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ENGLISH LAW IN WEST AFRICA:

THE LIMITS OF ITS APPLICATION

by

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ABSTRACT

Many people know that English law has been received in the four countries of West Africa, namely, The Gambia, Sierra Leone, Ghana and Nigeria; but few people realise that English law applies in West Africa "so far only as the limits of the local jurisdiction and local circumstances permit and subject to any existing or future local Ordinance". The object of this thesis, therefore, is to show the limits placed on the application of English law in West Africa. It is divided into four main parts.

Part One deals with the evolution of the judicial systems which are modelled on the English pattern. A separate chapter gives a synopsis of the present judicial systems.

Part Two is devoted to the general principles governing the reception of English law in the former British colonies with special reference to West Africa.

English law comprises the common law, the doctrines of Equity and statutes. Succeeding chapters deal with the reception of each of the three elements of English law in West Africa.

Part Three relates to the application of the common law of England in West Africa and the condition of its applicability. Some distinctive features of the common law,

for example, judicial precedents, the jury system, prerogative writs, the independence of the judges, contract, tort and criminal law are discussed.

Part Four deals with the influence of equity both on the general law and on the application of customary laws in West Africa.

Part Five relates to the application of English statutes of general application, some of which are deemed to be in force in West Africa depending on the date of the reception of English law.

The common law of West Africa can, therefore, be defined as embracing the three elements of English law and the local modifications made on their application.

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TABLE OF ABBREVIATIONS USED IN CITING LAW REPORTS

Abbrevn.	Reports	Period (where known
A.C.	Appeal Cases. Law Reports 3rd series	1891 - date
AC/App	Appeal cases; Appeals	
A.C.H.L.	Appeal Cases, House of Lords	
A.C.J.C.	Appeal Cases, Judicial Committee of the Privy Council	
App. Cas.	Law Reports. Appeal cases, 2nd series	1875-1890
A.I.R. Nag.	All India Reporter (Nagpur)	
All E.R.) or A.E.R)	All England Law Reports	1936 - date
B.C. or) B.C.R.)	British Columbia Law Reports	1867-1948
Burr.	Burrows Reports	1756-1772
C.	Calcutta	
C.A. or) Civ.App.)	Civil Appeals, Court of Appeal	
Ch.	Chancery Division, Law Reports, 3rd series	1891 - date
Ch.D.	Chancery Division, Law Reports, 2nd series	1785-1890
CL. & F. or) Cl & Fin)	Clark & Finnelly	1831-1846
Co. Rep.	Cokes Reports	1572-1616
De G.M. & G.	De Gex, Macnaghten and Gordon's Reports	1851-1857
D.Ct. or) Div.Ct.)	Selected Judgments of the) Divisional Courts of the Gold) Coast Colony)	1921-1925 1926-1929 1929-1931 1931-1937

D & F	Divisional and Full Court Judgments (1919)	1911-1916
D.L.R.	Dominion Law Reports (Canada)	
Dr. & War.	Drury & Warren (Ir.)	1841-1843
Earn	Earnshaw's Gold Coast Judgments, 1910	1909-1910
E.R.L.R.	Eastern Region of Nigeria Law Reports	1957 - date
F.C. or F.Ct.	Full Courts Judgments; Feb. 1919, and 3 Divisional Court Judgments	1919
	Full Court Judgments, Sept. 1920, and March-April 1921 (Gold Coast Colony)	1920-1921
	Full Court Judgments, March & April 1922 (Gold Coast Colony)	1922
	Selected Judgments of the Full Court Gold Coast Colony	1923-1925
	Selected Judgments of the Full Court Gold Coast Colony	1926-1929
F.C.(CC)	Full Court Judgments held at Cape Coast, September, 1919	1919
F.S.C.R. or) F.S.C.)	Federal Supreme Court of Nigeria Reports	1956 - date
G.L.R.	Ghana Law Reports	1959-
Grants Ch.R.) O. Can.)	Grant's Upper Canada Chancery Reports	1849-1882
H opk.	Hopkins New York Chancery Reports	
H.L.	English & Irish Appeals (House of Lords)	1866-1875
H.L.Cas or C.	House of Lords Cases (Clark)	1847-1866
I.A.	Indian Appeals	
I.L.R.	Indian Law Reports (various Districts)	

I.R.	Irish Reports	1838 - date
I.R. Eq.	Irish Reports, Equity	1866-1878
Ired. Eq.	Iredell's Reports 36-43 N.C. Eq.	
Jur.	Jurist Reports	1837-1854
K.B.	King's Bench, Law Reports, 3rd series	1891 - date
K-F	King-Farlow's Gold Coast Judgments, 1917 (privately printed)	1915-1917
L.J (e.g. K.B., P.C. or Ch.)	Law Journal Reports	1831-1949
L.R.A.C. or App.Cas	Supra	
L.R. Eq.	Equity cases, Law Reports, 1st series	1866-1875
L.R. Ex.	Exchequer Cases, Law Reports, 1st series	1865-1875
L.R.P.C.	Privy Council Appeals	1865-1875
L.R.P & D	Law Reports, Probate & Divorce Cases	1867-1875
L.R.Q.B.	Queen's Bench	1865-1875
L.T.	Law Times Reports	1859-1947
M & W	Meeson & Welsby	1836-1847
Mer	Merivale	1815-1817
M.I.A. or Moo.Ind.App.)	Moore's Indian Appeal Cases	1836-1872
Moo. P.C.	Moore, E.F.	1836-1862
N.L.R.	Nigeria Law Reports	1880-1955
N.R.N.L.R.	Northern Region of Nigeria Law Reports	1955 - date

N.Z.L.R.	New Zealand Law Reports	1883 - date
Ont.Rep.	Ontario Reports	1882-1900
P.	Probate Division, Law Reports, 3rd series	1891 - date
P.Wms.	Peere Williams	1695-1736
Q.B.	Queen's Bench, Law Reports, 3rd series	1891 - date
Q.B.D.	Queen's Bench Division, Law Reports, 3rd series	1875-1890
Red.	Redwar's Comments on some of the Gold Coast Colony - including Law Reports	1889-1909
Ren.	Renner's Reports (2 vols.) Gold Coast Colony	1868-1914
Russ.	Russell	1823-1829
S.L.L.R.	Sierra Leone Law Reports	
Sar F.C.L.	Cases reported in Sarbah's Fanti Customary Laws (1904)	1844-1885
Sar F.L.R.	Sarbah's Fanti Law Reports, 2nd Selection	1845-1903
S.C.(J.)	Session Cases, Justiciary (Scotland)	1907-1916
Str.	Strange's Reports	1716-1747
St.Tr.	State Trials (Cobbett and Howell)	1163-1820
T.L.R.(R.)	Tanganyika Law Reports (Revised)	
T.L.R.	Times Law Reports	1884-1952
U.C.Q.B.	Upper Canada Queen's Bench Reports	1844-1881
Vt.	Vermont (America)	

W.Bl.	Blackstone, William	1746-1780
W.A.C.A.	West African Court of Appeal Law Reports (16 vols.)	1930-1960
W.A.L.R.	West African Law Reports	1956-1958
W.R.N.L.R. or) W.N.L.R.)	Western Nigeria Law Reports	1956 - date
W.R.	Weekly Reporter	1853-1906
W.R.	Sutherlands Weekly Reporter (India)	

TABLE OF ABBREVIATIONS USED IN CITING BOOKS, REPORTS AND PERIODICALS

Af.Aff	African Affairs (formerly Journal of the Royal African Society)
Af.Stud.	African Studies (formerly Bantu Studies)
Amer. Jour. Inter. Law	American Journal of International Law
Bl.Comm.	Blackstone's Commentaries
Cd) Cmd) Cmnd)	Command Papers (British Parliament)
C.L.P.	Current Legal Problems
Cam.L.J.	Cambridge Law Journal
Crim. L.R.	Criminal Law Review
Enc.Soc.Sci.	Encylopaedia of Social Sciences
Gold Coast Leg. Co. Deb.	Gold Coast Legislative Council Debates
H.C.Deb.	British House of Commons Debates
I.C.L.Q.	International & Comparative Law Quarterly
J.A.A.	Journal of African Administration
J.A.I or) J.R.A.I.)	Journal of the Royal Anthropological Institute
J.A.L.	Journal of African Law
J.A.S. or) J.R.A.S.)	Journal of the Royal African Society (later African Affairs)
J.Comp.Leg. & I.L. or J.Comp.Leg.	Journal of Comparative Legislation and International Law

J.Inter. Comm.Jur.	Journal of the International Commission of Jurists
L.Q.R.	Law Quarterly Review
Leg.Ass.Deb.	Gold Coast Legislative Assembly Debates
M.L.R.	Modern Law Review
Par(l) Pap.	British Parliamentary Papers
S.A.L.J.	South African Law Journal
Sel.Cttee Rep.	Select Committee Reports of the British Parliament
W.P.	White Papers of the Ghana Parliament

TABLE OF ABBREVIATIONS USED IN CITING ORDERS IN COUNCIL, ORDINANCES, LAWS, Etc.

B.O.I.C.	British Orders in Council
C.A.	Ghana Courts Act, 1960
C.(A.)A.	Ghana Courts Amendment Act
(C.A.9)	(Ghaaa) 9th Act of the Constituent Assembly
C.C.(A.)L.	Customary Courts Amendment Law
C.C.(A.)L. W.R	Customary Courts Amendment Law, Western Nigeria
C.C.L.	Customary Courts Law
C.O.	Courts Ordinance
Crim.Pro. (or Crim. P.C.)	Criminal Procedure Code
D.T.(A.)O.	District Tribunals Amendment Ordinance
D.T.O.	District Tribunals Ordinance
E.R.	Eastern Nigeria
E.R.C.C.L.	Eastern Nigeria Customary Courts Law
E.R.H.C.L.	Eastern Nigeria High Court Law
E.R.M.C.L.	Eastern Nigeria Magistrates' Courts Law
F.S.C.O.	Federal Supreme Court of Nigeria Ordinance
H.C.L.(A.)O.	High Court of Lagos Amendment Ordinance
H.C.L.O.	High Court of Lagos Ordinance
M.C.(L.).O.	Magistrates' Courts Lagos Ordinance
M.C.(W.R.)A.)L.	Magistrates' Courts (Western Nigeria) Amendment Law

N.C.(A.)L.	Native Courts Amendment Law N. Nigeria
N.C.L.	Native Courts Law, N. Nigeria
N.R.	Northern Nigeria
N.R.H.C.A.L.	Northern Nigeria High Court Amendment Law
N.R.H.C.L.	Northern Nigeria High Court Law
P.C.(A.)O.	Protectorate Courts Amendment Ordinance, The Gambia
P.C.O.	Protectorate Courts Ordinance, The Gambia
Proc.	Proclamations
Rev.	Revised/Revision
S.I.	Statutory Instruments (British Parliament)
Sch.	Schedule
St. R.& O.	Statutory Rules and Orders (British Parliament)
W.R.	Western Nigeria
W.R.H.C.L.	Western Nigeria High Court Law

TABLE OF STATUTES AND ORDERS

A. UNITED KINGDOM

B. AFRICAN LEGISLATION

(Where possible, reference is made to the appropriate chapter number of the laws.)

BRITISH CAMEROONS

GAMBIA

Eastern Region.

TABLE OF CASES

PART I

THE JUDICIAL SYSTEMS

Chapter One

THE EVOLUTION OF THE JUDICIAL SYSTEM[1]

A. THE PERIOD LEADING UP TO 1821

The British dependencies in West Africa began to be treated with some seriousness towards the middle of May 1821. A long time before this date, however, considerable activity both in the commercial and in the judicial field had been going on.

The history of Sierra Leone (formerly known as the "peninsular of Sierra Leone") dates from the year 1787, when several Africans who had been released as a result of Lord Mansfield's celebrated judgment in The Negro Case,[2] were sent out from England to Sierra Leone as settlers. In 1788 a native chief, King Naimbara, and his subordinate chiefs sold and ceded certain portions of land to Captain John Taylor on behalf of the "free community of settlers, their heirs and successors, lately arrived from England

/and

1. A concise chart of the important dates is given at p.500
Valuable contributions have already been made on this topic. On Ghana see SARBAH, J.M. Fanti national constitution (1906), "The rise of British jurisdiction", pp. 71-120. REDWAR, H.W.H. Comments on some ordinances of the Gold Coast (1909), pp. 1-4. GRIFFITH, (Sir) W.B. A note on the history of the British courts in the Gold Coast Colony (1936). On Nigeria, see ELIAS, T.O. Groundwork of Nigerian law (1953), pp. 37-109. On Sierra Leone, see CROOKS, J.J. A history of the Colony of Sierra Leone, Western Africa (1903), passim; and FYFE, C. A history of Sierra Leone (1962) O.U.P.

2. (1771-1772) 20 St. Tri. p. 1.

and under the protection of the British Government".[3] The first settlement nearly failed because of unfavourable conditions, and the promoters formed themselves into The Sierra Leone Company in order to trade with the peninsula.[4] This was incorporated by an Act of Parliament in 1791,[5] whereby the Court of Directors, inter alia, were given powers to enact and declare laws. More settlers were brought in from time to time. As a result, the Company was granted a Charter of Justice in 1800, which authorised the appointment of a Governor, the establishment of a legislative council and the setting-up of a Mayor's Court for the administration of justice.[6] However, the Sierra Leone Company did not remain a "body politic" for long. Seven years later an Act was passed "for transferring to His Majesty certain possessions and rights vested in the Sierra Leone Company, and for shortening the duration of the said Company, and for preventing any dealing or trafficking in the buying or selling of slaves within the Colony of Sierra Leone ..."[7]

By the same Act the Company was to cease functioning as a body politic at the expiration of seven years, and the

/Crown

3. Colonial Office List (1957) p. 183.
4. Burge's Commentaries on colonial and foreign laws (ed. by A.W. Renton and G.C. Phillimore) 1907, Vol. 1, p. 272.
5. 31 Geo III. c. 55.
6. This Charter was subsequently revised in 1808 and finally in 1821.
7. 47 Geo III, c. 44. Repealed.

Crown was authorised to resume the management of the settlement. Such was the state of administration of justice till 1821 when fundamental changes were effected.

The several forts on the Gold Coast (Ghana) [8] previous to 1821, formed part of the territories of the Corporation of the Company of Merchants trading to Africa which was created and subsidized annually by Parliament.[9] There was no distinct judicial settlement then, and the administration of justice, as will be seen later, was far from satisfactory.

It is more accurate to state that the history of the British Gambia originates in 1816;[10] when a new settlement was founded on the Island of Banjul by the British merchants who had removed from the river Senegal and the Island of Goree, as a result of the restoration of those places to the French (by the Treaty of Paris). Banjul was /renamed

8. For an earlier history of Ghana, see LUCAS, C.P. Historical Geography of the British Colonies, Oxford, 1913, Vol. III, passim. Colonial Office List, 1862, s. V. "Gold Coast", p. 60. SARBAH, J.M. Fanti National Constitution, (1906) pp. 71-120.

9. 23 Geo. II. c. 31; 25 Geo II. c. 40.

10. For its earlier history, see Colonial Office List, s. V. "The Gambia", 1862, p. 59. Several different dates are given for the original settlement of the Gambia. In Parliamentary Papers, Session 1831, Vol. 17, p. 171, and in Session 1879, Vol. 34, p. 569, the date of occupation or settlement is 1631. In Par. Papers, Session 1845, Vol. 31 at p. 32, the date is 1618. Thus there is a divergence of opinion or inconsistency even in the most official source.

renamed St. Mary's and its town named after Lord Bathurst who was at that time the Secretary of State. From the time the settlement was founded (i.e. 1816) to 1821 when it was annexed to the Colony of Sierra Leone by an Act of Parliament,[11] Gambia was governed by a military commandant, aided by a board of merchants called "The Settlement Court".

At this material moment Lagos had not come into the picture as far as the establishment of a settlement was concerned. But as early as the 17th century, British traders had mercantile depots on the mouths of the Niger and adjacent rivers and creeks, which dealt in the slave trade. Journeys into the hinterland were not undertaken until the era of exploration in the 19th century.[12]

Since the administration of justice in West Africa at that time was far from satisfactory, the British Government did not fail to institute an investigation as soon as the occasion arrived. It occurred when the Committee of the Company of Merchants trading in Africa sent a petition to Parliament to ask for an increment of the annual parliamentary grant towards the cost of running the West African settlements. Before considering the petition, the British Parliament sent out some commissioners to investigate the state of the settlements and forts on the West Coast of Africa. The main investigation was centred on the slave

/trade

11. 1 & 2 Geo. IV. c. 28.
12. Colonial Office List. S. V. "Nigeria", 1957, p. 148.

trade and how best to deal with further trafficking in it. But the administration of justice was also looked into.

The report of the Commissioners, which was laid before the House on June 10th, 1816,[13] made very encouraging comments on Sierra Leone "from whence will probably emanate

> any degree of civilization which may be attained by the adjacent parts of Africa in the south-east quarter".[14]

The Commissioners were of opinion that the best way to improve the administration of justice and the general conditions of the settlementsin West Africa lay in the establishment of a colony of some strength "from whence as a focus, all efforts might be directed..... The want of the

> strong control of law, and of a general system of jurisprudence, is so severely felt amongst the traders in Africa, that the foundation of a colony which may attain hereafter a sufficient magnitude to render it a suitable seat for courts, armed with full authority to repress and punish the enormities which so frequently happen on this coast, and pass without animadversion; the foundation of such a colony must surely be considered as a matter worthy of very great attention; and there is no place on the whole coast which could in any degree be rendered so efficient for this most desirable purpose as Sierra Leone." [15]

In order to expedite the administration of law, the Commissioners made certain suggestions concerning Sierra Leone. The judge's duties as outlined by them were, inter alia, to preside at Quarter Sessions, to sit as a judge of

/the

13. Report of the Commissioners sent out by His Majesty's Government to investigate the state of the Settlements and Forts on the Coast of Africa. Par. Papers, Session 1816, Vol. 7b, p. 121.
14. Ibid, p. 124.
15. Ibid, p. 126.

the admiralty, and to assist the Governor with legal advice on all points. Further, he was to sit as a Judge of the Mayor's Court to decide all civil cases, and to have similar powers and jurisdiction as a judge in the King's Bench.

It was also recommended that the Governor and his Council should constitute a Court of Appeal, and that a Court of Quarter Sessions, or Gaol Delivery, was to be held four times a year. On the advisability or otherwise of trial by jury, the Commissioners said:

> "The Court of Quarter Sessions being a criminal court, it seems impossible to conduct trials without a Petty Jury; but if the Grand Jury could be legally dispensed with, it would be getting rid of a great nuisance, their mode of proceeding being in spite of all admonition, very unsuitable to the spirit of their institution."

Adverting to the Gold Coast, the Commissioners reported very unfavourably on the great expense incurred in keeping the various forts, especially in view of the abolition of the slave trade in 1807, which formed nine-tenths of the settlements' trade. They recommended the dropping of some of the forts. After the report of the Commisssioners had been laid before the House in 1816, a Select Committee of the British House of Commons was appointed to examine the matters arising therefrom.[16]

The Select Committee, in their report of the following year,

16. Select Committee Report. Par. Papers. Session 1817. Vol. 6, pp. 403-9.

year, declined to recommend that a parliamentary grant should be made to the Company of Merchants trading in Africa to enable them to establish regular contact with the interior of the West African settlements. They recommended, however, that the Government in Chief (Sierra Leone) should be appointed with supreme authority "over the whole of the British settlements on the Gold Coast".

As a result of the recommendations embodied in the report of 1816, and of other economic difficulties, an Act was passed by the British Parliament in 1821 to dissolve the Africa Company.[17] By a provision in the Act, the Company was to cease acting as a "body politic". A fewmonths later, the Company was stripped of all its possessions including the forts and castles,which were then vested in "His Majesty, his heirs and successors for ever". By section 3 of the Act, all the possessions held by the Africa Company, and also any territories, islands, or possessions on the West Coast of Africa, between the 20th degree of North latitude and the 20th degree of South latitude, belonging to the Crown, were annexed to or made dependencies of the Colony of Sierra Leone ..."and from the date of their being so annexed or made dependencies on the said Colony, they shall be subject to all such laws, /statutes

17. 1 & 2 Geo IV. c. 28.

statutes, and ordinances as shall be in force in the said Colony". Thus, on the dissolution of the Company, the settlements on the Gambia and the Gold Coast were joined to Sierra Leone to form a single "colony" under the name of the West African Settlements, with the seat of government at Sierra Leone.

On October 17th, 1821, a Royal Charter, which regulated the administration of the government and the dispensation of justice, was granted to the Colony of Sierra Leone.[18] By the provisions of the "Charter of Justice", it was ordained that there should be 9 or more councillors, advising and assisting the Governor, and 5 of the councillors could form a quorum. The Governor and Council were to have full power and authority to make laws, subject to certain limitations. Further, the Governor and Council were constituted as a court of record to receive, hear and determine appeals from the Court of the Recorder or other superior courts of the Colony. When the debt, damages or matter in dispute exceeded the value of £400, and subject to the

/condition

18. The Constitution of the Colony of Sierra Leone and its dependencies, London, 1835. William Clowes. A supplementary charter was granted on February 17th, 1826.

condition of giving security, a further appeal could be made to the King in his Privy Council.[19]

B. WEST AFRICAN SETTLEMENTS (1821 AND AFTER)

From this period onwards it may be said that the recommendations of the Commissioners appointed in 1816 to investigate the state of the West Africa settlements had been fully implemented. For, as it was suggested, almost all the facilities for the administration of government and for the dispensation of justice were centred on Sierra Leone. Thus as early as 1825, Sierra Leone could boast of a strong legal establishment.[20]

In addition to the appellate Court of Record just mentioned, the "colonial" courts were as follows:-

1. The Court of Royal Commission. This consisted of the Governor, Chief Justice, Commissary, Judge of the /Mixed

19. The full text of the provisions of the Charter can also be seen in official documents with reference to Sierra Leone, e.g. Sierra Leone Ordinances 1811-1857, compiled by A. Montagu. It must be remembered that the composition of the Privy Council in 1821 was quite different from that of the body which has come to be known as the Judicial Committee of the Privy Council, which dates from 1833.

20. Report of the Commissionersof Enquiry into the State of the Colony of Sierra Leone. Par. Papers, Session 1826-7, Vol. 7, p. 359.

Mixed Court, Kingʼs Advocate, Colonial Secretary, and others. The Court was established for the trial of offences committed on the high seas and for offences relating to the slave trade.

2. The Court of Vice-Admiralty.[21] This was presided over by the Chief Justice, but with the establishment of the Courts of Mixed Commissions, the business in this Court was much reduced.

3. The Court of Recorder of Freetown. The Chief Justice, as Recorder, presided in the Court, aided by two assistant judges appointed by the Governor from among the Council. The Court was said to resemble most closely the /Court

21. This Court was established under the Vice-Admiralty Courts, Act, 1863, and the Vice-Admiralty Courts Amendment Act, 1867. By these Acts, authority was given to establish these Vice-Admiralty courts in any "British possession". These Courts, being "Imperial", appeals were direct to the Privy Council. They did not, however, prove satisfactory, owing to the judges presiding over them also being judges in the civil courts of the Colony, to which the rules of procedure were different. In 1890 the Colonial Courts of Admiralty Act was passed which abolished the Vice-Admiralty Court, and provided for the transfer of the admiralty jurisdiction of the High Court of Justice in England to the colonial courts, and also allowed inferior courts in the colonies to exercise partial and limited admiralty jurisdiction which the County Courts exercised in England. See also TODD, A. Parliamentary Government in the Colonies, op cit. p. 239. See. e.g. The Le Louis (1817) 2 Dods. 210, in which the Vice-Admiralty Court of Sierra Leone condemned a vessel for participating in the slave-trade, contrary to the law of nations. Their judgment was reversed on appeal.

Court of Common Pleas in England, and was also a Court of Equity.

4. The Courts of Quarter Sessions and Oyer and Terminer. The Chief Justice presided, with the assistance of 2 members of the Council. These sessions were held in March, June, September and December, and generally completed their business within 3 to 5 days. The judges were directed to "proceed by indictment, or by such other ways and means as are used in England, as nearly as the condition and circumstances of the Colony and the inhabitants will admit". Apart from those already mentioned, the judicial personnel included:- The King's Advocate,[22] the Sherriff, the Clerk of the Crown and of the Recorder's Court, the Coroner of Freetown, and 2 practising attornies,[23] 7 justices in the Commission of the Peace, the Mayor of Freetown and 3 aldermen and 8 Commissioners of Requests, besides 8 district magistrates.

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22. The office of Queen's Advocate was abolished in 1896. Ordinance No. 10 of 1896 created the offices of Attorney-General and Solicitor-General.

23. One of these was a "person of colour" born and educated in England, and engaged in mercantile pursuits; see CLARK, C. A summary of colonial law, p. 498.

The strong judicial establishment in Sierra Leone partly explains the lack of adequate judicial control in the Gambia.[24] The Commissioners appointed to inquire into the state of the Colony of Sierra Leone in 1826 reported that it was sufficient for Gambia to have a resident stipendiary magistrate to preside over petty sessions.[25] It was also recommended that an assistant judge should go once a year there from Sierra Leone in order to hold a court of Oyer and Terminer, and also of Common Pleas. As things turned out, it was not possible for the assistant judge to travel to Gambia once a year, for in the first decade of the formation of the Settlements (1816-26) only two courts of Oyer and Terminer and Gaol Delivery were held.[26]

The Report of Her Majesty's Commission of Inquiry on the Gambia in 1841 sheds a clear light on the administration of justice in Gambia in the 1820's.[27] Dr. Madden, the Commissioner, observed that the laws of the Gambia were enacted at Sierra Leone, and after obtaining the sanction of the Governor-in-Chief, were transmitted to the Gambia.

24. The other reason was the smallness of trade.
25. Report 1826. Op. cit. p. 394.
26. Ibid, p. 394.
27. Report of Her Majesty's Commissioner of Inquiry on the State of the British Settlements on the Gold Coast, at Sierra Leone and the Gambia ...1841. Par. Papers. Session 1842. Vol. 12, p. 9.

Usually from 1 to 3 years elapsed before the laws were returned. In one case, an Act called the "Grumetta Law", purporting to be applicable to the Gambia and passed in Sierra Leone in 1825, only reached the Gambia in 1841.[28] The Lieutenant Governor of Gambia recounted to Dr. Madden that in order to know what laws were applicable to the Gambia, an application was made to the Sierra Leone authorities for a copy of the laws; the reply they received was that no copy existed in that Colony except one which was the Sierra Leone Government's copy.

With respect to the administration of justice, Dr. Madden found that the dependence of Gambia on Sierra Leone for its laws and judges was very inconvenient to the public and created cruel hardship to prisoners confined for criminal offences. Those who were committed for trial had to stay in gaol till such time as the Chief Justice of Sierra Leone found it convenient to visit the territory, no matter how long he might be delayed by business or be detained by contrary winds; for the voyage from Sierra Leone, though only 500 miles, frequently occuped 20 to 25 days to complete

28. Ibid. Information by one Huntley furnished by the Lieutenant-Governor to Dr. Madden. Report 1842, p. 215.

And in the event of death (as in the lamentable case of Chief Justice O. Flintoff, who in 1840 was drowned in the Gambia, where he touched on his way out to Sierra Leone) a year might elapse before a Court of Oyer and Terminer could be held.

As it will be recalled, there was no distinct judicial establishment in the Gold Coast previous to 1821. The only civil authority was that vested in individuals as justices of the peace, who also acted as Commissioners of Requests and decided in cases where thematter in dispute was upwards of £30 in value. Prisoners under sentence of confinement were detained in a dark close cell which harboured all classes of prisoners indiscriminately.[29]

The poor judicial arrangements on the Gold Coast were not changed very much in 1821 when the several forts previously belonging to the late Royal Africa Company were transferred to the British Crown. In fact, the Crown would have done little to improve the forts if Sir Charles M'Carthy, then Governor of Sierra Leone (by whom the transfer was effected) had not strongly recommended that 4 of the forts should be retained - namely Cape Coast Castle, Anomaboe, Dixcove and Accra.

29. Report of the Comm. of Inquiry, 1826. p. 399.

The wisdom of Sir Charles' recommendation was to be realised later. But it would appear that there were two main reasons for the reluctance of the British Government to continue maintaining the forts in the Gold Coast. Firstly, because of the great expense and defeat in the Ashanti War of 1824 and the death of Sir Charles in that war. (The cause of the defeat was not due to the paucity of the British forces - 1000 against 15,000 Ashanti-

> "but by the negligence of the Ordnance storekeeper in taking the ammunition out of store, and instead of sending the number of kegs of powder that were required, sending by mistake a corresponding number of casks of vermicelli..."! 30

Secondly, there was a decline in commerce on the Coast.[31] The British Government was, therefore, inclined to abandon the forts on the Gold Coast and to relinquish their control over them. However, as a result of representationsmade by the local chiefs andmerchants, the forts were transferred to the Company of African Merchants, inter alia, on the following terms:- (a) that Cape Coast Castle and the fort at James Town, Accra, should remain the dependencies of Sierra Leone. (b) That British law should continue in force there;

30. Report of Her Majesty's Commissioner of Inquiry on the state of the British Settlements on the Gold Coast, at Sierra Leone and the Gambia, 1841. Par. Papers, Session 1842. Vol. 12, p. 13.

31. "I should conceive that the slave trade was nine-tenths of the whole trade", per J. Swanzy, in Minutes of the Evidence before the Select Committee of the British House of Commons. June 14th, 1816. Par. Papers, Session 1816. Vol. 7B, p. 24.

and (c) that 5 of the merchants residing in the forts should form a council of magistrates for the regulation of the internal affairs of the forts, and exercising all such powers as might legally be conferred upon them for the preservation of the peace, and the protection of the forts; provided, however, that themagistrates should not exercise authority or jurisdiction over the districts and natives under the immediate influence or protection of the forts, but solely in the fort.[32]

It was by virtue of the last provision that some form of justice was administered by the Governor and the Council of Magistrates. One of the reasons for their limited judicial power seems to be due to the fact that prisoners guilty of serious offences were to be sent to Sierra Leone for trial. However, on account of the length of time it took to transport prisoners from the Gold Coast to Sierra Leone, the Governor and the magistrates exceeded their powers. They took cognizance of all classes of crimes tried them summarily and sentenced the guilty to long terms of imprisonment, or imposed heavy fines and even the death sentence. For instance, for stealing a spoon, one Quaw Danqua, was detained for 5 months, and later sentenced to 1 year's chain. In Cape Coast Castle, for example, "I was

32. From a copy of instructions addressed by Lord John Russell to Dr. Madden. Select Committee Report, Session 1842. Vol. 12, p. 5.

> informed by the President of the Council of Government that he had to take cognizance of cases where application for divorce had been made to him; and once in the instance of a female, now mistress of the School at Cape Coast, married to a European, in which case he had pronounced a formal sentence of divorce, and had the sentence duly recorded in the archives of his office". 33

The inclusion of this quotation is not intended to create the impression that the Governor favoured the idea of exercising ultra vires jurisdiction. On the contrary, it is intended to show that he and his Council found some difficulty in administering justice. Thus in 1836, Maclean, then President of the Council of Government of the Gold Coast, had sent a memorandum to the Committee of African Merchants in London complaining of the difficulties involved in the administration of justice. He said, inter alia:[34] "It may be said that Cape Coast Colony is in dependency upon Sierra Leone, and that persons guilty of grave offences ought to be sent there (where there is a competent court(?)) for trial. But, practically speaking, this is impossible. We have no communication, or the means of communication with Sierra Leone; nor have we funds wherefrom the expenses of conveying prisoners and witnesses to Sierra Leone could be defrayed. Besides, witnesses neither would nor could absent themselves from their homes and businesses for many months whenever the ends of justice might require their presence at Sierra Leone, nor could such a sacrifice be required at their hands.

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33. Ibid. Per Dr. Madden, The Commissioner. Report of Her Majesty's Commissioner of Inquiry on the State of the British Settlements, etc. Par. Papers. Session 1842. Vol. 12. p. 15.

34. GRIFFITH, W.B. op. cit. p. 9.

> I have thus, I trust, shown the necessity of providing for the due administration of existing magistrates to act judicially in all cases, or by the establishment of a separate and competent court."

C. DR. MADDEN'S REPORT AND ITS REPERCUSSIONS

Lack of proper jurisdiction in certain of the settlements revived the slave trade. In 1839[35] information reached the Marquis of Normandy (then Secretary of State for the Colonies) that a Spanish slaver, "Don Amigos", a short time previous to seizure, had been allowed to trade freely at Cape Coast, then a British Settlement on the Gold Coast, and "had been supplied there by a British merchant, a magistrate, with some of the goods requisite for her unlawful traffic". Captain Maclean, the "Governor", did not consider himself entitled to interfere with the traffic of any vessel of a friendly nation, whatever her purpose. As a result, Lord John Russell (then Secretary of State for the Colonies) expressed the opinion that it was desirable that the Government of these settlements should be resumed by the Crown, and instructed a Dr. Richard Robert Madden, a gentleman who had formerly been employed as a stipendiary magistrate in the West Indies, and subsequently in the Mixed Commission at Havana, to proceed as Commissioner to the Gold Coast, and the other British settlements on the

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35. Select Committee Report. Par. Papers. Session 1842. Vol. 12, p. 9.

West Coast of Africa, for the purpose of investigating these and other matters connected with the administration and condition of these settlementsin 1840.

It was as a result of Dr. Madden's inquiry laid before the British House of Commons in 1842[36] that the unsatisfactory state of the judicial system in West Africa, which has just been described earlier on, was fully reported to the British Government. Consequently, a Select Committee of the British House of Commons was appointed to inquire into the state of the British possessions on the West Coast of Africa more especially with reference to their present relations with the native tribes, on March 22nd 1842, under the Chairmanship of Lord Sandon.[37]

During the various sessions of the Select Committee one question was uppermost in the minds of all concerned: the question was whether in view of the unsatisfactory state of the administration of justice in West Africa, it would be expedient for each of the three dependencies (i.e. Gambia, Sierra Leone and the Gold Coast) to be judicially independent

36. Sel. Cttee Rep. 1842, Vol. 12. An account of which has been given earlier. It must be pointed out that neither the British Parliament nor the local administrations concurred in all Dr. Madden's conclusions. The local administrators were of opinion that Dr. Madden heard a great deal from "irresponsible critics". This is a very questionable proposition.

37. Sel. Cttee Rep. 1842, Vol. 11.

independent of one another. During the proceedings of the Committee, it appeared that delayed justice was one of the main factors of maladministration. In a despatch to Lord Stanley in 1841, T.L. Ingram, Officer, who was administering the government of the Gambia, recounted the case of one prisoner, Thomas Lafeuillet, accused of murder and arson.[38] He was committed for trial by the magistrates. For 10 months he was confined and untried. There was no witness in the country then whose evidence would convict the accused. The only person whose testimony would be sufficient to prove his guilt was the accused's employer, who had returned to England in an almost hopeless state of illness. It turned out that the employer had very patiently waited at Bathurst for 17 months, in the hope that the Chief Justice would arrive at the Gambia to hold the general sessions. No Chief Justice arrived, and so he left for England. As it was unlikely that the employer would return, the officer administering the government expressed the view that in such a case, the prisoner had to be acquitted for want of evidence.

Apart from despatches such as Mr. Ingrams', a number of people, including Dr. Madden, who, by virtue of their trade or otherwise were qualified to speak on West Africa, /appeared

38. Sel. Cttee Rep. 1842. Vol. 12, p. 235.

appeared before the Select Committee to give evidence. Almost all of them were in favour of separation.

Dr. Madden, reporting on the Gambia, had recommended that its growing importance and the great increase in its trade, would render it necessary for it to become independent of Sierra Leone as regards the framing of its laws and their execution. This view was reiterated before the Select Committee:[39]

Viscount Courtenay: "Is it your opinion that it would be well for the Gambia that the Colony there should have the power of making laws to themselves, without respect to Sierra Leone?"

Mr. John Hughes: "Yes."

Similar evidence was given by Messrs. Swanzy and Gedge:

F. Swanzy: 677: "I should say the government of the Gold Coast ought to depend entirely on the Colonial Office and not on Sierra Leone..."

Chairman: "What is the usual length of passage?"

Swanzy: "Going up from Gold Coast to Sierra Leone, from 3 weeks to 8 weeks, sometimes longer, perhaps."

Mr. Forster: 8650: "Do you think the forts on the Gold Coast should be rendered independent of Sierra Leone?"

Mr. W.E. Gedge: "Most decidedly."

Judging by the trend of the evidence given, it was therefore not surprising that the Select Committee reported in favour of separation to the House of Commons. The following extract relates to the Committee's attitude to

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39. Sel. Cttee Rep. 1842. Minutes of the Evidence, 1842. Vol. 11, p. 503, question 7975.

the Gold Coast:[40]

> "In the first place, then, we recommend that the Government of the British forts upon the Gold Coast be resumed by the Crown, and that all dependence on the Government of Sierra Leone should cease....
>
> The judicial authority at present existing in the forts isnot altogether in a satisfactory condition; it resides in the Governor and Council, who act as magistrates, and whose instructions limit them to the administration of British law, and that, as far as the natives are concerned, strictly and exclusively within the forts themselves; but practically, and necessarily, and usefully, these directions having been disregarded, a kind of irregular jurisdiction has grown up extending itself beyond the limits of the forts by the voluntary submission of the natives themselves, whether Chiefs or traders, to British equity ... Still, however, it is desirable that this jurisdiction should be better defined and understood, and that a judicial officer should be placed at the disposal of the Governor, to assist or supersede, partially or entirely, his judicial functions, and those now exercised by the Council and the several Commandants in their magisterial capacity; but we would recommend, that while he follows in his decisions the general principles, he be not restricted to the technicalities of British law and that altogether he should be allowed a large discretion..."

Adverting to the Gambia, the Committee made the following suggestions:[41]

> "As in the case of the Gold Coast, we recommend the entire separation of this Government from that of Sierra Leone. The dependence, which has hitherto existed, has been the cause of great inconvenience, and seems to possess no advantage. The laws of the Settlement have been enacted by those little acquainted with its concerns... and we would recommend the

/appointment

40. Sel. Cttee Rep. 1842. Vol. 11, pp. 4-9.

41. Sel. Cttee Rep. Ibid. p. 12.

> appointment of a distinct Judicial Officer in each settlement, who should have authority to act in case of vacancy in either."

The recommendations of the Select Committee were accepted by the British Parliament, and as will be shown later, Gambia and the Gold Coast were each in turn made independent of Sierra Leone.

The first reaction of the British Parliament was to pass "an Act to enable Her Majesty to provide for the Government of Her Settlements on the Coast of Africa and in the Falkland Islands" on April 11th, 1843.[42] This Act had a two-fold purpose: firstly, as far as the West African territories were concerned, it enabled Her Majesty to make such laws and to constitute such courts as might be necessary for the preservation of order and the administration of justice. Secondly, it made it lawful for the Crown to delegate "to any three or more persons within any of the settlements... the powers and authorities so vested in Her Majesty in Council..."[43]

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42. 6 & 7 Vic. c. 13. Hitherto the British Government had been legislating for her dependencies in West Africa under the Royal Prerogative. See Rex v. Thompson (1944) 10 WACA 201 at 207.

43. Ibid. s. 2.

In August of the same year, the first Foreign Jurisdiction Act[44] was passed by the British Parliament "to remove doubts as to the exercise of power and jurisdiction by Her Majesty within divers countries and places out of Her Majesty's Dominions, and to render the same more effectual".

By the provisions of this Act, Her Majesty was empowered to exercise jurisdiction on the same terms as her authority in the Crown Colonies. Any act done by her in order to exercise this jurisdiction was to be deemed as valid and as effectual as though the same had been done according to the local law then in force within such country or area. The third section made it clear that, if any doubts arose as to the exercise of jurisdiction by Her Majesty's judges, the matter was to be referred to one of Her Majesty's principal Secretaries of State for determination.

By section 4, persons charged with serious criminal offences were to be "sent for trial to any British Colony... and upon the arrival of such person within such Colony, it shall and may be lawful for the Supreme Court exercising criminal jurisdiction within the same ... to try and determine such crime..."

In West Africa at this time, Sierra Leone was the only ter ritory which was in fact a Crown Colony, and in which a Supreme Court had been established. It would appear therefore, that the effect of section 4 was that criminal

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44. 6 & 7 Vict c. 94.

offenders in the Gambia had to be tried by a visiting Sierra Leone judge, and that criminals from the Gold Coast still had to be transported to Sierra Leone for trial. Fortunately this inconvenience was remedied in good time. For, even just before the passing of the Foreign Jurisdiction Act, a Commission dated June 24th, 1843, at Westminster provided that the Gambia should sever its connections with the Colony of Sierra Leone. From then onwards she was to be regarded as a separate Colony with her own Governor and Commander-in-Chief.

The Gold Coast was next on the list. Three measures were taken to improve the government and the administration of justice there. Firstly, under the Act of 1843,[45] a British Order dated September 3rd, 1844, constituted the Settlement of Cape Coast Castle and the Colony of Sierra Leone as "British Colonies to which it shall be lawful for any person having authority derived from Majesty in that behalf ... to cause any person charged with the commission of any crime or offence ... to be sent for trial or in order that sentences passed within such countries and places as aforesaid may be carried into effect within such colonies."

The Order stipulated also that the judges, magistrates, assessors and other officers, duly appointed to exercise the jurisdiction in the name and on behalf of the British Crown were to observe "until further Order, such of the

45. 6 & 7 Vict. c. 94.

> local customs of the said countries and places as may be compatible with the principles of the law of England, and in default of such customs", such officers were to "proceed in all things as nearly as may be according to the law of England..."

Secondly, partly in accordance with the recommendation of the Select Committee of 1842, and partly as a result of the Foreign Jurisdiction Act of 1843, the office of Judicial Assessor was created in December 1843 and Mr. Maclean was appointed (by warrant) "Government Assessor".[46] This office was established at the right moment. On March 6th, 1844, certain Fante chiefs inhabiting the area which was then known as the British Protectorate assembled at Cape Coast, and "executed an agreement" which is often referred to by the name of the Bond.[47]

By the provisions of the Bond, the chiefs acknowledged the power and jurisdiction of the British Queen; they renounced human sacrifices and other barbarous practices,

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46. Sel. Cttee Rep. on Africa (Western Coast) 1865. Minutes of Evidence. Session 1865. Vol. 5, pp. 22 and 58.

47. This document was not a treaty but a unilateral declaration. Its historical title "The Bond" is the correct one. The British were not contracting parties; the Bond was executed by the Chiefs "before his Excellency the Lieutenant Governor" in the presence of Maclean, and the Chiefs of the British military and police forces, who signed in the capacity of witnesses. See FAGE, J.D. Ghana: a historical interpretation, 1959, p. 74.

and agreed that murder, robbery and other crimes should be tried by the Queen's officers, "molding the customs of the country to the general principles of British law".

On November 22nd, 1844, Lord Derby, who was then Secretary of State for the Colonies, wrote a despatch to the Governor outlining the duties of the Judicial Assessor. He said that the system upon which Mr. Maclean had proceeded in the exercise of judicial powers over the natives was to be taken as a guide for the future exercise of the powers of the Assessor. He was to combine with an impartial investigation of the cases the mitigation of the severity of the sentences, which in such cases would be awarded by native judges. He was to aim at a lenient exercise of the discretion entrusted to him, but in the event of his deeming capital punishment in any case inevitable, he was to take care that the capital execution should be carried into effect by the native authorities, and that it should take place in the country in which the offender was

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tried.[48]

In effect, the business of the Judicial Assessor was to superintend the magistracy in their jurisdiction over the local inhabitants. He resided in Cape Coast, but also went on a circuit. He had his own court called the Judicial Assessor's Court and sometimes sat with a jury.[49] In his appellate capacity, he heard and determined appeals from /the

48. By Commissions dated October 1st, 1847 and December 17, 1847, Brodie Cruickshank and J.C. Fitzpatrick were appointed to the offices of Ag. Judicial Assessor and Judicial Assessor respectively. See Ordinances, etc. of the Gold Coast, 1852-70, compiled by A. MONTAGU.

In the words of Sir James Marshall (who was appointed Judicial Assessor in 1873 and later Chief Justice of the Gold Coast, "The Judicial Assessor's duty was to use all that was good and useful in native laws and customs, and as far as possible to preserve these for the natives, and at the same time to introduce Christian justice among them." BROWNLOW, W.R.: Memoir of Sir James Marshall, p. 13.

See also: SARBAH, J.M. Maclean and Gold Coast Judicial Assessors (1909-10) 9 J.A.S. 349; and ALLOTT, A.N. Essays in African Law, 1961, pp. 99-116.

49. In the Judicial Assessor's Court a special jury was empanelled to hear a case on slave-dealing - The West African Reporter, published in Freetown, 5th December, 1876.

the British magistrates in cases involving customary law. In his official capacity of Judicial Assessor and assistant to native princes he was entitled to administer the estates of British subjects dying intestate in an area outside the British forts at Cape Coast Castle. Although authorised by the British Crown to advise or assist the "native princes", he exercised his authority within their dominions only with their consent.

In the exercise of his duties with regard to the administration of assets of British subjects dying intestate at Cape Castle Town, the Court of Chancery in England ruled that the Judicial Assessor would be recognized in the capacity of legal personnel representative only. This was so held in Hervey v. Fitzpatrick.[50] In that case James Hervey, a British subject died intestate in 1852, possessed of personal property in Cape Coast and elsewhere on the Gold Coast. The defendant, Fitzpatrick, in his capacity of Judicial Assessor, took possession of this personal estate, claiming to be the official administrator by usage. He sent some of the assets to England to be sold. When the defendants reached England, the intestate's father and sole next-of-kin obtained letters of administration and

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50. (1854) 23 L.J.Ch. 564.

instituted a suit against the defendant for the administration of the estate and a receiver. Despite the contention of the defendant that the English courts lacked jurisdiction, the English court held that it had jurisdiction since the assets were in England. A receiver was also appointed, since the defendant's presence was expected to return to Sierra Leone to resume his judicial.

The third measure taken to improve the system of government emanates from Letters Patent dated January 24th, 1850, which provided that the Gold Coast was to be separated from Sierra Leone, and that Sir William Winnett, Kt., Commander in the Royal Navy be appointed Governor and Commander-in-Chief over the forts and settlements of the Gold Coast.[51]

Lagos came into the picture on August 6th, 1861, when, "in order that the Queen of England may be the better enabled to assist, defend and protect the inhabitants of Lagos, and to put an end to the slave trade in this and the neighbouring countries", King Decemo of Lagos entered into a treay with the British, whereby the Port and Island of Lagos were ceded to Great Britain.

As consideration for the cession, King Decemo received from the representatives of the Queen an annual /pension

51. London Gazette, January 25th, 1850.

pension, which was calculated in 1862 to amount to 1200 bags of cowries.[52] Owing to past experience, the settlement of Lagos was not annexed to any other colony. By a Commission dated March 13th, 1862 under the Great Seal of the United Kingdom, provision was made for the separate administration of Lagos.

After reciting inter alia the Treaty of 1861, the Commission provided for the appointment of H.S. Freeman, Esq., as Governor and Commander-in-Chief over the settlement of Lagos, and of all forts and garrisons established there. Provision was also made for the establishment of an Executive Council to advise the Governor; again, under the British Settlements Act of 1843, powers for the peace, order and good government of Lagos were delegated to the Legislative Council, which consisted of the Governor and not less than 2 persons, to establish such ordinances not being repugnant to the laws of England, and to constitute courts and officers, and to make regulations, subject to certain limitations.[53]

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52. It was then worth £1,030 sterling: but note that before 1861, the British Government had established a consulate in Lagos. See Sel. Cttee Rep. Par. Papers 1865, Vol. 5, p. 23.

53. The provisions in this Commission were similar to those made for the Gold Coast and the Gambia.

After the Settlements hitherto dependent on her had been separated from her, Sierra Leone was reconstituted as a separate Colony with her own Governor and Commander-in-Chief, by a Commission dated May 27th, 1863.[54]

Before going any further, it may be useful to mention some of the Orders in Council and Acts of the British Parliament passed between this period and 1865, which were of special importance to West Africa - they are namely:-

(a) Admiralty Offences (Colonial) Act, 1849.[55] "An Act passed to provide for the prosecution and trial in the British Colonies of offences committed within the jurisdiction of the Admiralty". This Act applied to West Africa, for section 5 stated that "for the purpose of this Act, the word "Colony" shall mean any island, plantation, colony, dominion, fort or factory of Her Majesty, except any island within the United Kingdom and the Islands of Man, etc."

(b) British Order in Council, dated July 13th, 1850. Its purpose was to extend British jurisdiction over British subjects residing in countries under the dominion of "Native princes" adjacent to Sierra Leone. It was extended on the basis of treaties of cession of jurisdiction by the chiefs or princes concerned.

(c) British Order in Council, dated April 4th, 1856, with reference to the jurisdiction in the protected territories of the Gold Coast. The main provisions of the Order were as follows:

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54. For further details of the 1863 Constitution, see CROOKS, J.J. A history of the Colony of Sierra Leone, p. 213, et seq. 55. 12 & 13 Vict. c. 96.

In respect of all civil and criminal matters and questions, which arose within the said "protected territories", and in regard to which Her Majesty was "competent to exercise such jurisdiction as aforesaid without the co-operation of any native chief or authority, and especially in respect of all matters relating to the property of any bankrupt or insolvent person, all magistrates and courts of justice authorized to act within 'Her Majesty's Forts and Settlements' on the Gold Coast were granted the same power and jurisdiction as if such matters or questions had arisen within the said Forts or Settlements."

Again, in respect of civil and criminal matters, the person appointed to be the assessor to the native chiefs was given "such powers and jurisdiction as might at any time have been lawfully acquired by Her Majesty". By section 3 it was provided that in the determination of any matter or question which might concern or arise out of any dealings with the inhabitants of the protected territories, equitable regard was to be paid to the local customs, in so far as they were not "repugnant to Christianity or to natural justice".

To return to the provisions of the various commissions which provided for the separate administration of the West African territories, it will be remembered that under these Commissions powers were delegated to the Legislative Councils in each territory to enact laws and to constitute courts of justice.

On June 11th, 1851, the Governor and the Legislative Council of the Gambia passed an Ordinance providing for the establishment of a Supreme Court; for "the separation of these settlements and their dependencies from the Colony of Sierra Leone; and divers other reasons ... rendered it necessary to establish in the said Settlements a court of record, possessing supreme civil, criminal and equity jurisdiction, within the said Settlements and their dependencies ..." 56

By section 2 a court of record styled the "Supreme Court of the British Settlements in the Gambia", possessing the power and authority of a superior court of civil and criminal jurisdiction was established. Equity jurisdiction, for example over fraud, trusts, mortgates, etc., similar to that possessed by the High Court of Chancery in England, was vested in the Court.

It was presided over by Her Majesty's Chief Justice.

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56. Repealed by No. 6 of 1867. The above Ordinance also repealed a former Ordinance passed at Sierra Leone establishing a Court of Common and a Court of Appeal "in the said settlements, and also an Ordinance enacted by the Governor and Council of these settlements establishing a Court of Queen's Bench therein, and an Ordinance enacted by the said Governor and Council establishing a Supreme Court of civil, criminal and equity jurisdiction ...".

Where a jury trial was necessary, seven jurymen whose verdict had to be unanimous were empanelled.

During this period there were two classes of jurors:(a) the Grand and Special Jurors.[57] The men who qualified under this category had to be between 21 and 60 years of age. They must have been resident in the Gambia for six calendar months previous to the making of the Juror's book.

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57. Ordinance of the Gambia dated April 28th, 1845, repealed by No. 6 of 1867.

The Grand Jury or the jury of presentment originated from the Assize of Clarendon in 1166. In early days, the sheriff was directed to summon for the business either of the Assizes or of the Quarter Sessions 24 persons from the body of the county from which 23 were chosen.

They were instructed in the articles of their inquiry by a charge from the judge. They then withdrew to sit and receive indictments and to hear evidence on the part of the prosecution. They then had to decide whether to "find a true bill" or ignore the accusations preferred. In effect, they decided whether the prosecution had made a prima facie case against the accused or not. If a case had been made, it was tried before a judge and a petty jury. In the 13th century and during the early 14th century, almost all the members of a grand jury were also members of the petty jury. Not unnaturally, the judges sometimes considered that when members of a petty jury, who had presented a person as suspected, acquitted him, they contradicted themselves and deserved to be punished. (Holdsworth, Sir William: A History of English law, 7th ed, 1956, p. 321 et seq.) It is difficult to understand why such a complicated system was imposed on West Africa.

They had to be persons entitled to describe themselves as possessing the title of Esquire, or be persons of higher rank, who were bona fide property-owners to the value of £50 per annum, or were bona fide owners or occupiers of any house in the Settlement which contained not less than 15 windows, or had to belong to some profession in any part of the United Kingdom of Great Britain and Ireland.

(b) Petit and common juries: here the jurymen had to be between the ages of 21 to 60 years, and inter alia had to be owners of property worth £10 per annum, or be engaged in a mechanical trade, or be clerks.

By section 14 of the Supreme Court Ordinance a Court of Appeal was constituted and it consisted of the Governor and any 3 members of the Legislative Council. It had powers to direct new trials of issues of fact in civil cases, which might have been tried in the Supreme Court. Appeals only lay when the matter in dispute exceeded £30 in value. A Supreme Court of civil and criminal jurisdiction within Her Majesty's Forts and Settlements on the Gold Coast was

/constituted

constituted by Ordinance No. 1 of 1853.[57a] The Court, which was styled "the Supreme Court of Her Majesty's Forts and Settlements on the Gold Coast", was also a court of record presided over by a Chief Justice having criminal and civil jurisdiction similar to that of the courts of Queen's Bench, Common Pleas and Exchequer at Westminster. It also had jurisdiction in certain classes of offences committed on the high seas.

Trials were usually held at Cape Coast Castle before the Chief Justice and a jury[58] of 6 men, whose unanimous verdict was considered valid and binding. The appointment of the first Chief Justice of the Court went to the Hon. J.C. Fitzpatrick, who, as will be remembered, had already been appointed as a Judicial Assessor. He was paid a salary of £300 per annum, in addition to his salary as a Judicial Assessor.

The Court of Appeal consisted of the Governor, the Judicial Assessor and at least one other member of the

/Legislative

57a, Amended by Ordinance of September 21st, 1854, and further by Ordinance dated September 23rd 1856 in respect of section 5; amended further by No. 5 of 1864, and repealed by No. 13 of 1877.

58. By an Ordinance dated September 23rd, 1856, it became possible for the Court to try cases in Winneba and at other places appointed by the Governor.

Legislative Council disinterested in the case. In the event of a number of voices being equal in the determination or judgment on appeal, the Governor was temporarily entitled to two voices.

The Supreme Court was also given probate jurisdiction by the provisions of Ordinance No. 6 of 1856, equity jurisdiction by an Ordinance dated February 3rd, 1857, and jurisdiction in divorce and matrimonial causes by an Ordinance dated January 19th, 1859.

In Sierra Leone the title of the Court of the Recorder of Freetown was changed to "The Supreme Court of the Colony of Sierra Leone" by Ordinance No. 10 of 1858.[59] This Court, which was presided over by the Chief Justice in Freetown, sat on the first Monday of January, March, May, July, September and November for both civil and criminal trials. The composition and jurisdiction of the Court were similar to those of the Gold Coast. Both civil and criminal causes were tried before the Chief Justice and 12 Jurymen. In addition, it heard appeals from decisions of the police magistrates or justices of the peace, and from the courts for the recovery of small debts.

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59. Amended by an Ordinance dated May 4th, 1859. Repealed by No. 14 of 1904.

The Supreme Court of Her Majesty's Settlement of Lagos was constituted by Ordinance No. 11 of 1863.[60] The Court, which was presided over by a Chief Magistrate, was invested with jurisdiction in civil and criminal cases similar to those of the other territories just described.

D. THE SELECT COMMITTEE REPORT, 1865

In 1863, the second Ashanti War broke out, caused by the refusal of the Governor of the Gold Coast to surrender to the King of Ashanti 2 fugitives from his kingdom. In revenge for this refusal, the Ashanti forces invaded the British Protectorate. More British soldiers were sent to the territory without delay, but because of lack of adequate facilities, most of them died from sickness. In fact most of the soldiers did not agree with the British Government's main aim of taking Kumasi, the capital of Ashanti. The British troops were very bitter about the whole campaign, which was later abandoned. One correspondent recalled the declaration of the King of Ashanti to the effect "That though the white man has sent plenty of guns to the Bush, he knows the Bush will prove stronger than the guns"[61].

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60. Amended by No. 1 of 1864, No. 9 of 1864 and by No. 5 of 1865.

61. The Times, May 16th, 1864.

This abortive and expensive expedition provoked so much discussion in England,[62] that the British Government sent Colonel H. St.George Ord on a special mission to West Africa to inquire and report. On his return, he produced his report. As a result in 1865 a Select Committee of the British House of Commons was appointed to consider"the State of the British Establishments on the Western Coast of Africa."[63] The Rt. Hon. C.B. Adderley and 14 others were nominated to conduct the inquiry. In all 22 sessions were held from March 20th to June 22nd 1865, and among those who gave evidence before the Committee were Colonel Ord, R.E. and Dr. Livingstone. The recommendations made by the Committee in their Draft Report are so informative that they deserve quoting at length.[64]

> "Your Committee recommend in consonance with almost unanimous evidence, that the four existing settlements should be again concentrated under a Supreme Government at Sierra Leone.
>
> The reasons which led to their separation, on the recommendation of the Committtee of 1842, no longer exist. Rapid communication by steam will enable military and judicial arrangements to be made now, which in 1842 were impossible.

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62. See, e.g. The Times, May 12th, 16th and August 10th, 1864.

63. Select Committee Report, 1865, Vol. 5,

64. Ibid, pp. 15-16.

"The reasons for re-concentration are not only economical, but much more, the desirableness of uniform policy, and the hope of contracting our growing engagements and extricating ourselves as much as possible from anything in the nature of colonizing Africa, and from a fatal service, or the possible implication in native wars ...

The Government of Sierra Leone should be re-constituted Government over all the British Settlements in West Africa ...

The Chief Justice will also be required to make an annual circuit of the other settlements ...

Gambia should have only a Lieutenant Governor with a small Executive and Legislative Council, local Ordinances being subject to the sanction of the Governor...

The judicial establishments may be reduced to magistrates only, the Sierra Leone Chief Justice undertaking the more serious cases on his circuit.

On the Gold Coast there is no possibility of reaising a sufficient revenue while the Dutch remain, and thwart our policy ... The protectorate should only be retained while the Chiefs may be as speedily aspossible made to do without it. Nothing should be done to encourage them to lean on British help, or trust to British administration of their affairs, whether military or judicial. The judicial assessor does not fulfil the first intention of the office assisting the chiefs in administering justice, but supersedes their authority by decisions according to his own sole judgment. The office, instituted with the best intentions, seems by the evidence of a Commissioner from the native king of Cape Coast, to have led to the introduction of needless technicalities and expense, and the employment of attorneys when the natives had better speak for themselves. The Chiefs should rather be left to exercise their own jurisdiction, with only an appeal, when necessary, to the English magistracy. Queen's advocates seem wholly unnecessary, and trials by jury inapplicable in many cases.

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"The forts on the Gold Coast should be under the command of a Lieutenant Governor at Cape Coast Castle, under the orders of the Governor of Sierra Leone, with a small council, legislative and executive, subject to his sanction of their proceedings; and the exercise of his government should be as much as possible confined to the forts actually occupied ...

The judicial establishment should consist only of magistrates, important cases being reserved for the Chief Justice's circuit from Sierra Leone ...

Lagos will require an English Commandant until the native rule can be re-established, when he would resume the office of Consul, or rather confine himself to that office, which he now incongruously holds with the Government of Lagos as Consul of Benin.

The Houssa police should suffice for all military purposes."

As a result of the recommendations of the Draft Report, and of the 7 Resolutions made by the Committee and ordered to be reported to the House of Commons on June 26th 1865, tremendous changes were made by the British Government in respect of the four Settlements.

By a Royal Commission dated February 19th, 1866, all the previous laws which provided for the separate administration of justice in each Colony or Settlement, were revoked. The main purpose of the Royal Commission despatched to the Governor and Commander-in-Chief "in our West African Settlements", was for the "uniting the Colony of Sierra Leone together with the forts and Settlements on the

/West

West Coast of Africa (Gambia, Gold Coast and Lagos).[65]

The boundaries were defined to cover "Our Settlements of Sierra Leone, comprising all places, Settlements, and territories which may at any time belong to Us in Western Africa between the fifth and twelfth degrees north latitude and lying to the westward of the tenth degree of west longitude; Our Settlements on the Gambia, ... between the twelfth and fifteenth degrees of north latitude, and lying to the westward of the tenth degree of West longitude; Our Settlements on the Gold Coast ... between the fifth degree of West longitude and the second degree of east longitude; Our Settlement of Lagos ... between the second and fifth degrees of east longitude".

By the other provisions in the Royal Commission:

(a) A Legislative Council, consisting of the Governor and nor less than 2 nominated persons was to be established in each of the 4 Colonies.

(b) Each Legislative Council was given power and authority subject to certain limitations to enact "Ordinances not being repugnant to the law of England or to any Order made or to be made by us with the advice of Our Privy Council, and to constitute such courts and officers, and to make such provisions and regulations for the proceedings in such courts and for the administration of justice" as and when such measures were required.

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65. Hertslet's Treaties, Vol. 13 p. 26.

(c) The Governor was empowered to appoint judges and to veto unsuitable ordinances. In addition, he was to be advised by an Executive Council, which was to be established in Sierra Leone.

7 months later, on the instructions of the Governor at Sierra Leone, a series of ordinances were passed to provide for better administration of justice in the 4 territories concerned.

Thus, by an Ordinance dated November 16th, 1866,[66] the title of the Supreme Court of the Colony of Sierra Leone established was once more changed to "The Supreme Court of the Settlement of Sierra Leone". This time, the Court sat in Freetown each year on the second Monday of January, March and May, and on the third Monday in September and November. It had cognisance of pleas, civil and criminal, and jurisdiction in all cases just as fully and amply as that exercised by the courts at Westminster. Jurisdiction in equity, probate, divorce and matrimonial causes was also conferred on the Court. Criminal offences were to be tried before one or more of the judges and a jury of 12 men, sworn to give their verdict according to the evidence.

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66. No. 4 of 1866. Repealed by No. 14 of 1904.

Civil actions were triable before one or more of the judges without a jury. Thus by this Ordinance trial by jury in civil cases was abolished.[67] In all civil causes evidence had to be taken down in writing and kept as a record to be used when necessary, such as in connection with an appeal.

Furthermore, "The Court of summary jurisdiction of the Settlement of Sierra Leone" was established.[68] It was a Court of Record and was presided over by the Assistant Judge of the Supreme Court without a jury. The Summary Court had jurisdiction in all pleas of personal actions within Sierra Leone, where the debt, damage or demand claimed did not exceed £100. Such cases were tried summarily without a writ. It had no jurisdiction "in any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any tool, fair, market, or franchise shall be in question ... or in an action for any malicious prosecution, question under will, libel, slander, seduction, or breach of promise of marriage".[69]

Dissatisfied litigants were entitled to appeal to the Supreme Court within 10 days after the date of the judgment by the Summary Court, provided that security was given.

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67. For further details about the reaction of the inhabitants, see post p. 279

68. No. 5 of 1866. Repealed by No. 14 of 1904.

69. No. 5 of 1866, s. 6.

As a result of the variety of cases triable by the Court of Summary Jurisdiction, the Court of Requests for Freetown was abolished and its jurisdiction transferred to the former.

From the rules framed for the Summary Court on March 25th, 1867, by H.J. Huggins Ag.C.J., and A. Montagu, Assistant Judge, we are told:[70]

(a) that the Court was held on the first and third Mondays of every month at such places appointed, and

(b) that it was held in Freetown only on every Saturday for the hearing, trial and determination of all cases, and proceedings hitherto triable in the Court of Requests.

The third Ordinance passed by the Government of Sierra Leone for the better administration of justice applied to the Gold Coast. It will be recalled that in 1853 a Supreme Court styled "the Supreme Court of Her Majesty's Forts and Settlements on the Gold Coast" had been established.[71] By the provisions of Ordinance No. 7 of 1866 of the Gold Coast, a new supreme Court was established to replace the former. The new Court was styled "The Court of Civil and Criminal Justice of the Settlement on the Gold Coast".

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70. Ordinances of the Colony of Sierra Leone (1868-1880), Vol. 4.

71. See ante p. 37

It was a court of record, and was presided over by a Chief Magistrate appointed by the Queen. It washeld at Cape Coast Castle and other appointed places on the first Monday of every month for the trial of both civil and criminal cases.

All civil cases were triable before the Chief Magistrate without a jury, but criminal cases were tried before the Chief Magistrate and a jury of 12 men or at least not less than 6 in those cases where the number was reduced by lawful challenges. Where a person charged with a criminal offence was found guilty and sentenced to death, or to transportation, banishment, penal servitude, or imprisonment for more than 12 calendar months with hard labour, such punishment was not to be carried into execution until it had been approved by the Administrator of the Gold Coast.

The Court was given the care and custody of the persons and estates of idiots, lunatics, etc., and with powers to appoint guardians. It was empowered to appoint administrators of the estates and effects of persons dying intestate, or of those who in their last will and testament had failed to appoint executors, and finally, to grant probate in the case of persons dying testate. In actions where the matter in dispute was more than £50 in value, evidence had to be taken down in writing by the Clerk.

/The

The Supreme Court of civil and criminal justice of the Settlements of the Gambia was established on November 26th, 1866.[72] As a rule, the Court was held at Bathurst on the first Monday of every month in each year. It adjourned in the case of the indisposition of the Chief Magistrate. Otherwise the composition and jurisdiction of the Court were almost identical to those of the Gold Coast.

Finally,"the Court of civil and criminal justice of the Settlement of Lagos" was set up on December 1st, 1866.[73] This Court also had identical jurisdiction to that of the Gold Coast. According to the rules of the Court by the Chief Magistrate, Benjamin Way,[74] the officers of the Court were the Chief Magistrate himself, the Clerk of the Court and 2 bailiffs. The Court was held on the first Monday of each month at 12p.m. All writs had to be signed by the Chief Magistrate. All pleadings in the Court had to be verbal, but in civil cases where the claim exceeded £20, the evidence had to be taken down in writing by the Clerk.

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72. Confirmed on February 23rd, 1867.

73. By virtue of Ordinance No. 7 of 1866, which was confirmed on March 13th, 1867.

74. Ordinances of the Settlement of Lagos, 1862-70, compiled by A. Montagu, p. 239.

A person was allowed to practise as a barrister, solicitor, attorney or notary with the approval of the Chief Magistrate

After the Courts of Civil and Criminal Justice had been established in the Gold Coast, the Gambia and Lagos, it soon became evident that a proper court of appeal had to be constituted. For as it will be remembered, the Courts of Appeal set up to serve the previous supreme courts of the settlements of West Africa, usually comprised the Governor of the territory, and some members of the Legislative Council. Whenever there was any tie, the Governor had a casting vote. For obvious reasons, for example the lack of judicial training of the Governors, the decisions of the Courts of Appeal as they then existed, could not command respect.[75] It was with a view to remedying the legal anomaly that a British Order in Council was issued on February 26th, 1867, to constitute the Supreme Court of Sierra Leone, a court of appellate jurisdiction from the Courts of Civil and Criminal Justice on the Gambia, the /Gold

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75. Certainly, the private advice given by the Governor to an appellant, a Gold Coast native, to declare himself an insolvent, was not looked on with favour by an English Court, when he appealed to the Court of Appeal, in the case of Smith v. Moffatt (1865-6) L.R. 1 Eq. p. 397

Gold Coast and Lagos.[76]

By the provisions of this Order, the judges for the time being in the Supreme Court of the Settlement of Sierra Leone were made judges of appeal to hear and determine appeals from the Courts of Civil and Criminal Justice of the Settlements of Gambia, the Gold Coast and Lagos. This Court of Appeal was styled "The West Africa Court of Appeal".[77]

Appeals were made to the Court of Appeal in respedt of judgments at the courts of first instance, where the matter in dispute was valued at more than £50. Notice of the appeal had to be given within 14 days from the date of judgment. Further, the appellant was enjoined to enter into sufficient security to be approved by the Chief Magistrate of the court of first judgment. Whenever, at the hearing of any such appeal, the judges were equally divided in opinion, the judgment of the Court of civil and criminal /justice

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76. The appellate jurisdiction of the Governor and the Legislative Council in Sierra Leone itself was abolished much later in 1869 by Ordinance No. 3 of 1869, which was repealed by No. 14 of 1904. By virtue of No. 3 of 1869, all the powers and authorities granted to the Governor and Council to enable them to exercise their appellate jurisdiction were withdrawn.

77. Though the West Africa Court of Appeal established in 1867 may be regarded as heralding the formation of the 2nd W.A.C.A. of 1928, yet it must be noted that they are two separate entities, and quite distinct in composition.

justice from which such an appeal was brought stood confirmed, and was deemed to be the judgment of the Court of Appeal.

Further the judges of the Court of Appeal were empowered to make rules for the Court, provided that those rules when made were transmitted to the Governor-in-Chief of the West African Settlements, to be sent to him to Her Majesty for approval or disallowance. According to the rules of the West Africa Court of Appeal, drafted by George Finch, C.J., and Horatio James, Assistant Judge, both of the Supreme Court of the Settlement of Sierra Leone:[78]

(a) the notice of appeal had to be in writing and sent to the Registrar of the court whose sentence should be appealed for;

(b) within 14 days, the appellant had to state in writing his grounds of appeal and such statement was to be transmitted to the Registrar of the West Africa Court of Appeal;

(c) The W.A.C.A. sat on the 4th Monday of January, March, and May, and on the 1st Monday of October and December annually.

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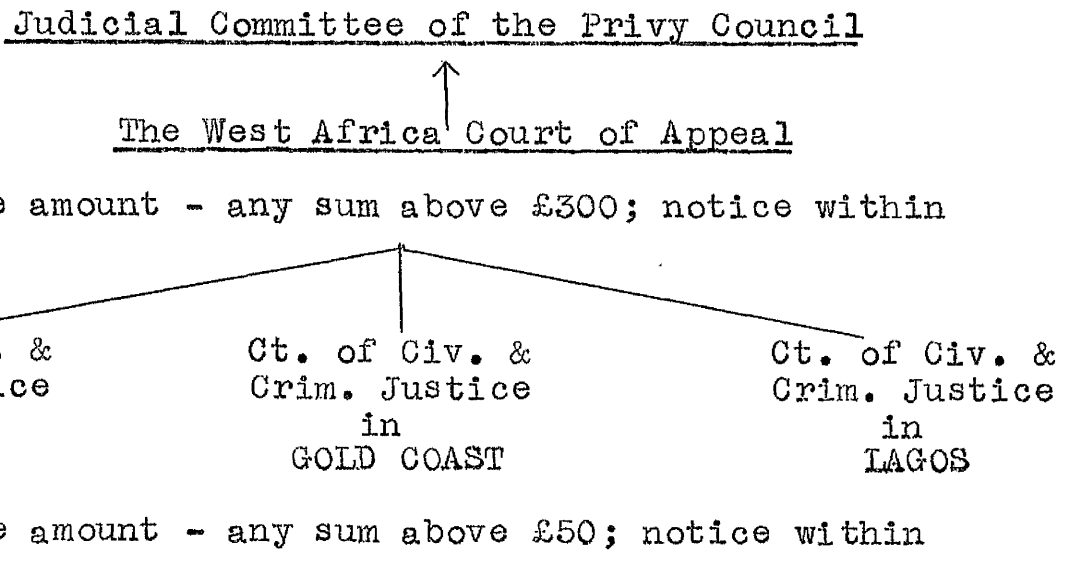
78. Ordinances of the Settlement of Lagos, 1862-70, compiled by A. Montagu, p. 279.

The scope of this Order-in-Council was not limited to the establishment of the West Africa Court of Appeal. By section 4, further appeals could be made by any persons dissatisfied with the judgment of the West Africa Court of Appeal to the Judicial Committee of the Privy Council, subject to certain regulations. These regulations regarding conditions of appeal were embodied in another Order-in-Council published on the same day with the Principal Order just mentioned.[79]

Diagramatically, the hierarchy of the courts was as follows:-



At this stage, mention must be made of "The West African Offences Act", passed by the British Parliament on /March

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79. The Order was published in Freetown on May 9th, 1867.

March 31st, 1871.[80] This was passed to extend the jurisdiction of the Courts of the West African Settlements to certain offences; for it had been found that "the inhabitants of certain territories in Africa adjoining Her Majesty's Settlements of Sierra Leone, Gambia, Gold Coast, and Lagos, and the adjacent protectorates, not being within the jurisdiction of any civilised government, and crimes and outrages having been and being likely ... to be committed within such territories against British subjects and persons resident within any of the said settlements, /and since/ it is requisite to provide for the trial and punishment of such crimes and such outrages"

it was enacted by section 1 that: "Crimes or offences committed within twenty miles of the boundary of any of the said Settlements or of any adjacent protectorate by any of Her Majesty's subjects, or by persons not subjects of any civilised power against the persons of British subjects, or of persons resident within any of the said settlements, shall be cognizable in the superior courts exercising criminal jurisdiction within any of the said settlements, and shall be inquired of, tried, prosecuted, and upon conviction, punished in such and the same manner as if the crime or offence had been committed within such settlements."

E. THE CHARTER OF JULY 24th 1874

It will be remembered that it was by virtue of the Royal Commission dated February 19th, 1866, which provided for the reuniting of the settlements on the Gambia, Gold Coast and Lagos, together with Sierra Leone, under one Government in chief seated at Sierra Leone. However, on July 24th 1874, a new British Charter was granted, the effect of which was (a) to revoke so much of the provisions /of

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80. 34 Vict. c. 8.

of the Royal Commission of 1866 as affected the settlements of the Gold Coast and Lagos, and (b) to erect them into a new Colony to be styled the Gold Coast Colony.[81]

Although one Supreme Court was established for the new Gold Coast Colony, it must be noted that neither the Gold Coast nor Lagos lost their identity under the Royal Charter. There was not a complete amalgamation in the strictest sense of the word. The Charter, after reciting inter alia the provisions of the Royal Commission of February 19th, 1866, and the 1843 Act,[82] clearly defined the boundaries of each settlement.[83] One Governor was appointed for both settlements, and he resided in the Gold Coast; but a separate administrator, appointed under the Royal Warrant and subordinate to the Governor of the Gold Coast Colony, was stationed in Lagos.[84]

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81. Letters Patent dated July 24th, 1874.

82. 6 & 7 Vict. c. 13.

83. The Gold Coast comprised all places, etc, (in West Africa) between the 5th degree of west longitude and the 2nd degree of east longitude. Lagos comprised all places, etc, of British West Africa between the 2nd and 5th degrees of east longitude.

84. Griffith, op. cit. (1936) p. 19.

Further, a Legislative Council was established, comprising the Governor and not less than 2 other persons from each of the Settlements of the Gold Coast and Lagos. Each Legislative Council was empowered to enact such ordinances as were not repugnant to the law of England, and also to establish such courts and to appoint such officers as would be required for the smooth administration of justice. The Governor had a negative voice in all these matters, but in making his decision he did so with the advice of the Executive Council, which was directed to be established under the provisions of the Charter. The appointment of judges and a Deputy Governor was also vested in the Governor.

After the Charter was granted, there followed a series of Orders in Council consolidating the position of the new Gold Coast Colony. Particularly instructive was the Order issued to determine the mode of exercising the power and jurisdiction in those areas adjacent to the Gold Coast Colony on August 6th, 1874.[85]

On December 17th, 1874, the anomalous position of Sierra Leone[86] and the Gambia was rectified by a Royal /Charter

85. British Order-in-Council, dated August 6th 1874. Proclaimed at Cape Coast on September 12th, 1874.

86. Letters Patent dated December 17th, 1874. See Hertslet's Treaties, Vol. 15, p. 525.

Charter, whose provisions were very much similar to those granted to the Gold Coast Colony. It revoked so much of the provisionsof the 1866 Charter as applied to Sierra Leone, and the Gambia, and provided that they be erected into one Government in Chief to be styled "The West Africa Settlement."[87] Just as in the case of the Gold Coast Colony, one Governor resident at Sierra Leone was appointed for both territories, but each one had her own Legislative and Executive Councils.

In the Gold Coast Colony on March 31st 1876, an important Ordinance for the constitution of a Supreme Court and for the purposes relating to the administration of justice was passed. This Ordinance is still very important to every West African lawyer, even though it has been repealed in parts and amended in others; yet it is well worth noting. The following is a summary of its provisions:

Constitution of the Court

By section 3 the Court was constituted "the Supreme Court of Judicature for the Gold Coast Colony, and for the territories thereto near or adjacent. Wherein

/Her

87. The Settlement of Sierra Leone was defined as "all lands belonging to the British in West Africa between the 5th and 12th degrees of North latitude and lying to the westward of the 10th degree of west longitude:"and the Settlement of Gambia as "all lands between the 12th and 15th degrees of North latitude and lying to the westward of the 10th degree".

> Her Majesty may at any time, before or after the commencement of this Ordinance have acquired powers and jurisdiction".

It consisted of the Chief Justice and not more than 4 puisne judges. The first Chief Justice was Sir D.P. Chalmers, appointed on December 2nd 1876.[88] Further, a Full Court was established to serve as a Court of Appeal. It was fully constituted when it consisted of not less than 2 and not more than 3 judges, one of whom must at all times be the Chief Justice. When matters were brought before the Full Court by way of appeal or otherwise, the decision of the majority was taken to be the judgment of the court. But in a case where the Full Court consisted of only 2 judges, the Chief Justice had a casting vote.[89]

Jurisdiction and Law

The Supreme Court was constituted a superior court of record to possess and exercise "all the jurisdiction, powers and authorities,

> excepting the jurisdiction and powers of the High Court of Admiralty, which are vested in or capable of being exercised by Her Majesty's High Court of Justice in England as constituted by the Supreme Court of Judicature Acts 1873 and 1875".[90]

The jurisdiction and powers of the former Courts of Civil and Criminal Justice in the Gold Coast and Lagos were vested in the Court.[91]

88. No. 4 of 1876, section 4.
89. Ibid, section 7.
90. Ibid, section 11.
91. Ibid, section 12.

Further, it was given all the powers equal to those of the Lord High Chancellor in England to appoint guardians of infants and their estates, keepers of idiots, lunatics, etc.[92] Section 14: "The Common Law, the doctrines of Equity, and the statutes of general application, which were in force in England at the date when the Colony obtained a local legislature, that is to say, on the 24th day of July, 1874, shall be in force within the jurisdiction of the Court".

Section 16: "The jurisdiction hereby conferred upon the Court in probate, divorce, and matrimonial causes and proceedings may, subject to this Ordinance 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".

Section 17: "All Imperial laws declared to extend or apply to the Colony or the jurisdiction of the Court shall be in force so far only as the limits of the local jurisdiction andlocal circumstances permit, and subject to any existing or future Ordinances of the Colonial Legislature ..."

Another section provided that law and equity were to be administered concurrently ... "and in all matters in which there was any conflict or variance between the rules of Equity and the rules of the Common Law with reference to the same matter the rules of Equity should prevail".[93]

Section 19: "Nothing in this Ordinance shall deprive the Supreme Court of the right to observe and enforce the observance of, or shall deprive any person of the benefit of any law or custom existing in the said Colony and territories subject to its jurisdiction, such law or custom not being repugnant to natural justice,

/equity

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92. No. 4 of 1876, section 13.
93. Ibid, section 18.

