NATIVE LAW.

The term Native law is used in three senses:— (1) The term is applied to laws enacted by Europeans Legislatures intended to affect primarily the Native Population of the country. Examples of such laws include the Basa Laws, Native Land and Trust Act, the Native Urban Areas, etc. (2) The term is also applied to laws devised by the Natives themselves for the conduct of their life, prior to their coming into contact with Europeans. (3) The term is applied to that portion of Native customary law which is recognised and applied by S.A. Courts in cases between Natives and Europeans; used in the first sense, Native Law comes within the scope of Native Administration. Used in the 2nd sense it comes within the scope of Social Anthropology. It is as used in the third that it comes within the scope of the study of Native Law. It is only recently that the recognition of Native Law has received attention in S. Africa.

Several reasons have been advanced for this:— (1) For many years, the European conquerors of the Natives had a general prejudice against according any recognition to the customs and usages of the people. Probably, they found it difficult to believe that this system of Law contained any legal principles worthy or capable of application. (2) Such knowledge as was obtained of Native Customs by missionaries, administrators and others, showed that these customs included practices which the white man regarded as repugnant to the principles of civilization with which European Courts and Judges refused to countenance such customs in dealing with Native cases. Among customs regarded in the old days as repugnant to Natural Justice may be mentioned the LOBOLA CUSTOM, the CUSTOM of POLYGAMY, the smelting of WITCHES and WIZARDS the perpetual minority of women, the UKINGENA CUSTOM. The existence of these customs, as in Native Life made it for Europeans to condemn the whole body of Native Law, and to insist upon the vigorous imposition of European Law upon them. (3) Even if there had been any disposition on the part of the Judges and Lawyers to recognize Native Law, it would have been difficult to apply it, because of the— (a) Absence of facilities for its proper study. Not only was the Language difficulty to be considered but (b) no educational institutions provided for its study. No books had been published on the subject and (c) nowhere had it received serious attention of students of Law or primitive culture in general. (d) It must also be remembered that there were different colonial governments in Africa each with its own Native Administration Policy and own Native Policy. Different attitudes were adopted in the different circumstances in regard to this subject. Natal became the only one which recognised frankly the rights of the Natives to be governed as far as practicable in the existing circumstances, by laws, customs, etc., recognised by these people from time immemorial. In the Cape on the other hand the view was held that it would be unjust to the Native as a British subject to apply to him a system of law different from that applied to Europeans, and he disposed of the question by making the same law apply to both.

Finally mention must be made of the fact that the existence of the different Native tribes with different customs made it appear impracticable to apply Native Law. The question was whether the general principles adopted in N. Law were sufficiently similar to make it just and equitable to apply the system as a whole to all Natives. Several causes have gradually led to the realisation of the necessity to recognize and apply Native Law. (a) The non-recognition of Native Law + Custom has not led to the abandonment of it by the Native people. The vast majority of them still accept the principle of Native Law, and it is essential for the proper administration of Justice that due account be taken of the fact (b) The necessity of attempting to impose European Law and Custom on people who neither know nor adhere to it has at last dawned upon administration. To impose upon a people customs which they do not approve makes them labour under a sense of injustice and lends them to evade its
be effective must be to some extent an expression of popular will and feeling, otherwise it is bound to be willingly disobeyed with the result that the system of administration of Justice is brought into disrepute. (c) Largely, through the writing of anthropologists and other writers of Native life and customs the personal influence of eminent Native Administrators such as Theo. Shepstone and the better appreciation of the recruit of various commissioners of Native affairs, Native Law at last obtained recognition. (d) The formation of the union has also made it more necessary to evolve a uniform re-
Native policy; one of the most important aspects of that policy is the recognition and application of Native Law in cases involving Natives. (e) It has been increasingly realised that even if some portion of Native Law cannot be recognised there is not reason why the un-
objectionsable features of it should not be applied; the practical in the way of recognition have been studied and methods have been devised for obviating them.

Finally from the point of view from student of Law the study of Native Law is of value to students of jurisprudence studies; the development of legal principles in all human societies and a study of Native Law throws light on the Nature of Native Law as such. Many modern legal principles can be explained by reference to the history of law in general and eminent jurists. Sir Henry Maine, the writer of "Ancient Law", based his study of historical jurisprudence on a study of the legal notions found in primitive legal systems such as early Roman Law. In Nat. Law, we can see from Law Notions actually at work in real law and then development and the gradual evaluation of modern principles can be studied at first hand. The communal or group ownership of property is gradually supersession by conception of individual owner; the principle of premogenture and the gradual recognition of the rights of members of the family to a share in the estate of their deceased father intestate succession and its replacement by testamentary succession; the development of the property and other rights of women; all these can be studied at first hand in Native Law. The study of Native Law also throws light upon customs and practices recognised in early Roman Law which is the basis of Roman Dutch Law the common Law of South Africa. Roman Law conceptions such as Patria Potestas are illumination by comparison with the Native Law conception regarding the position of the head of the family. The study of change in Native custom also throws light on the general question of how changes in Law seem in every society. It may be questioned as to whether changes in custom should be imposed from without or be due to development from within. At present changes in Native Law are imposed from within by the government. At present changes in customs are being made the people themselves. It would be interesting in the life of Native people as to which changes will be more successfully affected. The application of National Law also raises the important question whether National Law should be codified. The relative advantages and disadvantages of codifying National Law will be discussed at a later stage.
THE HISTORY OF THE RECOGNITION OF NATIVE LAW:

This falls into two stages:-
(1) The position prior to Union. (2) The position since Union.

The position prior to Union in the different territories of South Africa was as follows:--

(a) First the Cape Province proper (excluding British Bechuanaland and the Transkei territories) from the earliest days of European rule there was no aversion to any formal recognition of Native Law. Colonial Laws applied to European and Native alike in default of Legislation to the contrary. In spite of this lack of recognition of their law and custom the Native cases and inhabitants of the colony continued to adhere to Native Law and custom. Magistrates in Native areas were often compelled by circumstances to hear Native cases and to decide them according to Native Law. But whenever appeals were taken to the Supreme Court, the latter court refused to recognize Native Law in the absence of statutory authority for such recognition. One or two Acts, which gave limited recognition to certain aspects of Native Law were however passed by the Cape Government or Parliament. Thus the "NATIVE SUCCESSION ACT OF 1864" recognized the Native Law of INHERITANCE OF NATIVE SUCCESSION TO PROPERTY. But broadly speaking in the Cape proper Native was accorded general recognition.

(b) British Bechuanaland was annexed to the Colony in 1885 by the annexation Act 41 of 1895. Prior to this British Bechuanaland had been annexed to the Cape as a Crown Colony. When the British established their rule in British Bechuanaland in 1886 they passed Proclamation No. 2 of 1886 in terms of which Native Chiefs in that area of territory were given exclusive jurisdiction in civil cases between members of their tribes and were allowed to retain criminal jurisdiction except as regards certain grave offenses, e.g. treason, murder, rape, and stock theft. In other words Native Law was recognized and applied by Native Chiefs in disputes between members of their tribes. Appeals to the Magistrates being allowed. When this territory was annexed to the Cape the system was allowed to continue.

THE TRANSKEI TERRITORIES:
By Proclamation 110 of 1879 Magistrates were permitted where both the parties to a dispute were Natives to try civil cases according to Native Law. This practice was further strengthened by the decision of the Supreme Court in the case of Sekela et. al v. Sekela et. al., where it was held that in certain classes of cases the law shall not apply Native Law or custom. But even in the cases where application of Native Law was permitted, Native Law was recognized subject to the "proviso" that it must be compatible with the principles of Humanity observed throughout the civilized world. Examples of Native Customs which were refused recognition on this ground include:

1. Initiation Ceremonies for both boys and girls. (2) Accusation of practising witchcraft. (3) The Ukungena Custom.

As regards Criminal Law a special Code was passed in 1886 as a result of the report of the Native Laws and Customs Commission of 1881 and 1883 and made applicable to the Transkei Territories. This Code known as the "TRANSKEI TERRITORY PENAL CODE" is still in force in the Transkei to-day. The Code embraces European Law and applies to both white and black and white residents in the Transkei. It includes however certain practices recognized in Native Law, but not in ordinary European Law e.g. the examination of an accused person and his wife and husband as compellable witnesses in criminal cases.

STAFFORD:

STAFFORD: POSITION IN NATAL PRIOR:
In Natal Native Law was recognized from the earliest assumption of Government by the British in that territory. Not only was Native Law recognized but it was codified and the code was made statutory. This means that Magistrates were required to administer Native Law as it was laid down in the code. According to this code this was the case: i.e. all civil cases between Native and Native must be tried according to Native Laws, customs and usages unless otherwise provided by law; or unless such usages are manifestly unjust or are repugnant to the settled principles and policy of natural
equity. Furthermore civil cases arising of trade transactions unknown to Native Law were to be tried by ordinary European Law. (3) The operation of the LAW OF LIMITATION OR PRESCRIPTION OR ACTION was not to be extended to Native Law Cases. The Natal Code (long as they existed) or Native in Natal and Persons cited as Natives in any legal proceeding were to be regarded as such unless and until they proved the contrary. As regards criminal Cases, the Natal Government decided to apply European Law to the Native Population. The Code of Native Law contained certain criminal provisions applicable to Natives. In 1898, a special court known as the Natal Native Court was established for the trial for cases between Natives which fell outside the jurisdiction of the Magistrates.

THE TRANSVAAL:-
In the Transvaal, Law 4 of 1885 recognised Native Law in so far as it was not inconsistent with the principles of civilization. The law provided that firstly (1) such cases shall be dealt with according to Native Law at present in use and in force. (2) That the same (cases) shall not occasion conflict with the accepted principles of Justice. This limited recognition of the Native Law was further circumscribed by the decision of the Transvaal Supreme Court. Thus in the case of Rex Vs. Nalans 1907 and also in the case of Rex Vs. Mbobo 1910 it was held that marriage according to Native Custom was invalid as being inconsistent with the principles of civilization. In the case of Nela Vs. Ntela T.P.D. 1910 it was held that Lobola clauses could not be entertained in the courts on the ground of their being inconsistent with the principles of civilization and further more it was held that a mother is entitled to the guardianship of her children and the Native conception of the perpetual minority of women was contrary to principles of civilization. This latter point was further emphasised in the case of Nogsegosso Vs. Links. Further the recognition of Native Law was further limited by law. Law 2 of 1887, recognizing for the Native Courts to apply certain Native Law. Law 3 of 1897, according to which the Courts only recognised as lawful marriages entered into before a Native Commissioner under the provisions of that Law. Native Law in the Transvaal was not codified, and in each case its determination was made the subject of inquiry.

FREE STATE:-
In the Free State, Native Law never received any general recognition but by Law 26 of 1899 the principles of the Native Law of Succession were recognised and it was laid down that the offspring of heathen marriages is recognised if the parents regard one another as husband and wife.

RECOGNITION OF NATIVE LAW SINCE UNION: The recognition of Native Law became general in 1897 when a uniform policy was laid down in the Administration Act 38 of 1897. Section 11 of that Act lays down the conditions under which Native courts are to recognise Native Law in the following terms. (1) Notwithstanding the provisions of any other law, it shall be in the discretion of 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 that it shall not be law ful for any Court to declare that the custom is such principles. (2) Where the parties to a suit, reside in areas where different laws are in operation the Native Law, if applicable by the Court shall be that prevailing in the residence of the defendant. The following points must be noted in connection with Section 11. (1) The application of Native Law in a particular case is left in the discretion of the Court of the Native Commissioner. In other words the parties to a suit cannot claim as of right that their case should be settled according to Native Law or Custom. It is for the Court to decide whether Native Law or European Law shall be employed. It may be asked whether in exercising the discretion given to him the Native Commissioner should give preference to Native Law or to European Law. The Native Appeal Court of Native Commissioners is not an absolute discretion and that a true construction of this section is that Roman Dutch Law must be primarily applied and that Native Law should only be invoked in matters peculiar to Native Custom falling ou
outside the principles of Roman Dutch Law Nganoyi v. Mangololi Njombeni N.A. C., (câO) 1930. On the other hand the N.A.C. of the Transvaal and Natal has held that it is desirable to avoid as far as possible getting away from the system of Native Law which whatever its short comings may be, from the European stand point is more in harmony with Native concepts of equity and justice.


The position was further clarified in another case in which it was held that Native Law should be applied when it provides a remedy and European Law be applied when there is no remedy under Native Law. Gulum Khambula v. Alfred Kumuene N.A.C. (N.T.) 1932. Charles Mugubava v. William Mutabo N.A.C. (N.T.) 1929. A further question may be asked as to what stage the Native Commissioner ought to indicate his decision to apply Native or European Law in a particular case. It has been held that although this would naturally depend upon the circumstances of the Case, it is advisable that as far as possible the parties should know at the beginning of the case what line the Nat. Commissioner intends to follow. It was further emphasized in the same case that the Native Commissioner must avoid a confusion of the two systems of Law i.e. he must not try a case partly by Native Law and partly by European Law. Jacob Nathalie v. Jeremiah Phooko N.A.C. (c & O) A.T. 1930. Section 11 points out that Courts of Native Commission have a discretion to apply Native Law in suits of proceedings between Natives. In other words that Nat. Law cannot be applied in a case between a Native and a non-Native, the expression NON-Native includes besides Europeans, coloureds, Indians and also those Natives exempted from the operation of Native Law in terms of Natal Law 28 of 1930. Although the Native Commissioner cannot apply Native Law in a case between an unexempted and exempted Native. Exempted Natives are subject to the jurisdiction of Native Commissioners in all civil case with which Nat. Commissioners are competent to deal. Florence Mdilalose and Bénjamin Matsaso N.A.C. (Nat.) 1931.

The application of Native Law is only allowed in questions of custom followed by Natives. This means that Nat. Commissioners need not to pay attention to absolute customs or customs abrogated by disuse. Only customs actually followed now fall within the scope of this Section:— Poto v. Casta N.A.C. (C & O) the 1931. This raises the question as to whether the Native Law requires to be proved in every case brought before the Native Commissioner can rely on his own knowledge of Nat. Law. It has been held that Law presupposes that the presiding officer is versed in Native Law. Naturally if he is in doubt as to what the Nat. Law applicable to a particular case may be, he should either get the parties to lead evidence on the point or be should call expert assessors to his aid. This point was decided in the case of Morake and Dukuduke T.P.D. 1928, where it was clearly stated that where the Native Commissioner has no doubt in his own mind about the Native Law applicable, he is competent to decide the case without calling for evidence on the point. This decision was referred to with approval in the case of Mugukaya v. Mutata A.A.C. (B. & T.) Native Customs are either general or local. The question arises as to which customs should be given preference in recognition. It has been held that the court will refuse to recognize the local custom which is contrary to a general custom practised by the same tribe. Thus the law of Primogeniture is a universal one among the Bantu and a local custom in conflict with it would not be recognized. Kula Mazibuko v. Dhlizi Mazibuko N.A.C. (N&T) 1930; a local custom before it can be recognized must be proved whereas judicial notice is taken of general Native Custom. Questions of Customs followed by Natives are to be separate according to Native Law only in so far as Nat. Native Law has not been repealed or modified. Native Law may be repealed or modified by statute or by a proclamation issued by the Governor General under the powers vested in him as the Supreme Chief of the Native or by judicial decision or by abrogation by disuse or by the growing up of a different custom. Once the court has decided that a question before it is one of Nat. Law, then it should be settled according to principles of Nat. Law. Even if the point is one common to both Native and European Law, once the commissioner has exercised his discretion to apply Nat. Law, the principles of Native Law will have to be followed. The Commission is an offence on the two systems, but the principles of Native Law would have to be followed in a different case. In Native Law the father of the injured girl is the injured party. In European Law the girl is the injured party. Therefore the person who has the right to sue for damages the
father in one system and the girl in the other. Moreover the damages are assessed differently. In Nat. Law the damages given for the loss of Lobola by the father due to the loss of virginity by the girl. In European law the girl is accorded the right for her exposure to ridicule and contempt by this violation of personal rights. Nat. Law is only to be applied in so far as it is not opposed to the principles of Natural Justice and Public Policy. It is impossible to define specific terms what type of case will be regarded as opposed to the principles of public policy or Natural Justice. It has been held however that a Native Marriage in conflict with general principles of civilization merely because it does not exactly comply with the procedure established by people in a more advanced state of civilization.

Medesene Vs. Mkgatho, T.P.D. 1928: - The following are examples of customs which have been held opposed to the principles of public policy or Natural Justice. In the case of Lizzie Magcoba Vs. Magcoba N.A.C. Transkei. It was held that the Court is not prepared to recognise a Native Custom which would encourage the widow of a Christian marriage for the sake of bearing an heir to her deceased husband to inculc in illicit intercourse under circumstances repugnant to the principles of Christian marriage, which would perpetuate the consequence of a contract which had been absolutely and completely dissolved by her husband's death. The Native Marriage contracting a levy imposed by a chief to raise money for a legitimate tribal purpose by the confiscation of some property of the defaulters, without the regard to the amount of the property seized was held to be contrary to public policy or Natural Justice in the case of tribal levies in now regulated by Government Notice 349 of 1927, marrying a second child is prohibited by the principles of civilization recognized in the civilized world. The reference is to marriage by Christians or Civil rights, a polygamous Customary Union on the other hand is not regarded as opposed to Natural Justice or Public Affairs. The subsequent custom into a customary Union by a man who had already married legally by Christian or Civil marriage has been held to be an immoral and irregular contract inconsistent with the general principles of civilization. A man cannot be married by Christian rights and united to another by customary union at the same time.

Emmah Mkhwenaza and Enoch Mkhwenaza, Vs., Johannes Thwala (N.A.C. N.&T.) 1929. In fact in Natal, not only is this not permitted, but is a criminal offence being looked upon as bigamy. Further even after the termination of his Christian marriage the widower in Natal may not contract a customary union, nor are any of the children of a christian marriage allowed to do so. Otherwise they are liable to be punished by fine not exceeding £25., or with imprisonment with hard labour for a period not exceeding one year, in terms of Act 46 of 1887. In the Transkei Territories the position is slightly different. Under Proclamation 142 of 1910, three types of marital unions are recognised among Natives: -

1. Registered marriage by Christians or Civil Rights. (ii) Nat. Registered marriage; a marriage celebrated according to the terms of Native Custom and subsequently registered. (iii) An unregistered Native marriage which takes place during the subsistence of a Christian marriage or a registered marriage shall be recognised as conferring any status or right upon any party to such marriage by Native Custom or upon any issued thereof.

