads to the postponement or delay of marriage, with frequently disastrous results. It is of course right that recognition has been given to the custom so that those who, practise it in the right spirit should continue to do so without undue embarrassment; but where any abuse of the system is discovered, it should be visited with the punishment which it deserves. Thus it is interesting to note that in revising the Natal Code of Native Law 19 of 1891, the Government decided to disallow various claims commonly made by the guardian of the girl whose hand is sought in marriage for payments of different kinds as a pre-condition to considering the suit of the prospective husband. These payments, often totalling considerable amounts, did not form part of the lobola which was claimed in full thereafter. It is prostitution of lobola which has thrown it into the unjustifiable odium which now surrounds it, and it is therefore gratifying to find the new Code enact "No claim to payments variously known as vulamolom, ubilibiki, iblawulo, mnyobo, igagamazinyo, izikwehlela and the like in respect
of any proposed customary union shall be recognised, and
where such payments have been made the Native Commissioner
may direct that they be included as part of the lobola or
that they be refunded to the party or parties making them."

All these payments arose out of the difficulties that were
usually put in front of the suitors, in order to show
them that the girl they wanted was much prized at her
own home, and that her parents were very unwilling to see
her go. Behind it all was the family resistance to some-
thing which was going to impair its solidarity, but in
these days it lends itself so readily to abuse that the

- Vulamlomo means the "mouth-opener" and indicates that
  unless it is paid, the father or guardian of the girl
  will not answer any question addressed to him by the
  representatives of the prospective husband.
- Ubikibiki A word derived from Afrikaans meaning "little
  by little", and indicates small payments made for the
  purpose described above and not counted as part of the
  big payment to follow later.
- Ihlayulo means a fine, taxation exacted from the hus-
  band's representatives prior to the consideration of
  their case.
- Nkoyobo means same as above.

Igagamarinyo literally "that which opens the teeth",
but for which the guardian of the girl would not
speak to the suitors.

Isikwehlela literally "phlegms" referring to the
clearing of his throat by the guardian of the girl
prior to speaking to the suitors.
above enactment is a necessity.

Injuries in Native Law. Native Law recognised the distinction between crimes and wrongs giving rise to civil remedies. The underlying theory of crimes was that all the members of the tribe belonged to and gave strength to the Chief. Any injury to a member of the tribe was virtually an injury to the Chief to whom alone reparation was due. Such cases were known as Blood cases and no reparation in damages was claimable by the person or the family concerned or injured through the violence or wrong done. Thus all cases of homicide were dealt with by the chief's court and compensation could be exacted by him and him alone, because he was the only one injured. The same applied to cases of serious assault. Occasionally the Chief gave a portion of the fine imposed by him to the person injured, but this was a gift by him as an act of grace, and not compensation claimed as of right by the injured man or his family.

Injuries to property on the other hand gave rise to claims to compensations by the owner of the property. In protection of his property a man might be pardoned
for having killed anyone guilty of malicious injury to his property, and frequently the malicious injurer was mulcted in damages far in excess of the value of the stolen or injured property, but such damages were awarded to the owner, who "gave a portion to the mail or sheriff who executed the chief's judgment against the wrongdoer". Since these injuries were regarded as private and as not involving the chief or the tribe as a whole, they could be settled by mutual agreement and thus what amounted to crimes under European law were often settled privately in Native Law because they were merely civil wrongs. Thus, "indeed theft might be said to have been unknown to Native Law in the Cape Province as a crime or offence against the members of the same community (i.e., it was a civil offence capable of settlement by mutual agreement or by compensation) and so was the offence of compounding it; although theft between tribe and tribe often became the cause of war, and wholesale theft, i.e., a foraging expedition was the equivalent of a declaration of war". Thus in Native Law the criminal code comprised whatever

* Whitfield, W.B. "South African Native Law" (Juta) page 401
** Whitfield, W.B. Ibid
cases might be arranged under the general heads of
treason, murder, assault and witchcraft (i.e., injuries
to the person of members of the tribe or subversive of
order and good government and dangerous to the common
weal), while the civil code comprised all that had refer-
ence to property, including a man's wife, his character,
and proceeding downwards through his various kinds of
livestock to his houses, granaries and corn fields.

The penal sections resolved themselves into the
general system of pecuniary fines, varying from a single
head of cattle to the entire confiscation of property
which is termed "being eaten up" (ukudhliwa). Food, it
is interesting to note, was never included in the sen-
tence of confiscation. Where a fine was imposed the
acceptance of any portion of it raised a presumption
that the payment was in full settlement, unless the
claimant made it clear that the payment was only in part
settlement. * Effect of Death on Right to Damages. The
death of the injurer extinguished the right to damages
unless the action had been set in motion prior to the
death of the injurer. In Roman-Dutch law also the death
of a party before litis contestatio puts an end to an

* See Mkohlakali vs Mashini (2 N.A.C. 19)
action for personal injury (Meyer vs Gericke -- Foord 14). In Tinini Zakaza vs Dennis Pennington (4 N.A.C. 192) it was decided that once an action is instituted it does not die. Thus the rule of Native Law is that where action is taken before the death of the tort-feasor, his heir is liable for his wrong doing, but that in cases where no such action has been taken, the claim lapses. It must be clearly understood, however, that the heir or kraalhead could only be saddled with this vicarious responsibility in the case of claims arising out of Native law. If the claim is unknown in Native law, then the claimant has to proceed by ordinary law, and only the person actually committing the injury can be held liable. Then the principle "actio personalis moritur cum persona" comes into full operation.