> equity and good conscience, nor incompatible either directly or by necessary implication with any enactment of the Colonial Legislature existing at the commencement of this Ordinance, or which may afterwards come into operation. Such laws and customs shall be deemed applicable in causes and matters where the parties thereto are natives of the said Colony or territories, and particularly, but without derogating from their application in other cases, in causes and matters relating to marriage and the tenure and transfer of real and personal property, and to inheritance and testamentary dispositions, and also in causes and matters between natives and Europeans where it may appear to the Court that substantial injustice would be done to either party by a strict adherence to the rules of English law. No party shall be entitled to claim the benefit of any local law or custom if it shall appear either from the express contract or from the nature of the transactions out of which any suit or question may have arisen, that such party agreed that his obligations in connection with such transactions should be regulated exclusively by English law: and in cases where no express rule is applicable to any matter in controversy, the Court shall be governed by the principles of justice, equity and good conscience."

After the passing of this Ordinance for the Gold Coast Colony, further attention was directed to Sierra Leone and Gambia. First of all, the Supreme Court of Sierra Leone, which was established in 1866,[94] was reconstituted by a further Ordinance enacted on December 26th 1876.[95]

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94. See ante p. 44

95. No. 4 of 1876, repealed by 14 of 1904. Note: This Ordinance was enacted to be read and construed together with No. 4 of 1866, No. 10 of 1858, No. 8 of 1859 and No. 8 of 1864.

The main purpose of the Ordinance (the "Administration of Justice Ordinance") was to reduce the size of the judiciary. Thus the number of judges of the Supreme Court of Sierra Leone was cut down to 1 judge who was styled the Chief Justice of Sierra Leone. Further, the Court of Summary Jurisdiction was abolished, and Ordinance No. 5 of 1866 and the rules of that Court were repealed. As a result, the summary jurisdiction of the previous court of the same name was conferred on the Supreme Court, with the powers, etc., vested in the Chief Justice. By section 10 the Supreme Court was empowered to exercise summary jurisdiction in equity in certain suits, for example suits for foreclosure or redemption, or for enforcing any charge or lien where the mortgage, charge or lien did not exceed the sum of £200, and also in all proceedings for ordersin the nature of injunctions. Statutes in force in the County Courts in England applied to the Supreme Court when exercising summary jurisdiction, except in matters relating to bankruptcy, or insolvency or under the Charitable Trusts Act.[96]

Further, Ordinance No. 4 of 1877 was enacted for facilitating appeals from magistrates' decisions to the

/Supreme

96. No. 4 of 1876 (Sierra Leone)

Supreme Court of Sierra Leone. Notice of an appeal could be given orally in open court or at any time within 8 days in writing. All appeals ready for hearing were heard summarily by the Chief Justice at the first sitting of the Supreme Court in its summary jurisdiction.

The date October 23rd 1877 deserves to be noted in our brief historical sketch, for as many as 3 Orders in Council were issued on that day. The first one referred to the Gambia. By that order, the Supreme Court of Sierra Leone was constituted a court of record to hear and determine appeals from the Court of Civil and Criminal Appeals from the Settlement of Gambia.

The second Order regulated the conditionsfor appeals from the Supreme Court of the Gold Coast Colony to the Judicial Committee of the Privy Council.

The third Order abolished the West Africa Court of Appeal, which had been created 10 years previously.[97]

The reasons for the abolition of the West Africa Court of Appeal were obvious. A Supreme Court of Judicature had been established for the Gold Coast Colony, comprising the Gold Coast and Lagos. From the judgmentsof the Supreme Court further appeals lay to the Full Court and thence to the Privy Council. Besides, Gambia had been united with

/Sierra

97. Hertslet's Treaties, Vol. 14 p. 1000.

Sierra Leone under the name of the West Africa Settlements, and appeals from the Court of Civil and Criminal jurisdiction in the Gambia lay to the Supreme Court of the Settlementsof Sierra Leone and thence to the Privy Council. In view of these circumstances, the only thing that remained to be done was the revocation of the West Africa Court of Appeal Order in Council. Diagramatically, the following was the pattern of appeal:

West Africa Settlements	Gold Coast Colony
Privy Council	Privy Council
Supreme Court of the Settlement of Sierra Leone	Full Court (Supreme Court of Judicature)
Court of Civil and Criminal Justice on the Gambia	Divisional Courts of Gold Coast and Lagos

F. CONSULAR JURISDICTION

A few words may be devoted to the powers of Consular Courts in relation to British officials and to the government of the country in which the courts were established.[98]

Although all the powers which they held sprang remotely /from

98. See also HODGES, F.E. Consular jurisdiction in Her Majesty's Protectorate of the Niger Coast, etc. (1895).

from a delegation sent by the Sovereign of the territorial state, their authority derived immediately from the British Government, which had instituted them, not in the capacity of an agent, but independently in virtue of the rights acquired by treaty. They were British courts in effect, and the Foreign Jurisdiction Acts were the foundations of the Orders in Council issued to regulate the consular jurisdiction.[99] Thus, by Article 1 of the British Order in Council dated February 21st, 1872,[1] consuls were appointed to Old Calabar, Bonny, Cameroons, New Calabar, Brass, Opobo, Nun and Benin Rivers. The consuls were enjoined "to make rules for the peace order, and good government of Her Majesty's subjects being within the said territories".[2]

By Article 5, the consuls were empowered to reorganize within those territories the local courts termed Courts /of

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99. HALL, W.E. A treatise on the foreign powers and jurisdiction of the British Crown. p. 191.

1. HERTSLET, E. A complete collection of the treaties & conventions, etc. Vol. 13 (1877) p. 50.

2. By Article 1 of the rules & regulations framed under the 1872 Order in Council (Hertslet's Vol. 13, p. 63) it was stated that "No British trader in any of the territories /referred to/ is permitted to take the law into his own hands or to seize and to put under restraint the person or property of any native or native chief under any pretext whatsoever".

of Equity,[3] appointed for the Settlement, by permission of the Consul, of trading disputes between British subjects or between British traders and natives. Such Courts of Equity were to be composed of British agents and traders at the place where the Court was established, and out of their members the agents were to supply the assessors required to assist the consul in the trial of more important cases. The Consul's jurisdiction was as follows:-

1. To hear and determine breaches of rules and regulations, other than those relating to the observance of treaties, committed by a British subject.

2. To try all cases in which the penalty did not exceed 40/- or banishment for 1 month or imprisonment for a period not exceeding 14 days. These cases were triable summarily without the aid of assessors.

3. Where the penalty exceeded 40/-, etc, the Consul, before trying the case, had to summon 2 impartial "British subjects of good repute being members of a Court of Equity", to sit with him as assessors. The Consul was not bound by the opinion of the assessors.

4. Civil disputes were to be heard and determined by the /Consul

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3. The term "Court of Equity" shall be construed to include the principal resident British merchants and traders duly authorised by the Consul to hear and entertain Civil suits within their respective districts - Article 31.

Consul, or in his absence by a local Court of Equity (articles 6 & 7). Not less than 2 and not more than 4 assessors could be summoned to sit (article 3).

5. The Consular Courts were also constituted courts of probate to grant probate of a will or letters of administration to the intestate estates of any British subject, or any native of a state or place under British protection.[4]

6. The Consul could exercise within his Consular District all or any of the powers which, by an Act or Acts of "the Imperial Parliament for the regulation of merchant seamen or for the regulation of the mercantile marine, or for the enforcement of regulationsregarding quarantine, may now ... be exercised by any justice and justices of the peace within Her Majesty's dominions".

Where an offence was committed just outside the Consular District, the Consul had no jurisdiction to bring the offender to trial. This unsatisfactory state of affairs became evident in the case of Re John & Ors.;[5] or what has been described by a learned historian as "the Onitsha murder case".[6]

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4. Consular courts had no probate jurisdiction in cases where the deceased British subject died outside the Colony where the court was established. The powers of the Court in that case seem to be limited to taking possession of the personal property of the deceased, so that it might be kept until it could be dealt with according to law; or to granting if necessary, a protective administration to an officer of the Court (HALL, W.E. Foreign powers, p. 191.)
5. Correspondence respecting the trial of certain persons at Sierra Leone for the murder of a slave girl at Onitsha on the River Niger, Par. Papers. C.3430. Session 1882, Vol. 46, pp. 571-630.
6. CROOKS, J.J. History of Sierra Leone, p. 259.

In September, 1880, the Secretary of the Church Missionary Society at Lagos informed Governor Griffith that in 1878, one W.F. John, an interpreter to the mission of the Church Missionary Society at Onitsha on the River Niger, had flogged and brutally treated a girl of 13 or 14 years of age in his service, whom he was alleged to have ransomed. The death of the girl was discovered the following morning. The information goes that in the autumn of 1878, the late Mr. Consul Hopkins was at Onitsha, and was informed, "but as his jurisdiction did not extend to Onitsha he took no steps to deal with it". When his jurisdiction was extended to Onitsha, the said John had left for Sierra Leone. When the case of this brutal murder was reported to the British Government they decided to act. They were, however, aware of the procedural and technical difficulties. ~~However~~ The culprit was arrested in Sierra Leone in February 1881 and detained. In 1882, after considerable difficulty, the British Government appointed a Commission under Acts of Parliament, one of which dated back to 1536 as the Colonial courts had no jurisdiction in the matter.[7]

7. They are: (1) 28 Hen VIII Cap. 15 (1536) "An act for the punishment of pirates and robbers"; s. 2(2) stipulated for the trial of such persons "by 12 lawful men inhabited in the shire limited within such commission". (2) 46 Geo III, c. 54 (1806). "An act for the more speedy trial of offences committed in distant parts upon the sea, etc". (3) 57 Geo III, c. 53 (1817). "An act for the more effectual punishment of murders and manslaughters committed in places not within His Majesty's Dominions".

After a trial lasting 15 days, the jury returned a unanimous verdict of manslaughter against John and the three culprits, and they were sentenced accordingly.

In their report to Governor Havelock of Sierra Leone, the Commissioners[8] pointed out that though under the circumstances this proceeding by commission under the Great Seal was the only means of bringing the offenders to justice, yet they thought that it was a most cumbrous mode and extremely difficult in practice.

> "The institution of a grand jury was abolished here some yearsago on account of its not working properly yet under the Commission we had to have one summoned which alone was a matter of anxious consideration, for the number of the jurymen here is very limited, and if the best have to be taken out to form a grand jury, the remainder are less likely to be independent and were apt to be partisans".

For the future, the Commissioners suggested that an Act of Parliament should be passed giving jurisdiction to the existing courts in the West African settlements, rendering grand juries unnecessary, or that a commission should be appointed of a permanent nature. They also suggested that

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8. F.F. Pinkett, C.J. of Sierra Leone; T.F. Griffith, Colonial Secretary, Sierra Leone; F. Smith, Chief Magistrate of Gambia. The original list of Commissioners included W.W. Streeter, Chief Justice of West African Settlements, who left for England owing to ill-health, and James Marshal, Chief Justice of the Gold Coast Colony, who was also forced to leave for home owing to ill-health.

prisoners, natives of Sierra Leone, should be tried at Lagos, or the Gold Coast, and vice versa.

To this suggestion, the Secretary of State for the Colonies intimated that the proposed new Order in Council for regulating consular jurisdiction on the West Coast of Africa, if passed, would be more effective than the proposals made by the Commissioners. Consequently, in 1885, an important Order in Council for extending British consular jurisdiction on the West African Coast was issued.[9]

The preamble made it clear that the power of the consular officers to exercise jurisdiction sprang from the provisions of the Foreign Jurisdiction Acts. Part I of the Order dealt with general jurisdiction. The jurisdiction conferred extended to British subjects, or persons enjoying British protection, British ships, and natives of Africa. The foregoing provisions were adaptations of the Admiralty Offences (Colonial) Act of 1849 and the Merchant Shipping Act, 1867, section 11.

Part II dealt with the general law. By article 7(1):

> "The civil and criminal law to be administered under this Order shall be the civil and criminal law in force in England at the date of the commencement of this Order, so far as applicable and subject to the /modifications

9. London Gazette, April 10th 1885. Hertslet's Treaties, etc., Vol. 17, p. 83.

> modifications and with the additions contained in this Order, or for which provision is made by this Order, or by any Queen's Regulations made for the time being in force under this Order".

By article 7(2), the Secretary of State could declare that any of the laws or ordinances in force in the West Africa Settlements or the Gold Coast Colony could be applied in the consular districts. Thus under article 15 of the 1889 Order in Council,[10] which is similar to the one under consideration, 4 Ordinances of the Gold Coast Colony were modified and applied to the Niger Protectorate.[11] They were:-

The Niger Coast Customs Ordinance 1894;
The Niger Coast Post Offices Ordinance 1894;
The Niger Coast Constabulary Ordinance 1894;

The Niger Coast Fire Arms Ordinance, 1894.

Article 27 related to Assessors. Any male person of good repute and full age could be an Assessor. Not fewer than 2 and not more than 4 Assessors were to be empanelled at any time. "An assessor shall have no voice in the decision of a case or in awarding sentence, but the dissent of an assessor shall at his request be entered on the minutes of the case with any reasons assigned by him for such dissent." (Article 27(3))

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10. British Order in Council providing for the exercise of Her Majesty's Jurisdiction in certain parts of Africa and in the Island of Madagascar. 1889. London Gazette, October 22nd, 1889. Hertslet's Treaties, etc., Vol. 18, p. 1.

11. Hodges, op. cit. p. 30.

In certain criminal cases, sentences given by the consular courts had to be submitted for review to the Chief Justice of the West Africa Settlements, or to the Chief Justice of the Gold Coast Colony (Article 29). In civil matters, an appeal lay from the decision of the consular court to the Supreme Court of Sierra Leone or to the Supreme Court of the Gold Coast Colony. (Article 30).[12]

THE AFRICA ORDER IN COUNCIL 1889, ETC.[13]

In 1889 an Order in Council providing for the exercise of British jurisdiction in certain parts of Africa and in the Island of Madagascar was issued. The provisions in this Order were similar to the 1885 Order, except that they were more detailed and applied to other parts of Africa as well. Part VI, which dealt with criminal law and procedure, is worth noting:

"The crimes punishable under this Order are:-

(1) Any acts or omissions which are for the time being punishable in England on indictment with death, penal /servitude,

12. According to instructions issued by the Secretary of State in 1891 under the Africa Order in Council, 1889, the appellate system was re-organised. In the Oil River Protectorate, the Court of Appeal was the Supreme Court of the Colony of Lagos. For the Congo Free State, the Court of Appeal was the Supreme Court of the Gold Coast Colony. (Hertslet's Treaties, Vol. 19, p. 1.

13. London Gazette, October 22nd, 1889. Hertslet's Treaties, Vol. 18, p. 1.

servitude, or imprisonment, as treasons, felonies, or misdemeanours.

(2) Acts of omissions by this Order ... declared to be punishable as offences against this Order." (Art. 45)

"In case an act or omission is punishable both as a crime under this law in force in England and as an offence against this Order, the accused may be tried and punished for such an act or omission either as a crime as aforesaid, or as an offence against this Order, but he shall not be liable to be tried or punished in both ways." (Article 46)

Only brief mention can be made to the subsequent Orders. The Africa Order in Council issued in 1892 was a result of the General Act of the Conference of Berlin to extend jurisdiction under the 1889 Order to foreigners in the Protectorates, who were subjects of the signatory powers to the Act. [14] The Africa Order of 1893 applied the provisions of the 1889 Order to "natives" of any of "Her Majesty's Protectorates when in local jurisdiction". [15]

G. THE SEPARATE DEVELOPMENT OF THE TERRITORIES

Towards the end of the 19th century, positive steps were taken by the British Government to constitute each of the four territories as a colony in its own right again. At this juncture it will be best to treat each territory separately.

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14. Hertslet's Treaties, Vol. 19, p. 2.

15. " " , Vol. 19, p. 4.

(1) Gold Coast - Ghana

The policy of the British Government, which until 1872 was to allow the chiefs to exercise jurisdiction over the inhabitants with only an appeal to the English magistracy, was abandoned in favour of a more direct control. In 1872 Sir David Chalmers, who was the Judicial Assessor at that time, addressed a letter to the Governor, in which he submitted proposals "to utilise, regulate, and control the power of the hereditary chiefs" and to utilise the gradation of authority which existed from the headman of the village through the chief up to the "Chief or king of a large district" as a foundation upon which to build up a jurisdiction regulated by the local government.[16] This led to the enactment of the Gold Coast Native Jurisdiction Ordinance in 1878.[17] This Ordinance was never brought into operation before it was repealed and re-enacted 5 years later with improvements in 1883.[18] The principal change from 1878 was in regard to appeals. By the 1883 Ordinance the Chiefs "with their respective councillors authorised by native law" were to constitute tribunals

/with

16. JONES, W.J.A. History of legislation in connection with native jurisdiction in the Gold Coast and suggested amendments to the Native Administration Ordinance, 1927. (1931) p. 1 et seq.

17. No. 8 of 1878.

18. No. 5 of 1883.

with jurisdiction (irrespective of the Chiefs' seniority) to try specified civil and criminal matters.[19] The Ordinance was subsequently amended; the present enactment dealing with the matter is embodied in the Courts Act 1960.[20]

By Letters Patent dated January 13th, 1886, the Government of the Settlement at Lagos was separated from the Settlement on the Gold Coast. The limits of the new Gold Coast Colony were described as comprising "all places, settlements, and territories belonging to us on the Gold Coast in Western Africa between the fifth degree of West longitude and the second degree of East longitude".[21] An executive and a legislative council were created.

Ashanti was annexed to the "Colony" after the final conquest of that territory in 1901, by an Order in Council of September 26th, 1901. The Ashanti Administration Ordinance, 1902,[22] provided for establishing in Ashanti:-

(a) A Chief Commissioner's Court. This was a court of record with jurisdiction throughout Ashanti. The extent of

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19. See KORSAH, K.A. (Chairman). Report of Commission on Native Courts, (1951) p. 4 et seq.

20. C.A.9. (Republic of Ghana) See Chapter 2 for a synopsis of the present judicial system.

21. Hertslet's Treaties, Vol. 17, p. 109. A British O-in-C dated December 29th, 1887, provided for the exercise of British jurisdiction in the territories adjacent to the Gold Coast Colony - see Vol. 17, p. 127.

22. No. 1 of 1902.

the Chief Commissioner's jurisdiction was equivalent to that of a Divisional Court, except in divorce and matrimonial jurisdiction. In civil and criminal matters the Court was to be guided by the law in force in the Gold Coast Colony. The procedure so far as practicable was to be the same as the procedure in the Supreme Court of the Gold Coast Colony. Section 10 stipulated that "in no cause or matter, civil or criminal, shall the employment of a Barrister or Solicitor be allowed". By section 19 no appeal lay from the decision of the Chief Commissioner in any criminal matter.[23]

(b) A District Commissioner's Court in each district. In civil cases where the sum involved amounted to £100, appeals lay to the Chief Commissioner's Court and thence to the Supreme Court of the Colony. No appeal lay from the decision of either court in any criminal case.

23. The unjust provisions of this Ordinance came to light when Dr. Knowles, a European in Ashanti, was tried in the Chief Commissioner's Court without a jury and a lawyer. Previous to this, in the words of the Gold Coast Independent, our "brothers and friends in Ashanti" groaned "under the sting of iniquitous and oppressive laws". See post p 79
A propos the provision prohibiting the services of counsel in Ashanti courts, the Under-Secretary of State for the Colonies in answer to a question in the Commons (December 4th,1929), stated that "there were weighty reasons in the interest of the native populations for the retention of this prohibition" in spite of the public outcry!

(c) Native Tribunals: with civil jurisdiction up to £100 and criminal jurisdiction, except in cases of murder, rape, robbery, etc.

The Northern Territories (now known as Northern Ghana) came to be administered with the government of the Gold Coast by virtue of the Northern Territories Order in Council 1901, and the Northern Territories Administration Ordinance,[24] the provisions of which were similar to those of Ashanti. In view of the fact that Ashanti and the Northern Territories were to be administered with the Gold Coast Colony, the British Order in Council of 1877 was revoked and replaced by a new Order of March 2nd, 1909, which regulated appeals to the Privy Council from the final judgments of the Supreme Court in respect of appeals from the Colony, Ashanti and the Northern Territories.

An appeal lay:[25]

> "(i) as of right from any final judgment of the Court, where the matter in dispute on the appeal amounted to or was of the value of £500 sterling or upwards, or where the appeal involved, directly or indirectly, some claim or question or to or respecting property or some civil right amounting to or of the value of £500 sterling or upwards; and
> (ii) at the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if, in the opinion of the Court, the question involved

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24. No. 1 of 1902.
25. St. R & O 1909, p. 800.

> in the appeal was one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision."

Two further measures were taken to improve the administration of justice in Ashanti. Although these measures could be described as a step forward in the development of the administration, yet they did not go far enough. First, the Ashanti Administration Ordinance, 1902 (Sixth Further Amendment) Ordinance No. 8 of 1918, provided for the appointment of a professional lawyer to be a Circuit Judge with jurisdiction throughout Ashanti. Secondly, in 1919 the office of a Circuit Judge was made permanent. Under Ordinance No. 9 of 1919,[26] the Chief Commissioner (who was only an administrative officer) was relieved of his criminal jurisdiction in capital cases. By section 3 the Circuit Judge was empowered to exercise:

> "all the judicial powers and jurisdiction which in respect of criminal causes and matters were immediately prior to the commencement hereof vested in the Chief Commissioner".

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26. "An Ordinance to constitute the office of Circuit Judge of Ashanti and for purposes connected therewith."

He retained, however, exclusive jurisdiction in civil causes and matters to which native customary law was principally and substantially applicable.

Togoland (which became a German Colony in 1884) was surrendered to the combined British and French forces in 1914 during the First World War. On July 10th, 1919, after the signing of the Anglo-French agreement, the "British sphere" of Togoland, which was adjacent to the Gold Coast Colony and the Northern Territories, was mandated to Britain, who administered it as an integral part of the "Gold Coast Colony and its dependencies".[27]

The judicial system followed that of the Gold Coast Colony and of the Northern Territories. Thus the Chief Commissioner's Court of the Northern Territories exercised jurisdiction throughout the Northern section of the British sphere. The Supreme Court of the Colony also exercised jurisdiction throughout the Southern section of Togoland as it had exercised in the Colony. In civil matters the Court was guided by the laws in force in the Gold Coast Colony, and in criminal matters by the criminal code of the Colony.[28]

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27. As prescribed for by an Order in Council No. 1284 of 1923.

28. Report by His Britannic Majesty's Government on the Administration of British Togoland for the year 1924.

The Supreme Court Amendment Ordinance of the Gold Coast, No. 6 of 1923, amended the law with respect to proceedings in the Full Court. The provision which made the Chief Justice an indispensable member of the Full Court was repealed. The main object was to render it unnecessary for him to sit on an appeal from one of his own judgments. In view of this measure, it was further provided that if judges of the Full Court were equally divided (for example on an occasion when the Chief Justice was not sitting) an opportunity should be given for the case to be heard again before a reconstituted Court.

Although the laws relating to the administration of justice in the Colony were far from satisfactory, yet they compared favourably with the ill-assorted enactments applying to the Northern Territories, Togoland and Ashanti. The "iniquitous and oppressive laws" in Ashanti caught the public's attention (particularly in Britain) when in 1928, Dr. Knowles, a European, was subjected to them during his trial for the murder of his wife by shooting.[29] He was a medical officer in the employment of the administration of Ashanti, and stationed at Bekwai. By virtue of his residence in Ashanti he was tried there, where, according to /the

29. For a fascinating and instructive account of the trial see LIECK, A. Trial of Benjamin Knowles, 1933.

the prevailing law [30] he was tried by a Police Magistrate acting as a Circuit Judge without a jury and without the aid of a barrister or a solicitor. Dr. Knowles was convicted of murder by the Acting Circuit Judge, whose judgment was final in criminal matters.[31]

Judging by the nature of the whole proceeding, it is no wonder that the Judicial Committee of the Privy Council granted the appellant special leave to appeal. After hearing the appeal, the Judicial Committee advised His Majesty that the appeal should be allowed and the conviction quashed. Delivering the advice of the Privy Council, Viscount Dunedin[32] made it plain that their decision did not rest on the denial of a jury, but rather on the ground that the trial judge failed to direct himself as to the possibility of a verdict of manslaughter.

The trial aroused a great deal of interest, both in Ghana and in the United Kingdom. A leading article in The Times (March 11th, 1930) forecast rightly that the judgment of the Privy Council "might have rendered necessary changes in the criminal procedure in the Crown Colonies". The laws in Ashanti were described as "shocking", both by Mr. Pritt, K.C., the appellant's counsel and by the Daily /Telegraph

30. Ashanti Administration Ord. No. 1 of 1902, subsequently amended.

31. Ibid.

32. Knowles v. The King [1930] A.C. 366.

Telegraph (November 20th, 1929).

This necessitated a visit to Ghana a few years later by Mr. Bushe, legal adviser to the Colonial Office, and the subsequent enactment of an "Ordinance to make further and better provision of courts and for other purposes relating to the administration of justice";[33] however, there were other judicial reforms between 1927 and 1935, when the Courts Ordinance was passed. Under the Native Administration Ordinance, No. 18 of 1927, the Supreme Court ceased to exercise jurisdiction in cases touching political or constitutional disputes between Native Authorities, or in land cases arising between Paramount and Divisional Chiefs belonging to different states. Jurisdiction in such land cases was transferred to a newly-constituted Provincial Council.[34]

As a result of the establishment of the West African Court of Appeal in 1928,[35] the enactment of Ordinance No. 28 of 1929 made detailed provision for the hearing of appeals from the Supreme Court of the Colony to the West African

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33. Enacted as the Courts Ordinance No. 7 of 1935.
34. See Cap. 111 Laws of the Gold Coast 1928. There were subsequent ordinances, see e.g. Ashanti - Native Jurisdiction Ordinance, No. 3 of 1932. Northern Territories Native Tribunal Ordinance No. 1 of 1932. Togoland under British Mandate Native Administration (Southern Section Ord. No. 1 of 1932.
35. Constituted by the W.A.C.A. Order in Council 1928.

Court of Appeal.[36] In civil matters the features and conditions of appeal were practically the same as those hitherto prevailing in respect of appeals to the Full Court of the Supreme Court of the Colony. In criminal matters, an important innovation was introduced. The grades of appeal, conditions of appeal and the powers of the Court in determining the appeal were practically the same as those embodied in the English Criminal Appeal Act, 1907. Hitherto criminal appeals had lain to the Full Court only by way of a case stated on a point of law.[37] The only jurisdiction left to be exercised by the Full Court was in respect of the hearing of cases concerning disciplinary action over legal practitioners.[38] Similar ordinances relating to appeals from the Chief Commissioner's Court in Ashanti,[39] and from the Chief Commissioner's Court in the Northern Territories[40] to the West African Court of Appeal were made.

The wave of judicial reform also spread to the "British sphere" of Togoland. The Administration Ordinance, No. 1 of 1930, defined the jurisdiction to be exercised in the

/Southern

36. The W.A.C.A. Ordinance 1929.
37. See, e.g., Criminal Law and Procedure Ord. No. 5 of 1876, ss. 157-163.
38. Supreme Court Ordinance No. 29 of 1929.
39. W.A.C.A. Ashanti Ordinance No. 17 of 1929.
40. W.A.C.A. Northern Territories Ordinance No. 14 of 1929.

Southern section by the tribunal of a Head Chief and the tribunal of aChief, in civil disputes relating to land. Provision was made for appeals from these tribunals to the District Commissioner'sCourt and thence to the West African Court of Appeal. In any land dispute between Head Chiefs or Chiefs belonging to different divisions, the District Commissioner's Court was empowered to exercise jurisdiction with an appeal therefrom to the Provincial Commissioner's Court and thence to the West African Court of Appeal. The Ordinance, however, had one black spot, for the employment of legal practitioners in any cause or matter brought before a native tribunal or before a District Commissioner's Court or a Provincial Commissioner's Court was prohibited.

When Mr. Bushe, the legal adviser to the Colonial Office, arrived in Ghana, his mind was directed not only to the iniquitouslaws operating in Ashanti, but also th e existence of separate laws in the country. A new Courts Ordinance was, therefore, drafted in 1935 as a result of a series of recommendations made by Mr. Bushe. His first recommendation was that there should be a unification of legislation. In moving the second reading of the Bill, the Attorney-General was proud to say that "for the first time in the history of this Council a Bill has been submitted which is expressed to be enacted for the

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> whole of the Gold Coast. Formerly in legislating for the Gold Coast, we enacted ordinances piece-meal. That is to say, one was enacted for the Gold Coast Colony, another for Ashanti, another for the Northern Territories and another for Togoland. Now, thanks to the new Orders in Council which were promulgated and came into force on January first,[41] by Imperial Orders in Council, we can legislate for the Gold Coast".[42]

The second recommendation of Mr. Bushe was that the jurisdiction of the Supreme Court of the Gold Coast Colony should be extended to embrace within its ambit Ashanti and the Northern Territories. Thus the new Supreme Court was styled the Supreme Court of the Gold Coast.

The legal adviser's third recommendation related to the constitution of courts of summary jurisdiction, which had hitherto been presided over by District Commissioners who had no legal training. The Government from then onwards, formulated a policy of recruiting trained legal personnel to administer justice. By the Courts Ordinance of 1935, the Supreme Court therefore consisted of the Chief Justice of the Gold Coast and so many puisne judges ad the Governor might appoint. The Chief Justices and judges of

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41. The Gold Coast Courts Ordinances Order in Council, November 9th, 1934, provided that a single Ordinance might be made for the Colony and Ashanti and for the Colony, Ashanti and the Northern Territories. The Togoland under British Mandate Order in Council provided that the new Supreme Court should function throughout the Northern section of Togoland as if that section formed part of the Eastern Province of the Colony.

42. Leg. Co. Debates. Session 1935, Issue No. 1, p. 28.

the Supreme Courts of Nigeria and Sierra Leone and the judges of the Supreme Court of the Gambia were also made members of the Court.

In the same year the Criminal Procedure Code was passed.[42] At long last an Assessors Ordinance in criminal trials was enacted for Ashanti,[43] and the Northern Territories.[44]

The new Courts established in 1935 were:-

(1) The Supreme Court of the Gold Coast, whose jurisdiction extended to Ashanti and the Northern Territories and the Colony as a single territory. It was the Court of Appeal from the Magistrates' Courts.

(2) Magistrates' Courts. These courts took the place of District Commissioners' Courts. The new policy was to separate the executive and judicial functions of the District Commissioner. Appeals in civil and criminal matters from the Magistrates' Courts lay to the Divisional Court of the Supreme Court.

(3) Provincial Commissioners' Courts. This Court heard and determined appeals from the decisions of native tribunals. It also had first instance jurisdiction in certain land cases

/between

42. No. 10 of 1935.
43. No. 37 of 1935.
44. No. 38 of 1935.

between Chiefs. Appeals from the Court in land cases lay direct to the West African Court of Appeal.

(4) Ashanti Chief Commissioner's Court. This had original jurisdiction in certain land cases in which a Chief was a party. It had appellate jurisdiction in respect of decisions of magistrates' courts, the Asantehene's Court and native courts.

(5) Northern Territories Chief Commissioner's Court. The jurisdiction of this Court was similar to that of the Chief Commissioner's Court in Ashanti.

In 1946 after the Second World War, Britain placed Togoland under the International Trusteeship within the framework of the United Nations. By Article 5[45] Britain, the Administrator, was given full powers of legislation, administration and jurisdiction in the territory, and she was required to administer it "in accordance with his own laws as an integral part of his territory with such modifications as may be required by local conditions and subject to the provisions of the United Nations Charter and of this agreement". By Article 8, the Administering Authority undertook in framing laws relating to the transfer of land, to take into consideration native laws and customs.

In 1956, a year before the Gold Coast attained her independence, a plebiscite was held in British Togoland

/under

45. 1946. Cmd. 7083.

under U.N. supervision to ascertain the wishes of the people of Togoland.[46] In May of that year, the people voted for integration with an "independent Gold Coast". In December, the U.N. Assembly, by 63 votes in favour with none opposed, approved the integration of Togoland with an independent Gold Coast.[47]

On March 6th, 1957, the Gold Coast became independent and assumed the name of Ghana. By an Order in Council of 1957,[48] the West African Court of Appeal ceased to be a Court of Appeal for Ghana. This necessitated an amendment to the Courts Ordinance of 1935[49] The relevant enactments were the Courts (Amendment) Ordinance No. 17 of 1957, and the Courts (of Appeal ~~Amendment~~) Act No.35 of 1958. By the provisions of section 2 of the Courts (Amendment) Ordinance of 1957, the Supreme Court was constituted a court of record and consisted of:-

(a) The Court of Appeal. Appeals from the decisions of the Court lay direct to the Privy Council.

(b) The High Court of Justice.[50] The High Court exercised all

46. The U.K. Government had already indicated that she was not willing to continue administering Togoland when the Gold Coast became independent.
47. The Times, December, 1956.
48. S.I. 1957. No. 279.
49. For a detailed account, see Allott's Judicial & Legal Systems in Africa, 1962, Part I, West Africa, by W.C. Ekow Daniels.
50. By the Courts (Amendment) Ord. 1957 the word "High" was substituted for the word "Supreme".

all the civil and criminal and admiralty jurisdiction vested in the High Court of Justice in England. Also attached to the High Court were Commissioners of Assize and Civil Pleas.[51] The jurisdiction of a Commissioner was largely similar to that of a High Court Judge except that he was not required:-

(1) to try any criminal case where the maximum penalty on conviction was death or life imprisonment;

(2) to try any civil case where the amount claimed by the plaintiff exceeded £2,500;

(3) to entertain any application by way of habeas corpus, certiorari, mandamus, prohibition or information in the nature of quo warranto; or

(4) to hear any cause or matter in which the validity of any Act of Parliament was called in question.

The courts of inferior jurisdiction were the Magistrates' Courts, the Native Courts and Local Courts. The Local Courts Act No. 23 of 1958 was passed as a result of Korsah's Report on Native Courts (1951) to provide for the establishment of Local Courts in place of Native Courts.

Ghana was declared a republic on July 1st, 1961. A short description of the republican judicial system is given in the next chapter.

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51. Commissioners of Assize and Civil Pleas Act, No. 12 of 1958.

(2) Lagos, Nigeria, Cameroons

Lagos was erected into a colony in her own right when it was separated from the Gold Coast by Letters Patent dated January 13th, 1886, which also provided for the government thereof. The Legislative Council consisted of the Governor and not less than 3 persons.

The boundaries of the Colony fall between the 2nd degree of east longitude and the 6th degree of east longitude. By Ordinance No. 1 of 1886 all the laws of the Gold Coast Colony which had hitherto been in force in the settlement of Lagos were declared to remain in force in the Colony of Lagos. Ordinance No. 8 of 1886 established the Supreme Court of the Colony of Lagos. Byaa British Order in Council of September 24th, 1886, the Supreme Court of Judicature of the Gold Coast Colony was constituted a court of appeal for the hearing of and determining of appeals from the judgments of the Supreme Court of Lagos. Ordinance No. [redacted] of 1888 repealed the Supreme Court Ordinance No. 8 of 1886 and made further provision for the administration of justice in the Colony. The Supreme Court Ordinance of 1888 provided for the Constitution of the "Supreme Court of Judicature for the Colony of Lagos and adjacent territories".[52]

52. A British O-in-C of December 29th 1887 had provided for the exercise of British jurisdiction in the territories adjacent to the Colony of Lagos.
Hertslet's Treaties Vol. 17, p. 128.

The Court consisted of a judge or judges appointed by the Governor, and also the Chief Justice and every judge of the Supreme Court of the Gold Coast Colony who were designated puisne judges of the Supreme Court of the Colony of Lagos. The Full Court was to be a court of appeal and was fully constituted by 2 or 3 judges of whom the Chief Justice had to be one. Since Lagos was provided with her own Court of Appeal, the former British Order in Council of September 24th, 1886, was revoked in July 1889. A new Order bearing the same date - 1889 - provided for appeals from the Supreme Court of Lagos to the Full Court and thence to the Privy Council.

The Niger Territories, which included Northern Nigeria, were secured to the British Crown by nearly 500 treaties made by the Royal Niger Company (formerly the National African Company Ltd). A Royal Charter of July 10th, 1866, had authorised and empowered the National African Company to hold and retain the full benefit of the several cessions of territories in the basin of the River Niger and in Africa.[53] By the Northern Nigeria Order in Council dated December 27th, 1899,[54] certain of the territories situate /within

53. Burge's. op cit. 267.
54. 1899 No. 994 St. r & O. p. 628. By art. 4 the African O-in-C relating to the exercise of consular jurisdiction ceased to apply to Northern Nigeria on the coming into force of the 1899 Order.

within the limits of the Order were transferred to the British Government from January 1st, 1900 and designated the "Protectorate of Her Majesty the Queen". By the provisions made for the peace, order and good government, the British Crown was empowered to appoint a High Commissioner, for Northern Nigeria. He was authorised to issue proclamations to provide for the administration of justice.

> "The High Commissioner, in issuing such proclamations, shall respect any native laws by which the civil relations of any native Chiefs, tribes, or populations under Her Majesty's protection are now regulated, except so far as the same may be incompatible with the due exercise of Her Majesty's powers and jurisdiction, or clearly injurious to the welfare of the said natives." (Article 6)

The Protectorate Court Proclamation No. 4 of 1900 provided Northern Nigeria with a Supreme Court, a Provincial Court presided over by a Resident, a Cantonment Court in each cantonment, presided over by a Cantonment Magistrate, and lastly native courts at such of the principal towns as the Resident might appoint.[55] The native courts were presided over by persons appointed by the Head Chief or Emir.

By the Southern Nigeria Protectorate Order in Council dated December 27th, 1899,[56] certain of the territories formerly administered by the Royal Niger Company were added to the Niger Coast Protectorate, and designated the /Protectorate

55. Proc. No. 5 of 1900.
56. 1899 No. 995. St. R & O (1899) p. 634.

Protectorate of Southern Nigeria with effect from January 1st, 1900. Provision was made for the appointment of a High Commissioner and his powers for the administration of justice were the same as those recorded for the Protectorate of Northern Nigeria. By the Supreme Court Proclamation No. 6 of 1900, a Supreme Court of Southern Nigeria was created. The exercise of magisterial jurisdiction was vested in the "Commissioners' Courts".[57] The Native Courts Proclamation No. 9 of 1900 was promulgated in order to provide for the administration of justice in the native courts. By the Southern Nigeria Protectorate Order in Council 1906, it was provided that the powers hitherto exercised by the High Commissioners for the peace, order and good government of the territories, should now be exercised by the Governor of the Colony of Southern Nigeria and the Legislative Council. In the same year the Colony of Lagos was amalgamated with the Protectorate of Southern Nigeria, and a new entity "The Colony and Protectorate of Southern Nigeria" emerged, divided into

/three

57. Proclamation No. 8 of 1900.

three provinces.[58]

The Native Courts Proclamation (Northern Nigeria) No. 1 of 1906, established formally two classes of native courts: the Alkalis' Courts applicable to Muslim districts, and Judicial Councils suited to non-Muslims. The Alkalis' Courts consisted of

> "an Alkali, with or without Mallams, Almajirai, or other persons acting either in conjunction with the Alkali as judges, or sitting as assessors with such powers as a Resident" might determine. [59]

A Judicial Council comprised an "Emir, or a chief, or a district headman, with Mallams or other persons acting either in conjunction with the Emir, chief or district headman as judges, or sitting as assessors with such powers as a Resident" might determine. [60]

The old judicial system was preserved as far as possible by the Proclamation. Thus criminal and civil cases in which natives were involved were tried before the native courts. The law administered was native law, subject to provision against cruel punishments.

By virtue of an Order in Council dated November 22nd 1913 and Letters Patent dated November 29th 1913, the

/Nigerias

58. LUCAS, C.P. Historical Geography of the British Colonies Vol. 3. West Africa, p. 208. The Letters Patent of Feb. 28th 1906 stipulated that the Colony of Lagos was to be designated Southern Nigeria. It also provided for the establishment of Legislative and Executive Councils. S.R. & O. 1906, p. 885.

59. Section 4. See Laws of the Protectorate of Northern Nigeria in force in 1910. ed. by E.A. Speed.

60. Ibid.

Nigerias were reconstituted.[61] The Colony of Southern Nigeria, together with a portion of its Protectorate, became the Colony of Nigeria. The remaining parts of that Protectorate, and the whole of Northern Nigeria became the Protectorate of Nigeria. The Protectorate was divided into two parts, each under a Lieutenant-Governor, who was subject to the Governor of the Colony. For the Colony there were an Executive Council and a Legislative Council as before; for the Protectorate all executive and legislative powers were vested in the Governor. For deliberative purposes there was a Nigerian Council, consisting of the Governor, the Executive Council, the Residentsand Commissioners of the First Class. There were also 12 unofficial members.

By Ordinance No. 6 of 1914 a new Supreme Court of Judicature for the Colony and Protectorate was constituted /as

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61. The Colony of Nigeria Boundaries Order in Council November 22nd, 1913. This was amended by an Order in Council of May 10th 1917. Both Orders were revoked by the Nigeria Protectorate Order in Council of 1922. The Letters Patent referred to is recorded in Statutory Rules and Orders for 1913, p. 2388. Article XXII stipulated that "Nigeria unless the subject or context otherwise requires, shall include both the Colony and the Protectorate of Nigeria".

as a result of the amalgamation. On amalgamation the Chief Justice and puisne judges of Northern and Southern Nigeria were abolished.[62] There was only one Chief Justice for Nigeria, and such judges as the Governor might appoint; but the Chief Justice and judges of the Gold Coast were puisne judges of the Court. The Court had all the jurisdiction of the High Court in England (except Admiralty), and as regards infants and lunatics, all the jurisdiction and powers of the Lord Chancellor of England. The Full Court was a Court of Appeal, and for the purposes of interlocutory appeals and applications, it was fully constituted by 2 of the judges. For other purposes the Appeal Court was constituted by 3 or more judges, of whom the Chief Justice had to be one. The decision of the majority prevailed in respect of appeals brought before it, but the Chief Justice had a casting vote in cases where the judges were evenly divided in opinion.[63]

Effect was given to native law and custom so far as it was not repugnant to natural justice, or incompatible with the general legislation of the Colony. The local jurisdiction of the Court in the Protectorate was defined, with /authority

62. LUGARD, Sir F. Report on the Amalgamation of Northern and Southern Nigeria and administration. 1912-1919. Cmd. 468 of 1919.
63. Section 7.

authority given to the Governor to extend or limit it. The Provincial Courts Ordinance, No. 7 of 1914, defined the jurisdiction of the Provincial Courts established outside the limits of the jurisdiction of the Supreme Court. The Chief Judge of a Province was the Resident or Commissioner, who had unlimited civil and criminal jurisdiction. In the strict sense of the word there was no right of appeal in criminal cases, but a list of criminal cases requiring confirmation by the Governor operated as an appeal on behalf of every convicted person whose name was included therein. In civil proceedings appeals lay to the Supreme Court. No legal practitioner was allowed to appear before a Provincial Court. In no appeal from a Provincial to the Supreme Court was the employment of a legal practitioner permitted, unless the previous consent of the Chief Justice was granted.[64] It is reported that in 1922 over 80 persons suffered capital punishment without their being represented by counsel.[65]

The Native Courts Ordinance, No. 8 of 1914, regulated the powersand jurisdiction of native courts. A native court consisted of:

(a) an Alkali with or without native assistants, known as an Alkali's Court); or

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64. Section 32.

65. ELIAS, T.O. Groundwork of Nigerian Law, p. 126.

(b) of a paramount or head chief with or without minor chiefs, or other persons acting in conjunction with the paramount chief. A Court of the paramount chiefs, which also exercised executive functions was termed a judicial council.

The jurisdiction of native courts and judicial councils were defined in the warrants establishing them. A native court or judicial council which had jurisdiction over capital offences, was required, as soon as possible after passing a sentence of death, to send to the Resident or Commissioner a report of the case, together with all the documents and notes of evidence taken in the case.[65a]

A person dissatisfied with the decision of anative court in any civil or criminal case, could appeal to such court as the Resident or Commissioner directed. But a Resident Commissioner was also empowered to appoint the Court of the Chief Alkali or thejudicial council or the native court presided over by the paramount chief at the capital city of his province, to be a court of appeal from all other native courts or judicial councils in the province.

Legal practitioners were not allowed to appear or act for any party before a native court or judicial council.[66]

65a No. 8 of 1914, s. 13.
66. Ibid, s. 12.

At the end of the First World War in 1919, the former German Colony of Kamerun was partitioned between France and Britain. The British mandated area fell into two main divisions: the Cameroons Province, and the Northern Cameroons. By the British Cameroons (Administration) Ordinance, No. 3 of 1924, the British Cameroons was administered as though it formed an integral part of Nigeria. By By the same enactment the bulk of Nigerian law was applied to the territories. As from February 28th, 1924, German law, in so far as it was previously in force in the British Cameroons, was automatically superseded.[67]

In 1933, further and better judicial arrangements were made for the administration of justice in the Protectorate of Nigeria. By the Protectorate Courts Ordinance, No. 45 of 1933, a High Court was established, consisting of the Chief Justice and the puisne judges of the Supreme Court and other judges, and assistant judges to be appointed by the Governor.

The High Court in the Protectorate exercised all the jurisdiction and powers which were vested in or capable of being exercised by the Supreme Court in the Colony, except:

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67. See Report by His Britannic Majesty's Government on the administration of the British Cameroons for the year 1924. (1925). In 1946, after the 2nd World War, the Cameroons were placed under U.N. Trusteeship on the same lines as those recommended for Togoland - Cameroons under U.K. Trusteeship. 1946. Cmd. 7082.

The jurisdiction, powers and authorities of the Supreme Court in

(i) probate, divorce and matrimonial causes and proceedings; and (ii) admiralty, and (iii) proceedings in relation to, for example, the Legitimacy Ordinance, No. 27 of 1929, The Company's Ordinance, the Public Trustee Ordinance, No. 22of 1928.

Criminal causes were tried in the High Court after commital by a magistrate's court before a judge and jury or assessors. Appeals from magistrates' courts, in the exercise of original jurisdiction in any civil matter, lay to the High Court. The High Court also heard appeals from Native Courts and appeals from the decisions of magistrates' courts given on appeals from native courts. In view of the establishment of a High Court in the Protectorate, the general jurisdiction of the Supreme Court was abolished, with the exception of those mentioned above.[68]

The Protectorate was also divided up into areas in each of which there was a magistrate's court established. The magistrates' courts had original and appellate jurisdiction in civil and criminal matters.

By the Supreme Court Amendment Ordinance, No. 46 of 1933, the Full Court was abolished as a Court of Appeal

/from

68. See also Supreme Court Amendment Ord. No. 46 of 1933.

from the judgments of the Supreme Court. By the West African Court of Appeal Ordinance, No. 47 of 1933, appeals both in civil cases from the Supreme Court and the High Court of the Protectorate lay to the West African Court of Appeal.[69]

In 1945 a series of Ordinances were passed to complete the programme of judicial reform begun in 1943. For example, the Coroners Ordinance, No. 33 of 1944, abolished the Coroners Juries. The Magistrates' Courts (Civil Procedure) Ordinance No. 38 of 1945, based on the English County Courts Act, 1934, introduced a special form of procedure in civil matters for use in magistrates' courts, which had previously followed a procedure identical to that in the Supreme Court. A Schedule to the Ordinance contained a number of forms taken from the English County Court forms 1936-9. The Magistrates' Courts (Appeals) Ordinance, No. 41 of 1945, regulated appeals both in civil and criminal matters. Appeals were heard by a single judge of the Supreme Court, sitting as an appeal court.

These judicial reforms did not spread to the native courts. It was after criticisms had been made by the West African Court of Appeal in the Northern Nigerian case of Tsofo Gubba v. Guandu Native Authority,[70] that the legislature was compelled to pass the Native Courts Ordinance 1948 /to

69. For a brief history of the W.A.C.A. see post, 120

70. (1947) 12 WACA 141.

to solve the difficulties in the existing law.[71] Section 3 provided that, where an act or omission constituted an offence both against native law and custom and against the criminal code, or any other enactment, a native court might try the case in accordance with native law and custom. After a trial in a native court for homicide, a record of the proceedings was to be sent to the Supreme Court Judge of the division in which the native court was situated; he could either confirm the decision of the court of first instance, acquit the conviction of a person, or direct a retrial before the Supreme Court, or substitute a verdict of manslaughter for one of capital homicide, or substitute a special verdict of guilty but insane. These powers of the appellate court were of special importance only to cases tried by courts administering Muslim law.

The unified legal system in Nigeria was broken up in 1954 after 40 years by the decision of the Nigerian leaders to set up a federal system of government and a consequent regionalisation of the judiciary.[72] By the Nigeria /Constitution

71. No. 36 of 1948. This Ordinance was to remain in force until October 1st, 1951. For the present position see s. 62 of the Northern Nigeria High Court Law. N.R. No. 8 of 1955. Northern Nigeria has now a more suitable Criminal Code based on the Sudan Penal Code. See also (1950) 32 J. Comp. Leg. 3rd Series, p. 158.

72. ELIAS, T.O. Blending of two legal systems. The Times, Special number on Nigeria, 29th September, 1960.

(Constitution) Order in Council, 1954.[73] a Federal Supreme Court for Nigeria was established. The three Regions, Lagos and the Southern Cameroons, were each empowered by law to establish their own High Courts. Appeals lay from the decisions of the High Courts to the Federal Supreme Court, and thence direct to the Judicial Committee of the Privy Council, and not to the West African Court of Appeal as had been the existing practice.[74]

In October 1960, the Federation of Nigeria attained her indegendence. By the Nigeria (Constitution) Order in Council, 1960,[75] detailed provisions relating to the judicial system were made.[76] By the Northern Cameroons (Administration) Order in Council, 1960, provision was made for the establishment of a High Court for the Northern Cameroons.[77] In June 1961 the Northern Cameroons Trust Territory (now renamed Sardurna Province) voted to join the Northern Region of the Federation of Nigeria at a plebiscite held in February of the same year under the auspices of the United Nations.[78]

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73. S.I. 1954. No. 1146. (Revoked)
74. For a brief note on the W.A.C.A. see post p.120
75. S.I. 1960 No. 1652.
76. For the present legal system see post chapter 2
77. S.I. 1960. No. 1656, s. 12.
78. By the Nigerian Constitution First Amendment Act 1961, the Northern Cameroons was admitted to the Federation of Nigeria.

After 42 years of British rule the Southern Cameroons was united on October 1st, 1961 with the French Republic of the Cameroun in accordance with the result of a plebiscite held in February. The two territories were united for the first time since 1919, when the former German Colony of Kamerun was partitioned between France and Britain.

(3) Sierra Leone

In 1881, the Supreme Court of Sierra Leone Ordinance was passed, which among other things stipulated that "The statutes of general application which were in force in England on the first day of January, 1880" should be in force in the Colony.[79] The other provisions dealing with the constitution and jurisdiction of the courts, were broadly similar to those of the Gold Coast.[80] By Letters Patent dated November 28th, 1888,[81] Sierra Leone, which with the Gambia had comprised the West African Settlements, was erected into a separate colony with her own Governor and Commander in Chief. An Executive and a Legislative Council were established. The office of the Chief Justice of the West Africa Settlements was abolished and replaced by the office of the Chief Justice of Sierra Leone.[82]

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79. No. 9 of 1881.
80. Except the provision dealing with the establishment of a Court of Requests.
81. Hertslet's Treaties, Vol. 18, p. 723.
82. The Chief Justice Designation Ordinance, 1888, No. 17 of 1888.

The power of the British Government to legislate for the Colony subject to the right of dissallowance was delegated to the local legishature, so long as such local ordinances were not repugnant to the laws of England. In 1889 the Supreme Court of Sierra Leone was constituted a court of appeal from all final judgments of the Supreme Court of the Gambia by an Order in Council of April 6th 1889.

On August 24th 1895,[83] a British Order in Council made under the Foreign Jurisdiction Act, 1890, empowered the Legislative Council of Sierra Leone Colony to exercise jurisdiction in the territories adjacent to the Colony. The Order in fact heralded the proclamation on August 31st 1896 of an Ordinance which set forth the fact that the British Government had assumed a Protectorate over the territories adjacent to the Colony of Sierra Leone.[84]

In September 1896 "an Ordinance to determine the mode of exercising Her Majesty's jurisdiction in the territories adjacent to the Colony of Sierra Leone" was enacted.[85]

83. Hertslet's Treaties, op cit. Vol. 20, p. 173.
84. CROOKS, J.J. op cit. p. 325.
85. No. 20 of 1896. "The Protectorate Ordinance upon being passed into law, was transmitted to the Secretary of State for the Colonies, but Mr. Chamberlain found himself unable to agree to some of its provisions, particularly those which related to lands and which appeared to assume (what was not the case) that the soil of the Protectorate was vested in the Crown. He accordingly directed the repeal of this Ordinance, and an enactment of another ordinance to take its place, pointing out at the same time that an Ordinance dealing with subjects of so much complexity should not have been passed without having been first submittted." CROOKS, J.J. op cit.327. The Protectorate Ord. No. 11 of 1897 repealed No. 20 of 1896, but the 1897 Ord. in so far as it related to the p.t.o.

The Protectorate Ordinance, 1896, provided for the establishment of three types of courts; namely:

(a) The Court of the Native Chiefs, which consisted of the courts of the native chiefs as previously established under customary law. These Courts decided cases according to native law and custom between natives other than those inv-olving a question of title to land, and in all criminal cases other than cases of murder, culpable homicide, pretended witchcraft, slave-raiding, cannibalism, etc.

(b) The Court of the District Commissioner and Native Chiefs. This was a court of record and consisted of the District Commissioner and 2 or more nominated Chiefs. It had jurisdiction in the excepted cases mentioned under (a). But no sentence of death was carried into effect except upon the warrant of the Governor. In srriving at a decision the Court of the District Commissioner and Native Chiefs was guided as far as possible by the laws in force in the Colony.

(c) The Court of the District Commissioner was a court of record and consisted of the District Commissioner of the District and had jurisdiction to hear and determine:-

(i) all civil cases between persons not natives, or /between

85 (cont.) ... judicial system remained unchanged. It was the section dealing with land which was expunged.

between a non-native and a native, and all cases involving a question of title to land, although arising exclusively between natives;

(ii) in all criminal cases other than capital in which a person not anative was charged, and also in the following cases, notwithstanding that the person charged was a native, namely - pretended witchcraft, slave-raiding, dealing in slaves, or tribal fights.

In all civil cases between non-natives, or between a native and a non-native, any person aggrieved by the decision of the District Commissioner, could appeal to the Supreme Court of the Colony if the subject matter exceeded £25. In criminal cases a non-native could appeal to the Supreme Court from the decision of the District Commissioner for the payment of a fine exceeding £50, or for imprisonment for more than 6 months.[86] No legal practitioner was given the right of audience before any of the Courts.

The Supreme Court Ordinance, No. 14 of 1904, was described as an Ordinance to consolidate and amend the enactments relating to the law as administered by the Supreme Court, and to the administration of justice in the Colony of Sierra Leone.[87] The Supreme Court was a superior court of record

86. "'Native' meansany member of the aboriginal races or tribes of Africa ordinarily resident within the Protectorate, or in the territories other than the Colony adjacent thereto". Section 1.

87. Contained in Ordinances of the Colony of Sierra Leone, Revised Edition, Vol. II, 1900-1914.

with jurisdiction and powers basically similar to those exercised by High Court Judges in England. The Court once more was empowered to exercise summary jurisdiction at law and in equity in certain matters.[88] The statutes in force in the County Courts in England on the first day of January 1880, were to be applied in all suitsand matters in which the Supreme Court was to exercise a summary jurisdiction.[89] The Supreme Court was held at Freetown before the Chief Justice. The puisne judges usually held sittings of the Circuit Court in the Protectorate under the provisions of the Protectorate Courts Jurisdiction Ordinance, 1903.

The Supreme Court Amendment Ordinance, No. 14 of 1912, constituted a Supreme Court and a Full Court which was to be the Court of Appeal. The Full Court consisted of 3 or more judges of whom the Chief Justice "shall at all times be one". Appeals lay to the Full Court from decisions of the Supreme Court of the Colony, or the Circuit Court of the Protectorate of Sierra Leone. But the Supreme Court still remained the court of appeal from the decisions of the Supreme Court of the Gambia. This anomaly was removed by a British Order in Council of June 13th 1913,[90] which constituted the Full Court of the Supreme Court of Sierra Leone a court of record to

/receive

88. Ibid, s. 70.
89. Ibid, s. 74.
90. St.R.&.O. 1913, p.289 The previous Orders in Council which constituted the Supreme Court of Sierra Leone a court of appeal from the final judgments of the Supreme Court of the Gambia are dated 1889 and 1891 respectively.

receive, hear and determine appeals from the Supreme Court of theColony of the Gambia. From there, final appeals lay to the Privy Council.

The Supreme Court Amendment Ordinance, No. 4 of 1923, eliminated the provision inserted by No. 14 of 1912 by which the Chief Justice was compelled to preside over the Full Court of Appeal and so preside in some cases over the court hearing appeals from his own judgments. The amendment inserted in 1923 was as follows:[91]

> "6 (1) The Full Court shall be a Court of Appeal, and for this purpose shall be constituted by three or more Judges.
>
> (2) When the Chief Justice is not one of the Judges constituting the Court, the Judge who under the provisions of section five of this Ordinance is the first of the said Judges in order of rank shall be the presiding Judge.
>
> (3) In all matters brought before the Full Court by way of appeal or otherwise the decision of the majority of the Judges, in case they shall not agree in their opinion, shall be taken to be the judgment of the Court.
>
> Provided that when the Court is constituted by an even number of Judges the Chief Justice or in his absence the Presiding Judge shall have a casting vote."

The Magistrates' Court Ordinance, No. 36 of 1924, was also enacted to consolidate and amend the law with respect to the constitution, practice and procedure of courts having summary jurisdiction in criminal matters in the Colony of Sierra Leone.[92] The Governor was empowered to divide the Colony into judicial districts.

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91. S. 2, which replaced s. 6 of No. 14 of 1912.

92. For example, Nos. 29 of 1905, 3 of 1920 & 9 of 1922.

When the West African Court of Appeal was constituted by an Order in Council of November 1928, the Full Court of the Supreme Court of Sierra Leone ceased to be a court of appeal for the Supreme Court of the Gambia. The West African Court of Appeal (Civil Cases) Ordinance, No. 9 of 1929 provided that appeals from all final judgments and decisions of the Supreme Court or the Circuit Court to the suit value of £50 or more should lie to the West African Court of Appeal. Ordinance No. 10 of 1929,[93] related to appeals in criminal cases, which lay to the West African Court of Appeal.

The Supreme Court Ordinance No. 39 of 1932 repealed the Supreme Court Ordinance of 1924 after consolidating and amending the law relating to the practice and procedure of the Supreme Court. Similarly, the Protectorate Courts Jurisdiction Ordinance, No. 40 of 1932, repealed the Protectorate Jurisdiction Ordinance, 1924, in view of the Criminal Procedure Ordinance just enacted.[94] Hitherto, the jurisdiction exercised by the Protectorate Courts had become unwieldy and heterogeneous in character. The courts established in 1932 were:

(1) The Circuit Court, which was a superior court of record with an original jurisdiction and an appellate jurisdiction from decisions of the District Courts.

/(2)

93. W.A.C.A. (Criminal Cases) Ordinance.
94. No. 38 of 1932.

(2) The Courts of District Commissioners, known as District Courts, which exercised civil jurisdiction in matters between non-natives, or between a native and a non-native; and summary jurisdiction in criminal cases.

(3) Native Courts. These Courts had civil and criminal jurisdiction over natives. Section 11 of the Ordinance stipulated that whenever a "native" was sentenced by a Native Court to a period of imprisonment exceeding 14 days, the matter must be referred to the District Commissioner, and "such a statement shall be deemed to operate as an appeal to the District Commissioner, and it shall be lawful for him to diminish the period of imprisonment, or substitute a fine therefore, or quash the conviction".

The Protectorate Courts Jurisdiction Ordinance did more than merely provide for the law relating to the courts system in the Protectorate. All provisions relating to criminal procedure, summary conviction offences and summary ejectment in land cases ~~was~~ were omitted from the later Ordinance and passed as short separate Ordinances.

Ordinance No. 24 of 1935 repealed and replaced the Appeals from Magistrates Ordinance of 1877 (re-enacted as the Appeals from Magistrates Ordinance of 1924). "In view of a decision of the Supreme Court that the right of a Crown to appeal, and hitherto unquestioned, did not exist, it was considered desirable to overhaul completely the existing machinery of the law relating to appeals from the summary jurisdiction in the Colony and to bring our legislation relating to such appeals into line with more modern enactments in force in other countries". 95

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95. TURBETT, I.J. (1937) 19 J.Comp. Leg. 3rd s. 159.

By section 3(1) of the later Ordinance, any person dissatisfied with the decision of a magistrate in any civil or criminal proceedings to which he was a party could appeal to the "Supreme Court in its summary jurisdiction". The Attorney-General could also sppeal to the Appeal Court from a decision of magistrate, even though he was not a party to the proceedings.

Every appeal was to be made in form of a written petition containing all the essential details of the appeal. Formerly, appeals were instituted by an oral or written notice to the trial magistrate. Provision was also made for appeals by way of case stated on points of law. By section 33, the Attorney-General of hisown motion and any person if aggrieved by a decision of the appeal court in a criminal appeal could appeal to the West African Court of Appeal on a matter of law, but not on a matter of fact.

The Protectorate Courts Jurisdiction (Amendment) Ordinance, No. 9 of 1937, was designed to make provision for the better supervision of Native Courtsand for the formal establishment and constitution of Native Appeal Courts. Two classes of Native Appeal Courts were set up, namely:- (i) a Chiefdom Court, and (ii) a Group Native Appeal Court. Where in any chiefdom there was a Native Court over which a section chief or other member of the tribal authority (not being the Paramount Chief) habitually presided, such Native

/Court

Court was considered subordinate in its jurisdiction to the Chiefdom Court; any "native" aggrieved by the decision of such a subordinate court could appeal to the Chiefdom Court. A Group Native Appeal Court consisted of the Paramount Chief and one or more representatives of each Chiefdom of the group, and held sessions at such times and places as "the tribal authorities" of the group considered necessary. The jurisdiction of the Appeal Court was largely the same as that exercised by the Native Courts.

The Courts Ordinance, No. 7 of 1945, consolidated and improved considerably the law relating to the constitution of the Supreme Court and the magistrates' courts of Sierra Leone. It created the Supreme Court as a Superior Court of Record with jurisdiction throughout Sierra Leone. The Supreme Court comprised the Chief Justice and one or more puisne judges of Sierra Leone, and also the Chief Justices and judges of the Supreme Courts of Nigeria and the Colony of the Gold Coast and the judge of the Supreme Court of the Colony of the Gambia, who were designated puisne judges of the Supreme Court of Sierra Leone.

The jurisdiction of the Supreme Court was to be the same as that of a High Court judge in England, except that Admiralty jurisdiction differed. The Supreme Court had no jurisdiction in regard to any question arising exclusively /between

between natives involving (i) title to land situate within the Protectorate, or (ii) marriage or divorce according to native customary law, or any matrimonial claim founded on such a marriage, or (ii) where the claim or matter in dispute was below the value of £50.

The Courts Ordinance also abolished the summary jurisdiction of the Supreme Court which dated back to 1877. All cases below £50 were triable by the Magistrates' Courts. The Circuit Courtsand the Court of Requests were also abolished. District Courts were now termed Magistrates' Courts.

On April 27th, 1961, Sierra Leone attained her independence. A brief account of the present judicial system is given in Chapter Two.

(4) The Gambia

As will be remembered, in 1888[96] the Gambia (which had been merged in the West Africa Settlements) was constituted a separate colony. By the Supreme Court Ordinance, No. 4 of 1889, a supreme court of the Colony of theGambia was established. It was presided over by the Chief Magistrate. The Court was a court of record, and possessed and exercised all the jurisdiction, powers and authorities which are vested in or are capable of being exercised by the High Court of

/Justice

96. Hertslet's Treaties, Vol. 18, p. 614.

Justice in England, except the jurisdiction exercised by the English High Court in admiralty cases. The Supreme Court continued to exercise the powers and authorities which were vested in the former Court of Civil and Criminal Justice. In every civil cause or matter in the Supreme Court, law and equity were administered concurrently. Criminal trials were held before the Chief Magistrate and a jury of 12, or if that number could not be achieved, no fewer than 6, except in capital cases and in libel,[97] where also 7 jurors must be special, and in cases of slave-dealing, rape and other kindred offences against women, perjury,[98] and embezzlement, half of the jurors had to be special jurors. By the Mohammedans and Criminal Law (Amendment) Ordinance, No. 12 of 1889, sections 4 and 5 of the Criminal Law Amendment Act 1885, did not apply to Muslims if validly married according to the laws, rites and customs of Islam to the girl or woman in relation to whom the offence was alleged to have been committed.[99]

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97. Added by Ordinance No. 3 of 1893.
98. Added by Ordinance No. 13 of 1889.
99. The Criminal Law Amendment Act, 1885, 48 & 49 Vic. c.69, s. 4, declared it an offence for any person to defile any girl under 13. Section 5 deals with defilement of girls between 13 and 16. Now see Ordinance No. 10 of 1905, which regulates the jurisdiction of the Mohammedan Court in the Gambia.

The law in force consisted of the common law of England introduced by the British settlers from Senegal in 1816[1]; Imperial Acts extending to it, and "statutes of general application in force in England on the first day of November, 1888".

By an Order in Council of April 6th 1889, the Supreme Court of the Colony of Sierra Leone was constituted a Court of Record to receive, hear and determine appeals from the Supreme Court of theColony of the Gambia. A further Order in Council was issued in November 1891 relating to the same topic.[2] Any person who felt himself aggrieved by any decision of the Appeal Court (i.e. the Supreme Court of Sierra Leone) could appeal to the Judicial Committee of the Privy Council.

In 1893 an Order in Council regulating British jurisdiction within the territories adjacent to the Gambia was issued.[3] By this Order, the Legislative Council of the Colony was empowered to make regulations affecting the area concerned. Article 4 defined the jurisdiction of the Courts in the following terms:-

> "The Courts of the Colony of the Gambia shall have in respect of matters occuring within the said territories adjacent to the said Colony so far as such matters are within the jurisdiction of Her Majesty the same juris-

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1. MAXWELL, J.R. (Chief Magistrate) (1896-7) 1 J. Comp. Leg. 378. BURGES op cit. Vol. 1, p. 262.
2. St.R. & O. Revised. Vol. 6 p. 5.
3. St. R.& O. (1893) p. 311.

> -diction, civil and criminal, original and appellate, as they respectively possess from time to time in respect of matters occuring within the said Colony, and the judgments ... given in the exercise of the jurisdiction hereby conferred may be enforced and executed, and appeals therefrom may be had and prosecuted in the same way as if the judgment ... had been made or given under the ordinary jurisdiction of the Court".

The Gambia Protectorate Ordinance was enacted by No. 11 of 1894.[4] Two types of courts were constituted for the purpose of the administration of justice:

(1) The Commissioner's Court. Commissioners of districts were invested with magisterial jurisdiction over British subjects. In criminal matters the Commissioners had the same powers and jurisdiction as were given by the laws of the Colony to two justices of the peace. In civil matters their powers were identical to those given by the laws of the Colony to two commissioners of the Court of Requests at Bathurst. Appeals from the decisions were prosecuted in the same way as if made by a police court or Court of Requests within the Colony. In the exercise of the Commissioners' jurisdiction, it was provided that they should apply the laws of the Colony so far as local circumstances permitted. Thus the English common law, which formed part of the laws of the Colony had extra-territorial operation in the Protectorate.

4. Repealed and replaced by No. 7 of 1902. Subsequent enactments include No.s 30 of 1913 and 10 of 1915.

(2) Native Courts. These Courts were established in each district and were presided over by the Head Chief of the district. The civil jurisdiction of Native Courts extended to the hearing and determination of all personal suits to the value of £25, and all suits relating to ownership of land and succession to the goods of a deceased up to the value of £50. The criminal jurisdiction extended to the determination of minor offences, such as petty assault.

A person who was dissatisfied with the decision of a Native Court could appeal to the Commissioner, who might direct further enquiry by the Court or rehear the case and give such decision as the circumstances required, or grant or withhold an appeal or rehearing before the Supreme Court. There was no automatic right of appeal. Legal practitioners were not allowed to appear before a Native Court, nor in any proceedings removed from a Native Court to the Commissioner or to the Supreme Court by appeal or otherwise, except by special leave of the Commissioner or of the Supreme Court.[5]

By Ordinance No. 7 of 1902, a Court of Requests "for the easy and speedy recovery of small debts" was established, to be held at Bathurst before the Chief Magistrate or two Commissioners. Further, by Ordinance no. 10 of 1905, a Mohammedan Court was constituted at Bathurst, consisting of a Cadi appointed by the Governor. The Court had jurisdiction

5. Ibid. s. 21.

-diction in all matters, contentious or non-contentious, between or exclusively affecting Muslims, relating to civil status, marriage, succession, donations, testaments and guardianship. Appeals from that Court lay to the Supreme Court.

As has already been mentioned elsewhere, in 1913 the Full Court of the Supreme Court of Sierra Leone was constituted a Court of Appeal from decisions of the Supreme Court of the Colony of the Gambia.

The Supreme Court (Amendment) Ordinance, No. 16 of 1915 seemed to indicate either the failure or unsuitability of jury trial in the territory. Trial by a judge and 3 assessors was substituted for trial by jury in all cases of offences other than those punishable by death, either (i) where the accused elected to be so tried, or (ii) where the prosecuting counsel in the Supreme Court applied for trial by a judge with the aid of assessors. The Supreme Court Appeals Ordinance, No. 9 of 1929, was enacted in view of the newly-established West African Court of Appeal. (The West African Court of Appeal Order in Council, 1928.) The previous Order, dated 1913, which constituted the Full Court of the Supreme Court of Sierra Leone a Court of Appeal for the Supreme Court of the Gambia, was revoked.

/Consequently

Consequently, the Gambia Supreme Court Appeals Ordinance provided that appeals from the Supreme Court in civil and criminal cases should lie to the West African Court of Appeal on the same grounds as have been listed for the other territories, except that the right of appeal in criminal cases was not spelt out in detail. That defect was remedied by the Supreme Court Appeals (Amendment) Ordinance, No. 4 of 1930, which gave a person convicted the same right of appeal as was provided for by the English Criminal Appeal Act of 1907.

Provincial Courts were established in every province in the Protectorate by the Provincial Courts Ordinance, No. 5 of 1935, which repealed the Subordinate Courts Ordinance, 1933. A Provincial Court was presided over by the Commissioner or an Assistant Commissioner. It had both civil and criminal jurisdiction. It also had concurrent jurisdiction over "natives" with any Native Tribunal in its area of jurisdiction. In civil cases the Court might seek the aid of assessors, but the decision was vested exclusively in the Court. No legal practitioner was given a right of audience in any cause or matter before a Provincial Court, except by special leave of the Judge of the Supreme Court. Appeals from the decisions of a Provincial Court lay to the Supreme Court.

The Provincial Courts Ordinance was repealed by the

/Protectorate

Protectorate Courts Ordinance No. 13 of 1944. This Ordinance provides for the establishment of a High Court and subordinate courts in the Protectorate. The High Court is given the same jurisdiction, civil and criminal, as is exercised by the Supreme Court in respect of matters occurring in the former Colony. The Judge of the Supreme Court is the judge of the High Court. Subordinate Courts are established in every division of the Protectorate. The present judicial system is discussed in Chapter Two.

H. WEST AFRICAN COURT OF APPEAL II

As will be remembered, the first West Africa Court of Appeal came into being in 1867 when the Supreme Court of Sierra Leone was constituted a Court of appellate jurisdiction to hear and determine appeals from the Courts of Civil and Criminal Justice on the Gambia, the Gold Coast and Lagos.[6] The duration of this appeal court was short compared with that of the Court now under consideration.[7] It must, however, be noted that the second West African Court of Appeal was not a direct successor to the first.

The necessity for the formation of the West African Court of Appeal had agitated the minds of the West African leaders in the 1920's.

6. See ante, p. 50

7. 1867-1877. See British Order in Council, October 23rd, 1877; whereas the second one lasted from 1928-1959. See S.I. 1959. No. 1977.

For example, as a result of expenses incurred by the Nigerian government in respect of an appeal to the Privy Council, a question was raised by Mr. E.O. Moore in the Legislative Council as to whether the government would take the necessary steps towards the formation of a Court of Appeal for West Africa. Replying to the question, the Acting Attorney-General said:[8]

> "After full consideration of the views of the West African governments, the Secretary of State in 1922 formed the opinion that it would be impossible to adopt the proposal for the creation of an Appeal Court for British West Africa without imposing upon the West African Colonies considerable additional expenditure, which in the present circumstances they are unable to afford. He, therefore, decided that it was not possible to proceed with the proposal."

The West African leaders did not lose heart. During the second session of the National Congress of British West Africa, held in Freetown in 1923, the Hon. T. Hutton Mills in his address replied to the view of the Colonial Office in these words:-

> "We cannot suffer the question of an appellate court for British West Africa to be summarily dismissed on the score of want of funds. We cannot admit that in such an important reform, urged by a resolution of the last session of the Congress, the four Colonies cannot together pool the necessary funds which would meet the salaries of the Appellate judges ... The efforts of their Honours, the Chief Justice of the /Gold

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8. Cited in ELIAS, T.O. Groundwork of Nigerian Law, p.146.

> Gold Coast and the Chief Justice of Sierra Leone in pressing the matter of a United Appeal Court for British West Africa has /sic/ met with public approval and appreciation."[9]

At the instance of the Secretary of State for the Colonies, a conference was held at Accra during October and November 1924 "with a view to the formation of definite proposalsfor the establishment of a single Court of Appeal for the Gold Coast, Sierra Leone and the Gambia".[10] The conference was attended by several judges and law officers of the three Colonies. After the conference, two reports were issued, a majority report and a minority one. In March, 1928, the Hon. Mr. Casely Hayford again raised the issue in the Legislative Council.[11] On the question of Nigeria's refusal to join the scheme, he said this:

> "Now when you are dealing with four Colonies in the matter of an institution of this sort necessary for the efficiency, and one of them falls out, the views of the three might be considered and given effect to. I am suggesting the Government should re-open the matter, and if the Gambia, Sierra Leone and the Gold Coast seriously desire a Court of Appeal, the same might be given effect to enable the work of the courts to run more easily than it is at present".

Finally, action was taken by the British Government, and on November 1st, 1928, an Order in Council was issued[12].

9. SAMPSON, J.J. West African leadership (1951) p. 73.
10. Ibid, p. 83.
11. G.C. Leg. Co. Debates, 9th March 1928. Sessidn 28/29, p. 173.
12. St.R.&O. 1928 (No. 889) p. 616. This Order revoked the Order of 13th June 1913 which constituted the Full Court of the Supreme Court of Sierra Leone a Court of Appeal for the Supreme Court of the Gambia. Under the 1928 Order, local West African Court of Appeal Ordinances, which made more detailed provisions regulating appeals. In criminal matters local ordinances followed the English Criminal Appeal Act 1907, in respect of grounds and conditions of appeals.

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This Order brought great satisfaction to the people of West Africa. In the Gold Coast, Governor Slater echoed the feelings of the people when he said that "the creation of the Court forms a landmark in the judicial history of the Gold Coast inasmuch as its jurisdiction includes appeals on points of law and of fact in criminal cases under conditions similar to those envisaged under the English Court of Criminal Appeal Act".[13]

As Nigeria had decided to stand out, the new West African Court of Appeal had jurisdiction to hear and determine appeals, both civil and criminal, from the Courts of the Gold Coast, Sierra Leone and the Gambia. It consisted of the Chief Justice of the Gold Coast as President, and the judges of the Supreme Court of the Colonies, to which the Order applied and the judges of the Supreme Court of Nigeria. By Article 8 of the Order, the judges were empowered to call in the aid of assessors specially qualified whenever occasion arose.

In 1933, Nigeria joined, and by the West African Court of Appeal (Further Amendment) Order in Council[14] provision was made for the Court to hear and determine appeals from the Supreme Court of Nigeria.

The 1948 West African Court of Appeal Order in Council performed two main functions. Firstly, it

/constituted

12. (cont.) Hitherto appealshad lain to the Full Court only by way of case stated. See, e.g. Gold Coast W.A.C.A. Ord. No. 28 of 1929; Sierra Leone, W.A.C.A. Criminal Cases) Ord. No. 10 of 1929.

13. 7 Edw. 7 C. 23 (1907)

14. St.R. & O. 1934. Vol. 1, p. 651.

constituted the offices of the President and Justice of Appeal as permanent members of the Court. Secondly, it provided for the creation in the Gold Coast of the West African Court of Appeal fund.

With the granting of the 1954 Constitution, Nigeria was divided into three Regions, the Southern Cameroons and the Federal Territory of Lagos, which together formed the Federation of Nigeria.[15] The judiciary was also regionalised, and a Federal Supreme Court was established to hear and determine appeals from decisions of theHigh Courts created for any of the Regions, the Southern Cameroons and Lagos. From there appeals lay to the Judicial Committee of the Privy Council.[16] So Nigeria fell out.[17]

On March 6th, 1957, the Gold Coast became independent and assumed the name of Ghana. By an Order in Council issued in the same year,[18] the West African Court of Appeal ceased to be a Court of Appeal for Ghana. Ghana established her own appellate court styled the Court of Appeal for Ghana.[19] Appeals lay from there direct to the Privy Council.[20]

15. S.I. 1954. No. 1146.
16. The Nigeria (Appeals to Privy Council) Order in Council 1955. No. 706.
17. The West African Court of Appeal (Amendment) Order in Council 1955. No. 1821.
18. S.I. 1957. No. 279.
19. Courts (Amendment) Ordinance No. 17 of 1957 and Courts (Amendment) Act No. 8 of 1958.
20. The W.A.(Appeal to Privy Council)Order in Council, 1957, No. 1362; the Ghana (Appeal to Privy Council) Order in Council, 1957, No. 1361.

The only territories to which the West African Court of Appeal Order in Council applied were Sierra Leone and the Gambia. In 1959, the Principal Order was revoked. By the Sierra Leone and the Gambia Court of Appeal Order in Council, 1959, a Court of Appeal for Sierra Leone and the Gambia was constituted, to exercise the powers of an appellate court in relation to those territories which formerly were exercised by the West African Court of Appeal.[21]

The new scheme did not last long, for Sierra Leone became independent in 1961. By Article 79 of the Constitution,[22] a Court of Appeal for Sierra Leone was established from where further appeals lie to the Privy Council.[23] At the same time, a Court of Appeal for the Gambia, styled the Gambia Court of Appeal, was constituted, to exercise the powers of an appellate court in relation to that territory.[24] Further appeals lie to the Judicial Committee.[25]

Thus ends the life of one of the most useful experiments of legal machinery set up for the whole of West Africa. The history and activities of the Appeal Court

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21. S.I. 1959. No. 1977.
22. S.I. 1961. No. 741.
23. Ibid, s. 84. See also The Sierra Leone (Procedure in Appeals to the Privy Council) O-in-C 1961. No. 742.
24. S.I. 1961. 743. See also Gambia Court of Appeal Ord. No. 5 of 1961.
25. S.I. 1961. 744.

are yet to be written. It is true that during the lifetime of the Court, a number of questionable judgments relating especially to customary law have been given. Such a failing is to be expected for an appeal court exercising jurisdiction from four leading countries whose laws consisted of variations of variations of English law, customary law and Muslim law. However, taking all things into consideration, it can safely be said that the West African Court of Appeal was a success rather than a failure. The following are some of the advantages West Africa derived from the establishment of the Appeal Court:

(1) It was an appeal court based on African soil which held its sittings in the various capitals of the countries concerned. It was therefore in a better position to understand and interpret thelaws of the four countries than an external appeal court would have been. Indeed, the Court comprised Chief Justices and Judges of the participating countries.

