would be allowed to own or hold an interest in land, and another in which Europeans alone would have such rights. The areas set aside for the occupation of Natives and Europeans respectively were defined temporarily in a schedule to Act 27 of 1913, and a Commission was appointed to go into the question of what further areas, if any, were to be added to the areas for Native occupation, as the areas set out in the principal Act were admittedly insufficient for Native needs. The Commission submitted its Report in 1916 and in 1917 the further legislation contemplated by the 1913 Act was introduced into Parliament in the shape of the Native Affairs Administration Bill, in which the Native areas recommended by the Commission were embodied in a Schedule.

Legislation for Native Areas

We are not here concerned with the Land proposals of this Bill, but rather with its objects which included, inter alia, "the making of laws for, and the administration of justice and other matters in the areas" set apart for occupation by Natives. The administration of justice in the Native areas was to be different from the system

in vogue in the rest of the Union in several respects. Thus (i) No Act of the Union Parliament would be in operation in any Native area unless it was specially provided in the Act so passed or in some other Act of Parliament or unless the Governor-General had, by proclamation in the Gazette declared that such Act shall be in operation in that Native area or in all Native areas. (ii) The Governor-General was empowered by proclamation in the Gazette to make new laws for the peace, order and good government of all Native areas or any Native area or repeal or modify any laws already in operation in the Native area or areas, subject to the approval of Parliament.

(iii) Union Acts and Provincial ordinances already in operation in the areas as defined were to continue in force unless repealed or modified in the manner prescribed by the Bill.

The Court System of the Native areas was also to be a special one, and was outlined in section 9 of the Bill, according to which the Governor-General was empowered to constitute by proclamation in the Gazette the following

courts for the administration of justice in Native areas (a) one or more special courts; (b) Commissioners' courts; (c) Native chiefs' courts.

A special court which had jurisdiction in respect of civil and criminal cases and heard and determined appeals from commissioners' court was to be constituted as follows:-

(a) When exercising criminal jurisdiction or, in cases where any party to the proceedings is a person other than a native, civil jurisdiction, a judge of the Supreme Court, or an advocate of not less than ten years' standing (who shall be president of the court) and two other persons being commissioners or sub-commissioners.

The Commissioners Court which had civil and criminal jurisdiction within limits set out in the Bill was to be presided over by a Native Commissioner or sub-commissioner and was to hear civil and criminal appeals from any court of a native chief within its area of jurisdiction.

Native Chief's Court. "A court of a native chief shall have jurisdiction in such petty criminal cases as the Governor-General may by proclamation prescribe, where the offender is a native of the chief's own tribe, and in all

civil cases (except actions for divorce) where the person against whom the proceedings are brought is a member of the chief's own tribe."

The Appellate Division of the Supreme Court of South Africa was to have jurisdiction to hear and determine appeals in all civil and criminal cases from a special court, such as it possesses in respect of judgements and orders of a provincial* or local* division in like matters respectively.

Convictions and sentences of the commissioners' courts were to be subject to review by--

(i) The Chief Commissioner of the Transkeian Native Territories, where the commissioner's court was constituted for an area therein.

(i) The Chief Commissioner for Natal, where the commissioner's court was constituted for an area therein.

(iii) An officer or officers of the Department of Native Affairs designated by the Minister when the commissioner's court was constituted for any other area.

* The Superior Courts of the Union of South Africa consist of (i) an Appellate Division with headquarters at Bloemfontein, (ii) four Provincial Divisions consisting of the Supreme Courts of the former Colonies, viz. the Cape of Good Hope, the Transvaal, Natal and the Orange Free State with headquarters at Cape Town, Pretoria, Pietermaritzburg and Bloemfontein respectively, (iii) three local divisions, viz. the Eastern Districts Court, the Griqualand West Local and the Witwatersvard local with headquarters at Grahamstown, Kimberley and Johannesburg respectively, (iv) several circuit courts, (v) the Natal Native High Court with headquarters at Durban.

Jurisdiction of Ordinary Courts. After the constitution of a Special Court in any particular area, no provincial or local division of the Supreme Court, except in cases between Natives and non-Natives, not the Natal Native High Court nor the Transkeian Native Territories Appeal Court would have jurisdiction in that area in respect of any civil matter. Similarly the commissioner's court ousted the jurisdiction of the magistrate or resident commissioner or justice of the peace existing under any other law in respect of any civil or criminal matter between Natives in that area. Finally, as from the date in which a court of native chief is constituted under this section any other law heretofore enacted which conferred jurisdiction on any native chief residing where such court will be held, shall cease to apply.

The System of Law to be Applied. All through the Bill we find no mention of the kind of law which was to be applied in native cases in the native areas, and we can only suppose that, if the Bill had become law, the ordinary law of the country of the country, i.e. European law would have been applied in the native areas, but

that the Governor-General by use of his powers of legislation by proclamation for the native areas, would have gradually introduced the principles of Native Law in the administration of justice, even if only by way of a general simplification of the legal machinery to be used in native cases, and in special cases of which European law took no cognisance. The only reference we find to Native Law is in section 9(3),(b) where we are told that the commissioner's court would have jurisdiction to deal with questions of divorce, separation or nullity of marriage in respect of "marriage by native custom," while the same court had no jurisdiction to deal with such questions in cases of civil or Christian marriages.

In any event there was such a storm of opposition to the land proposals of the Bill on the part of the European public that it had to be shelved. There were some features of the Bill, however, which it seemed inadvisable to hold in abeyance or discard entirely because of the protests, justifiable or otherwise, which were aroused by its land provisions. Some of these were later culled from the Bill and made the subject of seperate Acts. Hence one of the

portions of the shelved Bill provided the nucleus of the Native Affairs Act 23 of 1920 which made provision for the appointment of a permanent Native Affairs Commission, for the establishment of Native Councils similar to the Transkeian Territories Council where these had not existed before, and for the consultation of native opinion before the introduction into Parliament of legislation affecting Natives.

That portion of the Bill which we have been discussing and which dealt with the administration of justice as far as Natives were concerned was later incorporated into the Native Administration Act 38 of 1927 which now is the principal Act governing the recognition and application of Native Law in South Africa.