A few examples of typical injuries in Native Law will now be considered:

(a) Abduction of a girl with a view to marriage gave rise to a claim to damages on the part of her father or guardian against the abductor as a condition precedent and as a preliminary step to any proposal of marriage,

Mlodana and Another vs Nokulela (2 N.A.C. 139)
provided that the father or guardian has not connived at or agreed to the girl being carried off. There is considerable difference of opinion as to whether damage imposed for abduction merges in the lobola paid if a marriage is subsequently concluded. Some authorities maintain that damages for abduction are only claimable where marriage does not supervene, as the abduction would then amount to an affront on both the girl and her guardian; but since abduction is one of the methods according to which marriages may be concluded (i.e., Ukugana), if the marriage does come off, the abduction fine merges in the lobola or the lobola is abated to the extent of the abduction fine previously paid. *

(b) Defamation of character is practically unknown in Native Law, with the exception of an accusation of practising witchcraft which is regarded as one of the most serious charges that can be made against anyone. The practice of witchcraft was taken as inimical to the interests and the welfare of the tribe as a whole and as such was punished with utmost severity. It is therefore obvious that to be charged with witchcraft.

* For cases bearing on this subject see Whitfield, W.B. Ibid. pages 80-84
might damage one most seriously as far as his reputation was concerned, and consequently gave rise to an action for damages for defamation. (See ex parte du Plooy (10 S.C. 7).)

(c) Seduction in Native law is the carnal connection of a man with a virgin, and as a general rule entitles the father or guardian of a girl to an action for compensation in damages, the damages consisting in the loss of her virginity and her consequent deterioration in the marriage market. The right to sue belongs to the father and to the girl seduced because it is the father who is injured by the seduction, i.e., it is his right to lobola which will be reduced by the loss of virginity on the part of the girl. While among Europeans the injury is more to the outraged sense of propriety and morality, yet in Native cases the injury is real and material; for the father looks to his daughters to build the fortunes of his house by means of their lobola, and the deflowering of any of his daughters has the immediate effect of depreciating their marriage value. *

Where a girl is seduced after lobola has been paid for her by another man, the damages claimed by her fa-

* Daniso vs Makenana (1 N.A.C. 86)
ther or guardian must be handed over to her prospective husband in abatement of the lobola already paid for a girl now depreciated in value through the loss of her virginity. (Mbinu vs Tshaka 3 N.A.C. 246) Where in addition to the lobola being paid, the girl had already been handed over to her husband, the latter has the right to sue the seducer directly in the same way as if adultery or pregnancy had taken place after marriage; this on the ground that once any part of the lobola has been paid for a girl she is virtually married and any wrongs against her are wrongs against her future husband. Where the prospective husband is himself the seducer, one beast would be deducted from the lobola paid by the seducer as damages for the seduction. It must be noted that damages can only be claimed where the woman is a virgin; where she has had a child before, no damages would be claimable for her seduction unless pregnancy followed, and in the latter event the damages for subsequent pregnancy or pregnancies would be considerably less than that claimed for a first pregnancy.

(d) Adultery is an actionable wrong among almost all the Bantu tribes of South Africa. The claim is not

* Daniel vs Socinsi (4 N.A.C. 320); Nkohla vs Rakana (4 N.A.C. 131); Ntwampantsi vs Mazeka reported on p. 171 of Seymour, W.M. "Native Law and Custom" (Juta) 1911
instituted in one and the same action against the wife for dissolution of marriage. This is because adultery is not deemed as a general rule to be a sufficient cause for divorce, whereas it is a sufficient cause for damages against the adulterer. But the claim must be made stante matrimonio, because if the marriage is first dissolved either because of the adultery or for any other reason the husband's right to sue the adulterer will be barred. He is not allowed to claim both a divorce against his wife and damages against the adulterer. The reason for this is that in connection with his claim for divorce would be put in a claim for the return of the lobola to which he was entitled. Therefore to permit him to claim at the same time damages from the adulterer would enable him to reap a double benefit which is not contemplated by the Native law of divorce. In all cases of adultery, it would have to be shown to the satisfaction of the court that a valid marriage subsisted between the man suing for damages and his alleged wife (Ndhuze vs Hdlimbi 1 N.A.C.) and it goes without saying that the plaintiff in cases of adultery must prove his allegations beyond all reasonable doubt. Zondani vs Gova CM Cir. d/d May 27, 1927) Collusion between husband and wife
of connivance on the part of the husband is a bar to his claim for damages. The damages would be higher in the event of pregnancy supervening the adultery, or where it is accompanied by aggravating circumstances such as the communication of syphilis to a man's wife.

The Bantu do not practise polyandry, and any man who marries the wife of another, even if in bona fide error he pays or has paid lobola to the father or guardian of the woman, is regarded as an adulterer liable to an action at the instance of the true husband. The adulterer would of course have an action against the father or guardian of the girl for reimbursement of the cattle he had paid for her in bona fide error.