Proclamation 142 of 1910 provides that no Christian marriage or registered Native marriage contracted during subsistence of an unregistered Native Marriage of her children and shall affect the property of the wife of the unregistered Native Marriage of children and the widow of a Christian marriage or a registered Native Marriage or her children shall have no greater property right in respect of the property of the deceased spouse than she or they would have had if their marriage were by Native Law or Custom. It would appear that in the Transkei a man married by Christian or Civil rights cannot contract a registered Native Marriage and the law commit, if he did so. See Section 31 of Proclamation 112 of 1877, read together with Section 28 of the Transkei Penal Code 1886; but these does not appear anything prohibiting Native Marriage during the subsistence of a Christian or registered Native Marriage. Furthermore there is nothing to prevent a person who was married by Christian or any issue of such marriage during the subsistence of a Christian or registered Native Marriage, to contract after its terminated a customary union and vice-versa, a party to a customary union or any issue thereof may after its lawful termination contract a Christian marriage. But where a party to a customary union
marries a wife by Christian rights during the subsistence of a customary union, the property rights of the customary wife and her children are protected both by Proclamation 142 of 1910 and by the Native Act 38 of 1927. No Court may declare that the customary Lobola or Bogadi or any similar custom is repugnant to the principles of public policy or natural justice. As pointed out before, the S. A. Courts, prior to the passing of the Nat. Adm. Act, had taken different views of this custom. The Natal Courts recognizing it, while the Cape, the Transvaal and the Orange Free State Courts looked upon it as inconsistent with the principles of Natural Justice. These invalidating distinctions between judicial recognition of this ancient and honourable custom have been done away with. It must be noted however that the payment of Lobola or Bogadi, is not in law regarded as an essential of either the customary union or the Christian marriage. In other words it is open to the parties to a marriage or a customary union to agree not to take or give Lobola. The absence of Lobola does not invalidate the customary union or Christian marriage. Where the parties to a case are subject to different Nat. Law, because they reside in different areas, the law prevailing in the place of residence of the defendant shall be applied. It must be noted that it is not the law of the tribe to which the defendant belongs but the law of the area in which that is to be applied. In other words, the jurisdiction of the Native Commissioner is territorial not personal. That court applies, either Nat. Law prevailing in its own area or that prevailing in the area of the defendant. Therefore where a Fingo resides, in a Gealeka area, Gealeka custom applies. There is nothing however to prevent (customs) persons from agreeing that a particular contract between them shall be governed by the law of an area other than one in which they reside.

The Court System:

The Native Administration Act of 1927, makes provision for the establishment of various Courts to deal with cases between Natives. This does not mean that the ordinary law of the country does not apply to Natives but rather that it has been found advisable from the administrative point of view to set up a system of tribunals for the hearing of purely Native cases especially as Native Law is now recognised throughout the Union.

Civil Matters:— Chief Courts:— In terms of Section 12 of the Native Administration Act the (Government) Governor-General may authorise any Native Chief or Headman recognised or appointed under section 2 of the Act to hear and determine Civil Claims arising out of Law or Custom by Native against Native resident within his area of jurisdiction brought before him provided that the Governor General may at any time revoke such authority and provided further that a Native Chief or Headman shall not under any other law have power to determine any question of nullity, divorce or separation arising out of any marriage. The following points must be noted in this section.

(a) Not all Chiefs or Headman possess this power to determine civil claims but only those on whom the power has been specially conferred by the Governor General. (b) The chief or Headman can only deal with claims arising out of Native law or Custom. No chief is empowered to apply European Law in Civil Cases. Moreover the Chief can only deal with Claims between Natives. He cannot exercise Civil Jurisdiction over Non-Natives. (c) The Natives whom the chief exercises civil jurisdiction must be resident within his area. The chief can only deal with cases brought before him. The parties are under no obligation to take their case to the chief; if they choose to do so, they can submit their dispute to the Native Commissioner without first seeing the chief. (d) A Native Chief or Headman cannot deal with questions of Nullity, divorce, or separation arising out of any marriage even if people resident in his area are affected. It is interesting to note that prior to passing of Act 38 of 1927, Native Chiefs in British Bech., possessed power to deal with questions relating to Nullity, or Separation arising out of marriages in so far as members of their tribes were concerned. But they were deprived of this power by Act 38 of 1927. It must be noted ; too, that the marriages referred to here are marriages by Christian or Civil Rights. Therefore Native Chiefs are entitled to deal with questions arising out of customary unions. The Governor General may by Council the authority he has given to a Native chief to try Civil Cases. Under SUBSECTION 3 OF SECTION 12, provision is made for appeal against decisions of Native Chief or Headman to the Court of the Native Commissioner and this Court may alter or set aside the judgement of the Chief after hearing such evidence as it deems fit and such
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 permissible under Native Law and Custom. Criminal jurisdiction has specially to be conferred by the Gov. General on the Native Chief or Headman concerning —

Originally the Gov. Gen. exercised this power only in respect of Zululand Chief who formerly had similar powers under Section 63 of Natal Act 49 of 1888 and in regard to British Bech. Chiefs who exercised similar powers prior to 1927 in terms of the British Bech. Proclamation of 1885.

Later it was decided to extend jurisdiction to certain Chiefs in the Transvaal and O.F.S. and Transkei Territories, at the same time, the power of the Chief to deal with criminal offences by members of their own tribe were limited by excluding the offences from their jurisdiction. Although these customs are punishable also under Nat. Law and Custom, Fire and attempted murder and attempted murder with intent to do grave bodily harm, attempted assault, common violence, sedition, stock theft, murder, sodomy, bestiality, pretended witchcraft, serious fighting, pretended witchcraft, persury in other than a Chief's Court, offences against non-Natives. The Chief has only criminal jurisdiction over members of his own tribe resident or being on tribal land or in a tribal location within his area. This means that he has no jurisdiction over non-members of his tribe even if they are resident or are upon tribal land or in a tribal location within his area nor has jurisdiction over members of his own tribe who are not resident or are not for the time being on tribal land or location within his area. The jurisdiction of the Chief rests upon two conditions i.e. membership of his tribe and, (ii) residence or sojourn on tribal land in a tribal location within his area. (iii) The Chief or headman only has jurisdiction in respect of offences punishable under Nat. Law and Custom. He cannot deal with offences known only to European Law and even though punishable under Nat. Law and Custom his powers have been limited as expressed above. The chief or headman in exercising criminal jurisdiction may impose a fine of two heads of cattle or £5 upon any person convicted by him. The Gov. General may at any time revoke the grant of criminal jurisdiction to any Native Chief.

(iv) The procedure at the trial, the manner of the execution, of penalty imposed and the appropriation of the fine imposed by a Native Law and Custom, save so far as the Minister of Native Affairs may make regulations to the contrary. Any objection by a Native Chief or headman, exercising criminal jurisdiction is subject to appeal to the Magistrate's Court. In practice such appeals go to the Native Commissioner's Court in terms of Section 9 of Nat. Administration Act.

**NATIVE COMMISSIONER'S COURTS: CIVIL JURISDICTION:** Under Section 10 of the Administration Act the Gov. General may by Proclamation in the gazette constitute courts of Nat. Commissioner's for hearing all civil cases between Native and Native only provided it shall have no jurisdiction in matters in which (a) The status of a person in respect of mental capacity is sought to be affected. (b) A decree of perpetual silence is sought. (c) The validity or interpretation of civil or other testamentary document is in question. (d) A decree of nullity, divorce or separation in respect of marriage is sought. The Nat. Comm. Court is empowered to deal with Civil Cases between Native and Native, except the fine matters noted above. There is no other limit to the jurisdiction of the Native Comm.'s Court. This must be compared with the jurisdiction of the Magistrate's Court as
laid down in the Magistrate's Courts ACT 32 OF 1927 which adds further
limitation in addition to the five noted above on the jurisdiction of
Magistrate's Courts. Thus the Magistrate's Courts cannot entertain an ac-
tion in which is claimed the delivery or transfer of property moveable or
immovable exceeding £200 in value or any other kind of action which the
claim of value of the matter in dispute exceeds £200 in value. There is
no such limitation in the jurisdiction of the Native Comm.'s Court. Again
the ordering of the specific performance of an act other than the delivery of
transfer of property or the rendering of an account is outside the
jurisdiction of a Magistrate's Court unless there is an alternative prayer for
damages not exceeding £200. Again this limitation does not apply to
the Native Courts. When the parties to a dispute do not reside in one
area of jurisdiction the court of the Native Commissioners within whose
area the defendant resides has jurisdiction in such proceedings. The
place of residence does not mean the place where the person concerned is for
the moment in casual employment or on a temporary visit. The Native Comm.
jurisdiction is conferred upon those residing within the local limits of
his jurisdiction. In regard to persons outside these limits, he clearly
has no jurisdiction. The jurisdiction of the commissioner therefore is
excluded territorially as was pointed out in the case of Shankweni Elias,
Johannes Zikhali VS. Joe Zondowsyo, N.A.C. (N.D.T.) 1930. In this con-
nection it is interesting to notice that magistrates Courts have jurisdic-
tion over (a) Any person who resides, carries business or is employed
within the district of the Court or whether or not he resides, carries on business or is employed in the district if the cause
of action arose wholly within the district. (c) Any partnership whose
business premises are situated or member thereof resides within the distri-
(b) Any defendant who appears and takes no objection to the jurisdiction
of the Court. Residence must however not be confused with domicile. It
has never been laid down that degree of permanence is required in resident,
but at all events when it desired to bring a person within jurisdiction of
the Court on the ground of residence, it must be shown that the person has
some good reason for regarding it as his place of ordinary habitation.
Where a defendant was residing at the time when he was summoned to appear before the Court and had been
resident at P. Dliz. as a member of the police force for 11 years,
Native Commissioner's Court at Victoria East was held to have no jurisdiction
in respect of offences committed by Natives. The Magistrates Court can
entertain Criminal jurisdiction against him although his kraal and domicile were situ-
situated within the district.


THE CRIMINAL JURISDICTION: Under Section 9 of Nat. Adm. Act the Gov. Gen-
may by proclamation in the Gazette confer criminal jurisdiction upon a
Native Commissioner's in respect of any offence subject to the jurisdiction
of a Magistrate's Court committed by a Native within his area of jurisdiction
but shall be concurrent with that of a Magistrate's Court or a Magistrate.
On regard to criminal matters the jurisdiction of the Native Comm's Court
is the same as that of the Magistrate's Court. The Magistrates Court can
deal with all criminal except treason, murder and rape
committed by any person within the district of the Court or within two
miles beyond the boundary of the district or on a voyage or journey of
which jurisdiction is vested within two miles of the district or begun or com-
pleted within the district.

In its power of punishment the Magistrate's Court is limited to
(a) Imprisonment not exceeding 6 months with or without hard labour, soli-
dry confinement or Spare Dlct. (b) Fine not exceeding £50; (c) Whipping not
exceeding 25 strokes. "Natives" under Native Adm Act are natives.
Where the Nat. Comm's Court has criminal jurisdiction, its jurisdiction is concurrent with that
of the Magistrate's Court. In other words, Magistrates Courts are empow-
entitled to deal with last criminal cases even if a Nat. Comm's Court
exists in the same district (Court of last Instance).

COURTS OF FIRST INSTANCE: NATIVE APPEAL COURT: CIVIL APPEAL:
Under Section 13 of the NATIVE ADM. ACT 38 of 1927 the Gov. Gen. is
empowered to establish one of the N.A.Courts for the hearing of appeal
against the judgement of Courts of Native Commissioner's. The Gover-
Gen. defines the area jurisdiction of the N.A.C. Each of which shall consist of
N.B. which shall consist of 19 members viz a full time President and two other members to be selected from time to time from Magistrates, Native Commissioners of other qualified persons. The decision of the majority shall be the decision of the N.A.C. Two such Courts have been established, first the N.A.C. with jurisdiction in Natal and in the Transvaal and with its headquarters at Pretoria. The N.A.C. with jurisdiction in the C. & O. with its headquarters at King Williams Town. A Nat. Appeal Court has full power to review, set aside, amend or correct any order, judgment or proceeding of the Native Commissioner's Court within its area of jurisdiction, to direct a case from such a Court to be heard or to make any such order upon the facts, justice may require, provided that no judgment or proceeding shall by any reason of regularity or defect in the records of proceedings be refused or set aside unless it appears to the Court that substantial prejudice has resulted therefrom. There is no appeal from judgment shall or are to be followed or the point decided except as provided in Section 24 of the Act. Native Commissioner in adjudicating in civil Cases between Natives are accordingly bound to follow the decisions of the N.A.C. even if such decisions are in conflict with decisions given in the various divisions of the Supreme Court of Natal.

NATIVE DIVORCE COURTS:— Under Section 10 of Act 9 of 1929 the Gov. Gen. is empowered to establish N. D. Courts which shall have jurisdiction to hear and to determine suits of nullity, divorce, separation between Natives domiciled within their areas of jurisdiction in respect of marriages which is not recognisable by a Nat. Comm.'s Court. Two Nat. D. Courts have been established:—

(a) With jurisdiction in C. & O. and another in N. & T. The membership of Nat. D. Courts consists of a President and two other members holding the office of Magistrates to sit and act with him as assessors in an advisory capacity on questions of fact. In this respect the ordinary Courts analogous to those of the Native Commissioner's Court. To this extent, the powers of the Magistrate's Court in respect of matters between Natives are similar to those of the Nat. Comm. Court. Hence we find that in regard to civil matters, between Nat. and Native where a N.C. Court it constitutes the jurisdiction of the Magis. Court. Thus in civil cases the Native is compelled to go to such matters to the N. C. Court. There are certain limitations placed on the jurisdiction of the Mag. Court, which do not obtain as far as the N.C.C. are concerned and similarly there are certain limitations as the jurisdiction of the N.C.C. which do not affect Mag. Courts. There we have already dealt with in dealing with the jurisdiction of the Nat. Comm. Court. In regard to criminal matters the jurisdiction of the N.C.C. is the same as that of Mag. Courts. Not every N.C.C. possesses criminal jurisdiction which has however to be specially conferred upon it by the Gov. Gen. The Nat. Adm. Act provides that the N.C.C. where it possesses criminal jurisdiction shall not constitute that of the Mag. Court. Consequently, even where a N.C.C. with criminal jurisdiction exists in a district, the Mag. Court is open to Natives in criminal matters.

SUPERIOR COURTS:— All matters, both civil and criminal which are beyond the N.C.C. and the Mag. Court are dealt with by the Superior Courts of the Union except one form part of the Supreme Court of S.A. which consists
of the following divisions:
(b) The local divisions of the supreme Court of S.Afr. viz, (i) The Eastern District Local Division with houses at Grahamston. (ii) Griqualand West Division with houses at Kimberley. (iii) The Wits Local Division with houses at Jo'Burg. (e) Circuit Courts which are single judge Courts held in different parts of the country for the sake of convenience.
(c) The appellate Division of the Supreme Court of S.A. with houses at Bloemfontein which is the final court of appeal from the decision of other superior courts already mentioned.
(d) The Judicial committee of the Privy Council with houses, in London to which appeals may be made in certain cases from the decisions of the appellate Division of Superior Courts
(e) The appellate Division and Privy Council are purely courts of appeal. The other divisions of the superior Courts act as courts of first instance in those matters civil and criminal which are beyond the jurisdiction of the Inferior Courts mentioned above and as Courts of Appeal the decision of the Inferior Courts in matters both civil and criminal, within their jurisdiction, The exception made above to the Natal Native H. C. which although not part of the Supreme Court of S.Afr. is regarded as the Superior Court in criminal matters in which one of the parties is a Native Appeals against N.H.C. decisions of the Natal N.H.C. go to the appellate division of the Natal Provincial Division in matters within its jurisdiction. The N.N.H.C. has not jurisdiction in civil matters. Its powers in this regard have been abolished by the Natal Appellate Division. The Superior Courts of S.Afr. are opened to Natives in all these matters both civil and criminal which are beyond jurisdiction of the N.H.C. and Registrar's Courts.

THE NATIVE FAMILY SYSTEM: In order to understand N. Family Law, it is necessary to consider the conceptions underlying the Native Family System. To the Roman Law, a family means the aggregate of those persons bound together by a common subjection to the same individual; i.e. all those who are subject to the power of what is commonly called the head. In other words the family comprises all those who belong to the same household. This community of household members rests in the law of blood relationship traced through males, i.e. the Native Family is matrilineal. This differs from the position in Roman law where the family was also defined as the aggregate of those persons who are subject to the same power. In Roman law, the basis of the family was not blood relationship but common subjection to the same power which the Romans called Paterfamilias. The Roman family consisted of blood relatives, non relatives slaves and other servants and all of them were regarded as members of the same Family as long as they fell under the power of the same individual. The Roman family was cognatic whereas the Native Family is Cognatic. (2) In the Native Law of marriage, polygamy, is recognised and consequently we must expect to find this fact reflected in the family structure of Native Society. The Native family may consist of several wives and children by these wives all of the same father. In order to avoid confusion in the property rights and the rights of succession and inheritance between members of the same household, Native Society devised the system of dividing the household into separate Houses. In the arrangement of houses in a Bantu Polygynous family, two important principles are recognised, i.e. the principle of the ranking of wives in order of seniority and the principle of the affiliation of Junior to Senior Houses. Different House systems prevail among the different tribes in South Africa. But the general principle is same and are mentioned above obtaining in all. Thus in Native South Africa, among the Zulus, a house system in which there may be three principal houses. (a) The Chief House known as Indlu Nkulu. (b) The right hand house known as Uku nen. (c) The left hand house known as Iqadi and houses are affiliated to one or other of the three main houses. The status of each wife being publicly declared at her marriage. In the Cape among the Xhosas we find a house system with two principal Houses, i.e. the Chief House and the right hand House with houses affiliated to one or other of the two chief houses. Affiliated houses being known as the 1-Qadi
Houses. Another kind of House known as ikhaba, found among the Sotho-speaking tribes, which is known as the Ancient because it is generally established with property belonging to and in honour of the Grandfather of the Husband and is regarded as an additional House not affiliated to any of the principal Houses mentioned above. Among the Sotho-speaking tribes we find a system with one principal House, all the other houses ranking in order of seniority after it with the principle of affiliation recognized as between the Houses. In each case all the Houses of the kraal taken together, constitute the Family. The head of the household is known as the kraal-head and the rest of the people who are subject to his power are known as inmates of his kraal. Every Native in Native Law is either a kraal-head or an inmate of some kraal according as he is or not the head of the household to which he belongs. As long as the kraal head is alive all his children married and unmarried and their children except grand daughters and daughters deceased through males are subject to kraal-heads authority in kraal matters. Married females cease to be under the control of their natural kraal heads and therefore cease to be members of their original families but fall after marriage under the power of their Heads of their husband's kraals. In each family there is only one kraal-head at a time, and in each family there must always be a kraal-head. Therefore upon the death of the Kraal-head someone succeeds to his Status and must assume his authority according to rules of succession in the tribe. In this connection it is interesting to compare the power of a kraal-head under Native Law, with power of head of a Roman house hold. (i) In Roman Law membership of the same household was based upon the agnatic principle whereas in Native Law membership of the family is based on the cognatic principle. (ii) In Roman Law monogamy was practised and the house system was fixed, whereas in Native Law especially in the later states of its history the position of a wife did not necessarily involve a loss of membership of her family to submission to the power of her husband's. In Native Law the wife was perpetual member subject to the authority of her husband as a member of his family. In Roman Law upon the death of the head of the home, holds all his sons and daughters who were immediately under his control became free from parental power and none of them was subject to any of their others. In Native Law, on the death of the kraal head, one son succeeds to the status of the kraal head while others remain under the powers of the new kraal head and the father could emancipate any of his children under his power and make him free from parental control. In Nat. Law the principle of emancipation from the status of kraal head kraal-heads power does not exist except where the inheritor of a kraal is being expressly disinherited for bad conduct. Such a disinherited person can establish his own kraal of which he shall be the kraal head.

