MODERN FAMILY LAW IN SOUTHERN NIGERIA

being a
Thesis presented for the Internal
Degree of Doctor of Philosophy
in the Faculty of Laws
August, 1963

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Note 1. (E.R.) = Eastern Region;
(W.R.) = Western Region;
(Fed.) = Federal.

2. Cap. references to Federal statutes are to the 1958 Revision, unless otherwise indicated.

3. Cap. references to Western Region statutes are to the 1959 Revision.

4. Acts of the United Kingdom Parliament are followed by the word "England" in parenthesis.

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ABSTRACT

This work deals with the law relating to families and family relationships in Lagos and the southern Regions of the Federation of Nigeria, including the proposed Mid-West Region. It is primarily concerned with customary law; but as statute law and principles of English law have made many incursions into the sphere of customary law, most of the topics covered have had to be treated on a comparative basis.

A unified treatment, rather than a separate investigation of the laws of each ethnic group in turn, is adopted because there is happily a remarkable degree of uniformity in these laws. But any local variations that do exist are indicated in the appropriate places; and where, as in intestate succession and prohibited degrees of relationship, there are no common principles, the ethnic groups are dealt with individually or in groups falling within well defined patterns.

The thesis is in two parts. Part One is concerned with the extended family. Among the items discussed here are the family as a corporate socio-legal entity; the position of family heads and family councils in contemporary society; the concept of family property and the rights therein of family members considered as individuals; and disintegration of the family.

Part Two is concerned with the elementary family or household. Chapters V-VII deal with the formation of family units

through marriage, while Chapter XIII discusses additions thereto through adoption and guardianship. The two types of customary law marriage and the four essential requirements for a valid marriage are here investigated, the legal effect of the omission of any one of these requirements being also discussed.

Chapters VIII-X analyse the law of husband and wife - including a wife's membership of her husband's extented family; her right to his name, his citizenship, his domicil and the matrimonial home. The next two chapters deal with the law of parent and child - including illegitimacy (which does exist as a status under customary law), legitimation by subsequent marriage and by acknowledgment, the affiliation of a child to one of three possible families, and the vicarious liability of parents.

Finally, Chapter XIV discusses the dissolution of marital relations - the point being made that whereas a wife's death brings a marriage to an end for all purposes, a husband's death leaves intact the wife's status as a married woman for a number of purposes.

ACKNOWLEDGMENTS

My sincere gratitude goes to Dr.A.N. Allott, Reader in Law, University of London, and Director of the Restatement of African Law Project at the School of Oriental and African Studies,

who inspired and supervised this course, giving invaluable advice and guidance in and out of normal office hours.

Among the many friends and colleagues who helped to make this course a success, special mention must be made of Mr. Arthur Nylander, LL.M. (London), Barrister and Solicitor of the Supreme Court of Nigeria, for much valuable information on many points relating to practice and procedure and also for his help on the section on citizenship and domicil; Mr.A. Whyte, LL.M. (London), Barrister-at-Law, Research Officer in African Law at the Restatement of African Law Project, for many useful pieces of information on Ijaw (especially Kalabari Ijaw) law; Dr. M.O. Onwuamaegbu, B.A., LL.M., Ph.D. (London), Barrister and Solicitor of the Supreme Court of Nigeria, for his help on the chapter on property law; Dr. W.C.Ekow Daniel, LL.M., Ph.D. (London), Barrister-at-Law - now of the University of Ghana - for many useful hints and tips on practical research methods; and to Miss Vera Georgiadou of the Far East Department at the School of Oriental and African Studies, who typed the thesis.

Above all, I owe more than I can ever hope to pay to my long-suffering wife without whose devotion, patience, tact and understanding this research would simply have been impossible.

S.N.C.Obi

MODERN FAMILY LAW IN SOUTHERN NIGERIA

(WITH SPECIAL REFERENCE TO CUSTOMARY LAW)

PART ONE

THE EXTENDED FAMILY

CHAPTER ONE

THE CONCEPT OF FAMILY IN NIGERIAN SOCIETY.

The Problems (Including justification for unified treatment of the customary laws of southern Nigeria.)

The problems that confront the student of Family Law in contemporary Nigerian society are many and difficult. The first (but perhaps the least difficult of them all) is the question of definition. What, in the context of Nigerian social life, does the term "family" connote? In other words, what does the ordinary layman who is literate in the English language understand by "family" as an indigenous institution in his local community; is this the same as or different from the ordinary meaning of that term as used in England; what is the "ordinary meaning" of the word "family" in England anyway?

The second problem is related to the first, and is a direct result of the progressive impact of Western culture and thought on Nigerian social and political institutions, so apparent in many departments of Nigerian law today. Given the ordinary meaning of "family" in the context of the traditional Nigerian society, to what extent would this be acceptable as an apt definition of that term in contemporary southern Nigerian society? In other words, how much of the old family concept is left, and how far is the family in the Western sense an established social fact in Nigeria today? The full significance of this question will become apparent in due course, for the answer to it could spell the difference between a treatise on domestic relations and one on constitutional law!

The third problem is less fundamental than the other two (being true of family law in any given country or society), but is much more difficult to surmount in practice: family law is a vast subject in more senses than one. To begin with, it covers a vast number of topics, ranging from the creation and growth of the family (by marriage, births, adoption, guardianship and service agreements), through the legal mechanism of family life (i.e. the domestic relations of husband and wife, parent and child, guardian and ward, master and domestic servant), to its disintegration - partial or complete - as a result of divorce or death or what may

be called fission. In the second place, southern Nigeria [1] is the home of dozens of ethnic groups with scores of languages and dialects, varied customs and beliefs. How does one state family law with reference to so many ethnic groups: does one survey these groups one after the other, classify them, or steam-roll them? Fortunately for the future of Customary Law in Nigeria, this problem is not as formidable as it looks. For, while there are variations in detail regarding the modes of achieving given legal results (e.g. getting married or creating family property), the legal results themselves (i.e. the substantive laws as opposed to the adjectival laws) are surprisingly similar as between the different ethnic groups, as we shall see in due course.[2] Finally, the incorporation by reference into Nigerial law of the current English law relating to divorce and matrimonial causes [3] means that, strictly speaking,

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1. We define "southern Nigeria" for the purposes of this thesis as the territory corresponding to the Eastern and Western Regions and the Federal Territory of Lagos as defined in Chapter I, section 3, of the Nigerian Constitution, 1960.
2. C.f. F.A. Ajayi, "The interaction of English Law with Customary Law in Western Nigeria", (1960) 4 J.A.L., 40-50, 98-114, at p.112.
3. See the E.R. High Court Law, 1955, s.16; also s.16 of the High Court of Lagos Law (Cap.80, Laws of the Federation of Nigeria and Lagos, 1958 Revision); and s.7 of the Law of England (Application) Law, 1959, of the Western Region which saves the application in the Region of imperial statutes relating to matters within the exclusive Federal list. The law relating to Christian marriages and matrimonial causes is within that list: Item 23 in the Schedule to s.154 of the Federal Constitution, 1960.

a discussion of family law in southern Nigeria should include a discussion of the law of England on the subject. It is proposed, however, to concentrate on the customary law, only discussing English law or the relevant Nigerian statute law insofar as it modifies, derogates from, or supplements the rules of customary law.

Nature and ascertainment of "customary law".

Our fourth and last problem is one that is not peculiar to family law, but which has special significance in that field. What is the place of customary law in the courts, and what is "customary law" anyway? The High Court Laws of the Eastern Region and the Western Region and the High Court of Lagos Act each provides for the application, as a first choice, of customary law where the parties are all Nigerians or where the justice of the case so requires, even if one or more parties are not Nigerians, provided that the customary law in question is not repugnant to natural justice, equity and good conscience, nor incompatible with the provisions of a written law, and provided further that the parties themselves had not previously agreed - either expressly or by necessary implication - that the transaction shall be governed by some law other than customary law. [4]

4. High Court Law; s.22 (Eastern Region); s.12 (Western Region); s.27 (Lagos). The various Magistrate Courts Laws, too, have similar provisions. Though they vary slightly in terminology, these provisions are practically identical in substance.

And customary law does not apply of course where the transaction which gave rise to the litigation is one that is unknown to customary law.

What then is customary law, and how are its rules ascertained in court? There is no good definition of "customary law" (known as "native law and custom" in the older statutes) in our statute books. The most ambitious attempt so far occurs in s.2 of the Customary Courts Law, 1956, of the Eastern Region which reads -

> "In this Law ... 'customary law' means a rule or body of rules regulating rights and imposing correlative duties, being a rule or body of rules which obtains and is fortified by established usage and which is appropriate and applicable to any particular matter, dispute, issue or question".

It will be noticed that this definition makes no reference to any territorial limitation or to association of the rules concerned with any local communities. It is therefore wide enough to include both long-established local customs and just-established general customs - not excluding commercial customs - whether or not they had their origin in the social life of a Nigerian community.

The definition contained in s.2 of the Customary Courts Law of the Western Region is hardly more helpful for the purposes of a general discourse. For it says

> "'Customary law' includes any declaration of local customary law made and approved under the provisions of s.78 of the Local Government Law, or the provisions of Part II of the Chiefs Law."

There is no definition of "local customary law", and so, while we are told where to find some examples of customary law, we are left in the dark as to what constitutes customary law as such. A better guidance comes to us from the definition of "custom" given in s.2 of the Evidence Act[5] of Nigeria:

> "'Custom' is a rule which, in a particular district, has, from long usage, obtained the force of law."

The only element of doubt in this succinct definition is in the phrase, "obtained the force of law". This could mean either (a) "regarded by the people of the district generally as binding and enforceable" or (b) "recognised as law by the courts". If (b), the question arises as to which system of courts - customary or non-customary - we are talking about. For not all customs which the local people regard as binding on them and enforceable at their

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5. Throughout this thesis we shall use the word "Act" in place of "Ordinance" wherever the latter term occurs in connection with Nigeria. This is because the Designation of Ordinances Act, 1961 (No.57 of the Laws of the Federation of Nigeria, 1961) provides that for all enactments having the force of law within the Federal competence, "Act" shall be read for "Ordinance". Regional enactments are now known as Laws with a capital "L" and this applies to Lagos as well in some cases.

suit in the customary courts or tribunals are enforceable in the non-customary courts.[6] But this is a large subject which cannot be pursued here, as it raises a number of fundamental questions, some jurisprudential, others constitutional. For example, is a custom law <u>because</u> it is actually enforced by the courts, or is it so even <u>before</u> it is ever litigated? Is a custom law because it is generally recognised as binding by the people concerned with its observance or non-observance (in which case all gambling would be lawful, and gambling debts legally binding, among gamblers), or because it is recognised as such by the state and its law-enforcement organs? What right has a superior court to declare a local customary law repugnant to natural justice, equity and good conscience, if it is perfectly satisfactory to the community concerned? If this power is statutory, as it is in Nigeria, is it not an infringement of the people's fundamental human rights?

Proceeding on the basis that the courts are obliged to observe and enforce the observance of customary law,[7] we will now attempt a working definition. Customary law

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6. A good example in the Yoruba doctrine of legitimation of children by mere acknowledgment of paternity. This was repeatedly rejected as repugnant to public policy by the High Court (W.R.), till it was finally reinstated by W.A.C.A. in <u>Alake v. Pratt</u>, 15 W.A.C.A.20.

7. Subject to the provisos already indicated.

will be used here as a rule (or body of rules) which the members of a given ethnic group recognise as binding on themselves, and which the courts will enforce if and when called upon to do so.[8]

Finally, given the status of customary law in the courts, and given a working definition of "customary law", the next question is how to "identify" a given rule of customary law for the benefit of the members of the superior courts who need not be experts in that field. In other words, how is customary law ascertained in court? The basic rule is that as far as the High Courts are concerned, customary law is a question of fact to be established by evidence. This probably began as a rule of convenience at a time when the superior courts were manned by expatriate judges. It was given statutory recognition first in the Evidence Act [9] and later in the various High Court Laws of the Regions.[10] In the recent case of Odunsi v. Ojora,[11] the Federal Supreme Court [12] underlined this principle when, after reiterating that "native law and custom" were questions of fact in the High Court, it went on to hold that findings in earlier

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8. Cf. the graphic description of "native law and custom" as "a mirror of accepted usage" in Owonyin v. Omotosho (1961), 1 All N.L.R.304.
9. Laws of the Federation (1958 Revision), Cap.62, s.14.
10. See e.g. the High Court of Lagos Law, loc.cit., s.67; High Court Law (W.R.), loc.cit., s.14;
11. (1961) 1 All N.L.R. 283.
12. Per Brett, F.J. with Taylor and Bairamian, F.J.J., concurring.

cases on such matters were not binding as precedents. In another recent case, a useful rider was added when it was held that "Native law and custom are matters of evidence to be decided on the facts presented before the Courts in each case, unless it is of such notoriety and has been so frequently followed by the Courts that judicial notice would be taken of it without evidence required in proof."[13]

To summarise: our first and most fundamental problem is to identify the institution (or group of institutions) generally known as the family in southern Nigeria, and to evaluate its legal significance in the contemporary social structure. Secondly, having regard to the influx of Western ideas, laws and cultures in Nigeria, we shall attempt to discover how far the family as generally understood in the Western world has become a socio-legal fact in southern Nigeria. A start will be made on these two problems in the next section below. The next problem is the enormity of the field covered by "family law". This we solve by restricting this study to customary law as much as possible, and by attempting to discover common principles of law rather than describe details of procedure. To the question: What is customary law? we have replied with a brief working definition. Finally, we have tried to show

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13. Giwa v. Erinmiloku, (1961) 1 All N.L.R.294; from the headnote. This is in fact an abridged version of the provisions of s.14(2) of the Evidence Act.

the place and importance of customary law (and the method of proving it in the superior courts) by a summary statement of the relevant statutory provisions and a brief reference to case law.

Nature and classification of family groups.

The word "family" is not easy to define with any degree of accuracy even in the context of English law from which the term is borrowed.[1] In the context of Nigerian customary law and traditional society, it is well nigh impossible to define with any precision.[2] Among the many

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1. Bromley sums up the position in English law in these words, "The word 'family' is one which is difficult, if not impossible, to define precisely. In one sense it means all blood relations who are descended from a common ancestor; in another it means all the members of a household, including husband and wife, children, servants and even lodgers." See his Family Law (2nd edn., 1962) p.1.

2. Of the term as used among the Yoruba, Lloyd says, "... it may connote any group from the smallest nuclear family of man-wife-child to several thousand persons tracing descent from a common ancestor through many generations:" Yoruba Land Law, pp.31-32. See also Burrows, Words and Phrases Judicially Defined (1943) Vol.2, pp.281-282 for other definitions.

reasons for this difficulty are (a) the dynamic nature of the family as a social institution: what began as a simple domestic unit rapidly grows into a complex social unit; (b) the tenacity of kinship ties among Nigerians: people cherish these ties and endeavour to employ only such terminology as will emphasise and nourish them; hence (c) the paucity of vernacular terms which denote the various categories and depths of social groups; as a result (d) the vernacular terms - ebi, ama, ufok and the like - which denote roughly the idea of "family", each stands for a large number of social entities/institutions according to context. Subject to this caveat, it may be said that the primary meaning of "family" as used in Nigeria is a social institution consisting of all the persons who are descended through the same line (the male line in a patrilineal, the female line in a matrilineal, society) from a common ancestor, and who still owe allegiance to or recognize the over-all authority of one of their number as head and legal successor to the said ancestral founder, together with any persons who though not blood descendants of the founder, are for some reason attached to the households of persons so descended, or have been otherwise absorbed into

the lineage as a whole.[3-5]

This, unfortunately, is the primary meaning of "family" as popularly used in southern Nigeria. "Primary" because it is the institution which almost invariably springs to mind whenever the word "family" is used without more; "unfortunately" because the institutions that could fit into this definition vary considerably in size and generation depth - anything from two or three to a dozen or more generations old - depending on the frequency with which fissions have occurred among the descendants of one ancestor, while the descendants of another have held on tenaciously together under successive "family heads" from generation to generation.[6]

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3. An example of those "attached to the households of persons so descended" is persons of slave origin; while an example of people attached "to the lineage as a whole" is to be found among persons who immigrated as a group and were formally absorbed into an existing family group.
4. Jones defines "extended family" as "A minimal lineage, i.e. a group of families descended unilineally from a common founding father (or mother in a matri-lineage)." "Family" he defines as "A husband, wife (or wives) and their unmarried children". See: Report of the Position, Status and Influence of Chiefs and Natural Rulers in the Eastern Region of Nigeria, pp. v-vi. This definition is a little short of perfection as it does not take account of (a) internal fissions, and (b) absorption of strangers.
5. In addition to the usual patrilineal and matrilineal groups, there are cognatic (double-descent) groups.
6. There is "fission" when a family group breaks up into two or more independent groups, each with its own head, each refusing to recognise the authority of the head of any of the other units, not even of the person who, but for the split, would be the legal successor of the ancestral founder.

It may be objected that this definition is wide enough to include units such as villages and towns,[7] (which traditionally were not merely social but essentially political units), since these too are based essentially on common ancestry. It may also be objected that the extended family is really a political unit (as opposed to a mere social group which a family is supposed to be) in the traditional society, so that we are stepping beyond the realm of family law into that of constitutional law by discussing it at all. The answer to the first objection is that our definition carefully leaves out an essential element of a political unit, viz. territorial association. The members of an extended family need not belong to a common territory, nor need they share a common political head such as a king or chief. It is enough that they recognise one of their number as head, and that they meet and/or share in common activities, rights and interests as a group, if and as the need arises. The answer to the second objection is really a development of the first. The term "extended family" is used in popular language to denote two types of legal entities, one territorially based, the other not. As a political

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7. In Nigeria the word "town" is used in popular parlance for the unit known to social anthropologists as a "village group". What the Englishman knows as "town" is called a "township" or "urban area" (the latter especially in official documents).

(or more accurately, perhaps, socio-political)[8] unit, the extended family may be defined as the smallest sub-division of a traditional society, consisting of all the persons who are descended unilineally from a common ancestor, who live and function as a group, occupying a common territory and recognizing one or more of themselves as their political head or governing body as the case may be - together with persons who, though not blood descendants of the said ancestor, have been absorbed into the group. This latter unit is obviously narrower in connotation than thei first: the requirement of common territory means that, as marriage is virilocal, women cease to be members of their maiden family (understood as a political unit) as soon as they marry, but retain their family membership (in the sense of a social unit) in spite of marriage, as we shall see.

The fault, then, is not in our definition but in the inherent ambiguity of the term "family" itself as used in the coutry. This ambiguity is magnified many times by the addition of the word "extended" to form the popular phrase "extended family", because, as already indicated, this extension is on two planes: a family extends territorially as its population grows; at the same time it grows in generation depth as present members die and are succeeded by their issue. But so long as the distinction

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8. For reasons, see Obi, Ibo Law of Property (1963), p.11.

between the "extended family" as a social and as a political group is kept in mind, no great difficulty will be experienced as a result of this ambiguity.

The second major connotation of the word "family" is the unit consisting of a man and his wife or wives with their unmarried children and any other dependants such as wards and domestic servants.[9] To this unit we shall give the name "elementary family".[10] It must be warned, however, that the term "elementary" is a little misleading, for it suggests that a family so described is the smallest possible social unit with any legal significance. This is not so. The elementary family itself may (in the case of a polygamous family, for example) be composed of two or more sub-divisions or branches corresponding to the number of women by whom the father of the family has had children.[11]

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9. Other meanings of "family" include (a) a man and his wife or wives with all their unmarried children plus their married sons and their wives and issue - the grandparental family/household; (b) a man and his wife or wives with all their children, including the children of his married daughters. To either of these may be added dependants if any. The difference between (a) and (b) is that (b) includes married daughters while (a) does not. Both exclude married daughters' issue, but may include issue of unmarried daughters.
10. It is also known as a Household.
11. The children of one mother in a polygamous family are said by the Yoruba to belong to one omoiya, and by the Ibo to belong to one useku, as distinct from the obakan (Yoruba) or the obi (Ibo). Cf. Lloyd, op.cit., pp.279-81.

We say "women by whom the father of the family has had children" advisedly because in those societies where a child of an unmarried mother can be "legitimated" and affiliated to the family of his natural father, a child so affiliated is deemed to constitute a family branch (or house) on his own, [12] in just the same way as the children of one wife between them constitute one branch in a polygamous family.[13]

The difficulty of finding a concise and satisfactory definition of "family" is due to a number of factors as we have seen. Among the factors already mentioned are (a) the fluidity of the social structure: what starts off as a small homogeneous group consisting essentially of a man and his wife and children soon grows into a complex body of separate but inter-related sub-units in the course of a few generations; it would require an extremely elastic language with an extraordinary range of vocabulary [14] to keep pace with such a social phenomenon; (b) the widespread reluctance of West Africans to employ terms which might indicate remoteness in their blood ties with their kinsmen;

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12. Cf. Lloyd, Yoruba Family Property, p.296.
13. For the moment we shall regard as "polygamous" any family which contains children born of different mothers, whether these were married concurrently or successively or perhaps not at all.
14. Or a "Ministry of Social Nomenclature" charged with the duty of making up new names for new groups of a given generation depth as they come into being.

hence the use of words like "brother", "sister", "father" or "mother" (or their vernacular equivalents) to designate cousins, nephews, uncles, aunts, step-parents or remoter relations - even among well educated people; (c) variations in social structure even within the same ethnic group.

Our statute books provide no clear guide in this search for definitions. For there is no general definition of the term "family" anywhere (e.g. in the Interpretation Act); what definitions there are, were made ad hoc for the purposes of a given enactment. Two examples will more than suffice to show the futility of searching for a guide in this sphere. Section 2 of the Fatal Accidents Law, 1956, of the Eastern Region [15] defines an "immediate family" in these words:-

> "'immediate family' means the -
>
> (a) wife or wives;
>
> (b) husband;
>
> (c) parent, which shall include father and mother, grandfather and grandmother, and stepfather and stepmother;
>
> (d) child, which shall include son and daughter, grandson and grand-daughter, and stepson and stepdaughter, of a deceased person;
>
> (e) brother and sister, which expression shall

15. No.16 of 1956, as amended by No.21 of 1960.

include half-brother and half-sister; and

(f) nephew and niece of a deceased person who were under the age of 16 at the time of the death of the deceased and who were being maintained by him."

From this it will be seen that in addition to his wife (or wives) and children, a person's "immediate family" includes his parents and grandparents, his brothers, sisters and grandchildren, as well as his nephews and nieces if these are his dependants.

The (Federal) Workmen's Compensation Act, [16] on the other hand, defines "family" by implication in these words:-

S.3. "'member of the family' means -

(a) when used in relation to a native [17] any one of those persons mentioned in one of the columns in the 1st Schedule according as the family is based on the paternal or the maternal system;

(b) when used in relation to any person not being a native: wife, husband, mother, father, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, grand-daughter,

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16. Laws of the Federation of Nigeria (1958) Revision), Cap. 222.
17. "Native" is defined by the Interpretation Act to be a Nigerian and to include a "native foreigner" which in turn means a member of an indigenous African tribe.

stepson, stepdaughter, brother, sister, half-brother, half-sister."

The 1st Schedule lists the following persons as members of the family in a "paternal system": "mother, father, wife, son, daughter, brother, sister, father's father, father's brother". For a "maternal system", it lists: "mother, father, wife, son, daughter, brother, sister, mother's mother, mother's brother, mother's sister, sister's son, sister's daughter, mother's sister's son, mother's sister's daughter." The difficulty of formulating a satisfactory definition of "family" from these two statutory provisions will have become obvious by now.

Neither popular usage therefore nor statute books provide any clear indication of what the word "family" stands for in general terms. But it should not be imagined that this vagueness is in any way peculiar to Nigerian law or Nigerian society. A brief digression will show that the position is no better in the English legal system and popular usage. Generations of eminent English judges have fought a losing battle in an attempt to find a clear and concise definition of that term down the centuries. Nor have academic lawyers and text-book writers had any better luck. As Earl Jowitt has said, "In English law the word family is a popular and not a technical expression." [18] In

18. Dictionary of English Law (1959), p.784. This statement is taken from Burt v. Hellyar (1872) L.R.14 Eq.160.

popular usage, Bromley tells us, it has a good number of meanings.[19] Let us take a quick look at one or two attempts at a judicial definition by English courts. In R. v. Darlington, Kenyon, L.C.J. defined a man's family as "those persons who reside with him, of whom he is the pater familias or head".[20] This definition excludes children who have married and set up homes of their own. In 1836 the Master of the Rolls, Lord Langdale, had this to say by way of definition of a family, "Under different circumstances it may mean a man's household, consisting of himself, his wife, children and servants; it may mean his wife and children, or his children excluding the wife." [21] In Re Terry's Will, Kamilly, Master of the Rolls, said that "the primary meaning of the word 'family' is 'children', and ... there must be some peculiar circumstance ... to prevent that construction being given to it. In ordinary parlance, the word 'family' means children." [22] The same learned judge said in another case, "The cases on the meaning of the word 'family' are very numerous, and its meaning depends on a variety of circumstances. Sometimes it means

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19. Family Law (1962), p.1. See also Re Perowne [1951] 2 All E.R.201, at p.202, [1951] Ch. 785, at p.788.
20. (1792) Nolan, 124, at p.128.
21. Blackwell v. Bull, 1 Keen, 176, at p.181.
22. (1854) 19 Beav. 580, at p.581.

heir-at-law, at other times it means next of kin." [23] Finally, Vice-Chancellor Hall, faced with the question whether or not an illegitimate child could take in a testamentary gift to a family, had this to say in Humble v. Bowman[24]

> "The ... question is whether the word "family" can be held to include the illegitimate child .... I look upon the dictum of James, L.J., in Lamb v. Eames [25] ... as an authority that, under the description 'family' in a power of appointment, a natural child may be included. Although the word 'family' may ordinanrily mean children and nothing else, it is, I think, not unreasonable that a natural child who has been treated and recognised as a child by the parent should be so included." [26]

The word "family" is, therefore, no more precise and certain in the law of England than it is in the law of Nigeria, statute or customary. But however difficult of precise

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23. Elgood v. Cole (1869) 21 L.T.80, at p.81. Jessell, M.R. also said that the primary meaning of "family" is "children": See Pigg v. Clarke (1876) 3 Ch.D.672, at p.675. And in Price v. Gould (1930) 143 L.T.333, at p.334), Wright J., said that though the primary meaning of "family" is "children", this is susceptible of a wider interpretation. He held that family included brothers and sisters in the case before him.
24. (1877) 47 L.J. Ch. 62.
25. (1871) 40 L.J. Ch. 448.
26. (1877) 47 L.J. Ch. 62, at p.65.

definition, the family is perfectly capable of a rational and systematic analysis as far as its functioning and the legal relationships of its members inter se and vis-à-vis others are concerned. To this task we shall now turn.

CHAPTER TWO

FUNCTIONING OF THE EXTENDED FAMILY.

1. The Family as a Corporate Body.

In traditional southern Nigerian society the extended family may be said to have a legal personality.[1] This implies that it has a name by which it is known, that it has permanence, and that it can acquire rights and interests and be subject to obligations and duties. The family is usually named after its founder, and this name it continues to bear throughout its legal existence. It is a permanent institution in that, though its members live and die, though its heads come and go, and though its size in terms of population and geographical distribution may vary from generation to generation, yet the group itself lives on under its original name. Whether a family can in law outlive its last member is an open question, but it can (and not infrequently does) predecease its members. This it does when it breaks up as a result of what we have described as "fission."[2] A family can acquire rights and interests in its corporate name. It can, for example, acquire rights in property. This it does in a number of

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1. Cf. Lloyd, op.cit., pp.32 et.seq.
2. On the meaning and process of "fission", see Lloyd, ibid., p.35.

ways, including purchase, lease and gift. Strange though it may sound, the family can be a beneficiary under a will, and can succeed on intestacy. These latter points will be examined in greater detail at a later stage. Suffice it to say here that in some societies (e.g. among the matrilineal and mixed-descent societies of the upper Cross River basin and the ~~Oban~~ Obubura Hill district) the family itself succeeds to the greater part of the intestate estate of its deceased members, the distribution of such property being in the absolute discretion of the family head[3]; that in all societies the family succeeds to the property of one of its constituent branches where (as sometimes happens) the latter dies out; and that in certain circumstances it is the extended family that is intended as beneficiary[4] under a will which creates part of an individual's estate as "family property". As a legal person the family could sue and be sued in its own name, the family head acting as its alter ego in such a case. Finally, the doctrines of corporate and vicarious liability apply to the family.[5] The corporate body is liable for the wrongful acts or omissions of its alter ego;[6] it is also liable for the wrongs of other

3. For a somewhat similar rule under Akan law (Ghana), see Allott, Essays in African Law (1960), p.234.
4. On the creation of family property by will generally, see Coker, Family Property among the Yorubas, pp.69 ff.
5. At all events in the traditional society.
6. I.e. the family head or the family council.

persons when the wrongful acts are authorized by it either expressly or by implication [7]. Indeed, the family was in the past responsible for the criminal acts of its members as well as for their civil wrongs against strangers, at any rate where the wrong-doer himself either would not or could not pay the penalty.[8]

From the legal responsibility of the family as a corporate entity (direct and vicarious[9]) must be distinguished the moral obligation, which the members of a family often feel, to give aid and counsel to one of their number who is in difficulty of any kind. In the former case, the injured party has an action in law to have the wrong righted. In the latter (moral obligation) the member in difficulty has no legal action to compel help from the family as a body or from its members as individuals. Thus the family would be liable for a trespass committed on a third party's land by the family head or the family council acting on its behalf. So, too, will it be for a trespass committed against a third party by one of its tenants (or servants) acting upon its authority (express or implied). But a member, for instance, who has lost his trading capital

7. An act is authorised by the family as a corporate body if it is authorised by the family head or the family council.
8. On group responsibility generally, see Elias, The Nature Of African Customary Law (1956), pp.87-92 and 137. See also Talbot, Peoples of Southern Nigeria, Vol. III, p.650, on the Ibo.
9. Responsibility is direct when due to the act or omission of the family's moving spirit or alter ego, as above explained; it is vicarious when due to the act/omission of any other person.

by theft, or his house in a fire, has no legally enforceable right to call upon his family to help him raise fresh capital or build a new house, though in normal circumstances they will feel morally obliged to do so.

The legal significance of this distinction may be illustrated as follows: Suppose that the family head or some wealthier member of the family, acting expressly on behalf of the family, (a) pays a reasonable compensation to the injured party in a trespass case, or (b) gives financial aid to the member in difficulty. Then in case (a) members can be compelled against their will to make a fair contribution towards reimbursing him; but in case (b) no one can be so compelled against his will. It must not be thought from this illustration that members are liable where the alleged obligation is to non-members, but are not liable where it is to fellow members of the family. For the injured party in the trespass case may well be a fellow member, as where the family council wrongfully orders a member's house to be burnt down, on the ground that he had refused on request to remove it from a site on the family land. In a case like this, the family as a legal entity is liable to the same extent as if the injured person were a stranger. But in practice the actual damages payable will be reduced by the amount of contribution which would be due from the plaintiff as a member had the action been

taken by a stranger.

2. ORGANS OF THE FAMILY

As a corporate body the extended family has two vital organs without which it cannot enter into legal relations with the outside world, involve its members in legal obligations to others or to one another, or even conduct its own internal affairs. These are a family head and a family council. The former was, in traditional society, and to a large extent is still in modern society the oldest male member of the family.[1] The latter is composed of the heads of the various branches of the extended family, hence the name "family elders" which is sometimes used for that body.

The family council is to the family what a Board of Directors is to a company, while the family head may be likened to a company's Managing Director. It may be said in general terms that there is a clear demarcation of functions as between the head and the council. Roughly speaking, the family head represents the family in all its deailings with the outside world [2] so that, in strict legal terms, no transaction with strangers carried out in the name of the family is valid unless done by him or by

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1. See the next section below for a more detailed examination of the law relating to succession to this office.
2. I.E. in matters concerning the family as a body.

a person duly authorised by him. To his province also falls the day-to-day administration of the family's property (such as granting short leases and accepting surrenders of such leases), and the settlement of minor internal disputes. On the other hand, all major policy decisions (e.g. to sell or partition family property) are taken by the council (of which he is a member and at whose meetings he generally presides).

How far a family head can bind the group by his act where the transaction involves a major policy decision which would normally require consultation with and approval by the council but was in fact done at his sole initiative, will appear in the succeeding pages. Conversely, we shall see later the circumstances, if any, under which the council has a right to assume the role of the family head in internal or external relations, or else bestow upon another member the rights and powers which properly belong to the family head.

An examination of the law relating to these two organs of the family will reveal the many interesting rules that govern the internal working of the family, and to this task we shall now address ourselves.

A. The Family Head

The family head is, as already indicated, the legal successor of the founder of the extended family and

the living symbol of the group's solidarity. As will be expected in a territory the size and population of southern Nigeria with its dozens of languages and scores of dialects, this functionary is known by different names in different societies. The Ibo of the Eastern Region, for example, call him the Okpala, while the Western Ibo know him as Diokpa. Among the Yoruba he is variously known as Bale and Olori ebi. The Efik call him the Ete ufok, while the Kalabari Ijaw call him the Polo Dabo.[5] But by whatever name he is known, the legal rights and functions of the family head are substantially the same[6] in all the societies covered by this treatise.[7]

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5. The names olori ebi (Yoruba), ete ufok (Efik) and polo dabo (Kalabari Ijaw) can all be translated literally as "father of the family". The Ibo name okpala and the Yoruba bale both mean "the first-born son" in the Biblical sense.

6. For further details on the social (not necessarily legal) rights and functions of the family head, see C.K. Meek, Law and Authority in a Nigerian Tribe (1937) pp.104-111; P.C. Lloyd, Yoruba Land Law (1962), pp.251 et. seq.; C.O. Omoneukanrin, Itsekiri Law and Custom (1942), passim; D. Forde and G.I. Jones, The Ibo and Ibibio-Speaking Peoples of South-Eastern Nigeria (1950), pp.71-73 (Ibibio); G.B.A. Coker, Family Property among the Yorubas (1958) pp.146-155; S.N.C.Obi, Ibo Law of Property (1963), pp. 18-24 and passim.

7. Even where the same person is both family head and political chief, his rights and powers in relation to his family are no greater than those of ordinary family heads. Cf. Lloyd, op.cit., pp.84 ff.

The law relating to the office of family head may conveniently be discussed under the following heads:

(a) Succession to the office;

(b) Legal functions; and

(c) Legal rights.

(a) Succession.

Before considering the rules governing the replacement of deceased family heads, one important coveat must first be given , as this is a source of confusion among writers on the subject. The law relating to succession to the headship of an extended family differs considerably from that which governs the selection of a new head for an elementary family at the death of its founder. In the latter case, the law is mainly concerned with providing a new father, husband and property owner. Not unnaturally, therefore, the law allows the founder considerable latitude in choosing who shall take care of his domestic establishment and property. Hence his right to appoint (orally or by a written will) any of his children, brothers, sisters and (in exceptional cases) even strangers [8] as the head of his own immediate family. It is for the same reason, too, that the Courts, if called upon to adjudicate on the choice

8. E.g. a trusted slave, in the olden days. Note, however, that though a stranger by descent, a slave was sometimes absorbed into the family by an owner during his life.

of such a new head, are reluctant to appoint a person who has no interest in the estate of the deceased. Thus in Sogbesan v. Adebiyi, Butler Lloyd, J. said,

> "It would to my mind be altogether contrary to the conceptions of native law and custom as well as to good sense to appoint a person who himself is given no interest in the family property to act as head of the family, a position which involves the management of that property." [9]

This property consideration need not affect the choice of a head for the extended family. for the administration of property may only be an insignificant part of his functions in certain families. Indeed the duty of looking after family property may be assigned by general consent to some other person or body of persons as a special land authority; in some cases, there may be no property to administer at all. But whether or not there is property to manage, the head of an extended family has no power to appoint his successor.

(i) Who may Succeed.

In traditional society the oldest male member of an extended family automatically became its new head at

9. (1941) 16 N.L.R.26, at p.27. See also Coker, op.cit., pp.146 et seq. All the terms used in this passage (head, family, family property) refer to the elementary family. But see Coker, op.cit., p.220 for apparently contrary views.

10. See Thomas, Anthropological Report on the Ibo-speaking peoples of Nigeria, Part I, p.73; Forde (ed.), Efik traders of Old Calabar, p.13; Lloyd, Yoruba Land Law, pp.37, 282.

the death of the incumbent of that office.[10] No family meetings were required; no notes were taken; and there was no formal installation. Except in the matrilineal and mixed-descent societies of Yako and Afikpo areas respectively women had no right to be family heads.

In modern times, however, the succession rule has been altered by most societies in favour of admitting women to this office. In practically all societies, too, automatic succession by the oldest man has given place to selection, by the family, of the person best suited personally for the post.[11] It is perhaps only among the patrilineal areas of Iboland that women are still barred from family headship.[12] The position today is then that, parts of Iboland apart, the rightful successor to a family headship is the oldest member thereof (male or female), but that the family is nevertheless entitled to select any of its number if of the opinion that the oldest member is not fit for the post, or that there is another member whose personal qualities make him pre-eminently suitable for the office.[13]

11. See Meek, Land Tenure and Land Administration in Nigeria and the Cameroons (1957), p.129; Meek, Law and Authority in a Nigerian Tribe (1937), pp.104-114; Forde, Efik Traders (ante), p.14; Omoneukanrin, op.cit., p.31; Lewis v. Bankole (1908) 1 N.L.R.82; Inyang v. Ita (1929) 9 N.L.R.84.
12. Even among patrilineal Ibo societies, it not infrequently happens today that wealthy influential women establish themselves as de facto (though not de jure) family heads.
13. Ibo law has a different set of rules for succession to the headship of an extended family in its other connotation of a socio-political group. In this case, the general principle is that succession is by the oldest male member of the most senior branch of the family in question. Note that these two groups are not identical except in name. See further, Obi, op.cit., pp.161-2.

The legal right of women to succeed automatically as oldest members or be selected for personal qualities is necessarily qualified by practical considerations. The first is that as marriage is everywhere virilocal, a woman will almost certainly be living away from the vast majority[14] of the family by the time she becomes the oldest living member. Since family meetings (including the rather frequent meetings of the family council) are normally held in the house of the family head, it follows that a married woman would not make a suitable head: a family will not be happy to hold its meetings in "foreign" lands (i.e. their married sister's matrimonial home), nor could the affairs of the family be satisfactorily conducted by an absentee head.

The selection of a new head is done by a meeting of family elders. In strict legal theory, a selection is valid and binding on the family as a whole if made by a majority of the elders. But in practice discussions and consultations go on continually until a new head acceptable to all branches is found. Failure to choose a person who has the willing support of member branches is a first step towards disintegration. For the aura of sacrosanctity that, in the past surrounded the family head (and other traditional functionaries as well) and the fear of retribution

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14. Viz. the male members plus their households.

from departed ancestors, should he be disobeyed or slighted, are rapidly dispersing (if not completely gone) in most societies today.

The process of evolution from primogeniture to selection by family members and the need for unanimity in such selections are graphically illustrated by Berkeley, J. in Inyang v. Ita and others [15] in these words -

> "Before the Government came to Calabar, and established law and order, it is certain that the headship of a house [16] belonged as of right to the senior male member of that house. But he took it at his peril. If he failed to find support within the family only two courses were open to him. Either he went into exile or else he stayed and was put to death. In either case the succession to the vacancy devolved on the next senior male, if he chose to take it up. Human nature is much the same all over the world, and it is absolutely certain that there must have been occasions on which the next senior male, knowing that he had no chance of winning the support of the family, had sufficient intelligence to stand aside rather than risk such perilous promotion. Thus we see, even under a

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15. 9. N.L.R.84, at p.85.

16. This is the popular word for an extended family among the Efik.

system of strict primogeniture, the will of the family functioning as an important factor in placing a man in the headship, and in maintaining him there or rejecting him therefrom."

(ii) Disputed Headship and the Courts.

Most cases of disputed family headship are settled either by a meeting of family elders or else by a general meeting of as many members as can attend. Should settlement out of court be impossible, however, a difficult point of law could arise, for it may well be that no court of law in the land has jurisdiction over such cases. Before Regionalization, there were the Appointment and Deposition of Chiefs Act,[1] the Cheiftaincy Disputes (Preclusion from Courts) Act, [2] and the proviso to s.12 of the Supreme Court Act (No.23 of 1943) which between them had the effect of taking all chieftaincy disputes out of the jurisdiction of the courts. Since Regionalization, there have been Regional enactments to the same effect.[3] If, therefore, family headships are regarded as falling within the general rubric of "Chieftaincies",[4] then all disputes concerning succession to them would be outside the jurisdiction of the courts, and

1. Laws of Nigeria, 1948 Revision, Cap.12.
2. No.30 of 1948.
3. See the Chiefs Law (W. Region), s.24 (1959 Revision, Cap. 19); Recognition of Chiefs Law, 1960 (E.Region, No.9 of 1960), ss.6, 7 and 8.
4. Family heads are popularly known as "Chiefs" among the Efik, the Yoruba, the Kalabari and the Okrika. Among the Ibo, too, the more influential ones are sometimes called chiefs.

will have to be settled in accordance with the rules laid down in the relevant statutes.

Who then is a "chief"; in particular, does that term include a family head, as above defined, in law as distinct from popular usage? Section 2 of the Chiefs Law (Western Region) defines "chief" as "a person whose chieftaincy title is associated with a native community and includes a minor chief and a recognised chief." But "native community" is not defined, and so it is impossible to say whether or not an extended family bears that meaning. The Recognition of Chiefs Law of the Eastern Region is even less helpful here, as it does not define the term "chief" at all. The Interpretation Act of the Federal parliament defines "chief" as "any native whose authority and control is recognised by a native community".[6] It is arguable that a family (in the sense under discussion) is not a "community" since its members do not all live within a separate and distinct territory. If this contention is valid, then a family head is not a chief within the meaning of the Chieftancy legislations. On the other hand, it can be argued that a substantial part of a family (viz. its male members and their households) do occupy a distinct territory as a rule, and so do constitute a community, whose head would therefore come within the meaning of "chief"

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6. Laws of the Federation of Nigeria (Cap.89 of the 1958 Revision), s.3.

unless where otherwise indicated.

If then a family head is a chief as above defined, cases involving succession to that office [7] cannot be entertained by any court of law, but must be settled in accordance with the provisions of the Laws in question.[8] If, on the other hand, a family headship is not a chieftaincy in law, the next question is this. Should it be classified as (a) a bare title or honour, (b) a title coupled with property rights, or (c) a family status? If it is no more than a bare title or honour, the courts (at all events the High Court) will not entertain an action concerned solely with succession to it. This was the decision of the Full Court in Adanji v. Hunvoo.[9] In the course of his judgment Griffith, J. said -

> "If the claim is to a bare dignity or honour without material benefit incident thereto, I am strongly of opinion that this court would be well advised to exercise its discretion and decline to entertain plaintiff's application." [10]

Speed, Acting C.J., was even more emphatic. He said -

> "Now what is the chieftaincy? I say without hesitation

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7. As opposed to cases involving dispute as to any property which goes with the office, e.g. regalia. See on this s.6 (3) (E.R.), and Proviso to s.24 (b) (W.R.).
8. Cf. Coker's masterly discussion: op.cit., p.147.
9. (1908) 1 N.L.R.75. Great caution is required in reading this and similar cases between members of the Ijaw group of societies; for there the head of an extended family is almost invariably called a Chief.
10. 1 N.L.R.75, at p.78.

that it is a mere dignity, a position of honour, of primacy among a particular section of the native community and that as such the court has no jurisdiction to decide upon it." [11]

The writ in the Adanji case read simply -

"The Plaintiff's claim is to establish his title to the Chieftaincy of Fiyento in Badagry".

Now, s. 11 of the Supreme Court Act which set up the superior courts (and which is substantially reproduced in the current Regional High Court Laws [12]) gave the Supreme Court (the equivalent of the Regional High Courts of today) the same powers as were vested in the High Court of Justice in England by the Judicature Acts of 1873 and 1875. And so the Acting Chief Justice explained why the Court must decline jurisdiction thus -

"I do not think that it can be reasonably contended that the High Court of Justice in England could entertain such a claim as is made in this action" [13] (viz. to establish title to a position of honour or dignity without more).

If, still assuming that family headship is not a chieftaincy within the meaning of the Chiefs Laws, if

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11. 1 N.L.R.75, at p.79.
12. See the High Court Law (W.R.), loc. cit., s.8; the High Court Law (E.R.), loc.cit., s.10(1); and the High Court of Lagos Law (Laws of the Federation, 1958 Revision, Cap.80), s.10.
13. 1 N.L.R.75, at p.79. For other cases on "bare titles" see Okupe v. Soyebo (1937) 3 W.A.C.A.151, and Ononye v. Obanye (1945), 11 W.A.C.A.60.

family headship is a title coupled with land and/or other rights, the courts will still not have any jurisdiction to entertain an action founded on a mere succession claim. The High Court can enquire into the legality of a person's claim to family headship or the validity of his selection therefor if, but only if, that enquiry is merely incidental to a dispute over property or other rights attached to the office.[14] Thus in Ononye v. Obanye [15] the Plaintiff's claim was for (a) a declaration that he was the head of his family; (b) a declaration that "as such head (Okpala) he is entitled to all the rights attached to that office according to native law and custom and is proper representative according to native law and custom of the family"; and (c) an injunction restraining the Defendants from "further interference with the Plaintiff's rites in Okpalaship". The High Court [16] dismissed the claim on a preliminary objection that it had no jurisdiction. On appeal to the West African Court of Appeal counsel urged, inter alia, that this was not a bare title.[17] "He asks us", said Baker, Ag. C.J. of Nigeria delivering the W.A.C.A judgment, "to say that the word 'rights' in the claim

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14. As was the case in the Privy Council case of Laoye v. Oyetunde (1942) 10 W.A.C.A.4. Note, however, that the title in that case appears to be a political one.
15. (1945) 11 W.A.C.A.60.
16. To which the case had been transferred from the Native Court.
17. The head, he said, signed leases in respect of family land, for example.

included 'rites' and that a claim of property is attached."[18] Nevertheless, the Court held that they were "satisfied that the only issue was a bare title" and that "no consequential relief" was claimed.[19] The explanation for this view seems to be that even if property and administrative rights were attached to the office, there was in fact no dispute over any specific property, neither was it shown that the Plaintiff was actually prevented from exercising any of his customary rights by the Defendants.[20]

If, finally, family headship is construed as a family status, the position would be different. In that case the Customary Courts (provided there was one in the area concerned) would have original jurisdiction, while the Magistrates and High Courts would have appellate jurisdiction. This is because s.13 of the High Court Law and s.17 of the Magistrates Courts Law (both of the Eastern Region) as well as the Proviso to s.9 of the High Court Law of the Western Region expressly bar these respective Courts from

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18. 11 W.A.C.A.60, at p.61.
19. 11 W.A.C.A.60, at p.63.
20. Plaintiff in this case should have acted on the broad hint dropped by Speed, Ag. C.J. in the Adanji case (1 N.L.R 75, at p.79) - "It may be that the chieftaincy carries with it by native law and custom some or many rights and privileges which might be made the subject of an action at law. It may be that upon a claim differently stated the court might have been forced to decide incidentally the question whether or no the plaintiff had been duly elected Chief Fiyento according to native law and custom."

exercising original jurisdiction in matters affecting "family status" where a Customary Court has jurisdiction.[21]

(b) Legal Functions of the Family Head.

The functions of a family head were both delicate and onerous in traditional society.[1] He had a duty to represent the family or any of its members in disputes involving strangers. Indeed he could sue or be sued in his own name in such cases. He exercised quasi-judicial powers in respect of disputes involving members of the family, including those between husband and wife. He gave the final approval to all marriages into or out of the group, and took part in the more important parts of the negotiations. As a rule too, he was responsible for the equitable adjustment of land rights as between members in addition to at least supervising the day-to-day administration of the family land generally.

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21. Non-customary courts can exercise original jurisdiction in such matters if (a) there is no Customary Court in the area or (b) the case is transferred to them from a Customary Court.

1: For a general survey, see Elias, Groundwork of Nigerian Law, esp. pp.325-326. On the Yoruba, see Ajisafe, Laws and Customs of the Yoruba People, pp.61-62; Lloyd, Yoruba Land Law, esp. pp.18, 40, 83-4 and 251; Coker, Family Property among the Yorubas, pp.134-5, 146-155. On the Efik and Ibibio, see Forde and Jones, The Ibo and Ibibio-Speaking Peoples of South-Eastern Nigeria, pp. 72-3. On the Yako, see Forde, "Government in Umor" (1939) 12 Africa 129-161, esp. p.131; Talbot, The Peoples of Southern Nigeria, pp.677-8. On the Urhobo see Hubbard, The Sobo of the Niger Delta, p.39. On the Ibo, see Meek, Law and Authority ..., pp.61-2, 104-114; Basden, Niger Ibos, pp.121 and 151; Thomas, Anthropological Report..., Part I, p.73; Obi, Ibo Law of Property, pp. 18-24, and authorities cited there. See also Balogun v. Balogun (1935) 2 W.A.C.A.290, esp. 294-305.

In the modern society, the family head still enjoys much social prestige. But his legal functions have largely disappeared. As far as arbitral/arbitration proceedings are concerned, it is no longer one of his functions to represent members of the family in matters which affect them in their private capacities. This means that while he may still volunteer or be persuaded to represent a member in a private dispute which is being settled by arbitral proceedings on the traditional lines, the family head is no longer in duty bound to do so by reason only that he is such a head. Any adult member of the family can now appear in his own case; infants are represented by their immediate parents or guardians as the case may be.

As regards judicial proceedings in the regular courts, it can be said with a large measure of confidence that a family head no longer has the right which attached to his predecessors in office to represent anyone outside his own immediate family, even in the Customary Courts. The Customary Courts Law of the Western Region [2] specifies the persons who, with the permission of a Customary Court, may appear before it on behalf of a party. These are "the husband, wife, guardian, servant, master or inmate of the household of any party, who shall give satisfactory proof

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2. S.28 (4): Laws of the Western Region, 1959 Revision, Cap.31.

that he or she has authority in that behalf."[3] Nothing is said of the family head as such (though he may appear as a party's master, husband or guardian if he happens to be one). And so, in view of the time honoured rule of construction - expressio unius est exclusio alterius - it would seem to follow that neither a family head nor anyone else not expressly mentioned here could represent any party in these courts.

As for representation in the Regional High Courts, it would be contempt of court for anyone who is not authorised in that behalf to institute or defend "any proceeding in the High Court in the name or on behalf of another person ... knowing himself not to be so authorised".[4] The basis of representation in these courts is, therefore, authorization. Now it is arguable that authorization may be express or implied, and that a family head may be said to be authorised by implication by virtue of his general position as traditional spokesman for his people. While admitting that there is some force in this argument, one must point out two weaknesses in it. First it would take a liberal judge to construe the word "authorised" to include "authorised impliedly by customary law" which is really what the contention boils down to. Secondly, it is not unreasonable to suppose that the legislature inserted this provision

3. Cf. s.32(1) of the Customary Courts Law, No.21 of 1956, of the Eastern Region which is identical in substance.
4. High Court of Lagos Law, s.82. Cf. Customary Courts Laws, ss. 32(1) and 28(4)(a) of the Eastern and Western Regions respectively.

deliberately to prevent representation by traditional heads or any other functionaries, as that power is obviously open to abuse.

The traditional judicial (or quasi-judicial) function of the family head has also suffered a virtually total eclipse. As already pointed out, he used to settle disputes; and he often enforced his decisions by a number of means, viz., moral pressure, threats of divine visitation or, in extreme cases, economic and/or social ostracism (assuming of course that he had the moral support of the bulk of the family on the matter). He can no longer compel appearance before him; neither can he now enforce his decision by his own direct act. This is because there are statutory provisions to the effect that no person or body of persons may hold judicial proceedings except as a duly constituted court of law, though any one may act as an arbitrator between willing parties in civil disputes.[5]

Two interesting points arise from these statutory provisions. The first is that the decision of a family head regarding intra-family disputes will not now have to depend on family backing for its efficacy. If we regard him as an ordinary arbitrator, then his award can be enforced by legal action in the appropriate court by the

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5. See s.56(1), (2) of the Customary Courts Law (W.R.), and s.10(1), (2), Customary Courts Law (E.R.).

successful party.[6] The second point, which applies to the Western Region but not to the Eastern Region, is that Customary Court Members are not allowed to act as arbitrators there. And so if a family head also happens to be a court member, he is barred from arbitration in intra-family (as he is barred from all other) disputes. Section 62, sub-section (2) is in these words -

> "Any person, other than a member of a customary court, adjudicating as an arbitrator upon any civil matter in dispute where the parties thereto have agreed to submit the dispute to his decision shall not be regarded as exercising judicial powers for the purposes of paragraph (a) of sub-section (1) of this section." [7]

The function of the family head as manager or caretaken of family property remains intact in modern society. Where such property consists in part or in whole of house rooms, he has almost unfettered discretion in the allocation of these rooms to members according to need.

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6. For a more detailed and scholarly discussion of this problem of arbitration in relation to traditional authorities, see Allott, Essays in African Law (1960), pp.123-141. See also Matson, "The Supreme Court and the Customary judicial process in the Gold Coast" (1953) I.C.L.Q.47.
7. Customary Courts Law, loc.cit., s.62 (2). Contrast s.10 (2) of the E.R. Customary Law: "Nothing in this section contained shall be deemed to prohibit any person from adjudicating as an arbitrator upon any civil matter in dispute where the parties thereto have agreed to submit the dispute to his decision".

He also has the final word in the yearly allocation of farm land to members. It is he who grants leases and other (short) tenancies to non-members, and who is responsible for the collection of rents or other dues therefor. As an ancillary to this function (of manager or caretaker) he has a right to bring action for and on behalf of himself and his family whenever this becomes necessary in connexion with the family property. Even where, as sometimes happens, the family as a body appoints another person as caretaker, court actions are still taken by the head.[8]

(c) Legal Rights of the Family Head.

Many rights and privileges were attached to the office of a family head in the traditional society, but many of these are now lost. He had a right to summon meetings of the Family Council as well as general family meetings, and to compel attendance thereto.[1] If any other member wanted a meeting held, he had to ask the head to

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8. Cf. Coker, op.cit., pp.95-6. Action may be against strangers or fellow members, e.g. to recover possession from a member for attempted alienation.

1. Cf. Thomas, Anthropological Report Part I, ante, p.73. On his rights generally, see Forde and Jones, op.cit., p.72 (the Ibibio including the Annang); Lloyd, op.cit., pp.84, 251 ff.; Meek, Law and Authority, ante, pp.104-111; Basden, Niger Ibos, p.121; Coker, op.cit., pp.144 ff, 151 ff.

summon one. It was the right and privilege of the head to preside at all family (and Family Council) meetings and to announce their decisions. He was entitled to periodic tributes and gifts in kind from other members. He had to be consulted before a stranger was brought in to occupy any part of the family land or otherwise make use of it. On final apportionment or alienation of the family property, his consent was an absolute essential to validity. It was a serious wrong to insult or slight him, and where the miscreant was a fellow member, the head could impose a fine on him. Finally, he had to approve any proposed marriage into or out of the family.

Many of these rights have disappeared. The family head can no longer lawfully demand tributes or any other gifts from the other members; he can no longer impose a fine on a member who insults him (though he probably has a civil action in the Customary Courts against anyone who insults him); he still summons family meetings, but has no means known to the law of enforcing attendance.

It may be said that it is in connexion with the family land that the legal rights of the family head are still of great importance. In those societies (such as among the Yoruba) where there is a family house, the head has a right to reside in the best rooms therein if he can go into possession without undue hardship to a member or

members in occupation. Among the Ibo where family houses are not common, the head as a rule has exclusive possessory (beneficial) interests in part of the family farm land, but only if he also happens to be the head of the socio-political group of the same name. In that case, he is entitled to that portion of the family holding known as ani isi (lit. "head land").

But the above constitute the limit of his exclusive beneficial interests in the family house or farm land as the case may be. His other rights are, as noted in connexion with his functions, hinged on his position as caretaker for the family property. We shall deal with this subject in greater detail in the next Chapter. Here it must suffice to indicate in a few words the more salient aspects (positive as well as negative aspects) of his position. He is the proper person to initiate proceedings against anyone in unlawful possession of the family property or any part thereof, be he a fellow member or a stranger.[2] He has also a right to sue for trespass or other wrong committed against the property; to sue for the recovery of rents due; to negotiate and grant leases and accept surrenders thereof.

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2. Umana v. Ewa (1923) 5 N.L.R. 24; Inasa v. Oshodi (1930) 10 N.L.R.4; Taiwo v. Sarumi (1913) 2 N.L.R.103; Bassey v. Cobham (1924) 5 N.L.R.90; Manuel v. Manuel (1926) 7 N.L.R. 101. Cf. Koran v. Dokyi (1941) 7 W.A.C.A.78. Also Buraimmo v. Gbamgboye, 15 N.L.R.139.

But he has no right to dispossess a member without just cause - dispossession being justified if brought about by serious misconduct on the part of the person in possession or by greater family needs.[3] He has a right to be consulted before any valid alienation of the family property can be made: indeed he must not only be consulted but must give his consent to the transaction. He has no right to sell family property without the consent of all family branches; but he has a right to recoup himself of expenses necessarily incurred for and on behalf of the family as a whole, and this by selling part of its property where necessary.[4] Finally, while he is not accountable for the rents and profits of family property at the suit of junior members, he is probably so liable at the suit of the Elders.[5]

B. FAMILY COUNCILS

In the traditional society the Family Council was an important, plenipotential organ which may be described as a miniature local government council, improvement society,

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3. Manuel v. Manuel, 7 N.L.R.101.
4. A good example is when he has had to perform the funeral expenses of an impecunious deceased member; another is when he has had to recover or preserve family property by legal action. All this is predicated on the assumption that the members were told of the intended transaction but either could not or would not help with the necessary expenses.
5. Cf. Coker, op.cit., p.152, note 50.

court of law and privy council rolled in one. For it made rules and regulations for the guidance of its members in their dealings among themselves and with strangers; it tried cases of misconduct (legal or moral) ~~including~~ involving members; it took steps to alleviate cases of hardship or misfortune befalling members; and it advised the family head in his more important dealings with the outside world. Many of these functions have passed away, but enough still survive to justify a brief examination of this aspect of social life.

(a) Composition and Meetings.

A Family Council consists of the heads of the various branches that compose an extended family, with the eldest member - the family head - as its president. It used to be an all-male body, but since women can now be family branch heads, it may be a mixed assembly of both sexes. Its president may even be a woman. By definition, every constituent branch is entitled to representation at meetings of this Council, but decisions taken therein are not necessarily void because one or more such branches are not in fact represented at a given meeting; since a branch head sometimes asks to be excused from attending, while expressing his willingness to be bound by any decisions made. Again, though only branch heads are legally entitled to be present, yet a Council meeting is not unlawfully constituted by

reason only that some junior members were present during its deliberations. Junior members may lawfully attend such meetings on three grounds: first because they were especially invited to attend (e.g. to give the Council the benefit of their special knowledge), or, secondly, because they were delegated to represent absent branch heads, or thirdly because they asked to be, and were, allowed to attend. A Council meeting will not be vitiated by the absence of a branch head if he had been given reasonable notice thereof but nevertheless failed to attend or to send a representative. A fortiori, the validity of a meeting is not affected where a branch head had been given reasonable notice but refused to attend or send representation.

The above special circumstances apart, a Family Council meeting is only fully efficatious if attended by all the branch heads. It is popularly said that a branch is not bound by a Council decision (or resolution) taken at a meeting of which its head had not been given reasonable[6] advance notice and at which, as a result, it had not been represented.[7] This may be construed as meaning that such a resolution is merely voidable at the instance of the branch that was not represented. But it is submitted that

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6. What is reasonable in any given case is a question of fact.

7. A representative can only be lawfully appointed by or with the approval of the branch head himself. Were this not so other Elders could easily by-pass a difficult-to-convince branch head.

it can only mean that the resolution/decision is void ab initio. The reason why it is void is not that it was not a unanimous decision, for unanimity is not essential; it is because the meeting itself was improperly constituted. A possible objection to this submission is that it has been held in a number of cases that a sale of family property without the consent of some members whose consent is necessary is not void but voidable.[8] Indeed, it has been repeatedly held that other things being equal, the consent of a majority of the members is all that is required for a valid sale of such property.[9] But these arguments are irrelevant. In the first place, decisions to sell family property are not taken by the Family Council but by a general family meeting. Secondly, even if such decisions are taken by the Council, there is a fundamental difference between a majority decision by a lawfully constituted meeting (which is valid) and a decision (whether unanimous or not) by a meeting which is improperly constituted and which, ex facto, cannot take any valid decisions.

Family Council decisions are made on the basis of majority votes (or acclamation). The various family branches are each entitled to one vote, and this even if more than one member of a given branch happens to be present at a

8. See e.g. Aganran v. Olushi (1907) 1 N.L.R.67; Manks v. Bonso, 3 W.A.C.A.62.
9. See Adewunyin v. Ishola (1958) W.R.N.L.R.110, per Ademola C.J.

given meeting.[10] The family head is only entitled to one vote, and that in his capacity as a branch head: he has no casting vote as president of the Council. A majority decision made by a properly constituted meeting is binding on the family as a whole.[11]

(b) Functions

As already indicated, a Family Council used to be an important body with traditional powers to make rules for the guidance of all members in matters spiritual and temporal. They levied contributions on members for such things as funeral expenses; marriage expenses for their young men who had to be provided with wives either to prevent their particular descent line from dying out or else to try and infuse some sense of responsibility into them and so stop them wasting their life and youth; and aid for deserving cases such as victims of trade depression, bad harvest, fire or theft. They settled disputes between members, including those between husband and wife, bringing all their collective pressure to bear on the errant ones.

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10. Cf. Lewis v. Bankole, 1 N.L.R.82 at p.104. See also Coker, op.cit., pp.133-4.
11. The only course open to dissatisfied members is to censure their branch head for casting his vote in favour of such a measure without due consultations behind the scenes. In the past, a branch whose head opposed a given measure of great importance and who felt very strongly about the matter would, in extreme cases, secede from the parent body. Today such a branch might try getting the decision reversed in court on the ground, for instance, that it was not in the best interest of the family as a whole.

In contemporary society, some of these functions are still performed by the Family Council. It still settles disputes between its members. But this it does, not as of right but at the request or at least with the consent of the parties concerned, and on the basis of arbitration.[12] It still advises the family head on matters concerning the family before he takes important steps in both his internal and external relations. But though he is usually guided by their wishes and advice, he is not bound to follow them (except, of course, where their consent is necessary under customary law [13]). It can still raise loans - on the security of the family property - for the education or advancement of deserving members. And finally, the Council still takes an active part in the management and control of the family property, inspecting it for necessary repairs, drainage and erosion control. For this they have a right of entry at all reasonable times.[14]

3. Disintegration and Loss of Family Membership.

(a) Loss of Membership by Individuals

In the olden days a person lost his family membership by renouncing all his rights and interests in the family property, declaring his intention never again to accept

12. See the discussion on the arbitration powers of the family head on pp.42-46, ante.
13. Perhaps the only occasion when this consent is ever necessary is in relation to the alienation of family property. But here the consent of all "important" members not just Family Elders, is required: Esan v. Faro (1947) 12 W.A.C.A.135.
14. Cf. Coker, op.cit., pp.131-4, on the Yoruba.

or recognise the authority of the family head, abandoning his home (at all events where he lived on the family land), and permanently attaching himself to another family (usually that of his maternal uncle). This course was naturally only adopted as a last resort, following a protracted period of acute discontent due to intolerable oppression in the hands of the family head or other members of the family.[1]

Conversely, the family itself could, in the past, terminate a person's membership thereof for one of several reasons: because he was an incorrigible rogue, a wilful murderer, a coward in war, a traitor to his people, or a person given to incestuous relations.[2] A decision of this magnitude was always taken either by the Family Council after the fullest possible consultations behind the scene, or by a general meeting of as many members of the family as could be assembled for the purpose.

In modern society, it is still open to a member to sever all connexion with his family if he so desires, and to attach himself to another family or else move into one of the big urban areas where the traditional family either does not exist or is fast breaking down. Presumably

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1. There were, however, a few cases (especially among the Ibo) where married women found they had to sever kinship ties with their maiden families as the only way to keep alive or to bear children and keep them alive: so quoth the diviner!
2. A determination of membership was usually followed in appropriate cases by an act of physical expulsion from the territory occupied by the bulk of the family.

a male member (and a fortiori, a married female member) can now sever his family ties without having to abandon his home. This he can certainly do if his home is in an individually owned house standing on an individually acquired piece of land. (Whether he is an owner-occupier or a mere tenant in a third party's house makes no difference for our present purposes.) In that case, all he need do is to renounce his membership of the family as well as his interests in its property. But a strong evidence of such renunciation is necessary if it is to be accepted as permanent and irrevocable. It is important to emphasise this point since many a man has in recent years attempted to evade payment of family assessments by declaring himself for ever cut off from his family while not having the slightest intention of effecting any permanent break in fact.