Property in Native Law. We have seen before that the object of law in any society is the regulation of the rights and duties of the individual members as against or between one another on the one hand and as against the group or community of which they form a part on the other. Among the most important of these rights in that is the ownership of property. In fact, the power to own property is the hallmark of individuality in all society. No one who is unable to own property

* Feliti vs Mkumbeni (2 N.A.C. II)
in his own right is regarded as a normal person of full capacity. The contractual, judicial and other social rights of an individual often depend upon the extent to which he possesses the right of ownership. It is practically impossible to make a bilateral contract with a person who does not or cannot own any property, because if he should fail to carry out his part of the contract and the result of the broken contract is some material loss on the part of the other party to it, it would be impossible for the latter to have a remedy. Thus we say that the former is an abnormal person who requires to be assisted in his contracts by somebody who owns property, who can back the actions of the abnormal person with his property. Consequently the ownership of property is often the measure of the majority of an individual, and in modern states individual ownership of property is prized so highly that a man is allowed to defend his property in the same way as he might defend his life. The old saying that "possession is nine-tenths of the law" is based upon the presumption that if a man is in possession of a thing he probably owns it and his de facto ownership
will be protected by the law against anyone who disturbs him in his possession without proper recourse to law. This right of ownership is one that is unlimited in point of time and user, except by the similar rights of others. As Maasdorp puts it, "ownership is the sum-total of all the real rights which a person can possibly have to and over a corporeal thing, subject only to the legal maxim: 'sic utere tuo ut alienum non laedas' (So use your own that you do no injury to that which is another's). Ownership implies the right to possession, the right of enjoyment and the right of disposition of a thing, in fact, it is 'the exclusive right of disposing of a thing combined with the legal means of alienating the same and coupled with right to claim possession and enjoyment thereof'." * The idea of ownership so far as outlined is that held in modern law, e.g., Roman-Dutch law. The question is whether the same conception prevails among primitive communities generally and among the Bantu in particular. Some writers contend that ownership of property is unknown among primitives, that everything is owned in common by the whole group. Closer examination, however, shows that there are different

* See Maasdorp, A.F.S. "Institutes of South African Law" Vol. II page 34
types of ownership among even primitive communities depending upon the kind of thing with which one is dealing. Some things such as land, for example, may be owned in common by the whole group, so that individuals possess them only during the pleasure of the group as a whole; others like stock may belong to smaller groups such as families and may be handed down from generation to generation through the descendants of the family concerned; other things such as shields and spears partake more of the nature of personal property, so much so that when the individual to whom they belong dies, they are buried with his corpse or destroyed; even women have ownership of the utensils, sleeping mats, etc. in their huts. Thus we must be on our guard against making general statements such as primitive communism without inquiring into the nature of the thing or things said to be communally owned. In fact, even in modern states we still find traces of common ownership. For example, things such as air, the water of perennial rivers, the shore, the fish in the rivers and the sea may be said to be the common property of all people in the land until they have been assigned to any particular individual,
because he has put something into getting them, e.g.,
catching the fish in the river, by common consent. The
result of work rightly belongs to the individual who
has done it. Among the South African Bantu property is
divided into Immovable and Movable, the latter being
further divisible into House, Kraal and Personal prop-
erty.

The only immovable property recognised in Bantu
law is land. The theory that things which attach to land
such as houses, trees, etc. are immovable is not found
among them. This is probably due to the fact that their
houses were not permanent structures, but were liable
to be moved or abandoned at any time, according to cir-
cumstances such as the outbreak of an epidemic in the
land, the failure of crops with consequent famine, the
lack of fertility in the soil, invasion by neighbouring
tribes, the delapidated condition of the huts, or any
other similar reason. The same applied to trees, which
being capable of being uprooted, were regarded as im-
movable. Land was held communally. Its ownership was
vested in the Chief who however did not have absolute
dominium over it, but held it in trust for the members
of his tribe among whom he allotted it according to certain well defined principles. It was assigned gratuitously to all those who owed allegiance to the Chief; it could not be assigned to non-members of the tribe or strangers unless they decided to affiliate themselves to the group and were accepted as members. The holder of land, the Chief included, could not sell it or negotiate with it. He had the right to use it for his kraal and his gardens, and while he was cultivating it he had a secure title to it. He might, for example, hand it down to his heirs according to Native law, the law of primogeniture being observed. But if he abandoned it, it reverted to the Chief who might re-allot to a new applicant. Therefore there is no one who can be said to own land in freehold in the European sense of ownership. Nor does the Chief own it in freehold. The occupier only has usufructuary rights as long as he remains subject to the Chief. Although the land was granted and held gratuitously, custom ordained that some tribute, either in the form of labour or beer or some portion of the crops, be given to the chief or headman as representative of the community. Apart from the arable land of which we have
been speaking, there was usually a portion of the land reserved for grazing purposes in Bantu society. All stock grazed freely over this uncultivated part of the land, which may therefore be said to have been owned communally. Sometimes cattle-posts were established by different families in different parts of the grazing grounds, and to these the cattle were taken in times of drought, or during the dry season, but even there the grazing was free all over the land, and only advantage that a family might have in this connection was what was gained for it by the skill, the alertness and sometimes the fighting prowess of its herdsmen among other herdsmen. By a kind of unwritten law the boy who wielded the stick with most effectiveness had the best grazing and watering rights. But as far as the tribe was concerned these rights were enjoyed equally by all. 