LEGAL CAPACITY OF PERSONS IN NATIVE FAMILY LAW:- All persons in a Native family are either kraal heads or inmates of kraals heads. The Kraal Heads are the only persons in the Nat. Family who are authoritative i.e. those under their own power and therefore of full legal capacity. All other persons are "alien juris" i.e. those under the power of someone whose legal capacity is consequently limited by the power of the person under whose authority they fall. Full legal capacity implies the following powers:- (i) Personal capacity:- the right to control ones person. (ii) Proprietary Cap. ".,",.,. (iii) Contractual Capacity the right to make contracts of separable agreements. (iv) Declarative Power: The right to freedom from being wronged by other. (v) Judicial Capacity: The right to sue and be sued in a court of law. The only person who possess these powers to their fullest extent within the meaning of Native Law, is the kraal head. The kraal head, as rule is the oldest surviving male in the Native Family. Upon his death the position is taken up by the eldest son of his chief wife or if that son is still a
minor, by a senior male relative of the deceased, e.g. a brother of the deceased. In original Native Law a woman could not become the kraal head. In modern Native Law however a woman may become a kraal head with the permission of the Court or kraal head in his absence. See Natal Code of Native Law Sections 28, 42, and 43 Powers and Duties of the Kraal Head.

In olden days, the power of the kraal head over members of his family was probably very extensive as was the case in Roman Law. The kraal head had a power, probably, of life and death over his children and the personal status according to his own wishes. He could get a wife for his son and give his daughter on marriage. This wide power were modified in time by the evolution of the rights of the Individual in Bantu Society. The coming of the Europeans has also resulted in the limitation of the powers of the kraal head and modern Nat. Law recognises the following rights, duties and powers belonging to the kraal head.

(a) THE CONTROL AND MANAGEMENT OF THE KRAAL: The Kraal-head disposition of the kraal and its inmates. His authority is thus limited by the fact that he is expected to consult the elders of his family, that is, his senior male relatives in the making of certain important decisions although he is not bound to take their advice. A good kraal head realises that the smooth running of his kraal he must give ear to the advice of his elder kinsmen. Ownership of Property: In Native Law, the kraal head is the absolute owner of property belonging to his kraal. Here a distinction must be drawn between kraal and house property. Kraal property is such property as accrues to the kraal-head in his own right as for example, labours received for his own sisters daughters, property inherited from his father and that which he has earned by his professional activities e.g. a doctor. As long as the kraal head has not apportioned or allocated any of this property to one or other of the houses of his kraal he has full and absolute ownership over it. He can dispose of it in any manner without laying himself open to any legal action by a member of his kraal. If however the kraal-head is acting prodigally or extravagantly, or is otherwise unfit to manage his property, he may with the consent of the chief or now-a-days with that of the Native Comm. be restrained from exercising the powers of the kraal-head and another person, a relative may be appointed to act in his place. This does not however affect the question of the kraal-head being the absolute owner of kraal-property. The concept of kraal property as property that is separate from house-property is found in Natal. But in the Cape all property in a kraal is presumed to belong to some house or other. There is no unallocated property in Xosa Law. As regards house property the kraal head is in pratice (de jure) the owner thereof, but in law practice (de facto) the property belongs to the particular house to which it has been allocated. The kraal-head has a charge, custody and control of such property and he has discretionary powers to use it for his own personal wants and necessities, for the entertainments of visitors or for general kraal purposes and if he uses it he is entitled to use it for the benefit of another house in the kraal. If he does so there is a liability on the part of the house benefited to return such property or its value to the house from which it was taken. In other words there is a duty placed upon the kraal head to keep the property of his different houses distinct. The wife of every house is given the right to protect the property of her house against mismanagement by the kraal head. During his life
time the kraal head is entitled to settle all disputes regarding
house property between his different houses in an equitable manner.

CONTROL OF KRAAL HEAD OVER MEMBERS OF THE KRAAL:-
The kraal head possesses the right to the control and custody
to all inmates of his kraal irrespective of age or sex and such
inmates owe him due reverence and obedience. He is entitled
to inflict moderate corporal punishment to ensure such obedience
and for the purpose of peace and good order. If however he
exceeds the bounds of moderation in chastising any member of the
kraal he may be punished by the chief or now-a-days by the Nat. Co.
The kraal head must maintain and support all inmates of his kraal
even in the case of grand-children whose fathers are still alive.
The kraal head is liable to be criminally punished if he fails to
carry out his duty to support inmates when he is in a position
to do so. On the other hand children and inmates of the kraal are
also expected to support the kraal head. In original Native Law
the kraal head was entitled to receive all the earnings of his chil-
dren in return for which he supported and maintained them providing
them and for general kraal purposes the sons with Lobola on their
marriage and the daughters with a marriage portion.

UNDER SECTION 35 OF NATAL CODE OF NATIVE LAW, it is provided that
a kraal head is entitled to the earnings of his children and to a
reasonable extent share of the earnings of other members of his
family and of any other kraal inmates. Such earnings are to be
utilised by the kraal head primarily for the maintenance and
benefit of the houses providing them and for general kraal purposes.
In particular the kraal head is not permitted to use the earnings
in such a way as to benefit one house at the expense of another
and if he acts unreasonably in the exercise of this right he may be
restrained by the chief or by the Nat. Commissioner.

THE CONTROL OF MARRIAGES:- The kraal head has the right
to consent to the marriage of all inmates, male and female. In
original Native Law no marriage could be recognised unless the
kraal head consented and gave his full authority over it to be
contracted. No one could interfere with him in his connection
although the advice of his senior male relatives and of the mother
concerned had to be given due consideration. In modern Native
Law however, if the kraal head withholds his consent to the marriage
of an inmate unreasonable, the Nat. Comm., is empowered after
immediate to authorise such a marriage without the kraal heads
consent. Moreover the consent of the kraal head is no longer
required in the case of a marriage or customary union of a male
inmate who has attained majority. Under the Natal Code of Nat.
Law, a Native male becomes a major (customary or) in law on marriage
or upon entering into a customary union or attaining the age of
twenty-one. In the Trankanit Territories, by PROCLAMATION No. 2 of
1879, the age of majority for both males and females was fixed at
twenty-one. This fixing of maturity by age is entirely contrary
to original Native Law but modern conditions have necessitated the
adoption of the principle of maturity. A Native female in Natal
may also be declared free from kraal head authority on application
to the Nat. Commissioner, if she is the owner of immovable property of
if by virtue of good character, education, thriftiness habits or any other good and sufficient reason she is
deemed fit to be emancipated. Such a woman would require the
consent of her kraal head to her marriage.

THE DUTY TO PROVIDE LOBOILA:- The kraal head is bound in Nat.
Law to supply the Lobola of his eldest son for his first or chief
wife and in true Nat. Law the kraal head could be compelled to
supply this Lobola. But in modern Native Law, if a son has not
given his earnings to the kraal head the latter is not under obli-
gation to provide him with Lobola.
On the other hand if a son has
paid to the kraal his earnings to his father, and the latter refuses
to assist him with his lobola, the son is entitled to recover the
earnings so paid to the kraal-head. Where a son has done no more
than his duty to help the kraal-head by contributing from his earnings
and has had the benefit of residence in the kraal and main-
tenance by the kraal-head, he cannot expect refund of earnings on refusal
to pay Lobola by the kraal-head. The kraal-head receives Lobola
for every female inmate or the kraal but such property is received on
behalf of and must be paid to the house to which the woman for whom
it was given belongs. Any other kind of disposal of lobola would create
a debt in favour of the house to which the woman belongs.

DELIBTS AND CONTRACTS:- The kraal-head is entitled to make con-
tacts on behalf of all the inmates of his kraal and regard to such con-
tacts he may sue in his own name or on behalf of the inmate concerned.
This refers to contracts on behalf of inmates who are minors. In modern
Nat. Law, the kraal-head is not allowed to sue in his own name or on
behalf of inmates regarded as majors. Similarly the kraal-head is
entitled to sue for all delicts committed against an inmate of his kraal
the principle of Nat. Law being that the wrongfull act is being inflicted
on the kraal head and not on the injured person. Where the kraal-head
himself commits a delict against the inmate of his kraal he cannot be
sued for such delict by an inmate the latter may apply to the Nat. Com.
to be removed from the control of the kraal head or for protection against
him or any other necessary relief.

LIABILITY OF KRAAL HEAD FOR
WRONGS OF INMATES:- Under the true Nat. Law the kraal-head is liable
for the debts and acts of inmates of his kraal. The kraal head's
liability in true Nat. Law arose out of the fact that all property in the
family was family property subject to the control and management of
the kraal head. Individual ownership was uncommon hence the kraal head
assumed liability for all the acts, delicts and debts of his inmates
whether such were incurred with or without his authority or whether
the inmate was acting for or on behalf of the family or not.

Therefore in strict Native Law the liability of the kraal head for the deeds
of inmates of his kraal is absolute. In modern Native law however
the kraal-head's liability in this regard has been limited in various
ways. Thus in the Transkei Territories, the Native Appeal Courts
have laid down the kraal-head's liability as follows:-

(a) The kraal-head is responsible for all penalties incurred by
the inmates if the latter are unable to satisfy the judgement.

(b) This liability extends to all inmates irrespective of the
degree of their relationship to the kraal head so that the kraal-
head may be liable of the delicts of a grandchild who was still a child.

(c) The fact that inmates are married does not exclude liability
on the part of the kraal-head.

(d) This liability continues until the inmate establishes a se-
parate kraal of his own, distinct from that of his father or until the
father has disinherited him.

(e) This liability applies in the case of delicts, delicts of both
major and minor inmates of the kraal.

(f) The liability extends to debts incurred even prior to the in-
mates taking up his abode in the kraal head's household. The reason
for this being that where the individual takes up his abode in a kraal
the kraal head benefits by all the stock and other property which he
brings with him. It must be noted that the kraal head's liability
in the Transkei depends upon the inmates being unable to pay the damages
awarded against him. This means that the kraal head is a guarantor
or a surety responsible for the behaviour of his members. Consequently
where their behaviour is not good the blame is put upon him.

In (a) East Griqualand the kraal head is liable for the debts
of the inmates of his kraal when contracted with his knowledge
and consent but not otherwise. (b) The kraal-head is liable for the
wrongs of his sons whether majors or minors committed while they are
inmates of his kraal, are resident with him but when the sons of the
kraal head marry the kraal head is no longer responsible for their
dealings. (c) Finally he is not responsible for either the debts
or delicts of inmates of a kraal not related to him.

In the Ciskei, the kraal head is liable for the debts and delicts
of minor inmates of his kraal. When such inmates reach the age of maturity or leave the kraal and set up separate establishments of their own or are publicly dispossessed or disowned for gross mis-conduct, the kraal head is not liable for their debts or delicts.

In Natal, according to Nat. Law as laid down in the old Code 1891, the kraal head's liability for the acts of the inmates of his kraal was absolute according to Native Code the kraal head is not liable for the contracts of his inmates unless he is a party to the contract or unless the act of the inmate was for the benefit or the kraal or of a particular house in the kraal. He is however not liable for the acts of married males or widowers related to him where such acts are in respect of their private dealings. Furthermore the kraal head is not liable for the acts of adult inmates not related to him though resident in his kraal. As far as delicts are concerned, the kraal head under the old code was liable for all delicts committed by inmates. The Natal Nat. High Court in interpreting the law regarding liability for delicts has held that a kraal head should not be liable for delicts committed by an inmate unless (one) the inmate was acting as the agent of the kraal head. (2) The kraal head adopts and ratifies the acts of the inmates. (3) The kraal head takes a benefit from the act of the inmate. In 1932, the Natal Code of Native Law was revised. SECTION 141 OF THAT CODE uses as with the liability of the kraal head for the delicts of inmates of his kraal in one following terms: "a guardian is liable in respect of delicts committed by his ward while in residence in the same kraal as himself. (2) Notwithstanding anything in SECTION 27 or in any other provision of the Code a father is liable in respect of a delict committed by his children while in residence of the same kraal as himself. (3) The kraal head is liable in respect of delicts committed by any unmarried inmate of his kraal while in residence at the kraal. (4) Legal proceedings arising out of any delict such as is referred to above may be instituted either against the person committing the delict or such person jointly with his father or guardian while the case is to be determined. The purpose of this section is that it makes kraal head liability dependent upon a number of factors: (1) The kraal head's liability in regard to minor is unaltered. He is made responsible for their delicts provided such delicts were committed while the minor was in residence at the kraal. In other words the kraal head is expected to exercise effective control over people in his residence at his kraal but not over persons residing elsewhere. Residence at the kraal means actual living there at the time of the commission of the offence. (2) The kraal head's liability as far as other inmates of his kraal are concerned i.e. non-minor inmates is limited to responsibility for the delicts of unmarried inmates who in other cases must be in residence at his kraal in the sense explained above. (3) The kraal head therefore is not liable for the delicts of married inmate of the kraal whether or not related to him even if they are in residence at his kraal at the time of the commission of the offence. (4) It must be pointed out that SECTION 141 only has reference to delicts which are regarded as such in Nat. Law. If the delict complained of is dealt with under common law then the kraal head will not be held responsible except in the case of minors. (5) The person to be sued for a delict is either the kraal head in his capacity as such or the actual wrong doer alone without mention of the kraal head then the latter will not be held liable.

WITH REGARD TO CONTRACTS AND LIABILITY OF THE KRAAL HEAD FOR THE CONTRACTS OF HIS DRAAL. SECTION 39 of the NEW CODE PROVIDES THAT A KRAAL head is responsible to the chief, and to the supreme chief for the good conduct of the inmates of his kraal and acquires rights and incurs obligations under contracts entered into by the inmates of his kraal when acting with his authority express or implied. This means that unless it can be shown that the inmate in making a contract was acting with authority of kraal head expressed or implied, the kraal head will not be held liable on the contract concerned.
CUSTOMARY UNIONS:—The Native Administration Act 38 of 1927 as amended by Section 9 of 1929 Act 9 defines a customary union as the association of a man and woman in conjugal relationship according to Nat. Law and customes, where neither the man nor woman is a party to a subsisting marriage. This definition must be contrasted with that of a marriage which is defined as the union of one man to one woman in a conjugal relationship to the exclusion while it lasts of all others. It will be noted that (1) The definition of a customery union implies polygamy while that of marriage implies monogamy. In S.A. Law no marital union can be regarded as a valid marriage if it is possible for one of the parties to contract a similar union with another person, during the subsistence of the first union. It is for that reason that it has been found necessary to distinguish between a customery union and a marriage. (2) The definition of a customary union implies that a party to such a union cannot at and the same time be a party to a subsisting marriage. Such an individual would lay himself or herself open to a suit for divorce by his or her partner in the Christian marriage.

ESSENTIALS OF CUSTOMARY UNION:—The essentials of a customary union as laid down in the Natal Code of Law are as follows:— (a) The consent of the father or guardian of the intended wife, this consent may not be withheld unreasonably. (b) The consent of the father or kral head of the intended husband should such consent be necessary. (c) A declaration in public of the intended wife to the official witness (only in Natal) at the celebration of the Union that the union is of her own free will consent.

The Natal Code of Native Law in section 50 goes on to provide that:— (1) The consent of the father or guardian is not required in respect of an emancipated female on entering to a customary union emancipated under Section 28 of the Code. Further it goes on to say that the consent of the father or kral head is not required in respect of one contracting of customary union by a native male who has attained majority. It will be noticed that this section makes no (notice or) mention of Lobolo. This is because the payment of Lobolo is not regarded as an essential of customary union in modern native-law. In other words it is open to the father or guardian of a woman entering into a customary union to waive his right as far as lobola is concerned.

CONSEQUENCES OF A CUSTOMARY UNION:—Certain consequences follow the contracting of a customary union. The Union places the customary wife under the guardianship of her husband. The natural guardian of a married woman is her husband, even if the husband happens to be younger than the wife, the husband is the guardian. (2) The wife assumes the status of her husband whatever position the wife may have held prior to her entering into union even if that position was senior to that of husband, after contracting the union she holds the same status as the husband. In S.A. that question is very important in connection with marriages between Europeans and Natives. This means that where a European woman enters into a customary with a Native she takes the status of a Native and conversely a Native woman takes the status of a European legally. (3) The wife takes the domicile of her husband, the husband decides the where the home shall be. (4) Children by the same parties are legitimised even if they were born prior to the creation of the union. (5) The husband is under obligation to maintain and support his wife. Any husband who fails to discharge this duty is liable to punishment for this offence which is regarded as criminal. (6) There is no community of property between the partners in a customary union. All property brought to the union with certain exceptions is the property of the husband. The principle of exception in that rule is the property given to the mother of the girl at her marriage, e.g. THE NGUBEU BEAST among the Zulu. This least belongs in absolute ownership to the woman.

DISOLUTION OF CUSTOMARY UNIONS:—There are two ways in which a customary union may be dissolved, i.e. by divorce or by annulment. DIVORCE is the dissolution of a valid customary union validly contracted with all the essentials present. An annulment to the dissolution of an invalid customary union i.e. one in which the essentials of a customary
union were not all present together. (1) An action for divorce in respect of a customary union can be brought by either of the parties to the union on the following grounds. (a) Adultery on the part of the other partner. (b) Continued refusal to render conjugal rights. (c) Wilful desertion. (d) Continued gross misconduct. (e) Imprisonment for not less than five years. If that conditions between the parties are such as to render continuous living together insupportable or dangerous. In additions to the above these are certain special grounds which are open to the wife only, i.e. gross cruelty or illtreatment of the wife by the husband. (e) Accusation of witchcraft or other serious allegations against the wife by the husband with regard to these grounds for divorce the following must be noted:— (1) A husband must not by his own conduct contribute towards the adultery of his wife, but the fact that a husband himself has committed adultery does not in connection with a customary union disentitle him from succeeding in his application for divorce as would be the case in a marriage Christian. This is obviously because a customary union implies polygamy. (2) To substantiate a charge of wilful desertion there must be evidence of separation with the manifest intention of not resuming marital relations. In other words the mere fact that the man has been away (absent) from his wife for a certain length of time is not sufficient indication of his intention to desert her. (3) Gross misconduct must be continous if it is to support an application for divorce. Where it is shown that the parties live together in harmony the court may decide that it is better for the divorce to be granted. But this will not be readily done. Moreover a divorce will not be granted merely because it is not opposed. An accusation of witchcraft is a serious matter in Native Law and where it is made against the wife unless there is a definite public apology by the husband, the wife may be granted divorce. Either party may bring action for divorce, but in the case of a wife action may also be brought on her behalf by her father or guardian. This does not apply to the husband. A wife seeking divorce must on leaving the husband seek the protection of her father or guardian or any other person who would have been her guardian if she had been unwedded. The protecting person must make an attempt to bring about reconciliation between the parties and only on failing in this effort, should he proceed with the woman to the Native Com., to initiate divorce proceedings. This must be contrasted with the procedure in an application for divorce in a Christian marriage where there is not necessity for an attempt to bring about a reconciliation. It is noteworthy however that where a divorce is based on the ground of a malicious desertion in Christian or Civil Marriage, the order of the Court is always to the fact that the deserting person should return to the person deserted by a certain date failing which divorce will be granted. If the wife seeking divorce has no protector she may apply to the Nat. Comm. who will appoint a person for the purpose of helping her with her case; such a person is known as the CURATOR AD LITEM. A husband seeking divorce must notify the father or guardian of the wife in order to give the latter an opportunity to reconcile the parties. If the reconciliation is not effected the husband may then proceed to initiate divorce proceedings. It is the duty of the father or protector or woman to assist her when she is suing or being sued for a divorce.