Where a member residing in a family house renounces his membership of that family, it can safely be said that he ipso facto loses his right of possession in respect of his home. While a member, his right of occupancy only exists during good behaviour.[3] A fortiori, if he ceases to be a member, he ceases to have a locus standi in the family house - as of right. A much more difficult legal point would arise where a person renounces his family membership while continuing to reside on the family land

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3. For what constitutes "bad behaviour" generally, see Report of the West African Land Committee 1948, p.243; Arigbe v. Adeoye, 5 N.L.R.53; Etim v. Eke, 16 N.L.R.43; Inasa v. Oshodi, 15 N.L.R.90.

but in a house which he had himself built or purchased. It is a notorious fact that a member who lawfully builds[4] a house on family land entirely with his own material and with his own or hired labour, is the exclusive owner thereof.[5] It is, on the other hand, equally well known that in a case like this, all that the member owns is just the building as a chattel.[6] It would seem to follow from these two principles that the family as landowner has a right in these circumstances to demand that the ex-member shall remove his house from the family land. Alternatively, he may be asked to pay an agreed ground rent as the price of his continued occupation of the site in question.[7]

Whether a family has a right to expel any of its members in modern society is an entirely different question. It would certainly be unlawful physically to drive a member away from his home even if this happens to be part of the family house. To begin with, it would constitute the offence of "Unlawful assembly" if three or more members of the family got together with the object of physically removing a man from his home, there being no doubt that this is conduct likely to lead to a breach (or fear of a breach) of

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4. I.e., with the permission of the family in the first place.
5. Cf. N.T. Brooke, "Legal aspects of Land Tenure in Nigeria", (1946) 5 African Studies, 211-220, at p.215; Lloyd, op.cit., p.81.
6. Cf. Omolowun v. Olokude (1958) W.R.N.L.R.130.
7. Two other possibilities are (a) that the family will agree to purchase the house for its own use, and (b) that, failing any satisfactory arrangement, the house is just left to decay.

the peace. And it would constitute the offence of "riot" as soon as the assembled party makes any move to execute their purpose.[8] In any case, and whatever the number of people involved in the operation, it would be the offence of "forcible entry"[9] for members of the family to enter "on land which is in actual and peaceable possession of another" in order to drive him out of it. Being in lawful possession is not given as a necessary element of this offence; neither is it material that the family has a right of entry in normal circumstances.[10]

It can safely be concluded, therefore, that the family no longer possesses the right to expel any of its members by physical force.[11] It is also submitted that it can no longer expel a member in the sense of disowning him and denying him the right to participate in its social life. In our view, this is an important aspect of a person's civil rights. If this be so, it would be a violation of one of the fundamental human rights guaranteed by s.21 of the 1960 Federal Constitution, for the family to interfere with that right in any way other than by the normal process of legal action. According to s.21(1),

"In the determination of his civil rights and

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8. For unlawful assembly and riot, see ss.69 and 70 of the Nigerian Criminal Code (Cap.42 of the Laws of the Federation of Nigeria and Lagos, 1958 Revision).
9. S.81 of the Criminal Code, loc. cit.
10. Ss.282, 292 and 293 give a person in peaceable possession wide powers of defence against unauthorised persons entering the land.
11. It is instructive to note that by virtue of s.26(1) of the Constitution, the Federal Government cannot expel a Nigerian citizen from the country. Can a family do so from its territory?

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."

A decision of the Family Council (or indeed of a family general meeting) will, therefore, no longer suffice; there has to be a decision of a duly constituted court of law. More important still, the traditional grounds for the expulsion of a member will no longer, in our submission, be entertained by the courts. For insofar as these are criminal offences (e.g. persistent stealing or incestuous relations), there are prescribed (and exclusive) punishments for them in the Criminal Code; insofar as they are mere social disgrace to the family, they are not punishable offences today.[12] Again it may well be that such interference with a member's right to participate in his family's social life would be a violation of another of his fundamental human rights, this time under s.22 (1) of the Federal Constitution. This subsection provides that "every person shall be entitled to respect for his private and family life, his home and his correspondence." There is no definition of "family" for the purposes of this or any other sub-section

12. Cf. Aoko v. Fagbemi and D.P.P. (1961) 1 All N.L.R. 400, where it was held that to convict and punish a woman for the (apparently customary law criminal) offence of adultery was a breach of her fundamental human right under s.21(10) of the Federal Constitution, the conviction not being under a "written law."

of Chapter III, [13] and so there is nothing to suggest that the extended family shall be excluded from the connotation of that term.

There is yet another argument in favour of the contention that the family no longer possess the right to expel its members. Such expulsion entails loss of property rights on the victim's part where, as is usually the case, there is family property to consider. In the first place, it would be contrary to equity and natural justice (at all events as conceived by people trained in the common law system) to let a family deprive a man and his posterity of all rights in the family property as a result of offences not necessarily connected with such property.[14] In the second place, such expulsion might involve an act analogous to compulsory acquisition of property rights without adequate compensation, and so would run foul of s.30(1) of the Federal Constitution. It is arguable that this subsection was designed to deal with compulsory acquisition of property and property rights by local and central government authorities, and therefore has no application to cases of the type under consideration here. But it is submitted that

13. The Chapter on Fundamental Human Rights.
14. It may be suggested that there is nothing inequitable in a rule which grants to the family the same right as is possessed by clubs, age-grade and improvement societies. To this it may be replied that membership of a family is much more fundamental and all-embracing. It is more like citizenship, and it should be noted that s.26(1) of the Federal Constitution makes it unlawful for the Federal Govt. (or anyone else) to expel a citizen from its territory.

where a family withdraws all rights in its property from one of its members, the other members acquire a greater measure of interests than heretofore as a direct result.[15] There is, therefore, no fundamental difference between "compulsory acquisition" by a local or central government authority for the benefit of the community as a whole, and what may be called "compulsory deprivation" by the family for the benefit of its other members.

To sum up: The family can no longer lawfully expel any of its members in the sense of actually driving him away from his home, for this would involve it in one of several criminal offences. Secondly, the family can no longer expel a member in the sense of cutting him off from participation in its social life, for this would be unlawful interference with his civil rights. Thirdly, the family no longer has the right to divest a member of his rights and interests in the family property except by the normal process of civil litigation, for to do so would once again constitute unlawful interference with his civil rights and might even amount to compulsory acquisition of property rights without compensation. Nor has any court of law the power to authorise such divesting of property rights on any of the traditional grounds, for the latter are now either crimes for which other penalites are prescribed under the general law, or else they are non-punishable (because non-statutory) social wrongs.

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15. So do their posterity.

Where, however, a member in exclusive possession of a specific portion of the family property commits a breach of one of the customary conditions of his tenure, the family has the right to apply for, and the courts the power to make, an order of forfeiture of that portion against the member concerned.[16] This is of course a different thing from forfeiting a person's entire rights and interests in the family property as a whole.

(b) Disintegration of the Family.

The extended family is said to disintegrate completely when it breaks up into as many separate and independent units as it had primary branches, the latter permanently withdrawing their recognition of the family head for any purposes whatever.[1] This process is inevitably accompanied by partitioning of the family property among the branches.[2]

Among the many factors that lead to this process of disintegration are (i) disagreement over the selection of a new family head; (ii) discontent with the family head

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16. On these conditions and their breach, see Adogun v. Fagbola, 11 N.L.R.110; Onisiwo v. Gbamgboye, 7 W.A.C.A.69, esp.at p.70; Ashogbon v. Oduntan, 12 N.L.R.7, esp. at p.10. On forfeiture generally, see Eyamba v. Holmes, 5 N.L.R.83; and Etim v. Eke, 16 N,L.R.43. See also Coker, op.cit., p.103, and Obi, op.cit., p.118.

1. The family head may, however, and usually does continue to be head of his own branch.
2. There is partial disintegration when one or more branches sever their connexion with the parent body while the latter continues to function as a composite whole. There is also the process (most commonly encountered in chiefly societies) whereby the family cleaves into two factions each supporting one of two rival candidates for a chieftaincy. Cf. Lloyd, op.cit., p.35.

for the time being in office and his general management of the group's affairs. (iii) the pressure of population on residential and farming facilities which sometimes makes it necessary for the family to dispose of its property so that its constituent branches could move out to fresh grounds; and (iv) the impact of Western culture which is progressively reducing the social and economic importance of traditional social groupings generally by replacing them with such bodies as local government authorities, provident societies, commercial and industrial companies, business partnerships, farm settlements and the like. In the final analysis, these organizations are designed to deal with the same social and economic problems which the large-scale kinship groupings were evolved to tackle by centuries of experience.

In the case of a complete disintegration, difficult legal questions usually do not arise. For everyone concerned accepts it as inevitable that the family property shall be partitioned and that the office of family head shall cease to exist (i.e. as far as the wider group is concerned). But when there is partial disintegration - when one or two branches "secede" or when the family breaks up into two rival factions - thorny legal problems can arise. First there may be disagreement as to whether or not the family property should be partitioned. This, however, can be easily resolved by recourse to the courts. Once it is established that the family can no longer hold together as a corporate

body, the courts will have no difficulty in coming to the conclusion that natural justice requires the partitioning of its property.[3] Secondly, each of the two factions into which the family may have broken might claim that it is the family and its new head the family head. This would raise anew all the questions of jurisdiction already discussed, in addition to provoking litigation on where the title to the family property now lies, and whether or not the said property should be partitioned. An easy way out of this tangle from the point of view of the courts would be to declare that as the two factions can no longer hold together as one family, they must be deemed to desire an end to the parent body, a partition of its property, and the emergence of two new social groups. But the problem of nomenclature will not thereby be resolved: which party now possesses the right to be known by the old family name? This may be of great importance where the family is also a chieftaincy family. It is tempting to suggest a solution on democratic lines: the faction with the greater number of branches in it should retain the family name. But a moment's reflection will reveal the possible injustice of this. For it could mean that the minority, who by the ordinary rules of selection were, but for the disintegration, entitled to have their nominee recognised, may lose not only that chance but also

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3. This is implied in the decision of Butler Lloyd, J. in Bajulaiye v. Akapo, 14 N.L.R.10.

their right to the family name itself! The only safe conclusion to draw from all this is that no a priori decision can be made on these problems: each case must be decided as it arises and in the light of the surrounding circumstances.

CHAPTER III

PROPERTY AND THE EXTENDED FAMILY

The Concept of Family Property

"Family property" may be defined as any form of property the radical title to which vests in the family as a corporate body. It should be pointed out right away that this indigenous institution[1] has nothing in common with joint tenancy or tenancy in common[2] or any other form of tenure found in English law.[3] If an analogy

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1. Cf. Foster-Sutton, P., in Young v. Young (1953) W.A.C.A. Civil Appeal No.363l (Cyclostyled Report) 19-24, at p.21.
2. For a masterly discussion of the whole subject of Family Property and its distinction from the English concepts of joint tenancy and tenancy in common, see Coker, op. cit., pp.40-66.
3. A distinguished British writer has suggested a similarity between family property and the pre-feudal system known as gavelkind and found in Kent, Hackney and Stepney in South-east England: Lloyd, op. cit., pp.78-9. But it is submitted that gavelkind had a number of characteristics which the family property lacks, and that this makes any comparison of the two systems inappropriate. According to Earl Jowitt, gavelkind tenure was subject to a widow's dower or a husband's curtesy; also "an heir in gavelkind at fifteen years could make a contract and sell his estate for money" - Dictionary of English Law, pp.858-9. As we shall see later, family property is not the subject matter of inheritance, nor can anyone sell his estate therein at fifteen, fifty or any other age.

must be found in English law, this may be sought in the law relating to corporations. It is a well-known principle of English law that property can vest in a corporate body (a corporation sole such as a Bishopric or the office of the Postmaster-General, or a corporation aggregate such as an ordinary trading company), ownership thereof lying not in the incumbent or the members for the time being, as the case may be, but in the corporation itself as a legal person.[4] In much the same way, ownership of family property vests in the legal abstraction known as the family, and not in its members for the time being. In the apt words of one writer, "Each member of the family is nothing more than a member of the community to which the property belongs. This is not a partnership but a corporation".[5] As was said in the celebrated Amodu Tijani case,[6] membership of the family as a land-owning corporate entity comprises the living, the dead and the unborn.

The basic characteristics of family property may be summarised under three heads. First, it belongs, as already indicated, to the family as a distinct, perpetual legal entity. Secondly, the members for the time being do not

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4. See Salomon v. Salomon (1897) A.C.22 (H.L.)
5. N.T. Brooke, "Some Legal aspects of Land Tenure in Nigeria" (1946), 5 African Studies 211-220, at p.215.
5. ~~African Studies, 211-20, at p.215.~~
6. Amodu Tijani v. Secretary, s. Nigeria (1921) 2 A.C.399 (P.C.)

possess any separate, disposable,[7] attachable[8] or heritable[9] interests therein. Thirdly, the fact that this property is vested in a body corporate implies that no transaction affecting interests therein is valid unless done by or with the consent of the family itself[10] acting through its alter ego, which for some purposes is the family Head and for others the family Council. This rule is, however, subject to two provisos. A court of competent jurisdiction can authorise a dealing (e.g. a mortgage or sale) if the overall interest of the family or the justice of the case requires that this should be done. Similarly, where the family sleeps on its rights, it will be estopped from upsetting an otherwise unlawful transaction if to do so would involve injustice to an innocent third party.[11]

Family property may be classified into chattels (including money), economic trees or plants, houses and land.[12] "Family houses" are a regular feature of customary tenure among the Yoruba and some riverine societies in the

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7. Buraimo v. Gbamgboye, 15 N.L.R.139; Caulcrick v. Harding, 7 N.L.R.48.
8. Miller Brothers v. Ayeni, 5 N.L.R.40;
9. Sogunro-Davies v. Sogunro, 9 N.L.R.79.
10. Adagun v. Fagbola (or Lasisi), 11 N.L.R.110; Oshodi v. Aremu, 14 W.A.C.A.83.
11. Aganran v. Olushi I.N.L.R.66; Marks v.Bonso, 3W.A.C.A.62.
12. It will be seen in due course that houses are not necessarily part of the land on which they stand, and so should not be discussed under the general rubric of "land."

Eastern Region (e.g. Calabar), and to these places our discussion on that form of property must be understood to be confined. All the other forms of family property are common to all societies.

Creation of Family Property

There are many ways whereby family property is created in the first place, or subsequently added to.[1] These include the operation of law, written wills, nuncupative wills, gifts, purchases and occupation by the family of vacant land.[2]

(a) By Operation of Law

It is a well known principle of customary law that where a man dies intestate his land as a rule becomes family property.[3] What is not so well known is that only a limited

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1. We can do no more here than summarise the basic rules relating to the creation of (and additions to) family property, as a detailed examination of the subject is outside the scope of the present work and should properly belong to a treatise with land law as its main focus.

2. For a more detailed treatment, see Elias, Groundwork of Nigerian Law, pp.327 and 335; Coker, op.cit., pp.69-83, 220-4; Lloyd, Yoruba Land Law, pp.78-86; Lloyd, "Some notes on the Yoruba rules of Succession and on 'Family Property'", (1959) 3 J.A.L. 7-32. Forde and Jones, The Ibo and Ibibio-speaking peoples of south-eastern Nigeria, p.21; Meek, Land Tenure and Land Administration in Nigeria and the Cameroons, p.184. Also Ogunmefun v. Ogunmefun, 10 N.L.R.82. On the position in Ghana customary law, see Ollennu, Principles of Customary Land Law in Ghana, pp.34-45.

3. Cf. Verity, C.J. in Awgu v. Nezianya, 12 W.A.C.A.450, at p.451.

class of land could be created into family property. And what is even less well known is that this rule requires a number of conditions precedent for its operation.

"Family property" can only be created out of individually owned property. It is immaterial how the latter was acquired in the first place: it may have been carved out of virgin forest, purchased from a third party, received as a gift, or acquired by the holder as his own share of the land of his wider family which had been permanently partitioned.[4] But the property must be individually owned, by which is meant that the holder must possess exclusive, alienable and inheritable interests therein.

Again, for family property to arise by operation of law, its owner must have died intestate. More important still, the deceased must have founded a "family" as recognised by the local customary law,[5] and at his death this family must contain two or more persons entitled to inherit on his intestacy.[6] Being survived by a sole heir will not bring

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4. A member has an "absolute right to his partitioned portion" of family land: Balogun v. Balogun, 9 W.A.C.A.78

5. This, at all events, was the rule in the traditional society. The raison d'etre for the very concept of family property was people's desire down the centuries to preserve their land for posterity and so perpetuate their own memory while providing posterity with a lasting basis for unity, and a place to build and/or grow food crops upon. Take away a man's family, and the need for "family property" disappears entirely.

6. Cf. Lloyd, Yoruba Land Law, pp.28-30 and 78.

the rule under discussion into operation,[7] neither would it be enough that the deceased left a male issue and any number of females in a patrilineal society. (The position is of course different in matrilineal societies.)

It may be objected that in principle there is no reason why a person who is survived by one son should not be presumed to leave his property to his progeny for ever just as does his brother who is survived by two or more sons. This can easily be answered with the aid of one simple negative test. Under customary law, a sole son-and-heir can dispose of his inheritance as freely as he can his own individually acquired property, either inter vivos or by will.[7] One of several heirs has no such right. This, it is submitted, is because in the latter case the property is turned into family property by operation of law. Unless and until therefore the heirs concerned agree on distribution (more technically, partition), none of them has any separate rights or interests to dispose of.[8]

It may also be objected that as daughters have now as much inheritance rights over their father's property (e.g. among the Yoruba)[9] as do sons, family property will arise

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7. But see Lloyd, op.cit., p.30, where it is said that opinions are divided on this question.

8. See Caulcrick v. Harding, 7 N.L.R.48, and Sogunro-Davies v. Sogunro, 9 N.L.R.79.

9. See for instance Salami v. Salami (1957) W.R.N.L.R.10.

whether the owner is survived by several sons or several daughters or any combination of the sexes. But this argument confuses the establishment of a perpetual legal entity known as the family which the founder is presumed to endow with his disposable property on the one hand, and the inheritance rights of children or other issue on the other. It is one thing to say that the law has come to recognise the right of women to inherit their father's property on equal basis with men, and quite another to hold that female issue alone (or indeed any number of female plus just one male issue) can in law constitute a self-perpetuating body corporate with its chief base in the territory of its founder - the latter being at the root of family property as an institution. In other words, to say that women have now acquired a right to share in the property of a lawfully constituted ~~family as if they were full members thereof is not the~~ family as if they were full members thereof is not the same as to say that women alone can constitute such a family in a patrilineal society such as ours, where marriage is virilocal, where children are affiliated to the husband's (not the wife's maiden) group, and where the ultimate goal of every normal woman not in the Holy Orders is still to get married and bear children for her husband and his group.

One final prerequisite for the creation of family

property by operation of law which we shall touch upon here is that the disposable land of the deceased must be subject to the customary law of succession. This excludes the Lagos property of persons married under the Marriage Act of Nigeria, for s.36(1) of that Act brings their disposable property under the pre-1914 law of England relating to intestate succession to personalty. It also excludes any property which the deceased might have left anywhere in the Western Region, if he contracted a non-customary form of marriage. This is because s.49 of the Administration of Estates Law, 1959, of that Region provides a new set of rules for distributing the estate of persons so married - on the lines of the current law of England. Finally any property in the Eastern Region must be excluded if its owner had contracted a "Christian" marriage anywhere provided that succession to his property can be shown to fall within the rule in Cole v. Cole.[9]

We shall now state the rules governing the creation of family property by operation of law, taking the above points into consideration. Where a person dies intestate leaving two or more children or remoter issue who are deemed by the local customary law as capable of perpetuating his line of

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9. (1898) 1 N.L.R.15.

descent and therefore of constituting a self-generating corporate body, his individually owned land, houses and insignia of office, if any, will in general become family property, and will vest in the corporate body so constituted. Where the deceased did not found a family as above described, his disposable property will, in certain circumstances, accrue to the wider group of which he was a member, and will in that sense become family property. A close examination of this second rule will, however, show that it is concerned with making additions to existing family property rather than with creating one where none existed before.

(b) By Act of Parties

One of the many ways in which family property is created (or added to) is by will, which may take the form of either a formal document of the English type[1] or a solemn oral declaration by the propositus. Other things being equal, a will is just as effective as intestacy[2] and may indeed succeed in turning land into family property where intestacy

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1. On the creation of family property by will see Coker v. Coker, 14 N.L.R.83; Caulkrick v. Harding, 7 N.L.R.48; George v. Fajore, 15 N.L.R.1; Shaw v. Kehinde, 18 N.L.R. 129; Sogbesan v. Adebiyi, 16 N.L.R.26; Ali v. Ali, 5 W.A.C.A.94 and 8 W.A.C.A.1; Young v. Young, W.A.C.A. Civil Appeal No.3631 (1953); and the Sierra Leone case of Timbo v. Jallow, 14 W.A.C.A.339.

2. But see Giwa v. Ottun, 11 N.L.R.160 and Young v. Abina, 6 W.A.C.A.180, where the courts inferred, from the wording of the will and the documents connected with the land respectively, an intention not to create family property.

would have failed. Any landowner who has legal capacity to make a will at all can create family property out of his land by means of a written will. In principle, too, there is no reason why any person of full age and sound mind could not achieve this objective by means of a nuncupative will. But a Gold Coast case (as she then was), Re Otoo,[3] has held that by contracting a marriage under the local Ordinance a person lost his legal capacity to make a valid oral customary will.[4] And there is a long line of Nigerian cases beginning with the celebrated decision of Griffith, J., in Cole v. Cole (already cited) whose general tenor is that where a person contracts a "Christian" marriage, he must be deemed to be so completely Anglicised as to be outside the realms of customary personal law. It is submitted, however, that whatever might be said of the presumed intentions of persons contracting "Christian" marriages in colonial days, it would be wrong today to presume that a Nigerian who contracts this form of prestige marriage thereby intends of necessity to adopt English law as his personal law, just as it would be wrong to suggest that a Yoruba man who contracts a Moslem marriage intends to adopt Islamic law as his personal

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3. (1927) Div. Ct. 1926-1929, p.84; cited in Allott, Essays in African Law, p.236.

4. Called samansew in Akan law.

law.[5]

The circumstances in which people prefer to turn their land into family property by will rather than leave the metamorphosis to the operation of law may be classified under four heads. The first is where statute law provides that in the event of intestacy succession shall be governed by some law different from the customary law. Examples of this are persons whose intestate estate would fall within the provisions of s.36(1) of the (Federal) Marriage Act or s.49 of the Western Region's Administration of Estates Law, 1959 (already cited). Akin to this is the case of persons whose intestate succession is governed by English law in accordance with the principle of Cole v. Cole. Persons coming within the operation of English law in these circumstances can only create family property by will. And, in view of the doubts expressed above regarding the legal capacity of such persons to make a valid oral will, the only certain method of doing this is by a formal will of the English type.

The second class of cases concerns persons whose intestacy would, under the local customary law, result in their

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5. See in re Alayo, Adm-Gen. v. Tunwase (18 N.L.R.88) where it was held that no such intention was to be presumed in the case of an Ijebu (Yoruba) Moslem. See also Lloyd, Yoruba Land Law, p.27, f.n.1.

children having no rights or interests in their land, as sometimes happens in the matrilineal and mixed-descent societies of the upper Cross River and the Obubura Hill districts of the Eastern Region.[6] In these societies the only sure way to create family property for the benefit of one's progeny is by will.

The third class of cases relates to people who have reason to fear that as soon as they are dead their land would be sold (away from the family) by their children, and who therefore wish to forestall any such sale by fortifying the customary law on the subject. An interesting example of this is to be found in Jacobs v. Oladunmi Brothers,[7] where a testator made a devise in the following terms -

> "I give and devise my said dwelling-house ... to all my children ... It being my intent and express wish that the said property shall not on any account whatever be alienated or sold by any of my said children or any of his or her issue and that the same shall always remain and be retained as 'family property' in accordance with the native laws customs and usages prevailing in Lagos ..."

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6. See Forde, Marriage and the Family among the Yakö, p.45; Chubb, Ibo Land Tenure (2nd edn.) paras.40, 41; Talbot, In the Shadow of the Bush, p.314.

7. (1935) 12 N.L.R.1.

Dismissing counsel's submission that the effect of this clause was to constitute the testator's children tenants in common under English law, Graham Paul, J. said, inter alia -

> "I hold that under the will the property in question became a 'family property' as effectively as if the children had succeeded to it under native law and custom on intestacy."[8]

It may be argued that Jacobs v. Oladunmi Brothers and other High Court decisions to the same effect can no longer stand having regard to the West African Court of Appeal decision in Young v. Abina.[9] In this latter case a testatrix devised her house to A, "his heirs, executors and administrators upon trust to hold the same as family property for the use and benefit of all his relatives and the same should on no account be sold or partitioned by him them or any of them." She also appointed executors under the will, who duly proved. After her death, the executors mortgaged the property to a third party. Later still, A (the trustee under the will) sold and conveyed the same property to yet another party. A's children thereupon brought an action against him as trustee, the surviving executor as mortgagor, the personal representative of the mortgagee (now deceased)

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8. 12 N.L.R.1, at p.2.

9. (1940) 6 W.A.C.A. 180.

and the purchaser. They (children/plaintiffs) claimed -

(a) that the executors had no power to grant the mortgage,
(b) that the sale and conveyance by their father, A, was void, and
(c) that the alleged mortgagee was liable to render account.

It was common ground that the mortgage was ultra vires the executors and so void unless the (English) Land Transfer Act, 1897, applied to Nigeria by virtue of s.14 of the Supreme Court Ordinance then in force.[10] If, however, the L.T.A. did apply to Nigeria, the executors were well within their legal rights in executing the mortgage, for that Act provides that where real estate was vested in any person with no right of survivorship in any other person, then at his death such realty shall vest in his personal representative as if it were personalty, any devise thereof notwithstanding. The effect of this provision would be to stultify the attempt by the testator in the instant case to create family property out of his land, by making that land freely alienable by his personal representatives, viz. the executors.

The West African Court of Appeal (reversing In re Sholu[11]) held that the Land Transfer Act, 1897, applied to Nigeria. They also held that customary law did not apply to the instant case because, in their words:

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10. This section incorporated into Nigerian law such statutes of the U.K. parliament as came under the generic term "statutes of general application".

11. 11 N.L.R.37.

> "We have as exhibits in this case a Will, two Indentures of mortgage and a conveyance on sale, all of them couched in the jargon of the English conveyancer, all of them highly specialised documents to which the Land Transfer Act was designed to apply generally."[12]

It was therefore further held that the executors had power to dispose of the property in question by mortgage or sale.

It is submitted, however, that the reasons given in the passage just quoted are only relevant insofar as they refer to the will, and even in that connexion need not be fatal. The form of a will and the technicality or otherwise of the language in which it was drawn up are admittedly some internal evidence from which a court is entitled to infer which system of law (English or customary) a testator intended to govern his devise. But surely this internal evidence should not be taken to over-ride the testator's express intention? Yet this was the effect of the Court of Appeal's construction of the will in the instant case. What could be more express than a devise to A "to hold the same as family property for the use and benefit of all his relatives"? A more recent decision of W.A.C.A. itself in the Sierra Leone case of Timbo v. Jallow[13] shows that the

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12. 6 W.A.C.A.180, at p.184.

13. (1953) 14 W.A.C.A.339. See also Young v. Young, ante, another W.A.C.A. decision.

use of a will drawn up in English could be effectual in creating family property. As for the mortgage indentures and deed of conveyance and their jargon, it should be pointed out that these documents all came into existence long after the testatrix's death, by which time the house was (for all that anyone knew) already family property. Why they should in effect be deemed retrospectively to thwart the testatrix's intention is hard to see.[14]

It is submitted, with the greatest respect, that the decision in Young v. Abina is bad law. It is only justifiable, if at all, on its own complicated and peculiar facts. In any event, the Abina case is easily distinguishable from Jacobs v. Oladunmi Brothers. The testator in the latter case was creating family property for his own elementary family; in the former case the testatrix was trying to create one, not for her issue, not even for the family group of which she was herself a member, but for the use and benefit of a third party's elementary family. In the second place, the testatrix in the Abina case introduced into her will the novelty of appointing a trustee for the family

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14. Note that even where a testator's intention is not expressed in the will itself, the court is entitled to take into consideration the widespread practice among property owners of creating family property within the society in which the deceased lived and made his will: Coker v. Coker (1938, 14 N.L.R.83.

property she was trying to create. This need not be fatal in her case as she did no more than appoint the founder and natural head of the intended beneficiary (the family) to take charge of the property - a function which devolved on him anyway.[15] It need not be fatal at all even if a person other than the family head was appointed as trustee.[16] But it does provide a point of distinction between the two cases under review. A point worthy of note is that it appears from their conduct that both the trustee and the executors understood the limitation in the will to be something other than an attempt at creating family property. For the trustee had mortgaged the property and the executors subsequently sold it, in either case without consulting the other members of the family - a process which they must have known to be necessary if the property involved was family property. This is not to say that the conduct of the living is necessarily material in the construction of the wills of the dead. Neither does it follow that any construction placed on a testamentary disposition by personal representatives should be taken into account in deciding the legal effect of such a disposition. But if it be shown that all

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15. It is arguable though that the rights and duties of a trustee are radically different from those of an ordinary family head in relation to property under their charge. See further below.

16. As will shortly appear, it has been held in Young v. Young - a W.A.C.A. decision - that family property was effectively created under a will which also appointed a trustee for the said property: (1953) W.A.C.A. Civil Appeal No.363.

the people concerned with the administration of this property regarded the limitation in the will as an outright gift to A on trust for the present members of his family, this might justify an inference that that was the testatrix's true intention as they understood it in the course of their ordinary contact with her in her life time.

Be that as it may, it is hoped that enough has been said here to show that Young v. Abina differs substantially in its facts from Jacobs v. Oladunmi Brothers and the other High Court cases already referred to, and so does not affect the principle established by them.

The fourth and final set of cases where the will is used to create family property concerns people who wish to extend rights and interests in their property to persons (such as children born illegitimate) who would otherwise be excluded from it by the law of intestate succession. A case in point is the Sierra Leone case of Timbo v. Jallow[17] already referred to. There a testator made the following devise -

> "To my natural sons (A and B) my house and premises at Jenkins Street in which I at present reside. The property is to be used as family property and is in no wise to be sold."

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17. 14 W.A.C.A.339.

He was survived by other children besides A and B. Among the questions that arose for decision were: (a) whether the devise created joint tenancy or tenancy in common; (b) if neither, whether family property had been effectively created; and (c) if so, which family the testator had in mind - his own (elementary) family or the families of A and B. The West African Court of Appeal held in effect that neither joint tenancy nor tenancy in common was created; that family property had been effectively created; and that when the testator said, "The property is to be used as family property", he must have meant his own family, not that of A or B. The devise was therefore to the testator's issue (including A and B) as a family unit. In the result, A and B acquired the same rights and interests in their natural father's house as they would have done if they were born legitimate members of his family.

It is not necessary that a testator should say in express terms that he intended to create family property. Provided that the words used in the devise, when construed against the general background of local practice and law, evince a clear intention to create family property, the court will give effect to this intention. Thus in Coker v. Coker[18] an Egba made a limitation in the following words -

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18. (1938) 14 N.L.R.83.

> "I leave and bequeath my present dwelling-house to the whole of my family or blood relatives and their children's children throughout...."[19]

Carey, J., in holding that this devise created family property, said that the duty of the court in all cases concerning the construction of wills was to ascertain the true intention of the testator insofar as this was possible. In this task, he went on, the court was entitled to take into consideration the common practice among the Yoruba of Lagos of creating family houses out of their property.[20]

To round off this survey of the methods whereby family property is created in the first place or added to subsequently, In the days when vast stretches of woodland lay uncultivated and ungrazed, when communities with more land than they were probably ever going to need were quite happy to let others help themselves, families not infrequently moved en bloc to new sites where they set up permanent homes and farms. Tracks reduced into possession by individual effort became the exclusive property of such individuals. At their death, the land became family property for their respective elementary families. Areas reduced into possession by community effort became property of the immigrant family as a whole, and remained so till ultimately partitioned among the constituent branches of that family. In much the same way, a family in modern times sometimes purchases land with funds contributed by its members,

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19. "Throughout" was presumably intended to mean "for ever".
20. 14 N.L.R. 83, at p.86.

or out of the proceeds of existing family property. This practice is on the increase in our modern urban areas. Again, where the last surviving member of a given family branch dies intestate, any separate property that was vested in that branch accrues to the parent family group. In the same way, where a family branch abandons its holding (which it does either by moving permanently to a new site or merely by manifesting its intention never again to use the land in question), such land goes to the parent group as family property. Finally, property may be given gratis to a family group. This gift may be made inter vivos or by will. The West African Court of Appeal case of Young v. Young[20a] is really a case of testamentary gift to a named family. There the testatrix, Elizabeth John, devised her property in these words -

> "Unto the said Benjamin A.A. Young his heirs executors and administrators upon trust to hold the same as family property, for the use and benefit of all his relatives and the same should on no account be sold or partitioned by him them or any of them."[20b]

The West African Court of Appeal[20c] held

20a. (1953) W.A.C.A. Civil Appeal No.3631 (Cyclostyled Report) p.19.

20b. Note the similarity in wording between this limitation and that in Young v. Abina, ante. Note also that the property in Young v. Young was alienated after the testatrix's death by a deed of conveyance. And yet the two decisions were diametrically opposed to each other.

20c. Foster-Sutton, P., Verity, C.J., and Coussey, J.A. In the Abina case the Court comprised Kingdom, Petrides and Graham Paul, C.J.J.

> that this devise converted the property in question into family property for the use and benefit of the immediate family group of which Benjamin Young was a member.

Neither in Young v. Abina nor in Young v. Young did the West African Court of Appeal discuss (a) the effect of appointing a trustee for a piece of property on the validity or otherwise of a clause (in a will) which purports to create such property as family property; (b) the validity or otherwise of such appointment, assuming that family property has been created in spite of it; or (c) the position of such a trustee vis-à-vis the family head. The idea of a trustee in the technical sense of that term is completely alien to the concept of family property.[21] It brings in its train the possibility of conflict between the traditional claims of the family head and the "English" law claims of the trustee.[22] This in turn makes for dissension and friction among the sympathisers of the two rival functionaries, with obvious danger to continued family unity. It is submitted, therefore, that had that issue been raised, the Court would have been justified in pronouncing against the creation of family property in the above and similar cases. As it is

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21. Cf. Coker, op. cit., p.76.

22. I.e. where the trustee does not also happen to be the family head. This happy coincidence occurred in Jacobs v. Oladunmi Brothers (ante.).

perhaps too late in the day to urge this point, however, we shall assume that the fact of appointing a trustee in itself does not affect the validity of a clause aimed at creating family property.

If then the appointment of a trustee does not vitiate an attempt to create family property, is the appointment itself rendered nugatory by the creation of family property, or is there a possible intermediate position? Coker simply dismissed such a trustee as "a redundant figure in the scheme of a family property."[23] Whether we interpret "redundant" as meaning that there is a bare trustee without trust property or that the attempt to appoint one was abortive, the result is the same - there is no place for a trustee in the law of family property. Were it otherwise, the result would be that part of the property of a given family vests in one person as trustee and therefore owner of the legal estate,[24] while the rest remains under the control of the family head as caretaker and manager thereof. The resulting chaos where several trustees appointed under different wills in respect of different pieces of property exist concurrently can be easily imagined. The answer to the third question posed

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23. Loc. cit., p.76; a view which we respectfully share.
24. As opposed to the beneficial interest which belongs to the family.

above must therefore be that a trustee qua trustee has no rights or interests in family property as against the ordinary family head.

This proposition derives some support from a recent decision of the Federal Supreme Court[25] in Odunsi (Chief Ojora) v. Ojora and Others.[26] It was there held that in the absence of proof of customary law to the contrary, only the recognised head of a given family (in that case, also a White Cap Chief) had any power to manage and, subject to the usual consents, dispose of family property.[27] Now while there is customary law to the effect that a family can appoint people of its choice to manage its property (e.g. among many Ibo societies), there is no customary law anywhere to the effect that a testator can appoint a trustee for family property or any part of it even if such property was a gift from him to the family. A testator can only create or add to family property; he cannot in law dictate to the family who shall control or manage its property. This latter function is exclusively the concern of the local customary law in the absence of any family arrangement to the contrary.

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25. Brett, Taylor and Bairamian, F.J.J.

26. (1961) 1 All N.L.R.283.

27. So runs the headnote, though this is more implied than expressed in the Court's judgement. Note that the case is concerned with the rival claims of two "chiefs" - one a family head by succession, the other a family head by selection, both being members of the same family.

Rights of Individual Members in Family Property

In analysing the nature of family property in the foregoing pages, we considered incidentally the negative aspects of the individual member's rights and interests therein. We saw that these rights and interests are non-proprietary, non-alienable (with minor reservations) and non-heritable. We shall now attempt a more detailed examination of these as well as the more positive aspects of such rights and interests. For ease of exposition, we shall classify family members under four heads:-

(a) Members by birth - I. Adult males;
(b) Members by birth - II. Females;
(c) Members by birth - III.Minors;
(d) Members by marriage, i.e. married women and widows.

(a) Members by birth - I. Adult males:

Under this head we shall examine the rights and interests of all the men (including the head in his capacity as an ordinary member) who are members of the group by virtue of being born into it and who are recognised as adults by the local law relating to minority and initiation into manhood. It will be convenient to classify these rights into seven categories, viz. -

(i) right to the natural produce of the land;
(ii) right of ingress, egress and regress (as regards both farm land and residential land);
(iii) right to annual farm plots;
(iv) right of exclusive occupation (both farm and residential land);

(v) right to be consulted;
(vi) right of disposition (inter vivos and at death); and
(vii) right to intestate succession.

(i) Natural Produce of Family Land.

For the purposes of this section we shall use the term "natural produce" to include the fruit of such things as the oil palm, the oil bean and the breadfruit tree; timber from timber trees; and rents and profits from the land itself. It might sound a little incongruous to include rights in rents and those in fruit and timber under one head. But as these rights are governed by the same legal principles, it will be convenient to discuss them together.

The general rule is that every adult male member of the family is entitled to collect the natural produce of the land for his own use and benefit. Thus he can cut down palm nuts, tap palm wine, cut timber or grass or other building materials, fish in the family ponds or hunt on the family land. These rights are founded on the twin maxims of customary law relating to communal land tenure, viz. that a member is entitled to maintenance for himself and his household out of communal property, and that a man

is entitled to the fruit of his labour.[15] The member is not under any duty to inform the family head or the other members, still less obtain their consent, before exercising these rights.

But to this general rule there are two qualifications. In the first place, the family, as the owner of the radical title in family property has a right to impose restrictions on its user, or indeed to make regulations ousting the rule as above stated. If such restrictions or regulations exist in any particular case, they will of course bind the members. The point to emphasise here is that the existence of such restrictions or regulations is a matter to be proved in court, the onus being on the party asserting their existence to make good the assertion. The second qualification is to the effect that the individual member is only entitled to help himself to so much of the natural

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15. For rights in communal property generally, see Meek, Land Tenure and Land Administration in Nigeria and the Cameroons, pp.129-39; Meek, Law and Authority in a Nigerian Tribe, p.100 ff; Elias, Nature of African Customary Law, pp.83-7; Elias, Nigerian Land Law and Custom, pp.142-58; Lloyd, Yoruba Land Law, pp.79-82; Bradbury and Lloyd, The Benin Kingdom and the Edo-speaking Peoples ..., pp.44-46; Ajisafe, op. cit., Ch.4, esp. para.21; Omoneukanrin, op. cit., pp.87-88; Forde and Jones, The Ibo and Ibibio-Speaking Peoples of south-eastern Nigeria, pp.21-3, 75-6; Coker, op. cit., pp.21-2, 25-7; Talbot, In the Shadow of the Bush, pp.262-7; Obi, Ibo Law of Property, pp.43-4, 49-50, 60-2; Forde, Yoruba-speaking Peoples ..., pp.25-6.

produce of family land as he requires for his ordinary domestic use, such as domestic consumption, house-building for himself or for his dependants, or for the purchase of such necessaries like tobacco, articles of clothing and the like. If he wishes to exploit this produce for commercial purposes, he must first obtain the consent of the family.

The next question is the meaning of the term "natural produce" of the land. Part of the answer is implied in the discussion above. In the case of fruit and timber trees, it means those that were not planted by man, that is trees growing wild on family land. Most palm and timber trees come under this description, but cocoa, rubber and cashew trees do not, as a rule. In the case of fishing and hunting rights, the rule under discussion only applies to wild game outside game reserves and to fish in natural pools or streams. This is almost too obvious to need stating, but not quite. For the point may be made that if a member turns a family pool into a gold-fish pond, or breeds rabbits on the family reserve, or grows cocoa on part of the family farm land - in each case without the consent of the family - he does so at his own peril, so that other members may help themselves at will. But this is not so; for the rule that a man is entitled to the fruit of his labour operates in these cases to oust the family "rights of common". (We

shall see later that the family has some other remedy against the land-grabbing member).

This brings us to the question of rents and profits. A member has no right to grant any interests in family land either gratis or for an economic rent, without family consent. But if he is allowed to make such a grant in respect of that portion over which he has been allowed to exercise exclusive beneficial rights, he is entitled to the proceeds of the grant.[16] Thus if a member is allowed to build a dwelling house on part of the family property or to establish a cocoa farm or a palm plantation thereon, he is entitled to obtain money on the security of such a house, farm or plantation for his own benefit; if he leases this farm or plantation at a rent, he is entitled to these rents. Finally, a member who receives his usual annual allocation of farm land has a right to make a lease thereof to a stranger (though with the consent of the family), in which case he is entitled to the rents received from his lessee.

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16. Cf. Lloyd, Yoruba Land Law, pp.300-301 (in re pawning of cocoa farms on family land), and 321-325 (in re obtaining credit on security of parts of family land occupied with family consent, by a member).

(ii) Rights of ingress, egress and regress.

Rights under this head are of legal interest in two principal sets of circumstances. The first is an obvious one. If, as stated in the last section above, members have a right to reap the natural produce of the land, it is only reasonable that the law should give them the right to enter upon such land for that purpose, and this it does. The second set of circumstances arises where parts of the family land are exclusively occupied by some members or by strangers. The question therefore sometimes arises what right, if any, other members have to go on the land. Can members not residing in the family house (usually occupied by the head for the time being) enter the house to attend family meetings, to inspect the state of repair, or to find out for themselves whether the actual occupier at any given time was the member allowed to reside there or his lessee?

The question whether or not members had a right to enter the family house for the purpose of attending family meetings arose in the leading case of Lewis v. Bankole[17], and there the learned Chief Justice affirmed that every member had this right. The court said in effect that whoever was entitled to attend a family meeting was also, ipso

17. (1908) 1 N.L.R.82.

facto, entitled to enter the family house for that purpose.[18] If, that is, it was a general meeting, every member was entitled to enter upon the family compound and into the family house, for the purpose of attending it. If it was what might be described as an executive meeting which only branch family heads were entitled to attend, then they alone would have the right of entry. On the further question whether members were entitled to enter the family compound to view the state of repairs, Osborne, C.J., said that members of the family council (usually representatives of the various branches of the family) were entitled to do so. This is only reasonable, since this council, led by the family head, is often charged with the duty of administering and generally caring for the family property.

But the learned Chief Justice qualified these rights by stating that they were exercisable subject to the right of resident members to a quiet enjoyment of their holdings. In the later case of Thomas v. Thomas[19], members' right of entry was described as one of reasonable ingress and egress.

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18. 1 N.L.R.82, at p.105. It will be noted that these meetings are usually held in the family house.

19. (1932) 16 N.L.R.5.

The inference is that the right can only be exercised at reasonable hours, at reasonable intervals of time and perhaps also by a reasonable number of persons at a time. (This rule as to quiet enjoyment which is recognised by the customary law everywhere but perhaps nowhere formulated in words is, incidentally, the foundation of the principle that a member in actual and lawful occupation of a portion of family property is entitled to exclusive rights of user over self-planted trees thereon. For example, the person actually cultivating a portion of the family farm land for the season has exclusive beneficial rights over palm trees standing on it, in the absence of a local regulation to the contrary. To grant to all other members the right to enter the farm and harvest or tap these palms would in many cases lead to damage to growing crops[20].) The practical effect of the rule which guarantees right of entry to members is that the family head has no power to keep an unwanted member out of a family meeting which he is otherwise entitled to attend, by refusing him the right of entry to the meeting place.[1]

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20. On this rule see, Meek, Land Law and Land Administration ..., p.133 ff;

1. This "meeting place", as we have seen, is usually the house of the family head, which in turn is usually part of the ancestral family house or compound.

(iii) Right to annual Farm Plots.[2]

All members of the family are entitled to be allocated plots out of the family farm land, if any, from year to year according to need or to some pre-determined principle of allocation. In legal theory it is the duty of the family head to decide what parts and how much of the family holding shall be brought under cultivation for the current season. In theory, too, it is his duty to allocate plots to the members. In practice, both these functions are performed by the family council of which he is a member and president. Indeed, in parts of the Eastern Region (e.g. among many Ibo societies) these functions are usually delegated to a distinct land authority.[2a] Whatever the local arrangement, the important point to observe in this connexion is that no member has a right to cultivate any part of the family farm land other than that allotted to him.

The member's right to these annual allotments is restricted to his ordinary farming needs. What these "ordinary farming needs" consists in will vary with individual

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2. See generally Lloyd, op. cit., pp.78-80; Meek, Land Tenure and Land Administration etc., p.133; Obi, op. cit., pp.60-1; Elias, Nigerian Land Law and Custom, pp.157-8.

2a. Consisting of the members of one particular age-grade, or a number of persons selected for their personal qualities.

farming habits and ability, among other factors. Perhaps it would be more convenient to say what they are not rather than what they are. Stated simply, the individual member has no right to be given plots from the family land for commercial farming, such as large-scale cattle breeding or cocoa growing. If he wants land for these purposes, he is liable to be treated as a stranger, and may be charged an economic rent. Most important of all, his request may be refused with or without reasons given; if it is refused, he has no legal remedy against the family. The customary law relating to annual allocations is apt to elude and confuse the unwary observer, and perhaps can be summarised again with advantage. If the family decides to allocate the farm land or part of it for the current season, every eligible member is entitled to a share. Members normally become eligible on attaining manhood according to local rules and usage. They cease to be eligible (permanently or temporarily) if they cease to be members or fail to discharge their financial and other duties as members, as where a member refuses to pay his assessment for the funeral ceremonies of a deceased member or for a court action to which the family is a party.

In traditional society, if a member needed more than his fair share of farm land for the current season, he had

a right to be given more plots from other parts of the family holding. He had no right to cultivate any more without family consent; but then the family had no right to refuse his reasonable request in this connexion. Today, with the commercialization of land and increasing population pressure, more and more families are successfully resisting requests for additional farm plots for the odd member. Cases are known to the present writer where members have had to pay economic rent for additional plots cultivated on the family holding.

(iv) Right of Exclusive Possession

Sometimes a family member is allowed to occupy a portion of the family land either for farming or for residential purposes. The permission might have been given by the founder himself, or by the head for the time being on behalf of the family and with its consent. The grant here may be for ordinary domestic user or for commercial purposes. Two main points fall for consideration in this connexion. The first is the nature of the grantee's interest, including the security of his tenure. The second is the nature of the interest, if any, retained by the family itself in the land so occupied, including its right to recover such land. As a preliminary observation, it should be stated that the

rules we are about to discuss are applicable whether the subject matter of the grant is farm land, a building site or just a room in the family house. The location of the land in question is also immaterial: the rules apply to property in a rural as well as that in an urban area. But as will appear later, different principles apply where the land granted is to be exploited on a commercial basis.

S e c u r i t y o f T e n u r e . In granting exclusive possession of part of its holding to one of its members, the family, acting through the family head (usually assisted by the family council) has a right to impose conditions under which the land shall be held. A common example of this in contemporary society is a permission to occupy a room in the family house so long as the member-grantee collects rents from tenants in other rooms and generally looks after the family property. In traditional society it was common to grant a dwelling house in the ancestral compound on condition that the grantee would look after an ageing member, usually the family head or the widow of a deceased family head. Whatever form the conditions take, they are binding on the grantee and the family alike. As a result, the family has no right to determine the grant so long as the conditions are fulfilled. On the other hand, the grantee forfeits his right of occupation if he

fails to perform his part of the bargain.

The nature of the conditions which the family has a right to attach to a grant to one of its own members is, however, limited where the grant is for normal residential purposes or peasant farming. It can stipulate what acts the grantee must or must not do if he wishes to retain possession. But it cannot make a grant of this kind on the condition that it shall be determinable at the family's pleasure and without any fault on the part of the grantee. For it is a fundamental principle of customary law that a family member shall not be deprived of his home or means of support unless he has given just cause. But this limitation does not apply to a grant of land required for commercial purposes. This point arose in the case of Manuel v. Bob Manuel.[3] There the family had granted a portion of family land to one of its members on the clear understanding that he had a right, if he wished, to develop it for commercial purposes, but that the grant was to be determined if the family required the land for other purposes. Counsel for the tenant argued that the general principle set out above[4] should apply to the instant grant, and so the alleged

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3. (1926) 7 N.L.R.101.

4. I.e. that the family could not impose a condition to the effect that the grant could be revoked even if the tenant had been guilty of no wrongful act or omission.

condition was nugatory. To this contention, Webber, J., replied in his judgement:

> "There is ... a vast difference in the tenure of a member of a family occupying family land for dwelling purposes and that of a member of a family occupying land for purposes of trade. In the former case the land is practically inalienable provided the usual native laws as to conduct or abandonment are not transgressed, but as for land given for business purposes, different considerations apply, and it is quite within the native rule to add a condition to the terms of the tenancy that it can be determined if the family require the land."[5]

In the absence of express conditions (these, it should be pointed out, are not very common), the law implies a number of conditions and guarantees in every grant by a family to one of its members. In favour of the family there is first the condition that the tenant shall not alienate his interests in the land without the consent of the family. If this condition is broken, the family, acting through its

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5. 7 N.L.R.101, at p.102. "Inalienable" in this passage was obviously intended to mean "irrevocable". It is also apparent that the learned judge was thinking of both express and implied conditions, for which see below. The family's action was dismissed on another ground, viz. that it did not in fact require the land concerned.

head, is entitled to revoke the grant and initiate proceedings to recover the land. Thus in Adagun v. Fagbola alias Lasisi[6] a member was given a portion of the family land under the normal customary tenure. Without the knowledge or consent of the family, he purported to mortgage the land to a third party. The family head thereupon sued for recovery of the land on the ground that, by alienating his interests therein, he had forfeited his tenure. This claim was upheld by the court (Kingdom, C.J.).

In this respect, it makes no difference that the tenant had improved the property in question. Family property does not cease to be so by reason only that a member has improved it.[7] If a member builds on a piece of family land he occupies with its permission, he has a right to sell the structure (as chattel, perhaps) but not with the land on which it stands.[7a] Here we see a conflict between the rule that a person is entitled to the fruit of his labour and the rule that family property can only be alienated with the consent of the family. Another condition in favour of the family is that no length of occupation will

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6. (1932) 11 N.L.R.110. See also Buraimo v. Gbamgboye (1940) 15 N.L.R.139, where it was also held that this rule had been proved so often in court that it needed no proof any more.

7. Shelle v. Asajon, (1957) 2 Fed. Sup. Ct. 65 (= Selected Judgements of the Federal Supreme Court of Nigeria).

7a. Omolowun v. Olokude (1958) W.R.N.L.R.130.

ever ripen a member's tenancy into ownership.[8]

In favour of the tenant there is the condition/guarantee that so long as he continues in possession and is of good behaviour, he cannot be dispossessed by the family. As Webber, J., said in the Bob Manuel case, his grant is practically irrevocable. There is also an implied guarantee that he shall be left in quiet possession. Hence other members not in residence in the same house (or not occupying other farm plots which can only be reached across his own) have no right of entry thereon, against his will. This is of course subject to the exception that if the land in question is the traditional family house, members are entitled to attend meetings therein, and members of the family council are in addition entitled to enter so as to view the state of repair.[9]

It may be argued that this customary tenancy in effect deprives the family of its land for an indefinite period of time, since they have to wait till the tenant either abandons possession or commits a breach of one of the conditions already discussed. This is true but only up to a point. The occupier's tenancy is only thus secure as

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8. Cf. Winkfield, J., in Lewis v. Bankole, ante, at p.92; judgement read by Packard, J. See also Shelle v. Asajon, ante, at p.67, per Jibowu, Ag. F.C.J., as he then was.

9. Lewis v. Bankole, 1 N.L.R.82, at p.105, per Osborne, C.J.

long as the property remains family property. But the family has a right to partition it or permanently alienate it once the necessary consent has been obtained. This may be done even if part of the property is in individual occupation.

(v) Right to be consulted.

In strict legal theory, every member of the family should be consulted personally before any dealings in family property or any interests in it are undertaken. Strictly speaking, too, any transactions done without such full consultation is voidable at the best, if indeed it is not void ab initio. But anything like full consultation is never practicable if only because some members are too young or too ill to understand what they are being consulted about, while others are too far away from home at any given time to be reached in time. Customary law, therefore, provides for consultation by proxy as it were.[9a] Thus, infants are "consulted" through their parents or guardian; absent members are consulted through their more immediate relations resident locally. So far, the law accords with common sense and expeditiousness. But should every adult

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9a. Indeed it dispenses with consultation altogether where the transaction in question is of little importance, e.g. short-term leases. These can be done by the family head or his authorised representative without any prior consultation with other members.

and mentally capable member within easy reach be consulted? If any of them are left out, what is the legal position as regards the validity of the transaction carried out: is it valid, void or voidable?

The answer to this question will depend on the nature and magnitude of the transaction and the existence or otherwise of agreed proceedings in any given family. On matters of ordinary day-to-day management of family property, no consultations are required. The family head (or the appointed land authority, if any) is, by virtue of his office, empowered to manage such property and make minor adjustments in intra-family claims and rights. He thus has a right to grant short leases (such as annual leases of parts of the family farm land, or monthly leases of urban house rooms), to allocate and re-allocate rooms or farm plots to members, to collect rents, accept surrenders of leases, and to effect necessary repairs. Transactions of this type carried out by him are valid and binding on the family although there had been no consultations with other members.

Any transaction, however, which involves alienation of family property on a permanent or long-term basis requires (as we shall see later) a prior consent of the family as a

whole. It is in these circumstances (e.g. sales, long-term plantation leases, mortgages or pledges) that the individual member has a right to be consulted. This principle has been litigated in scores of cases and accepted as a fundamental principle of the institution of family property. Thus in the Yoruba case of Adedubu v. Makanjuola,[9b] the head of an Ibadan family sold and conveyed a portion of his family's land to a stranger without consulting some of the members. There was some evidence in the trial court that the head could sell without any consultations; (in other words that members had no right to be consulted at all). The learned trial judge accepted this evidence in the face of the purchaser's own sworn admission in these words,

> "I knew that the land was family land. I know that no Magaji (family head) can sell family land without consent of the family;"[9c]

He also disregarded the family head's own pleadings which by necessary implication admitted that he had no such right. For paragraphs 5 and 7 of his defence sought to establish that the sale was done with the consent of "all senior and principal members", while paragraph 6 denied in strong terms the allegation that he had not consulted the other members.[9d]

9b. (1944) 10 W.A.C.A. 33; Other cases on the subject include Adewuyin v. Ishola (1958) W.R.N.L.R. 110; Esan v. Faro (1947) 12 W.A.C.A. 135; Onasanya v. Shiwoniku (1960), W.R.N.L.R. 166; Buraimo v. Gbamgboye (1940) 15 N.L.R. 139.

9c. 10 W.A.C.A. 33, at p. 35.

9d. Ibid., at p.34.

The West African Court of Appeal rejected both the learned judge's finding of "fact" and the evidence on which it was based, and held that such a startling proposition could not be entertained. The case was remitted to the court below "for further consideration on the basis that the Court was bound by the express admission of the Defendant that no Mogaji can sell family land without the consent of the family."[9e]

In Onasanya v. Shiwoniku[9f] the High Court of the Western Region held that family consent was essential for a valid partitioning of family property. And so, here too, the individual has a right to be consulted. We shall see later that every member need not consent, for a majority decision is enough. But here we are only concerned with the question of consultation. It is submitted that an important element in the individual's rights in family property is a right to be consulted in advance of any major transaction involving the ownership or long-term possession thereof. It may be objected that there is no essential difference between the

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9e. 10 W.A.C.A.33, at p.36. Note that the headnote to this case is misleading because it says that "the consent of all the members of the family is necessary to such a sale." All members need not be consulted.

9f. (1960) W.R.N.L.R.166.

right to be consulted and the necessity for consent. This objection is easily answered if one may draw a little analogy with company law. Certain general meetings (e.g. those called to discuss changes in the constitution of the company, removal of the chairman, alteration in share capital and the like) require for their validity that notice thereof shall be given to every shareholder not later than seven to fourteen days in advance. In other words, every shareholder has a right to be notified of the meeting. But unanimity is not essential for the validity of a meeting which is itself lawfully constituted. A bare majority may be enough.[9g] In the same way, a major decision (as above described) taken without consulting the members will be void ab initio. But given full consultation, a majority decision may be valid and binding on the family as a whole. What exactly is the nature of this right to be consulted? Personal consultation is neither required nor possible for all persons. It is enough that the heads of the constituent branches have been personally consulted. This is usually done in a family council meeting summoned for that purpose. It is then the duty of each branch head to inform his immediate subordinates of, and collect their views on, the proposed transaction. As a

9g. See Gower, Modern Company Law, pp.434-9; Halsbury's Laws of England (3rd edn., Hailsham), Vol.6, pp.332-7.

rule, this is normally done in branch meetings. As a result of these branch meetings, the branch heads generally vote (at a subsequent council meeting of the whole family) in accordance with the expressed wishes of the members of their respective branches. (These wishes may be unanimous or merely those of the majority).

We may sum up the position by saying that for ordinary everyday management of and minor transactions in connexion with family land, the individual member has no right to be consulted. But as regards permanent alienation, final partitioning among members and even temporary but long-term dispositions, he has a right to be consulted in advance. If he happens to be a branch head, he must be consulted directly; if he is not, he still must be consulted, but it is enough that this is done by proxy - through his own branch head. A major transaction made or decision taken in connexion with family property without such full consultation is void. The question of consent is another matter, and will be discussed more fully later.

(vi) Right of disposition.

The right of a member tenant is merely one of exclusive possession and user as above described. He has no right to

alienate the land itself or his interests in it without the consent of the family. Any attempted unauthorised alienation is void, and in addition renders him liable to an action for recovery of the land at the instance of the family head.[10] His interest in the property is not attachable by his judgement creditors.[11] He cannot pass it down to his children either inter vivos or by will. After his death, his widow and children, if any, are entitled to remain on the land during good behaviour, but do not thereby inherit it or the right to collect rents on it.[12] If a member tenant lets rooms he was allowed to occupy to third parties, without the consent of the family, the head, not the tenant himself, has the right to collect rents from such third parties.[13] There are, however, circumstances in which a member tenant can collect rents from his sub-tenants for his own benefit. A member may be so old or infirm that he is not able to earn his living. To help him, the family might permit him to sub-let parts of the family house or farm land in his occupation, and to keep the rents or other payments received

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10. Buraimo v. Gbamgboye, 15 N.L.R.139; Shelle v. Asajon, ante; Adagun v. Fagbola, ante; Caulcrick v. Harding, 7 N.L.R.48.
11. Miller Bros. v. Ayeni, 5 N.L.R.40.
12. Sogunro-Davies v. Sogunro, (1929) 9 N.L.R.79; Dosunmu v. Dosunmu (1954) 14 W.A.C.A.527.
13. Shelle v. Asajon, ante.

therefor. A young member was often allowed, in traditional society, to sub-let farm land or other portions of family property so as to raise funds for a contemplated marriage, title-taking expenses or similar prestige undertakings. The point to emphasise here is that in all such cases, the express consent of the family is required for the sub-letting and so, indirectly at least, for the member's keeping the proceeds thereof. It may be objected that this subject (i.e. right to collect and retain rents from sub-tenants) is of no legal importance since it is clearly a case of being permitted to do so. But this objection overlooks the nature of the consent or permission itself. As we shall see later, such a permission is valid and binding on all members even if obtained on a narrow majority vote. Hence it might mean in fact that some, perhaps many, members are being deprived of the income of family property against their will.[14]

(vii) Right to Intestate Succession.

There is nothing like succession to family property or any part of it as far as the individual member is concerned. If there is succession at all, it is by one generation of the family after another. But even this idea is not tenable

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14. This raises anew the whole question of corporate ownership versus individual rights into which we cannot enter here.

since the family is one perpetual socio-legal entity. However that may be, the individual member does not succeed to rights in the property as a whole: he becomes entitled to such rights by virtue of his membership of the family and quite often in the life time of his parents. One has only to remember the old maxim nemo est haeres viventis[15] to see that any argument in favour of succession is untenable. Neither does the individual inherit that portion of the family property which his father (or mother) had been allowed to occupy exclusively during his/her life time. Children are invariably allowed to continue in possession after their parents' death in these circumstances. But this is not the same as saying that they inherit that land or any interests therein. To begin with, they have no right to alienate their interests whether permanently or for a limited period of time - without the consent of the family. Secondly, there is nothing peculiar about the rule which says that such children shall be left in possession on the same terms as their deceased parent. This is true of practically all cases of gratuitous customary tenure, especially where

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15. No one can be heir during the life of his ancestor: Coke on Littleton, 22b.

kinship ties bind the tenant to his landlord.[16]

We may summarise our discussion under this heading by saying that the children of a member tenant, and à fortiori his widows, do not inherit their father's tenancy; they are however entitled to remain on the land on the same terms as their father in accordance with the normal rules of customary tenancy where the parties involved are kinsmen.

(b) Members by birth - II. Females.

In the past, there was almost complete uniformity on the subject of the law relating to women's rights in family property. Apart from the matrilineal Yako of the upper Cross River basin and the mixed-descent societies in and around Afikpo, all in the Eastern Region, the customary law everywhere in southern Nigeria denied women any direct rights in such property.[17] But some societies have come a long way away from this discrimination against women. As a result, it may be said that southern Nigeria can now be divided into two main groups of societies, viz. those in

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16. See generally, Lloyd, op. cit., pp.89-92, esp. 91; Meek, Land Tenure and Land Administration ,,., pp.140 ff. Obi, op. cit., pp.107-114, and the authorities cited there.

17. See Coker, op. cit., p.155 (Yoruba); Omoneukanrin, op. cit., p.87 (Itsekiri); Forde and Jones, op. cit., pp.22-3 (Ibibio, including Efik).

which women have and those in which they have no interests, as of right, in family land. The former are found in the north-east and the south-west, while the latter occupy the rest of southern Nigeria.

In addition to the Yako of the Obubura Hill districts and the Ibo of Afikpo (and Ohafia) already referred to, the Yoruba of today give to their women virtually equal rights and interests in family property as their men.[18,19] This right was held as long ago as 1937 to be well settled and beyond argument in Sule v. Ajisegiri.[20] But two points of interest must be mentioned here. The first is that almost all the reported cases dealing with the Yoruba law on this subject concern the final partitioning of the property in question or the distribution of the proceeds of sale thereof. It would be interesting to speculate on what course the stream of judicial decisions would have taken had the issue before the courts been the normal annual allocation of family farm land for cultivation purposes. One would not be surprised if the decisions confirmed the traditional discrimination against women, in view of the fact that, as

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18. For the gradual recognition of women's rights in family property among the Yoruba, see Coker, op. cit., pp.155-162 and the cases there cited.

19. For a practical limitation on women's land rights, see Elias, Groundwork ...., p.328.

20. (1937) 13 N.L.R.146, per Butler Lloyd, J.

a rule, men are responsible for the maintenance and general well being of family members. In this connexion it should also be noted that, as Elias has rightly said, women are "not usually given any farm land in the general allotment."[1] In practice, women have to make a request to the family head (or the land authority, as the case may be) if and whenever they require a piece of farm plot for their own use. Since the law now accords them a right to the land on equal terms as the men, female members' request for such farm plots could not lawfully be turned down. (Neither, in point of fact, is the request of their counterparts in other societies refused except in abnormal circumstances, such as where the woman concerned is of such bad character that she is a social disgrace to her family). The other point to note is that practically all the reported cases concern disputes over house rooms in urban areas, especially in Lagos, where there has been acute housing shortage for the better part of a century. There could be little doubt but that even the Customary Courts would have been prepared to declare that women have always had equal rights in the family land with men, if the choice before them was between this and permitting the male members of the family to turn their sisters and widowed sisters-in-law into the street in the

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1. Op. cit., p.328.

name of customary law. In the societies under consideration, the fact that a female member has married out of the family does not affect her right to a share in the family property: she has a right, for instance, to come back to it on leaving her husband.[2] In these societies too, if family property is sold, female members are entitled to a share of the proceeds of sale, wherever they happen to live at the time. What a married woman cannot do is to bring her husband to live on the land of her maiden family without the consent of that family.[3] If a man is allowed (or suffered) to live with his wife on part of her family property, he is liable to be evicted at his wife's death. For as he is not a member of the family, the security of tenure which the customary law affords members is not available to him. His position is even weaker than that of a man residing with his wife in her ante-nuptial private house. It has been held with referred to Ibo law that in a case like the latter, the woman's maiden family, not her husband or his family, is entitled to the house.[4]

In the other parts of southern Nigeria, women have no direct rights in family property. But they do have a right,

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2. Cf. Carey, J., in Coker v. Coker (1938) 14 N.L.R.83, at p.86.

3. Cf. evidence of the chiefs re-stated in Lopez v. Lopez, (1924), 5 N.L.R.47, at pp.49-50, being evidence originally given in Omoniregun v. Sadatu in 1888 (unreported).

4. Nwugege v. Adigwe (1934) 11 N.L.R.134.

as wards or dependants, to reside on such property. They cannot be turned out of any rooms in their actual occupation without satisfactory alternative accommodation being provided for them. These rights are suspended when they leave the family to be married elsewhere or for other reasons. But they retain the right to return to their maiden family and to be given living accommodation if, for instance, their marriage breaks up or their husbands die. In these societies, female members must ask for any farm plots they wish to cultivate. Their request is normally not refused; but if it is, they have no legal remedy against the family. On a final partitioning of the family property, women have no right to be considered. It is considered unnatural for a woman to remain permanently unattached (by marriage) to a man and his family. Customary law, therefore, did not make any provisions for a state of affairs whereby adult women would live as spinsters among their own people. Neither did customary law envisage the growth of cosmopolitan urban areas where people from abroad could acquire permanent residential sites without being absorbed into the local indigenous social groups. Hence there was no provision for the transmission of interests in family property through women to their husbands or their children. To grant such a right would be to undermine the very foundation of indigenous socio-political organization and kinship solidarity, by permitting strangers

to own and occupy parts of the family land without in law belonging to the village or town in which the land is situated, and without owing allegiance to its political head (or authority).[5] It was perhaps this consideration that prompted Pennington, J., to declare in 1924 that:

> "A decision that women are entitled to share in the landed property under native law and custom would strike at the very root of native ideas on the subject of family property."[6]

The extent of a woman's interest in family property in the areas under consideration may, therefore, be said to be a bare right to be allowed to reside on the family property before marriage, and to return to it if she loses her husband or her marriage. More particularly, this right consists in a recognised duty on the family to give her a living accommodation commensurate with her age and position in life, having regard to what is at the family's disposal. There is no duty on the family as such to build her a house or otherwise acquire rooms for her. That is the duty of her parents or guardian. The duty on the family is to let her occupy a room or rooms in the family house if she has no other accommodation and there is a room available. Alternatively, she has a right to demand of the family the allocation

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5. Cf. Coker, op. cit., pp.126, 155 ff.
6. Lopez v. Lopez (1924) 5 N.L.R.47, at p.50.

to her of building space, still assuming that there is available space for this purpose and that her immediate household cannot meet her need in this respect. Finally, as already indicated, she has a right to retain a family house or room in her possession till a satisfactory alternative is provided, even if the family requires her present room for other purposes.