**Noble Property.** Personal property such as clothes and weapons were clearly distinguished from things such as crops and stock. The former are considered to be so intimately associated with the individual that they follow his person wherever it goes. If he dies they are buried with him or destroyed, and are only with
reluctance given to other members of the family for general use. The latter being devoted to the satisfaction of the first necessity of life—food and self-preservation—are not held personally but in trust for the family. Thus a witch-doctor wanting to affect a particular individual with his medicines might use some article of clothing which has been in contact with the person of the individual and so produce the right effect; but he would not think of working on crops in order to affect the individual directly.

Family property was divided into two kinds, House Property and Krael. To each house that he established a man allocated some property consisting of stock, land for cultivation, utensils, and other household requirements. This constitutes the property of the house, to which additions are afterwards made through the earnings of the members of the house, further gifts from the kraalhead and from others and the lobola of such of its daughters as get married. All property not so assigned to a particular house is known as Krael property, and is in the absolute ownership of the kraalhead. Among some tribes such as the Xosa a kraalhead may not
om property independently of his various houses, but among others such as the Zulu all property not definitely allocated to one of the houses is kraal property and belongs to the kraalhead. In any event the kraalhead’s ownership is not absolute, but is limited by the claims of the different members of his family to maintenance and support. All property, whether house or kraal is under the management of the kraalhead, who is allowed wide discretion in the disposal of it subject to the well established rule that no house shall be enriched at the expense of another or others and that the wife and family whose house property is alienated be not impoverished. 3 Thus the principle of family ownership of property acts as a check upon the supposed absolute ownership of the kraalhead. An interesting question in this connection is whether the Native Administration Act 38 of 1927 by giving the Native the right to make a will gives him full testamentary freedom so that he can do at death what he could not do during his lifetime, namely to dispose of his property without due recognition of the rights of his wives and children. The Act provides that all property owned by

3 See Nonayiti Tabobo and Nsimani Tabobo vs Soja Tabobo 4 N.A.C. 142
a Native is capable of being devised by will except property allotted by him or accruing by Native Law to any woman with whom he lived in a customary union or to any house. The implication is that he may have unassigned property which he can deal with in this way, but this is contrary to Native Law at least in the Cape Province, as the following statement made by Native Assessors in the case of Fanekiso vs Sikade (C.M. Cir. d/d 12th December, 1925, No. 29 shows:

1. All the property not otherwise allotted belongs by custom to the Great House.

2. Adventitious property acquired by the kraalhead belongs by custom to his Great House.

3. Allotments of property of the Great House to minor houses may only take place in consultation with the wife and eldest son of such Great House.

4. The Kraalhead cannot own property which does not belong to one or other of his houses.

5. The earnings of the various wives and the dowries of their daughters belong to the respective houses, except in the case of the eldest daughters of minor houses whose dowries belong by custom to the major
house providing the dowry of the wife of such minor house.

6. The Right Hand House is established by the allotment according to custom of cattle from the Great House, which thereafter belong and are ear-marked for such Right Hand House.

Thus the kraalhead does not possess unfettered ownership, but is really in the position of a trustee or administrator in respect of property belonging to his house or kraal, out of which he has to provide lobola for his sons, wedding outfits for his daughters and suitable maintenance for his wives and other dependants. The position in Natal according to the Code is that the kraalhead does possess unfettered ownership with regard to unassigned property. * The proprietary rights of other members of the Bantu family are even more limited than those of the kraalhead. The personal earnings of the members of each house belong to the kraalhead, and are disposable by him, chiefly for the benefit of such house. He may demand, and can claim that all such earnings be handed over to him and in their disposal he is allowed much freedom and a wide discretion, but not so as to

* See Section 68 of Natal Code; also Ngcobo vs Ngcobo 1929 A.D. 233
benefit one house at the expense of another. This applies to wives as well. When the kraalhead dies and his place is taken by his eldest son, the latter succeeds to all proprietary rights of his father, including this claim upon the earnings of the members of his family.

If the home is broken up or where some members of the family have irrevocably abandoned their homes and set up their own establishments, there is no duty cast upon them to deliver their earnings to the kraal head or his eldest son who is acting in his stead. Conversely there is no obligation on the part of the kraalhead to support such members or to provide them with lobola. "No rights, duties" and vice versa is a well established principle in such cases. Between the members of a family there is a "universitas bonorum" to which all contribute and from which all draw according to their needs.