The Courts of Nat. Commissioners have jurisdiction to deal with the dissolution of Customary Unions, although they are absorbed by the ADMINISTRATION ACT from dealing with dissolutions of Christian Marriages or Civil Marriages. In Natal the Native Chief Courts have no jurisdiction to deal with questions of divorce or annulment of a customary union. But in other areas of the Union, where chiefs possess jurisdiction (civil) they are entitled to deal with dissolutions of customary unions. In that case an appeal lies from the Chief's Court to the N.O.C. where a litigant is not satisfactory to the decision of the N.O.C. whose decision is final. It must be noted that the Native Divorce Court cannot deal with the dissolution of customary unions but is only given jurisdiction over Native Christian or Civil marriages.
CONSEQUENCES OF DISSOLUTION OF CUSTOMARY UNION: One of the most important questions in connection with the dissolution of a customary union is that of the return of Lobola. The fate of the Lobola depends upon the cause or ground of divorce. Thus if the divorce takes place at the suit of the wife by reason of the wrongful acts, misdeeds or omissions of the husband, the latter may lose his Lobola cattle. On the other hand if the wife is in the wrong or is to blame for the divorce the husband may be entitled to a portion of his Lobola cattle by the father or protector of the woman. The following considerations generally guide the Court in deciding the number of Lobola cattle to be returned:—

1. The number of cattle paid.
2. The number of children born to the parties one least being deducted generally for each child.
3. The prospects of a woman re-entering into another customary union and the number of cattle her father or guardian is likely to obtain.
4. The blame attached to each party.
5. The period the parties have lived together.

It must be remembered that a dissolution of a customary union does not absolve the husband from paying the unpaid Lobola. Another question arising out of dissolution of a customary union is that of the custody of the Children of the union. The children of a customary union belong to the fathers and he is entitled to their custody when the union is dissolved. But in the interests of the children, the court in granting a dissolution may make such an order as to the custody and maintenance as may be just and expedient. Thus the children may be too young to be separated from the mother and the court may order that they should remain with her but be maintained by the father until they are old enough to be taken by him. Similarly in the interests of the moral welfare of the children the court may order that they should go with the mother rather than with the father but whether the children may be entrusted to the father and not to the mother.

The dissolution of a customary union affects the guardianship of a divorced wife; normally she returns to the guardianship of her father if he is still alive or that of his heir or that of his protector and the court may make order that she resides at such guardian’s kraal or such other place as the court may decide.

MUTILITY OF A CUSTOMARY UNION:— Either partner in a customary union may sue for mutility on one or other of the following grounds:—

1. Insanity of the other partner at the time of the contract.
2. Impotence (incapacitance) or other permanent physical defect preventing the consummation of the union.
3. Absence of any of the essentials of a customary union. (A) The previous marriage of the wife or her previous union to another man.

Regarding these grounds it must be noted that:
1. The insanity of the partner might have existed at the time of the celebration of the union of the partners. If it occurs after the celebration it will not be excepted as a ground for divorce. (B) The insanity of one partner must have been unknown to the other partner when he entered into the Union. There is nothing in law to prevent a man from entering into a customary union with an insane woman, but once he has done so he cannot claim divorce afterwards on the ground of insanity of the partner. (C) There are any of the essentials of a customary union are lacking thus rendering it voidable at the instance of the father of the woman concerned, the father must take immediate step to have it set aside, otherwise he will be presumed to have consented to the Union. Thus (A) a man marries by customary union a women (B) without consent of the father. As soon as this comes to the knowledge of the father of, it is his duty to take steps to have the union annulled if he is not in favour of it. If he delays in taking action it will be assigned by the court that he was in favour of the union although it was first contracted without his consent. In decreasing the nullity of a customary union the court shall order the return of any lobola already given together with the increase of the stock and shall order a refund of all other expenses connected with the nullified union. The parties are as far as possible to be placed in position in which they were before the contraction of the union.
LOBOLA–The term lobola means the cattle or any other property which in consideration of an intended customary union, the prospective husband, his parent, or guardian or any other representative agrees to deliver (make over) to the prospective guardian of the intended wife. Contrary to all appearances a custom popularly known as the giving and receiving of lobola is not looked upon as the purchase and sale of a woman in the native mind. To the native mind the lobola contract is one between father of intended bride and the prospective husband by which the father of the bride gives consent to the union and undertakes to protect his daughter in case of necessity either during or after the termination of the union and obtains from the intended husband some proof of property partly for such consent and undertaking to protect, and partly as a guarantee by the husband of his good conduct towards the wife. The person to whom the lobola for women is delivered or in case of his death the heir of the house receiving lobola is bound by the receipt thereof, should the union be dissolved by death of the husband or wife. The law is provided by section 30 of NATAL CODES OF NATIVE LAW. The person to whom the lobola for women is delivered or in case of his death the heir of the house receiving lobola is bound by the receipt thereof, should the union be dissolved by death of the husband or wife. The person to whom the lobola for women is delivered or in case of his death the heir of the house receiving lobola is bound by the receipt thereof, should the union be dissolved by death of the husband or wife. The person to whom the lobola for women is delivered or in case of his death the heir of the house receiving lobola is bound by the receipt thereof, should the union be dissolved by death of the husband or wife. The person to whom the lobola for women is delivered or in case of his death the heir of the house receiving lobola is bound by the receipt thereof, should the union be dissolved by death of the husband or wife.
date of delivery. After the expiration of this period the risk of loss is regarded as having passed to the receiver. A common type of agreement in connection with Lobola is that in terms of which the intended husband delivers cattle to a father or guardian of his intended wife before the celebration of the union on an installment basis as it were. Such cattle are regarded as SISA CATTLE. Sisa is a custom whereby cattle or other livestock are deposited by the owner to some person on the understanding that such person shall enjoy the use of them, but that their ownership shall remain vested in and their increase accrue to the depositor. Lobola cattle thus deposited on installment remain the property of the depositor and if the depositor disposes of such cattle to a third party, the depositor has a right of vindication with regard to them, i.e., he can recover the cattle from the third party even without repaying such third party whatever he may have paid for the cattle.

DELIVERY OF LOBOLA: may be made at any agreed place. But in the absence of any agreement delivery is taken to be at the place of the deliver, i.e., intended husband. The cattle may be handed over by actual delivery or by s uploadical delivery, i.e., by the pointing out of the cattle it is intended to hand over. This passes ownership of the cattle given to her goes to her father or to he be deeded to the heir of the house to which she belongs. If the unmarried woman was allocated to a particular son, or if her lobola was pledged to a particular house, then it must go to that house or that son. In the case of a divorced being married again her lobola goes to the father or to his heir as above. In the case of a widow, the lobola goes to the home to which she belonged in her deceased husband's kraal and not to her father's or his heir. In the case of an illegitimate child, her lobola goes to the house to which her mother belongs.

VALUE AND AMOUNT OF LOBOLA: As a rule lobola is given in the form of cattle. Such cattle must consist of 7 head of mast cattle; but lobola may be given in other forms. In Natal, according to the Code of Native Law, for the purposes of any dispute the value of each herd of lobola cattle is regarded as £5 provided that the supreme chief may by proclamation vary this amount or assessment from time to time. This value of £5 per head, is fixed for Lobola purposes and is not a basis for value in other transactions. In Natal there is a fixed tariff for lobola depending upon the status of the father of the girl in the tribal society. SECTION 87 OF THE CODE provides the lobola for a girl or woman who is a ward, is determined according to rank or position of a father or guardian, and is determined by agreement but shall not be imexcess of the scale prescribed in the following table:

1. For a woman who is the daughter of a chief no limit. 2. The daughter of headman, Chief's deputy or official witness 15. 3. Daughter of any other Native 5 head of cattle. 4. Doubtful cases 10.

The limit fixed applies whether in civil or customary union. It will be noted that SECTION 87 lays down a maximum. Any charge beyond this maximum is criminal. People in Natal have tried to circumvent this maximum by making other charges which they maintained did not fall in the category of lobola. Such payments have been variously known as VELAKLONGA, BULUMLA, QUAQHAMAZINO, ISTIKWELELA; Under SECTION 35 of the Code, such payments are regarded as part of the lobola in other places of the Union there is no tariff for the Lobola amount, to be paid, this left to the negotiations between father or the girl and that of the man. This is most in accordance with true Native Law where the Lobola was not fixed. But this system is open to abuse and there is a tendency for modern detribalised natives to raise the amount of lobola they demand unduly. On the other land in Natal, where the maximum has been laid down it has become customary for the maximum to be demanded. The creeping in of abuses into the practice of this ancient and honourable custom will lead ultimately to its abolition.
=NQUTHA BEAST=—Where a woman is entering into a customary union for the first time a beast known as the Nqutha-beast may be claimed in addition to the ordinary lobola. This beast is only payable where the woman is a virgin. If she has been previously seduced or by her intended husband or by some other person or the Nqutha-beast is not payable. The beast is payable to the mother and together with its increase becomes her own property to be dealt with by her for the benefit of her house or as she may deem fit. It may not be attached for her personal property (debts). If the woman's mother, (one who receives the beast) voluntarily deserts or abandons her husband's kraal her rights in and to the Nqutha Beast cease and the beast becomes the property of the house to which she belonged. If the mother is not alive when the woman is married, the payment is paid to the woman in accordance with the directions of the deceased mother. The Nqutha beast is not regarded as lobola and is not recoverable upon the dissolution of the customary union even if the return of lobola is awarded to the husband. There are three eventualities which may arise to account for the refund of the whole or part of the lobola paid by the person who made the payment. (1) When the engagement to marry has been broken off. (When this occurs both the original cattle and all their increase can be claimed, the father or guardian of the girl on the other hand can set off or deduct any damages suffered or payments made by him including (a) Cattle or other stock slaughtered in connection with engagement. (b) Damages for seduction and pregnancy if any i.e. the Nqutha Beast for seduction and a beast for each child born as a result of such seduction. (c) Burial expenses for any child born of the parties. These must be paid before (d) Damages, if any for abduction (slopping). (2) The death of a wife: Soon after the celebration of the union; modern Native Law permits a return of a portion the Lobolo not exceeding half of the number of the cattle delivered in respect of the union on the death of the wife within twelve months of the celebration of the union. The number of cattle to be returned is in the discretion of the Native Commissioner and no return will be allowed should there be surviving issue of the union. (3) Where the customary union has been dissolved, this subject has already been dealt with. Questions for the refund of lobola have been dealt with by a Nat. Com. is Court even in the case of Christian marriages which normally fall outside the jurisdiction of Nat. Com. is Court.

=UK'NEN'A UNION=—The Uk'nen'a Union may be defined as the Union with a widow undertaken on behalf of the deceased husband by his full or half-brother or other paternal male relative for the purpose of the following:— (1) In the event of her having no male issue by the deceased husband of raising an heir to inherit the property or property rights attaching to the house of such widow or (2) In the event of having such male issue increasing the normal offering of the deceased. This definition shows that the Uk'nen'a union has two main objects:— (a) To provide a male heir where there is none, because the Native Law of Succession only male heirs succeed. To achieve this object, the widow of a deceased man is persuaded to enter into an Uk'nen'a union under which she is persuaded to live in her deceased husband's home until she gives birth to a male heir who will succeed the husband. The second object was to increase the number of the offspring of the deceased. In this connection it must be remembered that the primary object of the marital union is the procreation of children. The more children a woman gave birth to the more she was regarded as a successful wife. This emphasis upon the number of children born is greater where the institution of lobola exists. Therefore where a man died leaving one or two children, this was regarded as an unsatisfactory position both from the point of view of the woman and that of her deceased husband's family. The Uk'nen'a provided a means whereby the position could be adjusted. The essentials of an Uk'nen'a Union are (1) That the Union be contracted for one or other of the purposes mentioned above. (2) That the union be entered into with the consent of the woman. (3) That it be the family arrangement entered into with the approval of the kraal head or in some cases, if the marriage is involved with the section of the majority of the tribe. (4) That no lobola be paid in respect of the Union. An Uk'nen'a Union may be established either for the chief house or one of the principal houses or affiliated houses of the deceased husband. Children born of such a union are regarded by law as children.
of the deceased husband and belong to the house of their mother.

Difficulties sometimes arise as to the position of an Ukungena child in the family of the deceased man, especially when the house held is a polygamous one, e.g. if the Ukungena child is the only male child in a Chief House but there are male children in other houses. What are the rules of procedure in such a situation? It has been held that the Ukungena child, if the only male child, becomes heir even to the Chief House; such a child has a better claim to the heirship even than a brother to the deceased man or any other non-descendant of the deceased. In an Ukungena child finds other male children in the house in which he is born the Ukungena child ranks after them in the order of succession. (3) If an Ukungena child finds, or is born in a house with no male heir and there are other houses with male heirs what is the position of the Ukungena child? The Ukungena heir will be heir to the house into which he is born, but if there are male descendants in a Junior house affiliated to that of his mother the Ukungena heir will rank after the male children of such junior affiliated house. The extent of affiliation is to provide against the absence of an heir in a senior house. Therefore if an ukungena union is created in the senior house after the death of the kraal head it would not deprive the heir of an affiliated house of his legal rights to give preference to the Ukungena child.

When there is competition between a general heir who is a descendant of the deceased and the Ukungena heir of one of the houses of the deceased the Ukungena heir is entitled to the rights relating to house property but the general heir is entitled to all the property rights which accrued to the house before the union was entered into, including lobola of daughters born before the union was formed. A general heir is entitled to succeed to the property of all houses without heirship at the time of the death of the owner of such houses. In an ukungena union is created in such an heirless house and a male heir is born such an heir can not deprive the general heir of rights which accrued to the house before the formation of union, but is only entitled to the rights accruing to the house after the union is formed.

UKUVUSA-UNION: This is a form of vicarious customary union occurring when the heir at law or other responsible person has property belonging to a deceased person and his own property to take a wife for the purpose of increasing or restoring the estate of such deceased person or to perpetuate his name and provide him with a successor. The essentials of the Ukuvusa union are the same as those of a customary union, i.e. the effect of this union is to create a separate and independent house in the name of the deceased. The points of difference and similarity between Ukungena and Ukuvusa are as follows; (1) The Ukungena wife is a widow of the deceased while the ukuvusa wife is not. (2) No lobola is given for an ukungena wife. It already having been given by her deceased husband. Lobola must be given for an ukuvusa wife. (3) The ukungena continues and already established house, the ukuvusa establishes a new house. (4) Both ukungena and ukuvusa unions are established in the name of the deceased and the offspring of such unions are regarded as children of the deceased. This is the main point of resemblance between the two unions. The new house established by this union has its own property and heir. The Ukuvusa heir cannot or does not succeed to any other property of the deceased man except that allotted to his mother's house. This type of union is less common among the Ukungena and tends to be carried out where it is impossible to create an Ukungena Union either because the man in whose name it is formed died unmarried or was followed in death by his heir or because his widow had passed child birth without a male heir.

CHRISTIAN MARRIAGES: Prior to the passing of the Administration Act of 1917, except in the Transkei Territories and in Natal the consequences which followed from Christian or civil marriage of which Natives were parties were exactly the same as those of a Christian marriage between non-natives. Thus if the parties were married by chosen Native law could not be applied to their marriage. This
frequently led to grave injustice to the dependants of a Native husband. Thus a polygamist converted to Christianity and having say three wives under Native custom was induced to marry one of these former customary wives on an entirely different one by Christian rites; the result was that community of property came into being between the husband and the wife of Christian marriage to the entire exclusion of the customary wives. The latter might even be deprived of property allotted to them by the husband prior to the celebration of civil marriage. This irregular position has now been remedied by the Nat. Adm., Act of 1927, in regard to marriages contracted by natives after the commencement of the Act. It did not affect marriages contracted before. Section 22 of the Act provides that:- (1) Marriages by Christian or civil rites among Natives shall not be in community of property unless the partners within one month prior to the marriage declare their intention that their marriage is to be in community of property. (2) Should a Native desires to marry by Christian rites when he is already a party to a subsisting customary union, he must first declare the wife's and children of such customary union and property allotted to them by him. In other words the rights of customary wives and children are protected as against the rights of the Christian wives and their offspring.

Section 22 of the Administration Act is modelled upon a similar provision contained in Proclamation 142 of 1910 of the Transkei Territories which was the result of the representations made by the General Council of the Territories. In the Transkei prior to 1910, there were three kinds of marital unions recognised among Natives (1) Customary Union which was termed a Native marriage, (2) Christian or Civil Marriage. (3) A registered Customary Union which was termed a registered Native marriage.

The registration of customary unions was optional and the intention of Proclamation 142 of 1910 was to make a registered customary union equivalent in status to the Christian marriage. Very few natives resorted to registration in the Transkei and registration consequently became a dead letter. At the present time the Government has under consideration a scheme of compulsory registration of customary unions throughout the Union and not only in Natal as is the case at present. In Natal the policy of the Govt. has always been to accord full Native Recognition but to insist that Customary Unions and Christian Marriages must be kept distinct. Furthermore, while permitting natives to marry by Christian rites the Natal Govt. was against the application of European Law to Native Christian marriages unless Natives concerned were exempted from Native Law. As a result of this policy in Natal:- (a) A customary union could only be annulled or dissolved by a competent Court and not by informal Native methods such as return of Lobola and handing back of the wife. (b) A Native who is a party to a customary union will not enter into a Christian marriage or convert his customary union into a Christian marriage. (c) Customary Unions were subject to compulsory registration. (d) Christian marriage did not remove the property of the parties from Native Law of Succession and Inheritance so that in the event of the death of a husband his property went to his male next of kin according to the Native Law of Premogeniture such heir also becoming the guardian of his wives and daughters and minor sons. There was no freedom of testamentary disposition in regard to landed property for such a husband. The issue of Christian marriages, could contract customary union under penalty of a criminal punishment and such union being null and void with no effect. (e) should the parties to a Christian marriage divorce or should either of them die a subsequent customary union by either or by the survivor is prohibited. (f) If the marriage is null and void and the offender is criminally punishable... 6. cases of divorce on separation in respect of Native Christian marriages were removed from Section 119 of the Native Laws. (g) Community of property did not apply to Native Christian marriages. The rules referred to so far apply to the Christian marriages of un-exempted Natives. As far as exempted Natives were concerned, the consequences of Christian marriage were exactly the same as those of marriage for Europeans under common law i.e. community of property.
existed between parties to a Christian marriage unless the parties had made an antenuptial contract excluding community of property from their marriage. Since 1927, Section 22 of NATIVE ADMINISTRATION ACT has been made applicable to Native Christian marriage in Natal, which means that community of property does not apply automatically to Nat. Christian marriages but can be introduced if the parties desire it and before the celebration of the marriage. Inclusive of a Special Court, Native divorce court has been established for dealing with questions of nullity divorce and separation arising from native Christian marriage. It is still illegal however in Natal for a person married by Christian rites to contract a customary union of for an exempted person to contract a customary union.

As a result of the recognition of the institution of lobola by Section 11 of the Native Adm. Act the payment of lobola in Christian marriage has by implication been recognised. It must be noted however that payment of lobola is not essential to the validity of a Christian marriage but it is not open to any court to declare payment of lobola to Christian marriage to be repugnant to the principles of public policy or natural justice. In cases of divorce arising out of Christian marriages an action for the recovery of lobola lies to the Native Divorce Court which has no such jurisdiction to such claims but to the Nat. Adm. Court.

