

THE JUDICIAL PROCESS IN COMMONWEALTH AFRICA

T O ELIAS

UNIVERSITY OF GHANA

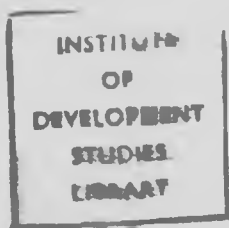
The judicial process
in Commonwealth Africa.



THE JUDICIAL PROCESS IN COMMONWEALTH AFRICA

T O ELIAS

formerly Chief Justice of Nigeria



UNIVERSITY OF GHANA LEGON
FEP INTERNATIONAL LTD

VICE-CHANCELLOR'S FOREWORD

AGGREY-FRASER-GUGGISBERG MEMORIAL LECTURES 1975

Dr Taslim Olawale Elias, who delivered the 1975 series of lectures, was born on 11 November 1914 and was educated at Lagos CMS Grammar School and Igbobi College before he proceeded to the University of London for a very brilliant academic career.

One academic honour after another came easily to him and I may only single out the following: University of London Post-Graduate Scholarship, 1946-49; Yarborough-Anderson Scholarship to the Inner Temple, 1948-49; the Ph.D. (London), 1949; Simon Research Fellowship at the Institute of Commonwealth Studies and Queen Elizabeth House, Oxford, 1954-60; Research Fellowship at Nuffield College, Oxford, 1956; and the LL.D. (London), 1962.

Dr Elias' fame quickly spread far and wide. No wonder then that he became Constitutional Adviser to the British West Indies, 1959; Somaliland, 1960; and Malawi, 1960. He was Chairman of the United Nations Constitutional and Legal Experts to draft a Constitution for the Congo (Leopoldville), 1961 and 1962. He has been a member of the International Law Commission of the United Nations since 1961 and was Chairman of that body in 1970; Member of the International Law Association, London, 1965, and Associate of the Institute de Droit International. He holds six honorary degrees and has been Visiting Professor of Political Science at the University of Delhi, 1956; Governor of the School of Oriental and African Studies, London University, 1957-60; Attorney-General and Minister of Justice of the Federal Nigeria Government, 1960-66 (the first Nigerian to hold this post); and again Attorney-General and Commissioner for Justice after October 1966; and from February 1972, the Chief Justice of the Federal Republic of Nigeria.

He has argued cases before the Privy Council and the International Court of Justice. He has also written extensively. Among his books are the following:

1. *Nigerian Land Law and Custom* 1951
2. *Groundwork of Nigerian Law* 1954
3. *Nature of African Customary Law* 1956
4. *Government and Politics in Africa* 1961
5. *Nigeria: Development of its Laws and Constitution* 1967
6. *Africa and the Development of International Law* 1972
7. *The Modern Law of Treaties* 1974

Dr Elias is indeed one of the most 'learned' sons of Africa practising the 'learned' profession—and he has brought distinction to his profession at home as well as on the international scene.

It is such lustre that Dr T. O. Elias brought to the thirteenth in our series of lectures designed to commemorate the three founders of Achimota: Dr E. Kwegyir Aggrey, Rev. Alex Fraser and Governor Gordon Guggisberg. These lectures were established in 1957 in the year of the independence of Ghana by the University of Ghana with funds provided by the Ghana Government.

Dr T. O. Elias chose for his theme 'The Judicial Process in Commonwealth Africa' with five subtitles: (i) English Law in African Courts; (ii) Judges and Customary Law; (iii) Conflict of Laws; (iv) Judicial Interpretation of the Constitution; and (v) Judicial Precedent and Legal Development in Africa.

These stimulating lectures, which have now been published, would be most educative, particularly for those who were not able to listen to Dr Elias and more so for those who listened to him on all five occasions.

D. A. BEKOE
PRO-VICE-CHANCELLOR

MARCH 1975

CONTENTS

Vice-Chancellor's Foreword

Lecture One:	English Law in African Courts	1
Lecture Two:	Judges and Customary Law	25
Lecture Three:	The Conflict of Laws	59
Lecture Four:	Judicial Interpretation of the Constitution	79
Lecture Five:	Judicial Precedent and Legal Development in Africa	103

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LECTURE ONE

ENGLISH LAW IN AFRICAN COURTS

I

The Reception of English Law

The most fundamental question in any consideration of Commonwealth law in African territories is perhaps one of determining how English law was introduced into the several countries, and how much of it is applicable therein. The extent of the application of English law may be due to the nature of the administrative policy underlying its introduction, or it may be due to the subject matter of the litigation, or even to the manner of its interpretation and application in individual cases or a group of cases.

One common feature of the reception of English law in the Commonwealth African territories is an invariable formula which runs somewhat along these lines:

The common law, the doctrines of equity and statutes of general application in England at a named date shall be applicable in the particular territory so far as local circumstances permit and it is not modified by express local legislation.

Now, in the case of Ghana,¹ that is, the former Gold Coast Colony, the operative date is July 24, 1874; in the Kenya Colony it is 1897; in Nigeria (with the exception of Western and Mid-Western Nigeria),² it is January 1, 1900; and in the case of Uganda, it is January 1, 1902.

¹ In the former Gold Coast Colony, English law was officially introduced on this date, even though it had been at work in one form or another in some parts of the settlement in the Bond of 1844.

² In the old Lagos settlement, English law was first officially introduced on March 4, 1863, not long after the Cession of 1861. The Nigerian formula runs as follows:

S 45 (1) Subject to the provisions of this section and except in so far as other provision is made by any Federal law, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1900, shall be in force in Lagos and, in so far as they relate to any matter within the exclusive legislative competence of the Federal legislature, shall be in force elsewhere in the Federation.

(2) Such Imperial laws shall be in force so far only as the limits of the local

By the Kenya Judicature Act of 1967 which substantially reproduced the provisions contained in the East Africa Protectorate Order-in-Council of 1902 with the 1911 Amendment, the courts of Kenya are empowered to administer, subject to any written law, "the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August 1897... Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances render necessary". By virtue of section 74 of the Courts Act, 1965, and subject to the provisions of the Constitution or any other enactment, the common law, doctrines of equity and statutes of general application in England on the first day of January 1880, are in force in Sierra Leone. Similarly, section 2(b) of the Judicature Act of 1962 of Uganda stated that, in so far as the written law did not apply, the Courts were to exercise jurisdiction "in conformity with the substance of the common law, doctrines of equity and the statutes of general application in force in England on the 11th of August, 1902". Although these provisions have not been specifically spelt out in section 3(2)(a) of the Judicature Act of 1967, it must be presumed that the statutes of general application in England remain in force in Uganda. As far as Ghana is concerned, the basic provision is to be found in the Ghana Courts Ordinance, Cap 4 (now repealed), section 83 which provided as follows:

Subject to the terms of this or any other Ordinance, the common law, the doctrines of equity and the statutes of general application which were in force in England on the 24th day of July, 1874, shall be in force within the jurisdiction of the courts.

This position has been retained under the Courts Act, 1971.

It will be noticed that all these omnibus provisions for the reception of English law in each territory pose a number of difficult problems. As regards common law and doctrines of equity, how are we to apply

jurisdiction and local circumstances shall permit and subject to any Federal law.

(3) For the purpose of facilitating the application of the said Imperial laws they shall be read with such formal verbal alterations not affecting the substance as to names, localities, courts, officers, persons, moneys, penalties and otherwise as may be necessary to render the same applicable to the circumstances. — Law (Miscellaneous Provisions) Act, 1964, (Cap 89) of Laws of the Federation of Nigeria and Lagos, 1958 Edition of the Laws, Vol III, Cap 89. All the States in the Federation (except Western & Mid-Western States) have adopted January 1, 1900, as the cut-off date.

the limiting date? Is it to apply only to the statutes of general application in England at the specified date, or to the common law and doctrines of equity as well at the specified date? Put in another way, have the common law and doctrines of equity applicable in a territory been affected by the decisions of the English superior courts since the specified date which have modified these branches of the law in England? Various answers have been given to these questions by a number of academic lawyers.³ No definite decision has been reached.

Both judges and academic writers have rightly complained that there is no convenient list attached to the relevant legislation of each territory specifying which English statutes among the thousands existing at the specified dates can be regarded as of general application in England as distinct from Britain or even the United Kingdom. Each territory is left to speculate for itself, and the courts have been much troubled by the resultant inconvenience and uncertainty. Again, assuming that some of the applicable English statutes that are applicable in a given case can be identified, it is not always easy for the courts to identify the modifications that are necessary in such statutes to make them suit particular local circumstances.

It was this and other problems that led to the interesting experiment carried out by Western Nigeria in 1959 in an effort to render it unnecessary to continue to refer to a given date as that of reception of English common law, equity and statutes. Sir Kenneth Roberts Ray,⁴ has described what happened in these words:

In the Western Region of Nigeria, however, which I think it fair to say is giving an enterprising lead in law reform and adaptation, they have gone one better. By a Law passed in February, 1959, it was provided that, in matters within the competence of the Regional Legislature, no English Acts should thereafter be in force in the Region unless it applied by virtue of its own terms. This at first sight seems a startling work of demolition; but looking further back in the statute book, one finds that they had filled the void before creating it, by enacting as laws of the Region more than twenty Acts of (English) Parliament adapted to their own circumstances, in other words they have relieved the Courts of the burden of interpreting the phrase 'statutes of general application'. This admirable piece of work involved examination of the English statute book from 1267 to the end of 1899 (the

³ See my *British Colonial Law*, 1962, A N Allott, *Essays in African Law*, pp 31ff; A E W Park, *Sources of Nigerian Law*, pp 20ff; N A Ollenu: 'The Changing Law and Law Reform in Ghana', *Journal of African Law*, 1971, vol XV, no 2, p 176.

⁴ See his essay, 'The Adaptation of Imported Law in Africa', *Journal of African Law*, 1960, vol. IV, no 2, p 71.

date prescribed for the application of the English law to Nigeria) and close study of about 100 Acts. It is particularly interesting to note that one result is that the Western Region is the first African country to have legislation based upon the English law of property reforms of 1925.

The latest legislative experiment of the same order has been carried out recently in Ghana under the Courts Act of 1971. Section 111 contains the following provisions:

- (1) Until provision is otherwise made by law, the statutes of England specified in the First Schedule to this Act shall continue to apply in Ghana as statutes of general application.
 - (a) to the extent indicated in the First Schedule to this Act, and not further or otherwise; and
 - (b) subject to such verbal amendment not affecting the substance as may be necessary to enable them to be conveniently applied in Ghana.
- (2) the statutes of England referred to in subsection (1) of this section shall be treated as if they formed part of the common law prevailing over any rule thereof other than a rule of customary law included in the common law under any enactment providing for the assimilation of such rules of customary law as are suitable for general application.

It is provided in subsection (5) that the Minister responsible for justice may prepare and publish a volume containing the provisions of the English statutes applied by both subsections, making all necessary modifications as are deemed necessary. The completed volume is required to be laid before the National Assembly for its approval. The First Schedule to the Act contains a list of English statutes beginning with the Statute of Uses, 1635, and ending with the Apportionment Act, 1870. Each of the 40 Acts listed indicates the sections that are to continue in force in Ghana. It is also interesting to note that subsection (3) of section 111 incorporates several sections of the English Law of Property Act, 1925, which now apply in Ghana, subject to such verbal amendment not affecting the substance as may be necessary to enable those sections to be conveniently applied in Ghana, but not so as to require a conveyance under customary law to be made by deed. The Courts Act then goes on to impose a limiting factor in section 111(8) which requires that the statutes of England shall, subject to the foregoing provisions, cease to apply in Ghana, except insofar as they may be applied by any enactment for the time being in force and no English statute will be deemed to be one of general application other than a statute referred to in the section itself.

The last point just made raises the question as to the introduction into each African territory by reference in a local enactment to English substantive law or rules of procedure. That is to say, that the common law, doctrines of equity and statutes of general application in England are not directly applied by specific provision to that effect, but so much of them as are relevant in certain limited areas of the law may be incorporated in the local law of the territory by reference. Here is an example from the High Court of Lagos Act (Cap 80), section 16 of which contains the following provision:

The jurisdiction of the High Court in probate, divorce and matrimonial causes and proceedings may, subject to the provisions of this Act and in particular of section 27 and to rules of court, be exercised by the court in conformity with the law and practice for the time being in force in England.

The same problem arose for determination in the recent case of *Lartey v Affutu-Nartey*.⁵ The question was whether the English Wills Act of 1963 applied to Ghana when the testator died. The answer given was 'yes' and this after the reform of the Courts Act, 1971, and also the English Wills Act of 1963 is a post-1874 enactment. The learned trial judge had stated in his ruling on July 29, 1970 thus:

So far as probate matters are concerned they are to be governed by the law and practice for the time being in force in England. It is therefore necessary that any will which is not a nuncupative will before it is admitted to probate must conform to the Wills Act, 1837.

Now, the law for the time being in force in England when the case first came before the court below was not only the Wills Act, 1837 but also the Wills Act, 1963. This 1963 Act was clearly not a statute of general application having been passed after 1874, but it was the law relating to probate for the time being in force in England which was applicable to Ghana by virtue of paragraph 93(2) of the Courts Decree, 1966.⁶ At the date of the testator's death, the English Wills Act, 1963, was the applicable law and the lower court was held bound to consider it. The will had already been proved in the Probate Court in Liberia where the testator, who was a Liberian national, was both resident and domiciled. It would appear from the proceedings of the Liberian Court that the formal validity of the will had been

⁵ (1972) 2 GLR 488, Court of Appeal.

⁶ NLCD 84.

established. Archer, J A, accordingly held that section 1 of the English Wills Act, 1963, applied in Ghana to govern the case.

A somewhat critical note was, however, sounded by Hayfron-Benjamin, J A, in *Gray v Gray*.⁷ In that case, it was held, *inter alia*, that the laws of England relating to divorce and matrimonial causes that were in force in Ghana before August 22, 1969, continued as part of the existing law by virtue of Article 126 of the Constitution of 1969. It was, however, further held that any provision in the laws of Ghana that any subsequent amendment, repeal or enactment of the laws operating in England should automatically be in force in Ghana was not consistent with the Constitution and the laws must be read with the modification and exception provided in Article 126(5) of the Constitution. The learned justice of appeal then permitted himself the following trenchant observation:

I am not prepared to hold that a law passed by the British Parliament in the exercise of the legislative power of Britain can become part of the laws of Ghana through the back door. It should be noted that it was Parliament, under the 1960 Constitution, which passed the Courts Act, 1960 (A.C.A. 9), making the law for the time being in force in England applicable to Ghana. Likewise, it was the National Liberation Council, acting in accordance with the Proclamation with Decree N.L.C. 84 making the law for the time being in force in England applicable to Ghana. Parliament under the new Constitution has passed no such legislation. All we have, therefore, are the provisions of the Constitution which regard this as part of the existing law which is to be read with such exceptions and modifications as may be necessary to bring it into conformity with the Constitution. With certain reservations I would say that the Parliament under the 1960 Constitution and the National Liberation Council under the Proclamation were supreme legislative bodies, the same cannot be said of the Parliament under the new Constitution. Speaking for myself I would be sceptical in according constitutional validity to any Act of the present Parliament which in effect embodied the future legislative will of the British Parliament in divorce and matrimonial causes, and for that matter in respect of anything, in the laws of Ghana.

Fortunately for all concerned, in this particular type of situation, the Nigerian Matrimonial Causes Decree of 1970, as well as the Ghana Matrimonial Causes Decree of 1971, has made it no longer necessary for our law of divorce and matrimonial causes to be tied to successive English statutes on the subject.⁸

⁷ (1971) 1 GLR 422.

⁸ It is not clear whether the English law of probate has ceased to apply in both countries at the present time.

II

Some Implications of the Reception of English Law

Yet another phenomenon of the reception of English law into an African country occurs where a rule of the English common law has been enacted as part of the local law and, thereafter, that rule was later amended or repealed in England by legislation. Does the local enactment embodying the repealed English common law rule still represent the law, or is it itself *ipso facto* modified to the same extent as the amended law in England? Should the interpretation of the enacted provision of English law depend upon the subsequent changes in the English common law? Somewhat divergent answers have been returned by some of our courts. Let us illustrate the point by reference to Nigerian law. In the English Law of Evidence, for example, there used to be what was known as the Rule in *Russell v Russell*,⁹ which was to the effect that neither of the two parents would be permitted to give evidence which might bastardize a child born during the continuance of a valid marriage or within a reasonable time thereafter. This Rule was the English common law rule in 1943 when the new Evidence Act was enacted in Nigeria and it was embodied in section 147 of the Act. The Rule in *Russell v Russell* was, however, subsequently abolished in England in 1949 by the Law Reform (Miscellaneous Provisions) Act, which was repealed and re-enacted first as section 32 of the 1950 Matrimonial Causes Act and now section 43 of the 1965 Matrimonial Causes Act. Since any English Act passed after 1900 would not apply in Nigeria unless it has been locally re-enacted, the English 1949 amendment should not normally apply in Nigeria. But, as we have seen, it is so applicable by virtue of section 16 of the High Court of Lagos Act. The problem is to determine whether this application of the English Matrimonial Causes Acts in Nigeria means that the Rule in *Russell v Russell*, as embodied in the Nigerian Evidence Act, ceases to be the law in Nigeria so as to enable a husband or wife to give evidence to bastardize their child. In *Ohuru v Ohuru*,¹⁰ and *Egurunwoke v Egurunwoke*,¹¹ the courts allowed such evidence to be given; in the former the husband gave evidence that his wife gave birth to a baby two calendar years after she had left Nigeria.

In *Elumeze v Elumeze & Martins*,¹² however, Taylor, C J, held

⁹ (1924) AC 687.

¹⁰ Unreported Judgment No 1/173/63.

¹¹ (1966) NMLR 147.

¹² HD/41/64 of March 6, 1967, and April 10, 1967.

that section 147 of the Nigerian Evidence Act still applied in Nigeria in spite of the incorporation by reference of the English Matrimonial Causes Act of 1965. The Matrimonial Causes Decree 1970 has now solved this problem by providing in section 84 that either spouse may now give such evidence.

A similar, though less complicated, problem arose for consideration in the Kenyan case of *Orude & anor v The Municipal Council of Kisumu*,¹³ in which the Court of Appeal for East Africa applied the English common law as defined by the House of Lords in *Rookes v Barnard*,¹⁴ in respect of the circumstances in which exemplary damages might be awarded, overriding certain earlier decisions. One of the tests applied by the Court of Appeal for East Africa in deciding whether *Rookes v Barnard* was applicable in Kenya was that, as there was no local law with which its application would be inconsistent, the English decision should be taken "as authoritatively setting out the law of England as to exemplary damages in tort, which law was applied in Kenya by the Judicature Act, 1967". The position may be viewed from two angles: *either* to regard the common law as at the date of its reception in Kenya in 1897, and as later modified by local enactment or judicial decision, as part of the existing law in Kenya, so that English decisions after the date of reception do not bind the local court; *or* to regard the common law which is currently in force in England as the applicable law in Kenya. The East African Court of Appeal would seem to have based its decision on the principle that decisions of the English superior courts cannot override or modify local decisions, but in the absence of any local rule of common law on a given subject matter in dispute, relevant English decisions such as *Rookes v Barnard* should be applied to fill the gap.¹⁵ This rule of thumb is in some ways similar to the so-called 'residual clauses',¹⁶ in many a court statute in the African territories providing

¹³ Civil Appeal No 37 of 1970. Judgment delivered on November 27, 1970.

¹⁴ (1964) AC 1129.

¹⁵ Some confusion would have been introduced in Kenyan law if the ruling in *Broome v Cassell & Co Ltd & anor* (1971) 2 All ER 187 by the Court of Appeal in England which declared *Rookes v Barnard* to be wrong had stood. Fortunately, the House of Lords itself subsequently overruled the English Court of Appeal in *Cassell & Co Ltd v Broome & anor* (1972) AC 1027.

¹⁶ S 126 of the Constitution of 1969 provides:

(2) The common law of Ghana shall comprise the rules generally known as the common law, the rules generally known as the doctrines of equity, and the rules of customary law including those determined by the Superior Court of Judicature.

(3) For the purpose of this article, the expression 'customary law' means the rules of law which by custom are applicable to particular communities in Ghana.

that, if there is no local applicable law, whether enacted law or customary law, English law may be applied to the settlement of any dispute before a High Court.

We may now turn to a consideration of the question where it is found that both English law and customary law are equally applicable to a dispute. This problem is pointed up especially in countries like Ghana which have a dynamic body of customary law and judicial process. Thus, under the Interpretation Act, 1960, "the common law" is defined in section 17, while "the customary law" is defined in section 18, and both sources constitute "the common law of Ghana".¹⁷ All persons are subject to this common law but, in addition, any member of a particular community or locality may invoke the operation of a local customary law which the judges are now empowered to declare. The combined effect of the provisions of sections 83 and 87(1) of the Courts Ordinance¹⁸ is thus stated in section 64, rule 6 of the Courts Decree:¹⁹

Subject to the foregoing rules, an issue should be determined according to the common law unless the plaintiff is subject to any system of customary law and claims to have the issue determined according to that system, when it should be so determined.

It is, of course, an erroneous interpretation of this provision to say that the common law of England overrides the customary law in all matters even in the fields of land tenure, inheritance and family law, which are reserved for these by express legislation. Let us consider a few examples in which the courts have grappled with disputes subject to the concurrent application of English and customary law. Thus in *Dagartey v Ekwamu & anor*,²⁰ Aboagye, J, held that the Limitation Act, 1623, as a received statute of general application in England, does not apply to govern a transaction between Africans unless the parties have previously agreed that the transaction should be governed by English law. The claim before the magistrate was for a debt of NC 130 contracted fourteen years previously, and he had dismissed the action as having been statute-barred. The learned judge allowed the appeal, holding that the customary law must apply to the exclusion of the Limitation Act. The transaction, though capable of being dealt with under English law, was held to be one

¹⁷ More will be said on this subject in the next chapter.

¹⁸ Cap 4, 1951.

¹⁹ NLCD 84.

²⁰ (1970) CC 1, HC.

under customary law in the contemplation of the parties to the transaction.²¹ A more illuminating case, however, is *Yanney v Nyamekye*, where a plaintiff claimed damages from the defendant for the seduction of his niece. As the action for seduction may be brought either under the common law or customary law, the plaintiff was free to choose which one he would pursue. The tort of seduction in English law is based on the fiction of the master-and-servant relationship whereby the plaintiff lost the services of the seduced girl *per quod servitium amissit*. Under customary law, however, the tort of seduction is innocent of such a fiction. The court pointed out:

The right to recover damages in this type of action is available both at common law and in native custom, and so the plaintiff who is a native is at liberty to bring either form of action.

In the instant case, the plaintiff chose to sue under the common law. It is interesting to note the following remarks of the court:

Proof of these ingredients is essential in an action for seduction at common law, whereas under customary law if a man seduces an unmarried woman of the type in this appeal, he is automatically liable to pay to her or her family damages for the wrong he has done to her and the disgrace brought on her family. As damages are presumed to have been sustained whenever an injury is done to the right of a party, the seduction of the appellant's relative may be an invasion of her legal right giving her the right to recover damages without necessarily proving loss of service as is required under common law.

Again in *Boateng v Aduna*,²² the plaintiff sued the defendant in the local court for damages for the seduction of his daughter, and was awarded £G80 as general damages and £G2 per month for the maintenance of the daughter during pregnancy. The defendant was also ordered to maintain the daughter's child when born. He appealed against this decision on the ground that where there was no evidence of loss of service, an action in seduction could not succeed and that, in any case, there was no legal ground for the award of damages and maintenance against him. The appeal was dismissed since the customary law does not require any such fiction as does the common

²¹ But see *Aradzie v Yandor* (1922) FCt 22, 91 where it was held that the Statute of Limitation applied because the parties had employed English methods of raising the loan.

²² (1963) 1 GLR 445.

law in order to provide a remedy for what is in truth the infringement of family or paternal honour. It was also held that the father of a child born out of wedlock is liable to pay for the expenses incurred during the seduced girl's confinement and to maintain the child during minority.²³ J M Sarbah's *Fanti Customary Laws* was cited with approval as follows:

If a man seduces an unmarried woman, he is liable to pay to her family damages for the wrong so done her and the disgrace done on her family.²⁴

In *Attiasse v Abobbitey*,²⁵ the question of a choice between common law and customary law which arose concerned the actionability or otherwise of calling a woman a prostitute who carried on prostitution in her shop. The local court of first instance gave judgment for the plaintiff; but, on appeal to a circuit court, it was reversed mainly because according to the English common law, calling a woman a prostitute is not actionable *per se*. On a further appeal, the Court of Appeal reversed the circuit court and reaffirmed the local court of first instance on the ground that the slander of the plaintiff woman was actionable *per se* under the common law of Ghana, since it accused her of the offence of keeping a brothel contrary to the Criminal Code. The Court of Appeal further held that the circuit court was in error in applying the common law to the facts of this case instead of the customary law on the basis of which the local court had given its judgment and all the parties had argued their case.²⁶ Ollenu, J, in delivering the judgment of the Court of Appeal, observed that under the customary law of defamation, the words complained of are actionable although they may be treated as mere vulgar abuse under the English common law. The English Slander of Women Act, 1891 is clearly not applicable in Ghana since it was enacted in England after the reception of English law in Ghana in 1874. It is gratifying to note that customary law has produced a satisfactory result in the circumstances of the case.

Sometimes a plaintiff may be put to his election by the court to choose between two applicable English statutes according as one or the other of them can probably be regarded as a statute of general application in the country concerned. A case in point is *Curator*

²³ See *Marshall v Dawson* (1885) Sar FCL III; *Adjei v Ripley* (1956) 1 WALR 62.

²⁴ *Ibid.*, pp 446-47.

²⁵ (1969) CC 149 CA.

²⁶ The Courts Decree, para 64(1) makes it obligatory to apply customary law where all the parties had adopted it as the basis of their pleading and argument.

of *Intestate Estates v N'jie and Betts*,²⁷ in which a learner driver, N'jie, drove Betts' car unaccompanied and negligently killed one Tejan Foon. The deceased was survived by his parents and a child who was *en ventre sa mere* at the time of his death who was born six months after. The Curator of Intestate Estates brought an action on behalf of the deceased as his personal representative against N'jie and Betts under both the Fatal Accidents Act, 1846 and the Law of England (Application) Act of the Gambia. This latter Act makes the Fatal Accidents Act of 1846 and the Law Reform (Miscellaneous Provisions) Act, 1934 applicable in the Gambia. The court advised the plaintiff to conduct the action under the 1846 Act rather than under the 1934 Act even though certain paragraphs of the statement of claim were also based on the latter. The Supreme Court held that the Curator could not recover any damages under the 1846 Act because (a) the deceased's parents were not his dependants within the meaning of the Fatal Accidents Act, 1846 and had therefore suffered no pecuniary loss, and (b) a posthumous child is not entitled under the 1934 Act. The court did, however, concede there might well be a case for allowing damages under the 1934 Act. This unfortunate result was brought about by the Supreme Court putting the plaintiff to his election to choose between the 1846 Act and the 1934 Act instead of leaving it to him to frame his action under either or both enactments. The balance was, however, in the end restored when the Gambian Court of Appeal reversed the learned Chief Justice of the Supreme Court of the Gambia and upheld the right of the plaintiff to bring his action under both English Acts.

An almost identical legal situation fell to be considered in the Ghanaian case of *Elrouh v Hamili*,²⁸ in which counsel cited the English Law Reform (Miscellaneous Provisions) Act, 1934, section 1 of which lays down the general rule that all causes of action subsisting against or vested in a person shall survive, upon his death, against or for the benefit of, his estate, except in certain cases. He accordingly argued that the common law rule of *actio personalis moritur cum personae* ceased to exist in England since 1934 in respect of claims for personal injuries by reason of this Act and was therefore not part of the common law of England on July 1, 1960 when the Ghana Constitution came into force and was consequently not part of the law of Ghana. But the Court of Appeal refused to accept this contention for two reasons. In the first place the English Act of 1934 did

²⁷ Court of Appeal (Civil Appeals) 1969, unreported. See 'Annual Survey of African Law', vol III, 1969, pp 69-70.

²⁸ (1963) 1 GLR 310.

not create a new common law rule; it merely provided a statutory remedy where none existed before at common law. The common law rule, therefore, remains in force in England except that by reason of certain statutes it cannot be successfully pleaded in bar to certain specified actions. The mere provision of a new remedy by statute does not imply an expansion of the old common law rule which preceded it. Statutes only supplement the common law where the latter does not provide a particular remedy. The Ghana courts could accordingly take cognisance of the English Law Reform (Miscellaneous Provisions) Act, 1934 as having modified the rules of common law. The second reason for the rejection by the Court of Appeal of learned counsel's submission was that the 1934 Act, not being a statute of general application in England on July 24, 1874, does not form part of the common law in Ghana as defined in section 17 of the Interpretation Act, 1960. Similarly in *Addae v Smith*,²⁹ the administrator of the estate of a deceased person claimed damages against the defendant as compensation for causing the death of the deceased through a motor accident in September 1960. The following month, the plaintiff instituted an action at common law on behalf of the estate of the deceased. Subsequently he sought to amend the action so that he could proceed under the Fatal Accidents Act, 1846 on the ground that the claim was being made on behalf of the defendants of the deceased. It was held, applying the decision in *Elrouh v Hamili*, that an action for compensation for the death of a person brought on behalf of his estate is barred by the *actio personalis* rule and is not maintainable at common law. It was further held that the amendment sought by the plaintiff was barred by section 3 of the Fatal Accidents Act.³⁰ Under section 3 of the Fatal Accidents Act, 1846, as applied to Ghana, an action must be commenced within twelve calendar months of the deceased's death. While it is true that this particular limitation period was in 1954 amended in England to three years by section 3 of the Law Reform (Limitation of Actions) Act of that year, this Act does not apply to Ghana.

III

Character of the "Received" English Law

The received English law covers both civil and criminal laws as well

²⁹ (1963) 1 GLR 349.

³⁰ It was held in *Marshall v London Passenger Transport Board* (1936) 3 All ER 83,

as the rules of evidence and procedure since, as Maitland once observed, "the English common law rules are embedded in the interstices of procedure".³¹ The rules of civil law exist both in judicial decisions and in statutes which have been re-enacted, with or without modifications, in local statutes which are to be found in every Commonwealth territory in a set of Revised Editions of the Laws published at periodic intervals. This set of publications of enacted law constitutes the Statute Book of each territory. In the fields of trade and commerce, English mercantile and commercial laws predominate. Thus company law, partnership, contracts and agency, sale of goods, carriage of goods by land and sea, shipping laws, negotiable instruments, banks and banking laws, are the most important that we need enumerate here. Another area of civil law regulated by English common law principles are the law of tort, the law of trusts and equity, industrial law and the conflict of laws (private international law). Although some of these laws are based upon the English common law and statutes, there are yet local variations and peculiarities dictated by the prevailing circumstances of the time and place. The element of English law is less strong in the field of jurisprudence and legal theory as well as of public international law, although the former is in its local orientation still haunted by the ghost of Austin and the doctrine of judicial precedent while in public international law the local practice is still based on the teachings of the Dualist School, despite the growing tendency towards independence which is discernable in the new concept and practice of contemporary international law, especially the law of international institutions.

In the light of the preceding analysis, it is easy to appreciate that the degree of Englishness of the common law varies with particular territories by virtue of their respective historical antecedents. Thus, as we have seen, Sierra Leone law is probably the most English, while Kenya exemplifies a territory with fairly strong English law tendencies, due no doubt to the long period of European settlement and administration, both of which have encouraged the proliferation of English law. On the other hand, in Nigeria and Ghana, where English law has had perhaps the longest connection, the process of dismantling many of the edifices of English law since independence has been most rapid. Economic and industrial developments have

that if a required amendment seeks to set up a new cause of action which was statute barred, the amendment should not be allowed.

³¹ T F T Plucknett, *A Concise History of the Common Law*, 4th ed, London.

in a sense both increased and diminished the borrowings from English law: *increased* by reason of the understandably English legal training of the lawyers at independence which made them turn readily to English models; *diminished*, because of the upsurge of nationalism and its attendant leanings towards constitutional autochtony. Not an inconsiderable part of the resurgence of nationalist aspirations has been due to cultural revival and political identity.