It must be pointed out however that between 1917 and 1927 several events in South Africa prepared the way for the recognition and application of Native Law in the country. Among these may be mentioned the opening of Bantu Studies Departments in the different Universities in South Africa, the writings of men like Professor Edgar Brookes, of Pretoria University, whose "History of Native Policy" published in 1924 pointed out very strongly the advisability of

recognising Native Law, and generally the consolidation of public opinion regarding the segregation policy of the country which culminated in the introduction of General Hertzog's four Bills* for the solution of the Native Problem in 1925.

The object of the Native Administration Act of 1927 is broadly speaking to provide for the better control and management of Native Affairs. The questions it deals with include (a) Tribal Organisation and control, (b) Land Registration and Tenure, (c) Judicial Organisation and

* General Hertzog's Bills which have not reached their final form are (i) The Union Native Council Bill which is to provide for the constitution of a council of native delegates, representative of the whole Union whose function will be to deal with such native affairs as Parliament may from time to time delegate to it; (ii) The Coloured Persons' Rights Bill which is to make provision for the extension of full citizen rights to coloured persons, i.e. persons of mixed blood; (iii) The Representation of Natives' in Parliament Bill which is to make special and uniform provision for the representation of the Native inhabitants of the Union in the House of Assembly, and to alter certain provisions of the laws governing voters' rolls and parliamentary elections, with a view to effect such representation; (iv) The Native Land (Amendment) Bill intended to make further provision as to the acquisition of land by natives outside the areas defined by the Schedule to Act 27 of 1913 (Natives Land Act); to amend that Act in certain respects; to determine the conditions on which natives may reside in areas in which they are prohibited from acquiring land, and for other purposes incidental to all such provisions.

Procedure, (d) Marriage and Succession, (e) the Prevention of Misconduct and Disorders in Native Villages and Townships, (f) Exemption from Native Law. Our chief concern will be with sections (c),(d) and possibly (f) which have a direct bearing on the question of the recognition and development of Native Law. Since the passing of this Act the Governor-General as Supreme Chief of the Natives has promulgated a number of proclamations and regulations to give effect to the various provisions of the Act. In 1929 the principal Act was amended in a number of important respects to give or bring about better control and management of Native Affairs, and therefore the Native Administration Act must be read together with Act 9 of 1929. The latest important work done in South Africa in connection with Native Law was the publication of a revised Code of Native Law in Natal. The original Code, it will be remembered, was published as a schedule to Natal Law 19 of 1891, and although the Code had been amended at different times, no thoroughgoing revision of it had ever been made with a view to bringing it up to date and correcting such errors in it as later resear-

ches into Native Law had brought to light since its promulgation. The revision of the Code was put in the hands of a Committee of experienced authorities on Native Law in Natal with the following objects* in view:-

(i) to bring the Code into harmony with the existing practices and usages of the Natives in Natal in recognition of the changes and development which had undeniably taken place in the family life and customs of the people during the years which had elapsed since it was enacted:

(ii) to consolidate the Native law in Natal which was contained in the original Code and in a number of amending statutes;

(iii) to re-arrange the Code in proper logical and legal form, the original Code being archaic in form and language and very badly arranged;

(iv) to bring the Code into harmony with the provisions of the Native Administration Act: and

(v) to facilitate the application of the Code in Zululand. The revised Code was first published in draft form to give the general public an opportunity of suggesting

* Rogers,H. "Native Administration in South Africa" p. 222

amendments and improvements, and it was ultimately promulgated under proclamation No.168 of 1932 dated September 17, 1932. This Code now (a) replaces the Code of 1891 (b) repeals antecedent Natal legislation, (c) took effect from November 1, 1932, (d) applies to Zululand.

This brings the development of Native Law in the Union right up to 1932, and we must now turn to the provisions of the Native Administration Act, as well as to the judicial decisions which have been made by the different South African tribunals in an attempt to interpret the provisions of the Act, in order to see, if we can, to what extent Native Law is to be recognised and applied, and what course its future development might be expected to take.

2.

The New Native Court System-Civil Jurisdiction under the Native Administration Act.

In order to be able to examine properly the effect of the Native Administration Act on the recognition and application of Native law and custom in South Africa, it is well for us to note that a new and separate court system

for Natives was contemplated and has been given effect to under this Act. Section 10 of the Act, as amended by Section 5 of Act 9 of 1929 (vide supra) provides that the Governor-General may be proclamation in the Gazette establish courts of Native Commissioners for the hearing of all civil causes and matters between Native and Native only but that no such court shall have jurisdiction in matters in which (i) the status of a person in respect of mental capacity is sought to be affected,(ii) is sought a decree of perpetual silence; (iii) nemptissement is sought; (iv) the validity or interpretation of a will or other testamentary document is in question; (v) a decree of nullity, divorce or separation in respect of a marriage (i.e. contracted according to civil or Christian rites) is sought: Provided that when the parties to any proceedings do not both reside in the same area of jurisdiction of such court the court of native commissioner, if any, within whose area the defendant resides shall have jurisdiction in such proceedings.

The law to be applied by the Commissioners in dealing with Native cases is set out in section of the Act which

reads:-

(i) Notwithstanding the provisions of any other law, it shall be in the discretion of the courts of native commissioners in all suits or proceedings between Natives involving questions of customs followed by Natives, to decide such questions according to the native law applying to such customs except in so far as it shall have been repealed or modified: Provided that such Native Law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles.

(ii) Where the parties to a suit reside in areas where different native laws are in operation, the native law, if any, to be applied by the court shall be that prevailing in the place of residence of the defendant.

A number of important phrases in this section call for some observations. In the first place we notice that the application of Native law is "in the discretion of the court of the native commissioner." Neither the plaintiff nor the defendant can claim as of right that the case must

be dealt with according to native law and custom. Quite obviously the law presupposes that the presiding officer, i.e. the native commissioner is versed in Native Law, although if he is in doubt as to what the native law and custom on the point in question is, he is at liberty to ask either of the parties to lead evidence on it or call to his assistance expert assessors.* With regard to question as to what will guide the commissioner in coming to a decision in trying the action either by Native law or Common law, it has been decided that if the aggrieved party has no remedy under Native law, the law providing the remedy should be applied.** Thus in applying Native law, the presiding officer will be guided by the fact of the existence or otherwise of a remedy in the law applied. He will apply the law, i.e. Roman-Dutch or Native, which gives a remedy under the circumstances disclosed in the case. This raises the further question as to what stage in the proceedings the commissioner is to signify his intention to apply one system of law or the other. Dealing with matter in the case of "Ntsabello vs Poolo" (1930) 2 N.A.C. (N.&T.) 13, Stubbs, the president of the Natal and Transvaal Division of the Native Appeal Court said, "It would be inadvisable to lay down any hard