(2) The Court contributed to the harmonisation rather than the fragmentation of "West African laws".

(3) As an intermediary appeal court, it not only sifted and reduced the number of appeals to the Privy Council, but also it cut down the expenses of litigation.

/(4)

(4) With the establishment of the Court, conditions of appeal were considerably improved. Hitherto, appeals from the decisions of the Supreme Court to the Court of Appeal in each territory were by way of case stated on a point of law.

In conclusion, we can say with Governor Slater that the establishment of a Court of Appeal for all West Africa was an important step forward in our system of judicial administration, and it was fraught with real advantages to the peoples of West Africa.

Chapter Two

SYNOPSIS OF THE PRESENT LEGAL AND JUDICIAL SYSTEMS

GHANA[1]

By article 4 of the Constitution of the Republic of Ghana, Ghana became a sovereign unitary republic on July 1st 1960. In accordance with the provisions of article 41 of the Constitution, the Courts Act of 1960 was enacted.[2]

The judicial power of the State is conferred on the Supreme Court and the High Court, and on such inferior courts as may be provided for by law, i.e. Circuit Courts, District Courts and Local Courts.[3]

1. The Supreme Court

The Supreme Court is the final court of appeal and consists of five judges of the Supreme Court, including the Chief Justice as President.[4] It is a superior court of record and has original and appellate jurisdiction. Its original jurisdiction relates to questions as to whether an enactment is made in excess of the powers conferred on Parliament by or under the Constitution. If any such question

/arises

1. The Territories are dealt with according to the order of attainment of independence.
2. The pre-republican system is set out fully in ALLOTT, A.N. (ed.) Judicial and legal systems in Africa, 1962. Part 1 21-30, "West Africa" by W.C. DANIELS.
3. The Constitution, art. 41(2). The power to repeal this article is reserved to the people.
4. C.A.9. Section 7. The Constitution, art. 44.

arises in the High Court or an inferior court, the hearing must be adjourned and the question referred to the Supreme Court for decision.[5] The appellate jurisdiction of the Supreme Court consists of:[6]

(a) The hearing of appeals from any judgment of the High Court in any civil cause;

(b) the hearing of appeals from any decision of a High or Circuit Court in a criminal matter exercised in accordance with the provisions of this Act or any other enactment;

(c) the hearing of appeals from any decision given by the High Court in any other matter whatsoever; and

(d) any other jurisdiction conferred by this Act or any other enactment:

Provided that-

(a) an appeal shall lie to the Supreme Court from a judgment of the High Court in the exercise of its appellate jurisdiction on any matter except amatter arising out of a criminal case-

(i) where the High Court has affirmed the decision of the Court from which the appeal is made to the High Court, by special leave of the High Court, and

(ii) where the High Court has reversed or materially altered the decision of the Court from which the appeal is /made

5. Constitution, art. 42(2).

6. C.A.P. s. 8(1).

made to the High Court upon the High Court giving leave to appeal from its judgment upon like terms and subject to the like conditions as if the judgment had been given in a suit or matter originating in the High Court. Notwithstanding anything to the contrary in any other provision of this Act, the Supreme Court may entertain any appeal from any court on any terms which it may think just.[7]

2. The High Court

The High Court was established by article 41 of the Constitution. It is a superior court and consists of the Chief Justice, or any judge of the Supreme Court or temporary judge or Circuit Judge requested to do so by the Chief Justice.[8] It is duly constituted when it consists of one or three judges of such Court.[9] Judges of the High Court have equal powers.[10]

The High Court has jurisdiction in all matters except: (a) where an enactment is alleged to be ultra vires; (b) in an action instituted for the trial of any question relating to the election, installation, deposition, or abdication of a chief; or (c) in an action[10a] for the recovery or delivery of stool /or

7. The Courts Act 1960, C.A.9, s. 13.
8. Ibid, s. 28(1)(2); as amended by the Courts (Amendment) Act 1962 (Act 130) s. 2.
9. Ibid.
10. Ibid, s. 31; as amended by the Courts (A.) A, 1962, s. 6.
10a. Such actions are justiciable before a Judicial Commissioner who has original jurisdiction to hear and determine any matters affecting chieftaincy. Appeals from the decision of a Traditional Council are also heard by him. (The Judicial Service Act, 1960 (C.A.10) s. 5; The Chieftaincy Act, 1961, Act 81, Part V.)

or skin property in connection with any such election, installation, deposition or abdication; or (d) the trial of any question touching the political or constitutional relations subsisting according to customary law between such chiefs.[11]

The High Court has appellate jurisdiction from (a) any decision of a Circuit Court, except a decision given in a trial on indictment; (b) any decision of a District Court in a criminal case or of a Juvenile Court; and (c) any other jurisdiction conferred by the Courts Act or any other enactment for the time being in force.[12] Appeals from the High Court in both civil and criminal cases lie to the Supreme Court.[13] The High Court has supervisory and revisionary powers in respect of all proceedings in Circuit Courts, except proceedings in trials on indictment,[14] and in respect of decisions of magistrates.[15]

3. Circuit Courts

Circuit Courts were established by the Courts Act and are courts of inferior jurisdiction.[16] The Chief Justice is empowered to divide the Republic into circuits for purposes of the administration of justice.[17] There is a Circuit Court in each circuit, which is presided over by a Circuit Judge.[18]

11. Courts Act, s. 41(a)-(c).
12. Ibid, s. 29(b), as amended by C.(A.) Act, 1962, s. 3.
13. Ibid, ss. 8(1); 14.
14. Ibid, s. 30, as amended by C.(A.) Act, s. 5.
15. Ibid, s. 60, as amended by C.(A.) Act, 1962.
16. Ibid, ss. 34-39, as amended by C.(A.) Act, 1962.
17. Ibid, s. 34; as amended by C.(A.) Act, 1962.
18. Ibid, s. 35, as amended by C.(A.) Act, 1962.

In civil matters, Circuit Courts have original jurisdiction:- (i) in all personal suits, whether based on contract or tort up to £500; (ii) in suits between landlord and tenant up to £500; (iii) relating to guardianship and custody of infants; (iv) to grant injunctions and specific performance; and (v) over questions relating to title to land or other property up to £500.[19] They have no jurisdiction in civil casesinvolving chieftaincy disputes.[20] Circuit Courts have original jurisdiction in criminal matters in the case of offences other than those where the maximum punishment is death or life imprisonment.[21] They have appellate jurisdiction from decisions of any District Court in civil matters, and subject to the provisions of Part VI, of any Local Court, within their Circuits.[22] Appeals from Circuit Courts other than a decision in a trial on indictment lie to the High Court.[23] Appeals from decisions of Circuit Courts given in trials on indictment lie to the Supreme Court.[23a]

4. District Courts

District Courts[24] are created in each "Judicial District". They are courts of inferior jurisdiction and are presided

/over

19. Ibid, s. 37(a) as amended by C.(A.) Act, 1962.
20. Ibid, s. 39, as amended by C.(A.) Act, 1962.
21. Ibid, s. 37(b), (d); as amended by C.(A.) Act, 1962.
22. Ibid, s. 37(c), as amended by C.(A.) Act, 1962.
23. Ibid, s. 38 as amended by C.(A.) Act, 1962.
23a. Crim. Proc. Code (A.) (No. 2) Act, 1962 (Act 116), s.10. The provision of this section replaces s. 337 of the Criminal Procedure Code 1960 (Act 30).
24. Ibid, ss. 47-64, as amended by C.(A.) Act, 1962.

over by District Magistrates.[25] Their original jurisdiction in civil causes is the same as that exercised by the Circuit Courts, but up to a limit of £150.[26]

In criminal matters, the District Courts have jurisdiction to try summarily offences punishable by a fine not exceeding £100 or imprisonment not exceeding 12 months, or both, and subject to certain conditions, indictatable offences other than those punishable by death, or more than 7 years imprisonment.[27] Any person aggrieved by a decision of a District Court may appeal in criminal cases to the Judge of the High Court for the time being exercising jurisdiction over the district in which such District Court is situated,[28] and in civil cases to the Circuit Court in which such District Court is situated.[29] Every District Magistrate shall, in respect of any matter, be subject to the orders and directions of the High Court.[30]

5. Juvenile Courts

The President may be legislative instrument order the constitution of Juvenile Courts in any area of the Republic. Every Juvenile Court shall consist of not less than 3 membersof the Juvenile Court Magistrates. They shall exercise such summary jurisdiction as the President confers on them in relation to the hearing of charges against, or

/the

25. Courts Act, 1960, s. 48.
26. Ibid, s. 52, as amended by C.(A.) Act, 1962.
27. Ibid, s. 53.
28. Ibid, s. 63, as amended by C.(A.) Act, 1962.
29. Ibid.
30. Ibid, s. 61, as amended by C.(A.) Act, 1962.

the disposal of other matters affecting juveniles.[31] Appeals from decisions of Juvenile Courts lie to the High Court.[31a]

6. Local Courts

The Minister responsible for local government is empowered to establish Local Courts throughout the Republic.[32] He decides whether one Local Court Magistrate sitting alone or three Local Court Magistrates shall constitute such a Court.[33] Local Courts have unrestricted jurisdiction as to persons.[34] Their jurisdiction in civil matters extends to suits relating to ownership, occupation, etc, of land, paternity, custody of children, divorce and other matrimonial causes, succession where the law applicable is customary law, and personal suits up to the value of £100.[35] Where the subject matter of a land case exceeds £200, such matter shall be determined by the Judge of the High Court for the time being exercising jurisdiction over such areas.[36] In criminal matters, Local Courtsare empowered to apply certain sections of the Criminal Code set out in ss. 146 and 147 of the Courts Act, but in no case should the penalty exceed £25 or a sentence of three months imprisonment, or both.[37]

/Local

31. Courts Act, s. 65.
31a. Ibid, s. 29(c), as amended by the C.(A.) Act, 1962.
32. Ibid, s. 92(1).
33. Ibid, s. 93(1)(2).
34. Ibid, s. 96(1).
35. Ibid, s. 98(1), as amended by the C.(A.) Act, 1962.
36. Ibid, s. 98(2), as amended by the C.(A.) Act, 1962.
37. Ibid, s. 99.

Local Courts have no jurisdiction in causes relating to chieftaincy, or in which the Republic or any public officer acting virtute officii is a party.[38]

Any party aggrieved by the decision of a Local Court in causes other than land and succession causes may appeal to the Circuit Court. A further appeal lies from the decision of the Circuit Court to a Judge of the High Court for the time being exercising jurisdiction over the ~~area~~ circuit in which such Circuit Court is situated, upon a point of law, and his decision is final.[39] Any party aggrieved by a decision of a Local Court on an issue relating to land or an interest in land or a succession cause involving land may appeal to the High Court and thereafter to the Supreme Court.[40] According to the new section 144, there shall be an Administrative Secretary (Local Courts) who shall be responsible to the Minister for the general efficiency of Local Courts.[41] No legal practitioner or attorney may appear or act for or assist any party in any cause or matter before a Local Court.[42]

The laws in force: the laws in Ghana comprise the following:

(a) the Constitution;[43]
(b) Ordinances of the Colonial Legislature and the statutory instruments made thereunder;
(c) Ordinances and Acts of the independent pre-republican

[redacted].

38. Ibid, ss. 96(2), 101, as amended by the C.(A.) Act, 1962.
39. Ibid, s. 125(1) and (2), as amended by the C.(A) Act, 1962.
40. Ibid, s. 126, as amended by C.(A.) Act, 1962.
41. Ibid, s. 144, as amended by C.(A.) Act, 1962.
42. Ibid, s. 104.
43. The Constitution, art. 40.

Ghana legislature and statutory instruments made thereunder;

(d) Acts passed by the Constituent Assembly, for example, the Courts Act 1960, cited as C.A.9., being the 9th Act of the Constituent Assembly;

(e) Acts of the Republican Parliament and statutory instruments made thereunder;

(f) Acts of the United Kingdom Parliament which applied generally to British Dominions, for example the Extradition Acts, 1870-1932;

(g) Acts of the United Kingdom Parliament declared to extend to Ghana, for example the Colonial Probates Act 1892;

(h) British Orders in Council applicable in Ghana;

(i) The "statutes of general application" which were in force in England on 24th July, 1874, as applied in Ghana immediately before the commencement of the Courts Act 1960;[44]

(j) "The Common law, as comprised in the laws of Ghana, consists in addition to the rules of law generally known as the doctrinesof equity and of the rules 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."[45] (The first two are of English origin.)

(k) The law and practice for the time being in force in England in respect of probate, divorce and matrimonial causes.[46]

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44. Courts Act, 1960, s. 154(4).
45. Interpretation Act, 1960. C.A.4, s. 17(1).
46. S. 17 of the Courts Ord. (1951 Rev.) saved by s. 154(3) of the Courts Act, 1960. C.A.9.

(1) Customary law.[47]

FEDERATION OF NIGERIA

The Federation consists of a Federal Territory of Lagos and three Regions - Eastern, Northern and Western.[48] The legal and judicial system of Nigeria is rather complicated. A detailed description has been given elsewhere.[49] In the circumstances, only a short account will be given. The Courts of Nigeria comprise the following:-

1. The Privy Council

The Privy Council is the final Court of Appeal. An appeal lies to the Judicial Committee from final judgments in the Federal Supreme Court in civil cases involving sums above £500, and in any civil or criminal proceeding on questions as to the interpretation of the Federal Constitution, or the constitution of a Region.[50]

2. The Federal Supreme Court

This consists of the Chief Justice of the Federation as President, not less than three Federal Justices, the Chief Justices of each Region, and the Chief Justice of Lagos.[51] The Federal Supreme Court is a superior court of record

47. The Constitution, art. 40(f). For the mode of ascertainment of customary law, see CourtsAct 1960, ss. 66 & 67, and the Chieftaincy Act, 1961, Act 85, ss. 58-64.
48. Nigeria (Constitution) O-in-C. 1960. 2nd Schedule, arts. 2 and 3.
49. Judicial and Legal systems in Africa, Part I, pp. 47 et seq.
50. Nigeria (Constitution) O-in-C. 1960. 2nd Schedule, art. 114.
51. Ibid, arts. 104 & 105.

record and has exclusive jurisdiction "in any dispute

> between the Federation and a Region or between Regions if and in so far as that dispute involves any question (whether on law or fact) on which the existence or extent of a legal right depends". [52]

It is also a Court of Admiralty.[53] An appeal lies to the Federal Supreme Court from the decisionsof the High Court of a territory or Region in any civil or criminal case or in any proceedings relating to fundamental human rights.[54]

3. The High Court of Lagos

This is the High Court for the Federal Territory. It consistsof the Chief Justice of Lagos and five or more judges appointed by the Governor General. It has all the general jurisdiction exercised by a High Court Judge.[55] The High Court has appellate jurisdiction to hear and determine civil and criminal appeals from the Magistrates' Court in Lagos.[56] An appeal from the High Court of Lagos lies to the Federal Supreme Court.[57]

4. Magistrates' Court (Lagos)

The Governor General may appoint magistrates in the following grades:- Chief Magistrate, Magistrates of Grades /I

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52. Nigeria (Constitution) O-in-C, 1960 arts 1960 107. See also Federal Supreme Court Ordinance No. 12 of 1960.
53. F.S.C.O., 1960, s. 17; Federal Supreme Court (General Provisions) Ordinance, No. 27 of 1955, s. 10.
54. Nigeria (Constitution) O-in-C, 2nd Schedule, art. 110; see also F.S.C.O., s. 15(1). 1960
55. Ibid, art. 115; see also H.C.L.O. No. 25 of 1955, and H.C.L.(A.)O. Nos. 36 and 37 of 1957, and 11 of 1960.
56. Nigeria (Constitution) O-in-C, 2nd Schedule, art. 118.
57. Ibid, art. 110. H.C.L.O. No. 25 of 1955, s. 49.

I, II and III.[58] The civil and criminal jurisdiction of the Magistrates varies according to their grades. Thus in civil matters the Chief Magistrate has jurisdiction in personal suits up to £500. The extent of his summary jurisdiction in criminal matters is £500 fine, or 5 years imprisonment.[59] Appeals from the Magistrates' Court lie to the High Court of Lagos.[60]

The Laws in Force

> "In the hearing and determining of an appeal by the Court of Appeal (i.e. the Federal Supreme Court) the law to be applied shall be the law applicable in the Region from the High Court of which the appeal is brought." 61

In the Federal Territory the laws comprise the following:-

(a) Acts of the United Kingdom Parliament which applied to British Dominions generally;

(b) Acts of the United Kingdom Parliament declared to extend to that Territory;

(c) British Orders in Council applying to Nigeria, for example the Nigeria (Constitution) Order in Council, 1960;

(d) the common law, the doctrines of equity and the statutes of general application in force in England on January 1st, 1900;

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58. Nigeria (Constitution) O-in-C, 1960, art. 119. Magistrates Court (Lagos) Ordinance, 1955 and as amended.
59. M.C.(L.)O., 1955, ss. 14-20.
60. Ibid, ss. 54-59; and Nigeria (Constitution) O-in-C, 1960, 2nd Schedule, art. 118(1).
61. Federal Supreme Court (Appeals) (Amendment) Ordinance, No. 28 of 1955, s. 3(2A).

(e) Nigerian Ordinances in force in Lagos before the 1954 Constitution;

(f) Federal legislation enacted since the 1954 Constitution applying throughout the Federation;[62]

(g) the law and practice for the time being in force in England in respect of probate, divorce and matrimonial causes;[63]

(h) Customary law.[64]

EASTERN REGION

1. The High Court

The High Court was established by the Nigeria (Constitution) Order in Council,[65] and it consists of the Chief Justice and not less than six judges.[66] It is a superior court of record and exercises all the powers (civil and criminal) of the High Court of Justice in England as may be appropriate to the exercise of the said jurisdiction.[67] The jurisdiction of the Court in probate, divorce and matrimonial causes, is in so far as the practice and procedure are concerned, to be exercised by the

/Court

62. Nigeria (Constitution) O-in-C, 1960.
63. H.C.(C.)O., s. 27 (1)-(3).
64. Laws of the Federation of Nigeria (1958 Revision) Cap. 80 s. 16.
65. 5th Schedule Constitution of Eastern Nigeria, 1960 art. 48. See also Eastern Region High Court Law, 1955. E.R. No. 27 of 1955, since amended, for example, by No. 14 of 1960.
66. 5th Schedule, art. 48(2).
67. Eastern Region High Court Law, ss. 10, 11, 12, 13.

Court in conformity with the law and practice for the time being in force in England.[68] Appeals ~~for~~ to the High Court lie both in civil (£50) and criminal (£25 or three months) cases from the decisions of the subordinate courts,[69] and thereafter to the Federal Supreme Court. [70] The High Court has revisional jurisdiction over Magistrates' Courts in respect of criminal proceedings. [71]

2. Magistrates' Courts

A Court is duly constituted when presided over by a Chief Magistrates or Magistrates. Every Magistrate is ex officio a justice of the peace for the Region. Magistrates have civil (highest £500) and criminal (£500 fine or five years imprisonment) jurisdiction;[72] within the limits of their authority a Magistrate is empowered to hear and determine appeals from customary courts or from the decisions of an Assessment Committee. [73] Further appeals lie to the High Court.

3. Customary Courts

These Courts are established by the Minister responsible. [74] The jurisdiction of a Customary Court is

/set

68. E.R.H.C.L., s. 16.
69. Nig. (C.) O-in-C. 5th Sehedule. E. Nigerian Constitution art. 51. To be read with E. Reg. No. 27 of 1955, ss. 34 & 35, and Customary Courts Law, E.R. No. 21 of 1956, s. 69.
70. Nig. (C.) O-in-C, 2nd Schedule art. 110.
71. Magistrates Courts (Amendment) Law. E.R. No. 8 of 1958, s. 2.
72. Magistrates' Courts Law. E.R. No. 10 of 1955, ss. 8, 17. E.R. No. 17 of 1960. 5th Schedule.
73. E.R. No. 10 of 1955, s. 28(a)(b).
74. Customary Courts Law, 1956. E.R. No. 21 of 1956, since amended, e.g. by C.C.(A.)L. E.R. No. 12 of 1957, 31/58,12/60, and 17/60.

set out in the warrant establishing it.[75] There are two grades - "District Court Grade A", and "District Court Grade B". The jurisdiction of a District Court Grade A is as follows:- unlimited jurisdiction in land matters and matrimonial cuases; causes relating to succession and personal suits up to £50.[76] In the case of Grade B Courts the maximum suit value is £25. The maximum in criminal causes is £50 fine or six months imprisonment in the case of a Grade A Court, and £25 fine in the case of a Grade B Court. Jurisdiction is exercised over persons of African descent, provided that their mode of life is that of the general community.[77] Appeals from the decisions of Grade A and B Courts lie to the County Court (if one is established) and thence to the Magistrates' Court, and thereafter to the High Court.[78] At the end of each month every Customary Court must forward to the Customary Courts Adviser a list of all causes decided by that Court for review or revision.[79]

The Laws in Force

The laws comprise items (a), (b), (c), (d) and (g) recorded for Lagos,[80] and Nigerian Ordinances before the /1954

75. Customary Courts Law, 1956, s. 3(4). Note that the expression "customary court" means a County Court and a District Court.
76. See E.R. No. 31 of 1958 and the schedules thereto.
77. C.C.(A.)L. E.R. No. 12 of 1957, s. 3.
78. C.C.L., 1956. s. 60(a)(c).
79. Ibid, s. 56(1).
80. See ante, p. 139

1954 Constitution; Eastern Regional legislation since the 1954 Constitution and statutory instruments made thereunder; Federal legislation applying throughout the Federation, and customary law.[81]

NORTHERN REGION

1. The High Court

The High Court of Northern Nigeria is a superior court of record and consists of the Chief Justice of the Region and not less than six judges.[82] It possesses all the (original) jurisdiction vested in Her Majesty's High Court of Justice in England. It also includes all Her Majesty's criminal jurisdiction exercisable within the Region. Appeals from District Courts and Magistrates' Courts, except appeals involving Muslim matters, lie to the High Court.[83] Appeals from the decisions of the High Court lie to the Federal Supreme Court,[84] except that a decision of the High Court shall be subject to appeal to the Court of Resolution on the ground that the Sharia Court of Appeal and not the High Court had jurisdiction in any particular matter.[85]

81. It includes Islamic law. See ANDERSON, J.N.D. "Customary law and Islamic law in British African territories", in The future of customary law in Africa, 1955, p. 77.
82. Est. by the Nig. (C.) O-in-C, 1960. 3rd Schedule Const. of Northern Nigeria, art. 49. The writer is highly indebted to Mr. S.S. Richardson who corrected the section dealing with the Northern Region.
83. Ibid, art. 52. See also N.R.H.C.L. 1955. N.R. No. 8 of 1955, s. 7, and N.R.H.C.(A.)L., 1960, s. 8.
84. Nig. (C.) O-in-C. 2nd Schedule art. 110. N.R.H.C.L.2/57.
85. N.R.H.C.L., s. 35A inserted by N.R.H.C.L.A. No. 14 of 1960., s. 17.

The High Court has powers of revision in respect of all proceedings in Magistrates' Courts and District Courts.[86]

2. Magistrates' Courts

The Governor has power to appoint Magistrates who are styled Chief Magistrates, and 1st, 2nd and 3rd Grade Magistrates.[87] Magistrates have only criminal jurisdiction and the extent of jurisdiction is as follows:-

Chief Magistrate	- fine up to £500 or imprisonment up to 5 years;
1st Grade Magistrate	- fine up to £200, or imprisonment up to 2 years;
2nd Grade Magistrate	- fine up to £100, or imprisonment up to 1 year;
3rd Grade Magistrate	- fine up to £25, or imprisonment up to 3 months.[88]

3. District Courts

By the District Courts Law (N.R. No. 15 of 1960), the Northern Region is divided into Districts; in each District there is established a District Court, presided over by a District Judge, for the disposal of civil causes and matters. Appeals from the decisions of Magistrates' Courts and District Courts lie to the High Court.[89]

4. Sharia Court of Appeal

This Court consists of a Grand Kadi, a Deputy Grand Kadi and two other judges in the Sharia.[90] The Court has jurisdiction

86. N.R.H.C.L., s. 39.
87. Established by Criminal Procedure Code Law, 1960. N.R. No. 11 of 1960, ss. 4-6.
88. Ibid, s. 16.
89. Ibid, s. 279; District Courts Law No. 15 of 1960, s.70.
90. Sharia Court of Appeal Law, 1960. N.R. No. 16 of 1960, ss. 4(1) and 5.

jurisdiction to hear and determine appeals in respect of regional matters in cases governed by Muslim personal law[91] from any decision of (a) a Grade "A" native court, (b) a Grade "A limited" native court; and (c) a Provincial Court.[92] A limited right of appeal lies to theFederal Supreme Court.

5. Native Courts

Native Courts are established by the President of a Province by warrant.[93] A Provincial Court is established in each Province in accordance with the provisionsof section 3 of the Native Courts Law 1956. A distinction is made between Muslim Native Courts (constituted by an Alkali) and a non-Muslim Court,which consists of head chiefs or chiefs sitting with or without assessors.[94] There are five grades of Native Courts - Grades "A", "A limited", "B", "C", and "D", and their civil and criminal jurisdiction is scaled down accordingly.[95] Appeals from native courts of Grades A and A limited go to the Native Courts Appellate Division of the High Court; appeals involving Muslim personal law go to the Sharia Court of Appeal. Appeals from Grade B, C and D

/courts

91. For definition of Muslim law, see Nig.(C.)O-in-C, 1960 3rd Schedule art. 52(5).
92. Sharia Court of Appeal (~~Amendment~~) Law. S. 11
93. Native Courts Law 1956. N.R. No. 6 of 1956, s. 34; and Nos. 12 of 1957 and 22 of 1958.
94. Native Courts Law 1956, s. 4.
95. See Crim P.C. 1960, s. 394; N.C.L., s. 15, 18; and N.C.(A.)L., 1958, No. 22of 1958. Under the Penal Code Law, 1959, N.R. No. 18 of 1959 and by N.C.(A.)L., 1960, in criminal matters Native Courts are guided by the provisions of the Criminal Procedure Code Law 1960.

courts lie to the Provincial Courts and thereafter to the Native Courts Appellate Division of the High Court or to the Sharia Court of Appeal, wherever appropriate in every case.[96] Powers of revision are vested in a Resident and a Native Courts Adviser.[97]

The Laws in Force

The laws comprise items (a), (b), (c), (d) and (g) as recorded for Lagos, and Nigerian Ordinances before the 1954 Constitution; Northern Region legislation since 1955 and statutory instruments made thereunder, federal legislation applying to Nigeria; customary law and Islamic law.

WESTERN REGION

1. The High Court

The High Court was established by the Nigeria (Const.) Order in Council 1960. [98] It is a superior court of record and consists of the Chief Justice of the Region and not less than six judges.[99] It possesses all the jurisdiction - civil and criminal - powers and authorities which are vested in Her Majesty's High Court of Justice in England.[1] The jurisdiction of the High Court in relation to probate, divorce and matrimonial causes, is in so far as the practice and

/procedure

96. N.C.L. 1956, as amended by the N.C.(A.)L. 1960. N.R. No. 10 of 1960.
97. N.C.L., 1956, ss. 55(2) and (5).
98. 4th Schedule Constitution of Western Nigeria ~~art~~ art. s. 48. See also W.R.H.C.L. 1955, and Nos. 7 of 1955, 11 of 1959, and 27 of 1957 (4th Schedule).
99. Nig. (C.) O-in-C. 4th Schedule. art. 48(2).
1. W.R.H.L. No. 3 of 1955, ss. 11 and 12.

procedure are concerned, to be exercised by the Court in conformity with the law and practice for the time being in force in England.[2] It has appellate jurisdiction in respect of appeals both civil and criminal from the Magistrates' Courts,[3] a Grade A Customary Court, and a Customary Court of Appeal.[4] Appeals from the High Court lie to the Federal Supreme Court.[5] The Chief Justice may require specified magistrates to forward to him, or to another judge, a monthly list of all criminal cases decided by such magistrates.[6]

2. Magistrates' Courts

Magistrates are graded into Chief Magistrates, Senior Magistrates and Magistrates.[7] They are assigned to specific districts.[8] In civil cases magistrates have jurisdiction (1) over all personal suits up to £500; £200; and £100, according to their grades; (2) landlord and tenant cases; (3) to appoint guardians, and (4) to grant injunctions. In criminal cases magistrates have power to try summary offences and can award the following penalties according to grades:- £500 fine or 5 years imprisonment: £200 or 2 years: £100 or 1 year.[9] Magistrates' Courts have appellate jurisdiction

/over

2. W.R.H.C.L. No. 3 of 1955, s. 12(1).
3. Nig. (Const) O-in-C. 4th Schedule art. 51. In civil cases appealable amount is £50 or more. In criminal, £85 fine or 3 months sentence or more. See also W.R.H.C.L. ss. 24 & 25.
4. Customary Courts Law, 1957, s. 48.
5. Nig. (C.) O-in-C, 2nd Schedule. art. 110.
6. Magistrates Courts (W.R.) Law 1954. No. 5 of 1955, s. 37.
7. M.C.(W.R.)(A.) L. No. 12 of 1959, s. 3.
8. M.C.(W.R.).L. s. 18.
9. Ibid.

over customary courts.[10] A magistrate may be appointed by the Minister to act as a "supervising authority" to review decisions of the customary courts.[11] Appeals from Magistrates' Courts lie to the High Court.[12]

3. Customary Courts

Established by the Customary Courts Law, 1957, since amended.[13] The Minister may delegate the power of appointment and of dismissal of members to the Local Government Board. Customary Courts have jurisdiction over all Nigerians.[14] There are 4 grades, namely: Grades A, B, C and D, and the jurisdiction, both civil and criminal, of each is set out in the Schedule.[15] Grade A Courts are presided over by Legal Practitioners and counsel are allowed to appear before the Courts.[16] In civil cases customary courts usually administer customary law. In criminal matters the courts have no jurisdiction in the following cases - homicide, treason, sedition, rape, procuration, defilement of girls and any other capital offences.[17] Appeals from customary courts of Grades B, C or D lie to the Magistrates' Court and thereafter to the High Court.[18] Appeals from the decisions of a grade A Customary Court lie to the High Court[19]

10. M.C.(W.R.)L. s. 23.
11. Ibid, s. 42.
12. Nig. (C.) O-in-C, 4th Schedule art. 51; M.C.(W.R.) L. s. 41.
13. W.R. No. 26 of 1957, amended by, e.g. C.C.(A.) L. Nos. 3 of 1958, 11 of 1958 and 34 of 1959.
14. C.C.L. 1957, s. 17.
15. Ibid, s. 18.
16. C.C.(A.)L.W.R. No. 34 of 1959, s. 4 replacing s. 6(1) of C.C.L., 1957.
17. Ibid, s. 9, which replaces s. 24 of C.C.L. 1957.
18. C.C.(A.) L. (W.R.) No. 3 of 1958, s. 2./19. Ibid, s. 3.

The Laws in Force

They include items (a), (b) and (c) recorded for Lagos and (i) Nigerian Ordinances before the 1954 Constitution and statutory instruments made thereunder;

(ii) Federal legislation since the 1954 Constitution applying throughout the Federation;

(iii) Western Region legislation and statutory instruments made thereunder;

(iv) "From and after the commencement of this law and subject to the provisions of any written law, the common law of England, and the doctrines of Equity observed by Her Majesty's High Court of Justice in England shall be in force throughout the Region." 20

> Subject to the provisions of this Law no Imperial Act hitherto in force within the Region shall have any force or effect therein provided that ... this section shall not revive anything not in force ... or affect the previous operation of any Imperial Act to which this section applies, or anything done or suffered under such Act ..." 21.

(e) Customary law.

SIERRA LEONE

1. The Privy Council

The Judicial Committee of the Privy Council is the final Court of Appeal. Appeals lie from the decisions of the Court of Appeal to Her Majesty in Council both as of right and with the leave of the Court of Appeal.[22]

20. Law of England (Application) Law. W.R. No. 9 of 1959, s.3.
21. Ibid, s. 18.
22. The Sierra Leone (Constitution) Order in Council. S.I. 1961/741. art. 84; The Sierra Leone (Procedure in Appeals to Privy Council) Order in Council 1961. S.I. 1961/742.

2. Court of Appeal.

This Court was established by the Constitution, and it consists of a President and the persons for the time being holding or acting in the offices of theChief Justice and the Puisne Judges of the Supreme Court, who shall be judges of the Court of Appeal, andother judges as may be prescribed by the Sierra Leone Parliament.[23] It shall have such jurisdiction and powers as may be conferred on it by the Constitution.[24]

3. The Supreme Court

The Supreme Court is a superior court of record and comprises the Chief Justice and such number of Puisne Judges as may be prescribed by Parliament.[25] It possesses and exercises all the powers vested in Her Majesty's High Court of Justice in England.[26] It has no jurisdiction in regard to questions arising exclusively between natives which (1) involve title to land situated within the Protectorate; (2) relate to customary marriage and divorce; or (3) where the matter in dispute is less than £50, or (4) relate to the administration of estates of deceased persons who are natives and such estates lie within the jurisdiction of any

/native

23. S.I. 1961/741. art. 79(2).
24. Ibid, art. 79(1).
25. S.I. 1961/741. 2nd Schedule art. 75(1). See also Courts Ordinance. 1960 Revision. Cap. 7.
26. Courts Ordinance, ss. 13, 15, 17 and 18.

native court.[27] Appeals from the Magistrates' Court lie to the Supreme Court and thereafter to the Court of Appeal.[28]

4. Magistrates' Courts

Magistrates' Courts are duly constituted when presided over by a Police Magistrate, a Provincial or District Commissioner.[29] Every Magistrate's Court has jurisdiction to hear and determine all civil and criminal matters arising within the district, or transferred to it by the Supreme Court.[30] The Criminal Procedure Ordinance, Cap. 39 applies to the Magistrates' Courts in the exercise of their criminal jurisdiction.[31] Appeals from these Courts lie to the Supreme Court.[32]

5. Native Courts

These Courts operate only in the Protectorate as there are no such Courts in the former Colony. Native Courts are established in each district of the Protectorate. There are:-[33]

(1) The Native Appeal Courts, which comprise (a) the Chiefdom Court, which hears and determines appeals from a /native

27. Ibid, s. 11. Unlike the case in Ghana, the Supreme Court has jurisdiction to hear an action on the validity of a Chief's election in the Protectorate - Kanu & ors. v. Sesay (1959) 16 WACA 86.
28. Courts (Appeals) Ord. No. 18 of 1960, ss. 3 & 4.
29. C.O. Cap. 7, s. 28.
30. Ibid, s. 30.
31. Crim. Proced. Ord. (1960 Rev) Cap. 39.
32. No. 18 of 1960. Part II.
33. See Native Courts Ordinance, Laws of Sierra Leone, 1960 Revision, Cap. 8.

native court, and (b) Group Native Appeal Courts, which can be established for two or more Chiefdoms.

(2) The Court of the Native Chiefs, i.e. native courts.

(3) Combined Courts, which can be established in the area of any Paramount Chief in whose Chiefdom a number of "non-natives" have settled.

Legal practitioners are not allowed to appear before any of these Courts.[34] There is no right of appeal from a native court in civil cases, but the District Commissioner has power to review them.[35] In criminal cases provision is made for all sentences exceeding 14 days imprisonment to be reported to the District Commissioner by a method which is to operate as an "appeal".

The Laws in Force

(a) Acts of the United Kingdom Parliament which applied generally to the British Dominions.

(b) Acts of the United Kingdom Parliament declared to extend to Sierra Leone or adopted by the territory, e.g. The Settled Land Act, 1884.

(c) The Constitution and other Orders in Council.

(d) The common law, the doctrines of equity, and the statutes of general application in force in England on the 1st day of /January

34. Native Courts Ordinance, s. 6.

35. Ibid, s. 27(2).

January, 1880, shall be in force in Sierra Leone.[36]

(e) Local legislation and Statutory Instruments made thereunder.[37]

(f) Customary law and Muslim law.

THE GAMBIA

The Territory consists of the Colony and the Protectorate. A description of the legal and judicial systems of the two parts of the Gambia must distinguish between the Colony system and the Protectorate system. The Courts comprise:-

1. The Privy Council

Appeals lie from the decisions of the Gambia Court of Appeal to Her Majesty in Council both as of right and with the leave of the Court of Appeal.[38]

2. The Gambia Court of Appeal

Established by the Gambia Court of Appeal Order in Council, 1961,[39] and consists of a President and a prescribed number of judges. It has appellate jurisdiction both in civil and criminal cases over decisions of the Supreme

/Court

36. Law of England (Application) Ordinance, Cap. 3, s. 2.
37. E.g. there are local enactments relating to matrimonial causes.
38. S.I. 1961/743, art. 3.
39. Ibid.

Court or the High Court.[40] An appeal lies to the Court of Appeal from any order of the Chief Justice suspending a barrister or solicitor of the Supreme Court from practice or striking their names off the Roll.[41]

THE COLONY

In the Colony the hierarchy of Courts is as follows:-

3. The Supreme Court, constituted by the Chief Justice. This Court exercises all the jurisdiction of a High Court. It has appellate jurisdiction over Subordinate Courts.[42] Appeals from there lie to the Gambia Court of Appeal.

4. The Bathurst Magistrates' Court. This is a court of summary jurisdiction. Appeals lie to the Supreme Court.[43]

5. The Kombo St. Mary Magistrates' Court, as (4).[44]

6. The Court of Requests. This only has jurisdiction in civil causes to the value of £50. Appeals lie to the Supreme Court.[45]

7. Juvenile Courts.[46]

8. The Mohammedan Court, established at Bathurst by the

/Mohammedan

40. Gambia Court of Appeal Ordinance 1961. No. 5 of 1961. Parts I & II.
41. Ibid, s. 14.
42. Supreme Court Ordinance. Cap. 5, ss. 14, 15, 17, 33,64 (Laws of Gambia, 1955).
43. Laws of Gambia, 1955. Bathurst Magistrates' Court Ordinance, Cap. 8.
44. Ibid. Kombo St. Mary's District Court Ordinance, C.103.
45. Court of Requests Ordinance. Cap. 9.
46. Children and Young Persons Ordinance. Cap. 20. s. 6(1).

Mohammedan Law Recognition Ordinance.[47] It is constituted by a Kadi with original jurisdiction only in Muslim matters.[48]

THE PROTECTORATE

The Protectorate consists of strips of territory on either bank of the River Gambia. The judicial system comprises:-

1. The High Court, which in respect of matters occurring in the Protectorate, has the same jurisdiction, civil and criminal, as is exercised by the Supreme Court in respect of matters occurring in the Colony.[49] It has appellate jurisdiction and powers of revision over decisions of subordinate courts.[50] Appeals from the High Court lie to the Gambia Court of Appeal.[51]

2. Subordinate Courts are established in every division of the Protectorate, each of which is presided over either by, for example, the Senior Commissioner, a 1st Class Magistrate or a 2nd Class Magistrate. The Courts have only original jurisdiction in civil and criminal matters.[52]

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47. No. 10 of 1905, Cap. 31.
48. Mohammedan Law Recognition Ordinance. Cap. 31, s. 6.
49. Protectorate Courts Ordinance. Cap. 7; P.C.(A.) O., 1958. s. 3.
50. Protectorate Courts Ordinance, ss. 20 & 26; P.C.(A.) O., No. 7 of 1957, s. 4.
51. S.I. 1961/743 at art. 3. Gambia Court of Appeal Ordinance, No. 5 of 1961, s. 3.
52. P.C.O. Cap. 7. ss. 11 and 21.

3. District Tribunals, which consist of a Chief and other members appointed in the warrant establishing the Courts.[53] They have original jurisdiction only in civil and criminal matters involving "natives" (a member of an African race)[54] resident in the area. There are 2 grades - Group Tribunals, with higher jurisdiction, [55] and District Tribunals. Their decisions both in civil and criminal matters are subject to review by the Commissioner of that Division.[56] Appeals from the District Tribunals or the Commissioner lie to the High Court.[57]

The Laws in Force

(a) Acts of the United Kingdom Parliament which apply generally to British Dominions.

(b) Acts of the United Kingdom Parliament declared to extend to the Territory.

(c) British Orders in Council applying thereto.

(d) The Supreme Court is empowered to administer "the common law, the doctrines of equity and the statutes of general application in force in England on the 1st November, 1888.[58]

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53. District Tribunals Ordinance. Cap. 49, s. 3; District Tribunal Rules, Cap. 49, s. 4. Subsidiary Leg. of Gambia, p. 446.
54. D.T.O., s. 7.
55. In criminal cases the maximum for Group Tribunals is £25 or 12 months; the civil maximum is £50; in the case of District Tribunals the maximum jurisdiction in criminal cases is £10 or 6 months; in civil cases - £25. D.T.Rules, s. 6
56. D.T.O., s. 23.
57. D.T. (A.) O. No. 13 of 1958, s. 5.
58. Law of England (Application) Ordinance, Cap. 3. s. 2.

(e) The law and practice for the time being in force in England in respect of probate, divorce and matrimonial causes.[59]

(f) Local legislation and Statutory Instruments made thereunder.

(g) Customary law and Mohammedan law.

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59. Supreme Court Ordinance. Cap. 5, s. 17.

PART II

INTRODUCTION AND RECEPTION OF ENGLISH LAW

Chapter Three

INTRODUCTION

"One curious result of our scrupulous respect for the status quo is that in our various colonial possessions we preserve systems of law which have elsewhere become extinct."[1]

Though never freely adopted, English law has, as a result of settlement and colonisation, been extended over a large section of the world.[2] In many parts of Africa and in India English law has been transplanted into and is developing within a cultural society entirely different from the society which created that law. Yet until recently, very little attention had been paid in England to ascertaining the effect of such transplantation.[3]

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1. BERTRAM, A. The Colonial service, p. 145.
2. HAMSON, C.J. Professor of Comparative Law, Cambridge - "Importing legal systems, The Times August 31, 1955. See also the correspondence on the same topic by Professor J.N.D. Anderson, Sept. 3, 1955, Mr. E.H. Collier, Sept. 7, and Dr. A.N. Allott, Sept. 10, 1955.
3. At the eleventh hour attempts are being made to cure this neglect. Sweet and Maxwell have begun a series entitled "The British Commonwealth, the development of its laws and constitutions" under the general editorship of Professor G.W. Keeton. Vol. 10 written by Dr. T.O. ELIAS deals with Ghana and Sierra Leone. In 1959, the Restatement of African Project was established at the School of Oriental & African Studies financed by the Nuffield Foundation, under the general direction of Dr. A.N. Allott, Reader in African Law, University of London. In December 1959 a full-scale conference attended by judges, attorneys-general and legal experts was held in London to discuss the future of law in Africa. The British Institute of International and Comparative Law, under the chairmanship of Lord Denning,

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In the Falconer Lectures, delivered at the University of Toronto in 1958, Viscount Kilmuir, the Lord Chancellor of Great Britain, regretted that "so little has been written on the history of the common law in its travels overseas". As a result of this apathy, certain rules and institutions not even suitable for England were freely exported to Africa.[4] In spite of these blemishes, there is no doubt that that the adoption of the English system of law has created a link between the United Kingdom and West Africa which is of value to both sides.[5]

English law consists of three main elements, namely, common law, equity and statutes. The introduction and adaptation of each of these elements will be considered in subsequent chapters. At this stage, it is only necessary to recall that English law, as known to English lawyers today, is far from identical to that received in West Africa. The extent to which English law was introduced into any particular British dependency varied according to the manner in which that territory was acquired.

3. (cont.) ... are making a valuable contribution. Other law conferences have been held in Lagos and Accra. In 1959, Professor A.L. Goodhart edited a series of broadcast talks under the title "The migration of the common law", now published by Sweet and Maxwell, 1960.
4. Sir Kenneth Roberts-Wray, G.C.M.G., Q.C: formerly Legal Adviser, Colonial Office and Commonwealth Relations Office - "The adaptation of imported law in Africa", (1960) 4 J.A.L. 66-78.
5. By "West Africa" is meant Ghana, Nigeria, Sierra Leone and the Gambia.

The British dependencies fell into four main categories - colonies, protectorates, protected states and trust territories. Not all of the dependent territories were acquired as a deliberate act of policy by the British Government. Those that were are generally those which are now called Crown Colonies - a Colony being by definition a territory which is part of the Queen's dominions, either by conquest, settlement, cession or annexation, and over which she exercises absolute sovereignty. Many dependencies, particularly those in Africa, accrued more often by chance, or through the initiative of an individual or a trading company.[6]

A. SETTLEMENT

It is stated in Halsbury's Laws of England[7] that there are three forms of settlements. First, occupation of a territory may be authorised by the Crown and settlers introduced. Secondly, the Crown may recognise as British territory, settlements made by British subjects without previous authority. Thirdly, uninhabited islands or areas in the Arctic or Antarctic may be formally annexed.

6. "Forty territories", 1st leading article, The Times, 30th December, 1959.

7. 3rd ed. Vol. 5. "Commonwealth and dependencies" by S.A. de Smith, p. 544.

Gambia, the oldest British dependency in tropical Africa,[8] is listed as one acquired by settlement, although views differ as to the actual date.[9] Even if we accept the version of the Under-Secretary of the Colonial Office that Bathurst, the capital of Gambia, was first settled in 1816 by English merchants expelled by the French from Senegal,[10] we begin to wonder what sort of settlement it was, for according to the 1826 Census that territory comprised only 28 European males and 2 females![11]

Sierra Leone, then meaning the peninsular of Sierra Leone, is listed as having been acquired by settlement in 1787. The "settlers" consisted of about 400 negroes and "sixty whites chiefly women of the lowest sort in ill-health and of bad character".[12]

As far as the Gold Coast was concerned, officials and text-writers seem to have been in great doubt as to what category she belonged to. In official returns to the

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8. "Gambia" by MAXWELL, J.R. Chief Magistrate (1896-7) 1 J.Comp. Leg. & Int. Law, 378.
9. See ante, p.3
10. Report from the Select Committee on Africa (Western Coast) Par. Pap. Session 1865. Vol. 5, p. 20 per T.F. ELIOT.
11. Par. Pap. Session 1826-7, Vol. 7, 385.
12. Par. Pap. Session 1845, Vol. 31, p. 32.

British Parliament in 1845, the Gold Coast is reported to have been acquired in 1618 under the category of "African forts".[13] Professor S.A. de Smith, editor of the relevant title in the third edition of Halsbury, lists the Gold Coast as having been acquired by settlement.[14] In the same book he admits that it is uncertain if the Gold Coast can be deemed anything but a settled colony, like the Gambia and Sierra Leone.[15] In the second edition of Halsbury's Professor Berriddle Keith, stated that "the Gold Coast, Sierra Leone, and even the Gambia may fall" into the category of a settlement.[16] On the other hand, in the same section in the first edition (of which Sir Charles Tarring was one of the joint authors) the Gold Coast is mentioned under the heading of conquered and ceded colonies.[17]

If these territories, in spite of the real facts, can be described as having been acquired by "settlement", then it is obvious that there is a remarkable difference which exists between the type of

13. Par. Pap. Session 1845, Vol. 31 p. 32.
14. Vol. 5, p. 544.
15. Ibid, p. 694.
16. 2nd ed, Vol. 11, p. 10. See R. V. Thompson, (1944) 10 W.A.C.A. at p. 201, where KINGDON, C.J. also tried very ably to ascertain the true position of the Gold Coast. According to him, there could be no doubt that "the Gold Coast Colony had its origin in the settlement of British subjects on the West Coast of Africa, and the original settlements formed the nucleus round which what is now the Gold Coast Colony has grown".
17. 1st. ed. Vol. 10, pp. 566-7.

of settlement made by the New England settlers in America and that made by the expelled merchants in the Gambia. The former group had animus manendi or animus non revertendi The same cannot be said of the latter group who were a handful of business people who went out to West Africa for the purpose of trade.

The phrase "acquisition by settlement" meant something quite different in the early days of British colonisation. "The early colonies", says Lewis,[18] "were in practice nearly independent of the mother country except as to their external commercial relations, and there was scarcely any interference on the part of England with the ordinary management of their internal affairs. Accordingly, there was at that time no separate department of the English government charged exclusively with the superintendence of the government of the dependencies; and the business connected them, being chiefly commercial, as assigned first to a board, and afterwards for a short interval, to a permanent committee of the Privy Council, which had the management of the officers of trade to the "Plantations"." Lucas also emphasises the point that the mainspring of early British colonisation was the reproduction of Great Britain overseas and not the formation of dependencies of the British government; and this principle was at times boldly

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18. LEWIS, Sir G.C. An essay on the government of dependencies. (Originally published in 1841; edited with an introduction by C.P. Lucas, 1891, p. 159.)

and well asserted by the colonists.[19]

There is no doubt that in the early days, the word "settlement" was used to describe the position created when Englishmen settled abroad in such numbers as to form the bulk of the population, such as the New England states.

> "But an English dependency, in which the bulk of the cultivators or proprietors of the soil are not Englishmen, and in which the bulk of the English residents reside there for purposes of government or trade, cannot, in strictness, be called an English colony, although its government may be under the Secretary of State for the Colonial Department".[20]

A settlement in the early days corresponded in meaning, therefore, to that given in Dr. Johnson's Dictionary - "A body of people drawn from the mother country to inhabit some distant place".[21]

The point being made here is that the term "acquisition by settlement", when applied to the former British Colonies peopled by Englishmen, has not the same meaning when applied to former British West African territories. It was one of the features of early colonisation that, apart from statute law, no legislature could be established in a settled colony by the Crown, except one which consisted of a representative body having powers of taxation. Again, the Crown could not legislate for the Colonies by Orders in Council.[22]

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19. Ibid, p. xxx.
20. Lewis, op cit. p. 175.
21. Lewis, op cit, p. 172.
22. JENKYNS, Sir H. British rule and jurisdiction beyond the seas, p. 5.

When colonisation proper spread throughout Africa it was found that it was "unwise and unsuitable" to allow a body of subject or "uncivilised population" to enjoy the ordinary representative institutions, and so the Sovereign in Council was given power to legislate for the new type of settlements. First, an Act of 1843,[23] was passed "to enable Her Majesty to provide for the government of Her Settlements on the coast of Africa and in the Falkland Islands". After reciting the main purpose very broadly in the preamble the Act empowered the Queen to make laws for such territories, and to constitute courts. It was also lawful for the Queen to delegate her powers and authorities to resident officers.

Later this Act was extended by an Act of 1860,[24] to other British possessions "not having been acquired by cession or conquest nor (except in virtue of this Act) being within the jurisdiction of the legislative authority of any of Her Majesty's possessions abroad."

Owing to some doubts as to which colonies were subject to these Acts, both Acts were repealed and superseded by the British Settlements Act, 1887.[25] The most notable change was contained in section 6, in which a British Settlement was defined as meaning "any British possession, which has not been acquired by cession or conquest, and is not for the time being within the jurisdiction of the Legislature, constituted otherwise than by /virtue

23. 6 & 7 Vict. Cap. 13.
24. 23 & 24 Vict. Cap. 121.
25. 50 & 51 Vict. Cap. 54.

virtue of this Act or of any Act repealed by this Act, of any British possession."

B. CESSION

This may take the form of a treaty made between states recognised by International law, as was the case when Gibraltar was acquired from Spain, or by treaty with "native chiefs". A great portion of the British dependencies in West Africa was acquired by treaties of cession.[26] There was the famous treaty in 1861 between Commander Bedinfield and the British Acting Consul on behalf of the Queen of Great Britain on the one hand, and Docemo, King of Lagos, on the part of himself and the chiefs on the other hand.[27] Again, the territory of "British Sherbro" was ceded to the British Government on 9th November, 1861, by the local chiefs.[28] In the words of the Under-Secretary of the Colonial Office, every subsequent annexation to the Colony of Sierra Leone was made by treaties of cession.[29]

26. "There were many variations of such treaties. Many were meaningless scraps of paper signed by Africans masquerading as chiefs, or who did not know what they were doing, in exchange for a bottle or two of spirits. But not all were such gin-bottle treaties, and not all of the gin-bottle treaties were ineffective. Often they did not commit either party to any great extent, though they were enough, and this was their point, to demonstrate that Britain's interest in the area they covered was more widespread and more potent than that of any other power." "Forty treaties", 1st leading article, The Times, 30 December 1959.

27. As to the interpretation of that treaty, see Oyekan & Ors. v. Adele (1957) 2 All E.R. 785, P.C. See also Amodu Tijani v. Sec. Southern Province (1915) 3 N.L.R. 21; Onisiwo v. A-G for S. Nigeria (1912) 2 N.L.R. 79. As to the title of the British Crown in the case of cession, see A-G v. John Holt & Co. Ltd. (1915) A.C. 599 at p. 608.

28. Par. Pap. Papers relating to Her Majesty's possessions in West Africa. Session 1875. Vol. 52, p. 805.

29. Sel. Cttee. Rep. on Africa (W. Coast) 1865, Vol. 5, 19.

However, it appears that neither International law nor English law had much respect for such treaties. According to Oppenheim,[30] "cessions of territory made to private persons and to corporations by native tribes or by States outside the dominion of the Law of Nations do not fall within the sphere of International Law. Neither do cessions of territory by native tribes made to States which are members of the international community."

With the greatest respect, it is submitted that this rule of International law is open to question, for, if the native states were not states to be reckoned with, why could not the acquiring state have acquired them by occupation on the ground that they were terrae nullius?

The mere fact that the British Government, or their agents, were sometimes particular about obtaining the consent of the appropriate ruler and his council, shows that the treaties were intended to command the respect of both parties and to have a binding force.[31]

30. OPPENHEIM, L. International Law, 8th ed. p. 547.

31. "Great Britain came very near to losing her rights of priority to certain territory on the Niger through making the treaty with a subordinate chief." The French refused to recognise that treaty. Hence followed a 'race' to a more important chief at Nikki. The determination with which the British joined in the race shows that they recognised the insufficiency of the Boussa treaty, and it was only by reaching Nikki first, and concluding another treaty, that they were able to retain the region in question." LINDLEY, M.F. The acquisition and government of backward territory in International Law, p. 170. The passage, it is submitted, makes the rule of International law very doubtful.

C. CONQUEST

There are examples of territories in West Africa which were acquired by conquest. Ashanti, a region of Ghana, is one; and some parts of Northern Nigeria others.[32]

D. PROTECTORATES AND PROTECTED STATES

The acquisition of a protectorate was often effected by a "formal" treaty with local chiefs. Thus, in the case of the former Niger territories, it appears that in 1884 37 treaties were concluded by Consul Hewitt with the various "tribes" on or near the rivers Niger and Benue, by which the Queen of Great Britain and Ireland undertook to extend to the chiefs "and to the territory under their authority and jurisdiction her gracious favour and protection"; the chiefs, on their part, promising "to refrain from entering into any correspondence, agreement, or treaty with any foreign nation or power, except with the knowledge and sanction of Her Britannic Majesty's Government".[33]

In some parts of West Africa, the protectorate was assumed "with the acquiescence of the tribes" rather than by formal agreement.[34] In the case of "protected states" there was a definite agreement between the ruler of the state and the Crown. There is very little difference

/between

32. Halsbury's Laws of England, 3rd ed. Vol. 5, p. 544.
33. HALL, W.E. A treatise on the foreign jurisdiction of the British Crown, 1894. p. 217.
34. Halsbury, op cit, p. 545.

between the two types of protectorate, except that, in general, protectorates enjoy greater autonomy in the management of their internal affairs in the name of the local ruler, who is recognised in English courts as being entitled to sovereign immunity.[35] Examples of protected states are lacking on the West Coast of Africa.

> "A British protectorate" says Jenkyns, "is a country which is not within the British dominions, but as regards its foreign relation is under the exclusive control of the King, so that its government cannot hold direct communication with any other foreign power, nor a foreign power with that government."[36]

Therefore, at common law the Crown had no power of territorial legislation outside the dominions of the Crown.[37] The statutory justification for the British Crown to assume jurisdiction over protectorates in West Africa and to apply English law therein, emanates from the provisions of the Foreign Jurisdiction Act of 1843. This Act was passed on the recommendation of Mr. Hope-Scott, Q.C., primarily to solve the difficult questions which arose as a result of the abolition of the Levant Company in 1825.

One of the recommendations of Mr. Hope-Scott was that "great latitude should be allowed by the Act in its description of the means by which the jurisdiction has been, or may hereafter be acquired, and of its extent and nature".[38]

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35. Halsbury's Laws of England. Vol. 5, p. 435.
36. JENKYNS. British rule and jurisdiction, p. 165. Sobhuza II v. Miller (1926) A.C. 518 at p522.
37. The King v. The Earl of Crewe, ex parte Segkome.
38. JENKYNS, Ibid, appendix VI.

Hence, the general terms stipulated in its preamble:

> "Whereas by treaty, capitulation, grant, usage, sufferance, and other lawful means Her Majesty hath power and jurisdiction within divers countries and places out of Her Majesty's dominions: and whereas doubts have arisen how far the exercise of such power and jurisdiction is controlled by and dependent on the laws and customs of this realm, and it is expedient that such doubts should be removed."

Although West Africa was not specifically mentioned, yet by virtue of the wide terms of the provisions in the preamble, the relevant territories in West Africa were by implication within the ambit of the Act.

The Act of 1843 and all the amending Acts were consolidated in the Foreign Jurisdiction Act of 1890-1913.[39] By section 1, it is provided that the jurisdiction held by the Crown shall be enjoyed "in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory". The meaning of this section has been a subject of judicial interpretation. In Hall's opinion,[40] "... this language does not assimilate the jurisdiction exercised in a foreign country, either in nature or degree, to that which belongs to the Crown in a conquered territory. Its object is simply to provide that such jurisdiction as may have been acquired by express consent or sufferance of the foreign state shall be exercised by the Crown precisely as if it were exercised by sole virtue of the prerogative."

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39. 53 & 54 Vict. Cap. 37; 3 & 4 Geo. 5. Cap. 16. By s.2 of the Foreign Jurisdiction Act, 1913, both Acts may be cited as the Foreign Jurisdiction Act, 1890-1913.

40. HALL, W.E. The foreign powers and jurisdiction of the British Crown, p. 11.

However, in Sobhuza II v. Miller, [41] a case relating to the grant of a writ of habeas corpus in the protectorate of Swaziland, Viscount HALDANE, delivering the advice of the Judicial Committee of the Privy Council, said:

> "The Foreign Jurisdiction Act thus appears to make the jurisdiction acquired by the Crown in a protectorate country indistinguishable in legal effect from what might be acquired by conquest. It is a statute that appears to be concerned with definitions and secondary consequences rather than with new principles."

In another context his Lordship observed that "The Crown could not, excepting by statute, deprive itself of freedom to make Orders in Council, even when these were inconsistent with previous Orders." [42]

The effect of the observations made by the noble lord would appear to be that the jurisdiction can be exercised to the fullest extent, even if the treaty made between a local chief and a representative of the British Crown restricts it

The theory that the jurisdiction of the British Crown in a protectorate is indistinguishable in legal effect cannot be accepted as a fait accompli, for the meaning of the term "protectorate" is indefinite and variable. Before any view is expressed on its classification, the protectorate in question must be critically examined. If, upon a proper investigation of the facts it appears that the internal governance of the protectorate is in legal effect

/indistinguishable

41. [1926] A.C. 518 at 522.

42. Sobhuza v. Miller at p. 528.

indistinguishable from that of a British colony acquired by conquest,[43] then section 1 of the Foreign Jurisdiction Act can be applied in its entirety.

For the purpose of the exercise of the internal sovereignty by the British Crown under the Foreign Jurisdiction Act in protectorates, special Orders were made, in which powers were given to the colonial legislatures in the then Gold Coast, Lagos, Gambia and Sierra Leone (subject to disallowance) to legislate for giving effect to all jurisdiction of theCrown acquired in the adjoining territories.[44]

Thus, in 1956, a British Order in Council was made to vest jurisdiction over "the protected territories on the Gold Coast" on the courts of justice established "within Her Majesty's Forts and Settlements on the Gold Coast."[45]

E. TRUST TERRITORIES

Trust territories, formerly termed mandated territorie like protectorates are not British territories. Countries like the Cameroons and Togoland were acquired by the British Government under the terms of the peace treaty with /Germany

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43. Ex parte Mwenya (1959) 3 W.L.R. 767 at 783.
44. See., e.g. St.R.& O. Revised Vol. III, Lagos, Dec. 1887, p. 523. Gambia, Ditto 1893, Vol. 5 ("Foreign Jurisdiction", p. 143); Sierra Leone, Ibid, 1895, Vol. 5, ("Foreign Jurisdiction", p. 165).
45. MONTAGU, A. Ordinances, etc., of Gold Coast, 1852-70, p. 170; [redacted].

Germany after the First World War. In 1945 they were placed under the international trusteeship system in accordance with the provisions of the United Nations Charter.[46]

THE RECEPTION OF ENGLISH LAW

The extent to which English law was introduced depended on whether such British dependency was acquired by settlement or conquest or cession. The manner in which the distinction is drawn appears to depend on the existence at the time of acquisition of a lex loci. In Freeman v. Fairlie,[47] the Master in his report said:

> "I apprehend the true general distinction to be in effect between countries in which there are not, and countries in which there are, at the time of their acquisition, any existing civil institutions and laws; it being in the first of those cases, a matter of necessity that the British settlers should use their native laws, as having no others to resort to; whereas, in the other case, there is an established lex loci, which it might be highly inconvenient all at once to abrogate; and therefore, it remains till changed by the deliberative wisdom of the new legislative power. In the former case, also, there are not, but in the latter case there are, new subjects to be governed, ignorant of the English laws, and unprepared, perhaps in civil and political character, to receive them. The reason why the rules are laid down in Books of authority, with reference to the distinction between new-discovered countries on the one hand, and ceded or conquered countries on the other, may be found, I conceive, in the fact that this distinction had always, or almost always, practically corresponded with that, between the absence and the existence of a lex loci, by which the British settlers /might

46. Halsbury, Vol. 5, pp. 435 & 546. See also Cmd. 7082-3; [redacted] and The Mandated & Trust Territories Act (1947) 11 & 12 Geo 6. C[redacted]. 8.
47. (1828) 1 Moo. Ind. App. 324.

> might, without inconvenience, for a time, be governed; for the powers from whom we had wrested colonies by conquest, or had obtained them by treaties of cession, had ordinarily, if not always, been civilised and Christian states, whose institutions, therefore, were not wholly dissimilar to our own."

Judging by the overall effect of the passage, the term lex loci would appear to refer to an established system of law of the European type. The learned author of Halsbury's Laws of England,[48] relying on the judgment of Lord WATSON in Cooper v. Stuart,[49] restated the principle in these words: "There is an essential difference between a possession acquired by conquest or cession, in which an established system of law of European type exists, and one acquired by the settlement of British subjects, which is unoccupied, or occupied only by undivilized inhabitants, and therefore without an established system."

Thus, generally, a distinction is drawn between "settled colonies" and "conquered or ceded colonies".

F. THE LAW IN SETTLED COLONIES

The case-law under this head clearly indicates that there are at least two types of settled colonies. The /first

48. Vol. 5, p. 691.

49. (1889) 14 App. Cas. 286 at 291. See also Lyons v. E.I. Co. (1836) 1 Moo. P.C.C. 272, applied in Yeap Chea Neo v. Ong Cheng Neo (1875) L.R.: 6 P.C. 381; Isaac Penhas v. Tan Soo Eng [1953] A.C. 304; Leong & anor v. Lim Beng Chye [1955] A.C. 648.

first type comprises the early colonies, which were populated by a bulk of Englishmen, such as the New England states in America. The second type consists of colonies which were actually held in subjection and governed by the British Settlement Act.

(1) Type I

It has been a time-honoured principle of British colonisation that Englishmen, who went out to settle in a new country took their rights of British citizenship and the laws of their mother country with them. According to the Master of the Rolls,[50] it had been decided by the Privy Council that "if there be a new and uninhabited[51] country found out by English subjects, as the law is the birthright of every subject, so wherever they go, they carry their law with them, and therefore such new found country is to be governed by the laws of England." [52]

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50. Anon. (1722) 2 P. Wms. 75.
51. It is arguable whether the countries concerned were really uninhabited.
52. But note Campbell v. Hall (1774) 20 State Tr. Cal.239 at 322, where MANSFIELD, L.C.J. said: "An Englishman in Minorca or the Isle of Man, or the Plantations, has no distinct right from the natives while he continues there." If the Scottish colonisation of Acadia, later known as Nova Scotia or New Scotland, had succeeded, it would have been interesting to know whether this maxim would still have applied. In 1621, Sir William Alexander, a Scotsman who could not be ignorant of the English settlements in Virginia or New England, or the French possessions in Acadia, or Canada, and of the great importance of Newfoundland for its fisheries, was led to contemplate the advantages of building up a New Scotland overseas. Having then resolved to enter into colonial adventure, he had no difficulty in obtaining from King James I in 1621 a grant of large and extensive territory on the mainland, to the east of the river St. Croix, and south of the St. Lawrence, "lying between our colonies of New England and Newfoundland" as a foreign plantation. Very few Scotsmen went on this

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It is absurd that in the colonies they should carry all the laws of England with them.[53] According to Blackstone,[54] "such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony; such for instance, as the general rules of inheritance and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance for the establishe clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force."

> Those English settlers also carried with them all the immunities and privileges of England.[55]

52. (cont.) ... expedition. Though he tried to rouse enthusiasm by publishing a pamphlet entitled "An encouragement to colonies". The Scottish colonies ended when the Treaty of St. Germain-en-Laye restored the area concerned to France in 1632. Nova Scotia was ceded back to Great Britain after the signing of the Peace of Paris. The legislature set up in Nova Scotia was given power to make local laws not repugnant to the laws of England. (HALIBURTON: A general description of Nova Scotia, 1825.) Thus every hope of Scottish law being imported was completely gone. See: Royal Letters, Charter and Tracts relating to the colonisation of New Scotland, etc. Edinburgh, 1867, The Bannatyne Club. LUCAS, C.P. A Historical geography of the British Dominions. Vol. V. Canada, Part I. 2nd ed. Oxford 1916, p. 172, et seq.

53. Campbell v. Hall.

54. Commentaries, Vol. 1, pp. 106-7.

55. The Lauderdale Peerage (1885) L.R. 10 App. Cas. 692, at p. 744.

It is not clear what the expression "so far as it is applicable to their new situation" means. This has been described as a "vague and general kind of phrase" with "sound sense in it".[56] In the opinion of Lord Blackburn,[57] Englishmen "cannot be expected to take out with them all the machinery of the law; they cannot take out with them judges, and justices of the peace, and quarter sessions, and everything of that kind that is established in England."

According to Blackstone,[58] "what /English law_/ shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the revision and control of the King in Council." With the greatrst respect, the uncertainty of what English law was applicable in a colony could hardly be solved by this method. It is therefore not surprising that Governor Pownall of the Colony of Massachusetts Bay expressed his anxieties thus:

> "It is a rule universally adopted through all the colonies, that they carried with them to America the common law of England, with the power of such part of the statutes (those concerning ecclesiastical jurisdiction excepted) as were in force at the time of their establishment; but, as there is no fundamental rule whereby to say, what statutes are admissible, what not, if they admit all, they admit the full establishment of the ecclesiastical jurisdiction, from which they fled to this wilderness for refuge .... Besides, /as

56. The Lauderdale Peerage (1885) p. 744.

57. Ibid at 746.

58. Commentaries, Vol. 1, p. 107.

> as the common law itself is nothing but the practice and determination of courts on points of law, drawn into precedents; where the circumstances of a country and people, and their relation to the statutes and common law differ so greatly, the common law of these countries must, in its natural course, become differen and sometimes even contrary, or at least incompatible with the common law of England, so as that, in some cases, the determinations arising both from the statute and common law must be rejected. This renders the judicatories of these countries vague and precarious, dangerous, if not arbitrary: This leads necessarily (let what care will be taken in forming and enacting their provincial laws). This leads to the rendering the common law of the country different, incompatible with, if not contrary to, and independent of, the law of the mother country, than which nothing can be more advantageous to the subject and nothing more derogatory from the power of the government of the mother country, and from the fundamental maxim, that the colonies shall have no laws contrary to those of the mother country."

(2) Type 2

Whereas in the former group of settlements the date for the application of English law was the date of the foun ding of the colony,[60] in the case of British settlements in West Africa, section 1 of the British Settlements Act of 1843 empowered the sovereign to "establish such laws, institutions, and ordinances, and to constitute such courts and officers ... asmay be necessary for the peace, order and good government" of the territories concerned."[61]

60. Anon. (1722) 2 P. Wms. 75.

61. 6 & 7 Vict. Cap. 13.

Thus, in the case of Ghana, section 14 of the Supreme Court Ordinance of the Gold Coast stipulated that,[62] "The common law, the doctrines of equity, and the statutes of general application which were in force in England at the date when the colony obtained a local legislature, that is to say, on the 24th day of July, 1874, shall be in force within the jurisdiction of the court."

By section 17,[63] such laws were declared to apply to the colony "so far only as the limits of the local jurisdiction and local circumstances" permitted. As will be seen later on, decided cases reveal that English law yields to the special circumstances and must give way to matters of publi policy which apply in a particular dependency.

In the Gambia, the date for the application of English law is the 1st of November 1888.[64] When the Colony of Sierra Leone was established, English common law prevailed /as

62. No. 4 of 1876. This Ordinance has been amended several times, but it is still saved by the Courts Act of 1960 of the Republic of Ghana. S. 154(4) stipulates: "The repeal by this Act of section 83 of the Courts Ordinance, (Cap. 4) shall not be taken to affect the continued application of such of the statutes of general application which were in force in England on the 24th July, 1874 as applied in Ghana immediately before the commencement of this Act: provided that the said statutes shall be subject to such modifications as may be requisite to enable them to be conveniently applied in Ghana."

63. No. 4 of 1874 (Gold Coast - Ghana). See, e.g. Yeap Chea Neo v. Ong Cheng Neo (1875) L.R. 6 P.C. 381; Penhas v. Tan Soo Engl (1953) A.C. 304; Leong v. Lim Ben Chye [1955] A.C. 648.

64. Supreme Court Ord. No. 4 of 1889. For the current provision, see Law of England (Application) Ord. Cap. 3, s. 3. (Laws of Gambia, 1955 Revision.)

as from the date of the settlement. However, later on in 1857, it was found "expedient to extent to the Colony such alterations and amendments of the laws of England as have been made since the establishment of the Colonial Legislature".[65] By section 2 of the Ordinance, "All laws and statutes which were in force within the realm of England on the first day of January" 1857 were taken to be in force in Sierra Leone. The date was extended to 1862[66] and finally brought forward to the 1st of January 1880.[67] Similarly, in Nigeria the date has not remained the same. At first a short while after Lagos was constituted into a separate settlement, the date for the reception of English law was declared to be the first day of January 1863.[68] Later, when the Gold Coast and Lagos were erected into one Colony in 1876, the date was shifted to the 24th July 1874.[69] When the Protectorate of Nigeria was united with the Colony the date was further extended to the 1st of January, 1900.[70]

65. An Ordinance to amend the Law, 21st Feb. 1857, amended by No. 3 of 1862 and repealed by No. 14 of 1904.
66. An Ordinance to amend the law, No. 3 of 1862, repealed by No. 14 of 1904.
67. S.C.O. No. 19 of 1881. For the current provision see S.C.O. Cap. 7, s. 37 (Laws of Sierra Leone 1960 Revision).
68. No. 3 of 1863, s. 1.
69. No. 4 of 1876, same as that of the Gold Coast.
70. This date has been adhered to by all the Regions of the Federation of Nigeria except the W. Region. See, e.g. The High Court Law, 1955 Eastern Region of Nigeria, No. 27 of 1955, s. 14, and Northern Region High Court Law, N.R. No. 8 of 1955, ss. 28-33, 35.

What is the effect of the date of the application of English lawin a British dependency? What, in effect, is the meaning of the phrase "the common law, the doctrines of equity and the statutes of general application in force in England" asat a particular date? Does the datelimit the application of each of the three elements of English law, or does it refer only to the statutes of general application? Dr. Allott has submitted that by necessary intendment the date should govern the rules of common law and equity applicable as well.[71]

With the greatest respect, it is submitted that the adoption of this approach would have rendered the common /law

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71. Essays in African Law, 1960. p. 31.
Of course, nothing prevents a local legislature from fixing a date for the application of the English common law, but it must be expressly stated. One such example is contained in the Courts of Justice Act of 1936 enacted by the Cyprus Government (Rev. Laws 1949, Cap. 11; section 28(1) stipulates that "every court in the exercise of its civil and criminal jurisdiction shall apply-
(a) the laws of the Colony;
(b) the Ottoman laws set out in the second schedule to the extent specified therein;
(c) the common law and the rulesof equity as in force in England on the 5th day of November, 1914, save in so far as other provision has been or shall be made by any law of the Colony;
(d) the statutes of the Imperial Parliament applicable either to the Coldnies generally or to the Colony save in so far as the same may validly be modified or other provision made by any law of the Colony."
Thus Dr. Allott's contention may be valid for the situation in Cyprus in 1949, but not for West Africa and a large proportion of the Commonwealth countries.

law static. As Roscoe Pound has said:[72] "The English materials as the colonies received them, were for the most part set forth authoritatively in the writings of Sir Edward Coke, Attorney-General under Elizabeth and Chief Justice under James I. Yet the common law of England, in the sense of the traditional body of legal precepts administered in the King's courts of law continued to develop throughout the seventeenth century and in the eighteenth century. Also the common law as a system had an important development in England in the nineteenth century. If the statutes limit American courts to the English legal precepts as they stood at in 1601, the traditional element of the law would have to stand still in America in its early seventeenth-century form, while going forward in England. Thus the courts would be seriously hampered in dealing with many subjects where in default of legislation, resort must be had to the common law. Hence, although some courts insist that in the absence of statutory rules they must apply English decisions as they stood in the first year of James I, the tendency of American decisions is to hold that the doctrine and the statutes refer primarily to the common law as a system.[73] On this ground courts consider that they may refer to recent English decisions, as against the seventeenth-century authorities, if the former are better expressions of the principles of the common law system."

The view that the date specified for the reception of English law refers to English statutes of general application is supported by ample evidence from West Africa. In 1883 the learned editors of the Gold Coast Assize, a legal journal, referring to the Supreme Court Ordinance (1876) of the Gold Coast Colony, argued that "from the very punctuation it would appear that the words 'which were in force', etc, apply simply to the statutes of general

72. POUND, R. "Common law" (1931) 4 Enc. Soc. Sci, 53.

73. Writer's italics.

application."[74] Again, the Supreme Court Ordinance of the Gambia, 1889, mentioned only "the statutes of general application which are in force in England on the first day of November" 1888.[75] This implied that the common law of England as a system was introduced by the "settlers" in 1816 into thenew settlement of the Gambia.[76] The recent actic of the Western Nigerian Legislature also lends force to the argument. After having dealt with the English statutes of general application in force in the Region in a particular way, [77] the Western Region Government passed a Law of England (Application) Law 1959,[78] section 3 of which provided for the application of the common law and equity simpliciter in these words:

> "From and after the commencement of this law, and subject to the provisions of any written law, the common law of England and the doctrines of equity observed by Her Majesty's High court of Justice in England shall be in force throughout the Region."

G. THE LAW IN CONQUERED AND CEDED COLONIES

As a general rule, the existing law before the conquest or cession is presumed to remain until it is altered or abrogated. One of the earliest decisions on this point /is

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74. Gold Coast Assize. 1884. Vol. 2, No. 5 p. 3.
75. S.C.O. No. 4 of 1889 as amended. See, e.g. s. 17 (Rev ed. of the Ordinances of the Colony of the Gambia, comp. F.A. van der Meulen, (1916-17). See also "An Ordinance to amend the Law (Sierra Leone) 1st Feb,1857
76. MAXWELL, J.R."Gambia"(1896-7) Vol. 1 J.Comp.Leg. 378.
77. See post, p. Chapter on statutes of general application.
78. W.R. No. 9 of 1959.

is Calvin's Case, [79] in which the report says "for if a king come to a Christian kingdom by conquest, seeing that he hath vitae et necis potestatem, he may at his pleasure alter and change the laws of that kingdom but until he doth make an alteration of those laws the ancient laws of the kingdom remain."

The report went on to make one exception to the effect that if a Christian king should conquer an "infidel country", there ipso facto the laws of the infidel are abrogated, "for that they be not only against Christianity, but against the law of God and nature". This exception to "pagans" was rightly described as "absurd" by Mansfield, L.C.J. in the case of Campbell v. Hall.[80] It "could not exist before the Christian era, and in all probability arose from the mad enthusiasm of the crusades".[81]

However, a conquered territory becomes a dominion of the British Crown, and is therefore necessarily subject to the legislative power of the British Parliament. Therefore the existing laws are necessarily affected by the introduction of English law as regards administration, appellate jurisdiction, matters connected with the exercise of the sovereignty, or matters of universal policy.[82] Indeed, English common law, and English statute law as they existed at a particular date have been introduced in some conquered or ceded colonies. Moreover, existing laws contrary to /the

79, (1608) 7 Co. Rep. 17. Lord Coke, the reporter of this case, gave no authority for this "absurd" exception. See Lyons v. E.I. Co (1836) 1 Moo. P.C.C. 272 at 273.
80. (1774) 20 State Tr. Col. 239 at 322.
81. Ibid.
82. JENKYNS, British rule ... p. 6.

the "fundamental principles of English law" are abrogated.[83] In West Africa customary laws were not abrogated so long as those laws were "not repugnant to natural justice, equity and good conscience".[84]

H. OTHER MODES OF RECEPTION

(1) Acts of the United Kingdom Parliament declared to extend to all overseas territories. Certain Acts of the United Kingdom Parliament, enacted after the date of reception, are declared to extend generally to all colonies by virtue of express or implied provisions of the Acts concerned.

Thus, by section 118 of the Bankruptcy Act,[85] "The High Court, the county courts, the courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of those courts respectively, shall severally act in aid of and be auxillary to each other in all matters of bankruptcy."

In the case of Callender, Sykes & Co. v. Colonial Secretary of Lagos and Davies,[86] the Judicial Committee decided that the Supreme Court of the Gold Coast Colony (including Lagos at that time) had no bankruptcy jurisdiction in 1877, and, therefore, could not act as an auxiliary to the English court under section 74 of the Bankruptcy Act, 1869. It decided further that this Act applies /to

83. E.g. Fabrigas v. Mostyn (1773) 20 St. Tr. 175 at 181.
84. As to the meaning of this clause see post, the chapter on Equity.
85. 46 & 47 Vict. Cap. 52.
86. [1891] A.C. 460.

to all Her Janesty's dominions.[87] Delivering the advice o: the Judicial Committee, Lord Hobhouse made the following observations:[88]

> "How far the Imperial Parliament should pass law: framed to operate directly in the Colonies is a quest· ion of policy, more or less delicate according to circumstances. No doubt has been suggested that if such laws are passed they must be held valid in colon· ial courts of law .... If a consideration of the scop· and object of a statute leads to the conclusion that the legislature intended to affect a colony and the words used are calculated to have that effect, they should be so construed."

The following are some more of the Acts of the United Kingdom Parliament which were or are in force generally in West Africa:-

(1) An Act establishing the Judicial Committee of the Privy Council to hear appeals from the Colonies. (1833) 3 & 4 Will. 4. Cap. 41, since amended.

(2) British Law Ascertainment Act, 1859. 22 & 23 Vict. Cap. 63. "An Act to offer facilities for the more certain ascertainment of the law administered in one part of the British Dominions when pleaded in the courts of another part thereof."

(3) The Extradition Act 1870-1932. 33 & 34 Vict. Cap. 52, etc. Extradition of Criminals.