There is a mutual sacrificing for each other and the common good which is one of the most admirable features of the Shona social organisation. The greed and the avarice so apt to be engendered by a more individualistic type of community are conspicuous by their absence, and this mutual sharing of fortunes and misfortunes accounts in

See Ndopi vs Sita 1917 N.H.C. 77; Zombeyana vs Nkomidhli 1917 NHC 135
part at least, for the absence among them of the profit
motive which is the foundation of modern commerce. Thus
even today when an African opens a store, the direct
members of the family immediately refer to it as "our
store", a kind of family concern in which they are entitled
to a share, however little direct contribution they may
have made to it. On the other hand if the store-keeper
be in difficulties, his relatives, if he has treated
them as they expect to be, i.e., as potential partners
in the firm, will rally to his assistance with anything
that they can contribute to prevent his downfall. To
separate business matters and family relationships is
one of the most difficult for the African to do. The
concept of private business is gaining ground among them
in South Africa, but it has to contend with something
on which the whole fabric of Bantu society rests. As
Thurnwald points out, in primitive societies such as
the Bantu, failure to succeed in business does not
lead to personal ruin, and communal economics, even if
only partial, protect the individual from starvation.
The importance of blood relationship has not been forced
into the background and the family has not been broken
up into individuals as it is in modern society where it results instead in the formation of associations formed partly on a vocational and partly on an ideal basis.

The Native Court System. Inasmuch as most of the disputes which came up for treatment in Bantu society were of a civil nature, they were dealt with privately in the first place. That is to say the families to which the plaintiff and the defendant belonged called a joint family council in which an attempt was made to settle the issue satisfactorily. Normally this was sufficient, but where one or other party was dissatisfied with the decision of the family court, the matter was referred to the Headman or petty Chief of the district. At his court the heads of villages (abanumzana) foregathered from time to time to help in determining such civil disputes. Hence an appeal lay to the court of the Paramount Chief of the tribe. There was no such thing as a review of the decisions of the minor courts by the superior tribunals, but it was the duty of the grieved party to take the matter to a higher court to obtain redress. This was a very simple form of settling dis-

* See Turnbull, R. "Economics in Primitive Communities" page 231
putes, and the technicalities found in the European system were unknown. Time was not considered an important element in the trial which was allowed to drag on until every source of information likely to throw light on the point at issue had been investigated, and until every member of the tribe who felt like it had cross-examined the parties and had made any statement calculated to assist in the elucidation of the matter in dispute.

**Witnesses.** All persons who are in a position to throw light on the question are competent witnesses, women and older children not excepted. Hearsay evidence is not necessarily disallowed and has to be rebutted in the same way as other evidence. The close relatives of the parties such as their spouses are also questioned, and the incompetency of the wife against her husband or vice versa in European criminal trials is very puzzling to the Native who regards this as neglect of possibly the best source of information.

**Lawyers.** There are no professional lawyers among the Bantu. Every man acts as his own counsel, but invariably each party finds either among his own relatives
or among those attending the court who sympathise with
him in his own view of the case and will therefore bend
every effort toward advancing his case.

Everybody was invited to and took part in the trial,
and even strangers were not disqualified from making
comments. Thus a man was tried by all his peers, in
the same as he is in modern states under the jury sys-
tem. One important difference was this: in European
courts in South Africa the jury concern themselves with
questions of fact, i.e., their duty is to determine
which version, that of the plaintiff or that of the
defendant, is consonant with the facts, while the duty
of the judge is to determine the law, i.e., to say what
offence is committed according to the facts found by
the jury. In Native courts in the olden times no such
distinctions were drawn; the "adstantes" the people who
attended and acted as jury (judices) dealt both with the
facts and cited apposite customary law.

Precedents. The law which they dealt with was cus-
tomary and by the very nature of things precedents were
at a premium. Cases of a similar nature which had been
tried before were referred to and quoted by aged coun-
sellers and the ratio decidendi was abstracted and applied to the case in question. The principle of stare decisis (standing by previous decisions) was strictly applied in the Native courts and innovations which could not be harmonised with established usages were the exceptions rather than the rule. This tended to maintain ancient traditions and to sustain established moral code or order.

Oaths. Evidence was not given under oath, but at any stage of the proceedings the witness might be called upon to substantiate his evidence by swearing that it was "the truth, the whole truth and nothing but the truth". On this matter of oaths it is noteworthy that different tribes have different oaths which are calculated to impress upon their minds the necessity for telling the truth. In the opinion of the writer the oath usually taken on the Bible in European courts makes hardly any impression on the Native mind. Having taken it, their evidence is often anything but the truth. In any event, it is not as impressive to them as swearing by one's father (especially if dead), or by one's sister or by any departed ancestors, especially male ascendants, or by one's totem where totems exist. The first and the
last mentioned forms of oath are fairly common among
the Bechuana and the Basuto, e.g., Ke ikana še o
shuleng (I swear by my deceased father) in reply to
the question "u ikana mang?" (by whom do you swear)
makes it obligatory for the witness to speak the truth
for fear of what might happen to him if he used his
father's name in vain. All kinds of calamities were
supposed to befall him after that and the important
thing was that they believed in these possibilities.
Swearing by one's totem, e.g., Ke ikana Phuti "I swear
by the duiker" for a person belonging to the Bamangwato
tribe, would have the same effect. This form of oath
is used quite commonly in Native cases in European
courts in Rhodesia. For the Zulu-Xosa group "ngifung
'dadewetu" "I swear by my sister" is much more impres-
itive than the form of oath usually administered. The full
implication of this oath, of course, is; "if I am tell-
ing a lie I am as bad as the man who sleeps with his
sister". Anyone who knows the incest rules of these
people would know that such an oath would not be made
lightly. Swearing by the ancestral spirits "amadhlozi"
had the same effect. The Xosa "Isiduko" or clan name
is frequently used for the same purpose. Thus