Let us now turn to the criminal part of the received English law. English Criminal Law has entered Commonwealth Africa by direct as well as indirect routes. Apart from the singular instance of Sierra Leone, the other African territories have "received" their law of crime in the form of Criminal Codes and Criminal Procedure Acts. In the case of Sierra Leone, the English Common Law of Crimes, as supplemented by some local statutes, is operative law – for example, in addition to the common law offences, whole provisions of the Perjury Act, 1911; the Forgery Act, 1913 and the Larceny Act, 1916 (now largely replaced by the Theft Act, 1968) apply. The Criminal Code of Ghana, before its revision in 1960, derived from the St. Lucia Code of 1889 which was originally intended for Jamaica but which failed to adopt it. In the case of Nigeria, the Queensland Criminal Code of 1899 which was first introduced into Northern Nigeria in 1904, was later applied to the rest of Nigeria at amalgamation of northern and southern Nigeria in 1916. It remained the criminal law for the whole of Nigeria until 1959, when Northern Nigeria adopted the Sudanese Criminal Code which itself derived from the Indian Penal Code of 1860; this Indian Penal Code was, of course, based upon English law. The Northern Nigeria Penal Code of 1959 has replaced the former Criminal Code and the Islamic law of crimes which were formerly administered by the traditional courts in Northern Nigeria.

The development in East Africa has taken a somewhat opposite course, because there the Indian Penal Code was the received law until it was replaced in the 1930's by the "model penal code" prepared by the British Colonial Office in London upon the basis of the Nigerian Criminal Code which thus served as the source of the Penal Codes of Tanzania, Uganda, Kenya, Rhodesia, Malawi and the Gambia.³² Whatever the movement from the Queensland model code and its Indian counterpart, there can be no doubt that the ideas and practices of the English law of crime, itself not wholly codified, supplies

³² On this whole question, see the interesting article by James S Read entitled, 'Criminal Law in the Africa of Today and Tomorrow', *Journal of African Law*, 1963, vol VII, pp 5–17.

the underlying unity of law and thought on the subject of the Criminal Law. It is true that the Indian Penal Code has, since the pioneering days of Lord Macauley in the 1860's, diverged more from the pure English sources; the history of the administration of criminal justice in both East and West Africa has shown a remarkable resilience and similarity in both its inward and outward forms. One interesting aspect of the introduction of English law through the medium of the criminal codes is that questions have been raised as to whether it is intended to apply English law in East and Central Africa and in the Gambia as at the date when the English enactments came into force, or whether only from the date when the Codes were enacted. Certain offences like piracy and treason have been defined in these Codes by reference to the law "for the time being in force" in England.³³ This kind of provision is not likely to be welcome in the independent Commonwealth African territories, as they are productive of the same types of problems which we have seen above to characterize similar provisions in local court enactments importing English Law of Matrimonial Causes and Probate Law in West Africa. Another aspect of this matter which calls for comment is the inclusion in each of the Criminal or Penal Codes of some territories of interpretation clauses in which it is laid down that the code shall be interpreted in accordance with the principles of interpretation obtaining in England and that certain expressions shall have the meaning attached to them in English Criminal Law.³⁴ A notable illustration of this phenomenon occurs in *Mawji & anor v R*.³⁵ There, a husband and his wife were convicted of the offence of conspiracy under section 110(a) of the Penal Code of Tanganyika, their marriage being potentially polygamous. Under English law, husband and wife cannot be convicted of conspiracy, but the local courts held that this did not apply to the marriage in Tanganyika which was potentially polygamous. On appeal to the Privy Council, the local courts were held to have been in error in refusing to import the English fiction of the legal unity of man and wife into the then Tanganyika, and that the appeal should be allowed on the ground that the rule of legal unity applied to the spouses of any marriage regarded as valid under the local law.

It is at this point necessary to note that the Criminal Codes of Nigeria and Ghana contain specific provisions to the effect that,

³³ Eg Kenya Penal Code, Cap 24, s 40; The Criminal Code of The Gambia, Cap 21, s 35; Uganda Penal Code, Cap 22, s 53.

³⁴ See the East African Penal Codes, eg Tanganyika Penal Code, Cap 16, s 4.

³⁵ (1957) AC 126.

in construing each code "a court shall not be bound by any judicial decision or opinion on the construction of any enactment, or of the common law, as to the definition of any offence". The Judicial Committee of the Privy Council has had occasion to pronounce upon this statutory provision and to confirm that they are not to be modified in any way by "glosses or interpolations derived from any expositions, however authoritative, of the law of England or Scotland". Thus, in *Wallace-Johnson v R* the appellant was charged with sedition under section 330 of the Gold Coast Criminal Code which, however, omits any reference to resort to violence, which is an essential ingredient of the English common law definition of sedition. The question, therefore, arose as to whether this English law requirement should be read into section 330. The Privy Council on an appeal from the then Gold Coast held that this could not be done because (a) section 330 was intended by the local legislature to be exhaustive,³⁶ and (b) any reference to violence as an ingredient of the statutory offence of sedition was omitted deliberately so as to take account of the volatile situation in West Africa at that time. As Their Lordships observed:

The elaborate structure of section 330 suggests that it was intended to contain as far as possible a full and complete statement of the law of sedition in the Colony. It must, therefore, be construed free from any glosses or interpolations derived from any expositions, however authoritative of the law of England or of Scotland.

Section 7(3) of the Criminal Code which provided that the court should not be bound by any judicial decision or opinion in the construction of any other statute or of the common law as to the definition of any offence was not expressly referred to in support of their conclusion, although English decisions might on other matters and in other circumstances still be referred to in construing the Criminal Code. It is interesting to note that this Privy Council opinion in the *Wallace-Johnson Case* was followed by the Court of Appeal for East Africa in *Yonasain & ors v R*, a Ugandan case in which the issue was whether the English common law rule that the principal offender must first have been prosecuted to conviction (the rule in *Smith v Selwyn*) before the accessory after the fact could be charged, applied in Uganda. The Ugandan Criminal Procedure Code was

³⁶ See also the Nigerian case of *R v Nameri* (1951) 20 NLR 6, and my *British Colonial Law*, 1962, pp 154-58.

silent on the trial of accessories after the fact. The Court of Appeal for Eastern Africa accordingly applied the procedure laid down in the Criminal Procedure Code, saying:

What is true of the Gold Coast law of sedition is true also of the Uganda law of accessories after the fact, and it is unnecessary in our opinion to engraft anything onto it from English law.

Although it was the Criminal Procedure Code of Uganda that was immediately in issue in that case, nevertheless the court did not refer to section 3 of the Uganda Penal Code which provided as follows:

This code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in the English Criminal Law and shall be construed in accordance therewith.

IV

Juries and Assessors in the Judicial Process

It remains to note in outline one more significant feature of the judicial process in Commonwealth Africa. The use of juries and assessors as part of the judicial process varies somewhat from territory to territory. The jury, often regarded by many — Goodhart for example — as the most characteristic feature of the English legal system, was once so in many territories in Africa, but it has never really taken root and is already on the way out in most of these. We shall deal with this fairly briefly anon. Assessors, on the other hand, abound in both civil and criminal causes, and judges commonly sit with assessors in most territories, except in Nigeria where judges sit alone despite express provisions to be found in many a local court law indicating the use of assessors. Let us now consider the uses of juries and assessors separately.

Trial by Jury

Trial by jury in the countries of Commonwealth Africa may have owed its origin to the prevalence of Jury Trial in England in the 18th and 19th centuries or may have been prompted by the European settlements in certain parts of Africa. Jury Trial, therefore, took

on some importance in Sierra Leone, the Gambia, Ghana and Nigeria on the West Coast, in Kenya on the East Coast and in Southern Rhodesia in Central Africa. In the West African territories, Jury Trial has been confined to the former colonies proper where European settlements or influence dictated its introduction, while in Kenya and Southern Rhodesia it has been confined only to Europeans. Its existence in Zanzibar before 1949 has been ascribed to the influence of Indian and Kenyan laws. Jury Trial in Sierra Leone has had the longest ancestry in Commonwealth Africa, although it has been witnessing a steady decline in the past 70 years or so. Even as far back as 1898, the Trial by Jury (Amendment) No 3 Ordinance of that year provided that the Attorney-General could apply for an order for trial with the aid of assessors in all cases, whether capital or non-capital; this was probably to enable the accused person to seek an alternative method of achieving fair and impartial trial in case it was apprehended that tribal or racial animosity might influence the jury. While in West Africa generally, race has never been an important factor in the qualifications of jurors, the situation in Kenya and Southern Rhodesia has been different.³⁷ The Kenyan Criminal Procedure Ordinance of 1906 enacted (in section 2) that all Europeans and Americans "committed for trial to a Court of Session" (later changed to High Court) should be tried by a jury of Europeans and/or Americans, and the pattern has been followed ever since. The Kenyan legislation required that the verdict of the jury must be unanimous, the only qualifications for jury service being that a juror must be male, a European, and aged between 21 and 60. There are no property qualifications or literacy requirements. There is no statutory provision permitting the accused person to elect for trial with the aid of assessors instead of trial by jury. Jearey has suggested the following three reasons for the successful operation of Jury Trial as developed in England:

First, the community in which it operates must be socially homogeneous, that is, there must be no racial, cultural, religious or linguistic divisions. Secondly, the people in the community must be sufficiently advanced educationally and otherwise to understand the responsibilities cast on them as jurors and to set the fulfilment of those responsibilities above private prejudices. Thirdly, the people of the community must be in basic agreement with the laws which, as jurors, they are required to enforce.

³⁷ See generally on this matter J H Jearey, 'Trial by Jury and Trial with the Aid of Assessors in the Superior Courts of British African Territories', *Journal of African Law*, 1960. no 2, pp 133-146.

As applied to Africa, the writer was of the opinion that the absence of these conditions was responsible for the unimportant part which Jury Trial plays in practice in the administration of the criminal law, and thought that it was surprising that the Jury Trial has survived at all till now.

Whether one agrees or not with Jearey's theory, there can be no doubt that the operation of the jury system in Africa has had only minimal success, and one may attribute this to the fact that it is not wholly in harmony with the African juridical concept of determining the guilt or innocence of an offender.

Trial with Assessors

In nearly all Commonwealth African States, with the possible exception of Nigeria, all trials in the superior courts not held with a jury are normally held with the aid of assessors. In former Basutoland, Bechuanaland, Swaziland, Northern Rhodesia, Nyasaland (Malawi), Tanganyika and Uganda, there was no trial by jury at all, but only trial with the aid of assessors.³⁸ Certain principles of trial with the aid of assessors have become established and these are: that the assessors are neither sworn nor affirmed before they sit with a judge at a trial; that the accused is not formally given 'in charge' of the assessors; that jurors, not assessors, are judges of fact; that it is no part of the assessors' duty to decide as to the guilt or innocence of the accused because they are not required to return a verdict as jurors are; and that their advisory opinions need not be unanimous. In the Ugandan case of *R v Bazilio Sentamu*,³⁹ Edwards, C J, after observing that sections 272 and 283 of the Criminal Procedure Code of 1950 had been taken from section 309 of the Indian Criminal Procedure Code 1898, made the following observation:

Is it necessary to sum up to assessors? Section 283(1) says 'the judge may sum up *the evidence* for the prosecution and defence' it is to be noted that there is nothing about explaining the law to the assessors. This is, I believe, a deliberate omission. All that a judge may do is to 'sum up *the evidence*'. It is clearly undesirable that a judge should befog assessors, some of whom, while full of natural wisdom and possessing shrewd minds, are not likely to understand an elaborate lecture on English Law ... Section 283(4) makes it optional for the assessors either to give their opinions individually at the end of the summing up (where there is one) or to retire—presumably

³⁸ Even in Nigeria where only the Lagos State has retained trial by jury, legislation is about to be passed abolishing this form of trial.

³⁹ Jeary, *op cit*, p 282.

to retire either separately or together ... If they do retire, in my view, there is no need for them to be 'locked up', as used to be done in England with juries in certain cases. They have not been sworn and they do not 'sit in judgment' on the accused.

The learned Chief Justice, after comparing his personal experience of the role of nautical assessors in Board of Trade Inquiries in England, gave the following warning:

In short, confusion is arising in some of those East African territories by reason of the quite erroneous belief held in some quarters that assessors are the equivalent of jury men.⁴⁰

In the Gold Coast case of *R v Bio*,⁴¹ however, the approach was different. There, the accused had been charged with the murder of a woman at the Kumasi Assizes and the trial judge had fully stated the case of the prosecution without a word in favour of the accused as to the alleged circumstances of the murder. On appeal, the West African Court of Appeal, in quashing the conviction, observed that this was a case of misdirection by non-direction in summing up to the assessor who should have been correctly and fully instructed in the trial judge's summing up. Again, in *R v Brimali*,⁴² the trial judge had failed to put the case for the defence to the assessors on the question of the danger of receiving in evidence an alleged confession made by the accused to a convict or even to a prison warden. The West African Court of Appeal quashed the conviction of the accused for murder, pointing out that the trial judge had failed to direct the assessors as to the prosecution's duty to prove the guilt of the accused person beyond a reasonable doubt.

It would seem that both the West African Court of Appeal and Edwards, C J, in the Uganda High Court case held that in summing up to assessors, the judge should deal only with the evidence and not with the relevant law, as he would do if he were summing up to a jury. Yet it is possible to take the same view as that taken by the Court of Appeal for Eastern Africa in *Andrea's case*,⁴³ that it would be difficult for assessors to give a rational opinion on the general issue in a given case without being instructed as to the law involved.

Another aspect of trial with the aid of assessors is to determine

⁴⁰ *Ibid*, p 283.

⁴¹ (1945) 11 WACA 46.

⁴² (1945) 11 WACA 49.

⁴³ *Andrea; O Kulinga & ors v The Queen* (1959) JAL 71.

what happens to a decision, where there is a summing up to the assessors, reached as a result of the judge omitting to direct them on a certain point or even misdirecting them on such a point. It is agreed by both the West African and the East African Courts of Appeal that an omission to direct assessors as to the burden of proof is not fatal to a conviction since the judge who is presumed to know the law is alone responsible for the decision.⁴⁴ But failure by the judge to direct the assessors as to any aspect of the defence has always been held to be fatal to a conviction. Thus in *Wafula S/O Waminira v R*,⁴⁵ the Court of Appeal for Eastern Africa reduced a conviction for murder to one of manslaughter because of the failure of the trial judge to put the defence of provocation to the assessors. Such a failure to direct the assessors could be regarded as strong evidence of non-direction of himself by the trial judge. The distinction between the verdict of a jury by which the trial judge is bound, and the opinion of assessors by which he is not bound, may be underlined by reference, for example, to the Nigerian Criminal Procedure Code, section 449(1) and the Kenyan Criminal Procedure Code, section 318(2). In *Washington S/O Odindo v R*,⁴⁶ the Court of Appeal for Eastern Africa held that, although a local statute, the Tanganyika Criminal Procedure Code, section 283(1), provides that the judge has a discretion whether or not to sum up to the assessors, "it's a very sound practice (to sum up) except in the very simplest cases" and that "the opinions of assessors can be of great value and assistance to the trial judge, but only if they fully understand the facts of the case before them in relation to the relevant law. If the law is not explained and attention not drawn to the salient facts of the case, the value of the assessors' opinions is correspondingly reduced."

One final point must be made about an aspect of trial with assessors, and that is whether the trial judge could take into account the opinion, unsupported by evidence, of one of the assessors on a question of customary law. In *R v Mutwiwa*,⁴⁷ the Court of Appeal for Eastern Africa answered the question in the affirmative, citing section 89(1) of the Kenya Civil Procedure Code empowering a court to summon assessors for the purpose of determining "questions which may arise as to the laws or customs of any tribe, caste or community". The Court took the view that it must be for the same purpose that assessors

⁴⁴ *R v Wuseni* (1939) 5 WACA 73; *Appiah Danquah & ors v The Queen* (1951) 13 WACA 134; *R v Jeck-Jezelani* (1947) 14 EACA 70.

⁴⁵ (1957) EA 498.

⁴⁶ (1945) 21 EACA 392.

⁴⁷ (1935) 2 EACA 66.

are employed in criminal cases. Similarly, in *R v Kiswaga*,⁴⁸ in which the appellant was charged with murder, the assessors gave an opinion as to Baha custom, on which it would appear that the trial judge had based his judgment in convicting the accused person of murder instead of manslaughter. In reviewing the verdict, the Court of Appeal for Eastern Africa said that, "if for conviction of murder, the prosecution depends upon local custom, that local custom should be proved in evidence for the prosecution so that the witnesses may be cross-examined and the accused may have an opportunity of controverting it by other evidence". We need not spend much time explaining here in detail the conditions subject to which proof of local custom would be accepted by a court of law, other than to say that the witnesses must be expert in the sense that they must be qualified to depose to the custom in question, or the nature and extent of a particular custom may be determined by the court consulting a treatise recognized as such by the community. Once satisfied about the quality of the opinion of the expert witness, the judge may then ask the assessors in a criminal trial to give their opinion regarding the weight to be attached to it. The main purpose of the statutory provision for trial with the aid of assessors is to protect an accused person against a possible miscarriage of justice. This is one reason why it is a necessary requirement in all cases that assessors must, unlike jurors, deliver their opinion in open court.

V

Summary

We have now seen that the reception of English law can take one of four different forms. Firstly, it can be received by a Commonwealth African country through the omnibus formula of 'the common law, the doctrines of equity and statutes of general application' in England as at a specified date. Secondly, the reception can take place through a local re-enactment of particular rules of English common law, equity or statutes, with or without modifications. Thirdly, English law can be made applicable in a territory by means of a local statutory provision that English law will be deemed applicable from time to time to particular subject matters, such as we have noticed with probate and matrimonial causes until the recent changes made in Nigeria and Ghana by the Matrimonial Causes Decrees of 1970

⁴⁸(1947) 15 EACA 50.

and 1971 respectively. Fourthly, English law can also be introduced indirectly through interpretation clauses embodied in local codes like the Criminal or Penal Codes wherein it is provided that English law may be employed in the construction of other provisions of the Code, provided of course that the particular provisions requiring interpretation are *in pari materia*.

In whatever form it has been "received" or introduced in a particular Commonwealth African country, English law requires to be applied always with due regard to the following warning which Lord Denning gave with such felicity in the Kenyan case of *Nyali Ltd v The Attorney-General*:⁴⁹

Moreover, if it were relevant I would add that the power to grant a franchise of tolls comes within the very words of the agreement with the Sultan for it confers on the officers of the British Government 'full powers in regard to the levy of tolls'. The next proviso says, however, that the common law is to apply 'subject to such qualifications as local circumstances render necessary'. This wise provision should, I think, be liberally construed. It is a recognition that the common law cannot be applied in a foreign land without considerable qualification. Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed but it needs careful tending. So with the common law. It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over: but it has also many refinements, subtleties and technicalities which are not suited to other folk. These off-shoots must be cut away. In these far off lands the people must have a law which they understand and which they will respect. The common law cannot fulfil this role except with considerable qualifications. The task of making these qualifications is entrusted to the judges of these lands. It is a great task. I trust that they will not fail therein.

⁴⁹ (1955) 1 All ER 646, p 653.

LECTURE TWO

JUDGES AND CUSTOMARY LAW

I

Recognition of African Customary Law

One of the earliest judicial statements on recognition of African law as law is the following pronouncement by the Privy Council in the leading case of *In Re Southern Rhodesia*.¹

Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society ... On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law.

Nearly a quarter of a century later, in the Nigerian case of *Oke Lanipekun Laoye & ors v Amao Oyetunde*,² Lord Wright, in delivering the judgment of the Privy Council, made the following definitive pronouncement:

The policy of the British Government in this, and in other respects is to use for purposes of the administration of the country the native law and customs in so far as possible and in so far as they have not been varied or suspended by statutes or ordinances affecting Nigeria. The courts which have been established by the British Government have the duty of enforcing these native laws and customs, so far as they are not barbarous, as part of the law of the land. In particular, native laws and customs regulating the appointment and election of chiefs have been recognized as having the force of law.

Before we embark upon an examination of the judicial development of customary law, we may observe, very briefly, certain statutory provisions spelling out the circumstances in which customary law

¹ (1919) AC 211.

² (1944) AC 170; see also *Esugbayi Eleko v Nigerian Government* (1931) AC 662.

would be enforced in the higher courts in the various Commonwealth countries in Africa. A representative provision, which is also convenient as a common course for both Ghana and Nigeria, was the following from the Supreme Court Ordinance 1876, which laid the foundation of the modern legal systems of both countries:

Nothing in this Ordinance shall deprive the Supreme Court of the right to observe and enforce the observance, or shall deprive any person of the benefit of any Native Law and Custom, such law or custom not being repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication with any law for the time being in force.

Despite the significant developments that have taken place in the legal systems of Nigeria and Ghana, this passage is still to be found substantially the same in all the subsequent enactments on our High Courts. It would be equally true to say that this statutory provision has set the pattern for similar court enactments throughout Commonwealth Africa.

On the other hand, it has also been established by the statutes of most Commonwealth African countries that customary law will normally apply to disputes coming before the courts when both parties are Africans, though this is not an invariable rule. It will also apply when, although one party is an African and the other is not, it will be unjust to either party to apply English law (or, in a few African States, the Roman-Dutch Law). By contrast, customary law will not apply either where one of the parties has entered into any transaction on the express or clearly implied bases of English law (or, in relevant cases, the Roman-Dutch Law), or where the transaction in question is entirely unknown to customary law. It remains to add that, in nearly all cases, statute contains what is known as the *residual clause* which is to the effect that where there is no precise rule either of customary law or of English law (or Roman-Dutch Law) which is applicable to a case, the court has the discretion to decide according to the principles of natural justice, equity and good conscience. It is tempting at this point to want to stop to dilate on the application as well as the implications of the somewhat fluid principles of "natural justice, equity and good conscience", but we must resist the temptation and leave further elaboration to these and subsequent lectures to be dealt with as and when occasion warrants.³

³ The matter has been dealt with extensively elsewhere, eg in my *Law in a Changing Society*, ch VI.

A subject of considerable importance in considering the question of applying customary law is the ascertainment of what a particular system or body really is. This is sometimes referred to as the rule in *Angu v Attah*,⁴ which requires that customary law is to be proved in the first instance by calling witnesses until its rules become so familiar to the courts that judicial notice may be taken of them. But it is necessary to remember M'Carthy J's warning in *Ababio II v Nsemfoo* (1947) 12 WACA 127, p 128, that the rule was "intended to apply to what may be described as British Courts before which it is sought to prove a particular custom. There is no ground for extending its application to Native Courts of which the members are versed in their own native customary law, although there is nothing to prevent a party from calling witnesses to prove an alleged custom. If the members of a Native Court are familiar with a custom it is certainly not obligatory upon it to require the custom to be proved through witnesses." Similarly, in *Kigizi v Lukiko of Buganda*,⁵ it was held that the members of the Buganda Native Courts "generally speaking require no evidence to inform them what (their) customs are". The principle underlying the rule in *Angu v Attah* may be said to be epitomized in what Butler Lloyd said in *Buraimo v Bamghoye*:⁶ "A particular custom may by frequent proof in the court become so notorious that the court takes judicial notice of them."

The Evidence Acts of some Commonwealth countries⁷ contain provisions for ascertaining customary law by calling persons knowledgeable in it to give expert evidence; legal textbooks of authority may also be consulted as one of the sources for ascertaining customary law. Sometimes, statute may provide that an application may be made by a court to a Local Authority for a declaration of what is in its opinion the customary law relevant to a particular case.⁸ Progressive opinion is that, despite all these modes of ascertaining customary law, it is no longer acceptable, whether as a rule of law or of practice, that customary law in independent African States should still be treated as a fact to be proved, like any other matter of fact or of foreign law, by calling evidence of it from these extraneous sources. The use of assessors who sit with the judge may be excused to some extent in the process of ascertaining rules of customary

⁴ (1916) Gold Coast Privy Council Judgments 1874-1928, 43, p 44.

⁵ (1943) 6 Ug LR 113.

⁶ (1940) 15 NLR 138, p 140.

⁷ See ss 14, 15, 16, 61 and 62 of the Nigerian Evidence Act, 1958 Edition of the Laws.

⁸ See Native Authority (Amendment) Ordinance No 3 of 1945 (Nigeria).

law in particular cases. The right trail has fortunately been blazed by Ghana which in its Courts Act, 1960, provided that customary law should no longer be treated as a matter of fact, but as law;⁹ and that, if the judges who are to apply a particular rule of customary law feel any doubt, they are free to consult whatever sources, such as by empanelling a group of persons to inform themselves before applying the law.¹⁰ The old rule in *Angu v Attah* has thus been displaced by this new rule. This, it is submitted, is the right course for all independent Commonwealth African States to take.

II

Judicial Development of Customary Law

Let us now return to a consideration of the judicial development of customary law in a number of significant areas of similar or at least comparable concerns to the various African countries. Perhaps the most important aspect of customary law in Commonwealth Africa is the ubiquitous phenomenon of land tenure.

In the *locus classicus*, *Amodu Tijani v Secretary, Southern Provinces*,¹¹ the following broad outline of the indigenous ideas underlying the land tenure systems throughout the Commonwealth was laid down by the Privy Council:

The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village or family have an equal right, but in every case the Chief or Headman of the community or village or head of the family has charge of the land, and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it, and any member who wants a piece of it to cultivate or build upon, goes to him for it. But the land so given still remains the property of the community or family. He cannot make any important disposition of the land without consulting with either the elders of the community or family, and their consent must in all cases be given before a grant can be made to a stranger. This is a pure native custom along the whole length of this coast, and wherever we find, as in Lagos, individual owners,

⁹ S 67(1); also Courts Act, 1971, s 50(1).

¹⁰ S 67(2); also Courts Act, 1971, s 50(2).

¹¹ (1921) 3 NLR 21.

this is again due to the introduction of English ideas. But the native idea still has a firm hold on the people, and in most cases, even in Lagos, land is held by the family. This is so even in cases of land purporting to be held under Crown grants and English conveyances. The original grantee may have held as an individual owner but on his death all his family claim an interest, which is always recognised, and thus the land becomes again family land.

The principles of customary land tenure enshrined in this passage have been the subject of judicial analysis and refinements in our courts, and they may be summarized in a number of propositions as follows: (a) that the family or sometimes the village or the community, is the unit of landholding, never the individual; (b) that this family ownership is not the fee simple absolute in possession of English law, with which it should never be confused; (c) that the individual holding was under the customary form of tenure allocated or deemed to be allocated to him by the local chief or family head, although as will soon be seen, land could be acquired by an individual as the first cultivator or settler in a virgin forest in times gone by; (d) that land granted by the family or community to a stranger remains the property of the grantor who enjoys a right of reversion should the grant determine in one of the seven ways to be considered presently; (e) that, before land can be granted to a stranger by the chief or the family head, all the elders of the family or community must be consulted and their consent obtained thereto; and (f) that when an individual owner of land dies, the land devolves upon his children as family land. The seven ways in which an individual family member's right in land may determine may be summarized as follows: (1) by express surrender or release; (2) by abandonment;¹² (3) by failure of effectual occupation or user; (4) by alienation or attempted alienation; (5) by denial of the title of the land-owning family; (6) by refusal or failure to pay the customary dues or to render the customary services; and (7) by 'bad behaviour' to the Chief or to the family head, as the case may be.¹³

III

Specific Aspects of Development

We may now turn to a consideration of the judicial development

¹² *Baillie & ors v Effiong* (1923) 5 NLR 28.

¹³ All these are discussed in the light of decided cases on pp 139-46 of my *Nigerian*

of the concept of family property or the family compound, with particular reference to the rights of the individual members therein. As good a beginning as any may be made with the interesting Ghana case of *Hagan v Kotey & 3 ors.*¹⁴ In this case, the first three defendants were children of one Herbert Charles Kotey, deceased, and the fourth defendant was his grandson. The plaintiff, who was the successor of the deceased and head of the maternal family, brought an action in these two capacities for accounts of rents collected by the defendants from a house which was in the possession of their father at the time of his death; he also sued for an order for ejectment from the house and an injunction to restrain them from having anything to do with it. The original plaintiff during the pendency of the suit, and Hagan, the present plaintiff, was on his own application substituted. The defendants accordingly contended that Hagan had no *locus standi* as not having been properly appointed to succeed the original plaintiff. The Accra High Court held that if the family property in dispute had been the self-acquired property of the deceased Herbert Charles Kotey which became family property on his death intestate, a successor could not have been appointed except at a joint meeting of the maternal and paternal families of the deceased. There was evidence, however, that the property was the ancestral property of the deceased and, therefore, of the plaintiff's family. That being so the only persons entitled to appoint a successor to sue in respect of the property would be the members of the deceased's maternal family alone, and no stranger to this family had a right to be invited. The plaintiff's appointment was therefore in order.¹⁵ The court, nevertheless, proceeded to hold that, at customary law, property acquired with money contributed by members of the family, even by two members only, is family property;¹⁶ that the self-acquired property of a person who succeeds to the property of another member of the family becomes merged into the family property;¹⁷ and that as, on the evidence, the deceased Herbert Charles Kotey succeeded to and controlled the estate of many members of the family even if the house in dispute had been acquired by him alone, it became family house in his hands and remained so at his death, to be taken

Land Law, 4th ed. Sweet & Maxwell Ltd, London, 1967.

¹⁴ (1961) GLR 594.

¹⁵ *Carboo v. Carboo* (1961) GLR 83; *Okoe v Ankrah* (1961) GLR 109 were distinguished.

¹⁶ *Tsetsewa v Acquah & anor* (1941) 7 WACA 216; *Nugent v Nartey & anor* (1958) 3 WALR 537.

¹⁷ *Antu v Bendu* (1929) FL 26-29, 474.

over by his maternal family. Therefore, the proper person to take charge and assume control of the house was the plaintiff who had been duly appointed by the maternal family. Again in *Nkonnua v Annafi*,¹⁸ a somewhat related problem, this time involving a distinction between stool property and family property, arose for a decision. There, the plaintiff, as the Queen Mother of the Odan Division of Akyem Abuakwa and head of the Aduana Royal Family of Otwereso and Osenase brought an action of declaration of title to a farm, recovery of possession and mesne profits. She contended that the original forest was cultivated by members of her family into a farmstead and that her deceased uncle developed the farmstead into a cocoa farm during his occupancy of the Osenase stool, although he abdicated from the stool before his death. During his tenure of office, a stool treasury was established into which were paid the proceeds from all stool farms, but the farm in dispute was not included among those the proceeds of which were paid into the treasury, to the knowledge of the stool elders. The plaintiff's deceased uncle treated this farm as his private property so that on his abdication from the stool, the farm was not included in the inventory of stool properties which he handed over to his successor. The defendant, a son of the plaintiff's uncle, and the present occupant of the stool, claimed the farm in dispute as stool property. It was held that, on the evidence, the land was the property of the Aduana Royal Family even before the plaintiff's uncle took possession of it, and that the cocoa farm he made on it was accordingly family property; *a fortiori* it retained that character where the ex-stool occupant merely developed a family farmstead into a cocoa farm. It was further held that, where a person acquires property with the assistance of a member of his family, that property becomes family property. Accordingly, if an occupant of a stool acquires property with the assistance of a member of his family, the property is not stool property, but the family property of the stool occupant. In the instant case, there was evidence that the plaintiff assisted her uncle, both physically and financially, in making the cocoa farm. The court finally held that the farm in dispute was family, and not stool, property.

With these general judicial descriptions may be compared a number of cases decided along similar principles in Nigerian courts. In the leading case of *Lewis v Bankole*,¹⁹ three pieces of land formed the estate of one Mabinuori who died leaving him surviving twelve

¹⁸ (1961) GLR 559.

¹⁹ (1909) 1 NLR 82.

children, to three of whom had been given some land adjacent to the main compound in which he had lived with the other nine children. Some of the children of the three had later been allotted houses and rooms in the main compound, and they brought an action against the remaining nine children claiming equal rights with them. After the Divisional Court had ruled differently, Osborne, C J, having taken detailed evidence as to the Lagos, and indeed, Yoruba customary law on the subject, held as follows:

(1) all the branches of the Mabinuori family had a right to be consulted before family property could be leased or otherwise dealt with; (2) rents from a lease should be divided in equal shares among the respective branches, regard being had to property received by any of the founder's children during his life-time; (3) the different branches of the founder's family should be represented *per stirpes* on the family council, each branch having one vote; (4) grand-children of the founder, the plaintiffs in this case, had no inherent right to build in the family compound without the prior consent of the family council; (5) normally, members of a family who do not reside on the family property have no general right of ingress and egress, but have a right of entry to attend family meetings and, if members of the family council, a right of entry to inspect the state of repairs; such rights must, however, be exercised as not to interfere unnecessarily with the quiet enjoyment of the occupants.