This duty on the family to provide its women members with living accommodation is more stringent than its duty to give them farm land. In the latter case, women have no enforceable right as against the family, for the latter's duty is social, not legal, in character. In normal circumstances, requests by women members for farm plots for ordinary use are not refused. But should they be refused, there is no legal remedy open to the injured party.

The interests of women members in family property in the areas under discussion are coterminous with the continuation of the property concerned as family property. If the family decides to partition its holding permanently or to alienate it outright, it is under no obligation to consult the wishes of its women members. Indeed, the property may lawfully be partitioned or sold in spite of the fact of its being occupied by a woman. In that case, her interest lapses, and she becomes the responsibility of her parents or guardian

as regards living and farming facilities. This, however, is not as unfair to the women as it sounds. Family land is partitioned *per stirpes* and sub-divided in the same way. This means that the first division is into as many parts as the family has branches. Each branch then partitions its share into as many parts as it has sub-branches or households. This ensures that, as far as building sites and farm land are concerned, there is something of the former family property which a given household can make available to its women members. It would have been otherwise if the partitioning were done *per capita* among the men, for that would mean an immediate end to the group family principle and so weaken, if not destroy, the inbred sense of responsibility which men feel towards women relations as members of their family units.

(c) Members by Birth - III. Minors.

In discussing the question of minority, there is a tendency among some writers on African customary law to confuse contractual capacity with capacity to hold legal interests in land. Most systems of law deny minors capacity to make valid contracts (except in special circumstances); so does the customary law of southern Nigeria. Different legal

systems adopt different expediencies in dealing with the more difficult problem of property rights. English law, for example, has tried to overcome this difficulty by separating legal estate in land from beneficial interests therein, and providing that whereas infants can hold the latter, they cannot hold the legal estate. This dichotomy is made possible by the concepts of trusts and settlements. Confronted with the problem of joint tenancies and tenancies in common where one of the holders is an infant and the others are of full age, English law extended the application of the trust principle so that in such a case the adult co-owners are deemed to hold the property in trust for sale for themselves and the infants. And so guarantee a fair share of the property to the infant co-owner in such a situation as this there is the equitable rule that, exceptional circumstances apart, a trustee must not benefit from his position as trustee.[7]

The customary laws of southern Nigerian societies also

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7. See Halsbury's Laws of England (3rd, Simond's edn.), Vol.21, esp. pp.151-158; Keeton on Trust, (5th edn.), pp.45-46; Hanbury's Modern Equity (7th edn.), p.261 and Ch.14; Underhill's Trusts and Trustees (11th edn.), pp.113-116; See also the Law of Property Act, 1925, ss.19-22, 35 (s.19(2) deals with the situation where some co-tenants are infants and the others of full capacity); the Settled Land Act, 1925, s.27 (where all tenants are infants).

deny contractual capacity to infants (minors) as a general rule, but allow them to hold land acquired for them by persons of full capacity. Thus both in traditional and in contemporary society, minors are often given plots of land by parents anxious to evade the rules of intestate succession, or desirous of advancing particularly promising children, or as a means of evading excessive income tax. As customary law does not distinguish between legal estate and equitable interest, and since no further act or formality is required to vest the radical title of such property in the infant on his attaining majority, the conclusion seems justified that the radical title passes to an infant donee at the time of the initial gift.[8]

Even if an infant is incapable legally of holding the radical title in land, there is no reason in principle to suppose that he cannot hold rights and interests in family property, for as we have seen, the radical title to such property is in the family itself as a corporate entity. And so we submit that in the absence of special local rules to the contrary, minors are entitled to rights and interests in family property on the same basis as adults.[9] Minors are

8. A contrary view is expressed in Coker, op. cit., p.163, and in Elias, Groundwork, p.328.

9. Cf. Coker, op.cit., p.163; Elias, op.cit., p.328. Elias says that where an infant has an interest in land, "an adult relative ... will hold it for the minor on trust until his attainment of puberty or so soon as the minor is capable and ready to cultivate or use the land profitably." This seems to confirm the contention here, viz. that a minor can hold land in law. Capacity to hold cannot depend on ability to make profitable use. Besides, minors do take over their land during minority.

not normally given farm plots during the annual allocation; nor are they given separate rooms in the family house. But this is not because they have no rights or interests in the property, but because they have no need for separate allotments of their own and are physically unable to work or care for farms or rooms as the case may be. After all, adult males resident abroad are not normally given annual farm plots or house rooms - and for much the same reasons.

The true test for determining who are and who are not entitled to rights and interests in family land is, in our submission, to be found in the answer to the question who are entitled to shares in the event of a final apportionment of the property or the proceeds of the sale thereof? Apportionment is always done per stirpes, that is, in this connexion, among the various branches that constitute the family.[10] Sub-division within the branches is also done on the same principle, and so on down to a partitioning between the individual members of the elementary family. Now if minors had no rights in family land, it seems to follow that a branch or sub-branch with only minors for members will be disregarded for the purposes of a final apportionment, just

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10. Dawodu v. Danmole (1962) The Times for July 26th, P.C. decision, Lords Evershed, Jenkins and Guest, upholding the Nigerian Supreme Court decision: (1958) 3 Fed. Sup. Ct. 46.

as branches or sub-branches with only female members are disregarded in those societies where women have no rights in family property. But it is yet to be suggested that a branch will be passed over for these purposes simply because it has no adult males. It is interesting to note in this connexion that, as regards the property of an elementary family, it has been held that a person's rights and interests therein are not affected by his minority, any more than it is affected by his absence from the country.[11] It is submitted that this is equally true of rights and interests in the property of the extended family. As Ajisafe, writing as long ago as 1924, has said,

> "Every member of a family or clan has his own share of family land, which must be partitioned to him, if he so desire it. But it must be proved that he is capable of working it before such partition is made."[12]

We may summarise the legal position by saying that minority per se is no bar to the holding of rights and interests in land; that male infants everywhere and female infants as well in the societies where women are entitled to rights in family land, have basically the same rights in such property

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11. Salami v. Salami (1957) W.R.N.L.R.10.

12. A.K. Ajisafe, The Laws and Customs of the Yoruba People (London & Lagos, 1924, Routledge etc.), p.7. "Partition" is perhaps used here in the sense of periodic allotment and not final apportionment.

as adult members; that since periodic allocations are usually made according to actual need, minors are not normally considered for these allocations; that even so, they are entitled to be considered on the same basis as adult members if they have genuine need and/or are capable of making use of the land; and that on the final partitioning of the property, they are entitled to as much a share as adult members on the familiar principle of division per stirpes.

(d) Members by Marriage.

Under this head we shall discuss the rights and interests of (i)married women and (ii)widows, in the property of their husband's (or late husband's) family. The modern customary law on this point is straightforward and uniform and may be stated in a few sentences. A married woman (as well as a widow) has some legal rights and interests in the property of her husband's family. During her husband's life time, she has a right to live with her husband in the family house or in his own house on the family land. This, in our submission, is not merely because the law permits a husband to bring his wife onto such property, but because she is regarded by the customary law as a member of her husband's family for this and some other purposes. In other words, her

right is derived from her membership of the family concerned and is co-extensive with that membership which, as will appear later, may continue after her husband's death. If she deserts or divorces him, however, she loses her right to occupy or cultivate any part of this property.[13] But this, in our view, is because she thereby loses her membership of the family by "abandonment".

If on her husband's death a widow wishes to remain attached to his family, she can either stay on ~~as~~ unattached or re-marry within the family. In the latter case, she retains her rights in the family property a propos her new husband on the same basis as she did in the life time of her deceased spouse. If, on the other hand, she chooses to remain in the family, but unattached, her legal position in the past would depend on whether or not she had a child surviving. In Yorubaland, it was immaterial whether such a child was male or female. If she had any child surviving, she was entitled to retain possession of any part of the family property which she or her late husband exclusively occupied or made use of. Thus, she would be entitled to occupy the matrimonial home even if this was in fact part of

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13. Cf. Coker, op. cit., pp.159-162; Elias, op. cit., p.328; Lloyd, op. cit., p.298 and passim; Obi, op. cit., pp.73 ff.

the family house.[14] She would also have a right to cultivate any part of the family farm land which for some reason her husband used exclusively to cultivate in his life time. Among the other societies of southern Nigeria, however, the rights described here attached to a widow who had a son (or sons) surviving, but not to other widows.

In the case of a childless widow (among the Yoruba) or one with no male child living (in other societies), there was no protection in law. For customary law took it for granted that a childless (or son-less) widow would like to re-marry and try to fulfil her major social function in life, viz. procreation. In legal theory, therefore, such a widow had no locus standi in the family if she elected to remain a feme sole. But in actual practice, she was seldom if ever ejected from her home, or deprived of the use of family farm plots which she used to cultivate with her husband. As Coker has said, what authority there is (indeed what evidence of normal practice there is) supports the proposition that even a childless widow was entitled to live on the family property for as long as she liked.[15] This in our submission, is now

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14. This did not apply to family houses occupied by Chiefs by virtue of their chiefly office. See Lloyd, op. cit., p.

15. Op. cit., p.160. Cf. Lopez v. Lopez (1924) 5 N.L.R.47, at p.49.

the general law in southern Nigeria, from all available oral evidence.

It must be pointed out, however, that whether a widow occupies a portion of the family property as of right or as a matter of grace, she does not thereby acquire any disposable, inheritable or attachable interests in such property.[16]

16. Cf. Oloko v. Giwa (alias Ekun), (1939) 13 N.L.R.31; Sogunro-Davies v. Sogunro (1929) 9 N.L.R.79.

PART TWO

THE ELEMENTARY FAMILY

CHAPTER 4.

NATURE, COMPOSITION AND GENERAL FUNCTIONING

Definition.

This Part will be devoted to an examination of the law relating to the formation, functioning and dissolution of the elementary family. We defined this institution earlier on as a domestic unit consisting of a man and his wife or wives, his unmarried children, and other dependants if any. There is an unusual measure of agreement among writers on Nigerian social institutions in this respect, though different writers chose slightly different names for the same group. Jones, for instance, defines a family as "A husband, wife (or wives) and their unmarried children".[1] Forde preferred the term "household", which he defined as "a group usually consisting of a married man with one or more wives and children and occasionally an adult dependent such as a widowed mother or disabled brother."[2] But

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1. Report on the Position, Status and Influence of Chiefs and Natural Rulers in the Eastern Region of Nigeria, p. v.
2. "Government in Umor. A Study of Social Change and Problems of Indirect Rule in a Nigerian Village Community", (1939) 12 Africa, 129-61, at p.130.

elsewhere the same writer uses the term "domestic family", and this he defines as a social unit which usually consists of "a man, his wife or wives and his unmarried children, and any other persons such as his mother or younger brother who may form a basic part of his economic unit." [3] Bradbury and Lloyd in their book on the Edo and the Itsekiri define a "nuclear or compound family" as a unit made up of a man and his wife or wives and their children.[4] Finally, Marris, writing on social change in Lagos, defines a "household" in these words, "Each married man, with his wives and unmarried children, and any other kin - such as his widowed mother or a young unmarried brother - for whom he was responsible, would form a separate household." [5] Schwab's definition is in similar forms.[6]

These definitions all agree on the usual composition of an elementary family, viz. a man, his wives and children (with or without other dependants). But it must be emphasised that the word "family" is not a term of art, and is sometimes applied to husband and wife alone (where there are no children of the marriage), to a man and his children alone (where he is a widower) and to a woman and

3. The Yoruba-speaking Peoples of South-western Nigeria, p.10
4. The Benin Kingdom and the Edo-speaking Peoples of South-western Nigeria together with a section on the Itsekiri (Forde, ed.), p.27.
5. Family and Social Change in an African City, p.14.
6. "Kinship and Lineage among the Yoruba" (1955) 25 Africa, p.365.

her children (where she is a widow).

Types of Elementary Families.

An elementary family may be homogeneous or composite. It is homogeneous when its father and founder only had children by one wife; and composite when he had children by more than one wife. A typical composite family is that of a polygamist. Here each wife is entitled to be given her own separate house or room(s) in which she lives with her children, domestic servants and dependent relations if any, free from interference from any other wife, and only subject to the over-all supervision and control of her husband.[1] But not all composite families are polygamous. A man may never have had more than one wife at a time; nevertheless, if he contracted a number of marriages in succession and had children by two or more of them, his family would be a composite one. Similarly, where a man had some children by one marriage and some others from one or more irregular unions, his family will be classified as composite, provided his personal law allows of the affiliation of the latter set of children to his family, and that they have been so affiliated (e.g. by being acknowledged)

1. Cf. Ardener, "The kinship terminology of a group of Southern Ibo," (1954) 24 Affica 85-99, at p.87; Forde, "Government in Umor ...." (1939) 12 Africa 129-61, at p. 130; Forde, Marriage and the Family among the Yakö in South-eastern Nigeria, p.99; Lloyd, "Some notes on the Yoruba rules of succession and on 'Family Property' " (1959) 3 J.A.L.7-32, at p.10; Ward Marriage among the the Yoruba, p.38; and Egharevba, Benin Law and Custom, pp.11-12.

The constituent parts of a composite elementary family are known by so many different names [2] even within the same ethnic group that we shall adopt a neutral English term here, and call them "branches". A branch, as already indicated, may consist of a wife and her children (with or without other dependants) considered as a unit, in a polygamous family. This is the ordinary meaning of the term as used by Nigerians. But it may also consist of the children of a deceased or divorced wife, or the natural children of a married man by his mistress. One child is enough to constitute a branch, provided he has a different mother from the rest of his father's children. Nor does it make any difference that such a child's mother had not been married to his father, so long as he has been duly acknowledged by the latter in accordance with the local customary law. The curious result of the last two principles is that a man who has only married once in his life (and may indeed have been legally incapable all along of contracting another marriage on account of his subsisting "Christian" marriage), can still be the founder and father of a composite family. For each child he has by a different woman (wife, mistress or casual acquaintance alike) is regarded as a separate branch of his own.[3] As Lloyd said on this point in

2. E.g. Omoiya (Yoruba), usekwu, mkpuke (Ibo).
3. Cf. Lloyd, Yoruba Land Law, p.296.

connection with intestate succession among the Yoruba, "The child of a concubine ranks as one stock provided that the father recognised the child by maintaining him ... Chiefs and informants were insistent that if a man had six children by a faithful wife and six more from fleeting liaisons with [six different] lovers, there would be seven stocks, each entitled to an equal share of the estate." [4] Finally there is an obsolescent (if not obsolete) practice found mainly among some Ibo and Ijaw peoples, whereby two wives and their children together constitute one family branch. This occurs when a childless wife pays the marriage expenses of another woman, with her own funds, in her husband's name and raises children by her - with the help of her husband or another man employed for the purpose. Both the children and their mother would belong to the house of the childless wife, and together with her would form one branch of the husband's family.[5] (The modern practice is that a childless wife provides her husband with the wherewithal to pay for a new wife and raise children by her. With the birth of such children, the childless wife is deemed to have fulfilled her duty to society. But these children would not count as members of her branch in a case

4. Lloyd, loc.cit., p.296.
5. Cf. Meek, Law and Authority in a Nigerian Tribe, p.275; Esenwa, "Marriage customs in Asaba Division" (1948) 13 Nigerian Field, 71-81 at p.74; Talbot, Tribes of the Niger Delta (Izaw), pp.195-6; Talbot, Peoples of Southern Nigeria, Vol. III, p.439.

of this type).

Seniority in the family.

A point of considerable importance which is often overlooked by writers on customary law and social life generally is seniority as between (a) wives, (b) children and (c) branches or houses in a composite elementary family. The importance of this principle can be shown by means of three examples drawn from every-day life. When the father of a composite family dies intestate so that his estate falls for distribution per stirpes, priority of choice of shares is governed by the seniority of the constituent stirpes. Again, when money, provisions, farm plots or benefits of any kind are to be shared out among the wives of a polygynist, priority of choice of shares is strictly in accordance with seniority. In the same way, priority of choice of shares as between children in such a family depends on their seniority inter se. Since this seniority is calculated on a slightly different basis as between wives, children and family branches, we shall consider these groups in turn.

(a) Wives:

The seniority of a wife is governed by the date of her marriage into the family, and not by the date of her birth or the date of her previous marriage to another

man.[1] Thus a girl of eighteen will be senior in law to a woman of thirty if, both being married to one and the same man, the former became his wife before the latter.[2] (This raises the question of when a woman actually becomes a man's wife in law, a question we shall discuss at some length in the chapter on marriage.) But there are two exceptions to this rule. Where a widow re-married within her late husband's family, she retains her marriage date with the deceased man as if that union had never been dissolved. (We shall see in the section on "widow inheritance" that the first marriage is actually dissolved in some societies.) Also, where two women are married into the same family on the same date, as occasionally happens, seniority is determined by reference to their dates of birth.

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1. Cf. Elias, Groundwork of Nigerian Law, p.296; Marris, op.cit., p.15; Parkinson, "Note on the Asaba People (Ibos) of the Niger", (1906) 36 J.R.A.I. 312-24, at p.316.
2. The same principle also governs seniority as between women married into a given lineage group such as an extended family or a village, with this additional result. If a woman married a member of a group, say in 1950, was divorced from him in 1962, and married another member of the same group on first January 1963, she would rank below any other woman who married into that group before 1963. In these cases, and once more excluding the case of widows re-marrying within their late husband's family, seniority depends on the date of the current marriage.

(b) Children.

Seniority as between a man's children is determined by the date of their birth,,as a general rule. It has nothing to do with the seniority of their respective mothers. Thus the last wife of a polygamist can be the mother of his eldest child, who will in due course take his father's place as family head (unless expressly rejected by the other members, as we have seen). This rule, however, only applies to children who were born legitimate. (We shall see later that legitimacy under customary law differs substantially from the concept of the same name in English law.[1] Suffice it here to say that a child is a legitimate child of the man to whom his mother was lawfully married at the date of his birth or conception) The seniority of a child who was born illegitimate but was later acknowledged by his natural father is reckoned from the date of such acknowledgement - more accurately, from the date of the first proved act of acknowledgement. This rule was recognised by implication in Young v. Young [2] where it was held that a child who was born illegitimate and later acknowledged by his natural father had no right to challenge the validity of a sale and conveyance of what was family property, since the sale took place before the

1. Cf. In re Adelabu and Aremu: Lawal, Ekun and others v. Younan & Sons and others, (1961) 1 All N.L.R.245, at p.250(F.S.C.)
2. (1953) W.A.C.A. Civil Appeal, No.3631.

first proved act of acknowledgement and therefore before he was legally a member of the family.[3] If membership of such a child in the family dates from his acknowledgement, the inference seems inescapable that his seniority vis-á-vis other children of his father will be determined with reference to the date on which he was acknowledged, not the date on which he was born. In other words, his seniority in the family will depend on the date of his legal birth into that family, not on the date of his natural birth into the world.

A somewhat similar principle governs seniority of children who were born illegitimate but were later legitimated by the subsequent marriage of their mother and their natural father. If the marriage was done under customary law, the child's seniority will be reckoned with reference to the date of his acknowledgement or the date of his parents' marriage, whichever is the earlier. This follows of necessity from the last principle above. If, however, it was a "Christian" marriage, the Legitimacy Act of 1929 [4] will apply. Section 3(1) of this Act provides, in respect of persons whose father is domiciled in Nigeria, that legitimatio per subsequens matrimonium shall operate from the date of the commencement of that Act or the date of the marriage, whichever is the last. The effect of this

3. Loc.cit., at pp.23-4.
4. Laws of the Federation of Nigeria, 1958 Revision, Cap. 103. See also Legitimacy Law (W. Region), 1959 Revision, Cap.62.

sub-section is that an illegitimate child born before the Act came into force became legitimated as from the date of the commencement of that Act,[5] provided he was still living at that date. (Posthumous legitimation was not contemplated by the Act.) A child born illegitimate after the commencement of the Act will, if his parents ultimately got married to each other, become legitimate with effect from the date of such marriage. A propos the other children of his father, therefore, such a child's seniority must be calculated from the date of his parents' marriage.

An intriguing point of conflict of laws arises from the fact that statute law and customary law recognise different operative dates for legitimation by acknowledgement and by subsequent marriage respectively. Suppose that a man has a child from an illicit liaison with a concubine, and that he acknowledged this child soon after he was born. Suppose that he later marries the child's mother under the Act. From which date should the child's legitimation be calculated: the date of the acknowledgement, or the date of the marriage? This problem seems impossible of logical solution. The acknowledgement was obviously lawful and effectual when it was made, and so the child's legitimate life should begin to run from the date of that event. On the other hand, the Legitimacy Act is unequivocal in its

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5. I.e. 7th October, 1929.

provision on this point. "Date of legitimation" is defined in s.2 as either the date of the commencement of the Act[6] or the date of the legitimating marriage. Section 3(1) provides that "... where the parents of an illegitimate person marry or have married one another ... the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in Nigeria, render that person, if living, legitimate from the commencement of this [Act] or from the date of the marriage, whichever last happens."

The dilemma is apparently complete. And yet one of these conflicting rules must yield place to the other. It is tempting to suggest that the customary rule must do so, for it is inconceivable that the clear and unambiguous words of a statute should be regarded as otiose by reason of the existence of a rule of customary law. But a moment's reflection will reveal the great weakness of this suggestion. For it is difficult (to say the least) to see how a status which a child acquired as a result of his natural father's lawful act (viz. the acknowledgement[7]) could subsequently be nullified by another lawful act of the father's (viz. the marriage). There is however, a perfectly simple solution to this problem - a solution which turns out to

6. Viz. 7th October, 1929.
7. Note that semble a man who is married under the Marriage Act can lawfully and effectively legitimate his natural child by acknowledgement; Alake v. Pratt (1955) 15 W.A.C.A. 20. Of this, more later.

uphold the customary law by interpreting the provisions of the Legitimacy Act against the general background of Nigerian social life. It will be recalled that s.3(1) speaks of the parents of "an illegitimate person" marrying each other. But a child who has been duly acknowledged is no longer "an illegitimate person",[8] and so does not fall within the provisions of that Act. Unlike the position in England where a person born illegitimate remains so till legitimated by the subsequent inter-marriage of his parents,[9] the position in Nigeria is that a child ceases to be illegitimate on being acknowledged by his putative father. It is therefore submitted that an acknowledged child is not covered by s.3(1) of the Act. If this be right, then the seniority of a child who was born illegitimate but whose parents later married each other would be calculated as from the date of his acknowledgement or the date of the marriage, whichever first occurs.

One final point deserves brief mention here. There was in the traditional societies of southern Nigeria an almost universal rule to the effect that male children had priority in law to female children, irrespective of their relative ages. In any given polygamous (or composite) family, therefore, there were at least three hierarchies - one for sons, one for daughters and a third for wives.[10] There

8. Cf. In re.Aremu and Adelabu, (1961) 1 All N.L.R.245 at p.250.
9. Barring the possibility of legitimation by special Act of Parliament.
10. There might be others for slaves, domestic servants and other persons attached to the family.

is everything to be said for a rule which decreed that, in the nature of things, daughters and wives alike were junior to sons as family members, at a time when responsibility for the defence and general welfare of the family was the responsibility of men only. But as women now play an increasingly active role in the family - paying for the education and advancement of its younger members, helping to build or maintain the family house out of their own income, giving financial support to the aged, the disabled or the indolent members - it is only fair that the law should give them a measure of social up-grading commensurate with their altered economic position in the family. It is for this and similar reasons that the courts in some places, and the people themselves in others, are beginning to place all members of the family on equal footing in matters like enjoyment of rights in family property,[11] intestate succession[12] and selection for family headship.[13] One of the most interesting examples of this legal evolution being given judicial recognition is to be found in Ricardo v. Abal

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11. See e.g. Sule v. Ajisegiri, 13 N.L.R.146;
12. Cf. Salami v. Salami (1957) W.R.N.L.R. 10.
13. See Meek, Land Tenure and Land Administration in Nigeria, pp.129-30; Meek, Law and Authority, p.106; Omoneukanrin, Itsekiri Law and Custom, p.31; Partridge, "Native Law and Custom in Egbaland", 10 J.A.S. 423, Lloyd, Yoruba Family Law, p.83. See "Family Property" ante.

(by Momo as Next Friend and Guardian ad litem), which held, on the evidence of local Chiefs called by the female party, that the principle of male seniority whereby a man had priority over an older woman by reason only of his sex, was not known to Yoruba law.[14]

As for the relative seniority of children and wives inter se as members of the family, the general rule seems to be as it was succinctly put by Lloyd in connection with Yoruba law -

> "Within the descent group a wife is senior in rank to members born after her marriage into the group and junior to those born before it ...." [15]

To this may be added what has just been said, viz. that in the case of persons who were born illegitimate but later became members by legitimation, the material date is the date of their parents' subsequent marriage to each other or the date of their acknowledgement by their natural father as the case may be - in other words, the effective date of legitimation.

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14. (1926 7. N.L.R.58.
15. Yoruba Land Law, p.284. This rule, houwever, has little practical legal (as opposed to social) importance. It is difficult (but by no means impossible) to visualise a situation in real life in which property or other legal fights fall for distribution and choice per capita among wives and children as members of a given family.

(c) Branches

The branches or segments of a composite family rank in order of seniority according to the relative age of the eldest child in each branch. This means that if, for example, the eldest (or only) child in each of, say, four branches of a man's family are aged 18, 15, 14 and 10 years respectively, these branches will rank in seniority in that order. It will be seen that seniority of branches within a family is completely independent of the seniority of the women who brought them into existence. This is because while, ex hypothesi, a man's children are members of his family, the mothers of these children need not be: they may have left the man following a divorce, they may have died, they may be no more than resident concubines with no legal status in the family at all, or they may be non-resident mistresses. It follows that while a mother may be part of a family branch as a domestic unit (and so should be included in its definition), her presence or membership is not necessary for its existence as a legal entity.

A question of considerable importance and difficulty is how far it is right to state the principle under consideration in terms of "children" simpliciter, as opposed to "sons" or "daughters" for patrilineal and matrilineal societies respectively. To take the case of daughters first. Even in the matrilineal societies of the Eastern Region,

matriliny does not play any important part in the grading of (elementary) family branches. As far as rights and interests in this type of family and its property are concerned, women have no priority over men. This is perhaps because the legal life of an elementary family, as opposed to an extended family, owes its origin to some man as its father, founder and natural head.[1] It is only natural that, as themselves potential elementary family founders, sons should have pride of place as against their sisters. (We shall see in due course that in the distribution of a man's self-acquired disposable property on intestacy, his sons are preferred to daughters as a rule, even in matrilineal and mixed-descent societies.)

If then the law does not give precedence to daughters over sons anywhere in our area of study, does it accord them equal rights with sons as regards seniority of family branches of which they are the eldest children? This raises anew the question (already discussed) whether or not daughters alone could in law constitute a family for the

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1. Pace Talbot (In the Shadow of the Bush, p.97) who says that among the matrilineal societies of Ekoi, it is not men but women who are regarded in law as family heads. This proposition, as will be shown presently, involves an element of confusion between a descent group (which is matrilineal and non-territorial) and a domestic family (which is territorial and, insofar as it involves succession rights at all, is patrilineal). In a matrilineal society a composite elementary family is not one descent group; for the members of its various branches belong to different descent groups, viz. those of their respective mothers. The founder, head and cementing factor in such a family is, therefore, the husband and not his chief wife or any other wife.

purpose of creating family property by operation of law. It will be recalled that we contended that although women now possess equal rights with men in family property in some societies, this does not necessary justify the proposition that women alone can in law constitute a family. To acquire a right to participation in existing family property is one thing; to constitute a family in which property can vest is quite another. But as the law on this point is not yet clear, we can do no more here than give two alternative propositions. If a man's children by a given woman cannot in law constitute a family branch unless one of them at least is a male, then a branch must be as old as its eldest (or only) male member, and will rank in seniority accordingly. If, on the other hand, absence of a male child is no bar to its formation, then a branch is as old as the oldest child therein, irrespective of sex.[2]

It should be noticed that for the present purposes the material age of a child is computed with reference to the date on which he became a lawful child of his father.

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2. The following statement by Lloyd seems to imply that sex is not material on this point in Yoruba law. "The child of a concubine ranks as one stock provided [he has been acknowledged]. Chiefs and informants were insistent that if a man had six children by a faithful wife and six more from fleeting liaisons with [six different] lovers, there would be seven stocks ..." (Yoruba Land Law, p.296.) But this inference need not be justified, as the author does not appear to have adverted to the question of the sexes of these children and their effect on the formation of family stocks.

In the case of children who were born legitimate in the first place, this would be the same as the date of their birth. For a child who was born illegitimate but was legitimated by the subsequent marriage of his parents to each other, it would be the date of such marriage. And for children who were legitimated by acknowledgement, the material date would be the date of the first proved act of acknowledgement; this, as we have seen, is the effective date of legitimation.[3]

Finally, the branches of a composite elementary family will, for certain purposes, retain their relative seniority positions for as long as they exist as legal entities. The effect of this deceptively simple rule can best be illustrated by reference to apportionment of family property, for which it was probably designed. If the three branches (B.1, B.2 and B.3) of a composite family who rank in that order partition their family property per stirpes (as they almost invariably do), choice of shares will be made in the same order, irrespective of the relative ages of the oldest surviving members therein at the date of apportionment. Even if the oldest living member of B.1 is only 20 years of age while his opposite number in B.3 is 25, the first choice still belongs to B.1. But for this rule to operate there must be at least one surviving issue

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3. Cf. Young v. Young, ante.

(within the lineage) of that first child who initially gave B.1 its seniority by being the founder's eldest son or eldest child as the case may be. As this rule is of greater practical importance in connexion with grand-parental and extended families, however, it need not detain us here.

Head Wives.

It is generally accepted that a man's first wife (or if dead, the most senior surviving wife in order of date of marriage) is entitled to great respect not only from the junior wives but also from the husband himself and all his children irrespective of sex.[1] Her position carries with it a considerable amount of prestige, and qualifies her for the title of "mother" or its vernacular equivalent, for example iyale (Yoruba), Okhuo Odion (Bini) or anasi (Ibo). But these rights are essentially social in character, not legal: they cannot, for instance, constitute a ground for action in the customary courts to say nothing of magistrates and superior courts. There are, however, four points that seem to deserve brief mention here, as they savour of legal rights. In the past, it was at once the right and the duty

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1. See generally, Basden, Among the Ibos of Nigeria, pp.978. Basden, Niger Ibos, pp.228-9; Talbot, Tribes of the Niger Delta, p.196; Talbot, The Peoples of Southern Nigeria, Vol. III, p.441 (Ibo), and p.678 (Ekoi/Yako); Forde, Marriage and the Family among the Yako in South-eastern Nigeria, p.99; Delano, The Soul of Nigeria, p. 143; Ward, Marriage among the Yoruba, p.41. Egharevba, Benin Law and Custom, p.14; Parkinson, "Note on the Asaba People (Ibos) of the Niger" (1906), 36 J.R.A.I., p.316.

of the first wife to represent the junior wives in a dispute between a husband and all his wives as a body.[2] But though she still does this on occasion, she can no longer do so as of right, in the teeth of opposition from the other wives. On the other hand, she is no longer under any legal obligation (though she usually considers it her moral duty) to perform this function.

The second point is that in parts of Iboland, when a polygynist takes an ozo title, his first (or most senior surving) wife as above defined has a right to assume a new title-holder's name, and to wear the usual regalia (or other symbols) of membership of this exalted society.[3] The third point concerns the matrilineal Ekoi peoples of the Upper Cross River and the Obubura Hill District of the Eastern Region. According to Talbot, in a polygamous family it is "the chief wife, not the husband [that traditionally] was regarded as head of the house."[4] If, as seems unlikely, this statement is intended to mean that the "chief wife" is the head of her own branch of the polygamous family, it is quite unexceptionable. But if it means that such a wife is or has ever been regarded as head of the entire composite family, we can do no better than confront the

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2. Cf. Delano, op.cit., p.143.
3. Basden, Niger Ibos, pp.228-9.
4. In the Shadow of the Bush, p.97.

author with a statement by another distinguished antrhopologist who has made a special study of the same peoples. "The first married or the senior existing wife has no formal superiority or prerogative." [5] A slight element of overemphasis there may be in this latter statement, but in our submission, it is much nearer the true legal position than Talbot's.

The fourth and final point is one that has a large measure of legal significance, and concerns the law relating to damages for adultery. It is always considered a much more serious wrong to commit adultery with a person's first wife, where he is a polygamist. And to commit adultery with the first wife of a chief, a priest or, among the Ibo, an ọzọ title-holder is indeed a very grave offence against the husband. The damages recoverable in these cases were correspondingly higher than those payable in respect of adultery with second or subsequent wives.

Acquisition and Loss of Membership.

A person acquires membership of an elementary family by marriage, by birth in wedlock, by birth out of wedlock followed by marriage or acknowledgement, by adoption, by being accepted as a ward or as a resident domestic servant. These topics will form the subject matter of the

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5. Forde, Marriage and the Family among the Yakö ..., p.99. Note that the names "Ekoi" and "Yakö" cover practically the same societies.

next three chapters. Obviously it is only possible in this thesis to examine the more important legal principles involved, as a detailed examination of any one of them could easily provide sufficient material for a separate thesis. And so all we can do here is to examine the essential legal requirements for, and the legal incidents of a valid marriage (including engagement and betrothal); the concept of illegitimacy; legitimation (either by subsequent marriage or by acknowledgement); the basic rules relating to adoption, guardianship and domestic service employment.

Family membership is lost by marriage (in the case of a child), by divorce (in the case of a wife), by a child renouncing or being renounced by his father/guardian, by termination of a service employment, and of course by death in all cases. These topics will be discussed in the chapters dealing with divorce and the inter-relationship of parent and child, guardian and ward, and master and domestic servant respectively.

CHAPTER V

AGREEMENTS TO MARRY - I

Nature, formation and incidents

Terminology

There are many points of difference between an agreement to marry which is governed by customary law and one that is governed by the general (English) law: the parties are different, so are the modes, the permissible ages, the resulting legal obligations and the remedies available to one party where the other cannot or will not fulfil their part of the bargain. In view of these differences, and to avoid possible confusion of thought, we propose to employ here two different terms, viz. "betrothal" and "contract to marry"[1] respectively according as the agreement falls under one system of law or the other.

Definitions

Betrothal may be defined as a formal agreement under customary law between a woman,[2] and/or her family[3] on one

1. Occasionally "engagement" will be used (for brevity) with the same meaning as "contract to marry".
2. "Man" and "woman" are used here to include a child of any age.
3. "Family" is used here to denote the (immediate) lineage group of which the man or woman in question is a member. We shall see later that, in the final analysis, this means no more than the parents or guardians of the spouses-to-be

hand and a man and /or his family on the other, whereby the woman's family agree to give her in marriage to the said man, the man and/or his family, for their part, undertaking to have the woman as wife, to pay any agreed bride price (dowry) and generally fulfil the usual obligations of "in-laws".

Betrothal is "formal" in more than one sense of the word. First, it is normally a formal expression, before one or more witnesses, of a prior informal agreement between the prospective spouses or their families to marry or be given (and accepted) in marriage as the case may be. Secondly, the transaction normally follows a fairly well-defined procedure or form in any given society, and is everywhere sealed, as it were, with commensality of one kind or another. (The usual victuals are kola nuts or some other fruits and nuts, drinks and a good meal, in that order).

A contract to marry, as the name implies, is a legal obligation between a man and a woman to take each other as husband and wife by one of the methods prescribed by the general law. This is, in essence, a transaction between the prospective spouses as individuals, not between their respective families.

Parties to the agreement

A. Betrothal

As a general rule, the parties to a betrothal are the families of the prospective spouses, and not the prospective spouses themselves.[1-8] In the olden days, an infant

1. On betrothal generally, see: Phillips (ed.), Survey of African marriage and family life, esp. pp.121-8, 201-6, 257-62; Radcliffe-Brown and Forde, African systems of kinship and marriage, esp. p.322ff; Elias, The Nigerian legal system(1963) pp.290-1.

2. On the Edo, see: Bradbury and Lloyd, op.cit., pp.48-9 and 156; Thomas, "Marriage and legal customs of the Edo-speaking peoples" (1910-11) 11 J. Camp. Leg.(n.s.) 95; Bradbury and Lloyd, op.cit., esp. pp. 48-9, 80, 156; Egharevba, op.cit., p.15.

3. On the Efik and Ibibio: Talbot, Peoples of southern Nigeria, Vol.III, p.451; Talbot, Life in southern Nigeria, p.203;Talbot (D.A.), Woman's mysteries of a primitive people, p.88; Forde and Jones, op.cit., esp. p.77; Cotton, "The Calabar marriage law and custom" (1905) 4 J.A.S.427-8; Simmons, "Sexual life, marriage and childhood among the Efik" (1960) 30 Africa, 161;

4. On the Ibo: Basden, Among the Ibos of Nigeria, 69-70; Basden, Niger Ibos, 215-20; Ekeghe, A short history of Abiriba, pp.46-7; Talbot, Peoples,III, (ante), 440ff; Esenwa, "Marriage customs in Asaba Division" (1948) 13 Nig.Field, 76; Green, Ibo village affairs, p.161; Meek, Law and authority .., p.268 ff.

5. Ijaw (inc. Kalabari): Talbot, Peoples of s.Nigeria, III, p.438; Talbot, Tribes of the Niger Delta, p.180; Kammer, "Marriage custom of Bakana, New Calabar", (1910), 16 W.Eq. Afr. Dioc. Mag. pp.58-9.

6. On the Itsekiri: Bradbury and Lloyd, op.cit., pp.190ff; Omoneukanrin, op.cit., pp.40-1.

7. On the Yakö (Ekoi): Talbot, Peoples,III (supra), p.454 ff.; Forde, Marriage and the family among the Yakö, pp.14-9;

8. On the Yoruba: Forde, The Yoruba-speaking peoples, p.28; Delano, The soul of Nigeria, p.121; Ward, Marriage among the Yoruba, p.11; Kasunmu, loc.cit., p.4; Rev. Johnson, History of the Yorubas, p.114; Coker, op.cit., pp.231-3; Partridge, "Native law and custom in Egbaland" (1911), 10 J.A.S.422-33, at p.425.

could lawfully be betrothed without his knowledge (as where he was too young to understand the significance of the proceedings), or prior consent (as where he was a long way away, from home at the time), or even in spite of his objection. In modern times, however, while infant betrothal is still lawful in many societies, and may be done without his knowledge if the infant in question is too young to be told, betrothal is in the vast majority of cases done with the active co-operation of the prospective spouses.

The persons who normally take part in a betrothal as representatives of the two families are the prospective spouses' parents (especially the father), their family heads, grown-up brothers and uncles (viz. paternal and maternal uncles in patrilineal and matrilineal societies respectively). But the parents of the spouses-to-be, indeed their fathers alone, can and sometimes do represent their respective families. While this is unusual and not unnaturally frowned upon as socially undesirable, it is quite lawful. This being so, it may be said that in the final analysis, the essential parties to a betrothal are the parents of the spouses-to-be, or their guardians.

The one exception to this rule is that a man of mature age - in particular, a widower or a married man who wants a

second or subsequent wife - may, and often does, negotiate and conclude a betrothal without participation or intervention by any member of his family. It would be idle to speculate on whether in doing this he is in fact contracting for and on behalf of his family even if he has no such intention.

One final point on parties to a betrothal is that in these days of extensive travel, with children separated from their parents and near relations by vast distances, the practice is growing of distant relations acting as special marriage guardians for infants and adults alike, and so deputising for parents at their request or at the request of the prospective spouses.

B. Contract to marry

Under the general ("English") law, the essential parties to a contract to marry are the prospective spouses themselves, not their parents or families.

It may be objected that where the spouses-to-be are infants (in this case, persons under 21 years of age), any purported contract to marry would be void, since the proposed marriage could not lawfully take place without parental consen

or its statutory equivalent,[9] and since the agreement is unenforceable anyway. To the first part of this objection it may be replied that there is no necessary connexion between parental consent as affecting legal capacity to contract a valid marriage, and legal capacity to enter into a binding contract to marry. This can easily be seen from the fact that where one of the prospective spouses is an adult and the other a minor, the latter has no capacity to marry without the necessary consent, but he does have a right of action against the other party for a breach of promise.[10] The contract is, therefore, not void in the accepted sense of that word.[11] As to the second part of the objection, the fact that a promise of marriage cannot be enforced against an infant arises, not from absence of parental consent, but from a general policy of English law (common[12] and statutory[13])

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9. In certain circumstances the necessary consent may be given by a Regional Governor, a judge of the High Court or an administrative officer: s.20 of the Marriage Act, ante.

10. Cf. Bromley, op. cit., p.16.

11. Cheshire and Fifoot, The Law of Contract (5th edn.), p.345; Bromley, ibid.

12. See Cheshire and Fifoot, ante, pp.333-41.

13. See the (U.K.) Infants Relief Act, 1874, which has been held to apply to Nigeria as a statute of general application: Labinjoh v. Abake (1924) 5 N.L.R.32 (Full Ct.). This case actually refers just to the colony (both parties being natives of Lagos); but the Act will in all probability be held applicable generally, and has in fact been re-enacted by the W.Region legislature as part of that Region's law.

to protect infants from contractual liability in all but a few cases. (An infant's promise of marriage will not be rendered enforceable against him even if consented to by his parents). In spite of an infant's incapacity to marry without parental consent, therefore, he can enter into a contract to marry.

Consents

The question of consents will be dealt with under two heads, viz. parental consent and consent of the prospective spouses themselves.

The customary law in our area of reference does not envisage parental consent to a betrothal. Where a prospective spouse is a man and is sui juris (i.e. neither a minor nor an adult dependant in law), he has legal capacity to be betrothed to any woman of his choice without parental consent, if he so desires.[1] But where a spouse-to-be is an infant male or a female of any age, the proper party to their betrothal is their family.[2] This is also true of dependent adult males, as in the case of mentally sub-normal persons. In these cases, therefore, the question of parental consent does not

1. There are overwhelming social reasons why such consent ~~is~~ is almost invariably sought and obtained, but more of this later.

2. We have seen that in the final analysis, "family" here really means "parents" in all normal cases.

really arise: either the parents are essential, not merely consenting, parties to the betrothal agreement, or they have nothing to do with it in law.

Nor does "English" law require parental consent to a contract to marry. As we shall see in the chapter on marriage, a minor requires parental consent to his/her marriage because there is a statutory provision to that effect.[3] But there is no corresponding legal requirement for parental consent to a minor's contract to marry. As for parental consent to such a contract where the parties thereto are no longer minors, there is some judicial authority to the effect that no such consent is required. This is found in a decesion of Waddington, Asst. J., in Alice Ugboma V. James Morah[4] where an exchange of promises made during infancy was later renewed in adult life. The defendant argued, nevertheless, that a woman had no capacity under the local customary law (Ibo) to enter into a contract to marry without her parents' consent. Since the plaintiff had not obtained such consent, the argument continued, she had not given valuable consideration for the defendant's promise,

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3. Marriage Act, s.18 (parental consent) and s.20 (consent by a Governor, a High Court judge or an administrative officer).

4. (1940) 15 N.L.R.78.

and so no contract had been made. Dismissing this argument, the learned assistant judge said -

> "It cannot possibly be argued that where the parties are of age the withholding of consent by their parents is a bar to their contracting a Christian marriage. Parties can undoubtedly contract a valid marriage under the Marriage [Act] without their parents' consent, if they are of age. It cannot therefore be a defence to this action to say that plaintiff lacked the necessary capacity to make a valid promise to marry defendant unless her parents consented to him."[5]

It is also arguable that by expressly providing that parental consent shall be obtained where "either party to an intended marriage, not being a widower or widow, is under twenty-one years of age"[6] the legislature must have intended to exclude all other cases from this requirement. If this be so, and in view of the decision in the Morah case, it is safe to conclude that parental consent is not required by law for the formation of a valid contract to marry, as opposed to actually contracting the marriage itself - even if the mutual promisors are both infants.

Betrothal Age

Under the traditional customary law, a person of any

5. ibid., at p.81.
6. Marriage Act, s.18.

age could lawfully be betrothed to any other person of the opposite sex, whatever their respective ages.[1] In other words, neither infancy nor extreme old age could affect the legal capacity of a prospective spouse to become betrothed; for, as already indicated, betrothal could be effected by parents or guardians for and on behalf of their children or wards as the case may be. But though valid at its inception, this contract (or perhaps more accurately, this status) can be repudiated by the infant on attaining marriageable age - usually at puberty - or at any time thereafter. It is not clear whether an infant has (or ever had) the right or the legal capacity to repudiate a betrothal at his sole volition. But on balance of probabilities, he had no such right or capacity in the traditional society.[2] As a rule, his objection to a marriage arranged for him by his parents or guardian, had no effect on the validity of such marriage if carried out in spite of his objection; any purported repudiation of his betrothal must, therefore, have been nugatory. Again, repudiation of a betrothal usually carried (and still might carry) with it an obligation to refund payments made by or on behalf of the prospective husband on

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1. But see Temietan, "Marriage among the Jekri tribes ..." (1938), 13 Nigeria 75-8, at p.76, where the average betrothal age for the Itsekiri is said to be 16.
2. He probably now has. But of this, more hereafter.

account of the betrothal or the intended marriage (e.g. a thanksgiving payment, ijohun, among the Yoruba, or part payment of the bride price). It also involved (and still involves) the return of certain classes of gifts made to the bride-to-be or members of her family. Few girls could afford these repayments at the age of puberty in the traditional society. This being so, it is unlikely that the customary law would have made provision for repudiation by girls at their own initiative.

The customary law relating to betrothal age in the Eastern Region has now been altered by statute, so that no one may now be betrothed or "engaged" under any system of law, below the age of sixteen. Section 3(1) of the Age of Marriage Law, 1956, of that Region provides as follows on the point -

> "A ... promise or offer of marriage between, or in respect of, persons either of whom is under the age of sixteen shall be void."[2]

Section 6(2) provides that no court shall take cognizance of, inter alia, any promise of marriage avoided by that Law.[3] (It will be seen later that by completely ousting the jurisdiction of the courts over matters connected with marriage

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2. Laws of the Eastern Region, No.22 of 1956.

3. Ibid. See also s.68(35) of the Local Govt. Law (W.R.), which authorises local authorities to make bye-laws regulating child betrothal.

agreements avoided by s.3, this Law makes it impossible to recover by court action any money paid or gifts made under or in respect of any such agreement).

Engagement age under "English" law

As we have seen there could be a legally binding contract to marry between two persons (of the opposite sex) one or both of whom are infants - that is, persons under 21 years of age. Where both parties are infants, neither of them can enforce the contract against the other during the defendant's infancy. Nor can he do so after the defendant has attained majority. This result flows from the fact that a contract of this type cannot be enforced against an infant, and not that an infant cannot himself enforce it. He can.

Where one of the parties is an infant and the other an adult, the law is heavily loaded in favour of the infant. In the first place, he can enforce this contract (by which is meant that he can recover damages in an action for breach of promise, not that he could obtain a court order for specific performance) either during his infancy or after he has attained majority, subject to the law relating to limitation of actions. In the second place, he has a legal right

to avoid the contract at any time during his infancy, or within a reasonable time after coming of age. Finally the adult party cannot enforce the contract against the infant party either during the latter's infancy or after he has attained majority. It makes no difference that the infant actually ratified the promise after he had reached the age of 21.[4] So long as he has not made a new promise since he came of age, any statements or conduct of his which amounts to no more than a ratification of the old promise could not involve him in legal liability to the adult party.[5]

All this results from a curious admixture of the pre-1874 common law on infants' contractual capacity and the provisions of the Infants Relief Act of that year. The proviso to s.1 saves all contracts which an infant could lawfully enter into at common law, and which, if entered into, would have been valid at common law. Contracts in consideration of marriage as well as contracts to marry come under this head. Section 2 makes unenforceable any ratification by an adult of any promise he might have made in his infancy. Ratification in adult life of a promise to marry made during infancy is caught by this section. The result: the infant

4. Coxhead v. Mullis (1878) 3 C.P.D.439.

5. On the distinction between making a new promise and merely re-affirming the old, see Northcote v. Doughty (1879) 4 C.P.D.385, at p.391; Holmes v. Brierley (1888) 4 T.L.R. 647; Ditcham v. Worral (1880) 5 C.P.D.410; and Coxhead v. Mullis, ante.

promisor has the best of both worlds. It should be noted in conclusion that the Infants Relief Act applies to Nigeria as an English statute of general application which was in force on 1st January, 1900,[6] and has in fact been re-enacted by the Western Region parliament as Cap.49 of the 1959 Revision.

Formation of betrothal and contract to marry (procedure)

In this section we shall take a closer look at the process whereby an agreement to marry comes into being, with a view to delimiting the point of time at which such an agreement acquires the force of a legally binding contract. Betrothal (customary law) and ordinary engagement ("English" law) will be examined separately, with reference to the ages of the prospective spouses in each case.

(a) Betrothal

The principal stages in the creation of a contract of betrothal under customary law where the spouses-to-be

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6. Labinjoh v. Abake (1924) 5 N.L.R.32.

are both of age may be summarised as follows.[1] First the man makes an exploratory approach to his future wife, usually through the agency of a mutual friend or relation. If she returns an encouraging word, the husband-to-be would then make his intentions known to the woman's father or guardian, again through the first agent, as a rule. If, after the necessary investigations into the family background and personal qualities of the prospective husband, the woman's father/guardian approves of the match, he sends word back to the former through the usual channels. Next a day is fixed for a meeting of representatives of the two families concerned, in the house of the woman's father/guardian or some other

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1. On the formation of betrothal relationships, see Basden, Among the Ibos of Nigeria, pp.69-70; Meek, Law and Authority, p.268 ff; Green, Ibo Village Affairs, p.161; Talbot, Tribes of the Niger Delta, pp.179-89; Talbot, Peoples of S. Nigeria, II, pp.243-4, 445-6; Cotton, loc. cit., pp.427-8; Simmons, loc. cit., p.161; Partridge, Cross River natives, p.254; Forde, Marriage and the Family among the Yakö, pp.14-19; Forde, "Double descent among the Yakö" in African Systems of kinship and marriage (ed. Radcliffe-Brown and Forde), p.322 ff; Forde, "Yakö marriage" (1940) 40 Man 57; Bradbury and Lloyd, op. cit., p.49; Egharevba, Benin Law and Custom, p.15; Omoneukanrin, op. cit., pp.40-1; Johnson, op. cit., pp.113-4; Thomas, "Marriage and legal customs of the Edo-speaking peoples of Nigeria" (1910-11) 11 J. Comp. Leg. (n.s.) pp.95-6; Kasunmu, loc. cit., p.4; Coker, op. cit., pp.231-3 (quoting from and commenting on Re Sapara (1911) R.G.C.Rep.607). Welch, "The Isoko Tribe" (1934) 7 Africa 160-73, at p.171. See also Survey of African Marriage and Family Life (ed. Phillips), loc. cit., for more general discussions.

place of his choice such as the house of his family head. During this meeting the husband-to-be makes his formal marriage proposal, sometimes personally but more often through the lips of his father, guardian or family head.

The chief point of legal interest here is that whether the prospective husband proposes in person or by proxy (on this formal occasion), he does so in the absence of the woman concerned. At this stage, she is called in to the meeting and asked in blunt language whether she would accept the man as husband. She indicates her consent in one of the conventional methods - she may nod, smile and shy away, blush (invisibly if very dark) and drop her gaze onto the floor, curtesy low or, exceptionally, express herself in words. If for any reason the woman is not available at this joint family meeting, she utters her consent through her father or guardian. But by far the most romantic mode of signifying consent occurs as follows. The woman is called in, told of the marriage proposal, given a glass of drinks, shown the suitor and asked to indicate her decision on the matter in hand. She takes a sip (if a teetotaller, she simulates a hearty sip) and hands the drink to her future bridegroom. He drinks, and she withdraws from the meeting.

(In the absence of the suitor himself, his father or guardian may deputise in this. It should be emphasised that neither spouse-to-be need be present at this meeting; nor indeed is it necessary that they have ever seen or written each other. The entire negotiations could be done by proxy without in any way detracting from the legal validity of the resulting agreement).

The necessary consents have now been secured, but there is no betrothal yet. The bride price (dowry or marriage consideration) must next be agreed upon. This takes one of two forms: either the sums payable are determined and the mode of payment agreed (e.g. so much before the "wedding" and the balance "payable when able"), or payments are expressly waived by the woman's father or guardian. The husband-to-be (or his deputy) then makes the customary "thanks-giving" payments.[2] This may be payable to the woman's parents,[3] the woman herself,[4] or those taking part in the betrothal ceremony,[5] or to all these. Finally, there is a commensal meal - the usual victuals being drinks bought for the occasion by

2. Ijohun (Yoruba), ego onụ nwanyị (Ibo); iwanrien omo (Bini).
3. E.g. among the Yoruba, see Johnson, op. cit., p.114.
4. E.g. among the Yakö etc. of the Cross River, see Partridge, loc. cit., p.254.
5. E.g. among some Ibo societies; see Meek, Law and authority ..., p.268. Ditto, Itsekiri societies, see Omoneukanrin, op. cit., p.40.

the prospective husband (or his parent/guardian) and a good meal specially prepared by the woman's parents/guardian.

This brief survey omits a number of steps which are considered either obsolete or obsolescent (such as consulting oracles and sacrificing to the family gods), or which have too little bearing on the law of betrothal to be worth mentioning (e.g. the often interminable exchange of visits between members of the two families concerned, or the exchange of oaths of friendship found in places).

To sum up: the essential steps in a betrothal where the spouses-to-be are both adults[6] are (a) consent of the woman's family as represented by her father or guardian, (b) the consent of the woman herself, usually expressed in public on a formal occasion, (c) agreement on the quantum of bride price payable, or express waiver thereof, (d) payment of a betrothal fee, and (e) commensality. Finally, it should be emphasised that, as a rule, all negotiations and most payments are made through or in the presence of a mutually recognised intermediary.

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6. A person is an "adult" if he has attained the prescribed age and gone through the necessary initiation proceedings, if any, in accordance with the local customary law governing passage from minority to majority for his sex. The age is usually puberty which is approximately 14 for girls and 16 for boys, and not 21 as under the general ("English") law.

Where one of the prospective spouses is an infant (as understood by the local customary law), the betrothal procedure just outlined has to be modified in at least one fundamental aspect. The infant's consent is neither sought nor given. On the other hand, his protest against the proposed match may lawfully be ignored, since by reason of his tender age an infant is not supposed to know his own mind, let alone decide what transactions are beneficial to him and what are harmful. A father (or guardian) consents to a proposed betrothal for his infant child (or ward), not as his authorised agent (as is the case with absent adults) but by virtue of a parent's inherent power to conclude a valid contract on his child's behalf if of the opinion that the transaction is for the benefit of the infant.

It should be remembered that infant betrothal is no longer a legal possibility in the Eastern Region if the infant is under the age of sixteen years, on account of the provisions of s.3 of the Age of Marriage Law, 1956. This is true also of any societies in the Western Region where infant betrothal has been made unlawful under a local authority bye-law made pursuant to s.68(35) of the Local Government Law.

(b) "Engagement" under "English" law (mode)

As already remarked, no formalities or symbols are required for the formation of a binding contract to marry; nor are parental consents required by law. It is now customary in many places for a man to present his prospective bride with an engagement ring or a Bible or both,[1] and to organize an engagement party to mark the event. These articles and festivities may have considerable evidential, social, sentimental or prestige value, and probably have. But as far as formation of a valid contract to marry and liabilities thereunder are concerned, they have no legal significance whatever. All that is required is proof of an exchange of promises (or a conditional offer of marriage by one party followed by fulfilment of the condition by the other party) with an intention thereby to create a legal relationship.[2]

As just indicated, the two principal modes of forming a contract to marry are as follows. Firstly, a mutual exchange of promises with the necessary intention. Here each party's own promise is their consideration for the other's promise. Such an exchange may be oral or written, announced or

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1. Cf. Elias, The Nigerian Legal System, p.293, footnote 4.
2. Cf. Bromley, op. cit., pp.16-29, esp. at pp.16 and 19.

clandestine, uttered before an assembled crowd or in the seclusion of a desert island. The other mode consists in a promise to marry if the promisee would do a specified act, followed by the performance of that act. Thus in the old case of Harvey v. Johnston[3] a man promised to marry a woman if she would come over to Ireland for that purpose. She did not stop to make promises, but made the trip to Ireland. It was held that she was entitled to damages from the promisor in a breach of promise action; for by making the trip, she gave valuable consideration for the promise.

Legal incidents of betrothal

For convenience we shall consider separately the legal incidents of betrothal insofar as they affect the prospective spouses and their respective families inter se and vis-à-vis third parties.

(a) Effect on the betrothed woman

Betrothal to a woman means a change of status to a considerable extent. She loses her sexual freedom[1] (in most societies), for she would be guilty of a wrong against her husband-to-be if she had sexual intimacy with another man.

3. (1848) 6 C.B.295.

1. On the Efik law on this point, see Simmons, loc. cit., at p.161.

Such a lapse, if discovered, would be a good ground for the fiancè to repudiate the agreement and recover any payments he had made in consideration of the proposed marriage.[2] She is precluded, during the continuance of the betrothal, from accepting another suitor's hand in marriage.[3] She is expected to behave (subserviently) towards her prospective husband and his family in much the same way as a wife does to her husband and his family, on pain of having the betrothal terminated at their instance. According to Ward,[4] a man has an action for damages against any other man who entices his fiancée away - under Yoruba law. If this is so, it would seem that after betrothal a woman comes under the constructive custody of her husband-to-be. This view derives some support from a statement by Talbot about the Oru(an Ibo group) that if an unwilling fiancée runs away to another man and is harboured by him, the latter is liable for damages at the prospective husband's suit.[5]

A betrothed woman is entitled to periodic gifts in money or in kind from her man, and has a right to break off the betrothal if he falls short of expection in this respect

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2. Cf. Talbot, Life in S. Nigeria (Ibibio law). He says elsewhere that where a betrothed woman becomes pregnant per alios, her fiancé is entitled to recover any dowry paid and claim the woman for wife: Tribes of the Niger Delta, pp.181-2 (Isokpo law).
3. Cf. Meek, Law and authority in a Nigerian tribe, p.268 (IBo law)
4. Marriage among the Yoruba, p.20.
5. Peoples of southern Nigeria, Vol. III, p.447.

- on the ground that he is mean by nature. In the past, too, a husband-to-be was under an obligation to make his prospective bride certain gifts which were specified in quantity and qualify, at a number of local feasts and events. While this is still done in a number of places, the modern practice is to commute such compulsory "gifts" into a lump sum payable at the same time as the bride price. For the Eastern Region there is now a statutory upper limit to the sum payable under this head, viz. £5, which includes similar "incidental" payments due to the woman's parents and relations.[6] Finally betrothal entitles a woman (at all events in the more sophisticated societies) to move about freely in her fiancé's company without moral opprobrium, and to visit and stay with his family as often and for as long as she pleases, subject to her own family's consent.

In view of these rights and obligations attaching to a woman by reason of her being betrothed to a man, it is tempting to suggest that there is little if any real difference between a betrothal and a marriage proper. This suggesting has repeatedly been made by writers and litigants alike. As an extreme example of the former we may cite a blunt statement by Basden on the effect of betrothal in Ibo law -

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6. Limitation of Dowry Law, 1956, s.3(b). The term used in this Law is "incidental expenses".

> "... after a long palaver, the amount to be paid as dowry (head-money) is fixed.
> "From the moment that the first instalment of the dowry has been paid the girl is reckoned as the man's wife. There are no such intermediated words as 'betrothal' or 'engagement'."[7]

We are not told what the position is between the fixing of the bride price payable and the payment of the first instalment thereof - two events that are not infrequently separated by a period of many months or even years. In any case, though single words there may not be for these concepts,[8] the Ibo do distinguish in descriptive phrases as well as in practice between betrothal and marriage. And as will appear later, the legal incidents of these two types of status are substantially different.

The confusion of betrothal with marriage among litigants can be seen in Edet v. Esien,[9] an Efik case of 1932, and In re Intended Marriage of Beckley and Abiodun,[10] a case decided at Kaduna in 1943 and involving a Lagos Yoruba couple. In Edet v. Esien a man claimed a woman's three children by her husband on the ground that before she married the said husband, she was betrothed to the plaintiff[11] who had paid

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7. Among the Ibos of Nigeria, p.70.
8. But see Elias, The Nigerian Legal System, p.293, fn.4, where nkwa is said to be the Ibo word for "engagement".
9. 11 N.L.R.47.
10. 17 N.L.R.59.
11. The headnote to this case is grossly misleading, as it gives the impression that the plaintiff was actually married to the woman concerned.

her parents part of the agreed bride-price, and that this money was never repaid to him. As the Commissioner of the Provincial Court found the evidence on the relevant customary law inconclusive, the High Court (Carey, J.) dismissed the plaintiff's claim on the ground that it would be contrary to natural justice, equity and good conscience to grant custody of another man's children to the plaintiff simply because his instalment on their mother had not been refunded. In re Beckley and Abiodun a man entered a caveat against the proposed Ordinance marriage of his son to a girl of his choice, on the ground that the youngman was already married to another woman under customary law. It turned out in evidence that the alleged marriage consisted of no more than a performance by proxy (which is perfectly lawful) of the idana ceremony.[12] Ames, J., as he then was, held that performance of the idana ceremony did not of itself constitute a marriage under Lagos Yoruba law so as to preclude the youngman from contracting an Ordinance marriage with another woman. This reason, in our submission, is the right one on which the decision in the Esien case should have been based, rather than the ~~bogey~~ nebulous doctrine of "natural justice, equity and good conscience."

The differences between the legal incidents of a

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12. This is the betrothal ceremony: Elias, Nigerian Legal System, p.294.

The differences between the legal incidents of a betrothal and those of a marriage will become self-evident after we have discussed the latter. Here it must suffice to say that betrothal has none of the following incidents which attach to marriage; (a) betrothal gives a man no right to any child born of his fiancée during the betrothal period, even if he is in fact the natural father of such a child. It is true that he can acquire that child as his by acknowledging him (in many societies), but it is submitted that he has no right to do so if the woman's family want the child to remain in that family. In any case, a right to acknowledge is open to any natural father who has a child by an unmarried mother, and so has no necessary connexion with betrothal. (b) Betrothal does not in law confer on a man the right to have sexual relation with his wife-to-be. An attempt to have connexion with an unwilling girl (or against her family's express instruction, even where she is willing) would be a good ground for her (or her family as the case may be), to repudiate the marriage agreement. (There are not many girls or families these days, though, who insist on pre-marital chastity). (c) In most societies, if a betrothed woman dies before the actual marriage, she is considered a loss to her family who will have to refund any bride-price already paid,

if her would-be husband or his family so demands.[1,2] The death of a woman after her marriage, on the other hand, is considered a loss to her husband who has no claims against her family in respect of any bride price paid in consideration of the marriage.

(b) Effect on the prospective husband

For the prospective husband, too, betrothal involves a certain amount of change of status. For he thereby acquires a number of rights and obligations a propos his bride-to-be, her family and third parties. In the first place (and there is almost complete unanimity among the earlier writers on this point), a man had an action for damages against anybody who had sexual connexion with his betrothed one.[3]

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1. According to Folarin, only half the bride price already paid is recoverable among the Egba (Yoruba): op. cit., p.32.
2. No refund is due under Itsekiri law, according to Omoneukanrin: op. cit., p.43. But it is not clear whether he was speaking of bride price paid or merely betrothal expenses incurred.
3. Cf. Basden, Niger Ibos, p.226; Talbot, Peoples of s.Nigeria Vol.III, p.447 (Ibo), p.673 (Ekoi); Talbot, Life in s. Nigeria, p.217 (Ibibio); Omoneukanrin, op. cit., p.50 (Itsekiri); Kasunmu, loc. cit., p.21 (Yoruba generally); Folarin, op. cit., pp.25, 26 and 34 (Egba - Yoruba), who says that parents too are actionable if they were privy to their daughter's liaison: loc. cit., at p.25.

To what extent, if at all, this represents the current customary law it is difficult to say.[4] In this day and age when more and more people choose their partners in marriage long after puberty, when an ever-growing number of marriages are preceded by a period of courtship and emotional attachment at least co-extensive with the betrothal period, cases of sexual aberration during this period must be few and far between. Again, with the high degree of freedom of choice now open to prospective spouses, and with the comparative affluence of bridegrooms-to-be which makes it easier and quicker than ever before to raise the necessary capital for the bride price and other marriage expenses, most people would sooner abandon whatever they might have paid as bride price and seek fresh grounds for their matrimonial ambitions than engage in expensive legal battles over a woman who is loose enough in morals to succomb to this type of temptation during her betrothal period. Be that as it may, there is a strong case for the view that a man has an action for damages against another man who has seduced his betrothed one. The gist of this action, as in adultery, is, to adapt the picturesque words of McCardie, J., in Butterworth v. Butterworth,[5]

4. There is an attractive suggestion (see Kasunmu, loc. cit., p.21) that this right of action still exists in Yoruba law. But as no authority is given for this statement, it is not much help to our case.

5. (1920) P.126, at p.142.

the prospective husband's injured feelings, shattered hopes of marital honour, matrimonial bliss and family life generally.

After betrothal a man and his family have a large say - not infrequently the final say - in his future wife's education, apprenticeship or training in market technique as the case may be. Very often a prospective husband likes to take over the financial burden of his fiancée's education etc., so as to be able to control its nature and scope. This he has a right to do.[6] In the same way, a man has a right (which is often exercised) to remove his prospective bride from her parents' control (but with their consent) to be brought up in a family of his choice (usually but by no means invariably that of his aunt or other near relation). This usually happens where the wife-to-be is still very young at the time of the betrothal.