(4) The Territorial Waters Jurisdiction Act, 1878. 41 & 42 Vict. Cap. 73. "n An Act regulating the trial of

87. See also the Report of the Commissioners appointed to enquire into the Insolvency Law of Ghana, 1961.

88. Callender, Sykes & Co., at pp. 466 & 467.

offences committed on the sea within a certain distance of the coasts of the British Dominions."

(5) The Fugitive Offenders Act, 1881. 44 & 45 Vict. Cap. 69. "An Act with respect to Fugitive Offenders in British Dominions, and for other purposes connected with their trial."

(6) The Colonial Prisoners Removal Act, 1884. 47 & 48 Vict. Cap. 31. This in effect authorises inter-commonwealth transportation.

(7) The Evidence by Commission Act, 1885. 48 & 49 Vict c. 74.
An amendment of the law relating to taking evidence in India and the Colonies and elsewhere in the British Dominions.

(8) British Settlements Acts 1887 and 1945. 50 & 51 Vict. Cap. 54; 8 & 9 Geo. 6, Cap. 7. This covers the Government of British Settlements in places where there were no "civilised" governments in the European sense.

(9) Colonial Courts of Admiralty Act, 1890. 53 & 54 Vict. Cap. 27. Note that section 4 of the Act, which requires certain laws to be reserved for the "signification of Her Majesty's pleasure or to contain a suspending clause and so much of section 7 of that Act as requires the approval of Her Majesty in Council to any rules of Court for regulating the practice and procedure of a Colonial Court of Admiralty shall cease to have effect in Sierra Leone". [89]

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89. Sierra Leone Independence Act, 1961. 9 & 10 Eliz. 2. Cap. 6, 2nd Schedule. See also Ghana Independence Act, 1957, 5 & 6 Eliz 2. Cap. 6, 1st Schedule; Nigeria Independence Act, 1960. 8 & 9 Eliz 2, Cap. 55. 1st Schedule.

(10) The Foreign Jurisdiction,Act, 1890 and 1913. 53 & 54 Vict. Cap. 37; 3 & 4 Geo. V, Cap. 16. By section 9 of the former, power was given to the Queen in Council to assign the same jurisdiction to courts in British possessions as to British courts in foreign countries. In the first schedule to the later Act certain Acts of the United Kingdom Parliament, such as The Colonial Solicitors Act 1900, and sections 34, 35 and 36 of the Companies (Consolidation) Act, 1908, could be extended to foreign countries under British jurisdiction.

(11) Colonial Stock Acts, 1877 to 1900. For example, 40 & 41 Vict. Cap. 59, and 63 & 64 Vict. Cap. 62.

(12) Evidence (Colonial Statutes) Act 1907. 7 Edw. 7, Cap. 16. "An Act relating to the proof of Acts, Ordinance and Statutes passed by the Legislature of any British possession".

By section 5, the Act could be extended to any British protectorate. It was extended to Nigeria and the Northern Territories of the Gold Coast (now Northern Ghana) in December, 1922.[90]

§2§ Acts of the United Kingdom Parliament declared to extend to particular territories.

In addition to British Imperial Acts which apply generally to all colonies, there are certain Acts which are extended to specifically mentioned territories. Such Acts are

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90. S.I. 1922. No. 1418.

extended by virtue of the provisions in the Act itself, or by a local enactment or by Orders in Council. Thus by section 1 of the Colonial Probates Act, 1892,[91] it is enacted as follows:

> "Her Majesty the Queen may, on being satisfied that the legislature of any British possession has made adequate provision for the recognition in that possession of probate andletters of administration granted by the Courts of the United Kingdom, directs by Order in Council that this Act shall subject to any exceptions and modifications specified in the Order, apply to that possession, and thereupon, while the Order is in force, this Act shall apply accordingly."

Consequently, an Order in Council was issued on May 16, 1893, extending the application of the Act to the Gold Coast Colony. In 1920 it was extended to Ashanti and Nigeria Colony.[92] In 1939, to the Northern Territories of the Gold Coast and Togoland, the Gambia Protectorate and the Cameroons under British Mandate.[93]

The following are more Acts of the United Kingdom Parliament which were extended or are still current in West Africa:-

(1) The Coinage Acts 1870-1891 were extended to the Gold Coast Colony, Sierra Leone and the Gambia by Orders in Council.[94]

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91. 55 & 56 Vict. Cap. 6.
92. Ashanti - S.I. 1920 No. 1663; Nigeria Colony - S.I., 1920, No. 887.
93. S.I. 1939. No. 1702.
94. S.I. 1898 No. 123. See Statutory Rules & Orders, (1898) p. 13.

(2) The Finance Act, 1894. 57 & 58 Vict. Cap. 30. Section 20 of the Act, which excepted property in British possessions with regard to the payment of estate duty, was extended by Orders in Council to the Gold Coast Colony and Lagos in 1895, Sierra Leone in 1896 and Gambia in 1916.

(3) The Colonial Loans Act, 1899, 62 & 63 Vict. Cap.3 By section 1, the British Treasury wasempowered to make advances to certain colonies and places. The territories listed in the Schedule included the Gold Coast, Niger Coast Protectorate, Lagos and Sierra Leone.

(4) The Copyright Act, 1911, was extended by an Order in Council to the Gambia Protectorate, Northern Nigeria Protectorate, Northern Territories of the Gold Coast and the Sierra Leone Protectorate in 1912.[95]

(5) The Administration of Justice Act 1920. 10 & 11 Geo. V, Cap. 81. Part II of the Act, which deals with the enforcement in the United Kingdom of judgments obtained in the superior courts in other British dominions, was extend to theGold Coast Colony, Colony and Protectorate of Nigeri in 1922, to the Colony of Gambiain 1923, to Ashanti and th Northern Territories of the Gold Coast in 1924.

(6) Evidence and Powers of Attorney Act, 1940. 3 & 4 Geo. 6. Cap. 28. Certain sections were extended by Order

95. By s. 17 of the Ghana Copyright Act, 1961, the Copyright Act of the U.K. shall cease to have effect in Ghana, and the Copyright Ordinance (Cap. 126) is accordingly repealed thereby. (Act 85 of 1961.)

in Council to the Gambia, the Gold Coast, Nigeria and Sierra Leone in 1941.

§3§ Acts of the United Kingdom Parliament adopted by local legislatures

This is another method of introducing English law into West Africa. Thus in the Gambia, an Ordinance was passed in 1855 to introduce the following Acts of the United Kingdom Parliament:[96]

(1) An Act for preventing malicious injuries to persons and property by fire, or by explosive or destructive substances, 1846. 9 & 10 Vict. Cap. 25.

(2) An Act for the removal of defects in the administration of criminal justice. (1848) 11 & 12 Vict. Cap. 46

(3) An Act for further improving the administration of criminal justice. (1851) 14 & 15 Vict. Cap. 100.

All these Acts were declared to be in force in the Gambia "as fully and completely to all intents and purposes as if the several provisions of the said Acts had been expressly enacted by the Governor or Legislative Council of these settlements and confirmed by Her Majesty the Queen."

Again in 1867,[97] an Ordinance was passed to extend an Act to amend the law of evidence in England in 1851,[98] and the Evidence Act 1853,[99] to the Gambia. These Acts dealt

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96. No. 3 of 1855, now repealed.
97. No. 154 of 1867.
98. 14 & 15 Vict. Cap. 99.
99. 16 & 16 Vict. Cap. 83.

with, inter alia, admissibility of documents in evidence without proof of seal, and the competence and compellabilit of husbands and wives to give evidence.

In 1872,[1] an Ordinance was passed to extend to the Gambia certain statutes in force in England relating to the criminal law, for example:-

(1) An Act to facilitate the performance of the duties of Justices of the Peace out of sessions within England and Wales with respect to persons charged with indictable offences (1848) 11 & 12 Vict. C.42.

(2) An Act to consolidate and amend the Statute Law of England and Ireland relating to accessories to and abettors of indictable offences. (1861) 24 & 25 Vict. Cap. 94.

(3) An Act to consolidate and amend the Statute law of England and Ireland relating to larceny and other similar offences. (1861) 24 & 25 Vict. Cap. 96.

(4) An Act to consolidate and amend the statute law of England and Ireland relating to offences against the person. (1861) 24 & 25 Vict. Cap. 100.

(5) An Act to amend the law in certain cases of misappropriation by servants of the property of their masters. (1863) 26 & 27 Vict. Cap. 103.

The Gambia Ordinance No. 3 of 1872 was superseded by the Imperial Acts (Adoption) Ordinance of 1899,[2] which was finally repealed by No. 2 of 1931.

1. No. 3 of 1872, superseded by No. 14 of 1899.
2. Gambia, No. 14 of 1899.

Better provisions have now been made with respect to the Criminal law and evidence in the Gambia. The Laws of the Gambia, 1955 Revision, contain the following enactments Criminal Code: Cap. 21, Criminal Procedure Code, Cap. 23, and Criminal Evidence Ordinance, Cap. 26.

Sierra Leone has also been in favour of adopting Acts of the United Kingdom Parliament in order to improve her own laws. For example, the County Court Acts in force in England were extended to the Settlement of Sierra Leone by Ordinance No. 4 of 1867,[3] "so far as the same can be applied, and are not inconsistent with any Royal Charter in force in this settlement". Again, section 1 of Ordinance No. 3 of 1883, was an adaptation of the English Act entitled "The Conveyancing and Law of Property Act, 1881,[4] subject to certain exceptions.[5] However, in the same year Ordinance No. 12 of 1883,[6] repealed the Conveyancing Ordinance. The preamble to the repealing ordinance reads thus:

> "Whereas it is inexpedient and has been declared to be unsatisfactory that Imperial Acts of Parliament should be embodied by reference thereto in the Ordinances of the Legislature of Sierra Leone ..."

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3. Repealed by Ordinance No. 12 of 1883.
4. 44 & 45 Vict. Cap. 41.
5. For example ss, 1, 48 and 69 (viii)(ix)(x) and 72 did not apply to the Settlement of Sierra Leone.
6. Repealed by Ordinance No. 14 of 1907.

Thers is much to be said for the warning given in the preamble. However, Sierra Leone still believes in the adoption of United Kingdom Acts. Thus, by the Imperial Statutes (Law of Property) Adoption Ordinance,[7] most of the pre-1925 Acts of the United Kingdom Acts relating to property and conveyancing have been adopted. The method of modifying these Acts shows a remarkable improvement. As will be seen from the schedule to the Ordinance, certain sections of the various English Acts adopted, are expressly precluded from applying in Sierra Leone. In addition, there are provisions in the Ordinance which modernise specific sections of the English law. By section 3 of the Sierra Leone Ordinance, so much of English law as prohibits or restricts the alienation or devise of land for charitable purposes, or the bequest of personalty to be laid out in the purchase of land for charitable purposes, does not apply in Sierra Leone. It is interesting to note that it took England at least 70 years before this restriction was removed by the enactment of the Charities Act, 1960.[8]

Further, so much of the old English law as specially restricted the acquisition, holding or disposition of real or personal property by a married woman as such, was also

7. Cap. 18. Laws of Sierra Leone, 1960 Revision.

8. 8 & 9 Eliz 2, Cap. 58. See, for example, s. 38 which repeals the law of mortmain.

also excepted.[9] Then the law conferring estates in dower or by the courtesy, and such totally inapplicable terms like "copyhold lands" were declared not to apply in Sierra Leone.[10]

By section 8 of the Ordinance, the common law technicalities in regard to conveyances have no application in Sierra Leone. At common law to confer an estate in fee simple on the grantee it was essential to limit the property to him "and his heirs", or in the case of a corporation sale to him "and his successors". But by virtue of the Conveyancy and Law of Property Act, 1881,[11] it is sufficient in conveying to an individual to use the words "in fee simple". This is the provision which would have applied in Sierra Leone. But Sierra Leone has borrowed word for word two imported sections of the Law of Property Act, 1925,[12] in addition to section 51 of the 1881 Act, so as to bring her property law more up to date. The effect of this adoption is that by section 8(1) of the Sierra Leone Ordinance, "A conveyance of freehold land to any person without words of limitation, or any equivalent expression, shall pass to the grantee the fee simple or either the whole interest which

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9. Cap. 18, s. 4. Laws of Sierra Leone (1960 Revision).
10. Ibid, ss. 6 & 7.
11. 44 & 45 Vict. Cap. 41, s. 51.
12. S. 60 (1) & (2).

the grantor has power to convey in such land, unless a contrary intention appearsin the conveyance. Surely, it would have been less clumsy if the Law of Property Act 1925 had been adopted and modified. The Schedule to the Imperial Statutes (Law of Property) Adoption Ordinance is hereby reproduced for ease of reference.

SCHEDULE.

Date of Statute and Title.		Extent to which applied.
44 and 45 Vict. c. 41 22nd August, 1881.	The Conveyancing and Law of Property Act, 1881.	The whole Statute except sections 3 (2), 6 (3), 30, 45, 48, 65, 72 and 73.
45 and 46 Vict. c. 38 10th August, 1882.	The Settled Land Act, 1882.	The whole Statute except sections 3 (ii), 4 (7), 6 (ii), 9, 10, 11, 14, 15, 16, 17, 20 (3), 21 (iii), (v) and (viii), 25, 26, 27, 28, 29, 30, 31 (v), 32, 46 (7), (8) and (10), 48, 49, 58 (viii), 61 and 65.
45 and 46 Vict. c. 39 10th August, 1882.	The Conveyancing Act, 1882.	The whole Statute except sections 2, 7 and 11.
47 and 48 Vict. c. 18 3rd July, 1884.	The Settled Land Act, 1884.	The whole Statute except sections 7 (v) and (vi), and 8.
51 and 52 Vict. c. 59 24th December, 1888.	The Trustee Act, 1888.	The whole Statute.
52 and 53 Vict. c. 36 12th August, 1889.	The Settled Land Act, 1889.	The whole Statute.
53 and 54 Vict. c. 19 25th July, 1890.	The Trustees Appointment Act, 1890.	The whole Statute.
53 and 54 Vict. c. 69 18th August, 1890.	The Settled Land Act, 1890.	The whole Statute except sections 8, 10, 13, 15, 17, 18 and 19.
55 and 56 Vict. c. 13 20th June, 1892.	The Conveyancing and Law of Property Act, 1892.	The whole Statute.
56 and 57 Vict. c. 21 29th June, 1893.	The Voluntary Conveyances Act, 1893.	The whole Statute.
56 and 57 Vict. c. 53 22nd September, 1893.	The Trustee Act, 1893.	The whole Statute except sections 6, 16, 34, 41, 44, 46 and 52.
57 and 58 Vict. c. 10 18th June, 1894.	The Trustee Act, 1893, Amendment Act, 1894.	The whole Statute except section 2.
59 and 60 Vict. c. 35 14th August, 1896.	The Judicial Trustees Act, 1896.	The whole Statute.
1 and 2 Geo. V. c. 37 16th December, 1911.	The Conveyancing Act, 1911.	The whole Statute except sections 4 (ii) (b) and 13.

The Criminal law of Sierra Leone is also in part derived from the Imperial Statutes (Criminal Law) Adoption Ordinance,[13] whereby the following Acts of the United Kingdom have been adopted in Sierra Leone subject to certain exceptions. They are:

(1) The Perjury Act, 1911;[14]
(2) The Forgery Act, 1913;[15] and
(3) The Larceny Act, 1916.[16]

4. POWERS AND ENACTMENTS OF COLONIAL LEGISLATURES

Colonial legislatures are invariably given a general power, for example by Orders-in-Council, to make laws for the "peace, order and good government" of the Colony. Firstly, this power confines colonial legislation to the territorial limits of the colony. Though subordinate, colonial legislatures are in no sense delegates of the British Imperial Parliament and have full power to delegate legislative authority to subordinate bodies.[17]

The second condition to be fulfilled by every colonial law[18] before it can be regarded as valid is that it should not be "repugnant to the laws of England". Without doubt

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13. Cap. 27. Laws of Sierra Leone, 1960 Revision.
14. 1 & 2 Geo. 5, Cap. 2. Sections applicable are 1, 2, 5, 6, 7, 8, 11, 12, 13, 14, 15, 16(1), 17 & 19.
15. 3 & 4 Geo. 5, Cap. 27. Sections applicable are 1,2,3(3) 4,5(1)(c), 5(3)(a), 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19(1), 20 & 22.
16. 6 & 7 Geo 5, Cap. 50. Sections applicable: 1-11, 13-16, 17(1)(2), 20-32, 33(1)(3)(4), 34-36, 37(1)-(5), 39, 40(1)-(4), 43, 46, 47, 48(1) & 50.
17. Halsbury's, 3rd ed. Vol. 5, 474. See generally Hodge v. R (1883) 9 App.Cas. 117, P.C.; Powell v. Appollo Candle Co. (1885) 10 App.Cas. 282, P.C.
18. The term "colonial law" shall include laws made for

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this meant that Colonial legislatures should base their local laws on English law alone. From the point of view of the British colonialist, the rule could hardly be expected to be otherwise.

What sparked off the fire during the hey-day of colonialism was the meaning of the phrase "repugnant to the law of England". It had agitated the minds of the Southern Australian Parliamentarians when Chief Justice Boothby of South Australia ruled that certain Acts of their legislature were contrary to English law and therefore invalid.[19] When the matter was referred to the Law Officers in the United Kingdom, they were of the opinion that Colonial Acts were invalid if contrary to United Kingdom Acts. The view which was finally preferred is embodied in "an Act to remove doubts as to the validity of Colonial laws; known /as

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18. (cont.) ... any colony either by such legislature as aforesaid (i.e. Colonial legislature) or by Her Majesty in Council" - section 1, Colonial Laws Validity Act, 1865.

19. PHILLIPS, O.H. The constitutional law of Great Britain and the Commonwealth, 2nd edition, 1957, p. 618.

as the Colonial Laws Validity, Act, 1865.[20]

> Section 2 provides that "Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."
>
> Section 3 provides, "No colonial law shall be or be deemed to have been void or inoperative on the ground or repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, Order, or regulation as aforesaid."

The effect of these two provisions was very well put by JENKYNS[21], with whose interpretation the writer completely agrees.

> "This view", (says Jenkyns), "is that a colonial law is void for repugnancy only if it conflicts with an Act of Parliament extending to the colony, i.e. an Act by which Parliament intends to bind the colony. A colonial legislature has therefore full power to alter what is sometimes termed the 'common law of the colony' - an expression which in 'settled' colonies includes /the

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20. 28 & 29 Vict. Cap. 63. If the Law Officers had carefully read an earlier Act (7 & 8 Will. 3, Cap. 22 (1695-6)) - an "Act for preventing frauds, and regulating abuses in the plantation trade"), they would not have reached the conclusion that Colonial Acts were invalid if contrary to U.K. Acts. Section 9 of the 1695 Act stipulated "That all laws, by laws, usages and customs ... which hereafter shall be in practice in any of the said plantations, which are in any wise repugnant to the before mentioned laws, or any of them, so far as they do relate to the said plantations, or any of them, or which are any ways repugnant to this present act, or to any other law hereafter to be made in this kingdom, so far as such law shall relate to and mention the said plantations, are illegal, null and void, to all intents and purposes whatsoever." (Writer's italics.) See also STOKES, A. A view of the constitution of the British Colonies in North America, etc. 1783, p. 27.

21. British rule and jurisdiction, p. 71. See also, p.t.o.

> the whole law of England, statute law as well as common law, so far as applicable to the colony at the date of settlement. It is not, therefore, a complete statement to say that a colonial legislature 'may make laws opposed to the English common law', for it may also make laws opposed to an English statute which, in the absence of such colonial legislation, would be in operation in the colony, not because made applicable to the colony, but merely as part of its 'common law'."

In practice, the conflict between colonial and imperial law rarely arose, for in most of the dependent territories, the British Crown had power to disallow any colonial law.[22] Moreover, a colonial governor was empowered either to refuse his assent, or to reserve bills "for the signification of Her Majesty's pleasure". Even if such legislation had been enacted, the condition that a colonial legislation should not be repugnant to English law would have been enforced by the decision of the local judiciary in the colony, in the first instance, and ultimately of Her Majesty's Privy Council, upon an action or suit at law, duly brought before such a tribunal to declare and judge a colonial statute either in whole or in part, to be ultra vires and void.[22(a)]

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21. (cont.) ...See also Phillips v. Eyre (1870) L.R. 6 Q.B. 1, Riel v. The Queen (1885) 10 A.C. 675, per Lord Halsbury at p. 687.

22. See, e.g. The Gold Coast (Constitution) Order in Council, 1950. S.I. 1950. No. 2094, s. 60.

22(a). TODD, A. Parliamentary government in the British Colonies (1894) p. 302.

As a result of these limitations, the dependent legislatures in West Africa simply had to model their laws on English law. In fact, the legislative councils were "guided" by the Colonial Office. Thus, in introducing the Bill to amend the law relating to Trade Marks in 1923, the Attorney-General of the Gold Coast admitted that the "Bill follows closely the provisions of Part I of the English Trade Marks Act, 1919..."[23] Again, during the debate on the Stamp Amendment Ordinance, the Attorney-General of the Gold Coast, referring to the definition of "conveyance on sale", given in the Bill, observed that "There isnothing novel in this. It has been the law in England for the last 40 years. In fact the whole Bill is copied from the English Stamp Act of 1891. It follows the Nigerian Stamp Ordinance".[24]

Mention could also be made of the Gold Coast Ordinance ~~providing~~ making further provision for the execution of instruments under the authority of a power of attorney: under the old law in England, an agent using such power of attorney, had to sign in the name of the principal or person for whom he was acting. That position was altered by the Conveyancing Act of 1881, whereby a representative of a company in the United Kingdom could use his own name and his seal. That provision was, however, never applied to /the

23. Gold Coast Leg. Co. Debates, Session 1923-24. 21st March 1923; p. 265. More specific examples will be considered later.
24. Gold Coast Leg. Co. Debates, Session 1932-33, p. 292.

the Gold Coast, and the object of the Bill was to apply that provision.[25]

Sometimes an enactment based on English law was borrowed from another Commonwealth territory. By an Ordinance dated 10th July 1851, the Gambian legislature adopted 10 of the Sierra Leone ordinances currently in force when Gambia was a dependency of Sierra Leone.[26] In fact, it had been the aim of the Colonial Office that there should be uniform legislation and administration in British West Africa. Thus, in introducing a Bill to amend the law relating to Trade Marks, the Attorney-General of the Gold Coast said that

> "The Secretary of State has pointed out the great desirability of securing uniformity of legislation on this matter throughout British West Africa; and accordingly this Bill is found in terms similar to those of the corresponding legislation in the other parts of British West Africa".[27]

The Comptroller of Customs of the Gold Coast in introducing a Bill to regulate the importation and sale of folded woven goods, pointed out that it had always been one of his ambitions to see as far as was reasonably possible, the same legislation enforced in all the British West African Colonies. He also intimated that the Bill would be enacted in

25. Gold Coast Leg. Co. Debates. 1st Session 1933. p. 50.
26. No. 6 of 1851 repealed by No. 20 of 1916.
27. Gold Coast Leg. Co. Debates, Session 1923-24. December 1923, p. 265.

in Nigeria, Sierra Leone and the Gambia, if it had not already been enacted.[28]

"The Southern Nigeria Forest Act" which, as The Nigerian Chronicle remarked,[29] "like almost all other laws that have come to us in this Colony of late, is modelled after the Indian Act although the conditions existing in these places are not identical", was enacted in 1911. The procedure of case stated incorporated into the Gold Coast Criminal Procedure Code Bill, 1935, was taken verbatim from Trinidad.[30] Even as recently as 1952, the Gold Coast Public Trustee Ordinance was based on the Nigerian model.[31] In the words of Mr. Branigan, Minister of Justice, "although this Bill was based on the Nigerian Ordinance, it equally corresponded with similar legislation in Malaya, in Kenya, in Singapore, in Rhodesia and in Tanganyika. It follows the Nigerian Ordinance most closely, however, because I think it is always advisable that in this kind of legislation we should try and keep in step with a country which is closely tied to ours by commercial and other ties."[32]

There are many other examples of the enactments modelled on English law, some of which will be considered later.[33]

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28. Ibid, 1st Session 1933, p. 52.
29. The Nigerian Chronicle, September 15, 1911.
30. Leg. Co. Debates. Session 1935, issue No. 1, p. 51.
31. Mr. Magnus Sampson, M.L.A., was unhappy about this trend of affairs. Great laughter was aroused by his remarks - "I have no objections to urge against the Bill, but I am wondering why the Gold Coast laws are always based on Nigerian laws. It is time the Gold Coast made laws for Nigeria to copy" - Leg. Ass. Deb. Session 1952, issue No. 2, p. 18.
32. Ibid.
33. See, e.g. post, chapter 5.

5. POWERS AND ENACTMENTS OF INDEPENDENT COMMONWEALTH LEGISLATURES

The attainment of complete independence means also the acquisition of legislative independence, subject to the written constitution. Thus section 42 of the Sierra Leone (Constitution) Order in Council, 1961, stipulates that "subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Sierra Leone". This section is identical to section 31(1) of the Ghana (Constitution) Order in Council, 1957, which was the subject of judicial interpretation when two Muslim leaders were served with deportation orders. In the course of his judgment at the Kumasi Divisional Court, Mr. Justice Smith explained the import of the expression thus:

> "If, as I hold, the words 'peace, order and good government' unqualified in any way are plenary powers possessed by the Imperial Parliament, then it follows just as it would in England, that the Court here has no power to inquire into this Act" -(the Special Act under which the two leaders were deported.)[34]

It has been decided by the Federal Supreme Court,[35] that the power entrusted to the Parliament in Nigeria to /make

34. The Times, Oct. 26, 1957. Lardan v. Attorney-General & ors. (No. 2) (1957) 3 W.A.L.R. 114 at p. 122.

35. Doherty & W. Nigeria Development Corporation v. Sir Abubakar Tafawa Balewa & ors. The Guardian, Law Reports, November 13, 1961.

make laws for the peace, order and good government of Nigeria did not entitle the Federal Government to pass an Act which was ultra vires the Constitution.[36]

However, there is no doubt that an independent Commonwealth territory in West Africa can pass any Act which is to all intents and purposes repugnant to a United Kingdom Act declared to extend to that particular territory either by express words or by necessary intendment. For, after independence, the Colonial Laws Validity Act, 1865, ceases to apply. Its place is taken by the Statute of Westminster, 1931.[37] Section 2(2) of which stipulates:

> "No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same ispart of the law of the Dominion."

As far as the scope of the Chapter is concerned, it only needs to be observed that the power conferred on an

/independent

36. The Act in question was the Tribunals of Inquiry Act, 1961. It is understood that the F.S.C. has granted application for leave to appeal to the Privy Council - West Africa December 16, 1961. Thus in the pre-republican Ghana case of Ware v. Ofori-Attah & anor,(1959) G.L.R. 181, MURPHY , J., ruled that the Statute Law (Amendment) No. 2) Act, 1957, under which the Minister may, inter alia, order the stool property to be held by a local government council, was invalid on the ground that it was contrary to s. 35 of the Ghana (Constitution) Order in Council, 1957.

37. 22 Geo 5, Cap. 4.

independent commonwealth country was the power to amend or repeal any act of the United Kingdom Parliament whatsoever, in so far as that Act was part of the law of the country concerned.[38]

It was not quite clear whether the words "existing or future Act of Parliament" excluded the statute itself from being amended, but the wording of section 2 of the 1st Schedule to the Nigerian Independence Act, 1960,[39] confirms the view that the statute itself can be amended. By section 3 of the Statute of Westminster it is enacted that the "Parliament of Dominion has full power to make laws having extra-judicial operation".

It is evident that the effect of these two sections is to restrict the application of English colonial law. Thus sections 735 and 736 of the Merchant Shipping Act, 1894, and sections 4 and 7 of the Colonial Courts of Admiralty Act, 1890, which limited the powers of colonial legislatures no longer apply to Ghana, Nigeria and Sierra Leone.[40] As a result, any of the three sovereign states can repeal the whole of the English Merchant Shipping Act 1894, and replace it with her own. In fact by the Ghana Merchant Shipping (Liability of Shipowners and Others) Act, 1961, the

/Parliament

38. WHEARE, K.C. The statute of Westminster and dominion status, 5th ed. (1953) 161; The constitutional structure of the Commonwealth, 1960.
39. 8 & 9 Eliz, 2, Cap. 55.
40. Sierra Leone Independence Act 1961, Ghana Independence Act, 1957.

Parliament of Ghana have amended Part VIII of the English Merchant Shipping Act of 1894 and section 2 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, in so far as the Republic is concerned.[41]

Further, it is within the competence of the legislature of any of the independent commonwealth territories to abolish appeals therefrom to the Judicial Committee of the Privy Council. If such a step is taken as has been done in the case of the Republic of Ghana,[42] the result would be that future decisions of the Judicial Committee would not bind that country.

6. APPLICATION OF CURRENT ENGLISH LAW

In the laws of all the territories in West Africa (except Sierra Leone) providing for the establishment of superior courts, there is a section which regulates the law to be applied in probate and matrimonial causes. Thus by section 16 of the High Court of Lagos Ordinance, it is enacted that:[43]

> "The jurisdiction of the High Court in probate, divorce and matrimonial causes and proceedings may, subject to the provisions of this Ordinance, and in particular

/of

41. Act 57 of 1961, Ghana.

42. Ghana (Consequential Provision) Act, 1960. 8 & 9 Eliz. 2, Cap. 41. It was clearly stated at p. 11 of the Ghana Government Proposal for a Republican Constitution that, on the establishment of the Republic, all appeals from the courts to the Judicial Committee of the Privy Council would be discontinued. White Paper No. 1/60.

43. Cap. 80, Laws of the Federation of Nigeria, 1958 Rev. This provision applies in all the Regions of the Federation, since "marriage other than marriages under Moslem

/p.t.o.

> of section 27, /which deals with the application of native law and custom/ 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 "law" refers to the substantive divorce and probate laws current in England, including recent legislation. Thus, by interpretation, the superior courts in West Africa are empowered to apply, for example:

> The Matrimonial Causes Act 1950;[44]
> The Matrimonial Cuases (Property and Maintenance) Act, 1958;[45]

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43. (cont.) ... law or other customary law; annulment and dissolution of and other matrimonial cuases relating thereto are" matters within the exclusive legislative competence of the Federation. (See Schedule to the Constitution of the Federation of Nigeria, Pt. I, 1960.) But the jurisdiction of a High Court of a Region in relation to marriages and annulment and dissolution of marriages shall, "so far as practice and procedure are concerned, be exercised in conformity with the law and practice for the time being in force in England." Laws of the Federation of Nigeria 1958, Regional Courts (Federal jurisdiction) Ordinance, Cap. 177.
In Ghana "notwithstanding the repeal by this Act/Courts Act 1960/of sections 16 and 17 of the Courts Ordinance, (Cap. 4) /which relate to infants and persons of unsound mind and to probate and matrimonial causes respectively/ those sections shall continue to apply in Ghana until other provisions is made by law". In 1961 a Government White Paper on Marriage, Divorce and Inheritance, was published. By section 8, it was proposed to introduce a uniform divorce law for all marriages, whether customary or under the Marriage Ordinance; now the Government has taken action by introducing a Marriage, divorce and inheritance Bill in 1962. For Gambia, see Supreme Court Ord. Cap. 5, s. 17. Sierra Leone has her own Matrimonial Causes Ordinance, No. 9 of 1949 (Cap. 102, 1960 Revision) based on the English model.

44. 14 Geo. 6, Cap. 25, which regulates the law of divorce & nullity of marriage, judicial separation and restitution of conjugal rights; declaration of legitimacy, alimony, maintenance and custody of children. See also the Ghana case of Manu v. Manu, (1959) G.L.R. 21.

45. 6 & 7 Eliz. 2. Cap. 35.

The Divorce (Insanity and Desertion) Act, 1958;[46] An Act to enable a person to marry certain kin, (for example sister, aunt or niece) of a former spouse, 1960.[47]

It has been held in Okpaku v. Okpaku[48] that unless they arise out of suits for divorce or judicial separation, or in respect of payments made by third parties to provide for necessaries for a deserted wife, a superior court of Nigeria has no jurisdiction to entertain claims for maintenance. The appellate court refused to make an order for maintenance first, on the grounds that the English Act entitled the Summary Jurisdiction (Married Women) Act,[49] of 1895, was not a statute of general application. The reason why the statute was not regarded as one of general application was that it did not apply to Scotland and Ireland. With the greatest respect, the fact that an Act does not apply to Scotland, does not deny it the status of a statute of general application, for Scottish civil law is very different from English law, and also most of the /legislation

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46. 6 & 7 Eliz. 2. Cap. 54.
47. 8 & 9 Eliz. 2, Cap. 29.
48. (1947) 12 W.A.C.A. 137; query whether the Matrimonial Proceedings (Magistrates' Courts) Act, 1960 - 8 & 9 Eliz. 2, Cap. 48 - will apply in West Africa, for the jurisdiction is vested in Magistrates' Courts.
49. 58 & 59 Vict. Cap. 39. The Act has been amended and improved upon by the Summary Jurisdiction (Separation & Maintenance) Act, 1925. Note: the court system has been reorganized since Nigeria became a federal and independent country.

legislation of the United Kingdom Parliament in civil matters are excepted from application in Scotland.

The second reason of the Supreme Court was that the procedure laid down in the 1895 Act under discussion provided for a hearing before a court of summary jurisdiction, with an appeal to the Probate, Divorce and Admiralty Division of the High Court. Therefore, the Supreme Court (now the High Court) of Nigeria, being a superior court of record, was not the appropriate court, as the matter in dispute was a claim for maintenance. This second reason is more tenable than the first. In the course of the judgment the Supreme Court pointed out that there is no local ordinance providing for maintenance simpliciter. If that is the case then there is a lacuna in the laws of Nigeria which must be filled. One wonders why this gap should have escaped the attention of legislators in Nigeria and, as far as it is known, in Ghana too. Yet as early as 1885, there was enacted an Ordinance to amend the law relating to divorce and matrimonial causes in Sierra Leone, whereby section 10 deserted wives could claim maintenance orders against their husbands.[50] The current legislation is embodied in the Married Women's Maintenance Ordinance of 1888.[51] Gambia is

50. No. 7 of 1858. An Ordinance to amend the law relating to Divorce and Matrimonial Causes in Sierra Leone.

51. No. 7 of 1888. See Laws of Sierra Leone (1960) Revision, Cap. 100.

has also a [redacted] Maintenance of Deserted Wives Ordinance, which entitles a deserted wife to summon her husband before a police magistrate or two justices of the peace in petty sessions. The magistrates, if satisfied that the husband being able to maintain the wife has wilfully refused or neglected so to do,, and has deserted his wife, may make maintenance orders against the husband. The maintenance orders are terminated if the wife is proved to be guilty of adultery.[52]

Quite apart from the two ordinances mentioned, a wife living apart from her husband has authority at common law to pledge his credit for necessaries suitable to her station in life.[53] This common law has been accepted in Ghana and in Nigeria. Indeed, in the Ghana case of Davy-Hayford v. Davy-Hayford,[54] ACOLATSE, J., in dismissing a claim for maintenance (without a petition for divorce) against the defendant husband, said, "I find that at common law, a wife had no right to sue her husband in contract, all that she had power to do was to pledge his credit."

A wife also has authority in equity to borrow money

/within

52. No. 8 of 1887, amended by No. 11 of 1916. Laws of Gambia, 1955 Revision, Cap. 11.
53. Wilson v. Glossop (1888) 20 Q.B.D. 354 at 357.
54. Unreported. Div. Court at Sekondi, Western Judicial Division. Suit No. 52/1957.

within the same limit.[55]

It does appear now that in the absence of current legislation on this point, deserted wives in Ghana and Nigeria would only have their remedy at common law and in equity. However, assuming that the English Summary Jurisdiction (Married Women)Act, 1895, had been held to be a statute of general application, would a claim for maintenance without more have succeeded either in a Nigerian magistrates' court, which is a court of summary jurisdiction? As a rule, magistrates have jurisdiction "in all personal actions, whether arising from contract or from tort, or from both, where the debt or damage claimed, whether as balance of account or otherwise is not more than £500". [56]

It is not likely that a married woman whose husband has been guilty of wilful neglect to provide reasonable maintenance for her or her infant children, whom he is legally liable to maintain, can apply to a magistrates' court for an order, by virtue merely of the passage just quoted. However, if the Statute were held to be one of general application, it is submitted that magistrates' courts, being courts of summary jurisdiction, would be

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55. Deare v. Soutten (1869) L.R. 9 Eq 151, as explained by DENNING, L.J. in Biberfeld v. Berens [1952] 2 Q.B. 770, at 783; [1952] 2 All E.R. 237, at 243.

56. Magistrates' Court (Lagos) Ordinance. Cap. 113. Section 14(1)(a).

able to apply the Statute, on the ground that statutes declared to be of general application have force both in the superior and inferior courts of West Africa (customary courts excepted).

Judging by the wording of the Matrimonial and probate laws provision just cited from the High Court of Lagos Ordinance, it is made perfectly clear that any Act of the United Kingdom Parliament enacted in connection with probate and matrimonial causes will extend even to the independent Commonwealth countries of West Africa. This view might appear to be contrary to section 4 of the Statute of Westminster, 1931[57] which reads thus:

> "No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof."

It could, however, be argued that as the provision was part of the existing laws of the colony before independence there is really no conflict.[58] Nevertheless, whilst there

/is

57. This section is incorporated in the independent Acts of Ghana, Nigeria and Sierra Leone.

58. "The expression 'the existing laws' means all Ordinances, laws, rules, regulations, orders and other instruments having the effect of law made or having effect as if they had been made in pursuance of the existing Orders and having effect as part of the law of the Colony and Protectorate of Sierra Leone or any part thereof immediately before the commencement of this Order." - The Sierra Leone (Constitution) Order in Council, 1961. S.I./741.

is no objection to the application of this provision in dependent territories, it is rather far-fetched for an independent country, such as Ghana or Nigeria, to give a legislative carte blanche to the United Kingdom Parliament on matters relating to probate and the dissolution and annulment of marriages.[57] The two societies are socially and culturally different. When members of the United Kingdom Parliament are debating on such bills they think primarily of the social conditions in England.[58]

In practice, however, a limitation can be exercised on the rather wide terms of the provision, for, as it has been observed by a former learned judge of Ghana:[59]

> "Upon a careful perusal, however, of section 16 (now section 17)[60] it will be seen that the jurisdiction conferred is expressed in such terms as to be merely permissive and not compulsory, the words being that 'the jurisdiction hereby conferred upon the court in probate, divorce, and matrimonial causes MAY...' be exercised by the court in conformity with the law and

57. In the Kenya case of Bashir v. Commissioner of Lands [1960] A.C. 45 at p. 62, the Judicial Committee have drawn attention to the uncertainty involved in the adoption "in advance future English legislation of unknown content".

58. Examples of customs peculiar to the English are artificial insemination by donor, and whether change of sex should be a ground for divorce. In Dolling v. Dolling, The Times, May 22 1958 (otherwise unreported), it was held that the latter was not a ground for divorce by the Court of Appeal. Sir Reginald Manningham-Buller, the Attorney-General, in a written reply, stated in Parliament that the conduct of the respondent in changing his sex did not amount to cruelty! (The Times, November 28, 1958.)

59. REDWAR, H.W.H. Comments on some ordinances of the Gold Coast Colony, etc. 1909. p. 19.

60. Courts Ordinance, Cap. 4 (1951 Revision) - repealed. Section 17 is still saved by the Courts Act of 1961.

practice in force in England ...

> With regard to this permissive character of the probate jurisdiction, it is submitted that it is reasonably clear after a perusal of sections 16 and 19 (now sections 17 and 87(1))[61] that the intention must have been to permit the admission to probate of wills of natives not executed with the formalities prescribed in English law."

Further, there is the proviso that Acts of the United Kingdom Parliament, declared either by the local legislature or by the local superior courts to extend within the jurisdiction of the courts, shall be in force so far only as the limits of local jurisdiction and local conditions permit.

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61. Courts Ordinance, Cap. 4 (1951 Revision) - repealed. Section 17 is still saved by the Courts Act of 1961.

PART III

THE COMMON LAW

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THE COMMON LAW

Chapter Four

A. NATURE AND CONTENT

The authority for the application of the common law of England in West Africa is now contained in the various local enactments providing for the application of English law. In Sierra Leone, for example, section 37 of the Courts Ordinance stipulates that:[1]

> "Subject to the provisions of this and any other Ordinance, the common law, the doctrines of equity and the statutes of general application in force in England on the 1st day of January, 1880, shall be in force in Sierra Leone."

What is the nature of the common law that is declared to have been introduced into West Africa? Over the years the virtues of the common law of England have been extolled to lofty heights. In one of his lectures[2] Mr. Justice McCardie sounded his praise in the following words:

> "When I reflect upon the spread and acceptance of our common law principles throughout the United States and Canada and Australia and New Zealand, may I not say that nothing has left a deeper or more beneficent

/impression

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1. Laws of Sierra Leone, Cap. 7 1960 Revision. There are variations in British colonial history. The Zanzibar Order in Council, 1924, speaks of the "substance of the common law".
2. The law, the advocate and the judge. (London, 1927. Solicitors' Law Stationery Society, p. 17.

> impression upon the Western world than the common law of England. Its work can never be undone. Its spirit and its ideals must ever live. If this country were to sink tomorrow beneath the waves, the record of the common law of England would stand for ever on the noblest pages of history."

The common law has sometimes been presented by admirers as a system without fault. Sir Frederick Pollock (perhaps the chief exponent in this century)personified the system into "Our lady the Common Law". But, let it be noted that even though Sir Frederick was prepared to do homage to "Our lady the Common Law", he made it clear in his address to the students of Columbia University that he did not worship her as a goddess exempt from human judgment or above human sympathy. "She is no placid

> Madonna sitting in a rose garden; rather she is like the Fortitude of the Florentine master, armed and expectant, her battle-mace lightly poised in fingers ready to close, at one swift motion, to the fighting grasp. Neither is she a cold minister of the Fates. Her soul is founded in an order older than the gods themselves, but the joy of strife is not strange to her, nor yet the humours of the crowd. She belongs to the kindred of Homer's gods, more powerful than men but not passionless or infallible. She can be jealous with Hera, merciless with Artemis and astute with Athene."[3]

Very few writers have been bold enough to attempt an exhaustive definition of the term "common law".[4] It is

3. POLLOCK, Sir F. The genius of the common law. New York, 1912. The Carpenter Lectures, 1911, p. 2. See also: HARVEY, C.P. The advocate's devil. (1958) p. 84. This excellent little book is a joy to read.

4. The adjective "common" came into use seven hundred years ago to describe the law common to the whole of England. The migration of the common law, 1960. Title "Introduction" by the Lord Chancellor, p. 3.

an expression easier to identify by its main characteristic than to define. Perhaps this is why it has been described as "the natural heritage of Englishmen". Merely to define it as that part of the law of England which, before the Judicature Acts of 1873-75, was administered by the common law courts as opposed to equity, is not enough.[5] Sir William Blackstone, one of the great English writers on law, divides the municipal law of England into two kinds: the lex non scripta, the unwritten or common law; and the lex scripta, the written or statute law:

> "This unwritten or common law is properly distinguishable into three kinds: 1. General customs, which are the universal rule of the whole kingdom, and form the common law in its stricter and more usual signification. 2. Particular customs, which for the most part affect only the inhabitants of particular districts. 3. Certain particular laws, which by custom are adopted and used by some particular courts, of pretty general and extensive jurisdiction." [6]

By "general customs" or the "common law" properly so-called, he means "that law by which proceedings and determinations in the King's ordinary courts of justice are guided and directed".[7] Blackstone also gives examples of them and describes them as the doctrines that are not set down in any written statute or ordinance, but merely depend upon

/immemorial

5. JOWITT, Earl. The Dictionary of English Law (1959) 426.
6. 1 Comm. 67.
7. 1 Comm. 68.

immemorial usage, that is, upon common law, for their support. In brief, as Pollock and Maitland put it,[8] "The custom of the King's Court is the custom of England and becomes the common law". The fact that the common law is based upon custom is, as Allen points out, beyond doubt; but assuredly it is not merely an agglomeration of spontaneous customary rules unless "we are to ignore the vital influence of judicial interpretation upon our law".[9] The influence of the judiciary on the common law is equally stressed by Kent. In his Commentaries on American Law, he observes that:[10]

> "A great proportion of the rules and maxims which constitute the immense code of the common law grew into use by gradual adoption, and received, from time to time, the sanction of the courts of justice, without any legislative act or interference. It was the applic-ation of the dictates of natural justice, and of cultivated reason to particular cases."

In the just language of Sir Matthew Hale,[11] the common law of England is "not the product of the wisdom of some one man, or society of men, in any one age: but of the wisdom, counsel, experience, and observation of many ages of wise and observing men."

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8. History of English law, 2nd ed. 1952, Vol. 1, p. 184.
9. Law in the making (1951) 5th ed. p. 65.
10. KENT, J. Commentarieson American law (1873) 12th ed. ed. by O.W. Holmes, Jr., p. 536.
11. Preface to Rolle's Abridgment.

The term "common law" is used by English lawyers with unfortunate diversities of meaning. The common law in its old home can be contrasted with the other branches of the law in at least three different ways:

1. Common law and statute law - In this sense, the term "common law" is used to describe the whole of the law except that which has its origin in statutes. According to the observation of an eminent English Chief Justice, "the statute law is the will of the Legislature in writing; the common law is nothing else but statutes worn out by time; all our law began by consent of the Legislature, and whether it is now law by usage, or writing it is the same thing." 12

Firstly, the common law comprises what Blackstone describes as "general customs" "That is that law, by which proceedings and determinations in the King's ordinary courts of justice are guided and directed. This for the most part, settles the course in which lands descend by inheritance; the manner and form of acquiring and transferring property; the solemnities and obligations of contracts, the rules of expounding wills, deeds, and Acts of Parliament; the several species of temporal offences; with the manner and degree of punishment; and an infinite number of minute particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires". 13

There have been statutory modifications to a number of the examples given by Blackstone. Secondly, the unenacted law, or the common law in the first sense, comprehends the law /merchant.

12. Collins v. Blantern (1765) 2 Wils. K.B. 341 at 348.
13. 1 Comm. 68.

Blackstone treats the law merchant under his second branch of the unwritten laws of England. He describes it as "a

> particular system of customs used only among one set of the King's subjects, called the custom of the merchants or lex mercatoria: which, however different from the general rules of the common law, is yet engrafted into it and made part of it; being allowed, for the benefit of trade, to be of the utmost validity in all commercial transactions." 14

The process of the "engrafting" was by no means smooth. In his treatise on the law of sale, Lord Blackburn observes:

> "There is no part of the history of English law more obscure than that connected with the common maxim, that the law merchant is part of the law of the land." 15

Early writers on the law regarded the law merchant as a branch of the law of nations. Undoubtedly, however, there was a time when the law merchant, though the law of England, was also the law of other nations and was the law of England because it was the law of other nations. The statement that the law merchant is a branch of the law of nations sometimes meant no more than that it was free from certain technical rules of the common law.[16] It was

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14. 1 Comm. 75.
15. A treatise on the effect of the Contract of Sale. London, 1st ed, 1845. p. 207.
16. SMITH, J.W. A compendium of mercantile law. 13th ed., by H.C. Gutteridge & ors. 13th ed., 1931, p. ccviii, The historical introduction relied on by the writer was written by Sir John Macdonell.

certainly administered in a different manner from that in which the common law was administered. The statement was true in so far as it also demonstrates the fact that mercantile law grew in great degree out of the transactions between different nations. Sir John Davies, writing in the 17th century, enumerated the differences between the law merchant and the common law, most of which have now lost their significance. There is, however, one distinction which exists today: "... in a sute at the common law no man's writing can be pleaded against him as his act and deed, unless the same be sealed and delivered; but in a sute between merchants, bills of lading, bills of exchange, being but tickets without seals, letters of advice and credences, policies of assurance, assignations of debt, all of which are of no force at common law, are of good credit and force by the law merchant." [17]

Although the law merchant was in its early stages distinguished from the common law, yet it was developed by such eminent judges as Lord Mansfield to form part and parcel of the common law. Thus law merchant had a three stage growth.[18] The first stage began when mercantile law, so far as it existed, was administered in special courts. In the second /stage

17. Cited in Smith's Mercantile law, p. ccxxi.
18. For simplicity, the expressions "mercantile law" and "the law merchant" are being used inter-changeably.

stage, mercantile law chiefly consisted of a body of customs, to be proved in case of doubt as facts, and binding only upon a special class. The third and final stage covers a period in which these customs are incorporated into the general law, and are binding upon all, whether merchants or not.[19]

Our third proposition is that the common law of England comprehends international customary law. In the case of West Rand Central Gold Mining Co. Ltd. v. The King[20] Lord Alverstone, C.J., made the following observations:

> "... The second proposition urged by Lord Robert Cecil that international law forms part of the law of England requires a word of explanation and comment. It is quite true that whatever has received the common consent of civilised nations must have received the assent of our country, and that to which we have assented along with other nations in general may be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant. But any doctrine so invoked must be really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that theparticular proposition put forward has been recognised and acted upon by our country, or that it is of such a nature, as has been so widely and generally accepted, that it can hardly be supposed that any civilised state would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognised, are not in themselves sufficient."

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19. Smith's Mercantile law. op cit. p. ccxxv.
20. [1905] 2 K.B. 391 at p. 407.

It is well established that it is the common law of this country that not only ambassadors, but members of their suites, are exempt from judicial process. The Diplomatic Privileges Act 1708[21] merely declared the law and did not achieve any change in the law.[22] Before this Statute, this immunity accorded to an ambassador derived from the comity of nations.[23]

Fourthly, the term common law, in the broad sense, would appear to include ecclesiastical law. Blackstone, following Lord Hale, classfies the civil and canon laws as part of the common law, which by custom, are adopted and used in peculiar jurisdictions.[24] This is how Lord Blackstone defends the proposition:[25]

> "It may seem a little improper at first view to rank these laws under the head of leges nonscriptae, or unwritten laws, seeing they are set forth by authority in their pandects, their codes and their institutions; their councils, decrees, and decretals; /and

21. (1708) 7 Ann. Comp. 12.
22. The Amazone [1940] P. 40 per GODDARD, L.J.
23. R. v. A.B. (1941) Sub nomine R. v. Kent (1941) 110 L.J. K.B. 268.
24. Crump v. Morgan - Supreme Court of North California; (1843) 3 Ired. Eq. 91. Reported also in Readings on the history and system of the common law, by Pound & Plucknett (1927) p. 325.
25. 1 Comm. 79-80.

> and enforced by an immense number of expositions, decisions, and treatises of the learned in both branches of the law. But I do this after the example of Sir Matthew Hale, because it is most plain that it is not on account of their being written laws, that either the canon law, or the civil law, have any obligation within this kingdom: neither do their force and efficacy depend upon their own intrinsic authority, which is the case of our written law, or acts of parliament...
>
> But all the strength that either the papal or imperial laws have obtained in this realm (or indeed in any other kingdom in Europe) is only because they have been admitted and received by immemorial usage and custom in some particular cases, and some particular courts; and then they form a branch of the leges non scriptae, or customary laws; or else, because they are in some other cases introduced by consent of parliament, and then they owe their validity to the leges scriptae, or statute law."

In spite of Blackstone's commentary, views differ as to whether ecclesiastical law forms part of the common law in its broad sense. In one case, TINDAL, L.C.J. spoke of "the common law of England of which the ecclesiastical law forms a part".[26] An American judge regarded it "as an entire mistake to say that the canon and civil law, as administered in the ecclesiastical laws of England are not parts of the common law".[27] But, on the other hand, in the American case of Burtis v. Burtis,[28] Chancellor Sanford

26. Reg. v. Milles ( ) 10 C.L. & F. 534 at 678. Blackstone, however, was of the opinion that the jurisdiction of the spiritual courts was not suitable for export - 1 Comm. 107.
27. Crump v. Morgan op cit.
28. 1st Hopkin's Chancery 557 New York, 14. American Decisions 563. See also: American Journal of Comparative Law (1908) Vol. 21, p. 231.

held that ecclesiastical did not form a part of the common law. In the course of his judgment, he said:

> "The English law concerning divorces ... is chiefly the ecclesiastical law and not the common law of that country."

2. Common law and equity: In another sense the common law is used to refer to the whole of the law (enacted or unenacted) excepting that portion which was developed and administered exclusively by the old Court of Chancery, and which is distinguished as equity. We shall, however, confine the meaning of the common law under this head to imply unenacted law. It is arguable whether the distinction is really valuable. The method of case-law which distinguishes the common law from other types of law equally applies in equity in its modern form, and in the admiralty and ecclesiastical jurisdictions. According to Lord Wright it is arbitrary to restrict the term "common law" to the law enforced in the old common law courts. In his view, the common law and equity should be treated as forming a single body of law.[29] Indeed, since the Judicature Act of 1873, common law and equity have been administered concurrently by the same courts. Lord Wright correctly points out that the working common lawyer is habitually using as part of /his

29. Legal essays and addresses: Title - "The Common Law in its old home", p. 330.

his tools conceptions and remedies provided in equity, such as the remedy of injunction or specific performance. In the opinion of the noble lord "it is impossible to conceive what we now regard as the modern common law without these and many other like concepts, which, though imported originally from equity, are as much a part of his daily work as the ideas of negligence, or conversion, or damages, and indeed are essential to functioning of the common law: without them the common law could not have survived." 30

It does not follow, however, that equity is not in itself a distinct source of law. In English law, equity has become, in the course of time, a technical system which is distinguishable from the common law.[31]

3. Common law and Special law. In yet a third sense, the term "common law" can be used to refer to the "general law" of the land, as opposed to the various forms of special law, such as local customs, which have to be specially pleaded and proved before the courts before they are recognised.[32]

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30. Lord Wright op cit. 331.
31. ALLEN, C.K. Law in the making (5th ed.) p. 399. English equity, said Austin, "arose from the sulkiness and obstinacy of the common law courts which refused to suit themselves to the changes which took place in opinion, and in the circumstances of society" - Lectures on jurisprudence, 5th ed. 1885, p. 615.
32. SALMOND, J.W. Jurisprudence, 3rd ed. 1910, p. 33.

B. MIGRATION AND CONDITION OF APPLICABILITY

In Chapter Two we pointed out that the extent to which English law is introduced into any particular territory varies according to the manner in which it was acquired. If it was acquired by settlement, then the common law of England, being the natural heritage of Englishmen, is directly applicable.[33] In the case of conquered or ceded countries which already had laws of their own before acquisition, the British Crown has power to alter or change those laws, but until then, the old laws of the country operate (unless such laws are repugnant on religious or ethical grounds). Thus Blackstone in his Commentaries observed that: "Our American plantations are principally of this latter sort, being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present inquire) or by treaties. And therefore the common law of England, as such, has no allowance or authority there."[34]

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However, local legislation enacted in the course of time, established the common law of England in all the British American colonies except the Province of Quebec.[35]

33. 1.Bl. Comm. 107.
34. 1.Bl. Comm. 108.
35. STOKES, A. A view of the constitution of the British Colonies in North America, etc. 1783, p. 30. Even now, the common law of the Province of Quebec, except in commercial matters, is "French law" - coutume de Paris. The common law of the other Provinces, as well as of Quebec in commercial matters is the English common law. See: (1897) 2 J. Comp. Leg. 26; The Migration of the Common Law, 1960, p.37. See also CHITTY, J. Prerogatives of the Crown, 1820, p. 32.

Until English law has been introduced in such countries acquired by conquest or cession, it would appear that the English common law would not be applicable automatically. Thus, it is recorded that when Jamaica became an English Colony and claimed English law as its consequential right, the British Crown not only denied such a right, but disallowed an Act[36] passed in the Island for declaring such law to be in force there; eventually, however, an Act was passed in Jamaica which declared that "all such laws and statutes of England which have been esteemed, introduced, used, accepted, or received, as laws in this Island, shall and are hereby declared to be and continue laws of this His Majesty's Island of Jamaica for ever."

For similar reasons the common law of Bechuanaland is not the English common law but Roman-Dutch law.[37] Trinidad retains much of the original Spanish law; the Cape of Good Hope and Ceylon retain a large amount of Roman-Dutch law, and Malta, which was a municipality of the Kingdom of Sicily, retains the old Sicilian law as modified by the subsequent legislation of the Grand Masters.

In West Africa, despite the introduction of English law, customary law is deemed applicable in causes and matters

36. 35 Car. 2, Cap. 13. See HOWARD, J.H. The laws of the British Colonies in the West Indies & other parts of America. (1827) p. xi.
37. (1896-7) 1 J.Comp. Leg. 137.

matters where the parties thereto are natives. The courts in most West African territories are enjoined to observe and enforce the observance of such customary laws, not being repugnant to natural justice, equity and good conscience.[38]

The common law emigrant, or the English common law, has usually been subject to certain restrictions in its new home. Englishmen and women who went out to settle in a new country carried with them "so much of the English law as is applicable to their own situation and the condition of an infant colony". One reason for this time-honoured principle is that, since the common law is the birthright of every Englishman wherever he may go, he accordingly carries his law with him.[39] With the greatest respect this rule is too wide: for an Englishman going to an English dependency, which is not an English colony, does not necessarily live under the English law. In Campbell v. Hall,[40] Lord Mansfield's fourth proposal gave weight to this view:

> "The law and legislation of every dominion equally affects all persons and all property within the limits thereof, and is the true rule for the decision of all questions which arise there. Whoever

/purchases

38. Law of England (Application) Ordinance, Cap. 3. s. 5 (Gambia).
39. 2 P. Wms. 75.
40. (1774) 20 State Tr. 323.

> purchases, sues, or lives there, puts himself under the law of the place and in the situation of its inhabitants. An Englishman in Minorca, or the Isle of Man, or the plantations, has no distinct right from the natives while he continues there." 41

As Lewis rightly points out, the true reason for the rule seems to be that the English settlers take out with them the common law of the mother country as of necessity.[42] They could not create out of hand a new body of law, and it is likely that there would be no persons sufficiently acquainted with any foreign system of law [redacted] to be able to administer it. Moreover, the system of law under which they had lived, to which they were accustomed, and which is expressed in their native language, was, on the whole, the best suited to their wants, however different the circumstances of the colony might be from the mother-country.

From my earlier remarks, it is evident that this reason does not apply to dependencies acquired by cession or conquest already possessing their own legal systems. In West Africa, as has already been observed, irrespective of the actual mode of acquisition by the British, special statutory provisions were made for the application of English common law. In the Gambia, for example, such law is applicable "so far only as the limits of the local jurisdiction and local circumstances permit and subject to any

41. It is worthy of note that Lord Mansfield was a Scotsman!
42. LEWIS, op cit. 197.

any existing or future local Ordinance".[43] What does this proviso mean? In interpreting a similar section applying to Kenya, DENNING, L.J. made the following observation:[44]

> "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 foreign lands without considerable qualification. Just as with an 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 fulfill 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 they will not fail therein."

Lord Denning's remarks are very helpful, but with the greatest respect the task must not be entrusted to the courts and the judges alone. Judges themselves have admitted that nothing is more difficult than to know which of the English laws is to be regarded as imported

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43. Laws of the Gambia (1955 Revision) Cap. 3, s. 2.
44. Nyali Ltd. V. Attorney-General. [1955] 1 All E.R. 646, 653; [1956] 1 Q.B. 1; [1955] 2 W.L.R. 649, affirmed: [1957] A.C. 253.

into the Colonies.[45] The effect of entrusting this task to the judges alone is to make the rules relating to the applicability of English law overseas so vague and ill-defined as to leave a wide discretion to the courts abroad, and even to cast doubt upon the extent of the legislation. Howard, in his book on the laws of the British Colonies in the West Indies and other parts of America, has made the following observations on the subject: "It is clear that the English laws are partially in force in many parts of our American possessions; but it is equally clear, that for want of certain admitted principles, upon which the applicability of those laws can be established, it is very difficult to define which of them do, and which do not extend to the Colonies respectively; and that, on the contrary, the greatest difference of opinion exists on the subject both at home and in the colonies." [46]

It is submitted that it should have been the primary duty of the local legislatures to decide what aspects of English common law should have been regarded as having been imported. It is only after this has been achieved that the judges should ensure that such aspects of the common law are applied subject to modifications and local conditions. The closest example of a more systematic reception of the English common law comes from British Guiana. In 1912 the Government of British Guiana appointed /a

45. Whicker v. Hume (1858) 7 H.L.C. 124 at p. 161.
46. HOWARD, J.H. The laws of the British Colonies in the West Indies & other parts of America. (1827) Vol. I, p. xii.

a Commission to inquire whether any changes in the common law of the territory (which was Roman-Dutch law) were desirable. The Committee, under the chairmanship of Mr. Nunan, were unanimous that Roman-Dutch law in British Guiana should be replaced by the common law of England. The particular aspects of the common law recommended to be adopted were made clear in the following extract from the Report: [47]

> "We recommend the introduction of English common law in regard to all mercantile matters, to all domestic relations (including marriage, judicial separation and divorce, the law of husband wife, parent and child, guardian or curator and minors, and master and servant), to the law of delicts or torts, agency, suretyship, liens, inteste succession, and in fact to all the law of persons, things, obligations, inheritance, and every other description of matters whatsoever not dealt with by legislation or otherwise expressly exempted."

The Commission were unanimous that the English law of real property should be expressly excluded. On that topic they declared that "We have no desire to introduce the complicated incidents of English real property law". The draft ordinance prepared by the Committee and entitled "An Ordinance to codify and to substitute the English common law and principles of Equity for the Roman-Dutch common law" became law in 1916.[48]

47. LEE, R.W. The common law of British Guiana. (1914) 14 J.Comp. Leg. n.s. 447; LEDLIE, J.C. Roman-Dutch law in British Guiana and a West Indian Court of Appeal. (1917) 17 J.Comp. Leg. n.s. 217-226.

48. The Civil Law of British Guiana Ordinance, 1916.

The reception of the English common law in West Africa has not been subjected to such a systematic approach as was done in British Guiana. The various legislatures have not been very keen to ascertain the extent to which the common law applies in the different territories. Here and there one comes across a modification or rejection of a particular feature of the common law, but these efforts have been spasmodic and unsystematic. Thus in Sierra Leone it was not until 1933 that so much of the English common law as specially restricted the acquisition, holding or disposition of real property by a married woman, and as much of the common law as conferred estates in dower or by courtesy, were abolished by legislation.[49]

In West Africa, therefore, it can be stated that the manner of the ascertainment of the applicable common law is based upon the principle of "wait and see". If there is a case in court the judges will doubtless give a ruling. Otherwise one must live in the realm of uncertainty. As has been pointed out elsewhere, this was also the view of Blackstone, who suggests in his Commentaries that "what shall be admitted and what rejected, at what times and under what restrictions, must in case of disputes be decided in the first instance by their own provincial judicature..." [50]

49. Imperial Statutes (Law of Property) Adoption Ord. Cap. 18 (1960) Revision. ss. 4 & 5. See also Bright v. Bright's Executors (1958) 16 W.A.C.A. 50.

50. 1 Comm. 107.

However, the assumption of such a view did not prevent the venerable author from listing a number of common law principles which in his opinion were unsuitable for export. Thus he admits that "The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force." 51

If Blackstone were to come back to life today, he would be astounded to see the extent to which the common law of England has been received abroad. With respect to English real property, he would have realised that the reception has been mixed. On the one hand, in British Guiana, it was expressly rejected. In 1844, when the Government of Hong Kong proposed to adopt the English real property law, Stephen objected. To him "if there be any subject on which the applicability of the law of England to local circumstances is questionable it is in regard to real property." 52

On the other hand, it has been received in America, subject to certain exceptions.53 In West Africa English land law

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51. 1 Comm. 107. See also The Lauderdale Peerage (1885) L.R. 10 App.Cas. 692 at 746.
52. HALL, H.L. The Colonial Office (1937) p. 135.
53. E.g. "The incorporeal hereditaments which subsist by our law are fewer than those known and recognised by the Englishm law. We have no such rights as advowsons, tithes, dignitaries" - KENT, J. Commentaries on American law (1873) Vol. 3, p. 402.

which was imported goes side by side with customary land tenure. In the Ghana case of Nsiah v. Union Trading Co.,[54] KORSAH, C.J. has ruled that leashold interest in land is still in Ghanaian law personal property, on the ground that laws enacted in the United Kingdom to improve English land law after 1874 are not applicable to Ghana. Why countries in West Africa should accept the intricate principles of English land law evolved down the centuries in conditions totally different from those to be found in Africa, is difficult to understand.

Secondly, Blackstone would, however, have discovered that there are conflicting decisions in America especially as to whether or not the jurisdiction of the former ecclesiastical courts in England formed part of the common law transported there. It is natural for such a question to have worried the early judges of the United States, once it is appreciated that, prior to 1857, the exclesiastical courts in England had exclusive jurisdiction in matrimonial matters with authority in certain cases to grant a decree for the dissolution of marriage.[55] In addition to this, the ecclesiastical courts had jurisdiction in relation to the grant and revocation of probates of wills and letters

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54. (1959) G.L.R. 79 at p. 84. See also Ansah & anor v. Joe & ors. Sup. Ct. Civil App. No. 17/61. Judgments Jan-June 1961. Unreported, p. 140.

55. "An Act to amend the law relating to Divorce and Matrimonial Causes in England" (1857) 21 & 22 Vict. Cap. 85.

of administration in England.[56] If the American colonists did not take this part of the law with them, there would be a big gap to be filled. There are two cases of interest. The first is the American case of Le Barron v. Le Barron,[57] decided in 1862. In that case, the wife petitioned to the Supreme Court of Vermont for a decree of nullity of marriage on the grounds of the alleged physical impotence of the husband. It was found that in a lower court the husband had refused to submit to a medical examination. However, in the Supreme Court, the husband's objection to the wife's notion was on this ground: that the whole jurisdiction and power of the Court over the subject of granting divorces and annulling marriages, was given by statute, and that as the statute did not give the Court power to require such an examination, it did not, therefore, possess such authority. POLAND, Ch.J., in his judgment admitted that as there were no ecclesiastical courts in America, the American courts had no authority to exercise jurisdiction in this branch of the law until they were invested with jurisdiction over matrimonial causes /by

56. "An Act to amend the law relating to Probates and Letters of Administration in England." (1857) 21 & 22 Vict. Cap. 77.

57. 35 Vt. 365. See POUND & PLUCKNETT. Readings on ... system of common law, op cit. 325. at p. 327

by the legislature. But the learned Judge went on to observe that "When the legislatures establish a tribunal to exercise this jurisdiction, or invest it in any of the already established courts, such tribunal becomes entitled, and it is their duty, to exercise it, according to the general principles of the common law of the subject, and the practice of the English Courts, so far as they are suited to our condition and the general spirit of our laws, or are modified or limited by our Statute."

The other case was decided in 1907.[58] It came before the United States Court for China. Primarily, the question was whether this Court had jurisdiction in matrimonial cases, including divorce. That question resolved itself into another - "whether the law on the subject (divorce and separation), as administered by the ecclesiastical courts, constituted a part of the common law of England which has been introduced into the United States at the date of the change of sovereignty."

There were two views on this topic presented to the Court. There was the view of Professor Bishop, who laid it down in his work on Marriage and Divorce,[59] that such /law

58. Reuben R. Mcdermid v. Alice F. Mcdermid. (1807). In The U.S. Court for China at Shanghai, (1908) 21 Amer. J.Interp. Law, p. 225. See also ibid, p. 233 for the case of Re probate of the will on John Pratt Roberts, where the question was whether the law governing the administration of estates was part of the imported common law of England. The learned judge cited a number of authorities to show that this was in fact the case. Indeed Judge Woerner, expressed it thus: "The common law of England, as affected by the statutes ... (and others relating to probate,) which were enacted before the settlement of the American Colonies, is at the basis of the American statutes concerning administration, and the law in the American States in so far as it has not been supplanted by their own statutes." (Woerner, American law of Administration Vol. 1, p.136)

59. Vol. I. Chapter 4.

law was transplanted. The contrary view was held by Chancellor Sanford in Burtis v. Burtis,[60] and the judge of the United States Court for China in the case under discussion agreed with the ruling in Burtis v. Burtis. The decision is remarkable, and it is doubtful whether Chancellor L Sanford's dictum is right. It is agreed that between the arrival of the American colonists and the organisation of the courts, the jurisdiction to grant divorce must have been in abeyance. But, as soon as the matrimonial and probate jurisdiction was conferred on the courts, the necessary inference is that such courts then had the power to grant divorce and probates according to the principles of the common law of England in the broad sense.[61]

How far can it be stated that Ecclesiastical law formed part of the common law introduced into West Africa? As will be seen from the chapter on the evolution of the judicial system, prior to the enactment of the English Divorce and Matrimonial Causes Act of 1857, the jurisdiction of the courts in matrimonial c auses in West Africa /was

60. 1 Hopk. 557.

61. All that the New York Court decided was that corporeal impotence was not a cause of divorce under the existing laws, and that the English law of divorce on that point had never been adopted. Well before 1873, the jurisdiction of the Court of Chancery on this subject was extended to enable the Chancellor to declare such marriages void - KENT; Commentaries, Vol. 2, p. 114.

was as uncertain as that of the American jurisdiction in former days. Thus in Sierra Leone a special Act had to be passed in 1829 to declare the marriage of Stephen and Maria Antoinette "to be dissolved, void, and of none effect, and to enable him to marry again".[62] In the former Gold Coast Dr. Madden was informed by the President of the Council of Government that he (the President) had to take cognizance of the cases where application for divorce had been made to him, and once, in the instance of a woman married to a European, he had pronounced a formal "sentence" of divorce and had the sentence duly recorded in the archives of his office.[63] Fortunately, this somewhat unhappy state of affairs did not last for very long. On the enactment of the English Divorce and Matrimonial Causes Act in 1857, which transferred the jurisdiction of the ecclesiastical courts in matrimonial causes to an English Special Court, jurisdiction in matrimonial causes was vested in the Supreme Court of the Colony of Sierra Leone in 1858.[64] The Supreme Court was also invested with probate jurisdiction

/similar

62. Ordinance dated 14th July 1829. See Ords. for the Colony of Sierra Leone 1811-1857, compiled by A. Montagu. Vol. I, p. 22.
63. Report of H.M. Commissioner of Inquiry on the State of the British Settlements on the Gold Coast, Sierra Leone and the Gambia. Par Pap. Session 1842. V.12, p.15
64. No. 10 of 1858, s. 8, repealed by No. 14 of 1904 (Sierra Leone).

similar to that exercised by Her Majesty's Court of Probate in England.[65]

On the question of suitability of English law to overseas countries, the Privy Council has held in a number of cases that there are rules of English law independent of statutes which can be regarded as applicable wherever English law is introduced. Thus, in the case of Yeap Chea Neo v. Ong Cheng Neo,[66] being an appeal from the Straits Settlements, the Privy Council held that the English law against perpetuities applied in Penang. "This rule, which certainly has been recognised as existing in the law of England independently of any statute is founded upon considerations of public policy which seem to be as applicable to the condition of such a place as Penang as to England viz. to prevent the mischief of making property inalienable, unless for objects which are in some way useful or beneficial to the community..."

"The law of England has, however, made an exception, also on grounds of public policy in favour of gifts for purposes useful and beneficial to the public, and which in a wide sense of the term, are called charitable uses, and this exception may properly be assumed to have passed with the rule into the law of the Colony." [67]

While so much of that law as can be said to relate to matters and exigencies peculiar to the local condition of England and to be inapplicable to the conditions of the

/overseas

65. No 10 of 1858 S.7. For the Gaol Court see Ord. dated Jan. 19, 1859

66. (1875) L.R. 6 P.C. p. 381. The case concerned a will drawn in the style of an English will, and attested according to English law, and the main question in the suit was the effect of the bequest of the residurary estate to the executor.

67. Ibid. at p. 394.

overseas territory is not be treated as so imported, the process of selection must rest on a solid basis. [redacted]. Again, the Privy Council in an appeal from the Supreme Court of the Federation of Malaya, held that the English rule that a condition subsequent in partial restraint of marriage, when annexed to a bequest of personalty, is ineffective to destroy the gift unless the will in question contains an explicit gift over of the legacy to another legatee, is applicable in Penang.[68]

Finally, let it be noted that although the common law of England consists of a collection of principles to be found in the opinions of sages or deduced from universal and immemorial usage, and receiving progressively the sanction of the courts, it is nevertheless true that the common law (so far as it is applicable overseas) has been recognised and adopted as one entire system.[69] As Roscoe Pound rightly observed in his article on the reception of the common law in America:[70] "If the statutes limit American courts to the English legal precepts as they stood in 1601, the traditional element of thelaw would have had to stand still in America in its early 17th century form, while going forward in England."

Very often, one comes across the statement - "the common law does not alter".[71] If by that it is meant that the /common

68. Leong & anor. v. Lim Beng Chye [1955] A.C. 648.
69. See, e.g. KENT: Commentaries on American law, Vol. 1, 537.
70. (1931) 4 Ency. of Social Sciences p. 53.
71. See, e.g. a lecture by Sir Patrick Devlin (as he then was) (1954) Crim. L.R. 661 at p. 663.

common law is static, then the statement is obviously erroneous. The better view is that the common law is a system which consists in applying to new combinations of circumstances those rules which are derived from legal principles and judicial precedents.[72] The genius of the common law is that the more it changes (or seems to change) the more it is the same thing. To Lord Wright, this maxim is a fiction. He would rather say that "the law is a living organism constantly growing, expanding, adapting itself, like a tree, which maintains its identity all the time, though in its full growth it looks very different from what it was when it was a sapling."[73]

The reason for the title of Lord Denning's courageous little book, The Changing Law, was because so many people think that thelaw is certain and that it can only be changed by Parliament. "The truth is that the law is often uncertain and it is continually being changed, or perhaps I should say developed, by the judges".

"This process of gradual change has been the very life of the common law". [74] There is an abundance of evidence to support Lord Denning's observation:

"Compare, for instance, the law of negligence a century ago with what it is today. Or take the rules as to the vicarious liability of an employer for the wrongful acts of his servants. In the time of Henry IV it was said that the employer could not be

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72. A statement of Lord Wensleydale - See Migration of the Common Law op cit, p. 4. Mr. Justice Holmes, an American, echoed this when he wrote "the life of the law has not been logic; it has been experience" - The common law, (1881) p. 1.
73. Ld. Wright. Legal essays & addresses (1939). Title: "The study of law" 401. An address delivered to the University of London Law Society, 1937. See also (1938) 54 L.Q.R. 185-200.
74. The changing law (1953) p. vii.

> held liable for his servants' acts because they were not his acts. After the middle of the last century vicarious liability was becoming recognised as the general rule, but it was still said that the employers would not be liable for frauds of a servant even in doing the class of acts he was authorised to do, if he did them for his own personal advantage. That limitation was swept away twenty years ago by the House of Lords.[75] The modern idea is that the employer who employs his servant for his profit, should bear the loss caused to others by the servant's torts while apparently engaged about the employer's business just as much as if the employer himself was actually so engaged. Again, it used to be said that there could be no liability in tort without culpa. But that idea has long been implicityly disregarded and now it is explicitly disavowed... Hence the cases of strict liability (Rylands v. Fletcher)[76] and a breach of a statutory liability, and the cases of vicarious liability in respect ofindependent contractors or of specially qualified managers or shipmasters with whose management the employers are by law forbidden to interfere." [77]

Indeed, if the common law of England had not been transplanted overseas as a living organism, the receiving countries would have been deprived of the sound rule enunciated by the House of Lords in the "Snail in the Bottle Case".[78] In 1842 it was axiomatically assumed that the doctrine of privity also operated in tort. Thus if A had broken a contract with B and the breach also injured C, C could not sue A in tort because A was not privy to the contract. This attitude is illustrated by the case of

75. The case referred to is Lloyd v. Grace, Smith & Co. [1912] A.C. 716.
76. (1866) L.R. 1 Ex. 265.
77. Lord Wright: Essays: "The study of law" p. 400.
78. Donoghue v. Stevenson [1932] A.C. 562.

of Winterbottom v. Wright.[79] The reasoning in that case, despite its evident fallacy, proved all too attractive to courts imbued with 19th century notions of the supremacy of "bargains" and the fetish of "privity". It was only after a long and expensive history that it met its quietus in the famous House of Lords decision in Donoghue v. Stevenson in 1932.[80] In that case a manufacturer of ginger beer had sold to a retailer ginger beer in an opaque bottle. The retailer resold it to A who entertained a young woman of her acquaintance with its contents. These included the decomposed remains of a snail which had found its way into the bottle at the factory. The young woman alleged that she became seriously ill as a result, and sued the manufacturers for negligence. It is true that there was no contractual duty on the part of the manufacturers towards her, but nevertheless a majority of the House of Lords held that he owed a duty to take care that the bottle did not contain noxious matter and that he was liable if the duty had not been performed. Lord Atkin's classic statement of the principle is one which can apply to all people that dwell on this earth. The relevant portion reads: /"The

79. Winterbottom v. Wright (1842) 10 M & W 109. See also FLEMMING, J.C. The law of torts (1957) p. 152; and WINFIELD on Torts (1954) p. 482.

80. [1932] A.C. 562. The Privy Council in Grant v. Australian Knitting Mills Ltd. [1936] A.C. 85 followed Donoghue's case.

> "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being affected when I am directing my mind to the acts or omissions which are called in question." [81]

It is declarations of the common law in such terms as these which are suitable to the rapidly changing Africa. Thus the experiment of Denning J., (as he then was) which consisted of tapping a slender stream of authority which had flowed in equity to improve the common-law doctrine of estoppel in the High Trees[82] case, has been applied with approval in the Ghana case of Bassil v. Said Raad & sons.[83]

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81. Op cit. p. 580.
82. [1947] K.B. 130. In Combe v. Combe [1951] K.B. 215; [1951] 1 All E.R. 767 DENNING, L.J. (as he then was) restated the doctrine thus: "The principle, as I understand it, is that, where one party has, by his words or conduct made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted upon it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him ..."
83. (1957) 3 W.A.L.R. 231.

C. SOME DISTINCTIVE FEATURES OF THE COMMON LAW OF ENGLAND

The common law has no doubt many features. Under this head it is intended to discuss some of its salient features, only - namely - judicial precedents, jury trial, prerogative writs, including that of Habeas Corpus, and the independence of the judiciary.

I. THE DOCTRINE OF JUDICIAL PRECEDENT[84]

In all the countries where the common law has been introduced, the custom of attributing exclusive or all but exclusive authority to judicial decisions has taken root. The common law method of judicial precedent, or the theory of stare decisis as it is sometimes called, is the very backbone of English law. In the words of Lord

/Wright

84. On this topic the following books are recommended for further reading:- DICEY, A.V. Lectures on the relation between law and public opinion in England, 1926; GOODHART, A.L. Essays in jurisprudence and the common law (1931) pp. 50-74; - Precedent in English and continental law (1934); ALLEN, C.K. Law in the making, 5th ed., (1951) & subsequent editions; PHILLIPS, O.H. A first book on English law (1955) 3rd ed. pp. 114-135; ALLOTT, A.N. Essays in African Law (1960) pp. 28-51; ELIAS, T.O. British colonial law (1962) pp. 18-36; HAILSBURY'S Laws of England, 3rd ed. Vol. 22, pp. 769 et seq.

Wright,[85] the idea is so deeply impressed in the mind of an English judge that he finds it hard to approach any problem except by first turning to the authorities.

In one English case,[86] PARKE, J., observed:

> "Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science."