To this clear enunciation of the rights of non-resident grandchildren of the founder of the family in the family house or compound must be added the equally careful judicial pronouncement in *Thomas v Thomas & anor*,²⁰ regarding the rights of *resident* members therein. In an action between members of a family for sharing the rents of leased portions of the family house, Butler Lloyd, J, in the Supreme Court held as follows:

Now so far as I can gather from the existing decisions, the rights of members of a family with regard to a family house are (1) to reside in it; (2) to have reasonable ingress and egress; (3) to have a voice in its management; and (4) to share in any surplus of income derived from it after necessary outgoings have been met; and if these rights are infringed they can come to this Court, which will enforce them by partition and/or sale if necessary.

There are two new points thrown up by this decision: one is the question of the right of residence of the individual member of the

²⁰ (1932) 16 NLR 5.

family, and the other is his right to apply to the court for partition or sale of the property. By later judicial pronouncements, it has been held that the individual member's right of residence is not only for life but is normally transmissible to his own children on death (*Richardo v Abal*;²¹ *Adagun v Faghola*²²) though he may not alienate by will (*Taylor v Williams*²³) or during his lifetime, eg by mortgage or purported attachment for debt (*Miller Bros v Ayeni*).²⁴ The individual's right in family property has also been distinguished from rights held in common (ie concurrent interests) under English law: see *Caulcrick v Harding*;²⁵ *George v Fajore*.²⁶ Webber, C.J., once made a distinction between rights acquired by an individual by purchase in recent times and those acquired by him as an individual member of a landowning family, as follows:

It is indubitable that if the learned Judge had found in favour of a sale of the land, a grant of declaration of title conveying a fee simple was inevitable but he does not appear to have discriminated between rights in the acquisition of native land by purchase and rights acquired under native law and custom — the former being *proprietary* rights and the latter *possessory* rights or rights of occupancy.

We need not allow ourselves to be diverted by this interesting solecism of the learned Chief Justice concerning the distinction between possessory and proprietary interests.

Now, with regard to the individual member's right to go to court to demand partition of the family house, again, judicial refinements have established that this right exists under customary tenure in case of dispute among the family members about occupation rights or about the sharing of rents from leased family property. It was thus described in *Richardo v Abal*:²⁷

The council of the family, or of neighbours, as the case might be, would divide the property into two or more parts, as required, and the eldest child, whether male or female, would take the first choice.

The same principles of partition have been described for Iboland by

²¹ (1926) 7 NLR 58.

²² (1932) 11 NLR 110.

²³ (1935) 12 NLR 67.

²⁴ (1924) 5 NLR 40.

²⁵ (1926) 7 NLR 48.

²⁶ (1939) 15 NLR 1.

²⁷ (1926) 7 NLR 58, p 59.

M M Green in her *Land Tenure in an Ibo Village*.²⁸

The court, which in modern litigation has replaced the family council at least in urban areas, will not order sale or partition of family property if one of the customary rights of the individual members enumerated above has been infringed. Thus in *Thomas v Thomas*,²⁹ the court refused to order sale or partition on the mere ground that the family head had not allowed him a share of the net rents which were shown to be nil. There was a similar refusal in *Bajulaiye v Akapo*,³⁰ where the only reason why certain individual members had demanded partition was that they wanted the family property turned into cash. The paramount consideration for the family council or the court, when called upon to order sale or partition, is what in a given situation is best for the family as a whole.

This brings us to a consideration of the indigenous institution of *The Family House*. This was thus explained in *Bajulaiye v Akapo*:³¹

The purpose of the institution is, as its name implies, to provide a place where members of the family can reside if they so desire and, so long as that purpose is still capable of achievement, I conceive that it would be wrong for the Court to order the sale of property subject to this form of tenure.

Further light was thrown on the subject by the judgment of Carey, J, in *In the matter of the Estate of Edward Forster*,³² where property left under a testator's will was held to be intended as the "family house" under the local law of tenure. He observed:

A family house (in the custom of Yorubas of Lagos) is a residence which the father of a family sets apart for his wife and children to occupy jointly after his deceased. All his children are entitled to reside there with their mothers and his married sons with their wives and children. Also a daughter who has left the house on marriage has a right to return to it on deserting or being deserted by her husband. No one has any chargeable or alienable interest in the family house. It is only with the consent of all those entitled to reside in the family house that it can be mortgaged or sold.

I have elsewhere compared the institution of family house with the English settlement.³³

²⁸ On pp 13-14.

²⁹ (1932) 16 NLR 5.

³⁰ (1938) 14 NLR 10.

³¹ (1938) 14 NLR 10.

³² (1938) 14 NLR 83.

³³ See my *Nigerian Land Law*, 4th ed, p 222.

It should be added, however, that partition or sale of a family house may still be ordered by the court if the overriding interest of the family so dictates in a particular case. This was so held in *Giwa v Otun*,³⁴ although the trust deed in that case clearly shows that it was the testator's intention that English law should apply.

We have seen above that no individual has an absolute fee simple estate in land under customary tenure. Judicial decisions have, however, clarified the situation by laying it down that, on a sale of the entire interest of the family in any piece of family land with the consent of all the principal members of the family, the purchaser acquires an estate which can only be a fee simple estate of English law: *Alade v Aborishade*.³⁵ Similarly, where family property has been duly partitioned either by the family council or by the court, into individual portions and conveyed to the members as such, each has a fee simple absolute interest in his own portion which he can convey to a third party as freely and as fully as he could an absolute estate acquired by him by means of an ordinary conveyance in English property form: *Balogun v Balogun*.³⁶

Partition clearly has the effect of breaking down the family structure with all its incidents of customary tenure. But where, as in *Bassey v Cobham*,³⁷ family land has been granted to an individual member for his occupation or use, it still remains family property although he may have improved it by, for instance, clearing some bush or reclaiming a swamp thereon.

If so far we have been considering the position as regards forms of landholding and user in the towns and urban areas in Ghana and Nigeria, we should now turn our attention to the legal situation in the agricultural areas to consider the interesting concept of the customary tenants and its development by our courts. Under Ghana customary law there are two main forms of customary tenancies—Abusa and Abunu (sometimes called Abetsem, in the Fanti language). In *Re Land at Nkwantang Christian Boy Owusu & anor v Manche of Labadi*,³⁸ Deane, C J, enunciated the principles relating to Ghana customary tenancies in these words:

³⁴ (1934) 11 NLR 160.

³⁵ (1962) WNLR 74.

³⁶ (1924) 5 NLR 90.

³⁷ (1943) 9 WACA 78; see also *Chairman, LEVB v Ashani* (1937) 3 WACA 143.

³⁸ Unreported. Divisional Court, February 9, 1932; referred to on p 97 of *Varley and Oko v Construction and Furniture (West Africa Ltd) & ors* (1962) 1 GLR 86.

Now there is no doubt that the courts acting on equitable grounds have recognised estates as having been carved out of stool lands when persons, subjects of the stool, have settled down upon stool lands and have for a long period of time so identified themselves with the lands as to become well recognised as the owners, the courts, in spite of the fact that the statutes of Limitations have no application between natives, so that mere occupation alone gives no right as against the owner, have always held that such occupation, if coupled with circumstances which raise an equity in favour of the occupier, should enure to the advantage of the occupier as against anyone who seeks to oust him from such occupation. But it is to be noted, what is indeed clear upon principle, that mere occupation alone for a time however long raises no equity, although it may serve as evidence of an agreement by the party claiming to abandon or release a right. It is only where the original owner has so acted as to induce the occupier to alter his position on the reasonable faith that he has released or abandoned his claim, that any equitable right accrues to the occupier, and apart from such circumstances, occupation will be immaterial.

In *Donkor v Asare & ors*,³⁹ the facts briefly were as follows. In 1952, the defendants applied to the Akwapim Stool for a grant of land for development into a football field. As the Oyoko Family was in possession, the Stool approached the family in accordance with customary law and the latter made a direct grant of a piece of land to the defendants under an agreement that the defendants should develop the land and share the proceeds with the family on the basis of one-third to that family. Two years later, a member of the Oyoko family purported to sell the land to the plaintiff without the consent of the head and principal member of the family. A year later, the plaintiff purported to buy the land from the family. Thereafter, the Oyoko family gave the defendants notice to quit, but they refused. The plaintiff thereupon brought an action against the defendants who were given judgment by the trial court. On appeal to the Accra High Court, (Land Division), it was held that the plaintiff had failed to prove that the sale had been in accordance with Guaka custom and that, in any case, the agreement between the Oyoko family and the defendants created a right in town land of the same nature as *Abusa* or *Abunu* (Abetsem) tenancy of agricultural land which cannot be determined upon short notice except where a tenant has denied the title of his grantor.⁴⁰ Ollenu, J, made the following interesting observation:

It is enough for me to observe that from the evidence that the licence was

³⁹ (1960) GLR 187.

⁴⁰ *Oheimen v Adjei & anor* 2 WALR 275 and *Thompson v Mensah* 3 WALR 240 were cited with approval.

granted with customary practice, and particularly from the evidence led both by the co-plaintiff and the first defendant that under the said agreement the defendants were to develop the land at their own expense and to share all proceeds accruing from it with the owners, it appears to me that the licence granted is not a mere licence in the English sense, determinable at will; rather it is a right in town land which is of the same nature as *Abusa* or *Abunu* (Abetsem) tenancy of an agricultural land.

Yet another interesting feature of the Ghana customary tenancy was dealt with in *Asuon v Faya*.⁴¹ There, the plaintiff brought an action against the defendant for the recovery of an old cocoa farm which he claimed to be his family land. He claimed that the land was entrusted to the defendant to manage, but this was denied by the defendant who alleged that it was granted to his predecessor on an *Abusa* customary tenancy by the occupant of the stool of Nkuntanasi who was the head of the Anona family. The disputed land was situated in Fanti land within the village of the stool. The question for determination was whether the disputed land was plaintiff's family land or whether it was part of stool land as defined by section 31 of the Administration of Stool Lands Act, 1962.⁴² It was held by the High Court at Cape Coast that the defendant or his predecessor was never a manager or caretaker of the cocoa farm in dispute, but occupied it only as an *Abusa* tenant under customary law. The court explained that the purpose of the Administration of Stool Lands Act and the Rent Stabilization Act was to do away with absentee-landlordism and the *Abusa* and *Abanu* systems and to revolutionize the tenure of landholding insofar as land tenancies caught by the Act are concerned.

In *Akrofi v Weresi & anor*,⁴³ Coussey, P, explained the nature of these forms of tenancy as follows:

It is a common form of tenure throughout the country for a landowner who has unoccupied forest or virgin land, which he or his people are unable to cultivate, to grant the same to a stranger to work on in return for a fixed share of the crops realised from the land. In such a case the tenant-farmer, although he has no ownership in the soil, has a very real interest in the usufruct of the land. The arrangement may be carried on indefinitely, even by the original grantee's successor, so long as the original terms of the holding are observed.

⁴¹ (1963) 2 GLR 77.

⁴² Under s 31 of the Act: "Stool land includes land controlled by any person for the benefit of the subjects or members of a stool, clan, company or community as the case may be and all land in the Upper and Northern Regions, other than land vested in the President and accordingly 'stool' means the person exercising such control."

⁴³ 2 WALR 257, p 259.

The West African Court of Appeal explained⁴⁴ that *Abusa* is the system whereby an owner of uncultivated land grants it to another person (usually a stranger) to cultivate and to share the produce of that farm with the owner in the proportion of one-third to the latter and two-thirds for himself. *Abunu*, on the other hand, is the system by which a person who has already cultivated his farm afterwards hands it over to another person to plant and maintain it with a view to the proceeds being shared in halves or where the owner of land gives financial assistance to the tenant to make the farm on the landlord's land.

In *Total Oil Products Ltd v Obeng and Manu*,⁴⁵ the first defendant leased a piece of land to the plaintiff company for a term of years and put it in possession. He was an Ashanti man and not a subject of the Akim Abukwa stool. He had purchased the land from the second defendant who was a subject of that stool. Before the lease was executed, the plaintiff company paid the first defendant rents in advance out of which the first defendant paid the second defendant the purchase price of the land and the buildings thereon. The plaintiff company, having been ejected from the land by the Tafo stool and upon the failure of the first defendant to put them back into possession, was obliged to take another lease of the same land from the Tafo stool. The company, therefore, brought an action to have the lease granted by the first defendant rescinded and also claimed recovery of the rent as well as general damages. It was held, *inter alia*, by the Accra High Court, that (a) the right of a person by customary law to the free use of land is limited to land in its natural state, ie land which has nothing but natural products thereon, not land which has been developed by human skill, industry or capital. No person is entitled to the free use of a cocoa farm made by another, or a house built by another person; (b) that a stool subject forfeits his usufructuary title to stool land in his possession if he denies the title of the stool, and this he can be deemed to do where he claims that the land he occupies belongs to a stool other than the stool to which he is a subject and that he holds the land as grantee of that stool. The second defendant has not made any such claim and cannot, therefore, be said to have ever forfeited his title to the land; (c) a fee simple estate is unknown in customary land law, but a conveyance which purports to convey the fee simple in land is not thereby void; rather it has the effect of transferring the highest estate or interest which the transferor has in

⁴⁴ On p 260.

⁴⁵ (1962) 1 GLR 228.

the land;⁴⁶ (d) a stool cannot alienate land in the possession of a subject without the consent of that subject;⁴⁷ (e) a lease by a stool subject of land in his possession does not constitute an alienation of his usufructuary title and does not, therefore, require the consent of the stool. As a stranger-transferee is in the same position as his subject-transferor, the grant by the first defendant to the plaintiff company is, therefore, valid in spite of the absence of such consent; and (f) the grant of a lease by the Tafo stool to the plaintiff company is null and void because the stool purported to grant the land to someone else without the consent of the subject in possession.⁴⁸

Let us now compare the Ghana judicial treatment of this interesting phenomenon with the somewhat similar treatment of the same subject in Nigerian courts. The theory, in brief, is that where strangers have been granted land for occupation and use, they are entitled to continue in peaceable enjoyment until they forfeit their rights either by alienating a portion of the land to others without the prior consent of the grantors or of their descendants, or by doing any other act or thing which would work a forfeiture under customary law, eg by failure to pay the customary tribute or by putting the land to uses other than those originally fixed. The court has, however, in the exercise of its equitable jurisdiction, not always allowed the landlords or grantors and their descendants to obtain a forfeiture. In *Chief Uwani v Akom & ors*,⁴⁹ certain headmen of four compounds of Aros had settled at Ukpom in the Bende District of Owerri Province, with the permission of the respondent as representing the community to whom the land belonged. When one Aro later alienated his farming rights to another Aro, the respondent Chief brought an action of ejectment against the people in all the four compounds. The Supreme Court ruled, however, that the Aro people should be permitted to remain on the land on payment of an annual tribute of £15 (₦30.00) to the respondent and his people.

An interesting illustration of the treatment of this subject by the Court is the recent decision of the Supreme Court in *Odunaran & ors v Chief John Asarah & ors*.⁵⁰ The plaintiff brought this action as representing themselves and the entire people of Uwerun in the Central Urhobo District of the Mid-Western State. The land in dispute is a portion of their land. Since its first settlement by their

⁴⁶ *Adday v Bonsu II* (1961) GLR 273.

⁴⁷ *Gu Lightly & ors v Ashinfi* (1955) 14 WACA 676; *Oheimen v Adjei & anor* (1957) 2 WACR 275.

⁴⁸ *Thompson v Mensah* (1957) 3 WALR 240; see also *Kotey v Odoi* (1962) GLR 347. (1928) 8 NLR 19.

⁵⁰ (1972) 6 SC 1.

ancestor from time immemorial, they had lived and farmed on the land, raised rubber and coconut and palm plantations on the land, put tenants on it, fished in the creeks and ferried people from one side of a river lying therein to the waterside, had jujus on the land and, in fact, exercised maximum acts of ownership on the land without hindrance from the defendants or any other people until the Tennessee (Nigeria) Inc entered upon the land in search of oil in November, 1965. The five children of the plaintiffs' ancestor now occupy the five main quarters. It was further proved that, long after the plaintiffs' predecessors had settled on the present site, the defendants' ancestors came and settled at a place about three miles away; the defendants begged the plaintiffs, and the latter agreed, to allow them to live with the plaintiffs on their own side of the bank of the river. The learned trial judge then granted a declaration of title to the plaintiffs, ordered that the defendants refund to the plaintiffs the sum received by them from the oil company in respect of the land in dispute, granted an order for forfeiture against the defendants and their people in respect of all rights and privileges hitherto enjoyed by them on the land in dispute, and also an injunction restraining the defendants and their people from further trespassing on the land in dispute.

It is clear that, on the issue of title, where a plaintiff claims that a defendant is his customary tenant on a piece of land while the defendant, on the other hand, also claims to own the land, the question before the court is whether the defendant's possession was by the plaintiff's permission. It is for the plaintiff to show that he put the defendant there. The learned trial judge found that, in the instant case, although traditional evidence was relied upon by both sides, the respondents had established that they put the appellants on parts of the land in dispute. While it is true that *Ashogbon v Odunsi*,⁵¹ and *Ogbakumanwu & ors v Chiabolo*⁵² have established that customary tenants should not suffer forfeiture for trite acts of misbehaviour and that the courts are loath to order forfeiture except in the most exceptional circumstances, it is to be observed that *Ashogbon v Odunsi* was essentially a case of an insult to the Chief as head of the family, while the court in *Ogbakumanwu case* refused to order forfeiture because the defendants at the pre-trial stage honestly believed that they were joint owners with the plaintiffs. The appellants' misconduct in leasing or letting the land in question to the oil company was such a gross act of misconduct as to warrant forfeiture, as indeed the court

⁵¹ 1 NLR 7.

⁵² 19 NLR 107.

did in *Onisiwo v Faghenro*,⁵³ where the court ordered forfeiture because the customary tenants purported to grant a lease of part of the land. It may also be pointed out that in that case there was a specific plea for relief against forfeiture by the defendants, but there was not in the present case. The Supreme Court observed:

It is to be noted that in almost all the reported cases in which the courts have been disposed to grant relief against forfeiture by a community of immigrant customary tenants, it has been on the ground that to order forfeiture would work great hardship on such tenants who might otherwise have nowhere else to go. That is, however, not the case here, where the appellants' own homeland is adjacent to the respondents' and is not shown throughout the proceedings to be already over-crowded or uninhabitable.

In *Waghoreghor & ors v Aghenghen & ors*,⁵⁴ the court, in another recent case involving acquisition of land for petroleum exploration in the Mid-West, had to consider the nature of the rights of customary tenants and the extent to which they are entitled to a share of the compensation money paid to the customary landlords as owners. In the case itself, the defendants had at least as individuals through their predecessors in title been granted rights of user with respect to the land for which they had at all material times paid tributes, they had from time immemorial planted economic crops and other produce thereon and generally farmed them according to the ordinary course of husbandry practised in the locality, and there was no finding that the plaintiffs had either lived or farmed on the disputed land. No dispute would seem to have arisen as between both parties over all these years until Shell-BP began to explore for oil on this land. There is neither authority nor warrant for the assertion that, in order to become customary tenants, the defendants must establish an express grant to them as a community, such as was presumed to have taken place in the undisputed portion of the land; customary tenants can and often have their parcels of land granted to them individually, provided they duly honour the incidents of tenure, especially the payment of tributes. It was not in dispute in this case that the defendants were lawfully on the disputed land. If, as contended by the plaintiffs, the defendants are not customary tenants, what are they? They occupied and used the land as ordinary customary tenants do, the plaintiffs had no concurrent rights of user with the defendants in respect of the disputed land, the defendants had duly been paying

⁵³ 21 NLR 3.

⁵⁴ (1974) 1 SC 1.

tributes, the £105 (N210.00) paid by Shell-BP was compensation for user and economic crops, the acquisition had indeed displaced only the defendants who are in possession of the land, and the courts had in two previous judgments refused to grant either forfeiture or an injunction against the defendants. The only reasonable conclusion to draw from these legal facts is that the defendants are either customary tenants of the disputed land or possess rights analogous to those of such tenants. All the incidents of customary tenure are present. The defendants cannot be regarded as licencees by arguments derived from English land law, as the learned trial judge had done. In customary land law parlance, the defendants are not gifted the land; they are not 'borrowers' or 'lessees'; they are grantees of land under customary tenure and hold, as such, a determinable interest in the land which may be enjoyed in perpetuity subject to good behaviour. This interest has in practice now been regarded by the courts as practically indefeasible, once permanent buildings or other forms of improvements like extensive commercial farming and/or occupation have been established thereon by the grantees. Any proved misbehaviour is usually now punished by a fine, as has happened in the present case. They enjoy something akin to *emphyteusis*, a perpetual right in the land of another. A very important factor is that the grantor of the land, once it has been given to the grantees as customary tenants, cannot thereafter grant it or any part of it to a third party without the consent or approval of the customary tenants. The grantor is not allowed to derogate from his grant.⁵⁵

As with the customary tenant in this type of legal situation where the grantors do not live on the land or farm thereon, "possession is nine-tenths of the law". It is they who would lose not only their means of livelihood, but also their very existence, by the compulsory acquisition of the land in question. With respect to the disputed land, the defendants were held to be customary tenants, not licencees and, as such, entitled to two-thirds of the compensation money.

In *Bassey & ors v Eteta*,⁵⁶ the plaintiffs were granted the two-thirds share of the rent received from the lessees of land to whom the defendant grantors had illegally leased part of the grantee's land; the plaintiffs had therefore adopted or ratified the defendants' illegal act. But in *Chief Etim & ors v Chief Eke & ors*,⁵⁷ where it was an express

⁵⁵ *Chief Sam Warri Esi v Itsekiri Communal Land Trustees & ors* (1961) WRNLR 15, p 21.

⁵⁶ (1938) 4 WACA 153.

⁵⁷ (1941) 16 NLR 43.

condition of the original grant that the grantors should retain a concurrent right of exploitation of the resources of the farmland, the subject of the grant, with the grantees, the proceeds from reaping palm nuts and rents of the land were held to be apportionable equally. It is unnecessary to import the concept of a quasi-contractual obligation into this situation, as the court obviously did in *Bassey v Eteta* (see p 155 thereof). It is sufficient that, in the exercise of its equitable jurisdiction, the matter would be a fair distribution of the proceeds of the land, be they from lease or sale or compulsory acquisition. The main consideration is that the grantees would, by the surrender of their possessory title, lose so much more than the grantors whose reversionary interests are now quite small, if not nebulous.

The practice regarding Itsekiri Land Trust furnishes an example of how the radical title of a piece of land could be in one entity while the possessory rights reside in another; there is also the principle of apportionment of the proceeds as between the two. In the recent decision in *Itsekiri Communal Land Trustees v Warri Divisional Planning Authority & ors.*⁵⁸ the Supreme Court awarded one-third to the Itsekiri Land Trustees and two-thirds to the customary tenants as fair shares in the compensation money paid for the acquisition of land. No hard and fast rule can be laid down as to the exact proportion of the shares in every case. It seems strange that the learned trial judge in this case had refused to entertain the defendants' claim to apportionment on the sole ground that apportionment is unknown to customary law. The principle of apportionment is part and parcel of every system of law that recognizes rights and obligations in relation to parties to a dispute. The High Court at Ughelli, like every other High Court in the Federation, is invested with equitable jurisdiction in all disputes before it which require the application of principles of equity. The case before the learned trial judge is one such, and it is not consonant with justice that that court should declare a *non liquet* in this matter. If apportionment is unknown to customary law, how does the principle of compulsory acquisition form part of customary law so as to be payable to the plaintiffs?

IV

The Customary Pledge of Land

Another interesting area of customary law in which our judicial

⁵⁸ (1971) 11 SC 235.

processes have done much to clarify the issues and develop the law is the customary pledge of land. Here, again as in the case of customary tenancies, we shall draw mainly upon the examples of Ghana and Nigeria, if only because the indigenous pledge has had the most developed set of principles evolved in our courts for nearly a century.

Let us begin with an examination of Ghana law on the subject. In *Addo Kofi v Addo Kofi*,⁵⁹ land was pledged in 1869 to secure a loan of 6/6d. In 1926 the successor of the pledgor offered to redeem it from the successors of the original pledgee. It was held that the pledgor or his successor was entitled to redeem it after that long lapse of time. Similarly in *Kuma & anor v Kofi & anor*,⁶⁰ land which was originally pledged for either one keg or half a keg of gun powder was held to be redeemable even though the action to redeem was being brought after some generations of the plaintiff's successors of the pledgee had passed. It was laid down in *Ebiassah v Abahio*,⁶¹ that as soon as the debt is paid the pledgee must vacate the land or be ejected. Notice is normally given to the pledgee before the amount of the debt is tendered by the pledgor or his successors. A pledgee of land under customary land law is not entitled, as is a legal mortgagee under English law, to sell the pledged land for failure to pay the debt in time; he can only do so upon a court order. In the Keta case of *Dabla v Ativor*,⁶² the father of the plaintiff pledged the land in 1916 to the defendant. There were a few coconut trees on it at the time of the pledge. The defendant later developed the land into a plantation. In 1947, when the plaintiff's father died, he gave notice to the defendant of his intention to redeem the land. The defendant refused to accept payment and claimed that the transaction between him and the deceased was a sale and not a pledge since by customary law, a pledgee should not be permitted to improve the pledged property without the pledgor's permission; the plaintiff and his predecessor in title, having sat by and permitted him to improve the land, were estopped from disputing that he was the owner of it. The defendant failed to prove a sale by documentary evidence, but the oral evidence that the transaction was a pledge was irresistible. The West African Court of Appeal upheld the judgment of the Land Court that the transaction was clearly a pledge. It is quite clear as Ollenu, J, pointed out,⁶³ that the

⁵⁹ 1 WACA 284.

⁶⁰ 1 WALR 128.

⁶¹ 12 WACA 106.

⁶² Unreported judgment of the Land Court, delivered March 5, 1949; confirmed by WACA on February 7, 1951, and discussed on pp 100-101 of N A Ollenu's *Customary Land Law in Ghana*, 1962.

⁶³ *Ibid*, p 102.

principle that the pledgee who improves the pledged land does so at his own expense and does not become the owner of it by reason of such improvement is in consonance with both the customary law principle and the equitable doctrine of acquiescence. On the well-established maxim "once a pledge, always a pledge", "acquiescence can never arise where a person, knowing quite well that he has no title to land and that he has only a limited interest in it, spends money to improve it in a manner which he knows he is not entitled to do. In such a case he cannot claim the benefit of the principle."

That any improvement carried out by the pledgee can never be a bar to redemption by the pledgor or his descendants was again emphasized in *Dzanku v Kwadwo*,⁶⁴ in which a family had pledged a parcel of land for six shillings. Several years later, a descendant of the pledgor wishing to redeem the land tendered the six shillings to the defendant, a descendant of the pledgee, who refused the payment. The plaintiff alleged that the land was now worth £500. On appeal to the Ghana Court of Appeal, it was held that a pledge is perpetually redeemable and that a pledgee is entitled to use the property for his own benefit and without accounting to the pledgor, but that the fact that the pledgee has spent his own money to improve the property cannot bar the pledgor from recovering the property upon payment of the debt of six shillings and no more.⁶⁵

We may now turn to Nigerian case law by beginning with the quite recent case of *Okoiko & anor v Esedalue & anor*.⁶⁶ There, the plaintiff's case was that one Omoro had a piece of land called Omokpa and five children, one of whom called Esegbe pledged the land after Omoro's death to one Eto, who was the grandfather of the first defendant, for three pieces of cloth. Anatoma, the grandfather of the second defendant, and Use, the grandfather of the third defendant, had each contributed a piece of cloth to Eto's own piece of cloth to make up the three pieces of cloth required for the pledge of Omokpa land by Esegbe to whom the cloths were given. They all proceeded to put the land to use and had continued to do so till the present action was brought. Evidence was led to prove that, a few years previously, his family decided to redeem Omokpa land from the defendants who agreed to the proposal on the condition that the plaintiff's family should pay the sum of £1,000 (₦2,000) to the defendants' families. The plaintiff's family regarded this amount as being excessive and so

⁶⁴ (1960) GLR 31.

⁶⁵ *Kofi v Kofi* 1 WACA 284 was cited with approval.

⁶⁶ (1974) 3 SC 1.

refused to pay. A little later, the plaintiff's family renewed the demand to redeem their land but, this time, the amount asked for by the defendants was reduced to £600 (₦1,200) which the plaintiff's family still considered excessive in view of the fact that Omokpa land was originally pledged for the equivalent of £15 (₦30). Thereupon, the defendants changed their tune and put forward the claim that the land was originally an absolute sale by Esegbe to their grandfathers, and not a pledge. There was uncontradicted evidence that, according to the custom of the Iyede people, the sale of land was unknown, and that land could only be pledged and was redeemable on payment of the exact amount for which it was pledged and no more.

The learned trial judge found as a fact that the actual date of the transaction was not established and that the defendants had been in exclusive possession of the land since it was pledged to them by the plaintiff's family. He nevertheless held that pledged land is redeemable, however long it might have been in the pledgee's possession. With regard to the evidence that the defendants grew rubber plantations on the land, the High Court at Ughelli held that, although a customary pledge permits the pledgee exclusive possession of the pledged land, it does not confer on him such rights as are exercisable by an absolute owner of land. The pledgee only enjoys a licence to use the land so long as the mortgage debt remains unpaid, and any accretion to the land during the period of his occupation passes to the pledgor on redemption. After citing Elias *Land Law and Custom*, p 178, 2nd edition, and the interesting case based on it of *Jimoh Amoo v Rufai Adigun*,⁶⁷ in which the pledgor was on redemption allowed credit for the improvement made on pledged premises by the pledgee while in possession, the court came to the following conclusion on this point:

I also endorse the view that a mortgagee is not entitled to compensation for any economic trees or improvements he may have made on the pledged land as the inability of the mortgagor to pay such compensation may deprive the mortgagor the right of redemption of the property which native law and custom allows him.

The High Court then granted to the plaintiff recovery of possession of Omokpa land which he held to have been pledged and not sold by Esegbe to the grandfathers of the defendants, and a perpetual injunction against the defendants from using the land or interfering with the plaintiff's occupation and possession of it. The plaintiffs were also

⁶⁷ (1957) WRNLR 55, p 56.

ordered to repay the sum of £15 (N30) as refund of the mortgage debt due to the defendants for the pledged land. The Court further ordered that the defendants must be given an opportunity to harvest their crops on the land and remove their property, structures, farm implements and other articles from the pledged land.

In the present case, the defendants led no evidence at all to discharge the onus on them that the original transaction was a sale which gave them absolute title to the land or that, contrary to the evidence of the plaintiff and his witnesses, the sale of land was known to Iyede customary law: *Ochonma v Unosi*.⁶⁸ Similarly, in *Leragun & ors v Funlayo*,⁶⁹ where the plaintiffs claimed recovery of land which the defendant admitted had originally been pledged to her for the sum of £12:10/- and later sold to her for an additional sum of £8, but there was no evidence produced by the defendant as to the alleged sale, it was held that the mere planting of economic crops in the pledged land is not by itself conclusive as to the defendant's ownership, and also that lapse of time (in this case over thirty years) is not a bar to recovery of a pledged land.

The Supreme Court made the following noteworthy observation:

Now, this appeal raises in an interesting form an age-long question of customary pledge of land, namely, whether the use to which pledged land has been put by the pledgee in occupation is in any way circumscribed and also whether any improvement carried out by the pledgee while in possession can be compensated for in some way by the pledgor; underlying the two inter-related questions is, of course, the basic issue as to whether the use made by the pledgee of the land should be regarded as interest on the capital originally borrowed by the pledgor. One invariable rule of customary pledge that can be gathered from the reported cases is that the pledgee always goes into possession and has the right to put the land to some productive use. To that extent, such use is a kind of interest due on the amount of the loan. The very nature of a customary pledge, which is perpetually redeemable, is that the pledgee has only a temporary occupation licence and that he must yield up the pledged land as far as possible in the form he took it on originally. This means that he must put it to only ordinary use so that its return to the pledgor should be unencumbered in any way. The planting of economic crops like cocoa or rubber can only be undertaken by the pledgee in possession at his own risk, unless of course there is express contract permitting him to do so. If the land pledged is already planted by the pledgor with economic trees, there may be a presumption in favour of the pledgee using the land as such until redemption of the pledge. The whole question was first raised

⁶⁸ (1965) NMLR 321, p 323.