A prospective husband places himself under an obligation to pay the agreed bride price in full, with other customary incidentals,[7] on pain of having his wife recalled by her family at any time in the future, the fact that he has paid a substantial part of the said bride price or indeed that the marriage has actually taken place notwithstanding. He is also under a duty (unless protected by statute as, in

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6. Cf. Ekeghe, op. cit., pp.47-8.
7. Cf. Partridge, loc. cit., p.425.

theory, he is in the Eastern Region) to render labour services personally or by hired hands, and to give financial help on request to his future parents-in-law according to their need and his means.[8] To refuse unreasonably to do so would entitle those parents to terminate the betrothal on grounds of the man's meanness. As we have seen, there is also a duty on the prospective husband to make periodic gifts in cash and in kind to his fiancée, with a similar sanction for unjustified failure to do so.

For their part, the woman's family bind themselves to give her in marriage to her betrothed "husband" on the terms agreed, on pain of having to refund any bride price paid so far (which they may well have spent) even before she has found another suitor. They also impliedly undertake to help preserve their daughter's chastity, and will be liable at the prospective husband's suit for refund of any bride price and customary incidentals so far received if she becomes pregnant *per alios* and the man decides to terminate the betrothal - as he has a right to do.[9]

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8. Cf. Ajisafe, *op. cit.*, p.55; Forde in *African Systems of Kinship ...*, p.332; Forde, *Marriage and the Family among the Yakö*, p.16; Thomas, "Marriage and Legal Customs of the Edo-speaking Peoples of Nigeria", *loc. cit.*, p.95; Talbot, *Tribes of the Niger Delta*, p.179 ff.

9. Cf. Talbot, *Tribes of the Niger Delta*, pp.181-2, esp. pp. 181-2 where he says that double the actual amount of the bride price paid is recoverable among the Isokpo and other Ijaw societies in the Port Harcourt area.

Finally, in our submission, besides making a betrothed woman's family (and not herself personally) liable for repayment of any bride price etc., already paid if the arrangement falls through, the fact that betrothal is an agreement between families rather than between individuals has another unsuspected result. If the affianced man dies before the proposed marriage takes place, another member of his family has a right, if otherwise acceptable, to step into his shoes and carry on from where he left off, any payments made so far being credited to his account. The resulting marriage is not a levirate marriage: the woman is the new suitor's lawful wife from the inception of the marriage, and any children thereof will be his just as if the woman was originally betrothed to him with her family's consent. The full significance of this will become apparent when it is realised that had the betrothed woman chosen to marry outside the family of her deceased fiancé, as she is perfectly entitled to do, her next suitor would have had to go through the whole process de novo. For betrothal, unlike marriage proper in some societies,[10,11] can be repeated any

10. E.g. among the Yoruba: see Rev. Johnson, op. cit., p.116; but see also Elias, Nigerian Legal System, p.293 where the impression is given that even for a "married" woman (i.e. a widow or divorcee) the usual stages are not omitted but merely telescoped into one process with "less formal and more insubstantial" ceremonies.

11. There is a Yoruba rule that a man cannot "inherit" (i.e. take over as wife) a widow of his junior brother or other kin: Coker, op. cit., p.38, a rule which is just an example of the more general rule that a family member cannot inherit from a member who is junior to him in age: Lloyd, Yoruba Land Law, p.293. There is no information on the question whether or not this rule applies to taking over a betrothed woman. Perhaps it does.

number of times in respect of an unmarried woman.

The question of who is entitled to a child conceived during his mother's betrothal will be discussed later under "Affiliation".

C H A P T E R VI

AGREEMENTS TO MARRY - II

Breach of the agreement and remedies therefor

Introduction: Jurisdiction and law applicable

The law on the respective jurisdictions of customary and non-customary courts in actions for breach of marriage agreements is more than a little obscure in the two southern Regions.[1] The position, however, appears to be as follows. If the broken agreement was for a customary marriage, original jurisdiction would belong exclusively to the customary courts - provided there is one in the area - and the matter can only come before the non-customary courts on appeal or by way of transfer from the appropriate customary court. Conversely, an action for a breach of promise can only be tried by a non-customary court where the intended marriage was to be a "Christian" (i.e. monogamous) marriage. In this case, however, the question of what customary payments and how much bride price already paid should be refunded by the woman's family will have to be referred to the customary courts.[2]

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1. As there are no customary courts in the Federal Territory of Lagos, this problem of jurisdiction does not arise there
2. This is the usual practice in divorce proceedings. It will be remembered that most Christian marriages are preceded or accompanied by payment of bride price - quite often by a full-dress customary marriage as well.

Where, owing to the curious provisions of s.19(a) of the Eastern Region's Customary Courts Law, 1956 (No.21 of 1956), the Customary Courts have no jurisdiction over one or both of the parties as persons and the non-customary Courts have no original jurisdiction because the proposed marriage was to have been under customary law, the action must be brought in the local Customary Court in the first place and then transferred to the High Court. We shall now take a closer look at these three propositions.

Section 13 of the Eastern Nigeria High Court Law, 1955, (as amended)[3] and the Proviso to s.9(1) of the Western Nigeria High Court Law[4] provide, in similar terms, as follows:

> "Except in so far as the Governor may by order otherwise direct and except in suits transferred to the High Court under the provisions of the Native Court Ordinance or the Customary Courts Law, 1956, the Court shall not exercise original jurisdiction in any cause or matter which is subject to the jurisdiction of a Native Court or Customary Court relating to marriage, family status, the guardianship of children, or the inheritance or disposition of property on death."[5]

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3. See Official Document No.15 of 1961.
4. Of the same year: Laws of the Western Region of Nigeria, 1959 Revision, cap.44.
5. This is s.13 of the E.R. enactment. The wording of s.9(1) differs somewhat from this, but the effect is the same.

The effect of this, in our submission, is to oust the original jurisdiction of the High Court on matters relating to an agreement to marry under customary law (betrothal), as an action founded on such an agreement obviously comes within the jurisdiction of the Customary Courts. And while a legal purist may doubt that betrothal relates to "family status",[6] there is little doubt but that it comes within the ambit of "any cause or matter ... relating to marriage."

Where a plaintiff claims damages - whether special or general - for an alleged breach of promise to contract a Christian marriage, she[7] must bring her action in a non-customary court (usually the High Court, since the damages claimed are almost invariably in excess of the highest claim over which a magistrate has jurisdiction). This is because, in our submission, an action for a breach of contract to marry (more usually: breach of promise) is an action which is unknown to customary law. To begin with, the contract

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6. The point has already been made that betrothal has to do with status, for it raises the question how far a woman becomes a member of her fiancé's family. Legitimacy, which raises the question of a child's membership of his putative father's family, was held to be a matter of family status in Briggs v. Briggs (1957) 2 E.R.L.R.6 (Palmer, Ag. J.).

7. A man, too, can sue; but he seldom ever does, probably because he would find it more difficult to prove damage than would a woman.

itself differs radically from its counterpart under customary law, being, unlike betrothal, a contract between two individuals who represent no one but themselves. Then again customary law knows nothing of damages for breach of a promise to marry.[8] If this view is correct, then obviously a breach of promise action, given that the promise was to contract a Christian marriage, falls outside the jurisdiction of the Customary Courts.

The crucial question in an action of this type is, therefore, the intention of the parties. If it be shown in evidence that the parties intended a Christian marriage as the ultimate goal of their agreement, it must be presumed ipso facto that they also intended that "English" law, not customary law, should regulate their contractual relationship. Thus in Alice Ugboma v. James Morah[9] there was ample evidence from the youngman's correspondence with his fiancée that their mutual promises referred to a Christian marriage. The High Court assumed jurisdiction and applied English law tempered, as to the quantum of damages, by Ibo customary law which recognises no such damages for a bare breach of promise.[10]

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8. See dictum of Waddington, Asst. J., in Ugboma v. Morah, ante. See also under "Remedies", infra.

9. (1940) 15 N.L.R.78.

10. "Bare" because pregnancy had not been brought about as well by the defendant.

It should be pointed out that in the Morah case, counsel produced evidence of intention to contract a Christian marriage (and therefore an intention to be governed by English law), not with a view to giving jurisdiction to the High Court, but to take advantage of that system of law which gives a right to damages to a disappointed promisee. It appears from the report that everybody concerned - the bench, the bar and the litigants - assumed from the parties' standard of education and position in life generally that they were subject to English law in these matters, not customary law. In a similar case[11] decided seventeen years later by the High Court of the Western Region, Irwin, J., held simply that the law applicable in the instant action was English law. No reason was given for this choice of law. Presumably the learned judge was influenced by the parties' apparent mode of life and sympathy for Western culture generally.

A natural sequel to the two propositions just discussed is that where a contract to marry under English law is accompanied by a customary law betrothal, the question of damages for breach of promise, return of engagement rings and similar gifts, and rescission of settlements made in contemplation of marriage will be decided by the High Court; while,

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11. Uso v. Iketubosin, (1957) W.R.N.L.R.187.

on the other hand, the question of repayment of betrothal fees and bride price will have to be settled by the Customary Courts. It is arguable that once it is proved that the proposed marriage was to be a monogamous one, the High Court should be legally competent to determine all questions arising between the parties in connexion with it, (a) to prevent multiplicity of actions, (b) because there is only one transaction, viz. an agreement to contract one particular marriage, the betrothal being merely a local modification of a formal engagement to marry as done in English society, and (or alternatively), (c) because the betrothal merges into the contract to marry, the latter being the operative transaction as manifest from the parties' intention. The question of what bride price, betrothal fees and other customary dues already paid that should be refunded in accordance with the appropriate customary law should then be determined with the help of expert witnesses, as in other cases involving the application of customary law by the High Court. This, in our submission, is a cheaper and more expeditious course than the present practice of splitting the case between two different systems of courts.

Finally,it is possible in the Eastern Region to come upon a jurisdictional no-man's land in betrothal cases.[12]

12. This, as will appear later, is also true of divorce and other matrimonial causes governed by customary law.

This is because of a curious provision in the Customary Courts Law, 1956,[13] section 19 of which reads in part as follows -

> "The following persons or classes of persons shall be subject to the jurisdiction of customary courts:
> (a) persons of African descent, provided that the mode of life of such persons is that of the general community and that such persons are in their country of origin subject to African customary law however that customary law may be modified or applied."

There is no definition of "general community", which makes it difficult to give any intelligible construction to this part of the section. Was the word "community" intended to refer to a village, a town or an entire ethnic group occupying the same territory? Does it include such semi-cosmopolitan towns like Owerri, Onitsha, Diobu, Awka and Oguta, for instance? If yes, what would be the "mode of life" of such a community: in other words, what would be the common denominators of the professional, business, paid labour and peasant farming elements of such a community? How many communities of today,[14] however defined, are homogeneous as to their mode of life? Assuming that complete homogeneity is not necessary, how much of a given community would constitute the "general community" - one-half, three-quarters, seven-eighths?

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13. Laws of the Eastern Region of Nigeria, No.21 of 1956, as subsequently amended.
14. Or in 1956, for that matter.

In any case, what is "mode of life" - possession of car, mopeds, bicycles or other mechanical means of transport; ownership of radio and television sets; membership of recreational clubs; or the wearing of any particular type of clothing?

This proviso was obviously intended for the benefit of a tiny minority of professional men and women, successful businessmen and politicians who would certainly consider it infra dignitatem to submit to questions and cross-examinations in the hands of semi-literate Customary Court judges (or worse). But it is so sweeping in terms (at face value) and yet so obscure in meaning that it creates more problems than it solves. As the above questions suggest, a strict construction would reject the paragraph under discussion as too uncertain in its connotation. A liberal construction, on the other hand, could lead to absurd results. For example, it would deny the local Customary Court jurisdiction in an action by a village schoolmaster to recover bride price and trousseau money which he had given to his prospective father-in-law and bride respectively, the former ("father-in-law") being the local Court messenger, the girl being the local midwife, and the three of them being the only sophisticated people in a predominantly peasant village community. For if, as is likely,

the girl's father leads a life that is different from that of the "general community", he would be outside the jurisdiction of the court at which he serves as a messenger. So too will the girl herself, on proving distinguishable "mode of life".

In any case, the effect of this proviso is that while s.13 of the High Court Law, 1955, confers exclusive original jurisdiction on Customary Courts over certain causes, the proviso to s.19(a) of the Customary Courts Law, 1956, denies the said Courts any jurisdiction on the same subjects by excluding their jurisdiction over certain persons. The practical solution is fairly simple: the action is initiated in the appropriate Customary Court and then transferred, on application, to the High Court. This is hardly satisfactory in view of (a) the long waiting lists in the High Court today, and (b) the prohibitive cost of High Court litigation.

The above discussion on the respective jurisdictions of Customary and non-Customary Courts rests on the proposition that, in the eyes of the customary law, betrothal confers on the prospective spouses concerned a status which is the same in kind (while differing in degree) as that conferred on spouses by marriage proper, and is, therefore, a matter of family status. The reasons for this view will already have become apparent in the preceding pages; but it is so funda-

mental to the whole discussion that one feels impelled to bring together the various strands of the argument in support, before we take our final leave of the subject.

Betrothal confers on a man (or his family acting on his behalf) the right to bring his fiancée into his house and to live with her as man and wife in all but one respect, viz. sexual intercourse,[15] without incurring social disapproval or moral reproach of any kind.[16] During her stay under his roof, he is under as much obligation to clothe and provide for her maintenance as is a married man to his wife - the sanction being the same.[17] From the moment of betrothal, a man owes a duty of labour service or, alternatively, financial aid to his prospective parents-in-law if and as required, and according to his ability.[18] In the traditional society when there was greater scope for self-help in the matter of redress for civil injury, a man had a right to inflict reasonable corporal punishment on his fiancée's seducer - anything from a spit in the face to a gruelling round of horsewhipping.

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15. But see Sporndli, loc. cit., at p.118.

16. At all events as soon as any part of the bride price has been paid and accepted. Cf. Basden, Among the Ibos of Nigeria, p.70.

17. Cf. Cotton, loc. cit., p.427. The "sanction" is loss of the fiancée in the one case and of the wife in the other.

18. Cf. Forde, Marriage and the family among the Yakö, p.16; Forde in African Systems of Kinship and Marriage, p.322; Ajisafe, op. cit., p.55; Thomas, ante, in 11 J. Comp. Leg. (n.s.), p.95.

Today, as we have seen, he has an action for damages against such a seducer,[19] or anyone who entices away his bride-to-be.[20] He has a right to decide on the type and duration of the woman's future education, apprenticeship or professional training.[21] And, according to one school of thought, he is entitled to any child born of his fiancée during the period between betrothal and marriage.[22] Obviously then betrothal is much more than a mere agreement to marry, and is only a short step below the marriage status.

Betrothal: Termination and Remedies

Betrothal comes to an end in one of three principal ways, namely when the proposed marriage is actually solemnised (in which case betrothal becomes functus officii), when one of the parties repudiates the agreement, or when either of

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19. Kasunmu, op. cit., pp.4 and 21; Omoneukanrin, op. cit., p.50; Folarin, pp.25 and 34; Talbot, Life in s.Nigeria, p.217; Simmons, loc. cit., p.161; Talbot, Peoples ... III, pp.447 and 673; Basden Niger Ibos, p.226.

20. Cf. Ward, op. cit., p.20.

21. Cf. Ekeghe, op. cit., p.48.

22. Basden, Niger Ibo, p.220; Thomas, Anthropological Report, Part I, p.68; Talbot, Tribes of the Niger Delta, p.183. But see also Sporndli, loc. cit., p.118; Forde (fn.18 supra) p.113; Marriage .... Adoptive Bye-Laws (W.R.) 1958, ante, s.13; Kasunmu, loc. cit., p.43.

the prospective spouses dies. The first of these is so obvious that it need not detain us here. The other two we shall examine briefly under four heads; (a) who can rescind the agreement; (b) on what grounds can this be done; (c) what are the legal remedies open to the injured party and (d) the effect of death on betrothal. Under (c) will also be discussed the incidental question: who can bring an action for such a breach, and against whom?

(a) Who can rescind

We saw earlier on that the parties to a betrothal in the eyes of the customary law are the families of the prospective spouses or, occasionally, an adult suitor personally (being sui juris) and his prospective bride's family. In principle, therefore, only these families (or the said adult suitor, as the case may be) have legal power to repudiate the agreement. In other words and excepting the case of the lone suitor, neither of the people actually betrothed to each other has a right or the power to repudiate their betrothal.[1] But as children can no longer be compelled against their will to marry a person chosen for them by their families, they can effectively bring the betrothal to an end by refusing to go

1. They are not necessary parties to the agreement, neither is their consent required in law. Cf. Kasunmu, op. cit., p.26.

on with the match, in which case their families will have to formally terminate the agreement.[2]

(b) On what grounds

There are really no "grounds" on which betrothal may be terminated by the parties, if by "grounds" is meant facts about the plaintiffs or their conduct which will justify repudiation and which the defendants must prove in order to escape liability for damages in the event of litigation. A party has a right to repudiate the agreement for any reason at all or indeed for no reason given. The usual reasons for this course of action, however, are, on the part of the woman's family, that subsequent investigation has revealed a history of crimes or some dangerous disease (such as epilepsy, leprosy or tuberculosis) or improvidence or cruelty to wives in the man's family; that the man has shown himself up as mean by nature; or merely that the prospective bride has changed her mind, so that her family are no longer in a position to carry out their side of the bargain however willing and anxious they might be to do so.[3] The usual

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2. See Bradbury and Lloyd, op. cit.,p.156; Basden, Among the Ibos of Nigeria, p.69; Folarin, op. cit., p.26; Omoneukanrin, op. cit., p.43; Ajisafe, op. cit., p.73; Basden, Niger Ibos, p.217. On repudiation in West Africa generally, See Mair in Phillips' Survey of African Marriage and Family Life, pp.121, 123 and 124.

3. Cf. Folarin, op. cit., p.24; Basden, Niger Ibos, p.217.

reasons why a man (or his family) brings his betrothal to a premature end include those given above; also that the prospective bride has proved to be indolent by nature, is of a sickly disposition, has become pregnant per alios,[4] or is lascivious; or that later investigation has shown her family to have a bad record of broken marriages or laxity of morals.[5]

(c) Remedies

To anyone trained in English law the most striking feature of a breach of promise action under customary law is that general damages cannot be claimed or recovered. For a simple breach of marriage agreement (by which is meant a breach that is not accompanied by pregnancy), the only remedies open to the parties are these. The would-be husband (or his family) can maintain an action for recovery of any betrothal payments made or bride price already paid. Either party can bring an action to recover any gifts made to the other party provided that the said gift can be shown to have been made and accepted - expressly or by necessary implication - as the donor's advance contribution towards the cost of setting up

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4. Cf. Talbot, Life in southern Nigeria, p.217.

5. This list is by no means exhaustive. For example, "adultery" by the woman or indeed by the man (pace Folarin, op. cit., p.26) would do; for at this stage either party is at liberty to change their mind.

and equipping the matrimonial home. These rules hold true howsoever the betrothal came to be terminated. In other words, the same action is available whether the betrothal was terminated by death of one of the would-be spouses,[6] or by the unlawful act of one of the parties to the agreement. This is because the object of such an action is not recovery of damages for wounded feelings or lost chances, but restitution of gifts made or property transferred for a consideration that has failed - to adapt a pet jargon of the English law of contract.

Another striking feature of this type of action is that there are hardly any defences to it. All that the plaintiff has to do is show that he made the gift or payment in question, to make out a prima facie case. If the claim is for recovery of payments made, all that is necessary is to show that the payment was lawful when made. Thus in the Eastern Region, any payment in excess of £30 would be unlawful as bride price, and so irrecoverable. Where "incidental expenses" are payable by the prospective husband, the maximum bride price payable

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6. Contra Omoneukanrin, op. cit., p.43, who maintains that among the Itsekiri, "No claim was made in case of dissolution by death". But it is not clear whether this statement was intended to refer to re-payments upon death before or after the intended marriage. Nor is it clear whose death the author had in mind - that of the would-be husband or of the would-be wife. In any case it appears that the author was thinking of the traditional, not modern law.

or recoverable is £25, and the maximum "incidentals" is £5. In other cases the maximum amount payable or recoverable is £30.[7] In the Western Region the sums recoverable will depend on whether or not the Marriage, Divorce and Custody of Children Adoptive Bye-Laws Order 1958,[8] has been adopted by the local government body in the area. If it has, the sums payable and those recoverable must not exceed those set out in Schedules A and B (i.e. Schedules to s.3(1) and s.8 respectively of the said Adoptive Bye-Laws[9]). If the Bye-Laws have not been adopted locally, any customary payments made (including the bride price) can be recovered. It should be emphasised that gifts made out of mere affection or ostentation are not recoverable, while those made in accordance with customary requirements or with a view to setting up and furnishing the matrimonial home are.[10]

It will be seen from this brief examination that, at all events when a betrothal is terminated as a result of the act

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7. Limitation of Dowry Law, 1956 (E.R.), s.3. See also s.5 which precludes any court's jurisdiction in suits concerning payments or other transactions made in breach of s.3.
8. W.R.L.N.456 of 1958. (Date of commencement - 27th November, 1958).
9. These Schedules, but not the main provisions, may be varied by any local government body: s.15.
10. Cf. Kasunmu, loc. cit., pp.24-5.

or default of one of the parties, there are only two possible defences open to the defendant. If the action is for recovery of a gift, he can plead that the said gift was made as a mark of affection and without any intention that it should be returned if the intended marriage failed to come to fruition. If this is proved, the defendant will succeed. In the case of an action to recover bride price or betrothal fees already paid, the plaintiff will fail pro tanto if it be proved that the payments in question were above the permissible maximum under the Limitation of Dowry Law, 1956, or the Marriage, Divorce and Custody of Children Adoptive Bye-Laws, 1958, as the case may be. In all other cases, the plaintiff will be entitled to judgement under customary law. It may sound strange that a defendant, for example a would-be father-in-law, should be able to resist an action for recovery of bride price and similar payments made to him, on the ground that the said payment was made in contravention of some statute law, when in point of fact he was himself privy to the alleged contravention. But this seems to be the effect of the two pieces of legislation under review. S.8 of the Marriage, Divorce and Custody of Children Adoptive Bye-Laws, ante, reads:

> "On the ... breaking of a contract of marriage, ... the maximum amounts which shall be recoverable ... shall be those specified in Part B of

the Schedule hereto."

Section 9 provides -

"All other claims or debts by one spouse against the other shall be recoverable in a separate suit as debts when supported by valid documents."

By using the words, "by one spouse against the other" the legislator obviously intended to emphasise that no more than the sums set out in the said Schedule could be recovered by way of customary gifts, under any circumstances. For bride price is not paid to or recovered from the bride herself. By limiting the right of action for debts arising out of betrothal to the would-be spouses themselves, therefore, s.9 makes certain that the parents (or family) of the would-be bride could not be sued in this way, in respect of any bride price paid in excess of the statutory maximum. Again, by inserting the words, "when supported by valid documents", the legislator ensures that no action could ever be brought against the would-be bride herself for repayment of any customary payments made to her over and above the statutory maximum.[11] For any such payments have to be set down in writing to be recoverable;

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11. Part A of the Schedule to the above Adoptive Bye-Laws of the Western Region, and the customary law in most societies provide for payment of certain sums to prospective brides on a number of occasions. See items (iv)-(vi) of the said Schedule, Part A.

while it would be a criminal offence, punishable by "a fine of £25 or, in default of payment, to imprisonment for three months" under s.3(2) of the said Adoptive Bye-Laws to make the extra payments in the first place. And so, nobody would dream of executing a document in support of this type of payment unless it is strictlywithin the law. From the practical point of view, too, the effect of s.9 is to make most gifts by one prospective spouse to the other virtually non-recoverable by legal action. Not many people would like to evidence their gifts by "valid documents" in these circumstances.[12]

The Limitation of Dowry Law, 1956, of the Eastern Region (ante) is more precise and direct in this respect. S.4 makes it a criminal offence to receive or ask for, give or offer, incur or promise any dowry or expenses in excess of the figures set out in s.3 (already given above). S.5 bars the courts from entertaining suits or making decisions that would in effect violate the provisions of s.3, which would happen if, for instance, judgement were to be given for the recovery of payments made to a woman's family, in consideration of marriage

12. Note that this discussion only applies to those areas of the Western Region where the Marriage ... Adoptive Bye-Laws Order, 1958, has been adopted by the local government body. This has not been a popular measure, for as far as can be discovered, only 7 such bodies have adopted it up to the end of 1962. These are the Irrua-Ewu, Ijero, Odo-Etin, Irepodun, Ikeja and Egba Odeda District Councils and the Ikorodu Divisional Council, in that order.

where these exceed £30.

To round off, it should be observed that under customary law (untrammelled by natural justice, equity and good conscience), it makes no difference to a party's right of action for recovery of betrothal payments and bride price, whose act or fault has led to the termination of the betrothal. In other words, it is immaterial that the agreement was repudiated by the defendant as a result of the plaintiff's wrongful act or omission, or indeed that the plaintiff himself had brought it to an end. In both cases, the right of action exists for the benefit of either party. For as already stated, the gist of the action is restitution of money paid or property transferred: the question of moral blame does not arise, The only difference is that in some societies, for example parts of Iboland, where the would-be husband or his family was morally responsible for the dissolution of the betrothal, he has to wait till the woman finds a new suitor out of whose payments the outgoing suitor would be reimbursed.[13]

13. On remedies for breach of marriage agreement under customary law, see: Basden, Among the Ibos of Nigeria, p.69; Ekeghe, op. cit., p.48; Talbot, Tribes of the Niger Delta, pp.180-2 (He says that in Owerri if a betrothed girl ran away and refused to marry her fiancé, "the latter could claim back double dowry": p.180); Ajisafe, op. cit., p.73; Folarin, op. cit., pp.24-6, esp. p.24; Bradbury in Bradbury and Lloyd op. cit., p.156; Omoneukanrin, op. cit., p.43; obiter dictum of Waddington, Asst. J., in Ugboma v. Morah, ante; Kasunmu, op. cit., pp.24-30; and more generally, Phillips (ed.), Survey of African Marriage and Family Life, esp. pp.121-4. See also Talbot's Peoples of s. Nigeria, Vol.III, pp.449-50.

In the traditional society the proper person to sue for repayment of gifts and payments made in connexion with betrothal and marriage generally was the would-be bride's father or guardian, who was himself often represented by the head of the wider family of which he was a member. He was sued not only for the betrothal fees and bride price which were his by right, but also for any gifts or payments due to or made to the woman concerned. To this there was an exception in the matrilineal and mixed-descent societies. There, bride price and similar customary dues were paid (directly or through the woman's father/guardian) to the prospective bride's maternal uncle or her maternal grandfather if still living. In this case, it was the uncle or grandfather as the case may be who was liable for repayment if the marriage agreement fell through.[14]

In modern society, however, while parents or guardians are still sued for all payments and gifts as a rule, the practice is growing of joining the would-be bride herself as a party, in respect of any payments or gifts - especially gifts - made <u>directly</u> to her. We say "directly" advisedly because where, as often happens, payments or refundable gifts are made to the woman through her father or guardian, it is the latter

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14. For references, see under "Repayment of Bride Price on Divorce".

that is usually sued and not the woman herself.[15]

It remains to say a few words on breaches of marriage agreement accompanied by pregnancy, as opposed to what we have described as simple breaches. Where a man brings about his fiancée's pregnancy and then repudiates the agreement, he may be compelled to go on with the marriage or else pay an agreed compensation to her family. This rule, however, is not peculiar to betrothed persons. Any man who causes an unmarried woman's pregnancy is faced with the same choice more or less, the difference between the cases of people who are and people who are not betrothed being that the latter may be rejected as sons-in-law and so compelled to pay damages even if they offered to marry the woman concerned.

As a rule, a man who repudiates his marriage agreement after causing his fiancée's pregnancy loses all claims to repayment of any gifts, fees or bride price already paid for her. If this is not enough compensation, he may still be sued for more damages if he persists in his refusal to marry the woman in question. It is theoretically possible for him to recover part of such payments and gifts after allowing for adequate compensation to the injured family. But as the measure of the damage done is the amount of bride price and other financial benefits to which the woman's family is entitled to from her

15. A payment is still "direct" even if made through the special marriage middleman. Indeed all returnable gifts and payments had to pass through him in the traditional society, and often still do pass through him today.

husband (or his family), nothing already paid could rightly ever be said to exceed the amount of damages recoverable.

It goes almost without saying that where a betrothed woman becomes pregnant per alios, her fiancé has a right to break off the match and bring an action for immediate refund of his gifts and bride price. He may, on the other hand - and quite often does - decide to forgive her and go ahead with the marriage. In that case all further payments are suspended and the marriage festivities and ceremonies are reduced to the absolute minimum, with a view to expediting the marriage and halting the spread of the shameful news which is regarded as a great family scandal everywhere. But in our submission, it would be wrong to say, as some writers have done, that where a betrothed woman becomes pregnant by another man, her prospective husband is entitled to take her away as wife without ever having to pay any more bride price for her.[16] It would be more erroneous still to suggest, as at least one writer has done, that in a case like this the fiancé is entitled to take the woman as a ~~slave~~ wife and recover whatever bride price he has already paid.[17] The rule, in our submission, is that the

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16. This is said to be the case in and around Isokpo, an Ijaw group near Port Harcourt: Talbot, Tribes of the Niger Delta, p.181.

17. Talbot, loc. cit., p.182.

obligation to pay or to complete the agreed bride price is suspended, not obliterated.[18] The woman's family can still demand the balance outstanding, or re-call their daughter from her husband's home at a later date. And this they do if they think she still has a good chance of finding another suitable husband.

(d) Effect of death on betrothal

If a betrothed woman dies before the intended marriage, there is an end to the betrothal. Her family is neither obliged nor expected to offer the disappointed fiancé a substitute bride. There is nothing in law, of course, to prevent a family from finding such a substitute if they particularly like the fiancé in question, or if they consider marriage relationship with his family especially desirable. Similarly, if the prospective husband dies, the betrothal comes to an end, though again there is nothing to stop his family from substituting a new suitor in his place if the woman and her family consent. In either case, as already indicated, there is no need to go over the grounds already covered: the two families having first agreed to be "in-laws", negotiations or preparations for marriage may continue at the

18. Cf. Thomas, p.68 of work given in the next footnote, infra.

point where they were interrupted by the death in question.[1]

On the question of what gifts and payments are recoverable where betrothal is terminated by the death of one of the would-be spouses, there seems to have been a fairly widespread rule in the traditional society that no repayments were asked for or made. Writing about the Owerri Ibo, Talbot says, "If the fiancée dies before marriage, the dowry already paid is forfeited ..."[2] Of the people of Okigwi Division, the same author says,[3] "Should she [i.e. the fiancée] die before marriage, the dowry is not refunded, except among the Ohonhaw Ngwa who do so if the girl has never been to her fiancé's house." Egharevba says of the Bini, "Should a betrothed girl die before her marriage, it is contrary to Benin law and custom for the parents to refund the dowry".[4]

In contemporary society, however, the rule is that a man (or his family as the case may be) has a legal right, which he sometimes waives in whole or in part, to recover the bride price or other customary payments made in respect of his would-be bride if the latter dies before the proposed marriage.

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1. Cf. Thomas, Anthropological Report on the Ibo-speaking Peoples of Nigeria, Part I, the Ibo of the Awka neighbourhood, p.66.
2. Peoples of southern Nigeria, Vol.III, p.446.
3. Ibid., p.449.
4. Benin Law and Custom (1946), p.19.

We find this modern position clearly implied in another statement of Egharevba's on Bini law when he said, "In the good old days people were not so particular to get their money back," presumably, that is, as they are today. "If a girl died before marriage, and her dowry had already been paid, the parents were not necessarily obliged to refund the dowry."[5] Of the Egba (Yoruba), Folarin says that only half the dowry already paid is recoverable.[6] But Ajisafe, writing of the Yoruba as a whole (in 1924) says, "On the death of a betrothed girl the parents shall return or refund to the fiancé moneys and the amount spent on goods by him on her behalf,"[7] though, he added, the right may be waived.

The reason for this change in the law is not hard to see. In the days of old, "bride price" was usually paid not in cash but in the form of labour services.[8] At that time there was no market price for hired labour.[9] And so, in the event of a betrothal falling through, it would be impossible to compute the services rendered so far by or on behalf of a

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5. Benin Law and Custom (1946), p.21.
6. The Laws and Customs of Egbaland, (1939), p.32.
7. The Laws and Customs of the Yoruba People, p.61.
8. Grown-up suitors rendered such services in person, while the family of an infant suitor did so with the help of "paid" labour (see the next footnote).
9. Hired labour was paid for in kind - usually one or more good meals and a drink for a man, one or more meals and sundry presents to a woman. The quantity and quality of the "payment" depended of course, on the payer's means, the nature of the work done, and the ability of the worker.

suitor in terms of money - apart altogether from the practical difficulty of recording and finding a satisfactory basis for the computing of such varied services as working on the farm, providing a sick or aged parent with a good supply of fire-wood, helping with house-building and giving a hand in processing palm oil, "pounding" the yam foofoo (fufu) or running errands at all hours of the day or night. At the early stages of the transition from labour services to cash payments, the sums payable were small enough to be overlooked without undue hardship to the fiancé or his family. But as bride price soared with the influx of ready cash during the second World War - even long before this in some places like Awka - it was only natural that men should insist on repayment, and that the law should change accordingly.

Breach of promise action under English law.

There is a wealth of literature on the English law relating to actions for breach of promise.[1] Here we shall only

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1. See, e.g., Bromley, op. cit., pp.16-29; Powell, "Frustration of a promise to marry" in 14 Current Legal Problems, 100 ff; the current editions of Nokes and Cross on Evidence; all the standard works and textbooks on the law of Torts, Contract and Divorce. The case law is simply legion.

concern ourselves with those aspects of the law which raise special problems owing to the inherent difficulty of synthesizing legal principles derived from social milieus as far apart in physical distance and basic philosophies as those of Nigeria and England. These problems we shall briefly examine under five main heads:- (a) the nature of "breach of promise", in particular to what extent, if at all, a person is liable for breach of promise if he agreed to contract one type of marriage and subsequently decided to proceed with another type; (b) recovery of damages; (c) recovery of gifts made by one party to the other during the period of their engagement; (d) defences; and (e) the effect of death. Where necessary, the points of departure between English and customary law rules will be recapitulated by way of emphasis.

(a) Breach of promise: its nature and legal remedy

A person commits a breach of promise to marry another when he fails or refuses, without lawful justification,[2] to carry out his undertaking in that behalf; when he creates a situation which makes it legally impossible for him to fulfil the promise; or, more generally, when he does an act which clearly negatives any intention on his part to carry out his

2. On "lawful justification", see (c) defences, post.

side of the contract. A simple case of failure, as opposed to positive refusal, to carry out one's undertaking would be where a lady's repeated requests to "name the day" are ignored in silence, or where one of the parties fails to turn up on the wedding day. Joining an institution for voluntary celibates would be a clear indication not to go on with one's contract to marry.[3] Again, where a person who was engaged to A goes and marries B, he would thereby render himself legally incapable of fulfilling his promise to contract a Christian marriage with A. This, incidentally, was the situation which arose in Uso v. Iketubosin.[4]

This last point calls for a closer, albeit brief, examination. What would be the legal position where a man who is engaged to marry Miss A under the Marriage Act goes and marries Miss D under customary law during the currency of his agreement with A? Would this constitute a breach of promise or not, in view of the fact that polygamy is legally permissible and socially commendable? The short answer to this question is that a subsisting customary marriage is as effective a bar to

3. "Voluntary" in the sense that members do not take a vow of perpetual chastity, and may leave the institution at any time they wish. Going into a monastery or nunnery where such a vow is taken would be to place oneself in a position wherein it becomes legally impossible ever to carry out the marriage contract.

4. (1957) W.N.L.R.187.

a Christian marriage as is a subsisting Christian marriage; therefore, to contract a customary marriage in these circumstances would be to render oneself legally incapable of contracting the proposed Christian marriage, and so would constitute a breach of promise. This is because s.33(1) of the Marriage Act[5] provides that -

> "... no marriage in Nigeria shall be valid ... where either of the parties thereto at the time of the celebration of such marriage is married by native law or custom to any person other than the person with whom such marriage is had."

S.47 of the same Act provides a penalty in these words:

> "Whoever contracts a marriage under the provisions of this Ordinance [now Act], or any modification or re-enactment thereof, being at the same time married in accordance with native law or custom to any person other than the person with whom such marriage is contracted, shall be liable to imprisonment for five years."

It should be noted in passing that it is equally impossible to contract a valid customary marriage during the subsistence of a Christian marriage,[6] the penalty for any such purported marriage too being five years imprisonment.[7] Therefore, a man who is betrothed to one woman under customary law and marries

5. Laws of the Federation of Nigeria (1958 Revision), Cap.115.
6. Ibid., s.35.
7. Ibid., s.48.

another under the Act would be guilty of constructive repudiation of such betrothal even if in actual fact he is ready and willing to complete the customary marriage.

The other question which arises from the phenomenon of dualism in our marriage law is this. Would it be tantamount to a breach of promise if a person is engaged to be married to another under the Marriage Act but later changes his mind so that while he now refuses to contract a Christian marriage, he is nevertheless ready and willing to contract a customary marriage with the ~~other~~ person concerned? Enough has been said above to show that an agreement to marry under customary law differs so fundamentally in character and legal incidents from one to marry under the Act, that they are not interchangeable one with the other. Moreover, the actual marriage, when completed, would have different legal incidents as well as social significance in the two cases. It would therefore, in our submission, be a breach of promise to switch over from a contract to marry under the Act to a statement of willingness to marry under customary law, and vice versa.[8]

8. It may be objected that since Christian marriage is patently more advantageous to a woman than is customary marriage, a change of promise by her fiancé from the latter to the former type of marriage would not constitute repudiation of the betrothal. But it must be remembered that a Christian marriage involves a greater loss of freedom on a woman's part, being much more difficult and expensive to dissolve: Hence the "vice versa" above.

A curious case which shares something of failing to turn up for the wedding on the appointed day and retracting from a promise to marry under the Act, in favour of (presumably) a customary marriage, is Martins v. Adenugba.[9] A man took his fiancée to a Registrar's Office to get married. On arrival, he asked her to wait outside the office, while he went in alone. When he emerged from the office, he took her away to a church to have their "marriage" blessed by the priest, as is usual among people who contract a "court" as opposed to a "church" marriage. The girl thought she had been duly married, so did the priest who accordingly proceeded to bless the "marriage". After the blessing, the couple repaired to the "matrimonial" home and lived as man and wife for a time. Three years later, the parties having separated, the "wife" petitioned for divorce, only to discover in court that she never was married under the Act so that there was no marriage for the High Court to dissolve. Whereupon she sued her "husband" for a breach of promise to marry, or in the alternative for fraudulent misrepresentation or for deceit.

Brooke, Acting C.J., held on the authority of Beyers v. Green[10] that this form of action was the right one to adopt,

9. (1946) 18 N.L.R.63 (Lagos, Supreme Court). The case was undefended.

10. [1937] All E.R.613.

and that the woman was entitled to recover. There is no clear indication in the report which of the alternative claims judgement was given upon. It was assumed without discussion that the law applicable to the case was English law, presumably on account of the fact that the parties went to the Registry in the first place. Given that the proper law of the case was English law, there could be no doubt but that the defendant was guilty of deceit, having led the plaintiff to believe that his going into the Registry Office while she stood outside the door constituted a perfectly valid "court" marriage - she was obviously quite innocent of the law and procedure relating to this type of marriage. If, however, the couple had already contracted a customary marriage as most (perhaps all) other Lagos Yoruba of their day did, then it is arguable that this was not necessarily a case of deceit or fraud but a genuine case of a man changing his mind about a Christian marriage (after having a word of advice, who knows, at the Registry) and deciding to have his customary marriage blessed in church (as is sometimes done) instead. Not that this would make any difference to the defendant's liability. For as we have seen, the two types of marriage are so radically different from each other that a change of heart in circumstances such as the present would clearly constitute

a breach of promise. But if it could be shown that the defendant had merely changed his mind in favour of letting their customary marriage stand alone (still assuming the parties were already married under customary law), the quantum of damages recoverable may well be considerably less than it would if there had been sheer calculated fraud.

(b) Recovery of damages.

We have seen that the object of an action for breach of promise to marry under customary law is to recover payments and gifts already made, irrespective of the parties' guilt or innocence. This is not the case in English law, whose object in this type of action is to award damages to the innocent party as recompense for any mental injury (including ordinary wounded feelings) and for any social, material or pecuniary loss arising as a direct (not remote) consequence of the breach

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1. "Material" and "pecuniary" are used here to denote two different types of loss. "Material" losses range in denotation from the comfort of chaffeur-driven limousines and luxury country homes with servants galore to inheriting a comfortable bank belance on intestacy. "Pecuniary" losses relate to actual financial losses through, for example, the purchase of wedding rings and dresses which became useless as a result of the breach of contract.

of contract, and to punish the guilty party.[2] These damages can be classified under two main heads, viz. general and special. General damages may further be classified into compensatory and punitive. And special damages may be either compensatory or merely restitutional.

(i) General damages. By compensatory general damages we mean a sum of money, usually substantial in amount, which the plaintiff recovers as a solatium for the loss of the defendant's consortium as a spouse and, in the case of a female plaintiff, the chance of attaining the status of a married woman.[3] In other words, general compensatory damages are aimed at placing the plaintiff in the position she would have been in but for the defendant's breach of promise - that

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2. This difference in juridical objectives probably reflects differences in social environment and psychology as between English and traditional Nigerian societies. Polygyny made marriage a dead certainty for every woman of normal disposition and health (physical and mental). Early betrothal, which was the norm, ensured that women were either married or jilted early enough in life to find other suitable husbands. So much for social environment. Openly to admit disappointment at the loss of a particular marriage prospect (which would be the effect of pleading injured feelings in a breach of promise action) would be a family disgrace, for it would mean a public declaration of lack of confidence in the girl's personal attractions and in her family's ability to raise desirable wives-to-be. Many lovers still suffer in silence in the Western world for this reason.

3. For a succinct statement of the English law, see Bromley, op. cit., pp.23-8.

is insofar as money can do this. Among the factors which a Court takes into consideration in assessing damages of this type are the related questions of the plaintiff's present age as compared to her age when the contract to marry was entered into; the length of the engagement period; the parties' emotional attachment to each other all through this period, with the resulting loss or rejection of other desirable matrimonial targets; and the present marriage prospects of the plaintiff, having regard to her age and present circumstances. In Uso v. Iketubosin[4] the parties became engaged in 1947, when the lady plaintiff was about twenty years old. In 1957 the defendant married a third party, whereupon the plaintiff sued him for damages. Irwin, J., held that in assessing general damages at £600, the Court was taking into consideration the plaintiff's present age, which was 30 (and so, by implication, her considerably diminished matrimonial prospects), as well as the parties' stations in life.

In an earlier action before Waddington, Asst. J., in the Onitsha High Court, it was held, as we have seen, that in assessing damages the Court must take cognizance of the fact that under the customary law of the parties there was nothing like an action for (general) damages.[5] This point was not

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4. (1957) W.N.L.R.187.
5. Ugboma v. Morah, ante.

discussed or indeed adverted to at all in Uso v. Iketubosin. The whole question of how far the courts should admit customary law principles so as to modify the usual incidents of a given transaction which is otherwise governed by English law, is, without doubt, a difficult one. On the one hand, it is only reasonable to expect that the received English (or other foreign) law should be interpreted and applied subject (or at least with reference) to existing fundamental legal ideas and social practices in the receiving country. But it is arguable, on the other hand, that to carry this principle to its logical conclusion would lead to the apparently odd result that a person could have the best of two worlds in personal law matters, to the detriment of the other party or parties to a given transaction. Thus, for instance, a man would be free to adopt the English form of marriage for prestige or other reasons, while escaping the normal legal incidents of such a union, to the detriment of his wife. There is great force in this argument which, incidentally, rests on the time-honoured doctrine that a person is deemed to intend the natural consequences of his intentional act.[6] Nevertheless, it should be noted that the principle under consideration (viz. that merely to adopt one system of marriage/engagement does not necessarily

6. Cf. R. v. Sheppard (1810), R. & R. 169; R. v. Philpot (1912), 7 Cr. App. R. 140; Hosegood v. Hosegood (1950) 66 T.L.R.735; Mancini v. D.P.P. (1942) A.C.I.

imply an intention to adopt a foreign law as one's personal law) has been accepted without demur as regards Yoruba Moslems contracting marriage according to Moslem rites. Thus on the question of which law should govern the intestate estate of an Ijebu Yoruba woman who was married by Islamic rites, Brooke, J., held in re Alayo, Administrator-General v. Tunwase[7] that the law applicable was not Islamic law but Ijebu customary law, as there was no evidence before the referee or the Court in this case that "an Ijebu who married according to Muslim rites and died without issue and intestate had [ever] had his or her property distributed in accordance with Maliki law. The same is the result if we substitute Mohammedan for Maliki law."[8] On the position in Customary Courts, Lloyd says -

> "I have seen no case in which a customary court has followed Moslem law in preference to Yoruba law ... Pious Moslems often arrange marriages partially following Moslem law and usage, but such marriages are recognized by the courts as customary law marriages."[9]

If this be true of people contracting what are ostensibly Islamic marriages, why should it not be true of those

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7. (1946) 18 N.L.R.88. See also Ayoola v. Folawiyo (1942), 8 W.A.C.A.39.

8. 18 N.L.R.88, at p.92.

9. Yoruba Land Law, p.27, fn.1. No great importance should be attached to the phrase "partially following Moslem law," since this is also true of persons contracting Christian marriages.

contracting Christian marriages?

Phillips' reading of the basic intention of the Act is certainly right when he says that -

> "So far the [Marriage] Ordinance seems to evince an intention to place both the spouses and their offspring outside the sphere of native law and custom,"[10]

as far as intestate succession to property is concerned. This was part of the civilizing mission of the British in Nigeria. But whatever the position where the local legislature makes a statute modelled on some English statute, as in the case of the Marriage Act, the Courts have no corresponding right to apply unmodified rules of English common law to transactions between two Nigerians, carried out in Nigeria against Nigerian social background. This is the position with agreements to marry under the Act. We shall have more to say on the presumed /apparent intention of the legislature in enacting the above Act when we come to deal with intestate succession. Suffice it here to say that on the equally hallowed principle of English construction of statutes - that the legislature must be presumed to intend the least possible change in the common law - and equating

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10. "Conflict between statute and customary law of marriage in Nigeria." (1955) 18 M.L.R.73, at p.74.

the introduction of English law into a society previously regulated by customary law with the enactment of statute law on a subject previously regulated by the common law, there should be a presumption in favour of doing as little violence to the customary law as possible. The great weakness of this proposition, however, is that to permit English law to be modified by a large number of different customary laws might be to modify it out of existence, as a unifying force. Be that as it may; but there is uniformity in the customary law throughout our area of reference to the effect that general damages are not recoverable in an action for breach of promise to marry. And so, in our submission, there is everything to be said for the decision in Ugboma v. Morah, viz., that the Courts should take that fact into consideration in assessing damages.

So much for the compensatory aspect of general damages. Such damages may also be punitive, in which case they are increased in proportion to the "injury to the plaintiff's feelings, reputation and health and will be less if the defendant can show extenuating reasons for his conduct."[11] One of the most frequently pleaded aggravating circumstances

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11. Bromley, op. cit., p.24, based in part on a statement by Phillimore, L.J., in Quirk v. Thomas, (1916) 1 K.B.516.

is that in reliance upon the defendant's promise the plaintiff allowed him to seduce her, with a shattering effect on her feelings, her pride and her future matrimonial prospects.[12]

(ii) Special damages. These, as already indicated, may be restitutional or compensatory. As pleaded in our Courts, the former include claims for the recovery of gifts such as sewing machines, or clothing given by one party to the other for use during their courting period. They also include claims for recovery of pledges of good faith such as rings and keepsakes of one kind or another. Damages of this type we designate as "restitutional" because the items claimed for are usually ordered to be returned to the donor in specie (though he may be given the option of returning its value in money).

Compensatory special damages, on the other hand, are those awarded in respect of money spent, or financial loss sustained, by the plaintiff as a direct result of the defendant's breach of promise. The former include money spent on (a) durable articles intended for use on the wedding day or in the matrimonial home, and which, in the nature of things, become useless if there is not going to be a wedding: wedding rings and dresses, bouquets and carnations, furniture and

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12. Bromley, op. cit., p.24, also based in part on a statement by Phillimore, L.J., in Quirk v. Thomas, (1916) 1 K.B.516.

trousseaus,[14] as well as forfeited deposits on new flats are obvious examples of these; or (b) refreshments and other forms of entertainment for the wedding day: wedding cakes, drinks and non-recoverable deposits on halls or brass bands readily spring to mind in this connexion. The other classes include (c) financial losses due to the fact that the plaintiff gave up his contract of service or changed his position adversely in reliance upon the defendant's promise;[15] and (d) frustrated hopes of a settlement[16] or even of intestate succession as a widow or widower.[17]

The practical significance of the distinction between "general" and "special" damages is quite considerable. At common law (and this, as we shall see presently, is the position in Lagos and the Eastern Region today) the general rule regarding survival of action for breach of promise to marry was that actio personalis moritur cum persona.[18] Nevertheless

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14. On trousseaus as part of special damages, see Halsbury's Laws of England (3rd edn.), Vol.19, p.773.
15. Ibid.
16. E.g. where the defendant had promised to settle property on the plaintiff after the marriage. Cf. Bromley, p.25.
17. Shaw v. Shaw (1954) 2 Q.B.429, where a woman recovered £1000, being 2/3 of the net estate of a man who had deceived her into marrying and living with him for 14 years by stating, contrary to the truth, that he was a widower at the time of the marriage.
18. Cf. Bromley, p.26. For details see textbooks on the law of torts.

the Courts recognised this exception to the general rule, viz. that a subsisting cause of action survived for or against a person's estate if it was for special damages. Both this rule and the exception to it have been stated and re-stated by generations of English judges among them such judicial luminaries like Lord Ellenborough, C.J., in Chamberlain v. Williamson,[19] Lord Esher, M.R., in Finlay v. Chirney,[20] Phillimore L.J., in Quirk v. Thomas[21] and Denning, L.J., (as he then was) in the post-common law case of Shaw v. Shaw.[22]

It is also submitted that the distinction drawn above between "restitutional" and "compensatory" special damages has more than a little practical significance. Where in an action a claim is made for damages coming within the former category, the plaintiff will fail if it could be shown that (a) the article in respect of which the claim is made is still in the plaintiff's possession;[23] or (b) that the article in

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19. (1814) 2 M. and S.408.
20. (1888) 20 Q.B.D.494; a Court of Appeal decision.
21. (1916) 1 K.B.516, another C.A. decision.
22. (1954) 2 Q.B.429; also C.A. See also, Bromley, p.26, and Halsbury's Laws of England, Vol.19, p.771 fn. (b) and p.774. (3rd edn.).
23. Uso v. Iketubosin, ante.

question was given to the defendant as a mark of affection,[24] as an introduction to the defendant's acquaintance or in order to gain her favour.[25] On the other hand, a claim which properly falls within the second category of special damages (i.e. compensatory) will not fail merely because the article concerned is still in the plaintiff's possession, or was never given to or even shown to the defendant. In other words, "restitutional special damages" are concerned with articles and gifts which are equivocal in nature: they may or may not have been bought or given in contemplation of marriage. Thus a gift of an expensive sewing machine, gold wrist watch or diamond necklace could equally be shown to have been made as a result of a transitory infatuation, or as a placatory offer for wounded feelings between lovers with no matrimonial intentions, or as an investment in one's future spouse and matrimonial home. In this last case, it is recoverable; in the other cases, it is not. "compensatory special damages", on the other hand, relate to articles, expenses or damage to the plaintiff's estate which, in the nature of things, point unequivocally to the proposed marriage. A wedding ring has but one story to tell; so has money spent on veils and

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24. Uso v. Iketubosin, ante.

25. Young v. Burrell (1576) Cary 54; Robinson v. Cumming (1742) 2 Atk. 409. See also Halsbury, op. cit., Vol.18, pp.390-1.

wedding dresses. Take away the marriage, and these articles become a ~~dead~~ complete loss in the plaintiff's hands. They are no less a loss because they are still in the purchaser's possession.

(c) Recovery of gifts

So far we have considered the recovery of gifts by one prospective spouse to the other as an item under the general heading: Special damages, for this seems to be the practice among our legal practitioners - insofar as it is possible to discover any pattern from the few cases on breach of promise to be found in the law reports. We shall now attempt an examination of the same question from a slightly different angle. And here we shall include in our discussion the question how far, if at all, gifts made to an engaged couple by third parties can be recovered, and for whose benefit.

The general rule at common law is that all gifts of whatever kind which are made in contemplation of marriage are recoverable (a) from both parties where the engagement is terminated by mutual consent or frustrated by the death of one of the parties;[1] and (b) from, but not by, the party who wrongfully repudiated the agreement to marry. Thus in the old case of Robinson v. Cumming (ante)[2] it was held that a

1. See generally, Halsbury, op. cit., Vol.19, p.774.
2. Cf. Bromley, p.28.

donee who unlawfully broke his promise to marry must return any gifts made to him in contemplation of the marriage. In Jacobs v. Davis,[3] Shearman J., decided in 1917 (i.e. before the introduction of statute law in this field in 1934) that a woman who broke off her engagement without justification must return the engagement ring. But in Cohen v. Sellar,[4] decided in 1926 but still under the common law, McCardie, J., held that where a man wrongfully broke his promise to marry, he had no right to recover the engagement ring from his ex-fiancée.

Gifts from third parties are governed by the same rules as far as recovery is concerned: provided they were initially made in contemplation of marriage, they are recoverable under the same circumstances. On the termination of the engagement, the would-be spouses are each entitled to those items which were given (or presumed to be given) to the couple jointly for his sake, to use a popular expression. In practical terms this means that where it is not clear to which party a particular gift was directed or intended by the donor, then it will go to the party whose friend or relation, as the case may be, made the gift.[5]

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3. [1917] 2 K.B.532.
4. [1926] 1 K.B.536. See also, Halsbury, Vol.19, p.774.
5. Halsbury, op. cit., Vol.18, p.391. We shall return to this subject in the chapter on Divorce. Meanwhile it should be noted that the above rules are subject to contrary intention /arrangement by the parties or donors as the case may be.

(d) Defences

We shall begin with two pleas which are most commonly raised in breach of promise actions, but which are really more in the nature of denial that there ever was a contract to marry than defences. The first is that although promises were exchanged, there was no intention at any moment to enter into legal obligations. A moment's reflection will show that this plea is not as ludicrous as it sounds. It is not uncommon, for instance, for two young people who find themselves physically attracted to each other to become "engaged" on an impulse and without really giving the matter any serious thought; or merely to have the opportunity of meeting each other at will and without parental interference; or, if living in a small provincial society, so as to stave off public censure. Such an understanding is seldom if ever expressed in words. Again, in our modern society where young men and women will do practically anything for the fun of it, it is important that the intention of the parties at the material time should be carefully investigated, having regard to all the circumstances, if we are to avoid frivolous, vexatious or, worst of all, "gold-digging" litigation. One is inclined to agree with Bromley when he says with reference to "unofficial" engagements, that in his submission, "there

is a presumption against the parties' intending to be legally bound."[1]

The other so-called defence is absence of corroboration where one party alleges a contract to marry and the other denies the allegation. In such cases, and to prevent gold-digging actions, the Courts insist on corroboration of the plaintiff's allegation. This, however, is not very difficult to secure, since the defendant's letters or even conduct in certain circumstances will provide the needed corroboration.[2] Now to true defences.

It is a good defence that since entering into the contract, the defendant discovered that the plaintiff was in fact unfit for marriage - morally, mentally or physically. The operative words here are "since", "in fact" and "unfit". The unfitness must have come to the defendant's knowledge after the contract came into being, either because the cause of the unfitness arose after the engagement, or because he was completely unaware of its existence at the material time.[3] Secondly, the alleged unfitness must exist in fact. It is

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1. Op. cit., p.19.
2. For details, see Halsbury, op. cit., Vol.19, p.770, and textbooks on the law of evidence.
3. If its existence was known to him before he entered into the contract, he must be presumed to have waived it: Bromley, op. cit., p.22.

not enough that the defendant believed honestly and on reasonable grounds that the plaintiff was unfit while in fact she was not.[4] Then again the plaintiff may be unfit for marriage by reason of (a) physical infirmity such as tuberculosis or leprosy; or (b) mental illness such as insanity and, perhaps, acute bouts of uncontrollable temper or of prolonged periods of depression; or (c) moral infirmity such as laxity in sexual morality or persistent tendency to steal.[5] On this it should be noted that for any factor to operate so as to render a party "unfit" and so provide the defendant with a good ground for breaking off the engagement, it must be such as to make the plaintiff unfit to be a husband or wife at all. It is not enough that he/she turned out to be less wealthy than the defendant had believed. For while this would make him/her a poorer "catch" than expected, it need not impair his/her quality as a spouse.

Lastly a word on infancy as a defence.[6] We have seen that the Infants Relief Act, 1874, of England was held to apply to the Colony of Lagos as a statute of general application in Labinjoh v. Abake,[7] a decision of the Full Court

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4. Jefferson v. Paskell, (1916) 1 K.B.57, (C.A.).
5. On defences generally, see Bromley, pp.21-3.
6. On infancy as a defence in the law of England: Halsbury, Vol.19, p.768.
7. (1924) 5 N.L.R.32.

comprising Combe, C.J., Van der Meulen and Tew, JJ. It is only reasonable, therefore, to say that it applies not only to the Federal Territory of Lagos as at present constituted but also the two southern Regions of the Federation. As far as the Western Region is concerned, however, all doubts have now been removed because the English Act has been re-enacted locally as the Infants Law, being Cap.49 of the 1959 Revision.

The Act (in both its English and local forms) defines an infant as a person under the age of 21 years (with certain irrelevant exceptions relating to married infants). Now, it is a notorious fact that in Nigerian indigenous societies, infancy ends long before a person attains the age of 21 - usually at puberty; but sometimes a little before or a little after, where initiation ceremonies are required to end infancy and usher the initiate into manhood or womanhood. The question whether the meaning attached to the word "infant" in the Infants Relief Act should be modified to accord with local (Lagos Yoruba) concept of infancy was canvassed in Labinjoh v. Abake (ante). The Divisional Court (the then equivalent of a High Court of today) held that such modification was necessary and that infancy ended at puberty. The Full Court (the early counterpart of the Federal Supreme Court of today as a Court of appeal), reversed this decision and held that

the Courts were not entitled to make such a modification. In our submission, this was the right decision to make. "Infancy" has, therefore, the same meaning under the general law as it has in the law of England in this respect.

The result of English case law on the scope of the Infants Relief Act, 1874, insofar as it concerns promise to marry may be summarised thus. In 1878, it was held by Lord Coleridge, C.J., and Lopes, J., that the Act applied to a promise of marriage. This was in Coxhead v. Mullis,[8] which was followed in Northcote v. Doughty[9] the following year. In both these cases the Court was asked to say that s.2 of the Act did not apply to a contract to marry - this being the section which provides that

> "No action shall be brought whereby to charge any person ... upon any ratification made after full age of any promise or contract made during infancy whether there shall or shall not be any new consideration for such promise or ratification after full age."[10]

It is therefore a good defence that the alleged promise was made by the defendant during infancy, or that it was merely ratified after he came of age.[11]

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8. (1878) 3 C.P.D.439 (=Com. Pleas Div.)
9. (1879) 4 C.P.D.385: Denman and Lopes, JJ.
10. This (s.2 of the English Act) is s.5 of the W.R. Infants Law.
11. Coxhead v. Mullis, ante.

If, however, the defendant has made a new promise since he attained his majority, instead of just ratifying the old childhood promise, the Act does not apply and so he will be liable.[12] Whether a promise or act was a new promise or a mere ratification of the old is a question of fact to be proved by evidence. But no question should be left to the jury (where there is one) on this score unless there is evidence on which they could properly base a finding.[13] No general rules could be given as to what does or does not constitute a new promise. But asking a girl to "name the day" has been held to be,[14] while declining to be released from a promise following a change of the plaintiff's father's fortune for the worse and merely continuing amorous relations was held not to be enough.[15]

(e) Effect of death of a party

If either of the parties dies while the contract to marry still subsists, the contract is automatically frustrated.[1] All gifts made in contemplation of the marriage lapse, so to

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12. Ditcham v. Worall (1880) 5 C.P.D.410. Per Denman and Lindley, JJ., with Lord Coleridge, C.J., dissenting.
13. Holmes v. Brierley, (1888) 14 L.T.(n.s.)70.
14. Ditcham v. Worall, ante.
15. Holmes v. Brierley, ante.
1. Cf. Bromley, op. cit., p.25, footnote (r).

speak, and may be recovered in an action by or against the deceased party's personal representative, in the absence of agreement to the contrary.[2] And as already indicated, marriage payments and customary gifts made under customary law in contemplation of a duplicated marriage also become recoverable unless waived. The same principle also governs the refund or recovery of payments and gifts, as the case may be, made in contemplation of marriage where the contract to marry had already been terminated by mutual consent before the death occurred. In this case, too, gifts and payments made in contemplation of marriage may be recovered for the benefit of or against the estate of the deceased party.[3]

When we turn to the question of how far, if at all, an action for breach of promise which accrued to a party during his life time will survive him for the benefit of his estate, and vice versa, we are confronted with more than a little uncertainty and diversity as between the different parts of southern Nigeria. In the Western Region, the position is now governed by statute law - the Administration of Estates Law, 1959 - as regards deaths occurring after the

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2. On this see McCardie, J., in Cohen v. Sellar, ante.

3. Halsbury, op. cit., Vol.19, p.774. Whether a gift is made "in contemplation of marriage" or not is a question of fact. But enough has been said in the section on classification above to indicate to which category a given item will probably be held to belong.

23rd of April, 1959. But there is, as far as one can see, no legislation in force on the subject in the Federal Territory of Lagos or in the Eastern Region. There is no English statute of general application which was in force on the first day of January, 1900, to consider in this connexion, as the position was regulated in England by the common law up to and including the 25th of July, 1934: the Law Reform (Miscellaneous Provisions) Act of that year only governs cases relating to deaths after July the 25th. The current law on the subject in Lagos and the Eastern Region is, therefore, the common law of England as at July 25th, 1934.[4] This law may be summarised as follows.

Where one of the parties to a contract to marry dies subsequent to a wrongful termination of the said contract, any right of action that might have accrued to or against

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4. The common law is not applied with reference to any reception date in Nigeria, for s.45(1) of the Interpretation Act and s.14 of the High Court Law which respectively provide for the application of English law in Lagos and the Eastern Region make it quite plain that the date - 1st January, 1900 - only refers to statutes of general application. The former says inter alia:
   "... the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1900, shall be in force in Lagos ..." S.14 of the High Court Law and s.40 of the Magistrates Courts Law of the Eastern Region are identical to this, except that they both omit the phrase "together with", putting in its place the single word "and".

him dies with him, except to the extent of any special damage of a pecuniary or property nature.[5] In other words, where the party in breach has died, the surviving party can sue his personal representative, but only for special damages which flow from the deceased's breach of contract. Conversely, if it is the innocent party that has died, his personal representative can maintain an action for similar damages against the party in breach, for the benefit of the deceased's estate. But in neither case are general damages, whether compensatory or exemplary, recoverable. This then, in a nutshell, is the position in Lagos and the Eastern Region.

The law of the Western Region relating to survival of causes of action in this respect is contained in s.15 of the Administration of Estates Law, 1959 (No.23 of 1959).[6] Section 15(1) provides that, with three specified exceptions,[7] all causes of action subsisting against or vested in a person dying after July 23rd, 1959, shall survive him, and may be brought against or for the benefit of his estate.

If a cause of action thus survives and is taken up for the benefit of a deceased person's estate, then:

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5. Cf. Halsbury, op. cit., Vol.19, p.771, footnote (b), Bromley, op. cit., p.26. For judicial decisions and obiter dicta, see Finlay v. Chirney, ante; Chamberlain v. Williamson, ante; Robinson v. Cummings, ante; Quirk v. Thomas, ante; and the conflicting views of Singleton and Denning, L.J.J., in Shaw v. Shaw, ante.

6. Laws of the Western Region, 1959 Revision, Vol.1, Cap.1.

7. Actions for defamation, seduction or for inducing one spouse to leave the other.

(a) damages to be recovered shall not include exemplary damages;

(b) if the action is for a breach of promise, damages recoverable "shall be limited to such damage, if any, to the estate of that person as flows from the breach of promise to marry".[8]

If, on the other hand, the action is against the estate of a deceased person, the better view is that the surviving party can recover as much as he would have done had the other party not died.[9] But the plaintiff in such a case has to act promptly, and may indeed find that the other party's death has barred any action against his estate. This is because s.15(3) provides that the action shall be barred by the wrongdoer's death unless either -

(a) proceedings were already pending in court at the time of his death; or

(b) the cause of action arose within the last three years immediately before his death and proceedings are taken within six months of his personal representative's taking out representation.

The effect of this sub-section is to shorten the normal period of limitation in these cases by two-and-a-half years, other things being equal: The innocent party has 6 years in which to bring his action for breach of promise. But if, for instance, the party in breach dies after 4 years of the

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8. S.15(2).

9. Cf. Halsbury, op. cit., Vol.19, p.771, fn.(b), and Bromley, op. cit., p.26, on s.1 of the 1934 Act on which the above section was modelled.

breach, the action is barred. Even if the guilty party dies only a few weeks after the breach (and so, well within the statutory 3-year period), the injured party will have his right of action barred if he fails to initiate proceedings within 6 months of the personal representative's taking out representation.

CHAPTER SEVEN.