PROCEDURE IN CONTRACTING CHRISTIAN MARRIAGE:—Native Christian marriages are contracted in different ways in different provinces. In the Cape and Orange Free State, Christian marriages are contracted by Natives in the same ways as other members of the nation viz by the publication of bans in church or at the Magistrate's office for three weeks followed by a marriage ceremony conducted by either a minister of religion who must be a recognised marriage officer or by a Native Commissioner or Magistrate who is an ex-officio marriage officer. Instead of the publication of bans the marriage ceremony may be preceded by obtaining a special licence or the payment of a special fee. The subsequent ceremony being conducted as indicated above. The object of the publication of bans is to provide an opportunity for those who have any objection against the proposed marriage to raise these objections before the marriage is concluded. Consequently a parent who is unaware that the marriage have been or are being published concerning a minor child of his and who takes no action before the ceremony is performed is conclusively presumed to have consented to the marriage. The object of special license on the other hand is to facilitate a speedy marriage where it is necessary. In Natal and the Transvaal, there are special provisions governing the celebration of civil and Christian marriages between Natives. Thus in Natal the parties have to make application to the Nat. Court of the District in which the intended bride resides. Before the Commission the parties concerned must make a declaration in which they acknowledge that the nature and obligations of the marriage have been fully explained and have been freely understood by them. Where the woman concerned is not exempted from Native Law, the consent of her father or guardian must be proved. If this consent cannot be obtained or is withheld by father or guardian unreasonably the parties may petition the Gov. General who may grant his written authority for the licence to be issued. Having obtained such a licence the parties may proceed to have their marriage solemnised by a marriage officer. Such a marriage does not remove the parties from the application of Native Law if they were unexempted Natives before the marriage. Natives' subsistence of a Christian marriage to which they are parties on entering into a customary union are guilt of bigamy. Should either of the parties be subsequently divorced or become a widow or widower she or he may not enter into a customary union. The Children of such a marriage are also prohibited from entering into a customary union. In the Transvaal Law 3 of 1897 provides male and female colours of maturable age may contract a marriage. Application is to be made to a marriage officer for coloured persons and certificate produced from the parties' Chiefs or Ministers of religion of the parties concerned indicating 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
DEATH:—This is the normal method of dissolving a marriage because every marriage is presumed to last until the death of one or other of the parties. The consequences of this event as far as the parties are concerned are as follows:—(a) The wife as the survivor acquires, where she did not have it, full legal capacity and has the custody of minor children of the marriage unless he deceased husband has made other arrangements. It must be noted that this would not be the case in Natal where Nat. Law applies even to Christian marriages between unexempted Natives. Marriages by Christian rites between unexempted Natives in Natal does not relieve the guardianship would not acquire full legal capacity nor would she have guardianship of her minor children unless she was emancipated under SECTION 28 of the CODE or was declared a kwaal head under SECTION 78. (2) As regards property the rights of the survivor depend upon whether the marriage was in community of property or not. If the marriage was in com. of property it is if in terms of SECTION 22 of Nat. Ad., Act a declaration will only be admitted in the event of the other contracting party having connived at the death. 

If the marriage was not in community of property then either the rules of Nat. Law of Succession will apply i.e. the property will go to the heir of the deceased in accordance with the rules of premogeniture or if an antenuptial contract was made its provisions would be followed. The degree of divorce can only be made by a competent court. As far as Nat. Christian marriages are concerned there are two alternative open to those seeking divorce. (1) Nat. Divorce courts or (2) Supreme Court. These Courts will only grant a decree of divorce on one of the following grounds:—(1) Adultery (2) Malicious desertion (3) Incurable insanity for 7 years (4) A declaration by a Competent Court there being no child of the spouses is an habitual criminal followed by 5 years imprisonment.

With regard to decree of divorce on grounds of adultery it must be remembered that it will be refused by the court in the following cases:—(a) Where the plaintiff has also committed adultery in concert with the defendant. (b) Where the plaintiff has connived at the adultery of the defendant. (c) Where the injured spouse has connived at the adultery of the defendant. (d) Where the spouses have acted in collusion e.g. acting in concert in order to deceive the court; they will either make false statements about or suppress the true facts of the case. Where the wife has committed adultery the husband may in addition to applying for a divorce decree claim damages from the husband. Respondent on the ground of insult inflicted upon himself and the loss of the comfort society and the services of his wife. These damages may be
granted even where the husband decides for good cause not to divorce his wife but merely to sue her. Corespondent for the damages of his wife.

Malicious desertion: is constituted by one of the spouses without just and sufficient cause leaving the other and staying away with the intention of not returning or deliberately and without any cause refusing to render the other conjugal rights or privileges. Before the Court grants a divorce decree on the ground of malicious desertion the defendant is always given an opportunity of putting the matter right. This is done by means of an order by the court calling upon the defendant to restore conjugal rights to the plaintiff by a given date and further directing that failing compliance with such order the defendant must appear in court on a subsequent date to show cause why a decree of divorce should not be granted against him. If on the later date it is proved that the defendant did not comply with the order for restitution the Court will grant the divorce but if the defendant complies with the order of restitution genuinely the Court will

INCURABLE INSANITY: In terms of the Mental Disorders Act No 88 of 1918, a decree of divorce may be granted where one spouse has been incurably insane for 7 years and has been proved by three medical practitioners of whom two must be appointed by the Court to be incurable insane for the mental condition of the defendant. The decree of divorce may be granted on the ground that a spouse has been declared a habitual N.R. criminal under the Criminal Procedure Act No 21 of 1925 and has been detained in prison for 5 yrs after such declaration. The divorce will be granted unless the plaintiff assisted the defendant in the commission of any crime for which she or he has been convicted.

CONSEQUENCES OF DIVORCES: As regards the persons of the parties the wife acquires if she did not have it full legal capacity and the parties may get married again to each other or to anyone else they are legally capable of marrying. It must be noted that if the parties desire to remarry each other they must go through the marriage ceremony. As regards their property the consequences are the same as if the marriage had been dissolved by the death of one of the spouses unless the court makes a special order at the request of the injured party. Thus the injured party may ask the court to order any benefits given to the guilty party under marriage.

As regards the minor children of the marriage the Court will make an order for their custody, the guiding principles being the interests of the children rather than the feelings of the parents. The custody of the minor children usually goes to the innocent party and the court also makes an order as to the maintenance and responsibility of the children, both husband and wife being required to contribute towards their maintenance and reasonable opportunities of access to the children are also to be allowed to the guilty party.

JUDICIAL SEPARATION: A decree of judicial separation if granted by the court ordering or authorising the spouses to be separated "a mensa et thoro" (1) the order is not final as there is always a possibility that the parties may be reconciled in which case the order lapses. Judicial Separation is not a dissolution of marriage but a temporary suspension of some of its most important provisions. Any ground which would entitle one of the spouses to a decree of divorce entitles him to an order for a Judicial Separation e.g. adultery, malicious desertion, incurable insanity, imprisonment for 6 years after declaration have been as habitual criminal.

(2) Conduct on the part of one spouse which makes it dangerous or intolerable for the other spouse to continue cohabitation e.g. habitual cruelty or ill treatment or intemperance or prenuptial conduct connoting sexual depravity and previously not known to the other party at the time of celebration of the union.

CONSEQUENCES OF JUDICIAL SEPARATION: (1) Neither party may commit adultery but they are under no duty to afford each other conjugal duties. (2) Each party retains his rights and privileges
especially property rights unless the court makes a special order e.g.,
in the marriage is in community of the court may order a division of the
estate giving the wife full legal capacity and absolving the parties
from responsibility for each other's debts contracted after the granting
of the decree or in the case of anti-paternal contact the court
may order any marriage settlement not carried out but will not
counsel a gift which has been completed. (3) Third parties must
recognise a judicial separation especially the creditors of the hus-
bond and wife each one of whom now becomes liable of his/her own debts
contracted after the granting of the decree.

EXTRA JUDICIAL SEPARATION:— The parties to a cohabiting union
may voluntarily agree to separate and draw up a deed of separation
setting out terms of division. Such an agreement is not binding on
creditors but is binding on parties themselves, provided it does not
amount to a donation between spouses or a change of the status of
the parties as married people.

INHERITANCE AND SUCCESSION:— The Nat. Law of Succession and
Inheritance is based on certain general principles which differ from
those invoked in European Law on the same subject. Firstly
(a) The structure of the Bantu family on which the system of succession
is based has certain peculiarities. The Bantu family is
unilinear and comprising an eldest and
arising out of it is the house system which must be taken into account
in dealing with Universal Law of Succession and Inheritance.
(b) Succession in
Bantu Law like succession in early Roman Law is what is called Universal
Succession as against singular Succession. By Universal Succession is meant
succession to liabilities as well as assets whereas by
Singular succession is meant Succession to rights only. Under Universal
succession the heir who succeeds a deceased person steps into shoes
of the deceased and exercises the rights and incurs the liabilities of
the deceased. Under the European system of Succession which is
Singular the heir does not succeed to any liabilities of the deceased
but only to rights to the estate of the deceased.

Another difference between the Nat. System of Succession and the
European System of Succession lies in the differential treatment accorded
to males as against females. In the European system male and
female heirs have equal rights, whereas in the Native system female heirs only have the right of maintenance from the estate of their
deceased parent. Further more even amongst male heirs there is

- Inheritance applies in Nat. Law. This means that preference is given
to the eldest male heir, who alone succeeds to the status of his deceased father, while the younger sons must look to him for share in the
estate. It must be noted also that under Nat. Law there are two
types of property which may exist in an estate viz.: kraal property and
house property. The rules of succession differentiate between these
two types of property the heirs to each being determined in a different
way.
Finally under original Nat. Law the making of wills was unknown therefore all succession was intestatesuccession. It was not
unknown however for an individual to express his wishes before death
with regard to the disposal of the property and as a rule these wishes
were compatible with principles of succession and Inheritance.
There are two kinds of heirs in Nat. Law depending upon the type and
position of property and position of heir.

(a) General heir who takes up after the death of his father the position
of kraal head with powers of oversight over the whole establishment
in addition to inheriting general kraal property, property of the
house he belongs to, and property of headless houses in the establishment.
(b) Special or House heirs i.e. the eldest sons of the different
houses that make up their fathers household. In each house, the
eldest son succeeds to the property which was allotted to his mother's
house as well as to a position of authority over members of his mother's
house although subject to the supervision of the general heir. Thus
we must distinguish between estate e.g. kraal and house properties.
Kraal property denotes all the property in a kraal which is the absolute
property of the kraal. It does not include property especially
gifted or apportioned to any house of the kraal nor the property of any
inmate of a kraal not related to or belonging to the family of the kraal.
head. House property denotes family and property rights which commence with attach to and arise out of the marriage of each woman. The heir to house property is the general heir viz., the eldest son of the Great House. Besides being heir to house property the general heir is liable for his father’s debts and in all points succeeds to the status as well as to the property of his father. The house heir is the eldest son of the House to which he belongs and succeeds to the property allotted to that house and he is in turn liable for the debts incurred by the deceased house head on behalf of or for the benefit of the house to which he belongs.

The order of Succession in Nat. Law is as follows:- (a) Upon the death of the house heir, (b) All men, (c) If there be no house heir or if he be already dead such eldest son senior male descendant becomes the heir. (d) If there be no son or male descendant of any son of the house first affiliated to the Great House and their male descendants in due order of seniority.

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such property upon his death must be dealt with according to Native Law and custom. (2) Hand in a location held under quitrent conditions in individual tenure, such land must be dealt with in accordance of Nat. Law and must devolve upon one real person. In regard to these two types of property the estate of a Native falls outside the jurisdiction of the master of the Supreme Court who is a special Officer appointed to deal with estates of deceased persons. All property other than such as falls within sub or other of the two classes indicated above is capable of being disposed of by will. Another effect of Section 23 is that it has given the Native the right to make a will a right, which did not exist under original Native Law. Consequently in dealing with the estate of a deceased Native when the property to be treated under Native Law has been put on one side it remains to decide in regard to the remaining property as to whether a will exists or does not exist. Where a Native has died leaving a valid will whether he disposed in it of the whole or only a portion of his property his entire estate excluding the non-devisable property there it must in terms of SubSection 9 of Section 23 of the Nat. Ad. Act be administered in all respects in accordance with the provisions of the ordinary law of the country. This means that portion of the estate will fall under jurisdiction of the master of the Supreme Court who will follow the ordinary regulations prescribed by the Adm. of Estates Act No 24 of 1913 as amended. (1) Intestate Estates: - When the Nat. Adm. Act of 1897 was first passed it provided that any property in the estate of a deceased Native not disposed of by will should devolve and be administered according to Nat Law and Custom. This provision was obviously undesirable in that it laid down a rigid rule making it obligatory for the property of a deceased Native who had left no will to be dealt with under Nat Law. It was realized after this act had been passed that not all Natives are in favour of their estates being dealt with under Nat Law. Just as not all Natives are in favour of their estates being dealt with under European Law. Consequently when the Nat Adm. Act was amended by Act 9 of 1929 provisions were made for the drawing up of regulations by the Gov. General so as to take account of the varying circumstances of different classes of Natives. There regulations were published under regulations is as follows: - If a Native dies living no valid will of his property as does not fall within the purview of sub-section 1 and 2 of Section 23 of the Nat. Adm. Act shall be distributed as follows: - (1) If the deceased was at the time of his death the holder of letters of exemptions issued under the provisions of Natel Law 28 of 1865 the property shall devolve as if he had been a European i.e. according to the ordinary law of the country. (2) If the deceased had during his life time contracted a marriage in community of property or under antinuptial contract the property shall devolve as if he had been a European i.e. according to the ordinary law of the country. (3) When any deceased Native resident at the time of his death in an urban or indurated area is not survived by any wife, parent or child under a marriage or a customary union and was at the time of his death living with any woman as his wife under such conditions as in the opinion of the Minister would render the application of Nat. Law or custom to the dissolution of his property inequitable or inappropriate, such property shall devolve as if the deceased and such putative wife had been married i.e. according to the ordinary law of the country. (4) If the deceased does not fall under any of the classes described under 1,2,3, the property shall be distributed according to Native Law and Custom. The principle underlying these provisions is that Nat Law and Custom should apply in respect of the intestate estates of ordinary tribal natives but not as regards the estates of such Natives as live more or less according to European standards and ideas as evinced by (1) Exemption from Nat Law (2) Marriage under Common law or antinuptial contract which are purely European types of marriage (3) their detribalisation or residence in urban or industrial centre united to a women in a merital union conforming neither to European nor to Native Custom. Where an estate is supposed to devolve according to Native Law and Custom it is the policy of the law that such an estate should be administered by the people themselves in accordance with the ordinary law of the country.
way under their recognised customs. Provision has however been made for the Nat. Commissioner to intervene. (1) Where it is apparent that some enquiry is necessary (2) Where a definite dispute has arisen (3) Where the transfer of immovable property is concerned. In the case of Nat. estates, the division according to the common law of principles of Succession, the estate must be administered under the supervision of the Nat. Com. or Magistrate of the district in which the deceased ordinarily resided, whose duty it is to ensure that the distribution of property is effected in accordance with the ordinary principles of Intestate Succession under these principles the order of Succession is as follows:— (1) The descendants of the deceased in the inheritance both male and female descendants succeeding equally. (2) Where there are no descendants the ascendants of the deceased succeed to the estate equally. (3) Where there are no ascendants the descendants of the ascendants succeed equally. (4) If there are no relatives of the deceased, his estate goes to the state. In the adm. of Native Estates undue formalities are to be avoided the main object being to secure expedite and efficient adm. and distribution of property by a simple and inexpensive procedure. Thus for the adm. and distribution of property in a Native estate the appointment of an executor is not regarded as far as European estates are concerned the appointment of an executor is obligatory but the Nat. Com. may where he deems it desirable authorise some person to act as representative of the estate and to assume responsibility for the payment of debts, collection of assets and general adm. and distribution of the property especially where immovable property is concerned. Such a representative may be required as executors of Euro. Estates are required to furnish security to the due and proper adm. of property and to render a just, true and exact account of his adm. at such intervals as the Nat. Com. may prescribe. Where a Native has died leaving a valid will his estate is administered by the master of the Supreme Court of the Province in which the deceased ordinarily resided. The master of the Supreme Court appoints an executor to take charge of the Adm. and Distribution of the property in the Estate. The deceased testator is allowed to nominate an executor in his will for approval by the master of the Supreme Court. It is the duty of the Nat. Com. to furnish the executor of such an estate with full particulars regarding property in the Estate which fall under Sub-Section 1 or Section 23 of Act 38 of 1927 which property must be distributed according to Nat. Law and Custom. It is the duty of the executor to collect all assets of the Estate and to pay all debts out of such assets and to proceed to distribute such property according to the terms of the will. The debts of the Estate must not be paid out of the property falling under Sub-Sections 1 and 2 of Section 23 but out of the rest of the Estate in connection therewith to the master of the Supreme Court. A parent of Minor children entitled to inheritance from the Estate of that parent's deceased spouse before remarriage must obtain from the Nat. Com. a certificate to the effect that proper arrangements have been made for the protection and preservation of the inheritance of such minor children. That certificate must be presented to the marriage officer who is to solemnise the marriage and a marriage officer solemnising the marriage of a widower or widow with minor children without getting this certificate is guilty of an offence.

CONTRACTS IN NATIVE LAW:- Contracts are not entirely unknown in Nat. Law although this aspect of Bantu jurisprudence is not as highly developed in modern industrialised communities or nations Contracts found in Nat. Law are simple both in form and in the solemnities required to bring them into being. But in principle they conform to the fundamentals or rudiments of the term contract as understood in law. A contract is an agreement which is enforceable at law i.e. no agreement however solemn it may be entered into satisfies the requirements for a contract unless the party seeking to enforce it can obtain of right the assistance of the local tribunal in the matter. Thus an agreement between two or more persons to break the law of a Com. could never possess the validity of a contract because no community
Court worthy of the name could enforce such an agreement. On the ground that no person should be allowed to take any advantage from a evil practice in which he had a part. The position of the defendant in such a case would be exactly the same as a plaintiff's' hence a well known maxim of modern law is that the position of the defendant is the stronger. The principle of law is established not for the benefit of the plaintiff or defendant but is founded on the principles of public policy. In Bantu Society agreements would in the last analysis be enforced by chiefs to whom the matter may be referred in the event of disagreement. Therefore in order that an agreement would be enforced and constitute a valid contract it must not be illegal or have no illegal object. Secondly in order that an agreement should be enforceable as a contract it must be shown that the parties were actually agreed on the matter. They must have the same thing in mind, be agreed as to the parties to the contract and about the same terms of the contract. No vague and indefinite agreement can be regarded as a contract. Thirdly as long as an agreement has been entered into seriously with the intention to make it binding on both sides and as long as the making of it can be proved to the satisfaction of the Court by means of witnesses or otherwise, it will be enforced. In other words a contract in Nat. Law need not conform to any special formalities e.g. writing although there are a few contracts such as marriage which are usually accompanied by certain formalities. Another important aspect of contracts is that to be enforceable a contract must have been concluded between persons competent to contract viz persons allowed by law to make the contracts. The power to contract may be given either generally or specially i.e. a person may be permitted to make all kinds of contracts while another may have only limited contractual capacity while another has no contractual capacity. There are certain persons such as minors, lunatics and even women who are usually denied the privilege of making contracts save in certain specified ways. This is done in order to protect such persons both against themselves and other people who may take advantage of them. The contractual capacity of persons in Nat. Law is very limited. In original Nat. Law the kraal head was the only person of full legal capacity in the family or household as the de jure owner of all property in the kraal. He was strictly speaking the only one with full contractual capacity all other inmates of his kraal had was to be assisted by him in their contracts in order to make them valid and binding. The kraal head was the representative of the household thus contracts in Nat. Law could be said to have been more frequent between groups or families or households and not between individuals. It is probably for this that the Nat. Law of Obligation did not develop to any great extent for as Hopehouse points out "As long as the old grouping remains by which a man has a fixed place as member of a clan, a point family or a village Community, he is scarcely free to enter into obligations on his own account he cannot himself without binding others and no obligation must be entered into if all between communities rather than individuals. Hence the part played by voluntary contract in Princ. Council is insignificant.