* Morake vs Dubedube (1929) 1 N.A.C.(N.&T.) at p.78
**Muguboya vs Mutato (1929) 1 N.A.C.(N.&T.)

and fast rule as to when or at what stage in the proceedings the Native Commissioner should signify his election to try the case by Native Law. This would be largely governed by the circumstances in each case. While, however, it may be desirable that the parties should know when the hearing is begun, what course the Commissioner intends to follow so that they may know from the outset of the proceedings the manner in which the issue or issues involved may be approached, the circumstances may be such that until the legal aspects and the facts are sufficiently before him, he would not be able to properly exercise his discretion. With this general outline as a guide I shall leave the matter but express the hope that it may be possible for Native Commissioners to avoid in the future a confusion of the two systems of law."It is clear from this decision that the Commissioner cannot try one half of the case by Native and the other half by European law. The two systems must be kept separate as far as possible.

Another significant phrase in Section 2 quoted above is that the Court of Native Commissioner has this discretion only in <u>suits or proceedings between Natives</u>. All suits or proceedings between Natives and non-Natives

are to be tried by the ordinary law of the land. As a matter of fact such cases are outside the jurisdiction of the court of the native commissioner and fall within the scope of the Magistrate's Court. Native Commissioners Court are constituted for the hearing of all civil causes and matters between Native and Native only. (Section 10 of Act 38 of 1927)

Moreover Native Law is to be applied between Natives only in suits or proceedings "involving questions of customs followed by Natives." It has been held that a true construction of Section 2 on this point is that Roman-Dutch must be primarily applied and Native Law only invoked in matters peculiar to Native custom falling outside the principles of Roman-Dutch law. Thus an action for money lent or advanced is not peculiar to Native Law but is a transaction common to the daily affairs of Europeans and Natives alike, and therefore prescription would apply to it, whereas in proper Native Law debts were never prescribed. (Nqanoyi vs Njombeni (1930)N.A.C. (C.& O.))
And yet it is desirable in cases of this nature to avoid, so far as possible, getting away from a system of law, whatever its shortcomings may be from our point of view,

that is more in harmony with native concepts of equity and justice. (Monageng vs Komupi 1930) 2 NAC(N&T) The difficulty with which we are faced is that of developing Native Law as a dynamic and not a static system, one which must conform to the needs of a people in a state of transition. The individuals who come before the court from time to time are at different levels of development, and it would be inequitable to apply to all of them without discrimination the same system of law. The question is whether the manner in which the commissioners are instructed to exercise their discretion according to the decisions quoted above will assist in the development of Native Law as a separate system of jurisprudence or whether eventually Native Law will be assimilated in all points to Roman-Dutch Law or South African Law, as it may be more properly termed today. On the face of it it seems as if it is the intention of the Legislature to do away with Native Law as soon as Natives cease to follow the customs which they followed prior to the coming of the white man. Suppose the Natives develop new customs different from those they had previously followed, what then ? A case has

already come up for decision where it was sought to set up a local custom which was contrary to the universally recognised, among Natives, law of primogeniture, and in which influential witnesses gave evidence to the effect that the new custom existed among the tribe in question. The Court in refusing to recognise the new custom held that it would be a dangerous doctrine to hold that because such is the modern development within a tribal entity in a given area, a law which has its genesis in the ancient polity of the founders of the race and has been universally recognised and generally applied down through the ages to the present time is ousted thereby.* The second part of section 2 of the Native Administration Act 38 of 1927 deals with the conflict of laws resulting from the fact that the Plaintiff and the defendant may be Natives living in different areas where different tribal laws are in vogue. Where the law of the plaintiff's domicile differs from that of the defendant's, and when no special agreement has been made to the contrary, the law to be applied shall be that prevailing in the area in which the defendant resides; but there is nothing to prevent the

* Mazibuko vs Mazibuko (1930) 2 N.A.C.(N. & T.) 143

parties from entering into an agreement, for example, to pay the dowry or lobola fixed by the custom obtaining in the plaintiff's place of abode: nor is there anything which would preclude the parties from agreeing that the custom of the tribe of which they are members, although they do not reside in the same place, should apply.* Where Natives of the same tribe are resident away from their tribal domicile in a large industrial centre in which diverse systems of native law and custom prevail, enter into marriage negotiations in accordance, so far as possible, with the principles governing such negotiations by the law and custom of their tribe, they must be taken to have agreed that the laws of their tribe, so far as is possible under local conditions, are to apply to the transaction and ensuing marriage.** There is nothing to prevent such an agreement.

Thus we have the following possible cases of conflict of laws:-

(a) Where the parties belong to different tribes and reside in different areas with different laws applicable.

(b) Where the parties belong to the same tribe but reside

* See Beliso and Thomson vs Zeka (1930) 2 N.A.C.(C.&O)
**See Mazibuko vs Manana (1930) N.A.C. (N & T)

in different areas with different laws applicable.
(c) Where the parties reside in an industrial centre such as Johannesburg which is not a native area and where no particular native laws are in operation.

In the absence of a special agreement to the contrary, the law to be followed shall be that in operation in the place of residence of the defendant, which it is quite conceivable may be what the defendant himself does not want. If in any transaction one party or the other feels that he may be prejudiced by the fact of having the transaction governed by the law in force in his place of residence, he has the privilege of prescribing by agreement with the other side the law which he desires to have apply.. Of course people are as a rule not so circumspect in entering into legal obligations, so that we can expect to find that much litigation in the future will turn round just this question of the most equitable law to be applied under the circumstances of the case. Hence the wide discretion given to the Commissioner.

Native Chiefs' Civil Jurisdiction.

The Native Administration Act makes provision for the

greater use of Native Chiefs in our judicial administration. The Governor-General may authorise any Native Chief or Headman recognised or appointed under subsection 7 of section 2 to hear and determine civil claims arising out of Native law and custom by Natives against Natives resident within his area of jurisdiction brought before him, provided that a Native chief or headman shall not under this or any other law have power to determine any question of nullity, divorce or separation arising out of any marriage, and marriage within the meaning of this Act means a Christian or civil marriage. It will be remembered in this connection that prior to the passing of this Act Native Chiefs in British Bechuanaland had power to deal with Christian or civil marriages in the manner in which no chiefs shall in future be allowed to do. Presumably Native Chiefs may deal with similar questions arising out of customary unions i.e. marriages according to Native custom. Thus the Native chief's civil jurisdiction is confined to cases

(a) between Natives resident within their own area of jurisdiction

(b) involving questions of Native law and custom
(c) brought before him by the parties i.e. they need not bring the case to the Chief, or Headman but may take it to the Native Commissioner's Court as a Court of first instance.
(d) but excluding questions of nullity, divorce or separation arising out of Christian and/or civil marriages.