⁶⁹ (1956) WRNLR 167.

in what is probably the first case on customary pledge heard by Nigerian courts which took place in 1889. In *Kuahen v. Arose*, where there was a pledge of palm trees, Smalman Smith, C.J., held that the amount of the produce which came to about £12 per annum while the prevailing customary tribute was £9 per annum must be taken into account so that the capital borrowed could be reduced each year by the excess of £3 per year. The learned Chief Justice regarded as 'unjust' a custom according to which, as alleged by the plaintiff, the pledgee was entitled to 'farm the trees and hold them until the original debt be paid, giving and rendering no account of the value of the produce, which in this case amounted to more each year than the amount paid as tribute'. The matter was taken a step further in *Jimoh Amoo v. Rufai Adigun* (1957) W.R.N.R. 55 in which the plaintiff's claim for an account of rents collected by the defendant pledgee while in possession of the plaintiff's shop in respect of a loan was granted. It seems to follow from these two cases that the court will in all proper cases take into consideration the nature and character of the use to which the pledgee has put the land while in possession, so that any unjustified benefits thereby derived by the pledgee may be brought into the final account when the pledge is ultimately being redeemed. No longer, it would seem, can the pledgee in possession take all the benefits from his commercial exploitation of the land and still get back his original capital; much less can he claim against the pledgor any benefit arising from his having planted the land with economic crops like cocoa or rubber, or from his having carried out improvements on the pledged premises.

The Court further pointed out:

In the present case, the loan took the form of three pieces of cloths worth £15 (N30) handed over to the grandfather of the pledgor by the grandfather of the pledgee. The debt was, therefore, not incurred by the pledgee lending money to the pledgor but by being given three pieces of cloth. The general incidents of tenure of pledged land, however, attach to it so as to make it perpetually redeemable. We think that the planting of the land with economic crops like rubber must be regarded as necessarily incidental to the use of the land since there is no evidence that it was forbidden under the terms of the original pledge; but it is also clear, nevertheless, that the pledgee has no right to any compensation or credit for the plantations, which accrue to the pledged land on the principle of *quicquid plantatur solo, solo credit*. It was, therefore, as an act of grace rather than as a matter of legal right, that the learned trial judge ordered the plaintiff/appellant to permit the respondents to reap the next harvest before returning the pledged land to the appellant. The law is that the pledgee should quit the land as from the date of the judgement in favour of the pledgor.

Finally, the Court said:

One other important point is that the pledgor's right of redemption cannot be clogged in any way by the pledgee, such for instance as by demanding any amount in excess of the sum for which the land was originally pledged, or by planting the pledged land heavily with economic trees, or by using other

subterfuges to delay or postpone the pledgor's or his successor's right to redeem; nor is lapse of time a bar to the exercise of the right of redemption, for customary pledges of land are perpetually redeemable.

V

Law Relating to Customary Marriages

We may attempt here a brief summary of the essentials and incidents of a customary marriage by reference to a few cases in illustration. Thus in *Yaotey v Quaye*.⁷⁰ *R* married under the Marriage Ordinance Cap 127 (1951 revised edition) and had three children by this marriage of whom the plaintiff was the eldest. *R* divorced the ordinance wife and married the defendant under customary law, and the issue was a girl. *R* also had another child by another woman whom he did not marry either according to the Ordinance or under customary law. When *R* died intestate in 1961, he was survived by all the five children and the two women. The plaintiff's eldest child applied for letters of administration on the ground that she and the other two children of her mother were the only lawful children of their deceased father by virtue of the Ordinance marriage of their mother. The defendant ordered a *caveat*, alleging that as a widow by customary law, she was entitled to a share in the estate, as also was her child who was a lawful child of the deceased. The Accra High Court held that, (a) as *R* was survived by children of the marriage under the Ordinance, succession to his estate should be governed by section 48 of the Marriage Ordinance; (b) by customary law all children who are acknowledged by a man as his children are lawful and the defendant's child was accordingly entitled to share equally with the plaintiff and her brother and sister; (c) the essentials of a valid customary marriage in Ghana are the agreement by the parties to live together as man and wife, consent of the families of both established either expressly or impliedly and consummation of the marriage in the sense that the couple lived together openly as man and wife. Accordingly, the defendant was the lawful wife of *R*, but the other woman was not a wife by customary law; (d) the fifth child by that other woman was however acknowledged by *R* as his child and, accordingly, was entitled to share in her deceased father's estate; and (e) that it is an incident of customary marriage that the husband should provide maintenance and shelter for the wife. After his death this responsibility devolves upon his family.

⁷⁰(1961) GLR 573.

Consequently, the family head is bound to provide maintenance for the widow of a deceased member of the family during the period of the funeral. Thereafter he must offer her in marriage to another member of the family. If the family does not want her to remain with them, proper customary proceedings similar to customary divorce proceedings should be instituted to settle the matter.⁷¹

It will be noticed that this case, in addition to explaining the problems raised when a man has mixed a customary marriage to one woman with an Ordinance marriage to another also raises the issue of legitimacy of the children of the marriage. Under Ghana customary law, as indeed under its Nigerian counterpart, there is no question of illegitimacy of children born of marriages contracted thereunder. The issue of illegitimacy, however, arises in the case of children born to a man by another woman during the subsistence of an Ordinance marriage.⁷²

The importance of the type of marriage contracted by a man is that on it may depend the rights of the issue of the marriage to inherit or not to inherit their father. On the authority of the Nigerian case of *Cole v Cole*,⁷³ and the Ghanaian case of *Coleman v Shang*,⁷⁴ whenever a man married under the Marriage Ordinance dies leaving a wife or a wife and children surviving him, succession to his estate will be determined by English law. It follows that where there is mixture of a statutory marriage with one under customary law in the sense already explained above, the children of the statutory marriage in strict theory take, on their father's intestacy, all the property to the exclusion of those born out of wedlock. Our courts have nevertheless interpreted the inexorable operation of customary law notions in such a way that all the children of a deceased intestate tend to share equally. The principle usually applied in such cases is that of natural justice, equity and good conscience. Let us briefly illustrate. In *Siaw v Sorlor*,⁷⁵ S died in 1935, survived by two wives married under customary law, one of the wives having born him one child while the other had several children. After his death his brother T, who had been duly appointed successor by the family, shared the deceased's self-acquired property *per capita* among all the children of the two

⁷¹ The case of *Coleman v Shang* (1961) GLR 145, PL was cited as on all fours with the instant case.

⁷² *Nartey & ors v Koshie & anor* (1961) CLR 728.

⁷³ (1898) 1 NLR 15.

⁷⁴ (1961) GLR 15.

⁷⁵ (1960) GLR 77.

marriages. Each child duly accounted to *T* for the proceeds of his portion of the land until *T*'s death two years later. Thereafter the children ceased to account to anyone. Some 24 years later, the plaintiff, the only child by one of the deceased's wives, sued the defendant who was of the several children by the second wife, claiming that the division done by *T* was a temporary arrangement to pay off his father's debts, and that he was by Shai customary law, entitled to a share of the property equal to half *per stirpes*. It was held by the Accra High Court that, (a) although under Ga-Adangbe customary law, the general principle might be that the property of a deceased person might be divided among the children *per stirpes* on the basis of the number of wives, nevertheless, customary law gives a discretion to the family to share the property *per capita* if adherence to the strict rule would cause inequity and hardship; (b) such a discretion in a family applies generally whatever the local rules of inheritance may be; (c) in the instant case, the plaintiff, on whom the onus lay, had failed to establish that the *per capita* apportionment in question was intended to be temporary. With this Ghana case should be contrasted the Nigerian decision in *Danmole v Dawodu*.⁷⁶ There, a deceased intestate left him surviving nine children by four wives married according to Yoruba customary law. On appeal to the Supreme Court of Nigeria in 1958, it was held (a) that distribution should not be among all the nine children *per capita* but into four shares *per stirpes* according to the number of wives; (b) that this mode of distribution is the universal principle in Yorubaland; (c) that if a dispute should arise among the claimants, the family head had a final discretion to order that the *per capita* method rather than the *per stirpes* method should be adopted; (d) that the *per capita* method was a relatively modern innovation; and (e) that the *per stirpes* method is not contrary to natural justice, equity and good conscience. The Privy Council upheld these decisions.

A Ghanaian case which is interesting because customary law was applied to regulate the intestate succession to the estate of a deceased Ghanaian Moslem is *Kwakyie v Yuba & ors*.⁷⁷ There, two brothers *KP* and *KK*, both deceased, were Moslems. *KK* died without issue. The defendants were the children of *KP*. The plaintiff was the customary successor to *KK*, and claimed a declaration of title to a farm left by *KK* and for accounts. The defendants contested the claim on the following three grounds: (a) that the plaintiff's appointment as

⁷⁶ (1962) 1 WLR 1053 PC.

⁷⁷ (1961) GLR 720.

successor was invalid because it was made at an improperly constituted meeting; (b) that the plaintiff was not a uterine brother of *KK* and, in any case, there was a brother of the full blood of the deceased who could have been appointed; and (c) that the deceased *KK* was a Moslem and succession to his estate must be governed by Islamic law and that as the deceased died without issue, the defendants as the children of his brother were the proper persons to succeed him. The High Court of Accra held (a) that the appointment of the successor was in order and that in Ghana succession is not based upon a person's religion but it is regulated by customary law unless otherwise provided by statute; (b) that as *KK* was alleged to have been a Moslem, Mohammedan law would apply to his estate if it was proved that his marriage satisfied the conditions of the Marriage of Mohammedans Ordinance Cap 129, particularly section 10 thereof which requires that the marriage must have been registered under the Ordinance; (c) that a marriage by a Mohammedan according to Mohammedan law is at its very best a marriage by customary law, and does not affect succession to his estate, unless the said marriage is registered under the Ordinance; and (d) that as there was no evidence of the registration of *KK*'s marriage, Mohammedan law cannot apply to his intestate estate.

It is of passing interest to remark that both the form of marriage and succession to the estate of an intestate may sometimes depend upon whether the particular society is patrilineal or matrilineal. Both types are to be found in nearly all societies in Commonwealth Africa. The patrilineal form of succession is the predominant type in Nigeria, while the matrilineal is very much in evidence in Ghana. For example, succession in Accra is matrilineal, the maternal family consisting of descendants in the direct female line of a common ancestress, however remote the relationship.⁷⁸ It has, however, been held *obiter* in *Siaw v Sorlor*,⁷⁹ that the children of a deceased person whose intestate estate is subject to matrilineal succession are entitled to support and to training from their father's estate and also to a share each of their father's personalty.

We may illustrate very briefly in this connection how the courts have handled problems relating to customary marriages either in the light of application of the doctrine of repugnancy or by appeal to constitutional rights of the individual. Thus, through the application of the doctrine of repugnancy, the courts have gradually set their

⁷⁸ *Okoe v Ankrah* (1961) GLR 109.

⁷⁹ (1960) GLR 77, p 79.

face against certain obnoxious or obsolescent practices or aspects of customary law. On the ground that an alleged custom is contrary to natural justice, equity and good conscience, the court held in *Edet v Essien*,⁸⁰ that where a man was engaged to be married to a woman under customary law and the latter deserted him for another by whom she had two children, the deserted man could not claim the children under an alleged local Efik custom. On the other hand, in *Amachree v Goodhead*,⁸¹ the defendant chief was the head of the family of the husband for whom the wife bore no children until his death. The wife, who had remained in the house of her deceased husband's family, later had a daughter by another man outside. The family of the wife claimed the child on the ground that it was illegitimate and could not either physiologically or legally belong to the defendant chief's family. The Divisional Court at Degema, affirming a Native Court's decision, held that the child belonged to the chief's family to whose custody the child was therefore assigned. The court considered this decision to be in accordance with both customary law and natural justice or humanity.

It must nevertheless be said that in so many of the cases decided on this principle, no consistent principle is discernible and that some of the decisions are hard to justify. This is probably an area in which the court has not made a very notable contribution.

But in the cases coming before the court on pure issues of customary marriage and the family, the courts have tended to apply straight judicial reasoning. For example, in *Chawere v Aihenu & anor*,⁸² a wife under Yoruba customary law deserted her husband having been seduced by the plaintiff, with whom she later cohabited. A Native Court ordered the plaintiff to refund to the injured husband £20 as 'dowry' previously paid by him on the wife. The woman later deserted the plaintiff for a third man, with whom she was living when the action was brought against her and the third man for the return of the £20 and £4:10/- (as the cost of a sewing machine bought for her). The court held (a) that the lower court was wrong in holding that the very fact of a woman living in adultery with another man made her become the wife of the adulterer under customary law; (b) that the claim of the plaintiff could be against the adulterer only or by way of damages for adultery with the plaintiff's wife; and (c) that on the evidence the plaintiff's claim was bad because the third man was not responsible

⁸⁰ (1932) 11 NLR 47.

⁸¹ (1923) 4 NLR 101.

⁸² (1935) 12 NLR 4.

for the woman's desertion of the plaintiff. In very similar circumstances, the Ghana Court of Appeal held in *Ginburo & anor v Kaba*⁸³ that the husband was not entitled to a decree ordering the alleged wife to return to the man who brought the action.

Again, in the recent case of *Egri v Ukperi*,⁸⁴ the Supreme Court of Nigeria held that a claim by a man for the return of his 'wife' under customary law must fail because the alleged customary marriage had not been established by evidence and the claim was in any case contrary to the wife's constitutional right to freedom of association under section 26(1) of the Constitution of the Federation. The court observed that, in proceedings before a customary court, an order for the repayment of bride price or 'dowry', assuming that one was in fact paid by the husband, is usually made subsequent to an order for the dissolution of a customary marriage. But the plaintiff in the present case had been granted £20 as refund of dowry allegedly paid by him, although he was suing, not for a dissolution, but for the return of his 'wife' by her father who denied the marriage. The order for the repayment made by the lower court was therefore set aside, as was, of course, the order compelling the 'wife' to return to the appellant. In another recent Supreme Court decision in *Osamwonyi v Osamwonyi*,⁸⁵ there was an action for the dissolution of a marriage under the Marriage Act on the ground of a precedent customary Benin marriage between the wife and another man, which was unknown to the petitioning husband at the time of the statutory marriage. The law is that, in order to invalidate a marriage under the Act on the ground that, at the time of the aforesaid marriage, there was a customary marriage by one of the parties still subsisting, the customary marriage must be proved with a high degree of certainty.⁸⁶ In the present case, it was established that, under Benin customary law, a daughter could not be married off to a man by her parents without her consent. The court took the view that the consent of the bride-to-be was a condition precedent to a marriage under the Benin customary law, and that this requirement was consistent with natural justice, equity and good conscience. The court also held that, as there was no proof of cohabitation between the wife and the third man, payment of dowry alone does not constitute marriage under Benin customary law.

⁸³ (1971) 2 GLR 416.

⁸⁴ (1973) 3 SC (SC 364/1971).

⁸⁵ (1972) 10 SC (SC 295/69).

⁸⁶ *Abisogun v Abisogun* (1963) 1 ALL NLR 237.

VI

Law Relating to Chieftaincies

The institution of chieftaincy has also been a subject of many judicial pronouncements, especially in determining the legal nature and status of holders of these customary titles.⁸⁷ This is a matter of some importance when considering the political or even legal role of a chief in society. One notable case in which the court had found itself called upon to define the issue is *Giwa & ors v Alashe*,⁸⁸ in which Smalman Smith, C J, said:

Such a position (i.e., of a chief) only carries a certain social status and distinction among his fellows, but no authority beyond that of any other private person. More especially do I draw attention to this fact, inasmuch as certain pretensions have recently been advanced by persons calling themselves White-Capped Chiefs, to control over land in the lawful and beneficial occupation of persons owing no rent or service to them.

This strictly limited view of the chieftaincy was provoked by the occasion, but it also stated a necessary reminder to the unnecessary arrogation of power sometimes assumed by past chiefs. But the real question as to what a chief is was thus answered in *Adanji v Hunvoo*:⁸⁹

Now what is the chieftaincy? I say without hesitation that it is a mere dignity, a position of honour, of primacy among a particular section of the native community...

That, depending on the particular context, the title of chief may not carry the status and dignity envisaged in *Adanji v Hunvoo* in respect of Badagry is borne out by Baker, C J, in *Ononye v Obanye & ors*:⁹⁰

The Okpala (Okpara) is described in Dr. Meek's *Law and Authority in a Nigerian Tribe* as the senior elder (or more correctly the recognised head) of the extended family. He receives obedience and tokens of respect and has duties in assisting members of the family: he is also the holder of the family *ofo* (sacred symbol of office) and is the chief priest and ceremonial head of

⁸⁷ See *Laoye & ors v Oyetunde* (1944) AC 170 and *Eshughayi Eleko v Nigerian Government* (1931) AC 662 for the recognition by the courts of the customary law relating to chieftaincy, especially from the point of view of political power and status.

⁸⁸ (1891) Lagos Reports of Certain Judgments of the Supreme Court, etc. (1884-92), p 45.

⁸⁹ (1908) 1 NLR 71.

⁹⁰ (1945) 11 WACA 60.

the cult of the founder of the family. The senior Okpala is the ritual head of the group; he has not executive authority but is consulted on all matters affecting the welfare of the kindred.

A case in which the question of a chieftaincy recently arose for determination before the Supreme Court is *Akanbi & ors v Yakubu & ors*.⁹¹ There, the plaintiffs in their capacity as senior traditional heads responsible for the traditional appointment of the Bara of Ijagbo sued the defendants seeking a declaration that the approval and selection of a particular candidate (the fourth defendant) was not made in accordance with the customary law, that it was null and void, and that an injunction should be issued restraining the fourth defendant from performing any of the functions of Bara of Ijagbo or from holding himself out as such. The facts are that, several years ago, a number of persons from the town of Offa gradually migrated to the site of the neighbouring village of Ijagbo until at the commencement of the present suit, there were 35 compounds in the village. Each compound consisted of between 50 and 70 persons, thus making a total of about 2,500 persons. The village would appear to be administered by six compound heads acting as a council or committee of elders, of which one of their number would normally act as chairman. Although the headship of each compound was normally elected by the members of the compound, nevertheless in the case of the compound head that would be made chairman there must also be formal adoption and approval by the remaining five compound heads. It would seem that the position of the chairman of committee is not that of the ordinary traditional chieftaincy, though the expressions 'king-makers', 'chief' and sometimes 'king' were freely used by both sides to the case, in their pleadings as well as in evidence. It is also generally agreed that the head of the Bara compound, who was the father of the fourth defendant, was the last chairman of the committee of six and often went by the title of Onijagbo, but it is not agreed that the title was either traditional or borne by chairmen previous to the last holder of the post. The Onijagbo or Bara would, if properly appointed in accordance with the customary rules and procedure, normally carry a position of honour or dignity among the community of Ijagbo and was generally accepted and respected as such.

The defendants argued that since the plaintiffs and their witnesses said that there had never been an Onijagbo of Ijagbo, it is clear that the defendants had not committed any breach of the custom of which

⁹¹ (1973) 12 SC 1.

the plaintiffs could complain and that, as there are 35 family heads in the village, the plaintiffs could not fight for a right belonging exclusively to only one of the six family heads. They further submitted that the position of the president of Ijagbo village committee comes within the definition of 'chief' under section 3 of the Interpretation Law, Cap 52, of the Laws of the Northern States and that under section 11 of the Chiefs (Appointment and Deposition) Law, Cap 20, of the Laws of the Northern States, the jurisdiction of the High Court is ousted. Their final submission was that, in accordance with section 78(6) of the Constitution of the Northern States, the court has no jurisdiction to entertain a chieftaincy dispute.

The plaintiffs, on the other hand, argued that the fact that the six heads of compounds administer the village and even control it does not make them chiefs, neither does it make the Onijagbo of Ijagbo a chief. When the six heads of compound meet, they collectively control the whole community, but the chairman of the committee has no control over the whole community of the village. It has become traditional for the committee to act jointly, not individually. They pointed out that the fourth defendant did not claim that he was made the chairman of the six heads of compounds or that he is even one of them. All that the evidence has established is that the Sole Administrator, as the Local Government Authority for Oyun Division, appointed him a tax collector, which is not the same thing as appointing someone a chief. They contended that the case is not a chieftaincy matter and that the court, therefore, had jurisdiction over it. The learned trial judge upheld the plaintiffs' claims.

The Supreme Court held that there was no evidence before it to show that the president of the committee of the six compound heads was a chief in the accepted connotation of the term in law, or that he could even be regarded as a 'head chief' in view of the definition of this expression in section 3 of the Interpretation Law, Cap 52, which defines a head chief as one who is not subordinate to another chief or native authority. The Court observed:

We are of the view that the chairman or president of the committee of the six heads of compounds at Ijagbo cannot be a chief because he is no more than a titular head of a gerontocracy appointed by the remaining five from time to time and to whom he is accountable for his actions. He would appear only to be a *primus inter pares* who has no authority of any kind over the village community of Ijagbo apart from the nebulous power and influence granted him if properly appointed by his remaining five colleagues. All the six members of the gerontocracy have a collective responsibility towards their community. The society is clearly republican in its political complexion

and has yet to evolve into a chiefship or indeed a kingdom. It is like what Ibadan was before the appointment of the first Olubadan—congeries of compounds with family heads who meet together to administer the affairs of their community. The social contract theory, if one may apply it to the Ijagbo society, would make it appear to be at an inchoate stage, in that the other five members of the committee have not yet agreed to surrender their sovereignty to an almighty ruler in return for protection and succour; or, if one subscribes to that view of the social contract theory which recognizes two stages in the process, the community would seem to have achieved only a *pactum unionis*, not yet a *pactum subjectionis*. They may one day evolve to a position in which a formal supplication might be made to the Kwara State Government for the recognition of their chairman as a chief in the traditional sense, but that stage does not appear to have been reached when this action was brought.

We may note in passing the fact that there have been some understandable differences of approach between the European judges and their African colleagues in the interpretation and even the application of customary law principles. This is most noticeable in the employment of the doctrine of repugnancy to disallow certain obnoxious customs and practices, such as the killing of twins at birth or the determination of the paternity of a child born out of normal wedlock especially in connection with the practice of what anthropologists call the levirate. Nevertheless, we need not make too much of this ethnic phenomenon since it is on record that some Nigerian judges of earlier days also made implausible findings of customary law, as when it was once held that the married woman or even a widow under customary law was without any right or interest in her husband's or deceased husband's estate. What is important in this connection is to remember that the judicial attitude, where it became difficult to accept, was almost invariably due to lack of training or experience in customary law as part of the general professional equipment for membership of the profession. In two ways, customary law has been coming gradually into its own: (a) by its introduction into the academic curriculum of our various Faculties of Law in all the universities in Africa as well as in some universities abroad, and also its position in the professional training at our Law Schools; and (b) by the importance which our Superior Courts have attached, particularly in recent years, to the need for a clinical examination and analysis of existing authorities wherever it becomes necessary to apply these to new cases coming on appeal before them, with a view to ensuring that customary legal rules and norms are laid upon sound and secure foundations for the future.

LECTURE THREE

THE CONFLICT OF LAWS

I

Nature and Types of Conflict

In this lecture, it is proposed to consider the judicial handling of four main types of conflict: (a) between English law and customary law, (b) between local statute law and customary law, (c) between customary law and customary law,¹ and (d) between Roman-Dutch law and customary law. Where the issues are not straightforward, the court is called upon to make the choice as best it can. As we have seen, the essential problem is one of choice of law and, where statute has defined the respective areas of application of English law and customary law and the issues are clear, there is little for the court to worry about. A noteworthy example of a conflict between English law and customary law occurs in *Nelson v Nelson*. There, the plaintiff's father, by a death-bed disposition, called *Samansew*, left certain self-acquired property to his eldest son, the first defendant, to take charge of it on behalf of himself and all the deceased's children. The Government later acquired a portion of the land and the eldest son used part of the compensation money to purchase the land in dispute, the conveyance having been taken in his own name and in English form. The eldest son thereafter sold the land to the third defendant who leased it to the second defendant. The remaining children brought an action against the second and third defendants for a declaration of title to the land and recovery of possession. It therefore became necessary to decide whether English law or customary law should apply to determine the rights of the parties. It was contended that the appellants were guilty of laches and acquiescence in having allowed the eldest son to take a conveyance in English form and that English law should apply since the parties were not exclusively Ghanaians. The Supreme Court of Ghana upheld these contentions. On appeal to the West African Court of Appeal it was held that customary law should apply in order to obviate a substantial miscarriage of justice

¹ In certain areas of Africa, the expression 'customary law' includes Islamic law. Native Courts Law (Cap 78 of the Laws of Northern Nigeria, 1963), S 2: also, S 2 of the High Court Law of Northern Nigeria (Cap 49), 1963.

since section 74 of the Courts Ordinance (Cap 4) provided that "native customary law shall be deemed applicable" not only in causes and matters where the parties are natives, but "also in causes and matters between natives and non-natives where it shall appear to the court that substantial injustice will be done to any party by a strict adherence to the rules of any law or laws other than native customary law". The Court pointed out that the original death-bed disposition by the appellant's father, which was recognized by customary law, manifested an intention that his children should have a joint but exclusive interest in the land, and that to apply English law to the transactions after the father's death would defeat the objects of the testator and this, notwithstanding that the second and third defendants were non-natives. The Court observed that whatever the form of conveyance to the first defendant, there could be no doubt that it was the intention and purpose of the children that the property purchased to replace that acquired by the Government was to be held on the same terms as the properties originally disposed of by the testator, the appellant's father.

It might sometimes happen that a situation could arise which is neither governed entirely by English law, nor entirely by customary law. In such a case, the problem must ideally be resolved by a resort to what the courts have called the *residual clause*, that is to say, by the application to the case of the proviso that "in cases where no express rule is applicable to any matter in issue, the court shall be guided by the principles of justice, equity and good conscience". In *Rubhern and Lembemba v Lime Shikuloya Nswima*,² both the plaintiff and the defendant were Africans of the Bemba people in Northern Rhodesia, the plaintiff being the son-in-law of the defendant. Both plaintiff and defendant were resident in the town of Lusaka. It would appear that, in 1955, a year after the plaintiff had married the defendant's daughter, he had left his previous employment as chef at the Lusaka Hotel in order to run a tea-room and store for the defendant in a suburb of Lusaka. The exact terms of the contractual arrangement between the parties were in dispute. The plaintiff claimed that it was a term of the agreement that he should work for the defendant for three years, after which the shop should belong to him. The defendant, for his part, maintained the plaintiff had merely entered his service in accordance with Bemba customary law which recognized a custom that a son-in-law should render free service to his father-in-law in a form of marriage by service. As the defendant refused to return the

² HCCC No 449/57. Judgment delivered on March 1958.

shop to the plaintiff after the three years, the latter claimed compensation for the services that he had rendered. The question was whether any compensation was due to the plaintiff; and if so, according to what principle should it be determined. In other words, what system of law—English, Bemba or other—should govern the contractual arrangement? There is the further question as to whether it was competent for the parties to enter into a contract otherwise than in accordance with their customary law. The learned trial judge observed that, in respect of the application of customary law, “it was never honestly intended by either the plaintiff or the defendant that Bemba custom should apply to their relations with one another, *qua* the defendant’s shop”. Accepting the evidence of two African expert witnesses, the judge came to the conclusion that the custom whereby a son-in-law rendered free service to his father-in-law was already dying out in the urban areas of Lusaka. The provision of section 17 of the then Northern Rhodesia High Court Ordinance was that customary law should be applied in “civil cases” except that “no party shall be entitled to claim the benefit of any native customary law if it shall appear ... that such party agreed or must be taken to have agreed that his obligations in connection with all such transactions shall be regulated exclusively by some law or laws other than native customary laws”, and also that “in cases where no express rule is applicable to any matter in issue, the Court shall be guided by the principles of justice, equity and good conscience”. The position, therefore, is that customary law is the primary law applicable to civil disputes between Africans, unless the parties have rejected it in favour of some other law. Where there is no such law clearly indicated, the judge falls back on the residual clause requiring him to be guided by the principles of justice, equity and good conscience. It would appear that the parties did not expressly agree, at the time of entering into the arrangements, to be bound exclusively, by Bemba customary law. Nor could English law be applied since the learned trial judge found that “the terms of any contract (between the parties) were vague and ill-defined”.

Now, how was the residual proviso to be applied to enable the Court to decide the issue according to the principles of justice, equity and good conscience? The learned trial judge would seem to have followed the precedents set in other jurisdictions, notably in the Sudan and British India and to a large extent in West Africa by importing the rules of English law, in this case the principle of *quantum meruit*, thus awarding the plaintiff a reasonable remuneration or compensation for his services. The learned judge, it is respectfully submitted, might

have reached the same result by frankly applying equitable principles which are universal in all legal systems, and should not have referred expressly to a principle of the English law of contract. It may be mentioned in parenthesis that the provisions of section 17 of the former Northern Rhodesia High Court Ordinance are almost identical with those of the Ghana (Gold Coast) Ordinance 87(1) and with section 17 of the Nigerian Supreme Court Ordinance, 1914.

Where the parties to a dispute before the court are Africans, the onus is on the defendant to establish that customary law should not be applied to the transaction, and that English law should apply. Thus in *Ferguson v Duncan*,³ the plaintiff lent some money to the defendant and received a receipt which read: "Received from G F F of D the sum of £200 as loan." A few years later, the plaintiff sent his mother, as was the custom, to demand the repayment of the debt; his solicitor thereafter recovered £20 and the defendant mortgaged his house for the balance and remained in possession, which was in accordance with English law of mortgage. When the plaintiff subsequently sued for the balance, the trial judge held that the transaction was governed by English law and so was statute-barred. The plaintiff appealed, contending that the transaction was governed by customary law. The respondent argued that customary law could not apply because there was no evidence of customary ceremonies in respect of the loan and also because the subsequent English mortgage of the house showed that English law should apply. The West African Court of Appeal held that the evidence did not establish that the transaction was to be exclusively regulated by English law and that the subsequent mortgage in English form was an afterthought and formed no part of the original transaction. The Court emphasized that the onus was on the defendant to satisfy it that customary law should not be applied to the parties in the case, and that the defendant had failed to establish this. The case was distinguished from *Koney v Union Trading Co Ltd*,⁴ where the transaction was between an African and a European firm and it was clear that English law must apply to govern the relation between the parties, and the action was held to be statute-barred.

In cases where there is a conflict between one body of customary law and another, the court may sometimes be tempted to apply the rules of English Private International Law in order to determine the

³ 1953 14 WACA 316.

⁴ (1947) 2 WACA 189.

applicable law. Thus in *Ghamson and ors v Woovill*,⁵ the defendant claimed possession of a house in Winnebah on the ground that it had been sold to him by deed by two persons who traced their title through their mother's mother by inheritance. This was disputed by the then head of the matrilineal family of the plaintiff's grandmother claiming that, in accordance with the Fanti customary law, he became entitled to the house as the successor to the plaintiff's deceased grandmother. There was evidence in support of this contention which was in accordance with Efutu law that prevailed in Winnebah to the exclusion of Fanti law. The question which the learned trial judge had to decide was whether succession to the grandmother's estate should be governed by Efutu law, in which case the plaintiff's claim would succeed, or by Fanti law according to which the head of the matrilineal family would succeed, since Fanti law was the law of the place of origin of the deceased grandmother. The learned trial judge applied the English rule of Private International Law that the *lex situs* was the appropriate law to govern succession to immovables. He therefore applied Efutu law and granted possession of the house to the defendant. On appeal, the West African Court of Appeal held⁶

- (a) that since there was express local legislation governing the matter, namely section 15 of the Native Courts (Colony) Ordinance 1944 and s. 74 of the Courts Ordinance, Cap. 4, the trial judge's application of the English rules of Private International Law, even by way of analogy, was mistaken;
- (b) that section 15 of the Native Courts (Colony) Ordinance 1944 did not oblige a native Court to administer only the customary law prevailing in its area of jurisdiction, but permitted the court to administer "any law binding between the parties"; and
- (c) that in the instant case, the law binding between the parties, one of whom was a Fanti and one an Efutu, was Fanti Law, and this was because the title of the defendant depended on the prior title of the grandchildren of the deceased grandmother who were alleged to be entitled to succession in accordance with Fanti law.