Sir William Blackstone in his famous Commentaries, lays down the general rule that the decisions of courts of justice are evidence of what is the common law.[87] Hence /it

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85. Essays, op cit, p. 341. As against this view a satirist has suggested that the resolution to follow precedents is the same as a determination to perpetuate a wrong decision. "It is a maxim", says Gulliver, "among /our/ lawyers, that whatever has been done before may legally be done again, and therefore they take special care to record all the decisions formerly made, against common justice and the general reason of mankind. These, under the name of precedents, they produced as authorities to justify the most iniquitous opinions, and the judges never fail of directing accordingly." SWIFT, J. Works XI, ed. by Sir Walter Scott (2nd ed.) p. 318 - Cited in Dicey at p. 366.
86. Mirehouse v. Rennell (1833) ICL & F 527 at 546.
87. 1 Comm., 71.

it is the theory of stare decisis which keeps the common law alive. Blackstone, who also defends judicial precedents for the sake of certainty of the law, says:[88]

> "For it is an established rule to abide by former precedents, where the same points come again in litigation; as well as to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land."

But strict adherence to this principle may perpetuate a bad law. As the learned jurist himself admits, if a former decision is found to be manifestly absurd and unjust it should be declared that such a sentence was not law.[89] Another reason for precedent may be termed respect for the opinion of one's ancestors.[90]

As against this view, Mr. Justice Holmes (one of the great American judges of his day) hassaid that:

> "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." 91

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88. 1 Comm., 69.
89. Ibid, 70.
90. GOODHART in his Precedent in English and continental law lists 12 reasons.
91. Collected legal papers, 1920. p. 187.

The modern method of precedent in England depends upon a clear and unchangeable hierarchy of courts. It has been said that three conditions must exist for the successful working of the doctrine. There must be (1) a centralised judicial system; (2) a group of learned lawyers, both at the Bar and on the Bench, who are bound together by a common professional tradition; and (3) an independent Bench.[92] Briefly stated, the mechanics of the systems is that every court is absolutely bound by the decisions of all courts superior to itself, but the highest court of the land holds itself bound by its own previous decisions. Thus in England the rule is that:

(a) The decision of the House of Lords upon questions of law must be followed by every inferior court.[93] The House of Lords also holds itself bound by its previous decisions. As the Earl of Halsbury, L.C., admitted in London Street Tramways Co. v. London County Council,[94] interest reipublicae that there should be finis litium at some time. An erroneous decision of the House can be set aside only by an Act of Parliament.[95]

92. Sir William Holdsworth: Some lessons of our legal history (1928) p. 20.
93. French v. Macale (1842) 2 Dr. & War. 269 at 283.
94. [1898] A.C. 375 H.L.
95. Ibid at p. 380

(b) The decisions of the Court of Appeal upon questions of law bind the courts of first instance. Although the Court of Appeal is bound by its own previous decisions, the Court in Young v. Bristol Aeroplane Co.,[96] laid down three exceptions to this rule, namely, that:- (1) the court is entitled and bound to decide which of two conflicting decisions of its own it will follow; (2) the court must refuse to follow a decision of its own which, in itsopinion, is inconsistent with the decision of the House of Lords; and (3) the court is not bound to follow a decision of its own if it is satisfied that it was given per incuriam, for example, when the court has acted in ignorance of a previous decision of its own or of a court of co-ordinate jurisdiction which covered the case before it, or when it has acted in ignorance of a decision of the House of Lords, or a statute.[97]

(c) The Court of Criminal Appeal regards itself as generally bound by its own previous decisions. But in R. v. Taylor,[98] the Court of Criminal Appeal, in overruling a /previous

96. [1944] K.B. 718. On appeal to the House of Lords the substantive points was reversed, but the principle enunciated was not questioned. See also [1946] A.C. 163.

97. The Court of Appeal does not regard itself as /bound by the decisions of the Court of Criminal Appeal, even if both Courts are of the same standing, but each others' decisions are treated with great respect. See Thorne v. Motor Trade Association [1937] A.C. 797, as to how such conflict may be resolved.

98. [1950] 2 K.B. 368. It was a case of bigamy.

previous decision in Rex v. Treanor,[99] adopted a more suitable principle. Lord Goddard stated it thus:

> "This Court, however, has to deal with questions involving the liberty of the subject, and if it finds on reconsideration, that, in the opinion of a full court assembled for that purpose, the law has been either misapplied or misunderstood in a decision which it has previously given, and on the strength of that decision, an accused person has been sentenced and imprisoned, it is the bounden duty of the Court to reconsider the earlier decision with a view to seeing whether that person had been properly convicted."

(d) Divisional Courts are bound in civil cases by decisions of the Court of Appeal,[1] and probably by the decisions of the Court of Criminal Appeal in criminal matters. Divisional Courts are bound by their own previous decisions,[2] but subject to the same flexible exceptions enunciated for the Court of Appeal. In Nicholas v. Penny,[3] the Divisional Court dissented from its previous majority decision in Melluish v. Morris,[4] which must now be regarded as of no authority.[5]

(e) In principle a judge of the High Court sitting alone is not bound by the decisions of another High Court judge, although one High Court judge will seldom depart /from

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99. [1931] 1 All E.R. 330.
1. Read v. Joannon (1890) 25 Q.B.D. 300 at 302-3.
2. Huddersfield (Police Authority) v. Watson (1947) K.B. 842 at 846.
3. [1950] 2 K.B. 466.
4. [1938] 4 All E.R. 98.
5. See ALLEN, C.K. Law in the making (5th ed.) p. 230; and WINDER, W.H.D. Divisional Court precedents, 9 M.L.R.257.

from the decisions of the other.[6] The previous decision must be palpably wrong for him to do so.

(f) The Judicial Committee of the Privy Council is in theory only an advisory body to the sovereign. The Judicial Committee, which is a tribunal of Privy Councillors, was created by the Judicial Committee Act, 1833, for the purpose of hearing appeals, which before the passing of the Act could be brought before the Sovereign, or the Sovereign in Council. It is the final Court of Appeal for a few of the Commonwealth territories, and all the British dependencies. It is also an appellate court for English ecclesiastical and prize courts. From the foregoing, it can be seen that the Judicial Committee occupies a peculiar position. As a general rule the decision (or more accurately the advice) of the Judicial Committee is not binding on English courts[7] except in ecclesiastical or prize cases. But as KENNEDY, J., observed in Dulieu v. White[8] "A judgment of the Privy Council ought of course to be treated by this Court as entitled to very great weight indeed; but is not binding upon us." Contrary to the

/procedure

6. Green v. Berliner [1936] 2 K.B. 477 at 493-4.
7. London Joint Stock Bank v. Macmillan [1918] A.C. 777.
8. [1901] 2 K.B. 669 at 677.

procedure of the House of Lords, the Privy Council does not hold itself as bound by its own previous decisions. Thus in Mercantile Bank of India Ltd. v. Central Bank of India Ltd.,[9] which was an appeal from the High Court of Madras on a point of mercantile law, the Judicial Committee clearly refused to follow its own decision given in the Ghana case of Commonwealth Trust v. Akotey.[10] Again, in criminal matters where life and liberty are at stake, the Privy Council will not hesitate to reject even a recent decision of its own.[11] However, in constitutional matters, it seldom reverses its own decision.[12]

It is not very clear as to how far the decisions of the House of Lords bind the Privy Council on a point of English law pure and simple. It can be argued that since it is an open secret that almost all the members of the Privy Council are also judges in the House of Lords, there should be no difficulty in the way of the Privy Council in following the decisions of the House of Lords. Thus the principle of negligence enunciated by the Lords in Donoghue v. Stevenson in 1932,[13] was followed four years later by the /Privy

9. [1938] A.C. 287.
10. [1926] A.C. 72. Even the High Court in England refused to follow it in Jerone v. Bentley and Co. [1952] 2 All E.R. 114.
11. Nkambule v. R. [1950] A.C. 379.
12. A-G for Ontario v. Canada Temperance Federation [1946] A.C. 193.
13. [1932] A.C. 562.

Privy Council in Grant v. Australian Knitting Mills Ltd.[14] But as English law in the various Commonwealth countries is not necessarily the same as that in England, it is not safe to predict the situation. Similarly, it must not be taken as a foregone conclusion that the decisions of the Privy Council have no binding effect whatsoever on English courts. Recently, the Judicial Committee in Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd,[15] popularly known as The Wagon Mound, has refused to follow the rule concerning liability for the direct but unforeseeable consequences of a wrongful act, generally believed to have been established by the Court of Appeal in Re Polemis [1921] 3 K.B. 560.[16] The Privy Council held that the decision in Re Polemis was not good law, and that the essential factor in determining the consequence of a tortious act of negligence is whether the damage is of such a kind as the reasonable man should have foreseen. Although the Court of Appeal is bound by its own decision, it is hoped that the Court of Appeal and the High Court of England will follow the decisions of the Privy Council given in the Wagon Mound case.

It need hardly be said that the decisions of the Privy Council, which acts as the highest Court of Appeal from some of /the

14. [1936] A.C. 85.
15. [1961] A.C. 388.
16. For a stimulating note see: "Obituary: Re Polemis" by A.L.G. (1961) 77 L.Q.R. 175-178.

the Commonwealth countries, bind all such courts. The implications of this last statement will be discussed in another context.

Finally, some other principles governing the operation of the English doctrine of precedent must be noted. The first point is that the principle of stare decisis is applied in England to the construction of statutes as well as to the ascertainment of the common law and equity rules. Secondly, the successful operation of the principle depends on a first class system of law reporting. Thirdly, a distinction is made between a binding authority and a persuasive authority. As a general rule, courts must follow a binding precedent even though they disapprove of it. But English judges through the "art of distinguishing" are usually able to free themselves from the rigid doctrine. That which is binding is often termed the ratio decidendi, i.e. the general reasons given for the decision, or the general grounds upon which it is based, detached or abstracted from the specific peculiarities of the case which gives rise to the decision.[17] Statements made by English judges which are not necessary to the decision are technically termed obiter dicta, which means "things said by the way". These dicta have only persuasive authority on

17. HALSBURY'S Laws of England. 3rd ed. Vol. 22, 796. /the
For a detailed discussion see GOODHART, A.L.: Essays.

the judges. In the absence of binding precedents, persuasive authority is also given to the decisions of the Privy Council, Irish, Scottish, Commonwealth and United States' courts.

(a) Judicial precedent in West Africa.

The subject divides itself into two. Firstly, there is the question of the operation of the doctrine in West Africa, and secondly, there is the question of the authority of decisions of the courts in England on the West African courts.

A quick reference to the chapter dealing with the courts system in West Africa will reveal that the structure of the courts is largely similar to the English system, which was reorganised by the Judicature Act, 1873. There are, however, some courts existing in England which were never introduced into West Africa. In addition there have been modifications on the English model. Appellate courts in West Africa exercise both civil and criminal jurisdiction. The hierarchy of the courts is the same(except that there are no ecclesiastical courts). The highest courts are:- the Court of Appeal for Sierra Leone, the Gambia Court of Appeal, the Supreme Court in Ghana (formerly called the Ghana Court of Appeal), and the Federal Supreme Court in Nigeria. The final appellate court for all the countries

/except

except Ghana, is the Judicial Committee of the Privy Council. All the local courts mentioned can be described as the direct successors to the now defunct West African Court of Appeal, which itself had succeeded the Full Courts.

The appellate courts in West Africa can be considered to be of the same standing as the English Court of Appeal and the Court of Criminal Appeal.

Next in order come the Supreme Courts of Sierra Leone and the Gambia and the High Court of Ghana, and in all the Regions of the Federation of Nigeria, including that of Lagos. The jurisdiction of these courts is very similar to that exercised by the High Court in England. In addition, the local High Courts have appellate jurisdiction in respect of appeals from the Magistrates' Courts or Circuit Courts (as is the case in Ghana). The Courts of Appeal and the High Court are termed superior courts. Unlike the position in England, some Magistrates' Courts, for example in the Eastern Region of Nigeria, and some customary courts, as in the Western Region, have appellate jurisdiction in both civil and criminal matters originally decided in the customary courts. In a country where the customary courts are graded, it would appear that decisions of a higher customary court would bind the lower courts.

/Thus

Thus in the Ghana case of Anane v. Mensah,[18] the Court of Appeal (now the Supreme Court) said "Native customary law is peculiarly within the knowledge of the native courts, and the opinion of a superior native court on native custom must be preferred to the opinion of an inferior native court, unless it is either contrary to a decision of the Supreme Court of the Privy Council on the point..." The inference to be drawn from this statement is that the decisions of the Superior Courts bind local customary courts and that decisions of customary appeal courts bind customary courts of first instance. Indeed, in the Western Region of Nigeria Grade A Customary Courts, presided over by legally qualified judges, notice is taken of decisions of the former West African Court of Appeal, and they are regularly cited by counsel who have a right of audience in such courts. Nevertheless it cannot be said that the method of precedent has really been established at the level of courts of inferior jurisdiction since the decisions of such courts are not reported.

Case law in West Africa confirms the view that the English doctrine of precedent forms part of the received laws. Thus, in Osumanu v. Amadu,[19] the West African Court of Appeal ruled that in civil cases it was bound to follow /previous

18. (1959) G.L.R. 50 at p. 53.
19. (1949) 12 W.A.C.A. 437, overruling Dompreh v. Marfo 12 W.A.C.A. 349.

previous decisions of its own, as well as those of courts of co-ordinate jurisdiction. The Court added that:-

> "The only exceptions to this rule (two of them apparent only) may thus be summarised:
>
> (1) The Court is entitled and bound to decide which of two conflicting decisions of its own it will follow.
> (2) The Court is entitled to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the Judicial Committee of the Privy Council or the House of Lords.
> (3) The Court is not bound to follow a decision of its own if it is satisfied that the decision was given per incuriam."

The Court also adopted the principles enunciated by the English Court of Criminal Appeal in R. v. Taylor,[20] with regard to the reconsideration of previous decisions of the latter court.[21] The rule laid down by the West African Court of Appeal was that it would not be invariably bound by its own previous decisions, but as a matter of practice no previous decision by it would be reviewed save by a full court constituted by five members.

The principle enunciated by the West African Court of Appeal that the appellate court was bound to follow its own previous decisions must be taken to mean that such decisions bind only the courts of the territory from which

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20. [1950] 2 K.B. 368.
21. (1950) 13 W.A.C.A. 114.

thethe appeal was brought. For the laws in the four territories, even on a question of English law is not the same. As early as1935 the West African Court of Appeal in the case of Nertherland Distillery v. J.H. Henkes' Distillery,[22] on a question relating to trade marks, held that the decisions of the Full Court of Nigeria (which before it was abolished was of equal standing with the West African Court of Appeal,)[23] was not binding on the Divisional Court of the Gold Coast or the West African Court of Appeal. DOORLY, J., delivering the judgment of the Court gave the reasons thus:-

> "The Full Court of Nigeria was a Nigerian Court and every Judge sitting in that Court, whether he was substantially a Nigerian Judge or not, was for the purpose of the matter in hand a Nigerian Judge. The Full Court of Nigeria had no appellate or other powers in regard to any Court in the Gold Coast. It therefore follows that Aitken, J., was not bound by the decision of the Full Court of Nigeria, although it was his duty (and he fulfilled that duty) to consider very carefully any decision of the Full Court of Nigeria. The West African Court of Appeal is clearly not bound by the decisions of the Full Court of Nigeria."

At best it could only be said that the decision of the Full Court of Nigeria was of a persuasive authority.

In every territory of West Africa the High Courts or Divisions of the High Courts are courts of co-ordinate

22. (1935) 2 W.A.C.A. 258 at p. 359.
23. See ante p. 120 History of W.A.C.A. II

jurisdiction. A High Court Judge is therefore not bound by a decision of a court of equal and concurrent jurisdiction with his own.[24]

After reviewing the English authorities on this point, BROWN, C.J., in Olawoyin v. Attorney-General of Northern Nigeria said:[25]

> "It would therefore appear to be clear that while a judge sitting at first imstance will accord great weight to a previous decision of a judge of co-ordinate jurisdiction, and will only depart from it with reluctance and after the most careful consideration, he commits no breach of principle if he does - for he is not bound by it."

In the same case, the learned Chief Justice ruled that the High Court in the Northern Region sitting in its appellate jurisdiction is analagous to a Divisional Court in England. Therefore such a court will be bound to follow its own decisions subject to the three exceptionslaid down by Lord Goddard in Nicholas v. Penny.

In Ghana the doctrine of precedent is now written down in the Republican Constitution. For our purpose Article 42(4) stipulates that "The Supreme Court/which is the /final

24. Sasraku v. David (1959) G.L.R. 7 at p. 14.
25. (1960) N.R. N.L.R. p. 53 at p. 58. But a Court of co-ordinate jurisdiction has no power to treat the decision of another such court, even if acting outside its jurisdiction, as a nullity. Pon v. Omanhene Atta Fua, Div. Ct. 1921-25, p. 11.

final Court of Appeal /shall in principle be bound to follow its own previous decisions on questions of law, and the High Court shall be bound to follow previous decisions of the Supreme Court on such questions ..."[26]

(b) The Authority of Decisions of English Courts over West African Courts

In respect of the decisions of the Judicial Committee of the Privy Council there is no doubt that where it is the final Court of Appeal itsdecisions bind the courts of the country from which the appeal was made. As it was pointed out in a Nigerian case,[27] "such courtsmust give precedence to the decisions of the Privy Council before those of any other tribunal." The statement from the judgment of a New Zealand case even goes further. In that case,[28] HERDMAN, J. said:-

> "Although modern opinion in Great Britain seemsto be unanimous in holding that the statement of the law in the Victorian case[29] is either erroneous or obsolete, we in New Zealand are no doubt bound to follow their Lordships' judgment unless the facts of the present case can be distinguished from the facts of the case which the Privy Council decided."

Where the decision of the Privy Council was based on a question of English law prevailing in the country concerned, it can be said that such decision ought to be binding only on the courts from where the appeal came, /even

26. The Ghana Constitution, 1960.
27. Thomas & ors v. Ademola (1945) 18 N.L.R. 12 at p. 23.
28. Stevenson v. Basham & anor (1922) N.Z.L.R. 225 at 231. - Supreme Court.
29. Victorian Railway Commissioners v. Coultas (1888) 13 App.Cas. 222.

even though the law has been changed in England. Similarly, where the question involved on appeal to the Privy Council is one concerned a customary law from, say, Nigeria, since the Privy Council will be sitting as a Final Court of Appeal for Nigeria, one would have thought that such a decision will only bind Nigerian courts and not, for example, courtsin Sierra Leone. Indeed, the Ontario Court of Appeal in refusing to be bound by the Privy Council decision in the Victorian case just mentioned, argued that since that case was an appeal from a New Zealand court, the Canadian Courts were not bound by it.[30] As against this view, there is the Ghana case of Onogen v. Leventis & Co. Ltd.,[31] where Adumua-Bossman, J., considered himself as bound by a decision of the Privy Council. He said: "Such a case was that of Tewari v. Singh & anor, (1908) 24 T.L.R. 884), which was decided by the Privy Council on appeal from an Indian Court, and which, as a decision of the Privy Council is binding on the Supreme Court of Ghana."

The present position in Ghana is that the High Court is bound by the decisions of the Supreme Court on questions of law, and neither the Supreme Court nor the High Court is bound to follow the previous decisions of any other court on questions of law.[32]

30. Negro v. Pietro's Bread Co.Ltd.(1933) Ont.Rep. 112.
31. (1959) G.L.R. 105 at p. 115.
32. The Constitution 1960. Art. 42(4).

It is respectfully submitted that the view expressed by the Ontario Court in the Negro case is to be preferred. This view is really not contrary to the opinion expressed in Fatuma Binti Mohamed Bin Salim Bukhashuwen v. Bakhshuwen by the Privy Council.[33] In that case their Lordships approved a statement made by "the experienced judges of the Court of Appeal for Eastern Africa" to the effect that they did not doubt that on a question of Muslim law decisions off the Privy Council in appeals from India must bind them in appeals from the High Court of Zanzibar. Their Lordships then extended the principle to appeals from Kenya. Whatever the merits involved in this method, if it is correct that Muslim law in India is the same as that in Kenya, then the opinion expressed by their Lordships is the right one. On the other hand, if Muslim law is not the same in both countries, then the decision will have to be reviewed.[34]

Where the point involved in an appeal to the Privy Council is a question of English common law pure and simple, then if a Privy Council decision differs from that of the /House

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33. [1952] A.C. 1 at p. 14 P.C.
34. It is submitted that such a course will rather enhance the position of the Privy Council. In South Africa the immediate cause for the abolition of appeals to the Privy Council was as a result of Pearl Assurance Co. Ltd. v. Union Government [1934] A.C. 570 where the Privy Council overruled the judgment of four members of the Appellate Division on what was a pure question of Roman-Dutch law. One South African /author

House of Lords, the courts in West Africa are bound to follow the decision of the House of Lords, for, as the Privy Council itself admitted in Robins v. National Trust Co.Ltd.,[35] the House of Lords "is the supreme tribunal to settle English law, and that being settled, the colonial court, which is bound by English law, is bound to follow it".[36] As the personnal of both courts is almost the same at any given time, there is no doubt that the law settled at the House of Lords will be applied by the Privy Council.[37]

34. (cont.) ..author, criticising the judgment said that "It is no reflection on the members of the Judicial Committee, therefore, to say that neither in the past nor in the case under consideration have they been happy in the application of a system of law with which they were not even on a footing of nodding acquaintance. Not that they are to blame, but a ridiculous arrangement which charges them with an impossible task." (1943) 60 S.A.L.J. at p. 476. See J.Comp.Leg. 3rd s. (1950) Vol. 32, p. 83.

35. [1927] A.C. 515 at p. 519. In Will v. Bank of Montreal, (1931) 3 Dominion L.R. 526, FORD J., (Alberta Sup.Ct.) ruled that where a Canadian Court in attempting to apply English law discovers that a decision of the Privy Council is in conflict with a later decision of the House of Lords in which the error of the decision is expressly stated, it must apply the law as enunciated in the later decision.

36. The term "colonial court" must be taken to include an independent Commonwealth court.

37. Indeed, the Privy Council in Grant v. Australian Knitting Mills Ltd. (1936) applied the law as settled four years earlier in Donoghue v. Stevenson (1932).

Where the statement of English law made by the local court of appeal differs from that of the English Court of Appeal should one regard the law as stated by the local court of appeal as erroneous? In Robins' case, Viscount DUNEDIN, delivering the judgment of the Privy Council supplied the answer:

> "When an Appellate Court in a colony which is regulated by English law differs from an Appellate Court in England, it is not right to assume that the Colonial Court is wrong. It is otherwise if the authority in England is that of the House of Lords ... Equally, of course, the point of difference may be settled as far as the Colonial Court is concerned by a judgment of this Board." 38

The effect of Viscount Dunedin's statement is that as there is no channel of appeal from the local court of appeal to the English Court of Appeal, the decisions of the English Court of Appeal should at best be considered as of persuasive authority by the local court of appeal. If, on the other hand, a question of English law pure and simple has been settled by the Privy Council, then the law as settled by the Privy Council should be followed by the local courts of appeal, even though such latter decision

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38. Op cit. at p. 519. This question of discrepancy of views between the Privy Council and those of the Court of Appeal had been a source of embarrassment to the courts in Canada and Australia some time ago. It can now be regarded as finally settled. For further reference, see Fanton v. Denville (1932) 2 K.B. 309; Toronto Power Co. v. Paskam (1915) A.C. 734 - the dictum of GREER, L.J.; and finally Wilsons and Clyde Coal Co. v. English :106LJPC 117.

may conflict with a decision given by the English Court of Appeal. This view is on all fours with the Australian case of The Wagon Mound, in which the Privy Council regarded the Court of Appeal decision in Re Polemis on the point of determining the consequence of a tortious act of negligence as erroneous. But supposing the principle of English law which was laid down by the Privy Council is over 30 years old, and today the English Court of Appeal makes a pronouncement that that decision of the Privy Council was not a correct statement of English law, are the Commonwealth courts for whom the Privy Council is still a final appellate court, to be bound by the old decision of that Court? A Commonwealth court would argue that since the Privy Council was sitting as a final appellate court for, say, Nigeria, it would not be bound by such decision. But can the Federal Supreme Court of Nigeria ignore that decision of the Privy Council? It appears that it cannot, and the Federal Supreme Court can only be saved such embarrassment through the action of the legislature. The points just raised are illustrated by the refusal of the English Court of Appeal in Re Hastings to follow the judgment of the Privy Council given in the Nigerian case of Eleko v. Officer Administering the Government of Nigeria. The point involved was the right of a person whose application for a writ of habeas corpus has been

been refused by the High Court. The whole matter is discussed later.[39]

In practice, the courts in West Africa treat with great respect decisions of the High Court and the Court of Appeal.[40]

As has already been stated, the method of judicial precedent is also applied to the construction of statutes.[41] In England, it has been held that if two statutes are in pari materia, any judicial decision as to the construction of one "is a sound rule of construction for the other".[42] But this rule cannot be applied too rigidly. The mere fact that certain statutes in West Africa are "identical" to English ones does not mean that they are in pari materia. As has been observed elsewhere, there are different types of enactments in force in the West African territories:-

(1) Acts of the United Kingdom Parliament which are of universal application in all British dependencies until such acts are repealed on attainment of independence, e.g. the Territorial Waters Jurisdiction Act, 1878.

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39. See post p. 278
40. In Amissah v. Amissah Div.Ct. 1926-9 (Ghana) YATES, J., regarded himself as bound by the English decision in Stoate v. Stoate 3 Law Times, n.s. 757 - a case relating to the time of the discharge of an order for payment of alimony.
41. See the valuable contribution to this topic by ALLOTT, A.N. Essays, p. 28 et seq.
42. R. v. Mason (1788) 2 T.R. 581 at 586. See also ODGERS, C.E.: The construction of deeds and statutes, 4th ed. 1956, p. 241 et seq.

(2) Acts of the United Kingdom Parliament, although enacted after the date of reception of English law, are extended to Commonwealth territories by Ordersin Council, e.g. The Finance Act, 1894.

(3) "Statutes of general application in England" as on a particular date, which are declared to be in force in the West African territories in accordance with the date of the establishment of a local legislature.

(4) Acts of the local legislature which are sometimes based on an Act of the United Kingdom Parliament, or on English common law.

A question arises, therefore, as to the manner in which the rule of contruction is to be applied with regard to Acts of the United Kingdom Parliament which are of universal application in all British dependencies, there is no doubt that Commonwealth countries are bound by the interpretation of the Act judicially decided by the English Courts. As Dr. Allott has rightly pointed out, it can be argued that such Acts are designed to form a coherent system of law prevailing the British possessions, and that it would be most undesirable if different interpretations of such legislation were to be found as between one court in Britain and the colonies and another.[43] The same canon of interpretation is applied to Acts of the United Kingdom Parliament extended to Commonwealth territories by Orders /in

43. ALLOTT, A.N. Essays, p. 41.

in Council. The true reason is that such Acts are really in operation in England "in respect to the Commonwealth". Therefore it is only an English court which can have the final say in the interpretation of English Acts of Parliament.

The same method of approach cannot be adopted for the interpretation of what have been termed "statutes of general application in England" declared to be in force in West Africa.[44] Such statutes are declared to be in force "so far only as the limits of the local jurisdiction and local circumstances permit and subject to any existing or future local Ordinance". Thus in the recent Ghana case of Coleman v. Shang,[45] which turned on whom Letters of Administration of a deceased intestate under the Marriage Ordinance should be given, the Privy Council held that apart from the Interpretation Ordinance (Laws of the Gold Coast, 1951, Cap. 1)[46], in construing Statute 21 of Henry VIII, Cap. 5, and the Statute of Distribution (1670), which were statutes of general application, the Courts of Ghana were entitled to apply the words "wife" and "widow" to all persons regarded as lawful wives or widows according to the law of Ghana. It follows therefore that Ghana courts are

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44. As to what are statutes of general application see post, Chapter 8
45. [1961] 2 All E.R. 406 at 411.
46. Now see Interpretation Act 1960 (C.A.4) s. 26.

not bound by the decisions of English courts in interpreting sections of statutes of general application. Local circumstances must be given pride of place. It has also been held that a decision of an English court based on a statute which by virtue of the date of reception in Ghana is not regarded as one of general application will not bind the courts.[47]

The rule of construction mentioned earlier on comes into play only when comparing Acts of the local legislatures with similar provisions in the United Kingdom. Some of these Acts are adopted wholesale from similar ones in the United Kingdom. Such Acts are The Imperial Statutes (Criminal Law) Adoption Ordinance,[48] which provided for the application of the following English Acts subject to minor alterations in Sierra Leone: The Perjury Act, 1911; The Forgery Act, 1913; The Larceny Act, 1916; Other Acts may be modelled on a United Kingdom statute. Thus in the Western Region of Nigeria The Property and Conveyancing Law 1951,[49] is based on the English Law of Property Act 1925. The Ghana Administration of Estates Act, 1961,[50] was modelled on the English Act of 1925. What then should be the guiding light for such courts? As early as 1879 the Privy Council, /in

47. Ampofo v. Quartey (1928) Div.Ct. 1926-9, p. 151 at 152.
48. Cap. 27 Laws of Sierra Leone (1960 Revision).
49. W.R. No. 21 of 1959. Laws of Western Nigeria 1959, Rev. Cap. 100.
50. Act 63.

in Trimble v. Hill,[51] an appeal from NewSouth Wales, expressed their view in the following terms:

> "Their Lordships think the Court in the Colony might well have taken this decision as an authoritative construction of the Statute. It is the judgment of the Court of Appeal, by which all the courts in England are bound, until a contrary determination has been arrived at by the House of Lords. Their Lordships think that in colonies where a like enactment has been passed by the Legislature, the Colonial Courts should also govern themselves by it."

The successful application of the rule laid down by the Privy Council depends on the local statute being in pari materia. But can it easily be proved that a statute passed by two different Parliament is in pari materia? Happily enough, the Privy Council in modern times have modified their views considerably. Sir Henry Strong, delivering the advice of the Board in Grand Trunk Railway Co. v. Washington,[52] declined to hold that the Canadian Court of Appeal in Ontario was justified in regarding Dominion Acts for the regulation of provincial railways asin pari materia with an Act of the United Kingdom Parliament. "As these are enactments emanating from a different legislative body from that which passedthe statute to be interpreted, and cannot be said to be in pari materia with that, their Lordships are unable to see that they ought to have any influence upon the question to be decided arising exclusively /upon

51. (1879) 5 App.Cas 342 at p. 344. See also Catterall v. Sweetnan (1945) 9 Jur. 951 at p. 954.

52. [1879] A.C. 275 at p 286.

upon the Dominion Act, and relating only to Dominion Railways."

In Chettiar v. Mahamtee,[53] (on an appeal from Ceylon) the Privy Council went even further:

> "It is, however, one thing to presume that a local legislature, when re-enacting a former statute, intends to accept the interpretation placed on that statute by local courts of competent jurisdiction with whose decision the legislature must be taken to be familiar; it is quite another thing to presume that a legislature, when it incorporates in a local Act the terms of a foreign statute, intends to accept the interpretation placed on those terms by the Courts of the foreign country with which the local legislature may or may not be familiar. Thers is no presumption that the people of Ceylon know the law of England, and in the absence of any evidence to show that the legislature of Ceylon at the relevant date knew, or must be taken to have known, decisions of the English Courts under the Moneylenders Act, there is no basis for imputing to the legislature an intention to accept those decisions."

From the foregoing, it is clear that the rule in Trimbl v. Hill has been modified. It does not mean, however, that courts in West Africa should completely ignore decisions of English courtson the interpretation of statutes similar to those of the United Kingdom. The practice of the superior courts is to pay the highest regard to decisions of English courts. Thus in interpreting the meaning of "any person aggrieved" within the context of the Criminal Procedure Code,[54] the Ghana Court of Appeal preferred the inter-

53. [1950] A.C.481 at p. 491. In view of this decision, it is respectfully submitted that the dictum of the West African Court in Motayo v. Commr. of Police (1950) 13 WACA at p. 117, is no longer to be relied on.
54. Dormaa State Council v. Ansu (1957) 3 WALR 295.

pretation put on that expression by the English courts to that decided by the West African Court of Appeal. On the other hand, it has been held in Karam v. Commissioner of Income Tax,[55] that it is not safe for local courts to rely upon decisions of English courts or any other court in the interpretation of any Income Tax Act. If, of course, there is a decision of the Privy Council which interprets a local statute, then the local courts are bound by such decision.

(c) Conclusion

The foregoing is an epitome of the method of precedent in West Africa. What are the future prospects for the doctrine? The successful operation of the doctrine inter alia depends on a first-class system of law reporting, but the system of law reporting has not been able to catch up with the development of law in West Africa today. At the time of writing, Nigeria is the only country which has been prompt in reporting the decisions of the courts. Ghana is two years behind with its law reports. The law reporting in Sierra Leone is very unsatisfactory. It is only recently that decisions of the defunct West African Court of Appeal on appeals from Sierra Leone have been published as Volume 16 of the W.A.C.A. reports. There is hardly any system of law reporting in the Gambia.

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55. (1948) 12 W.A.C.A. at p. 339 (Ghana).

It has also been established that the doctrine of precedent succeeds best in a country with a uniform and centralised judiciary. How the challenge is going to be faced in the Federation of Nigeria remains to be seen.

As regards the authority of decisions of English courts on West African courts, a caveat must be put in. No doubt the greatest respect must be accorded to such decisions, but, as Pollock has observed, "this just and necessary respect, if not informed by a due measure of intelligent criticism, tends to degenerate into mechanical slavery".56 Recalling his experience in India, this great exponent of the common law added:57

> "One may find indeed that imitation is now and then carried to excess. Not only the decisions of Indian superior courts and of the Judicial Committee on appeal therefrom, but those of English courts, are cited wholesale throughout British India, frequently by advocates who cannot know much of the common law and before judges or magistrates who may know as little; and the citations, one suspects, are too often not even from the report but at second hand from text books. Even technical rules of English real property law have been relied on in Indian courts without considering whether they had any reasonable application to the facts and usage of the country. Some Indian judges, even in the superior judgment seats of the High Courts, have forgotten that the law they administer (with strictly limited exceptions) is not English law as such, but 'justice, equity and good conscience' interpretated to mean so much of English jurisprudence as appears to be reasonably applicable, and no more. Blind following of English precedents according to the letter can only have the effect of

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56. The genius of the common law at p. 114.
57. Ibid at p. 92.

> reducing the estimation of the common law by intelligent Indians to the level of its more technical and less fruitful portions, and making those portions appear, if possible, more inscrutable to Indian than they do to English lay suitors."

From this self-explanatory passage a few lessons can be deduced. Firstly, less use should be made of obiter dicta of English judges. Secondly, decisions of a single judge should be sparingly cited or relied on, for High Court judges everywhere are too enthusiastic in laying down what in their opinion is the law. Thirdly, judges in West Africa should be more inclined to draw upon judicial experience, past and present, in all the common law countries. This gives to the common law the flexibility and dynamism required to meet the demand for change. Indeed, decisions of the Commonwealth countries will show us how the application of the common law abroad has been limited to suit local conditions. The prospect is not grim, for a start in that direction has already been made. In a recent case decided by the Federal Supreme Court of Nigeria, the appellate court "found the decisions of the Australian courts helpful".[58]

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58. Doherty & the W.Nigeria Development Corporation v. Sir Abubakar Tafawa Balewa & ors. The Guardian, November 13, 1961.

II JURY TRIAL(59)

Jury trial, which has been described as the most distinctive part of the common law, has not been received in West Africa without modification.[60] At common law it is a system under which no man can be convicted off felony unless he has been found guilty by a jury of twelve ordinary citizens. Professor Goodhart has quite rightly remarked that "the jury system isthe most effective guard against governmental tyranny ever devised if - and this is an essential if - the ordinary citizen is prepared to show courage and independence."[61]

The modification of jury trial in West Africa was not attained in one process. At the very beginning the system of jury trial was introduced without any qualification whatever. Thus, by the provisions of the Charter /of

59. The most up-to-date account on Jury Trial in Africa is that by JEARY, J.H.: "Trial by jury and trial with the aid of assessors" (1960) 4 JAL 133; (1961) 5 JAL 36-47, 82-98. See also KNOX-MAWER, R.: "The jury system in British Colonial Africa" (1958) 3 JAL 160-3; "Juries and assessors in Criminal trials in some commonwealth countries: a preliminary survey" (1961) 10 ICLQ 892-8; MACAULAY, B. "Assessors in criminal trials in West Africa" (1960) Crim. L.R. 748-58, 825-32.
60. Although the practice and procedure of the High Court relating to the trial of indictable offences are exercised, as near as possible, in accordance with the practice and procedure in the like cases of the English High Court of Justice Jury Ordinance. Cap. 90 Laws of the Federation of Nigeria, 1958 Revision, s. 82.
61. The migration of the common law, 1960, p. 8.

of Sierra Leone, 1821, the Sheriff was invested with the power and authority of summoning juries both in civil and criminal cases. The cumbersome system of grand jury in criminal trials had also been made part of the laws applicable in West Africa. Yet as early as 1816, the Commissioners sent out by the British Government to investigate the state of the settlements and forts on the coast of Africa, had stated that if the grand jury could be legally dispensed with it would be getting rid of a great nuisance - their mode of proceeding being, in spite of all admonition, very unsuitable to the spirit of their situation.[62] In spite of criticisms such as these, grand juries persisted in West Africa until they were abolished, for example in Sierra Leone,[63] and the Gold Coast in 1853,[64] and in the Gambia in 1867.[65] The Sierra Leone Ordinance categorically stated "That the proceeding by grand jury in criminal prosecutions in the said Colony be and the same is hereby abolished; and that it shall no longer be /necessary

62. Par Pap. Session 1816, Vol. 7, p. 121.
63. An Ordinance to amend the laws relative to Jurors & Juries in the Colony of Sierra Leone. No. 59 of 1853; (March 13, 1853.)
64. Supreme Court Ordinance, No. 4 of 1853 (April 6, 1853.
65. Jurors & Juries Amendment Ordinance. No. 6 of 1867, s. 2.

necessary for the sheriff to summon persons to attend to serve as grand jurors in the Courts of Quarter Sessions of the Peace, and oyer and terminer and gaol delivery or other superior criminal court in the said Colony".[66] Provision was made for the trial of all offences by the criminal courts by a process of information. All issues of fact joined on every such information in any of the courts mentioned were to be tried by two or more commissioners or justices of such courts, "and a jury of twelve good and lawful men impanelled in the usual manner and sworn to give a verdict according to the evidence".[67]

The next major modification of the jury system occurred in 1866 when jury trial in civil cases was abolished in West Africa. Several witnesses who appeared before the Select Committee on Africa in 1865,[68] had criticised the system of jury trial in West Africa, especially in civil cases. In his evidence to the Committee, Governor Blackall of Sierra Leone observed:

> "The jury system with regard to trials of criminals, I think works fairly, although I have known instances where prejudice has been brought to bear, but I think that occurs which is common to all small communities where the question to be tried is well known and talked over among a very small number of people, from whom the jury has to be chosen ... in civil cases ... generally the juries are prejudiced." [69]

66. No. 59 of 1853 (Sierra Leone S.I.)
67. Ibid, s. 2.
68. Sel. Cttee Rep. 1865, Vol. 5.
69. Ibid, p. 323.

It is evident from the nature of the evidence given before the Select Committee that the main cause of the criticism of jury trial in civil cases was due to the breakdown of race relations in Sierra Leone. It was alleged by the Europeans that an "Akoo jury /in Sierra Leone/ will never convict an Akoo, and that they will never acquit a whiteman or a Timmanee, and that the verdict of an Akoo is generally agreed upon out of court before the trial comes on". On the other hand, the Judicial Assessor in the Gold Coast, William Hackett, told the Committee that he did not find that "native jurymen" in the Gold Coast invariably gave their verdict in favour of their countrymen. However, the Select Committee in their recommendations to the British Parliament pointed out that trial by jury was inapplicable in a great many instances in West Africa. Hence, when the West African territories were re-united in 1866, a series of ordinances were enacted for the better administration of justice in the West African Settlements.[70] These Ordinances /drafted

70. Reference has already been made to these Ordinances - see ante p. 42 et seq. No. 8 of 1866, The Gambia; No. 4 of 1866, Sierra Leone; No. 7 of 1866, Lagos; and No. 97 of 1866, the Gold Coast. There was no jury system in Lagos in 1865; so it is not accurate to say that civil juries were abolished in Lagos. See Select Committee Report, 1865, Vol. 5, p. 358. Indeed, s. 15 of the Lagos Civil Liability (Miscellaneous Provisions) Act, No. 33 of 1961, empowers a jury to assess damages in cases where a plea of contributory negligence is raised.

drafted in Sierra Leone by CARR, C.J., in compliance with Governor Blackall's request, and passed by the Legislative Councils of Sierra Leone, the Gambia, the Gold Coast and Lagos, provided inter alia for the abolition of jury trial in civil cases.

In transmitting the draft ordinances for the consideration of the Governor, the learned Chief Justice[71] justified his action thus:[72]

> "It will be seen that by these Ordinances trial by jury is only allowed in criminal cases, and not in civil suits. A few remarks may be necessary in explanation. In criminal cases the question submitted to the jury upon the evidence is a very simple one, viz., 'whether the prisoner be guilty or not guilty'; and in well conducted prosecutions the whole of the evidence bears upon that point. Further qualified jurors are usually persons of some property and they have an interest in the repression of crime, and in giving security to life and property by their verdicts. In civil suits the case is somewhat different. These suits are usually actions arising out of commercial transactions and complicated accounts. The issues raised by the pleadings are oftentimes many and various. The litigating parties, if not on friendly terms with the jurors, are generall well known to them... Add to all this, the advocacy of these attorneys, without any public opinion to check them in their course, and the jealousies existing between the different races and tribes inhabiting

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71. Chief Justice Carr was a "coloured" West Indian appointed Queen's Advocate of Sierra Leone in 1840, and Chief Justice in 1841; which position he occupied for more than a quarter of a century. He retired in 1867 on a pension of £1000 p.a. and died in 1880 - CROOKS, J.J. A history of the Colony of Sierra Leone, pl 171.

72. Par. Pap. Session 1867, Vol. 49, p. 522.

> these Settlements, and it is not to be wondered at that verdicts in civil suits on this coast should have given less satisfaction than verdicts in criminal cases. With the right of appeal given by these Ordinances, and the provisions before referred to for taking down the evidence by the officer of the court, I think the decision ofcivil suits may be safely left to the resident magistrates at the other settlements, and to the judges of the Supreme Court at Sierra Leone, without a jury."

Although a number of the reasons given for the abolition of civil juries are tenable, it must be pointed out that Governor Blackall's administration in Sierra Leone did the right thing for the wrong reason. Not unnaturally, the inhabitants rebelled. A petition signed by nearly 800 people was sent to the Secretary of State for the Colonies. They stated clearly that criticisms of jury trial in civil cases did not emanate from the bulk of the inhabitants. That some European elements who advocated its abolition were biased was clearly stressed. They were alarmed that "this Ordinance abridging the Comstitution of its rarest and most valuable part, calling upon Her Most Gracious Majesty to deprive the inhabitants of an institution of the Colony enjoyed by them from time immemorial here, was passed at one reading - passed in less than an hour - passed while members of the Legislature in less than that period; and Her Majesty's other loyal subjects here generally were profoundly ignorant at all of its existence! Can Her Gracious Majesty, then, give Her royal sanction to this Ordinance, so destructive to the

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interests, constitutional rights, and liberties of your Lordships' petitioners, introduced as it was, unsustained as it has been, and passed, too, under such unlawful circumstances?"[73]

The Secretary of State, after careful consideration, advised the Queen to confirm the Ordinance, but he did not refrain from expressing his regret at the manner in which it was passed.

Over a period of years, jury trial in criminal cases in West Africa has undergone modification. The following are a few examples:-

(a) Number of a jury. The English peculiar tradition of trial by a jury of twelve men and women has been broken through in West Africa. In Nigeria, on a trial of any capital offence the jury consists of twelve jurors, of whom not less than seven may be special jurors. On the trial of any offence other than a capital offence, the jury should consist of eight jurors who may be either common or special jurors or some of one and some of the other.[74] In the Gambia the size of the jury in all criminal trials remains at twelve,[75] whereas in Ghana, in cases tried with a jury (for example capital offences) the trial must be

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73. Par. Pap. 1867, vol. 49, p. 544.
74. Jury Ordinance, Cap. 90 Laws of the Federation of Nigeria (1958) Revision. ss. 26 & 27. The Ordinance applies to the whole Federation. See also Jury Law - Laws of Western Nigeria, 1959, Rev. Cap. 53.
75. Supreme Court Ordinance, Cap. 5 (1955 Rev.) s. 33. Cf. Criminal Procedure Code, Cap. 23, s. 226.

with a jury of seven persons.[76]

(b) The unanimity rule: According to English practice, the verdict of a jury in criminal cases must be unanimous. In the course of his lectures on Trial by jury in England Sir Patrick Devlin (as he then was) observed that "whatever its origin, unanimity is now so ingrained in our procedure that its eradication would seem to take from the verdict a virtue that in criminal law it needs. The criminal verdict is based on the absence of reasonable doubt. If there were a dissenting minority of a third or a quarter, that would of itself suggest to the popular mind the existence of a reawonable doubt and might impair public confidence in the criminal verdict".[77]

The advantages of the unanimity rule must not be stretched too far. It could encouragegenuine dissenters to be false in their oath. This rule in England is very much in need of reform. The verdict in Scotland has always gone by a majority. A compromise has been struck in West Africa. On the trial of any capital offence, the verdict of the jury must be unanimous.[78] This rule is, however, qualified in Nigeria. Section 65 of the Jury Ordinance

77. The Hamlyn Lectures, London, 1956. Stevens & Sons Ltd. p. 56.
78. Ghana Crim. Proc. Code 1960. s. 285(4); Gambia " " " Cap. 23. s. 256(2)(b); Sierra Leone Jurors & Assessors Ordinance, Cap. 38 (1960 Rev.) s. 27(1); Nigeria Jurors Ordinance, Cap. 90 (1958 Rev.) s. 64(a).

stipulates that on the trial of any capital offence if, on the expiration of two hours from the time when the jury began to consider their verdict, the foreman of the jury informs the court that the jury are agreed in the proportion of eleven to one or ten to two or nine to three, that the accused is not guilty of the capital offence, but is guilty of a lesser offence, the majority verdict may at the discretion of the judge, be accepted. In the case of trial of offences not punishable by death a verdict of the majority of two-thirds of the jury shall be accepted as the verdict of the whole jury in the cause.[79] The majority verdict is not accepted by the judge as a matter of course, or after the first deliberation of the jury. In Ghana, for example, if the jury are not unanimous, the judge may require them to retire for further consideration. After such period as the judge considers reasonable, the jury may deliver their verdict, or state that they are not unanimous.

"This section/s. 295 of the old Criminal Procedure Code_7 now. s. 285 of the Criminal Procedure Code, 1960_7 empowers the judge upon the statement of lack of unanimity to require the jury to retire for further consideration, and in this connection, it would not be improper for a judge to indicate to the jury the importance from the point of vies of general convenience of their reaching a definite conclusion upon the matter." [80]

79. Sierra Leone, Cap. 38 s. 27(1)&(2). In Ghana the ratio is 5 to 2. In the Gambia two-thirds. In Nigeria the ratio is 7 to 1 or 6 to 2.
80. Reg. v. Antor & ors (1958) 3 WAIR 430 at p. 433. (Ghana Court of Appeal.)

(c) Trial with Assessors. The third major modification of jury trial in criminal cases, is the introduction of a system of trial by a judge of the superior courts with the aid of assessors.[81] Generally, a person charged with a non-capital offence may be tried by a judge with the aid of usually not less than three assessors, instead of a judge and jury. This practice is believed to have originated in India.[82] The essential difference between the two modes of trial in Ghana was summed up by KORSAH, C.J., thus:

> "We would however point out the essential difference between trial by a court with the aid of assessors, and trial by a court with a jury: Unlike a jury, the assessors are merely required to give their opinions to the judge, who must thereafter pronounce his verdict whether the accused is guilty or not guilty irrespective of whatever opinions the assessors may have expressed. Whereas in a trial by a court with jury, it is the jury who pronounce the verdict of guilty or not guilty and the judge is thereafter required by law merely to record the verdict of the jury and proceed either to convict or acquit as the case may be in accordance with that verdict.
>
> It follows from the above distinction that with regard to trial by a court with a jury, the judge is not required to write any judgment stating the reasons for the decision of the court provided the summing up to the jury is adequate and does not amount to misdirection or non-direction of essential elements of

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81. In Nigeria - Crim.Proc. Code Cap. 43 (1958 Rev.) s.441 et seq; Ghana " " " 1960. E.g. ss. 204, 227, 243 & 260-264; Sierra Leone - Jurors & Assessors Ord. Cap. 38 ss. 39-45; Courts Amendment Ord. No. 2 of 1960 s. 2; Gambia - Supreme Court Ord. Cap. 5 (1955 Rev.) ss. 66-71.

82. REDWAR, H.W. Comments on some Ordinances of the Gold Coast Colony, p. 92.

> the charge and on the evidence. On the other hand it is clear that in a trial by a court with the aid of assessors the judge is required to pronounce the verdict irrespective of what the opinions of the assessors may be, the judge should therefore write a judgment stating his reasons for whatever conclusion he reaches upon the evidence adduced before him." [83]

The general principle stated by the learned Chief Justice is true for the rest of West Africa, except for Sierra Leone where, if the opinions of the assessors are unanimous, such opinions constitute the decision of the court, but if they are not unanimous the decision rests exclusively in the judge who must record in writing his reasons for the decision.[84]

The rules regarding the opinions of assessors in criminal cases are spelt out more clearly in the Ghana Criminal Procedure Code than elsewhere. Section 287 stipulates:

> "(1) When, in a case tried with assessors, the case on both sides is closed, the Judge may sum up the evidence for the prosecution and the defence, and shall then require each of the assessors to state his opinion orally, and shall record their opinions.
>
> (2) The Judge shall then give judgment, and in so doing shall not be bound to conform with the opinions of the assessors, but he shall record his judgment in writing and in every case the judgment shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the Judge at the time of pronouncing it.

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83. Adade v. Reg (1959) Judgments of the Court of Appeal, July to December 1959. Cyclostyled p. 79 at 80.
84. Cap. 38, s. 45(1).

(3) If the accused is convicted, the Judge shall pass sentence on him according to law."

With the exception of Ghana there is no statutory obligation on the judges in the rest of West Africa to sum up the evidence for the prosecution and the defence, although such judges in practice do sum up.[85] Whether the judge sums up to the assessor or not, he should give a written judgment from which it will appear to all who read it that he has, in arriving at his own verdict, instructed himself as fully as his duty would require him to instruct a jury if he had in fact been sitting with a jury.[86] The judge is the tribunal both of fact and of law, and failure to direct the assessors on a point of law would not as a rule necessitate the quashing of a conviction, as it would in a jury trial.[87] A summing-up, which if addressed to a jury might be criticised as being dogmatic, cannot be criticised on that account when addressed to assessors. It serves rather to indicate the judge's approach to the

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85. MACAULAY, B. op cit. (1960) Crim.L.R.751; Caulker v. The Queen (1959) 16 WACA p. 63.
86. Sarpong v. Reg. (1959) Judgments of Ghana Court of Appeal, July-December 1959. Cyclostyled. p. 87 at p.88, per Granville Sharp.
87. See, e.g. R. v. Bio (Sierra Leone Prot.) 11 WACA p.46; R. v. Wuseni (1939) 5 WACA 73; Caulker v. The Queen (1959) 16 WACA 63; R. v. Dagarti (Ghana) 10 WACA 278. ~~R. v. Dankwa~~ (Ghana) 13 WACA 134.
Dankwa v The King

case and the way he regarded various items of the evidence. If his approach and view were wrong, the summing-up may be criticised on that account as affecting the soundness of his decision.[88]

Another departure from jury trial is the fact that, after the summing-up, each of the assessors is required to state his opinion orally in open court.[89] Thus the element of secrecy which underlies jury trial is missing. Further, unlike jury trials, assessors are required to give their opinions individually. The provision which enjoins "dissenting" assessors to give their reasons can be described as an improvement on the jury system. According to Sir Patrick Devlin (as he then was) the jury merely says yes or no. Indeed it is not allowed to expand upon that and its reasons may not be inquired into. It is the oracle deprived of the right of being ambiguous.[90] The foregoing are some of the main differences between the two systems. Trial by a Judge with the aid of assessors has many advantages which commend themselves to the West African situation. There is, however, one aspect of the system of assessors which needs reforming. It is this,

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88. Caulker v. The Queen.
89. Dhalamini v. Rex [1942] A.C. 583. See also Jearey, op cit. (1961) JAL 88.
90. Op cit. p. 14. See also The Times December 14, 1956; The Observer, June 21 1956; The Times December 1, 1961 "Trial without Jury" - Observer, February 25, 1962. ALIEN, C.K. "The layman and the law" (1959) J. International Commission of Jurists, Vol. 2(1) 57-67.

that judges should pay the greatest respect to the unanimous opinions of assessors. The fact that their decision is unanimous against conviction should indicate to the judge the existence of reasonable doubt. In spite of the overwhelming support given to the system by one of the outstanding English judges, it issubmitted that the jury system as it existsin England today is suitable neither for England nor for West Africa. As Dr. Glanville Williams put it, "To entrust the defendant's liberty to a jury on these terms is not democracy; it is certainly aristocracy ; it is the despotism of small, nameless, untrained, ephemeral groups, responsible to no-one and not even giving reasons for their opinion".91

III PREROGATIVE WRITS92

The legal maxim that prerogative writs form part of the common law of England admits of no doubt.93 In the /words

91. The Listener, August 24th, 1961, p. 280.
92. For further reading see: CHITTY, J.: A treatise on the law of the prerogatives of the Crown, etc. 1820. SHORT, F.H. & MELLOR, F.H.: The practice on the Crown side of the King's Bench Division, etc. 2nd ed. 1908. HALSBURY'S Laws of England, 3rd ed. Vol. 11.
93. Re Mwenya [1959] 3 All E.R. 525 at 533.

words of Sir William Blackstone:

> "By the word prerogative we usually understand that special pre-eminence, which the king hath over and above all other persons, and out the ordinary course of the common law, in right of his regal dignity. It signifies, in its etymology (from prae and rogo), something that is required or demanded before, or in preference to, all others. And hence it follows, that it must be in itsnature singular and eccentrical; that it can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects: for if once any one prerogative of the Crown could be held in common with the subject, it would cease to be prerogative any longer. And therefore Finch lays it down as a maxim, that the prerogative is that law in case of the king, which is law in no case of the subject." 94

Of all the prerogative writs the best known are:-

(a) Habeas corpus ad subjiciendum, commonly known as the writ of habeas corpus.

(b) Certiorari.

(c) Prohibition.

(d) Mandamus.

By the Administration of Justice (Miscellaneous Provisions) Act, 1938,[95] which does not apply in ~~some~~ the countries

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94. 1 Comm. 239. But see a very stimulating article - "The Prerogative writs" (1951) 11 Cam.L.J. 40-56, where the author, S.A. de Smith (as he then was) makes the following comments:- "Most modern writers have said that prerogative writs are writs which originally were issued only at the suit of the king but which were later made available to the subject. This view cannot be accepted without a number of reservations. Prohibition and habeas corpus appear to have issued on the application of the subjects from the very first; and although writs of certiorari and mandamus were initially royal mandates issued for diverse purposes of government, their earliest use in judicial proceedings seems to have been to rectify wrongs due to subjects..

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95. 1 & 2 Geo. 6, Cap. 63.

countries in West Africa,[96] it was provided that the prerogative writs of certiorari, mandamus and prohibition should be abolished and replaced by orders of the same name The Act left habeas corpus inviolate as a writ with the old procedure, as it was apparently feared that to meddle with habeas corpus might be misconstrued as subversive of the rule of law.[97] As prerogative writs form part of the common law, they are in force in West Africa by virtue of the provision which stipulates that the common law, the doctrines of equity and statutes of general application as at a particular date in England shall apply in a particular territory.[98] The writ of habeas corpus is of high constitutional importance and the other three writs are /used

94. (cont.) ...It is nevertheless true to say that when, in the 17th and 18th centuries these various writs came to be called prerogative, it was because they were conceived as being intimately connected with the rights of the Crown." pp. 40-41.

96. However, an error in applying for an Order instead of a writ is not fatal and a judge can amend it. See The Resident, Ibadan Province, & anor. v. Lagunju (1954) 14 W.A.C.A. 549.

97. DE SMITH, S.A. op cit. at p. 40.

98. See, e.g. N.Reg. High Court Law, No. 8 of 1955, s. 28. But by s. 20(1) of the High Ct. of Lagos Law, Cap. 80, prerogative writs of mandamus, prohibition and certiorari should not be issued by the High Court. By s. 20(1) the High Court is invested with all the jurisdiction of the English High Court to make orders of mandamus, prohibition and certiorari. This section is more in line with the U.K. Act of 1938. S. 14B of the Gambia Law of England (Application Amendment) Ordinance, No. 11 of 1957, makes similar provision.

used to control inferior courts and other persons and bodies exercising judicial ~~acts~~ quasi-judicial functions.

(a) Habeas corpus. The importance of this writ cannot be over-emphasised. According to Halsbury's Laws of England,[99] "The Writ of habeas corpus ad subjiciendum, unlike the other writs of habeas corpus, is a prerogative writ, that is to say, it is an extraordinary remedy, which is issued upon cause shown in cases where the ordinary legal remedies are inapplicable or inadequate." As Lord Birkenhead said of that writ on an appeal to the Privy Council: "It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement ... It has through the ages been jealously maintained by Courts of law as a check upon illegal usurpation of power by the executive at the cost of the liege".[1] The right to apply for the writ of habeas

99. Vol. 11, 3rd. ed. p. 26.

1. Secretary of State for Home Affairs v. O'Brien [1923] A.C. 603. at 609. Zabrovsky v. Gen. Officer commanding Palestine [1947] A.C. 246 P.C. "It has been said that each word of this writ is of more value than is a library of books written in praise of liberty. Habeas corpus is the key that unlocks the door to freedom" - GOODHART, A.L. The migration of the common law, p. 9.

corpus exists at common law independently of any statute, although the right has been confirmed and regulated by statute.[2] It follows, therefore, that it is the common law rights to the writ of habeas corpus and the rules evolved therein by the English courts, which are in force in West Africa.[3]

The writ is applicable as a remedy in the High Court in all cases of wrongful deprivation of personal liberty or in civil and criminal cases, provided there is a deprivation of personal liberty without legal justification.[4] The sole object of a writ of habeas corpus is to secure the release of a person who isunlawfully detained. Where an applicant is not detained, it obviously cannot issue, and it would be an absurdity to listen to arguments of a purely academic nature based on a state of affairs which does not in fact exist.[5]

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2. HAISBURY'S Vol. 11, p. 27. See. e.g. Habeas Corpus Law of the W. Region of Nigeria, Cap. 42, Laws of W.R. of Nigeria, 1959 rev. Nigeria(Constitution) Order in Council 1960. No. 1652, Chapter III.
3. Eleko v. Govt. of Nigeria [1928] A.C.P.C. 459. Zabrovsky'scase (1947). In thematter of the arrest & detention of E.O.K. Dumoga & 12 others, 1961. Cyclostyled judgments, where ADUMUA-BOSSMAN, J., considers this topic at great length. In West Africa the writ has been invoked for all sorts of purposes. See In re Native Court of Onitsha (1928) 9 N.L.R. 65.
4. Liversidge v. Anderson [1942] A.C. 206; Re detention of Kofi Koree, Div. Ct. 1926-9, p. 170 (Ghana). In re Preventive Detention Act 1958, & In re Okine & ors, etc. (1959) G.L.R. p. 2.
5. Dogah & ors. v. Kwasinye (1931) 1 WACA 154 at p. 155 (Sierra Leone).

However, the writ will not be granted where the aim behind the application is an indirect method of appealing against the decision of an inferior court on a matter within its jurisdiction.[6] In the Western Region of Nigeria an application to the High Court for the issue of a writ of habeas corpus to secure the custody of a child was refused on the ground that questions relating to custody of children governed by customary law were not justiciable in the High Court.[7]

What is the right of a person whose application for a writ has been refused? In the case of Eleko v. Officer administering the Government of Nigeria,[8] the Judicial Committee had decided that a person whose application for a writ of habeas corpus has been refused may apply not only to every superior court of competent jurisdiction, but also to every High Court judge in turn. Lord HAILSHAM, L.C. who delivered the advice added: "The same principle [as existed in England] must apply in the case of judges of the Supreme Court of Nigeria." 9

6. Ibid, p. 155.
7. Omodion v. Fasoro (1960) W.R.N.L.R. p. 27. See also Infants Law (1958) Cap. 49, 1959 Rev. of Laws of W.R. of Nigeria, Part III.
8. [1928] A.C.J.C. 459.
9. [1928] A.C. 459 at p. 469.

But in an English case, Re Hastings,[10] the Chancery Division of the Courts ruled that "this supposed right was an illusion". Eleko's case was not formally disapproved, but HARMAN, J., confessed, however, to have had his belief "in that judgment very much shaken by the Irish case to which Lord Parker, C.J. referred".[11] The decision of the Chancery Division was affirmed by the English Court of Appeal.[12] This is another example of a Privy Council decision conflicting with that of an English Court of Appeal. What should be the authority of Eleko's case on the West African Courts? In 1959 Professor S.A. De Smith, writing a note on Re Hastings,[13] suggested that in the light of the dicta expressed in the case, it was unlikely that the Eleko case would be followed subsequently. The decision in Re Hastings attracted a good deal of attention and brought to light again the defect in English law with particular reference to the right of a petitioner for a writ of habeas corpus when it was refused by a Divisional Court.[14] The result of the public outcry was the enactment in 1960 of the Administration of Justice Act.[15]

10. [1959] 1 All E.R. 698, no. 3.
11. Ibid at p. 701 The Irish case is The State (Dowling) v. Kingston (No. 2) (1937) I.R. 699.
12. Re Hastings No. 3 [1959] 3 All E.R. 221.
13. (1959) 22 L.Q.R. 421 at p. 423.
14. See, e.g. The Times March 12 & 19, 1959. Letters of Prof. O.H. Phillips and Prof. H.W.R. Wade respectively; The Guardian, August 4, 1959.
15. 8 & 9 Eliz 2, Cap. 65.

In the Act it is provided that where a criminal or civil application of habeas corpus has been made by or in respect of any person, no such application shall again be made by or in respect of that person on the same grounds, whether to the same court or judge or to any other court or judge, unless fresh evidence is adduced in support of the application; and no such application shall in any case be made to the Lord Chancellor.[16] By s. 15(1) an appeal lies, in any proceedings upon application for habeas corpus, whether civil or criminal, against an order for the release of the person restrained as well as against the refusal of such an order. The English Act does not apply in West Africa.[17] In the Ghana case of In re Amponsah & Apaloo (1960),[17] Dr. Danquah, Counsel for the applicants, relying on O'Brien's case,[18] unsuccessfully tried to convince the Court of Appeal as it was then known, that a right of appeal existed under the common law for an unsuccessful applicant for a writ of habeas corpus. The Appeal Court rejected the argument. The learned judges of the Appeal Court cited the decision in Re Hastings to refute the learned counsel's argument and

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16. S. 14(2).
17. In the matter of the P.D.A. 1958, and In the matter of the arrest and detention of Amponsah & Apaloo, see Judgments of the Court of Appeal delivered during Jan-June 1960. Civil Appeal No. 7 of 1960, p. 100.
18. [1923] A.C. 603 at pp. 609-10.

added:"In our view if there had been a right of appeal in Habeas Corpus generally under the common law, there would have been no necessity for an unsuccessful applicant to go from judge to judge or from court to court."The Administration of Justice Act, 1960 clearly confirms the views expressed by the Ghana Court of Appeal.

There is no doubt that very shortly legislative measures will be taken in the Gambia, Sierra Leone and Ghana to improve the position of a person whose application for a writ of habeas corpus is refused by the High Court. As has been argued earlier, the courts of the three countries can easily find a way of avoiding the binding effect of Eleko's case. The courts of Nigeria will, however, find it difficult to ignore the judgment given in that case. Fortunately, the difficulty has been removed by the passing of the Administration of Justice (Habeas Corpus) Act, No. 41 of 1961. This Act is expressed to be operative throughout the Federation. Section 2(1) stipulates

> "Subject to the provisions of this Act, where a judge of the appropriate High Court has refused an application for a writ of habeas corpus ad subjiciendum by or on behalf of his liberty made on the grounds that the confinement or restraint is unlawful, or has ordered the release of a person confined or restrained of his liberty, an appeal shall lie to the Federal Supreme Court from the refusal to make, or the making of the order, as the case may be."

/(b)

(b) Certiorari. In England "the writ of certiorari is the process by which the King's Bench Division in the exercise of its superintending power over inferior jurisdictions, requires the judges or officers of such jurisdictions to certify or send proceedings before them into the King's Bench Division, whether for the purpose of examining into the legality of such proceedings, or for giving fuller or more satisfactory effect to them than could be done by the Court below".[19]

Order 59, s. 3 of the Annual Practice (1962) states that the prerogative writ of certiorari lay to remove proceedings from inferior courts to the High Court for a variety of purposes, sometimes at common law, "sometimes by statute, sometimes at common law as restricted by statute".[20] "... The most important function of the Order is that by it, in the exercise of the supervisory capacity of the High Court over inferior Courts, judgments, orders, convictions (other than judgments upon indictments) or

/other

19. Short & Mellor op cit. p.14. See also Halsbury, 3rd ed. Vol. 11, p. 54 et seq. S.A. de Smith: Judicial Review of Administrative Action, 1959. The origin of this controlling power was the writ of certiorari, by which the king commanded the judges of any inferior court of record to certify the record of any matter in their court with all things touching the same, and to send it to the king's court to be examined. R v. Northumberland Compensation Appeal Tribunal. Ex parte Shaw [1952] 1 K.B. 338 at 347 per DENNING L.J. (as he then was).

20. Short & Mellor cite the following examples: certiorari for the removal:- of indictments, of coronersinquisitions, of summary convictions, of orders generally, of county rates, of Orders of Commissioners, of Orders of Commissioners of Sewers, etc., of Orders of Town Councils or County Councils, of Auditors allowances or disallowances; and certiorari in miscellaneous cases.

other proceedings of inferior courts, whether civil or criminal, made without or in excess of jurisdiction, may be removed to the High Court to be quashed."[21]

The power to exercise supervisory jurisdiction over inferior courts by way of prerogative writs was conferred upon the Supreme/High Courts in West Africa by the provision which stipulates for the application of English common law.[22] Sometimes, the extent of these powers is recorded in the various court laws.[23] The procedure to be followed is the same as that which prevailed in England before the passing of the Administration of Justice Act, 1938. In Ghana, however, full details of the English procedure modified to suit local conditions have been incorporated into the Courts Rules.[24]

The superior courts in West Africa have jealously guarded their supervisory powers over courts of inferior /jurisdiction

21. Annual Practice, 1962, p. 1728.
22. E.g. Ghana CourtsAct (C.A.9) s. 154(4) & Interpretation Act, 1960, s. 17. The Queen v. The Resident Ogoja Province; ex parte Ihpah Onah of Igogobe (1957) 2 F.S.C.R. 30 at p. 31 per FOSTER-SUTTON, F.C.J.
23. E.g. s. 31 of the Ghana Courts Act, 1960. W. Reg. High Ct. Law, Cap. 44 (1959 Rev.) s. 19. E. Reg. Magistrates' Court Amendment Law. E.R. No. 8 of 1958, s. 2. British House of Commons Debates, October 23, 1958.
24. Laws of the Gold Coast, 1954, Subsidiary Legislation, Vol. 7; Order 59 s. 14(9) of the Gambia Law of England (Application) (A.) Ord. No. 11 of 1957 stipulates that the rules of court made under s. 99 of the English Supreme Court of Judicature (Consolidation) Act 1925 pursuant to the provisions of s. 10 of the Administration of Justice (Misc. Provisions) Act 1938, shall apply mutatis mutandis in the courts of the Gambia.

jurisdiction, such as customary courts, Native Authorities, State or Traditional Councils. Statutes will be construed so as not to oust the supervisory jurisdiction of the superior courts. As GRANVILLE SHARP, J.A. observed:

> "It must, however, be noted that decided cases of long-standin have clearly established the principle that enactments which expressly provide that proceedings shall not be removed by certiorari to the High Court have no application when the lower tribunal has overstepped the limits of its jurisdiction or is not duly constituted, or where the party who obtained the order obtained it by fraud." 25

The award of the writ of certiorari (as well as mandamus and prohibition) is discretionary and it is not a writ of right.[26] The writ may be granted to quash the proceedings of an inferior tribunal which has acted without jurisdictinn. It will also lie in cases where inferior courts have exceeded their jurisdiction.[27] In Ghana, for /example

25. Ahenkora v. Ofe (1957) 3 W.A.L.R. 145 at 151. By a majority decision of 2 to 1, the Ghana Court of Appeal (as it then was) went on to hold that In re State Council of Wassaw v. Enimil (1934) Div. Ct., 1931-37, p. 61, was wrongly decided.

26. Commr. of Police v. Abassi and ors. (1929) 9 N.L.R. 108: The Resident, Ibadan Province and anor. v. Lagunju (1954) 14 WACA 549.

27. Reg. v. Akiwumi and Bannerman, ex parte Dako (1958) 3 W.A.L.R. 372 (Ghana). In re Umoulu Village Group Court ex parte Macaulay and Ben (1952) 20 N.L.R. 111. For other grounds for granting the writ, see Halsbury, Vol. 11. For the meaning of "inferior court", see Halsbury, p. 122. There are a number of High Court decisions which, wrongly relying on a passage in Halsbury's (Vol. 11, p. 130) to the effect that certiorari does not lie to quash the judgments of inferior courts of civil jurisdiction, created the impression that the writ does not lie to a native court in its civil jurisdiction. See, e.g. cases cited in R. v. Govt. of E. Nigeria, ex parte Okafor (1955) 21 N.L.R. 67; and In the matter of the State Councils (Colony and S. Togoland) Ordinance, 1952, etc. (Ghana) Civil App. No. 66/1957. This view has been rightly held to be erroneous. As FOSTER-SUTTON, C.J. explains the meaning of the statement in Halsbury's is that certiorari will not lie where the former writ of error lay. "I am not, however, prepared to accede to the proposition that in a country where the writ of error never lay, [i.e. Nigeria] the Supreme Court (now the High Court) cannot exercise the supervisory jurisdiction by certiorari because in the far distant past the procedure by way of writ of error lay in England." - Reg. v. The Resident, Ogoja Province and anor (1957) 2 F.S.C. 30.

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example, where an order of certiorari is made in any such case, the order shall direct that the proceedings shall be quashed forthwith on their removal into the court.[28] This rule, based on the Supreme Court Rules in England, is of general application in West Africa. In the Nigerian case of In re Umuolu Village Group Court,[29] MBANEFO, J., (as he then was) quoted with approval a dictum of Lord Goddard explaining the reason for the rule. Lord Goddard said:

> "If a Court imposes a sentence which is not authorised by law for the offence for which the defendant is convicted the conviction is bad on its face and can be brought here to be quashed. That is because this Court has no power, and has never had any power, on certiorari to amend the conviction. If such a power existed, it would enable the court to sit as Court of Appeal on justices and we have no such jurisdiction."[30]

Now in England, s. 16(1) of the Administration of Justice Act, 1960, has provided that where a pe rson who has been sentenced for an offence by a magistrates' court, applies to the High Court for an Order of certiorari to /remove

28. Courts Rules of Ghana Order 59, r. 6.
29. (1953) 21 N.L.R. 111. The case referred to is R. v. Willesden Justices Ex parte Uttey [1947] 2 All E.R. 838 at p.
30. But according to DENNING, L.J. (as he then was) there is power to quash and order trial again. R. v. Northumberland Compensation Appeal Tribunal [1952] 1 K.B. 338. "Where there is a right of appeal from the decision of the Court below a dissatisfied party may nevertheless apply for a writ of certiorari instead of appealing, but he cannot do so until the time for appealing has expired " - per MBANEFO, J. (as he then was In re Umuolu Village Group Court, supra, at p. 113.

remove the proceedings of the magistrates' court into the High Court, and the High Court determines that the Magistrates' Court had no power to pass the sentence, the High Court may, instead of quashing the conviction, amend it by substituting for the sentence passed any sentence which the Magistrates' Court had power to impose. There is a strong argument for the universal adoption of this new rule in West Africa.

It must be remembered that certiorari is a remedy of a very special character, and it lies only to remove judicial acts.[31] In The Queen v. The Governor in Council Western Region of Nigeria & ors. QUASHIE-IDUN, C.J. cited with approval a dictum of Lord Goddard which is as follows:[32] "It will be observed that the persons must have authority to determine, and they must be persons who have a duty to act judicially. Their Orders if they act im excess of their authority, can be reviewed by this Court under the Order of Certiorari, which has now taken the place of the writ, but it is essential to remember... that there must be something that can be called a determination which will affect the rights of the party and there must be a tribunal whose duty it is to act judicially. It isnot easy to give a definition of exactly what is meant by "act /judicially"

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31. Amaka v. Lt.Gov. W.Reg. & anor (1956) 1 F.S.C.R.57 per FOSTER-SUTTON, F.C.J. Hetherington v. Security Export Co. [1924] A.C. 988.
32. (1961) W.N.L.R. 86 at p. 89. The English case is Reg. v. Statutory Visitors to St.Lawrence's Hospital, Caterham; ex parte Pritchard (1953) 1 W.L.R. 1158 at p. 1162; [1953] 2 All E.R. 766.

> judicially", but in my opinion, for this purpose the expression refers to a body which is bound to hear evidence from both sides. Although there need not be anything strictly called a lis, it must be a body which has to hear submissions and evidence and come to a judicial decision in approximately the way that a court must do".

There is a long series of cases in West Africa which go to confirm the view that certiorari will not issue to quash the order of a body that has acted in a purely ministerial or executive capacity, notwithstanding that its ministerial order may have been preceded by a determination of a judicial character of another body.[33]

(c) Prohibition. Short and Mellor,[34] define the writ of prohibition as "a judicial writ issuing out of a court of superior jurisdiction and directed to an inferior court for the purpose of preventing the inferior court from usurping a jurisdiction with which it is not legally vested, or, in other words, to compel courts entrusted with judicial duties to keep within the limits of their jurisdiction... It is a preventive rather than a corrective /remedy

33. See, e.g. Dadzie VI v. TheAttorney-General (1933) 1 WACA 271 (Ghana). The Resident, Ibadan & anor. v. Lagunju (1954) 14 WACA 549 (Nigeria); Amaka v. Lt.Gov. Western Region. (1956) 1 F.S.C.R. 57 (Nigeria) Nyako v. Min. of Local Govt. (1956) 2 WAIR 147 (Ghana). See also S.A. de Smith: Judicial Review (1959) p. 281.

34. Op cit, p. 252.

remedy and is used only to prevent the commission of a future act and not to undo an act already performed."[35] The expression "inferior courts" includes bodies which have authority to act judicially, such as Traditional Councils, which have jurisdiction in Ghana in matters relating to the nomination, election and installation of chiefs. Thus in Adoko v. Edu,[36] a writ of prohibition was granted to prevent a State Council from exercising its powers otherwise than had been provided by statute.

(d) Mandamus. "The prerogative writ of mandamus may be defined as a high prerogative writ, issuing from the Crown side of the King's Bench Division of the High Court, whereby the court, in the King'sname, commands the person to whom it is addressed to perform some public or quasi-public legal duty which he has refused to pefform, and the performance of which cannot be enforced by any other adequate legal remedy." [37] "A mandamus", says Lord Mansfield, "is certainly a prerogative writ, flowing from the king himself, sitting in this court, superintending the police, and preserving the peace of this Country." [38] The function of a writ of mandamus is to compel a magistrate to exercise his jurisdiction; it is not issued as a means

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35. But see a dictum of DENNISON, J. in Nyako v. Min. of Local Govt. (1956) 2 WAIR 147 at 154, (Ghana).
36. (1958) 3 WALR 441, see the now Chieftaincy Act 1961, Act 81.
37. Short & Mellor op cit p. 197. See also HALSBURY, 3rd ed Vol. 11, p. 84 et sequ.
38. R v. Barker 1 W.Bl. 352.

of having his decision reviewed, or compelling him to state the reasons for his decision.[39] Thus where a magistrate re-transfers a case to a native court in a manner which is ultra vires, mandamus will issue to compel him to hear and determine the case.[40] The writ is often resorted to in order to compel traditional councils in Ghana to hearand determine matters "of a constitutional nature".[41]

Mandamus, therefore, differs from certiorari and prohibition in that the last two are used only when an inferior court has wrongly exercised or exceeded its jurisdiction, whereas mandamus is only issued when an inferior court has declined jurisdiction.[42]

IV. THE INDEPENDENCE OF THE JUDGES

The fourth essential feature of the common law is the principle of the independence of the Judiciary. This /principle

39. Reg. v. Magistrate Grade I, Jos (1954) 21 N.L.R. 28 per BAIRAMIAN, J.
40. Henshaw v. Effiong (1925) 6 N.L.R. 114.
41. Kpanynli & anor v. W. Nzima State Council & ors (1957) 3 WAIR 190 (Ghana).
42. Also it differs from quo warranto, in that it is used to compel an election to a vacant public office, whereas quo warranto only questions the election - Short & Mellor op cit. 199. By the High Court of Lagos Ord. Cap. 80, s. 21 abolishes information in the nature of quo warranto. That isreplaced by Injunction. But proceedings in quo warranto are expressly provided for by the W. Region High Court Law, Cap. 44 (1959 Rev.), s. 23. Such proceedings are deemed civil proceedings.

principle, says Lord Wright, is the life-blood of the common law and justified the description of the common law as the lawof free peoples.[43] Lord Denning summed up the position for England thus: "Ever since the Act of Settlement in 1701 it has been part of our constitution that a judge of the High Court cannot be removed except for misconduct, and even then, there must be a petition from both Houses of Parliament for his removal".[44] However, in Terrell. v. Secretary of State for the Colonies,[45] Lord GODDARD held that section 3 of the Act of Settlementwas not part of the English law which Englishmen carried with them to the Straits Settlement or to any colony; for that section, which stipulated that English judges were to be appointed during good behaviour was a comparatively modern innovation applicable only to English judges of the superior courts. The effect of that judgment was that, whilst English judges were appointed quamdiu se bene gesserint (i.e. during their good behaviour), colonial judges, unless otherwise provided by law, held office during the pleasure of the Crown /(i.e. the

43. Legal Essays, p. 334.
44. The changing law, p. 4.
45. /1953/2 Q.B. 482. But Colonial Regulations provided that any proposal to dismiss a judge had to be referred by the Secretary of State to the Judicial Committee of the Privy Council.

the Executive) as is the case in the Gambia Colony.[46]

The first reaction to Lord Goddard's judgment is contained in the resolution of the Commonwealth Empire Law Conference, 1955, which beads as follows:"This Conference is of the opinion that the Supreme or High Court Judges of the Colonial Empire should be appointed to hold office during good behaviour and not during Her Majesty's pleasure".[47] The principle of the independence of thw judiciary was reiterated at the International Conference of Jurists held at New Delhi in 1959.[48] Clause 1 of the Report of Committee IV is as follows:

> "An independent Judiciary isan indispensable requisite of a free society under the Rule of Law. Such independence implies freedom from interference by the Executive or Legislative with the exercise of the judicial function, but does not mean that the judge is entitled to act in an arbitrary manner. His duty is to interpret the lawand the fundamental principles and assumptionsthat underlie it. It is implicit in the concept of independence set out in the present paragraph that provision should be made

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46. Supreme Court Ord. Cap. 5 (1955 rev.) s. 6: "whenever the office of Judge becomes vacant by death or otherwise, the Governor may appoint another fit and proper person to fill such office until Her Majesty's pleasure be known." See also British colonial judges (1956) by the Inns of Court Conservative and Unionist Society.
47. Cited by CHITEPO, H.W. at p. 75 of the Report of the African Conference on the Rule of Law, Lagos, 1961. Published by the International Commission of Jurists, Geneva, 1961.
48. Journal of the International Commission of Jurists Vol. 2 (1959) p. 16. Re-affirmed at Lagos in 1961.