CUSTOMARY LAW MARRIAGE

Definition

Marriage as known to customary law may be defined as the union of a man and a woman for the duration of the woman's life, being normally the gist of a wider association between two families or sets of families. [1, 2]

'Union' is employed here in the sense of a permanent association of two human beings that are legally and physically distinct, not as a fusion of two such beings into some mystic or metaphysical entity - an obsolescent concept which found its way from the Bible, through ecclesiastical law into 'Christian marriage' law, leaving, for instance, some aspects of English law of crime, evidence and torts riddled with anomalies, as we shall see.
In spite of the fact that customary law permits polygyny, marriage is still a union of 'a man and a woman', not, as

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1. On the nature and objects of marriage under customary law, see Phillips, Survey of African Marriage ..., pp. XIII-XVII; Basden, Among the Ibos ..., p.68; Temietan, 'Marriage among the Jekri ...' (1938) 13 Nigeria, p.77; Thomas, Anthropological Report on the Edo-speaking peoples ..., p.60; Delano, An African looks at marriage, p.26 ff.; Kasunmu, loc.cit., p.8. On uniformity, see Ajayi, 'The interaction of English law with customary law ... (1960) 4 J.A.L.112.
2. On 'woman - to - woman' marriage, see below.

is often said, between a man and one or more women. To think of marriage in terms of one man and one or more women is to confuse its basic nature with one of its characteristic incidents, a negative one in this case. For a polygamist is a man who has entered into two or more separate marriage contracts concurrently with as many women, not one who has entered one marriage contract with two or more women considered as a legal entity. In other words, there are as many marriages co-existing in a polygamous household as there are wives. To postulate the converse of this would be to imply that the various contracts are simultaneous in their inception and inter-dependent on each other for their existence, so that they either stand or fall together.

Customary law regards marriage as co-extensive with the life of the wife. This implies two things. First, the death of the husband does not necessarily terminate the marriage because, as we shall see later, a woman may retain the status of a married woman for a number of purposes in spite of her husband's death. Secondly, the fact that divorce is possible, sometimes easy, even without judicial intervention, does not alter the position. A marriage is intended to be of indefine duration, measurable, if at all, only by reference to the wife's natural span of life. And that is the true meaning of a 'union for life' even in Christiandom, now that the

old ecclesiastical ban on divorce has lost its force in secular law in many, perhaps most, 'Christian' states.

Again, it is common knowledge that marriage under customary law is more than a contract between two individuals, being more in the nature of an association of two families. But as we saw in the first chapter on betrothal and will see again shortly, an adult male who is sui juris may marry without the knowledge, consent or intervention of his family. In such a case, too, even active family opposition to the marriage has no effect on its legal validity. It follows, therefore, that a marriage need not always be accompanied by inter-family contract. Hence the use of the word 'normally' in our definition. Finally, the phrase, 'or sets of families' in the definition is intended to reflect the usual practice in matrilineal societies whereby a marriage contract is between a boy's (paternal) family and his mother's maiden family on one hand, and their opposite numbers on the girl's side. It happens not infrequently that while a boy's family has to consent to his proposed marriage, it is his maternal uncle (or his family) who undertakes to pay the bride price and other customary payments. Similarly, while a girl's family are the right people to consent to her marriage and receive her bride price in the first place, it is sometimes her maternal uncle (or his family) who ultimately gets the bulk of the said bride price and who binds himself to refund it in

the event of divorce.[3]

Types of customary marriage.

No less than fifteen types of 'marriages' have been recorded in southern Nigeria and, allowing for differences in language or in spelling as between different writers, at least twenty-two words and phrases have been employed in designating them! A great many of these possess none of the legal characteristics of marriage, at all events from a lawyer's point of view, and some of them are obsolete anyway. We shall now take a quick look at them one after the other, if only to eliminate some of them from our list.

The first is what has been described as woman - to - woman marriage.[1] This, as we have seen, is a devise whereby a childless wife tries to perform her supreme service to society while entrenching her position as a beneficial

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3. Cf. Forde, Marriage and the Family among the Yako in South-eastern Nigeria, pp.45, 50, 53, 72. According to Forde, the girl's maternal uncle gets from two-thirds to four-fifths of her bride price: ibid., p.45. Uncles' rights are now said to be successfully and progressively challenged by brides' fathers: ibid., ;pp.45-6.

1. Meek, Law and Authority in a Nigerian Tribe, p.275; Esenwa, loc. cit., p.74; Talbot, Tribes of the Niger Delta, pp.195-6; Talbot, Peoples of Southern Nigeria, p.439 and 431. Meek and Esenwa speak of the Ibo; while Talbot speaks of the Ijaw in the first three pages given, and of the Ibo in the fourth.

member of her husband's family, by paying for a new wife on behalf of her husband or by providing him with the necessary funds for a new marriage, with a view to raising children for her husband by proxy so to speak.[2] In our submission, this is not a marriage between one woman and another. The fact that the bride price and other customary dues were paid by a woman is immaterial. After all, many mothers make these payments for and on behalf of their sons of any age; so do fathers, guardians and maternal uncles. And yet anyone is yet to suggest that in these latter cases the legal husband is not the man on whose behalf the marriage payments were made, but his mother, father, guardian or uncle as the case may be - these being merely his benefactors[3]. In those cases where, as Meek rightly says, unmarried women sometimes 'marry' other women, the fact is that these women actually effect such marriages in the name of their deceased fathers - a sort of 'ghost marriage' said to be encountered

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2. But see Meek, who says that 'Even an unmarried woman may marry another woman by paying a bride price...' ibid.

3. Note that where B pays the marriage expenses in respect of W on behalf of her son, W is sometimes referred to in popular parlance as B's wife; the legal position being different of course.

in East and Central Africa. We are therefore driven to the conclusion that there is no difference in kind (as distinct from procedure) between the so-called 'woman - to - woman' marriage and the regular man - to - woman marriage.

The second reported type of 'marriage' is 'concubinage'.[4] This statement, to a legal mind, is a contradiction in terms, for concubinage is the very negation of marriage. It satisfies none of the essentials of a valid marriage, except for parental consent. Nor has it the legal incidents of a marriage as between the 'spouses' themselves, as regards their issue, or a propos third parties. We must therefore exclude it from our discussion which is on marriage and its legal incidents. As with concubinage, so with 'friendship marriage,'[5] and with 'marriage by consent'[6].

Next comes a miscellany of 'types' of 'marriages' which only need mentioning by name to be declared unsuitable for inclusion in a treatise on modern family law. Under this head we have 'slave marriages'[7] which went out

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4. Esenwa, loc-cit., p.75. See also Williamson, "Changes in the marriage system of the Okrika Ijo" (1962) 32 Africa 53-60, at p.57. His account of Lekeria sime (living together) differs but little from Esenwa's mgba (concubinage).
5. For which see Temietan, ante, p.77. Friendship (ukun) marriage, says the author, is unsatisfactory, for the 'wife' 'can be dispensed with at any time:' ibid.
6. Per Johnson, op. cit., p.116.
7. Talbot, Tribes of theNiger Delta, p.189 ff.

with the slave trade; 'marriage by purchase'[8] (insofar as 'purchase' has its primary meaning in that phrase; insofar as it connotes no more than payment of bride price, we shall come back to it presently); matrilocal marriages;[9] marriages initiated by throwing periwinkle shells;[10] and 'marriage by exchange.'[11] Matrilocal marriages must have fallen into desuetude since Thomas wrote; for our enquiries have so far not disclosed the existence of any such marriage in the District in question (Asaba). But there are traces in this area of a form of marriage (which is more prevalent among the Ishan further west,) in which a couple may start by living apart-each among their own family - though a man who is very fond of his wife might prefer moving over to her family, while one who is not in a financial position to pay for his wife's hand in marriage by cash and so has to discharge his obligations by labour services, may have to do the same if only to save himself long journeys to and from his wife's family. This will be discussed in a little more detail shortly. There is also in this area what we have called concubinage above (following Esenwa). This latter is not marriage. The

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8. Talbot, Peoples of Southern Nigeria, Vol.III, p.425.
9. Elias, Groundwork of Nigerian Law, summarising Thomas, Law and custom of the Ibo of the Asaba District, Pt. IV, Ch. IV.
10. Isamu gbein. See Williamson, ante, p.57.
11. Peoples of Southern Nigeria, Vol.III, pp.440-1.

former may be 'trial marriage' or 'residence according to convenience,' but not matrilocal marriage.

Williamson himself says that the periwinkle-throwing marriage is now obsolete. Even if it were not, it is not really a 'type' of marriage but just a method of initiating proceedings for a marriage relationship: viz by throwing a perwinkle on a pregnant woman's belly, thereby declaring an intention to marry the child in the womb for oneself or one's infant relation if it turns out to be a baby girl. On the same footing is 'exchange marriage.' This, too, was not a different type of marriage - just a convenient made of paying for marriage without the use of money: A gives his sister or other kinswoman in marriage to B in return for B's own sister or kinswoman.

Next, Moslem marriage. Whatever the arguments for and against classifying this as a separate type of marriage in general, there seems no point in doing this in respect of southern Nigeria. For as we have seen, that two Moslems in these societies contract a marriage according to Moslem rites does not involve them in a relationship which is intrinsically different in substance or in legal incidents from marriage under the local customary law of the parties.[12]

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12. In re Alayo, ante; Lloyd, Yoruba Land Law, p.27, f.n.1. For this reason, Kasunmu's interesting treatment of the incidents of Moslem marriage (pp.95-6) would seem out of place in Yoruba law.

Again there is an institution known among some Edo-speaking peoples as the Arewa (or arhewa)[13] and among the Western Ibo as the Idegbe[14]. This may be described as the status of a woman who remains unmarried in her deceased father's compound with the object of raising sons (or other children) who would then succeed to her father's property. But as Bradbury says, there is no evidence that she is married to any one man.[15] We may add that the very idea of an arewa or idegbe implies the absence of a marriage, lest there be doubts or disputes as to the affiliation of any children born to the woman concerned. These, too, will be excluded in our classification and more detailed study of customary marriages in southern Nigeria.[16]

In our submission, therefore, there is only one type of customary marriage in the bulk of southern Nigerian societies, i.e. among the Yoruba, the Ibo, the Ibibio

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13. E.g. the Ishan: Bradbury and Lloyd, op.cit., p.8; Thomas, in (1910) 10 J.A.S., ante, pp. 7-8:- Bradbury's and Thomas's spellings.

14. Rowling, Notes on Land Tenure in Benin... (1st edn.), para.99.

15. Bradbury and Lloyd, ante, p.80. Cf. 'wife of the village' among the Lele of Kasai (per Tew) in Phillips' Survey, p.90.

16. This elimination process is not a criticism of the writers referred to above. It only serves to underline the basic difference in approach and emphasis between anthropologists, sociologists, historians and lawyers writing on social institutions.

(including the Annang and the Efik) and the Ekoi (Yako). In these places, customary marriages are indeed contracted in a wide variety of ways as regards preliminary procedures, marriage ceremonies and what may be called inductio in domum (a form of 'giving away'). But the end product, the resulting marriage as an institution, is the same in kind and in legal incidents in all these cases. A classification of customary marriages in these socieities on the basis of such procedural differences would be as barren as a classification of 'Christian' marriages according as they are contracted

(a) by civil rites before a Registrar, an embassy official in a foreign country, or an officer in one of the armed forces; or

(b) by religious rites before a priest of one of the numerous Christian sects in the country or before a chaplain in the armed forces; and in each case, according to whether or not there was a formal proposal of marriage, and if so by which of the parties.[17]

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17. ~~Though~~ These procedural differences do not make the resulting marriages different in kind, but they could be of some legal importance. E.g. the locus celebrationis, status of the person officiating and form of words used would be relevant facts in proving or disproving the existence of a marriage in doubtful cases; whether or not there was a formal proposal and by whom could be vital in an action for breach of promise where the very existence of a promise to marry is in issue.

In the other societies of southern Nigeria, viz. among the Ijaw, some Edo and some Ibo-speaking peoples of Western Nigeria, there are two types of customary marriages. These are known by such vernacular terms like iya and igwa (Kalabari Ijaw)[18], ya or yaa and igwa or egwa (Okrida Ijaw)[19], amoiya, amoiia or ami and isomi, isoma or osi (Edo-speaking peoples)[20]. In this discussion, however, we shall adopt the popular (but by no means accurate) terms 'big dowry' and 'small dowry' marriages.[21] In the former, the wife becomes a full member of her husband's family (insofar as this is possible under customary law), is under a legal duty to cohabit with and perform all the usual domestic services for him, and her children belong as of right to his family group. In a 'small dowry' marriage, on the other hand, a wife need not live with her husband or cook for him (in the absence

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18. See Talbot, Tribes of the Niger Delta, pp.189ff.

19. Talbot, ibid., p.193; Talbot, The Peoples of Southern Nigeria, Vol.III, p.437; Williamson, 'Changes in the marriage system of the Okrika Ijo' (1962) 32 Africa, at pp.55 and 56.

20. Thomas, 'The Edo-speaking peoples of Nigeria', (1910) 10 J.A.S. esp. at p.5; Thomas, 'Marriage and Legal Customs of the Edo-speaking peoples of Nigeria' (1910-11) 11 J.Comp. Leg. (n.s.), p.95; Thomas, Anthropological Report on the Edo-speaking Peoples of Nigeria, p.47; Bradbury and Lloyd, The Benin Kingdom and the Edo-speaking peoples of South-Western Nigeria..., esp. p.80

21. Talbot, The Peoples of Southern Nigeria, p.437; Hubbard, The Sobo of the Niger Delta, p.191. It should be noted that the correct name for the last-named people is now Urhobo, the old term 'Sobo' being now reprehensible to them.

of a 'buying the mouth' ceremony, of which more below); nor has he a legal right to any of her children by him.[22]

Essential requirements for valid customary marriage.

The essential requirements for a valid customary marriage may be classified under four broad heads. These are (1) consent, (2) capacity, (3) bride price or dowry and (4) formal giving away. Let us examine these in turn.

(1) Consent

Under this head will be discussed first family (or parental) consent and secondly consent of the prospective spouses themselves. In the traditional society, family consent was by far the most fundamental of all these requirements. Without it bride price could not properly be paid, since any such payment must be made to the family and not to the bride herself. Obviously too the formal giving away of a bride could only be properly done by or with the approval of her family. In normal circumstances family consent made up for the spouses' want of age; in extreme cases it dispensed with the consent of an infant bride, who could be given in marriage to a bridegroom of her family's choice - her objections and entreaties notwithstanding. Again, in the traditional society 'family consent' was a complex notion.

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22. See Hubbard, ante, and the other references above.

For it could mean consent of the family council (as where the prospective spouse occupied a special ritual or chiefly position in the family), consent of the family head and of the spouses' own parents, or consent of such parents only.

In modern society, family consent is still of great importance; but it has become less complex and can even be dispensed with in certain circumstances. As a rule, 'family consent' is now conterminous with 'parental consent', 'parental' being used here to include any person, such as a guardian, who is in loco parentis to the prospective spouse. The person who is de jure entitled to give or withhold this consent is the father of the spouse concerned. But an increasing number of widows now exercise what may be called a de facto right in connexion with their daughters' and infant sons' marriages. As these cases do not come before the courts, it is impossible to say at this stage whether or not a mother alone can now validly give the necessary consent to her children's marriage under customary law. As for the wider family, their consent is no longer sought or required as a general rule. A father may still consult his wider family or its head before he gives or withholds consent to his children's marriage; but this he now does as a matter of courtesy, and not because he has to do so.

Parental consent can be dispensed with in two sets of circumstances. In the first place, an adult male has a right, as we have seen, to conduct all the necessary negotia-

tions for his marriage without the knowledge - to say nothing of consent - of his parents or family,[1] though this right is seldom exercised. In the second place, in those societies wherein the Marriage, Divorce and Custody of Children Adoptive Bye-Laws Order, 1958, of the Western Region is in force, it is now possible to circumvent one's parents if they prove unco-operative. This is because s.5 of the Bye-Laws provides:

> 'When any parent or guardian of a bride refuses his or her consent to a marriage or refuses to accept his or her share of the dowry, the bride, if she is eighteen years of age or above, and the bridegroom jointly may institute legal proceedings in a competent court against the parent or guardian to show cause why he or she should refuse consent or to accept his or her share of the dowry; and if the court is of the opinion that no sufficient cause has been shown, it shall order that the marriage may proceed without the consent of such parent'.

This section raises a number of interesting points. First it only speaks of 'the bride'. Does this imply that the bridegroom has no corresponding right of action; if so, why? Or does it imply that men have enough freedom of

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1. In re Papara, ante, Osborne C.J. said, 'I am unable to accept the proposition ... that the consent of a man's family is a legal essential to his marriage'. (At pp. 607-8).

action to require no help from the legislator in this respect? Secondly, the right of action is given to the prospective spouses jointly, and not to the bride independently. This may be construed as a recognition of the old customary rule that women acting alone had no locus standi in a court of law. At the same time, it deals a serious blow to the principle of family solidarity and representation in civil litigation. Thirdly, it would appear to pave the way for the eventual acceptance of a dowry-free customary marriage, by providing that 'the marriage may proceed' in the absence of a recalcitrant parent's consent, without at the same time providing that the maximum permissible sum of £17. 10s. payable to parents under Schedule A should be paid into court, for instance. It would be but a short step from dispensing with payment of bride price to reluctant parents, to dispensing with such payments in all cases. Finally, there is no indication in the Bye-Laws how the proposed marriage could be made to proceed in practice if, as seems almost certain in these circumstances, the bride's parents and family refuse to co-operate in any way whatever. The answer would perhaps lie in the insertion of a new section authorising a Customary Court President, for instance, to take the place of the bride's parents for the purposes of

the marriage in question.[2]

The consent of the spouses themselves was not essential in the traditional society. But since it must have been realised quite early in the history of marriage that making an unwilling horse drink was child's play compared with making a wife out of an unwilling bride, it was common practice to consult the wishes of the bride-to-be as well as those of the prospective husband before any bride price was asked for or paid, except of course where either spouse or both were too young to be thus consulted,

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2. On parental consent, see Thomas, Anthropological Report on the Ibo-speaking Peoples of Nigeria, Part I, p.62; Forde and Jones, op. cit., pp.17-18; Meek, Law and Authority...., p.268; Wieschhoff, 'Divorce laws and practices in modern Ibo culture' (1941) 26 J.Negro Hist., p.299; Esenwa, loc.cit., p.74; Talbot, In the Shadow of the Bush, p.107; Elias, Groundwork, p.287; Ajisafe, op cit., pp.52 and 59; Ward, op.cit., p.21; Partridge, loc.cit., p.423 and 425; Omoneukanrin, op.cit., p.43; In re Sapara, ante, pp.607-8; Coker, op.cit., p.233; Welch, 'The Isoko Tribe' (1934) 7 Africa p.171; Johnson, opcit., p.114; Ellis, op.cit., p.185; Kasunmu, op.cit., pp.6 and 53; D.A. Talbot, Woman's Mysteries...., pp.89-90, an out-of-date account, this.

in which case they only ratified the arrangement later.

In modern society, it is the invariable practice to ask for the prospective spouse's consents to the proposed marriage even where, as often happens, they are both still in an educational institution and the marriage is financed by their parents or guardians. Most marriages in fact start with an agreement between the spouses, their parents being later informed of this and asked for their consent. In this connexion it should be noticed that it would be a criminal offence to take away or detain or cause a female person of any age to be so dealt with against her will, even where marriage is the object of the exercise. This is the result of s.361 of the Nigerian Criminal Code which provides, in part, as follows -

> 'Any person who, with intent to marry ... a female of any age, or to cause her to be married ... by any other person, takes her away, or detains her against her will, is guilty of a felony and is liable to imprisonment for seven years.'

This section was apparently designed to punish persons who were guilty of what is sometimes referred to as marriage by capture. But there is no reason why a person should not be found guilty of this offence if he takes away or detaines a girl against her will under the pretext of a marriage transaction between him and the girl's family, the latter being guilty of aiding and abetting him.

Finally, it should be recalled that parental consent was never required for the remarriage of a widow within her late husband's family. It is not infrequently said that the consent of the widow herself was not required in the past, as she was merely inherited, not remarried. This is a doubtful proposition at any age. It is completely untrue in the modern age. (See the section on 'widow inheritance' below).[3]

(2) Capacity.

As an essential requirement for a valid marriage, capacity has two aspects. These are (a) capacity to marry on the part of each prospective spouse considered as an individual, and (b) capacity to inter-marry; in other words capacity to marry each other. Under customary law,

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3. On consent of the spouses themselves generally, see Basden, Among the Ibos, pp.69-70; Basden, Niger Ibos, pp.214ff, Thomas, Anthropological Report on the Ibo-speaking peoples, Part I, p.62; Ekeghe, op.cit., p.46; Esenwa, loc.cit. p.73; Talbot, Tribes of the Niger delta, p.184; Talbot, Peoples of Southern Nigeria, Vol.III, pp.455-455 passim; Cotton, loc.cit., p.427-8; Talbot, In the shadow of the bush p.110; Partridge, Cross River natives, p.254; Delano, op.cit., p.121; Ward, op.cit., pp.17 and 44; Folarin, op.cit., p.17; Bradbury and Lloyd, op.cit., p.48; Coker, op.cit., p.233; Welch, loc. cit., p.171; Temietan, loc. cit., p.76 ; Ellis, op. cit, p.185; Thomas, Anthropological report on the Edo-speaking peoples, p.59.

both these aspects are governed by the parties' personal laws. (A man's 'personal law' may be defined as that which derives from his membership of a given ethnic group; which determines his status in society; and which regulates his domestic relations as well as his right to acquire or transmit rights and duties at death, by virtue of his membership of the said society.)

(a) Capacity to marry.

At customary law [1] a person lacks legal capacity to marry either because he is under age (Eastern Region only), or because there is a 'Christian' marriage subsisting between him and a third party. Section 3 (1) of the Eastern Region's Age of Marriage Law, 1956, stipulates 16 as the minimum age at which a person can lawfully marry or be given in marriage -

'A marriage ... between ... persons either of whom is under the age of sixteen shall be void'. Section 4(2) provides that ignorance of the parties' age shall be no defence unless the accused can prove that 'he took reasonable steps to verify the ages of the parties to the marriage'.

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1. As modified by statute.

And s.6(1) says that no court shall have jurisdiction to hear any action based on a marriage which contravenes this Law, while s.6(2) provides that no court shall take cognizance of any marriage avoided by this Law. This section, however must not be construed literally. For one thing the courts must assume jurisdiction where an action is based on an alleged marriage, if only to settle the preliminary issue of the validity or otherwise of such marriage. For another, the proviso to s.3(1) provides that it shall be a good defence to sundry charges under the Criminal Code (viz. ss.218, 221, 222 and 360 which create and provide penalties for sexual offences to show that, on the strength of a marriage avoided by this Law, the accused honestly believed that the woman concerned was his wife.

This law, therefore, effects a substantial alteration in the customary laws of the Eastern Region on the point. Those laws were all agreed on this that neither tender age nor extreme old age was an impediment to marriage, though as a rule people did not in fact complete the marriage process until the bride had attained the age of puberty. Today, while there is nothing in law to prevent a centenarian from marrying a girl of 16, and vice versa, any attempted marriage between two fifteen-year olds would be both void and criminal.

There is no legislation yet in the Western Region or in Lagos corresponding to the Age of Marriage Law of

the Eastern Region. The customary law in these areas, therefore, remains as already indicated: age per se is no impediment to marriage, though people normally marry at puberty or later.[2]

Since customary law allowed polygyny, the subsistence of a marriage with a third party was not a disability for a man (though it was for a woman, polyandry not being recognized by the law). This is still the position as regards subsisting customary marriages: these are no impediment in law (as opposed to economics) to further customary marriages. But among Moslems, the rule is that a man is entitled to have four wives (not counting concubines) at any one time. A Moslem is, therefore, legally incapable of taking a fifth wife, his four previous Moslem marriages still subsisting. Anyone who has contracted a 'Christian' marriage[3] - either under the Marriage Act

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2. On the customary law relating to marriage age, see: Bradbury and Lloyd, op.cit., p.48; Folarin, op.cit. pp.17 and 23; Ajisafe, op.cit., p.61; Elias, Groundwork, p.287; Williamson, loc.cit., p.54; Talbot, Peoples III, p.441; Green, Ibo Village affairs, p.156; Basden, Niger Ibos, p.215.

3. But see the difficult case of Asiata v. Goncallo (1900) I.N.L.R.42, where the full Court held that as Lagos was not a Christian country, the deceased who was a Moslem and was domiciled in Lagos had a legal right to marry B and C by Moslem rites even if his first Christian marriage wife was still alive. More of this later.

within Nigeria, or under the legal system of a country that only recognises monogamy - becomes ipso facto incapable of contracting any other marriage (customary or otherwise) during the currency of the said Christian marriage. S.35 of the (Federal) Marriage Act provides inter alia -

> 'Any person who is married under this Act, or whose marriage is declared by this Act to be valid, shall be incapable, during the continuance of such marriage of contracting a valid marriage under native law or custom ...'

S.48 provides a penalty for contravening this section thus:

> 'Whoever, having contracted marriage under this Act, or any modification or re-enactment thereof, or under any enactment repealed by this Act,[4] during the continuance of such marriage contracts a marriage in accordance with native law or custom, shall be liable to imprisonment for five years.'

Obviously then, no one who has an existing Christian marriage can lawfully take a second wife under customary law anywhere in Nigeria, since the Marriage Act is country-wide

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4. I.e. Cap. 95 of the Laws of Southern Nigeria, 1908 edition; and No. 6 of 1913, Laws of Southern Nigeria (foreign marriages).

in its application.[5]

(b) Capacity to inter-marry.

Under this heading we shall consider the question of prohibited degrees of relationship, status bars and the position of strangers (including 'native strangers' as defined in the statute books). It is impossible to formulate any rules regarding prohibed degrees, which will hold for all societies in southern Nigeria. It will, therefore, be necessary to state the law for each of the major ethnic groups insofar as this is possible on available evidence.

The EKOI (YAKO)

In the words of Talbot, 'There are practically no marriage restrictions among this people ... It is not even forbidden by native law for half-brothers and sisters to marry, though cases of this kind are extremely rare'.[1] This point is also made by Bystrom in relation to the Ekpara-bong. 'No marriage restrictions exist in the clan,' he says, 'and a man may marry any woman of the same tribe

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5. On the effect of subsisting marriage, see: Lewin, "Some legal consequences of marriage by native Christians in British Africa" (1939) 3 M.L.R. p.48; Asiata v Goncallo, ante; and Onwudinjoh v. Onwudinjoh (1957) II E.R.L.R.1.

1. In the Shadow of the Bush, p.110.

or of another, even a half-sister.'[2] Forde went a little further when he said of the people of Umor, "Cross-cousin marriage with the father's sister's daughter ... is regarded as desirable and praiseworthy."[3] It may, therefore, be said that the only degree of relationship which acts as a legal bar to marriage in these societies is that between full-brothers and sisters.

The EDO (including the Bini, the Ishan, the Urhobo and the Isoko)

The fullest and perhaps clearest statement of the rule partaining to prohibited degrees among the Edo was made by Thomas as long age as 1910. 'Over the whole area occupied by the Edo-speaking people', he said, 'the ordinary rule of prohibited degrees is that a man may not marry a woman who belongs to his father's or his mother's family.' Any recognised family relationship is a bar, he says.[4] But there is no indication what constitutes a 'family' for this purpose. The general rule, however, appears to be that inter-marriage is forbidden between blood relations.

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2. 'Notes on the Ekparabong clan' (1954) III Orientalia Suecana, part 1, p.7.
3. 'Double descent in a Nigerian Semi-Bantu community' (1937) 37 Man, p.66.
4. Anthropological Report on the Edo-speaking peoples of Nigeria, p.61.

below the fifth degree, but is allowed after that point even within the same extended family as above defined. As a Bini writer put it, 'Within the same family inter-marriage is allowable from the fifth generation, or 'ghabiona', onwards.'[5] This general rule is sometimes relaxed to permit marriage between a man and his paternal half-sister where this is particularly desirable on other grounds.[6] On the other hand, it is illegal for any man to marry two full-sisters concurrently, the King of Benin apart.[7]

IBIBIO-SPEAKING PEOPLES (including the Annang, the Ibibio proper and the Efik)

The general rule here is that marriage is not permitted between persons who are known to be related by blood in any traceable degree.[8] But to this rule there are exceptions in a number of societies, notably among the Annang and the Efik. The prohibition is only strict in Efik Law as between members of the same extended family; between cousins; between a man and his wife's mother, sister or

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5. Egharevba, Benin Law and Custom, p.12.
6. 'The Edo-speaking peoples of Nigeria' (1910) 10 J.A.S.; p.8.
7. Egharevba, ante, p.20.
8. Talbot, Life in Southern Nigeria; the magic beliefs and customs of the Ibibio tribe, p.204.

daughter; and between a man and his brother's wife.[9] The ban on marriage between a man and his brother's wife is said to extend to half- as well as full-brothers, and to divorced as well as deceased brothers.[10] Among the Annang, the general rule is said to be relaxed to the extent that "a man could wed his cousin once removed."[11]

ITSEKIRI

As among the Ibo, marriage is forbidden under Itsekiri law between persons who are related by blood, however remote the relationship- provided only that it can be traced or that there is a tradition (even if legendary) to that effect.[12]

IBO, IJAW and YORUBA

The law relating to prohibited degrees of relationship among the Ibo, the Ijaw and the Yoruba is so similar that we feel justified in treating these peoples together. Of the

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9. Forde (ed.), Efik Traders of Old Calabar (based on the diary of Antera Duke, with D. Simmons and G.I. Jones as the other contributors), p.14. See also Simmons, "Sexual life, marriage and childhood among the Efik", (1960) 30 Africa, part 2, p.161.
10. Footnote 9 supra. See also section on "Widow Inheritance".
11. Talbot, Peoples of southern Nigeria, Vol.III, p.717.
12. Omoneukanrin, Itsekiri Law and Custom, p.46.

Yoruba, Ellis says that "Marriage is forbidden in the same blood; and as descent is traced on both sides of the house, it is consequently forbidden both in the father's and mother's families, as far as relationship can be traced".[13] But the author's later statement that "As a rule relationship does not seem to be traced further than second-cousins ..." must not be construed as meaning that marriage is allowed by the law after that degree of relationship. For reputed relationship is usually as effective a bar as relationship that can actually be traced on a genealogical tree.

The Ibo rule is succinctly stated by Ardener who says that a man "is prohibited from marrying any woman who has any traceable blood relationship with him".[14] (The term "traceable" as used here and elsewhere in the present section is not a term of art. Relationship is "traceable" if, inter alia, a person's paternal or maternal ancestor is known to have descended from a given extended family, even if it is now impossible to state his relationship to any members of that family in terms of uncles and aunts and cousins. Also relationship is frequently regarded as "traceable" even if it is only reputed to be so). As Folarin graphically put the

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13. The Yoruba-speaking Peoples of the Slave Coast of West Africa, p.188.

14. "The kinship terminology of a group of Southern Ibo" (1954), 24 Africa, p.95.

matter in connexion with the Yoruba, "Prohibition of marriage takes place[15] as between ... people with a taint of blood relationship in their veins."[16] On this point, it must be warned that Basden's statement that "In proper marriage, consanguinity up to eight or ten generations is nso (forbidden)" does not imply that marriage is permissible after the tenth generation.[17] The phrase "eight or ten generations" only serves as an illustration of the extraordinary tenacity of this type of relationship among the Ibo, and the sweeping nature of the prohibition.

Affinity (i.e. relationship by marriage) also plays a part in our marriage laws; pace Ellis who says, "Relationship by affinity has not yet been invented, and a man may marry two or more sisters, aunt and niece, and even mother and daughter, but the last unions do not often occur."[18] Thus Ward said of the Yoruba that a man may not marry two full-blood sisters concurrently or even consecutively, though he may marry two sisters born of the same father but by different mothers - a rare occurence.[19] It is true that there is a space of forty-one years between the publication of Ellis's

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15. I.e. exists.
16. Op. cit., p.23.
17. Niger Ibos, p.215.
18. Op. cit., p.188.
19. Ward, Marriage among the Yoruba, pp.18-19.

book in 1894 and that of Ward's in 1937; but it is unlikely that the rule given by Ward had been "invented" in the intervening period. Of the Ibo, Thomas says that a man may not marry either in his wife's family or in her mother's family, except that two sisters may be married to the same man, "usually, however, only in succession".[20]

There is an interesting process whereby blood relationship is severed under Ijaw, Itsekiri and Ibo laws. The actual ceremony varies from society to society, ranging from the offering of sacrifices to the ancestral deity of the woman's family (as at Ihiala) to a symbolic cutting of the relationship in parts of Owerri and Onitsha Divisions.[21] This devise is sometimes used to facilitate marriage between two distant relations where this is known to exist before the intended marriage. But more frequently it is used to validate an otherwise void marriage which was entered into in ignorance of the existence of any blood relationship. In the latter case, it operates retrospectively.[21A]

As exceptions to the general rule in the Eastern Region, it should be noted that among the Aro, the Ututu and the Ihe,

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20. Anthropological Report on the Ibo-Speaking Peoples of Nigeria, Part I, p.69.

21. On the Ihiala people, see Talbot, Peoples of s. Nigeria, Vol.III, p.716.

21A. On the Itsekiri, see Omoneukanrin, op. cit., p.47.

marriage with very distant relations (including nieces but not cousins) is said to be permissible.[22] At Elele and Aro, it is said that people "may marry even in the same compound, provided the parties have neither the same father nor mother".[23]

Status Bars

In the traditional society there was in most places a prohibition on inter-marriage between slaves and free citizens, the definition of "slaves" in this respect including persons of slave descent. This status ceased to operate as a cognizable legal bar to inter-marriage with the passing of the emancipation statutes of the late nineteenth and early twentieth centuries. But the social stigma remained, so that among the Ibo of the Eastern Region, for instance, the words "osu" and "oru" (or "ohu" according to dialect) which denote slaves belonging to the gods and those belonging to human beings respectively, acquired particularly sinister connotations. In 1956 the Eastern Region parliament passed the Abolition of the Osu System Law. Section 3 solemnly declares that "... the Osu System is hereby utterly and for ever abolished and declared unlawful." By section 6 -

22. Talbot, Peoples of southern Nigeria, Vol.III, p.717.
23. Talbot, Tribes of the Niger Delta, p.189.

"Whoever on the ground of the Osu System enforces against any person any disability whatsoever and in particular, but without prejudice to the generality of this section, with regard to -
(1) marriage;
.....
is guilty of an offence ..."

By section 10, it is an offence to abet the commission of an offence under this Law, "whether the offence is actually committed or not." The significance of s.6 for our present purposes is that it would be a punishable offence for a parent to refuse to give his son or daughter in marriage to a suitor (or female applicant) on the ground that the said suitor or applicant is a person of slave descent. The effect of s.10 is to render punishable any attempt, whether successful or not, on anybody's part to persuade another not to marry or give his child/ward in marriage to a third party on the ground that the third party concerned is a person of slave descent.

The legislature obviously then had the best of intentions. Unfortunately, however, they not only provided the wrong remedy but also, in our submission, left the right of redress in the wrong hands. To create discrimination against an osu or an oru into a criminal offence could, other things being equal, be an effective way of combating the evil. For

one thing, it would make it possible for the offender to be brought to justice without any cost to the person directly injured by his conduct. For another, the fear of a court trial and possible term of imprisonment is often a good deterrent. But these two points are in fact the major weaknesses of this legislation. Because responsibility for bringing the offender to trial is taken away from the injured party and given to the Police, there is not much certainty that the prosecution will be diligently prepared and resolutely pursued. Again the fact that the accused person faces a possible jail sentence would tend to make the Court lean in his favour. It is a notorious fact that the Courts tend to construe penal legislations strictly where this would be in the interest of the accused. It is also common knowledge that the onus imposed on the prosecution in a criminal case is considerably higher than that which lies on a plaintiff in a civil action. A prosecution under s.6 or s.10 of the Law under discussion could therefore easily fail where a civil action founded on the same facts would have succeeded. Hence our earlier remark that the Law provided the wrong remedy. It is submitted that a better approach would have been to make any act of discrimination - including incitement thereto and abetting thereof - a civil wrong analogous to

what is known in the general law as "slander actionable per se", with a provision that punitive damages could be awarded, and a broad hint that they should - wherever the circumstances are right.[23A]

The only other points worth a passing mention in this connection are the fact first that in the past there were many societies in which it was unlawful for people to marry non-members of their community, usually the town or a group of towns reputed to have descended from a common ancestor. But this is no longer a legal bar, though it still operates to a considerable extent as a social bar. Secondly, there are still said to be places where socio-political heads, that is Kings and Chiefs, are not allowed to take wives (especially their first wives) from strange parts.[24]

Position of strangers

As already indicated, the old ban placed by our customary laws on inter-marriage between members of different

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23A. For an unsuccessful attempt to make allegation of osu slander actionable per se, see Nwachukwu v. Nnoremele (1957) II E.R.L.R.50.

24. On status bars generally, see Basden, Niger Ibos, p.258; Forde and Jones, op. cit., p.23; Green, Ibo Village Affairs, p.158; Arikpo, "The end of Osu?" West Africa for April 21, 1956, p.201; Horton, "The Ohu system of slavery ..." (1954) 24 Africa, p.317; Leith-Ross, "Notes on the osu system ..." (1937) 10 Africa, p.207; Talbot, Life in southern Nigeria, p.204.

ethnic groups (or even parts of the same ethnic group) has now disappeared, except perhaps as regards the heads of certain ruling Houses. But the superior courts have now established a rule to the effect that a non-Nigerian has no legal capacity to contract a customary marriage with a Nigerian. In this connexion it is immaterial that the non-Nigerian is actually domiciled in Nigeria.

In Savage v. Macfoy[25] a man who was born in Freetown of liberated slave parents had come to live and work in Lagos, where he also went to school. He later went through a process of marriage with a Lagos Yoruba girl in accordance with Yoruba rites, having obtained the consent of the girl's parents and paid the ano and other traditional dues. The girl was formally "given away" to him and ceremonially conducted over to the matrimonial home by members of the girl's family. In an action by this woman, now widowed, to establish her right to administer her late husband's estate, as his widow, Osborne, C.J., held that she was not the deceased's widow as claimed, for the deceased had no legal capacity to contract a valid customary marriage with a Yoruba

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25. (1909) 1 Renner's G.C. Rep.504. In view of the later definition of "native" as including "native foreigners", i.e. persons of African descent, the decision in this case is perhaps no longer good law. See s.3 of the Interpretation Act.

of Lagos. He lacked capacity, said the learned Chief Justice, because "he came from Sierra Leone where polygamy is unlawful." Mere adoption of a Lagos domicile, he said, did not confer on the deceased the capacity to contract a customary marriage.[26] The plaintiff's marriage with him was therefore void ab initio.

A similar decision was made fifty years later by Hedges J., in Fonseca v. Passman.[27] In that case, a Portuguese had come to Nigeria in 1924, and had "married" an Efik girl in accordance with Efik customary law, in 1926. At the time of the marriage, he was domiciled in Portugal. At his death intestate, his Efik "widow" took out a summons to determine whether she or the deceased's creditor was entitled to letters of administration. The learned judge held that it had not been proved that the deceased was domiciled in Nigeria, and continued -

> "In my view it is clear law that a European, domiciled in the country of his nationality, cannot contract a valid marriage in accordance with native law and custom in Nigeria."[28]

The learned judge then went on to say, obiter, that even if

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26. (1909) 1 Renner's G.C. Rep.504 at p.508. In view of the later definition of "native" as including "native foreigners," i.e. persons of African descent, the decision in this case is perhaps no longer good law. See s.3 of the Interpretation Act, p.508.
27. (1958) W.R.N.L.R.41. Savage v. Macfoy was not cited in this case.
28. Ibid., at p.42.

the deceased had been domiciled in Nigeria, he still could not contract a valid customary marriage. (In view of the learned judge's finding that the deceased man was not domiciled in Nigeria, this latter statement could be no more than an obiter dictum, and this the court made quite clear, at p.42.)

The law as it emerges from these two cases may be summed up as follows. No person, whether merely resident or actually domiciled in Nigeria, has legal capacity to contract a valid marriage in Nigeria with a Nigerian and in accordance with the customary law of any Nigerian society, if in his country of origin he was subject to a system of law which enjoins monogamy on its citizens.[29]

It would be interesting to speculate on what difference it would make, if any, on the Court's attitude if the person concerned had become a registered Nigerian citizen under the Nigerian Citizenship Act of 1960.[30] But this point must await judicial decision.

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29. Cf. on this point the English court decision (per Stirling, J.), in Re Bethell (1888) 38 Ch.D. 220, where it was held that a purported marriage between an Englishman and a Baralong girl in Bechuanaland according to Baralong customary law could not be recognized in England.

30. As amended by the Nigerian Citizenship Act, 1961. (No.9 of 1961). See also Cap.43 of the W. Region, 1959 Revision.

(3) Bride Price or Dowry

The third essential for a valid customary marriage is what is sometimes called "bride price" and at other times "dowry". As used in both legal and popular language in Nigeria, these two terms are interchangeable. "Dowry" is defined in s.2 of the Marriage, Divorce and Custody of Children Adoptive Bye-Laws Order, 1958, of the Western Region in these words -

> "'Dowry' means a customary gift made by a husband to or in respect of a woman at or before marriage".

Two minor points call for a word of comment here. Contrary to the suggestion implied in this section, the dowry need not be paid by the husband, being sometimes paid by his parents, guardian or even employer. The definition should, therefore, be read as if the words "or on behalf of" were inserted immediately after the word"by". In the second place, a dowry is not necessarily a gift. Its payment is enforceable in a court of law. (There is, however, nothing wrong in the insertion of the words "to ... a woman" in the definition: as we shall see presently, part of the dowry is due and payable to the bride herself in some societies, especially in the Western Region).

Section 2 of the Limitation of Dowry Law, 1956, of the

Eastern Region has a somewhat similar definition, which reads:

> " 'Dowry' means any gift or payment, in money, natural produce, brass rods, cowries or in any other kind of property whatsoever, to a parent or guardian of a female person on account of a marriage of that person which is intended or has taken place."
>
> " 'Incidental expenses of marriage' means customary gifts or payments, other than dowry, made or incurred on account of a marriage, before, at the time of, or after that marriage."

The words "any gift or payment" in this definition appear, on first reading, to suggest that any gift or payment at all which passes from a husband or his family to his wife's parent or guardian (including Christmas presents and payments for sales of goods, for instance) come within the meaning of "dowry". But this is not the case. For "any gift or payment" is governed by the operative phrase "on account of a marriage". Not all gifts or payments are made "on account"; and only those which are, in fact, so made form part of the dowry. In the same way, the words "gifts or payments" in the definition of "incidental expenses" are governed by the phrase "on account" as well as by the important word "customary".

In the traditional society, the dowry was paid partly in the form of labour services rendered by or on behalf of a

husband to his wife's parents, guardian or family generally. It started long before the actual marriage took place as a rule, and continued right into middle age and beyond. Hence the common saying that "a woman's dowry is never finished" which being translated into English (!) means that the dowry on a woman is never paid off completely, being in the nature of a perpetual debt. In modern society, the dowry is paid in cash and kind, either in one lump sum or by sporadic instalments.

It is worth noting that until the recent legislations controlling the quantum of bride price payable, and even now in those places in the Western Region where the Marriage, etc. Adoptive Bye-Laws, 1958, are not yet in force - to say nothing of the many places and occasions when the statutory limitations are conveniently forgotten by all concerned, in both Regions - the quantum of bride price payable is fixed in each case by individual bargaining. Where in the past the circumstances were such that the husband was not likely to be in a position to make the usual periodic payments in money and in kind, and to be on call in cases of family hardship involving his parents-in-law (e.g. where he lived a long way away from his wife's family), the dowry was computed at a correspondingly

high figure. This, incidentally is one of the chief causes of the sharp rise in bride price which occurred during the war years, 1939 to 1945 (availability of large quantities of currency was another): many bridegrooms were away on active service and so obviously not in a position to do the customary labour services or even make the necessary periodic gifts of food-stuff and livestock. They certainly could do any of these things by proxy. But so few able-bodied young men were available locally for this task that in many cases it just was not practicable. It was, therefore, in the interest of all concerned that the payments in kind and any labour services due should be converted into cash payment; and this was usually done.

Though the bride price is an essential element in a customary marriage transaction, it is perfectly proper for the bride's parents or guardian to waive it so that nothing is actually paid. Cases of waiver - which by the way are not of modern origin - are extremely rare even among the most progressive elements of today. Most people prefer to honour the letter of the law while evading its spirit. (It should be noted that the payment of bride price as well as the quantum thereof has considerable prestige value for the bride concerned and her family - hence the use of the word "evade" here). The most direct method of evasion, and one that is

seldom ever adopted, is for a man to make available to his son-in-law sufficient funds to cover the agreed dowry and incidental expenses. This is done in private. The fund is then paid back to its original owner, this time in public, as dowry for his daughter! But by far the most common devise is for the father (or guardian) of the bride to ask for and receive full payments from his son-in-law in the normal way, and then give it all back - and more besides - to the new couple by way of a trousseau.

But whatever the devise adopted, the point of legal interest is that payment of the dowry can be waived, and that a waiver is as good in law as a full payment.

Quantum of Bride Price

As we have seen, the maximum amount of bride price now payable in the Eastern Region is £30.[31] In the Western Region, people are still generally free to pay or receive any sum of their choice. But in those local government areas (already listed) where the Marriage, Divorce and Custody of Children Adoptive Bye-Laws Order of 1958 has been adopted, the maximum

31. Limitation of Dowry Law, 1956, ante.

is £35 or as determined by the local government body.[32]

To Whom Payable

It is generally said that the bride price is payable to the parents of the bride. This is an over-simplification. In the traditional customary law, bride price had three unequal component parts. There was first a token gift - originally in kind, later in cash - which was made to the prospective bride herself. This may be called "proposal money". Its acceptance meant that the girl had consented to the marriage. (Where she was too young to consent, the "gift" was received on her behalf by her parents, usually her mother). Conversely, its return to the donor or outright rejection meant rejection of the suitor. It was really not a gift in the accepted sense of the word; for it was recoverable if the proceedings fell through at any stage, or in the event of a divorce (though it was sometimes waived). In some societies too, chiefly among the Yoruba, a number of payments were due to the bride herself. (See, for example, Schedule A of the Marriage etc. Adoptive Bye-Laws). Then again, in all societies there were a number of compulsory customary "gifts" made to

32. See s.3 and Schedule A: also s.15 which permits variation by local authorities of the amounts set out in the said Schedule.

the bride on a number of specific occasions or at specified intervals during the first year or so of the marriage. These customary "gifts" and payments are lumped together under the terms "incidental expenses" in the Limitation of Dowry Law of the Eastern Region,[33] and "allowances" in the Western Region Adoptive Bye-Laws, Schedule A.

No part of the dowry paid in cash is paid directly to the mother of the bride. But in practically every society, she is entitled to a portion of the payment made to her husband (or whoever is the bride's father). Similarly, maternal uncles (more generally, the maiden family of the bride's mother) are entitled to a share of the dowry in matrilineal societies and mixed-descent groups, though fathers are now said to be successfully asserting a claim to exclusive entitlement to an increasing extent.[34] Again, in strict law, the person entitled to the bride price of a "small dowry" daughter is not her father but her maternal uncle or his family, since such a child never belonged to her social father (by which is meant the husband of her mother). Finally, if a "big dowry" wife leaves her husband and re-marries to another man (this can

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33. But payments and "gifts" to parents are also included under that term.

34. Forde, Marriage and the Family among the Yako, p.45; Bradbury and Lloyd, op. cit., p.156; Hubbard, ante, p.191.

only be by a "small dowry" marriage, by the way[35]), it is the former husband, not the latter, who in strict law is entitled to the bride price of any daughter born of the "small dowry" marriage![36]

These special payments and cases apart, a father is the person legally entitled to the bride price paid in respect of his daughter. In the case of a child born of an unmarried mother, the person entitled to her bride price is her mother's father or other person in loco parentis to her.

This is no place to refute the charge that bride price is purchase price. Neither will any useful purpose be served by discussing the relative merits of the theories (a) that the object of bride price is to validate a marriage; (b) that its payment gives a husband the usual rights over his wife; and (c) that the raison d'etre of bride price as an institution is the transfer of "ownership" and custody of her children from a woman's maiden family to her husband and his family. Payment or waiver of bride price has all three effects, except, as will appear later, in matrilineal societies and in the case of "small dowry" marriages (at all events in the

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35. Cf. Williamson, loc. cit., pp.56-57.

36. Cf. Kammer, "Marriage custom of Bakana, New Calabar", (1910) 16 W. Eq. Afr. Diocesan Mag., No.196, pp.58-60.

traditional customary laws).[37]

(4) "Giving away the bride"

Our fourth and final essential for a valid customary marriage is what may be called the "giving away" of the bride, for want of a better term. This procedure is usually accompanied by festivities, the pouring of libations and ceremonies generally; hence the frequent use of the words "marriage ceremony" to describe it. But as one learned writer on Yoruba marriage law put it, "Customary marriage does not need

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37. The literature on bride price and its objects is enormous. We can only give a select list here:-

Nature and mode of payment: Basden, Niger Ibos, pp.217-8; Thomas, Anthropological Report on the Ibo, I, p.63; Ekeghe, op. cit., pp.46-7; Forde and Jones, op. cit., p.18; Meek, Law and Authority, p.271; Esenwa, loc. cit., p.76; Williamson, loc. cit., p.55; Forde, Efik Traders, p.14; Kammer, loc. cit., pp. 58-60; Cotton, loc. cit., p.428; Simmons, loc. cit., p.161; Forde and Jones (Ibibio section), p.77; Talbot, In the Shadow, p.108; Forde, Marriage ... among the Yako, p.45 ff; Elias, Groundwork, p.285; Ajisafe, op. cit., pp.53 and 56; Forde, Yoruba-Speaking Peoples, p.28; Delano, op. cit., pp.122 and 124; Ward, op. cit., p.21 ff; Partridge, loc. cit., p.425; Bradbury and Lloyd, op. cit., p.49; p.156; Omoneukanrin, op. cit., p.43; Bystrom, loc. cit., p.7; Temietan, loc. cit., p.76; Ellis, op. cit., p.182; Thomas, Anthropological Report on the Edo ..., p.48; Delano, op. cit., p.32; Kasunmu, op. cit., p.5.

Who takes it: Thomas, "Marriage and legal customs of the Edo", loc. cit., p.97; Parkinson, loc. cit., p.316; Johnson, p.114; Hubbard, p.191; Forde in African Systems of Kinship and Marriage, pp.323-4; Coker, 233.

Quantum: Basden, Among the Ibos, p.70; Talbot, Peoples of s. Nigeria, pp.438-9; Talbot, Life in s. Nigeria, p.203.

Object of payment: Ward, op. cit., pp.21-22; Forde (see last para. above); Bawden, Among the Ibos, p.71.

any particular form of ceremony in order to establish its validity. The wedding feast has a social or evidential significance, but not a legal one."[38] This statement is true of all southern Nigerian societies generally, bar the case of Moslem weddings which differ but little from "Christian" weddings.

The gist of a customary marriage ceremony, whatever its form and trimmings, is the handing over of the bride by her parent or guardian to the bridegroom or his representatives. In a number of societies, including the Ibo and some Yoruba, this "giving away" takes place at the home of the bride (or some other place of her family's choice), the bridegroom and/or his representatives going there to receive her. In other societies, the formal handing over is done in the bridegroom's place, the bride being taken there for this purpose by members of her family. Among societies in this second category are the Itsekiri, some Yoruba and the Edo-speaking peoples, including the Bini and the Urhobo.

Two further points may be mentioned in this connexion. The first is that among the Ekoi, there is said to be no marriage ceremonies of any type, a marriage being complete as

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38. Kasunmu, op. cit., p.82.

soon as the woman concerned leaves the fatting-house.[39] Even here, however, there is always a formal handing over of the bride: it would be too much to expect her to try and find her way to the matrimonial home as best she could. The other point is that the "fatting-house" method of preparing girls physically and mentally for the great task of running a home, admirable though it is, is progressively proving impracticable in the modern society and is gradually disappearing.[40]

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39. Cf. Bystrom, loc. cit., p.7.

40. On "giving away" and "marriage ceremonies" generally, see Basden, Among the Ibo, p.70; Sporndli, loc. cit., p.121; Esenwa, loc. cit., pp.73 and 76; Talbot, Peoples of southern Nigeria, Vol.III, pp.425, 439, 445 and 452; Kammer, loc. cit., p.60; Simmons, loc. cit., p.161; Elias, Groundwork, p.285; Ajisafe, op. cit., p.54; Forde, The Yoruba-speaking Peoples, p.28; Ward, op. cit., pp.21 and 50; Partridge, loc. cit., p.426; Bradbury and Lloyd, op. cit., pp.49, 80, 157; Egharevba, op. cit., p.17; Omoneukanrin, op. cit., p.42; Coker, op. cit., p.423; Welch, loc. cit., p.171; Johnson, op. cit., p.114; Temietan, loc. cit., p.76; Thomas, Anthropological Report on the Edo-speaking Peoples, p.48; Delano, An African look at marriage, p.85; Kasunmu, op. cit., pp.5 (customary) and 93 (Moslem).

Void, Voidable and Inchoate marriages.[1]

The legal effects of the absence of one or more of the essential requirements for a valid customary marriage may be classified under three main heads: A purported marriage which lacks one or more of these essentials is either void, voidable or merely inchoate, depending on which requirements are missing. These results will now be examined very briefly.

(a) Void marriages

A purported customary marriage is void ab initio in five sets of circumstances. (i) If the consent of the bride's parents or guardian to the transaction was not obtained, there could be no marriage, since in the nature of things, there would be no agreement on the payment or waiver of the bride price; neither could the bride be properly given away in marriage. (ii) A customary marriage contracted during the subsistence of a "Christian" marriage is void ab initio because of the operation of s.35 of the Marriage Act, (that is, assuming the said "Christian" marriage to have been contracted in Nigeria and therefore under the Marriage Act.[2])

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1. In strict logic, a "void marriage" is a contradiction in terms, for what is void is no marriage. Nevertheless, we use "marriage", "husband", "bride" etc., in such cases as shorthand for "purported marriage" etc.

2. Onwudinjoh v. Onwudinjoh, ante.

It is still, in our submission, an open question whether a subsisting "Christian" marriage contracted outside Nigeria would invalidate a subsequent customary marriage entered into in Nigeria. In the succession case of Asiata v. Goncallo,[3] a practising Yoruba Moslem had been taken as a slave to Brazil. There he had married A by Christian rites, having first married her by Moslem rites. He later returned to Lagos where, subsequently to the passing of the 1884 Marriage Ordinance on which the present Marriage Act of Nigeria was largely based, he married B and C by Moslem rites, his "Christian" marriage with A still subsisting. The Full Court - Griffith, J., Speed, J., and Morgan, Acting C.J. - held that the marriages with B and C were valid. Among the reasons given for this decision were that the deceased had never ceased to be a practising Moslem, his Christian marriage being no more than an exercise in social conformity; that he did not live in Brazil as a free agent but as a slave; and that Lagos in which he was domiciled at the time of his death and in which he contracted the Moslem marriages with B and C was not a Christian but a Moslem country! A liberal interpretation of this case would be that any Nigerian who has never fully given

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3. (1900) 1 N.L.R.42.

up his local religion, which is true of most Nigerian Christian converts - be they Moslems or so-called animists originally,[4] has legal capacity to contract any number of customary marriages in Nigeria during the subsistence of his "Christian" marriage, if the latter was contracted outside Nigeria. On the other hand, it is arguable that the case must rest on its own peculiar facts, and that the element of involuntary sojourn in foreign lands as a slave distinguishes that case from any that is ever likely to occur in modern times.

In Adegbola v. Folaranmi[5] we have the converse case of a Yoruba who was married under customary law in Nigeria, later contracting a "Christian" marriage in Trinidad whence he had been taken as a slave, during the subsistence of his customary marriage, and finally dying intestate after his return to Nigeria. Another Full Court - Combe, C.J., Pennington and Van der Meulen, JJ. - held that his Trinidad "Christian" marriage was valid. The Court sought to evade the question of the legal effect of the subsisting customary marriage on the subsequent Christian one, when they said -

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4. It should be noted that the deceased in the instant case was converted to Christianity while in Brazil.
5. (1921) 3 N.L.R.81.

"I think that the proper presumption on the facts is that Harry Johnson, before he contracted his marriage with Mary Johnson, considered that he and his partner to the native marriage were absolved from all obligations to one another founded on the native marriage, and that he was free to contract a Christian marriage with Mary Johnson ..... "[6]

It is obvious from the above passage that the learned Chief Justice was mistaken in thinking that a valid customary marriage could in fact be dissolved merely because one of the spouses thought it was so. As Coker said while commenting on this passage,

" it is not correct that a marriage can be dissolved by the intention of either of the parties. To dissolve a marriage, an act in law is necessary, however formal or trivial such act in law is."[7]

But even if we assume that the deceased, Harry Johnson, was justified in regarding his customary marriage as having been dissolved in the circumstances - he had lived as a slave in the West Indies for some 35 years, without hope or prospect of ever going back to his wife and his other "pagan relations",

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6. (1921) 3 N.L.R.81, at p.83, per Combe, C.J. who delivered the judgement of the Court.

7. Op. cit., p.274.

as the Chief Justice put it[8] - even if he was justified at the material time in regarding himself as "free to contract a Christian marriage" in Trinidad, his case could not be placed any higher than that of an English man of his day whose spouse had been missing for seven years and who had reasonable grounds, as later expressed by Sachs, J. in Chard v. Chard[9], for not believing her to be alive. In Harry Johnson's day (i.e. at common law, before 1937), the English man's second marriage "would be conclusively void" if it later turned out that his first wife was then alive.[10] As it happened, Johnson's customary wife was still alive both at the time of his Christian marriage and at the time of his return to Nigeria. In spite of this, and notwithstanding the common law rule referred to above, the Full Court held that his Christian marriage was valid.

If these two decisions, Asiata v. Goncallo and Adegbola v. Folaranmi are good law, the inference seems irresistible that a customary marriage contracted in Nigeria and a Christian marriage entered into outside Nigeria have no invalidating effect on each other, whatever the order in which they came into being.[11]

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8. 3 N.L.R.81, at p.84.
9. (1955) 3 All E.R.721; (1956) P.259 at p.272.
10. Cf. Bromley, op. cit., p.80. See now s.16 of the M.C.A., 1950.
11. Cf. Coker, op. cit., p.271.

(iii) A customary marriage between persons within the prohibited degrees of relationship as prescribed by their local law is void ab initio, although, as we have seen, the position could be rectified either in advance or retroactively in a number of societies, chiefly among the Itsekiri, the Ijaw and the Ibo. (iv) In the same way, a marriage between a native of Nigeria and a non-native is void. As already seen, a "native of Nigeria" used to be defined for these purposes as a person who was a member of an ethnic group indigenous to Nigeria, e.g. a Yoruba of Lagos in Savage v. Macfoy (ante), an Efik of Calabar in Fonseca v. Passman (supra). It is doubtful, however, whether Savage v. Macfoy, which was decided in 1909, is still good law in view of the subsequent definition of a "native of Nigeria" as including a "native foreigner".[12] This latter means "any person (not being a native of Nigeria) whose parents were members of a tribe or tribes indigenous to some part of Africa and the descendants of such persons, and shall include any person one of whose parents was a member of such a tribe." (v) Finally, a customary marriage is void if it is not supported by the payment or express waiver by the bride's family of a bride price (dowry). It should be remembered, though, that payment

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12. Interpretation Act, s.3.

may be postponed in whole or in part, for a fixed period or indefinitely. Such postponement does not have any adverse effect on the validity of the marriage in question: perhaps customary law, like equity, regards as done that which ought to be done!

(b) Voidable marriages

The only clear case of voidable marriages under customary law so far discovered is connected with infant marriage. As we saw in the section on "Consent of the spouses themselves" a child has a right (which is not infrequently exercised) to repudiate a marriage entered into on his/her behalf by his/her parents or guardian, when old enough to make independent critical appraisal of the relationship. As Basden said, "... occasionally [a girl] will refuse to follow the intended husband in spite of entreaty or applied persuation. In such a case any expenses incurred by the man must be refunded by the guardian of the girl."[1] As long ago as 1912, Talbot said of the Ekoi that child marriage was voidable, at the suit of the infant bride, when she grew up. In Ared Asham v. Njokk Abang, the Native Court held that a girl could, on attaining

1. Among the Ibos, p.69.

marriageable age, confirm her childhood marriage by accepting marriage gifts from her husband, or reject him by refusing to move into the matrimonial home.[2] Ward says of the Yoruba that, though "a marriage can be prescribed for a boy conditionally ... he is free to refuse (the prescribed wife) if he wishes"[3] - apparently on growing up.

The law on this subject may be summarised by saying that though parents or guardians had the power in the traditional society (and to some extent today where marriageable age has not yet been regulated by statute) to give their infant children in marriage without the consent or even knowledge of such children, the latter have a right (which is virtually unfettered in the modern society) to refuse to go on with such marriage when they are old enough to know their own minds in the matter. Infant marriage can, therefore, be said to be voidable at the instance of the infant spouse. Such a marriage may be declared void by a court of competent jurisdiction, or terminated by the less formal procedure which is a characteristic feature of divorce procedure under customary law.

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2. See Talbot, In the Shadow of the Bush, p.111.
3. Ward, Marriage among the Yoruba, p.17.

(c) Inchoate marriages

The most straightforward case of this (and one that only requires a few words of discussion here) is the one which relates to absence of "giving away" in a marriage transaction. In the nature of things, the legal consequence of this defect is not that the marriage is void, nor that it is voidable: there just is no completed marriage yet. In other words, until the woman is handed over in the traditional way to her husband or his family, the proposed marriage is still inchoate. The question whether marriage has been completed or is still inchoate assumes great importance when the "ownership" (affiliation) of a child is involved, or when legal capacity to contract marriage with a third party has to be decided.

The first point arose in the Efik case Edet v. Esien.[1] In this case A paid dowry to Inyang's father while she (Inyang) was still a little child. When the girl grew up, she found herself another suitor B who, having obtained her parents' consent, paid them an agreed bride price for her. B duly completed the marriage transaction and took Inyang away to the matrimonial home. The couple lived together as man and wife, and of this union three children were born. A now

1. (1932) 11 N.L.R.47.

brought an action against B claiming that, as the dowry he had paid on Inyang was never returned to him, he was the woman's legal husband and that the three children of Inyang were therefore his. The local customary court held that this claim was valid in law. The case was then sent to the Provincial Court of Calabar. But the Commissioner found the evidence on the customary law governing this point inconclusive either way. The Divisional Court, Carey, J. held that whatever the customary law, it would be repugnant to natural justice, equity and good conscience to hold that a man was entitled to children born in these circumstances merely because the dowry he paid on their mother had not been refunded to him.

It was unnecessary, in our submission, to invoke the doctrine of repugnancy in the instant case. It would have been enough to hold that there never was any marriage between A and Inyang, and that as A had no other claim to the children (e.g. being their natural father), he had no locus standi in the case. This point of view was adopted in the later case of Re Intended Marriage of Beckley and Abiodun.[2] In that, a Yoruba couple agreed to marry each other while they both lived

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2. (1943) 17 N.L.R.59.

in Lagos. The prospective husband later left Lagos for Northern Nigeria, from where he authorized the performance in his name of the idana (or ana) ceremony for the girl. Later, however, the youngman changed his mind and became engaged to a third party. Thereupon his father entered a caveat against a celebration of the proposed Christian marriage with the second woman, on the ground that the bridegroom-to-be was already married to the first woman under customary law. The High Court of Kaduna, Ames, J. held, after hearing expert evidence on the relevant Yoruba law, that the alleged customary marriage did not exist, since the performance of the idana ceremony without more did not constitute a completed marriage.

Both the marriage in Edet v. Esien and that in Re Beckley and Abiodon lacked one essential requirement for a valid customary marriage - viz. a formal "giving away" of the bride to the bridegroom and/or his people. Both were cases of inchoate marriage. In both cases, the alleged marriage was non-existent. This then is the legal effect of the absence of a handing over of a customary law bride.

CHAPTER EIGHT

HUSBAND AND WIFE - I :

RIGHTS OF HUSBAND AND WIFE IN GENERAL.

Legislative competence, Jurisdiction, and Law applicable.

The Schedule to s. 154 of the Federal Constitution 1960, provides under Item 23 that -

> "... matrimonial causes relating to marriages other than marriages under Moslem law or other customary law" shall be on the Exclusive Legislative List of the Federal legislature.

On the other hand, legislation on marriages under customary law is exclusively within the competence of the Regional parliaments. Hence such measures as the East Regional Age of Marriage Law and Limitation of Dowry Law; and the Western Region's Marriage, Divorce and Custody of Children Adoptive Bye-Laws all of which have already been discussed.

Jurisdiction over disputes and other matrimonial causes between husband and wife belongs to either the High Courts or the Customary Courts according as the parties concerned were married under a monogamous or a polygamous marriage law. In other words, matrimonial causes between parties to a Christian marriage come within the jurisdiction of the High Courts; those between parties to a customary

marriage fall within the jurisdiction of the Customary Courts as a general rule. This dichotomy stems from the provisions of the High Court Laws on the one hand and those of the Customary Courts Laws on the other. (The various Regional legislations are so similar in their terms that we need do no more than discuss one of each type.)

The Regional High Courts (including the High Court of Lagos) derive their jurisdiction in matrimonial causes from the Regional Courts (Federal Jurisdiction) Act, 1958 - a Federal statute - which also stipulates in s.4 what system of law shall be applied in such causes. Section 4 reads, in part, as follows:-

> "The jurisdiction of the High Court of a Region in relation to ... matrimonial causes shall, subject to the provision of any laws of a Region so far as practice and procedure are concerned, be exercised by the Court in conformity with the law and practice for the time being in force in England".[1]

"Marriage" is defined in s.2 as a marriage other than a marriage under Moslem law or other customary law. The same section defines "matrimonial cause" as a matrimonial cause other than one relating to a marriage under Moslem law or other customary law. The law applicable to matrimonial causes between parties to a Christian marriage (wherever

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1. Cf. s.16 of the High Court of Lagos Law; s.16 of the High Court Law, 1956 (E.R.).

contracted) is, therefore, the current law of England on the subject.