II

Conflict Under Statutory Marriages

Somewhat more difficult problems arise in the field of conflict of laws

⁵ (1947) 12 WACA 181.

⁶ *Per* M'Carthy, J.

where there was marriage under statute law in English form and the husband later died intestate. Two related questions then fall to be considered. The first is to determine who are entitled to inherit on the intestacy, and this raises the further question: Which law is to apply to govern the distribution of the estate? Let us look at the well-known case of *Ekem v Nerba*,⁷ which relates to intestate succession to land situated at Cape Coast. A Nigerian who had long been resident in Cape Coast, while retaining his Nigerian domicile, married two Fanti women by the first of whom he had a daughter called Ekem, the plaintiff in the case. Nerba, the defendant in the case, was the second wife. The question was to determine which of them should inherit the intestate estate of the *propositus*. It was held by the local court that the *lex situs*, i.e. Fante law, applied to exclude Ekem from the succession. When the matter came before the West African Court of Appeal, this judgment was set aside, and the case was remitted to the local court with directions to take evidence as to what interest, if any, the plaintiff should have in her late father's property in the light of whatever law was found to be appropriate. While one must regret that the WACA did not specify the law that should be applied by the lower court, the original judgment could not reasonably have been upheld since it would have had the effect of disinheriting the only child of the deceased intestate.

Where the application of the appropriate customary law would work hardship in a particular case, the Court would disregard it in whole or in part in the interest of natural justice, equity and good conscience. Thus in *Re Whyte*,⁸ a Fante died in Nigeria domiciled in Ghana, leaving a widow, an infant daughter and a sister who lived in Ghana. Under the Fante customary law, succession is matrilineal and a widow accordingly had no share in the estate of her deceased husband. The sister came to Nigeria to claim the entire estate of her deceased brother as she was entitled to do under Fante customary law, and offered to educate her niece in Ghana out of the estate. Since to grant this lawful request would mean that the infant daughter would have to be separated from her Nigerian mother to live in Ghana, the Administrator-General proposed to the Court that he be empowered to give two-thirds of the estate to the sister and the remaining one-third to the daughter; he also proposed that letters of administration be granted to the widow as the daughter's legal guardian. The Court accepted this scheme of distribution in place of the full application of the Fante customary law:

⁷ (1947) 12 WACA 258.

⁸ (1936) 18 NLR 70.

The *locus classicus* on this whole subject is, however, *Cole v Cole*.⁹ There, one John William Cole was a native of Lagos where he was also domiciled. In 1864, he left Lagos for Sierra Leone where in the same year he married Mary J Cole, the defendant. Soon thereafter he returned to Lagos where in 1866, the second defendant Alfred Cole was born. In 1897, John William Cole died in Lagos, leaving him surviving his wife, Mary J Cole, and his son Alfred Cole. His brother, the plaintiff A B Cole, brought an action in 1898, claiming to be declared customary heir of the deceased J W Cole and trustee for Alfred Cole, the lunatic son. The learned trial judge granted the declaration sought by the plaintiff, holding that he was the customary heir of his deceased brother since they were born of the same father. Rayner, C J, held that in accordance with section 19 of the Supreme Court Ordinance customary law should govern the intestate estate of J W Cole. In the full Court, however, the decision was that customary law could not apply and that the English law of succession must apply. Griffith, J, gave the following reason for the decision:

Christian marriage imposes on the husband duties and obligations not recognised by native law. The wife throws in her lot with her husband, she enters his family; her property becomes his. (These parties were married in 1863 and at any rate till 1876 were under the English law). In fact a Christian marriage clothes the parties to such marriage and their offspring with a status unknown to native law.

In such circumstances, can it be contended that the question of inheritance to the deceased in the present case should be decided in accordance with the principles of native law and custom? I think not. Such a contention would be contrary to the "principles of justice, equity and good conscience". "Were such a contention to hold good, then an educated native Lagos gentleman -- may be a doctor, or a barrister, or a clergyman, or a bishop (for there are all such) -- marrying an educated native lady out of the colony and coming to reside permanently in Lagos would have his estate subject to native law in case he died intestate, his widow being required by a strict undiluted native law to act as wife to her brother-in-law in order to obtain support." Having ruled out the application of the customary law of inheritance to the instant case, the court then went on to exclude the Statute of Distributions since in its view that statute only applies to marriages solemnized within the Colony of Lagos. It held that the common law

⁹ (1898) 1 NLR 15.

of England in 1874 was the same as the law in England in 1863 when the marriage was contracted and that, according to English law, the eldest son was the heir, no matter whether he was a lunatic or not. Accordingly, Alfred Cole was declared the heir of the deceased, and the widow's right to dower and to one-third of her husband's personalty was granted. Thus was consecrated the anomaly that whenever a deceased who in his life time had been married in accordance with the forms of English marriage dies intestate, English law must apply to govern succession to his estate, and that this English law would be the Statute of Distribution 1670-1685 if the marriage took place within the Colony but it will be the English common law of succession involving declaration of an heir and the widow's right to dower if the marriage took place outside the Colony of Lagos.

That the decision itself was based upon a misconception has ever since been shown by subsequent decisions modifying and clarifying the issues involved. Thus in *Asiata v Goncallo*,¹⁰ the parties were Moslems, who had been sold into slavery in Brazil, got married according to the rights of the local church and lived there for some years. Both husband and wife later returned to Lagos where, in the course of years, the husband took another woman to wife under customary law, by whom he had some other children in addition to those of the first wife by church marriage. The Supreme Court held that the mere fact of church marriage was not conclusive evidence that the parties intended that their lives should be governed by English law. The Court was of the view that one must look at the true intention of the parties when in a strange land, they merely conformed to the only form of marriage in vogue in their place of residence at that time. It was clear from their subsequent mode of life that they really led the life of traditional Africans. Accordingly, the Court held that intestate estate of the deceased husband must be governed by customary law which permitted all the children of both marriages to share in the inheritance. The matter was carried a stage further in *Alake v Pratt*,¹¹ where it was held that, since all legitimate children are entitled to share in their father's estate under Yoruba customary law, children who, though born out of wedlock, are nevertheless legitimate by that law, are entitled to share equally with those who are the issue of a statutory marriage. The WACA took into account the doctrine of acknowledgement of paternity according to which children born out of wedlock, if recognized and treated by a deceased intestate as if he were their

¹⁰ (1900) 1 NLR 41.

¹¹ (1955) 15 WACA 20.

father, are put in a position of equality with those born in wedlock, since customary law does not recognize degrees of legitimacy. It is significant that no reference was made to *Cole v Cole* in this case. The Court simply chose to follow the dictates of equity and good conscience in this particular case.¹²

In the well-known case of *Bamghose v Daniel and others*,¹³ first decided by the WACA and later taken to the Privy Council on appeal, a Nigerian died intestate in Lagos, survived by twelve children and a nephew. The intestate estate was valued at £100,000. The twelve children were the offspring of polygamous marriages contracted by the deceased under Yoruba customary law. The deceased's parents who were the grandparents of both the nephew and the twelve children, had contracted a marriage under the Marriage Act of 1864 according to section 4 of which the English law of intestate succession should, notwithstanding any local law or custom to the contrary, govern the devolution of the estate not only of those married under the Act, but also of *their issue*. In view of this provision, the nephew contended that, in accordance with the decision in *Cole v Cole*, the Statute of Distribution, 1670, as the relevant English Law applied to exclude the twelve children as illegitimate descendants and that he alone was by English law the nearest legitimate kinsman of the deceased intestate. Their Lordships of the Privy Council, in approving the earlier decision of WACA, held as follows: (a) that, for purposes of succession under the Statute of Distribution 1670, the legitimacy of persons claiming on an intestacy must be decided upon the basis of the law of their domicile; (b) that the law of Nigeria, as the law of the children's domicile, permitted the deceased to contract the polygamous marriages by which the children were born legitimate under the relevant customary law; (c) that the Statute of Distribution 1670 and the decision in *Cole v Cole* cannot be limited in its local application to children who are the issue of monogamous unions; and (d) that the twelve children of the deceased (Daniel) were entitled to inherit their father's estate to the exclusion of their cousin, the appellant in the case.

That the principle involved in this case is of considerable relevance to other African countries is borne out by the decision, first of the

¹² Inheritance upon the death intestate of a deceased who was the issue of a marriage under the Marriage Act is to be determined not by customary law but by English law which requires that the status of those claiming under the estate depends upon the law of their parents' domicile at the time of their own birth; in this case the customary law children born under a customary law marriage are legitimate and so would be entitled to take: *Re Williams* (1941) 7 WACA 156.

¹³ (1952) 14 WACA (1955) AC 107.

Ghana Court of Appeal and then of the Privy Council in *Coleman v Shang*.¹⁴ The facts may be summarized as follows: *S* married *A* by customary law and had three children by her, before she either died or was divorced in accordance with customary law. *S* thereafter married *W* under the Marriage Ordinance and had five children by her, of whom only one survived. *W* died in 1940. During the lifetime of *W*, however, *S* lived and cohabited with the appellant by whom he had ten children. After *W*'s death in 1940, *S* married the appellant in accordance with customary law. *S* later died intestate. *W*'s only surviving child, the respondent in this appeal, applied for letters of administration, claiming to be solely entitled to *S*'s estate as the only surviving lawful issue of the Ordinance marriage. The appellant, the third wife, resisted the application on the ground that respondent was not the only lawful child of the deceased, since there were all these other children, and that she was a lawful widow of the deceased. She also claimed to be acting for herself and the deceased's family. Succession to the deceased's estate was governed by section 48 of the Marriage Ordinance 1949 (Cap 147) 1959 Edition. The lower court gave judgment for the child of the Ordinance Marriage holding that the appellant was excluded from the succession as being merely a widow by a customary law marriage and thereby not entitled to succeed under the Statute of Distribution. The Ghana Court of Appeal, however, laid down the following definitive principles: (a) a person subject to customary law who marries under the Marriage Ordinance does not cease to be a native subject to customary law by reason only of contracting that marriage; the customary law will be applied to him in all matters, except those specifically excluded by the statute and other matters which are necessary consequences of the marriage under the Ordinance Courts Ordinance Cap 4 S 87(1); (b) a person subject to customary law cannot contract a valid marriage under the Ordinance while the customary law subsists,¹⁵ nor can he contract a valid marriage under customary law during the continuance of an Ordinance marriage (Marriage Ordinance, S 44); consequently, he cannot, during the continuance of his marriage under the Ordinance have a legitimate child except by his wife of the said marriage (Marriage Ordinance, S 49); (c) the words "leaving a widow or husband or any issue of such

¹⁴ (1961) AC 481; (1961) 2 AER 406.

¹⁵ Eg in *Osamwonya v Osamwonyi* (1972) 10 SC 1, where a husband petitioned for divorce from his wife married under the Nigerian Marriage Act on the ground that before the said marriage the respondent was already married to another man under customary law and that that marriage was subsisting; the petition was dismissed because he failed to prove that there was the prior customary marriage.

marriage" in S 48(1) of the Marriage Ordinance merely indicate the condition precedent upon which English law will be applied to the estate of an intestate who married under the Ordinance; they do not limit the class of those entitled to a share in his estate; (d) in the application of the Statute of Distribution, which governs the distribution of two-thirds of the estate under S 48 of the Marriage Ordinance, "wife" and "child" mean lawful wife and lawful child by the law of the domicile, and not by the law of England — *Bamghose v Daniel* was cited with approval among other cases; (e) if a man who is married under customary law intends to marry again under the Ordinance, he must either marry the same person to whom he is already validly married according to customary law, or if he intends to marry a person other than such a wife, then he must first determine the customary marriage lawfully; any marriage which a man purports to contract by customary law, while the marriage under the Ordinance still subsists, is null and void and any children of that relation are illegitimate; (f) accordingly, the three children of the deceased by his first wife were legitimate and entitled equally with the surviving child of the Ordinance marriage; the ten children by the appellant during *W's* lifetime were illegitimate by the Marriage Ordinance; the marriage between the deceased and the appellant was valid and she was entitled to a share in her deceased husband's estate in accordance with the Statute of Distribution; and (g) letters of administration should be granted to the appellant (who was illiterate) and the respondent (the child of the Ordinance Marriage) jointly on behalf of those who were entitled. The Privy Council accordingly upheld the decision of the Ghana Court of Appeal by which a joint grant of letters was made to the appellant and the respondent.

Similar consideration to those we have been discussing arose in *Molungoa Khatala v Francina Khatala*.¹⁶ In that case, the deceased *Bk* married *M* in 1914 both by Basuto and Christian rites. The appellant was their eldest son. *M* died and, in 1955, *Bk* married *FBk*, again both by Basuto and Christian rites. *Bk* died shortly after this second marriage, leaving £300 credit in the Post Office Savings Bank and certain livestock. The appellant, as the deceased's eldest son, claimed to be his heir under Basuto law and was given judgment in the Basuto Court of first instance. On appeal *FBk* successfully claimed under Basuto law that, as the deceased's widow, she had a better right than the appellant. A further appeal to the Central Appeal Court was allowed and the original judgment restored. On a further appeal to

¹⁶ Basutoland Civil Appeal No 1 of 1964. Judgment delivered on August 23, 1964.

the court of the Judicial Commissioner, the original judgment was restored. A further appeal to the High Court was dismissed. Before the Central Appeal Court, the respondent agreed that there was community of property under the general law (that is Roman-Dutch law) between the deceased and herself by virtue of the marriage by Christian rites and that the appellant was not entitled under Basuto law to more than one-half of the joint estate held by the deceased and herself. Alternatively, she claimed that as widow of the deceased, she was entitled to retain the bank book because, under Basuto law, a "widow has charge of all her deceased husband's property during her lifetime". It was held (a) that the Marriage Proclamation does not lay down the legal effect of registering under the Proclamation, a marriage under Basuto law; (b) that by S 12 of the Proclamation No 26 of 1884 "Native law may be administered in suits to which all the parties are Africans" and that this was the reason that provision so provides; (c) the Proclamation supported this finding, since where Basutos living according to Basuto customs "marry according to Basuto rites as well as according to Christian rites, their proprietary relations during their joint lives and their intestate succession rights after the death of one of them are governed by Basuto law"; and (d) that the respondent as widow had a right to be maintained in accordance with Basuto law, but that she should deliver the Post Office Bank book to the appellant.

A case from the Gambia which raised more or less the same issues of conflict of laws as *Bamghose v Daniel* and *Shung v Coleman* is *Samba Bah and Another v Mary Taylor and others*.¹⁷ The question which fell for determination was whether only children who would be recognized as legitimate children under English law can take upon an intestacy occurring under the English Statute of Distribution, or whether an extended meaning should be given to the term 'children' so that children who might be illegitimate by English law were legitimate by the law of their parents' domicile when they were born. What happened in this case was that one Mary Taylor claimed against the appellants, a father and daughter, who lived in part of the premises in dispute, a declaration of title in the Gambian Supreme Court in Barthurst, which was within the Colony area. Other plaintiffs soon joined Mary Taylor claiming that they were entitled as collateral relatives of the previous owner of the land, one John Cessay, who died in 1943, under English law. The defendants had counter-claimed on the ground of long possession. The plaintiffs were, however, granted

¹⁷ (1959) 16 WACA 101.

a declaration by right of inheritance. The defendants appealed to the West African Court of Appeal on the grounds that they had a good title by adverse possession and that the respondents, (the plaintiffs in the lower court) were, being illegitimate, not entitled to succeed under English law. Under section 15 of the Intestate Estates Ordinance, Cap 33, the real estate of a deceased intestate "shall be distributable in like manner as personal estate is now distributable and amongst and to the same persons". This brings the succession under the Statute of Distribution 1670 as amended by the Administration of Estates Acts, 1685; so that the widow Marian Cessay was entitled to one-half of the property, while the other half was, in the absence of any living descendants, distributable amongst the collaterals and their descendants. Since they were illegitimate by English law, they were held not entitled to succeed. It is very strange that both *Bamghose v Daniel* (supra) and *Shang v Coleman* in which the relevant customary law of the domicile had in similar circumstances been applied by the West African Court of Appeal and the Ghana Court of Appeal respectively and finally confirmed by the Privy Council in both cases, were not mentioned in the decision of the Gambian Supreme Court. It would seem that the deceased intestate was a Wolof and that the Wolof recognize descent through both the male and the female lines, although in practice their law of inheritance might be modified by Islamic principles, thus enabling the respondents to qualify as the closest relatives of the deceased to succeed to his property on intestacy.

III

Conflict Between English Law and Customary Law

Consideration of the possibility of the application of Islamic law in the Gambian case just described leads us to examine the position where there is a conflict of laws between English or local statute law and a body of customary law, which for our purpose, includes Islamic law. An interesting illustration of this occurs in *Kharie Zaidan v Fatima Khalil Mohssen*.¹⁸ The parties to the case are Lebanese Moslems, the deceased husband having died domiciled in Lebanon and intestate. He was survived by the defendant wife, also domiciled in Lebanon and by the plaintiff who is his aged mother who had given a power of attorney to a brother of the deceased. Both the wife and this brother

¹⁸ (1973) 11 SC 1.

had also been resident in Warri in the Mid-Western State of Nigeria, but the mother of the deceased and other surviving relatives had never been to Nigeria. Both parties admitted that the defendant wife and the deceased were lawfully married in accordance with Moslem law. The main question was to determine the law to be applied to the intestate succession to the immovable property of the deceased. The learned trial judge in the Warri High Court held that the applicable law was the Moslem law of Lebanon and not the Administration of Estates Law, Cap 19, of the Laws of Western Nigeria, 1959, which is applicable in the Mid-Western State of Nigeria. For the deceased brother, it was argued that the applicable law is either English law or customary law. By English law was meant, of course, the Administration of Estates Law; on the other hand, customary law could not apply on the alleged ground that Moslems, like the parties in this case, are not subject to the jurisdiction of any customary law. It was finally submitted that the *lex situs* should govern the devolution of the intestate estate, in support of which contention *Coleman v Shang*,¹⁹ and *King v Elliot*,²⁰ were cited on behalf of the wife; however, it was submitted that the local administration of Estates Law could not apply to the deceased's estate because (a) the terms of that law are not really applicable to a potentially polygamous form of marriage like the one involved in the instant case; and (b) because, on a true construction of that law, anyone subject to Moslem law is excluded from its operation. It was further argued that Moslem law is one of the systems of law, like Roman Law and Roman-Dutch Law, which have no territorial boundaries in the sense that they are not confined to one country, and that the High Court Law of the Mid-Western State provides that the Court may apply an "appropriate customary law" as defined in section 20 of the Customary Courts Law, Cap 31, of Western Nigeria 1959. Where there is a conflict between two systems of customary law, the rules to be applied are set out in section 20 of that Law which provides that, in land matters, the appropriate customary law shall be the customary law of the place where the land is situated and that, in causes and matters arising from inheritance, the appropriate customary law is the customary law applying to the deceased. On appeal to the Supreme Court of Nigeria, it was held that the *lex situs* governs the immovable property of a deceased intestate, and the *lex situs* means "the law of Nigeria which embraces customary law including the conflict rules between two systems of customary law as laid down in

¹⁹ (1961) 2 A.

²⁰ (1971) 1 Ghana LR 54, 57.

section 20 of the Customary Courts Law which is a summary of the various previously existing decisions on internal conflicts of laws".²¹ The Supreme Court, in holding that the *lex situs* is the customary law of the deceased which is Moslem law in this particular case, ruled as follows:

It follows therefore that having regard to our own built-in rules in section 20 of the Customary Courts Law governing the choice of law in the application of the *lex situs* to the intestate succession of a deceased person in Warri, the applicable law is not that of the Administration of Estate Law (Cap 1), but the (Moslem) customary law of Lebanon, which is the one binding between the parties (section 20(3)(a)(i) of the Customary Courts Law). We are of the view that, in this context, customary law is any system of law not being the common law and not being a law enacted by any competent legislature in Nigeria but which is enforceable and binding within Nigeria as between the parties subject to its sway.

A case in which the application of Islamic law as a form of customary law arose for determination is *Timothy Adesubokan v Yunusa*.²² The plaintiff son of the deceased claimed against the defendant, sole executor of the will, a declaration that the probate granted to the defendant in respect of the estate of the deceased be revoked, as the deceased was a Moslem, died as a Moslem, and left heirs and wives who were Moslems. The testator in the will made some bequests to one of his sons and devised his properties to two others. The learned trial judge felt that the distribution to his sons should be under Maliki law which favours equal shares. The learned trial judge in the High Court of the North-Central State of Nigeria held (a) that a Moslem of the Northern States of Nigeria, though entitled to make a will under the Wills Act, 1837, has no right to deprive by that will any of his heirs, who are entitled to share his estate under the Moslem law, of any of their respective shares; (b) that, in the case of a will of movable property, the testator must comply with his personal law, that is, the customary law of his particular locality unless such customary law is repugnant to natural justice, equity and good conscience or is incompatible with any law for the time being in force which does not deprive any person of the benefit of the personal law of the testator; and (c) that, where

²¹ Within the context of the High Court law all persons in Nigeria, whether Nigerians or foreigners, are subject to the jurisdiction of every High Court in Nigeria. This point was confirmed in *Mary Ekem v Egha Nerba* (1947) 12 WACA 258, pp 259–60, an appeal from Ghana to the West African Court of Appeal on the analogous provision of section 15 of the Native Courts Colony Ordinance of the then Gold Coast.

²² (1971) SC 25/70.

the testator is a "native" within the meaning of the Land Tenure Law and the will concerns immovable property situated in the Northern States of Nigeria, the testator must comply with the customary law of succession of the place where the land is situated. He accordingly proceeded to set aside the probate of the will. On appeal to the Supreme Court it was held that the Wills Act of 1837 is a statute of general application which applies to the Northern States of Nigeria and that the definition of "native law and custom" in both section 2 of the Native Courts Law (Cap 78) of the Laws of Northern Nigeria (Cap 49) includes Moslem law. The learned trial judge had construed the words "and nothing in this law shall deprive any person of the benefit of any such native law and custom" to mean that in this case the Wills Act shall not deprive the plaintiff of the benefit of Moslem law. The Supreme Court held that these words mean only that nothing in the High Court law shall deprive any person of the benefit of any customary law, including Moslem law, which is not incompatible directly or by implication with any law for the time being in force, in the present case the Wills Act, 1837. The learned trial judge took a view of the law which violates the provisions of the Wills Act, 1837 under which a testator can dispose of his property real or personal—as he pleases. The provision of the Maliki law which he invoked is undoubtedly incompatible with section 3 of the Wills Act, 1837. The judgment of the lower court was accordingly set aside and the probate of the will granted to the defendant. The principle of the case just considered was recently applied by the Gambia Court of Appeal in the case of *Teresa Saidy v Saika*.²³ One Fordie Saidie lived in London at the time he made the will in 1970. His signature was identified by his wife who was the appellant in the case. The will was duly attested and three persons including the appellant were made executors and trustees of the will. Since the deceased and the appellant were living together in a house in Banjul at the time of his death, the house constituted the matrimonial house which the deceased bequeathed to her. Succession to the sum of £6,000, being personalty, would be governed by the *lex domicili* at the time of his death. He also made a bequest of the remainder of his estate to trustees on trust to sell and convert the sale into money which should be applied to the payment of debts, estate duty and other expenses for twenty-one years from the date of his death and thereafter to apply the residue as a trust fund "for the benefit of such poor of the people of Gambia and Kolibantang, West Africa, as they shall in their absolute discretion think fit". The deceased was

²³ Civil Appeal No 4/73 delivered on May 7, 1973.

born at Bain, in the Gambia, in December 1911. His father was also born at the same place. The deceased had been married to one Gwen Mary Ali, whom he had divorced in 1952. He had applied and been registered in 1967 as a citizen of the United Kingdom and Colonies. As a result of the registration he had been issued a British passport in which his personal status was shown as that of a British subject. Teresa Saidie, the appellant and a Christian, was married to the deceased in 1969, although she had lived with him as his mistress since 1949. She first came with him to the Gambia in 1957. The deceased and the appellant were married in England and, throughout the proceedings it was assumed that the marriage was monogamous. Siaka Saidie claimed to be a younger brother of the deceased born of the same parents. He said that he had not seen his brother for about eighteen years prior to his death. He himself was living in Freetown all that time; but, at the time he gave evidence in the case, he described himself as the watchman of the house of his brother as he was out of a job. On the basis of the evidence adduced, it would appear that, although the deceased may have been born at Bain in the Gambia, his father was from Kolibantang in Senegal. The younger brother sought a grant to himself of letters of administration in respect of the estate of the deceased on the ground that he and his deceased brother were Moslems; and also that he should have the bigger share in the estate since the surviving wife was a Christian who should not administer the estate of a Moslem, although she would be entitled to one-third of the estate. In effect, his claim was in the nature of a declaration that the will was invalid to the extent of two-thirds of the estate of Fordie Saidie. The two main issues were: (a) was Fordie Saidie a Gambian citizen subject to Moslem law, and (b) is the will made in 1970 invalid to the extent of two-thirds of the estate of Fordie Saidie? It was submitted before the Gambia Court of Appeal that the Wills Act 1837 is the law which governs the distribution of the estate of the deceased and that there was no restriction on the power of testation conferred by the Act; and that in the Gambia, Moslem law is part of customary law, so that, on the authority of the *Adesubokan Case*, when customary law is incompatible with the Wills Act, such customary law is void. The Court below had, however, based its decision on the *Adesubokan Case* as decided by the North-Central State High Court,²⁴ not knowing that that judgment had been later reversed on appeal to the Supreme Court of Nigeria, as we have just seen above. In the result, the Gambia Court of Appeal held that, in the Gambia, as in

²⁴ Reported in *Journal of African Law*, vol XIV, no 1, 1970, pp 56-64.

Nigeria, Moslem law is part of customary law and the Wills Act, 1837 is a statute of general application. It was, therefore, held that the will he made was valid and the younger brother's claim accordingly failed.

Thus far we have been discussing cases of conflict of laws between English or local statute law and customary law, including in this term Islamic law where applicable. We have seen that the power of testation given under the Wills Act, 1837 is irrespective of the religious belief of the maker of the will, so long as the exercise of such power is not inconsistent with the principles of natural justice, equity and good conscience or incompatible with an existing local enactment relating to the subject. A case in which the testamentary power is expressly restricted by local statute is *Thompson Oke & anor v Robinson Oke and anor*.²⁵ A testator who was a retired police officer, aged about 96 years, died in 1960 having devised by will a property in Warri to one of his sons who was the first defendant in the present case, while the second defendant was one of the executors of the will. The plaintiffs were the eldest son and daughter of the testator whose mother, being a member of the land-owning family, permitted her husband, who was a stranger to the locality, to build a house and some adjoining apartments on the land in question. The deceased lived there with the plaintiffs' mother till his death, after which it was found that he had made a will leaving the property to one of the younger sons by another woman. The question then arose as to whether the testator, who was an Urhobo man, could devise the house by will to the defendant who was the testator's son by another man, or whether the Itsekiri customary law should govern the succession, so that the eldest son of the testator should alone inherit the house in which the testator had lived and died. The defendant contended that the Wills Law gave the testator testamentary capacity to devise the house to him as the deceased did and that the transaction was governed by English law. The Supreme Court of Nigeria held (a) that customary law, and not English law or the local Wills Law, should govern the succession to the estate of the deceased testator; (b) that, accordingly, the plaintiff/appellant was entitled to the house as the eldest son of the testator under the Itsekiri customary law; (c) that section 3 of the Wills Law makes the testamentary capacity of a testator subject to any relevant customary law and, in any case, deals only with the devise of a "real estate", an interest unknown to customary law; and (d) that neither the plaintiff's mother could make an absolute gift of her portion of family land to her husband testator, nor could the latter alienate

²⁵ (1974) 3 SC.

whatever interest he might have in the house to anyone other than his first son.

In the Botswana case of *Fraenkel and anor v Sechele*,²⁶ a somewhat unsatisfactory solution would seem to have been applied by the Basutoland, Bechuanaland Protectorate and Swaziland Court of Appeal. An African married under the Marriage Proclamation, bequeathed his estate to his wife by will, to which he later added a codicil providing for certain legacies in favour of another woman with whom he had lived for some years before his death. The will appointed the first appellant as executor. In the High Court, the wife (who was the respondent in this case), brought an action to set aside the will and the codiciliary legacies on the ground that the provisions of both documents were contrary to Tswana customary law which should govern the devolution of the deceased's estate. The High Court upheld the validity of the will "to the extent that the said deceased had testamentary capacity", but invalidated the legacies and directed that the will be administered in terms of the customary law. The Court reached this decision after taking evidence of Tswana customary law relating to wills. The curious result was to uphold the substantive provisions of the Tswana customary law and to apply them within the framework of a will executed according to the general law of Botswana, that is, the Roman-Dutch Law. In effect, the judgment assumed that the two systems of law could be reconciled in regard to a particular transaction, and that any possible conflict between them need not necessarily be resolved by reference to one of them only. This *hybrid* approach did not, however, find favour with the Court of Appeal. It preferred to concern itself merely with the interpretation of conflicting or obscure statutory provisions relating to the application of the customary law of marriage and succession in general and of wills in particular. It considered that the evidence of customary law relied on by the lower court had been wrongly admitted. The Court of Appeal inferred that the intention of the legislature was to permit "an African to escape the restrictions of tribal law by making a will in terms of the Wills Act", and seemed to regard the general Roman-Dutch law and the customary law as mutually exclusive. It, therefore, allowed the appeal and upheld the validity of the will. The customary law of succession was disregarded in favour of the provisions of the general law of Botswana, that is, the Roman-Dutch law, which decrees an unlimited freedom of testamentary capacity. Thus was bypassed the important question as to the nature of the rights of the deceased testator in some

²⁶ Delivered in Lobatsi, July 7-9, 1964. See (1967) JAL, pp 51-52.

of the property which he had purported to devise by his will—a question that was explicitly dealt with in the *Thompson Case* just considered in connection with Nigerian law. The Botswana Court of Appeal in the instant case chose to leave it to the executor to determine whether “in fact the deceased had such personal rights in the property mentioned in the codicil as to entitle him effectively to dispose of the same”. It is strange that the Court decided to abdicate its function in this matter in this way. In the first place, it should not have confined its observation to the property mentioned in the codicil, but should rather have included the property devised by the will itself. In the second place, the Court should have been explicit as to whether the Tswana customary law should be applied in the determination of the nature of the deceased’s rights in the properties in question. These two comments have been made in respect of the Court’s ruling that the executor should settle the matter. The proper course open to the Court was to have come to its own definitive conclusions on both questions, as did the Nigerian Supreme Court in the analogous situation already discussed.

It is fair to observe that the attitude of the Botswana Court of Appeal in this case by applying the Roman-Dutch law as the applicable law is reminiscent of the similar attitude that non-African judges adopted by applying English law in West Africa in situations of conflicts between that law and African customary law. When more and more of the judges would be Africans, there might be less and less disposition on the part of the judges in Central and East Africa to have all too ready a recourse to English law whenever there is a problem of internal conflict of laws.

LECTURE FOUR

JUDICIAL INTERPRETATION OF THE CONSTITUTION

In this lecture it is proposed to discuss the judicial approach to the problems of interpretation of the various constitutions in Commonwealth Africa. In so diverse and plentiful a field anyone attempting to analyse the situation is bound to be eclectic in his methods if the aim is to select those salient features of the judicial treatment of significant constitutional provisions which should give an insight into the judicial process. The aim, therefore, will be to consider some three or four groups of matters of contemporary constitutional importance. The first will be a general consideration of certain constitutional principles such as the nature and power of parliament, certain provisions of the constitution relating to fundamental human rights and problems associated with racial discrimination against the background of its prohibition in particular constitutions, and the place of conventions in the written constitutions of Africa. The next is to consider the issue of preventive detention and the related question of emergency legislation. The third broad field we shall explore in depth deals with problems concerning the legality of illegal regimes, or the validity of *coup d'etats*, in Africa. We shall now consider these matters *seriatim*.