"for the adequate remuneration of the judiciary and that a judge's right to the remuneration settled for his office should not during the term of office be altered to his disadvantage."

Clause 3: "The principle of irremovability of the Judiciary and their security of tenure until death or until a retiring age fixed by statute is reached, is an important safeguard of the Rule of Law. Although it is not impossible for a judge appointed for a fixed term to assert his independence, particularly if he is seeking re-appointment, he is subject to greater difficulties and pressure than a judge who enjoys security of tenure for his working life."

Clause 4: "The reconciliation of the principle of irremovability of the Judiciary with the possibility of removal in exceptional circumstances necessitates that the grounds for removal should be before a body of judicial character assuring at least the same safeguards to the judge as would be accorded to an accused person in a criminal trial."

These principles have already gained a firm footing in Africa. Thus in Nigeria,[49] and Sierra Leone,[50] The Chief Justice is appointed by the Governor-General, acting in accordance with the advice of the Prime Minister. In Ghana the Chief Justice is appointed by the President from among the judges of the Supreme Court.[51] The judges of the superior courts in Nigeria,[52] and Sierra Leone,[53] are appointed by the Governor-General, acting in accordance with the Judicial Service Commission. In Ghana although /the

49. The Nigeria (Constitution) Order in Council 1960. 2nd Schedule art. 105.
50. Sierra Leone (Constitution) Order in Council 1961. The 2nd Schedule art. 76.(1)
51. The Ghana Constitution, Art. 44(1).
52. E.g. 4th Schedule - The Constitution of Western Nigeria, art. 49(2).
53. Sierra Leone (Constitution) Order in Council 1961 art. 76(2)

the judges of the superior courts are appointed by the President,[54] in practice it is the Chief Justice who submits proposed appointments of judges for signature by the President.[55]

Subject to the compulsory retiring age, judges in West Africa can be removed from office only for inability to discharge the functions of their office ("whether arising from infirmity of body or mind or any other cause) or for misbehaviour".[56] The procedure for removal in Sierra Leone and Nigeria differs from that of Ghana. The provision for Sierra Leone (which is practically the same as Nigeria) is as follows: (Section 77(4):[57]

> "A judge of the Supreme Court shall be removed from office by the Governor-General if the question of removal of that judge hasat the request of the Governor-General, made in pursuance of sub-section (5) of this section, been referred by Her Majesty to the Judicial Committee of Her Majesty's Privy Council /under

54. The Ghana Constitution, Art. 45(1).
55. Statement of Sir Arku Korsah, C.J. of Ghana. African Conference on the Rule of Law, Lagos (Report), p. 141. The learned Chief Justice added: "In brief, judicial organization in Ghana is a very faithful copy of the English model and there are very satisfactory guarantees of an independent judiciary."
56. Western Nigeria (Constitution) 4th Schedule to the Nigerian Constitution, 1960. Art. 50(2). There are similar provisions for Sierra Leone. In Ghana the expression is "for stated misbehaviour" - Ghana Constitution, Art. 45(3).
57. Sierra Leone (Const.) O-in-C, 2nd Schedule. This method is common in the constitutions of ex-British African territories. See also De Smith, S.A.: "Fundamental rights in the new Commonwealth" (1961) 10 I.C.L.Q. 83*102; 215-237.
215-237

under any enactment enabling Her Majesty in that behalf, and the Judicial Committee has advised Her Majesty that the judge ought to be removed from office for inability as aforesaid or for misbehaviour.

(5) "If the Prime Minister represents to the Governor-General that the question of removing a judge under this section ought to be investigated, then

(a) the Governor-General shall appoint a tribunal which shall consist of a chairman and not less than two other members, selected by the Governor-General, acting in accordance with the advice of the Prime Minister, from among persons who hold or have held office as a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from any such court;

(b) the tribunal shall enquire into the matter and report on the facts thereof to the Governor-General and recommend to the Governor-General whether he should request that the question of removal of that judge from office should be referred by Her Majesty to the Judicial Committee; and

(c) if the tribunal so recommends, the Governor-General shall request that the question should be referred accordingly.

(6) If the question of removing a judge from office has been referred to a tribunal under sub-section (5) of this section, the Governor-General, acting in accordance with the advice of the Prime Minister, may suspend the judge from performing the functions of his office, and any such suspension may at any time be revoked by the Governor-General, acting in accordance with the advice of the Prime Minister, and shall in any case cease to have effect-

(a) if the tribunal recommends to the Governor-General that he should not request that the question of removal of the judge from office should be referred by Her Majesty to the Judicial Committee; or

(b) if the Judicial Committee advises Her Majesty that the judge ought not to be removed from office.

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(7) The provisions of this section shall be without prejudice to the provisions of sub-section (5) of section 76 of this Constitution." 58

The procedure for removal from the office of a judge in Ghana follows the present pattern in the United Kingdom. A judge can be removed by the President only "in pursuance of a resolution of the National Assembly supported by the votes of not less than two-thirds of the Members of Parliament and passed on the grounds of stated misbehaviour or infirmity of body or mind".59

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58. Sub-section 5 of s. 76 deals with appointment for a limited period.

59. Ghana Constitution. Art 45(3).

Chapter Five

A: ASPECTS OF CIVIL (COMMON) LAW IN WEST AFRICA

(1) CONTRACTS

The English law of contract being part of the common law is in force in West Africa in so far as local conditions permit. As the late Professor Dicey observed, "Nine-tenths, at least, of the law of contract, and the whole, or nearly the whole, of the law of torts are not to be discovered in any volume of the statutes."[1] Therefore in order to ascertain the law relating to contracts in West Africa, one has to rely mainly on English judge-made law. There are, however, certain aspects of the law of contract, which, since they are peculiar to the English should not have been exported to West Africa in the first place. One such example is the English doctrine of consideration. Lord Wright has described consideration as "perhaps the most characteristic and fundamental doctrine in the common law relating to contracts. Save in contracts under seal, no contract can be valid in law unless there is consideration. But some doubt may be felt as to its value when it is realised that it is peculiar to the common law. No other modern system has any such notion; the Code Civil does indeed provide for "cause" as a condition of contract,

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1. DICEY, A.V.: Lectures on the relation between law and public opinion in England during the nineteenth century. (2nd ed), p. 362.

but it seems to be agreed that the provision is not practically significant. The Roman-Dutch law and Scottish law know nothing of consideration; modern Codes, the German and the Swiss, have disregarded the notion. Consideration is thus clearly no necessary part of a civilized law of contract.[2] Indeed, in 1937, the Law Revision Committee set up in England under the chairmanship of Lord Wright, produced a valuable report on the Statute of Frauds and the doctrine of consideration.[3] The Committee inter alia recommended the repeal in England of section 4 of the Statute of Frauds, section 3 of the Mercantile Law Amendment Act, 1856, and section 4 of the Sale of Goods Act, 1893, paragraph 16. It also made proposals for alteration in the law relating to consideration and to jus quaesitum tertio. The main recommendations of the Committee were not accepted in the spirit with which the report had been written. The only action which has been taken is the passing of the Law Reform (Enforcement of Contracts) Act 1954, which amended section 4 of the Statute of Fraudes, 1677, an repealed section 4 of the Sale of Goods Act, 1893. According to Cheshire and Fifoot, there is a slender chance of

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2. Legal Essays, p. 375.
3. Sixth Interim Report, 1937, Cmd. 5449.

the report being accepted in England.[4]

Far from being daunted by the temerity shown by the English Parliament on this issue, the Parliament of the Ghana Republic has been bold and realistic in adopting the recommendations of the Law Revision Committee in the Contracts Act 1960.[5] It is not a codification of the whole law of contract. The long title describes it as an "Act to amend the law of contract and to replace certain Imperial enactments". Part III lays down the law relating to consideration in respect of certain contracts as follows:-

> Section 8(1) "A promise to keep an offer open for acceptance for a specified time shall not be invalid as a contract by reason only of the absence of any consideration therefor.
>
> (2) A promise to waive the payment of a debt or part of a debt or the performance of some other contractual or legal obligation shall not be invalid as a contract by reason only of the absence of any consideration therefor.
>
> Section 9. "The performance of an act or the promise to perform an act may be sufficient consideration for another promise notwithstanding that the performance of that act may already be enjoined by some legal duty, whether enforceable by the other party or not.
>
> Section 10. "No promise shall be invalid as a contract by reason only that the consideration therefor is supplied by someone other than the promisee."
>
> The foregoing provisions show a clear departure from the

4. CHESHIRE, G.C. & FIFOOT, C.H.S.: The law of contract. 5th ed., 1960, p. 92.
5. Act 25 (Ghana). See a note on the Act by READ, J.S. in (1961) 5 J.A.L. 48-50.

the existing common law rules in England. Section 5, which relates to privity of contract appears to be directly contrary to the English law on the same point.[6] The English law was restated in Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge Ltd. by Viscount HALDANE as follows:[7]

> "...Only a person who is a party to a contract can sue on it. Our law knows nothing of a jus quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a conttact as a right to enforce the contract in personam.

Another exception has been added to the list by section 25(1 of the Restrictive Trade Practices Act, 1956, which provides that:

> "Where goods are sold by a supplier subject to a condition as to the price at which those goods may be resold, either generally or by or to a specified class or person, that condition may, subject to the provisions of this section, be enforced by the supplier against any person not party to the sale who subsequently acquires the goods with notice of the condition as if he had been party thereto."[8]

On the other hand, section 5(1) of the Ghana Contracts Act, following the recommendation of the English Law Revision Committee provides that "Any provision in a contract made after the commencement of this Act which purports to confer a benefit on a person who is not a party to

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6. See READ, J.S.: "Change in the law of contract" (1961) 5 J.A.L. p. 49. CHESHIRE & FIFOOT op cit, pp. 67 & 367.
7. [1915] A.C. 847 at p. 853.
8. Writer's underlining.

the contract ... may, subject to the provisions of this Part,[9] be enforced or relied upon by that person as though he were a party to the contract";[10] but subsection (1) does not apply to:-

> "(a) a provision in a contract designed for the purpose of resale price maintenance, that is to say, a provision whereby a party agrees to pay money or otherwise render some valuable consideration to a person who is not a party to the contract in the event of the first-mentioned party selling or otherwise disposing of any goods, the subject matter of the contract at prices lower than those determined by or under the contract; or
> (b) a provision in a contract purporting to exclude or restrict any liability of a person who is not a party thereto." [11]

Part IV, which relates to Contracts of Guarantee, is drafted on the lines suggested by the Minority Report of the English Law Revision Committee of 1937. Section 14(1) stipulates that contracts of guarantee shall be void "unless it is in writing and is signed by the guarantor or his agent, or is entered into in a form recognised by customary law". This section is a good example of the efforts of the Ghana Government to eradicate the dichotomy of laws existing in that country.

Part I which deals with frustration of contracts follow

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9. Part II of the Act relates to third party rights. Ss. 6 & 7 deal with "Assignment" and to priorities based on the English rule in Dearle v. Hall (1828) 3 Russ. 1.
10. The Ghana case of Amuakwa v. Anyon (1936) 3 WACA 22, which is authority for the statement that only a party to a contract can sue is therefore obsolete.
11. S. 5 (1) & (2).

almost word for word the English Law Reform (Frustrated Contracts) Act, 1943.[12] Section 11 of the Ghana Contracts Act is another provision which gives statutory recognition to customary law. It provides that "subject to the provisions of any enactment, and to the provisions of this Act, no contract ... shall be void or unenforceable by reason only that it is not in writing or that there is no memorandum or note thereof in writing".

Finally, section 12, is welcome in so far as it abolishes the antiquated English rule that contracts by corporations have to be made under seal.[13] The reasons for the general rule that contracts and other documents to be legally binding upon a corporation or the person contracting with it must be executed under its common seal was stated by Blackstone to be that:[14]

> "A corporation, being invisible body, cannot manifest its intention by any personal act or oral discourse. It acts and speaks only by its common seal."

But what was a sound rule in Blackstone's time may be an anachronism in the nuclear age.

The English Law Reform Committee, reporting in 1958, recommended that the law in England should be changed.[15]

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12. 6 & 7 Geo 6, C. 41.
13. But there were many exceptions, e.g. by s. 32 of the English Companies Act, 1948, companies registered under the Companies Acts, and Trading Corporations acting in the course of their business can contract in the same way as individuals.
14. 1 Comm. 475.
15. Law Reform Committee. Eighth Report. Cmnd. 622.

The Corporate Bodies Contracts Act, 1960,[16] carried out that recommendation by enabling a corporation to contract in the same way as an individual of full age and capacity. Section 12 of the Ghana Contracts Act, which is based on the English Act, is therefore up-to-date in that respect.

The Western Region of Nigeria Contracts Law, 1958,[17] makes provisions with regard to specific topics. Part II of the law relates to contracts for the sale of land, and contracts of guarantee. By section 2 it is provided that "No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised."

Section 3 stipulates that:

> "No action shall be brought whereby to charge the defendant upon any special promise, whether made before or after the commencement of this law to answer for the debt, default or miscarriage of another person unless the agreement upon which such action is brought or some memorandum or note thereof is in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorised."

This statutory requirement is based on the amended version of section 4 of the Statute of Frauds, 1677.[18] Lack of

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16. 8 & 9 Eliz. 2 C. 46.
17. Laws of the Western Region No. 22 of 1958 (1959 Rev.) Cap. 25.
18. See Law Reform Committee (First Report) 1953. Cmd.8809, and the Law Reform (Enforcement of Contracts) Act, 1954

writing merely makes the contract unenforceable just as it is the law in England.[19] On the other hand, the framers of the Ghana Contracts Act adopted the minority report of the Law Revision Committee, 1937, which renders such contracts void.

Section 3(2) of the Western Region Law, which is based on the English Mercantile Law Amendment Act, 1856, states:

> "No such special promise being in writing, and so signed as aforesaid, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise has been made by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document."

Part III of the Western Region Contracts Law, relates t "Frustrated Contracts". Like the Ghana Act, the provisions made on that topic by the Western Region Law are taken almost word for word from the English Law Reform (Frustrate Contracts) Act 1943.

The Law Reform (Contracts) Act, No. 64 of 1961, which has been enacted for the Federal Territory of Lagos, contains provisions largely similar to those described for the Western Region of Nigeria. Thus the provisions relatin to frustrated contracts originate from the English Act of 1943. Part II of the Law Reform (Contracts) Act, relates

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19. "A contract of guarantee made orally is not void or a nullity but is merely incapable of proof unless and until a memorandum complying with the Statute of Frauds is prepared." - U.A.C. v. Jazzar (1939) 15 N.L.R. 67, per BUTTLER LLOYD Ag.C.J.

to contracts for the sale of land, and to contracts of guarantee like the provision in the Western Region, section 5(2) of the Federal Territory Act stipulates that no contract for the sale,etc. of land "shall be enforceable by action unless the contract or some memorandum or note in respect therefor is in writing and is signed by the party to be charged therewith or by some other person lawfully authorised by him". But section 5(3) goes on further to provide that nothing in that section shall;

(a) apply to any contract for the sale or other disposition of land made under customary law;

(b) apply to the sale of land by order of any court of competent jurisdiction;[20] and

(c) affect the operation of the law relating to past performance.

Section 5(b) declares that the section is in substitution for section 4 of the Statute of Frauds, 1677, of the Parliament of England and therefore the latter section ceases to be in force in the Federal Territory. The provision which deals with contracts of guarantee, like the Western Region, stipulates that consideration for the guarantee need not appear in writing.

20. "Court" means in relation to any matter the court or arbitrator by or before whom the matter falls to be determined.

(2) COMMERCIAL AND RELATED LAWS

The divergence of the commercial laws in West Africa today is due partly to colonialism and partly to the lack of interest shown by colonial attorneys-general, who paid scant attention tothe need for law reform. As a result, the commercial and related laws in West Africa are based on English statutes passed at different times. There are four main ways by which the commercial laws of England were received in West Africa. The first type of reception is through the common law. Thus, although the United Kingdom Partnership Act, 1890, has not been re-enacted in Sierra Leone, the Gambia or Ghana, it can be regarded as applicable there as a codification of the common law.[20a] By the second method, statutes which were of "general application" in England before the date of the introduction of English law, usually applied to the receiving territory. A good example is the Sale of Goods Act, 1893. By the third method, statutes of England passed after the reception date or sections of such statutes are adopted. Thus the

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20a. The Act of 1890 is an "Act to declare and amend the law of partnership". For case-law on Partnership, see, e.g. H. Van Hein v. Kraku (1925) Div. Ct. 21-25, p.146; Reynard v. Allan (1934) 2 W.A.C.A. 52; Hadaby v. Halaby & anor (1951) 13 W.A.C.A. 180. The Partnership Act, 1890 of the U.K. is in force in Nigeria as a "statute of general application". The Western Region has its own Partnership Law, No. 44 of 1958 (Cap. 86.)

Gambia Stamp Ordinance No. 14 of 1937,[21] adopted the definition of "conveyance on sale", "equitable mortgage" and "mortgage" in the English Stamp Act of 1891. Fourthly, English Acts relating to commercial law may be "codified" locally. A difficulty arises when an English Act relating to mercantile law is repealed or altered. Such an action may leave the receiving country with the old law, which has been found to be unsuitable in England.

One way out of this dilemma is to be found in the Civil Law Ordinance of Malaya. Section 5(1) of the Ordinance, reads:[22]

> "In all questions or issues which arise or which have to be decided in the Colony with respect to the law of partnership, corporations, banks and banking, principals and agents, carriers by land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen, or had to be decided in England, unless in any case other provision is or shall be made by statute."

As far as it is known, there never was any such provision in the laws of West Africa.

(a) Sale of Goods. The English Sale of Goods Act, 1893 has now been re-enacted in all the four West African

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21. Laws of the Gambia Cap. 167 /1955 Rev./s. 2.
22. "The Civil Law Ordinance, s. 5(1). A re-appraisal", by CHAN SEK KEONG, (1961) 27 Malaya Law Journal Nos. 8 & 9.

countries.[23] As the date for the application of English law in West Africa (except in Nigeria) was fixed previous to 1893, the English Act did not apply to Sierra Leone, the Gambia or Ghana until it was re-enacted locally, whilst it applied in Nigeria as a statute of general application.[24] However, as the English Act merely codifies the common law rules relating to the sale of goods, the courts in the Gambia, Sierra Leone and Ghana, before local enactments were passed, were able to apply the provisions of the Act without any difficulty.[25] Indeed section 61(2) of the Sale of Goods Act, 1893, expressly provides that:

> "the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent, and the effect of fraud, misrepresentation, duress or coercion, mistake or other invalidating cause, shall continue to apply to contracts for the sale of goods."

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23. W. Nigeria No. 43 of 1958 Cap. 115 (1959 Rev.); Sierra Leone No. 20 of 1950 Cap. 225 (1960 Rev.); The Gambia, No. 4 of 1955. Ghana - a Sale of Goods Bill has been introduced in 1962. For decided cases on sale of goods generally, see, e.g. Khalil v. Mastronikolis (1949) 12 W.A.C.A. 462; Akoshile v. Ogidan (1950) 19 N.L.R. 87; Boshali v. Allied Commercial Exporters, Manchester Guardian, 1961.

24. At present the English Act is only in force in all the Regions of the Federation, except the Western Region.

25. Thus, before the Ghana Sale of Goods Act was passed, the courts freely relied on the provisions of the English Act, except in name only. See, e.g. Anglo-Guinea Produce Co. Ltd. v. George (1925) Div.Ct. 1921-25. Commonwealth Trust Ltd. v. Akotey (1926) A.C. 72 (The judgment isnow regarded as erroneous). Nanka-Bruce v. Commonwealth Trust Ltd. (1926) A.C. 77.

Sackey v. Fattal (1959) G.L.R. 169 at p. 176.

In Ghana a Sale of Goods Bill just published, is stated to:

> "'... represent in many ways a considerable departure from the English rules which have hitherto, generally, been applied in Ghana.[26] The English Sale of Goods Act 'cannot be regarded as wholly satisfactory'. A buyer is given 'an extraordinarily wide right of rejecting goods which are perfectly satisfactory'. These restrictions have caused 'great and entirely unnecessary complications in the law relating to misrepresentation and mistake'. The English rule that the property in specific goods sold passes to the buyer as soon as the contract is made, 'is in many respects unfortunate'."
>
> "Another innovation in this Bill is to be found in the section which codifies, as briefly and simply as possible, normal commercial practice relating to c.i.f. and f.o.b. contracts. 'It is one of the weaknesses of the English Sale of Goods Act that it does not mention these contracts, especially since so many of the provisions of the Act must be read differently - relying always on the "contrary intention" - in c.i.f. and f.o.b. sales'."
>
> "The Bill proposes that customary law should apply to all contracts for the sale of goods, 'a proposal which has the merits of simplicity and uniformity'." [26a]

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26. West Africa, 30 June, 1962, p. 723.

26a. The Bill became law too late for serious study in this work. Upon a careful reading of the provisions of the Ghana Sale of Goods Act, 1962, Act 137 (which has just been passed) one finds that there is not a "considerable departure" from the English rules. The provisions of the Act make use of the English judgments given in respect of the Sale of Goods Act 1893. One such example is s. 27 of the Ghana Act which deals with the transfer of risk. Again, s. 80 of the Ghana Act stipulates that "The rules of the common law and of customary law, save in so far as they are inconsistent with the provisions of this Act shall continue to apply to the contracts for the sale of goods".

There are only a few verbal alterations between the various Sale of Goods laws in West Africa. One notable difference is in respect of transfer of title. The Western Region Law adopts the old English doctrine of "market overt",[27] which says that where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided that he buys them in good faith, and without notice of any defect or want of title on the part of the seller. The Sierra Leone and the Gambia Ordinances omit the provision relating to sale of goods in a market overt. These countries in West Africa must be taken to be content with the general rule stated by Lord HERSCHELL thus:[27a]

> "The general rule of the law is that where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against the owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the person taking it can shew that the true owner has so acted as to mislead him into the belief that the person dealing with the property has authority to do so."

It may also be mentioned that this doctrine was rejected in America long ago as unsuitable to American conditions.

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27. For the raison d'etre of this principle, see COKE, 2 Ints. 713. The relevant section in the W.R.N. Law is s. 23 which is a word for word copy of the U.K. Act, s. 22; but whereas in the U.K. legislation it is stated that the sectio shall not affect the law relating to the sale of horses, that of the Western Region of Nigeria is silent.

27a. The London Joint Stock Bank v. Simmons /1892/ A.C. 201 at p. 215.

America sticks to the general principle that nemo plus juris in alium transferre potest quam ipse habet.[28] The Western Region case of Economic Exports Ltd. v. Odutola,[29] brings to light the danger involved in incorporating English commercial terminology into local statutes without consideration of the effect. In an action by the plaintiffs for general and special damages for breach of a contract for the sale of goods ordered, it was proved that the defendant had been in breach and the main question was the measure of damages recoverable. JIBOWU, C.J. held that the measure of damages was not to be assessed according to s. 50(3) of the Sale of Goods Act, 1893 (which is identical to s. 50(3) of the Western Region legislation) since the term "available market" in that section did not mean shops in which goods were sold, but a place like the Corn Exchange or the Coal Exchange where goods of the type in question /were

28. KENT, J. Commentaries: Vol. 2, p. 324. The doctrine has also been rejected in a number of Commonwealth countries, e.g. Alberta, Manitoba, Nova Scotia and Barbados. But it has been adopted in British Columbia. See ILBERT, I.: "Unification of commercial law" (1920) 2 J.Comp.Leg. (3rd series) 77 at p. 78.

29. (1959) W.R.N.L.R. 239. It is difficult to understand why the English Sale of Goods Act, 1893, was referred to in view of the fact that a Sale of Goods Law, No. 43 of 1958 had been passed by the Western Region Legislature.

were continuously being sold. "In that sense we have no such marketsin Lagos or Ibadan". This decision would appear to make section 50(3) of the Western Region Sale of Goods Law meaningless.

(b) Company Laws. When Professor L.C.B. Gower was invited to inquire into the working and administration of th existing company law of Ghana,[30] he was alarmed at the lack of uniformity of company laws in West Africa:

> "Nigeria has an Act based on the English Act of 1908, with assorted amendments since.[31] Sierra Leone's Act is based on the English Act of 1929,[32] while Gambia's is based on that of 1948.[33] Hence at present West Africa runs the whole gamut of English consolidating Acts from that of 1862 (Ghana)[34] to that of 1948 (Gambia). There appears to be no logical reason for this diversity; it seems to result solely from the fact that the Attorneys-General of the various territories displayed an interest in company law at different dates."

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30. Final Report of the Commission of Enquiry into the working and administration of the present company law of Ghana, 1961. For a review of the Report, see O. K-F, "Report of Committee" (1962) 25 M.L.R. p. 78.
31. The Companies Ordinance No. 8 of 1912 of S. Nigeria was an adoption mutatis mutandis of the Companies (Consolidation Act, 1908 of the U.K. The Ordinance of 1917 of Nigeria merely reproduced the former Ord. No. 8 of 1912 (S. Nigeria) and incorporated provisions of the U.K. Company (Consolidation) Act of 1908. The Companies Ord. No. 54 of 1922 reproduced that of 1912 and 1917. The Companies Ord No. 20 of 1929 incorporated the more important changes of the U.K. Companies Act of 1928.
32. The 1st Companies Ord. of Sierra Leone was No. 3 of 1906 which adopted en bloc the whole of the English Acts with rules and regulations "so far as the same are applicable to the circumstances of the Colony". The Companies Ord. No. 18 of 1937, which repealed that of 1924, is based on the U.K. Act of 1929.
33. The Companies Ordinance No. 9 of 1955.
34. The Companies Ord. No. 14 of 1906 followed the U.K. Act of 1862. This Ordinance virtually unamended and a century out-of-date in England, remained the statute law in Ghana until the Gower Report of 1961.

Perhaps another reason for the lack of interest in the development of company laws in West Africa is due to the fact that almost all the existing companies were of foreign origin.[35] The picture is changing and with the rapid economic development in Africa now, the need for reform in commercial law is greatly felt more than ever now. In Nigeria a Company Law Revision Commission has been set up.[36] The nature of reform needed in West Africa to improve the laws of commerce should follow the lines suggested in the Gower Report set up to inquire into the working of company law in Ghana which has been acclaimed everywhere as a notable achievement. After considering a number of possible solutions, Professor Gower rightly decided to draft a Companies Code Bill properly suited to Ghana's needs, or for that matter sufficiently attractive to have any chance of forming the basis for uniform legislation throughout the African states. Another reason which weighted with Professor Gower in suggesting a codification of the company laws is that thereby greater uniformity of the laws in this field would be of enormous

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35. Indeed, decided cases on company law are negligible. Those worth mentioning are - African Commercial Corp. Ltd. v. Holm (1926) Div.Ct. 1926-29, p. 53; Obu v. Strauss & Co. Ltd. (1947) 12 W.A.C.A. 277 and 281 P.C.; Lagos Chamber of Commerce v. Registrar of Companies (1952) 14 W.A.C.A. 197.
36. See West Africa, April 7 1962.

economic value to the African states. With this aim in view, Professor Gower has produced a Code, which not only blends many of the provisions of English, and American and continental laws, but also takes African conditions into account. However, since the West African countries are familiar with English law, the draft Code Bill leans heaviest on English law. Thus Clause 7 stipulates that, "the rules of equity and of common law applicable to companies shall continue in force except so far as they are inconsistent with the provisions of this Code". But greater freedom of interpretation is provided for by Clause 2 which reads :-

> "This Code and every provision thereof shall receiv such liberal construction as will best ensure the attainment of the objects thereof according to their true intent, meaning, and spirit, and in aid of construction and to ascertain the objects of this Code and its several provisions reference shall be made to the Report dated the 6th day of April, 1961, of the Commission of Inquiry into the Working and Administrati of the Company Law in Ghana and to the Government Statement thereon dated."

Some of the English provisions have been rejected as unsuitable to the needs of Ghana. "The quite incomprehensible and senseless dichotomy of the company constitutions in memorandum and articles is given up".[37] By clause 16, both the memorandum and articles of association are merged and the word "Regulations" is substituted. English concepts, such as "authorised capital

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37. O.K-F.: (1962) 25 M.L.R. p. 80.

"issued capital", and "paid-up capital" disappear in the limbo of legal history and are replaced - partly on the pattern of American legislation - by the new concept of the "stated capital" (Clause 66). Non-voting shares are banned (Clauses 31, 49, & 50). In explaining the reason for this action, Professor Gower says:[38]

> "The traditional pattern of English company laws is to allow complete freedom so that one class of share even equity shares may be completely deprived of votes, or the voting may be weighted in favour of one class. This enables one group of persons to maintain complete control notwithstanding that they may have only a small financial stake in the business... Furthermore, the objections to non-voting shares are not merely based on unfairness; they lead to a number of abuses which seem undesirable in the general interest."

Clause 25 modifies the ultra vires doctrine as suggested by the English Cohen Committee. The Report of that Committee pointed out (Cmd.6659, para. 12) that the doctrine of ultra vires has become "an illusory protection for the shareholders and yet may be a pitfall for third parties dealing with the company". Professor Gower, has therefore based Clause 2 on section 6 of the American Model Business Corporation Act "which seemsto provide an eminently workmanlike solution".

Professor Gower also pays attention to the improvement of African businesses. To encourage them, he recommends that the one-man company should be openly recognised. Thus Clause 8 , which stipulates that "Any one or more persons

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38. Final Report on Company Law in Ghana, p. 58.

may form an incorporated company in Ghana by complying with this Code in respect of registration" is yet another departure from the English provision. As a supplement to the Companies Code, Professor Gower has drafted an "Incorporated" Private Partnerships Act, which is also designed to help African businessmen. "The principal weakness of the present type of partnership as an organisation for African business is that the firm has no separate existence and that the partnership is automatically dissolved on the death or retirement of any partner. Under this Bill, a distinction is drawn between the partnership relationship and the firm. The former is dissolved on the death or retirement of any partner. But th firm (the business itself) on registration of the partnership becomes a separate legal entity capable of permanent survival and its life is not destroyed by a change in the constitution of the partnership".[39] This is a happy blend of African and English law. It also enhances Ghana's system of family business.

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39. Op cit, p. 37.

(c) Miscellaneous. In addition to those already mentioned, there are in West Africa the usual laws relating to commerce. Thus there are enactments relating to pawnbrokers,[40] insurance,[41] registration of trade marks, stamp duties, Bills of Exchange, Bills of Lading, exchange contro Bills of Sale (except in Ghana), based on English law, with minor verbal modifications. Further, the Money-lender Acts of 1900 and 1927 in England form the basis of the mone lenders laws.[42] But, apart from Sierra Leone, it is worth noting that "the English Acts of 1900 and 1927 which are the fountainhead of the local Ordinance on moneylenders, do not contain any provision similar to the provision in our /section

40. E.g. The Pawnbrokers enactments in Ghana (Cap. 189, 1951 Rev.) Gambia (Cap. 177 1955 Rev.); Sierra Leone, (Cap. 243, 1960 Rev.), and Nigeria (Lagos) Cap. 146, (1958 Rev.) are based on the English Pawnbrokers Act, 1872 (35 & 36 Vict. C. 93). But, whereas the English Ac does not apply to a loan by a pawnbroker of above £10, i Ghana the amount is £50, in the Gambia £10, in Sierra Leone and Nigeria (Lagos) £20.
41. E.g. The Nigerian Insurance Companies Act, 1961, No. of 1961, which is of federal application. The Nigerian Marine Insurance Act No. 54 of 1961 - also of federal application.
42. 63 & 64 Vict. C. 51; and 17 & 18 Geo. C.5. In fact, the Moneylenders enactments in Sierra Leone, No. 15 of 1941, Gambia, No. 25 of 1954, and in Ghana N 21 of 1940 were based on the Nigerian Moneylenders Ordinance No. 45 of 1938, which was itself based on the English laws.

section 3 /which creates a presumption that a person is a moneylender./ Here there is no need to prove a repetition of acts which can be branded as acts of a moneylender in order to show that a person is a moneylender: it is sufficient to show that he has given a loan at interest or in consideration of a larger sum being repaid, and then the onus is shifted on to him to prove that he is not a moneylender." [43] But in the Nigerian case of Egbele v. Amadu,[44] from which the above-quoted extract emanates, the learned judge held that presumption was rebutted where it was proved that money was advanced to a close friend at interest. On the other hand, in the Gambian case of Farage v. Davies,[45] the plaintiff was unable to discharge the onus cast upon him by section 3 to prove that he was not a moneylender.

Notable omissions in the commercial laws of West Africa at the moment are comprehensive laws relating to banking and bankruptcy. One reference to the latter item is made in Professor Gower's interim report on Company Law in Ghana:

> "A bankruptcy law, fairly but vigorously administered might enable the feckless and dishonest few to be weeded out to the enormous advantage of the responsible and honest many".

As a result of his recommendations, an Insolvency Commissio/was

43. Egbele v. Amadu (1953) 20 N.L.R. 131 at p. 132 per BAIRAMIAN, J.
44. Ibid.
45. (1957) 2 W.A.L.R. 324.

was set up in Ghana in 1960, which produced a Report in 1961,[46] including a draft Insolvency Bill, now awaiting Government action.

There can be little doubt that within the next few years large-scale reforms relating to commercial laws will be undertaken. That will be the opportune moment for the West African governments to pay more attention to the uniformity of commercial laws. It may be appropriate to establish a body such as the National Conference of Commissioners on Uniform State Laws,[47] established in America for that purpose. It is reported that through the work of the Conference many uniform laws relating to commerce - for example the Uniform Instruments Act, modelled on the English Bills of Exchange Act - have been adopted by the various States of America.

(3) TORTS

The English law of torts, which consists largely of the decisions of judges, is in force in West Africa as part of the common law. So long as the common law relating to torts in England is developed through judicial decisions, the courts in West Africa are able (where applicable) to avail themselves of the current developments in England. There

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46. Report of the Commissioners appointed to enquire into the Insolvency Law of Ghana, 1961.
47. LAWSON, F.H. Uniformity of laws: a suggestion. (1944) 26 J.Comp.Leg. 3rd series, 16-27.

is, however, a limit to the process of development of the common law by means of the rule of stare decisis. However competent English judges may be, there are certain aspects of the common law which can only be changed by legislation and indeed a number of rules in torts have been altered by statutes in England to suit modern conditions. But owing to the fact that in West Africa, by means of various statutory provisions, the date of the reception of English statutes has been fixed in the 19th century, statutes passed in England in the 20th century to alter the common law rules of tort have been regarded as inapplicable unless re-enacted locally. This has resulted in the application c certain common law rules of torts in West Africa when they have long been abandoned in England. Thus, for a long time the famous, or infamous, doctrine of common employment, first laid down in Priestly v. Fowler,[48] was regarded as applicable in West Africa. Of this case, it has been well said, "Lord Abinger planted it, Baron Alderson watered it, and the Devil gave it increase".[49] Broadly stated, at common law a master was not liable for negligent harm done /by

48. (1837) 3 M. & W. 1.
49. Cited in KENNY'S Cases on the law of tort, 4th ed. p. 90, quoted by A.L. GOODHART.; Essays in jurisprudence, 1931, p. 2.

by one of his servants to a fellow servant engaged in common employment with him. This defence of common employment was limited in England first by the Employers' Liability Act, 1880, which did not apply in Ghana, and secondly by the Workmens' Compensation Acts 1925-45. The latter Acts did not apply to West Africa, but an Ordinance modelled on the English Acts by the Colonial Office was accepted and enacted by the West African governments.[50] For example, Section 5(1) of the Ghana Ordinance,[51] stipulates that "If in any employment personal injury by accident arising out of and in the course of the employmen is caused to a workman, his employers shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the provisions of this Ordinance". There follows a number of exceptions to the section. The defenc of common employment was abolished in England by the Law Reform (Personal Injuries) Act 1948,[52] but it did not appl in West Africa.

Fortunately, the wave of judicial reform, which is sweeping across West Africa, is correcting some of these

50. E.g. Workmens Compensation Ordinance Cap. 93 (Gambia) (as amended by No. 9 of 1956); Workmens Compensation Ordinance, Cap. 222 (Nigeria).
51. Workmens Compensation Ordinance, Cap. 94 (Laws of Gold Coast (1951 Rev.).
52. 11 & 12 Geo 6. C. 41.

these anomalies. Part I of the Nigerian Law Reform (Torts Act, 1961, which applies only to the Federal Territory of Lagos, abolishes the doctrine.[53] By section 3(1) it is stipulated:

> "It shall not be a defence to an employer who is sued in respect of personal injuries caused by the negligence of a person employed by him, that that person was, at the time the injuries were caused, in common employment with the person injured, and accordingly the Employers' Liability Act, 1880 of the Parliament of the United Kingdom, to the extent to which it applies shall cease to be in force."

It is also provided that any provision contained in a contract of service or apprenticeship, or in any agreement collateral thereto shall be void insofar as it would have the effect of excluding or limiting any liability of the employer in respect of personal injuries caused to the person employed.[54] The foregoing provisions bind the Crown These provisions are almost identical to those of the Engl Law Reform (Personal Injuries) Act, 1948. Similar provisions have been made in Sierra Leone,[55] and the Western Region of Nigeria,[56] and the Gambia.[56a]

/Where

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53. No. 63 of 1961.
54. S. 3(2) and s. 5.
55. Law Reform (Law of Tort) Ordinance of Sierra Leone, No. 33 of 1961. Part II, s. 7.
56. Torts Law of the Western Region of Nigeria. W.R. No.4 of 1958.
56a. S. 14A(1) Law of England (Application) (Amendment) Ordinance, No. 11 of 1957.

Where, as in Ghana, there has not as yet been any specific legislation abolishing it, it would appear that the defence of common employment will still be available to employers just as it was ruled by the Privy Council in the Indian case of Governor-General in Council v. Wells.[57] However, when the defence is raised in Ghana today, it is hoped that the reasons given by a High Court in India in refusing to apply the doctrine will be of assistance. In rejecting the doctrine in the case of Secretary of State v Rukhminibai,[58] STONE, C.J. made the following observations

> "I am of opinion however that in considering what is today consonant to justice, equity and good conscienc one should regard the law as it is in England today, and not the law that was part of England yesterday. One cannot take the common law of England divorced from the statute law of England and argue that the former is in accordance with justice, equity and good conscience ... the doctrine of common employment would not apply, not because the case would fall outside the common law doctrine of common employment, but because it would fall inside the Employers' Liability Act."

On the general question of the reception of the common la the learned Judge said:[59]

> "What I desire to point out is that when one finds rule has been abrogated by legislation, that rule

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57. (1949-50) 77 I.A.1. Cited in DAS, S.K.: The common l p. 20.
58. A.I.R. /1937/ Nag. 354 at p. 368; cited in SETALVAD M.C.: The common law in India, p. 111.
59. Ibid, at p. 368.

becomes an unsafe guide. Even when, as in this case, the rule remains but its practical applicability is by statute very greatly reduced, one is entitled and boun to view it more critically than would be the case if i remained in full force and effect. When one finds its criticised by competent jurists in the country of its origin and followed not because of its infrangible logic but because of its authority, an authority derived from an earlier age when circumstances were different, one is also justified in treating it as an unsafe guide."

(a) Negligence

The law of negligence in West Africa is basically the same as that of the English common law.[60] Thus the old common law rule that the contributory negligence of a plai tiff was a complete defence to the claim was held to apply in Ghana, even though by the English Law Reform (Contribut Negligence) Act, 1945,[61] contributory negligence is no longer a defence to an action for negligence. This ruling was made in Amoabeng v. Mills,[62] where the plaintiff, a police constable, sustained injuries after being knocked down in the road by a taxi driven by the defendant. It wa established that the plaintiff crossed the road without taking due care for hisown safety. On a claim by the

/plaintif

60. See, e.g. Lawal & ors. v. Messrs. Youna & Sons & The Royal Exchange Assurance Co. Ltd. (1959) W.R.N.L.R. 15 Jacob v. Bandoe (1955) 16 W.A.C.A. 3 (Sierra Leone); Gilbey Construction Co. Ltd. v. Bangura (1957) 16 W.A. A. 37 (Sierra Leone).
61. 8 & 9 Geo. 6. C. 28.
62. (1956) 1 W.A.L.R. 210.

plaintiff for damages for negligence, the defendant successfully set up contributory negligence as a defence. Having held that the decisive factor in the accident was the plaintiff's negligent way of crossing the road, SMITH, Ag. J., observed:

> "Following the principle in Radley v. London & Northwestern Railway Company,[63] and if one looks at the cases in Gibbs collisions on land, 5th ed., pp. 34 and 35, the contributory negligence of the plaintiff i circumstances such as these defeat his claim. Negligence though the defendant was, the proximate and direct cau of the accident was the plaintiff's act in suddenly crossing the road, without looking. I much regret tha the Law Reform Act is not in operation in this country it would have obviated hardship to the plaintiff in thi case. There will, however, have to be judgment for th defendant with costs." [64]

The old common law doctrine which is unsuitable to rapidly developing countries in West Africa is being eliminated by statutory provisions similar to the English Law Reform (Contributory Negligence) Act, 1945. Thus contributory negligence is no longer a defence to an action for negligence in Sierra Leone.[65] Western Nigeria,[66] and Federal Territory of Lagos.[67] Section 11(1) of the Lagos A /which

63. (1876) 1 App. Cas. 754.
64. 1 W.A.L.R. 210 at p. 213. The editorial note suggests that the remarks in Radley's case can no longer be taken as an accurate exposition of the law.
65. Law Reform (Law of Torts) Ord. No. 33 of 1961, Part 3
66. The Torts Law W.R. No. 41 of 1958, part 3; see also Olaiya v. Ososami (1959) W.R.N.L.R. 264.
67. Civil Liability (Miscellaneous Provisions) Act, No. 33 of 1961.

which is identical to section 1(1) of the English Act, provides that "where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the share of the claimant in the responsibility for the damage". For the purposes of section 11, "fault" "includes negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort, or would, but for this part of the Act, give rise to the defence of contributory negligence".[68] This section also applies in cases of fatal accidents where the damages recoverable in an action brought for the benefit of the dependants of the deceased may be reduced to a proportionate extent.[69]

(b) Occupier's Liability

Both in Sierra Leone[70] and in the Federal Territory of Lagos[71] legislative provisions similar to the English Occupiers' Liability Act, 1957,[72] have been made to provide

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68. Civil Liability (M.P.) Act 1961. s. 11(3). Similar to s. 4 of the English Law Reform (Contributory Negligence) Act, 1945.
69. Ibid, s. 13.
70. Law Reform (Law of Tort) Ord., 1961, Sierra Leone.
71. Law Reform (Torts) Act 1961. Nigeria (Lagos).
72. 5 & 6 Eliz 2. C. 31.

new rules to replace the rules of the common law under whi the duty owed by an occupier of premises differed accordin to whether the visitor was an "invitee" or a "licensee".[73] Thus section 7(1) of the Nigerian Law Reform (Torts) Act, provides, "An occupier of premises owes the same duty, 'th common duty of care' to all his visitors, except insofar a he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise." Subsection 2, which is identical to the English provision, defines the common duty of care as "a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited, or permitted by the occupier to be there". Thus the distinction between invitees and licensee /is

73. Explanatory memorandum to the English Occupiers' Liability Bill. The Act of 1957 carries out the recommendations of the Law Reform Committee (3rd Report), 1954. Cmd. 9305. S. 1(1) of the Act stipulates: "The rules enacted ... shall have effect, in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them". This section is identical to s. 6(1) of the Nigerian (Lagos Act.

is abolished in the Federal Territory of Lagos and in Sierra Leone. The old common law rules, will, however, apply in Ghana, the Gambia and the other Regions of Nigeria until altered by legislation.

(c) Defamation

The English common law of libel and slander has not bee adopted in West Africa without some legislative adjustment. The following local Acts have been enacted:

> Defamation Law, No. 42 of 1958 (W. Region of Nigeria): Defamation Ordinance No. 32 of 1961 (Sierra Leone): Defamation Act No. 66 of 1961 (Federal Territory of Lagos).[74]

All these enactments are based on the English Defamation Ac of 1952,[75] which was passed in order to carry out the recommendations of the Report of the Committee on the Law of Defamation.[76] Introducing the Defamation Bill for the Federal Territory of Lagos, Dr. Elias, the Federal Minister of Justice, said that it sought to improve the existing law of defamation by making provisions under which any person who claimed that publication of any defamatory words was made innocently could, under certain conditions, be exonerated from liability for damages. Thus he said it placed the law relating to pleas of qualified privilege on a new basis.[77] In West Africa, the distinction made by

/English

74. It is expressly stated in all these local enactments that nothing in any of the Acts affects the law relatin to criminal libel.
75. 15 & 16 Geo. 6 & Eliz. 2. C.66.
76. Cmd. 7536.
77. The Times November 27, 1961.

English law between libel and slander actionable per se on the one hand,[78] and ordinary slander on the other, which requires proof of special damages, has been adopted.[79] Another aspect of the English law of defamation is that libel, which tends to provoke a breach of the peace is a crime as well as a tort. Slander, as such, is never criminal except that spoken words may be punishable as being treasonable, seditious or blasphemous.[80] Such a /distinction

78. See, e.g. Quacoe v. Dadson (1958) 3 W.A.L.R. 396. By virtue of the date of the English Slander of Women's Act (1891), that enactment has been in force in Nigeria as a statute of general application. Indeed the right given to women by this Act to sue for slande without proof of special damage when words spoken imputing adultery or unchastity are spoken of them, ha been re-enacted in the Nigerian and Sierra Leone Defamation Acts. Until legislative provisions are ma the Act of 1891 will not apply in the Gambia or in Ghana. See, e.g. Amoah v. Djabi (1926) Div.Ct. 1926-9, p. 43. In Ghana there is a tendency to distinguish between slander according to customary law and slande according to English law. See Chuku v. Nkrumah (1958) 3 W.A.L.R. 471. Thus if A calls B a "thief" in the vernacular, it could be slander according to customary law. It will be otherwise if spoken in English. Such a distinction is undesirable. A future legislation shoul aim at assimilating the two types.

79. It is interesting to note that in Scotland no differen tiation is made between libel and slander. In the 3 States of Australia - Queensland, New South Wales, and Tasmania, slander is put on the same footing as libel. See WILLIAMS, G.L. (1939) 21 J.Comp.Leg. 3rd s. p. 161 et seq. Owing to the cultural background of peoples in West Africa perhaps it may be best to preserve the distinction. "It is a matter of common knowledge of which this Court takes judicial notice that . p.t.o.

80. WINFIELD on Tort (6th ed. 1954), p. 291.

distinction is recognised in the Gambia,[81] Sierra Leone,[82] and Ghana.[83] No such distinction is made between libel and slander by section 391 of the Penal Code Law of Northern Nigeria,[84] which is stated to be similar to the relevant provisions of the Pakistan and the Sudan Penal Codes. The rest of Nigeria also does not recognise this distinction. Section 373 of the Nigerian Criminal Code, which defines "defamatory matter", adds that: "such matter may be expressed in spoken words or in any audible sounds, or in words legibly marked on any such substance whatever, or by any sign or object signifying such matter otherwise than by words, and may be expressed either directly or by insinuati or irony."[85]

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79 (cont.)"... people commonly abuse each other as a prelud to a fight and call each other 'Ole! Elewon (Thief! Ex-convict), which abuses no-one takes seriously, as they are words of heat and anger, and are nothing but vulgar abuse" - per JIBOWU, C.J. in Bakare v. Ishola (1959) W.R.N.L.R. 106 at p. 107.

81. Laws of the Gambia. 1955 Rev. Cap. 21, s. 178.

82. Sierra Leone has not codified its criminal laws which are virtually the same as the English laws. Thus in Patience Richards & ors v. The Queen (1956) 16 W.A.C.A. 16, s. 6 of the English Libel Act 1843 (6 & 7 Vict.C96) was applied.

83. Criminal Code 1960. Act 29, s. 113. The Act also charac erises two types of libel - "negligent" and "intentiona

84. N.R. No. 18 of 1959.

85. The reason for the departure from the English practice here is that the section is based on ss. 366 & 368 of the Queensland Criminal Code Act, 1899. 63 Vict. No. 9.

(d) Miscellaneous

In addition to the specific topics discussed, legislative provisions have been made in other "areas" of torts. There are now local enactments defining the class of persons for whose benefit an action may be brought and providing for the compensation of the families of the persons killed. These are:- The Law Reform (Miscellaneous Provisions) Ordinance,[86] and the Fatal Accidents (Damages) Act, 1961, of Sierra Leone;[87] the Torts Law of the Western Region of Nigeria,[88] the Fatal Accidents Act, 1961, of the Federal Territory of Lagos,[89] and the Fatal Accidents Law of the Eastern Region of Nigeria.[89a] All these Acts are based on the English statutes with modifications to suit local conditions. Where no local legislation has been passed, the English Fatal Accidents Act 1846 and 1864[90] would be in force as statutes of general application.[91] In the Federal Territory of Nigeria and in Sierra Leone there are

/legislative

86. Laws of Sierra Leone (1960 Rev.) Cap. 19.
87. No. 58 of 1961 (Sierra Leone).
88. Laws of the W. Region of Nigeria (1959 Rev.) Cap. 12
89. No. 34 of 1961 (Lagos).
89a. E.R. No. 16 of 1956, as amended by E.R. No. 20 of 1958 and E.N. No. 21 of 1960.
90. 9 & 10 Vict. C. 93. 27 & 28 Vict. C. 95, and also the Carriage by Air Act, 1932, which applies in Nigeria by virtue of the Carriage by Air (Colonies, Protectorates and Mandated Territories) Order, 1953.
91. Eguriase v. U.A.C. Ltd. & anor (1959) W.R.N.L.R. 72.

legislative provisions relating to proceedings against joint tort-feasors similar to the English law on that point.[92]

(4) Evidence

The rules of evidence, which are almost the creation of English judges, form part of the common law introduced in West Africa. Thus such English rules relating to judicial notice, presumption, admissibility of facts, estoppel, res judicata, hearsay, and the burden of proof, are in force in the general courts with modification wherever possible. In Ghana, for example, it is now common knowledge that the type of evidence, usually designated as "traditional evidence" is widely admissible in support of cases in courts involving the history and traditions of families, clans and tribes.[93] The law on this point was stated by REDWAR in his Comments as follows:-[94]

> "In cases relating to pedigree, inheritance, boundaries of land, hearsay evidence or evidence of common reputation is admissible, and it was held in Bura & Amonoo v. Ampima,[95] that a much greater latitude is permissible in these matters than is allowed by English law, because of the absence of written memorials in a country where everything, the native la

/itself

92. No. 33 of 1961 (Lagos) Part 2; No. 33 of 1961 (Sierra Leone).
93. Poh v. Konamba (1957) 3 W.A.L.R. 74 at p. 79 per ADUMUAH-BOSSMAN, J.
94. At page 86.
95. (1891) Sar. F.C.L. 214.

itself included, depends on oral tradition. Besides evidence as to declarations of deceased members of a family, hearsay statements of linguists and of other persons with presumable knowledge of the matters in dispute were admitted."

In Nigeria, where the rules of evidence are contained in the Evidence Ordinance,[96] section 44 lays it down that "where the title to or interest in family or communal land is in issue, oral evidence of family or communal tradition concerning such title or interest is relevant."

(5) Practice and Procedure

The English Supreme Court Rules appear to be the main source of the local rules.[97] There are, however, other rules which depart from the English practice. With the /exception

96. Laws of Nigeria (1958 Rev.) Cap. 62.

97. A footnote to the Supreme Court Rules of Sierra Leone reads: "Following the practice in England, the Rules are printed without any revision of the serial number of the Orders or Rules. Underneath most of the marginal notes are references ... to the corresponding rule of the Supreme Court Rules of England. These references are not part of the marginal note and are merely to indicate the English rule, which appears to be the local rule (the two may or may not be identical in text)". /1960 Rev./ Vol. 6. See also Laws of the Gold Coast, 1954. Subsidiary Legislation. Vol. 7 - Supreme Court (Civil Procedure) Rules - saved by s. 8 of the Ghana Courts Act, 1960. For Nigeria, see Suprem Court (Civil Procedure) Rules /Laws 1948 Rev./ Vol. 10 which is apparently saved by, e.g. s. 3 of the High Court of Lagos Rules - Laws of Nigeria, 1958 Rev., Vol. 8. For Western Region see The High Court (Civil Procedure) Rules - Laws of Western Region of Nigeria, 1959 Rev. Subsidiary Legislation, Vol. 2.

exception of Sierra Leone, both movables and immovables may be attached under a writ of fi fa,[98] whereas under English law only the personal goods or chattels can be so attached.[99]

The dissimilarity between the English procedure and that in some parts of West Africa was mentioned in the Nigerian case of Janmi v. Balogun & ors,[1] when GRAHAM PAUL, J., referring to the old Nigerian rule, said:-

> "The next question I have to decide is whether in Nigeria an estate tail is attachable under a writ of fi fa. In England, of course, it could not be attached under a writ of fi fa, but in Nigeria the position is quite different. Under Schedule 11 Order 44 Rule 13 of the Supreme Court Ordinance,[2] 'all property whatsoever moveable or immoveable belonging to the party against whom a decree is to be enforced' ... is liable to attac ment and sale in execution of the decree, and Order 45 Rule 10 of the same schedule specifically prescribes th procedure for attachment 'where the property shall consist of lands houses or other immoveable property or any interest therein the procedure is by writ of fi fa.

98. See, e.g. Saibu v. Igbo (1941) 16 N.L.R. 25; Ghana Commercial Bank v. Chandiram /1960_7A.C. 732. Commenting on the practice in the Gold Coast (now Ghana), REDWAR observes that the provision in the Gold Coast Rules was copied from the Hong Kong Civil Procedure Code of 1837, op cit, p. 47.
99. In England, where the debtor has land, the judgment creditor may apply under Order 46, s. 2 for a charging Orde pursuant to s. 35 of the Administration of Justice Act, 1956, which abolished the old writ of elegit.
1. (1936) 13 N.L.R. 53.
2. The Rule is identical to Sch. 11 Ord. 43 Rule 13 of the Gambia Supreme Court Rules and Order 42 Rule 45 of the Gold Coast Supreme Court Rules. The present Rules for Nigeria are now embodied in the Sheriffs & Civil Proces Ord. Cap. 189, Laws of Nigeria, 1958 Rev., as amended b No. 62 of 1961 (Federal Territory). For the W. Region, see Sheriffs & Civil Process Law, Cap. 116, Laws of Western Nigeria.
3. 13 N.L.R. at p. 57.

Moreover, whereas in the English rules, relief by way of interpleader summons is granted only where goods or chattels are involved,[4] in the Gambia,[5] and in Ghana,[6] relief by way of interpleader may be granted where a claim is made to any property, moveable or immovable taken or intended to be taken in execution under any process.

The local rules may not cater for every contingency. Hence Order 42 Rule 3 of the Supreme Court Rules of Sierra Leone provides:

> "Where no other provision is made by these rules, the procedure, practice, and forms in force in the High Court of Justice in England on the 1st day of January, 1957, so far as they can be conveniently applied, shall be in force in the Supreme Court."

In Ghana,[7] and in the Western Region of Nigeria,[8] the saving clause provides for the application of English rules of practice and procedure "in force for the time /being

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4. Rules of the Supreme Court of England, Ord. 57 r. 1, which is followed in Sierra Leone.
5. Supreme Court Rules - Gambia. Sch. 11. Ord. 44, Rule 5
6. Supreme Court (Civil Procedure) Rules. Order 57, r. 1b See also Mahmudu v. Zenuah & anor (1934) 2 W.A.C.A.172 Brandford-Nettley v. The G.C. Independent Press Ltd. & ors (1936) 3 W.A.C.A. 100; John v. Oluwa (1942) 8 W.A.C.A. 26 (Nigeria).
7. Court Rules Order 74.
8. The High Court (Civil Procedure) Rules Ord. 35 r. 10. See also Ogunleye v. Arewa (1960) W.R.N.L.R. 9.

being in the High Court of Justice in England". The effect of such a provision is to bring into operation in the country concerned the practice and procedure of the High Court in England.[9] The Supreme Court Rules of England should apply only when the local Rule is silent.[10] It has been held in Ghana that the saving clause, Order 74, merely regulates procedure and practice to be followed in the High Court, but does not purport to confer jurisdiction on any other Court.[11]

(6) The Common Law and the Common Market

Some fears have been expressed by some English lawyers that the United Kingdom's entry into the European Common Market will ultimately lead to the disappearance of the common law as a distinct legal tradition. It has been argued that the rules on restrictive trade practices and on the misuse of monopolies, which are contained in the Treaty of Rome, will be immediately applicable in the Englis courts, and they will abrogate rules of the common law with which they are at variance.

/"What

9. Macfoy v. United Africa Co. Ltd. /1961/ 3 All E.R. 1169 at 1171 P.C. per Lord DENNING.
10. The Gold Coast & Ashanti Electric Power Development Corp Ltd. v. A-G of the Gold Coast (1937) 3 W.A.C.A. 215 at p 217.
11. Amponsah v. Min. of Defence & anor. 1960. Civil Appeal No. 7/60. Cyclostyled Judgments of Court of Appeal, January-June 1960, p. 100 at p. 107.

> "What is likely to be a more serious issue from the point of view of English law and the English legal profession is the need for a new style of legal thinking. The Treaty is couched in language which differs noticeably from that used in the framing of statutes in this country." [12]

If the English judges, who are responsible for the development and growth of the common law, are going to abdicate their duty and adopt a new style of legal thinking suitable to members of the European Economic Community, then it becomes necessary to ask how much of this legal reorientation is going to affect the common law African countries on Britain's entry. The obvious choice for such countries will be to develop their own common law without leaning too heavily on the English common law which seems to be on the way out.

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12. "Legal consequences of Common Market" by Prof. O. KAHN-FREUND. The Times, May 21, 1962. See also MARSH N.S.: "The Common Market and the common law". The Listener, March 15, 1962.

B. ASPECTS OF CRIMINAL LAW, EVIDENCE AND PROCEDURE

(1) The Criminal Law

The criminal laws of the West African countries are base ultimately on English statutes and common law, although the immediate source differs from one territory to another. The 1960 revision of the Criminal Code of Ghana was originall enacted as Ordinance No. 12 of 1892. This Ordinance was base on a criminal code drafted in 1877 for Jamaica by Mr. Justice Wright and settled by Sir James Stephen.[13] The Jamaica draft never became law there, but it was adopted in St. Lucia, the Gold Coast (Ghana), British Honduras, St. Vincent and Grenada. The Code of St. Lucia followed the 1877 model very closely, an that of the Gold Coast follows St. Lucia. The Nigerian Crimin Code Ordinance No. 15 of 1916, which applies partly throughout the Federation and partly in Lagos, was modelled on the Crimin Code Act of Queensland.[14] The Queensland Criminal Code Act of 1899 was itself partly based on the English Criminal Code draf of 1879,[15] and to a large extent on the penal codes of Italy /

13. (1896-7) 1 J.Comp.Leg. pp. 147 and 177. STEPHEN, H.L.: "A model criminal code for the colonies" (1899) 1 J.Comp.Leg. (n.s.) p. 439. READ, J.S. "Ghana: the Criminal Code, 196((1962) I.C.L.Q. 272.
14. See The Public Acts of Queensland (1828-1936) Vol. 2. It was reported in West Africa, December 16, 1961 that the Government of Nigeria is to review the Criminal Code of the Federation.
15. See the Criminal Code (Indictable Offences) Bill, 1879. Pa Pap. Session 1878 Vol. 2, p. 5. See also the Report of the Royal Commission appointed to consider the law relating to indictable offences: with an appendix containing a draft code. Par. Pap. Session 1878-79. Vol. 20, p. 169.

and of the State of New York. The Penal Code Law, 1959, of Northern Nigeria is based on the Sudan Penal Code, which itself was adopted from the Indian Penal Code. The Indian Penal Code itself has been described as "the criminal law of England freed from all technicalities and superfluities systematically arranged and modified in some few particulars to suit the circumstances of British India".[16]

With the exception of Sierra Leone, all the other West African countries have reduced their criminal laws into a codified form. The fact that the criminal laws are codified raises a number of problems. Firstly, it poses the question in regard to the interpretation and construction of the Code itself. Thus section 3(1) of the Gambia Code reads:

> "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 consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith."

On the other hand, the general rules for the construction of the Ghana Criminal Code as laid down by section 4(b) are as follows:

> "In the construction of this Code, a court shall not be bound by any judicial decision or opinion on the construction of any other enactment, or of the common law, as to the definition

16. STEPHEN: History of criminal law of England, Vol. 3, p. 30(Cited by SETALVAD, M.C. The common law in India, p. 118.

definition of any offence or any element of any offence.'

Even in the absence of an express provision relating to the interpretation of the Nigerian Criminal Code, it would appear that the reasonable course to adopt (which has in fact been done on occasion), in construing the provisions of the Code is to abide by the general principles of construction peculiar to "codifying statutes". In the English case of Bank of England v. Vagliano Brothers,[17] which related to the meanin of a section in the Bills of Exchange Act, 1892, Lord HALSBURY L.C. indicated the method of approach in the following words:

> "It seems to me that, construing the statute by adding to it words which are neither found therein nor for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of construction, and I am wholly unable to adopt the view that where a statute is expressly said to codify the law, you are at liberty to go outside the code so created, because before the existence of that code another law prevailed."

The principles enunciated above were applied in R. v. Hare[18] with respect to the New Zealand Criminal Code. As CHAPMAN, J., pointed out, "The Crimes Act is a code in which the preceding Acts have been put in the crucible, and a code drawn with the intention of expressing anew the criminal law of the country. That is the reason why, as was said by Lord Herschell in Vagliano's case, we should read it according to its ordinary /meaning

17. [1891] A.C. 107 at p. 120; but see Robinson v. Canadian Pacific Railway Co. [1892] A.C. 481 at p. 487.
18. (1910) 29 N.Z.L.R. 641 at p. 646.

meaning,and not allow ourselves to be embarrassed by consider ations as to what the antecedent legislation meant."

In West Africa, the classic statement with respect to th interpretation and con truction of a codifying statute was made in the Ghana case of Wallace-Johnson v. The King:-[19]

> "The present case, however, arose in the Gold Coast Colony, and the law applicable is contained in the criminal code of the colony. It was contended that the intention of the Code was to reproduce the law of seditio as expounded in the cases to which their Lordships' attention was called. Undoubtedly the language of the section under which the appellant was charged lends some colour to this suggestion. There is a close correspond-ence at some points between the terms of the section in the code and the statement of the English law of sedition by Stephen J. in the Digest of criminal law ... The fact remains, however, that it is in the Criminal Code of the Gold Coast Colony, and not in English or Scottish cases, that the law of sedition for the Colony is to be found.[20] The elaborate structure of section 330 suggests that it was intended to contain, as far as possible, a fu and complete statement of the law of sedition in the Colony. It must therefore be construed in its applicatio to the facts of this case free from any glosses or inter-pretations derived from any expositions, however author-itative, of the law of England or of Scotland."

In the Nigerian case of Potts-Johnson v. Commissioner of Police,[21] the West African Court of Appeal, in deciding what interpretation should be given to the words "corruptly and und colour of his employment", by a majority of two to one followed the

19. [1940] A.C. 231 at p. 239.
20. Laws of the Gold Coast [1936 Rev.] pub. 1937-8.
21. (1947) 12 W.A.C.A. 198. VERITY, C.J. declined to sign the judgment.

the the Privy Council's advice given in Wallace-Johnson's cas and declined to resort to English decisions to interpret the words used in the Nigerian Criminal Code. However, in Motayo v. Commissioner of Police,[22] the same Court in 1950, consisting of five judges unanimously refused to follow its own decision given in the Potts-Johnson case. The appellate court in Motayo's case ruled that "Where, then, the local legislature uses a phrase found in English enactments its meaning should be considered in the light of English authorities".[23] It held further, that Potts-Johnson's case was wrongly decided and should be regarded as overruled. With the greatest respect to the learned judges in Motayo's case, it is submitted that the principle enunciated therein must be confined within limits. It may be that if the appellate court's attention had been drawn to the statement made by the Privy Council in Chettiar v. Mahamtee,[24] the method of approach adopted in deciding Motayo's case might have been different.

The effect of cofidication on the method of interpretatio is further illustrated by the Nigerian case of Ogbuagu v. Police,[25] where it was held that as the defence provided in section 7 of the Libel Act, 1843 (popularly known as Lord Campbell's Act) has not been inserted in the Nigerian Criminal /Code

22. (1950) 13 W.A.C.A. 114.
23. Ibid, at p. 117.
24. [1950] A.C. 481 at p. 491: see ante p.
25. (1953) 20 N.L.R. 139

Code in regard to seditious libel, it does not apply in Nigeria. For the same reason, it has been held that that par of section 6 of Lord Campbell's Act which provides that it is a defence to a charge of publishing a defamatory libel if it is proved that the publication is for the public benefit, and that the matter published is true, has ceased to apply in Nigeria, since that is a matter which has been dealt with by section 377 of the Criminal Code Ordinance. The plea of justi fication under section 6 of the Libel Act, 1843, is, however, operative in Sierra Leone. The reason is that Sierra Leone has not as yet codified its criminal law.[26]

The second point to consider is how far the various penal codes can be regarded as being exhaustive statements of the criminal laws of the countries concerned. As VAUGHAN WILLIAMS L.J. observed: "The difficulty arises which must always exist when an attempt is made to enact an exhaustive code of any branch of our law. However able the codifier may be, when the code comes to be applied to some innumerable cases that must arise, there is found every now and then some case which it is impossible to suppose was in fact intended to be governed by the Code. At the same time the code purports to be exhaustive, and therefore it is necessary to try to treat every case as falling within it."[27] The learned Lord Justice's dictum related

26. Richards and ors. v. The Queen (1956) 16 W.A.C.A. 16.
27. Wren v. Holt [1903] 1 K.B. 610 at p. 613-4.

related to the interpretation of a provision of the Sale of Goods Act, but it is submitted that it is of equal application to the codification of criminal law.[28]

There is ample evidence in some of the codes in West Africa to support the view that the codification of the criminal law is not exhaustive. Thus, although the Criminal Code of the Gambia is described as "an Ordinance to establish a Code of Criminal law", section 2 of the Code states that except where otherwise expressly provided, nothing in the Code shall affect:

> "(1) the liability, trial or punishment of a person for an offence against the common law or against any other law in force in the Colony other than this code; or
> (2) the liability of a person to be tried or punished for an offence under the provisions of any law in force in the Colony relating to the jurisdiction of the Colonial Courts in respect of acts done beyond the ordinary jurisdiction of such courts; or
> (3) the power of any court to punish a person for contempt of such court."

The Nigerian Code also stipulates that a person may be tried or punished for an offence under the provisions of the Code "or some other Ordinance, or some law, or of some Order in Council made by Her Majesty for Nigeria, or under the express provisions

28. It is interesting to note the following passage in the Report of the Commissioners appointed in England in 1878 to report on a draft criminal code which had just then been prepared: "It must be observed that codification merely means the reduction of the existing law to an orderly written system freed from the needless technicalities, obscurities, and other defects, which the experience of its administration has disclosed." Op cit, at p. 175. See also AUSTIN, J.: Jurisprudence, op cit, p. 660 et seq.

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provisions of some statute of the Imperial Parliament which is in force in, or forms part of the law of Nigeria."[29] This provision must be read as one with section 21 subsection 10 of the Nigerian Constitution Order in Council 1960 which states that "No person shall be convicted of a criminal offence unless tha offence is defined and the penalty therefor is prescribed in a written law."[30] The effect of the two provisions is that whilst a person may be tried or punished for an offence under some law in force in Nigeria, that law must be a written law. Thus no-one can be punished for an offence either under native law and custom,[31] or under the common law, since both are unwritten laws.[32] Section 8 of the Ghana Criminal Code /stipulates

29. Laws of Nigeria [1958 Rev.] Cap. 42, s. 1.
30. E.g. The Admiralty Offences (Colonial) Act 1849 and the Territorial Waters Jurisdiction Act, 1878.
31. Indeed section 3(2) of the N. Nigeria Penal Code Law lays it down that no person shall be liable to punishment under any native law or custom.
32. In view of the provision in the Nigerian Constitution it is doubtful whether the decision given in the Nigerian cas of R. v. Edgal (4 W.A.C.A. 133) can be regarded as a corre statement of the law. In that case it was held that the omission of a definition or a declaration in the Criminal Code of Nigeria merely throws the enquirer back to ascerta what is the law of the land in regard to when it is lawful and when unlawful to procure a miscarriage. As the law of the land was held to be the same as the common law of England, the appellate court applied the meaning given to the word "unlawfully" by the English court in R. v. Bourne [1939] 1 K.B. 687.

stipulates that "no person shall be liable to punishment by th common law for any act".[33] However, the power of the courts in Nigeria and Ghana to punish a person for contempt of court under the common law is expressly saved. Thus the proviso in section 21 subsection 10 of the Nigerian Constitution Order in Council, 1960 reads "... Nothing in this subsection shall prevent a court of record from punishing any person for contempt of itself notwithstanding that the act or omission constituting the contempt is not defined in a written law and the penalty therefor is not so prescribed".[34]

Even though the main object of codification is the reducti of the existing English law to an orderly written system freed from the needless technicalities, it must not be assumed that such a process has been undertaken in West Africa without some modification. Thus one feature of the Criminal Code in Ghana and the Northern Nigeria Penal Code is the use made of illustrations to explain the true ingredients of the crime set out in the sections. Again, treason apart, crimes in England are divided into two - felonies and misdemeanours. The Nigeria Criminal Code has three kinds of offences, namely, felonies, misdemeanours and simple offences.[35] The Ghana Criminal Code /recognizes

33. Act 29.
34. It is also saved by s. 10 of the Ghana Criminal Code, 1960
35. Cap. 42, s. 3.

recognizes the distinction of offences into felonies and misdemeanours, but a felony is of two kinds, namely, "first degree felony" and "second degree felony".[36]

The English law relating to the defence of insanity prior to the Homicide Act, 1957,[37] was that laid down by the judges in answer to certain questions propounded to them by the House of Lords in the M'Naghten case.[38] Among other things, the M'Naghten rules did not recognise the defence of "irresistible impulse". A comparison of the answers to the second and third questions propounded to the judges in the M'Naghten case with section 28 of the Nigerian Criminal Code shows that the Nigerian Legislature have not only departed from the phraseology of the judges, but have also introduced two entirely new factors, that of "natural mental infirmity" and that of incapacity to "control one's actions".[39] Thus the defence of uncontrollable impulse is a good defence in Nigeria by virtue

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36. Act 29, s. 1. This section is to be construed in accordance with section 296 of the Criminal Procedure Code, Act
37. 5 and 6 Eliz 2. C. 11. s. 2. The M'Naghten rules remain in force but their harshness in England has been to some extent alleviated by the Act of 1957 which affects the defence of diminished responsibility. See Attorney-General for the State of Australia v. Brown [1960] A.C. 4
38. (1843) 10 Cl. and Fin. 200; 8 E.R. 718.
39. R. v. Omoni (1949) 12 W.A.C.A. 511.

of section 28 of the Criminal Code Ordinance.[40]

In R. v. Dangar,[41] the West African Court of Appeal held that the law in England regarding homicide by a person who is being unlawfully arrested is incorporated into the law of Nigeria by section 317 of the Criminal Code which states that "A person who unlawfully kills another under such circumstance as not to constitute murder is guilty of manslaughter." The law relating to the defence of provocation in homicide cases is virtually the same as that known to English law.[42] In the Ghana case of Mensah v. The King,[43] Lord GODDARD delivering the advice of the Judicial Committee said:

> "The law relating to murder and manslaughter in the Gold Coast is contained in the Criminal Code, but in all material respects the Code reproduces the common law of England on the subject. Section 233[44] provides that intentional homicide shall be manslaughter only, if among other matters of extenuation it is proved on the accused's behalf that he was deprived of the power of self control b such extreme provocation given by the person killed as mentioned in section 234.[45] Among the matters which may amount to extreme provocation is an unlawful assault of such a kind ... as to be likely to deprive a person being

/of

40. Echem v. The Queen (1952) 14 W.A.C.A. 158 at 160. Note s. 2 of the Nigerian Criminal Code Ordinance is identical to s. 27 of the Criminal Code Act, 1899, of Queensland.
41. (1944) 10 W.A.C.A. 225.
42. See, e.g. R. v. Tekyi (1941) 7 W.A.C.A. 122; R. v. Wunuah (1957) 3 W.A.L.R. 303.
43. (1945) 11 W.A.C.A. p. 2 at p. 6.
44. Laws of the Gold Coast 1936 Rev. Now substantially the same as s. 52 of the Ghana Criminal Code, 1960. Act 29.
45. Laws of the Gold Coast 1936 Rev. Now s. 53 of the Ghana Criminal Code, 1960. Act 29.

or ordinary character and in the circumstances in which he was of the power of self-control. Then section 235[46] excludes the benefit of provocation where the accused was not in fact deprived of the power of self-control and also where after the provocation such a time elapsed or such circumstances occurred that a person of ordinary character might have recovered his self-control. This puts into statutory form what has for long been the law in this country.

However, the question whether in the circumstances the provication was such as to deprive an ordinary person of self-control is a matter to be left to the local jury who must apply the tests to the ordinary West African villager." [47]

In R. v. Igiri,[48] BLACKALL, P., observed:

"In primitive communities,[49] where the subjection of women is accepted as natural and proper such an insult [provocative words coupled with spitting] from a wife arouses more passion than in more sophisticated societies

In Northern Nigeria, provocation reduces liability not only with respect to homicide,[50] but also grave and sudden provocation under any other section of the Penal Code modifies the nature of an offence or mitigates the penalty which may be inflicted.[51]

46. Now s. 54 of the 1960 Act.
47. Mensah v. The King 11 W.A.C.A. at p. 7.
48. (1948) 12 W.A.C.A. 377.
49. The Learned Presidentmust be taken to be referring to a society culturally different from that of the English.
50. S. 222.
51. S. 38, except (1) provocation sought or voluntarily provoked by the offender as an excuse for committing an offence; (2) provocation given by anything done in obedience to the law or by a public servant in the lawful exercise of the powers of such public servant; (3) provocation given by anything done in the lawful exercise of the right of private defence. Such cases as Wonaka v. Sokoto Native Authority (1956) 1 F.S.C.R. 29; and Nomad v. Bornu N.A. (1954) 21 N.L.R. 31, must be regarded as no longer the law in view of s. 3 of the Northern Nigerian Penal Code Law.

It has been held in the Ghana case of R. v. Mensah,[52] that the Ghanaian law as to criminal negligence is very different from the English law on that topic. LUCIE-SMITH, C.J. pointed out the difference in the following words:

> "Now as regards the law as to criminal negligence in the Colony one must realise that criminal negligence in this country is a very different matter from criminal negligence in England and many other parts of the Empire. This has been laid down by this Court on more than one occasion. Under English law, negligence to be criminal must be so gross and outrageous as to offend against the State as guardian of lives and liberties - so culpable as to be for the purpose of vindication outside the solace of mere civil damages - so wicked as to call for vindication and punishment under the criminal law. Section 14 of the Criminal Code [now section 12 of Act 29 1960] reads as follows:
>
> "A person causes an event negligently if, without intending to cause the event, he causes it by voluntary act, done without such skill and precaution as are reasonably necessary under the circumstances ..." [53]
>
> From this it will be seen that criminal negligence here amounts to little more than what is known as civil negligence in England and in other places."

Perhaps the most notable departure from English law is section 387 of the Northern Nigeria Penal Code Law which regards adultery as a criminal offence. That section reads:

> "Whoever, being a man subject to any native law or custom in which extra-marital sexual intercourse is recognised as a criminal offence, has sexual intercourse with a person who is not and whom he knows or has reason to believe is not his wife, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery and shall be punished with imprisonment for a term which may extend to two years or with a fine or with both."

52. (1948) 12 W.A.C.A. 346 at p. 347.
53. In the 1960 Criminal Code the word "care" is substituted for the word "precaution".

(2) Evidence

As has been mentioned earlier on, the English rules of evidence are in force with modification, where necessary, in West Africa. Some of the rules have been incorporated either in the Criminal Procedure Codes or enacted separately, such as the Criminal Evidence Ordinance of the Gambia.[54] The English Criminal Evidence Act, 1898,[55] has not been adopted without modification. Owing to the fact that English law prohibits polygamy whilst customary or Mohammedan law in West Africa favours polygamy, one provision which calls for comment is the law relating to the evidence of husband and wife. The local laws make a distinction between the so-called Christian marriage and customary marriage. Thus section 77 of the Sierra Leone Ordinance (which is similar to that of Nigeria and the Gambia laws) stipulates:[56]

> "Where a person charged with an offence is married to another person by a marriage other than a Christian, such last named person shall be a competent and compellable witness on behalf either of the prosecution or of the defence: Provided that no party to a Mohammedan marriage shall be compellable

/to

54. Cap. 26 Laws of Gambia [1955 Rev.]
55. The Gold Coast Criminal Evidence Ordinance No. 13 of 1907 is incorporated into the Criminal Procedure Code Act 30 of Ghana with modifications. See, e.g. s. 123. The Criminal Evidence Ordinance No. 2 of 1908 of Sierra Leone is incorporated in the Criminal Procedure Code Cap. 39 [1960 Rev.] ss. 77-82. The Evidence Ordinance Cap. 62 of Nigeria consolidates and amends the law on the subject of evidence in both civil and criminal proceedings.
56. Laws of Sierra Leone 1960, Cap. 39.

to disclose any communication made to him or her during the marriage by the other party." [57]

The first part of the passage just cited adopts the old English fiction that husband and wife are regarded as one person and denies the application of the principle to potentially and polygamous marriages. In view of the reasoning of the Judicial Committee of the Privy Council in the Tanganyika case of Mawji v. The Queen,[58] it is hoped that some of the consequences of the fiction will be modified. The provision in the Ghana Criminal Procedure Code has made such a move as follows:[59]

"In any enquiry or trial the wife or husband (whether married by customary law or otherwise) of the person charged shall be-

(a) a competent and compellable witness for the defence and
(b) a competent, and on a charge of felony, a compellable, witness for the prosecution without the consent of the person charged.

Provided that no party to a marriage shall be compellable to disclose any communication made to him or her during the marriage by the other party."

Thus the Ghana version operates regardless of race, religion, or of the type of marriage.

Another rule of evidence which shows a departure from the English law is the law relating to dying declarations. Section 270 of the Ghana Criminal Procedure Code (which is identical with the

/provision

57. For case-law on this topic see R. v. Ajiyola and ors (1943) 9 W.A.C.A. 22; R. v. Dogbe (1947) 12 W.A.C.A. 184. (The law in Ghana on this topic is changed. See s. 123 of the Act 30 1960); and R. v. Dom and ors (1947) 12 W.A.C.A. 227.
58. [1957] A.C. 126 at p. 135.
59. Act 30 1960. S. 123.

provision in the old Nigeria Criminal Procedure Ordinance) reads:[60]

> "Upon a trial where the cause of death of a person comes into question, the declaration of the deceased, whether it be made in the presence of the accused or not, may be given in evidence if the court is satisfied that the deceased at the time of making the declaration believed himself to be in danger of approaching death although he may have entertained at the time of making it hopes of recovery."