Original jurisdiction in matrimonial causes relating to customary marriages belongs primarily to Customary Courts in the Eastern and the Western Regions.[2] This is because the Regional Customary Courts Laws confer on the Customary Courts unlimited jurisdiction in these matters (and in others which are not relevant here); while the Regional High Court Laws contain provisions which oust the original jurisdiction of the High Courts in matrimonial causes where the Customary Courts have jurisdiction, with two exceptions to be considered shortly. Here are some of the relevant provisions:

The Second Schedule to the Customary Courts Law of the Western Region (as substituted by No34 of 1959) gives the Customary Courts in that Region -

> "unlimited jurisdiction in matrimonial causes and matters between persons married under customary law or arising from or connected with a union contracted under customary law ...." [3]

On the other hand, s.13 of the High Court Law, 1955 (as amended), Eastern Region, provides as follows -

> "... the Court shall not exercise original jurisdiction

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2. There are no Customary Courts in Lagos, and so both original and appellate jurisdictions vest in the High Court there.
3. Cf. s. of the Customary Courts Law, 1956, of the Eastern Region.

in any cause or matter which is subject to the jurisdiction of a Native Court or Customary Court relating to marriage, family status or ...." [4]

There are only three circumstances under which a High Court could assume original jurisdiction in these matters, viz.

(a) where a case is transferred from the appropriate Customary Court to the High Court;

(b) where the Governor of the Region concerned so directs by order; and

(c) in the unlikely event that there is no Customary Court in the area so that there is none to which original jurisdiction belongs as of right.

All these, however, only apply to original jurisdiction. The High Courts have appellate jurisdiction in matrimonial (as in other) causes and matters involving customary law.[5]

Modification of English Law by the Courts.

We have seen that the law applicable to matrimonial causes relating to Christian marriages is the current law of England on the subject. There is some uncertainty as to how far, if at all, the High Courts have power to modify this law to suit local circumstances. There are at least two conflicting views. On the one hand, it is arguable that, since matrimonial causes are a Federal matter expressly

4. Cf. Proviso to s. 9(1) of the High Court Law, Western Region.
5. It is not clear in what circumstances the Governor will direct a case involving a customary marriage to be tried in the High Court instead of a Customary Court. This he will probably do if, e.g. there is a local political disturbance affecting the local courts; or if an influential politician is a party to the action.

assigned to Regional High Courts by way of delegation, and since the law applicable thereto has been specifically prescribed by the Federal legislature, any power to modify this law must be expressly conferred on the Courts by the Federal parliament. On this view, it will be necessary to look through the Federal statute books to discover whether or not this power has in fact been granted.

The two provisions which came closest to the point are s.15 and s.45(2) of the Interpretation Act. The former reads:

> "Whenever by any Act of Parliament or Ordinance or Law any Act of [the Imperial] Parliament is extended or applied to Nigeria or to a Region, such Act shall be read with such formal alterations as to names, localities courts, offices, persons, moneys, penalties and otherwise as may be necessary to make the same applicable to the circumstances.[2]

This cannot be said to confer on the High Courts any general powers of modification, since no more than "formal" alterations are envisaged. The general term "otherwise" at the end of the list of alterable items is not much use either; for it is obviously governed by the operative word "formal". S. 45(2) goes a little further, when it provides that -

> "Such Imperial laws shall be in force so far only as the limits of the local jurisdiction and local circumstances shall permit ...."

But this sub-section apparently only refers to "such imperial laws" as are indicated in sub-section (1) of that section. These "imperial laws" are there given as -

> "... the common law of England and the doctrines of Equity, together with the statutes of general application that were in force in England on the first day of January, 1900 ...."

If it be objected that there is no reason why, in principle, the power of modification granted in s.45(2) should not be said to apply to all received English law generally, the answer is simple. S.4 of the Regional Courts (Federal Jurisdiction) Act, 1958, already referred to stipulates "the law and practice for the time being in force in England", and then allows for alteration "so far as practice and procedure are concerned", while remaining silent on the question of alteration to the law itself. This is a strong indication that no such alterations are contemplated. And so, either a clear and unambiguous provision elsewhere (which does not exist) or a very weighty reason based on first principles (which will next be investigated) can displace this strong contrary indication.

The second view is that in giving jurisdiction in matrimonial causes to Regional High Courts, the Federal legislature could not have intended that co-opted English statute law on the subject should be applied on a different

basis from received English statute law on other subjects, simply because the reception is done by the Federal and not a Regional parliament. Were this the intention, the legislature would have said so in express terms. In other words, it is not necessary that the Regional High Courts should require express power to modify received English law (statute or otherwise) merely because their jurisdiction on the subject matter concerned is of Federal rather than Regional origin: if these Courts have power, independently, to modify received English law generally, they can exercise this power irrespective of the source of their jurisdiction in a given class of cases.

If this view is correct, there is no doubt but that the Regional High Courts have power to alter the current law of England relating to matrimonial causes, so as to make them better suited for application locally.[6] S.16 of the High Court of Lagos Law provides that -

> "The jurisdiction of the High Court in ... matrimonial causes and proceedings may, subject to the provisions of this [Law] and in particular of s.27 ... be exercised by the Court in conformity with the law and practice for the time being in force in England. "

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6. This is particularly true of the High Courts of Lagos and the Eastern Region. The Western Region has abolished the idea of English statute law applying there: Law of England (Application) Law, 1959 - No.9 of 1959. S.7 of this law provides, however, that it shall not apply to any Imperial Act relating to a matter which is within the exclusive Federal legislative list, as is "matrimonial causes".

S.27 provides for the application of customary law between "natives", or between natives and non-natives where the justice of the case so requires. The combined effect of ss. 16 and 27 is that the High Court of Lagos has power to modify the received English law on matrimonial causes in the light of the local customary law (or the customary law of the parties in the case, as the case may be). S.20(1) of the High Court Law of the Eastern Region is more general in its scope, but leads to the same result for our present purposes.

> "All statutes of general application", it says, "or other Acts of [the imperial] Parliament which apply within the jurisdiction of the Court by reason of this Law or any other written law shall be in force so far only as the limits of the local jurisdiction and local circumstances permit."

It is obvious from these provisions then that the Regional legislatures envisage some judicial modifications in the substantive law of England to suit local circumstances. The absence of any detailed provision on the point in the Western Region is immaterial: its High Court still has this power of modification in appropriate cases. As Allott has aptly put it:

> "It is submitted that even in territories where there is no such express provision enabling [Nigerian] courts to modify English law for local application, the courts

have an inherent power in similar terms by virtue of their general duty to administer justice. Otherwise the application of English law would be stultified ...." [7]

Husband's general position vis-à-vis his wife or wives.

The legal head of an elementary family (household) is the husband. This is true today even in the matrilineal societies of the Cross River, and among their southern neighbours, the Efik of Calabar, who are frequently described in popular parlance as "matriarchal" on account of their great respect for women generally. This means that a man is entitled to respect and obedience from his wife or wives, the absence of any matrimonial vow to that effect notwithstanding. It also means that a woman must first obtain her husband's consent to any major transaction or undertaking she wishes to embark upon - starting up in business or trade, purchasing land or other valuable forms of property, taking a title where this is done by women, and joining social or thrift associations are only a few examples. In the traditional society, it meant, too, that a man had a right to chastise his wife, within reason, without incurring disfavour from her maiden family. Thomas made an interesting list of some of the things a wife was forbidden to do vis-à-vis her

7. Essays in African Law, p.25.

husband in the traditional Ibo society - a list that was good for most other ethnic groups. These were that a wife must not (a) offer food to her husband with her left hand;[1] (b) point at his food with her foot; (c) throw away what her husband wanted to have; (d) expose her genitals or buttocks before him;[2] or (e) "draw down her eyes at" him, this would be insulting.[3]

It must not be thought, however, that even in the traditional society women were treated as anything but respected and cherished members of society - mothers of the rising generation, counsellors to their husbands behind the scenes, and, above all, people who never quite lost their membership of their maiden families and could always count on active intervention from the latter in all cases of dispute with their husbands or with other members of their matrimonial families. Indeed there are societies where women have always held a privileged position as against their husbands. One of these is Kalabari, an Ijaw group of whom Talbot had this to say as long ago as 1926 -

> "Kalabari women are extremely well treated; they are not bound to do any work beside that of looking after the compound and cooking the food." [4]

More remarkable still is the position occupied by wives

1. This is an insult even today, unless accompanied by the vernacular equivalent of "excuse my left". It is true of all persons a propos their superiors.
2. I.E. in anger, or by way of derision.
3. Thomas, Anthropological Report on the Ibo, Part I, p.61.
4. Peoples of Southern Nigeria, Vol.III, p.490.

among the Ekoi of whom Talbot said that traditionally: "the head wife, not the husband, was regarded as head of the house".[5] Even in those societies where wives were reputed to occupy less exalted positions in the traditional society, it can be shown that their social and legal inferiority then, as now, was more theoretical than real. Thus Forde and Jones say of Ibo wives that they influence their men by concerted action and by individual control of the domestic food supply (and its preparation). But the position is brought out most clearly by Basden in this passage -

> "In theory women are regarded as inferior creatures, little better than other household property, but in daily life they hold a strongly entrenched position, the key of which is food. Every married woman holds the whip hand over her husband by means of this vital weapon. A crossed woman will torment her husband in galling manner by refusing to prepare food for him ..."[6]

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5. In the Shadow of the Bush, p.97 (a book published in 1912). But this statement must not be taken too literally, for Talbot was obviously thinking here of the relative positions of first and subsequent wives in a polygamous household. This fact emerges more clearly at p.109 of his book where he says: "A man's first wife is always the head of the house. The younger wives obey her and consider her in everything."
6. Among the Ibos of Nigeria, p.100. On the respective positions of husband and wife generally, see Basden, supra, pp.88-102; Thomas, Anthropological Report on the Ibo-speaking Peoples, Part I, pp.61 and 69; Forde and Jones, op.cit., 24; Green, Ibo Village Affairs, pp.170-5; Basden, Niger Ibos, p.130; Talbot, Peoples of Southern Nigeria, Vol. III, p.439; Talbot, In the Shadow of the Bush, pp.97-8 and 109; Ward, The Yoruba Husband-Wife Code, pp.120-137; Hubbard, The Sobo of the Niger Delta, p.191; Wieschhoff, "Divorce laws and practices in modern Ibo culture", loc. cit., p.301.

It is against this background that the following observations of Ward's must be read -

> "A husband never considers himself obliged to obey his wife. On the other hand, he demands that his wife obey him .... The very nature of the wife's obligations to her husband seems to presuppose obedience. It is largely based on obedience." [7]

"Nationality", Citizenship and Domicil.

In this section we shall briefly consider a wife's right to her husband's nationality, citizenship and domicil. (For our present purposes, "nationality" is to be understood in the customary law sense of membership of a given race or ethnic group, or of a sub-division thereof.)[1] We shall attempt an answer to three questions, viz., (a) if two Nigerians belonging to two different ethnic groups (e.g. an Ibo and a Yoruba) inter-marry, to what extent, if at all, does the wife become a member of her husband's ethnic group, and vice versa, by reason of the marriage; (b) if a Nigerian citizen marries a non-Nigerian woman, does she ipso facto become a Nigerian citizen; and (c) if a man who is domiciled in Nigeria marries a woman who is not so domiciled, does the

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7. Ward, The Yoruba Husband-Wife Code, pp.120-1.

1. The terms "race" and "ethnic group" are used here in place of "tribe", a term which has so much emotive political flavour in contemporary Nigeria, and is so deeply entangled with magic and witchcraft in the minds of many a foreign reader, that we propose to avoid its use in this work.

wife automatically acquire a Nigerian domicil; again if, as has been suggested, [2] there is a Regional domicil in personal law matters, does a woman change her own Regional domicil of Birth or previous marriage in favour of her husband's Regional domicil?

(a) Nationality of a married woman.

Under customary law, a woman is a member of her husband's family - for a number of purposes at all events - for as long as she possesses the legal status of a married woman. It is immaterial that in her unmarried state she belonged to an ethnic group different from her husband's. Thus if say a Yoruba or an Ibibio woman is married to an Ibo man, she acquires a right to take any Ibo titles open to other local housewives; she has a right to assume (and often does assume) a locla Ibo name; it would be incest for a blood relation of her husband's to have sexual connexion with her; and, more generally, she becomes subject to the authority of the local (customary) social and political authorities, while at the same time acquiring rights and obligations under the local customary law as if she originally belonged to that ethnic group. Now, membership of an ethnic group depends on membership of some family within the group, as an ethnic group is no more than the apex of a socio-political pyramid whose base comprises a large

2. See Okonkwo v. Eze and Another (1960) N.R.N.L.R.80; but see also Nwokedi v. Nwokedi, Suit No. WD/17/1958 (Lagos).

multitude of extended families. It would seem to follow, therefore, that a woman is sufficiently absorbed into her husband's family, under customary law, for her to acquire her husband's nationality as above defined. The converse, however, is not true: a husband never assumes his wife's nationality to any extent at all, not even in the matrilineal societies, and not even where he resides among her people.[3]

(b) Citizenship of married women.

Citizenship is a peculiarly "English" law concept, and will be discussed as such. And as indicated above, we are only concerned here with the acquisition of Nigerian citizenship by a non-Nigerian woman who marries a Nigerian citizen.[4] Neither the Federal Constitution, 1960, nor the Nigerian Citizenship Acts provide for automatic acquisition by a woman of her husband's Nigerian citizenship by virtue of their marriage. They do, however, provide for her registration an application. (There are no provisions on the converse case of a non-Nigerian male marrying a Nigerian female citizen).

Section 8(2) of the Federal Constitution, 1960, provides that a woman "shall be entitled, upon making application in such manner as may be prescribed by Parliament

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3. For an interesting attempt at a judicial construction of the term "native of Egbaland" generally, see Allen v. Peliku (1911) 1 N.L.R.117 at pp.121 and 122. It must be warned, however, that this case had nothing to do with husband and wife relationship.
4. For persons who became Nigerian citizens on 1.10.60, see ss.7, 8 (1) and 9.

to be registered as a citizen of Nigeria" if on the 30th day of September, 1960, she was married to a person who became a Nigerian citizen on the 1st of October, 1960, by virtue of s.7 thereof, or who would have become such a citizen but for his prior death. The combined effect of s.7 and s.8(2) is that a wife or widow has a right to be so registered on application if her husband was - (a) born in the former Colony or Protectorate of Nigeria, and (b) a citizen of the United Kingdom and Colonies or a British protected person on the said date, [5] and (c) a son or grandson of a person who was born in the former Colony or Protectorate of Nigeria.[6]

S.8(3) provides that a woman "who is or has been married" to a citizen who became so by registration under s.8(1) and who is a citizen of the United Kingdom and Colonies or a British protected person, shall be entitled to registration on application. This brings in the wives of persons neither of whose parents or grandparents was born in Nigeria but who, nevertheless, satisfy conditions (a) and (b) in the last paragraph above. The point of s.8(3) is that such persons must apply for citizenship before the 1st of October, 1962. S.8(4) is similar in terms to s.8(3) except that it relates to the wives of eligible but deceased persons.

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5. This excludes "aliens" (as defined in s.16) like Frenchmen who might satisfy conditions (a) and (c) regarding birth and ancestry respectively.
6. Conditions (a), (b), (c) are parts of s.7, (c) being the proviso thereto.

So far, we have been dealing with women who before their marriage were "citizens of the United Kingdom and Colonies or British protected persons." S.3(3) of the Nigerian Citizenship Act, 1960,[7] deals with women who before their marriage were outside this class. It provides that the wife of a Nigerian citizen or of a person who but for his death would have been such a citizen, may apply for registration as a Nigerian citizen, even if she is not of full age and capacity, provided that she - (a) makes a written declaration of her intention to renounce any other citizenship she might have, and (b) takes an oath of allegiance. Sections 3 B, 3 C(1) and 3 D (1), which were added by the Nigerian Citizenship Act, 1961, are similar in terms to sections 8(2), 8(3) and 8(4) of the Federal Constitution already discussed, except that they provided the procedure for these applications for registration. This they do by stipulation which of the Forms in the Schedules thereto shall be used by a given applicant, and by prescribing the time limits for such application under s. 3C(1). Finally, s.14A(2) extends the rights given, to persons who are "British subjects without citizenship".

(c) Domicil of married women

Domicil, like citizenship, is a peculiarly "English" law concept. The current law of England on the

7. As amended by the Nigerian Citizenship Act, 1961 (No.9 of 1961).

subject of a married woman's domicil is succinctly stated by Bromley, and we can do no better than reproduce him here.[8]

> "On marriage", he says, "a woman automatically acquires her husband's domicile and retains it throughout her coverture.[9] This will not occur, of course, if the marriage is void; but if it is voidable, she will retain her husband's domicile until the marriage is annulled.[10] She is incapable of acquiring a separate domicile of choice even though the spouses separate by agreement[11] or under a decree of judicial separation[12] and a fortiori if she merely has grounds for a divorce but has not petitioned for one.[13] Similarly, if the husband deserts his wife and acquires a fresh domicile abroad, her domicile still automatically follows his."[14]

Now since many problems in family law, including the validity of marriages and the question of the courts' jurisdiction in divorce and other matrimonial causes, are inextricably interwoven with a man's lex domicilii,[15] it is obvious that the law of Nigeria on matrimonial domicil is the same as

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8. See Bromley, op.cit., p.14.
9. Harvey v. Farnie (1882) 8 App. Cas. 43.
10. De Reneville v. De Reneville [1948] p.100; [1948] 1 All E.R.56.
11. Dolphin v. Robins (1859) 7 H.L. Cas. 390.
12. A.-G. for Alberta v. Cook [1926] A.C.444.
13. Lord Advocate v. Jaffrey [1921] 1 A.C.146.
14. H.v.H. [1928] p.206.
15. Cf. Bromley, p.12.

the current law of England by virtue of s.4 of the Regional Courts (Federal Jurisdiction)nAct, 1958, already discussed. And so the above excerpt from Bromley is a reasonably good summary of our law on the subject.

It follows then that where a non-Nigerian[16] woman marries a man who is domiciled in Nigeria, she automatically acquires a Nigerian domicil, which she retains all during the legal existence of the marriage. It is immaterial where the marriage took place. Given that the husband is domiciled in Nigeria at the date of the marriage, his wife automatically acquires a Nigerian domicil, wherever the marriage took place and whether or not, if it took place outside Nigeria, the woman intends ever living in Nigeria or indeed ever visiting it. Again, it makes no difference to her domicil that the woman in question is not a citizen of Nigeria. For citizenship and domicil are two separate concepts in Nigerian law, and need not co-exist in respect of the same person. Thus if a Scots-woman domiciled in Scotland marries a Nigerian domiciled in Nigeria, she automatically becomes domiciled in Nigeria. And since no one can have two domicils at one and the same time,[17] she will lose her Scottish domicil for the duration of the marriage. Similarly, a Frenchwoman resident in Nigeria but domiciled

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16. By which we mean a person not domiciled in Nigeria, in this context.
17. Cf. Bromley, p.13. This excludes cases of "suspended" or"dormant" domicils of origin.

in France will lose her French domicil in favour of a Nigerian one if she marries a person domiciled in Nigeria.[18]

There remains the question of a Regional as opposed to a Nigerian (national) domicil. If a Northern Nigerian woman marries an Eastern Nigerian, or the other way round, does she thereby acquire a Northern or an Eastern Regional domicil, as the case may be? This obviously depends on whether or not there is such a thing as a Regional domicil. The only two known cases on this point flatly contradict each other. In December 1958, Onyeama, J. held in the Lagos High Court that "there is only one domicile in this country for matrimonial causes and that is the Nigerian domicile."[19] Hurley, Acting C.J., on the other hand, held in the High Court at Jos in 1960 that when a person petitions for divorce, "he must have the same domicile as he has for all other purposes, and that will be a Regional domicile or a domicile in the Federal Territory" of Lagos.[20]

The High Court of Lagos came to the conclusion it did in the Nwokedi case (viz. that there is only one Nigerian domicile for matrimonial causes) on the following grounds -

"There is only one system of law relating to matrimonial

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18. It is possible that neither of the spouses is a Nigerian citizen. But the question whether or not a man can acquire a Nigerian domicil while remaining a non-Nigerian citizen is beyond the scope of the present work.
19. Nwokedi v. Nwokedi, Suit No.WD/17/1958 (Lagos) at p.2.
20. Okonkwo v. Eze and Another (1960) N.R.N.L.R.80, at p.81.

causes (other than matrimonial causes arising under native law and custom or Moslem Law) in Nigeria, and that is the law as enacted by the Federal Legislature. There is no power in the Regional legislatures to enact laws pertaining to matrimonial causes. It follows that although there is a High Court of Justice in each Region, yet in matrimonial causes the jurisdiction of all the High Courts is the same irrespective of the Regional residence of the parties, and derives from the same source ..." [21]

The Nwokedi case (which is unreported) was not cited in the later case of Okonkwo v. Eze (ante), but the ratio decidendi of it was reproduced practically verbatim by counsel and decisively rejected by the learned Acting Chief Justice in the latter case. As appears from the Court's judgment, counsel had argued that the Regional High Courts obtained their jurisdiction in matrimonial causes under the Regional Courts (Federal Jurisdiction) Ordinance which was a Federal statute; that legislative competence in relation to such causes was exclusive to the Federal parliament by virtue of s.51 and Item 22A of Part I of the First Schedule to the 1954 Constitution; and that -

"Nigeria is a territory subject to one system of law in relation to matrimonial causes and is therefore, to

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21. Nwokedi v. Nwokedi, ante, at pp.283 (Cyclostyled Report.).

the exclusion of the Regions, the unit for the purposes of domicile in matrimonial causes, and the jurisdiction of this court in matrimonial causes extends to cases where the husband is domiciled anywhere in Nigeria and not confined to cases where he is domiciled in the Northern Region."[22]

To this contention the learned Acting Chief Justice replied:

"Each Region is a unit, to the exclusion of the other Regions and the Federation, for the purposes of domicile where domicile comes in question in relation to legitimacy, or in relation to the succession to movables. The person whose domicile is material in any dispute concerning legitimacy or concerning the succession to movables will necessarily have a domicile in one of the Retions or in the Federal Territory of Lagos, not in Nigeria as a whole. When he comes to court to petition for a dissolution of marriage, he cannot have a different domicile, for he cannot have more than one domicile at the same time; he must have the same domicile as he has for all other purposes, and that will be a Regional domicile or a domicile in the Federal Territory." [23]

This argument can be reduced to two simple propositions and a conclusion. "Every person has a Regional

22. Okonkwo v. Eze and Another, ante, at p.81 (From the judgement).
23. Ibid.

domicil for the purposes of the law relating to legitimacy and succession to movables. No one can have more than one domicil at a time. Therefore every person must have a Regional domicil for the purposes of the law relating to matrimonial causes." The second of these propositions is unexceptionable; but the first smacks of petitio principii. For it has not been established yet that domicil in relation to legitimacy or intestate succession to movables is in fact Regional. On the contrary, there is some indication that it is not. In Re. Macaulay[24] the West African Court of Appeal held that for a person who was subject to customary law (as most Nigerians are), the proper law for determining his legitimacy or otherwise was the customary law of the ethnic group of which he was a member.[25] Since this customary law, like the ethnic group to which it belongs, may cut across Regional boundaries or else apply only to a very limited section of a Region, it follows that in deciding questions relating to legitimacy the courts do not necessarily advert to the Regional membership of the person concerned. A person is not held to be legitimate or otherwise because he is an Eastern, a Western or a Lagos Nigerian whose Regional or Lagos customary law so stipulates. He is said to be legitimate or illegitimate because he is a Yoruba, an Ijaw or an Ibo. In view of the fact that ethnic groups are not

24. (1951) 13 W.A.C.A.304.
25. Ibid., p.309.

co-estensive with, and may cut across the limits of any given Region, it is more likely than not that the courts regard their various laws (i.e. customary law) not as part of the legal system of any particular Region but merely as part of the law of Nigeria. If this view is correct, then since "domicil" is defined with reference to a legal system, the case for the existence of a Regional as opposed to a Federal domicil would appear not to have been made out. The same doubts and queries must also be expressed with regard to the proposition that intestate succession to movables is determined with reference to a Regional domicil, at all events where the proper law of the case is customary law.

If in spite of these doubts and quries the decision in the Eze case turns out to be accepted by the courts in preference to the Nwokedi doctrine of a Nigerian domicil, then if a woman from one Region marries a man of another Region her Regional domicil will give way to her husband's in much the same way as if she were a non-Nigerian marrying a Nigerian.

The Matrimonial Home.

Under this head we shall consider the legal position of husband and wife with regard to the matrimonial home both under customary law and under the general law. But as a necessary preliminary, we shall discuss the question of matrilocal (perhaps more correctly, uxorilocal) marriages,

and their place in contemporary Nigeria. We start therefore with an examination of the question whether the "matrimonial home" is normally among the husband's or the wife's people.

The general rule is that customary marriages in southern Nigeria are patrilocal (more correctly, virilocal): after marriage, a woman is under legal obligation to take up permanent residence with her husband among his people, or wherever else he chooses as their home. (She is normally consulted of course if a choice of new home is to be made subsequent to the marriage). This, too, is the rule under the general law.

In a number of societies, however, there is a form of customary marriage in which the law does not contemplate any right or duty of cohabitation between the spouses. This is the case with the "small dowry" system of marriage found among the Ijaw. A "small dowry " wife has a right to continue to live with her people, in her maiden family and away from her husband, for an indefinite period.[1] In the traditional society, she was expected to do this unless and until a formal handing-over ceremony was performed - the husband making certain traditional payments and gifts with a view to "buying the mouth" of his wife, the wife's parents

1. Williamson, loc. cit., p.56. See also Hubbard, op.cit. p. 191.

formally handing her over to her husband with whom she could now cohabit and for whom she had to cook and keep house. In modern times, many Ijaw men get over this rule of separate homes for husband and wife by a number of devises which include taking wives from other ethnic groups than theirs,[2] or performing the "buying the mouth" ceremony at the same time as the marriage itself.

There are no known systems of matrilocal marriages properly so called anywhere in southern Nigeria. That is, there is no society today where the law requires a husband to move over to and take up permanent residence among his wife's maiden family, though there is nothing in law to stop him doing so if he wishes. There were in the past, however, places such as the Western Ibo area wherein young husbands sometimes took up residence (for months or even years running) among their wives' people, with a view to being better able to render the labour services required of them.[3] This was particularly so where the young man concerned was not in a financial position to pay the necessary bride price for his wife in cash, and so had to work off his indebtedness to his "in-laws" by such services.

To summarise: Wives are under a legal obligation

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2. Hubbard, op.cit., p.192.
3. Cf. Thomas, Anthropological Report on the Ibo ...., Part IV, The Law and Custom of the Ibo of the Asaba District, Ch.4. On the practice in that area in more recent times, see Esenwa, loc.cit., p.75.

to cohabit with their husbands, the matrimonial home being normally among the husband's people. Where the "small dowry" marriage system exists, a wife so married has a right to live among her own maiden family and away from her husband until formally "bought over" by him. There was a system whereby young men could elect to live with their parents-in--law and pay off their dowry debts by performing labour services rather than by paying cash, and ultimately take their wives away.

To what extent, if at all, has a wife anynlegal right to share the matrimonial home with her husband? The general rule in the vast majority of non-urban areas is that men provide their wives with houses or rooms of their own. This is so in monogamous as well as polygamous families. In the latter, each wife normally has her own house or room which is separate from those of all the other wives and separate from her husband's. But all such houses form part of one and the same pompound; or section or a largen parent-compound in the case of a multiple-household residential unit. As already said, a woman's house or room is under her exclusive possession vis-à-vis her husband and fellow wives. None of the latter has a right to make any use whatever of this house or room without her consent (though this consent may be implied or even presumed to be forthcoming, where personal relations are good). Conversely,

a husband has an exclusive right of occupation and user over his own house or room, as against his wives.[4] If then we define "matrimonial home" in the Western sense of a house or flat occupied jointly by man and wife, the answer to the above question is that a wife has no right under customary law to any such matrimonial home in these societies, for such a home normally does not exist. If, on the other hand, "matrimonial home" is understood in the sense of the entire compound (or section thereof) occupied by a man and his wives, the answer is that a wife has a customary law right to live in and share the use of it with her husband and his other wives, if any.

In the urban areas, the general rule, in view of their considerable population pressure and housing difficulty, is that a man shares the same house or flat with his wife or wives in much the same way as his counterpart does in the Western world. This is also true of certain rural societies (for example, some Yoruba and Western Ibo societies) where the general housing pattern is one large circular (or square) building with an open court in the middle and a common exit. Again, even in the societies discussed in the last paragraph above, young married men sometimes have to share the same house or room with their wives. In these places and circum-

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4. It should be noted that we are here concerned solely with the legal rights of husbands and wives inter se. As against strangers, the whole compound and all the houses therein are in the ownership and possession of the man, not his wives, in the eyes of the customary law.

stances then, there are "matrimonial homes" of much the same kind as are found in Western societies. In such places too a wife has a legal right to live in the matrimonial home, which in this case means a right to share the house or room, as the case may be, with her husband and his other wives, if any. In all cases, a wife's right to live in the matrimonial home, however the latter is defined, is co-extensive with her married status.

Given the dual connotation of the term "matrimonial home" in the context of contemporary Nigerian society, viz. (a) a single house or room shared by man and wife, and (b) a cluster of houses occupied by a husband and his wife or wives, usually one to each, and constituting either a single compound or a well-defined part of a multi-household residential unit - we can now formulate the general principle governing a wife's position regarding the matrimonial home. Marriages in which no legal duty of cohabitation exists between spouses apart, there is a legal obligation on a husband to provide his wife (or wives) with living accommodation commensurate with his means and station in life, having regard to the normal residential arrangements between spouses in the locality. Expressed from the woman's point of view, this means that a wife is legally entitled to live in the matrimonial home as locally understood, for the duration

of her status as a married woman [5] - a status which, as will appear later, may extend beyond the natural life of her husband and into what is commonly known as widowhood.

So far we have assumed that the matrimonial home is owned or otherwise provided by the husband in his private capacity. But what is the legal position of a wife whose husband, instead of occupying a house owned by himself or rented from a third party, lives in the "family house" at the time of his marriage or subsequnetly moves into it? The rule here is that a wife has the same right and to the same extent to live in the "family house" in these circumstances as she has to live in her husband's privately acquired house or flat. To put it from the husband's point of view, a man who himself has a right to live in the "family house" has a right to bring his wife into it and to live with her there.[6] A woman retains her right to live in the family house after her husband's death and for as long as she has not re-married. What is not clear, however, is whether a man's right to bring his wife to reside with him in the family house (and, conversely, her right to live there even after his death [7]) is merely a necessary adjunct to his own right to live there himself by virtue of his family membership, or an independent right arising from the wife's

5. Cf. Coker, op.cit., p.118.
6. Coker v. Coker, 14 N.L.R.83, at p.86 (per Carey, J.).See also Coker, op.cit., pp.41, 118, 159-160.
7. Cf. Coker, ante, p.159.

membership of that family.[8] In other words, is a wife's right to reside in the family house derived from her husband's or from her own membership of the said family? This is still an open question. But in our view, the wife's right is independent of and not derived from her husband's. This is because, in our submission, there is no general right attaching to family members to settle non-members in the family house without the consent of the family. In other words, a member's right to occupy does not imply or include a right to bring non-members onto the property without family consent. A member, for example, has no right to bring his msitress to live with him, or, having brought her, to retain her, in the family house in the face of family opposition. Not so his wife. So long as her husband is in lawful occupation of the family house or part thereof, a wife cannot be ordered out of it by the family acting in opposition to her husband. The difference between these two cases would, therefore, seem to stem from the fact that the wife is, while the mistress is not, a member of the family concerned.

What, finally, is the legal position of a man who lives with his wife in her house or that of her maiden family?

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8. The question whether or not a woman is a member of her husband's family is not as academic as it appears to be - a question which the statement in the text begs obviously. A number of results flow from the acceptance or rejection of the theory of a woman's membership of her husband's family. In particular, its acceptance may well provide the rationale for many a perplexing rule, e.g. those relating to affiliation and legitimacy of post-humous children, "Widow inheritance" and the like. But of these, more later.

To take the second part of the question first. A husband as such has no legal right (under customary law) to live in any house belonging to his wife's maiden family. If he chooses to do so, or indeed even if he has to, his legal position is at the best that of a tenant at sufferance; he is more commonly looked upon as a parasitic stranger. A woman, for her part, has no legal right to bring her husband to live in any house forming part of her family's property. This rule was given (and accepted judicially) as expert evidence in the unreported Yoruba case of Omomiregun v. Sadatu in 1888, and was later repeated without comment - apparently with approval - by the Full Court in Lopez v. Lopez, in 1924.[9]

On the other question, what right, if any, a man has to live in his wife's house or flat, the short answer is that he has no such right under customary law. This is because customary law made no provision for such a situation. For as the chiefs said in expert evidence in the Ibo case of Nwugege v. Adigwe,[10] it was unthinkable that a man should live in his wife's house. As for the general law, the position is probably that a wife's duty to cohabit with her husband "will normally mean that he will have a right to the use and occupation of the matrimonial home even though it

9. 5 N.L.R.47, at pp.49-50. (Combe, C.J., Van der Meulen and Tew, J.J.).
10. 11 N.L.R.134.

is her property".[11] But a husband will lose this right if he loses his right to his wife's consortium by his own conduct.[12]

Matrimonial and other names.

The general rule under customary law is that a woman has a right, which is often exercised, to retain her maiden first names.[1] But there are societies, especially among the Ibo, where a husband and his family have a right to re-name a new wife. In the past, this was normally done without any consultations with the woman concerned, who for ehr part, had no right to reject a name so chosen for her. Today, however, the practice is growing of obtaining a wife's approval for her new married first name.

On the question of surnames, the general rule under customary law is that a woman is entitled to use her husband's name. In the less sophisticated societies, she adopts his first name as her surname. But in other places, she assumes his surname as hers. This, as far as is known, has always been the law and practice in southern Nigerian societies except among the Yoruba. Here, the traditional rule was that a wife retained her maiden surname for as long as she pleased. The modern trend, however, is as already stated: she has a right to use her husband's first or family name as

11. Bromley, op.cit., p.428; and see Shipman v. Shipman (1924) Ch.140, at p.146.
12. Bromley, ibid., and Shipman v. Shipman, ante.
1. Cf. Kasunmu, op.cit., p.222.

her surname, and this she often does.

Similar to the rule relating to surnames is that which governs a woman's position where her husband takes a title under customary law and assumes a new name as a result. A woman advances automatically in social status with her husband, especially if she is his first or only surviving wife. If therefore he takes a title which is indicative of an enhanced social or political status, and if this title gives him a traditionally recognised right to assume a new name or title of honour, his wife too is entitled to assume a corresponding name of her own. This need not be the same as her husband's, and seldom ever is. She, like her husband, has a right by virtue of her new title or status to choose any name she pleases from a whole range of names reserved to women whose husbands have attained the rank or title in question.[2]

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2. Two little points deserve notice here. The first is that among the Ibo of the Onitsha area, a short inexpensive, matter-of-course ceremony is required to endow the wife of an ọzọ title holder with a status corresponding to his, and so to confer upon her the right to assume a new ọzọ name. Only the most senior or sole wife is entitled to have this ceremony performed on her behalf; and only she has a right to wear the usual insignia of the ọzọ title-holder's wife. The other point is that the titles and title-holders' names we have in mind here are only those that indicate distinction in the social or traditional political sphere. We are not concerned here with professional titles (such as those of blacksmiths and doctors) or with religious titles (such as those of priests and the like).

A woman's right to her husband's name or to a name acquired by virtue of her position as the wife of a titled man attaches to her for life or until divorced. In other words, she loses her right to his name and to her title--name on divorcing or being divorced by him. If he predeceases her, she retains her right to these names until she dies or re-marries. In the case of the Ibo ọzọ title, this is a curious rule, since the ọzọ title is ceremoniously undone at a man's death: and yet, his widow retains her ọzọ title-name!

Under the general law, derived from the common law of England, a woman has a legal right to assume her husband's surname. (In certain circumstances, however, women prefer to retain their maiden surnames for professional purposes. At present this is common among women doctors; it will probably spread to radio and television stars in due course, as it has done in England and America.) If a man has a knighthood, his wife automatically assumes the female version of his title. So far, only Christian marriage wives have used such a title ("Lady X") in public. But in principle, there is no reason why a lawful wife, however married and whether an only wife or one of many, should not enjoy a legal right conferred on wives qua wives by the general law of the land.

A woman's general law right to use her husband's

surname continues "after the marriage has been terminated either by death or by divorce."[3] Thus a Christian marriage wife, like a customary marriage one, has a right to use her husband's name after his death. But unlike her customary law counterpart, a Christian marriage wife has a right to retain her husband's name, if she wishes, after divorce. This is because " a man has no such property in his name as to entitle him to sue for an injunction to prevent his divorced wife from using it ...."[4] If, however, she uses his name so as to defraud him, he has a right to ask for such an injunction. If she holds herself out as his wife (that is by conduct or by word, in addition to using his name), he can restrain her from doing so by the curious process called jactitation of marriage.[5] Finally, if a divorced woman holds herself out as still married to her former husband, who has in fact remarried to another woman, she will be liable for defamation at the suit of the man's current wife; the innuendo being that the latter is not lawfully married but merely living in sin with the man concerned.[6]

3. Bromley, p.153.
4. Ibid. See also Cowley v. Cowley [1900] p.305; Du Boulay v. Du Boulay (1869) L.R.2 P.C.430 at p.441.
5. On this see Bromley, p.53. For its limitations, see Thompson v. Kourke [1893] p.11 and 70; Hawke v. Corri (1820) 2 Hag. Con. 280; R.v. Kingston (1776) 20 St.Tr.356.
6. Cf. Bromley, p.153, footnote (b). It should be noted that in practice women drop their husband's names as soon as they are legally divorced, and sometimes even before this - as soon as they are separated and have made up their minds never again to go back to their husbands.

CHAPTER NINE

HUSBAND AND WIFE - II:

RIGHTS OVER THE PERSON

In this chapter we shall discuss four questions relating to husbands' and wives' rights over each other's person, and what remedies are open to a spouse whose rights in this respect have been invaded either by the other spouse or by a third party. These are (a) the question of a husband's right, if any, to chastise his wife; (b) the question how far, if at all, a husband has a right to restrain his wife; (c) the right of one spouse in the other's consortium; and (d) the remedies open to a spouse where his or her right to consortium has been evaded by the other spouse or by third parties.

(a) Right to chastise.

Under customary law a husband has a right to chastise or otherwise correct his wife, within reason, for misconduct which infringes his rights or threatens his position as husband and head of the household.[1] It should be

1. Cf. Ward, Yoruba Husband-Wife Code, pp.84-85 and 91; Ajisafe, op.cit., p.62; Simmons, "Sexual Life, marriage and childhood among the Efik", loc.cit., p.161; Forde (ed.) Efik traders of Old Calabar, p.14; Talbot, Tribes of the Niger Delta, pp.199-203; Thomas, Anthropological Report on the Ibo ...., Part I, pp.69 and 123; Basden, Niger Ibos, p.233.

emphasised from the outset that this right does not cover all types and degrees of misconduct. For example, it would be considered cruel for a man to chastise his wife for a trifling slip such as failure to sweep out the kitchen floor on one occasion, omitting to shut the chicken pen at the usual time (where this is her duty), or failure to get the children ready for school at the right time on one or two isolated mornings. But, as already said, a husband does have a right (which is now but seldom exercised) to correct his wife where her misconduct is an affront to him, a threat to his position in the home or a serious encroachment upon his marital rights. He may, for example, impose a fine (normally in kind, but at times in cash) or inflict corporal punishment upon her for adultery, for keeping bad company in spite of his admonitions, for indolence (this affects his economic position as well as hers) or for insubordination. Whatever form of correction a husband chooses must be reasonable in amount and in kind in the circumstances.

Should a man punish his wife for no just cause, or impose what is excessive punishment in the circumstances, she can seek redress in one of three places, viz. her maiden family, the husband's own family, or, in the more serious cases, the customary courts. In each case, the husband may be asked to atone for his irrational conduct by paying a little compensation - usually in kind, not in money - to

the injured woman. What constitutes "just cause" or "excessive punishment" in a given case is of course a question of fact to be determined in the light of the surrounding circumstances.[2]

The law of England on this subject at the present day is that a man has no right to chastise or otherwise punish his wife without recourse to due process of law.[3] It would, therefore, be an assault punishable by the courts, for a husband to inflict corporal punishment on his wife. As Bromley puts it: "it would be no defence today to a husband prosecuted for assaulting his wife that he was doing no more than administering reasonable chastisement.[4]

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2. Cf. Ward, ante, p.91. With the progressive emancipation of our women, the customary law as set out here is rapidly falling into desuetude without any intervention by the courts. Besides, there is the possibility (perhaps even a probability) that the superior courts would reject this law as repugnant to natural justice, equity etc., especially in view of the position under the general law (post).
3. See Bromley, pp.150-2.
4. Bromley, p 150, and see R.v.Jackson [1891] 1 Q.B.671, at pp.697 and 682. There seems to be some doubt as to whether the law of England, as opposed to social practice, ever gave a man the right to chastise his wife. According to Bacon's Abridgement, says Bromley, a husband might beat his wife (but not in a violent or cruel manner) and confine her. But in Lord Leigh's case (1674) 3 Keble 433, Hale denied he had any such right in law. Nevertheless, Blackstone maintained that "the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege" to beat their wives. See Bromley, p.150.

Whether or not this is the law in force in Nigeria is not entirely free from doubt. It is arguable that the subject does not fall within the provisions of s.4 of the Regional Courts (Federal Jurisdiction)Act, 1958, being outside the jurisdiction of the High Courts "relating to marriages and ... matrimonial causes." If so, then of course English law would not apply to such cases in Nigeria by virtue of that section. Against this view, it should be pointed out that the phrase "in relation to marriages" appears wide enough to include matters (such as the present) which are incidental to marriage, and not just the validity and recognition of marriages: validity of marriage is indeed more directly covered by the word "annulment" which occurs in the same line. A stronger indication that husband and wife have no right in law to inflict any punishment on each other comes from s.160 of the Evidence Act which provides by sub-section (1) (c) that when a person is charged with inflicting violence on his or her wife or husband, the other spouse concerned shall be a competent and compellable witness for the prosecution (or defence) without the consent of the spouse so charged. Obviously then, a man could be criminally liable for using violence on his wife; and chastising her would in all probability come within the meaning of "inflicting violence".[5] If this view of the

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5. On a similar rule at common law, Bromley says: "This includes any form of violence ..." p.274, note (d).

section is correct, it becomes clear that a man has no right to inflict corporal punishment on his wife any more than a wife has a right to do so on her husband. It must be noted, though, that this provision of the Evidence Act does not apply to customary marriage couples (including those married under Islamic law), because s.161 expressly provides to the contrary.

(b) Right to restrain.

To what extent, if at all, has a husband a right to restrain his wife by force from pursuing what he considers to be an objectionable course of action, or to confine her with a view to enforcing his right to her consortium? Under customary law at the present moment, neither of these rights directly attaches to a husband. A man has a right to use moral force to restrain his wife or to forbid her leaving the house. If she ignores him and goes on with the objectionable course of conduct, this would be a case of insubordination which, in suitable circumstances, would entitle him to impose suitable punishment upon her. But he has no right in law to employ physical force in order to prevent his wife from leaving him; neither has he a legal right to punish her in anticipation of a threatened desertion.

There are no such rights under the general law either. As long ago as 1891, the Court of Appeal held in R. v. Jackson that a husband had no right to confine his

wife, and that, on an application for a writ of habeas corpus it was no defence that the husband was merely confining his wife in order to enforce his right to her consortium .[6] As McCardie, J. said of this case in Place v. Searle -

> "From the date of their decision the shackles of servitude fell from the limbs of married women and they were free to come and go at their own will." [7]

(c) Consortium

"Consortium", says Bromley, "connotes as far as possible the sharing of a common home and a common domestic life." But, he goes on, "It is difficult to go beyond this and to define with more precision the duties which the spouses owe to each other ...." [8] Consortium may be described, in the context of customary law, as the fact of the spouses' accepting and treating each other as husband and wife, coupled with either the fact of their living together as man and wife, or at least the intention of so doing as soon as circumstances permit. This means that consortium is not lost or interrupted, for instance, by the fact that a man is compelled by circumstances to live a long way away from his wife on account of his profession, trade or employment. On the other hand, a married couple may still

6. [1891] 1 Q.B.671: Bromley, p.150.
7. [1932] 2 K.B.497, at pp.500-501. See Bromley, p.151.
8. Bromley, p.152.

live under the same roof and share a common front door and entrance hall, while being in fact separated a mensa et thoro.[9]

We have already considered some of the legal incidents of consortium - cohabitation (with exceptions in some cases of "small dowry" marriages), wife's right to her husband's name and rank, and the like. Here we shall only touch upon two more incidents. These are the spouses' rights and duties inter se regarding sexual intercourse, and each spouse's right to protection by the other against third parties.

Sexual intercourse. Under both the customary and the general law, each spouse owes the other a duty to satisfy the other's reasonable demands for sexual intercourse. But here again "reasonable demands" are a question of fact to be determined with reference to the ages, health, temperaments and biological needs of the parties, as well as such extraneous factors like extremes of temperature and what is regarded as the norm in the local community generally and among the class to which the couple concerned belong, in particular. On the one hand, excessive demands could amount to cruelty, especially if the other party's health is thereby affected adversely. On the other hand, refusing reasonable demands, like practising coitus interruptus in spite of

9. For want of a more appropriate term, we shall use the word "consortium" for both the "English" and the customary law concept of being husband and wife in fact and in spirit, as far as external appearances go.

protests from the other party, could be harmful to health (physical or mental) and so constitute cruelty.

In the past, customary law gave a husband the right to attain his legal right to sexual connexion by using (perhaps reasonal) force. This was probably because a man would normally find it difficult to determine whether his wife's refusal (especially when young) was genuine and intended to be final, merely inspired by modesty, or else just a preliminary to extracting a favour from him. Cases of this nature seldom ever reach the law courts. And so it would be difficult to say how far, if at all, the traditional customary law stated here still holds good. Under the general law, too, a husband no longer has a legal right to compel his wife by physical force to have connexion with him. If he did, he would be guilty of common assault,[10] but not, in our view, of indecent assault. If this happened while they were separated either by mutual agreement or by order of a court of competent jurisdiction, he would be guilty of rape upon her.[11]

Mutual protection. Each spouse owes the other a duty of protection from danger to life and limb according to their abilities - which means in practice that, as a rule, a man owes this duty to his wife. As Bromley succinctly put it, one spouse is entitled to use reasonable force

10. R.v. Miller [1954] 2 All E.R.529, following R.v.Jackson, ante.
11. R.v. Clarke [1949] 2 All E.R.448. And see Bromley, p.155.

to protect the other from attack or other physical harm, "and may kill an assailant if he or she believes that the act is absolutely necessary to preserve the other's life."[12] This seems to be the extent of the customary law too, in modern society. But in the past, there was a right in one spouse to defend the other's honour or good character by physical force if necessary, provided this force was used against a person of his or her own sex. Thus, if a man Y maligns X's wife, X had a right to defend his wife's good name with any weapon which he considered reasonable in the circumstances. So might X's wife if her husband was defamed by a woman. Perhaps physical violence is only permissible today, however, ~~only~~ in cases of protection from physical harm. For while it may be hard to expect a man to stand by and do nothing while his wife is being assaulted or otherwise subjected to physical harm, there is not the same compelling argument in his favour if all his wife suffers is no more than injury to her name or reputation. A court action would be less dangerous to life and limb, and perhaps more rewarding. In any case, tempers and passions are normally easier to keep in check where the only weapon of attack employed against one's spouse is words, than where physical violence is used.

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12. Bromley, p.155 (and R.v.Rose (1884) 15 Cox, C.C.540) and the other cases given in note (b) therein.

(d) Remedies in re consortium.[1]

Under this head we shall discuss the remedies open to a spouse whose right to the other's consortium has been invaded. In appropriate cases, these remedies will be discussed in two parts, namely one spouse's remedies against the other spouse, and a spouse's remedies against third parties. The remedies to be considered are actions for

(i) recovery of a deserting wife (including the general law remedy of restitution of conjugal rights which is open to both spouses);

(ii) harbouring a deserting wife;

(iii) enticement; and

(iv) adultery.

(i) Recovery of deserting spouse

Customary Law.

Until very recent times, the idea of a husband deserting his wife in the sense of leaving the matrimonial home with no intention of ever coming back or of re-uniting with her, was practically unknown to customary law. For, as marriage was virilocal, and as virtually every married man lived in his own (not rented) house, for a man to desert his wife in this sense would be tantamount to his abandoning his membership of his native community and seeking refuge

1. It should be emphasised that in applying the term "consortium" to customary marriages we are merely using a shorthand expression for the rights that flow from the fact of being husband and wife on the plane of personal relations.

in strange parts. Even now that many spouses live in rented houses or flats in the urban areas (or in quarters provided by their employers elsewhere), it is generally considered infra dignitatem for a man to abandon his home on account of domestic difficulties with his wife or his stronger attraction towards another woman. But desertion by a wife is a common feature of domestic life under customary law. So also is what may be described as constructive desertion, viz. where a man either drives his wife away from home without lawful justification, or makes cohabitation so difficult for her by his frequent misconduct that she feels impelled to leave him. What remedies are open to the innocent spouse in such cases?

Customary law has nothing corresponding to the English action for restitution of conjugal rights. In other words, neither the customary courts nor the superior courts applying customary law have power to compel a deserting spouse to return to the matrimonial home against his or her will. Nor, in the case of constructive desertion as above described, have the courts any power to compel an unwilling husband to take back his wife.[2]

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2. There are, however, two indirect courses of action which the innocent party may pursue: (a) appeal to the guilty party's family and friends for their intervention: the resulting moral and social pressure is usually enough to effect a reconciliation; (b) sue for divorce: the guilty party may then be penalised on such matters as the amount of dowry recoverable and when, custody of children (in the Western Region), and distribution of property.

Similarly, a husband has no right or power to recover his deserting wife by force under customary law (neither, for that matter, has a wife). As the Ibo put it: "E jiro mkpa anu di". A literal translation of this in colloquial language would be: "It is not a 'done thing' to kidnap one's wife". But "kidnap" here does not refer to what is sometimes called "marriage by capture" - a practice unknown to Ibo law - but to the "recapture" of one's deserting wife. Writing on Yoruba law, Ward, says that if a wife decides to leave her husband on account of his bad conduct, ill-treatment and the like, he cannot stop her. Neither can he bring her back by force, once she has left him. "And", she concludes, "the law gives him no power to do so." [3]

The general Law:

After a long period of uncertainty, it was decided that a man had no right at common law to recapture his errant wife, or to confine her in his house in order to enforce his right to her consortium. This was a Court of Appeal decision in R. v. Jackson.[4] In that case a woman had refused to return to her husband (after his period of absence from the country) and had failed to comply with a court decree of restitution of conjugal rights. He therefore got two men to seize her as she came out of church one Sunday

3. Yoruba Husband-Wife Code, p.112. See also Thomas, Anthropological Report on the Ibo ..., Part I, pp.67-8; Talbot, Peoples of S. Nigeria, III, pp.450, 455, and 667; Egharevba, op.cit., p.20; Partridge, Cross River Natives, p.256.
4. [1891] 1 Q.B.671.

and take her to his home: this they did. The woman was thereupon confined to the house, though she was allowed to move freely inside it. On her application for a writ of habeas corpus, the Court of Appeal unanimously made the decision stated above. "So ended the husband's right to treat his wife as he would a recalcitrant animal", says Bromley.[5] "From the date of their decision", said McCardie, J., "the shacklesnof servitude fell from the limbs of married women and they were free to come and go at their own will".[6] This is the "English" law in force in Nigeria as regards Christian marriage spouses. That is, a husband has no right to compel his deserting wife by physical force to return to the matrimonial home; nor, if she happens to be there, has he a right to keep her there against her will. But he does have an action against her for restitution of conjugal rights, for which reference should be made to the standard works on divorce.

(ii) Harbouring a run-away wife.

Under customary law, if a woman leaves her husband without just cause, and goes back to her own people, the husband's first step is normally to appeal to her parents and other kinsmen. If the latter co-operate, the resulting moral, social and sometimes economic pressure is usually

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5. Bromley, op.cit., p.151.
6. Place v. Searle [1932] 2 K.B. 497, at pp.500-1.

andugh to bring the woman back to reason. Should they refuse/fail to co-operate, or if their efforts prove fruitless, the husband may sue them for a refund of the bride price which he had paid in respect of his wife, or else for a return of the latter to the matrimonial home.[7a]

The same rule (as to action for a refund or return of the wife) also applies where a woman is harboured by a person who is not a relation of hers,[7b] except that in this case the third party concerned may also be liable in damages for adultery, if proved; except also that husbands do not begin with a quiet plea in a case like this. Where, as sometimes happens in more recent times, a wife leaves her husband and goes to live on her own (usually in some urban area) her husband has an action against her personally for the repayment of whatever bride price he had paid on her. This rather strange rule seems now to be well established; strange because the woman concerned is held liable for the refund of a sum of money which was not paid to her and in which she often had no share as of right. (~~Even~~ Among the Efik where woman are given a substantial part of their bride price, this seems to be done as a matter of grace rather than of right.)

Finally, it should be pointed out that there are

7a, 7b. See Ajisafe, op.cit., p.58; Forde, Marriage and the Family ... Yako, p.72; Partridge, supra; Talbot, Peoples ...., Vol. III, pp.449 and 455; Thomas, supra, pp.67 and 68. Also Egharevba, op.cit p.20.

societies, chiefly among the Ibo of Onitsha and Udi areas, where the strict rule relating to the repayment of dowries is that a woman's parents are not liable for such refund unless and until she re-marries. This rule works hardship in at least two respects. An innocent, deserted husband may have to wati for months or indeed for years in order to recover his bride price. The woman concerned may die in the waiting period, or contract some incurable disease, or else become so morally degenerate that she loses all chances of ever remarrying: in each case, the husband loses his money entirely. It is little wonder, therefore, that even in these societies the more general rule stated earlier is gradually but progressively being accepted and applied by the customary courts.

English law has never had anything like an action for harbouring a deserting husband; while the common law action for harbouring a deserting wife is now thought to be obsolete.[8]

(iii) Enticement and "unlawful detention" of wives.

We shall discuss here the two related subjects of enticing a wife away from her husband with a view to establishing marital or amorous relations with her, and unlawfully taking a wife away from her husband with a view to giving her in marriage to a third party or for some other

8. See Devlin, J. (as he then was) in Winchester v. Fleming [1957] 3 All E.R.711. Also Bromley, p.162.

reason. To some extent, both these wrongs exist under our customary as well as non-customary laws; but the remedies are different.

Taking a wife away from her husband with a view to giving her in marriage to a third party ("unlawful detention" for short) is primarily a customary law concept and of course is done by the woman's parents or guardian. Among the other reasons why parents adopt this course are personal differences between them and their son-in-law; a desire to set up their daughter in trade or profession for the benefit of her maiden family; and possibly (in parts of the Mid-West area where the institution known as idegbe is found) because her father has died leaving no male issue to succeed him.[9] As in the case of harbouring a run-away wife, the husband's legal (as distinct from social) remedy is an action to compel his parents-in-law either to return his wife to him or to refund the bride price he paid in connexion with the marriage. Since, ex hypothesi, there is no lawful justification for the action of the woman's parents, they are liable for the immediate refund of the bride price if they insist on keeping the woman in the family. (By "immediate" here is meant that, contrary

9. An idegbe is normally a woman who, because her father left no male child, remains unmarried in her maiden family so as to raise sons and heirs for her father's estate. But it is possible that a married daughter might be taken away from her husband for this prupose, the bride price being refunded and her marriage dissolved eventually. On the idegbe generally, see Rowling, Notes on Land Tenure in ... Benin Province, para.99.

to the rule found in many places, the parents are not entitled to wait until she remarries before having to repay the bride price to the injured husband.)

Where the spouses contracted a Christian marriage, the position is more complex. To begin with, two legal actions are required: one a petition for divorce against the wife herself, on grounds of desertion; the other an action against her parents or guardian for the repayment of the bride price or, alternatively, return of the woman to her husband. (The latter action is usually the first in sequence.) Then again there is the difficulty of proving desertion where, as often happens in these cases, the woman concerned is opposed to her "detention", only submitting to it for social and sentimental reasons not quite within her control. Above all, there is the difficulty of establishing the jurisdiction of a given court in the case. For on the one hand, it is arguable that even where the Christian marriage was preceded by a customary marriage, the latter merged in the Christian marriage, [10] and that therefore only the High Court could have jurisdiction in such cases. On the other hand, it is equally arguable that the concept of bride price has not been assimilated into the general law, and that therefore a subsequent Christian marriage has no effect on the jurisdiction of customary courts on matters

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10. Cf. Elias, Groundwork .... who says, at p.284, that a "church or court marriage supersedes the prior or subsequent customary unions."

relating to the bride price.

Enticement.

Under the general law a person is guilty of "enticement" if he or she induces, causes, procures or is in some way positively responsible for one spouse leaving the other and so committing a breach of his/her duty to consort with the other spouse. The position was explained with delightful lucidity by the West African Court of Appeal in Sharples v. Barton, [11] a case heard on appeal from the High Court at Jos. In that case, a wife had her injured leg treated by a doctor friend of the family. In the course of the treatment, doctor and patient fell in love and both of them informed the husband of that fact. The latter thereafter objected to his wife's seeing the doctor any more; whereupon she left him, and went on seeing the doctor.

6 In an action by the husband against the doctor for enticement, the West African Court of Appeal held that the doctor was not liable, because (a) it was not enough to prove that the woman and the defendant committed adultery; or that she left the matrimonial home so that she could go on seeing him; (b) it was not enough to prove that the defendant alienated the wife's love for her husband; (c) to succeed, the husband must prove that there was a

11. (1951) 13 W.A.C.A.198: Verity, C.J., Lewey, J.A. and De Comarmond, J. See also Denning, J. in Gottlieb v. Gleiser [1958] 3 All E.R. 715, [1951] 1 Q.B.267; Place v. Searle, ante.

definite interference by the defendant with the husband's right of consortium with his wife; or that there was procuring or inciting; or that but for the defendant's persuation the wife would not or might not have left the matrimonial home.

This action (which is for damages) for enticement is open to both spouses in English law. In other words, an action will lie at the suit of a wife whose husband was enticed away by another woman as well as at the suit of a husband whose wife was enticed by another man. This was so decided by Darling, J. in Gray v. Gee, [12] a decision which was subsequently approved obiter, first by the Court of Appeal in Place v. Searle [13] and then by the House of Lords in Best v. Samuel Fox.[14] As will appear shortly, there is no corresponding action open to women under customary law.

It is a good defence in English law that, in persuading one spouse to leave the other, the defendant acted from principles of humanity - to prtoect the spouse in question from further oppression in the hands of the other spouse. This defence of "humanity" is good even where it turns out that the facts were not as the defendant had thought they were at the material time.[15] It is also a good defence of course that the defendant did no more than receive

12. [1923] 39 T.L.R.429. Cf. Newton v. Hardy (1933) 149 L.T.165.
13. [1932] 2 K.B.497.
14. [1952] 2 All E.R.394; [1952] A.C.716.
15. Per Greer, J. in Place v. Searle, ante.

and retain a spouse who had left the matrimonial home on his or her own accord; for in such a case the defendant has obviously done no positive act to induce, persuade or cause the spouse in question to leave the matrimonial home.[16] Finally, an action for enticement dies with the plaintiff or the defendant, as the case may be in English law.[17]

Under customary law, a husband (but not a wife) has an action against a man who induces, procures, causes or otherwise entices his wife to leave him either with a view to marrying her or merely to establish amorous relations with her. (We are not concerned here with the case of parents or guardians inducing their daughters or wards to leave their husbands; this has already been considered.) This wrong is substantially the same as "enticement" under the general law. But there are two significant differences in the relevant adjectival law. In the first place, there is a presumption under customary law that a man who receives another man's wife into his house and takes no immediate steps to bring the spouses together again, was himself responsible for her leaving her husband in the first place.[18]

16. Sharples v. Barton (1951) 13 W.A.C.A.198; Newton v. Hardy ante.
17. Bromely, p.162. Quaere if this is true of Nigerian (general) law.
18. The first duty of a man in whose house a deserting wife takes refuge is to inform her husband of her presence there; then endeavour to effect a reconciliation or to persuade the woman to go back to her husband; or, failing these, send her back to her maiden family.
cf. Egharevba, op.cit., p.20, on the Bini.

But this presumption is rebuttable. Secondly, while the remedy for the injured spouse in the general law is damages, the remedy under customary law is the refund of the bride price by the defendant.[19] As already said, while the general law gives both husband and wife a right of action against anyone who entices his or her spouse away from the matrimonial home, customary law only gives the said action to a husband - a logical state of affairs since the only remedy is refund of the bride price which is not paid on husbands;

(iv) Adultery and damages therefor .

Who may sue? Subject to certain exceptional circumstances to be discussed later, a husband has a right of action for damages against any man who commits adultery with his wife - this being in addition to his right to divorce her on grounds of her adultery. A wife, on the other hand, has no right of action for damages against a woman who commits adultery with her husband. This bias in favour of husbands is common to both the general and the customary laws in Nigeria. Bromley says with reference to English law that:

> "... since crim. con. was based upon the quasi-proprietary interest which the husband had at common law in his wife, the anomaly survives that a wife may not petition for damages from a woman

19. For references see notes 7a and 7b above, under the heading "Harbouring a run-away wife."

who has committed adultery with her husband."[1]

Forde summarised the customary law position everywhere in southern Nigeria when he said of the Yako:

"A wife can place no legal restriction on the sexual activities of her husband ...." [2]

In other words, there is no legal remedy open to a wife either against her husband or against "the other woman", short of an action for divorce - this latter only in the case of a Christian marriage wife as a rule.

Remedies for adultery.

(a) Between the spouses themselves.

(i) Under customary law, two remedies are open to a husband whose wife is guilty of adultery. These are reasonable chastisement, as we have seen, and divorce. Even one solitary act of adultery by his wife entitles a man to send her wife away from the matrimonial home, recover any bride price lawfully paid by him or on his behalf in connexion with the marriage, and have the marriage dissolved. (In practice, however, none but the most highly sophisticated and Victorian husband would divorce his wife for just one act of adultery, assuming that other things are equal.) There is a third remedy which, though more frequently

1. Bromley, op.cit., p.166.
2. Marriage & the Family ...., p.102. See also Forde, Double Descent in African Systems of Marriage ...., ante, p.326; Lloyd, "The Itsekiri" in Bradbury and Lloyd, op.cit., p. 190; Talbot, Peoples of S. Nigeria, Vol.III, p.431. According to Talbot, a husband's age-class members can also claim damages from an adulterer in Ikwerri.

resorted to than either of the other two, is difficult to classify as a legal remedy. This consists in "sending her to coventry" and refusing to make any further contributions towards her maintenance, her continued residence in the matrimonial home notwithstanding.

On the other hand, a wife whose husband has committed adultery has but one legal remedy open to her viz. divorce. Even this one remedy, however, is only available if the adultery is persistent or aggravated. For these purposes, adultery may be described as persistent if it is carried on in spite of the wife's protests. And so, a number of clandestine illicit affairs unknown to the wife at the time will not, as a rule, entitle her to ask for a dissolution of her marriage if and whenever she learns the truth. Adultery is aggravated if it is also an incest, if it is accompanied by or results in the husband neglecting the general welfare of his wife and children, or (among the Ibo at all events) if committed under the man's roof. In these cases, a wife is entitled to divorce her husband even for one act of adultery. (She seldom does so in fact.)

The popular reason usually given for this discrimination against female spouses is that a wife has not that degree of proprietary interest over her husband's person as will turn his illicit sexual activities into a personal wrong against her - an invasion of her legal right.

Whatever the intrinsic merits of this theory, it goes to account for the fact that a man's adultery gives his wife no right to a legal remedy unless it also involves a serious wrong against the gods or the ancestors (as incest and adultery under one's roof are said to do,) or else encroaches upon some other matrimonial rights of the wife (as in the case of neglect. It should be noted also that there is an element of mental cruelty involved in what we have described as persistent adultery in spite of a wife's protests.)

(ii) Under the general (English) law, both husband and wife have a right to petition for divorce on account of each other's adultery. In this case, too, one case of adultery is sufficient to found an action for divorce. In addition, a wife forfeits her right to her husband's consortium and maintenance by reason of her infidelity. [3]

(b) Against third parties.

(i) Customary law.

Under customary law, a husband has a right of action against anyone who commits adultery with his wife, this action being for damages. (The ancient remedy of self-help whereby a man inflicted corporal punishment on "the other man" is now obsolete.) The quantum of damages recoverable varies with the status of the injured husband

3. See Bromely, op.cit., pp.156, 196. See also ibid pp.428, 440, 202 and 337 for other consequences of a wife's adultery.

(the higher his status the greater the damages payable), the degree of relationship between him and the defendant (the closer the relationship the smaller the damages; hence if the kinship ties are strong enough to make the wrongful act an incest as well, no damages are claimed or paid: the adulterer only has to provide money and provisions for a sacrifice of propitiation to the family and other gods, in appropriate cases.).

In exceptional cases, especially where the husband also claims divorce from his wife, the damages recoverable are measured in terms of the bride price paid by the plaintiff or his family on the woman in question.[3a] In other words, an injured husband sometimes asks for , and the court orders, refund by the paramour of any bride price paid in respect of the woman concerned; this repayment done, the defendant may then proceed to complete the marriage process thus started per force.

The mere fact that a man and his wife were living apart at the time the adultery took place does not of itself affect his right to recover damages from the adulterer. But if he had sent his wife away, thus renouncing his claim to her "consortium", he loses his right to recover damages: Chawere v. Aihenu and Johnson (1935) 12 N.L.R.4. Even where

3a. Cf. Native Court decision as given in Chawere v. Aihenu and Johnson (1935) 12 N.L.R.4. Though that judgment was reversed by the Divisional Court (Graham Paul, J.), the Customary Courts still apply the principle therein contained.

a man was deserted by his wife in the first place, he will probably lose his right to damages if it could be shown that he no longer desired to continue the marriage relationship.