I

General Constitutional Issues

In *Wari v Ofori-Attah & ors*,¹ there arose a question of great constitutional importance in which an Act of the Parliament of Ghana and a ministerial order made under it were both held to be invalid by the Kumasi High Court. The plaintiff, the Gyasehene of Ejisu, claiming that he was a chief and the customary custodian of the customary Ejisu stool, sought a declaration that the Statute Law (Amendment) (No 2) Act, 1957, was invalid, null and void, as it contravened section 35 of the Ghana Constitution Order-in-Council, 1957, and that the Ejisu Stool Property Order 1958 made under the Act was itself invalid, null and void. Section 35 of the Constitution laid down certain procedures

¹ (1959) GLR 181.

which must be complied with before a Bill could be declared to have been passed by the Speaker of the House of Assembly. If the Bill affected the traditional functions or privileges of a chief, the Speaker was required forthwith to refer it to the House of Chiefs of the Region concerned before the second reading of the Bill could be moved in the House of Assembly at least three months thereafter. In this particular case, however, this procedure was not followed and the Governor-General signified the Royal Assent to it. Some eight months later, purporting to exercise his powers under the Act, the Minister of Local Government made the Ejisu Stool Property Order, 1958, which provided that Nana Kofi Atta was thereby authorized to take possession and prepare an inventory of all the Ejisu Stool Property. After carefully examining the claims of the plaintiff for the declaration, the Court held that the plaintiff was a chief and the customary custodian of the Ejisu Stool Property; that the Act directly affected the traditional functions of the Chief as such a Chief; that the Act was invalid because the procedure laid down in section 35 of the Constitution had not been followed; and that the order made thereunder was, *ex hypothesi*, invalid. Murphy, J, made the following interesting observation:

I do not find the comparison with the powers of federal and state (or provincial) legislatures very exact. In Ghana there is only one Legislature and all laws passed by it are presumed to be for peace, order and good government, in accordance with section 31(1) of the Constitution. Obviously the fact that a law is so passed cannot alone exclude it from the ambit of section 35, since, if this were so, section 35 would not have applied to any law. The only criterion, in my view, was whether a Bill directly affected the traditional functions and privileges of a Chief. If it did so, the procedure laid down in section 35 had to be followed, whatever other purpose the proposed legislation might have.²

The main interest of this case is to illustrate that an Act of Parliament as a sovereign legislature may be declared invalid for non-compliance with procedural requirements provided in the relevant constitution. It is sometimes thought, erroneously, that only under a federal constitution can a court declare an Act of Parliament invalid. This case shows that even under a *unitary* constitution like that of Ghana at the material time, a court can declare an Act of Parliament invalid if so authorized by the Constitution. It shows that the unitary state of Ghana is different from the unitary state of the United Kingdom where no court can ever declare an Act of Parliament invalid, the usual constitutional reason being that the latter has no written constitution.

² *Ibid.*, pp 186-87.

In *Adegbenro v Akintola*,³ an important constitutional principle was affirmed by the Judicial Committee of the Privy Council to the effect that, where it is desired to incorporate a British rule or convention in the constitution of a Commonwealth country, express provision must be made. The facts of the case were that, by section 33(10) of the Constitution of Western Nigeria, it was provided that the Governor should not dismiss the Regional Premier "unless it appears to him" that the Premier had lost the support of the majority of the members of the Regional House of Assembly. The Governor, purporting to exercise his power thereunder, dismissed the Premier on the strength of a letter signed by 66 out of 124 members of the House declaring that they no longer had confidence in the Premier. The Regional High Court held that the Governor could not dismiss the Premier as he had purported to do since he could only remove the latter as a result of an adverse vote against him taken on the floor of the House. The Supreme Court of Nigeria, by a majority of four to one, upheld the decision of the High Court. On appeal to the Privy Council, the decision of the Supreme Court of Nigeria was reversed on the ground (a) that the Constitution of Western Nigeria was a written one, the wording of which could not be overridden by the extraneous principles of other constitutions which were not explicitly incorporated into it; and (b) *a fortiori*, the British Constitutional Convention relating to the sovereign's right to dismiss the Premier could be of no guidance, since this was no longer considered to be within the scope of practical politics in Britain. This decision greatly surprised Nigerian constitutional lawyers who had all along assumed that the conventions of the British Constitution which had not been expressly excluded from the Nigerian Constitutional Order-in-Council, could be invoked in construing provisions relating to the Cabinet system of government. The Government of Western Nigeria thereupon introduced an amendment to the Constitution taking away the implied power of the Regional Governor to dismiss a Premier except on the basis of an adverse vote to that effect taken on the floor of the House. As was then required by the Constitution of the Federation, the relevant legislative amendment was sent to the Parliament in Lagos which ratified it because the same provision was also contained in the Federal Constitution in respect of the Head of State *vis-a-vis* the Prime Minister. During the debate on the amendment which took place in both the Regional Legislature and in Parliament, the protagonists of the measure cited the British Government's enactment of the Gambia Validation Order-in-Council

³ (1963) AC 614; (1963) 3 WLR 63.

of 1963 which had retrospectively got rid of an inconvenient judicial decision only a few weeks previously. Professor Geoffrey Sawer, who approved the Privy Council's interpretation of section 33(10) of the Western Nigeria Constitution in *Akintola v Adeghenro*,⁴ nevertheless welcomed the retroactive amendment of it in these words:

It is a sensible provision. Constitutional monarchs and their gubernatorial or presidential equivalents are well advised to inform themselves on such matters only by reference to events in the corporate lives of the legislatures.⁵

While still on the subject, we may note in passing the Privy Council decision in *Ningkan v Sli*.⁶ There, the Acting Chief Justice of Borneo High Court had held invalid a purported dismissal of the Chief Minister by the Governor of the State on the strength of a letter apparently signed by 21 out of the 42 members of the unicameral State Legislature. The Chief Minister had demanded, as had the then Western Nigeria Premier, that the question of his having lost the confidence of the legislature be tested on the floor of the House, but his request was turned down and the Governor thereafter proceeded to appoint another candidate as Chief Minister. When *Adeghenro v Akintola*,⁷ was cited to the learned judge he somewhat disingenuously distinguished that case and held that a Premier could not be dismissed by a State Governor except in consequence of a majority vote taken on the floor of the House in favour of his dismissal. This decision would appear to have been accepted in the Borneo State at that time, as the similar decision of Western Nigeria had been.

According to the learned judge, there were two main differences in Western Nigeria: the Governor could remove the Premier if it *appeared* to him that the latter no longer commanded the support of the majority, whereas in Malaysia, the Chief Minister must actually cease to do so; again, the "support" referred to in the Western Nigeria Constitution is less of a term apart than the "confidence" mentioned in the Sarawak document. Confidence means voting. The confidence of the legislature was to be tested objectively. One must confess that this is a piece of logical hair-splitting, a mere attempt to make a distinction without a difference.⁸

⁴ (1963) AC 614.

⁵ See his article, 'Emergency Powers in Nigeria and Malayan Federation', *Malaya Law Review*, (1964), vol 6, no 1, pp 83-99. He added in a footnote: "Substantially the same effect is achieved under the well-drawn provisions of the 1963 Centre Constitution, ss (68(5), 87(1), (2), (8) and (11) and 93."

⁶ (1966) 2. *Malayan Law Journal*, 187.

⁷ (1963) AC 614.

⁸ This special pleading by the learned judge has been rightly criticized by Thio in his article, 'Dismissal of Chief Ministers', *Malaya Law Review*, pp 283-91.

When, in *Ningkan v Government of Malaysia*,⁹ the Privy Council approved the dismissal of the Chief Minister of Sarawak only after the local legislature had passed a majority vote of no confidence in him, Their Lordships referred to the judgment in *Ningkan v Sli* without any adverse comments, it would seem that we are entitled to infer that their earlier decision in *Akintola v Adegbenro* was thereby impliedly overruled or to regard it as having been decided on its own peculiar facts.

In *Sabally and N'Jie v Her Majesty's Attorney-General*,¹⁰ there was a general election in the Gambia in 1962 which the Gambia Court of Appeal had declared invalid. Thereafter the Gambia Validation Order¹¹ had been made by the British Government in order to validate the results of the election. The English Court of Appeal held, *inter alia*, that the British Settlements Acts, 1887, under which the Order was made, empowered Her Majesty-in-Council to make laws with retrospective effect whenever it should be deemed necessary in the case of any British overseas settlement, which the Gambia was at that time. The Gambia House of Representatives had enacted the Elections Act, 1963, section 11 of which had the effect of meeting the problem created by the making of the Gambia Validation Order. It therefore follows that the plaintiff's challenge of the 1961 electoral register had been brought after the enactment of the new legislation; the plaintiff might have lost, since the Gambia Court of Appeal had based its judgment in the plaintiff's favour on the 1961 register. The facts briefly were that the plaintiff, an unsuccessful candidate at the general election, sued for a declaration that the Gambia Validation Order-in-Council, 1963, was invalid on the ground that it sought to validate retrospectively the election which was invalid because it failed to comply with the 1961 Constitution. There was consequently an impasse. The Privy Council ruled that the 1963 Order was valid either on the ground that it was legislation under the reserved power of the Crown contained in section 74 of the Constitution or that it was within the power granted by the British Settlements Act. That Act had extinguished the prerogative right to grant representative legislatures to settled colonies, and everything done thereafter by the Crown-in-Council in a British settlement was done under the legislative powers conferred by the Act.

An interesting attempt to invalidate an independence constitution occurred in *Buck v Attorney-General*.¹² The point was that the then

⁹ (1968) 1 MLJ 119.

¹⁰ (1965) 1 QB 273. See also (1964) 3 All ER 377.

¹¹ SI (1963) No 1051, made on May 30, 1963.

¹² (1969) ch 745; (1965) 2 WLR 1033.

newly independent State of Sierra Leone was made up of the settled colony and the hinterland Protectorate. Six inhabitants of Freetown, as the descendants of the original settlers, brought an action for a declaration that the establishment of the new state was invalid because the British Crown held the colony in trust for the settlers and their descendants and that they were entitled to obtain independence for the colony and set up their own government thereover. By virtue of section 2 of the British Settlements Act 1887, the Crown has power to establish by means of an Order-in-Council laws and institutions for the peace, order and good government in a British settlement, even though such laws and institutions are also to apply to a neighbouring protectorate. Accordingly, the Court of Appeal in England rejected the plaintiffs' claim on the ground that they as descendants of the original settlers of the colony had no interest in or rights over the territory and that in any case the English courts before one of which the suit had been brought lack jurisdiction to make a declaration impugning the validity of the Constitution of a foreign independent State, especially when it is clear that that is the object of the suit. The court decided, therefore, that the independent State of Sierra Leone was validly established by the Sierra Leone Independence Act, 1961.

In *Akar v The Attorney-General of Sierra Leone*,¹³ Tejan-Sie, C J, in the Supreme Court of Sierra Leone, was faced with the task of following the provision of section 1 of the Constitution which reads:

Every person who, having been born in the former colony or Protectorate of Sierra Leone was on the 26th day of April 1961 a citizen of the United Kingdom and colonies or a British protected person shall become a citizen of Sierra Leone on the 27th day of April 1961.

Provided that a person shall not become a citizen of Sierra Leone by virtue of this sub-section if neither of his parents nor any of his grandparents was born in the former colony or Protectorate of Sierra Leone.

It is clear that this section makes any person of whatever race who satisfied the conditions stated automatically a citizen of Sierra Leone. In 1962, the House of Representatives adopted an amendment which introduced the phrase "person of Negro African descent" in place of "every person" which has had the effect of depriving certain persons, who would have qualified for automatic citizenship, of such a right. Of course, such persons may by application become registered citizens. The 1962 amendment was made retrospective to April 27, 1961, the date of independence. By a further amendment, it was sought to remove the limitation of citizenship to persons of Negro African

¹³ CC 68/67 A No 30. October 26, 1967.

descent from the category of discriminatory legislation, since protection against discriminatory legislation is one of the entrenched provisions of the Constitution. This second amendment was also made retrospective to April 27, 1961. John Akar, a former Director of the Broadcasting Corporation of Sierra Leone, brought an action challenging the validity of the two amendments to the Constitution by seeking a declaration that they were *ultra vires* the Constitution and therefore null and void. The plaintiff was born in Sierra Leone in 1927 to a Lebanese father and a Temne mother. His father was born in Senegal, had never been to Lebanon, and had lived in Sierra Leone for some 56 years. Thus the plaintiff was a citizen of Sierra Leone under the original section 1 of the Constitution, and the 1962 amendment had the effect of depriving him of that right. The question was whether the Parliament of Sierra Leone had power to amend the Constitution in this way. Counsel for the plaintiff submitted that Parliament had no such power and that "once a citizen, always a citizen". It was, however, contended on behalf of the Attorney-General that Parliament was competent to enact the amendments which could be regarded as being reasonably justifiable in a democratic society and was valid because the proper procedure for amendment had been followed. The learned Chief Justice, while accepting the contention of the Attorney-General that the amendment procedure under the Constitution had been duly followed, rejected the amendments themselves on the ground, *inter alia*, that the intention of the Founding Fathers of the Sierra Leone Constitution, particularly in section 1, was to create a non-racial citizenship for the country. He therefore held that the validity of any amendment of the Constitution must depend on the extent to which such amendment did not derogate from this basic intention. He accordingly concluded that the purported amendment was a direct negation of the basic intention behind the Constitution, and that both amendments were invalid as not being reasonably justifiable in a democratic society. This bold decision must be one of the very few in which a court in an African Commonwealth country has expressly disallowed legislation on the ground that it was not reasonably justifiable in a democratic society. It seems strange, however, that the learned Chief Justice had chosen to overrule legislation, not on the basis of its procedural and substantive validity as enjoined in the relevant sections of the Constitution, but on that of its objective or moral validity. By so doing, the learned Chief Justice would seem to have opened himself to the charge of going beyond his task of mere interpretation of the constitutional provisions, so that he himself could be said to have exceeded his judicial powers as much as Parliament has exceeded its own by passing *ultra*

vires legislation. The retrospective nature of the amendments could, of course, have been frowned upon rather than the ground chosen by the learned Chief Justice. Fortunately, however, the Sierra Leone Court of Appeal reversed the Supreme Court by re-stating the proper function of the courts as being limited to an examination of the procedural and substantive validity of the legislation. It is not their business to preoccupy themselves with moral considerations or the rightness or wrongness of the legislative policy of Parliament.

With this interesting exercise in legislative provision for discrimination within the constitutional framework in Sierra Leone may be compared two recent cases in Kenya on the same subject. The two cases are *Madhwa & ors v City Council of Nairobi*¹⁴ and *Re Maangi*.¹⁵ In the *Madhwa Case*, certain holders of stalls in the municipal market at Nairobi, who were tenants of the defendant Council, were served with notices to quit, and they brought an action for a declaration that the notices were void as being in conflict with certain provisions of the Constitution of Kenya. The notices to quit had been based upon a resolution of the City Council in pursuance of Government policy of Africanization of commerce, the plaintiffs being non-Africans who had been given three months' notice for the termination of their tenancies and the re-allocation of the stalls to suitable Africans for whom loan should be provided from Government funds to enable them to take up the tenancies in question. The plaintiffs claimed that both the policy and the resolution violated the provisions of sections 14 and 26(2) of the Constitution of Kenya, and that their implementation would amount to unlawful discrimination and an infringement of the plaintiffs' constitutional rights. Counsel for the plaintiffs contended that four of the plaintiffs having been born in Kenya were entitled to be registered as citizens under section 2(1) of the Constitution and that they should be treated as if they had become citizens by registration. The delay in registering the plaintiffs had been that of the Government of Kenya, not that of the Nairobi City Council. As matters stood, the plaintiffs were not yet citizens of Kenya but were still citizens of the United Kingdom and Colonies. The learned trial judge in the High Court of Kenya was, however, of the view that it was immaterial to the determination of the suit whether or not the plaintiffs were citizens of Kenya. The learned trial judge held that both the policy and the notices were discriminatory against the plaintiffs and therefore contrary to the provisions of section 26(2), and that they were therefore void.

¹⁴ (1968) EQ 406.

¹⁵ (1968) EA 637

In *Re Maangi*, an African widow of a deceased African inspector of police had applied for the grant to her of letters of administration in respect of the intestate estate of her husband. The important question of principle which arose for determination was the existing practice which, based upon a provision in the Indian Acts (Amendments),¹⁶ was deemed to preclude the making of such grants to Africans. Both counsel who appeared in the case agreed that section 9 of the Indian Acts (Amendments) is discriminatory within the meaning of section 26(3) of the Constitution of Kenya; it was also thought that the section is discriminatory insofar as it restricts the application to Africans of the Indian Probate and Administration Act. The Kenyan High Court accordingly held that the widow of the deceased intestate was entitled to obtain the grant of letters of administration in respect of her deceased husband's estate. It seems strange that it was only in 1968 that Kenyan Africans were for the first time legally declared entitled to the grant of letters of administration in respect of the estate of a deceased intestate African.

An interesting case which shows that, even in the post-independence period in Kenya with its settler problems, an attempt could still be made to revive or retain some of the vestiges of colonialism is *R v Wilken*.¹⁷ There, a European was accused of the murder of some Africans, and a mixed panel of assessors resident in Kenya was established to assist with the trial of the case. The accused, a European, challenged the validity of the trial on the ground that it had been the practice in Kenya for Europeans standing trial to be tried only by all-European juries. It was, however, held that the constitutional guarantee of freedom from discrimination which is enshrined in the Constitution of Kenya does not entitle a European accused person to be tried by a panel of assessors who are exclusively Europeans.

II

Preventive Detention and Emergencies

Of all the cases of preventive detention heard before Ghanaian courts in the early years of independence, perhaps one of the most important was *Re Akoto & 7 ors.*¹⁸ In November 1959, the appellants were arrested and placed in detention under an order made by the Governor-

¹⁶ Cap 2 of the revised edition of the Laws of Kenya, 1948, section 9 which deals with the non-applicability of Indian law to African except as therein strictly defined

¹⁷ (1965) EA 286.

¹⁸ (1961) GLR 523.

General and signed on his behalf by the Minister of the Interior under section 2 of the Preventive Detention Act, 1958. Their application to the High Court for writs of *habeas corpus ad subjiciendum* was refused. On appeal to the Supreme Court the following main contentions were urged by their counsel on their behalf: (a) that the learned trial judge acted in excess of jurisdiction when he refused the application without making an order for a formal return; (b) that, by virtue of the Habeas Corpus Act of 1816, the Court is required to enquire into the truth of the facts contained in the grounds upon which the Governor-General was satisfied that the order was necessary to prevent the appellants from acting in a manner prejudicial to the security of the State; (c) that the Minister of the Interior who signed the order for and on behalf of the Governor-General was actuated by malice; (d) that the grounds upon which the appellants were detained did not fall within the ambit of the expression "acts prejudicial to the security of the State"; (e) that by virtue of section 3 of the Criminal Procedure Code of 1951, now section 1 of the Criminal Procedure Code 1960, the Governor-General was precluded from exercising the powers conferred on him under the Preventive Detention Act, to make an order for the arrest and detention of the appellants without trial except in accordance with the Criminal Procedure Code; (f) that the Preventive Detention Act, 1958, was in excess of the powers conferred by Parliament by article 13(1) of the Constitution, or was contrary to the solemn declaration of fundamental principles made by the President on his assumption of office; and (g) that the Preventive Detention Act, not having been passed upon a declaration of emergency, was in violation of the Constitution of the Republic of Ghana. An affidavit was filed on behalf of the Minister of the Interior which stated that the detention order was made in good faith and that the Governor-General was satisfied that the "order is necessary to prevent the persons detained from acting in a manner prejudicial to the State". The grounds of detention served upon the said detainees contained particulars of the previous acts upon which the conclusion of the Governor-General was based. In delivering the judgment of the Supreme Court, Korsah, C.J., held (a) that the affidavit disclosed all the facts relevant for determining whether the writ of habeas corpus should issue or not, and the learned trial judge was entitled to dispose of the case on the basis of the affidavit alone;¹⁹ (b) that although the Habeas Corpus Act 1816 is a statute of general application, it did not apply to the instant case because the Preventive Detention Act gave full discretion

¹⁹ See *Rv Home Secretary, ex parte Greene* (1941) 3 All ER 104, p 123, per Goddard, L.J.

to the Governor-General, (later the President) if satisfied that such an order was necessary. Upon production of the order, the only question which had to be considered was its legality. If the order was lawful, the detention was *ipso facto* lawful;²⁰ (c) that the Court could only look into allegations of bad faith by high officers of the State if there was positive evidence which was, however, singularly absent in the instant case;²¹ (d) that the term 'security of the State' is not limited to the defence of Ghana against a foreign power and the powers of the Preventive Detention Act might be invoked where the basis of law was sought to be undermined and attempts were being made to cause disruption in the normal functioning of government; (e) that the Preventive Detention Act should be distinguished from the Criminal Code in that while the Code concerns itself with Acts already committed, the Act was aimed at preventing the future commission of acts prejudicial to the safety of the State; (f) that article 13(1) of the Constitution imposed only a moral obligation upon the President of Ghana. The declaration which the President was required to make was like the Coronation Oath of the Queen of England and did not constitute a Bill of Rights which could be regarded as creating legal obligations enforceable in a court of law; (g) the effect of article 7 of the Constitution was that Parliament was sovereign and its legislative powers were qualified only with respect to the entrenched articles; and (h) that the Preventive Detention Act, 1958, was therefore not contrary to the Constitution, and Parliament was competent to pass such an Act even in time of peace.

Although the situation dealt with in *Re Akoto* was not one in which a state of emergency had been declared, we find echoes of Korsah, C J's opinion that the Minister of the Interior's *bona fides* could not be enquired into in the following *dictum* of Ademola, C J N, in the Nigerian case of *Williams v Majekodunmi*;²² "that a state of public emergency exists in Nigeria is a matter apparently within the bounds of Parliament, and not one for this court to decide. Once that state of emergency is declared it would seem that according to the Constitution, it is the duty of Government to look after the peace and security of the State and it will require a very strong case against it for the court to act". In that case, the Federal Parliament of Nigeria had found it necessary to declare a state of emergency under section 65 of the Nigerian Constitution of 1960 in Western Nigeria as a result of what the Parliament believed to be a breakdown of law and

²⁰ *Liversidge v Anderson* (1942) AC 206, HL was followed in this respect.

²¹ *Nakkuda Ali v M F de Sagaratue* (1951) AC 66, p 77, PC.

²² (1962) 1 All NLR 328, p 336.

order accompanied by two rival claimants to the one post of Regional Premier. The plaintiff was one of those whose movements were restricted in consequence of the emergency, and had brought an action challenging the *bona fides* of the defendant who had been appointed an Administrator of the territory during the period of the emergency. It is interesting to note the following observation of Lord MacDermott in *Ningkan v Government of Malaysia*:²³

It is not for their Lordships to criticize or comment upon the wisdom or expediency of the steps taken by the Government of Malaysia in dealing with the constitutional situation which had occurred in Sarawak, or to inquire whether that situation could itself have been avoided by a different approach. But, taking the position as it was after Harley, J. had delivered judgment in September 1966, they can find, in the material presented, no ground for holding that the respondent Government was acting erroneously or in any way *mala fide* in taking the view that there was a constitutional crisis in Sarawak, that it involved or threatened a break-down of stable government, and amounted to an emergency calling for immediate action... these were essentially matters to be determined according to the judgment of the responsible Ministers in the light of their knowledge and experience.²⁴

A somewhat unusual type of claim to fundamental rights and freedoms was upheld in *People's Popular Party v Attorney-General*.²⁵ In the Accra High Court, the plaintiffs, members of a duly registered political party, were refused a permit by the police to hold protest marches concerning certain important political issues, even though a permit had been given to another group (a United Kingdom one) to protest against one of the political issues. The police did not assign any reason for the refusal. The applicants sought a court order to compel the police to issue them a permit, claiming that their freedoms of association, movement and assembly as provided in the 1969 Constitution had been infringed. The respondent denied any such infringement, and asserted that the police had acted properly within their powers under the Police Act as well as under articles 23 and 24 of the Constitution. It was held (a) that the applicants, by virtue of their registration in the manner prescribed by law, had corporate personality and as the word 'person' must be deemed to include bodies corporate under the Interpretations Act, 1960, the applicants were entitled to the fundamental freedoms enumerated in article 12 of the Constitution and enforceable under article 28

²³ (1970) AC 379.

²⁴ See my 'Emergency in Malaysia and in Nigeria', *Nigerian Law Journal*, vol 4, 1970, pp 149-52.

²⁵ (1971) 1 GLR 138.

thereof; (b) that the discretionary power vested in a police officer by law must be exercised in a fair and candid manner so that, when the police refused to grant a permit, they must assign reasons for their refusal and, if they failed to do so, the court could inquire into the grounds and reasons for the police action; and (c) that, while the law prohibits the issue of an injunction against the police, it does authorize the court to make a declaration of the rights of the applicants. The court then proceeded to hold that the applicants were entitled to a declaration that the police were wrong in refusing the permit, and that they can only refuse if such a procession is likely to cause a breach of the peace; and that the applicants were entitled to know in writing the grounds on which the police relied in coming to a decision that the marches could cause a breach of the peace. Hayfron-Benjamin, J. stated the nature of the judicial function in this type of situation as follows:

The powers conferred on the High Court by article 28(2) are wide in the extreme, but they seem to me to reflect the general intention of the drafters that the courts should be the custodians and protectors of the liberties of the individual citizens of Ghana. It is a duty which is at once onerous and honourable. In discharging these duties, the courts must tread the narrow, humble but firm path between the Scylla of over-zealousness and the Charybdis of judicial timidity. Where the liberty of the citizen has been invaded, they should by all means offer protection, but they should not try to find an invasion where none has occurred.²⁶

In *Attisogbe v Harlley*,²⁷ a libel action was brought by the plaintiff against the defendant in respect of a publication in the *Ghanaian Times*. The publication was at the instance of the defendant, then Inspector-General of Police and the Vice-Chairman of the National Liberation Council. The defendant later became a member of the Presidential Commission. The plaintiff alleged that the publication was defamatory of him and also that the defendant, in causing it to be published, was actuated by express malice. Both the plaintiff and the defendant agreed that the defendant as a member of the National Liberation Council and the Presidential Commission, occupied in law the position of the President. By article 36(8) of the 1969 Constitution, it was provided that it should be lawful to institute proceedings, whether civil or criminal in any court in Ghana, against the President within three years of his ceasing to hold office as President. The plaintiff, therefore, contended that as the defen-

²⁶ *Ibid.*, p 140.

²⁷ (1972) 1 GLR 194.

dant was thus immune from legal process, his action was not brought earlier. The Accra High Court held that (a) article 36(8) of the 1969 Constitution was inapplicable to the case because no individual member of the National Liberation Council or the Presidential Commission constituted the President, even though such a member could be presumed to have performed the duties of the President; (b) that the action was statute-barred because no action could be instituted against a public officer after three months from the default complained of, the defendant being such an officer; (c) that insofar as the act complained of did not relate to the overthrow of the Convention People's Party Government, the suspension of the 1960 Constitution, the establishment of the National Liberation Council or that of the 1969 Constitution, the court had jurisdiction to entertain the suit, contrary to the defendant's contention; and (d) that at the material time when the document was published, the National Liberation Council was the supreme legislative body in the country, and the publication was therefore absolutely privileged despite the fact that only an abstract of the original document was published by the *Ghanaian Times*.

In *Matzimbamuto and Baron v Lardner-Burke N O & ors*,²⁸ the General Division of the High Court of Rhodesia had ruled that the court should give effect to legislative and administrative measures by the regime as the only effective government in the country. Lewis, J. based his judgment on the necessity in the interest of the society for the courts to continue functioning and enforcing the regime's measures as a means of avoiding chaos and a vacuum in the law, while Goldin, J. based himself on the ground of public policy required by absolute necessity. There was an appeal to the Appellate Division. While the decision was pending, death sentences imposed either before or after Unilateral Declaration of Independence were not carried into effect. The Officer Administering the Government, however, in August 1967, confirmed the death sentences imposed in three cases. There was an application for a declaration that the confirmation in question was invalid; Lewis, J. in *Ndhlamini & ors v Cartono & anor*,²⁹ held that it was essential that everything done for the proper administration of justice be recognized.

Towards the end of January 1968, the Appellate Division gave judgment in the pending appeal. The court unanimously declared that all the detentions effected after Unilateral Declaration of Inde-

²⁸ (1960) RLR 756.

²⁹ (1967) (4) SA 378 (R).

pendence were unlawful as being *ultra vires* the Emergency Powers Act; it may be observed that this finding did not pronounce upon the legality of the regime as such. The court held that section 4(1) of the Emergency Powers Act did not empower the making of a regulation authorizing general detentions since it was clear that the legislature had permitted the power of interfering with individual liberty to be exercised only by a particular method, but in this case the exercise of that power by another method was *ultra vires*.³⁰

While the judges were unanimous in declaring invalid the continued detention orders, they expressed different views on the legal effects of seizure of power. Thus MacDonald, J A, took the view that his authority for exercising his judicial function was derived from the 1965 Constitution and also from the law enjoining upon all citizens, including judges, the duty of allegiance to the government of the country for the time being. Quenet, J P, for his part, held that the regime had become the internal *de jure* government since its constitution and laws had binding force and since those who perform the judicial function were thereby required to give effect thereto. Two other judges, Fieldsend and Jarvis, A J A, asserted that they derived their authority from the 1961 Constitution and that, although the regime was an unlawful government, they felt impelled to regard its legislative and administrative measures as valid in order to protect the interests of society. The basis was the doctrine of necessity. Beadle, C J, took a position that neither the 1961 Constitution, which he regarded as already defunct, nor the 1965 Constitution which was not yet in force since the regime was not yet so firmly established is to be regarded as a *de jure* government, could be regarded as valid. The learned Chief Justice was of the view that judges should declare the law in the light of a criterion deemed acceptable to them and that the authority of the court to function must be regarded as derived from the tolerance of the regime. He accordingly ruled that the overriding principle must be that the regime could do anything which a lawful government could do under the 1961 Constitution.

III

Legality of Coup d'états

In *Adamolekun v The Council of the University of Ibadan*,³¹ the Su-

³⁰ *Madzimbamuto and Baron v Lardner Burke and others* NO 1968 (2) SA 284 (RAD) pp 356-60.

³¹ SC 378/66 (unreported). Judgment delivered August 7, 1967.

preme Court held that the provision of section 6 of the Constitution (Amendment and Modification) Decree No 1 of 1966 to the effect that no question as to the validity of any Decree or Edict is to be entertained by any court of law does not preclude the courts from enquiring into any question of inconsistency in a Decree or Edict, and that section 6 merely bars the courts from questioning the validity of the making of a Decree or Edict on the ground that there is no valid legislative authority to make one.

Also in *Jackson v Gowon*,³² Sowemimo, J, relying on *Doherty v Balewa*,³³ decided that the powers of the courts to review legislation have remained unimpaired and that a court could declare the provisions of a Decree or Edict invalid and unconstitutional.

That the judiciary could become seriously involved in a constitutional and political controversy is demonstrated in the *Matzimbamuto Case* which, as we have seen, involved a determination of the legality or otherwise of the *Unilateral Declaration of Independence* (UDI). The majority Rhodesian Bench had postponed the final decision on the question, but the majority of the Judicial Committee of the Privy Council had no illusion whatsoever that judges who were loyal to Her Majesty under the 1961 Constitution could at the same time concede a limited legality of a kind to the "regime which had usurped powers and acquired control of that territory".³⁴ Faced with a situation in which each of the two governments was "seeking to prevail over the other", the court could not sit on the fence. It must decide. The Privy Council had to advise on the question whether the detention of the appellant under the Emergency Powers (Maintenance of Law and Order) Regulations 1966 made by the usurping government's Officer-Administering the Government was valid in spite of the provisions of the United Kingdom (Southern Rhodesia) Act, 1965 and the Constitution Order of the same year by which the Prime Minister and other Ministers had been dismissed and according to which no laws could be made or business transacted by the Legislative Assembly of Southern Rhodesia. The same Rhodesian Appellate Division had also refused a declaration that an appeal lay as of right to the Judicial Committee under section 75(1) of the 1961 Constitution, since none of the basic rights provided for in the Constitution had been alleged to have been contravened; that court also supported its refusal for the case to be submitted to the Privy Council with the curious argument that any decision

³² Judgment delivered March 3, 1967, (unreported), High Court of Lagos.