+ A small deer
"Gifung'Amabamba" "I swear by the whole Amabamba clan" regarded by the Amabamba as very impressive. But we must be taken to use the exact totem or "isiduko" another form of oath which is regarded by the individual concerned as making it obligatory for him to speak the oath. With the advance of Christianity among the Basuto, we find that they begin to take to new forms of oath such as swearing by God or Christ. "Tixo", "Modimo", "Emmunkulu" words standing for God in Xosa, Suto or Xhosa, and Zulu respectively are today in common use. The fact that they are so often used even in ordinary conversation makes them of only formal value. We still find, however, that even in Christian native communities old tribal forms of oath are held in great veneration and are seldom lightly used. But with the non-Christian natives who constitute about two-thirds of our native population, the old Bantu forms of oath are the only ones they know and revere, and to apply any others to them, is so consistently done in our South African courts, as to say the least, absurd. Even in the rules of Court the Native Commissioners' Courts set up under the Native Administration Act 33 of 1927 the writer has
been unable to find any direction that any form other than
the usual may be used. Rule 3 of the Regulations govern-
ing the proceedings in Native Commissioners courts pub-
lished in Government Notice No. 2253 in 1928 states "All
oral evidence shall be given after the witness has been
duly sworn or admonished to speak the truth". This
statement is quite general and vague, and using native
forms of oath would not be inconsistent with it. In
Res vs Hepworth, 1928 A.D. 265 it was decided that in
a prosecution for perjury it was essential for the just
decision of the case that the question whether the evidence
was given under oath should be determined. It would
be interesting to know whether in a case of this kind
evidence given after the administering of a Bantu form
of oath would be accepted as evidence "given under oath".

Record. As writing was unknown among the Bantu,
there was no record kept of cases, but the decisions
were treasured in the memories of the people and were
recited or recalled as occasion demanded. Even under
the Native Administration Act 38 of 1927 Courts of Na-
tive Chiefs are not Courts of Record, and by necessity
all cases tried in such courts must on appeal be tried
by the Native Commissioner de novo and treated as cases
of the first instance. This is an anomaly which will undoubtedly be corrected when the type of man who generally becomes a Chief improves in his qualifications for the post. If a larger use is going to be made of Chiefs in the future, they will have to be properly trained.

Judgment. The judgment of the court is delivered by the Chief who acts as chairman throughout the proceedings. He also took part in the cross-examination, but his chief duty was to deliver the judgment after the matter had been thoroughly thrashed out. Thus we see that Bantu courts act as boards of arbitration rather than decide the case on evidence. But even when they have given a decision, it is an expression of tribal lore rather than a sentence which they enforce; it is a matter which has been thrashed out publicly in open debate, and it is therefore generally a decision that gives satisfaction to the whole body of tribesmen; both the plaintiff and the defendant usually left the court feeling that justice had been done, which is more than can be said of many a court in civilised states. Decisions given in the chief's court must be carried out and any refusal to comply with them would be con-

See discussion of relevant cases in Blaine, C.H. "Native Courts Practice" (JUTA) 1931 pages 166-168
strued as treason and would render the accused liable to have his property confiscated in addition to running the risk of being put to death.

Evidence. We have seen before that evidence was not given under a formal oath rendering the witness liable for perjury in the event of him giving false witness. The court placed full confidence in public cross-examination as an effective instrument for eventually laying bare the truth. All types of evidence were allowed—hearsay, confessions, irrelavent matters, etc., but due weight was given to evidence according to its nature. The evidence of close relatives was not necessarily excluded. In European courts in South Africa such evidence is usually excluded unless the case is one between close relatives, e.g., husband against his wife, in which case of course they would have to testify against each other. But normally European courts discount such evidence on two grounds, (I) because of the temptation to give false evidence in order to put the relative in a good position and (II) because it seems unnatural to expect relatives to testify against each other. Native courts take the view that if relatives
who are generally extremely loyal to one another testify
against each other, it raises a very strong presumption
that the second party is in the wrong. Naturally in-
vestigations would be made to see that the testimony was
not vitiated by the existence of, for example, strained
relations between the relatives. But a relative, e.g.,
a father, a mother, a wife, a husband, a brother was ex-
pected to give evidence favourable to his or her relative,
and so if the contrary took place, the accused had to
produce very strong evidence in rebuttal.

Fines. Fines constitute the normal penalty for all
offences in Native Law except in the case of anti-social
acts which we have seen are expiated only by the ex-
termination of the accused. A portion of the fine is
usually retained by the chief for his services and this
constituted a source of income for the chief. Yet al-
though they worked under a system so ostensibly open to
abuse, it must be said to the credit of the Chiefs that
they seldom took advantage of their position. They
frequently slaughtered the beasts which came into their
possession by way of fines for the benefit of the members
of the tribe as a whole. Practically every day an im-

important chief entertained his people in this way. The fact that they were not always above board in this re-
spect is well illustrated in the case of Basutl where many complaints are made about the way in which they misuse their rights in this particular matter.