Any party dissatisfied with the judgment of a Native Chief or Headman may appeal to the Native Commissioner's Court which may confirm, alter or set aside the judgment after hearing such evidence (which shall be duly recorded) as may be tendered by the parties to the dispute or may be deemed desirable by the Court. Native Chiefs' Courts, it must be noted, are not courts of Record,* and by necessity all cases tried in such courts must on appeal be tried de novo by the Native Commissioner and treated as cases of first instance. On this question of appeals from the Chief's court Stubbs, President of the Native Appeal Court has said:- "The Native Commissioner, in hearing an appeal from the former (chief's court) acts both as a Court of Appeal and a Court of first instance. Paradoxical as it may seem, the object of the legislature in the

* See Hlungwane vs Mapumulo(1929) 1 N.A.C. (N & T)

language of section 12 (3),(4), and (5) of Act 38 of 1927, read with rules 6,7 and 8 governing procedure in this regard was to invest the Native Commissioner's Court with functions of a twofold character:

(i) as one of appeal from a decision of a chief, and

(ii) as one of first instance for purposes of recording the evidence and of bringing any such matter dealt with by it within the purview and the authority of the Native Appeal Court for purposes of appeal. It was therefore necessary that so far as concerns the Court of Native Commissioner it should be one of record as well as one of first instance to try out and decide any such appeal as though it were one of first instance at the same time care being taken to indicate on the record that it is an appeal, to obviate a possible objection of res judicata. I hope that this has been set out in sufficiently clear language to serve as a future guide to the courts of Native Commissioners." With regard to this statement it must be said that the fact that the Chief's Court is not one of Record and consequently not really one of first instance is not likely to encourage litigants to take their cases to the

Chief for adjudication. It means that they have to go through the expense and trouble involved in the case twice to get at the first definitive decision if they begin the process in the Chief's Court. It seems that it would have been better to make the Chief's Court the court of first instance and that of the Native Commissioner the court of appeal from the native Chief's court. One recognises that the difficulty at present in doing this is the fact that the ordinary Native chief is not qualified to do this work satisfactorily for purposes of appeal, but it is not unreasonable to suggest that this should be one of the earliest reforms of the system of native judicial administration. It would enhance the reputation or the prestige of the Chief's court in the eyes of the Native public that it is intended to serve. In fact by a proclamation passed in August 1931, it has been made obligatory for chiefs to see to it that all judgments delivered by them are entered, together with the names of the parties and the particulars of the claim, in a register to be kept by the Clerk of the Native Commissioner's Court for the purpose. Such entries are made in the presence of the parties to the case as well

as that of the Chief or his deputy, and not later than 14 days after judgment is given; further no judgment of the Chief's court shall be enforced unless and until it has been registered in this way. This is a useful beginning which might later be extended from the judgment and the particulars of the claim to the evidence as a whole, thus making the Chiefs Court a Court of Record.

Native Commissioner's Court and its Civil Jurisdiction

The limits of the civil jurisdiction of the Native Commissioner's Court are set out in Section 10 of the Native Administration Act 38 of 1927 as amended by Act 9 of 1929, which provides that the Governor-General may by proclamation establish courts of Native Commissioners for the hearing of all civil causes and matters between Native and Native only but that no such court shall have jurisdiction in matters in which

(a) the status of a person in respect of mental capacity is sought to be affected

(b) is sought a decree of perpetual silence

(c) Nantissement is sought

(d) the validity or interpretation of a will or other

testamentary document is in question.

(e) a decree of nullity, divorce or separation in respect of a marriage (contracted according civil or Christian rites) is sought:

Provided further that when the parties to any proceedings do not both reside in the same area of jurisdiction of any such court, the court of native commissioner, if any, within whose area the defendant resides shall have jurisdiction in such proceedings. The law to be applied in dealing with such Native cases has already been dealt with above. Here it must be noted that the court of Native Commissioner only has jurisdiction over persons residing within the limits of its area of jurisdiction. In regard to persons outside such local limits he clearly has no jurisdiction. This raises a difficulty with regard to matters or causes which have arisen in areas other than those in which the parties reside. Thus two Natives employed in Durban but residing outside Durban have a case between them. Has the Native Commissioner's Court in Durban any jurisdiction over them ? Can it deal with this case, or must the parties return to their place of residence in order to

take action, although the cause of action arose wholly in Durban and all the witnesses are in Durban ? In the case of Zibali vs Zondwayo (1930) N.A.C.(N & T) 163, the Native Appeal Court of its own accord raised the question as to whether the Native Commissioner's Court at Durban had jurisdiction over Natives who resided in the district of Mntunzini, Zululand, in which district the cause of action wholly arose. The Natives were in casual employment for the moment in Durban, and the court said "in no sense can it be said that they reside there for the purpose of giving the Native Commissioner at Durban power to try the issue." Moreover there seems to be no provision according to the Act by which a case can be transferred from one Native Commissioner's Court to another for the convenience of suitors or in the interests of justice. This means that residence is the only criterion by which we are to determine jurisdiction. There seems to be no reason why, taking into account the movements of the native population necessitated by their casual employment in different parts of the country, some criterion other than residence should not have been added, such as the place of employment

of the parties, the place where the cause of action wholly arose, or the convenience of the parties, the costs of litigation, etc. Under the Magistrates Court Act 32 of 1916, section 28, which governs this matter in the ordinary courts of the land, gives a much more flexible means of settling the question of jurisdiction, and this rigidity in the case of native litigants is thus all the more inexplicable. What the Native public needs is a judicial system which is simple and free from the technicalities which provide unscrupulous lawyers with a fruitful source of exploiting their credulous native clients, and which are the bane of Western systems of of law.

The Native Appeal Courts.