It is to be noted that these provisions are very materially different from the law in England, where before a dying declaration is admissible it has to be shown that it was made in a settled hopeless expectation of immediate death. Here the requirements are far less.[61] But in Sierra Leone, a person making a dying declaration must have "believed himself to be in danger of imminent death and entertained at the time of making it no hopes of recovery".[62]

(3) Criminal Procedure

In West Africa there are statutory provisions regarding the manner in which a person charged with a criminal offence can be brought to trial and punished.[63] The provisions deal with, for example, arrests, the granting of bail, trial, examination of

/witnesses

60. Laws of Nigeria [1923. Rev.] Cap. 20, s. 51.
61. R. v. Bebetebe (1938) 4 W.A.C.A. 67 at p. 68.
62. Laws of Sierra Leone. 1960 Rev. Cap. 39, s. 62.
63. Ghana - Criminal Procedure Code, 1960, Act 29; Sierra Leone, Cap. 39 (in part only); Gambia [1955 Rev.] Cap. 23; Nigeria - Criminal Procedure Code Ordinance Cap. 43 (partly federal and partly in operation in Lagos; Northern Nigeria Criminal Procedure Code. N.R. No. 11 of 1960.

witnesses, punishment, probation and appeals. In Ghana, Northern Nigeria and the Gambia the legislation is described as a code, whilst in the rest of Nigeria and Sierra Leone no such claim is made. Perhaps the use of the word "code" in this connection is too strong a word. Indeed, in Shorunde v. The King, Lord PORTER observed:[64]

> "In their Lordships' opinion the contention that the Ordinances and Rules in force in Nigeria provide the only method by which subpoenas ad testificandum can be obtained in the colony cannot be supported. In their view there exists, side by side with them in appropriate cases, the English common law right of subpoena."

This view is further strengthened by the fact that section 363 of the Nigerian Criminal Procedure Ordinance lays it down that:

> "The procedure and practice, for the time being in force of Her Majesty's High Court of Justice in England in criminal trials shall apply to trials in the High Court in so far as this Ordinance has not specifically made provisions therefor."

Referring to the old Criminal Procedure Ordinance of Ghana, the West African Court of Appeal in R. v. Darko said that "In effect therefore, the relevant sections in our Procedure Ordinance contain similar provisions to the English law and since our Ordinance are as silent as the English statutes in regard to the right of the Crown to [order a juror] to "stand by", it would seem that the old common law right of the Crown in that respect survives here as in England".

64. [1946] A.C. 317 at p. 327.
65. (1931) 1 W.A.C.A. 134 at p. 135.

The modifications in West Africa of the English Criminal Procedural rules are very slight and we need be mentioned only once. With the exception of Ghana, the expression used to refer to the trial on indictment is "trial by information", although the relevant provisions regarding such trials are identical to the provisions of the English Indictment Act 1915.[66] The modification of the jury trial has already been discussed elsewhere.

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66. See, e.g. R. v. Jones (1939) 7 W.A.C.A. 75. The expression used in the Northern Nigeria Penal Code Law is "charge". It must be noted that with reference to criminal procedure, no attempt is made to compare the provisions of the Northern Nigeria Criminal Procedure Code Law with the others in West Africa.

PART IV

THE INFLUENCE OF EQUITY IN WEST AFRICAN LAW

Chapter Six

THE INFLUENCE OF EQUITY IN WEST AFRICAN LAW

(A) INTRODUCTION

The term "equity" appears in three contexts in the laws of West Africa.[1]

Firstly, it appears in the law which provides for the application of English law in eabh of the four territories.

Thus in the Gambia, by the Law of England (Application) Ordinance,[2] the Supreme Court of the Colony is empowered to administer:

> "The common law, the doctrines of equity, and the statutes of general application in force in England on the 1st November, 1888." Such laws are applicable "so far only as the limits of the local jurisdiction and local circumstances permit and subject to any existing or future local Ordinance."[3]

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1 The Gambia, Sierra Leone, Ghana, Nigeria and formerly the Southern Cameroons. In view of the changes in the legal structure of Ghana on becoming a republic, it is necessary to state that the references to the Ghana cases have bearing on the existing law only. "The repeal of section 83 of the Courts Ordinance (Cap.4) shall not be taken to affect the continued application of such of the statutes of general application which were in force in England on 24th July, 1874, as applied in Ghana immediately before the commencement of this Act:

Provided that the said statutes shall be subject to such modifications as may be requisite to enable them to be conveniently applied in Ghana." (Courts Act (C.A.9) s. 154 (4)).

2 Laws of the Gambia (1955 Revision) Cap.3, s.2.

3 Ibid., s.3 (1).

By virtue of section 29 of the Protectorate Ordinance, the above-mentioned provisions apply to the Protectorate of the Gambia.[4] Similar provisions are enacted for Sierra Leone, where the date for the application of "English law" [5] is January 1, 1880.[6]

Secondly, the term "equity" occurs in the following phrase: "repugnant to natural justice, equity and good conscience," and thirdly in the phrase, "principles of justice, equity and good conscience." It is submitted that the meaning of "equity" in each of these phrases is not the same, and it is intended to expatiate on this point at a later stage. Our present task is to show in what different contexts the two latter phrases appear.

In the Gambia, section 5 of the Law of England (Application) Ordinance, Cap.3, states that:

> "(i) Nothing in this Ordinance shall deprive the courts of the right to observe and enforce the observance, or shall deprive any person of the

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4 Ibid., Cap.47, s.29.

5 "English law" includes the common law, the doctrines of equity and the statutes of general application as at the particular date.

6 Laws of Sierra Leone (1960) Cap.7, s.37. See also The High Court Law, 1955, Eastern Region, No.27 of 1955, s.14. Northern Region High Court Law, N.R. No. 8 of 1955, ss.28-33, 35. Western Region High Court Law, Cap.44, Laws of Western Region (1959 Rev.) High Court of Lagos Ord. Cap.80, Laws of the Federation of Nigeria (1958 Rev.)

"benefit, of any native law or custom existing in the Gambia, such law or custom not being repugnant to natural justice, equity and good conscience, nor incompatible either directly or by necessary implication with any law, for the time being in force.

"(ii) Such laws and customs shall be deemed applicable in causes and matters where the parties thereto are natives, and also in causes and matters between natives and non-natives where it may appear to the court that substantial injustice would be done to either party by a strict adherence to the rules of English law.

"(iii) No party shall be entitled to claim the benefit of any local law or custom, if it shall appear either from express contract or from the nature of the transactions out of which any suit or question may have arisen, that such party agreed that his obligations in connection with such transaction is a transaction unknown to native law and custom.

"(iv) In cases where no express rule is applicable to any matter in controversy, the court shall be governed by the principles of justice, equity and good conscience."

There are, of course, verbal variations from territory to territory. For example, section 38 of the Courts Ordinance of Sierra Leone provides inter alia that:

"Such native customary law shall, except where the circumstances, nature or justice of the case shall otherwise require, be deemed applicable in all causes and matters where the parties thereto are natives . . ." [7].

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[7] C.O. (1960 Rev.) Cap.7, s.38.

There is no doubt that this sentence has been put in with a particular aim in view. The effect of it appears to be this: that even if a customarylaw is not repugnant to natural justice, equity and good conscience, the courts have a very wide discretion in refusing to enforce it. The rule is not so wide in the other territories. There is no case in Sierra Leone on this point, but the Ghana case of Re Whyte [8] decided by a Nigerian court, is in point. In that case the deceased was a Fante from Ghana who died in Nigeria, his domicile being Ghana. He left a widow, to whom he had been married in accordance with Fante customary law, and an infant daughter of the marriage, both of whom were in Nigeria, and also a sister, who was living in Ghana and who was the successor to the estate under Fante customary law to the exclusion of the widow.

The Administrator-General, who was administering the estate, proposed a distribution of the residue which was not wholly in accordance with Fante customary law, in that it made - inter alia - the widow a beneficiary. This scheme was opposed by the deceased's sister, who claimed the whole estate in accordance with Fante custom.

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8 (1946) 18 N.L.R. 70; but see Abusatu Balogun and anor. v. Amodu Balogun and ors. (1935) 2 W.A.C.A. 290, 306.

The sister, in opposing the scheme, also relied on a passage in Sarbah's Fanti Customary Laws which said: "That by the Fanti customary laws, a woman married in accordance with that law has no share in the estate of the deceased husband, etc."[9]

To this BROOKE, Ag. C.J., in delivering judgment, said:

> "There can be no doubt that this is a correct statement of the strict native law applicable and it has in principle been recognised in judgements of the West African Court of Appeal."

But when he was faced with the enactment which directs the court to enforce customary law when certain conditions were fulfilled, the learned judge had this to say:

> "The general rule is that where there is a native law applicab which is not repugnant to natural justice, equity and good conscience, the matter in controversy should be determined in accordance with such native law and custom. There is however an exception that if the decision of the court based on native law and custom would, having regard to the position of the persons affected, be contrary to natural justice, equity and good conscience native law and custom should not apply." [10]

It is submitted that the attitude of the learned judge in regard to the law of succession of the Akan as it stood at the time of the judgment, is questionable. It was his clear duty to apply the law of succession as was proved to him. Indeed in a recent Nigerian succession case of Dawodu and ors v. Danmole and ors,[10a] the Privy Council has observed that "In their Lordships' opinion the principles

> of natural justice, equity and good conscience applicable in a country where polygamy was generally accepted should not in a matter of this kind be readily equated with those applicable to a community governed by the rule of monogamy".

Since Ghana became a republic, the provision enjoining the courts to enforce customary law subject to certain reservations similar to the Gambian example has been abolished as being

9. J.M. SARBAH, Fanti Customary Laws (2nd ed. 1904) p. 100.
10. (1946) 18 N.L.R., pp. 72-73.
10a. The Times, July 26, 1962.

unsatisfactory. In fact in Ghana today the existence or content of a rule of customary law is a question of law for the court and not a question of fact as it used to be.[11]

The provision for the application of customary law can be found in the laws of the various Regions of Nigeria, although the original provision has undergone several amendments.[12]

With the exception of Ghana, the phrase also appears in the laws enacted for the establishment of customary or native courts in West Africa. For example, in Northern Nigeria a native court shall in civil causes and matters administer:

> " the native law and custom prevailing in the area of the jurisdiction of the court or binding between the parties, so far as it is not repugnant to natural justice, equity and good conscience nor incompatible either directly or by necessary implication with any written law for the time being in force." 13

(B) NATURAL JUSTICE, EQUITY AND GOOD CONSCIENCE

(1) The Repugnancy Clause

This expression in its full context has sometimes been described as the "repugnancy clause" or the "repugnancy doctrine."

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11 Courts Act, 1960 (C.A.9), s.67.

12 e.g., The High Court Law, E.R. No.23 of 1955,s.22; Northern Region High Court Law, N.R. No.8 of 1955, s.34; Western Region High Court Law, Cap.44, s.12.

13 Native Courts (Amendment)Law, 1960. N.R. No.10 of 1960, s.6 (a).

It will be recalled that the courts were under a duty to enforce native law or custom ". . . not being repugnant to natural justice, equity and good conscience." There are may versions of it. As far back as 1844, when Cape Coast (in Ghana) was made a suitable place for the trial of offenders (under 6 & 7 Vict. c.94), an Order in Council [14] stipulated that all judges, etc., were to observe "such of the local customs . . . as may be compatible with the principles of the law of England."

Again in 1856, in another British Order in Council, made to apply to the Gold Coast, the expression "not repugnant to Christianity or to natural justice" was used. [15]

In the Gambia the expression is "not repugnant to natural justice and morality," whilst in the old Native Courts Ordinance of Nigeria it is "not repugnant to natural justice or morality" [16]; as far as punishment authorised by native law or custom is concerned, it must not be "repugnant to natural justice and humanity." [17]

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14 Sept.3, 1844, British Order in Council recorded in A.Montagu, Ordinances, etc. of the Gold Coast, 1852-70, p.169.

15 April 4, 1856, B.O.I.C. Jurisdiction in the Protectorate Territories. (Ibid.)p.170.

16 Laws of Nigeria (1948) N.C.O. Cap. 142, s.10 (1) (a).

17 Ibid., s.10 (2).

In section 23 (j) of the Native Authority Ordinance, the term is reversed to "not repugnant to morality or justice." [18]

In the Act granting a Representative Constitution to New Zealand (15 &16 Vict. c. 72) it was provided that the laws, customs, etc., of the aboriginals or natives of New Zealand "so far as they are not repugnant to the general principles of humanity" should be maintained.[19]

The French phrase given by M. Labouret is a much narrower one, viz. - "coutumes compatibles avec la civilisation occidentale." [20]

The repugnancy clause is distinguishable from the "residual clause" which states that the court "shall be governed by the principles of justice, equity and good conscience," where no express rule is applicable to any matter in controversy. We shall considef the residual clause later.

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18 Native Authority Ordinance (of Nigeria), Cap.140 (Laws of Nigeria 1948 Rev.)

19 C.J. Tarring, Chapters on the Law Relating to the Colonies (2nd ed., 1893), p.7.

20 Cited by E.J. Arnett, "The French Mandate in the Cameroons" (1938) 37 J.R.A.S. 191-198 at 194. In Belgium and Portugal, indigenous laws which are prejudicial to the ordre publique are denied recognition. See A. Robert, "Legislation and Courts in French, Belgian and Portuguese Territories" (1959) J.A.A. 124-131.

(2) Interpretation of the Phrases

The phrase can be looked at in one of two ways. It can be considered as one expression consisting of three different and distinct phrases, or it can be looked at as a single expression. It is not a mere academic exercise, for the problem involved has misled a number of people. Assuming that each phrase has a definite meaning, our first task is to try to find that meaning.

(a) Equity. STORY tells us that:

> "in the most general sense, we are accustomed to call that equity, which, in human transactions, is found in natural justice, in honesty and right, and which properly arises ex aequo et bono. In this sense it answers precisely to the definition of justice, or natural law, as given by Justinian in the Pandects." [21]

Snell begins his learned work on Equity thus:

> "The term 'equity' has a broad popular sense and a narrow technical sense. In its popular sense equity is practically equivalent to natural justice or morality." [22]

At this juncture an impression is being formed that the meaning of equity in the broad sense was equivalent to the meaning of natural justice. This view is supported by Allen,[23] who referred to the remarkable treatise of St. Germain, Doctor and Student, which

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21 The Hon. Mr. Justice Story, Commentaries on Equity Jurisprudence (3rd English edition by A.E. Randall), p.1.

22 R.E. Megarry and P.V. Baker, Snell's Principles of Equity(24th ed., 1954), p.3.

23 C.K. Allen, Law in the Making (5th ed.,1951), p.382.

appeared early in the sixteenth century. We learn from a reply to one of the Doctor's questions that the technical jurisdiction of the Chancery was not as yet known by the general term "equity," that word being understood in its broad meaning of natural justice.

(b) Natural justice in its broad sense.[24] In the English case of Maclean v. The Workers' Union, MAUGHAM J. (as he then was) observed that:

> "The phrase is, of course, used only in a popular sense and must not be taken to mean that there is any justice natural among men. Among most savages there is no such thing as justice in the modern sense. In ancient days a person wronged executed his own justice. . . The truth is that justice is a very elaborate conception, the growth of many centuries of civilisation, and even now the conception differs widely in countries usually described as civilised." 25

With the greatest respect, the learned judge is in error to think that people he describes as "savages" have no idea of justice. Their sense of justice is as good as if not better than the so-called British justice; and there are a number of anthropological works which make this clear. The phrase, it must be remembered, is not synonymous in

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24 For a scholarly account on this topic see H.H. Marshall, Natural Justice (1959).

25 (1929) 1 Ch. 602 at 624. "I am not sure that I know what the terms 'natural justice and good conscience' mean. They are high-sounding phrases and it would of course not be difficult to hold that many of the ancient customs of the barbaric times are repugnant thereto, but it would not be easy to offer a strict and accurate definition of the terms": per SPEED Ag.C.J., Lewis v. Bankole (1908) 1 N.L.R. 82, 84.

meaning with equity in the technical sense. STORY rightly gives the warning that it "would be a great mistake to suppose that equity, as administered in England, embraced a jurisdiction so wide and extensive as that which arises from the principles of natural justice. . . " [26]

According to Snell:

> "when the rules of natural justice enforced by the courts are examined, it will be seen that many of them are rules of common law, many others statutory, and some are derived from ecclesiastical and other sources. Only a small fraction of the whole are rules of equity in the technical sense." 27

Keeton [28] describes equity in the technical sense as "an imperfect realisation of the conception of natural justice," and he also admits that "a good deal of the common law is also based on natural justice." One learned author put it this way:

> "The words 'natural justice' were here clearly not used in their restricted modern sense but were synonymous with natural law; in the same way as the word 'equity' did not refer to technical equity, i.e., the equity of the Chancery Court, but to jus naturale.

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26 Commentaries on Equity, p.2.

27 Principles of Equity, p.1.

28 An Introduction to Equity (2nd ed., 1947), p.5.

> In other words, 'natural justice' and 'equity' in this passage meant the same thing, i.e., natural law." 29

This conclusion, though helpful, does not answer all the questions. One must agree with what a learned jurist has said, that "natural law has been the occasion of much repetitive generalisation and of great arid tracts of scholasticism on which no green thing grows." [30] Further on, the learned author observes that "Natural law is either a canon of the moral world as certain and as cognisable as, say, the law of gravitation in the physical world, or it is an imaginative embodiment of an aspiration."[31]

The effect of the foregoing is very interesting. When we look for the meaning of equity in the broad sense, we are told that

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29 Marshall, H.H., op.cit.,p.9. The passage referred to was said by Lord Mansfield in Moses v. Macferlan (1760) 2 Burr. 1005 (in an action to enforce a "quasi-contract"). The Lord Chief Justice said: "In one word, the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."
Calvin's Case (1608) 7 Co.Rep. 1a, was considered mainly on the basis of natural law. Thus an extract from the judgement reads: "... the law of nature is immutable. The law of nature is that which God at the time of the creation of man infused into his heart, for his preservation and direction; and this is lex aeterna, the moral law, called also the law of nature. And by this law, written with the finger of God in the heart of man, were the people of God a long time governed, before the law was written by Moses, who was the first reporter or writer of law in the world."

30 C.K. Allen, Aspects of Justice, p.44.

it is equivalent to natural justice. When we try to ascertain the meaning of natural justice we are told that it is practically equivalent to equity in the popular sense. Then both are said to mean natural law. At this juncture we re-enter the realm of uncertainties, but one thing is being made clear: it is that the theory of assigning specific meanings to each of the phrases in the context just quoted is untenable.

(c) Good conscience

From what has just been said it would be a waste of time to try to define the phrase "good conscience" apart from equity. Two short passages from Allen and Maitland, respectively, will put the matter in its correct perspective. The former states that:

> " If we look for one general principle which more than any other influenced equity as it was developed by the Chancery, we find it in a philosophical and theological conception of conscience. . . . In the common law courts of the thirteenth and fourteenth centuries, we hear a good deal, in many connections, about 'conscience,' 'good faith,' 'reason,' 'conscience and law,' 'the law of conscience,' 'right and reason', 'reason and good faith'; of 'equity' we hear very little." [32]

That was the state of affairs then. Three hundred years later, as Maitland shows, the marriage between equity and good conscience had been consummated:

> " In the course of the sixteenth century we begin to learn a little about the rules that the Chancellors are

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[32] Law in the Making, pp. 381-382

> administering in the field assigned to them. They are known as 'the rules of equity and good conscience'." 33

Even though equity is not synonymous with good conscience, as the first passage has indicated, yet it can be said that the meaning of equity in the broad sense embraces almost all, if not all, the "concept of good conscience." Therefore in the phrase "equity and good conscience," the words "good conscience" can be regarded as superfluous.

The repugnancy phrase is usually punctuated, but it has also been written without any punctuation. Thus in Snell, we come across the phrase "natural justice equity and good conscience." [34] Section 62 of the High Court Law of the Northern Region has this style: "natural justice, morality, equity or good conscience." The fact that the expression is punctuated does not mean that each phrase has a separate meaning. Punctuation is regarded as a kind of contemporanea expositio, but not as forming part of the Statute itself.[35]

Perhaps the reason for using these three almost similar phrases was due to the fact that the expression was coined in the

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33 Equity, p.8.

34 Principles of Equity, p.4.

35 Sir Charles E. Odgers, The Construction of Deeds and Statutes (4th ed., 1956), pp.220-221.

period of English history when draftsmen believed in employing more words to cover a single situation so as not to leave any loophole. If this submission is correct, then it follows that the expression "natural justice, equity and good conscience," in the context under discussion should be treated as though it were a single phrase.

(3) Interpretation of Expression as a Whole

On the other hand, if we assume that the three phrases joined together have only one meaning, certain possibilities arise. Much ink has been spilt on this topic both by judges and jurists. When all the views are assembled and sorted out, it appears that when a custom is said to be repugnant, it could mean repugnancy as to one or more of these:

(a) natural justice;

(b) equity;

(c) public policy and/or morality. Each of the three heads will be discussed in some detail.

(a) The repugnancy clause with regard to natural justice [36]

As a result of what has been said earlier on, it will be rather ambitious to attempt a definition here. Fortunately it has

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[36] The reader is referred to the excellent account on "natural justice" by Professor S.A. de Smith in his Judicial Review of Administrative Action, p.101 et seq. See also Marshall, Natural Justice, p.3.

gone on record that the expression "natural justice" is one "sadly lacking in precision." [37] Again, it has been said that in so far as it "means that a result or process should be just, it is harmless though it may be a high-sounding expression; in so far as it attempts to reflect the old jus naturale, it is a confused and unwarranted transfer into the ethical sphere of a term employed for other distinctions; and in so far as it is resorted to for other purposes, it is vacuous." [38]

It is difficult sometimes to know whether it is the "natural sense" of justice which is meant or just justice. The following have been resorted to with the same effect: "substantial justice," "the essence of justice," "fundamental justice," "universal justice," "rational justice," "the principles of British justice," [39] "rough justice," or even "palm tree justice."

When, however, an African customary law is said to be repugnant to "natural justice," it could mean:

(i) repugnancy relating to the substantive law;

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37 R. v. Local Government Board, ex p. Arlidge [1914] 1 K.B. 165

38 Local Government Board v. Arlidge [1915] A.C.120 at p.138 per Lord Shaw.

39 de Smith, op.cit. 102.

(ii) repugnancy relating to procedure;

(iii) repugnancy affecting the degree of punishment. [40]

Each of the three items will now be considered.

(i) Repugnancy relating to the substantive law.

Before the British assumed control and jurisdiction over the West African territories, and well after their arrival, slave-dealing was tolerated by both black and white until it was "found" to be repugnant to natural justice. Thus, in 1874, the Gold Coast Slave-dealing Abolition Ordinance was enacted. [41]

This Ordinance abolished only the worst form of slavery which had acquired international notoriety (or so it seemed), but not all the incidents arising out of that status. This state of affairs was bound to produce some ambiguity.

Therefore in December of that year the Gold Coast Emancipation Ordinance was enacted to resolve certain doubts. [42] By section 3 "persons born after the 5th of November, 1874" were

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40 J. Lewin, "The recognition of native law and custom in British Africa" (1938) 20 J.Comp.Leg. (3rd series) 16-23.

41 No. 1 of 1874

42 No.2 of 1874 (December 17, 1874).

declared ffee. It was also expressly provided that "nothing herein contained shall be construed to diminish or derogate from the rights and obligations of parents and of children or from other rights and obligations, not being repugnant to the law of England, arising out of the family and tribal relations customarily used and observed in the protected territories."

The effect of this provision is that if a customary rule depends solely on slavery for its existence, it would not be recognised.

In the Ghana case of Santeng, per Ohemeng v. Darkwa and anor.,[43] STRATTER-STEWART J., delivering the judgement of the court, explained it in these words:

> "The true construction of that section is, in my opinion, that slavery, being repugnant to the law of England, is abolished by the enactment, but any privileges or rights which the slave may have had before the passing of the Ordinances are saved, provided those privileges or rights are not in themselves repugnant to English law."

Consequently, the West African Court of Appeal held that the custom that the child of a slave woman is considered, for purposes of

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43 (1940) 6 W.A.C.A. 52, 53-54. See also Donkor v. Danso (1959) G.L.R. 147.

succession and otherwise, to be a member of the father's family, was not repugnant.

Another custom which has been abolished by statute as being repugnant to natural justice is the cult of Osu in Eastern Nigeria.[43a] It was strictly taboo for these "social outcasts" to marry or to have sexual relations with free-born Ibo, and they were subjected to a number of other restrictions.[44]

The custom of killing twins will no longer by countenanced under any circumstances.

Far from these customs having been regarded with opprobrium, they have been regarded as criminal offences.

Thus section 246 of the Nigerian Criminal Code states that[45]:

> "Any person who without the consent of the Governor buries or attempts to bury any corpse in any house, building, premises . . . is guilty of misdemeanour, and is liable to imprisonment for six months."

43a Abolition of the Osu Sysiem Law, 1956, E.R. No. 22 of 1956. Nwachukwu v. Nnoremele (1957) II E.R.L.R.50.

44 Originally these Osu or their ancestors were free-born, but were brought by a family or individual at the command of a diviner and offered as slaves to some deity whose wrath was aroused and whom the sacrifice of a mere fowl or goat would not satisfy. See M.M.Greene, Ibo Village Affairs, p.24.

45 Laws of Nigeria (1958), Cap.42, s.246. See also N.W.Thomas, "Some Ibo burial customs" (1917) 47 J.R.A.I., 160-163, 164.

(ii) Repugnancy relating to procedure.[46]

As will be recalled, there are statutory provisions which direct indigenous courts to administer customary law. This means inter alia that the procedure adopted in court also must not be repugnant to natural justice. From the point of view of superior courts, the customary procedure adopted in the indigenous courts must, as far as possible, conform to the standard set in the English courts. In the technical sense, English law recognises but two principles of natural justice[47]:

that an adjudicator be disinterested and unbiased (nemo judex

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46 See J. Lewin, "The recognition of native law and custom in British Africa" (1938) 20 J.Comp.Leg. (3rd series), 16-23; "Some problems involved in the recognition of African native law" (1942) 24 J.Comp.Leg. (3rd series), 109-113; "Native courts and British justice in Africa" (1944), 14 Africa, 448-452. A.N. Allott, "The extent of the operation of native customary law. Applicability and repugnancy" (1950) 2 J.A.A. (No.3) 4-11; A. Epstein, "Some aspects of the conflict of law, and urban courts in Northern Rhodesia" (1951) 12 Rhodes-Livingstone Journal, 28-40; Administration of justice and the urban African, Chaps. 6 and 7, and "The standard of justice." T.O. Elias, "Customary law. The limits of its validity in colonial law" (1954) 13 Afr.Stud. 97.

47 S.A. de Smith, op.cit., p.101.

in causa sua) and,

that the parties be given adequate notice and opportunity to be heard (audi alteram partem).

The origin of these two rules is not English. We are told by Professor de Smith in his book that the principle that no man is to be judged unheard was a precept known to the Greeks. In English law perhaps the earliest celebrated case is that popularly known as Dr. Bentley's case. [48]

Why, it may be asked, should a superior court upset a decision of a native court on a matter of procedure according to customary law? The answer is that there are certain rules of procedure so fundamental in any system of law that their observance is obligatory on every court of law. These rules are known to lawyers as "the principles of natural justice." [49] They apply in all judicial and quasi-judicial hearings. Thus in Thomas and ors. v. Oba A. Ademola II and ors., [50] where the plaintiff, a holder of the

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48 R.v. Chancellor of the University of Cambridge (1723) 1 Str. 557 at 567 where Fortescue J. said "....even God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam' (says God) 'where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldst not eat?' "

49 J. Lewin, "Native courts and British justice in Africa," cit.supra, note 46, pp. 448,450.

50 (1945) 18 N.L.R. 12.

Iwarefa title-chieftaincy of Base of Iporo since 1934, was "drummed out" of the Iwarefa body by his fellow Iwarefa chiefs in a way which amounted to taking matters into their own hands, POLLARD Ag.J. said this:

> "No evidence has been given to this court that the first plaintiff had been previously informed of the charges held against him, or that he was to be tried; no invitation was given to him to appear to defend himself, or to answer the charges that these two Iwarefa chiefs . . . conceived he had committed. In his absence, and without being even notified of any inquiry into his conduct, far less being called upon, he was expelled from their society. This method of procedure was in direct violation of the native law and custom bearing upon the deposition and/or suspension of a chief . . . . I find as a fact that in Ogboni societies the sacred principle which is enshrined in the legal maxim - audi alteram partem - operates with full force."

He continued, "the chiefs had done so in violation of the elementary principles of natural justice." [51]

An interesting case, which illustrates the responsibility resting on the shoulders of the indigenous courts, is the High Court case of Egba Native Administration v. Adeyanju. [52] The facts are these:

The Ake court was a native court established by warrant

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51 Ibid. 33, 37.

52 (1936) 13 N.L.R. 77.

under the Native Courts Ordinance. The warrant provided that the court should consist of the President and twenty-two other members, but without any provision that a quorum of the members of the court could function. The appellant was charged in the Ake court with a criminal offence. The President and two members sat to try the case. Just before the close of the case for the prosecution these two members of the court were replaced by two others who heard the rest of the evidence for the prosecution and that for the defence. These two newcomers dropped out and two other members, who had heard none of the evidence at all, took their places, and the court so constituted convicted and sentenced the appellant. On appeal to the Native Court of Appeal, the conviction was upheld. On further appeal to the High Cpurt GRAHAM PAUL J. did not mince his words in rejecting the customary procedure referred to. The learned judge was of the opinion that if a custom amounted to a denial of the fundamental right of an accused person to have his case heard by judges, he conceived that it would be the

> "clear duty of this court on appeal to refuse to give effect to such a practice and to quash a conviction obtained in such circumstances. I regard the procedure disclosed in this case as a travesty and a mockery of the administration of justice. A custom of that kind is clearly in the terms of section 16 of the Protectorate

Courts Ordinance [53] 'repugnant to natural justice, equity and good conscience'. " 54

The principle that a person ought to be given an opportunity to be heard applies to his witnesses: "It is a fundamental principle of the administration of natural justice that a defendant and his witnesses should be heard before the case against him is determined, and it is, in my view, a denial of justice to refuse to hear a defendant's witnesses." [55]

It has also been held that the duty of audi alteram partem is not performed by the substituting for the case of one side a record of the evidence given by it before another magistrate.[55a]

It is contrary to natural justice that a person should be convicted or punished for an offence in respect of which there is no complaint or charge. This was so held by the High Court of Northern Nigeria in Dzakpe v. Tiv Native Authority. [56]

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53 Now see Northern Region High Court Law, No.8 of 1955 (amended), ss. 28-33, 35.

54 (1936) 13 N.L.R. at 80.

55 Malam Sadau of Kunya v. Abdul Kadir of Fagge (1956) F.S.C.R. 39, at 41, per Jibowu F.J.

55a Ogiogun v. Idukpaye (1959) W.R.N.L.R 81 at p.82 per MORGAN, J.

56 (1958) N.R.N.L.R., 135, 137.

The principle that no man may be judge in his own cause is well illustrated by the Nigerian case of Modibbo v. Adamawa Native Authority,[57] which was heard by the High Court on appeal. The facts were that the appellant was sentenced by the Lamido of Adamawa to twelve months' imprisonment for writing an insulting letter to the Adamawa Native Authority Council.

The Lamido is President of the Council, and certain other members of the Council were members of the court by which the sentence was passed. The appellant argued that as the Native Authority Council were the persons to whom the allegedly insulting letter was addressed, the alleged offence ought not to have been tried in the Lamido's court, but in the Alkali's court. It was, however, contended on behalf of the respondents, that even though in Maliki law the same principle (that no man shall be a judge in his own cause) applies, yet this case was an exception on the grounds - inter alia - (a) that no Alkali had power to adjudicate upon a religious matter between a ruler and a subject, and therefore (b) the case had, of necessity, to be tried by the Lamido in his court. It was held upon a consideration of this point as a preliminary point, that this case afforded no exception to

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57 (1956) N.R.N.L.R.,101. The courts system has been reorganised.

the general principle, and that although the Ruler is the proper person to hear and determine religious disputes this does not apply where the dispute takes the form of a personal attack upon him; and that in such a case the principle that no man can be a judge in his own cause must be maintained.

These days all efforts are being made to ensure that persons appearing before the courts get a fair hearing. Chapter III of the Nigeria (Constitution) Order in Council, 1960, deals with fundamental rights.[58]

It would, however, be wrong to presume that any indigenous rule of procedure which is not compatible with English law should be held to be repugnant to natural justice.

One can do no better than quote what Lord Hailey has said[59]:

> "It would be a mistake to assume that primitive Africa made no provision for the decision of contentious issues; there existed everywhere a recognised means of securing decisions on them, beginning with the arbitrament of family heads or or heads of kin groups and ending with the more formal adjudication by a Chief, or a Chief and his

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58 S.1. 1960/1652,s.21(1) states that: "In the determination of his civil rights and obligations a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality."

59 An African Survey (revised 1956) pp.628-629.

council, or some form of clan or tribal moot.

"If these tribunals had their limitations, they nevertheless seem to have been accepted as dispensing justice to the general satisfaction of those who sought their decisions. But the procedure of trial differed widely from that practised in the present Colonial courts, Africans do not seem to have had any clear concept of relevancy, and no limits were set to the relevancy of the evidence given; . . . where writing was unknown, documentary evidence was necessarily excluded and hearsay evidence was entirely unrestricted."

But real evidence was usually available. Moreover, the judge or judges might be well acquainted with the litigants and might know all the circumstances of their lives. The facts of the case might be well known to the judges. It is submitted that the judgement should not be impugned merely because of "bias" or some such technical ground in English law.

The High Court in Northern Nigeria when hearing appeals from the native courts is warned about this danger. Section 62 of the High Court Law provides that[60]:

"Where the jurisdiction conferred on any native court is as regards practice, or procedure, regulated in any particular by native law and custom, no objection to any proceeding in such court shall be taken or allowed on the hearing of an appeal from a decision of

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60 N.R. No.8. of 1955. See also Fagoji v. Kano N.A. (1957) N.R.N.L.R. 57; Tsamiya v. Bauchi N.A. (1957) N.R.N.L.R.73.

> such court on the ground only that, in any such particular, there has been a failure to observe any principle of English law or any English rule of evidence or procedure, if such proceeding or decision is not in fact contrary to natural justice, morality, equity or good conscience nor incompatible with the provisions of any written law."

These provisions emanate from the Tsofo Gubba case,[61] which impelled the legislature, whilst maintaining the application of the Criminal Code to all cases, to allow native courts to try cases in accordance with their customary law on the one hand, and on the other hand to have their decisions corrected in the light of the Criminal Code, where necessary, in courts familiar with its provisions.[62]

The Northern Nigeria case of Kano Native Authority v. Obiora [62a] decided by the Federal Supreme Court is also relevant to this topic even though Criminal trial under Maliki law has been superseded by the Northern Nigeria Penal Code. The importance of the case lies in the emphasis which the Federal Supreme Court gives to the requirements of the principles of natural justice. Delivering

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61 Tsofo Gubba v. Gwandu N.A. (1947) 12 W.A.C.A. 141.

62 Fagoji v. Kano N.A. (1957) N.R.N.L.R. 57, at p.71, per Bairamian S.P.J.

62a (1960) N.R.N.L.R. 42 at p.47

the judgement of the Appellate Court, ADEMOLA, F.C.J., remarked:

> "A procedure is not contrary to natural justice merely because it is foreign to English law, so long as it is clear that substantial justice is done. This was laid down in the case of Scarpetta v. Lowenfeld . . . ." (62b)
>
> "We agree that natural justice requires that an accused person must be given the opportunity to put forward his defence fully and freely, and to ask the court to hear any witnesses whose evidence might help him, but we do not regard the decision in Auzinawa v. Kano N.A. (62c) requiring the Appellate Courts to hold, as a matter of course, that there has been a denial of natural justice merely because a Native Court has not adopted any particular method of achieving this end."

The interpretation given by the Federal Supreme Court to the decision in Auzinawa's case shows that the power of Appellate Courts to disturb the decisions of Customary Courts on technical procedural grounds should be exercised with great caution. Section 15(d) of the Sharia Court of Appeal Law [62d] states, inter alia, that "The Court, in the exercise of the jurisdiction vested in it by this law as regards both substantial law and practice and procedure, shall administer, observe and enforce the observance of the principles and provisions of . . . . natural justice, equity and good conscience."

62b (1911) 27 T.L.R. 509

62c (1956) F.S.C. 27. See also Dei v. Pong (1959) G.L.R. 135.

62d N.R. No. 16 of 1960.

The best way of approaching this practice is to be found in the language used in an Eastern Nigerian Case by DE LESTANG, F.J.: [62e]

> "I venture to say that so long as those (Native) Courts act in good faith, listen fairly to both sides and give fair opportunity to the parties adequately to present their case and to correct and contradict any relevant statement prejudicial to their view, they cannot be accused of offending against the rules of natural justice."

(iii) Repugnancy relating to the degree of punishment

The degree of punishment inflicted by the native courts must be reasonable. Thus section 2 of the old Native Courts Ordinance of Nigeria (Cap. 142) says that:

> "For offences against any native law or custom a native court may, subject to the provisions of this Ordinance, impose a fine or imprisonment or both, or may inflict any punishment authorised by native law or custom, provided it does not involve mutilation, or torture, and is not repugnant to natural justice and humanity."

Even stronger language is used by the Nigeria (Constitution) Order in Council, 1960, s.187 [63] : "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."

62e The Queen v. The Lieutenant-Governor, Eastern Region (1957) 2 F.S.C. 46 at p.47.

63 See S.I. 1960/1652.

(b) The repugnancy clause with regard to equity

It will be recalled that Snell [64] described equity as having a broad popular sense and a narrow technical sense. In its popular sense, equity is practically equivalent to natural justice or morality. Snell goes on to say that sometimes both are to be found in the same instrument, as in the Courts Ordinance, 1935, of the Gold Coast (now Ghana). This enacted that the courts of the Colony were to apply "the common law the doctrines of equity and the statutes of general application which were in force in England" on a certain date, and also empowered them to give effect to any native law or custom, "such law or custom not being repugnant to natural justice, equity and good conscience" Here the first phrase refers to equity in the narrow sense and the second to equity in the wider sense.

As has been said before, equity in the popular sense actually meant natural justice or morality. Looking at a number of cases that have been decided by the High Court, one finds that the judges have taken the view that under the repugnancy clause they can incorporate equitable principles to tame some of the harsh customary laws.

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64 Snell, Principles of Equity, pp. 3 and 4.

It is submitted with the greatest respect that the view is erroneous. Judges are directed to observe and enfonce the observance of customary law not repugnant to natural justice, equity and good conscience. There is nothing in it which gives the power to incorporate equitable principles. On this ground, the interpretation of M'CARTHY Ag. C.J. in the Ghana case of Fiscian v. Nelson [65] is, with respect, untenable. The learned judge interpreted it thus:

> "The equitable jurisdiction exercised by him (the trial judge) in refusing to grant relief to the plaintiff-appellant is based on section 74 of the Courts Ordinance (66) which provides in effect that native customary law will not be recognised by the courts where to do so would be contrary to equity and good conscience."

It must be noted that the repugnancy clause has only a negative function and no more. A similar misinterpretation has recently been put forward by a writer in the Journal of African Administration. In writing about Ghana, he stated that "if the courts decide that a custom is repugnant they have to fall back on the principles of justice, equity and good conscience in deciding the case before them." [67]

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65 (1946) 12 W.A.C.A. 21.

66 Later s.87 (1) of the Courts Ordinance, Laws of the Gold Coast (1951) Cap.4.

67 A. St. J.J. Hannigan, "The present system of succession amongst the Akan people of the Gold Coast" (1954) 6 J.A.A. 166-171.

Upon careful reading of the relevant provision in the Ordinance,[68] it will be seen that the courts are ~~governed by~~ to employ the positive principles of justice, equity and good conscience, only where no express rule is applicable to any matter in controversy. Thus this expression, usually called the residual clause, has only a positive function. By the absence of express rule is meant absence of customary law rule on that point.

As Lord Atkin pointed out in his speech to the Judicial Committee of the Privy Council in the case of Eshugbayi Eleko v. Government of Nigeria[69] :

> "If it [the customary law] still stands in its barbarous character it must be rejected as repugnant to natural justice, equity and good conscience. In other words, the court cannot itself transform a barbarous custom into a milder one."(70)

It is respectfully submitted that it is unnecessary for the courts to resort to the repugnancy clause in order to introduce equitable principles, for the doctrine of technical equity is already conferred on the court.

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68 See supra.

69 [1931] A.C.662 at 673.

70 Writer's italics.

(c) The repugnancy clause with regard to public policy and/or morality

This is our third and last major division. Under this head may be included principles which have to be regarded as offending against the principles of Christianity.

As will be recalled, all the three "terms" have been used in enactments governing the recognition of customary law. Thus in the Gold Coast the phrase "not repugnant to Christianity or natural justice" was used in 1856. In the Gambia it is "not repugnant to natural justice and morality." [71] Section 11 of Act No.38 of 1927 of the Union of South Africa provides for the application of native law in suits between natives involving questions of customs "provided that such native law shall not be opposed to the principles of public policy or natural justice." [72]

As Dr. Allott has rightly pointed out,[73] when the term public policy is used in relation to African law, the meaning is probably wider than its meaning in English law; for, as was recognised by the English court in Fender v. St. John Mildmay, [74]

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71 See ante, p.34

72 A.S. Welsh, "Native customary law in the Union of South Africa" (1958) 10 J.A.A., 83-94 at 83.

73 "The extent of the operation of native customary law" (1950) 2 J.A.A. 4-11.

74 [1938] A.C. 1 at 23

it is no longer legitimate for the courts to invent a new head of public policy. A judge must expound, not expand, this particular branch of the law.

There is no yardstick by which the exact line of demarcation between public order [75] and morality can be determined. In fact morality is no more than an aspect of public policy. Decided cases have revealed that when a customary law is held to be repugnant to public policy, what is probably meant is that it offends against the sense of morality of the Western world.

It is on this ground that some injustices have been done. Thus in South Africa the courts have been erroneously led to regard the transfer of cattle as marriage consideration as nothing other than an offer for "the immoral purpose of cohabitation with a woman," and have therefore declined to enforce such contracts or rights that arose out of it.[76]

Until recently, the English courts relied upon the principles established in Hyde v. Hyde, [77] following the case of Warrender v.

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[75] D. Lloyd, Public Policy (1953), p.27. "Public order" is the French version of public policy.

[76] J. Lewin, Studies in African Native Law, p.108

[77] Hyde v. Hyde (1866) L.R. 1 P. & D.130.

Warrender,[78] where Lord Brougham expressed himself as follows:

> "It is important to observe that we regard it (marriage) as a wholly differing thing, a different status, from Turkish or other marriages among infidel nations, because we clearly never should recognise the plurality of wives."

With the passage of time, this notion has been proved to be without virtue. In the words of one learned writer, it could scarcely be the law "that our courts in England should absolutely ignore all family relations among the great majority of the human race, treating all wives among them as mere concubines, all children as bastards and all property left by an intestate among them as escheating or becoming ownerless." [79]

(4) By what Criteria is it Decided, and who Decides that a Customary Law is Repugnant?

The quick answer to the second question is that the power to observe and enforce the observance of native law and custom not repugnant to natural justice, equity and good conscience, or morality, is vested in the breast of the superior court. This means that it is exercised by the individual judges.

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[78] (1835) 2 Cl. & F. 433, 532.

[79] Sir Dennis Fitzpatrick, "Non-Christian Marriage" (1900) 2 [illegible] J.Comp.Leg. (n.s.) 359-387 at 379.

The thorniest problem is by what criteria the judge is to assess thecustom.

There seems to be a welter of examples all pointing in the direction that the standard to be used is that of English or British morality. The late Right Honourable Sir Sidney Abrahams, delivering a lecture at the London School of Economics in 1948,[80] expressed himself thus:

> "Morality and justice must of course mean British and not African conceptions of these. Were that not so British justice would be looking in two different directions at once."

Later on in the course of the lecture, he expounded this theory[81]:

> "I have sometimes been asked . . . 'How do you justify the application of English principles of justice to so many different peoples whose outlook and mentality vary so much from our own, especially when English ideas pass their understanding'?... We believe that these ideas are the best that can regulate our administration of justice, and an Englishman because he is an Englishman and not someone quite different, cannot adopt other persons' conception of justice."

Ten years ago, another English judge, delivering a judgment

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80 Sir Sidney Abrahams "The Colonial legal service and the administration of justice in the Colonial dependencies" (1948) 30 J. Comp.Leg. and I.L. (3rd series, parts 3 and 4) pp. 1-11 at p.8.

81 Ibid, p.11.

in Tanganyika,[82] asked himself a similar question:

> "To what standard then does the Order in Council refer - the African standard of justice and morality or the British standard? . . . . I have no doubt whatever that the only standard of justice and morality which a British court in Africa can apply is its own British standard."

One may ask why an African indigenous law should be looked at through the monocle of an Englishman? With the greatest respect, this view is rather narrow and insular.

Sir Sidney himself had remarked, in his address, that "the court has to be wary not to condemn a custom merely because it does not accord with a European mode of life."

As far as the last statement is concerned, Sir Sidney had many followers. To take a few examples:

In 1887 Sir James Marshall, an experienced judge in the Gold Coast, recounted his impression thus[83]:

> "My own experience of the West Coast of Africa is that Government has for the time succeeded best with natives which has treated them (sic) with consideration for their native laws, habits and customs, instead of ordering all these to be

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82 Gwao bin Kilimo v. Kisunda bin Ifuti (1938) 1 T.L.R.(R.) 403.

83 (1887) 16 J.A.I. 180-182 at 181.

> suppressed as nonsense, and insisting on the wondering negro at once submitting to the British Constitution and adopting our ideas of life and civilisation . . . . What I wish to say is that the natives of the Gold Coast and the West Coast of Africa, have a system of laws and customs which it would be better to guide, modify, and amend, rather than to destroy by Ordinance and force."

The same warning was given by an administrative officer who had done distinguished service in Nigeria. He observed [84]:

> "The attitude of the English lawyer towards African law and custom is not that of adaptation but contempt for a worthless thing, which should be abandoned and replaced by European law whole and undefiled.
>
> "The problems of Africans today of how to adapt themselves to the sudden inrush of strange European ideas get no help from English lawyers, but perhaps we may hope that some day the lawyers, like the missionaries, will discovef that there is something in African ideas of justice and right worthy to be built into the new structures that Africa demands."

(a) <u>What should the role of the judge be</u>? [85]

From the foregoing passages, certain observations emerge which throw some light on the duty of a judge in such cases.

It is admitted that the use of the repugnancy clause is

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84 (1939) 38 J.A.S. 161

85 In formulating these rules the writer has had great assistance from the work of Professor D. Lloyd on <u>Public Policy</u>, 121 <u>et seq</u>., and he is highly indebted to him.

beneficial in many cases in pruning down and abolishing some unpleasant instances of customary law, but it must also be mentioned that the repugnancy clause, like its English counterpart of public policy, may be an "unruly horse" which may carry its rider he knows not where.

The following are a few suggestions for such a situation:

(b) Negative aspects of the judge's role. (i) The judge must not condemn a custom merely because it does not accord with a European mode of life, or offends against the stringent domestic policy of England. The standard by which it is judged must depend also on the conception of justice held by the people concerned.

(ii) The judge must not rely too heavily on previous decisions, for that prevents the evolution of customary law, and it may prevent him from dealing with a novel situation. He should use reported decisions as a guide.

(iii) The question whether a customary law is repugnant or not must notdepend solely on the conscience of a judge, for (and if we may adapt a passage from Selden's Table Talk on the Chancellor's Conscience) one judge has a long foot, another a short foot, and a third an indifferent foot - it is the same thing with the judge's

conscience.[86] In other words, the judge must not indulge in the subjective test.[87]

(iv) But he must not be bound to observe a custom of the community if he is satisfied that the custom or opinion is abhorrent to right-thinking people. Otherwise, to give an example from the Southern States of America, a judge might have to favour lynch-law.

Put it another way, the judge must not follow mass opinion on a particular custom when it is clearly in error.

(v) Finally, the judge must not make a sort of extra-judicial inquiry as to the prevailing moral concept.

(c) Positive aspects of the judge's role

(i) In arriving at a decision as to whether a customary law is repugnant or not, the judge should consider the social consequences of the custom propounded as to its probable results.

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86 Selden's Table Talk, title "Equity," cited in Story's Commentaries on Equity Jurisprudence, p.13

87 Lecturing on "The enforcement of morals: a consideration of the jurisprudence in the Wolfenden Report," Mr. Justice Devlin (as he then was) is reported as saying that morals were not always a matter for private judgment, for the structure of every society was made both of politics and morals; the fact that no grave offence against morals was punishable without the verdict of a jury was of great importance: The Times, March 19, 1959.

(ii) Although the judge must not hold a public inquiry into the alleged customary rule, he must try to get the best evidence possible from reliable and expert witnesses.

(iii) Lastly, the judge is expected to maintain a high degree of impartiality and to seek, as best as he can, to apply not his individual moral or ethical conception, but that which his training, background and knowledge lead him to believe to be in accordance with customary morality and the general conscience of the community.

~~(c)~~ C THE RESIDUAL CLAUSE

This is the second limb of the repugnancy clause, but each operates in a different field. Whereas the repugnancy clause operates in the negative field, the residual clause functions positively to introduce principles of justice, equity and good conscience. At this juncture, it is necessary to give the full quotation in which the expression occurs.

In Sierra Leone, for example, there is a proviso to section 38 of the Courts Ordinance which states that no party will be allowed to claim the benefit of any local law or custom if it appears either from the express contract, or from the nature of the transaction, that such party agreed that his obligations in accordance with such transactions

should be governed exclusively by English law.[88]

There follows this quotation[89]:

> "and in such cases where no express rule is applicable to any matter in controversy, the court shall be governed by the principles of justice, equity and good conscience."

Until recently, these provisions could be found in the statute books of all the four territories of West Africa. Why were they enacted? One answer was given by BRANDFORD GRIFFITH J. (as he then was) in the Nigerian case of Cole v. Cole.[90] The learned judge explained that:

> "These words show that the legislature was well aware that it could not lay down specific rules as to where native law and custom was to apply and where it was not to apply. It was aware that cases must arise for which it could not possibly provide, accordingly it framed the section in very general terms, expressly specifying one particular class of transaction in which natives should not take advantage of native law and custom, and finally giving the court large discretionary powers."

(1) Origin of the expression

As far as West Africa is concerned, there is strong reason to believe that the quotation was modelled on an enactment from India.[91] We are told by STORY, however,[92] that perhaps it

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88 Courts Ordinance (1960) Cap.7.

89 Ibid.

90 (1898) 1 N.L.R. at 21, 22.

91 See H.W.H.Redwar: Comments on Some Ordinances of the Gold Coast Colony, etc., p.63 et seq. Sir Frederick Pollock, Essays in the Law, pp.74-79.

92 Op.cit. pp.3-4

originated from Roman jurisprudence. Thus in his chapter on the nature of equity he said this:

> "In the Roman jurisprudence we may see many traces of this doctrine, applied to the purpose of supplying the defects of the customary law, as well as to correct the measure of interpretation of the written and positive code.
>
> "Domat accordingly lays it down as a general principle of the Civil law that <u>if any case should happen which is not regulated by some express or written law, it should have for a law the natural principles of equity, which is the universal law, extending to everything</u>."

These words are not identical with the quotation given earlier, but there seems to be a possibility of the draftsman having availed himself of some such similar early provision.

(2) <u>Meaning and application of the residual clause</u>

Since the expression was probably imported into West Africa from India, it will be helpful to consider its meaning and how it has been applied in one or two different countries.

(a) <u>The Indian example</u> [93] Section 93 of the Regulations made for the Sudder Dewanny Court by Sir Elijah Impey on July 5, 1781, provided that:

> "in all cases, for which no specific directions

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93 See <u>Tagore Law Lectures 1912</u>, "Codification in British India," pp.90 and 270, by B.K. Acharyya, for a brilliant account. See also <u>Tagore Law Lectures 1894</u>, "The law of Fraud in British India," by Sir Frederick Pollock, in which the author points out on p.6 that "equity and good conscience had already appeared in the Charter of 1683," but that this was confined to the Company's own people.

"are hereby given the judges of the Sudder Dewanny Adawlut do act according to justice, equity and good conscience."

This provision was later copied at various intervals in the other presidencies and provinces of British India and Burma.[94]

How was this maxim or expression applied, and with what results, in India? At this juncture we can do no better than cite four Indian cases to illustrate the answer. It has been said that the maxim was used to introduce the technical rules of English law. This might have been largely true but, as the cases will show, it must not be over-emphasised.[95]

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94 See Tagore Law Lectures 1912, p.95 et seq.

95 A similar provision was introduced in the Japanese Civil Code. Acharyya op cit.96. As Sir Frederick Pollock stated (Tagore Law Lectures 1894): "The really natural justice for Englishmen governing in India was to follow the rules they were best acquainted with. The only 'justice, equity and good conscience' English judges could and did administer, in default of any other rule, was so much of English law and usage as seemed reasonably applicable in this country" (at p.7). "But I have already endeavoured to show that the 'justice, equity and good conscience' of the Old Regulations could not in practice, if there was to be any settled system of justice, mean anything else than the analogies of English law" (at p.10). It is significant that the learned author uses the phrase "analogies of English law" rather than simply "English law."

In the case of Saroop v. Troyla-Khonath [96]

Sir Barnes Peacock asked himself this question:

> "Now, having to administer justice, equity and good conscience, where are we to look for the principles which are to guide us? We must go to other countries, where equity and justice are administered upon principles which have been the growth of ages, and see how the courts act under similar circumstances, and ifwe find that the rules which they have laid down are in accordance with the true principles of equity, we cannot do wrong in following them."

Sir James Stephens later explained that:

> "Though justice, equity and good conscience are the law that Indian judges are bound to administer, they do in point of fact resort to English law books for their guidance...." 97

In an 1862 case [98] Lord Ligsdown expressed himself to be in favour of total importation of English law under the guise of the maxim for "to adopt it (English law) and yet reject its qualifications and restrictions would be scarcely consistent with justice."

In the Calcutta case of Sinha v. Ghose [99] O'KENEALY J. said

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96 (1868) 9 W.R. 230,232.

97 Supplement to the Gazette of India, May 4, 1872, 535.

98 Varden Seth Sam v. L.R. Lallah (1862) 9 M.I.A. 307

99 (1897) 24 C.[illegible]908

that it has long been the practice that

> "where the code does not provide for a matter arising in a suit the court must adopt the procedure of courts of equity, and that in the present case means that they must follow the procedure of the High Court of Chancery in England."

The foregoing interpretation was judicially approved by the Judicial Committee of the Privy Council when their lordships ruled in 1887 that equity and good conscience are "generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances." [1]

The italicised sentence, it is submitted, makes a world of difference. In effect, it subjects the application of Egglish law in such circumstances to a severe test.

Following this ruling, judges began to interpret the maxim even more liberally.

In 1898 [2] the Privy Council treated the words as equivalent to "abstract justice." Lord Shaw, in another case [3] thought that the maxim meant "natural justice." Sir Frederick Pollock, however,

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1 Wagheda v. Masludin (1887) 14 I.A. 89.

2 Moidin v. Nepean (1898) I.L.R. 26.

3 Skinner v. Singh (1913) 40 I.A. 105, 114-115.

was of the opinion that these words "could only be read . . . . as being synonymous with the law of Nature." [4]

(b) The Sudan example. In the Sudan, section 9 of the Civil Justice Ordinance, 1929, enacts that:

> "In cases not provided for by this or any other enactment for the time being in force, the courts shall act according to justice, equity and good conscience."

It would appear that the section was also modelled on the Indian provision, but the judges in their interpretation of the maxim did not rely solely on the Indian example.

To the Sudan judges, the maxim of "justice, equity and good conscience" did not completely exclude the application of Egyptian, French or any other law. [5] For, as was stated by OWEN J.: "We are guided but not governed by English Common and Statute law." [6] If English law was applied, it was applied "so far as it is appropriate to conditions in the Sudan."

However, the courts have been very reluctant to follow the Statute law of other countries. Thus BENNETT J., in the course of a

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4 Essays in the Law, p.75

5 E. Guttmann, "The reception of the Common Law in the Sudan" (1957) 6 I.C.L.Q. 401-417, 410.

6 Heirs of Ibrahim Khalil v. Moneim B and Bros. A.C./App./42/1926.

very extensive judgment, said [7]:

> "Whatever may be the scope and meaning of section 9 of the C.J.O., it does not enable this court to set itself up as a legislative body free to adapt or adopt, and so in effect to enact any foreign statute or any statutory enactment of its own imagination that may recommend itself."

Thus Statute law would only be applied in so far as it dealt with matters of principle and not when it contained mere artificial qualifications. [8]

(c) The West African example. How far have the instances cited for Indian and the Sudan influenced the development of the law in West Africa?

Surprising as it may seem, there have been very few occasions on which the residual clause has been invoked. Where the matter in issue was unknown to "customary" law, the judges were prone to conclude that it could only be governed by English law.

It has been argued by a learned author that in countries such as Ghana, where there is no legislation expressly authorising the application of Islamic law as such, it might be applied not as native law

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[7] Manios v. Boxall and Co. A.C./App./14/1936.

[8] Guttman, op. cit., p.411

but as required by "justice, equity and good conscience." [9]

This means that in Ghana the residual clause can be invoked to introduce both English and Islamic law wherever necessary.

It must be remembered that Islamic law is administered as native law and custom in the areas where it is the customary law prevailing among a section of the people.

A case in which the residual clause was actually invoked is the Nigerian one of J.S. Andre v. Johnson.[10] This was an administration suit. The first question to be decided was who were the next-of-kin to the deceased Samuel; then to whom the letters of administration would be given.

The Divisional Court judge found that the only evidence of native law and custom as to succession was that of one chief, who stated that if a child left property the family on his father's side would inherit. The case that the learned judge had to decide was, in his opinion, different, as it was a case of an illegitimate child dying intestate, and leaving property. On the death of the deceased there

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[9] Dr. A.N. Allott, Reader in African Law, School of Oriental and African Studies, University of London.

[10] (1931) 10 N.L.R. 79.

survived a uterine brother and a half-sister born of his father by the latter's lawful marriage. The judge was inclined to the opinion that the trend of decisions was in favour of the uterine brother succeeding to some share of the inheritance. But this view conflicted with the evidence of the chief. Thus, in order to resolve the conflict, the learned judge said [11] :

> "The court realises the futility now of obtaining any reliable evidence of native law and custom on the special point. Not one of the several counsel engaged could produce any evidence beyond that of Amodu Tijani (the chief). The court therefore falls back on that part of the law, namely section 20 of the Supreme Court Ordinance, which lays it down that in cases where no express rule is applicable the court shall be governed by principles of justice, equity and good conscience."

The learned judge then proceeded to administer justice as seemed fit to him.

In the Ghana Case of Abosso Gold Mines Co. Ltd. v. Koomah (1883)[12] when he had to decide an action for specific performance which in turn depended on the construction of a vague and unsatisfactory wording of "Concession documents" between a Foreign Company and an African illiterate in the English language, MACLEOD, J., invoked the doctrine in order to

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11 Ibid. p.81, per Webber J.

12 Reported in The Gold Coast Assize Vol.1, No.2, 1883.

do what was fair and just. As he put it:

> "I desire first of all to remark that this point eminently calls for a decision according to those principles of justice, equity and good conscience which have been so thoughtfully inculcated in section 19 as the guiding-stars of the Court - by the eminent and learned gentlemen who framed our Supreme Court Ordinance."

Chapter Seven

THE DOCTRINES OF EQUITY[1]

A. INTRODUCTION

It was pointed out in the previous chapter that equity as administered in England, which has been described as "technical equity", was introduced into West Africa in the instrument which provides for the application of English law. It is usually found in the courts legislation. Thus in Sierra Leone section 37 of the Courts Ordinance lays it down that:[2]

> "Subject to the provisions of this and any other Ordinance, the common law, the doctrines of equity and the statutes of general application in force in England on the 1st day of January 1880, shall be in force in Sierra Leone."

In Ghana the provisions of the sections which enable the courts to apply the doctrines of equity have been repealed by the new Courts Act, 1960,[3] but by section 17(1) of the Interpretation Act, 1960:[4]

> "The common law, as comprised in the laws of Ghana, consists, in addition to the rules generally known as the common law, of

/the

1. This Chapter is based on my thesis submitted for the LL.M. degree in 1960 under the title "The Place of Equity in West African law".
2. Laws of Sierra Leone [1960 Rev] Cap. 7. For Western Region see The Law of England (Application) Law. Cap. 60.
3. But s. 154(4) provides that the repeal of s. 83 of the Courts Ordinance, Cap. 4 [1951 Rev.] should not affect the continued application of the statutes of general application which were in force in England on July 24, 1874, as applied in Ghana immediately before the commencement of this Act.
4. (C.A.4.)

> the rules generally known as the doctrines of equity and of rules 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."

Thus the application of the doctrines of equity has not been impaired.

In the English system the term "equity" under this head has acquired a technical connotation. It may loosely be described as a distinct source of law, though the distinction between the common law and equity has been modified by the Judicature Act, 1873. As Allen puts it,[5] in spite of the fusion, there is still a frontier between the common law and Chancery. If we regard equity as a distinct source of law, then its application in West Africa should be subject to the same conditions as the other sources of English law. It follows from this that those rules of equity which have been described as "anachronisms" should be regarded as unsuitable to the conditions of West Africa.[6] Apart from this reservation, it may be

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5. Law in the making, 5th ed. p. 388.
6. E.g. the doctrines of conversion, secret trusts and half-secret trusts. See KIRALFY: "The penal consequences of the equitable doctrine of conversion". (1949) 13 The Conveyancer and Property Law pp. 362-372; and MARSHALL, O.R. "Anachronisms in equity" (1950) 3 C.L.P. 30-45. Although in the Ghana case of Sani v. U.T.C. Ltd. Div. Ct. 1926-9, p. 189, it was held that the rule in Clayton's case did not apply, that must not be taken as conclusive that the rule does not apply under any other circumstances.

said that the reasonable doctrines of equity have played an important role in the development of the law in West Africa. The impact of the English Judicature Act, 1873, on West African law is too well known to be repeated here. The influence of the doctrines of equity on customary laws is no less pronounced. Indeed, where principles of customary law, though not repugnant to natural justice, etc., conflict with the rules of technical equity, it has been held that the rules of equity should prevail.[7] Thus in the Nigerian case of Awo v. Gam,[8] which was a case concerning the ownership of land after a long period of acquiescence, WEBBER, J. said:[9]

> "We do not decide this point in accordance with any provision of English law [because the transaction was governed by native law which knew no prescription]... but simply on the grounds of equity, on the ground that the Court will not allow a party to call in aid principles of native law merely for the purpose of bolstering up a stale claim."

Again, in the Ghana case of Ado v. Wusu[10] the West African Court of Appeal expressed the same principle in the following words:[11]

> "We accept the finding and entirely agree that in accordance with strict native law and custom the plaintiff remains the owner. But there is a long series of decisions in which it has been laid down that the Courts will not allow the strict native law and custom to be invoked in such cases as this when the effect is, in equity unjust."

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7. But see ALLOTT, A.N. Essays in African law, p. 196.
8. (1913) 2 N.L.R. 100.
9. Ibid at p. 101.
10. (1938) 4 W.A.C.A. 96.
11. Ibid at p. 99.

B. MAXIMS OF EQUITY

Almost all the so-called maxims of equity have played their part in the evolution of the law in West Africa. A few examples may be mentioned.[11a]

(1) Qui prior est tempore potior est jure. As the Latin tag says, "He who is earlier in time is stronger in law". This maxim governs the question of priorities where the equities are equal, and in West Africa it has functioned mainly in the field of registration of instruments to land. In the Gambia, for example, section 7 of the Land (Registration of Deeds) Ordinance, provides:[12]

> "Every instrument executed after the date when this Ordinance shall come into operation so far as regards any land to be affected thereby shall take effect as against other instruments affecting the same land from the date of its registration."

/It

11a. For the application of other maxims, see: Quagraine v. Bronie F.C. 1920-21, p. 62; Okunubi v. Assaf (1951) 13 W.A.C.A. 226. Tetteyfio v. Awuku (1955) 14 W.A.C.A. 723; Akenzua v. Benin Divisional Council (1959) W.R.N.L.R. p. 1; Kome v. Yemoah Ghana Civil Appeal No. 20 of 1961.

Davis 3

12. Laws of the Gambia [1955 Rev.] Cap. 126. For Sierra Leone see Registration of Instruments Ordinance, Cap. 256, s. 4 [Laws of Sierra Leone 1960 Rev.]; and the Sierra Leone case of Isaac v. Isaac (1937) 3 S.L.R. 3. For the Federal Territory of Lagos, see Land Registration Ordinance, Laws of the Fed. of Nigeria, [1958 Rev.] Cap. 99, s. 16. In Ghana the provision relating to the registration of instruments in regard to land is now contained in s. 26(1) of the Land Registry Act 1962 (Act 122). This Act repeals the Land Registry Ordinance, Laws of the Gold Coast [1951] Cap. 133, s. 21. The statement of the law as far as "priority" is concerned is virtually unchanged, so the old case-law will still be useful. See, e.g. Anyidoho v. Markham (1905) Ren. 318; Crayem v. Consolidated African Selection Trust Ltd. (1949) 12 W.A.C.A. 443.

It then goes on to stipulate that if registered within a certain period after execution, any such instrument takes effect from the date of execution.

Bound up with the question of priority is that of "notice". The statement of the law on that point by SNELL[13] that a purchaser is affected by notice of an equity where it has come either within his knowledge or to the knowledge of his agent, was cited with approval by the West African Court of Appeal in the Nigerian case of Ollivant Ltd. v. Alakija.[14] In the course of the judgment, BLACKALL, P., gave the facts of the case as follows:[15]

> "In the present case the former landlord, having received rent in advance from Messrs. G.B. Ollivant (the appellants), was in equity bound to treat that advance as a fulfillment of the latter's obligation to pay the rent and the respondent who purchased the right, title and interest of the former landlord, is bound by the tenant's equity against him. Now, in the appeal before us the respondent had not only constructive but actual notice of the appellant's equity, for Hallinan, J., found as a fact that the bailiff announced at the sale that it was understood that rent had been paid in advance up to 31st December, 1963 ... In these circumstances it would be clearly inequitable, in the popular as well as the legal sense, to permit the respondent to exact from the appellants a rent which they have already paid."

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13. Principles of Equity, 22nd ed. p. 40.
14. (1950) 13 W.A.C.A. 63.
15. Ibid at p. 67. See also Johnson v. Onisiwo and ors, (1943) 9 W.A.C.A. 189. Fraser v. Young (1944) 10 W.A.C.A. 135 - Sierra Leone. Crayem v. Consolidated African Selection Trust Ltd. (1949) 12 W.A.C.A. - Ghana.

(2) One cannot approbate and reprobate. In its African context this rather dramatic maxim is illustrated by the Ghana case of McLaren Bros (Manchester) Ltd. v. Nartey.[16] The facts are set out in the head-note as follows: The defendant was a storekeeper for the plaintiff, under an agreement not to give credit. In spite of this, he allowed one Korkor to run up an account, and the plaintiffs having thus found a deficiency in his books, sued him for the amount. In the course of the hearing, Korkor was added as a defendant. She admitted the debt, judgment was given against her, and the plaintiff withdrew against the defendant. The judgment debt remaining unpaid, the plaintiffs brought the action under discussion, one of tort, against the defendant for damages for breach of his agreement. The Divisional Court held that, as the plaintiffs had discontinued against the defendant in the first suit, and had not obtained leave to bring a fresh action, they were estopped from bringing the new suit, even though it purported to be for tort. SMYLY, C.J., in the course of his judgment observed:[17]

> "Scrutton, L.J. in the case of Verschures Creameries Ltd. v. Hull and Netherlands Steamship Company Ltd.,[18] a somewhat similar case to the present one, refers to the following lines:-
>
> 'Thoughts much too deep for tears pervade the Court,
> When I assumpsit bring and, godlike, waive the tort.'
>
> He puts it thus: 'A person cannot say at one time that a transaction is valid, and thereby obtain some advantage, to which he

/could

16. D.Ct. 1926-29, p. 30.
17. Ibid, at p. 32.
18. [1921] 2 K.B. 608 at p. 611.

could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is, to approbate and reprobate the transaction'."[19]

The phrase is apparently borrowed from the Scotch law, where it is used to express the principle embodied in the English law of election - namely, that no party can accept and reject the same instrument. The doctrine of election was discussed in the Nigerian case of Taylor v. Williams and Anor.[20] In that case a testatrix in her will devised her undivided share in a family property. The plaintiff claimed that such devise was null and void. The defendants, the executors under the will pleaded in bar of the claim that the plaintiff, who had accepted a benefit under the will, had thereby elected and therefore could not challenge the devise. GRAHAM PAUL, J., rejected the argument and made the following observations:[21]

"The law as to election under a will is clear enough in its main principles. Where a testator under his will disposes or professes to dispose of property not his to dispose of, the disposition is of course of itself void and of no effect. But if the person to whom the property wrongly disposed of in fact belongs and who has the power to dispose of it, is a beneficiary under the will he is put to his election, that is to say he must refuse the benefit he gets under the will or allow his property to go under the testator's devise of it, or compensate the devisee thereof for the failure of the devise. What the testatrix here in the devise in question sought to dispose of was her undivided share in certain family property. That undivided share of the family property did not belong to the plaintiff though it is

/probable

19. [1921] 2 K.B. at p. 612.
20. (1935) 12 N.L.R. 67.
21. Ibid at p. 68.

probable that the plaintiff's share of the same family property would be increased to some extent by the failure of the devise to the second defendant. The plaintiff had not, any more than her mother, the power to dispose of the subject of the bad devise. In such circumstances I consider on the authorities that the plaintiff by taking a benefit under another part of the will was not put to her election." [22]

(3) Equity looks on that as done which ought to be done.

The doctrine of conversion in equity, which stipulates that where A directs that property shall be converted from one form into another, then in the eyes of equity the property is regarded as converted, rests on it. It also applies to agreements which are specifically enforceable. Thus in equity a written lease not made under seal was treated as an agreement for a sealed lease, of which specific performance might be granted. This was the stand equity took both before the passing of the Judicature Act, 1873, and after, when the variance between the common law and equity was resolved in the leading case of Walsh v. Lonsdale.[23] The West African equivalent of the Walsh v. Lonsdale situation is the Nigerian case of Savage v. Sarrough.[24] In that case the plaintiff and his brother and sister were the owners of certain land and buildings. The plaintiff usually managed the property. In 1932, he let the

/property

22. In Hoare v. Hoare (1936) 13 N.L.R. 28, the plea of election succeeded.
23. (1882) 21 Ch.D. 9. On this subject see any edition of KEETON, Equity; see also Sackey v. Ashong (1956) 1 W.A.L.R. 108 at p. 115 - Ghana.
24. (1937) 13 N.L.R. 141.

property for two years at a rent of £3 a month to the defendant. On the expiration of the two years the defendant stayed on as a monthly tenant at the same rent until the end of August, when the plaintiff and the defendant entered into a new agreement for a term of five years at the same rent. About a year later, the plaintiff received an offer of a higher rent for the premises, and told his brother, P, to press the defendant also to make a higher offer. On the defendant refusing to do so, the plaintiff brought the action.

The plaintiff contended, inter alia, that since the agreement was not under seal it was void. "But the simple answer to this", said KINGDON, C.J., "is that in equity the lease is deemed to have been effectively granted, and for practical purposes the parties are in the same position as if the lease were valid at law".[25]

(4) Delay defeats equities. ([redacted] Vigilantibus non dormientibus jura subveniunt.)[26] It is no exaggeration to state that of all the equitable rules that have been invoked to mould the application of the indigenous West African laws, the maxim "equity aids the vigilant", has been the most active. Thus the doctrine/of

25. Ibid at p. 142. The learned Chief Justice in this case adopted the statement of the law given in Halsbury's Laws of England, 2nd ed, Vol. 20, p. 59. See also Chidiak v. Coker (1945) 14 W.A.C.A. 506 at p. 508.

26. "The maxim does not apply in such circumstances as these to infants" - per KING-FARLOW, J. in the Ghana case of Vanderpuye and other infants v. Cudjoe (1915) K-F 87 at p. 89.

of laches, which is a feature of the maxim, has been frequently applied to customary transactions in order to produce just and equitable results. In this sphere, the superior courts have been guided by the essentials of the doctrine of laches laid down in 1874 by the Judicial Committee in the leading case of Lindsay Petroleum and Co. v. Hurd to be as follows:-[27]

> "Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are not material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

Thus if by the conduct and neglect of the plaintiff a new situation has arisen, the court will not aid the plaintiff to recover his rights on the grounds that it would be unjust to give a remedy. In the Ghana case of Taylor, Laughland and Co. v. Hammond Barnor and Sackey,[28] the defendant, Hammond, was engaged by the appellants as their storekeeper and clerk by an agreement in writing /dated

27. (1874) L.R. 5. P.C. 221 at p. 239.
28. (1893) Ren. 106.

dated October 1, 1889, and signed by Hammond. Under the agreement Hammond's duty was to sell the appellants' goods entrusted to him for that purpose, and to account for theproceeds of sale. In Clause 4 it was provided that "in case of any deficiency in any goods or moneys" for which Hammond was responsible he "shall forthwith make good the value of amount". By an endorsement on the agreement the respondents, Barnor and Sackey guaranteed to the appellants "the due performance" by Hammond of this agreement. The evidence taken in the Divisional Court disclosed that Hammond first received goods from the appellants for sale in October, 1889. The books were made up on December 31, 1889, and Hammond had made a deficit of £4. 6s. 8d. which he paid. In April 1890 there appeared a deficit of £18.19s.0d. which Hammond paid. A deficiency was again discovered in June of that year, and this was stopped from Hammond's salary. From June 1890, notwithstanding the repeated deficits, the books were not made up until January 1892, and all this time the sureties were not informed of any of Hammond's defaults until February 1892.

The question which the Divisional Court had to determine was whether on these facts Barnor and Sackey were liable as sureties. The Court held that they were not liable. On appeal to the Full Court the appeal Court affirmed the judgment of the Divisional Court. REDWAR, J., applying Phillips v. Foxall,[29] pointed out that "this /conduct

29. (1872) L.R. 7 Q.B. 666.

conduct, in my opinion, amounts to such 'laches' as, in equity, entitles the sureties to relief from their obligations".

Laches consists of standing by while an infringement of one's rights is in progress. Thus, where the defendants posted caution notices on both occasions when an infringement of their rights by the sale of their property was attempted, the Court refused to give relief to the purchaser.[30] If a plaintiff holds an equitable title and believes that he has the legal title as well, he should not content himself with mere verbal objection or protests to the persons attempting to deal with the property, for such conduct might amount to laches.[31]

From the conduct of the plaintiff, it can be inferred that he has waived his rights or does not wish to proceed further with the matter in question. In Ephraim v. Asuquo,[32] where the plaintiff sought to revoke a grant of Letters of Administration after a lapse of two years or so, the Court found him guilty of laches. WEBBER, J. delivering the Judgment of the Divisional Court at Calabar, observed:-[33]

> "It is now nearly two years since this grant was made. The plaintiff and his people have had every opportunity of opposing the grant, of which opportunity they have not availed themselves. If they were anxiously desirous of administering

/their

30. Erikitola v. Alli and ors (1941) 16 N.L.R. 56.
31. Laryea v. U.A.C. Ltd. (1939) 5 W.A.C.A. 166 at p. 170 - Ghana.
32. (1923) 4 N.L.R. 96.
33. Ibid, at p.

this estate, why did they wait a whole year to make this first move, and why did they wait another twelve months before getting the case on the hearing list?"

The lapse of time here is presumptive of the fact that the plaintiff did not believe in his cause of action.

As a general rule, the sale of family land, in some parts of West Africa, without the consent of a member of the family whose consent is necessary is voidable by that member,[34] but unexplained delay by him in asserting his right may be deemed to amount to an expression of intention or promise on his part not to exercise that right.[35]

The length of the delay, the inadequacy of the explanation for the delay, and the consequences of setting aside the sale of land as against a bona fide purchaser for ~~maxim~~ value, who had been in occupation of a piece of land during the whole period of nine years, and had apparently altered the structure of the buildings thereon, were held by the Judicial Committee in the Nigerian case of Agbeyegbe v. Ikomi,[36] to have created a "balance of justice" in favour of the respondent within the ambit of the dictum of Lord

/Blackburn

34. Bayaidie v. Mensah (1878) Sar F.C.L. 171 at p. 172.

35. Aganran (Oku substituted) v. Olushi (1907) 1 N.L.R. 67. See also the Gambian case of Jallow v. Jallow (1956) 2 W.A.L.R. 64.

36. (1953) 12 W.A.C.A. 383. See also the Ghana case of Odonkor v. Akoshia F.C. 1926-29, 322 at p. 330.

Blackburn in Erlanger v. New Sombrero Phosphate Company,[37] and that in Lindsay Petroleum Company v. Hurd.[38]

The doctrine of acquiescence is also a feature of the equitable maxim under discussion. In the Nigerian case of Aganran v. Olushi,[39] PENNINGTON, J., defined it as follows:-[40]

> "Acquiescence may be defined as acquiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct. But when once the act is completed without any knowledge or without any assent on the part of the person whose right is infringed, the matter is to be determined on very different legal consideration."

Although one would have wished for a clearer definition, it must be observed that some of the essentials which constitute acquiescence are mentioned, namely, that there can only be acquiescence where there is knowledge, and that a person can be estopped from asserting his rights where he has led the other party to alter his position. In the leading English case of Willmott v. Barber,[41] which has been followed in West Africa without reservation, FRY, J., laid down the conditions which will deprive a man of his rights as follows:-[42]

> "It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view this is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights /unless

37. (1878) L.R. 3 A.C. 1218.
38. (1874) L.R. 5 P.C. 221 at p. 239.
39. (1907) 1 N.L.R. 67.
40. Ibid, at p. 69.
41. (1880) 15 Ch.D. 96.
42. Ibid at p. 105.

unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money, or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it, he is in the same position as the plaintiff, and the doctrine of acquiescenc is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in other acts which he has done, either directly or by abstaining from asserting his legal right When all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the lega right from exercising it, but, in my judgment, nothing short of this will do."