It is a good defence to an action for damages for adultery under customary law that the husband is impotent, suffering from a chronic disease, insane, or either too old or too young to perform the biological act necessary for procreation, and that the adultery complained of was committed at the request /instigation of the wife herself as the only practical means of achieving what society deems the true object of marriage - procreation of children. It is also a good defence among the Ibo that the adultery was encouraged or positively arranged by the husband's family either for one of the above reasons, or for some reason of eugenics: for example, because the husband is abnormally short or ugly, an incorrigible rogue, a prodigal , a sloth or a half-wit. In both these sets of circumstances, no damages are recoverable; but the defendant still has to provide the plaintiff with the wherewithal to make propitiatory sacrifices to the ancestral gods (if he believes in these).[4]

4. On adultery, see Basden, Niger Ibos, p.233; Thomas, Anthropological Report on the Ibo...., PartI, pp.67-8; Talbot, Tribes of the Niger Delta, pp.199-203; Talbot, Peoples of S. Nigeria, V. III pp.431, 629, 644, 650, 651, 654, 673; Simmons, loc. cit., p.161; Talbot,Woman's Mysteries ..., p.97; Forde, Marriage ... among the Yako, p.102; Elias Groundwork, p.289; Ajisafe, op.cit., pp.35,56; Ward, Marriage among the Yoruba, p.40; Egharevba, op.cit., p.48; Omoneukanrin, op.cit., pp.49-50; Chawere v. Aihenu and Johnson (1935) 12 N.L.R.4; Welch, loc.cit., p.172; Parkinson Loc. cit., p.316; Ellis, op.cit. p.186; Thomas, Antrop. Report on the Edo ...., p.52; Folarin, op.cit., pp.34-5.

(ii) The general (English) law.

Under the general (English) law, a wife has no right of action for damages against a woman who has committed adultery with her husband. (She could name her in a petition for divorce on grounds of her husband's adultery, though, but even then no damages are recoverable from "the woman named.").

A husband, on the other hand, has a right of action for damages against anyone who commits adultery with his wife. This claim may be made in a petition for divorce or for separation, in which case the man concerned is cited as co-respondent, or else in a separate action for damages by virtue of s.30 (1) of the Matrimonial Causes Act, 1950 - an Act of the United Kingdom parliament.[5]

Quantum of damages:

(i) Adultery during cohabitation. Damages for adultery are compensatory, not punitive, being designed to compensate a husband for the loss of his wife's society and comfort which inevitably flows from the adulterer's wrongful act,[6] for the injury to his feelings, for the blow to his marital honour, for the hurt to his matrimonial and family life,[7] and for any economic loss sustained by him as a result of the co-respondent's breaking up his marriage. The essential points to be

5. Quaere whether such an action lies against a woman who commits an unnatural sexual act with a man's wife.
6. Weedon v. Timbrell (1793) 5 Term Rep.357, at p.360 (Ashhurst, J.).
7. Butterworth v. Butterworth [1920] p.126 (McCardie, J.)

considered in assessing such damages are, therefore:-

(1) the value of the woman concerned as a wife, mother, house-keeper and source of income (e.g. as property owner, business woman or income earner);

(2) the nature and extent of the injury to the husband's feelings (this being most severe where there was great mutual affection between the spouses, where a woman of high moral purity is seduced, where the husband is himself a man of considerable moral integrity and social standing, or where the adultery took place under the husband's roof; the injury would be less severe naturally where the woman concerned was a person of loose character, where little love is lost between the spouses, or where the parties had parted by mutual consent);

(3) the conduct of the parties (e.g. whether the woman had been the prime mover in the illicit relationship; whether the wife of an honest man of humble means has been dazzled and lured into adulterous relations by an unscrupulous man of wealth); and

(4) any other aggravating or extenuating circumstances, such as the adulterer's knowledge or ignorance of the fact that the woman was married, whether, in particular, the woman had put herself up as a single woman, whether the liaison had continued in spite of the husband's protests to the adulterer, or whether the illicit relationship had led to

a break-up in the marriage and if so (perhaps) whether or not there are issue of the marriage to be taken into consideration. (It should be noted that the damages recovered may be settled by court order for the benefit of such children in appropriate cases.[8])

(2) Adultery during separation. Though the case law on this subject is somewhat conflicting and unsatisfactory, the better view is that the fact that the adultery complained of took place while the spouses were separated is not of itself a bar to a husband's right to recover damages from the adulterer; its relevance is rather to the quantum of damages recoverable. Thus in Agbo v. Udo [9], a wife deserted from the matrimonial home eleven months after her marriage with the plaintiff. Twelve months later, she committed adultery with the defendant. Thereupon the plaintiff brought this action for damages against "the other man". Abbott, J. held that "an action such as this clearly lies ...." [10] On the quantum of damages to be awareded, the learned judge said:

> "The final consideration relates to damages and I have to ask myself the question: 'What was the extent of the financial loss sustained by the petitioner by reason of the respondent's adultery?' This is by no means an easy question to answer. After careful consideration I assess the damages at £15." [11]

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8. M.C.A., 1950, s.30(3).
9. (1947) 18 N.L.R.152.
10. Ibid., at p.152.
11. Ibid., at p.154.

In Mohammed v. Mohommed and Akel [12] the court of first instance, Robinson, J., awarded nominal damages at £5 chiefly because the woman concerned in that case was a person of loose morals before she married, but probably also because the series of adulterous unions complained of did not start until after the spouses had separated. The West African Court of Appeal held, however, that the husband was entitled to substantial damages, which they assessed at £200.[13]

In the recent case of Evoroja v. Evoroja and another, [14] an Urhobo woman deserted her husband and went to live with another man as husband and wife. The husband thereupon took this action for damages for adultery, "joining" his wife as a party, without asking for divorce. There was no evidence that the respondent and co-respondent committed adultery before the separation of husband and wife occurred: there was indeed no direct evidence that adultery ever took place at all, it being held that the fact that the petitioner's wife and the co-respondent lived together as husband and wife was enough evidence that they had committed adultery. On the qeustion of damages, the High Court of the Western Region, Adeyinka Morgan J., held as follows -

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12. (1952) 14 W.A.C.A.199.
13. It should be noted that (a) though the wife was chiefly responsible for the break-up of the marriage, the co-respondent was found to have contributed thereto; (b) this was a divorce case, not just an action for damages as in Agbo v. Udo (supra).
14. (1961) W.N.L.R.6.

> "It was held in Weedon v. Timbrell (1793) 5 Term Rep. 357 and Winter v. Henn (1831) 4 C.& P. 494, that no damages are obtainable if husband and wife had been living apart at the time of the adultery. For this reason, I hold that damages are not obtainable in this case." [15]

This decision was based apparently on a passage in Rayden on Divorce.[16] But it is unfortunate that the attention of the Court had not been directed to a passage in Latey on Divorce which is in the following words:

> "But a husband is wronged by the seduction of his wife, far beyond the loss he sustains by the breaking up of his home, and the mere fact that he was living apart from his wife at the time of her seduction is no answer to his claim for damages." [17]

Moreover, Weedon v. Timbrell and Winter v. Henn actually contradict each other in what they decided, and neither of them supports the view that a husband cannot recover damages for adultery committed by his wife while living apart from him. Let us take a closer look at these and a few other English cases on the subject.

In Weedon v. Timbrell, [18] a husband's claim was indeed rejected. But this was not just because he and his wife were

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15. Ibid., p.8.
16. (7th edn.), p.521.
17. (14th edn.), para 579, p.296.
18. Ante.

living apart at the material time; it was rather because the husband had already freely relinquished his rights to his wife's consortium by entering into a voluntary separation agreement with her. The ratio decidendi of the case was neatly summed up by Lord Kenyon in this rhetoric question -

> "But what injury was done to the plaintiff, who has voluntarily relinquished his wife?" [19]

The same point was made, and in stronger terms still, by Alderson, J. in the other case of Winter v. Henn [20] in his direction to the jury when he said -

> "I apprehend the law to be that the plaintiff will be entitled to recover, unless he has, in some degree, been party to his own dishonour, either by giving a general licence to his wife to conduct herself as she pleased with men generally, or by assenting to the particular act of adultery with this defendant, or by having totally and permanently given up all the advantage to be derived from her society." [21]

If however, the learned judge continued, if before the adultery took place the husband had permanently given up all intention of living with his wife, he could not recover:

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19. Ibid., at p.360.
20. Ante
21. Ibid., at p.498.

"... because, if he had, it seems to me ... that he cannot set up the loss of what he had voluntarily relinquished as the ground for a claim for compensation." [22]

In Evans v. Evans and Platts, [23] the adultery complained of took place more than a year after a husband and his wife had separated. Directing the jury, the President of the Probate Court said -

"It cannot be denied that there have been thrown out, at different times and in various cases, suggestions tending to show that where a husband and wife have become separated, the husband cannot afterwards claim damages. That is not, however, the law. And that is not the law I am going to lay down to you." [24]

The fact of a separation having taken place before the adultery was committed, continued the learned President, was only one of the elements to be taken into consideration in assessing the quantum of damages to be awarded: it did not of itself deprive the husband of a right to recover damages in appropriate cases. This was because -

"A man is wronged by the seduction of his wife far beyond the loss which he sustains by the breaking up of his home. It is a matter for consideration whether

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22. Ibid., at p.499.
23. [1899] P.195.
24. Ibid., at p.198.

> a man whose wife has been seduced by another man has not been subjected to intolerable insult and wrong, and the fact that he is at the time separated from his wife does not render the blow to his honour less acute ..." [25]

In Gardener v. Gardener and Bamfield [26] the spouses had executed a separation deed (thus releasing each other from their marital obligations) and were living apart when the adultery occurred - the husband had found his wife's irregular and intemperate habits quite intolerable. Bannes, J. quoted with approval the last passage reproduced above from the Evans case, and then invited the jury to consider the value of the woman in question in that case to her husband, as a wife and company. The jury must have decided that she was valueless, for they awarded no damages. The judge's direction to the jury as to the law shows however that "a husband is not precluded from recovering damages from a co-respondent by reason of the fact that there had been a separation between himself and his wife before adultery was committed." [27] The jury's act in not awarding any damages at all in the case is an illustration of yet another principle, viz. that they need not award any damages if, on other grounds, they think that the case is not one

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25. Ibid.
26. [1901] 17 T.L.R.331.
27. Ibid., from the headnote.

for damages.[28]

To sum up. Other things being equal, the fact that a man and his wife were living apart when she committed adultery does not deprive him of the right to recover damages from the co-respondent. But if the husband had, prior to the adultery, voluntarily relinquished his rights to his wife's consortium, or had contributed by his own act or omission towards the commission by the wife of the adultery ~~of~~ complained of, then he cannot recover any damages. Similarly, if the wife's character is such that, while living with him, she was worthless to him as a wife and companion, no damages will be recoverable from her seducer. A different consideration would apply, of course, where the co-respondent (not the wife) was responsible for the break-up of the marriage.[29]

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28. Cf. Gibson v. Gibson and West (1906) 22 T.L.R.361. See also Butterworth v. Butterworth (ante); Collins v. Collins [1920] P.126; Barratt v. Barratt (ibid); Howell v. Howell (ibid); Adams v. Adams (ibid.); Ellworthy v. Ellworthy (ibid).

    N.B. These cases were all decided by McCurdie, J. between January 13th and February 10th, 1920, and were reported together.

29. It will be seen that the weight of judicial decisions is against the judgment in Evoroja v. Evoroja (supra), which must therefore be regarded as made per incuriam.

CHAPTER TEN

HUSBAND AND WIFE - III: MISCELLANEOUS

1. Maintenance.

Jurisdiction. Before 1950, no court in Nigeria had jurisdiction to entertain an action by a Christian marriage wife against her husband for maintenance simpliciter. This was held in effect by a powerful Bench of the West African Court of Appeal in Okakpu v. Okakpu.[1] In that case a wife sued her husband for maintenance in the Supreme Court. When the case went on appeal to W.A.C.A., the husband raised a fresh point to the effect that there were no provisions in the laws of Nigeria for the payment of maintenance by a husband to his wife. The Court upheld this contention, holding, among other things, that the Supreme Court had no such jurisdiction; that the law on this point which was in force on 1st January, 1900, was the Summary Jurisdiction (Married Women) Act, 1895 [2]; that this was not a statute of general application; and that it did not apply to Nigeria. As there was no local legislation conferring such jurisdiction on the Supreme Court

1. (1947) 12 W.A.C.A.137. Per Harragin, Chief Justice of the Gold Coast as she then was; Verity, Chief Justice of Nigeria; and Lucie-Smith, Chief Justice of Sierra-Leone.
2. This Act applied to Magistrates Courts in England, not to the High Court.

or the Magistrates Courts, it followed that a wife who wished to obtain an order for maintenance without asking for divorce or judicial separation had no locus standi in any court.

This lacuna in the law was filled by s.23 of the Matrimonial Causes Act, 1950 (we have seen that this applies to Nigeria) which reads as follows -

> "(1) Where a husband has been guilty of wilful neglect to provide reasonable maintenance for his wife or the infant children of the marriage, the court, if it would have jurisdiction to entertain proceedings by the wife for judicial separation, may, on the application of the wife, order the husband to make her such periodical payments as may be just; and the order may be enforced in the same manner as an order for alimony in proceedings for judicial separation.
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> (2) Where the court makes an order under this section for periodical payments it may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife the periodical payments, and for that purpose may direct that a proper deed or instrument to be executed by all necessary parties shall be settled and approved ...."

A neglected wife can now, therefore, petition for maitenance by her husband, under the general law. She can, however,

only make this application to the High Court. This is because the Magistrates Courts still lack jurisdiction over maintenance actions between husband and wife.[2a]

The 1950 Act does not apply to customary marriage wives, neither have the Customary Courts any power to entertain maintenance actions involving Christian marriage wives.

Duty of maintenance under customary law. The duty to provide substenance as well as shelter for the household is primarily that of a husband. A man is therefore under legal obligation to provide his wife with the necessities of life according to his means and station in life. "Necessities of life" in this context include not only food and clothing but also medical attention in times of illness, pregnancy and the like. Indeed they also include fees for membership of social and recreational societies such as married women's social and dancing clubs. In strict legal terms, these duties attach to the husband even if the wife has separate income of her own.[3] In practice, however, a wife with independent income or property invariably contributes to the daily domestic budget either in money or in kind or both ways. Thus in peasant and fishing communities, the man usually provides the local staple food for at least one meal a day, while his wife provides the other meal or meals out of

2a. But see ss.3 and 6 of the Maintenance Orders Act for the power of Magistrate Courts to enforce foreign maintenance orders.

3. Cf. Folarin, op.cit., p.21.

her own resources. In non-peasant/fishing communities, the husband normally provides money for the greater part of the family (household) budget; the wife makes up any deficiencies and provides the "condiments" out of her own pocket, if any.[4]

A husband's duty to maintain his wife is limited under customary law to the period during which they cohabit. Should they live apart following a dispute, then as a general rule, this duty is suspended for the duration of the separation.[5] It is immaterial whose fault was responsible for the separation: the innocent party has no right to be maintained in these circumstances. But to this general rule there are two exceptions which are similar to each other in nature. If the separation occurs during a wife's pregnancy, her husband must make reasonable contributions to her maintenance at her new address if he wishes to avoid heavy "charges"., when the time comes for him to claim the child from his wife or her family. For a man is liable for the cost of maintaining his child in these circumstances, if he makes a claim for the child.[6] Similarly, if husband and wife separate while the wife is nursing a baby, so that she takes him away with her, the husband has a legal duty to send them

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4. See Forde and Scott, op.cit., pp.65-6; Talbot, Tribes of the Niger Delta, p.205; Ajisafe, op.cit., p.62; Ward, Yaruba Husband-Wife Code, pp.58-67; Forde, Marriage among the Yako, pp.65-6, 101-2; Folarin, supra.
5. This does not apply of course to spouses living apart because of the demands of the husband's trade, profession or employment, and vice versa.
6. He is not liable, on this score, to his wife; the liability is to her family (as a rule she goes back to them) who will have a right to retain the child in their custody till his father discharges his duty of maintenance - in arrear.

money or food as often as is reasonable, again under pain of having to make substantial back payments for his child's maintenance. What is reasonable contribution in these cases will depend of course on such practical considerations as the husband's means as compared with the wife's and her parents', the distance between the husband's and the wife's new homes and so the possibility or otherwise of sending regular contributions.

There is a duty on the family head in particular and other members of the family in general to house and maintain the wife of a member, if her husband will not or cannot do so.[7] But this duty, which was more important in the past than it is today, is only moral, not legal. It is only one aspect of the moral obligation of members of a family to help one another in case of need.

Duty of maintenance under the general law.[8]

"Primarily the husband's duty is to provide his wife with the necessities of life .... this duty is prima facie complied with if he provides a home for her, and the wife has no right to separate maintenance in a separate home unless she can justify living apart from her husband .... this obligation remains if the spouses are obliged to live apart, for example owing to the illness of one of them

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7. Cf. Ajisafe, op.cit., pp.61-62.
8. For details, see Bromley, pp.195-257, and the standard works on divorce. Here we shall do no more than give an outline of the rights and duties of Christian marriage spouses inter se.

provided that there is no desertion on the part of the wife".[9] (So far, there is complete similarity between the duty of a Christian marriage husband and that of a customary marriage husband on the subject of maintenance.)

A wife who commits adultery - even on one solitary occasion - ipso facto loses her right to be maintained by her husband. Even if he remained unaware of the adultery for some considerable time, a husband has a right to refuse his wife further maintenance on subsequently discovering the offence. And the fact that the husband himself had committed adultery is immaterial. Thus in Govier v. Hancock,[10] a husband was held to be under no duty to maintain his wife who had committed adultery, the fact that he had himself done so before her, that he had treated her with cruelty and that he had driven her away from the matrimonial home notwithstanding What is more, if a wife by her conduct leads her husband reasonably to believe that she had committed adultery, he is relieved of his obligation to maintain her, for the duration of such belief.[11] On this subject, a customary marriage wife is in a better position legally than her Christian marriage counterpart. For as we have seen, a husband may chastise his wife (within reason) or impose a

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9. Bromley, p.196, summarising Lord Hodson's statement in McGowan v. McGowan [1948] 2 All E.R.1032, at p.1034, and a Court of Appeal decision in Lilley v. Lilley [1959] 3 All E.R.283.
10. (1796) 6 Term Rep.603.
11. Cf. Chilton v. Chilton [1952] 1 All E.R.1322; But a man is not relieved of his duty of maintaining his wife if he had condoned or connived at her adultery: Bromley, p.197.

small fine (usually not in cash but in kind) on her for her adultery. But he is still under an obligation to maintain her as long as he wants her for a wife - which he usually does.

A man is also relieved of his duty to maintain his wife if she deserts him. But the obligation revives as soon as the desertion ends. A husband remains under the duty of maintenance if he deserts his wife. The combined effect of these last two rules is that if a wife deserts her husband but subsequently makes a genuine move to return to him and is refused, her right to be maintained by her husband revives: for in that case, and provided that the request to return to the matrimonial home was genuine when made and remained so when proceedings were taken, it is the husband who is now in constructive desertion.

There is a measure of similarity as well as an important difference between the respective duties of a Christian marriage and a customary marriage husband whose wife has deserted him. In both cases, the husband is relieved of his duty to maintain the wife. But whereas a Christian marriage husband reverts to his former duty if, as a result of his unreasonable refusal to take his deserting wife back, he becomes himself guilty of constructive desertion; a customary marriage husband's duty of maintenance does not revive in these circumstances. Till actual

cohabitation re-commences (or is deemed to have done so, by mutual agreement), his duty is suspended. Again, as desertion by a husband was virtually unknown in the traditional society, there is no provision under customary law whereby a deserting husband remains obliged to maintain his wife.[12]

Enforcement of maintenance orders (For the orders that may be made, see ss.19, 20,22, 23 and 24 of the Matrimonial Cuases Act, 1950)

(a) Orders made within the country. If a husband against whom a maintenance order has been made (in favour of his wife) is in arrears with the payment, the wife can enforce the payment of such arrears by some of the methods open to a judgment creditor. Among other things, she can apply to the court for a writ of fi.fa. (fieri facias, or writ of execution), for sequestration (in which case temporary control of the husband's property or part thereof will be taken over by law-enforcement officers), for a charging order, or for a garnishee order (in which case the husband's money in the hands of a third party will be attached - a usual method of getting hold of his bank account. She can also apply for an order to attach the husband's earnings at source if four or more weekly payments, or two or more

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12 But this duty will probably be imported into customary law by the superior courts applying the principles of "natural justice, equity and good conscience", if need be.

other periodic payments are due and unpaid, provided that the husband has either wilfully refused or culpably neglected to make these payments.[13] If such an order is made, the husband's employer has to make the necessary deductions from his wages /salaries and pay them over to the proper officer of the court.

A wife cannot, however, enforce the payment of maintenance arrears by means of bankruptcy proceedings; or by an ordinary action in debt in the High Court. Moreover, the court has power to vary the orders on the husband's application, and to remit the arrears payable either in part or in full. If the husband dies, any arrears still unpaid die with him, for a wife has no right to enforce their payment against her deceased husband's personal representative. (Neither can the personal representative of a deceased wife enforce the payment of any such arrears owing to her at her death.) In the same way, a wife cannot prove in her husband's bankruptcy in respect of maintenance arrears. (We saw earlier that she cannot herself initiate bankruptcy proceedings to have him declared bankrupt, as a means of enforcing the payment of maintenance arrears.)

(b) Enforcement of foreign orders. The Maintenance Orders Act [14] provides machinery whereby maintenance orders

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13. See Part II, Maintenance Orders Act, 1958 (of England), especially s.6. Cf. Bromley, pp.213-217.
14. Laws of the Federation of Nigeria (1958 Revision), Cap. 114.

obtained in England or Ireland can be registered in a Nigerian Court. Once duly registered, such an order is deemed "from the date of such registration [to] be of the same force and effect ... as if it had been an order originally obtained in the court in which it is so registered, and that court shall have power to enforce the order accordingly". [15] A maintenance order is registered in a court of similar jurisdiction to the one in which it was made in England or Ireland - High Court orders in the High Court, magistrates courts orders in the Magistrate Courts - the Nigerian court in question thereby acquiring the same powers as regards enforcement as had the court in which the order was originally made. [16]

Wife's liability to maintain her husband under "English" law.

The general rule under "English" law is that a wife is under no obligation to maintain her husband. There are, however, a number of circumstances under which the courts may order that she shall do so or that her property, business profits or earnings shall be settled for his benefit. Orders of this kind may be for an interim period, for a specified term or on a permanent basis.

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15. 2.3(1). And see s.6 for the enforcement of provisional orders.
16. S.3(2).

In the first place, if a wife presents a petition for judicial separation on the ground of her husband's insanity, the High Court has power under s.20(3) of the Matrimonial Causes Act, 1950 (of England) to make an interim order that she shall pay alimony to her husband. On making the decree for judicial separation asked for, the court has power under the same sub-section to order that the wife shall pay such permanent alimony to her husband as the court thinks fit.

In the second place, if a wife petitions for divorce on the ground of her husband's insanity, the High Court may, by virtue of s.19(4) of the same Act, make an interim order against her for the payment of alimony to her husband. If the divorce asked for is granted, the wife may be ordered to secure to her husband "such gross sum of money or annual sum of money for any term not exceeding his life" as the court thinks fit. In addition to or in place of this secured sum, the wife may by order be directed to pay her husband a monthly or weekly sum of money for the rest of their joint lives.

In the third place, if a decree of divorce or of judicial separation is granted against a wife by reason of her adultery, cruelty or desertion, the High Court may order that any property to which she is entitled (whether in possession or in reversion) shall be settled in whole

of in part for the benefit of her husband and/or children: s.24(1).

In the fourth place, if a decree of restitution of conjugal rights is granted on a husband's application, there is power under s.24(2) of the same Act whereby the High Court may make one of the following orders, viz. (a) that the wife's property shall be settled in whole or in part for the benefit of her husband and/or children; or (b) that any part of the wife's "profits of trade" or earnings shall be paid periodically by her to her husband for his own benefit, or to her husband or any other person for the benefit of their children or any of them. [17]

The first point to note in connexion with ss. 19, 20 and 24 of this Act is that, s.24(2) apart, their provisions only apply where a decree for divorce or for judicial separation has been granted or is being sought. In other words, there is no power in the courts to make an order, by virtue of these sections, that a wife shall maintain her husband or settle her property for his benefit while the spouses are still living together, or while they both desire so to live. On the face of it, s.24(2) is an exception to this observation, being concerned as it is with property settlements and periodic payments following

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17. See further, Bromley, pp.245 ff.

a decree of restitution of conjugal rights. But the sub-section was obviously intended by the legislature to provide some practicable remedy against a wife who refused to obey a court's order for restitution of conjugal rights. Committing her for contempt of court could hardly do any good; bringing her back to the matrimonial home by force of arms would be worse than useless as a basis for family life. Hence this provision for an economic sanction.

Another point that calls for a word of comment is that there is only one condition under which a husband can obtain an order for permanent alimony against his wife. This is where the latter obtains a decree of judicial separation against him on the ground of his insanity.[18] Again, it should be noticed that no provision is made in s.19(4) for any payments by a wife to her husband in the event of her obtaining a decree of nullity (as opposed to divorce) on the ground of the husband's insanity. Sub-sections (1), (2) and (3) of s.19 provide for payments by a husband to a wife in the event of his asking for or obtaining a decree of divorce or nullity; but sub-s. (4) only speaks of cases "where a petition for divorce is presented by a wife on the ground of her husband's insanity". Finally, it should be remarked that while an order to secure a gross or an annual sum of money in favour of a

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18. S.20(3); and cf. Tolstoy on Divorce (4th edn.), p.148.

husband who is divorced on account of his insanity may be made "for any term, not exceeding his life", an order for the payment to him of monthly or weekly sums for his maintenance is limited to the duration of "their joint lives" - s.19(4). To this extent then, a periodic payment of this type is not a good substitute for a secured gross or annual payment; though against this must be set the fact that not many wives have enough resources for secured lump or annual payments.

2. Property rights of spouses inter se.

Ante-nuptial property. The fact that a woman was later married does not affect the legal ownership of any property which she acquired before the marriage. Such property remains in her separate and exclusive ownership under both systems of law - customary and general. Under customary law, if the property in question was never brought by the woman to her husband's place, then not only does it remain in her separate ownership in her life time, but also the husband has no inheritance rights over it. If the property was brought over to the husband's place, he can inherit it, but even so only if the woman concerned left no children who are legally capable of inheriting it. As Ajisafe said of women landowners in Yoruba law:

"When a woman owning land is married to a man, whether of her own township or tribe or not,

> in no circumstances whatever can the husband become the owner of such land: it is part and parcel of the property of such woman, and when she dies her children inherit it," [1]

a rule which finds an echo in practically identical words in Partridge's article of the Egba Yoruba.[2] On Onitsha Ibo law, the High Court (then called a Divisional Court of the Supreme Court where there was a sole judge) has held in Nwugege v. Adigwe [3] that even where a man and his wife lived in the wife's ante-nuptial property (in that case a house) till her death, he had no right to inherit that property as against members of her maiden family. The same case also decided that on the death of a married woman, property which she had acquired before her marriage goes to her own maiden-family and not to her husband or his family, in the absence of children.[4]

The position under the general law is regulated by legislation - the Married Women's Property Act, 1893 (of England) which applies as a statute of general application, and which has been re-enacted as the Married Women's Property Law, 1958, by the Western Region. [5] S.4(1)(b) of the latter

1. Ajisafe, op.cit., pp.7-8.
2. "Native Law and custom in Egbaland", loc.cit., p.433.
3. (1934) 11 N.L.R.134 (Graham Paul, J.) See Also Thomas, Anthropological Report on the Ibo, Part I, pp.124-5.
4. It ~~is~~ not infrequently happens that husband and wife merge their property rights (whether ante- or post- nuptial) by mutual consent, or as a result of "gentle persuation" on the part of the husband. Indeed, it sometimes happens that the husband assumes (or is given) full control and at least apparent ownership of his wife's property. But here we have passed beyond the strict bounds of law into those of social arrangements.
5. Laws of the Western Region, Cap.76 of the 1959 Revision.

Law provides that all property which belonged to a married woman before marriage shall be hers as if she were a feme sole. S.6 provides that all stock, deposits, annuities and the like which stand in a married woman's name shall be deemed to be her separate property: presumably this section relates to ante-nuptial property of the types enumerated, as well as to those acquired during coverture. As will appear presently, there are statutory provisions for the protection of one spouse's property from the other spouse.

On this question of ante-nuptial property, a man would seem to be in a disadvantageous position in law as compared with his wife. For, as we have seen, a husband's property, whenever acquired, becomes liable for the wife's maintenance, and may be attached, sequestered or settled by court order in order to meet this liability - under the general law. Under customary law, too, a man is legally liable to maintain his wife from any property at his disposal - including property acquired before the marriage. He is, in addition, bound to permit his wife to make such use of his farm land (whether lying fallow or under cultivation) as is customary in the local community.[6] A man's property is therefore less separate and exclusive than is his wife's.

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6. Cf. Ardener, loc.cit., p.88; Jones, "Ibo land tenure", loc.cit., p.315.

Wife's capacity to acquire property under customary law.

The air of mystery and confusion which surrounds the question whether or not women have legal capacity to acquire and own property under customary law is forcefully brought home to us by Leith-Ross when, writing on the Ibo, she said -

> "The question of a married woman's or widow's property is a nebulous one. One is constantly being told a woman has no property, yet one is equally constantly being shown "my" farm or hearing of a woman who has gone to court about "her" oil palms or "her" share of a dowry." [7]

A good example of such conflicting statements can be seen in the following three passages taken from an early book on the Ibo.[8] "Women have but few rights in any circumstances, and can only hold such property as their lords permit." [9] ("Lords" presumably stands for "husbands"). "Practically the whole of the trade in Ibo country is in the hands of the women, and they are extremely capable".[10] "The only possessions that can really be labelled as the property of a wife are her waterpot, market basket and calabash, together with her cooking utencils, and all the vegetable called koko (ede). She helps to purchase other

7. African Women: A study of the Ibo of Nigeria, p.102.
8. Basden, Among the Ibos of Nigeria (1921).
9. Ibid., p.88.
10. Ibid., p.90, It is not clear who owns the capital and profits here.

household requisites and has free use of them; she may also accumulate extra things in her own conner." [11]

The position, in our submission, is that a married woman has legal capacity to acquire, own and dispose of property in her own right and in her own name, under customary law. (There are, as we shall see later, certain limitations in her power of disposition of certain types of property; but this is a reflection not on her legal capacity as such but on the peculiar rules governing the disposition of those classes of pooperty.) As Thomas, another early writer on the Ibo, said of societies covering approximately the same territory as those of whom Basden wrote, a wife's money and koko yams are her own property over which her husband has no rights or control.[12] A woman who cooperates with her husband in farm work in the normal fashion is entitled to be given plots by him for her own corps, and has a right to plant her own crops among the husband's yams according to the local rules of interplanting of crops. Again, women (including married ones) can "secure personal control over land by providing money for purchase or securing pledged land ...." [13] According to Jones, "... the women

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11. Ibid., p.93. To this list should be added a wife's personal articles such as clothing, beads, etc., as well as such crops like the cassava which along with her other crop ("koko") and her husband's yams constituted the staple food of the Ibo at the time when Basden wrote. It is therefore hard to see how women could be siad to lack capacity to own property.
12. Anthropological Report on the Ibo ..., Part I, p.124 (But, he says, this rule does not apply to Nise, a town in Awka.)
13. Forde and Scott, op.cit., pp.66-7 Cf. Esenwa, op.cit., p.73.

themselves can acquire property in land in their own right, obtaining it by gift, for rent, on pledge or by outright purchase." [14] He says indeed that a woman is debarred by Ibo custom from having absolute ownership of property; but then he goes on to say, "As long as she remains in his [i.e. husband's] household, however, the property is hers and she can dispose of it as she likes during her lifetime." [15] The most categorical statement of the law is to be found in the works of Talbot:[16] "Among all tribes", he says, "the wife's property is exclusively under her own control and can never be touched by her husband; she leaves it to whom she likes, usually to her dauthers or sons, but sometimes to her own relatives." Among the Ekoi, a wife is said to have a right of action in court against her husband if he used her own separate property without her consent.[17] Yako wives, too, own and control property apart from their husbands.[18] Of the Lagos Yoruba, Marris says: "A wife's profit from her trade is her own, and she spends it mostly on her personal needs, her children and in helping her own relatives"- and this even where the initial trading capital was provided by the husband.[19] A 19th-century writer on Yoruba law

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14. "Ibo land tenure", loc.cit., p.315.
15. Ibid., p.316. See also, Forde and Jones, op.cit., p.70.
16. Peoples of Southern Nigeria, Vol. III, pp.455 and 678. Cf. Ardener, loc.cit., p.88.
17. In the shadow of the bush, p.98: Cf. Partridge, Cross River Natives, 255.
18. Forde in African systems of kinship and marriage, p.289.
19. Marris, op.cit., p.53.

generally summed up the position in these words, "... the property of a wife is always separate and distinct from that of her husband." [20]

Wife's capacity to acquire property under the general law.

A married woman's "English" law capacity to acquire property and to possess separate property of her own is governed by statute law, once more the Married Women's Property Act, 1893. By s.3 of this Act, as re-enacted by the Western Regional parliament: "... a married woman shall (a) be capable of acquiring, holding and disposing of any property ... in all respects as if she were a feme sole." [21] All stock, deposits and annuities standing in the sole name of a wife are deemed to be her separate property. [22] (For the husband's remedy where his wife invests his money in one of these ways without her consent, see below.) A married woman may take out an insurance policy in her own name and for her own benefit, either on her life or on her husband's life. [23]

Protecting one spouse's property from the other spouse.

(a) Customary law. As already indicated, a woman who is married under customary law can acquire and own property as of right. She also has an action against her husband (or anyone else) if he infringes this property right. This

20. Ellis, The Yoruba-speaking peoples ...., p.177. Cf. Partridge, "Native law and custom in Egbaland" (ante), pp.431-3, on the Egba Yoruba.
21. Laws of the Western Region (1959 Revision) Cap.76.
22. Ibid., s.6.
23. Ibid., s.9.

principle is recognised and preserved by statute to some extent. For s.148 of the Criminal Procedure Code provides in effect that a customary marriage wife (like her Christian marriage counterpart) has a right of action against all persons, including her husband, "for the protection and security of her own separate property". But unlike a Christian marriage wife, a customary marriage wife can institute proceedings in this regard while still living with her husband[24]. Again, s. 36 of the Criminal Code provides that, Christian marriage spouses apart, husband and wife can be criminally responsible for an offence against each other's property even if no third party's property rights are involved.[25] The same section also provides by implication that legal proceedings may be taken against a spouse who has committed an offence against the property of the other spouse even if they are still living together. This rule about criminal responsibility and time for legal process was unknown to the traditional customary law, under which an injured spouse's only remedy against the other spouse was an action for compensation - a civil action.

(b) The General law. As a rule, spouses married by "Christian" rites cannot be criminally responsible under the general law for any offences committed against the property of each other unless the property interests of a third party are involved.[26] Even where the offending spouse is criminally

24. Laws of the Federation, Cap.43. On 2.148, see further, post.
25. Criminal Code (Fed.), s.36; (W.R.), s.33.
26. Criminal Code (Fed.), s.36.

responsible in fact, it is provided in the same section of the Criminal Code (s. 36) that no proceedings shall be instituted while the spouses are still living together. Thus even if a third party's interests are involved adversely in the offence so that the guilty spouse can be brought to trial for it, this cannot be done while the spouses are living together. Similarly, though a spouse who takes and carries away some property of the other spouse while deserting or about to desert the latter is criminally responsible for that act, yet no proceedings may be taken in respect of the offence until the desertion is actually accomplished.

As for civil liability, s.148 of the Criminal Procedure Code [27] provides that a Christian marriage wife has civil action against all persons, including her husband for the protection and security of her own separate property. But this section is made subject to the operation of s.36 of the Criminal Code (already touched upon) as regards the permissible time for the institution of proceedings. This probably means that, like criminal proceedings, civil actions may not be brought by a wife for any injury or offence ommitted by her husband against her property so long as she is living with him. It should be noted in this connection that this statutory right to a civil action is available

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27. Laws of the Federation, Cap.43. Cf. s.10 of the Married Women's Property Act, 1893 (1958 for the W.Region)

to wives only, and not to husbands: a husband has no civil action against a wife who damages or commits any other wrong against his property.

There is an interesting provision in the Married Women's Property Act, 1893 (of England), which reads -

> "If any investment in any such deposit, annuity or shares shall have been made by a married woman by means of moneys of her husband without his consent the High Court may upon an application under S.17 order such investment and the dividends thereof or any part thereof to be transferred and paid respectively to the husband".[28]

The effect of this section is to provide a husband with a measure of protection against misappropriation of his money by his wife. For it says in effect that a husband has a right, by means of summary proceedings under s.17, to "follow" his money into the hands of a bank or insurance company wherein his wife has deposited or invested it. This is obviously a useful provision from a husband's point of view, in view of the fact that there is, as already indicated, no other civil remedy open to him against his wife in such circumstances.

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28. This is s.7 of the W. Region version of the Act. S.17 is the one which provides for "summary proceedings" between spouses alone or with third parties (e.g. a bank or an insurance company) in respect of the property of one or both spouses to a Christian marriage.

Vicarious liability and representation.

(a) Customary law. A husband is not liable in law for his wife's debts, tortious acts, breaches of contract or any other civil wrong committed against a third party, unless she was, at the material time, acting on his instruction or authority. In practice an injured party would normally not institute any legal action against a married woman unless and until he has made a formal complaint to her husband, and the latter has indicated that he has no intention of settling the claim himself out of court. But this does not mean that the primary liability is on the husband. It simply means that no one would normally wish to disturb a man's domestic life by bringing an action against his wife, without first giving him a chance to have the matter settled out of court. The English law principle of "agency of necessity" is unknown to our customary laws. In the realm of criminal law too, a husband is not responsible for his wife's offences unless he had asked her to commit a given offence. Thus a husband who sends his wife to steal or to destroy another's growing crops will be as guilty of the offence as his wife is. But these unusual circumstances apart, a woman is criminally responsible for her own offences.

In the past, husbands were expected to, and usually did represent their wives in civil as well as criminal proceedings before a male (but not a female) arbitral court.[29]

29. Cf. Ward, Husband-Wife Code, pp.68-70; Folarin, op.cit. p.22.

But this he did, not because he was personally liable/ responsible in law, but because he was the head and spokesman of his household. In more serious cases, and especially where strangers were involved as parties to the case, this task of representation was performed by the family head - that is, the head of the wider group of which a man's household is a part. Today there is nothing in the statute books to prevent a man from representing his wife, if he so desires, in the Customary Courts, and some husbands still do so. But there is an indication in the Regional Customary Courts Laws to the effect that such representation requires at least the consent of the wife concerned. S.32(1) of the Customary Courts Law of the Eastern Region, and s. 28(4)(a) of that of the W. Region provide in similar terms:-

> "... a customary court <u>may permit</u> the <u>husband</u>, or wife, or guardian, or any servant, or the master, or any inmate of the household of any party, who shall give satisfactory <u>proof</u> that he or she has <u>authority</u> in that behalf ...." to represent him or her.

As the first part of this passage shows, not only is there no suggestion that a husband has a duty to represent his wife, but also the court has a discretion to permit him to do so or turn him out. And as appears from the last part of the passage, some proof of authorisation is required from the would-be representative (though, it is

perhaps arguable that the fact of marriage is enough evidence of such authorisation, on account of the traditional practice discussed above.) There is no corresponding provision whereby a husband may represent his wife in a Magistrate Court or the High Court.

(b) The general law. Under this, there is no duty on a husband to represent his wife in any litigation, whether civil or criminal. Neither is a husband civilly or criminally responsible for his wife's offences or wrongs. The two apparent exceptions to the latter rule are, first that a husband who actually compels his wife to commit a crime in his presence (excluding crimes punishable by death, or those involving grievous bodily harm or an intention to commit them) will probably himself be personally responsible: s.33 of the Criminal Code (Federal) (s.31 of the Western Region Criminal Code) provides that the wife will not be responsible in those circumstances. Secondly, a husband may be liable civilly or criminally for his wife's wrong if she was acting as his agent at the time. But this is not an incident of marriage but an aspect of the law of agency. For a master or parent or guardian may be similarly liable for the wrongs of a servant, child or ward as the case may be. In other words (and this is also true of a wife's "agency of necessity") a husband's liability here is based on the principle that he had either authorised the wrong

or contract as the case may be, or is deemed to have authorised it.[30]

Spouses and the law of crime.

(a) Offences against property.

We have seen that, Christian marriage spouses apart, husband and wife may be guilty of a criminal offence against each other's property - theft, arson and wilful damage, for instance - in the same way and to the same extent as if they were not married.[1] We have also seen that, in the case of Christian marriage spouses, neither spouse can commit a crime in relation to the other's property unless either (a) the act complained of involved a third party's interest, or (b) one spouse took away the other's property while deserting or intending to desert that other party.[2]

(b) Assault and rape.

It would appear from Alawusa v. Odutose [3] that a husband and wife cannot be guilty of indecent assault on each other, though they can be guilty of common assault. In that case a husband shaved off his wife's pubic hairs against her will, and was charged with indecent assault on her. The West African Court of Appeal held that "an assault upon a wife is not rendered indecent by circumstances which

30. On agency of necessity, see Bromley, pp.198-203, and the standard works on agency. See also M.W.P. Act, 1893, ss. 11, 12, 18.
1. S.36 of the Criminal Code (S.33, W.R. Criminal Code).
2. Ibid.
3. (1941) 7 W.A.C.A.140.

would render it indecent in the case of another woman". [4] They therefore held that though he was guilty of common assault on his wife on the facts, the accused was wrongly convicted of indecent assault.

As long as a husband is entitled to his wife's consortium he cannot be guilty of rape on her. For a wife is deemed to have consented to having sexual intercourse with her husband from the moment of their marriage, this consent only being withdrawn or terminated by a separation agreement [5] or by judicial separation. A man does not lose his right to his wife's consortium by reason only of the fact that they had a dispute and are living apart. And so, a man who has sexual intercourse with his wife against her will in these circumstances will not be guilty of rape.[6] It is immaterial in such a case (i.e. where a husband has connexion with his unwilling wife while the spouses are living apart other than as a result of judicial separation or separation deed with a non-molestation clause), that the husband effected his objective with the aid of reasonable physical force: he is still not guilty of rape.

But as was held in Alawusa v. Odusote, a man can commit common assault on his wife. In R. v. Jackson (ante) it was held to be unlawful for a man to restrain his wife

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4. From the headnote.
5. Obiter dictum by Lynskey, J. in R. v. Miller [1954] 2 All E.R.529.
6. R. v. Miller (Ante).

by force in order to enforce his right to her consortium. Following this case, Lynskey, J. held that a man who, at a time when he was living apart from his wife, used physical force to achieve sexual intercourse with her against her will, was guilty of assault on her.[7] In the same way, a man who administers corporal punishment on his wife, however reasonable in amount, would be guilty of assaulting her.[8]

(c) Marital coercion.

Section 33 of the (Federal) Criminal Code is so curiously worded that, before attempting to divine its meaning, it would be necessary to set it out in extenso. It reads -[9]

> "A married woman is not free from criminal responsibility for doing or omitting to do an act merely because the act or omission takes place in the presence of her husband.
>
> But a wife of a Christian marriage is not criminally responsible for doing or omitting to do an act which she is actually compelled by her husband to do or omit to do, and which is done or omitted to be done in his presence, except in the case of an act or omission which would constitute an

7. R.v. Miller, ante.
8. R.v. Jackson, ante. See also s.160(1)(c) of the Evidence Act (Federal), and Bromley, pp.150, 155, 329.
9. Cf. s.31 of the Criminal Code of the Western Region which is identical in effect though less ambiguous in its wording.

> offence punishable with death, or an offence of which grievous harm to the person of another, or an intention to cause such harm, is an element, in which case the presence of her husband is immaterial."

The first paragraph of this section disposes of the old English law doctrine of marital coercion whereby a woman who committed a crime in her husband's presence was presumed to have done so under compulsion by him. The first part of the second paragraph says by implication that a wife of a non-Christian marriage can never take advantage of what looks like a new version of the doctrine of marital coersion. That part also means that, as a general rule, a wife of a Christian marriage will not be criminally responsible for a crime which she was actually compelled to commit by her husband "sitting on top" of her, as it were. In other words, she is free from responsibility if (a) her husband was present at the material time and place, and (b) she was actually compelled to commit the offence by him. Neither "actually" nor "compelled", nor again "his presence" is defined. And so it is difficult to say what in fact makes compulsion "actual". Does "actual" here mean "physical" as where a man by beating or physical torture makes his wife forge another man's name on a cheque? This could hardly be the meaning contemplated by the legislature.

Surely anyone so compelled by physical force - husband, wife child or stranger - would not be a free agent as far as the crime is concerned: or would he? If he would not, then the point about Christian marriage wives is superfluous; for no one would be criminally responsible if he did not act as a free agent. Perhaps then, "actual" simply means "effective" so that "actually compelled" means "effectively compelled". A similar difficulty arises about the meaning of "compelled". Will moral or psychological pressure be enough? Does the compulsion have to be physical, or is it enough that threats were used? On the question of the husband's presence, what degree of proximity to the scene of the crime is required? Does a man's wife commit arson "in his presence" if he stood fifty yards away from the property concerned but in full view thereof? Is a forgery done in his presence if he stands at the entrance door of a bank while his wife appends the forged signature on a cheque at the counter across the room?

But even if these points were clarified, even if we said that a wife is "actually compelled" to commit a crime in her husband's presence if in some way he gets her to do so against her will with him sufficiently near the scene that she feels she has no choice but to do the act or omission required of her - we are still faced with the problem of assigning some meaning to the part of the section

beginning with "except". Does this passage mean that a wife is not free from criminal responsibility for a capital crime or one involving grievous bodily harm even if she was compelled to commit the offence by her husband who was physically present at the material time and place? Or is the contrary meaning intended? The crux of the problem is in the phrase "in which case the presence of her husband is immaterial." Does this mean that the wife is responsible even if the offence was committed in her husband's presence and as a result of compulsion by him: or the other way round? In re-enacting this section, the Western Region interpreted it to mean that a wife will not be excused from this type of serious offence even if committed in the circumstances just described.

On this construction of the section, the law then is that where a Christian marriage wife commits a crime (other than a crime punishable by death, or one involving grievous bodily harm or an intention to commit this) in her husband's presence and by his actual compulsion (physical, moral or psychological), she will not be criminally responsible. In all other cases - i.e. (a) in all cases involving customary or Islamic marriage wives, and (b) in ~~all~~ cases involving Christian marriage wives, where the offence is punishable by death or involves grievous bodily harm - a wife is criminally responsible for her crime.

Spouses and the law of torts.

We have seen that under s.148 of the Criminal Procedure Act, a wife by a Christian marriage has a civil action against her husband (and other persons) for any offence committed by him against her property: for example for conversion, detinue, slander of property, and passing off where they produce rival goods.[1] We have also seen that a husband does not have a similar right of action against his wife, barring the summary proceedings under s.17 of the Married Women's Property Act, 1893. Even where a Christian marriage wife has a right of action, she cannot initiate legal proceedings while still living with her husband.

Subject to these exceptions, a spouse has no right of action in tort against her husband under the general law. Spouses by customary law marriages, however, do have a right of action against each other for civil wrongs committed by one against the other. And, though this is rare in practice, they may bring this action in the Customary Courts while still living together. (Civil cases between spouses used to be quite frequently decided by the traditional "arbitral" courts of the past, and by chiefs, family heads and other persons acting as arbitrators in modern times.)

Spouses and the law of conspiracy.

A husband and wife of a Christian marriage are

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1. Cf. s.10 of the Married Women's Property Act (ante).

not criminally responsible for a conspiracy between themselves alone [1] - "Christian marriage" being a marriage which is recognised by the lex loci celebrationis as a voluntary union fof life of one mand and one woman to the exclusion of all others.[2] This means that spouses so married will be free from criminal responsibility for doing an act which would otherwise be a conspiracy, if and so long as they did not act in concert with any other person; but they will be so responsible if a third party took part in the act or scheme. Thus a husband and wife of this description will be open to a criminal charge if they committed an act of conspiracy with their son or daughter, ward or servant, provided only that the latter has attained the age of criminal responsibility. The section also means that other spouses, such as customary law and Islamic law spouses, have no immunity of any kind in this respect.

On a charge of conspiracy involving a husband and wife, it is not necessary for the parties to prove their Christian marriage strictly or at all, in the absence of express demand to that effect. In Keshiro v. Inspector-General of Police,[3] a man and a woman were conviced by

1. S.34 of the (Federal) Criminal Code: reproduced in s.32. of the Western Region Criminal Code. And see Keshiro v. Inspector-General of Police (1956) W.N.L.R.84.
2. S.1 of the (Federal) Criminal Code.
3. Supra. Cf. R. v. Ajiyola, R.v. Udom, R.v. Adesina (Refs. below).

a Senior Magistrate on a charge of conspiring to bring false accusation against another person contrary to s.125 of the Criminal Code. At the trial they were both sworn on the Bible; the woman accused referred to the man charged with her as "my husband" in her evidence; and other witnesses described the accused persons as husband and wife. This allegation (that they were husband and wife) was not challenged by the prosecution or questioned by the Court. On appeal to the High Court, the conviction was quashed on the ground that in the absence of evidence to the contrary, and in view of the fact that the accused persons were sworn on the Bible, it must be presumed that they were husband and wife and that their marriage was a Christian marriage.

Spouses and the law of evidence.

(a) Non-Christian marriage spouses. Section 161 of the Evidence Act of the Federation provides that where an accused person has contracted a non-Christian marriage, his or her spouse is a competent and compellable witness for both the prosecution and the defence. To this there is a proviso to the effect that in the case of a Mohammedan marriage neither spouse may thereby be compelled to disclose any communication made to him or her by the other spouse during the continuance of the marriage. In other words, while as a general rule spouses of non-Christian marriages may be compelled to testify for or against each other, in

addition to being free to volunteer evidence for either side in the case, where the non-Christian marriage spouse concerned is an Islamic marriage spouse, he or she cannot be compelled to testify one way or the other if this would involve her having to disclose a communication made to him or her during the continuance of the marriage.

While, as we have seen, the courts are willing to presume on very slight evidence that a man and woman are husband and wife of a Christian marriage for the purposes of accepting or rejecting the evidence of one spouse for or against the other spouse, it has been held on more than one occasion that no such presumption can be made in favour of a polygamous marriage. If the prosecution, for instance, wishes to compel a wife to testify against her will or against her husband's desire, it must produce positive proof to the satisfaction of the court that the spouses had contracted a non-Christian marriage. In Idiong v. R.[4] the West African Court of Appeal held that no presumption in favour of a polygamous marriage could arise from the fact that the wife was sworn by a gun and was therefore probably not a Christian, or from the fact that the court records of the case described the accused husband as a "pagan". Ten years before in the case of R. v. Laoye[5] the same Court had said in a unanimous judgement -

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4. (1950) 13 W.A.C.A.30.
5. (1940) 6 W.A.C.A.6.

> "... the wife of the second accused was called as a witness for the prosecution without it being definitely given in evidence that she was not the wife of a monogamous marriage. It is true that she was sworn on the Koran and was therefore presumably a Mohammedan; but a point of this importance should not be left to presumption." [6]

In the sphere of civil actions the question of the competence of spouses of the parties to testify is governed by s.157 of the Evidence Act. The section reads:-

> "Subject to the proviso contained in s.147, in all civil proceedings ... the husband or wife of any party to the suit shall be" a competent witness. [7]

But the section is silent on the question whether or not such a spouse is also compellable. A similar provision is contained in s.162 of the same Act, which says that "the husbands and wives of the parties [to any proceedings instituted in consequence of adultery] shall be competent to give evidence in the proceedings ...."

Both s.157 and s.162 merely speak of "husbands" and "wives" without any indication or reference to the type of marriage which made them so. It is therefore reasonable to infer from this that both Christian and non-Christian marriage spouses

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6. Ibid., at p.8 Note that "pagans" often contract "Christian" marriages in Nigeria.
7. S.147 deals with the non-competence of a parent to give evidence of non-access where the legitimacy or paternity of his child is involved.

are contemplated therein.

(b) Christian marriage spouses.

The general rule is that when a person is charged with a criminal offence, his or her Christian marriage spouse is "A competent and compellable witness but only on the application of the person charged." [8] This means that in normal circumstances such a spouse can only be called as a witness for the defence, and that an unwilling spouse can be compelled to testify for the defence but not for the prosecution. But the possibility cannot be ruled out of an accused masochist making an application that his wife or husband as the case may be, should be allowed or indeed compelled to testify for the prosecution. It is submitted that in this unlikely situation, the court has no choice but to grant the application.

To this general rule there are a number of exceptions. First, where a person is charged with one of the many sexual offences or those against children, under the Criminal Code, his or her spouse is a competent and compellable witness for the prosecution or for the defence without the consent of the person so charged.[9] Secondly, where a person is charged with an offence against the property of his or her spouse, the latter is a competent and

8. S.160(2) of the (Federal) Evidence Act. And see R.v. Adebowale (1941) 7 W.A.C.A.142; Akpolokpolo v. Com. of Police (1960) W.R.N.L.R.89; and s.8(2) of the (Federal) Criminal Code.
9. S.160(1)(a) of the Evidence Act. The sections of the Criminal Code referred to here are: ss.217-219, 221-226, 231, 300, 301, 340, 341, 357-362, and 369-371.

compellable witness for the prosecution or the defence without the consent of the party charged.[10] But this is subject to the proviso that a husband and wife of a Christian marriage cannot be charged with an offence against each other's property unles (i) there was also an intention to defraud or injure a third party, or (ii) the offence was committed while the accused spouse was leaving or about to leave the other spouse. In other words, s.160(1)(b) of the Evidence Act is subject in its operation to the provisions of s.36 of the Criminal Code. Thirdly, where one spouse is charged with inflicting violence on his or her wife or husband as the case may be, the spouse thus assaulted is a competent and compellable witness for the defence or the prosecution, and that without the consent of the person charged: s.160(1)(c) of the Evidence Act. Fourthly, under the provisions of s.6 of the Punishment of Incest Law, 1955, of the Eastern Region, the wife or husband of a person charged with incest "may be called as a witness either for the prosecution or the defence and without the consent of the person charged."[11] But there is no indication here whether or not such a spouse can be compelled to testify against his or her will. There is a similar provision, and a similar quaere, in s.149 of the Federal Criminal Procedure Code which says that in an action by a Christian marriage

10. S.160(1) (b), Evidence Act.
11. Laws of the Eastern Region, 1955.

wife for the protection of her property, both she and her husband shall be competent witnesses.[12]

It is expressly provided in s.160(3) of the Evidence Act that nothing in that section "shall make a husband compellable to disclose any communication made to him by his wife during the marriage" and vice versa.[13] The effect of this is that an unwilling spouse cannot be compelled to testify for or against[14] the other spouse if such evidence would take the form of disclosure of some oral or written information made to him or her by the other spouse during the subsistence of their marriage. Sub-section (3) of s.160 must, moreover, be read with s.163 of the same Act. The latter provides that neither spouse can be compelled to disclose a communication made to him/her by the other spouse during the marriage, nor can he/she be permitted to do so except with the consent of the spouse who made the communication. An interesting result of these provisions is that while one spouse can permit the other spouse to disclose a marital communication where this is in his interest, and can forbid such disclosure where it would

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12. See below under civil actions.
13. This sub-section applies to all spouses, however married. Unlike many other sections of the Code, it is not limited in its application to Christian marriage spouses either expressly or by necessary implication.
14. The intention was presumably to prevent the prosecution from compelling spouses to testify against each other.

militate against his interests, there is no power in the courts to compel an unwilling spouse to disclose such a communication at the request of the spouse who made it. This is a flaw in the law, since the defence may well crumble without such a disclosure. Suppose a woman is charged with murder. Suppose that her defence is that she was being raped by the deceased, and that she struck the fatal blow in defence of her chastity. Or suppose that the accused is a man and that his defence is that he struck the victim down in a blind rage because the latter had made a revolting suggestion to him to perform some homosexual act. In either case, the defence may well stand or fall according as the accused person can or cannot prove his/her claim that he/she had reported the incident to the other spouse, soon afterwards - a difficult claim to prove without that spouse's co-operation.

One of the several problems that could arise under this sub-section is what precise meaning to attach to the word "communication". Would this include a statement intended by one spouse for a third party but made incidentally or unintentionally to the other spouse? More specifically, would this include, for instance, a statement contained in a document sent to a third party (such as a postcard, a telegram or a letter) but which the writer expected the other spouse to see and which in fact he/she saw; a state-

ment which one spouse overheard the other spouse make to a third party or to himself; or, nearer the border line, a letter written by one spouse to a third party and handed to the other spouse to be typed or translated before being transmitted to the addressee thereof? These and similar questions must, however, await a treatise on the law of evidence. Suffice it here to note further that s.160(3) does not give any clear answer to the question whether or not divorced spouses may be compelled or allowed, as the case may be, to disclose communications made to each other during their marriage, against the wishes of the party who made them. On this point it is submitted that the position is the same as in the law of England on the question of incompetence to testify generally. That law may be summed up in these words: once incompetent, always incompetent. "If a spouse is incompetent to give evidence against the accused during marriage," says Bromley, "the incompetence dontinues in respect of matters which occurred during coverture after a decree of divorce and, apparently, after a deree of nullity where the marriage was voidable."[15] Thus in R. v. Algar[16] a man had been drawing on her husband's bank account by forging cheques in her name. This was not discovered until after their marriage had been annulled on the ground of the husband's impotence. He was then

15. Bromley, p.275.
16. [1953] 2 All E.R.1381, [1954] 1 Q.B. 279.

prosecuted and convicted of forgery,[17] the ex-wife testifying against him. On appeal the Court of Criminal Appeal held that the wife was incompetent to testify as she did in spite of the fact that she was no longer his wife when the trial took place, and in spite of the fact that their marriage was voidable anyway.[18]

As already indicated in the section on non-Christian marriage spouses, the courts are ready to make a presumption in favour of Christian marriages where the result of such assumption would be to prevent one spouse from being allowed or, a fortiori, being compelled to testify against the other spouse without the consent of the accused. There is a long line of cases in which this principle was either laid down in express terms or applied without verbal formulation. In R. v. Ajiyola, [19] for instance, the West African Court of Appeal held in terms that where a wife was sworn on the Bible (her husband was also sworn on the Bible) before she testified, there was a presumption that she was a wife of a Christian marriage. It was, therefore, also held that she was not a competent witness against her husband without his consent. This decision was followed by the same court four years later in R. v. Udom; [20] by Morgan, J. in

17. It should be noted that the man could not be charged with stealing the money, since the "theft" took place while he and the owner of the money were husband and wife, and since the "theft" did not occur while the accused was deserting or about to desert his wife.
18. Cf. Bromley, p.64.
19. (1943) 9 W.A.C.A.22.
20. (1947) 12 W.A.C.A.227.

Akpolokpolo v. Commissioner of Police,[21] and by the Federal Supreme Court in R. v. Adesina.[22] Chief Justice Verity summed up the law on the point thus:

> "This question has been dealt with in a number of cases. In R. v. Mamodu Laoyo[23] it was said that where a witness was sworn on the Koran she was 'presumably a Mohammedan', but the court added: 'a point of this importance should not be left to presumption'. In R. v. Ajiyola and others where both the witnesses and the person charged were sworn on the Bible the Court said 'it must be taken that they are husband and wife of a Christian marriage and the woman was only a competent witness if called upon the application of the person charged.' In R.v. Ajobodu Afenya [unreported] it was lid down that it is necessary for the prosecution to show that the marriage is not monogamous and that this cannot be presumed. This was followed in R. v. Udom."[24]

In civil cases, on the other hand, the rule is that both spouses are competent witnesses each for and against the other.[25] This is the effect of the broad provisions

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21. (1960) W.R.N.L.R.89.
22. (1958) 3 F.S.C.25. Conviction upheld on grounds of other sufficient evidence.
23. 6 W.A.C.A.6.
24. Idiong v. R. (1950) 13 W.A.C.A.30, at p.31.
25. See Evidence Act, ss.157, 162 and 167; and s.149 of the Criminal Procedure Code - a curious section which in fact deals with civil litigation.

of s.157 of the Evidence Act which says: "Subject to the proviso contained in s.147 [relating to evidence of non-access by husband and wife] in all civil proceedings the parties to the suit and the husband or wife of any party to the suit, shall be competent witnesses." Similar in terms to this are the provisions of s.149 of the Criminal Procedure Code which says that the spouses shall be competent witnesses in an action by a Christian marriage wife for the protection of her separate property - an action she is entitled to bring against her husband or anyone else by virtue, inter alia, of s.148 of the Criminal Procedure Code. Again, s.162 of the Evidence Act provides that "The parties to any proceedings instituted in consequence of adultery and the husbands and wives of the parties shall be competent to give evidence in the proceedings." Finally, s.163 of the same (Evidence) Act provides -

> "No husband or wife shall be compelled to disclose any communication made to him or her during marriage by any person to whom he or she is or has been married; nor shall he or she be permitted to disclose any such communication, unless the person who made it, or that person's representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for an offence specified in subsection (1) of s.160."

The wording of this section, (in particular, the insertion therein of the phrases "any person to whom he or she is or has been married" and "nor shall he or she be permitted to disclose any such communication"), avoids two possible sources of hardship which exist in s.3 of the Evidence Act, 1853, of England and in s.160(3) of the Evidence Act of Nigeria which are practically identical in their terms. As Bromley says of the English provision, "... it gives the privilege to the spouse to whom the statement was made and not to the maker of it. Hence if the statement in question was made by the husband to his wife, he may be compelled to disclose it although his wife may not; but if she waives her privilege he has no power to prevent her from breaking his confidence." [26] Section 163 of the Nigerian Evidence Act obviously avoids these strictures by protecting both the maker and the recipient of the communication. It also avoids this other defect of which Bromley complains thus: " ... once the marriage has been terminated by death or divorce, the surviving or former spouse, no longer being the husband or wife of the other, may then be compelled to disclose communications which during the marriage would have been privileged." [27] The effect of this section is, therefore, that neither party to a Christian

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26. Bromley, p.274.
27. So held in Shenton v. Tyler [1939] 1 All E.R.827; [1939] Ch.620: A court of Appeal decision.

marriage is compellable to disclose any communication made to him or her by the other party; that neither party may be allowed to disclose any such communication without the consent of the party who made it or his/her successor in interest; and that a communication once thus privileged never ceases to be privileged even after the marriage has come to an end.[28]

Spouses and the law of wills

The law relating to wills is governed by two sets of statutes. The first set consists of (a) the Wills Act, 1837, of England which applies to Nigeria as a statute of general application, and which still governs testamentary dispositions in Lagos and the Eastern Region; and (b) the Wills Law, 1958 (No.28 of 1958) of the Western Region, which is an adaptation and re-enactment of the English statute of 1837. The second set concerns women's capacity to make wills, and comprises (c) the Married Women's Property Acts, 1882 and 1893, of England which also apply to Nigeria as statutes of general application and which are still in force in Lagos and the Eastern Region; and (d) the Married Women's Property Law of the Western Region already referred to.

Three points call for brief mention here on the

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28. The discusion assumes throughout that the communication was made during the subsistence of the marriage.

law of wills as it affects husbands and wives. The first is the capacity of women to make testamentary dispositions; the second is the effect of a person's marriage on his existing will; and the third relates to the validity or otherwise of a gift made to a person's spouse in a will which he attests.

(i) Testamentary capacity of women.

There are no statutory provisions which disqualify women from making testamentary dispositions of their separate property by reason only of their sex. Neither is there any such incapacity on women property owners at common law or under customary law. As far as a feme sole is concerned, therefore, there is the same legal capacity to make a will as attaches to a man. S.8 of the Wills Act, 1837, deprived married women of any testamentary capacity; but that defect was later removed by s.1 of the Married Women's Property Act, 1882, and s.3 of the Married Women's Property Act, 1893.[1]

(ii) Effect of marriage on existing wills.

Section 18 of the Wills Act, 1837, provides that-

> "Every will made by a man or woman shall be revoked by his or her marriage ...."

The intention of the legislature in enacting this section was obviously to make a testator's estate descend on his

1. Cf. the Married Women's Property Law of the Western Region, ss.3 and 13.

wife and issue as on intestacy (mutatis mutandis for a testatrix) should he forget to change his will after marriage in favour of his widow and issue if any - an intention which appears clearly in the exception to this general rule in the same section, to be considered presently. Clearly then there is a strong case for the application of this rule to customary law marriages, in the patrilineal societies at all events. For while it is true that women do not inherit anything from their deceased husbands, it is equally true that sons do so in all patrilineal societies and that daughters too inherit under some customary laws. So far, this question has not come before the courts. But s.15 of the Wills Law, 1958, of the Wester Region expressly removes customary law marriages from the operation of that rule when it provides -

> "Every will made by a man or woman shall be revoked by his or her marriage (other than a marriage in accordance with customary law) ...."

The reason for this exclusion is apparently a desire on the part of the legislature to keep the legal effects of the two systems of marriages separate and distinct. While this may be a laudable objective at the present stage of our legal development, there is little doubt but that the result could be hardship and injustice in some cases. Suppose a testator who was married under customary law made a

will in which he left all his property "to my wife Mgbogo, my daughter Odukpe, and my sons Ekong and Aghevba". His wife later died, and he contracted another customary marriage, of which four sons were born. He never got round to altering his will. He now dies, leaving his widow and seven children surviving. Had his first wife survived him, the second wife and her four sons would have been without any inheritance from him; what is worse, they would lose their rights to a roof over their heads (assuming the family all lived in the late testator's house.) As it is, the surviving widow is entitled to nothing under the will, since the gift to the testator's wife was made to her by name. And since that wife pre-deceased the testator, her legacy lapsed. It is only to this part of the estate that the four sons of the surviving widow are entitled on partial intestacy - a part which they have to share with the other three children who got the bulk of their father's estate under the will. Now, had the testator re-married under the Marriage Act after the death of his first wife, this will would ipso facto have been revoked; both the widow and all seven children would each be entitled to some share in the estate under the provisions of s.49 of the Administration of Estates Law, 1959, of that Region.