By section 13 of the Native Administration Act the Governor General is empowered to constitute one or more native appeal courts for the hearing of appeals in any proceedings from courts of Native Commissioners. Two such courts have already been established in the Union of South Africa, one with jurisdiction throughout the Provinces of Natal and Transvaal, with headquarters at Pretoria, and another with the Orange Free State, with

headquarters at King Williams Town. These Courts have full power to review, set aside amend or correct any order, judgment or proceeding of a Native Commissioner's Court within the area of its jurisdiction or to direct a case from such court to be reheard or re-tried or to make any such order upon the case as the interests of justice may require: Provided that no judgment or proceeding shall by reason of any irregularity or defect in the record or proceedings be reversed or set aside unless it appears to the court of appeal that substantial injustice has resulted therefrom. The latter proviso obviates the difficulty and the endless litigation that might result if persons were allowed to pursue slight irregularities in the judicial proceedings which have resulted in no prejudice or manifest injustice to either side.

The relation of the Native Appeal Courts to the Appelate Division of the Supreme Court of South Africa is interesting. Section 14 of the Native Administration Act states that whenever conflicting decisions are given by a native appeal court within its area of jurisdiction the Minister (of Justice) may cause a special case to be prepared and to be argued before the Appellate Divi-

sion of the Supreme Court of South Africa in order to obtain its ruling thereon, and such ruling shall thereafter be deemed to be the correct decision in the matter. This section would seem to suggest that the Appellate Division is looked upon as a Court that ought to exercise a supervisory function over the decisions of the native appeal courts. But it must be noted that it is only in the event of the native appeal court giving conflicting decisions within its own area that the Appellate Division may be called upon to settle the matter. There is no machinery provided at present for the Appellate Division to adjudicate upon a decision given by a Native Appeal Court in conflict with a decision of the Appellate Division or any other superior court of the land even if such a decision is based on a statute or on common law as opposed to native law. In fact a case has already occurred wherein the Native Appeal Court (Natal and Transvaal section) has given an interpretation of a Statute quite contrary to that given by the Appellate Division, in a case decided by itself.* This means that Native Commissioners in adjudicating in civil cases between Natives are to be guided by the decisions of the

* See D.Ndimande vs J.Ndimande (1930) 2 N.A.C. (N & T) 114

Native Appeal Court even if such decisions conflict with decisions given in superior common law courts. There is therefore no appeal from the judgment of a Native Appeal Court, unless in terms of section 18 of the Administration Act the native appeal court itself consents to an application for leave to appeal (upon any point stated by the said court) being made to the Appellate Division of the Supreme Court, which latter court may receive the application or not according to its rules. Otherwise the decision of a native appeal court is final and conclusive. Furthermore there is no machinery by which conflicting decisions of the two sections of the native appeal court can be settled either by the Appellate Division or by any other body.

All this means that the Native Appeal Courts are in an extremely strong position, so that they are free to develop Native Law as much and as well as possible. If they were subject to the Appellate Division they might have been hampered by that body in their special job of harmonising the customary observances of the different Bantu tribes which have legal effect, and so evolving a

complete system of Native Law. But one cannot help confessing to a feeling of apprehension regarding these courts which are practically a law unto themselves, and are entrusted with the legal destinies of the whole Native population of South Africa, for the Native Appeal Court claims to have jurisdiction over all natives, exempted or unexempted.* This concern is by no means lessened by the fact that the Native Appeal Courts generally consist of men whose main qualification for their work is their knowledge of native law and custom. The two Native Appeal Courts consist of the President who is appointed in that capacity by the Governor-General and two members, the latter being usually appointed from officers holding appointments as Magistrates or Native Commissioners in the Province in which the Court is in session. The decision of the majority is the judgment of the Court. Thus we have three men with the qualifications of magistrates given powers greater than those of those of the judges of the Supreme Court of South Africa, including Appeal Court judges, simply because of their socalled knowledge of Native Law and Custom! The system might have been more

* See Florence Mdhlalose vs Benjamin Mabaso (1931)N.A.C.(N&T)

defensible if the members of the Native Appeal Court had the qualifications and the experience of the judges of the Supreme Court, who are generally advocates of several years standing with a more general training in jurisprudence than is common among Magistrates or Native Commissioners. The question is 'What do they know of Native Law who only Native Law know'? Undoubtedly this policy was dictated by financial considerations and perhaps by the fact that the field of Native Law is erroneously regarded as one which does not call for the expert knowledge and experience of Supreme Court judges: but the problem of harmonising the principles of an archaic system of law with those of modern life will require all the legal sagacity and ingenuity of our best judges in South Africa.

Magistrates' Courts cease to have jurisdiction. Where a Native Commissioner's Court has been established in any area, cases between Natives in that area can only be tried by that Court.* Hence the jurisdiction of the Magistrates' Courts, and therefore that of the Supreme Court, has been ousted by Act 38 of 1927 in civil actions between Natives.

Native Assessors. In any case in which a Native Appeal Court

*See Section 17(4) of Act 38 of 1927

or Native Commissioner's Court deems it desirable, it shall be at liberty to call to its assistance, in an advisory capacity, such native assessors as the court may deem necessary. The opinion of such native Assessors shall be recorded and form part of the record. This is a very important provision, of which no doubt extensive use will be made in the future. In the Transkeian Territories where Native Law has always been recognised, but was not codified as it was in Natal, it has been the custom to make Native Law and custom the subject of an inquiry as to the facts, and in this investigation Native Assessors played a great part. Their statements are included in the Reports of Native Appeal Court decisions, and often constitute the most illuminating part of the Report. This is an aspect of our judicial administration in which educated Natives with the right kind of training ought to take an increasing share in the future, the following statement of the Native Appeal Court notwithstanding,"It is however, well known that educated natives are apt to fall away from the custom of their fellow-tribesmen, and it is my experience that they frequently view matters rather from the European standpoint."**

**See Abram Notsung vs Timothy Notsung (1930).2N.A C.(N&T)p.36

This is merely an invidious attempt to discourage the use of educated Natives in a field in which they ought to render signal service to their country.

3. Criminal Jurisdiction under the Native Administration Act.

Thus far we have dealt with the civil jurisdiction of the Native Court system set up under the Native Administration Act of 1927, and we have seen that the hierarchy of courts consists of the Chief's Court, the Commissioner's Court and finally the Native Appeal Court with a rather limited right of appeal to the Appellate Division of the Supreme Court of South Africa. It now remains for us to outline the criminal side of native judicial administration under Act 38 of 1927.