The superior courts in West Africa recognise two degrees of acquiescence: (i) the first degree is acquiescence in occupation over a period, which would bar the original overlord from bringing an action for ejectment, and (ii) the second is such acquiescence as would serve to pass the original rights of the overlord to the occupier. Very much more is required to establish the second than the first.[43]

The elements of acquiescence laid down by FRY, J., calls for a /few

43. Oshodi v. Imoru (1936) 3 W.A.C.A. 93 at p. 95 per KINGDON, C.J. The first degree is characterised by the case of Awo v. Gam (1913) 3 N.L.R. 100; and the second degree is illustrated by Suleman v. Johnson (1951) 13 W.A.C.A. 213 at p. 215. See also Oshodi v. Balogun and ors (1936) 4 W.A.C.A. 1. P.C.

few comments. One point to be emphasised is that the plaintiff, in order to succeed with his plea of acquiescence, must have occupied the land in the mistaken belief that the land was his own. It is evident therefore that mere occupation of land for a long time or lapse of time is not by itself conclusive. Thus, in the Ghana case of Kuma v. Kuma,[44] where evidence was given that the defendant and his ancestors had been in occupation of the land in suit for six generations without let or hindrance by the plaintiff or his ancestors, and without paying any tribute, the Judicial Committee, in advising that the appeal should be set aside, observed as follows:-[45]

> "Their Lordships are not prepared to accept without qualification the evidence as to the length or continuance of the occupation by the defendant and his predecessors, but even assuming that the defendant and his predecessors have been to some extent in occupation of parts of the land in question for some considerable time without paying tribute to the plaintiff or his predecessors, such possession ... is not conclusive evidence of the defendant's title."[46]

But by virtue of the long period of occupation the Courts as a rule can infer acquiescence.[47] There is no hard and fast rule about the

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44. (1936) 5 W.A.C.A. (P.C.) 4. See also Thomas v. Holder (1946) 12 W.A.C.A. 78; Oloto v. Administrator-General (1946) 12 W.A.C.A. 76; Erempong II v. Brempong III (1952) 14 W.A.C.A. 13.
45. Ibid at p. 7.
46. "I say and affirm that such prolonged possession does not destroy the title of the original owner" - per BRANDFORD-GRIFFITH, Ag.J. (as he then was) in Eccobang v. Hagan (1885) Sar F.C.L. 159-60.
47. Miller v. Kwayisi (1930) 1 W.A.C.A. 7; Fiscian v. Tetteh (1956) 2 W.A.L.R. 192.

exact length of time. Whilst the courts sometimes apply the Statutes of Limitations by analogy, they are not bound to do so. It appears that the time factor depends on the circumstances surrounding each case. In one case, eight years after sale was deemed sufficient to establish evidence of acquiescence;[48] in another case it was a hundred years, plus two generations.[49]

Although there is no prescriptive title known to native law and custom, the courts in West Africa, on the grounds of equity, will not allow a party to call in aid strict principles of native law for the purpose of bolstering up a stale claim.[50]

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48. Assraidu v. Dadzie (1890) Sar F.C.L. 174 at p. 176 [Ghana].
49. Yamike v. Adako (1853) Sar F.C.L. 2 [Ghana]; Ilori v. Oloto (1941) 7 W.A.C.A. 154 - 80 years [Nigeria].
50. Rihawi and ors. v. Aromashodun (1952) 14 W.A.C.A. 204 at p.206 [Nigeria]. Macauley v. Chief Bungay 2 S.L.L.R. 22 [Sierra Leone]; Concession No. 38 (Bokitsi No. I.) (1903) Ren. 239 at p. 243.
Note that the Western Nigeria Prescription Law, Cap. 95 (Laws of Western Nigeria, 1959) states by s. 1(2) that nothing in that law affects the acquisition of easements or rights over or in respect of any kind, the tenure of which is subject to customary law. However, in Ghana, the Farm Lands (Protection) Act 1962 (Act 107), seeks to protect farmers whose title to land are found to be defective. But the Act applies to prescribed areas only; section 2(1) reads: "Where a farmer has, in good faith, at any time after the thirty-first day of December, 1940, and before the commencement of this Act, acquired any land by customary law or otherwise, in a prescribed area for purposes of farming and has begun farming on that land within eight years from the date of such acquisition, this section shall, notwithstanding any defect in the title to the contrary, operate to confer valid title on such farmer."

In the recent Ghana case of Cofie v. Ashong[51] VAN LARE, J., (as he then was) stated the law on this point as follows:[52]

> "Although it is true that there is no such thing in native customary law as a prescriptive title, and this has been accepted by the courts to mean that mere use and occupation for any length of time cannot oust an original owner, it is nevertheless good law that a grant by an original owner followed by a continuous occupation and effective possession without payment of rent or dues, coupled with ownership for several years without let or hindrance, gives a valid title."

The defence of estoppel plays an important part in the doctrine of acquiescence. The basis of all estoppel is the principle that where one man has led another to believe something, and the other has altered his position on the strength of that belief, it would be unjust for the man inducing the belief to profit by asserting that the belief was mistaken.[53] In applying this doctrine, the Courts in West Africa have extended the principles laid down in the English case of Ramsden v. Dyson,[54] in determining cases governed by customary law.[55]

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51. (1956) 1 W.A.L.R. 82.
52. Ibid at p. 86.
53. BRUNYATE, J.: Limitation of actions in equity (1932) p. 185 et seq.
54. (1866) L.R. 1. H.L. 129 at p. 140.
55. For case law in Ghana see, e.g. Abbey v. Ollenu (1954) 14 W.A.C.A. 567; Allotey v. Essien (1958) 3 W.A.L.R. 527; Thompson v. Mensah (1957) 3 W.A.L.R. 240; Sarfo v. Bonsu (1957) 3 W.A.L.R. 195. For Nigeria, see Rafat v. Ellis (1954) 14 W.A.C.A. 430.

C. EQUITABLE RELIEF AND REMEDIES

A great portion of the jurisdiction of equity lies in providing relief against the harshness of contractual bargains, which operate according to their strict terms as "penalties" or "forfeitures".[56] The notable examples are the decree of specific performance,[57] injunction, rescission, and rectification, all of which are dealt with adequately in the standard English textbooks on the subject of equity.[58] In West Africa, the principles relating to the grant of equitable relief and remedies have also been extended to transactions governed by customary law. The relief against forfeitures is one good example, and the redemption of customary mortgage another.

Questions of forfeiture frequently arise as a result of: (a) alienation or attempted alienation of the lineage or family property without consent; (b) denial of an overlord's title; and (c) misconduct.[59]

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56. EVERSHED, Sir Raymond (as he then was): Aspects of English equity, p. 29.
57. "The doctrine of specific performance is an equitable relief and will never be granted where it will cause hardship to third parties unless it can be shown that such third parties were aware of the existence of the contract of which the plaintiff is claiming specific performance" - per HARRIGAN, C.J., in Taylor v. Arthur (1947) 12 W.A.C.A. 179, at p. 180.
58. E.g. the current edition of SNELL'S, KEETON'S, HANBURY'S and NATHAN'S.
59. On forfeiture in Nigeria, see BROOKE, N.T. "Some legal aspects of land tenure in Nigeria" (1947) 5 Afr. Stud. 211, 218 et seq. ELIAS, T.O. Nigerian land law and custom; COKER, G.B.A. Family property among the Yorubas, p. 83 et seq; MEEK, C.K. Land tenure and land administration in Nigeria and the Cameroons, p. 129.

Although alienation, of attempted alienation, of lineage or family land without consent is considered a serious breach in customary law,[60] the superior courts do not readily allow forfeiture to take its course. As OLDENNU, J. has pointed out in the Ghana case of Thompson v. Mensah,[61] "forfeiture according to native custom is not an automatic consequence which must of necessity attend a breach of a condition of grant". Again, according to customary law, the denial of an overlord's title used to be considered as a grave breach, but in modern times, liability to forfeiture in such cases has been modified by the courts in the exercise of their equitable jurisdiction. The attitude of the superior courts is illustrated by the Nigerian case of Ogbakumanwu of IWollo Oye and ors v. Chiabolo of Agbogbo Awha and ors.[62] In this case, the plaintiffs sued the defendants for damages for trespass, and the defendants alleged that the land originally belonged to the Awha people, and that it was jointly farmed by themselves and the plaintiffs. To this the plaintiffs replied that the defendants, having denied the plaintiffs' title, forfeited their rights as customary tenants and were therefore trespassers. Such a claim was rejected by HALLINAN, J., who

60. Onisiwo and ors. v. Gbambone (1941) 7 W.A.C.A. 69.
61. (1957) 3 W.A.L.R. 240 at p. 247.
62. (1949) 19 N.L.R. 107.

who distinguished between a mere denial of a landlord's title from cases where the misconduct was serious. The learned judge conceded that there had been a breach which under native law might amount to forfeiture, but he added:-

> "I doubt whether upon a denial of the landowner's title the Native Court would ipso facto order a forfeiture, and in any case I must consider whether the native law and custom is consonant with natural justice, equity and good conscience." [63]

In another case,[64] DE COMARMOND, S.P.J., stated that in his opinion the right of forfeiture under customary law was an "irksome or outmoded law" and that it was high time legislative action was taken.[65] One can well sympathise with that dictum, for the consequences of forfeiture under customary law are drastic. It is submitted that the judgment in the case of Inasa and ors v. Chief Oshodi,[66] that a breach of tenure under native law and custom committed by the head of the tenant family involves the whole family in the forfeiture of the property, would not be followed in modern times.

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63. Ibid at p. 108.
64. Onisiwo v. Fagbenro and ors (1954) 21 N.L.R. 3.
65. But note that s. 14 of the English Conveyancing and Law of Property Act, 1881, which deals with relief against forfeiture of leases governed by English law applies in Nigeria.
66. (1930) 10 N.L.R. 4. On appeal to the Privy Council, (1933) 11 N.L.R. 10; [1934] A.C. 99; the comments of the Judicial Committee are instructive. In the former Sierra Leone Protectorate, the liability for the misconduct used to be one of banishment from the Chiefdom - see Bongay v. Macauley (1932) 1 W.A.C.A. 225.

The right of redemption of customary mortgage is another topic which is being gradually modified through the jurisdiction of equity. In English law, the right to redeem, whether legal or equitable, is barred if the mortgagee remains in possession of the mortgaged land for twelve years without giving an acknowledgment of the title of the mortgagor or his equity of redemption. This is a statutory provision.[67] There is no such provision affecting the right of redemption in the customary laws of West Africa. As long ago as 1882, in the Gold Coast (Ghana) case of Incroma v. Harmon,[68] BAILEY, C.J. after listening to the views of his assessors, stated the principle in these words:

> "No right of possession by a mortgagee could vest ownership of mortgaged lands in such a mortgagee. No length of even adverse possession would entitle the mortgagee to oust the claim of the mortgagor to the mortgaged debt."

Only recently, LANGLEY, J., reiterated the rule thus:[69]

> "It is established law that a pledgor can redeem his land after any lapse of time. However much one may feel that, with changing conditions, there ought to be some limitation of this doctrine, it is a well established principle and it is not open to this Court to depart from that principle."

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67. MEGARRY, R.E. and WADE, H.W. The Law of Real Property (1st ed) p. 902.
68. (1882) Sar F.I.P. 157. See also Ikeanyi and anor v. Adighogu (1957) 2 E.R.L.R. 38.
69. Kuma v. Kofi (1956) 1 W.A.L.R. 128 at p. 130.

It is the practice these days for a fixed time, within which the pledge or customary mortgage should be redeemed, to be agreed upon. Moreover, there is a tendency shown by the courts to ensure that native law and custom is not used as an instrument to do injustice. Indeed, in the Ghana case of Adobea v. Lassey,[70] a High Court Judge (formerly Supreme Court) ruled that where an order of the court is sought and obtained for the enforcement of a customary right to redeem a pledge, a customary right becomes merged in the court order, so that if the pledge is not redeemed within the period allowed for redemption by the order, the right to redeem it is lost.

D. TRUSTS[71]

> "Of all the exploits of equity, the largest and the most important is the invention and development of the trust."

These are the words of Maitland.[72] In the course of his lecture the learned professor ascribed the invention of the Law of Trusts to the work of English lawyers. It should be pointed out that the institution of trusts is not peculiar to English law.

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70. (1956) 1 W.A.I.R. 181.
71. This section is discussed more fully in my LL.M. thesis.
72. MAITLAND: Equity: a course of lectures, p. 23.

Thus, writing about the Katab of Northern Nigeria, one learned author records:[73]

> "If the sons are too young to inherit the various kinds of property enumerated above, the property is held in trust for them by their father's brother or paternal cousin, who restores it when they reach the age of discretion, or gives them the equivalent either in kind or by meeting the marriage expenses of their wards."

It is evident that the word "trust" is being used in this context in the customary law sense. In West Africa, therefore, there exist two types of trusts; one operating under customary law and the other under the general or English law. There are differences between the two types. For example, ~~[illegible]~~ section 53(1)(b) of the English Law of Property Act, 1925, (which is the same as the Western Region legislation,)[74] stipulates that "a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing, signed by some person who is able to declare such trust or by his will." According to customary law, however, writing is not essential. Thus among the Mende of Sierra Leone:

> "the individual inheriting land automatically becomes head of the family concerned and trustee of its property, and in acknowledging his position the other members look to him/to

73. MEEK, C.K. "The Katab and their neighbours" (1928) J.A.S. 265-273 at p. 266.
74. Western Nigeria. Property and Conveyancing Law. Cap. 100. Section 78(1)(b).

to fulfil the double responsibility."[75]

The mere fact that writing was absent in the creation of a trustee according to customary law does not necessarily make the position of a trustee less responsible. In England, under the common law, a trust could be created without deed, without writing, without formality of any kind, by mere word of mouth. According the the preamble of the Statute of Uses it could be created by signs.[76]

In recent times there is a tendency either through legislative action or by judicial decisions to merge the two types of trusts. The Communal Land Rights (Vesting in Trustees) Law,[77] is one such example. Under this law, the Governor in Council may declare those chiefs whose chieftaincy titles are associated with a particular community to be the traditional authorities there.[78] Where any chiefs have been declared under this law to be the traditional authority in respect of that community, the Regional Minister responsible shall appoint them as the trustees of communal rights in respect of that community.[79] The communal rights recorded in the trust instrument are vested in the trustees,[80] and all the

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75. "Land and labour among the Mende" (1947) 47 African affairs, p. 23 et seq at p. 25.
76. MAITLAND. Equity, Lecture 5. KEETON, G.W. The law of trusts, 5th ed. (1949) p. 50.
77. W. Nigeria Laws (1959) Cap. 24.
78. Ibid, s. 3(b).
79. Ibid, s. 7(1). Here, the Chiefs will be acting as trustees in the strict legal sense.
80. Ibid, s. 5(1).

revenue received in consequence of the exercise of communal rights must be applied or disposed of by the trustees in accordancw with the provisions of the trust instrument by which they are appointed, and not otherwise.[81] Other provisions deal with the powers of the trustees, breach of trust, and removal of the trustees. It can be seen from the foregoing that the aim of the legislation is to regularise the role of the traditional authorities to suit modern conditions.

Although according to the customary laws in some parts of West Africa a head of a family was not liable to render a strict account to the members of the family, recent judicial decisions show that an unscrupulous and callous head, who exploits this custom to the detriment of the individual members of the family, will not escape liability.[82] On the question of the duties of the head of a family in Nigeria, ROBINSON, J. observes:e[83]

> "He cannot treat house money as his own. If it is his own, he can throw it away or misuse it. He cannot do that with house money, although I think he can spend it without consulting any member, if he thinks reasonably it is in a good cause and for the good of the house. He should certainly keep accounts and work on some rules, either laid down by himself or, preferably, after consulting with the heads of his house."

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81. Section 6.
82. This topic is discussed in detail in my LL.M. thesis.
83. Chief Eyo Archibong and ors. v. Etubom Archibong and ors. (1947) 18 N.L.R. 117 at p. 123.

As far as the general laws of trusts are concerned, it need only be said that the various local statutory laws are based on the English legislation.[84] These laws are in addition to the Acts of the British Parliament which are in force locally.

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84. E.g. Public Trustee Law, Cap. 108, and Trustee Law, Cap. 125 of Western Nigeria.
85. Ss. 7 and 8 of the Statute of Frauds, 1677. See also Akwei v. Akwei (1943) 9 W.A.C.A. 111 at p. 116.

PART FIVE

1. STATUTES OF GENERAL APPLICATION

2. THE COMMON LAWS IN WEST AFRICA

Chapter Eight

STATUTES OF GENERAL APPLICATION

A. THE MEANING AND SCOPE

In West Africa, the Common Law of England has generally been received together with such statutes of the United Kingdom Parliament as were enacted before local legislatures were established. Thus in the Gambia, the Supreme Court is empowered to administer, "the Common law, the doctrines of equity, and the statutes of general application in force in England on the 1st November, 1888".[1] As has been mentioned elsewhere, the operative date in Ghana is 1874; in Sierra Leone, the date is 1880 and in the Federation of Nigeria (except the Western Region) the date is 1900.

An Act of the British Parliament enacted after the establishment of a local legislature does not apply to a West African country unless:

(a) it is expressly extended to that country;

(b) that country is expressly mentioned; or

(c) it is adopted by an Act of the local legislature; or

(d) it is re-enacted locally.

The expression "Statutes of general application" refers, therefore, to statutes in force in England antecedent to the establishment of a local legislature in any part of West Africa.

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1. Laws of the Gambia (1955 Rev.) Cap. 3, s. 2.

If the expression simply meant all statutes in force in England, there would have been no difficulty in ascertaining what laws ought to apply in West Africa and what laws ought not to apply. The various legislative provisions refer to so much of the statutes of England as are of general application.

The task of ascertaining what are statutes of general application is further complicated by the fact that it is the courts and not the legislature which usually exercise the authority in determining what statutes are of general application and what are not. The approach of the courts to this problem has not been systematic. Therefore it is not always possible to know the tests used by the courts in determining the issue. As will be shown later, one court may regard an English statute to be [redacted] a statute of general application, whilst another judge may decide differently. A few examples may be selected to illustrate the way in which the courts set about their work. In the Ghana case of Des Bordes v Des Bordes,[2] which turned on the jurisdiction of the court to grant a decree of divorce, MACLEOD J., had to consider whether the Marriage Acts of England before 1874 were statutes of general application. The following is the reasoning of the learned judge:

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(2) (1884) Sar. F.C.L. p. 267

"Now what is meant by 'statutes of general application'? That expression cannot mean statutes which apply to the whole United Kingdom for this court constantly enforces the provisions of statutes which do not apply to Scotland; neither can that expression mean those statutes which are printed under the designation 'Public General Statutes', for statutes which apply to Scotland alone, are among the 'Public General Statutes", neither does that expression indicate those statutes which apply to the whole of England, for the Full Court (sitting at Lagos) has decided that the Bankruptcy Acts of England are not operative here.

"The Marriage Acts of England are of general application when compared with some statutes,[3] and of particular application when compared with other statutes, and I am afraid I must designate those words 'statutes of general application' as a slovenly expression, made use of by the Legislature of this Colony to save itself the trouble of explicitly declaring what the actual law of the Colony shall be.

"I am not aware of anything in the Marriage Acts of England which makes them of more general application than the Bankruptcy Acts; it is my duty therefore to follow the Full Court (though I do not by any means say that I concur with the Full Court), and declare that the Marriage Acts of England are not operative within this Colony . . . The same Ordinance to which I have already alluded, [The Supreme Court Ordinance, 1876], makes operative within this Colony the Common law of England . . . That Common law which was in force in England until July 24, 1874. But at that date there was, on the subject of marriage, no Common law operative in England, for it had been swept away by statutes. This Colony is deprived (1) of the presently existing Marriage Acts of England, and (2) of the old Common law."[4]

The exhaustive dictum of the learned judge calls for a few comments. Firstly, it may be remarked that the meaning ascribed to the expression "statutes of general application" is on the whole commendable. However, it can hardly be described as a definition of that expression. The learned judge tried to define the expression by stating

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(3) Namely, The Marriage Act of 1823 (4 Geo. 4 C.76), and The Marriage Act of 1836 (6 & 7 Will. 4 C.85)

(4) For another exposition on the topic see Dede v African Association Ltd. (1910) 1 N.L.R. 131

what "statutes of general application" are not; but he was silent on what "statutes of general application" actually are. Secondly, it will be remembered that, having examined the provisions of the relevant Marriage Acts of England, the learned judge concluded that when compared with some other English statutes they could be classified as statutes of general application within the provisions of the Supreme Court Ordinance of 1876, yet when he had to decide whether those Acts could be applied in the Gold Coast Colony as statutes of general application, the learned judge was swayed not by the provisions of the English Marriage Acts themselves, but by a decision of the Full Court which ruled that the English Bankruptcy Act was not a statute of general application in Lagos. It is submitted that the learned judge could have distinguished the two cases without much difficulty. He admitted that the Supreme Court Ordinance, 1876 extended to the Gold Coast only the Common law of England which existed in England until July 24, 1874. But as at that date, in the words of the learned judge himself, the Common law operative in England on the subject of marriage, had been swept away by statutes, he should have realised that to hold that the relevant English Marriage Acts were not applicable in the Colony, would have left the Colony, as it did, without any

law with regard to marriages governed by English law.[5] The fact that a Common law rule has been abrogated by statute clearly shows that the legislation takes the place of the Common law rule.

Secondly, as it has already been pointed out, the learned judge's main reason for declaring that the English Marriage Acts were not statutes of general application, was due to the fact that the Full Court had decided that the English Bankruptcy Act of 1869 was not a statute of general application. We now know that this was not the way the Privy Council considered the question in Callender, Sykes & Co. v Colonial Secretary of Lagos & ors[6] on appeal from the Supreme Court of Lagos. All that the Judicial Committee decided was that, the Supreme Court of the Gold Coast Colony had no bankruptcy jurisdiction in 1877, and therefore could not act as an auxiliary to the English Court under Section 74 of the Bankruptcy Act, 1869. The Judicial Committee held further, that the English Bankruptcy Act of 1869 applies to all Her Majesty's dominions. It can therefore be surmised that if MACLEOD J., had had the benefit of the ruling of the Privy Council on the "bankruptcy question", his decision on the application of the English Marriage Acts in the Gold Coast

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(5) Indeed the first Marriage Ordinance for the Gold Coast Colony was passed in 1884 No. 4 of 1884.
(6) [1891] A.C. 460

before the enactment of a local legislation in 1884, might have been different.

Apart from these comments, it is submitted that the tests suggested by MACLEOD J., for the ascertainment of statutes of general application are very instructive. For example as it can now be inferred in the learned judge's dictum, the expression refers to statutes of general application in force in England; therefore the fact that a statute in force in England does not apply to Scotland or Ireland does not deny it the status of a statute of general application. It is submitted that the method of approach adopted by the West African Court of Appeal in Okpaku v. Okpaku[7] to the effect that a statute of general application is one that applies to Scotland and Ireland is questionable. It is unfortunate that the attention of the Appellate Court was not drawn to an earlier decision of its own in Young v Abina.[8] In this case the West African Court of Appeal held that the decision given in a Nigerian case In re Sholu[9] to the effect that the English Land Transfer Act of 1897 did not apply in Nigeria was erroneous. As the court in Young's case put it:[10]

"It would appear that the basis of this reasoning was that the Land Transfer Act applied to England only and not to Scotland or Ireland. We are unable to agree with this view. It seems to us that the words of 'general application' are used with reference to the matter of the statutes and not only geographically. Also it seems to us that under section 14, England is the test of

(7) (1947) 12.W.A.C.A. 137 (8) (1940) 6. W.A.C.A. 180
(9) (1932) 11.N.L.R. 37 (10) 6. W.A.C.A. at p. 184

geographical generality."

The other case which illustrates the method of ascertaining whether a statute is one of general application is the Grenada case of Attorney-General v Stewart[11]. The question involved in that case was whether the statute of mortmain[12] applied in Grenada; and on this point Sir WILLIAM GRANT, the Master of the Rolls, made the following observations:

"Whether the statute of mortmain be in force in the island of Grenada, will, as it seems to me, depend on this consideration - whether it be a law of local policy adapted solely to the country in which it was made, or a general regulation of property equally applicable to any country in which it is by the rules of English law that property is governed. I conceive that the object of the statute of mortmain was wholly political - that it grew out of local circumstances, and was meant to have a merely local operation. It was passed to prevent what was deemed a public mischief, and not to regulate, as between ancestor and heir, the power of devising, or to prescribe, as between grantor and grantee, the forms of alienation. It is incidnetally only, and with reference to a particular object, that the exercise of the owner's dominion over his property is abridged.

". . . . What the legislature had to consider was, whether, as there was so much of the land of England already in mortmain, it was not expedient to lessen the facility of putting more of it into that situation. That was a consideration purely local. It related to land in England and to land in England only. The statute contains some exceptions. These exceptions are also local, and still further show the local nature of the law, and how little it can be considered as a general regulation of property . . . But, framed as the Mortmain Act is, I think it is quite inapplicable to Grenada, or to any other Colony. In its causes, its objects, its provisions, its qualifications and its exceptions, it is a law wholly English, calculated for

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(11) (1816) 2 Mer. 144 at 160 et seq
(12) (1735) 9 Geo. 2 C.36. It is described in the statutes at large as "An Act to Restrain the disposition of lands, whereby the same become inalienable".

purposes of local policy, complicated with local establishments, and incapable, without great incongruity in the effect, of being transferred as it stands into the code of any other country. I am of opinion, therefore, that it constitutes no part of the law of the island of Grenada, and that the exceptions must consequently be allowed."

The illuminating opinion given by the learned Master of the Rolls shows that not only must a statute of England be examined to see whether it is one of general application, but also the object of the legislation must be considered.[13] As to whether the test suggested by Sir William Grant is comprehensive is another matter. On this point it is interesting to note that as early as 1845 in Upper Canada, the Court of Queen's Bench in Doe. Anderson v Todd[14] held that the English Statute of Mortmain applied in Upper Canada as a statute of general application in spite of the decision in The Attorney-General v Stewart. Robinson C.J., expressed himself as follows:[15]

"I think the reasoning of the Master of the Rolls, [in Stewarts' case] is obvious and irresistible, and that it should lead us to say, that the legislature if they had given no evidence of their intention than is to be found in Statute 32 Geo. 3 Ch. 1, [a local statute] did not intend by that Act to introduce the Statutes of Mortmain, among which the 9th Geo. 2 is usually though not very accurately classed. But my opinion is, that we cannot properly hold

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(13) In Whicker v Hume (1858) 7 H.L.C. 124, the House of Lords held that the Mortmain Act did not extend to New South Wales. "Now I think, upon general principles, if the question were without reference to any act of the legislature, whether the Mortmain Act was applicable to the situation of New South Wales, I should most decidedly, without any hesitation, come to the conclusion that it was not;" - per Lord CHELMSFORD, L.C., at p.151.

(14) 2 U.C.Q.B. 82. It was also held to be applicable by the Court of Chancery of Ontario in Corporation of Whitby v Liscombe (1875) Grants Ch. R. (O. Can.) p.1.

(15) ibid at p. 88

that opinion now, after the legislative exposition, which has been afforded, and especially in recent times, of the assumed effect of that statute. The legislature it is admitted, are the best interpreters of their own laws; and to say nothing of other evidences they have given of their understanding upon this point, by the Church Temporalities Act, passed in 3 & 4 Vict., Ch. 78, they have provided that lands may be conveyed to such uses, for the benefit of the United Church of England and Ireland in this province, as would clearly have been prohibited by the British Statute 9 Geo. 2, and they have shown it to be their understanding, that without such express legislative authority the English Statutes of Mortmain would have restrained parties from making such a disposition, for they have added the words 'the Acts of Parliament commonly called the Statutes of Mortmain or other acts, laws or usages to the contrary thereof notwithstanding;'"

The crux of the learned Chief Justice's point is that since the local legislation, the Church Temporalities Act, was passed on the assumption of the Statutes of Mortmain being in force there, it was not permissible for the Court to hold otherwise. The Canadian case therefore does not conflict with the dictum of the Master of the Rolls in Stewart's case.

The meaning and method of ascertainment of a statute of general application was discussed in yet a third case decided in Nigeria. The case is unreported but the language used was cited in Attorney-General v Holt & ors[16] by the Full Court and it is as follows:

"No definition has been attempted of what is a statute of general application within the meaning of section 14, [of the S.C.O. which introduces English law] and each case

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(16) (1910) 2 N.L.R. 1 at p. 21. The judgment of the Full Court on the substantive point was set aside by the Privy Council in A.G. of Southern Nigeria v HOLT [1915] A.C. 599. The unreported case referred to above is Re Public Lands Ordinance, Lawani Bale, Claimant- Exparte Joseh. 1910.

has to be decided on the merits of the particular statute sought to be enforced. Two preliminary questions can, however, be put by way of a rough, but not infallible test, viz.: (1) by what courts is the statute applied in England? and (2) to what classes of the community in England does it apply? If, on the 1st January, 1900, an Act of Parliament were applied by all Civil or Criminal courts, as the case may be, to all classes of the community, there is a strong likelihood that it is in force within the jurisdiction. If, on the other hand, it were applied only by certain courts (e.g., a statute regulating procedure)[17] or by certain classes of the community (e.g., an Act regulating a particular trade), the probability is that it would not be held to be locally applicable."

The view that you can determine whether a statute is or is not one of general application in England according to whether it is to be applied by a special court is questionable. This argument was put forward in the British Columbia Case of S v S (1877) without success.[18] The main question at issue was whether the British Columbia Proclamation declaring that "the Civil and Criminal laws of England, as the same existed on the 19th day of November, 1858, and so far as the same are not from local circumstances inapplicable, are and shall be in force in all parts of the Colony of British Columbia," gave jurisdiction to the Supreme Court of British Columbia to suits in divorce. In other words by virtue of that Proclamation, did the English Divorce and Matrimonial Causes Act, 1857 become operative in British Columbia, and did the Supreme Court have

(17) But the Common Law Procedure Act, 1852 which regulated the procedure and practice in the Superior Courts of Common Law at Westminster, has been held to be a Statute of general application. see Ribeiro v Chahin (1954) 14 W.A.C.A. 476

(18) (1877) 1 B.C. (pt.I) 25 followed in Sheppard v. Sheppard (1908) 13 B.C. 486. Lord BLACKBURN has also said of Colonialists that "they cannot be expected to take out with them all the machinery of the law; they cannot take out with them the judges, and justices of the Peace, & quarter sessions and everything of that kind that is established in England." - The Lauderdale Peerage (1885) L.R. 10 App. Cas. 692 at p. 746

jurisdiction to grant divorces? It had been argued that since the type of special court set up in England had not been established in British Columbia, the Act did not apply. This argument did not impress the learned judges. The observations of Gray J., are instructive:[19]

"The principle of the English Divorce Act not being inapplicable, have we the machinery to carry it out, in the case of a local marriage, or is all this legislation to be nugatory because we have not? A Lord Chancellor, a Lord Chief Justice of the Court of Queen's Bench, a Lord Chief Justice of the Common Pleas, a Lord Chief Baron of the Exchequer or a Judge of the Court of Probate Constituted by Chap. 77, passed by the Imperial Parliament in the same session, to be called the Judge Ordinary), being the special tribunal, of whom any three, the Judge Ordinary being one, is to constitute the Court in England under this Act. Or, in such a case, must the injured party necessarily go to England, before this specific tribunal, to get his remedy? . . . Does not the Supreme Court of this Province exercise the powers of the Chancery and the Exchequer, without a Chancellor or a Baron? In no instance has it been deemed necessary to have the English machinery; we adopt the principles and the rules of practice, but not the officers of a court . . . The action of Local Legislatures, in adopting laws and creating tribunals for local purposes, when constitutionally taken, must be received as a legislative declaration that for all local purposes those tribunals are competent to carry out these laws. If this principle be sound, when the Legislature of British Columbia after the Union in 1867, adopted for the whole of the Province the English law as it existed on the 19th November, 1858, which permitted pleas of divorce and matrimonial causes, and at the same time merged the two pre-existing courts into one, with the combined powers of both, with power to have "complete cognizance of all pleas whatsoever," it was a clear legislative declaration that in all local matters of this nature, that court as then constituted, had jurisdiction and was empowered to act. It would be inconsistent to hold that we adopt an English remedial law for local purposes, but when you want to use the remedy you must go to England to get it. When adopted it becomes local law."

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(19) (1877) 1 B.C. (Pt. I) at p. 31

Since the decision in S v S, jurisdiction in divorce cases has been uniformly exercised by single judges of the Supreme Court in British Columbia. Martin J., in Watts v Watts[20] refused to follow it but on appeal to the Privy Council, their Lordships allowed the appeal and placed the question beyond discussion that the Supreme Court in British Columbia had jurisdiction in divorce cases for the reasons already given by GRAY and CREASE J.J. in S v S.[21]

Other tests may be suggested. It is evidenct that if a statute of England merely declares the Common law, there is a strong reason for believing that such a statute is one of general application. Mr. West's opinion on this topic given to the Lands Commissioners of Trade and Plantations in 1720 is as follows:[22]

> "The Common Law of England, is the Common Law of the Plantations, and all statutes in affirmance of the common law passed in England, antecedent to the settlement of a Colony, are in force in that Colony, unless there is some private Act to the contrary; though no statutes made since those settlements, are there in force, unless the colonies are particularly mentioned."

This test does not present any difficult problems. If such a declaratory statute was passed in England before the founding of the settlement of before a local legislature was set up, it is submitted that it ought to be

(20) (1907) 13 B.C.R. p.281. On appeal see [1908] A.C. 578
(21) Ante p. 464
(22) See CHALMERS, G., Opinions of Eminent Lawyers on various points of English jurisprudence chiefly concerning the Colonies, Fisheries and Commerce of Great Britain. Burlington (1858) p. 206

regarded as one of general application. Indeed if even it was enacted after the setting up of a local legislature such as the Sale of Goods Act, 1893 with regard to its application in Ghana, it will not make much difference. On such occasions, it becomes the tendency of the courts of the receiving country to refer to the provisions of the declaratory statute, not because they regard such an Act as being in force there, but [illegible] because, it merely records what is the common law on a given topic.

The next proposition is that statutes which alter the common law (termed remedial statutes) or are in derogation of it, and statutes which abrogate the common law antecedent to the establishment of a local legislature, generally fall within the category of statutes of general application. The danger involved in not regarding such statutes as those of general application, is that in the absence of a local legislation, the receiving country may be left without either the common law or the statute law on a particular topic. It can hardly be the intention of the "donor" country which in this case is England, and the receiving country, that there should be a lacuna in the law. Statutes of this nature passed in England after the establishment of the local legislature in West Africa, as have been already pointed out, do not apply to the countries concerned, even though they fall within the category of statutes of general application. The disadvantages

inherent in the latter statement just made have been discussed elsewhere.[23]

B. THE DECLARING AUTHORITY

It has already been stated that the duty of deciding whether a statute of England is one of general application or not has generally been exercised by the judges of the receiving countries, namely West Africa. We have also seen that the courts are not consistent in their method of approach. Hence it may be postulated that the "declarations" made by judges acting alone could open the door to much controversy and render the law uncertain. Further, as one "wrong declaration" even by a court of first instance, may perpetuate a bad law, it is evident that the part to be played by the legislature should be great. Indeed as one Canadian Chief Justice put it "We can hardly suppose a point more especially within the province of the legislature to decide, than whether a particular part of the statute law of England is or is not so far in its nature applicable to the state of things in this province."[24]

However, if one looks back into the Colonial days, one finds that the local legislatures have functioned mainly in the negative sense. Thus section 2 of the

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(23) See ante Parts I and II
(24) [redacted] Doe. Anderson v. Todd. 2 UC. QB. 82 at p 89.

Gold Coast Statute Law Revision Ordinance No. 1 of 1893, stipulated that notwithstanding section 14 of the Supreme Court Ordinance, 1876, (which extended English statutes of general application to the Colony) twenty-one statutes which fell within the category of ~~statutes~~ statutes of general application in force in England, were declared "not to be in force within the jurisdiction of the Supreme Court". One such statute was "An Act for the more effective prevention of crime".[25]

Perhaps the first full-scale attempt by a Colonial legislature to determine how much of English statutes ought to be regarded as applicable locally, is the one illustrated by the "Declaratory Act of the Bahama Islands".[26] Its full title is,"An Act to declare how much of the laws of England are practicable within the Bahama Islands, and ought to be in force within the same." It gave a full and clear account of which part of English law should be deemed in force and binding in the Bahamas, instead of leaving it to the varying discretion of the judges from time to time as has been the normal practice elsewhere.[27] The preamble to the Act declared that "the Common law of England in all cases, where the same hath not been altered by any of the Acts or Statutes hereinafter enumerated,or by any Act or Acts of the Assembly of these islands, (except so much thereof as hath relation to the ancient feudal tenures, to

(25) 34 & 35 Vict. C.112
(26) (1799) 40.Geo.3,C.2(Bahamas Legislation). LEWIS G.C., Op.cit. p. 191. See also MALCOLM O.D.: "Modes of Legislation in the Bahamas" (1899) I.J.Comp.Leg(N.S.) No.2 p. 296
(27) CLARK C.: A Summary of Colonial Law (1834)p.368. The full text of the Act is contained in HOWARD'S The Laws of the British Colonies in the West Indies (1827), Vol. 1, p. 341

outlawries in civil suits, to the wager of law or of batail, appeals of felony, writs of attaint, and ecclesiastical matters) is and of right ought to be, in full force within these islands, as the same now is in that part of Great Britain called England." Section 2 provided that "the several statutes and Acts of Parliament hereinafter particularly enumerated and mentioned, are, and of right ought to be, in full force and virtue within and throughout this Colony, as the same would be if the Bahama Islands were therein expressly named, or as if the afrosesaid Acts and Statutes had been made and enacted by the General Assembly of these Islands." The titles of a large number of English statutes enumerated, began with 9 Hen. 3. C. 3. and ended with 27 Geo. 2. C.3.[28]

By section 3, it was stipulated, that:

"All and every of the Acts, Statutes, and parts of Acts and Statutes of the Parliament of England or Great Britain, which relate to the prerogative of the Crown, or to the allegiance of the people, also such as require certain oaths (commonly called the state oaths) and tests to be taken or subscribed by the people of Great Britain, also such as declare the rights, liberties, and privileges of the subject are, and of right ought to be, of full force and virtue within this Colony, as the same would be if the Bahama Islands were therein expressly named, or as if the aforesaid Acts and Statutes had been made and enacted by the General Assembly of these Islands."

By section 6, it was declared, "That the several Acts and Statutes hereby declared to be in force shall be taken, construed and executed liberally and according to the substantial effect and meaning of the same and

(28) i.e. From 1225 - 1787

provided also, that nothing herein contained shall extend or be construed to extend, or abridge, alter or repeal any Act or Acts of the General Assembly of these Islands, or any article, clause, matter or thing herein contained."

The Western Region of Nigeria is the first African country to have embarked upon a similar venture to prescribe the exact number of English statutes which are in force in that Region. A Law Revision Committee set up for that purpose went through all the English legislation passed from the thirteenth century to the twentieth century (1899 to be exact). All the statutes selected for that period and a number of post-1900 statutes, including the Law of Property Act 1925, have been re-enacted locally with slight modifications. By section 4 of the Law of England (Application) Law, 1959,[29] it is provided that "Subject to the provisions of this Law no Imperial Act hitherto in force within the Region shall have any force or effect therein; provided that, subject to express provisions of any written law, this section shall not-

(a) revive anything not in force or existing at the commencement of this Law; or

29. Laws of W.R. 1959. Cap. 60. But note; s. 6 provides that "Nothing in this Law shall affect or apply to any Imperial Act which by express words or by necessary intendment applies to 'Her Majesty's dominions or other possessions'". By s. 7 it is provided that nothing in this Law shall affect or apply to or be construed as affecting or applying to the provisions of any Imperial Act relating to any matter in respect of which the exclusive power to enact laws is conferred on the Federal Legislature.

(b) affect the previous operation, of any Imperial Act to which this section applies or anything duly done or suffered under any such Act; or

(c) affect any right, privilege, obligation or liability accrued or incurred under any such Act; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any such Act; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if this Law had not been passed."

By section 3, the "Common law of England and the doctrines of equity observed by Her Majesty's High Court of Justice in England shall be in force throughout the Region."

C. CONDITIONS OF APPLICABILITY

By way of introduction, it may be apt to reproduce the language of GRAY J., a British Columbian Judge, which is as follows:[30]

"The application or non-application of a statute, or any particular part of it, does not rest upon the view

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(30) (1877) 1 B.C.R. 1 at p. 36

or opinion of any one person, however conscientious he may be, but upon the wants and necessities of the community; nor does it depend upon the frequency or common nature of the subject legislated upon. It is sufficient if the evil ever occurs. The moment it does, the statute applies. The mere fact that there has been no call for its application in the particular direction since the introduction of the statute is no answer. Its powers may be dormant for years; lapse of time will not destroy them. The occasion which requires the remedy, and the demand for it, at once give the needed vitality, unaffected by the previous non-user."

The first condition that must be satisfied before an English statute can be applied in West Africa is that such statute must be in force in England at the due date, i.e. before the establishment of a local legislature. In Ghana the date of the first establishment of a local legislature is July 24, 1874. It has been held, therefore, that the Judicature Act of the Imperial Parliament, which was enacted in 1873 but did not come into force until November 1, 1875 does not apply there.[31]

The second condition is that such Acts of the British Parliament which are declared to extend or apply in the West African Countries, are considered to be in force "so far only as the limits of the local jurisdiction and local circumstances permit and subject to any existing or future local Ordinance.[32] Even where it is not expressly stated in the

(31) See The Colonial Bank v Bellon F.C. 1923-5, 173 at p. 177. Lomas v Pappoe F.C. 1926-9. 220 at p. 225. But local legislation has re-enacted all the essential provisions of the Judicature Acts 1873-1925.

(32) Gambia. Law of England (Application) Ordinance. Cap. 3.S. 3(1). In the Republic of Ghana, it is enacted that such statutes apply provided that they are "subject to such modifications as may be requisite to enable them to be conveniently applied in Ghana - Courts Act.(CA9)S.154(4). See also Neo v Neo (1875) L.R.6. P.C.381; applied in Penhas v Eng[1953] A.C.304 and in Leong v Chye [1955] A.C.648

legislation that such statutes should apply subject to local conditions, it must be implied, "because it would be absurd to suppose that the common law is to prevail in the Colony only if suitable, and that laws [statutes] abrogating it are to prevail whether suitable or not."[33] Thirdly, as these statutes are applicable "subject to any existing or future local Ordinance, it follows that when a local enactment has been enacted on a subject of English law, it is not permissible to pray in aid the provisions of any English statute of general application covering the same point. In the Ghana case of Inspector-General of Police v Kamara,[34] the question to be decided by the West African Court of Appeal was as follows:

"(1) Is the Summary Jurisdiction Act of 1848 in force in the Colony, and
(2) if so, does section 11 thereof apply to summary trials before a Police Magistrate?"

The Appellate Court were agreed that that Act was a statute of general application, but it also observed that the Act was to be in force only so far as local circumstances permitted. In holding that the statute in the circumstances could not be applied in Ghana, the Court was guided by

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(33) Jex v McKinney (1889) L.J.P.C. 67 at p. 69. The sole question in this case was whether the Mortmain Act was in force in British Honduras as a statute of general application.

(34) (1934) 2 W.A.C.A. 185

the following reasoning:[35]

"First of all it is very doubtful if a statute like the Act of 1848 could be held to apply to the Police Magistrates' Court of this Colony, which are branches of the Supreme Court invested with far larger powers and wider jurisdictions than a Petty Sessional Court in England. A time limit of six months to prevent state prosecutions for petty offence in a country like England is by no means a statutory provision which obviously fits in with local circumstances and the status of our Courts of Summary Jurisdiction.

"In the second place a cursory study of the Supreme Court Ordinance, the Criminal Procedure Ordinance and the Commissioners Ordinance, all of which are to be read together, suffices to show that the Colonial legislature has adopted and embodied in its own Ordinances practically every provision of the 1848 Act except the six months time limit provided by section 11 thereof. From these legislative activities it seems reasonably clear (a) that the Colonial legislature intended to replace the 1848 Act by its local Ordinances, and (b) that it had decided that the six months limit was not suitable to the circumstances and conditions of this Colony.

"Lastly, we have section 15 of the Supreme Court Ordinance, which explicitly enacts that the jurisdiction vested by that Ordinance in the Supreme Court shall be exercised (so far as regards procedure and practice) in the manner provided by itself, and the criminal Procedure Ordinance, or by rules and orders of the Court made pursuant to its own provisions."

The fourth point relating to the condition of aplicability is that the words "shall be in force" or "shall apply" must be construed to mean "can reasonably be applied."[36] Fifthly, it follows from the last mentioned point, that the application of such statutes abroad must yield to the special local circumstances and

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(35) ibid at p. 187
(36) Jex v McKinney (1889) at p. 69. See also Okeke & anor v Comm. of Police, (1960) N.R.N.L.R. 1

must give way to matters of local public policy. Neo v Neo[37] shows that even the English statutes of Distribution, exported to the Straits Settlements, apply there only sub modo to allow for a plurality of Chinese widows.[38] Indeed, as has been mentioned in the chapter on precedents, the Privy Council held in the Ghana case of Coleman v Shang,[39] that in construing Statute 21 of Henry 8, C.5 and the Statute of Distribution (1670), the Appellate Court in Ghana was entitled to apply the words "wife" and "widow" to all persons regarded as wives and widows according to the laws of Ghana. These decisions point to the conclusion that local courts are not to consider themselves as bound by the decisions of English courts in the interpretation of such statutes of general application as the ones just mentioned. It may be mentioned that section 85 of the Gold Coast Courts Ordinance (now repealed) provided that:[40]

"All Imperial laws declared to extend or apply to the jurisdiction of the courts shall be in force so far as only as the limits of local jurisdiction and local

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(37) (1875) L.R. 6 P.C.381. "In applying this general principle, it has been held that statutes relating to matters and exigencies peculiar to the local condition of England, and which are not adapted to the circumstances of a particular Colony, do not become of its law, although the general law of England may be introduced into it." Per Sir Montague SMITH (at p. 394) who delivered the judgments of the Privy Council.
(38) Counsel's argument in Leong v Chye [1955] A.C.648
(39) [1961] 2 All E.R. 406
(40) Laws of the Gold Coast [1951 Rev.] Cap. 4.

circumstances permit . . . and for the purpose of facilitating the application of the said Imperial laws, it shall be lawful for the said courts to construe the same with such verbal alterations, not affecting the substance as may be necessary to render the same applicable to the matter before the court; . . ."

Although this section has been repealed, it is submitted that this condition must still be implied in construing statutes of general application applicable to West Africa.

A contrary view to principles just enunciated in the fifth condition was put by COMBE C.J., in the Nigerian case of Labinjoh v Abake.[41] The facts were these: The defendant, an unmarried girl under 21 years of age living with her parents, was sued in the Police Magistrate's Court, Lagos, for the price of goods sold and delivered to her. The Police Magistrate held that the Infants Relief Act, 1874, was in force in Nigeria, and he dismissed the action on that ground. The plaintiff appealed to the Divisional Court, which allowed the appeal on the ground that the Act, as applied to Nigeria, should read with modifications, and that a native should be considered to come of age when he or she arrives at the age of puberty. The defendant appealed to the Full Court. The questions which the Full Court had to determine were:

"1. Is the Infants' Relief Act, 1874, a statute of general application in force in this Colony by virtue of section 14 of the Supreme Court Ordinance, 1914?

2. If the Act is in force in this Colony, is the Court entitled to read that Act, in its application to this

(41) (1924) 5 N.L.R. 32 at p. 34

Colony, with the modification suggested by the learned Judge [at the Divisional Court], or with any modification?

3. 3. Was the learned Magistrate right in holding that, if the Infants' Relief Act, 1874, is in force in the Colony, the contract on which the plaintiff sued is void?"

With regard to the first question, COMBE C.J., who delivered the judgment of the Full Court of three judges, had "no doubt whatever but that the Infants' Relief Act, 1874, is a statute of general application." His answer to the second question is as follows:

"With regard to the second question I am of opinion that the learned Judge was wrong in holding that, in applying the Act the Court is entitled to alter the Act to suit local conditions. The legislature in using the term "infant" must be assumed to have been aware of the legal definition of that term and to have intended that the term should be read in accordance with that definition.

"When any matter before the Court is governed by the English law, whether the common law or a statute of general application, the question in issue must be decided in accordance with English law, and not, as has been done by the Divisional Court in this case, in accordance with what the court considered would be proper modification of the English law in its application to this Colony."

With the greatest respect, the learned judges of the Full Court were wrong in assuming that when any matter before the court is governed by the English law, it is the English law that is in force in England which should be applied. It was expressly stated in the Supreme Court Ordinance of 1914, of Nigeria, that the English law applicable was subject to local jurisdiction and local circumstances. The English law applicable must be understood to mean so much of the English law as is

applicable to the situation of the people in Nigeria. When such English law is adopted for local purposes, it becomes local law. It is submitted that the answer given to the second question was right but for the wrong reasons. The better view is that the definition of an infant in Nigeria for the purposes of the Infants' Relief Act, is not necessarily synonymous with the definition of capacity to marry. Further, as it is the general law of the land that an infant or child means a person under the age of twenty-one years, the Divisional Court were wrong in construing an infant to mean a person who has not reached the age of puberty.

The sixth condition that must be noted is that if a statute is held to be one of general application, then it means that it is the substantial part of the Act which must be held to be applicable. To take one or two sections of such an Act, divorced from their context, is to apply a new law, which is not the law of England, and so construed might never have been introduced in England at all.[42]

Seventhly, it must be noted, that with particular reference to civil law, statutes of general application can be invoked only when by express or implied term in any particular transaction, English law is deemed to be the

(42) Shaik S. bin Abdullah Bajerai v Chettiar [1933] A.C.342 P.C. at p. 347. The question at issue here was whether the English Money Lenders Acts applied to the Straits Settlements.

governing law thereon. Statutes of general application are not intended to override the application of customary law where the latter is the proper law which governs any particular transaction.

In the Nigerian case of Malomo v Olushola,[43] it was argued that section 17(1) of the Old Supreme Court Ordinance (Cap. 211),[44] which deals with the application of native law and custom where the parties are natives effected an alteration of the law precluding the Court from giving effect to native law and custom if such law or custom is "incompatible either directly or by necessary implication with any law for the time being in force," the relevant words being "any law"; whereas before the enactment of section 17(1) the equivalent provision read "nor imcompatible either directly or by necessary implication with any local enactment . . ." It was further argued by counsel that the change of wording brought in the statutes of general application which were in force in England on the 1st January, 1900, of which the Statute of Frauds is one, and as the gift of land made under native law and custom was made orally, and it was not evidenced by any meorandum or note in writing, it could not be proved, since section 4 of the Statute of Frauds precluded its being proved by oral evidence.

(43) (1955)15 W.A.C.A. 12
(44) Laws of Nigeria 1948 Revision

In its judgment the West African Court of Appeal rejected Counsel's ingenious argument purely on the technical ground that the statute had not been specially pleaded in his statement of defence. In these circumstances, the court found it unnecessary to decide whether section 17(1) of the Supreme Court Ordinance did effect the change in the law contended.

It is regretted that the court felt it "unnecessary" to decide the point involved. The court should have stated categorically, that in a civil case where a transaction is governed by customary law, English law or statutes of general application are expressly excluded. It is admitted that the phraseology used in the early legislation in West Africa ot prescribe the circumstances under which customary law was precluded from apply to certain transactions was ambiguous, but with judicial courage the judges could have settled that matter in a more reasonable manner. The Gold Coast legislation on this point was amended in 1935 when according to the Attorney-General, a Divisional Court held that the Statute of Limitations applied in a particular case governed by customary law. Moving for the second reading of a Bill entitled "An Ordinance to restore native customary law to its previous effectiveness", S.S. Abrahams, the Hon. Attorney-General made the following observations:[45]

(45) Gold Coast Colony. Leg. Co. Deb. 1929-30 issue no 3

"It may or may not be a good thing that there should be a law of limitation in the application of native law: that is a matter we must consider sooner or later. When we want to bring it [statutes of limitations] in we shall not bring it in this way, we shall pass it here in this Council. We shall do that with every English enactment which we desire to bring in affecting native customary law. But it is essential that before any other statutes of general application are held by the Court to affect native customary law, we should put this matter beyond all doubt".

The last point in connection with the application of statutes of general application is this, that if a statute is declared to apply to a particular territory, a subsequent amendment or a repeal of the Act, does not affect its continued application in the receiving country. This proposition is valid only when the repealing Act comes into force after the date of reception in a given country. Thus in the Nigerian case of Gazal & Co. Ltd. v Soufan & Sons[46] BATE J.: who ruled that the Fraudulent Conveyances Act, 1571, is in force in the Northern Region of Nigeria, also pointed out that the fact that the statute was repealed in England by the Law of Property Act 1925, is immaterial since the repeal took place after January 1, 1900 - which is the reception date.

D. SOME PARTICULAR EXAMPLES

1. Statutes of Limitations. Owing to the absence at the moment of Comprehensive local laws governing the limitations of actions, especially in the law of contract, a number of English statutes apply to West Africa with the exception

(46) (1961) N.R.N.L.R. p. 39

of Western Nigeria which has her own Limitation Law.[47]

The relevant statutes are

(a) "An Act for the limitation of actions and for avoiding suits in law", 1623.[48]

(b) "An Act for the limitation of actions and suits relating to real property, and for symplifying the remedies for trying the rights thereto" - commonly known as the Real Property Limitation Act, 1833.[49]

(c) The Real Property Limitation Act, 1837[50]

(d) The Real Property Limitation Act, 1874, which amends the 1833 Act.[51]

Of these, the first Act relates to actions arising out of simple contracts or torts, and this Act, often referred to as "Statute of James" has been declared to be a statute of general application. In the Nigeria case of Pearse v Aderoku[52] LLOYD J., emphasised it that, "It has been repeatedly held in these courts that theStatutes of Limitations are statutes of general application and are therefore in force in Nigeria by virtue of Section 14 of the [1876] Supreme

(47) In the field of Torts there are local enactments governing limitation of Actions. For example, S.4(1) of the Lagos Fatal Accidents Act, No. 34 of 1961, provides that "Every Action under this Act shall be commenced within three years after the death of the deceased person . ." The Western Region of Nigeria Limitation Law, 1959, is based on the English Act of 1939. Laws of W. Nigeria [1959 Rev.] Cap. 64.
(48) 21. Jac. 1. C.16
(49) 3 & 4 Wm. 4 C.27
(50) 7 Wm. 4 & 1 Vict. C. 28
(51) 37 & 38 Vict. C. 57
(52) (1936) 13 N.L.R. 9

Court Ordinance." Similarly, in the Gold Coast Case of Fischer & Co. v Swanikier,[53] HUTCHINSON C.J., observed that, "In my opinion, the Statutes of Limitations are in force in this Colony." The circumstances in which the Statute of James can be held as applicable were related by Redwar in his comments as follows:[54]

"The question as to the application of the Statutes of Limitations has more than once engaged the attention of the Gold Coast Courts, but the local case law on this subject is not in a very satisfactory condition. The better opinion is that, except in cases coming within a provision in Section 19 of the Ordinance,[55] these statutes have no application as between natives, and that a defence of the Statute of Limitations in a suit between natives, or between a native and a European, must rest entirely, and can only succeed upon the evidence of a contract to be bound exclusively by English law, such contract being either express, or implied from the course of dealing or the nature of the transactions between the parties. In this view of the matter, the right to claim the benefit of the statutes is not, in strictness, a matter of law, but is purely conventional or contractual, within the provision of section 19 of the Ordinance. In order that the court may be indueced to hold that English law shall apply under Section 19, it must be satisfied that the parties agreed that their obligations should be regulated exclusively by English law,

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(53) (1899) Red. 1
(54) At. pp. 10 & 11. See also Koney v Union Trading Co.Ltd. (1934) 2 W.A.C.A. 188 at p. 190.
(55) S. 19 of the S.Ct.Ord. 1876. Later S. 87 of the Gold Coast Cts. Ord. [1951 Rev.] now abolished by the Courts Act 1960. There are similar versions of the provisions of that section in the laws of other West African countries. See e.g. the Sierra Leone Courts Ord. Cap. 7 [1960 Rev.] S. 38; and the Western Region High Court Law Cap. 44 [1959 Rev.] S. 12(3).

and nor partly by English law and partly by native law".[56]

The effect of section 3 of the Statute of James (1623) was that all actions on the case (except slander), actions of account, trespass, debt, contract, etc. had to be brought within six years. Actions of assault, battery, wounding and imprisonment had to be commenced within four years after the cause of action has arisen; and actions of slander within two years next after the words were spoken.[57]

With the exception of a judgment in one case, there would have been no difficulty in stating that the English Real Property Limitation Act, 1833, amended by the Act of 1874 is a statute of general application in cases where English law is the proper law. It is the Nigerian case of Deade v African Association Ltd.[58] It related to ownership of land in which the defendants pleaded possession and the statutes of limitation. WEBBER J., who tried the case was of opinion that the statutes of limitation concerning actions involving land did not apply in Nigeria. The reasoning of the learned judge is evident in the

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(56) For Case law on this subject see e.g. Henoji II v Sallah, D.Ct. 1931-7, p.158; (Ghana). Quartey v Akuah (1895) Red. 138 (Ghana). Adoo v Bannerman (1895) Red. 139, Aradzie v Yandor F.C. 1922 p. 91, Tandoh v Williams F.C. 1923-5. p.18 (Ghana). Bakare v Coker (1935) 12 N.L.R.31 (Nigeria). Ajike v De Souza (1938) 14 N.L.R. 103

(57) DARBY J.G.N. & BOSANQUET : A practical treatise on the Statute of Limitations in England and Ireland. 2nd. ed. revised and enlarged by BOSANQUET, F.A. & MARCHANT, J.R.V. (1893) p. 4.

(58) (1910) 1 N.L.R. 131

following passage:

"The Acts of Limitations apply to land in England and the principle of the limitation of actions relating to it could not be applied here unless this principle was recognised by native law or there was a special local enactment inculcating it and when statutes of general application in England were made applicable here it would never have been intended that the statutes affecting land in England and relating to their acquisition and extinguishment of title in it were to be so applied in a Colony or in a Protectorate as to affect the land in that Colony or Protectorate where the tenure and acquisition of land was according to native law modified as far as was considered necessary by local enactment . . ."[59]

If the learned judge's main contention is that the statutes in question do not apply to actions for the recovery of land governed by customary law, no one will disagree with that statement. On the other hand, if if is to be inferred that the statutes do not apply in Nigeria on the ground that the Real Property Limitation Act was passed in England to affect land in England, and therefore it could not apply there, then with the greatest respect, the learned judge's view is questionable. It appears that in arriving at this conclusion, he was influenced greatly by the language used by the Master of the Rolls in Attorney-General v Stewart.[60] The two cases are distinguishable from each other. As will be shown later a number of English statutes relating to land have been held to apply in West Africa. Indeed the case law on this subject clearly shows that the

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(59) ibid at p. 135
(60) See ante page 461.

Real Property Limitation Acts are statutes of general application. In the Nigerian case of Green v Owo[61] GRAHAM PAUL J., observes:

"To my mind it is clear - and it is well-settled by authority - that the English statutes of limitations are statutes 'of general application', and therefore they apply to Nigeria under . . . the Supreme Court Ordinance."

It needs to said that the Acts apply to the other countries of West Africa.[62] The joint effect of the Real Property Limitation Acts 1833 and 1874 is that actions to recover money charged on land are required to be brought within twelve years from the time when the right to receive the money accrued to some person capable of giving a discharge for the release of same. This in effect is a summary of the provisions of section 8 of the 1874 Act which reduced the twenty year period prescribed by the 1833 Act to twelve. Finally, it must be remembered that the statutes do not apply in cases concerning land governed by customary law. Thus possession of land - under customary law even for 30 years would not of itself defeat a plaintiff's case.[63]

2. The Statutes of Frauds. In England today only part of section 4 of the Statute of Frauds, 1677, remains in force. The fact that the Statute of Frauds, 1677, and the Statute

(61) (1936) 13 N.L.R. 43 at p.45
(62) See Naiah v U.T.C. Ltd. (1959) G.L.R. 79. Ghana. For Sierra Leone Case Law see Macaulay v Bungay (1934) 2 S.L.L.R.28, Pratt v Noah 3 S.L.L.R. 60; Bright v Brights Executors (1958) 16 W.A.C.A.50. For the Gambia case law, see N'Jie v Hall (1931) 1 W.A.C.A. 100; 2 S.L.L.R. 31; and Joof v M'boge (1959) 16 W.A.C.A. 105.
(63) Abinah v Kennedy F.C.1920-21, p.21 at 22. Guraba v The Public Trustee (1947) 18 N.L.R. 132 at p.135
(64) 29 Car.2 C.3

of Frauds Amendment Act, 1828,[65] are statutes of general application in West Africa has not been doubted. By section 4 of the statute, "no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer to the debt, default or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." The question which has often come up for decision in the Courts is whether and when the statute does apply to transactions entered into by the indigenous people either inter se or between them and non-natives. In the Nigerian case of Okoleji v Okupe,[66] which related to the sale of land by an illiterate woman to a literate registered moneylender, GRAHAM-PAUL J., had this to say on the subject:

"It has been held that the question whether the Statute of Frauds is applicable in Nigeria depends on the particular

(65) 9 Geo. 4 C.14.
(66) (1939) 15 N.L.R. 28 at p.29

facts of each case in which it is pleaded.[67] In these suits which are between a literate registered money lender seeking to set up a sale as against an illiterate woman, I of opinion that the Statute of Frauds does not apply. In fact I consider that its application is even more just and equitable to protect an illiterate person against a literate person's claim in Nigeria than it is between parties, both literate, in England. In my view the Court should be more willing to hold that the Statute of Frauds is applicable in Nigeria in a case where it is pleaded by an illiterate against a literate party. Where a literate party (particularly where that party is a professional money lender in a large way of business) enters into a contract of sale of land, he ought to have the Contract recorded in writing, executed by the illiterate party in such circumstances as to make it absolutely beyond question that the illiterate party understood thoroughly what he or she was executing."

It must, however, be borne in mind that the statute does not apply to transactions governed by customary law. Thus parole evidence is receivable to prove a gift of land made orally under native law and custom between the indigenous parties.[68]

The Statute of Frauds, 1677 and the Statute of Frauds Amendment Act, 1828, have been virtually replaced by local legislation in West Africa. In Ghana, section 4 of the Act has ceased to apply there, except in so far as it relates to any contract for the sale of lands. Section 17 which relates to contracts for the sale of goods to the value of £G10 and upwards has also ceased to apply.[69] Section 7 of the 1828 Act no longer applies. Again with the passing of the Ghana Administration of Estates Act, 1961, sections 10, 11, 23 and

(67) The case referred to here is perhaps that of Alake & anor v Awawu. 11 N.L.R.39
(68) Malomo & ors. v Olushola & ors. (1954) 21 N.L.R.1, (1955) 15 W.A.C.A.12. But it applies to contracts between non-natives: Kuri v Kuri (1923) 4 N.L.R.76 at p. 81
(69) Ghana Contracts Act, 1960 Act. 25

24 of the Statute of Frauds, 1677, do no apply in Ghana any more. In the Federal Territory of Nigeria, the Law Reform (Contracts) Act, No. 64 of 1961, has substituted a new provision in place of section 4 of the statute. The new provision is very similar to the provision in section 4 of the statute with respect to contracts for the sale of land, but it makes it very clear that nothing in the new provision applies to any contract made under customary law. By virtue of the Western Region Law of England (Application) Law, 1959, the all the provisions of the statutes have ceased to apply there;[70] but the legislative adjustment made in the Western Region Contracts Law, 1958, is similar to that in the Federal Territory.[71]

3. Statutes Relating to Fraudulent Deeds and Conveyances

There are two relevant English statutes. One is the Statute, 13 Elizabeth, Cap. 5 (1571), enacted to declare void fraudulent deeds made to avoid debt and conveyances of lands. The other is the Statute, 27 Elizabeth Cap. 4 (1585) which by its provisions render void fraudulent conveyances made to deceive purchasers. It has been held in the Nigerian Case of Braithwaite & anor v Folarin,[72] that the Statute 13 Elizabeth Cap. 5 applies there. As the learned judges of the West African Court of Appeal put it,

(70) Laws of Western Nigeria (1959) Cap. 60
(71) Laws of Western Nigeria (1959) Cap. 25
(72) (1938) 4 W.A.C.A. 76 at p. 77. See also Gazal & Co. Ltd v Soufan (1961) N.R.N.L.R. 39.

"The Statute in question is in our view a statute of general application, applying as it does quite generally to ordinary affairs and dealings of men without any qualification or speciality restricting its application. The statute was simply declaratory of the common law at the time. And the statute was in force in England on 1st January, 1900. The repea in 1925 does not affect Nigeria as the repealing act was subsequent to 1st January, 1900."

The statutes do not apply in the Western Region of Nigeria now. The reason is that the Western Nigeria Property and Conveyancing Law, 1959 which is based on the English Law of Property Act, 1925, contains adequate provisions designed to check such mischiefs.[72a] Both statutes - 13 Elizabeth C. 5 (1571) and 27 Elizabeth, C. 4 (1585) have been declared to apply in Ghana.[73]

4. Other Statutes Declared to be of General Application[74]

An Act concerning probate of testaments, fees to be taken etc, 1529.[75]

(72a) W.N. Cap. 100 ss.181-183
(73) Asante v Compagnie Francaise De L'Afrique Occidentale (1956) 2W.A.L.R.177
(74) Some of these may be of historical interest only as local legislation may have been enacted to cover them.
(75) 21 Hen.8 C.5. In Ghana, in Coleman v Shang [1961] 2 All.E.R. 406

Statutes of Distribution, 1670.[76]

Sunday Observance Act, 1677.[77]

Administration of Intestates Estate Act, 1685.[78]

Middlesex Registry Act, 1708.[79]

Landlord and Tenant Act, 1730.[80]

Distress for Rent Act, 1737.[81]

Common Carriers Act, 1830.[82]

Administration of Estates Act, 1833.[83]

Statutory declarations Act, 1835.[84]

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(76) 22 & 23 Cha.2 C.10. For Ghana see Gorleku v Gorleku (1934) 2 W.A.C.A. 82, and Coleman v Shang (1959) G.L.R. 390 [1960] 4 J.A.L. p.160. On appeals to Privy Council [1961] 2 All.E.R. 406, P.C. For Nigeria see Bamgbose v Daniel (1952) 14 W.A.C.A. 111, (1954) 14 W.A.C.A. 116, P.C., [1955] A.C. 107. For Sierra Leone, see Godwin v Crowther (1934) 2 W.A.C.A.109. For Gambia see Bah v. Taylor (1959) 16 W.A.C.A.101.

(77) 29 Cha.2 C.7. In Ghana, in Testa & Co. v Duncan Div. ct. 1926-9 p. 191.

(78) In Ghana in Coleman v Shang. In Nigeria, Bamgbose v Daniel. In the Gambia Bah v Taylor.

(79) 7 Ann. C.20. In the Ghana case of Crayem v Consolidated African Selection Trust (1949) 12 W.A.C.A. 443.

(80) In Ghana in Kalenderian Bros. v Nahun (1955) 1 W.A.L.R.18

(81) 11 Geo.2. C.19. In Ghana, Kalenderian Bros v Nahun, 1 W.A.L.R. 18

(82) 11 Geo. 4 & 1 Will.4 C.68. In Ghana, Orlelegeh v Zogbi Civ. Ct. 1921-25 p. 107.

(83) 3 & 4 Will. 4 C.104. In Sierra Leone in Thompson & anorv. Jones (1939) 5 W.A.C.A. 85.

(84) 5 & 6 Will.4 C.62 in the Ghana case of R v Borson (1941) 7 W.A.C.A. 158

Wills Act, 1837.[85]

Real Property Amendment Act.[86]

Gaming Act, 1845.[87]

Inclosure Acts, 1845*1878.[88]

Common Law Procedure Act, 1852.[89]

Court of Probate Act, 1857.[90]

Partition Act, 1868.[91]

Forfeiture Act, 1870.[92]

The Conveyancing and Law of Property Act, 1881.[93]

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(85) 7 Will. 4 & 1 Vict. C.26. In the Ghana case of In re Abaka (1957) 3 W.A.L.R. 236.
(86) 8& 9 Vict. C.106. In the Ghana case of Kugbe v U.T.C. Ltd. Div. ct. 1926-29. p. 202.
(87) 8 & 9 Vict. C.109. In Nigeria, Chemor v Sahyoun (1946) 18 N.L.R. 113.
(88) 8 & 9 Vict. C. 118, + 41 + 42 Vict. C.56. In Nigeria in Ebenyam v Ayigo (1941) 16 N.L.R. 30
(89) 15 & 16 Vict. C. 76. In the Ghana case of Ribeiro v Chahin (1954) 14 W.A.C.A. 476
(90) 20 and 21 Vict. C.77 in G.B. Ollivant & Co. Ltd. v Haroun Bros. & ors (1934) 2 W.A.C.A. 159 (Ghana)
(91) 31 & 32 Vict. C.40. In Williams v Williams (1946) 18 N.L.R.66; Michel v Frederick (1944) 10 W.A.C.A 286. (Nigeria).
(92) 33 & 34 Vict. C.23. In Owarey v Macaulay (1941) 16 N.L.R. 61 (Nigeria).
(93) 44 & 45 Vict. C.41. Indeed in Nigeria, the Law of Property Act 1881 - 1892 applies. See Onwuta v Niger Co. (1926) 7 N.L.R.79. Shorunmu v Dophon (1940) 15 N.L.R.87; Erikitola v Alli & ors. (1941) 16 N.L.R.56; Raji v Williams & ors. (1941) 16 N.L.R. 14, on appeal, (1941) 7 W.A.C.A.147; Awele v Habib (1954) 21 N.L.R.8.

In Sierra Leone, both the Acts of 1881 and the Conveyancing Act, 1911 apply. See Lisk v Barllatt (1938) 4 W.A.C.A. 56; Basma v Noureldine (1952) 14 W.A.C.A. 231. For the Gambia, see N'dow v Sagna & ors. (1956) 1 W.A.L.R. 183.

Note that the Act of 1881 does not apply in Ghana. See Colonial Bank v Bellon F.C. 1923-25, 167 at p. 180; Del Mue v Ologo 1927 Div. Ct. 1926-9, p. 193. Plino

Settled Land Acts, 1882-90.[94]

Partnership Act, 1890.[95]

Land Transfer Act, 1897.[96]

5. Statutes not of General Application

Very few statutes have been declared to be not of general application. As a rule, those statutes which have been declared to be inapplicable have been so held because they were passed in England after the date of the reception of English law. A good example is the Administration of Estates Act 1925.[97] One illustration of a statute held to be inapplicable to West Africa is the Sierra Leone case of Johnson v Regem[98] which was decided by the Privy Council. In that case, Counsel had relied on the provision that declares that statutes of general application which were in force in England on January 1, 1880, should be in force in Sierra Leone from the date of the Ordinance coming into effect. He contended that that provision imported into Sierra Leone the Crown Suits Act, 1855.[99] The argument was rejected. Their Lordships were of opinion "that that Act is not a statute of

(94) From 45 & 46 Vict. C.38 - 53 & 54 Vict. C.69. Thomas & anor v Nabhan (1947) 12 W.A.C.A. 229.
(95) 53 & 54 Vict. C.39. In Nigeria in Farhoud v Chama (1953) 2 N.L.R.166
(96) 60 & 61 Vict. C.65. In Nigeria - Young v Abina (1940) 6 W.A.C.A.180. This decision overruled In re Sholu (1932) 11 N.L.R. 37 which held that the statute was not of general application. Note this statute does not apply in Ghana. See France & ors v Quartey & anor Div.ct. 1921-25 p.194, and also Gorleku v Gorleku (1934) 2 W.A.C.A.82.
(97) 15 & 16 Geo.5 C.23. See e.g. Taylor v Taylor & anor (1935) 2 W.A.C.A. 348; Johnson v U.A.C.Ltd. (1936) 13N.L.R.13.(Nigeria). Similarly the voluntary Conveyances Act 1893 56 & 57 Vict. C.21 has been held to be inapplicable in Ghana - Muffat v Trading Association of Nigeria Div.ct. 1926-9 p.59.
(98) (1904) 73 L.J.P.C. 113
(99) 18 & 19 Vict. c.90

general application within the meaning of section 19 of the Ordinance in question. It only deals with proceedings in the United Kingdom."[100]

6. Conclusion

From our brief analysis of the so-called statutes of general application we have seen that in four of the former British dependencies different portions of statutes of England are in force in different territories. Might it not have been more logical and more conducive to uniformity both of practice and construction, to have had one fixed period for all the territories of West Africa? It would not have been difficult to fix such a date in the Colonial period, because the four territories had been governed together as a political unit once. As it happened some territories benefitted from the alterations of statute law since 1874, whilst Ghana was deprived of such benefits. However, it is now too late for a uniform date to be fixed from outside. One encouraging sign is that full-scale legislative reform is well under way to bring the laws in West Africa more up to date with modern needs. As a result of this wave of legislation, it can be said that the days of statutes of general application are numbered. In the old days, when there were no official legal draftsmen employed in the local legal service, the necessity of resorting to English statutes

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(100) op. cit. at p. 116

of general application was justified. It cannot be justified in modern times. Local legal draftsmen no doubt still have recourse to English statutes, but they also mould them to suit local conditions before they are adopted.

THE COMMON LAW IN WEST AFRICA

In the foregoing Chapters we have examined in some detail the application of English law in the former British territories of West Africa. English law in West Africa has been stated broadly to include the common law, the doctrines of equity and statutes of general application. It is an amalgam of these three elements and rules of customary law applying to a whole territory which constitute the common law of a particular country in West Africa. The conditions of the applicability of the separate branches of the laws have already been discussed. It only needs to be noted that, as the common law in West Africa is nothing but the practice and determination of the courts drawn into precedents, where the circumstances of a country and its people differ from the English pattern, the common law of these countries must in its natural course, become different, and sometimes contrary, or at least incompatible, with the common law of England.

The definition and scope of the common law of each country in West Africa can therefore be taken to mean the provision which extends the application of English law to that particular country and rules of customary law. Examples of such provisions have already been given.[2] The most recent declaration of the common law in Ghana is contained in the Interpretation Act, 1960,[3] section 17 of which reads:

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2. See ante p.
3. Interpretation Act, 1960 (C.A.4)

"(1) The common law, as comprised in the laws of Ghana, consists, in addition to the rules of law generally known as the common law, of the rules generally known as the doctrines of equity and of rules 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.

(2) In the case of inconsistency, an assimilated rule shall prevail over any other rule and a rule of equity shall prevail over any rule other than an assimilated rule.

(3) While any of the statutes of general application continue to apply by virtue of the Courts Act, 1960, (C.A.9), they shall be treated as if they formed part of the common law, as defined in subsection (1), prevailing over any rule thereof other than an assimilated rule.

(4) In deciding upon the existence or content of a rule of the common law, as so defined, the court may have regard to any exposition of that rule by a court exercising jurisdiction in any country.

(5) A reference in an enactment to the common law shall be construed as a reference to it as affected by any enactment for the time being in force."

Whether the other countries in West Africa will make such a formal declaration as has been done in the case of Ghana remains to be seen. It is possible that the declaration of each country may differ from that of another country. Indeed, in the United States of America - also a common law country - the declaration

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of the common law differs from State to State.[4]

There can be no doubt, however, that in any future declaration to be made by the other West African countries English law will still be the foundation.

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4. In McDermid v. McDermid, L.R. WILFLEY, Judge of the United States Court for China, observed that "The term common law as used in the Statute has been interpreted by this Court in the case of the United States v. Biddle [decided on March, 6 1907] to mean 'Those principles of the common law of England and those statutes passed in aid thereof, including the law administered in the Equity, Admiralty and Ecclesiastical Tribunals, which were adapted to the situation and circumstances of the American Colonies at the date of transfer of sovereignty, as modified, applied and developed generally by the decisions of th State Courts and decisions of the United States Courts, and incorporated generally in the Statutes and constitutions of the States'". See The American Journal of International Law (1908) Vol. 21, p. 228. In Taylor v. Fee (1956) 233 F. 2d. p. 251 it has been declared that "The law of California is the common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States or the constitution or laws of California". The 1956 Wisconsin declaration is as follows:- "The common law in effect at the time of the adoption of the State Constitution is not confined to English Statutes and the decisions of the English Courts and is perhaps broad enough to embrace customs and usages and legal maxims and principles in vogue at the time." - Menne v. City of Fond du Lac 77 N.W. 2d. 708. The Washington declaration in 1958 is as follows:- "The 'common law' is comprised of that body of court decisions in the non statutory field to which the doctrine of stare decisis applies." Windhurst v. Department of Labor and Industries, 323. P.2d.241. The Federal common law has been defined by the Court of Appeal in Massachussetts to be "a body of decisional law developed by the federal courts untrammeled by state court decisions." - Lyons v. Howard (1958) 256 F.2d. 912. For more examples, see, e.g. WEST'S General Digest, 3rd series, and Corpus juris secundum 15 C.J.S. Common Law.

CHRONOLOGICAL TABLE

Relevant dates	United Kingdom	Gambia	Sierra Leone	Gold Coast – Ghana	Lagos – Nigeria – Cameroons
17th century		1618. Formed part of the possessions of a company established for trading in Africa		1618 or 1631. Forts formed part of the possessions of a company formed for trading in Africa. No distinct judicial establishment, jurisdiction vested in individuals as J.P.'s. Forts formed part of Co. of Merchants Trading in Africa.	British traders had mercantile depots on the mouth of the River Niger.
18th century	1791. Act of Parlt. making settlement of Sierra Leone more formal.		1787. 1st "African settlers" sent out.		
19th century	1816: Report of Commissioners to investigate state of settlements.				
1821 May.	1821. Act of Parlt. dissolving Africa Co. All possessions in W. Africa annexed to Crown.	United with Sierra Leone	———————	United with Sierra Leone	
1821 Oct.	Oct. 1821. Royal Charter for dispensation of justice in West Africa.				
1842	Dr. Madden's Report.				
1843	Foreign Jurisdiction Act.	In 1843 Gambia separated from Sierra Leone			

Relevant dates	United Kingdom	Gambia	Sierra Leone p. 501	Gold Coast – Ghana	Lagos – Nigeria – Cameroons
1844				1844 – Bond of 1844.	
1850				1850 – Gold Coast separated from S. Leone	
1861					1861 – Lagos ceded to British Crown
1863			1863 – S. Leone reconstituted as separate Colony		
1865	Sel. Cttee. Report Royal Commission provided for the reunification of the W. African territories ←		re-united with ~~re~~. Colony of S. Leone ~~reunited~~	→	
1867	E S T A B L I S H M E N T O F W E S T A F R I C A N C O U R T O F A P P E A L I				[1872 – Consuls appointed to Old Calabar, etc.]
1874	By Royal Charter	Gambia joined with Sierra Leone under the name: West Africa Settlements		Gold Coast and Lagos united under the name: the Gold Coast Colony.	
1877	W E S T A F R I C A N C O U R T O F A P P E A L I D I S S O L V E D				
1886					1886 – Lagos separated from Settlement of Gold Coast
1888		1888 – Gambia separated from Sierra Leone			
1894		1894 – Gambia Protectorate Ordinance			
1896			1896 – S. Leone Protectorate declared		

Relevant dates	United Kingdom	Gambia	Sierra Leone P.502	Gold Coast – Ghana	Lagos – Nigeria – Cameroons
20th century					
1900					1900 – Niger Territories secured to Britain. Prot. of Southern Nigeria declared.
1901				Ashanti and Northern Territories administered with Gold Coast Colony	
1906					Lagos amalgamated with Prot. of S. Nigeria under the name "Colony and Protectorate of Southern Nigeria".
1913	Order in Council				The Nigerias reconstituted into "Colony of Nigeria" and "Protectorate of N. Nigeria".
1914					Nigeria Judiciary amalgamated by the Supreme Court of Nigeria Ordinance No. 6 of 1914
1919				Former German Colony of Togoland mandated to Britain and administered as part of Gold Coast Colony	Former German Colony of Kamerun mandated to Britain and administered as part of Nigeria as Cameroons Province and the Northern Cameroons
1928	WEST AFRICAN COURT OF APPEAL II ESTABLISHED FOR APPEALS FROM GAMBIA, SIERRA LEONE AND GOLD COAST				
1933–4					1933 – Jurisdiction of WACA extended to Nigeria
1935				Supreme Court of G.C. Colony extended to whole of the territory	
1954	Order in Council granting Nigeria a "Federal" Constitution				Regional High Courts established for the Northern, Western, Eastern Regions, Lagos and S. Cameroons. Appeals lay to the Federal Supreme Court.

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Relevant dates	United Kingdom	Gambia	Sierra Leone	Gold Coast - Ghana	Nigeria - Lagos - Cameroons
1956				Before Gold Coast became independent, Togoland (now a trust territory) voted for integration with the Gold Coast	
1957	Order in Council granting independence to Gold Coast under name "Ghana"			Gold Coast became independent under the name "Ghana"	
1959	WEST AFRICA COURT OF APPEAL DISSOLVED				
1960	Order in Council granting independence to Federation of Nigeria			Ghana became a Republic	System of Courts almost similar to that of 1954
1961			March 1961 - Sierra Leone became independent		June 1961 - N. Cameroons Trust Territory voted to join N. Nigeria and was renamed "Sadurna Province" October 1961 - Southern Cameroons reunited with former Republic of the Cameroons
1962		Internal self government.			

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