Another essential element of contracts is that they must be entered into freely. No court would enforce an agreement entered into as a result of threats or promises merely promised by one party against the other. Even if it conforms to all requirements of a contract it remains unenforceable because it is vitiated by the absence of free consent on the part of one or other of the parties.

SPECIFIC CONTRACTS: MARRIAGE AND CUSTOMARY UNION: These contracts have already been discussed in detail and it is not necessary to repeat here what has been said elsewhere except to note that they are probably the most important contracts in Nat. Law and illustrate very well the essential features of a Nat Contract. In the case of both marriage and customary union, a greater emphasis is laid on the attitude of the family in Bantu Society than is the case in modern Society. As far as customary union is concerned it does not require to be written in order to be binding in the parties although certain formalities are usually observed such as the payment of lobola and the formal handing over of the bride by her guardian to the family of her prospective husband. It must be noted also that the customary union creates...
certain rights and impose certain duties on the respective parties. Finally the law provides for various ways in which this contract may be terminated for specific grounds. In regard to each contract the points noted above in connection with athletic codes which this imposes on the parties and how it is terminated. Arising out of the customary union are a number of subsidiary customs which also partake of the nature of legal agreements e.g. Ukungena and Ukuvusa which have also been fully dealt with elsewhere. (1) Ukutelleka Custom practised by the Xosa speaking tribes under which a married woman when on a visit to the home of her father or guardian might be impounded for the sake of exacting unpaid lobola or further lobola from her husband. There are certain rules which have been developed in connection with this custom. Thus the payment of any portion of the balance of lobola entitles the husband to the return or release of his wife who may however be impounded again in the future as long as the parents are not satisfied with the amount of lobola paid. The refusal of an impounded woman to return to her husband until he has paid something for her release is not regarded as malicious desertion and therefore cannot be made a ground for the dissolution of the union. Furthermore it has been held that ukutelleka custom is not incompatible with Christian marriage and therefore a woman married by Christian rights may also be impounded in this way and the husband cannot sue the woman for divorce on ground of malicious desertion if she insists upon him paying something before she returns to him.

UKUSISA CONTRACT: - This means a contract whereby cattle or other live-stock are deposited by their owner with one person on the understanding that such person shall enjoy use of them but that their ownership shall remain with and their increase become the property of the depositor. In the case of Mandelele Ve Boboane the High Court of Natal, this contract was discussed and it was explained that the custom of ukusisa carries with it certain obligations on both sides. (1) One such obligation on the part of the person with whom the cattle are deposited is to report any deaths to the owner and in self-protection to keep the hides or skins in proof of such deaths. (2) It is only the usufruct of the cattle which is vested in the person with whom they are placed. He has the use of the milk of the cows and he might use the oxen for ploughing or draught purposes. But he cannot deal with the stock in any manner that might be prejudicial to the interests of the owner or might jeopardise his ownership. 

The rights of the owner of the deposit are as follows: (1) The right to recover the cattle and their increase from the depositary at any time after the contract is terminated. (2) The right to charge the depositary for any increase of the stock which he takes place of or ought to have taken place if proper care were exercised. Thus if a cow is deposited with an individual for his benefit it is his duty to see that this cow produces a calf in the normal time. If he neglects this duty year after year when the contract is terminated the owner may claim the increase as well as the cow itself. The rights of the owner of the deposited stock include: (1) The right to recover the stock from the depositary together with its increase on the termination of the contract. (2) The right to expect that when the stock is restored to him it will be in as good a condition as it might have been if the owner had cared for it himself. (3) The right to recover the stock from any person other than the depositaries who may be in possession of it.

Although legally the depositary of the stock is entitled to the restoration of the property and its increase it is usual for the depositary to reward the depositary for his care of the property by giving
him one or more of the stock... The tendency is for the depositary to give the depositee some of the original stock deposited. It has been held also that the depositary has no right to take back the stock. Such stock cannot be taken without the knowledge of the possessor.

Tiwana Vs Qeman Luknu N.A.C. (C&O.F.S. 1943) Another common contract in Nat. Law is that of ukwethula defined as follows. * in the Natal Code of Nat. Law the term 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 source from which the liability is to be met but the custom is not recognised as extending to the handing over of the ethulalo as a pledge for the payment of the debt owed. What is pledged is not the girl herself but the lobola which will be given for her upon her marriage. Ethulalo arises out of the establishment of a junior house with property provided by a senior house. A ethulalo house B raises a presumption that house B is senior to house A. a matter which may be of great importance in connection with the laws of Succession and Inheritance. This contract shows that the idea of a pledge was not entirely unknown among the Amas. As a rule in modern law the thing that is pledged as a security for payment of a debt is handed over to the creditor by the debtor. In Nat. Law the pledge is not necessarily handed over but is merely pointed out in the presence of witnesses so that if the contract in respect of which the pledge is made is not fulfilled the pledge will be taken back. But as already pointed out, in the case of Ukwethula it is not contemplated that the girl who isili is to satisfy the debt will be claimable by or handed over to the Senior House. Even if she is placed in the Sen. House it is her lobalo which is pledged. Any attempt to interpret this contract as implying the transfer of the person of the girl from one house to another would be regarded as contrary to public policy and Natural Justice.

SONDLO OR MAINTENANCE :- Sometimes a contract arises where a person other than the natural guardian of a child is entitled to receive maintenance for the period of time extending beyond what is regarded as ordinary hospitality. This contract gives rise to a claim enforceable at law by the person who has maintained the individual against the natural guardian of the person concerned. As a rule the contract arises in regard to children but it is not necessarily confined to them. Maintenance may be payable in respect of a woman or of a person suffering from some physical or mental disability. Sondlo is not claimable in respect of widows or orphans whose husbands' kreas, and return to those of their father's or guardians by whom they are maintained for a maintenance time as they are entitled to such maintenance by virtue of lobola paid for or to them by their husbands. It is however claimable in respect of the children of a man's wife born at the home of his wife's guardian and maintained by such guardian for any length of time. In cases of seduction also, the seductress of a girl who gives birth to an illegitimate child is liable to be called for the maintenance of his natural child. A husband is also liable for sondlo to any one who has maintained the adulterating child of his wife. Such a child belongs to the husband of its mother. Whoever its father may be and it is the duty of the husband to support the child and wife. Where this duty is carried out by another person on his behalf it gives rise to an obligation to pay for the maintenance. As a rule in Nat. Law the fee payable for maintenance of children is one beast never long the period of maintenance.

DONATION CONTRACT:- The contract of donation or gift is known to Nat Law. Donations are divided into two kinds e.g. donations inter vivos and donations "in mortem causa" donations made in contemplation of death. Both kinds of donation exist in Nat Law but there are certain circumstances in which donation cannot be made e.g. house property cannot be disposed of by way of donation without creating a debt in favour of the house. But krael property and personal property may be disposed of by way of donation. Similarly a father can make a donation in favour of one of his sons during his life time but
but he is not allowed to dispose of the inheritance of his eldest son unless he is prepared to disinherit such eldest son. Under modern Nat Law the right to dispose of property by will has been granted to Natives and in this way it is open for an individual to make a gift of his property to another such gift to take effect after the death of the donor this is an example of a "donatio mortis causa". Although it is possible for a gift to be revoked before it has been carried out once a gift has been made it is irrevocable. It has not been the policy of the union government to recognize Native contracts indiscriminately. Wherever it has been felt that a contract though recognized in Nat Law, was contr bonne the court has refused to give thus the court has refused to recognize a contract according to which women had in return for property given over her illegitimate child to a man on the understanding that he should maintain it and should repay himself with the forthcoming lobola cattle upon her marriage. For a long time also the court of this country refused to accord recognition to the lobola contract on the ground that it was inconsistent with the principles of civilization recognized throughout the civilized world. Since 1827 however a principle has been laid down that no court shall declare this contract opposed to the principles of Public Policy or Natural justice. Under original Nat Law also, the members of a tribe could be held responsible for the debts contracted by their chief but under SECTION 3 of the Nat Adm Act it is provided that a tribe is not responsible for the personal obligations of its chief nor shall the tribe or land occupied by the tribe be in any way bound by any contract or liability incurred by a chief unless the Prior approval of the Minister of Nat Affairs has been obtained. Under the Natal Code of Nat Law it has been found necessary to prohibit also the payments made by the parties to a lobola contract additional to the actual lobola itself. This has been done in order to reduce the abuses which tended to surround the practice of lobola under modern conditions. Currently even if a person claims that an individual is responsible for a gift or present, which he has agreed upon the law would not assist the plaintiff in enforcing the contract. In addition to the contracts peculiar to Nat. Law to which reference has been made above, all the contracts of European law are open to Natives. In taking part in such contracts Natives must conform to the principles laid down for such contracts under European Law according to the conditions under which the Nat. people live to-day the contracts of modern society are becoming much more common amongst them than those of original Nat. Law.

LAW OF INJURIES

Nat. Law recognised the distinction between crimes and wrongs giving rise to civil remedies. A crime is primarily an offence against the community as a whole although as a rule it also inflicts an injury upon an individual person. An actionable wrong on the other hand is an offence committed by one individual against another in such a way as to inflict injury upon the latter in his person, property, dignity or reputation. Where such an injury has been inflicted upon an individual it is the policy of the law that the wrong doer should be made to compensate the sufferer for the insult which he has suffered. It is not always easy to determine the amount of compensation which should be awarded to the plaintiff against the defendant in such cases because it is difficult to determine exactly which injury the plaintiff has suffered. In the majority of cases the amount of damages to be awarded is in the discretion of the court. A few examples of typical injuries in Nat. Law will illustrate how injuries are dealt with.

(1) Defamation: Defamation of character is an actionable wrong and it consists in the publication by one individual of a defamatory statement about another, the publication being made with the intention to injure another in his dignity or reputation. According to the Natal Code of Nat Law, every malicious statement alleging evil or misconduct on the part of any person constitutes defamation. provided that should any person cast an aspersion upon the character of another in the course of heated quarrel and within a short period thereafter publicly withdraw and apologise for the same no claim for damages will be granted. Provided further that no action for defamation will he if the words used with reference to the plaintiff were addressed to any person in authority in good faith and not with express
malice. Defamation of character: This consists in the publication of a statement by one person in respect of another with an intention of exposing that other person to ridicule and contempt, thus injuring him in his dignity or reputation. Where the statement published is made orally, the offence is known as slander and when it is published in written form the offence is (N.R) known as libel. There are certain defences which can be put forward by a person sued for defamation. All these defences are intended to show that the defendant in making the statement complained about did not have the intention to injure the plaintiff. One such defence is what is known as "innocent" The word "rixa" means quarrel. In the course of a heated quarrel people are apt to make statements which on second thought they find were not right. If in the course of such a quarrel one individual makes a defamatory statement about another and immediately thereafter withraws publicly such statement and publicly apologises for the same that is considered in Nat Law as sufficient to remove the presumption of intention to injure and therefore a statement so made and withdrawn cannot support a suit for defamation. Another defence to a defamation is the fact that the statement complained about was made on what is known as a privileged occasion, e.g. if an individual who is a witness in a case makes a statement in the course of his evidence which might otherwise have been defamatory about another he cannot be sued for defamation unless it can be proved affirmatively that in making the statement he was actuated not by a desire to place facts before the court but by an intention to injure the plaintiff. A third defence to defamation is the justification. Proof beyond reasonable doubt that the statement complained about was true and that it was for the benefit of the public that the statement should be made. Any one putting forward this defence and failing to establish it is usually mulcted in heavy damages because this defence amounts to a repetition of the defamation. It must be remembered also that truth must be coupled with public benefit. It is not every true statement that ought to be brought to the notice of the public. Defamatory statements are generally divided into two classes i.e. (a) Statements which are defamatory per se i.e. statements defamatory in themselves in their ordinary meaning. (b) Statements which are not defamatory in their ordinary meaning but are defamatory because of the circumstances under which they are made or the manner of statement. It must be remembered that all statements must contain an innuendo or inclination, and in such cases it is always essential for a defendant to point out the innuendo and go to show that the statement bears a defamatory meaning. The defamatory per se, e.g. charging an individual with having committed a crime. (2) Accusing a girl of being insatiable. (3) Accusing an individual of practising witchcraft. On the other hand to call a man a dog is not defamatory per se the plaintiff in such a case would have to bring out the innuendo and show in what sense this statement exposed him to the ridicule and contempt of his neighbours. It must be borne in mind also that an individual cannot sue for defamation if the statement published was made to him personally not in the hearing of other people. This is because the essence of the offence in defamation is that it injures the reputation of the plaintiff among his neighbours consequently if none of the neighbours is present or hears or reads the statement, does not suffer in any way. On the other hand every individual who repeats a defamatory statement is liable to suits for defamation because he is participating in the publication of the defamatory statement.

SEDUCTION:— According to SECTION 137 of NATAL CODE OF NAT. LAW: The seduction of an unmarried female gives rise to an action against the seducer in damages for the nuptial beast. In addition to such beast a further beast may be given for damages in respect to every child such a woman bears to the seducer provided that such a child born children be born to the subsistence of engagement between the seducer and seduced no claim for damages shall be unless the marriage does not take place and presumed further that should the child be born to the common necessity then the nuptial beast and respect of her seduction shall be regarded as forming part of her lobola. Seduction in Nat Law means the casual connection of a woman with a virgin. As against rule the seduction of a virgin entitles the father or guardian of a girl to an action or compensation for damages. The
damages consist in the loss of her virginity and in the consequent
deterioration of her value in the marriage market from the point of view
of Lobola. The action is usually instituted by the father or guardian
of the seduced girl and not by the girl herself as is the case in
European Law. As was pointed out by the Nat. Court in the case of
Deniso Vs. Makinena. In cases of this kind it is the Nat father who
suffers real injury for while among Europeans the injury is more to the
outrage of propriety and morality in Native cases the injury is real
and material. For the father looks to his daughters to build up the
fortune of his house by means of their lobolo and the deflowering of
of any of his daughters has an immediate effect of depreciating their
marriage value. This does not mean that the sense of propriety and
morality of the Native father is not outraged by the conduct of the
seducer and the seduced but that over and above the sentimental and
moral injury suffered by the father material loss results from the
seduction and it is this material loss which must be made good ac-
doring to Native law. With regard to females no longer virgins at the
time when the seduction takes place although no
damages can be claimed by them on the ground of loss of virginity
yet if such a girl should become pregnant and give birth to a child
then damages may be claimed in respect of the child born. These
damages are more in the nature of maintenance for the child born but
if the seducer should thereafter enter into a customary union with the
same girl then the damages paid in respect of the child born must
be counted as part of lobolo but the damages paid in respect of
loss of virginity are not counted as part of lobolo but as part of
the property of the mother of the girl. Thus the main damages
claimable for seduction are the uquthu beast where the girl is a virgin
and a beast for each child born if pregnancy supervenes. But there
is nothing to prevent the court from awarding other damages if that is
the custom among the people of the tribe concerned e.g. where a girl
has died in child birth arising out of seduction it is usual for the
seducer to make compensation to the father or guardian of the girl
although this would appear to be a moral rather than a legal obliga-
tion. The same principle would presumably apply where the seduced
girl as a result of seduction contracts a disease e.g. venereal disease
affecting her health adversely. But although additional damages may
be claimed compensation will not be awarded for loss not a conse-
nce of the seduction or which is only remotely connected with it, thus
in Moleta Vs. Magwetsulu N.A.C. ( C. & O.F.S. 1930 ) it was held that
loss of service through the seduction is too remote to include damages
flowing from seduction. Consequently if the seduced girl was rendering
certain services to her father or guardian which she became unable to
render because of seduction the father or guardian cannot make any
claim for such services paid in respect of the seduced girl as a result of seduction and it is this material loss which must be made good ac-
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certain services to her father or guardian which she became unable to
render because of seduction the father or guardian cannot make any
claim for such services paid in respect of the seduced girl as a result of seduction contracts a disease e.g. venereal disease.
Evidence must always be produced to show that the seduction has actually taken
place and that the defendant is responsible for it. Where seduction has taken place it is usually reported to the seducer's kraal at the
earliest possible occasion and where such a report is not made within
a reasonable time it engenders a suspicion against the complainant.
If the seducer denies that he is responsible for the seduction the evidence must be produced to prove that he is. The unsupported

Illicit intercourse may not only cause connection with unmarried females but also wives, widows and divorced women and the question arises as to what the position will be regarding damages in such cases. Sub-
Section 2 of Section 137 of the Natal Code of Nat. Law runs thus far as widows and divorce women are concerned. Any person having illicit intercourse with a divorced woman or a widow as a result of which a
child is born shall be liable in damages to her father or guardian
such damages shall be reckoned in respect of each child so born.
In the event of a subsequent customary union between the parties any
payment of damages shall be regarded as forming part of the lobolo.
It must be noted that as far as widows and divorced women are concerned
illicit intercourse with them only become unlawful if such intercourse
is followed by pregnancy, otherwise no action for damages will
be.

(2) Where pregnancy does supervene the amount of damages claimable is
at least one beaat for each child born. A person entitled to claim da-
mgages is the father or guardian of the divorced or widowed woman,
both a divorced woman and a widow upon the dissolution of the union
to which they were party fall under the guardianship of some male
person who would be entitled to the lobola of a woman if she entered
into another marital union. The illicit intercourse followed by pre-
gnancy reduces lobola value of such a woman and it is for that reason
that her guardian is entitled to claim damages from the person respon-
sible for her pregnancy. It must be remembered that the widow is con-
cerned where the ukungena custom is practiced no damages can be
claimed from the ukungena husband for any child resulting from
his intercourse with the widow concerned. Such a union cannot be
formed with a divorced woman, and cannot be formed with the widow of a
Christian union. Where a man who has paid damages for a child born
as a result of an intercourse with a widow or divorced woman sub-
sequently enters into a customary union with such woman, the damages
previously paid must be counted as part of lobola, this provision is
therefore inapplicable to such cases.