³³ (1961) All NLR 604.

³⁴ (1968) 3 All ER 561, p 573.

of the Privy Council would be ignored by the usurping government and accordingly be of no value to the appellants.³⁵ The Privy Council's ruling in the *Dhlamini Case*³⁶ that the wife of the detained man had a right of appeal to itself showed the Rhodesian judges' leaning towards politico-legal realism and their aversion to strict legality even in a situation where the individual's right to life was at stake. The Privy Council equally rejected the attempt of the Rhodesian Court to apply Roman-Dutch law to the question of the legal effect of laws passed by the United Kingdom Parliament in Southern Rhodesia and quoted with approval Innes, CJ's *dictum* in *Union Government v Estate Whittaker*,³⁷ and asserted that "the nature of the sovereignty of the Queen in the Parliament of the United Kingdom over a British Colony must be determined by the Constitutional law of the United Kingdom".³⁸ Lord Reid observed that it was not obvious that the result would be in any way different if Roman-Dutch law were in fact to be deemed applicable. The Privy Council was of the opinion that the constitutional convention requiring the United Kingdom Government to legislate only with the consent of the Rhodesian Parliament "had no legal effect in limiting the legal power of Parliament". The United Kingdom (Southern Rhodesia) Act, 1965 accordingly had full effect in Rhodesia.

The concept of *de facto* and *de jure* governments were very much prayed in aid of their ambivalent attitude to the problem of the Universal Declaration of Independence by the majority of the Rhodesian judges. Their Lordships of the Privy Council pointed out that these were "conceptions of international law ... quite inappropriate in dealing with the legal position of an usurper within the territory of which he had acquired control". The Board was of the opinion that usurpers might become, in certain circumstances, lawful governments, and that a court must answer the question how or at what stage the new regime became lawful. The Judicial Committee referred to the recent decision of *Uganda v Commissioner of Prisons, ex parte Matovu*³⁹ (which was a Ugandan case) and *The State v Dosso*,⁴⁰

³⁵ This opinion of the Rhodesian Appellate Division was probably based upon the Rhodesian Minister's Affidavit "that it (the Rhodesian Government) will not in any way recognise, enforce or give effect to any decision, judgment or order of any other court... which purports to be given on an appeal from this Honourable Court". It is strange that the Rhodesian judges were not disposed to consider the legality of this threat.

³⁶ *Dhlamini & Co v Carter & ors* NO 1968(2) SA 464.

³⁷ (1916) SA AD 194.

³⁸ (1968) All ER 561, p 572.

³⁹ (1966) EA 514.

⁴⁰ (1958) 2 PS CR 180.

which was a Pakistani case. The Board pointed out that in both cases the new constitution of each country was held to be valid because, on the doctrine of efficacy of the change, the pre-existing constitution had been annulled. The difference between the situations in Uganda and Pakistan on the one hand, and the situation in Rhodesia on the other was that, at the material date in the middle of 1968, the "British Government acting for the lawful sovereign, is taking steps to regain control and it is impossible to predict with certainty whether or not it will succeed". This particular opinion might have been responsible for the subsequent change of loyalty unequivocally declared by the Rhodesian judges to the sovereign. The Rhodesian judges' argument for their earlier ambiguous stand had been based upon the so-called doctrine of *necessity* which, as the Board pointed out, had no parallel in English law, whatever might have been the position with regard to the United States Civil War cases. The situation in Rhodesia was so different from the situation in the United States of America that no meaningful comparison could be made. The Board finally rejected the doctrine of implied mandate on the ground that "the fact that the judges among others have been put in a very difficult position cannot justify disregard of legislation passed or authorized by the United Kingdom Parliament".

It would seem that the Southern Rhodesian judges accepted the correctness of the Board's decision as witness the attempt to explain away their former role in *Archion Ndhlovu & ors v The Queen*.⁴¹

We can now turn to an examination of the *Uganda Case* to which the Privy Council referred in the *Matzimhamuto Case* in order to see how another Commonwealth country dealt with the legality of a *coup d'etat* in an independent sovereign state. In *Uganda v Commissioner of Prisons, ex parte Matovu*,⁴² there had been a change of government which arose when the then Prime Minister declared in a public statement that, in the interest of "national stability and public security and tranquillity", he had taken over all the powers of the Government of Uganda, abolished the pre-existing constitution of the country and become the Executive President of the State. The High Court of Uganda held that it felt itself bound to take judicial notice of the fact that the change of government had been completely successful and that the new government was valid on the ground of efficacy, though not on the basis of legitimacy. It was argued before the High Court on behalf of the new govern-

⁴¹ (1968) (4) SA 515 (RAD).

⁴² (1966) EA 514.

ment that customary international law recognizes a *coup d'etat* as an effective and legal way of changing a government if the following four basic requirements are satisfied:

- (a) There must have been an abrupt political change, eg a *coup d'etat* or a revolution. It does not matter whether the change had been effected directly by a military junta or by a civilian or group of civilians subverting the existing legal order, with or without the aid of the military. There can be a *coup* without the use of armed force.
- (b) The change must not have been within the contemplation of an existing constitution; if it were, then the change would be merely *evolutionary*, ie constitutional; it would not have been *revolutionary*.
- (c) The change must destroy the entire legal order except what is preserved. In order for the *coup d'etat* to be complete, the new regime need not have abrogated the entire existing constitution. It is sufficient that what remains of it has been permitted by the revolutionary regime.
- (d) The new constitution and government must be effective. There must not be a concurrent rival regime or authority functioning within or in respect of the same territory.

Hans Kelsen, in his *General Theory of Law and State*, has put the legal situation thus:

It amounts to this question: Under what circumstances does a national legal order begin or cease to be valid? The answer given by international law, is that a national legal order begins to be valid as soon as it has become — on the whole — efficacious, and it ceases to be valid as soon as it loses this efficacy ... The government brought into permanent power by a revolution or *coup d'etat* is, according to international law, the legitimate government of the state, whose identity is not affected by these events.⁴³

We, therefore, deduce that the abrupt change required under the first principle must have taken place in a politically independent sovereign state, and that this is the distinguishing mark between the Ugandan situation and an independent political entity on the one hand and the colony of Southern Rhodesia over which the United Kingdom was at the material time the political sovereign on the other.⁴⁴ The Judicial Committee in the *Matzimbamuto Case* held that Ian Smith's regime in Southern Rhodesia was invalid on the following grounds:

⁴³ (1961) Edition, pp 117ff 220.

⁴⁴ See Lord Reed's *dictum* in the *Matzimbamuto Case* (1938) 3 WLR 1129, p 1249.

Their Lordships would not accept all the reasonings in these judgements but they see no reason to disagree with the results. The Chief Justice of Uganda (Sir Udo Udoma, C.J.) said: 'The Government of Uganda is well established and has no rival.' The court accepted the new Constitution and regarded itself as sitting under it. The Chief Justice of Pakistan (Sir Muhammad Munir, C.J.) said: 'Thus the essential condition to determine whether a constitution has been annulled is the efficacy of the change.' It would be very different if there had been still two rivals contending for power. If the legitimate government had been driven out but was trying to regain control, it would be impossible to hold that the usurper who is in control is the lawful ruler, because that would mean that by striving to assert its lawful right, the ousted legitimate government was opposing the lawful ruler.

In Their Lordships' judgment, that is the present position in Southern Rhodesia.⁴⁵

This passage would seem to be descriptive of the regime of Ojukwu in Nigeria before the end of the rebellion or attempted secession in January 1970. It should be noted that, *vis-a-vis* the legitimate Federal Military Government, the territory under which Ojukwu declared secession on May 30, 1967, is an integral part of Nigeria and not even a colony or other dependency of Nigeria. The attempted secession was clearly unconstitutional and invalid having regard to sections 71 and 86 of the Constitution of the Federation, 1963.

We need consider here only two or three cases in which the Nigerian Courts had had to pronounce upon the validity of the Federal Military Government of Nigeria and of its legislative measures. In *Lakanmi & anor v The Attorney-General (Western State) & ors*,⁴⁶ the Western State Government, acting under a Decree of the Federal Government established a Tribunal of Inquiry to investigate the assets of certain public officers suspected of having been corruptly acquired. On the basis of the report of the Tribunal, the assets of those found guilty were forfeited. In an appeal to the Western State Court of Appeal, those affected challenged the validity of the Decree and of the legality of the Federal Military Government itself. As the Supreme Court had, in an earlier case of *Adamolekun v The University of Ibadan*,⁴⁷ decided that the court cannot question the *vires* of the Federal Military Government in making a Decree or an Edict on the grounds that there is no legislative authority to make one, the Western State Court of Appeal therefore held that the impugned Decree was valid, and so was the order made thereunder. Again

⁴⁵ *Ibid*, p 1250.

⁴⁶ (1968) CAW/35/68.

⁴⁷ (1968) NMLR 253.

in *Ogunlesi & ors v Attorney-General of the Federation*,⁴⁸ the High Court of Lagos State held that two Decrees of the Federal Military Government under which the salaries of certain grades of staff of public corporations had been reduced, were valid as being *intra vires* the Federal Military Government whose decrees can override the new Constitution of the Federation. The *Lakanmi Case*⁴⁹ went on a further appeal to the Supreme Court. It is sufficient for our purpose to summarize the various conclusions it reached as follows:

- (a) that what took place on January 15, 1966, was not a revolution, but a voluntary transfer of power to the Military by the group of Cabinet Ministers after the Prime Minister disappeared;
- (b) that the Military regime was a constitutional interim government to which power had been given for the limited purpose of restoring law and order and thereafter returning such power to the truncated 'cabinet' that 'transferred' it, although there was no provision in the pre-existing Constitution for any such transfer even if the Prime Minister had been alive and had headed the meeting;
- (c) that the *Forfeiture of Assets, (etc) Validation Decree of 1968*, insofar as it purported to validate the orders made by the Military Governor of the Western State, was invalid and *ultra vires* the partly abrogated Constitution of 1963, despite the clear and categorical provisions of the Constitution (Suspension and Modification) Decree No 1, 196 which overruled it;
- (d) that, insofar as the *Forfeiture of Assets (etc) Validation Decree of 1968* impinged upon the sphere of the judiciary by the express provisions therein, it was void as an unnecessary legislative intrusion by the Federal Military Government into an essentially judicial domain;
- (e) that the Federal Military Government, as a temporary military regime, lacked the competence to make laws, not justified by the *necessity* of the State, despite the fact that the power transferred to it is to make laws for the "peace, order and good government of Nigeria on any matter whatsoever".

It is not surprising, therefore, that the Federal Military Government considers these views as not only manifestly untenable, but also likely to lead to chaos. It accordingly promulgated The Federal

⁴⁸ (1970) LD/28/69.

⁴⁹ (1970) SC/58/69. See my 'Military Decrees in Nigeria and Ghana', *Nigerian Law Journal*, vol 5, 1971, pp 129-32; see also my 'The Nigerian Crisis in International Law', in Proceedings of the Annual Conference of the Nigerian Society of International Law, March 1970, pp 137-54.

Military Government (Supremacy and Enforcement of Powers) Decree No 28 of 1970 which reaffirmed that what had taken place on January 15, 1966 was not the amicable transfer of power by a few civilian Ministers to the Armed Forces, but a bloody revolution which brought the Military regime into power. The point was clearly emphasized in this Decree that a Military regime is a government of unlimited powers, the Decrees of which cannot be declared invalid by a court which it had permitted to function under its sway.

Similarly, in *Awunor-Williams v Gbedemah*,⁵⁰ when the National Liberation Council overthrew the government of Dr Nkrumah on February 24, 1966, it suspended the Constitution of Ghana of 1960 and assumed the Executive, the legislative and the judicial powers of the State. On February 26, 1966, a proclamation published in the official gazette, however, permitted the courts to continue in existence with the same jurisdiction as before "subject to any Decree that may be made by the National Liberation Council", and this was later confirmed by the Courts' Decree of September 1966. There was a general election in 1969, and one of the two defeated candidates brought an action against the successful candidate, praying the court to declare his election null and void and his seat in the National Assembly vacant on the ground that the new 1969 Constitution of Ghana expressly provided that anyone found guilty of corruption, by *inter alia* a tribunal of inquiry, is disqualified for five years from standing as a candidate for a parliamentary constituency, and that the defendant was such a person. It happened that a tribunal presided over by a High Court judge and set up under the Investigation and Forfeiture of Assets Decree (No 72) and the Commission of Inquiry Act, 1964 had found the defendant guilty of corruption in respect of his former office as Finance Minister in the Nkrumah government before he left it some six years previously. The defendant contended that he was entitled to retain his seat in the National Assembly to which he had been duly elected in a free and fair election, and that the National Liberation Council (Investigation and Forfeiture of Assets) (Amendment) Decree No 129 which took away his right of appeal against any finding of the Commission of Inquiry and the Investigation and Forfeiture of Assets (Further Implementation of Commission's Findings) Decree No 354 which provided machinery for realizing the confiscated assets were void because they were contrary to article 102 of the new Constitution of 1969 which vested

⁵⁰ (1969) Court of Appeal sitting as the Supreme Court, Const SC 1/69 dated December 8, 1969.

judicial powers in the Judiciary and did not vest any final judicial power in any organ or agency of the Executive. The defendant thus alleged that, by the two Decrees, the Military regime had usurped judicial power. Also, by the National Liberation Council (Investigation and Forfeiture of Assets) Decree No 253, the courts were forbidden to entertain or grant any of the various prerogative orders to anyone against whom an adverse finding had been made by a commission of inquiry. The Court of Appeal sitting as the Supreme Court said *obiter*:

In view of the grave disabilities which the findings of a commission imposed by the Constitution which came into force on August 22, 1969, we think, in retrospect, that the passage of Decrees 129 and 253 did anything but advance the end of justice.

The Court thereafter proceeded to make the following observation:

... it would be accurate to say that judicial power was exercised by the Courts during the era of the National Liberation Council on sufferance. To say this is not to accuse the National Liberation Council even obliquely of totalitarianism or cast anything like a posthumous reflection on a regime which was in many respects a liberal one. But we think this is the true constitutional position. *No Decree which was passed by the National Liberation Council could have been struck down by the Courts as unconstitutional* (Italics mine). In our opinion, therefore, not only were the two Decrees perfectly valid at the dates of their passage, but so were any acts and steps taken under them including, of course, the findings of the Commissions established under the Decree 72 and Act 250.

Thus the Supreme Court of Ghana reached a conclusion which was in consonance with those reached by its Nigerian counterpart in earlier cases before the strange decision in the *Lakanmi Case* in 1970 which we have just discussed above. The Ghana Supreme Court had in this way vindicated the legality of the military regime without the existence of any specific Decree to that effect, as there was in Nigeria — namely, the Constitution (Suspension and Modification) Decree No 1 of 1966. It is also significant that throughout the judgment in *Awunor-Williams v Gbedema* the Ghana Supreme Court had no occasion to make any conscious reference to the four principles of customary international law governing the legality of illegal regimes which we enunciated earlier.

In *Sallah v Attorney-General of Ghana*,⁵¹ however, the same Ghana Court of Appeal sitting as the Supreme Court had to determine

¹ (1970) Const SC 8/70 delivered on April 20, 1970. See also S K Date-Bah's 'Jurisprudence's Day in Court in Ghana', *International and Comparative Law Quarterly*, vol 20, pt 2, 4th in series, April 1971, pp 315-23.

definitively the precise legal effect of a *coup d'état* on the country's legal system. The Attorney-General of Ghana cited Hans Kelsen's views on the subject in order to buttress his argument that the *coup* of February 24, 1966, had put an end to the pre-existing legal order and substituted an entirely new one, under which all existing laws, including enactments, must be deemed to have been re-established until amended or suspended by the new ones made by the National Liberation Council. On this view, the plaintiff in the case had been rightly dismissed from his post as a manager in the Ghana National Trading Corporation established under the Statutory Trading Corporation Act, 1961, when the Presidential Commission wrote him a letter dated February 21, 1970 to that effect on the basis of section 9(1) of the Transitional Provisions of the Constitution of 1969. The plaintiff contended that the Military Government was not entitled to terminate his appointment since he did not owe it to the National Liberation Council's proclamation, but to the 1961 Act which had thus survived the *coup* and which did not come under section 9(1) of the Transitional Provisions, which contemplated only posts 'established' since the *coup*. The Supreme Court by a majority of two to one, held that the word 'establish' must be given its ordinary meaning and that, accordingly, the plaintiff's office was not established by the National Liberation Council's Proclamation of February 26, 1966, which rather permitted "the continued existence to the Kelsenite principles advanced by the Attorney-General". The Court prefers to base its decision on a simple legislative interpretation of the relevant constitutional provision, thereby refusing to answer the question whether the *coup* of February 24, 1966 did destroy the entire legal order and not just the pre-existing legal system of Ghana. It was not enough for a majority of the Court to dismiss the arguments based on Kelsen as merely theoretical and foreign, or to regard the difference between the occurrence of the *coup* on February 24, and the making of the Proclamation on February 26 as having created a hiatus in the legal order. The Proclamation should have been made retroactive to February 24, as it no doubt was intended to have been by the National Liberation Council. It was so made by its Nigerian equivalent in similar circumstances. Reasoned analysis for and against by the two judges in the majority and by the one judge in the minority, would have been valuable. As it was, the Court did not take the matter far enough.

LECTURE FIVE

JUDICIAL PRECEDENT AND LEGAL DEVELOPMENT IN AFRICA

It has with a good deal of truth been claimed by many that the Jury system and the Habeas Corpus procedure are the pillars of the English common law. Even more than either of these, however, is the Doctrine of Judicial Precedent as the main characteristic of the common law as it operates in the Commonwealth, in the United States of America and in certain marginal areas that have been influenced by the common law, such as the Sudan, Ethiopia and Liberia. The importance of the doctrine lies in the fact that, in contrast with the civil law systems of continental Europe and Latin America, it envisages a legal system that derives its source from a developing legal order based upon a series of judicial decisions embodying the common customs of the realm. This is in contradistinction to the civil law which derives its source from codes. In simple terms, the distinction is between case-law and codification as the underlying basis of the legal system.

Now, by the Doctrine of Judicial Precedent is meant the concept and practice whereby decisions of the highest court in the land are binding upon all courts subordinate to it, those of the court or courts immediately below the highest courts bind all courts subordinate to them and so on until the lowest courts are reached at the base of the pyramid. Thus, in the United Kingdom, the highest appeal court for British Courts is the House of Lords, the decisions of which bind the English Court of Appeal, the High Court, the Crown Courts and the Magistrate's Courts in the same way as they bind the Scottish Court of Sessions and subordinate courts in Scotland. While decisions of each of the other courts just mentioned bind the courts respectively subordinate to it, the decisions of the Court of Sessions in Scotland bind only Scottish Courts subordinate to it, but English and Scottish decisions are mutually exclusive as regards their binding character below the House of Lords. Her Majesty's Judicial Committee of the Privy Council was, and in a number of cases still is, the highest court of appeal for the British colonies (and for a few English tribunals like those of the legal or medical professions in matters of discipline) and its decisions—commonly referred to as *opinions*—are binding on such courts and not on English courts as such.

In its operation in Africa, the doctrine implies that, for instance, in Nigeria and Ghana, the decisions of the Supreme Court as the highest court bind the High Court, those of the High Court bind the District or Magistrate's Courts, while those of the latter bind, at least in theory, the Customary or Local Courts. We need not stop to consider how far customary or local courts do in practice observe the doctrine of judicial precedent, particularly having regard to decisions of superior courts on issues within their jurisdiction. But we must mention in passing that in a federation like Nigeria, while the decisions of the Supreme Court bind all the State High Courts, no decision of one High Court or even of the Western Nigeria State Court of Appeal binds another State High Court. This is because all the State High Courts are of co-ordinate jurisdiction. When there was the West African Court of Appeal, its decisions bound the Courts of each of the four countries subject to its sway. Since independence, however, the old West African Court of Appeal decisions have only a persuasive authority in each West African State. If we may explain this a little, we should say that there is a well-established principle to the effect that precedents are classifiable into the two categories of *authoritative* and *persuasive*: that is to say, that precedents are authoritative within a particular hierarchy of courts under one territorial jurisdiction, as is the case with the Supreme Court decisions of each State *vis-a-vis* courts subordinate to it, while with respect to the Supreme Court of one territory, its decisions have only a persuasive authority in any other territory and may be followed or not at the will of the courts of the latter. In other words, such persuasive precedents are not binding. These considerations apply with equal force to the Court of Appeal for Eastern Africa which is the final court of appeal for Kenya, Uganda and Tanzania. Although the decisions of the East African Court of Appeal bind all the Supreme Courts of the constituent States, no decision of the Supreme Court of one State constitutes an authoritative precedent for the courts of another State.

While we are still about the distinction between authoritative and persuasive precedents, we may note briefly that, for much the same reason as we have just given, the decisions of the former West African Court of Appeal were never binding upon the Court of Appeal for Eastern Africa or, indeed, upon the defunct Central African Federation Court of Appeal. While each was free to consult the decisions of the other for parallels or analogies, each was not bound to follow such decisions. We shall return to this subject later when we come to consider the problems likely to arise where there was a decision of the Privy Council upon identical issues of law previously applied in cases

before the courts of one or more of these territorial courts of appeal in Commonwealth Africa. For the present, we need say no more than that when the Privy Council was the court of last resort for both the West and the East African groups of territories, its decisions were binding upon both appeal courts equally. Today the Privy Council is no longer a court of appeal for both groups of States, although the problems of its erstwhile hegemony still remain with us and will be considered anon.

I

Attitude of African States Towards English Decisions

Because of the reception of English law, including in particular the use of the so-called residual clause providing for the application of English law wherever a particular dispute before the court is not covered by customary law or a local enactment, judges—African and non-African—tended during the colonial era all too readily to resort to English law to fill the gaps. This was often the case when dealing with such sensitive areas as the application of the doctrine of repugnancy or issues relating to public policy or morality, when as we saw in Lecture II English notions of these concepts were freely imported by the judges to deal with the situation. There was not sufficient knowledge of the sociology of our peoples or of the ethos underlying our polity; so the early judges fell back on the ‘unruly horse’ of English public policy with which they had probably a nodding acquaintance in their study of English law and political thought.

We must hasten, however, to add that there were exceptions to this general tendency, as when for instance even an English judge during the colonial period showed true judicial technique in refusing to apply English decisions to a local case before him involving the determination of trade marks. Thus, in *MacIver & Co Ltd v CFAO*,¹ Weber, J, observed: “To the trained eye of a civilised community, there is undoubtedly a considerable difference in the two designs set side by side and the one would hardly be likely to be mistaken for the other, but while the broad principles laid down in English cases should be applied, the Trade Marks laws of this country should be administered with due regard to local conditions.”² A little further on, the same opinion was expressed by Speed, C J, in these words: “It seems clear that the learned judge in the court below was inclined to

¹ (1917) 3 NLR 181.

² *Ibid.* p 19.

refuse registration of this mark and would have done so had he not felt constrained to a contrary conclusion by the decisions of the English courts. These decisions are of course binding on us but they must be construed having regard to the local conditions which are widely different from those that obtain in England."³ These various observations clearly show that even English judges have sometimes decided to depart from English precedents when they felt that local circumstances precluded the application of English authorities to local conditions that were widely different from those in England.

Since political independence, however, a more strident note for judicial independence of English decisions has been struck in various parts of Africa. This proclamation of the new freedom is typified by this observation of Mr Justice Ollenu: "Again as to the common law, from its English source, the courts of Ghana have hitherto paid regard to decisions of the courts in England; now they may pay regard to expositions of the common law by the courts of any country which exercises jurisdiction in the common law, namely, the English common law." What has in fact happened at political independence has been that English decisions, whether of the House of Lords or of the Privy Council, now have only a persuasive authority in Commonwealth Africa. It follows that the decisions of other common law countries like the United States of America, Canada, Australia and India, have at best only a persuasive authority in African courts.

This raises the general question as to how far Commonwealth countries follow English decisions. In *Parker v R*,⁴ Discon, L C J, of Australia in a very illuminating judgment held that the controversial English decision in *DPP v Smith*⁵ had been wrongly decided and was, therefore, not to be followed in Australia. This same English decision fell to be considered in the East African case of *The Queen v Sharmopal Singh*,⁶ where the accused had been convicted of the murder of his wife by the Kenya High Court sitting with three assessors who said that the accused was not guilty since the wife's death occurred in the process of the husband having intercourse with her. The Court of Appeal for Eastern Africa substituted a verdict of manslaughter, and the State appealed against this judgment to the Privy Council for the restoration of the verdict of murder. The Kenya Government counsel cited *DPP v Smith (supra)* as authority for the proposition that "knowledge" within the meaning of "malice aforethought" under the

³ *Ibid*, p 22.

⁴ (1963) CLR 569.

⁵ (1960) CLY 739, (1961) AC 290.

⁶ (1962) EA 13 (PC).

Kenya Penal Code does not mean actual knowledge but only such knowledge as a reasonable man would have that death might be the probable consequence of his acts or omissions. It was further argued that the Court of Appeal for Eastern Africa had wrongly ignored the English decision in *D P P v Smith* in substituting its verdict of manslaughter only. The Privy Council refused to follow *D P P v Smith* because, in their view, the Penal Code provision of what constituted grievous harm was not affected by the English decision. Their Lordships accordingly affirmed the decision of the Court of Appeal for Eastern Africa.

Another decision showing that judges—African and non-African—are increasingly conscious of the need to safeguard local judicial precedents against English decisions in certain situations is *Ezeani & ors v Njidiye*.⁷ This was a case involving, *inter alia*, the tort of conversion and the measure of damages therefor. Brett, J S C, in delivering the judgment of the Supreme Court of Nigeria, observed on p 98 in reference to the House of Lords decisions in *Rookes v Barnard*⁸ regarding the award of *exemplary* damages: "It is not necessary in the present case to decide whether the Courts in Nigeria should adopt this decision *in toto*, but as a warning against the over-free award of exemplary damages it is of strong persuasive authority." Incidentally, the question whether or not *Rookes v Barnard* was applicable in Kenya was considered in *Orude and Nwangi v The Municipal Council of Kisumu*.⁹ The Court of Appeal for Eastern Africa, relying on the Privy Council test in *Australian Consolidated Press Ltd v Uren*, held that there was no local body of law inconsistent with *Rookes v Barnard* which must be treated "as authoritatively setting out the law of England as to exemplary damages in tort, which was applied in Kenya by the Judicature Act, 1967". This decision was soon to be upset by *Broome v Cassell & Co Ltd & anor*,¹⁰ in which the English Court of Appeal cast serious doubts on its validity, but the House of Lords has since restored *Rookes v Barnard*. But for this restoration by the House of Lords in England, the law as to exemplary damages in East Africa would have remained chaotic as a result of the slavish application there of this English decision. It would have been wiser for the Court of Appeal in Eastern Africa to have followed the example of the Supreme Court of Nigeria by regarding the English decision as having only a persuasive authority.

⁷ (1965) NMLR 95.

⁸ (1964) 2 WLR 269.

⁹ Civil Appeal No 37 of 1970. Judgment delivered on November 27, 1970.

¹⁰ (1971) 2 All ER 187.

In *Rashid Muledina & Co (Mombasa) Ltd & ors v Hoima Ginners Ltd*,¹¹ one of the arguments of counsel for the respondent was that, in interpreting the Arbitration Act of Kenya (Cap 49), the Court of Appeal for Eastern Africa should not consider English decisions, nor even the decisions of the Court itself, since they were subject to appeal to the Privy Council. Sir Charles Newbold, C J, observed:

It has been urged on behalf of the respondent that this court is not bound to English decisions and that it should overrule the decision in the *Sohan Lal Case*¹² as that decision was given at a time when this court was subordinate to the Privy Council. It is clear that this court is not bound by any English decision, whether given before or after independence. Nevertheless, this court will pay due regard to the decision of any Commonwealth Court where a similar system of law to that pertaining in East Africa exists, and will, of course, pay especial regard to the decision of the English courts, especially where those decisions enunciate the common law or equity or interpret statutes of general application or statutes which have been substantially copied in East Africa. As regards previous decisions of this court, whether before or after Independence, I would not wish to express an opinion as to the precise application of the doctrine of *stare decisis* as the matter was not fully argued before us and in any event I am quite convinced that the decision in the *Sohan Lal Case* was correct and should be followed.

As regards the reservation of the learned Chief Justice in his last sentence, Spry, J A, explained the position further in these words:

I would, of course, agree that this court is not bound by English decisions but in the interpretation of the Arbitration Act, much of which (including sections 11 and 12) is clearly derived from the English Arbitration Act, 1889, respect should be shown to English decisions on that Act, particularly those given prior to the enactment of the Kenya statute because, in the absence of any indication to the contrary, it is reasonable to suppose that the legislature enacted the Kenya statute with knowledge of those decisions. As regards the pre-Independence decisions of this court, the legislature has on each of the constitutional changes, expressly maintained the existing law and therefore those decisions should carry just as much weight as if there had been no constitutional changes.

In *Ahmed & anor v R*,¹³ the question was whether the joinder of two accused persons which constituted a procedural defect under the Kenya Criminal Procedure Code was a mere irregularity, or whether it was a fundamental illegality which vitiated the whole trial. On an appeal from the Kenyan Supreme Court, the Court of Appeal for

¹¹ (1967) EA 645.

¹² *Sohan Lal v East African Builders' Merchants* (1951) 18 EACA 50.

¹³ 1 Criminal Appeal No 31 of 1962. Judgment delivered on May 2, 1962.

Eastern Africa first considered *Mubarak v R*,¹⁴ one of its own earlier decisions on appeal from the High Court of Somaliland Protectorate, which, while involving a similar problem, really turned on the application of a Criminal Procedure Code based on that of India. The Court of Appeal pointed out, however, that one of the differences between the Indian (and Somaliland) Code and the Kenya Code, was the omission in the Kenya Code of any provision for separate trial of every charge; and the court was of the opinion that, as the Kenya Code had been based on the English Indictment Act, 1915, and not on the Indian Code, the English decisions must be followed.¹⁵ The Court of Appeal took the view that "it is the English law and practice to which it is right to turn to ascertain the effect of an irregular charge or information and that the Indian law and the decision made thereunder are not impugned."

When a Privy Council decision was based on an Indian Act which applies in East Africa, the Court of Appeal for Eastern Africa might very well decide not to follow it. Thus, in *Zamburakis & anor v Rodussakis*,¹⁶ the appellants had argued at the trial that the claim against them was barred by the Indian Limitation Act, 1908, which, with the Indian Code of Civil Procedure, was applied in Tanganyika in 1920 by Order-in-Council. Mahan, J, who tried it as a preliminary issue in the pleadings, rejected the plea. When the matter was taken to the High Court, Cox, C J, upheld this ruling and ordered that the account should be taken. On appeal, the Court of Appeal for Eastern Africa affirmed Mahan, J's ruling for the reason that section 97 of the Code of Civil Procedure forbids appeal from a preliminary ruling on any appeal from the final decree. On a final appeal to the Judicial Committee, Their Lordships followed an earlier decision of their own on the interpretation of the same Act on appeal from India in 1917 in *Fricomdas Cooverji Bhoja v Gopinath Fiu Thakur*.¹⁷ The question now is: Would such a decision of the Privy Council be followed in any East African court today? The issue is important in view of the sizable number of Indian Acts which apply there as part of the received law.

There may occasionally arise a case before an African court in respect of which there are two inconsistent decisions, one of the

¹⁴ (1959) EACA G App No 172 of 1959, unreported.

¹⁵ This decision was in accordance with the rule in *Trimble v Hill* (1879) 5 AC 342 to the effect that where the local legislation was substantially the same as the English legislation, the English decision on such legislation should be followed. Indeed, this was done in *Jeremiah v R* (1951) 18 EACA 218.

¹⁶ PC Appeal No 5 of 1957. Judgment delivered on July 16, 1968.

¹⁷ ILR 44. Cal 759.