Chief's Criminal Jurisdiction. The Governor-General may grant to any Native chief or headman jurisdiction over members of his own tribe resident or being upon tribal land or in a tribal location within his area in respect of offences punishable under Native Law and Custom. This section creates no offence but confers power to try offences which have always been punishable under Native

Law and Custom.*

It is clear from the above section that a Chief or Headman would have no jurisdiction over a Native who was not a member of his tribe, although he resided or was within his area of jurisdiction, nor would he have authority over a member of his own tribe who resided elsewhere. The authority of the chief would have been strengthened immensely by giving him jurisdiction over all Natives who, while resident or sojourning within his area of jurisdiction, committed offences cognisable in Native customary law: but no doubt the fear that non-members of his tribe would run the risk of not obtaining substantial justice or a fair trial necessitated the imposition of this restriction. In the exercise of the jurisdiction conferred upon him, a chief or headman may impose a fine not exceeding two head of cattle or five pounds upon any person convictedof any such offence as is trisble by him. The procedure to followed shall be in accordance with native law and custom, unless the Minister of Native Affairs decides to specify regulations to the contrary. Any conviction shall be subject to an appeal to the Magistrate's Court. "The policy of the government

*See Madonsela vs Bande (1929) 1 N.A.C. (N & T) at p.155

is to confer this special criminal jurisdiction upon chiefs and headmen in Zululand and British Bechuanaland, but not in the remainder of the Cape and Transvaal Provinces, nor in the Transvaal and Orange Free State."* Zululand and British Bechuanaland are parts of the country where tribalism among the Bantu is still very strong. Hence the Government's policy. Appeals from the decisions of Native chiefs in British Bechuanaland in both civil and criminal cases, lie to the court of the Magistrate of the district from whose decision there shall be a further appeal to the Griqualand West Local Division of the Supreme Court of South Africa which has its seat at Kimberley.

Under the revised Code of Native Law in Natal, 1932, Chiefs and Headmen have the following powers:-
(a) Authority to require compliance by the people under their jurisdiction with their duties under Native law and to give orders for that purpose; the enforcement of obedience to authority, of the duty of children to their parents and of the obligations of the inmates of kraals to their kraalheads in particular fall within the scope of their

*See Rogers,H. "Native Administration in South Africa" p.225 (Witwatersrand University Press,1933

authority; and in exercising these functions they may impose a fine not exceeding two pounds for any defiance or disregard of their orders.

(b)Are, in carrying out the orders and directions of the Supreme Chief his minor deputies and when so acting may impose a fine not exceeding two pounds for any act of defiance or disobedience to a lawful order

(c)In exercising their lawful judicial functions, are entitled to the privileges of a court of law in respect of disobedience to their orders or contempt and may impose a fine not exceeding two pounds for any such offence.

It will be noted that there is no duty cast upon anyone to obey the Chief when he has exceeded his powers· it is only in the exercise of their"lawful judicial functions" that it is obligatory to obey their orders on pain of paying a penalty not exceeding two pounds. This will obviate any difficulty that might arise from the abuse of their power by capricious chiefs or headmen.

Magistrates Courts. From the Chiefs' Court an appeal will lie to the Court of the local magistrate. Here it must be observed that it is not the policy of the Government to

confer criminal jurisdiction upon the Courts of Native Commissioners: the latter are to deal with civil disputes between Natives as already explained elsewhere (p.38). But the Governor-General may, by proclamation in the Gazette, under section 9 of the Native Administration Act, confer criminal jurisdiction upon a Native Commissioner (not upon the Native Commissioner's Court) in respect of any offence, within the purview of a Magistrate's court, committed by a Native within his area of jurisdiction. In such a case the Commissioner shall exercise the same powers as a Magistrate in a ll proceedings relating to the offence committed by the Native and the Magistrate's Court Act 32 of 1917 shall apply. Criminal jurisdiction is conferred upon Native Commissioners (i) when a Native Commissioner is stationed at a centre remote fromthe seat of magistracy, so that it is desirable for the convenience and in the interests of the community generally that he should exercise criminal jurisdiction; (ii) where, in order to prevent congestion in the Magistrates Court, it is necessary that an additional forum should be provided for the trying of offences committed by Natives.

Superior Courts. From the Magistrate's Court or from the Courts of Native Commissioner's acting as Magistrates, an appeal may be taken to one of the Superior Courts of the Union. At the head of these Courts is the Appellate Division of the Supreme Court of South Africa with its headquarters at Bloemfontein. Under it come what are known as the Provincial Divisions of the Supreme Court, i.e. the Cape, Natal Transvaal and Orange Free State Provincial Divisions, and also the Local Divisions of the Supreme Court which consist of the Eastern Districts Court with headquarters at Grahamstown, the Griqualand West Local division with headquarters at Kimberley, the Witwatersrand Local with headquarters at Johannesburg and the several circuit courts of the country. Provincial and local divisions have the same powers within their areas of jurisdiction. Among the Superior Courts of the Union must be mentioned the Natal Native High Court which deals with all crimes committed by unexempted Natives i e. Natives who have not been relieved from the operation of Native Law, except the following cases:-(i) Criminal cases under the insolvency laws; (ii) criminal cases arising out of the laws relating to electoral or municipal franchise; (iii) cases of or-

imes or offences created or defined by the laws relating to the following subjects including contraventions of such laws or of any by-laws, rules, or regulations made thereunder:-Municipal Corporations, Townships, Villages Immigration Settlements, Customs and Excise, Railways, Posts and Telegraphs, Stamps, Ports, and Harbours, Licences other than those required under Native law, Mines (iv) Private prosecutions (including cases under the laws relating to Masters and Servants) in which the complainant is not a Native.* In respect of offences cognisable by the Native High Court the jurisdiction of the Provincial Division is expressly excluded by section 1 of Natal Act 30 of 1910. Appeals from the Native High Court lie to the Appellate Division of the Supreme Court, except that an appeal lies to the Natal Provincial Division from the Native High Court upon the question whether any person is or is not a Native within the meaning of Act 49 of 1898 under which the Native High Court was established or on any question of law reserved by the Native High Court itself for the consideration of the Natal Provincial Division.