Notice of Action. There is no such thing as an ex parte action in Native law. The other side must al-
ways be given due notice of the case that he has to answer and the date of the hearing through a court messenger who had to be paid for his services, either by the plaintiff or the defendant as the court deemed fit.

* See Buell, R.L. "The Native Problem in Africa" Vol. 1 under "Basutoland"
We have reviewed the different aspects of Native Law as they existed prior to the advent of the white man and as they are still followed in many areas of the country the Native population is principally to be found. We have noted here and there the conflicts and the confusions which have resulted from the incoming of new conceptions regarding legal relationships into the life of the Native. It may be in place to state here briefly the points at which these conflicts are apt to arise and, in a word, to contrast the Native with the European idea of the same phase of life.

The Bantu conception of marriage as a contract between groups or families rather than between individuals, a contract which may continue even after the death of the parties primarily concerned in it—for while individuals may die, groups or families do not—unless it is terminated inter vivos in one of the ways prescribed by custom, is fundamentally different from the modern European notion of a rather personal affair which lasts at best "until death us do part".

The perpetual minority of women which necessitates their always being under the tutelage of some male member of the family and which deprives them of the rights of personal guardianship of their children—for how can a person who herself requires a guardian act as one over another—is somewhat incompatible with the status of woman in Roman-Dutch Law where she may be emancipated at 21 or upon marriage or subsequently thereto. The South African Native complains that this "unchartered freedom" claimed
by their children under the white man's law results in young women leaving their homes, in spite of the admonitions of their parents, for industrial centres where they cannot help living lives of dissipation and prostitution. Hence the frequent demands by them that stringent laws should passed to make it possible for urban authorities to return these "dissolute women" to their rural homes and to parental authority. This it is now possible to do under the Native Urban Areas Act 21 of 1923.

The communal idea of property, especially landed property, according to which all property is held by the head of the family in trust for its members is in direct conflict with the absolute dominium of European Law which is unlimited in point of user and disposition. Hence the frequent misunderstandings which arise when white people who have been given land by Native Chiefs claim its ownership only to find that the Native had intended to give only the right of occupation during his pleasure. Furthermore where Natives have been given individual title-deeds to their lands, they cannot readily understand the necessity for registering any transfers of their land from one to another. A Native desiring to buy land from another pays the amount agreed upon and receives in exchange the title-deed of the owner. Imagine his confusion when he discovers that although he has paid for it, he does not become the rightful owner of the land unless he has had it conveyed to him through the Deeds Registry Department, necessitating the employment of a qualified conveyancer and the payment of transfer duty and legal costs amounting in many instance to more than the actual value of the land to be transferred.
The result has been that in numerous land transactions Natives have ignored the provisions of the white man's law and title-deeds have changed hands without the necessary registrations being effected. It is needless to comment on the resultant state of confusion. A recent attempt on the part of the Government to terminate this state of affairs in the Cape Province, where it exists in its worst form, led to protracted litigation which went as far as the Privy Council, the Natives refusing to hand over their title-deeds for correction. (See Rex vs Ndobe-1930-A.D.424). In all its new Native land legislation, however, the Government of the Union of South Africa endeavours as far as possible to base its measures on conceptions intelligible to the Bantu, combining the best features of communal tenure of land with those of the much-desired system of individual land tenure. Thus the Glen Grey System of Land Tenure which has been in vogue in the Transkeian Territories since 1894 is being gradually extended; it gives access to land which is sui generis, its essential features being the inalienability of the land without the consent of the Governor-General, ready transfer effected by means of a simple endorsement of the title-deed upon payment of a nominal registration fee, the prohibition of the right to subdivide or sublet the land, and forfeiture of the land upon non-fulfilment of certain conditions, including beneficial occupation.

In the field of Succession and Inheritance we find the same conflict between Native ideas and Western civilisation. Nativ Law with its principle of primogeniture, its restriction of the right to succeed to males only, its succession to liabilities as

* Rogers, H. Native Administration in South Africa pp.136-137
well as to assets, to status as well as to property is diametrically opposed to the white man's law with its testamentary freedom, its infinitesimal subdivision of property among heirs who accept no responsibility for the estate of the deceased.

Finally in the sphere of contracts the solemnity of written documents is unknown to the Native and so is the fact that time is of the essence of most contracts in Western civilization. The persons who have full contractual capacity are few in number and the European who has to deal with the Native finds himself involved in or confronted by conceptions, slow-dying conceptions, of an earlier day when business matters, trade transactions included, were conducted in a more leisurely fashion, when the debts of the "fathers" were passed on, like transgressions, to the "children" unto the third and fourth generation.

With the effluxion of time and with the contacts between Native and Native on the one hand and Native and White on the other on the increase rather than on the decline, the necessity for taking account of the Bantu conception of things has become more and more imperative. No longer is it desirable or indeed possible to brush aside these questions with a shrug of the shoulders, or worse, with a determination to force everybody through the same mould. Intelligent understanding and wise administration have led to the movement whose history will be traced in the next two chapters for the recognition of at least certain aspects of Native Law.
Chapter III

The Recognition of Native Law in South Africa

The question as to whether Native Law should be granted any recognition in the courts of the country has always engaged the attention of Native administrators and jurists in South Africa. There are two schools of thought in South Africa regarding this matter, and before dealing with the history of the recognition of Native Law, it would perhaps not be out of place to state briefly the main arguments of the two contending parties, although the battle seems to have been won by those in favour of recognising Native Law, as the passing of the Native Administration Act 38 of 1927 indicates.