English House of Lords and the other of the Privy Council. As the Doctrine of Judicial Precedent operates in Africa, the better opinion is that Privy Council decisions prevail. Thus, in *Clyde-Wiggins v Maha Estates Ltd*,¹⁸ Goldin, J, preferred to follow *Baines v Pick*¹⁹ rather than *Scharfeneker v Duley & Co Ltd*,²⁰ thereby affirming the principle that decisions of the South African Appellate Division, given before the abolition of its appellate jurisdiction over the High Court of Southern Rhodesia, are binding on a single judge of the High Court of Southern Rhodesia. The South African Chief Justice had in the course of his judgment in *van der Linde v Calitz*²¹ discussed *R v L*²² on appeal from Rhodesia, wherein the view was expressed that, despite statutory wording that evidence was to be admitted "as if the matter were depending in the High Court of Judicature", regard must be had to the fact that the Privy Council was the Court of Appeal and not the House of Lords. Accordingly, in the event of a conflict between the two, Privy Council decisions will prevail. Davies, J, in *ex parte Boland* gave a salutary reminder that, where courts are given a judicial discretion, reported cases are only examples of how past judges have thought fit to exercise the discretion and cannot either fetter or limit the discretion conferred by statute or create a binding rule of practice.

II

Post-reception Date English Decisions in Africa

It will be recalled that in Lecture I when we discussed the question of the respective dates of introduction of English law into the several African territories, we mentioned briefly the problem as to which English decisions should be regarded as part of the received law; we then promised to re-examine the question more fully in this lecture.

The treatment in *Orude and Nwangi Case* (*supra*) of the authority of *Rookes v Barnard* (*supra*) by the Court of Appeal for Eastern Africa has once again focussed attention upon the binding character in an African State of English decisions given *after* the reception date. Let us illustrate with an example where the reception date is January 1, 1920. Should an English decision given in 1930 on a rule of common law which extends its scope by creating new law be binding upon that

¹⁸ (1967) (1) SA 240 (R).

¹⁹ (1955) (1) SA 534 (AD).

²⁰ (1940) SR 223.

²¹ (1967) (2) SA 239 (AD), pp 250-51, per Steyn, C.J.

²² (1951) (4) SA 614 (AD). (1967) (3) SA 655 (R).

particular State? There have been two views on this matter. The first view is that such a post-reception date English decision, insofar as it is a legitimate extension of existing common law rule, should be regarded as binding on the courts of that State provided that it is a decision of the appropriate English court.²³ The other view is that only those English decisions at the cut-off date will be binding.²⁴ The problem will be thrown into bold relief if we take one or two concrete cases, one from the law of contract and the other from the law of tort. Consider what is known as the Rule in *Chandler v Webster*.²⁵ which is to the effect that if I hire a room in your house along the main road in town in order to view a procession, and that procession is subsequently cancelled, I cannot recover any money paid in advance; the contract is frustrated, and the loss "lies where it falls". This was the English common law up to *Fibrosa v Fairbairn, etc Ltd*,²⁶ in which the House of Lords overruled *Chandler v Webster* and held that the payer of money for a consideration that has wholly failed should be able to recover it. On the second view, a Commonwealth African country would not be able to claim this logical extension of the English common law rule except by means of fresh legislation. Again, let us take in the law of tort the development of the tort of negligence. According to the decision in *Winterbottom v Wright*,²⁷ if *A* sold a defective chattel to *B* and *C* was injured by using it, *C* could not sue *A* because *C* was not a party to the contract between *A* and *B*. Then, after a series of decisions, *Donoghue v Stevenson*²⁸ was decided by the House of Lords on a Scottish appeal to the effect that if *A* puts a deleterious manufactured substance into circulation by means of a sale to *B* and *C* is injured, *C* can sue *A* for negligence independently of the fact that *C* is not a party to the contract. On the second view, this worthwhile extension of the principle of tortious liability for negligence would not be available to the State concerned.

An interesting example of the inter-State use of judicial precedents is afforded by the Ghanaian case of *Wallace Johnson v R*²⁹ which, it will be recalled, was to the effect that, where a provision in a code was intended to be exhaustive of the applicable law, it should be considered

²³ See my 'Judicial Precedents in Colonial Courts', *Modern Law Review*, 1955, pp 361-370; and Park, A W E's *Sources of Nigerian Law*, pp 20, 38 and 95.

²⁴ See A N Allot's 'Essays in African Law', pp 31ff; and *Judicial Precedent in African Revisited* (1968), JAL, pp 3-31.

²⁵ (1904) 1 KB 493.

²⁶ (1943) AC 32.

²⁷ (1842) 2 M & W 519.

²⁸ (1932) AC 562.

²⁹ (1940) 1 All ER 241.

free from any glosses or interpretations based upon English or Scottish law. In *Ogbuagwu v Police*,³⁰ in which there was a charge of seditious libel under section 51 of the Nigerian Criminal Code, Bairamian, J. approved and applied *Wallace Johnson's Case* in holding that a defence which was available under English law but which had not been expressly incorporated into the Nigerian Code, was not available in Nigeria, since the Nigerian Criminal Code was "meant to be complete and exhaustive". Similarly, in the Ugandan appeal of *Yonasani & ors v R*,³¹ the Court of Appeal for Eastern Africa applied the *dictum* of the Privy Council in the *Wallace Johnson's Case* where the question was whether, in a trial of accessories after the fact, the English rule that the principal offender must first have been prosecuted to conviction before the accessories after the fact could be charged was held applicable in Uganda. The Court of Appeal for Eastern Africa made the following pertinent observation:

What is true of the Gold Coast Law of sedition is true also of the Uganda Law of accessories after the fact, and it is unnecessary in our opinion to engraft anything onto it from English Law.

In the Zambian case of *John Chitenge v The People*,³² the trial judge held that, if the intent to commit a felony was proved, malice aforethought was conclusively established, and the Zambian Court of Appeal accepted this view. What had happened in the case itself was that *A*, after a quarrel with *B* at a beer party, later went at night to set fire to *B*'s house in which *C*, a visitor staying with *B*, was asleep at the material time. *A* honestly thought that the house was empty at that time, but *C* suffered injuries from which he later died. *A* was convicted of the murder of *C*, who then appealed. But the Court of Appeal pointed out that the law of Zambia differed from the English law prior to the enactment of the Homicide Act, 1957. The learned trial judge had, in reaching his conclusion, applied *Wallace Johnson's Case* and some other decisions of the Court of Appeal for Eastern Africa.³³ The Zambian Court of Appeal held, however, that the law of Zambia was in fact the same as that of England before the Homicide

³⁰ (1953) 20 NLR 139.

³¹ (1942) 9 EACA 65.

³² Judgment No 15 of 1966. Criminal Appeal 14/66, unreported.

³³ Eg *Petero Sentali v R* (1953) 20 EACA 230; *Seronga Ole Gidi & ors v R* (1953) 20 EACA 241; and *Abdu Rabi v R* (1956) 20 EACA 555; and *Handulwe v R* (1962) R & N 47 (a decision of the Federal Supreme Court of the defunct Federation of Rhodesia and Nyasaland).

Act of 1957, and said that the Zambian Penal Code contained a provision in section 4 which was different from the provision of the Gold Coast Code. It accordingly held that *Wallace Johnson's Case* was not applicable to Zambia.

We may cite one more illustration from Australia. In *Hungier v Grace & anor*,³⁴ Barwick, C J, of Australia cited with approval the Privy Council judgment in the Nigerian case of *Kasumu v Baba-Egbe*³⁵ in support of his conclusion to the effect that advances made by a person which were not in the course of carrying on a business of money-lending could not be regarded as loan within the meaning of section 22(1) of the Money Lenders Act 1958 of Victoria, which is the same as part of section 19 of the Money Lenders Ordinance of Nigeria.³⁶

It is possible to take the view that this example of intra-Commonwealth borrowings of relevant decisions has no doubt been induced by the fact that, in applying the Nigerian case, the Australian High Court was merely applying the persuasive authority of a decision of the Privy Council. Thus, examples of direct citation of a Supreme Court judgment of Nigeria or of any other African Commonwealth country by one of the older members of the Commonwealth are rare indeed.

The attitude of Ghana courts³⁷ has, in recent years, been largely influenced by the provision of section 42(2) of the Constitution of 1960 which says that "the Supreme Court shall in principle be bound to follow its own previous decisions on questions of law". Commenting on this expression, Mr Justice Ollenu said:

Now, what is the proper interpretation to be given to the words 'shall in principle be bound to follow its own previous decisions on questions of law'? Are they to be interpreted in the same way as the principle of *stare decisis* as operates in England in the House of Lords or the Court of Appeal, namely, that the Supreme Court has no option but to follow its previous decision even though it is manifestly wrong unless it can show that that previous decision was given *per incuriam*? Our view is that the words 'in principle' are intended to create an elastic rule, to save the Supreme Court in embarrassing situations and to enable it to re-examine its own previous decision, to correct or differ from it when it finds such decision to be either manifestly wrong, not only because it was given *per incuriam*, but because of inconsistency with some principle of law or custom and is therefore a decision which for some good reason or the other should not be followed. In our view the Article lays

³⁴ (1972) 127 CLR 210.

³⁵ (1956) AC 539, pp 546-47 and p 551.

³⁶ *Ibid.*, p 215.

³⁷ Eg in *West African Bakery v Miezah* (1972) 1 GLR 78, pp 86-88.

down a flexible rule intended to enable the court to mould and develop the law, the common law no less than the customary law, to meet the needs of economic and social changes which are taking place in our new and developed nation without the necessity to resort to Parliament each time to rectify an error in the law brought about by a wrong decision.³⁸

The same line of reasoning may be observed in *Loga v Davordzi*,³⁹ where Azu Crabbe, J S C (as he then was), observed as follows:

Article 42(4) of the Constitution of Ghana declares that the Supreme Court 'shall in principle be bound to follow its own decisions on questions of law'. To my mind, the words 'in principle' connotes some flexibility in the application of the doctrine of *stare decisis* by this Court, which cannot regard itself as absolutely bound by its own previous decisions. ... The merit of this less strict rule of precedent is that it enables the court to mould the law and to adapt it to the changing conditions of society ... It follows, therefore, that this Court, like the Privy Council, must feel strongly disposed to adhere to its previous decisions (see *Fatuma Binti Mohamed Bin Salam v. Mohamed Bin Salam* (1952) A.C. 1). It must only deviate from its previous decision when the previous decision is manifestly wrong, or in exceptional circumstances.

III

African Interstate Use of Precedents

The extent to which the various Commonwealth African States make use of precedents from one another depends upon a number of factors. Among the factors that should encourage such use may be mentioned the common heritage of English law, the once all-pervading judicial opinions of the Privy Council, geographical contiguity and similarity of reactions of the several customary laws to the current social and economic stimuli. Of the various countries in Commonwealth Africa, Nigeria and Ghana have probably the closest relationship in legal and judicial matters. This is because the old Lagos Settlement was formerly administered as the Eastern Province of the old Gold Coast Colony for some years between 1866 and 1874; our two legal systems derive their common source from the Supreme Court Ordinance No 4 of 1876; and the intermingling of lawyers and of political leaders on such

³⁸ 'Judicial Precedent in Ghana' (1966), 3 *UGLJ*, pp 160-61.

³⁹ Court of Appeal Judgment delivered on June 13, 1966, unreported. See also *CFAO v Zacca* (1972) 1 *GLR* 366. The flexibility referred to in the text as essential to a developing society would seem to be reflected in the holding that the High Court of Ghana is not bound by its own decisions: *Saarah v Asuah* (1962) 1 *GLR* 536, p 538 (bottom).

issues as the West African Land question and the National Congress of British West Africa.

In practical judicial terms, this rapprochement in legal and allied matters has been reflected in the judicial sphere. Thus, in *Ekpendu v Erika*,⁴⁰ the Supreme Court of Nigeria decided that the purported lease of a portion of family land without the consent of the family head was void *ab initio*. The court further laid down the following propositions of customary land tenure: (a) that a sale or lease of family land carried out by the family head, without the concurrence of the principal members of the family, is *voidable*, and that this had been so decided by the West African Court of Appeal in *Esan v Faro*,⁴¹ and (b) that a sale or lease of such land by the principal members of the family without the concurrence of the family head is *void ab initio*, and that this had been so decided by the West African Court of Appeal in *Aghloe v Sappor*.⁴² The Supreme Court pointed out that it was immaterial that *Esan v Faro* relates to Lagos land while *Aghloe v Sappor* relates to Accra land, since both cases were decided by the same three judges of the West African Court of Appeal within two months of each other.⁴³ In *Shang v Coleman*,⁴⁴ which we have discussed at length in Lecture II, a strong Court of Appeal of Ghana consisting of Van Lare (Ag C J as he then was), Granville Sharp and Ollenu quoted with approval the Privy Council decision in *Bamghose v Daniel*⁴⁵ to the effect that the succession rights of persons under an intestacy must be governed by the *lex domicili*, that is, the customary law of succession in that case. The court observed, *inter alia*, that African interpretations should wherever possible be given to English statutes which apply in Africa. Sometimes, however, the courts of Nigeria may not follow a Ghana precedent and *vice versa*. Thus, in *Taiwo v Dosunmu*,⁴⁶ where the issue was as to the accountability of the family head to members of the family, the Supreme Court of Nigeria, to which a number of Ghanaian cases⁴⁷ had been cited by counsel, pointed out that "although we are content to assume that it might be judicially noticed in Ghana that in certain areas, at least of the country, the junior

⁴⁰ (1959) 4 FSC 79.

⁴¹ (1947) 12 WACA 135.

⁴² (1947) 12 WACA 187.

⁴³ See also NA Ollenu's 'The Changing Law and Law Reform in Ghana' *Journal of African Law*, vol 15, no 2, 1971, pp 52-53 on accountability of family head in Ghana.

⁴⁴ Civil Appeal No 41/59 delivered on November 23, 1959; see also *Coleman v Shang* (1961) AC 481 where the Privy Council affirmed the Court of Appeal of Ghana.

⁴⁵ (1955) AC 107 (PC).

⁴⁶ (1966) NMLR 94.

⁴⁷ Eg *Nelson v Nelson* (1932) 1 WACA 215.

members of the family cannot call on the head of the family for an account, we do not consider that that in itself means the existence of such a custom in Ghana can be judicially noticed by the High Court of Lagos". The court would seem to be saying no more than that, since under Nigerian law an alleged rule of customary law has still to be established as a matter of evidence, this particular Ghanaian custom which obtains only in certain places in Ghana must be proved to be the custom of Lagos. *Quaere* whether, if the alleged custom had been held in Ghana to be a general custom, it would have been accepted by the Supreme Court of Nigeria. It would not have been, for the reason that it could not be taken judicial notice of, since as foreign law, it still has to be proved by evidence. Finally, it will be sufficient to refer briefly to *Awunor-Williams v Gbedemah*,⁴⁸ in which, as we may recall, the Ghana Supreme Court referred to its Nigerian counterpart's decision in *Lakanmi & anor v The Attorney-General (Western State) & ors*⁴⁹ in dealing with the question of the validity of the decrees issued by the military governments of the National Liberation Council. We have already set out the facts of this case in the last lecture.

We may now turn to other instances of interstate uses of precedents in Africa. An epoch-making judgment of the Court of Appeal for Eastern Africa in which the fundamentals of the applicability of Judicial Precedents were examined and restated for that part of the continent is *Dodhia v National and Grindlays Bank Ltd & anor*.⁵⁰ The immediate questions for determination were:

- (a) whether the Court of Appeal for Eastern Africa was bound by decisions of the Privy Council given in appeals from East Africa, and
- (b) whether the Court of Appeal for Eastern Africa was bound by its own previous decisions.

Along side these was also the question of the application of the doctrine of *stare decisis* by the High Court and subordinate courts in Kenya. But before we deal with this particular case, let us look at the state of the law as declared by the Court of Appeal for Eastern Africa in *Vallabhji v National and Grindlays Bank Ltd & anor*.⁵¹ There, it was held that unattested letters of hypothecation were wholly void. When the matter was taken on appeal to the Privy Council, it was held that

⁴⁸ (1969) Court of Appeal sitting as the Supreme Court, Const SC 1/69 dated December 8, 1969.

⁴⁹ (1970) SC 58/69.

⁵⁰ Kenya Civil Appeal No 53 of 1968. Judgment delivered on November 21, 1969.

⁵¹ (1964) EA 442.

such letters were valid *inter partes*.⁵² The *Vallabhji Case*, which was the last decision delivered by the Privy Council in an East African appeal before the abolition of appeals to the Judicial Committee, raised a point of law identical with that involved in the instant *Dodhia Case*.

The *Vallabhji Case* raised the question of the applicability and authority in Kenya and New Zealand decisions on New Zealand Acts which formed the basis of the Kenya Chattels Transfer Act. Newbold, P, after scrutinizing the terms of the applicable statute law against the background of the received English Common Law and Equity in order to discover whether there was anything in the local circumstances of Kenya which made these inapplicable there, held that the Court of Appeal for Eastern Africa was bound by the decisions of the Privy Council when the latter court was the final court of appeal; that the Privy Council had the necessary flexibility in following its own previous decisions; and that the Court of Appeal is not bound by any prior decision of the Privy Council, including that in the *Vallabhji Case*. The other two Justices of Appeal agreed with him. The Court was also unanimous in the view that "while it would normally regard a previous decision of its own as binding", it "should be free in both civil and criminal cases to depart from such a previous decision when it appears right to do so". The Court also "accept that subordinate courts are bound by the decisions of superior courts and that a subordinate court of appeal should normally be bound by a previous decision of its own". Newbold, P, while adhering to the position he had taken in the *Vallabhji Case*, thought the majority of the judges of the Privy Council in that case were "unaware of the conditions and needs of the people of Kenya"; that the *Vallabhji Case* was wrongly decided, but that this was a comparatively minor matter of the construction of a section, and to change the construction of it three times in as many years would cause uncertainty in law for the business community; hence the court of appeal would not depart from the Privy Council view in *Vallabhji*. Duffus, V-P, thought that to reverse the Privy Council now would lead to complete uncertainty, while Spry, J A, considered that "the majority judgment... represents a logical and reasonable view which has formed part of the law of Kenya for the past three years", and that "there was no compelling reason for departing from that decision". Thus, by a self-denying ordinance, the Court of Appeal for Eastern Africa refrained from upsetting an inconvenient decision of the Privy Council, and chose to allow it to remain on the ground of convenience.

⁵² See (1966) EA 186.

IV

Precedents in the Service of Legal Development

We may now take a look in the round at the operation of *stare decisis* as inherited by Commonwealth African States as part of the received English common law. There can be little doubt that, despite the disadvantages that inevitably attend upon the strict application of the doctrine of judicial precedent, it has been an agent of evolutionary legal development. Among its notable disadvantages are, to be sure, its tendency towards bulk and complexity in the growth of the common law; the possibility of having to make sometimes illogical distinctions between cases that are apparently similar in order to avoid having to follow inconvenient precedents,⁵³ the sometimes continued application of old and outmoded decisions to current social and economic problems; and the difficulty of determining the *ratio decidendi* of a case where different reasons were given for reaching the same conclusion.⁵⁴ On the other hand, the advantages of the case-law system are reasonable certainty of the law at any particular stage and also flexibility of growth of the law according to changing notions of legal development dictated from time to time by changing social and economic conditions. Such changes in the law as are considered to be necessary are made after the fullest possible arguments in open court by counsel for both sides followed by careful scrutiny and consideration by the bench of all the relevant factors urged in favour or against change. Where a change is more than the normal modification or extension of existing legal principle so that it amounts to a radical departure from established notions of justice according to law, the judicial function is at an end and the legislative initiative comes into play to effect the needed change. We noticed this phenomenon when we considered earlier in the present lecture the judicial modification of the Rule in *Chandler v Webster* (*supra*) which held that where there was a frustration of the adventure of a contract, the loss lay where it fell and the payer of money or the renderer of services could not recover anything under the contract, into a new rule in the *Fibrosa Case* (*supra*) whereby if, under the frustrated contract, there was total failure of consideration, money paid or services rendered could be recovered or compensated for respectively. But

⁵³ For a perceptive study of these problems, see W E Geldart's *Elements of English Law*, Macmillan & Co, London.

⁵⁴ See Goodhart's famous essay, 'Determining the Ratio Decidendi of a Case', *Essays in Jurisprudence and the Common Law*, 1931, London, pp 1-32; Simpson's *Oxford Essays in Jurisprudence*, 1961, p 148.

where the failure of consideration is only partial so that only a part of the payment had been made in advance but the payee has been put to reasonable expenses in executing the contract, there is need for apportionment of the rights and obligations of the parties to the contract. The House of Lords could not, however, do this; what it did, and what all courts faced with a similar situation should do, was to draw the attention of Parliament to the desired change. In the particular instance under consideration, we may note that the fundamental change required in the law was effected by the Law Reform (Frustrated Contracts) Act, 1945. The common law system thus recognizes the respective spheres of the judicial and the legislative processes in the development of the law.

If we seem to favour the case-law approach to the problems of legal development, it is mainly because it is the rational and dynamic interpretation of a situation in each African territory in which poly-ethnic communities abound. The advocates of codification would be up against great difficulties in any attempt to codify the customary laws of the respective communities that make up the State. How are we to organize the compilation of such codes? What types of personnel should be engaged in the task — lawyers, sociologists, historians and other research workers? Should these work singly or as a team? Then, we may ask whether they should employ questionnaires, or should combine questionnaires with visits to the towns and villages. Whom should they consult — the old or the young, or both? How should they reconcile the data thus obtained from both? These and similar problems have been agitated at considerable length elsewhere and it would deflect us from our present course to repeat all the relevant arguments here. Suffice it to say that case-law is clearly preferable to codification as a means of legal development in Commonwealth Africa today. The recent efforts in the form of Restatements of African Law in parts of East Africa are useful as stop-gaps, but are hardly a substitute for case-law as a dynamic of social change in African legal development.

It may be pointed out that the mere proliferation of codes within a State is not conducive to the early emergence of a body of common law towards which each territory is or should be striving as a worthwhile goal of its legal development.⁵⁵ The co-existence of a multiplicity of codes within the same territorial entity might encourage tribal particularisms if it did not also breed ethnocentric prejudices. In this connection, it should be mentioned that Ghana has given the first

⁵⁵ See Elias (ed), *Law & Social Change in Nigeria*, ch 12, 1972, Evans Bros, London.

and the most explicit statutory expression to the concept of a common law as the aim of its legal system. Here is Ollenu's summary of the Ghana situation:

But what is the 'common law', and what is the 'customary law', which together with the principles of equity and the statutes of Ghana constitute the law of Ghana today? They are the English common law as assimilated to the circumstances of Ghana through the years that justice has been administered according to the English law, and the customs that have passed the tests I have already described and are thus contained in the body of case law on the subject. These two laws are defined in the Interpretation Act, 1960, sections 17 and 18. Without wearying you with a recital of these sections, their effect as I understand it is this: when the expression 'common law' is now used, it means 'the common law of Ghana', the two different sources of which I have already described. All persons are subject to this common law; but over and above this, when a person shows that he, as a member of a particular locality or community, is entitled to the benefit of a local custom, then he will be given the benefit of that custom. Thus in Ghana today, a Local Court is by statute vested with full jurisdiction to administer, as part of the law of the land, principles of English law and the principles of equity which, before, were foreign to it. Again the customary law is no longer a fact to be proved in a Supreme Court; consequently the provisions in the High Court (Civil Procedure) Rules requiring customary law to be pleaded must disappear. Henceforth any mist which has surrounded the customary law is guided by the principle of repugnancy, and by precedents, the judges will be able to set out authoritatively the law of Ghana, and thus make possible the compilation of books on the common law of Ghana.⁵⁶

It is thus clear that the common law of Ghana, as indeed of any Commonwealth African country, is made up of the English common law, the principles of equity, applicable English statutes, local statutes and those rules of customary law which form part of the country's case-law and which apply to the relevant local communities. All the other elements of this common law apply to all persons within the State generally, while the customary law element apply to particular groups. There is also the desired mechanism of legal development — the production of legal textbooks from time to time out of the whole judicial process. The method of case-law permits the possibility of similar, if not uniform, development of bodies of customary law by the application of juridical technique to the moulding of the raw materials along scientific lines. "The English common law", as Oliver Wendell Holmes has observed, "has not been logic; it has been experience."⁵⁷ It is the result of a slow but steady evolution, through generations, of

⁵⁶ 'The Influence of Eng. Law on W. Africa', *Journal of African Law*, vol 5, 1961, p 34.

⁵⁷ *The Common Law*, p 1.

the once disparate Anglo-Saxon customs fashioned from the time of Henry II onwards by itinerant justices (often referred to as *justices in eyre*) and later by the royal courts until these customs gradually became for the most part the common law, that is, "the common custom of the realm". It seems reasonable to assume that, as inheritors of the English common law, especially of its spirit and practice, the various Commonwealth African States, given the polygot nature of their communities and the interplay of the ever-changing economic and social forces, would do well to maintain the method of case-law as the means of their developing a common law within their respective borders.

In each State, the judicial process will inevitably produce not only similarities of development as between the main bodies of customary law but also a measure of mutual borrowings often resulting in uniformity of rules. One would make bold to say that if the operation of the case-law system should lead to the adoption of a rule of one of the dominant bodies of customary law as the new law, that would not necessarily be a bad thing. For instance, one would not be surprised if a matrilineal system of succession becomes under the stress of prevailing economic and social circumstances gradually patrilineal, patrilocal and even patripotestal.⁵⁸ After all, fathers are now more often than not expected to pay their children's school fees, the children are themselves expected to bear their father's name and to inherit his estate on his death. The increasing individualization of holdings and possessions encourages the tendency towards placing greater reliance on the nuclear family, with the father as the head. On reflection, it seems better that one body of customary law should where necessary adopt a rule from another body of customary law and make it the universal rule within the State, than that, under the Rule in *Cole v Cole* or *Coleman v Shang*, the court should continue to apply the ancient and discarded Anglo-Saxon rules of succession prescribed under the Statute of Distributions 1670 and 1685, which, by the way, was done away with in England itself well over fifty years ago.

By the use of judicial precedent in our system of case-law, there has been a significant development of our customary laws. We saw in our first lecture how a number of customary rules and traditional practices have been evolving since the advent of English law: it has been due to the courts that the concept of family land has been gradually analysed and clarified in such a way that the rights of the individual

⁵⁸ One example in which the Fante rule of matrilineal succession has sometimes been confused with the Ga custom of patrilineal inheritance occurs in *Solomon v Botchway* (1943) 9 WACA 127.

family members therein have been defined from case to case; that the chief or the family head has been shown to be a kind of trustee or caretaker in relation to the family land; that the characteristics of the customary tenancies have been defined in precise legal terms; and that the customary pledge of land as a perpetually redeemable interest has been compared and distinguished from the English mortgage. Nor has the judicial process neglected the problems associated with the customary marriage and divorce, especially in relation to marriage under statute or what is sometimes but erroneously called English or Christian marriage, although some of the crucial aspects of this relationship have yet to be resolved by legislation in order to produce a rational and coherent body of law in many Commonwealth countries. The customary laws of succession and inheritance have been elaborated by judges in a number of leading cases by the well-known methods of case-law. On the whole, it can be said that the application of the judicial techniques of the English common law to our customary laws has often resulted in the remoulding of the traditional rules and concepts along lines of rational development to suit our evolving economic and social characteristics. Through the use of the doctrine of repugnancy, customary law has been largely shorn of its obnoxious aspects, while at the same time the judicious use of precedents in our superior courts has helped in the gradual build-up of bodies of legal principles and practices which have enriched our various bodies of customary law. Some mistakes have, no doubt, been made in the process, resulting sometimes in misapplication of one type of customary rule or observance to the wrong groups and sometimes in over-easy generalizations which might obscure real differences; but such errors, where they have in fact occurred, can be and have often in fact been corrected by legislation or through the normal operation of the judicial process; they do not detract from the over-all benefit to the development of customary laws that accrues from the judicious use of judicial precedents.

If we turn to the other areas of our laws that we have examined, we shall find that our judges have tried within the limits of their vision and resources to introduce order into chaos by the rational application of the judicial process. Let us take for instance cases of the conflict of laws. The principles enunciated in a series of cases in which English law has come into conflict with customary law, or in which customary law has been at variance with statute law (whether English or local), or in which one body of customary law is opposable to another body of customary law, have over the years been evolved by the courts to meet the peculiar needs and circumstances of our pluralistic societies

and the resultant profusion of laws. For one of the factors that make the laws of each of the Commonwealth African States so complex is the simultaneous application of at least three streams of laws often to the same set of people. The sometimes bewildering variety of the interactions between these bodies of laws reinforces the growing need and even desirability of fashioning a body of common law for each State as the prime goal of the legislative policy and the judicial process.

What we have said earlier in the present lecture concerning the attitude of our courts towards English judicial precedents applies with equal force to the judicial interpretation of the various constitutions, in peace time as in times of national emergency or war. We saw in the last lecture how ready the courts were to follow English precedents that afforded clear and pertinent guide; but we also saw how the courts did not hesitate, on occasions, to depart from inconvenient precedents and, if need be, the local legislature stepped in to nullify a Privy Council decision considered to be inappropriate to the local circumstances. But perhaps it is in dealing with the constitutional problems arising out of *coup d'etats* that the judges have shown their most notable resilience and independence of approach to unorthodox legal situations. What is worthy of note, however, is the steady fidelity of the judges to legal techniques no less than to the basic requirements of the rule of law.

V: Conclusion

The role of the judge in a Commonwealth African court is *ex hypothesi* a truly dynamic one. Unlike his counterpart in other common law jurisdictions in the older Commonwealth, the African judge is faced with tasks or series of tasks that require a good deal of judgment and stamina. In the first place, the law he has to apply is almost everywhere complex and often unsettled, in that he must make a choice of alternatives among the competing claims of English common law, equity and statutes of general application, various bodies of customary law, and local statutes — all of which may apply to the subject-matter of the dispute before the court. In the second place, the judge has to consider his task in applying this complex law not only *ratione personarum* but also *ratione materiae*; this is because he is very often required to ascertain which law to apply to which parties where at least one of these is a non-African, and also to have regard to the subject-matter of the dispute as well as to take into account whether one or more of the parties have made a choice of law and whether such a choice should be permitted. In the third place, the judge must have an underlying philosophy that should

guide his action from case to case, because it is this "inarticulate major premise", to use Oliver Wendell Holme's expressive phrase, which supplies the rationale of his conclusions. Without such an underlying assumption the judge's task in the judicial process becomes unconvincing because it loses a proper sense of direction. Although trial judges are very much in need of this philosophy, it is judges of appeal that cannot truly discharge their functions fully without it.

Yet, the nature of the judicial process in a Commonwealth African court is such as to induce in the judge a disposition towards judicial law-making in certain areas of the law where there is either some uncertainty or no precedent at all. This is most noticeable in the sphere of the judicial treatment of certain aspects of customary law which we need not repeat here as we have had occasion to draw attention to them in Lecture II. African judges of today sometimes find the evolving customary law as malleable as Chief Justice Holt and Lord Mansfield found the English common law of their days in the seventeenth and the eighteenth centuries.⁵⁹ Whether as trial judges or as justices of appeal, they need courage and a sense of conscious purpose in the moulding of the evolving law, but above all they need also the resources of intellect and of character without which the law they attempt to nurture and tend would be but a poor and sterile thing. Since judges in each Commonwealth African country have the additional responsibility to administer also the received English law as well as the locally enacted law in commerce and industry, the task of achieving an amalgam capable of meeting the needs of a developing society becomes all the greater because it is ever so challenging.

The ultimate aim of the judicial process is to effect a dynamic compromise between law and society, between the technicalities of legal science and the requirements of social justice. As the law develops on the basis of the flexible application of the doctrines of repugnancy and of judicial precedents, there will emerge in due course a common law in each Commonwealth African country as the goal of its judicial process.

⁵⁹ Bora Laskin, a judge of the Supreme Court of Canada, in his lecture entitled 'The Institutional Character of the Judge', observed as follows:

A final court which is prepared to overrule its own precedents puts itself, institutionally, into a partnership, albeit a junior one, with the legislature. Especially in the field of private law, such as contract, tort and property, where the courts themselves have fashioned many of the rules, they have some responsibility for keeping the rules under surveillance with a view to modifying or changing them as changing conditions may at a particular time warrant. ... They may, hence, properly rely on the courts to share in the burden of law-making in those areas congenial to judicial legislation. as, for example, in the private law fields that I have already mentioned.

See also Lionel Cohen Lectures, 1972, the Hebrew University of Jerusalem.



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