In the case of Mkluze VS Tunes N.A.C. (N & T.V.L. 1931) held that the fact that a husband is in a leper insti-
tution does not mean that he is living apart from his wife and conse-
quently any one committing adultery with such wife is liable to damages.
Similarly it has been held that a man guilty of illicit intercourse with
an ukungena wife is liable in damages to the ukungena husband. Al-
though an ukungena union may be dissolved at any time by either party as
long as the union subsists damages may be claimed by the husband for adultery
of the wife. In order that the husband should succeed in such a case it
must be clear that there was no connivance on the part of the hus-
bond in the adultery of his wife for the court will not allow a husband
to profit by the infidelity of the wife. He himself must be about. As
far as the amount of damages concerned that lies in the discretion of
the court. There may be aggravating circumstances which may lead the
court to fix damages at a higher amount, thus where a man in addition
to committing adultery with the wife of another communicates a
cerebral disease to such wife damages will be awarded on a higher
scale. It has been held however that an unexempted Native cannot
claim higher damages for the adultery of his wife on the ground that
he has married by Christian rites. A claim for damages for adultery
may be made at the same time as a claim for divorce on the ground of
adultery. It is possible however for the husband to condone the offe-
tence of his wife and sue him for damages only in that case the court
will inquire into the matter to ensure that the husband has not acted
in collusion with the wife in that matter. N.B. The occurrence of proving
that adultery has been committed by the defendant with his wife lies
upon the husband. In Natal where committing adultery is a criminal
offence in Nat. Law any reasonable doubt as to whether the adultery
has taken place will lead the dismissal of the claim of the husband,
but the circumstances in which the parties are found may be such as
are to lead to no other conclusion than that adultery was committed.

much stress is also laid in Nat. cases upon some article of
clothing to the defendant as proof that he was committing adultery
with wife of another, this is what is known as a "catch" in the
Trente. Abduction: Section 124 of Natal Code of Law provides
Any person abducting the wife, child or ward of another or inducing the
wife, child or ward of another to leave the kraal without the con-
sent of the husband, father or guardian, shall be liable in damages to
such female's kraal head or guardian etc. provided no action will lie if
the action is in connection with the betrothal visit of the girl to the
kraal of Proposed husband. It is obvious from this section that the
person abducted or induced to leave the kraal of her husband, father
or guardian; The meaning of the term abduction in Nat Law differs
from its meaning in European Law where abduction applies to both
male and female persons. The person can claim damages, as long
is the husband, kraal head or guardian of the woman concerned. An
exception is made in the case of a betrothal visit by the girl to the
kraal of her proposed husband. One of the methods by which an
engagement is effected among some tribes is for a man to take the
fact of her presence at his kraal to her father and to offer lobola.
This is the so-called "Ukutwala". If the abductor in such a case
is acting in good faith, i.e. genuinely desires to marry the girl and
has not seduced her during the period of abduction her father cannot
be said to have suffered any damages, consequently no damages will be
awarded for the abduction, but failing to report girls presence will
deprive the action of its character of being a betrothal visit and
would render the abductor liable in damages. The same would apply
if the abductor afterwards declines to marry the girl. If during the
period of abduction the girl has been seduced whether the abductor
marries the girl or not, there is liable in damages for the abduction.
As indicated above it is not only unmarried female that may be abducted
or induced to leave her kraal, a married female may be so abducted.
The individual responsible for the abduction is liable on damages to
the husband of the woman concerned or her kraal head or guardian if her
husband is deceased.

PROPERTY: Section 124 of Natal Code provides the destruction
of crops by cattle of other stock will be fined for damages against the
owner or person having the custody and control of such stock unless
such damages have been caused by the contributory negligence of the
owner of the crops. This section refers to trespass by stock" In
Nat. Law there can be no award for damages for trespass unless it is
proved that damages resulted from the trespass. Thus if the stock
merely passed through the crops without any damages no action for
damages will lie. Besides it must be shown that there was no neglig-
ence by the owner of crops. There is an obligation on the part of
the owner of stock to have them properly herded so as to avoid damage
to the property of other persons. Where crops have been damaged
by stock the owner of the crop must at once notify the owner of the
stock in order to enable the latter to come and examine the crop and
assess the damage done. Failing a satisfactory settlement between the
parties the matter must be referred to tribal authorities if any, or Nat.
Com. If the recognised steps have not been taken the owner of the crops
may declare damages by right.

In Nat. Law any person injuring the property of another is liable
to pay damages to the owner of the injured property even if no actual
damage is proved to have been suffered. The objection is that persons from
carelessly and wilfully injuring property of others.
Where a person has taken law into his own hands and has seized property
in a lawful possession of another, he commits "Spoliation". The
person in lawful possession of such property is entitled to sue the
spoliator for the restoration of the property concerned. Where spo-
ilation has been committed the court will insist upon the property in
question being restored before the question of the ownership of such
property can be discussed. Spoliation may be committed by the owner of
the property if he seizes his own property which is in the lawful
possession of another person e.g. a PLEDGE. If spoliation takes place
under circumstances amounting to CONDUCIELTA viz. defiance or insult
in addition to ordering restoration of the property in question the
court awards damages against the spoliator.
FOSTERED OF ILLEGITIMATE CHILDREN IN NAT. LAW. — There are four kinds of illegitimate children in Nat. Law. (a) Those born as a result of the adultery of wife. (b) Those born as a result of unmarried women. (c) Those widows and divorced women. (d) those begotten by a man with a woman who is not his wife.

Such a child belongs to the house of its mother and the property rights in such a child belong to the mother's house e.g., if such a child is a girl then lobolo given for her upon her marriage will go to the mother's house. This is so even if the conception of such a child took place before marriage although the child was born after the marriage. This illustrates the principle of Nat. Law that all children born of a woman duly married belong to her husband as far as property rights in them are concerned. The natural father of such a child does not have any property rights in such child, nor does the maternal grandparent have any property rights over such child. Regardless of when and to whom the conception takes place the child belongs to the house in which its mother was married at the time when the child was born. Such a child however cannot succeed to property in its mother's house for example such a child is a son and turns to be the only surviving son of such a house he cannot become an heir of that house. (b) The illegitimate child of an unmarried girl belongs to the house to which that woman belongs, thus falls under the guardianship of the person who exercises guardianship over its mother.

If the natural father of such a child later marries its mother the child becomes legitimised by this marriage and in future ranks as a member of its father's family. Among some tribes, the natural father of an illegitimate child could secure guardianship over the child by paying a fine for the seduction and also paying for the maintenance of the child. It is in modern Nat. Law it has been held by the courts that the custom under which illegitimate children can be disposed of to their actual fathers in payment of a fee is contra-bonas morres. as being opposed to public policy. Such a child unless it is legitimised in the manner indicated above viz. by the marriage of its mother and the natural father has no rights of inheritance in its mother's house. If such a child is a female the rite to its lobolo belongs to the father or guardian of its mother. Should the mother of such a girl be married by some man other than the natural father of the child her husband will not acquire rights to the lobolo of that child such rites continue to belong to the father or former guardian of the mother. In modern Nat. Law such children can of course inherit under a will and can acquire property and establish their own kreals but under intestate succession they have no rights of inheritance.

(c) If a widow or a divorced woman marries again and children are born to her they belong to the established house. But if a child is born to a widow less than ten months after the death of her deceased husband such a child is regarded as belonging to the family of her late husband. In the case of a divorced woman a child born within 10 months of the divorce becomes a member of the family of her father or guardian. But in either case if the child born of the woman is an illegitimate child it will belong to the house to which she belongs, that is, the house of her father or guardian and such a child will have no rights of inheritance in such house. In the case of widows we must distinguish between ukungena children and illegitimate children. Ukungena children are regarded as legitimate with full rights of inheritance although they rank after the children of the deceased husband of their mother. (d) Such child born of a woman as above belongs to the house of its mother. In certain tribes a child of this kind may be adopted by its natural father and will rank as younger son of the kraal the procedure followed is of that the natural father to pay for the seduction of the child's mother and for maintenance during its stay at the mother's kraal. The child is then taken and brought up as a son in the kraal of its natural father. If there be no legitimate sons in the kraal of the natural father such an illegitimate son may even inherit its father's estate adopting illegitimate provided it has been duly adopted. This practice of adopting illegitimate son exists among Rebes and Pondos. Where such an illegitimate son finds legitimate sons in his father's kraal it cannot inherit with legitimate sons. In Natal such an illegitimate son cannot be adopted and can only be legitimised by the mother's marriage to its natural father.
DEFINITION OF NAT. In dealing with Native cases brought before courts it is essential to decide as to whether the individual said to be a Nat. is really a Native. For this reason the term Native has been defined in various laws; in this connection it must be remembered that when a definition of a term is laid down in a particular law the term is only defined with reference to that law and can only be applied when a subject matter of the case falls within the scope of that law. In other words to be a Native for the purposes of one law does not necessarily mean that the same individual is a Native for the purposes of another. This point was illustrated in the case of Rex Vs. Ncobo where Ncobo was declared not to be a Native as far as the law relating to the payment of reserve-tax by Natal Natives was concerned but was declared to be a Native for purposes of rendering in Natal Reserves.

In the Urban Areas Act, Native means, any person who is a member of an aboriginal race of tribe of Africa. Under the Native’s Land Act of 1913 Nat. means any person male or female who is a member of an aboriginal race or tribe of Africa. Under Nat. Taxation and Development Act Native means any member of an aboriginal race or tribe of Africa but does not include a person in any degree of European descent even if he is described as Hottentot Griqua Korana or Bashmen unless he is residing in a Nat. Location under same conditions as a Native. Under the Liquor Act No 30 of 1928 Nat means any person belonging to one or other of the following classes (a) Aboriginal tribes of Africa including Bushmen but excluding Hottentots. (b) Corenas (c) Persons upon whom are levied general or local tax in terms of the Nat. Taxation and Development Act of 1925 or any tax substituted for such Act. (d) American Negroes. In the Nat. Adm. Act the term Nat. is defined thus:- Native shall include any person who is a member of any aboriginal race or tribe of Africa provided any person residing in an area proclaimed under Sect. 6 Sub-section 1 of the Act under the same conditions as a Native shall be regarded a Native for the purposes of this Act. The areas referred to in the definition of Native in the Nat. Adm. Act clearly shows that it was not the intention of the Legislature to confine the operation of the Act to full blooded or pure Natives only but also to include within its scope any other person living in Native areas under the same conditions as Native. Thus an illegitimate child of a Swazi woman by a European has been held by the Nat. Ap. Court to be a Native on the ground that all the associates and friends of that person were of the Bantu race and that she lived in Nat. Location and spoke a Native Language.

The courts have laid down the following tests as to whether a person is a Native on Native appearance. (2) habits of life and (3) preponderance of blood.
CUSTOMARY UNIONS:— The Native Administration Act 38 of 1927 as amended by section 9 of Act 9 of 1927 defines a customary union 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 woman is a party to a subsisting marriage. This definition must be contrasted with that of a marriage which is defined in S.A. Law as the union of one man to one woman in a conjugal relationship to the exclusion, while it is a contract of all others. It will be noticed that (1) The definition of a customary union implies polygamy while that of marriage implies monogamy. In S.A. Law no marital union can be regarded as a valid marriage if it is possible for one of the parties to contract a similar union with another person during the subsistence of the first union. It is for that reason that it has been found necessary to distinguish a customary union under which it possible to have more than one wife from a marriage under which it is not.

(2) The definition of a customary union implies that a party to such a union cannot at one and the same time be a party to an existing marriage. Such a person would lay himself open to a suit for divorce at the instance of his or her partner in the Christian marriage.

ESSENTIALS OF A CUSTOMARY UNION:— The essential of a customary union as laid down in the Natal Code of Native Law are as follows

(1) The consent of the father, or guardian of the intended wife, which consent may not be withheld unreasonably, is required.

(2) The consent of the father or kraal head of the intended husband, should such consent be necessary.

(3) A declaration in public of the intended union by the official witnesses (even in Natal) at the celebration of the union that the union is with her own free will and consent.

The Natal Code of Native Law goes on to state that in what cases the consent of the father or guardian or kraal head is not required to bring about a customary Union. Thus section 59 provides that (1) the consent of the father or guardian is not required in respect of an emancipated female on entering into a customary union. This refers to females emancipated under Section 28 of the Code. (2) The consent of the father or kraal head is not required in respect of the contracting of a customary union by a male who has attained majority in one of the ways laid down in Section 27 of the Code.

It will be noted further that this Section in which the essentials of customary union are laid down, makes no mention of the question of lobola as one of the essentials of a customary union. This is because the payment of lobola is not regarded as essential to the validity of customary unions in modern Native Law. In other words it is open to the father or guardian of a woman entering into a customary union to claim the lobola or to waive his rights in this regard, but whether he does so or not does not affect the question of the validity of the customary union provided the other essentials are present.

It will be noted further that mention is made of an official witness in regard to the consent of a woman entering a customary union. This is a requirement found only in Natal where in order to prevent fathers or guardians from compelling their daughters or female wards to enter into a customary union against their wishes, special official witnesses are appointed by the Administration. An official witness is required to be present at the celebration of every customary union in Natal and the intended wife must indicate to the official witness that she has consented to the union. In other parts of the Union the institution of the "official witnesses" is unknown and therefore this declaration of consent to the official witness is not one of the essentials of a customary union. Apart from the consent of the father or guardian and that of the parties concerned the only other formality required to render a customary union valid is the lading of the bride to the prospective husband or his relative. It must be noted also that the holding of a wedding feast is not an essential of a customary union. As a rule such a
a feast is held as part of the marriage celebrations and during the celebrations the handing over of the bride to her perspective parents in law takes place. This part of the celebration is of vital importance, as that formal handing over is essential to the union.

CONSEQUENCES OF A CUSTOMARY UNION: Certain consequences follow the contracting of a customary union. (1) The union places the customary wife under the guardianship of her husband. The natural guardian of a married woman is her husband; even if the husband happens to be younger than the wife, he becomes the guardian of his wife. (2) The wife assumes the status of her husband, whatever position the wife may have held prior to her entering into union, even if that position was senior to that of her husband.

After contracting the union she holds the same position as the husband In S.A. the question is very important in connection with marriage, between Europeans and Natives. This means that where a European woman enters into a customary union with a Native she takes the status of a Native and conversely a Native woman takes the status of a European legally. (3) The wife takes the domicile of her husband the husband decides the place where the home shall be. (4) Children of the parties to the customary union even if they were born prior to the creation of the union, become legitimized. (5) The husband is under obligation to maintain and support his wife. Any husband who fails to discharge this duty is liable to punishment for this offence which is regarded as criminal. (6) There is no community of property between the partners in a customary union. All property brought to the union, with certain exceptions, is the property of the husband. The principal exception to this rule is the property given to the mother at her marriage e.g. the so called Nguthu beast among the Zulu. This beast belongs in absolute ownership to the woman. Another exception is the Ubulinga beast i.e. the given to a prospective bride by her own father; among the Xosa tribes Under original Native Law the woman in respect of whom an ubulungu beast was given was entitled to its possession and could take it with her wherever she went. The animal and its progeny remained the property of her father's kraal and the husband did not acquire any ownership in them. Under modern Native Law, owing to some extent to contact with European civilization, the custom has lost much of its meaning and sacredness and the courts acting on the opinion of Native Chiefs and the authorities in Native Custom have decided quite definitely that although the wife to whom an ubulungu beast is given has an interest in it and its progeny, and although the husband cannot divert them from her house that of another wife without her consent the property in this is invested in him and on his death they form part of his estate and become the property of his heir. (See Rabeley Rasebo or Motsizi Rasabe N.A.C. (C & O) 1937. (3) Personal effects remain the property of the wife.

DISOLUTION OF A CUSTOMARY UNION:— There are two ways in which a customary union may be dissolved viz: (a) by divorce or (b) by annulment. Divorce is the dissolution of a valid customary union validly contracted with all the essential present. An annulment is the dissolution of an invalid customary union i.e. one in which the essentials of a customary union were not all present.

GROUNDS FOR DIVORCE:— An action for divorce is respect of a customary union can be brought by either of the parties to the union on the following grounds: (a) Adultery on the part of the other partner. (b) Continued refusal to render conjugal rights (c) Wilful desertion. (d) continued gross misconduct. (e) Imprisonment for not less than five years. (f) That condition between the partners such as to render continuous living together insupportable or dangerous.

In addition to the above there are certain special grounds for divorce which are open to the wife only viz. (1) Gross cruelty or imprisonment of the wife by the husband. (2) An accusation of witch-
or other serious allegation against the wife by the husband.

With regard to these grounds for divorce the following points must be noticed. (1) A husband must not by his own conduct contribute towards the adultery of his wife, but the fact that a husband himself has committed adultery does not in connection with a customary union, disentitle him from succeeding in his application for divorce. As would be the case in regard to a Christian marriage. This is obvious because a customary union implies polygamy and consequently marital infidelity on the part of the husband is not looked upon as seriously as it is under a Christian or civil marriage. (2) To substantiate a charge of wilful desertion there must be evidences of separation with the manifest intention of not resuming marital relations. In other words the mere fact that the man has been away from his wife for a certain length of time is not sufficient indication of his intention to desert her. Similarly, wife is not a wilful deserter. (3) Gross misconduct must be continuous if it is to support an application for divorce. Where it is clear that the partner cannot live together in harmony, the court may decide that it is better for the divorce to be granted. But this will not be due readily. Moreover a divorce will not be granted merely because it is not opposed by the party. (4) An accusation of witchcraft is a serious matter in Native society and where it is made against a wife unless there is a definite public apology by the husband, the wife may be granted divorce on application. Either party may bring an action for divorce, but a wife may also bring on her behalf by her father or guardian. This does not apply to the husband sue on his own behalf, being a major.

PROCEDURE: A wife seeking divorce must on leaving her husband seek the protection of her father or guardian or any other person who would have been her guardian if she had been unmarried. The protecting person must make an attempt to bring about reconciliation between the parties and only on failing in this effort, should he proceed with the women to the Native Commissioner to initiate divorce proceedings. This must be contrasted with the procedure in an application for divorce in a Christian or civil marriage where the re is no necessity for an attempt to bring about a reconciliation. It is not worthy however that where a divorce is based on ground of malicious desertion, in Christian or civil marriage, the court is always and the effect that the deserting person should return to the person deserted by a certain date, failing which divorce will be granted.

CURATIS AD LITEM: If the wife seeking divorce has no protector she may apply to the Native Commissioner who will appoint a person for the purpose of helping her with her case. Such a person is known as the "Curator ad Litem".

A husband seeking divorce must notify the father or guardian of the wife in order to give the latter an opportunity to reconcile the parties. If the reconciliation is not effected the husband may then proceed to initiate divorce proceedings. It is the duty of the father or protector of the woman to assist her when she is suing or being sued for a divorce.

 COURTS HAVING JURISDICTION TO DEAL WITH DIVORCE. The courts of Native Commissioner’s have jurisdiction to deal with the dissolution of customary unions, although they are debarred by Section 10 (e) of the Native Administration Act 38 of 1927, from dealing with dissolutions of Christian marriages or civil marriages. In Natal the Native Chief Courts have no jurisdiction to deal with questions of divorce or annulment of customary unions, but in other areas of the union, where chiefs possess civil jurisdiction, they are entitled to deal with dissolutions of customary unions. In that case if the parties are not satisfied with the decision of the chief court they may appeal to the Native Commissioner’s Court. From the latter court an appeal lies to the Native Appeals Court whose decision is final. It must be noted that the Native Divorce Courts established under the Nat. Adm. Act as amended by Act 5 of
1929 cannot deal with the dissolution of customary unions, as they have only been given jurisdiction over Native Christian marriages.