The Case against Recognition. In the first place in the Cape Province and the Orange Free State, both of which states have strenuously opposed the recognition of Native Law, though at times for different reasons, the territorial view of law is maintained. According to this theory all people who live or are domiciled within the same territory should be subject to the same law. Any other principle, according to the followers of this theory, offends against the legal maxim of equality be-
for the law for all the subjects of the state. Different laws for different people imply different treatment for different people, and that is open to abuse. The only safe policy is to apply the same law to all people living within the same territory subject to the same sovereign state. The theory was clung to particularly in the Cape which has always stood against the separation of Native and European interests.

Again, it has been argued that Native Law, because it is not recorded anywhere, is not accessible either to the judges who would have to apply it, or to the Natives themselves to whom it is to be applied. The argument that the Common Law of all countries is not written or has not been the subject of legislative enactment does not seem convincing to these theorists who maintain that in applying the Common Law in civilised countries judges have to be guided by the records of cases which have already been decided. In the case of Native Law such precedents were lacking, and the result of trying to apply Native Law would be that litigants would be at the mercy of the magistrates, and would often be embarrassed in meeting the cases preferred
against them because the law to which they were subject
ended so much on the caprice of the magistrate. In
order to establish the law, enquiries would have to made
by Native Assessors by officials whose knowledge of
Native language was problematical; or through inter-
preters whose knowledge of the legal implications of the
statements or meanings which they had to convey was as
little as that of the persons they had to question on
point of law involved. This was clearly open to a-
ne, and could hardly be preferred to the system of law
which was definite because it was in writing, which had
been interpreted in numerous recorded cases which ad-
mitted of no equivocation or ambiguity. If Colonial
was good for the European, it was certainly good
ough for the Native.

Another strong contention of this group was the
that Native customs included some practices which
were clearly repugnant to the principles of civilization
and natural justice, and if Native Law were recognized,
ought mean perpetuating an archaic system of law
which had outlived its usefulness. The smelling out of
the accused of witchcraft, the purchasing of brides,
certain elements of procedure in Native Criminal Law such as communal responsibility and the interrogation of the husband or the wife in the event of a criminal charge being preferred against either—-all these and many other practices such as the Ukumetaba or the Ukulobonga custom, the Ukungena custom, polygamy, which were particularly offensive to the sense of justice of the European made it difficult for the territorialists to accept the advisability of the recognition of Native Law in South Africa.

The Case for Recognition. On the other hand those who have advocated the recognition of Native Law have pointed out that the territorial theory of law can only be applied consistently where one is dealing with a homogeneous population with practically the same culture and historical antecedents. In a country like South Africa where the population consists of different peoples at different stages of development, with different customs and traditions, it is more equitable to make the application of law personal, not territorial. That is to say that in such a country the laws should be divided into (a) common laws, i.e., laws which apply to all the inhabitants, (b) the Ukumetaba (Xosa) or Ukulobonga (Zulu) is a form of external sexual intercourse sometimes practised by the youth of the tribes mentioned. Ukungena was the custom by which a widow was taken to wife by her deceased husband's brother for the purpose of "raising up seed" to the departed brother.
e.g., the laws regarding theft; no one would maintain that some people should be allowed to steal and others not. (b) special laws, i.e., the laws which apply to a person because he happens to belong to a particular section of the population. Native customary law would fall within the second category, as consisting of laws which are applied to Natives because they are Natives. The strongest argument of the advocates of Native Law is that law must follow facts, i.e., in the administration of justice it is much better to accept as your point of departure the laws which are known by the people and which have been followed by them from time immemorial. One of the greatest forces in the administration of justice is the appeal to tradition, and any attempt to apply to the Natives a system of law of which they were ignorant would defeat its own ends. Moreover, to refuse to recognize Native Law was far more unjust than the territorialists seemed to realize. One of the most important legal maxims is that "ignorance of the law is no excuse". This maxim could only be applied in fairness to people who had only themselves to blame for their ignorance of the law. But applying Colonial Law to
Natives was in effect to put them into a position where the application of this maxim would be rank injustice to them, whereas the recognition of the system of law with which they were best acquainted would obviate this difficulty. The fact that Native Law was not obtainable in writing and that its establishment would require time and the exercise of great pains is, in the view of its advocates no true obstacle to its recognition. No amount of time spent on settling a case in point in such a way that substantial justice is done can be regarded as wasted, for the record of such a case can always be used for the future guidance of those who have to administer as well as those who have to obey the law.

The fact that certain Native customs are repugnant to Natural Justice or to the principles of civilization is all the more reason that Native Law should be recognized, because as Sir Theophilus Shepstone pointed out in giving evidence before the Cape Native Laws and Customs Commission of 1881, recognizing Native Law ensures better control of the Natives and gives the Government greater power of introducing civilised ideas. The government can control Native customs, direct their