The Privy Council Finally above all the Courts in South

* Natal Native High Court See Natal Act 40 of 1898

Africa is the Judicial Committee of the Privy Council in England, but in terms of Section 106 of the South Africa Act appeals to this Court shall only be by leave of the Appellate Division, and by leave of Privy Council itself. The Privy Councils is empowered to hear both criminal and civil appeals, and the fact that the Privy Council granted leave to appeal in the recent Native case of Rex vs Ndobe (1930) A.D.484 shows that this is not a merely theoretical right.

4. Marriage by Native Custom and by Christian and Civil Rites

Marriage by Native Custom has been discussed more or less fully in Chapter 2. Here we desire to make a few remarks on the effect of the Native Administration Act on it.

Name and Definition. In order to distinguish marriage by Native custom from a civil marriage or one by Christian rites, the Native Administration Act uses the expression "customary union" which is then defined as the association of a man and a woman in a conjugal relationship according to native law and custom, where neither the man nor the man is party to a subsisting marriage. It is clear from this definition that the customary union contemplates the possibility

of polygyny, for unlike a marriage it is not the association of one man with one woman tothe exclusion, while it lasts, of all others. But it is to be noted also that according to the definition a customary union and a marriage cannot exist together i.e. a man cannot enter into a customary union with one woman and into a marriage with another, nor conversely can a woman. A marriage supersedes a customary union, and this is one of the places where, prior to the passing of Native Administration Act, an injustice was sometimes done to the wife and children of a customary union. A Native polygynist converted to Christianity and having more than one wife by Native custom, decided to marry by Christian rites one woman, who might or might not be, one of his existing wives. The result was that community of property sprang into being between the husband and the wife of the Christian marriage, to the entire exclusion of the other wives. In fact the Church sometimes insisted, on moral grounds, that the wives by Native custom be put away entirely and sent back to their homes. The Native marriage not being recognised by law even such property as might previously have been alloted to the houses of the

wives by Native custom was taken away from them, and they were left without maintenance or support. This difficulty was first met in the Transkeian Territories where in 1910 Proclamation 142 was passed, after the matter had been considered by the Cape Native Affairs Commission of 1910 which made the following recommendations:-

(a) That marriage by Native custom during the subsistence of a legal marriage shall confer no rights upon any party to such marriage or any issue thereof.

(b) That the widow or issue of a legal marriage contracted during the subsistence of a marriage by Native custom may interfere in no way with the property rights under Native custom of the wife or issue of the Native marriage, and that such legal marriage shall confer upon the legal wife or issue no greater rights to the property of the deceased than if the marriage had been by Native custom

(c) That before a man, being married to a wife by Native custom, may be allowed to contract a legal marriage with another woman, adequate provision in accordance with native custom must be made for the maintenance of the existing wife and family.

Section 7 of proclamation 142 of 1910 and section 22 of the Native Administration Act 38 of 1927, which are based upon the principles laid down by the 1910 Commission as quoted above are practically identical in terms in making provision for the protection of the wives and families of customary unions. The section goes further and provides that a Christian or civil marriage between Natives solemnised after the commencement shall not produce the effect of community of property between them unless the parties within one month previous to the marriage declare their intention that the marriage is to be in community of property This means that community of property between Natives is effected by means of an ante-nuptial contract , whereas between Non-Natives in South Africa community of property is excluded by ante-nuptial contract, while it attends all normal marriages. Neither proclamation 142 of 1910 nor the Native Administration Act require that the Native polygonist who thereafter enter into a contract of Christian or civil marriage should put away his wives or their issue by Native custom, nor that he should at the time of the Christian or civil marriage make adequate provision for them.

As was pointed out in the case of Kopman vs Nohakiss (3 N. A.C.228) "what the section requires is not that specific provisions shall be made at the time of the celebration of the Christian marriage for the wives married by native custom, but merely that a man shall declare to and place on record what property has, under native custom, been already alloted to each of his then existing houses. The wives of a man's various houses, according to custom, would still be his wives under his control, but the property could not be diverted from any house to another any more or less than before; it would still have to administered strictly in accordance with custom; the dominium would remain in the husband and each house would have the usufruct, and the women could not claim any right in the property , the rights of neither party being impaired nor increased by the section. It must be remembered, however, that after the celebration of the Christian or civil marriage the husband could no longer legally cohabit with any of his wives by native custom, for to do so would be inconsistent with his Christian or civil marriage, and would lay him open to an action for divorce at the instance of the new wife. On the

other hand the wife by native custom could legally marry another man, and she would be entitled to leave his kraal and return to her own people or go elsewhere, but if she did so, she could no longer claim that he should maintain or protect her. She would be subject to his control and protection whilst living at his kraal, not as a wife, but as the mother of her children and as an ordinary inmate of his kraal. As section 22 (7) of the Native Administration Act points out it is "the material rights" of the parties (wives) to a marriage by native custom and their issue that are protected by this provision. Other marital privileges such as cohabitation would necessarily have to alter to fit into the principles governing the new marriage. A christian or civil marriage implies a contract of exclusive cohabitation , consequently any intercourse on the part of the husband with another woman under the cloak of a native custom ary union would be adulterous and any children born as a result would be adulterine and illegitimate.* The fact of dowry or fine having been paid for their mother cannot legitimise the children.

* See Barnett Mdingi vs Percy Mpande (1929) A.N.A.C.(C & O) 27

Marriage by Christian or Civil Rites. Throughout the Union of South Africa it is competent for Natives to contract marriages according to civil or Christian rites. In order to do this they have to comply with the ordinary rules prescribed for other persons desiring to conclude Christian marriages, except in the case of the Transvaal and Natal where Natives had to comply with certain special provisions. Thus in the Transvaal male and female coloureds of marriageable age may contract a lawful marriage; application has to be made to a marriage officer for coloured persons; and a certificate produced from parents, guardians, chief or minister of religion that there is no obstacle to the proposed marriage; where the parties live in different districts it is left to them to decide in which district they will be married; the marriage officer must satisfy himself that the parties have complied with all laws affecting Natives, e.g. Pass Laws; he must also clearly and emphatically expound to the parties the moral and legal significance of the marriage; if the woman has been previously married, 300 days must have elapsed since the dissolution of the previous marriage.