**Consequences of the Dissolution of a Customary Union:**

1. One of the most important questions arising out of the dissolution of a customary union is that of the return of lobola. The fate of the lobola cattle depends upon the cause or ground of the divorce. Thus if the divorce takes place at the suit of the wife by reason of the wrongful acts, misdeeds or omissions of the husband, the latter may lose his lobola cattle. On the other hand if the wife is in the wrong or is to blame for the divorce, the husband may be entitled to the return of a portion of his lobola by the father or guardian of the woman. The following considerations generally guide the court in deciding upon the number of cattle (lobola) to be returned:

   - The number of cattle paid.
   - The number of children born to the parties, one beast being deducted generally for each child born.
   - The prospects of the woman re-entering into another customary union and the number of cattle her father or guardian is likely to obtain in that event.
   - The blame attaching to each party for the dissolution.
   - The period the parties have lived together.

   (It must be remembered that the dissolution of a customary union is **does not[1]** absolve the husband from paying any unpaid lobola. Any debts which may be owing by him in this regard have to be made good)

Another question issuing out of the dissolution of a customary union is the custody of the children of the union. The children of a customary union belong to the father and he is entitled to their custody when the union is dissolved. But in the interests of the children, the court in granting a dissolution may make any order as to the custody and maintenance of the children which may be just and expedient. Thus the children may be too young to be separated from their mother in which case the court may order that they should remain with her but be maintained by their father until they are old enough to be taken by him. Similarly in the interests of the moral welfare of the children the court may order that they should go with the mother rather than the father if the latter is not a fit and proper person to take care of them. But wherever the children may be they will belong to their father i.e. to the man who paid lobola for their mother rather than to their mother.

3. The dissolution of a customary union also affects the guardianship of the divorced wife. Normally she returns to the guardianship of her father if he is still alive or that of his heir if he be dead and the court may make an order that she resides at such a guardian's kraal or such other place as the court may decide. In Natal it is possible for such a woman to apply for emancipation in terms of section 28 of the Code.

**Nullity of Customary Union:** Either partner in a customary union may sue for the nullity of the union on one or other of the following grounds:

   - The insanity of the other partner at the time of the celebration of the union.
   - Impotence or other permanent physical defect preventing the consummation of the union.
   - Absence of any of the essentials of a customary union.
   - The previous marriage of the wife or her previous union to another man.
THE LEGAL POSITION OF INMATES OF KRAALS:

ORIGINAL NATIVE LAW: In original Nat. Law in every household at any one time there was only one person who was sui juris i.e. with full legal capacity and that was the KRAALHEAD. All the rest of the members of the household i.e. the inmates of the kraal were obiini juris i.e. in the power of another subject to the authority of the kraalhead and therefore of limited legal capacity. This applied irrespective of their age, whether he was male or female, married or unmarried the inmate was de jure a minor. He was " incapable of entering into contracts i.e. acquiring rights and incurring liabilities apart from the head of the family. The kraalhead was responsible for acts committed by him and took action or claimed redress in regard to debts or delicts committed by him.

(a) The inmate could not sue or be sued without the intervention of the head of the family. This conception of the absolute subordination of the inmate of the kraal to the head of the household was the outcome of the structure of the Native family which as we have seen already was the aggregation of a number of persons subject to the legal authority of one person, the kraalhead, who alone was sui juris in the family.

(b) Even in regard to the person of the inmate, although in Native Law the kraalhead did not possess the jus vitae necisque, the right of life and death, as the Roman paterfamilias was the possessor over his family, in early Roman Law, the kraalhead possessed considerable power over the persons of members of his kraal; at least in theory he could administer corporal punishment on any member of his kraal for purposes of correction and did not thereby lay himself open to being sued judicially for assault by the victim of the corporal punishment. The fact that he seldom exercised this power in respect of married inmates of his kraal, male or female, and exercised it more frequently in respect of the juvenile members of the kraal did not mean that he did not possess the right to do so.

MODERN NATIVE LAW: It was inevitable that with the advent of European legal conceptions inroads would be made upon the power of the kraalhead over inmates of his kraal. In recognising Native Law in different parts of the country, European governments, whether by Statute or by Proclamation or on grounds of equity have in various directions circumscribed the vast powers of the kraalhead under Native Law on the one hand, and increased the legal capacity of inmates of kraal to take account of changed and changing circumstances.

Thus in Natal while inmates of kraals are still in theory minors and therefore incapable of alienating kraal or making house property or entering into contracts save by and with the consent of the kraal head, the conception of minority is more narrowly interpreted. Inmates are now minors in the sense that the kraalhead is the person of the kraal; at least in the view of modern Native Law that a married person, though an inmate, should have as little legal capacity as an unmarried inmate. A further distinction is drawn between males and females. This is not contrary to Native Law where the minority of women was perpetual whereas that of males might be terminated by a male himself becoming a kraalhead.

Mention must also be made of adult males not related to the kraal. These are inmates who for one reason or another have attached themselves as inmates to a particular household and have therefore come under the power of a kraalhead to whom they are not related by blood. As pointed out before the Native family rests primarily upon the concept of the kraal (i.e. members of the kraal are usually all related by blood, unrelated inmates being exceptional. In modern Native Law while it might be regarded as equitable that persons related to the kraalhead by blood should come fully under the kraal in all points, the view is held that it is stretching the point too far to place persons not related to the kraalhead in the same position. Whereas it might be argued in the case of the former i.e. related inmates, that the power of the kraal head was based on natural grounds and that natural considerations would
prevent the kraalhead from abusing his powers over inmates, the
same cannot be said about the latter i.e. unrelated inmates. In
their case the temptation to abuse his powers might prove too strong
and they might be reduced to a position bordering on slavery which
in modern law is regarded as contrary to natural justice. Therefore
in modern Native Law, although unrelated adult inmates, both married
and unmarried are subject to the kraalhead in general kraal matters,
they are deemed to be majors in law for the purpose of contracts
entered into by them and are capable of suing or being sued in their own names
with respect to their own private transactions. In other words
modern Native Law recognises that it is possible for such inmates
to have private affairs in which the kraalhead should have no say or
for which he should incur no liability or responsibility.

Another factor which modern Native Law takes into account in re-
gard to inmates is their age. Original Native Law took no account
of the age of an inmate of a kraal. All that counted was his posi-
tion or status in the family i.e. whether he was a kraalhead or an
inmate. Modern European law on the other hand regards age as an im-
portant element in the legal capacity of an individual. On reaching
the age of 21, the individual male or female acquires full legal
capacity.

As far back as 1879 the principle of age as a factor in de-
termining legal capacity was introduced into Native life in the
Transkeian Territories. There by proclamation 110 of 1879 an inmate
male or female who had reached the age of 21 was made entitled to
the privileges appertaining to majors. This means that inmates
of kraals who had reached this age were placed out of the tutelage
and control of their father. They are freed from guardianship and
are under no legal obligation to obey him. Although this proclama-
tion thus apparently place the Native inmate of a kraal of the age
of 21 beyond the authority of his father it still presumed to leave
the inmate under the power of his kraalhead. It did not make the
inmates completely sui juris because the kraalhead is still held
responsible for the delicts of inmates of his kraal. The kraal-
head is still expected to exercise some kind of control over all
inmates of kraal. This would appear to be an injustice done to the
kraalhead.

The principle of recognising age as an element in legal capa-
city has also been adopted in Natal in the new Natal code of Native
Law which became law in 1892. Under section 21 of that Code it is
provided that a Native male becomes a major in law upon marriage or
upon entering into a customary union or upon attaining the age of 21.
It will be observed that the section refers to "Native males"
and females being unable in Natal to acquire majority in this way i.e.
by attaining the age of 21. But even in Natal, although male in-
mates of kraal can become majors by mere effluence of time, the
kraalhead is still in certain circumstances held for their delicts.

All this goes to show that the position of inmates in modern
Native Law is undergoing changes which are in the direction of
giving the inmate greater legal capacity. But at the same time
there seems to be considerable reluctance to free the kraalhead
entirely from responsibility for the conduct of inmates of his kraal.
The change over from the position as it obtained in Native Law is
being made as gradual as possible and the tendency is to go faster
in the case of male inmates than in the case of female inmates.
When it is remembered that even in European law women still suffer
from many legal disabilities compared with men, it is not surprising
that the law is moving so slowly in the case of Native women who be-
long to a society in which legal rights are still so largely based
on status rather than on contract.

The position which has been reached in the evolution of the
legal capacity of the inmates of kraal differs in different parts of
the country. Thus the position in Natal is different from the
position in the Transkei. These differences may be summarised as
With regard to property acquired by inmates otherwise than from the kraalhead himself, this also did not belong in law to the inmate. Thus if the inmate was given anything by a relative such as his mother’s brother or by a stranger, the inmate might be allowed the use of the thing given him regardless of any title to it. The title to the kraal, whatever it be, would be the kraalhead’s. This must be contrasted with the position in Roman Law where at first, i.e. in early Roman Law, the position was the same as in Native Law, namely that the property of the filiusfamilias, as the inmate of a Roman household was called, belonged to the paterfamilias, as the head of the Roman family was called, the filiusfamilias merely having the right to use that property which was known as his peculium. In Later Roman Law, how-

**CONTRACTUAL CAPACITY:** (a) In Natal: (1) All inmates of kraal except males over 21 (see section 21 of Natal Code of Nat. Law) are proper minors and cannot sue or be sued without the assistance of the kraalhead. (2) All contracts made by them are null and void unless they were made with the consent or the acquiescence of the father or kraalhead. (3) If, however, a kraal head ratifies or accepts a contract made by a minor or accepts benefits under such a contract and will have either to carry out the minor’s part of the contract or put the other party into as good a position as he would have been in if the minor had carried out his contractual obligations. The same would apply if the minor contracted with a third party with which the kraalhead is obliged to supply him. It is the duty of the kraalhead to maintain and support a minor inmate of his kraal i.e. supply him with necessaries such as food, clothing, etc. If a third party carries out these obligations, the kraalhead would be under a duty to reimburse him. The right to reimbursement for maintenance (sindle) by a minor who carried out the duty to support on behalf of another is a well recognised claim in Native Law. (4) As far as married males and widowers are concerned, majors or improper minors they are regarded as majors i.e. sui juris in respect of their own private transactions and private property, but they are subject to the authority of the kraalhead in regard to kraal and house property. In this respect they differ from minors proper who se private transactions with third parties are null and void. Under the new code of Nat. Law in Natal all male inmates who have attained the age of 21 become majors in respect of their private transactions and private property. Married males and widowers must be understood to include not only those who have married by Christian or civil rites but also those who have entered into customary unions.

(a) In the Transkei: (1) Inmates of kraal under 21 are incapable of entering into contracts except with the consent of the kraalhead and they are in exactly the same position as similar minors in Natal (Sec. 1 to 3 in above). (2) In terms of proclamation 110 of 1879 inmates over 21 both male and female are majors and are therefore capable of contracting and of suing or being sued in their own names without the assistance of the kraalhead.

**PROPRIETARY CAPACITY:** (a) In Natal: All the property in a kraal de jure belongs to the head of the kraal, but he may allow inmates of his kraal certain rights in connection with such property. Thus he may allow his son the use of certain kraal property or house property but this would not imply that the son had become owner of such property. The son might refer to the particular property as his own, but such ownership as he had would be merely de facto ownership, because the de jure ownership is vested in the kraalhead who can at will revoke the authority previously given to anyone to use kraal or house property. This implies that a kraalhead could not give a valid gift to his son while the latter was still under his power; Where he did so he could revoke or cancel the gift at any time during his life time. Consequently the so-called property of an inmate, being de jure the property of the kraalhead could be attached for the payment of the debts of the kraalhead.

With regard to property acquired by inmates otherwise than from the kraalhead himself, this also did not belong in law to the inmate.

Thus if the latter gave the former property which had been inherited from mother’s brother or by a stranger, the inmate might be allowed the use of the thing given him regardless of any title to it. The title to the kraal, whatever it be, would be the kraalhead’s. This must be contrasted with the position in Roman Law where at first, i.e. in early Roman Law, the position was the same as in Native Law, namely that the property of the filiusfamilias, as the inmate of a Roman household was called, belonged to the paterfamilias, as the head of the Roman family was called, the filiusfamilias merely having the right to use that property which was known as his peculium. In Later Roman Law, how-
In later Roman law, this principle was departed from. The first departure occurred in connection with property not derived from the poteri familiæ. Thus first the filiusfamilies was allowed the ownership of property which he had acquired in the course of military service, the so called peculium caestrense and later he was allowed the ownership of property he had acquired in public service of some kind, such as government service. These called peculium quasi caestrense, and finally, even property acquired from the filiusfamilies the so-called peculium profecticum, the filiusfamilies was given rights of ownership, although the poteri familiæ still retained certain rights in regard to the peculium of a filiusfamilies who was subject to his authority i.e. his pietia poteriarum.

In modern Native Law we find a similar evolution in the property rights of inmates of kraals. Whereas in former days the property of inmates belonged to the kraalhead so that the latter legally did not have the right to acquire property for himself today the position is different.

Thus in Natal under the new Code of Native Law it is provided in section 26 that "any Native may acquire property but this right in so far as females, minor persons and kraal inmates are concerned is subject to the provisions of section 35. This clearly establishes the right of an inmate of a kraal to acquire property subject to certain conditions laid down in section 35. Section 35 provides: (1) A kraal head is entitled to the earnings of his minor children (see Section 27 for the definition of majority) and to a reasonable share of the earnings of the other members of his family and of any other kraal inmates. Such earnings are to be utilized by him primarily for the maintenance and benefit of the houses providing them and for general kraal purposes. (2) While the kraal head has allowed a wide discretion in disposing of the earnings referred to in Sub-Section 1 it is not permissible for him to benefit one house at the expense of another. (3) A kraal head shall not exercise in the exercise of his rights under this section may be restrained by the Native Commissioner or the chief.

It must be noted that this section lays down the following principles regarding the proprietary capacity of inmates of kraal: (1) All inmates of kraals have the right to acquire property in absolute ownership. (2) The Native Law vests in a kraal head to the property of inmates of the kraal head is retained as far as his minor children are concerned. Nothing is said about the property of the minor children of other persons attached to the household. Presumably the ownership of the property of such minor children, e.g. the children of persons related or unrelated to the kraal head, is not vested in the kraal head. By minor children are meant children under the age of 21. (3) All persons other than minor children of the kraal head are under obligation to contribute a reasonable share of their property to the maintenance and support of the kraal. Such persons include: (1) The minor children of the kraal head. (2) Persons who are not children of the kraal head such as his younger brothers and other relatives and strangers attached to his household.

The property of such persons is vested in them subject to the condition that they contribute a reasonable share of their earnings to assist the kraal head in the upkeep of the kraal. What will be regarded as a reasonable contribution depends upon circumstances and would in any dispute over the matter be settled by the Native commissioner or the chief. (3) In disposing of the contributions of inmates of the kraal towards its upkeep the kraal head is expected to use his discretion. This discretion is subject to the limitation that: (i) such contribution are to be used primarily for the maintenance and benefit of the different houses in the kraal and for general purposes (ii) no house is to be benefitted at the expense of another by the kraal head's disposal of such property. (4) The Native Commissioner or the chief is to exercise
to their rights in this regard. Where any party is aggrieved by the kraalhead’s administration of the earnings or property contributed

In the Transkei the position may be briefly stated as follows:

1. The property of an inmate under 21 who is unmarried belongs to the father. 2. If the inmate is over 21 or married, in either case he becomes a major in law and may own property separately from the kraalhead and such property cannot be attached to pay the debts of the father. From this it would appear that proclamation 110 of 1879 has introduced into Native Law in the Transkei the principle of individual ownership apart from family ownership.

DELICTUAL CAPACITY: In original Native Law the kraalhead was fully responsible for the conduct of inmates of his kraal. Consequently where an inmate committed a wrong against another individual, the kraalhead could be sued for damages; he was the proper person to be sued for such a defect or wrong because as he alone owned property in the family, he alone could make good the damage caused by the delict. The kraalhead then was liable for delicts committed by inmates of his kraal. This held whether the inmates were subject to kraalhead authority. Similarly where a delict was committed against an inmate of a kraal, it was the kraalhead who had the rights to sue for damages arising out of that delict. He was the person injured and therefore the right to sue was vested in him.

Under modern Native Law, however, it has become necessary to limit the liability of the kraalhead for the delicts of his inmates and to give certain inmates of kraals the right to sue in their own names for delicts committed against them. This is part of the policy of recognising individual responsibility which is concomitant with the recognition of the right to acquire property in individual ownership on the part of inmates of kraals. Thus in Natal the liability of kraalheads for the delicts of their inmates has been laid down as follows in section 141. (1) A guardian is liable in respect of delicts committed by his wards while in residence at the same kraal as himself. (2) Notwithstanding anything in section 27 or in other provision of the Code (a) A father is liable in respect of delicts committed by his children while in residence at the same kraal as himself. (b) A kraalhead is liable in respect of delicts committed by an unmarried inmate of his kraal while in residence at the kraal.

It will be seen that this section recognises the responsibility of the kraalhead for the conduct of members of his kraal. This point is further strengthened by reference to section 38 and 39 of the Code. Section 38 states: "The inmates of a kraal irrespective of sex or age are in respect of all kraal matters under the control of the kraal head". Section 39 states: "A kraalhead is responsible to his chief and to the Supreme Chief for the good conduct of the inmates of his kraal. But the responsibility of the kraal head varies according to the inmates concerned and the extent to which the inmate was actually under the control of the kraalhead at the time when he committed the delict. Thus while the kraalhead is held responsible for the delicts of inmates who are his children including major children (see Mahayi and Miilango N.A.C. (N & C) 1942 and inmates not his children who are unmarried he is not responsible for the delicts of any other inmates of his kraal such as his own married brothers and other married persons attached to his kraal. Secondly even in those cases where he is responsible it must be shown that such inmates committed the delicts complained about while in residence at the same kraal as the kraalhead i.e. where directly under his oversight and control. If they were not resident at the kraal at the time, then the kraalhead would not be liable. In the Transkei the liability of the Kraal for the delicts of inmates of his kraal is based on rather different principles. The leading case on the point is that of Klaus vs Nqweqwe N.A.C. 1597 in which it was held down "It is a well known principle of Native Law that the heard of a kraal is responsible for penalties incurred
by members of that kraal providing those committing them are not in a position to satisfy judgments recorded against them and further that the legal guardian under whom a ward is living is liable irrespective of the degree of relationship subsisting between them. From this it will be obvious that in the Transkei two tests are applied for kraalhead responsibility of delicts of inmates of kraal. The first is whether the alleged inmate is actually under the guardianship of the kraalhead concerned, and the second is whether the inmate is in a position to pay them, the kraalhead must pay, irrespective of whether the inmate concerned is related to him or not. In the case of Sifuba Vs Moaswana, N.A.C. 1909 it was laid down that the kraalhead is responsible for the delicts of both major and minor inmates of his kraal. This shows that the kraalhead is regarded as a surety or guarantor responsible for the delicts of both major and minor inmates of his kraal. Thus, just as the kraal benefits by the good action of the inmates of the kraal, so it must bear responsibility of their misdeeds. In order that the kraalhead should be held liable to he must be sued together with i.e. jointly with the inmate who actually committed the delict. If this is not done the kraal head cannot be held liable.