In Natal by law 46 of 1887 application has to be made to the Magistrate of the district of the intended bride; a

declaration of particulars made before him, and a declaration made by the magistrate that the parties fully understand the nature and obligations of the marriage; the consent of the woman's father or guardian, where she is not exempted from Native Law, must be obtained. Where the male party is exempted he may enter into an ante-nuptial contract. Marriages of Natives celebrated under this law do not remove the parties from the application of Native law; Natives marrying during the subsistence of a marriage under this law, either by Christian or by Native custom, are guilty of bigamy; should either party subsequently be divorced or become a widow or widower, they may not contract any future marriage by Native custom: the children of a marriage under this law may not contract a marriage by native custom. It is worthy of note that the provisions of the Natal law make it unlawful for a Native once he marries by Christian rites to go back on his Christian status and subsequently marry by native custom if his first marriage is dissolved. Moreover this prohibition extends even to his children.

The only effect of the Native Administration Act on native marriages by Christian rites that we would like to comment on here is the provision that a marriage between

Natives contracted after the commencement of the Act shall not produce the consequences of marriage in community between the spouses, unless the parties declare one month before the solemnisation of the marriage before a magistrate or native commissioner that it is their intention and desire that community shall result from their marriage; if the husband is already married by native custom to another woman, the wife of the Christian marriage shall not have any greater rights in respect of the estate of the husband, at his death than she would have had if the said marriage had been a customary union. This protects the proprietary rights of the wife married by Native custom; but it also gives the wife by Christian marriage the power to own property in her own right which the native custom wife does not have. This new proprietary right of native wives by Christian is bound to have tremendous results in raising the status of Women in Native society.

Native Divorce Court. Finally it may be mentioned that under the Administration Act as amended by Act 9 of 1929, special Native Divorce courts have been established for the determination of suits of nullity, divorce and separation arising out of marriages by Christian or civil rites (as distinct from customary unions in respect of which Native

Commissioners' courts have full jurisdiction) between Natives domiciled within their respective areas of jurisdiction and to decide any question arising out of any such marriage which is not cognisable by a Native Commissioners' court. The President of the Native Appeal Court is also the President of the Native Divorce Court which has the same limits of jurisdiction as the former. Thus we have a Divorce Court for the Transvaal and Natal, and another for the Cape and the Orange Free State. The sole object of providing these special courts was to meet a very real and urgent need for an inexpensive forum for the determination of matrimonial causes between Natives married according to civil or Christian rites. But there is nothing to prevent any Native who wishes and can afford to do so to take his proceedings for divorce, separation, etc., in the Supreme Court whose jurisdiction is not ousted by that of the Native Divorce Court. It would probably have been more consistent to deprive the Supreme Court of jurisdiction in this matter upon the creation of the Native Divorce Courts, or else to require the Supreme Court to apply simpler and less expensive rulers for the settlement of native cases arising out of Christian or civil marriages.

5. Status of Native Chiefs. This subject has been fairly fully treated in describing the Native Court System set up under the Native Administration Act. One need only emphasise at this stage the point that if the position of Native Chiefs is to be strengthened in those areas where their authority is still recognised by the Native people, then vigorous efforts will have to be made to give them, where possible, some training in their duties and responsibilities. In the olden days the Chief received this training by attendance at the Court of his father before he took up the Chieftainship and by simple participation in the ordinary activities of the community. The activities of a Native community even in a purely Native area are no longer so simple as they used to be, and therefore in fairness both to the Chiefs and to the members of their tribes, one would suggest that they receive a more formal type of training consistent with the importance of their offices. There is only one school for Chiefs in South Africa at the present time, i.e. at Kwa Magwaza in Zululand, while the South African Native College at Fort Hare, Alice, also undertakes to give a special course to Chiefs' sons. One of the most outstanding Chiefs in the Transkei today, Victor Poto of Pondoland, received his training at Fort Hare, and

some of his success is undoubtedly due to this training. But something may be said against the method of separating Chiefs' sons from the rest of the community and putting them in a special school as is done at Kwa Magwaza. Perhaps the methods followed by most of the Bechuanaland Protectorate Chiefs of sending their sons and daughters to Institutions such as Lovedale and Healdtwon, etc., where they get an opportunity of making contacts with "commoners" is more desirable, although it is to be regretted that no provision is made at those institutions for specific training of chiefs' sons in administration, law and the other responsibilities of chieftainship.

6. Exemption from Native Law. Where Native Law has been recognised to any extent in South Africa there has always existed in conjunction with it a system of exemption from its operation. If it is inequitable to apply European law to Natives who have for generations lived under a different system of social organisation with different legal concepts and arrangements, it is no less so to apply to Natives who under the influence of Western civilisation have become accustomed to a different type of life from the Native system of law of which they are ignorant and by whose principles they are no longer, rightly or wrongly, guided in their lives.

A natural corollary therefore of the recognition of Native law is the development of a system of exemption. Thus we find that in Natal by Law 26 of 1865 all Natives who desired to be relieved from the operation of Native law were given the right to apply to the Governor of the Colony for Letters of Exemption which meant that thereafter they were subject to Colonial Law, i.e. the ordinary commonlaw of the land in the same way as the other inhabitants of the Colony. The applicant had to comply with certain requirements such as seven years' residence in Natal, monogamy, ability to read and write, the furnishing of letters of recommendation by one or more European residences of the Province and particulars regarding the applicant's Chief, family, reasons for desiring to be relieved from Native law, etc. The possession of the necessary qualifications and the fulfilment of the requirements governing the necessary application did not entitle the applicant to exemption which was granted at the absolute discretion of the Governor. Exemption conferred a completely new status upon the individual. He at once acquired all the personal, proprietary and judicial and contractual rights of an ordinary citizen in so far as he was not denied these by the express provisions of some statute law. It entitled him, inter alia,

to apply for registration as a voter after seven years' exemption. In the event of his being married or subsequently marrying, the marital relations between himself and his wife were governed by Colonial law--community of property, of profit and loss, the joint guardianship of their children; the rights of succession and inheritance of their children were altered, although at majority the children reverted to Native law unless they applied for exemption in their own right. It will be readily observed that the changes of status involved in exemption were far-reaching, and the prestige value of it was enhanced by the fact that its possession relieved the holder from certain laws intended to apply to Natives qua Natives, such as the Pass Laws, Curfew Regulations in urban areas, the liquor laws, (afterwards withdrawn), laws prohibiting the residence or acquirement of property by Natives within European areas in towns, etc., although the fact that the holder of exemption had to carry his certificate on his person in order to claim any right under it converted into a form of Pass. The result was that many Natives applied for exemption because of its immediate social prestige value without realising its full implication from the point of view of legal rights and duties, as the writer has discovered from