Agency of necessity.

One of the common law remedies open to a wife

whose husband fails in his duty to maintain her in the style to which she is accustomed, having regard to the man's social position and resources, is to pledge his credit for the purchase of such goods and services as are "necessaries" for her and the household. "The power", says Bromley, "takes the form of an irrevocable authority vested in the wife to act as her husband's agent for the purchase of necessaries ...." Though normally exercised by wives living apart from their husbands, this power is probably exercisable by a woman cohabiting with her husband if he fails to make her adequate allowance for housekeeping: Alderston, B., in Read v. Legard.[1] A wife's agency of necessity was held in Bazeley v. Forder [2] to include a right to pledge her husband's credit for the purchase of necessaries for their children. The term "necessaries" here includes not only food and clothing but also lodging and education.[3] It must be emphasised, however, that agency of necessity does not arise except where the husband fails to supply his wife with enough funds to purchase what the law would consider to be necessaries in the particular circumstances of the household, and then perhaps only where the wife is living apart from the husband.

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1. (1851) 6 Ex.636; Bromley, pp.198-9.
2. (1868) L.R. 3 Q.B. 559.
3. Bromley, p.336. Agency of necessity is too big a subject to be dealt with at all adequately here. For details, reference should be made to standard works on Agency and Divorce.

It has been suggested by a distinguished writer that "the wife (or wives) may pledge the husband's credit for such necessaries of life as are suited to her (or their) condition" [4] - the use of the plural forms in parenthesis indicating that the rule applies to customary marriage wives as well as to Christian marriage ones. But inquiries made so far have not discovered any society in our area of reference where the principle of agency of necessity is recognised by customary law.

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4. Elias, Groundwork, p.296.

Inheritance rights of spouses in each other's property

1. Under customary law

(a) Position of widow

Nowhere in southern Nigeria does the customary law give a widow the right to inherit, or to share in the, intestate estate of her husband.[1] The Federal Supreme Court's decision on the Yoruba case of Suberu v. Sunmonu [2] neatly sums up the law for all societies in these words:

> "It is a well settled rule of native law and custom of the Yoruba people that a wife could not inherit her husband's property." [3]

Even where a husband in his life time allots a farm, a house or some other form of landed property to his wife for her use and enjoyment, the latter does not thereby acquire inheritance rights in it. A contention that she did acquire such rights under Yoruba law was rejected in no uncertain terms by the West African Court of Appeal in Dosunmu v. Dosunmu.[4] As the Court put it -

> "The native law and custom alleged here is, briefly that property can be allotted and descend not through

1. See Esenwa, loc.cit., p.80; Cotton, "The people of Old Calabar", loc.cit., p.305; Talbot, In the shadow of the bush, p.314 (Ekoi); Forde, Marriage and the family among the Yako, p.70; Forde, "Double Descent among the Yako", loc.cit., p.325; Lloyd, "Some notes on the Yoruba rules of succession ....", loc.cit., p.28; Omoneukanrin, op.cit., p.74 (Itsekiri); Coker, op.cit., p.161; Thomas, "Marriage and legal customs of the Edo-speaking peoples of Nigeria", loc.cit., p.100; Lloyd, Yoruba Land law, pp.304-205.
2. (1957) 2 F.S.C.33.
3. From the headnote.
4. (1954) 14 W.A.C.A.527.

> a child but through a wife. If such native law and custom existed, it would mean that on the death of a childless wife, not of the same family as her husband, property vested in her would pass away from the husband's family, from whom the wife became entitled to it, to the wife's family." [5]

As will appear later, it is for this same reason that a husband is excluded from succession to his wife's share of her (maiden) family property.

Nevertheless, a widow is not entirely without rights in her late husband's estate. She has a legal right to retain the use and possession of the matrimonial home, whoever the new owner of the radical title may be and even if the said matrimonial home happens to be part of the family property.[6] In the same way, a widow is entitled to make use of as much portion of her late husband's farm land as she ordinarily requires. In either case, she has the right whether or not she has any children surviving, and for as long as she wishes to remain in residence among her late husband's people.[7] The result is that the legal heir's right to possession is postponed till the widow dies or re-marries or otherwise leaves the family for good.

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5. Ibid., at p.528.
6. Cf. Coker, p.161.
7. Ibid., pp.160 and 244.

(b) Position of husband

With the exception of the Ekoi and the Yoruba, the general rule is that a man can inherit his wife's post-nuptial movable property and any ante-nuptial property which she brought with her to the matrimonial home. He only does so, however, if there are no children of the marriage or, more generally, if the woman left no children who are entitled to succeed to her property on intestacy. A husband has no right to inherit his wife's ante-nuptial landed property, at all events where such land is situated in the territory of her maiden community.[8] Similarly, he cannot inherit her share of her (maiden) family land, as this would mean that the land in question would pass away from the woman's to the man's family. But a man can and does inherit his wife's after-acquired landed property if at any rate it is situated in his or in a neutral community.[9]

The Yoruba rule, on the other hand, is that a man does not inherit his wife's property or anybpart thereof on intestacy. Her primary heirs are, as we have seen, her children. Failing children, her siblings will inherit.[10] Under Ekoi (including Yako) law, too, a woman's heirs are her siblings, not her husband, if she left no children

8. Cf. Nwugege v. Adigwe (1934) 11 N.L.R.134.
9. "Neutral" means here neither in his nor in her local community.
10. Lloyd, "Some notes on the Yoruba rules of succession ....", loc.cit., p.28; Partridge, "Native law and custom in Egbaland", loc.cit., p.433; Lloyd, Yoruba land law, p.304.

surviving her.[11] This rule also applies to the property of "small dowry" marriage wives in Ijaw law.

2. Under the general law.

(a) Lagos.

The surviving spouse of a person who contracted a marriage under the Marriage Act and who in his life time was subject to customary law is entitled to succeed to the intestate estate of the latter; so is the surviving spouse of an issue of such marriage.[12] It is immaterial whether or not the issue of an 'Ordinance marriage' was himself married under the Act or died single; his disposable property still descends to his spouse in whole or in part in accordance with the provisions of English law as it stood on the date of commencement of the Act in 1914. Again, if the Privy Council decision in Coleman v. Shang[13] is followed by the courts in Nigeria, as it probably will be, then it would also make no difference that the surviving spouse is not an 'Ordinancy marriage' spouse. Provided only that a man ~~of the spouses~~ was once married under the Act, any spouse who ultimately survives him will benefit from the provisions of s.36(1) of that Act.[14]

The effect of s.36 of the Marriage Act is to

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11. Forde, Marriage and the family among the Yako, p.69.
12. S.36(1), Marriage Act.
13. [1961] 2 All E.R.406: on appeal from the Supreme Court of Ghana.
14. For a more detailed discussion, see the section on the inheritance rights of parents and children inter se, post.

incorporate into the law of Lagos the provisions of the Statutes of Distribution 1670 and 1685 as amended by the Intestates' Estates Act, 1890, of England. These provisions may be summarised as follows. If a man so married dies intestate as regards the whole or any part of his personality or as regards any realty which he could have disposed of by will, this property shall be distributed as if it only consists of personalty. Where there are surviving issue in addition to the widow, the latter is entitled to one-third of the net estate - the rest going to the said issue. If there are no issue who can inherit, the widow takes the entire net estate if it does not exceed £500 in value. If it exceeds £500, she takes one-half of the net estate, plus another charge of £500 on the estate, plus an interest of 4 per cent. per annum on the value of her inheritance as from the date of the husband's death.

Where the surviving spouse is the husband, he is entitled to the deceased's net estate absolutely, whether or not there are any issue surviving.

(b) Western Region

The inheritance rights of the spouses of a Christian marriage inter se is governed by s.49 of the Administration of Estates Law, 1959, of the Western Region. If the spouse in question dies intestate, leaving the other spouse surviving, but not leaving any issue or parent, or brother

or sister of the whole blood or any issue thereof, then "the residuary estate shall be held in trust for the surviving husband or wife absolutely": s.49(1)(i)(1). Where the deceased left a spouse as well as issue surviving, the surviving spouse shall take (a) all the personal chattels absolutely; (b) a charge on the residuary estate to the value of one-third of such residue; and (c) subject to this charge, one-third of the said residue shall be held in trust for the surviving spouse for life. Finally, if the intestate left a spouse and one or more immediate relations (i.e. parents, brothers or sisters of the whole blood), but no issue, then (a) the surviving spouse is entitled to the personal chattels absolutely; (b) in addition, the residual estate shall stand charged with a money payment to him or her equal to two-thirds of the value of the said residue; (c) subject to the payment of this charge half the residue shall be held in trust for the surviving spouse, and the other half shall be held in trust for the surviving parent absolutely (equally, if both parents are still alive), or on trust for sale for the deceased's brothers and sisters of the whole blood.

(c) Eastern Region

Whether or not the provisions of any, and if so which, English statutes apply to the Eastern Region is far from clear. For many years, the courts have held almost

consistently that though s.36 (1) of the Marriage Act did not apply to the Region, succession to the intestate estate of any person who contracted a Christian marriage should be regulated by the law of England and not by the local customary law. This was, for example, the decision of Ames, J. in Re Emodie, Administrator-General v. Egbuna.[15] But the Chief Justice of the Region said twelve years later in Onwudinjoh v. Onwudinjoh [16] that he would not decide the case before him in accordance with the line of cases whereby successive generations of his learned bretheren had sought to bring the law of Nigeria in line with that of England as it was at the close of the nineteenth century. In his view, the decision in Cole v. Cole [17] on which later judges based their own judgments, may one day be called in question by the Federal Supreme Court.[18] If therefore Re Emodie and similar cases are followed, the inheritance rights of spouses of a Christian marriage will be the same as those already discussed in connexion with Lagos. If, on the other hand, Ainley, C.J.'s hint is heeded by the courts, customary law and not the law of England will be applied. In that case, the rules discussed in the section on customary law rights of spouses to take on each other's intestacy will apply.

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15. (1945) 18 N.L.R.1.
16. (1957) II E.R.L.R.1.
17. (1898) 1 N.L.R.15.
18. Onwudinjoh v. Onwudinjoh, ante, at p.5.

CHAPTER ELEVEN

PARENT AND CHILD - I

LEGITIMACY, LEGITIMATION AND AFFILIATION

A. LEGITIMACY.

Conflict of laws.

The problem of determining whether or not a child is legitimate represents one of the most complex aspects of the notoriously complicated field of conflict of laws in Nigeria. For it calls for answers to at least three deceptively simple questions, involving three tiers of choice of law rules:

(a) to which legal system shall reference be made, Nigerian or foreign?

(b) if Nigerian, which type of law should apply, customary or non-customary; if the former, which society's law is to be applied;

(c) to what extent, if at all, do the two types of law in Nigeria employ the same principles in deciding a person's legitimacy or otherwise?

The position is made more difficult by a number of judicial dicta which, by suggesting that the customary law knows nothing of illegitimacy as a status, tend to blur the distinction between legitimacy at birth and legitimation by

subsequent events, and the further distinction between legitimacy as a status and membership of a social group.

Taking the last points first and anticipating a little what will be later developed more fully, it should be pointed out at the outset that there is a status of illegitimacy under the customary laws of all the societies within our area of reference; that this status carries with it certain legal disabilities especially in relation to inheritance and succession to property and traditional offices with ritual functions respectively; that while the Nigerian's proverbial desire for children has led to the principle that, in a patrilineal society, every child is affiliated to (i.e. is a member of) some family at birth, a child in such a society is illegitimate if his membership of the family derives solely from that of his mother as opposed to his father; and that to say that a child's status as legitimate has nothing to do with his mother's status as a wife or widow is to confuse legitimacy acquired at and by virtue of birth with legitimacy acquired after birth by virtue of the subsequent act of the parents or one of them.

(a) Nigerian or foreign law?

The legitimacy or otherwise of a non-Nigerian child is determined with reference to the law of his

domicil at any given moment.[1] A child's domicil is that of his parents, if married to each other, and changes with it as will be seen later.[2] (The child's nationality or citizenship is irrelevant for this purpose.) If the parents were not married to each other at the time of his birth, and if they had different domicils either then or subsequently, his domicil is that of his mother. If, however, the child's parents were married to each other at the time he was conceived or born, his domicil would be that of his father. The father's domicil may be his domicil of origin, namely where he was born, or that of choice; for a man may change his domicil at will provided he has attained the age of twenty-one. A mother's domicil, too, may be either one of origin or one of choice. But it may also be a domicil of dependence, viz. that of her husband for the time being. It follows that where a child depends for his domicil on his mother (because he was born out of wedlock, or because his father has died), his domicil may change to that of his mother's new husband even if the child has in no way been accepted as a member of his household and has never

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1. Bamgbose v. Daniel (1954) 14 W.A.C.A. 116; [1955] A.C. 107; Phillips, "Conflict between statutory and customary law of marriage in Nigeria," (1955) 18 M.L.R. 73, at p. 75.

2. Bromley, p. 14.

been to the new man's country. (We shall see later that this only happens when the mother expressly changes the child's domicil for his own benefit.)

Once the child's domicil is ascertained through the application of one of the above rules, the question of his legitimacy is determined with reference to the law of that place. These, by the way, are English conflict of laws rules which apply to Nigeria presumably under the general rubric of "common law". Incidentally, too, these rules apply without regard to the child's nationality or citizenship, as a rule. Thus a child born in Nigeria since independence is a Nigerian citizen by birth (subject to two exceptions relating to the children of enemy aliens and members of the diplomatic corps.) But he will not have a Nigerian domicil if his father is domiciled elsewhere.

(b) Which Nigerian law?

If a child's domicil of dependence, as above described, is Nigeria, we are faced with the problem of internal conflict of laws. To begin with, which of the two types of law in force in the country should be applied - customary law or the general law? The prima facie answer is that this would depend on whether the child in question was born of a customary or a Christian marriage. But this, in our submission, would be quite

wrong. While the married status of a child's parents at the time of his conception or birth is a vital point in determining his domicil in external conflict of law cases as already seen, and while that status may be important in deciding the question of legitimacy itself where the child is domiciled in Nigeria, it is irrelevant to the problem of choice of law. The vital question here is whether or not the child concerned is a person subject to customary law. If he is, then the proper law of the case would be the customary law of the child's society.[3] Since, in spite of early judicial dicta to the contrary, the courts still regard all Nigerians[4] as subject to customary law by applying that law to cases to which they are parties (wherever the nature of the cause or the transaction which gave rise to it permits,) it follows that for practically all Nigerians the proper law of a legitimacy case is his local customary law. A child's "local customary law" is that which prevails in the society of which he, like his ancestors before him, is a member.

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3. So held in Re Macaulay, 13 W.A.C.A. 304. See the unanimous judgment in this case (per Verity, C.J.) at pp. 309-10, for the point under discussion.

4. The statutory provisions which require the courts to apply and enforce the application of customary law in suits involving "natives" have already been discussed. The difficulty of applying these provisions to naturalised Nigerians has been hinted.

If, however, a child is not subject to customary law (e.g. where his parents had immigrated into the country from a European or North American country), his legitimacy will be determined with reference to the general law (ante), which is the same as the law of England.[5]

Who is legitimate?

(a) Under the general law, a child is illegitimate if born out of wedlock and vice versa. A child is only born in wedlock if he is the joint biological product of his parents, and if the said parents were lawfully married at the date of his conception or birth. A child so conceived or born is legitimate at birth; all others are not. If a marriage is void ab initio, any children born of it are illegitimate at birth. Thus in Onwudinjoh v. Onwudinjoh,[6] a man purported, during the subsistence of his Christian marriage, to marry another woman under customary law, and of this latter "marriage" a number of children were born. It was held that as the second marriage was void by virtue of s.35 of the Marriage Act, these children were illegitimate. In coming to this decision, the court was obviously

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5. The Legitimacy Act is a misnomer, so is the Legitimacy Law of the W. Region. They only deal with legitimation by subsequent marriage and its effects on inheritance.

6. (1957) II E.R.L.R. 1.

applying the general law principle that a child born out of wedlock is illegitimate. In view of the decision in Re Macaulay[7] on the proper law applicable to cases of persons subject to customary law in Nigeria, this choice of law might be said to be wrong in principle. But it is perhaps justifiable on the general conflict of law rule that in the absence of evidence to the contrary, any foreign law may be presumed to be the same as what we shall call the primary law of the court.[8] (As we have seen, customary law is treated as foreign law in the Interpretation Act, for the purposes of its ascertainment in court). Be that as it may, the important point here is that under the general law, and in the absence of any personal law operating to the contrary, children of a marriage that was void ab initio are illegitimate.

If a marriage was voidable and was later nullified, any children thereof will be legitimate if they would have been so had the marriage been valid to begin with but subsequently dissolved by divorce. This is because the Matrimonial Causes Act, 1950, provides:

> "Where a decree of nullity is granted in respect of any voidable marriage, any child who would have been the legitimate child of the parties to the

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7. Ante.
8. Cf. Allot, Essays in African Law.

marriage if it had been dissolved, instead of being annulled, at the date of the decree shall be deemed to be their legitimate child notwithstanding the annulment." Doubt has been expressed as to whether the phrase "at the date of the decree" refers to "the legitimate child of the parties to the marriage" or to "if it had been dissolved."[9] If the former, then a child would only be legitimate by virtue of this section if he would have been legitimate at the date of the annulment, had the marriage been valid in the first place. In other words, a child conceived during the subsistence of a voidable marriage would not be legitimate if born after the said marriage had been annulled even if he was the joint biological product of his parents as parties to the marriage. But if the other view is correct, then a child would be legitimate even if born subsiquently to the annulment of his parents' voidable marriage, provided he was their joint product and was conceived during the subsistence of the marriage. This, in our submission, is the correct interpretation of the section. In other words, the section simply means that a child born of a voidable marriage which was subsequently annuled at a given date shall be legitimate if he would have been so had the words "voidable" and "annulled" been replaced with "valid" and "dissolved" respectively, so that what took place in fact at the relevant date was a dissolution

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9. Bromley, p. 290, note (y).

of a valid marriage.

(b) Under the customary law, no child is born illegitimate if he was either conceived or born during the subsistence of his mother's valid marriage. And, as a general rule, a child is legitimate if conceived and/or born during his mother's widowhood, provided that her marriage to the late husband had not been formally dissolved (usually by repayment of the bride price). This means that paternity and legitimacy have no necessary connection under customary law. A child is the legitimate child of the man to whom his mother was married at the time of his birth (sometimes conception), whether the said husband is alive or deceased, and whether or not the husband was also the child's natural father.[10] In Briggs v. Briggs (see note 10), a man sued a woman in the Kalabari Native Court for slander because she had said that the plaintiff was not a son of his father's. The plaintiff's father gave evidence for the defendant, and the action failed, apparently on grounds of justification. Later

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10. Cf. Folarin, op. cit., p. 33. See also Briggs v. Briggs (1957) II E.R.L.R.6, where this was the substance of counsel's contention, insofar as this could be gleaned from the judgment of Palmer, Ag.J., at p. 8.

the plaintiff sued his own father in the Magistrate's Court, again for slander - the father having repeated his statements about the plaintiff's paternity outside the court. The magistrate gave judgment for the plaintiff, and his father appealed on the ground that, the magistrate had no jurisdiction over the case which,he argued, was a matter of "family status". In the High Court, the case was fought mainly on the issue of justification. In allowing the father's appeal, Palmer, Acting J. said:

> "A curious point was raised in argument which I confess I have some difficulty in following. It is said that the essence of the defamation lies not in the defendant's denial that he is the plaintiff's father, but in the further assertion that Ajumo is. I cannot quite see what difference it makes ..... I am saitsfied that the real question at stake is the plaintiff's paternity and legitimacy."[11]

It is submitted that what is curious in the case is not that the plaintiff and his counsel were trying to distinguish between paternity and legitimacy in Kalabari customary law, but that the learned judge should fail to see that distinction, or worse still, having seen it,

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11. Briggs v. Briggs (ante), at p. 8. But query if these two concepts (paternity and legitimacy) are identical in Kalabari law.

should dismiss it as immaterial. What the plaintiff was saying was that he was his father's son legally even if not biologically. If this was actually what he pleaded and argued in the lower court, then in our submission, the court erred in telescoping the two concepts of paternity and legitimacy into one and treating the issue as if the case revolved on the single question of paternity in the biological sense. It is a great pity that expert evidence was neither asked for nor called to help determine the following questions which, in our submission, were really the crux of the plaintiff's case:

(a) whether in Kalabari customary law a person was a lawful child of his mother's husband at the time of his birth, even if he was not also a biological product of the said husband;

(b) if the answer to this question is in the affirmative, whether such legal relationship could be repudiated by the father; and

(c) if a father had no such right to repudiate in law, whether his purported repudiation was defamatory of the child concerned.

In fairness to the learned judge, however, it must be pointed out that whatever observations he made on the identity or otherwise of the concepts of paternity and legitimacy were entirely <u>obiter</u>. For in his own

words:

> "The main issue raised in this case is the paternity of the plaintiff,[12] which is a matter of family status. There is sufficient evidence to show that this issue is within the jurisdiction of the Kalabari Native Court .... The jurisdiction of the Magistrate's Court is therefore ousted.
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> "In the result, therefore, this appeal must be allowed, the judgment of the lower court set aside, and the plaintiff's claim struck out for want of jurisdiction. If the plaintiff wishes to have the matter of his paternity determined, the only court in which he can take action is the Kalabari Native Court. If he feels, as he may well do, that it should not be tried there, he must apply for a transfer" to a higher court.[13]

The decision in this case, therefore, still leaves open the question whether or not there is a necessary connection between biological paternity and legal paternity (i.e. legitimacy in this context) in Kalabari law. And, for what it is worth, the judgment of the Magistrate's Court, albeit given without jurisdiction, gives some indication

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12. This, with respect, is not quite accurate: the main issue appears to be legitimacy, not paternity. But this does not affect the correctness of the court's decision which only concerned jurisdiction.

13. Ibid., at p. 9

that there is no such necessary connection. The High Court did decide, however, that the proper court in which to bring an action wherein the issue of family status was raised should be the local Customary Court. It therefore, also held by implication that the proper law of such a case was the local customary law, since this would naturally be the primary law of that court. But it cannot be emphasised too strongly that even if the case were tried by a non-customary court (by way of transfer, for example, or on appeal), the proper law would still be the parties' customary law. This, in our view, is not because the plaintiff was born of a customary marriage, as the High Court said, but because the parties were persons subject to customary law.

Where a person's mother was not married at the time of his conception or birth, the proper law applicable to the question of his legitimacy is, in our submission, the customary law of his mother's society, assuming of course that she is a "native of Nigeria" as defined in s. 3 of the Interpretation Act. (The enactments setting up the various Courts provide that customary law shall apply where the parties are natives are irrelevant here.[14])

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14. See, e.g., the High Court Laws: s.22 (1) (E.R.), s.12 (W.R.), s.27 (Lagos); Mag. Courts Laws: s.43 (E.R.), s.32 (W.R.)

The Privy Council held in Bamgbose v. Daniel[15] that the status of a child as a legitimate child must be considered independently of the status of his mother as a lawful wife or widow, and that the difficulty or otherwise of accepting his mother as a lawful widow for the purposes of the Statute of Distribution does not affect the claim of the child as a legitimate child. Again a distinguished writer has said: "The legitimacy of the children depends on their recognition by the father; the status of the mother, as a wife by English or by customary law or as a lover is immaterial."[16] It must be remembered, however, that the Privy Council was dealing in Bamgbose v. Daniel with the inheritance claims of children whose mother was married under customary law at the time of their birth, and who were treated by the deceased as his lawful children down to the end of his life. The Court's decision in that case must, therefore, not be taken as a general statement of the law relating to legitimacy in all circumstances. As Coker reminds us in connection with Yoruba law (it was under Yoruba law that Bamgbose v. Daniel was decided), it is not correct to suppose that there is no status of illegitimacy, for that

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15. (1954) 14 W.A.C.A.116; [1955] A.C.107.

16. Lloyd, "Some notes on the Yoruba ..." (1959) 3 J.A.L., at p.22; Lloyd, Yoruba Land Law, p.297.

status does exist: a "bastard ... is commonly called the omo ale, which literally means 'the child of a mistress or unmarried woman'."[17] It is submitted that there is a customary law rule of universal application in southern Nigeria, viz. that a child born of a unmarried mother is illegitimate at birth - "unmarried" being used here to include women whose marriages have been legally dissolved.

Presumption of Legitimacy.

Section 147 of the Evidence Act provides that if a child is born to a man's wife during the subsistence of a valid marriage or within 280 days after its dissolution, the woman remaining unmarried meanwhile, this fact "shall be conclusive proof that he is the legitimate son of that man," unless it can be proved (a) that there was no access during the material period, or (b) that even if there had been a meeting or more of the spouses during the material period, the circumstances were such that sexual intercourse was "highly improbable." It is therefore possible to prove that a child was not born in wedlock in the sense of not being the natural and joint product of his parents, by showing, for example, that his "father" was impotent, too ill or too far away from the mother all during the possible

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17. Coker, op. cit., p. 237 Cf. Simmons, loc. cit., p. 156., p. 156, on the Efik.

period of gestation, or that his mother and her husband never met in private, or that they only met in a prison cell with a glass wall between them.

A proviso to s. 147 says, however, that neither spouse is a competent witness as to "their having or not having had sexual intercourse with each other where the legitimacy of the woman's child would be affected," and further that declarations made by either spouse on this subject are not relevant (i.e. admissible) evidence. The effect of this is that only circumstantial evidence introduced by third parties could be used to prove a person's illegitimacy in these circumstances, in the vast majority of cases. It may be objected that positive evidence may be adduced to prove that the child in question was a natural child of another man, and that both spouses as well as third parties can introduce such evidence. (Blood test and comparison of physical features readily spring to mind here.) But it is submitted that evidence of this type may be useful in proving adultery; it is completely useless in disproving legitimacy. This is because s.147 only provides for two related methods whereby the presumption of legitimacy can be rebutted. These are by proof of non-access during marriage or within 280 days of the dissolution of the marriage; and by proof that even if there was access, the chances of sexual intercourse having taken place were practically non-

existent. No other method of disproving legitimacy is contemplated. And so it is not open to anyone to negative the presumption of legitimacy by ascribing paternity to a third party however strong the indications are from laboratory tests and physical resemblances. This line of reasoning obviously leads to a number of anomalies. One of these is that it might be possible to show from blood tests and other scientific methods that a woman has committed adultery and that a child ~~had~~ resulted from that illicit liaison. The wife may then be divorced and her paramour made liable in damages. And yet the child concerned would be presumed conclusively to be the legitimate child of his mother's husband. Another possible anomaly is that, in strict legal principle, a man would have no right to repudiate his wife's child on the ground that he was not the child's natural father, unless he can prove non-access or a very high degree of improbability that sexual intercourse could have taken place between him and his wife during the possible gestation period. How could a man repudiate a child who is deemed to be his own legitimate child? Another result of the provisions in s. 147 is that a woman's confession of adultery, or its admission by her lover, during divorce proceedings or in an action for damages for adultery, as the case may be, is not admissible in evidence in an

action for declaration of legitimacy. This is not just because the parties are different (as is the case in civil actions founded on the same facts as those of a prior criminal prosecution); it is because the presumption of legitimacy can only be rebutted in the way already described, a way which is not open to either spouse. (A lover's confession of adultery is, in our submission inadmissible evidence in legitimacy proceedings as it has nothing to do with access or the absence of it as between the spouses themselves.)

There is a proviso to. s. 13 of the Marriage, Divorce and Custody of Children Adoptive Bye-Laws Order, 1958, of the Western Region which says simply: "Provided that the husband of a woman shall be presumed, for the purposes of these Bye-Laws, to be the natural father of any issue born or conceived by the woman during the period over which their marriage sibsists." But there is no indication whether or not this presumption is rebuttable.

The presumption in favour of a child's legitimacy is not a product of statute law only: it also exists under customary law pure and simple. The best statement of this rule was made by Forde in relation to Yako law. A man, he says, is presumed to be the father of his wife's children. Even where evidence of physical

paternity by another man is conclusive, the husband is still the legal father of a child born to his wife, provided only that the marriage was still subsisting - /presumably at the time the child was conceived./[18] The same author accounts for this rule in terms of payment and receipts of dowry (bride price). "There is no doubt," he says, "that it is the transfer of the libeman[19] which gives the husband legal right to his wife's services and to the social fatherhood of the children born to her during the marriage."[20] This account is quite correct in principle, but it requires a little qualification in view of the fact that, as we have seen, the bride price may be waived by the person entitled to receive it, deferred for a time or paid by instalments. Therefore, there need not be any "transfer" of bride price. But there must be a valid marriage. And so it may be safely concluded that what gives a man a right to the "social fatherhood of the children" born to his wife is, in the final analysis, the fact of their being married.

The relevant point that emerges from this

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18. "Double Descent among the Yako" in African Systems of Kinship and Marriage (ed. Radcliffe - Brown and Forde), p.291.
19. i.e. the bride price, dowry or marriage consideration.
20. Forde, loc.cit., p. 323.

discussion is that, other things being equal, a child is the legitimate child of his mother's lawful husband. But against this must be set the growing practice of sophisticated men renouncing their wives' children on the ground of non-paternity, witness the Briggs case. However, this practice and its converse have more to do with affiliation, and will further be examined later.

B. AFFILIATION.

Definition and Scope.

This is such a vast subject that we shall have to limit the scope of the present study rather severely. The term, "affiliation" is used in two different and unconnected senses. Under the general law, it is usually found in the phrase, "affiliation proceedings," which means, in simple language, the process whereby a man is compelled by the courts to make contributions towards the maintenance of his natural child until the latter attains a specified age. We shall not be concerned with this meaning of the term. As used in the field of customary law, "affiliation" denotes the right of a person or his family to the "ownership" of a child, and conversely the right of a child to the membership of a given family by virtue of his blood relationship with one of its members. The present discussion will be confined to this meaning of the word.

Child of Unmarried Mother.

Children of unmarried mothers may be classified under two heads according as their mothers were or were not betrothed at the time of their conception or birth. And since the law which governs affiliation in each case

is different one from the other, it will be convenient to adopt this two-fold classification.

(a) Where mother was not betrothed.

The general rule under customary law is that a child born of a woman who is neither married nor betrothed is affiliated to the family of his mother, not that of his natural father. As Simmons says of the Efik, if an unmarried girl gives birth to a child, he "will be stigmatized as a bastard, or eyen akpara, 'child of a harlot'! Such a child, he says, belongs to his mother's parents whose name he bears.[1] This is true even where the man and woman live together as husband and wife, Simmons[2] goes on, a point also made by Fordė about the Yako,[3] by Thomas about the Edo,[4] and by Elias about Nigerian societies generally.[5] Similarly, Leith-Ross says of the Ibo that "if a girl is entirely free, that is to say, if not even the smallest instalment of dowry has been paid,

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1. Loc. cit., p. 156. Cf. Meek, Law and Authority .... pp. 282 - 3.
2. Ibid., p. 163. Cf. Forde and Jones, op.cit., p. 18.
3. Marriage and the Family among the Yako ..., p. 113.
4. Anthropological Report on the Edo ....., p. 50 (Urhobo).
5. Groundwork of Nigerian Law, p. 297.

then, if she bears a child, that child belongs to her parents 'but they think shame.'"[6] Of the Egba Yoruba, Folarin says, "Any child begotten by un-married woman for a friend cannot be claimed by that friend as his own" unless he proceeds "forthwith" to marry her.[7] "An illegitimate child born before marriage belongs to the girl's father", states Egharevba, writing of the Bini.[8] The one writer who makes a categorical statement to the contrary is Lloyd in his contribution on the Itsekiri. In this society, he says, a "man has rights over any child of which he can claim biological paternity .... whether or not he was the legal husband of the mother at the time of the child's conception or birth."[9] Similarly, Bradbury says that among the Urhobo and the Isoko (Edo), illegitimate children "live with their mother when small, but the genitor can claim his son later on, perhaps after he has paid compensation to the woman's father or husband."[10] It would appear nevertheless, that in all these societies - Itsekiri, Urhobo and Isoko, the position is very much like that in Yorubaland, viz. that in strict law a man has no

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6. African Women, A Study of the Ibo of Nigeria, p.103
7. Op. cit., p.33.
8. Op. cit., p.19. Cf. Bradbury and Lloyd, op.cit., p.36.
9. Bradbury and Lloyd, op. cit., p.191.
10. Ibid., p.137.

right to his natural child, but that in the absence of opposition from the family of the child's mother, such a natural father can acquire paternal rights over the child by acknowledgment.[11]

This brings us to the modern development on this subject. As we have seen, there is now statutory power in the courts to award "paternal rights" to the natural father of an illegitimate child in parts of the Western Region.[12] Elsewhere, the practice is growing of natural fathers claiming their illegitimate children as against the mother's family - even among the Ibo.

(b) Where mother was betrothed.

The problems that could arise in connection with the affiliation of a child whose mother was betrothed at the time of his conception or birth are many and varied; for the circumstances are capable of a wide variety of permutations and combinations. But they can all be dealt with in answer to three sets of questions. First, if a betrothed girl (including a woman whose previous marriage had been dissolved) becomes

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11. For further references on the general rule: Basden, Among the Ibos, p.76; Thomas, Anthropological Report on the Ibo, I, p.69; Esenwa, loc. cit., pp.73 and 75; Sporndli, loc.cit., p.118.

12. i.e. where the Marriage, Divorce and Custody of Children .... Orders, 1958, has been adopted.

pregnant either by her fiancé or per alios, and the marriage proposed falls through, so that the child was born while his mother was single, who is entitled to the child? Secondly, if a girl becomes pregnant by her fiance but marries another man before the child is born, who is entitled to the child? And thirdly, if a betrothed girl becomes pregnant per alios but proceeds to marry her fiancé nevertheless, and the child is born subsequently, who is entitled to the child?

Where a betrothed girl becomes pregnant during the period of betrothal, but the child is born after the termination of the betrothal, affiliation of the child is governed by the same rules (already discussed) as apply where the girl was not betrothed. The general rule (which, as we have seen, is subject to statutory modifications in some places and to a growing but as yet unrecognised practice elsewhere) is that the child in these circumstances is affiliated to the family of his

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1. Here as elsewhere in this treatise we speak of people being "entitled" to children as if they were pieces property. Indeed some writers describe children as "property of X" in such circumstances. But it should be emphasised that this is no more than a reflection of people's almost pathological attachment to children as the fulfilment of their mission in life. It can be translated into "custody" in English law provided that term is extended to include custody over children of unmarried mothers.

mother. In such cases, it makes no difference whether the pregnancy was caused by the girl's fiancé or by another man. Nor does it matter that the fiancé had already paid some bride price on the girl and that at the time the child was born this bride price had not been repaid in full or at all. As we have seen in another context, the mere fact that a man had paid bride price on a girl does not give him any rights whatsoever to her children unless the proposed marriage was actually celebrated: Edet v. Esien (ante).

The answer to the second question flows naturally from the rule, already discussed, that a child is the lawful child of the man to whom his mother was married at the time of his birth, whether or not that man was his natural father. We may, therefore, state the rule thus: where a girl is betrothed to a man and becomes pregnant by him during the period of betrothal, but marries another man before the child is born, then as a general rule, the child is affiliated to the second man as his mother's legal husband, and not to the first man to whom she was merely betrothed. The woman's family have no claims to the child in this case.[2]

If the betrothed girl becomes pregnant per alios

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2. Cf. Forde, Marriage and the Family among the Yako in South-Eastern Nigeria. Once more this rule is subject to the provisions in s.13 of the Western Region's Marriage ... Adoptive Bye-laws Order, 1958, where this enactment has been adopted.

but proceeds nevertheless to marry her fiance, and the child is born subsequent to the celebration of the marriage, then, subject to the exceptions already indicated, the child is affiliated to his mother's fiance, now her husband. There is, however, a local variation to this rule among the Urhobo and the Isoko areas of Edoland. In these places, "if a betrothed girl bears a daughter to a man other than her future husband, the genitor, provided he has paid compensation to the husband, may claim the marriage payment when the daughter is herself married."[3] From this it would appear that the woman's husband has custody (in the technical sense) while the biological father has a right to the child's bride price, a right which is, however, conditional on his having paid compensation to the husband for the illicit affair. But whether the lover has a right to demand that the husband shall accept payment of compensation in these circumstances, or whether he merely, has an option to make the payment and so set up a claim to the child if the husband does not feel disposed to be a legal father to another man's natural child, is uncertain. It is submitted that the second alternative is the more likely except where the 1958 Marriage .. Bye-Laws Order has been adopted, in which case "paternal rights" will in all probability be

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3. Bradbury and Lloyd, op.cit., p.137.

awarded the natural father. Which brings us to our second exception to the general rule, viz. that the courts may now award "paternal rights" to a natural father wherever this is possible, having regard to the child's interests - in parts of the Western Region.

There are two other local variations which deserve a word of mention here. The first is that among the matrilineal Yako (and Ekoi generally) of the Cross River, children born of Yako (or Ekoi) parents - but not those one of whose parents is a "non-native" - are affiliated to the family of their maternal uncles or grandfathers, though they normally live with their mothers in her matrimonial or other home till old enough to start off in life on their own, after their father's death. The other local variation is that in the case of a woman who has been divorced(or widowed) from a "big dowry" marriage among the Ijaw and parts of the Western Region (already described), all her subsequent children, whether born to lovers, to fiancés or to later husbands, are affiliated to the "big dowry" husband, if alive, or his family, if he is now deceased.[4] In these communities, too, a "small dowry" wife's children are affiliated to her family of origin and not

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4. Since a "big dowry" marriage is never repeated by the same woman, a widow or divorced woman who had been so married can only contract a "small dowry" marriage after the dissolution of her "big dowry" one.

to that of her husband.[5] These variations described in this paragraph apply with equal force in the cases about to be discussed, viz. where a married woman bears a child by a man other than her husband.[6]

Children born during coverture.

The law relating to the affiliation (as above defined) of a child born or conceived during the subsistence of his mother's marriage is virtually identical in all societies within our area of reference. Barring the exceptional cases and the statutory provisions discussed in the last paragraph above, a child born or conceived by a married woman is affiliated to whoever was that woman's husband at the time of the child's birth, or, if she had divorced one husband and married another in the period between the child's conception and birth, to the man to whom she was married at the time the child was conceived. It makes no difference that the husband in question was not also the child's natural father. Nor, in particular, is it material that the second man, where a change of husbands had occurred between conception and

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5. See Williamson, loc.cit., pp.55, 56 and 57; Kammer, loc.cit., p.58; Talbot, Tribes of the Niger Delta, esp. p.195; Talbot, Peoples of S. Nigeria, Vol.III p.439.

6. Or where the woman concerned is a widow whose bride price has not yet been repaid to her husband's people.

birth, was the child's natural father. In other words, suppose a man commits adultery with another's wife and she becomes pregnant as a result; suppose further that the woman divorces her husband and marries her lover, and that the child is born subsequently to the second marriage, the child is still affiliated in law to the former husband. A fortiori, where a woman leaves her husband, (whether through her own fault as in desertion, or through the fault of her husband as in the case of constructive desertion) and cohabits with another man, and a child is born of the liaison, the child is affiliated to the husband, not the lover. In all these cases, it is immaterial that the husband concerned has died in the internal between the child's conception and birth: for in those circumstances the child is affiliated to the deceased husband's family. In the felicitous language of Elias, "if a married woman leaves her husband for another man by whom she later has a child before her first marriage has been formally dissolved and the 'dowry' returned to her husband, customary law would award the child to the first man to whom she is still regarded as married."[1] On the same subject Lloyd wrote of the Yoruba, "The legitimacy of a child, under customary law, as a member of the descent group is determined by his

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1. Elias, Groundwork of Nigerian Law, p.297.

birth. The legal pater is the man who was the legal husband (having paid the bride wealth) of the mother at the time of the child's conception ..." [2] But perhaps the clearest expesition of the legal position was made about the Ibo by Basden when, after stating that a child born of an adulterous relation by a married woman belongs to her husband as the legal father, he said, "That he is not himself the /biological/ father will not affect possession: the child is born to his wife, and that is the argument that counts."[3]

For the sake of completeness, the exceptions already discussed above will be mentioned again here. The first is that in the Niger Delta area, children of a "small dowry" marriage are affiliated to their maternal grandfather's (or uncle's) families, not to their mother's husband; children of a woman who was once married by the "big dowry" procedure are affiliated to the "big dowry" husband (or ex-husband) even if that marriage no longer subsists in fact. The third is that , where the 1958 Marriage legislation of the Western Region has been adopted, "paternal rights" may be awarded the natural

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2. Lloyd, Yoruba Land Law, p.78

3. Basden, Niger Ibos, p.226. The affiliation of post-humous children will be dealt with presently under a separate heading.

father of a child born of an illicit relation.[4]

Posthumous children.

A child born to a woman whose husband has died is affiliated to the late husband's family (more correctly to the husband's name) if the bride price had not been refunded and the marriage legally terminated before the child was conceived. The interval between the husband's decease and the child's conception is immaterial, so is the fact that the deceased man was not the child's natural father. If the woman remarries between the date of conception and that of birth of the child, the result is still the same - the deceased husband's claim to the child

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4. See further: On the IBO and IBIBIO:- Leith-Ross, African Woman, p.103; Basden, Niger Ibos, pp.215 and 226; Forde and Jones, op.cit; p.17; Meek, Law and Authority, pp. 282-3; Green, Ibo Village Affairs, p.156; Leith-Ross, African Conservation Piece, p.71; Esenwa, loc.cit; p.73; Talbot, Tribes of the Niger Delta, p.195; Talbot, People of S. Nigeria, Vol. IV, p.357; ditto, Vol. III, pp.431 and 439; Williamson, loc.cit; 55 and 57; Kammer, loc.cit; p.58; Simmons, loc.cit, p.161; Forde and Jones, op.cit., p.77; Forde in African Systems of Kinship & Marriage (ed. Radcliffe-Brown and Forde), pp.291, 293 and 328. On the YORUBA: Folarin, op.cit., p.33; Partridge, "Native Law and Custom in Egbaland", 10 J.A.S., p.433; Lloyd, Yoruba Land Law, p.78. On the ITSEKIRI:- Omoneukanrin, op.cit., pp.45-6. On the EDO:- Bradbury and Lloyd, op.cit., pp.30 and 137; Egharevba, op.cit., p.19; Thomas, "The Edo-speaking Peoples" 10 J.A.S., p.6; Hubbard, op.cit., p.191; Thomas in 11 J. Comp.Leg.(n.s.), p.99; Thomas, Anthrop. Report on the Edo, p.50.

is superior to that of the living husband in these circumstances. If, however, the woman or her maiden family had repaid the bride price to the deceased husband's family, the child is affiliated to the latter family. Finally, if the woman had re-married within the deceased husband's family (the so-called widow inheritance), the child is affiliated to the new husband just as if he were a stranger who marries another man's widow.

In Amachree v. Taria (or Goodhead)[1] the head of a Degema family brought a writ of habeas corpus to determine the affiliation of a child born posthumously to a member of the family. The dispute was between the plaintiff on behalf of the deceased and the family generally on one hand, and the child's maternal grandmother on behalf of her family by marriage. In other words, this was a contest between the maiden family of the child's mother and the family into which she ~~had~~ married. The child's natural father put in no claim. The local Native Court had held in 1907 that the child

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1. (1923) 4 N.L.R.99. See also Elias, op.cit., p.297; Meek, Law and Authority ..., p.282-3; and contrast Talbot, Tribes of the Niger Delta, p.218. Talbot's statement that among the Ibo a widow "may leave the family on repayment of dowry; but, even in this case, all children subsequently born to her belong to the House" was probably intended to refer to the "big dowry" marriage system of Kalabari of which the author had just written.

in question belonged to the family into which her mother had married, a decision which was confirmed 15 years later by another Native Court. Meanwhile, the child's grandmother had been given custody of the child by the plaintiff's family after she had signed a statement to the effect that the child was a member of the plaintiff's family. The grandmother now refused to give up custody, hence the writ of habeas corpus.

Counsel for the defence argued that the two Native Court decisions were wrong in law, and were, in any case contrary to natural justice and humanity. To award parental rights over the child to the plaintiff's family (as against the defendant and her family by marriage) merely because the child's mother was once married therein was unconscionable, as it amounted to taking away the child from her blood relations and handing her over to comparative strangers, counsel said. The Divisional Court at Degema (Berkeley, Acting J.) held, however, that the two customary court judgments stated the customary law on the point correctly, and that the grandmother's signed statement was an admission of this fact. The learned judge also held that the customary law which affiliated a posthumous child born in "concubinage" to the family into which the child's mother was married, instead of to the mother's maiden family, was not "repugnant either to natural justice or humanity"

as counsel had contended.[2]

As indicated in passing in sundry places, there is a growing practice of what may be called "disaffiliation" whereby the more sophisticated husbands renounce their legal fatherhood of children born to their wives on the ground of non-paternity in the biological sense. It is too early yet, perhaps, to say whether or not this has become a generally accepted social practice, or, what is more important, whether or not the courts will accept it as part of the customary law of any given society.

More popular still is the practice whereby a man claims a child born to him of an illicit sexual relation as hiw own, without also taking the child's mother for a wife. In some cases, the child's mother is unmarried; in other cases she is a married woman. There may,therefore, be claims and counterclaims involving the child's natural father on one hand and either the mother's husband (as the legal father) or the mother's family on the other hand. In the Western Region there is some indication on what lines the courts will take in such cases,[3] but no reliable information is available elsewhere. The position, however, appears to be as

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2. Ibid., at p.100.

3. See the Marriage, Divorce and Custody of Children Adoptive Bye-Laws Order, 1958, ss.13 and 14.

follows. Where the natural father claims a child and the legal father resists the claim, then in our submission, the claims or counter-claims of the legal father must prevail, except in the few local government areas where the Marriage etc. Adoptive Bye-Laws Order of the Western Region has been adopted, in which case the court has some discretion in the matter.[4] This is because the claims of the legal father are founded in law; those of the natural father in natural justice. Where neither the legal nor the natural father puts in a claim, or both fathers disclaim, the courts should lay the responsibility for maintenance and upbringing of the child on its natural father. This would bring the customary law in line with the general law relating to affiliation. Finally, where the legal father is willing to give up his rights to a child in favour of the natural father who is willing to take over such rights, there is an end of the matter as far as the two fathers are concerned. But it is arguable that, on growing up or even long before, the child can institute proceedings to have

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4. S.13 provides: "Paternal rights shall normally be awarded to the natural father whether or not such natural father is married to the mother." The juxtaposition of "shall" and "normally" apparently means that these rights shall be awarded the natural father except that the rule may be varied in s pecial circumstances in the child's interest.

himself attached to his legal father if this is in his best interest socially or otherwise.[5]

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5. Why should a man be allowed to shirk his duties to his legal child if this will result in hardship to the child? After all, he has an action for damages for adultery against the natural father.

C. LEGITIMATION.

As was seen in the section on children's priority as members of the household, an illegitimate child may be legitimated in one of two ways, viz. by the inter-marriage of his mother and putative father, and by acknowledgment of paternity by the latter. We shall here consider some of the more important points of legal interest involved in these processes.

Legitimation per subsequens matrimonium (General Law).

By the Legitimacy Act, 1929,[1] where the parents of an illegitimate child contract a Christian marriage, the child is legitimated with effect from the date of such marriage; if the marriage took place before the commencement of the Act, the date of legitimation is the 17th day of October, 1929, on which date the Act came into force; provided in each case that the child's putative father was domiciled in Nigeria at the date of the marriage.[2] "Christian marriage" is defined as a marriage which is recognised by the lex loci celebrationis

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1. No. 27 of 1929 as amended by No. 107 of 1955. This has been re-enacted for Lagos as Cap.103 of the 1958 Revision (Federal) and for the Western Region as Cap.62 of their 1959 Revised Laws, but the wordings are virtually identical.
2. S.3(1).

as the voluntary union for life of one man and one woman to the exclusion of all others.[3] This definition implies that a child is legitimated per subsequens matrimonium wherever the marriage took place, provided only that it is monogamous in conception.

Any person who claims that he, his parent or remoter ancester was legitimated in this way has a right to apply to the High Court for a declaration to that effect.[4] On any such application, the Court "shall make such decree as the court thinks just,"[5] This suggests that the court has a discretion to make the declaration prayed for or not, just as it sees fit. But in our submission the provision only allows the court to exercise its discretion in deciding how much evidence it would consider sufficient to prove the celebration of the alleged legitimating marriage.

It is also provided that a judicial declaration of legitimacy shall not prejudice any person's interest if it is subsequently proved that it was obtained by fraud or by collusion. What is more, the declaration can only prejudicially affect parties to the proceedings, persons who had been made or cited as parties (but did

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3. S.2.
4. S.4(1).
5. S.4(3).

not appear), or persons who derive their title or claim from one of them.[6] Subject to these qualifications, a declaration of legitimacy is a judgment in rem in the sense that it is binding on all persons.[7] In other words, though only parties or persons cited as parties and their successors in interest can be prejudiced by such a declaration; yet all persons are bound to recognise it, and so accept the child concerned as having been legitimated thereby.

For the purposes of testate or intestate succession, a legitimated person ranks as a person who was born legitimate to begin with. Thus a legitimated child will take as a "child" under a will which leaves property to the "children" of a named person: This he could not do under the general(common) law. Similarly, a legitimated child will take on intestacy if he would have done so had he been born legitimate.[8] Conversely, if a legitimated person dies intestate, his estate will be inherited by the same persons as would have done so had he been born legitimate.[9] But where property rights (presumably including succession rights) depend on the

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6. Proviso to s.4(3)
7. Rayden on Divorce (7th edn.), p.740.
8. S.5(1).
9. S.6.

relative seniority of the children of a given person, a legitimated person ranks as if he had been born on the date of legitimation. If two or more persons were legitimated by the same marriage or otherwise at the same time, they rank in seniority inter se in order of seniority of age.[10]

A legitimated person's rights to be maintained and advanced by his parents or guardian, and, conversely, his obligation to maintain or advance his own children or wards as the case may be, are the same as those which attach to a person who was born legitimate.[11] In the same way, any rights to damages, compensation, allowances, or other benefits to which a person would be entitled in respect of a legitimate child, will be equally open to him in respect of a legitimated child.[12] In a word, for all practical purposes there are no differences known to the law between a legitimate child and a legitimated child, except that the latter is deemed to be born at the date of his legitimation.

Legitimation by subsequent marriage under a foreign law is recognised by Nigerian Law. For the

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10. S.5(2). But no preferential rights shall accrue to legitimated persons by virtue of this provision: s.5(2), proviso.

11. S.8.

12. S.8.

Legitimacy Act provides that if the parents of an illegitimate child inter-marry, and if at the date of the marriage the father is domiciled in a country whose law recognizes legitimation per subsequens matrimonium, the child will be regarded in Nigeria as a legitimated child. This is so even if at the date of the child's birth the law of his father's domicil did not recognise such legitimation.[13] The effects of these provisions are three-fold. In the first place, if the law of the father's domicil has altered in favour of legitimation by subsequent marriage between the child's birth and his parent's marriage, the child will benefit from this change in the law. Secondly, if between the date of a child's birth and the date of his parents' marriage his father had abandoned his domicil in a country which did not recognise legitimation by subsequent marriage, and had acquired a new domicil in a country which did so, the child will once again benefit from the change in domicil. And thirdly, a child will be legitimated, it would seem, by a marriage celebrated in a country whose law does not recognise legitimation by marriage, provided that the said marriage satisfies the definition of a Christian marriage, and provided further that at the date of the marriage the child's father was domiciled in a country

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13. S.9(1)

whose law does recognise this type of legitimation. This is because the Act only speaks of the state of the law of the father's domicil, and is silent on the state of the Lex Loci celebrationis on the subject. The converse is true of course in all these cases; so that whether or not the lex loci recognises legitimation by subsequent marriage, a child's status as an illegitimate child will not be affected by his parents' marriage there, if at the date of the marriage his father was domiciled in a country whose law did not recognise legitimation by subsequent marriage. Worse still, he will still not be recognised as having been legitimated (in Nigeria, that is) even if at the date of his birth, but not at the date of his parents' marriage, his father had been domiciled in a place where this type of legitimation was recognised. In other words, any change in his father's domicil or in the state of the lex domicilii away from recognition of legitimatio per subsequens matrimonium will affect the child adversely. This is not unfair to the child, nor is it a flaw in the law of Nigeria which, after all is only concerned with according to a child born illegitimate the same change of status, if any, as his own law would accord him by virtue of his parents' marriage.

If a legitimate child died before his parents inter-married, and if he was survived by any spouse or

children or remoter issue, and if these persons or any of them were alive when the parents of the deceased illegitimate child ultimately married, then provided that he would himself have been legitimated by such marriage, the provisions of the Act regarding property rights as well as those relating to succession rights by and to the surviving spouse, child or remoter issue as the case may be will apply as if the deceased had lived and been legitimated on the date of his parents' marriage.[14] In such circumstances, therefore, and for property and succession purposes, a deceased illegitimate child is treated as if he were legitimated posthumously. It should be noted that this section of the Act speaks of the deceased leaving "any spouse, children or remoter issue." It would, therefore seem to follow that the type of marriage which the deceased illegitimate child himself ~~had~~ contracted is immaterial - it may be customary or Christian - so long as his parents' marriage is a Christian one.

Finally, where a woman is survived by one or more illegitimate children and no legitimate ones, her intestate estate is inherited by the illegitimate child or children as if they were legitimate. Conversely, a mother inherits from her illegitimate child as if he

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14. S.7.

were legitimate.[15] This, however, does not affect succession rights under customary law, where the mother of the illegitimate child is a "native."[16]

There is nothing in the Legitimacy Act to prevent a child's being legitimated per subsequens matrimonium by reason only that either or both of his parents were lawfully married at the time of his birth. This is because the Act does not contain the equivalent of S.1(2) of the Legitimacy Act, 1926, of England - a relic of the Canon Law era.[17] If therefore, a married person has an adulterine child, and later has his or her current marriage dissolved, he/she can legitimate this child by subsequently marrying the other party.[18]

The Legitimacy Act only applies to the subsequent marriage of an illegitimate child's parents to "one another." It does not operate to legitimate a child because either his mother or his putative father later married a third party. By the strict letter of the law, therefore, a child will not be legitimated if, contrary to his parents' claims, he was not in fact their joint issue, even if they both believed in the

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15. S.10(1), (2).

16. S.10(3).

17. Cf. Bromley, p.291.

18. The discrimination against adulterine children in s.1(2) of the English Act of 1926 was removed by the Legitimacy Act, 1959.

correctness of their claim. In practice, however, a man's recognition of a child as his natural child is regarded by the courts as sufficient practical proof of the child's paternity, so that even if the acknowledgement of paternity was based on a false but honest belief, the child will be regarded in fact as the natural child of the man who acknowledges him, and will be deemed to be legitimated by his marriage to the child's mother.[19]

Legitimation by acknowledgment: Customary law

The Yoruba law on the acknowledgment of illegitimate children by their natural father is thus stated by Lloyd-

> "The natural father of a child born to an unmarried woman or as the result of an adulterous union with a married woman may, by acknowledging the child as his own and caring for it (with the child's reciprocal acknowledgment of the father demonstrated especially at the latter's funeral), confer upon the child legitimate membership of his own family."[1]

Mr. Justice Coker, on the other hand, would not put the matter any higher than this that "acknowledgment by the father is reputed to clothe /his natural children/ with

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19. Cf. James, L.J. in the Privy Council case of La Cloche v. La Cloche (1872) L.R. 4 P.C. 325, at p.333.

1. Yoruba Land Law, p.78.

the right to receive property, not, as some people think, with the status of legitimacy."[2] It is not easy to see what legal disability attaches to a child born illegitimate but subsequently acknowledged as his putative father's child. Howbeit, it is perfectly safe to say that for certain purposes at least - including family membership, property and succession rights insofar as these rights depend on family membership - an acknowledged child ranks in law as a legitimate child as from the date of the acknowledgment, as already indicated in greater detail.

What constitutes "acknowledgment" is, in the final analysis, a question of fact to be decided on available evidence in each case. Nevertheless, it may be said that it is not enough that a man is known, or reputed, to be a child's natural father. It is not even enough, in our submission, that he merely admits paternity.[3] Some positive act is required on the putative father's part. He may, for example, take the child into his custody and bring him up as he would his

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2. Coker, op.cit., p.266.

3. To attempt a distinction between "acknowledgment" and "admission" of paternity is, in Coker's view, to make "a distinction without a difference;" op.cit., p.237. But unless we are prepared to endorse the view that no positive act on the father's part is required to accept the child as his own, there seems to be something to be said for the existence of this distinction.

own child by a lawful marriage; he may undertake responsibility for the child's education and/or general maintenance; he may enlist the aid of a third party in the child's custody, maintenance or education if he is not in a position to bear these responsibilities himself; or he may leave the child in its mother's custody, making her periodic payments on a voluntary or an agreed basis in the express understanding that these payments are made to her not just as a mistress but as the child's custodian. But merely to own up to having had an illicit affair with a woman and to being the father of her child - which is all we understand by "admission" of paternity - will not ipso facto clothe the child with the status of a child legitimated by acknowledgment.

The principle of legitimation by acknowledgment has been stated and re-stated with reference to Yoruba Law in a long line of cases, one of the earliest of which is Savage v. Macfoy.[4] In that case it was held that all the children of the intestate, whether born in or out of wedlock - and there were some of each - were entitled to inherit, since the latter had been acknowledged by the deceased as his children during his life time. Quashie - Idun, Ag.J. came to the same decision in the comparatively

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4. Ante.

recent case of In re Adelabu and Aremu.[5] In this case action was brought under the Fatal Accidents Act, 1846, which was at the time applicable in the Western Region, on behalf of, ~~the~~ inter alia, the four children of Aremu and the seventeen children of Adelabu some of whom were illegitimate. Giving judgment in favour of the children, the Federal Supreme Court had this to say on appeal -

> "Children not born in wedlock (Marriage Ordinance) or who are not the issues of a marriage under native law and custom, but are issues born without marriage can also be regarded as legitimate children for certain purposes, if paternity has been acknowledged by the putative father."[6]

The West African Court of Appeal had, in 1955, made the same point in Alake v. Pratt[7] in words to this effect - /It has been satisfactorily proved before the trial judge that/ "under the Native Law and Custom of the Yoruba people, paternity of the two persons concerned having been acknowledged by the deceased in his life-time, they are to be regarded as legitimate under the law in Nigeria."[8] And

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5. (1959) W.R.N.L.R.155.
6. (1961) 1 All N.L.R.245.
7. 15 W.A.C.A.20.
8. From the headnote.

in view of this finding of facts, the Court concluded, the question of marriage of the children's mothers was not a relevant subject for investigation.[9]

To what extent does the doctrine of acknowledgment apply under customary law outside Yorubaland it is difficult to say at the moment. This is because there is evidence everywhere, especially among the more sophisticated elements, that the practice is both popular and progressively widespread. Since customary law, unlike "general custom" in England, does not have to be traced beyond the limits of legal memory or indeed to any date at all, there is the probability that expert evidence will be readily available to prove the application of the rule in question to all and sundry societies.[10] For example, it was held on the basis of expert evidence that the rule is part of the customary law of Kwale. This was in another action under the Fatal Accidents Act, 1846, and the decision was made in the High Court at Warri by Dufus, J. The illegitimate children of the deceased were in that case held to be entitled to recover as "children" within the meaning of the Act because it was proved that the deceased

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9. Ibid. See also Phillip v. Phillip (1946) 18 N.L.R.102, and cf. Kasunmu, op.cit., p.170.

10. This claim was made, but not proved, in the Ibo case of Onwudinjoh v. Onwudinjoh (ante).

recognised and treated them as his children in his life, and because according to Kwale customary law, reads the headnote, "such recognition accorded them the same rank in every respect as and an equal status with the children of a marriage."[11] Again, Simmons says of the Efik that a natural father may legitimate his putative children by making a money payment to their mother's family. (This was £12 in 1960).[12]

More problematic still is the question whether or not a man who has contracted a Christian marriage has legal capacity to legitimate his natural child by acknowledgment if the child was born during the subsistence of the said marriage. An eminent writer said on this -

> "This is not a case where acknowledgment of paternity can be evoked, for the nature of the marriage renders the man incapable of having any other woman as his wife or any other offspring as his children during the subsistence of such Christian marriage[13]..... the issue of capacity would affect their father to the extent that he could not even acknowledge them, however much he might be willing to do this."[14]

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11. Jirigho v. Anamali (1958) W.R.N.L.R.195.
12. Loc.cit., p.164.
13. Coker, op.cit., p.263.
14. Ibid, p.272.

It is tempting to say that this view of the law is contrary to the West African Court of Appeal decision in Alake v. Pratt[15] where it was held that both the children of the deceased by an Ordinance marriage and the two other children born to him out of wedlock were entitled to succeed on his intestacy, as legitimate children. Delivering the Court's judgment (in which Coussey, J.A. and Abbott, J. concurred without comment), Foster Sutton, P. said -

> "The short point we were asked to determine at the hearing of this appeal was whether the appellants, Adeyinka and Adenike Coker, who are children born out of wedlock to their father /D.T.C./, deceased, are entitled to share in his estate together with the respondents who are the issue of a marriage contracted by him under the Marriage Ordinance.".....
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> "The learned trial Judge came to the conclusion that it had been satisfactorily proved that under the Native Law and Custom of the Yoruba people, paternity of the two persons concerned having been acknowledged by the deceased during his life-time, they are to be regarded as legitimate under the law in Nigeria .... "[16]

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15. 15 W.A.C.A.20.
16. Ibid., at p.20.

But to say that this decision directly contradicts Mr. Justice Coker's views quoted above would be to beg the question. The gist of the decision in Alake v. Pratt is that where a child is legitimated by acknowledgment, he has equal rights of succession on his father's intestacy as the other children of the deceased who were born legitimate. The case did not decide the more fundamental question whether a marriage under the Marriage Act does or does not divest a person so married of his customary law capacity to legitimate his natural children by acknowledgment, which is Coker's proposition. It may be argued that this question was decided by implication: the deceased was married under the Act; he left illegitimate children; these children were held to be entitled to succeed as legitimate children; therefore, they must have been legitimated in fact and in law. But this argument overlooks the point that the report is silent on the question whether the children were born and/or acknowledged before, during the subsistence, or after the dissolution of the marriage. The question under discussion could only be said to have been answered by implication if the acknowledgment was made during the subsistence of the marriage.

We are, therefore, driven back to first principles. What effect, if any, has a marriage under

the Marriage Act on the legal capacity of a person so married?[17] Does such a marriage ~~so~~ clothe a person with a status so alien to customary law that he loses any capacity he had before the marriage to legitimate his putative children by acknowledging them as his? To what extent, if at all, does this type of marriage remove a person from the ambit of the customary law of his people into that of the general (English) law in the fields of personal law and intestate succession?

These questions have cropped up time and again before the courts in Nigeria since the celebrated decision of Griffith, J. in Cole v. Cole.[18] So far, no comprehensive answer has yet been attempted by the judges. In Bamgbose v. Daniel,[19] for example, it was contended that a child by an Ordinance marriage had no legal capacity to contract a customary marriage, and that his alleged children by a customary marriage were therefore illegitimate. The Privy Council rejected this proposition,[20] as did the West African Court of Appeal before it.[21] In Re Macaulay,[22]

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17. The statutory provisions regarding bigamy and kindred offences apart, that is.
18. 1 N.L.R.15.
19. 14 W.A.C.A.116 (P.C.)
20. Ibid.
21. 14 W.A.C.A.111 (W.A.C.A.)
22. 13 W.A.C.A.304.

it was contended, on facts which were similar to those in Alake v. Pratt (ante), that by contracting an Ordinance marriage a man lost his (customary law) capacity to legitimate his natural children by acknowledgment, for the purposes of intestate succession under s.36 of the Marriage Act. It turned out that the crucial question in that case was this: Which law, customary or general, should determine the legitimacy or otherwise of children born out of wedlock to a man who was married under the Marriage Ordinance? Following Re Goodman's Trusts[23] and the Sinha Peerage Case,[24] the West African Court of Appeal held that the question of legitimacy must be decided with reference to the lex loci domicilii of the children concerned; and that in the case of persons who were subject to customary law, this meant with reference to their local customary law. In the words of Chief Justice Verity (in whose judgment the other members of the Court - Lewey, J.A. and Jibowu, J - concurred without comment):-

> "If, as it appears to have been assumed throughout the proceedings, the deceased was a person subject to native law and custom (and only in such cases would section 36 of the Marriage

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23. (1881) 17 Ch.D.266.
24. [1946] 1 All E.R.348, n.; 171 Lords Journals, 350.

> Ordinance apply), then the law to be applied in ascertaining the legitimacy of the children is the native law and custom applicable to him /= their deceased father/ subject, of course, to such modification and qualifications as may be imposed by statute."[25]

The learned Chief Justice therefore, concluded that:-

> ".... those children who are legitimate according to the native law and custom to which the deceased was subject as modified or qualified by statute, shall be entitled to participate in the distribution of the estate ..."[26]

So far as is known, there is no statutory provision which has modified or qualified a person's customary law right to legitimate his putative children by acknowledging them as his, or excluded the operation of this rule from cases where the putative father was at the material time married under the Marriage Act. It would, therefore, seem to follow that the personal status of a man as a married or a single man, a Christian or a customary marriage husband, does not affect the law to be applied in determining his natural children's status as legitimated children under customary law. This, in effect, is saying that an

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25. Re Macaulay, ante, at p.309.
26. Ibid., at p.310.

Ordinance marriage does not affect a man's legal capacity to acknowledge his natural children, provided that he would have possessed such capacity under customary law if he were not married under the Ordinance.[27] By the same reasoning, a man's customary capacity to legitimate his natural children by acknowledgment is not affected by any other form of monogamous marriage, wherever contracted.

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27. It should be noted that as in Alake v. Pratt, the report does not specify whether any, and if so which, of the children in Re Macaulay were born and/or acknowledged during the 5 months duration of the deceased's Ordinance marriage - from December 1898 to May 1899 when the wife died: loc. cit., p.305. All that appears is that "at various times both before and after his marriage the deceased begat a number of children ... by a number of women:" Ibid. But this does not affect the ratio of the case in any way.

CHAPTER TWELVE.

PARENT AND CHILD - II

RIGHTS AND OBLIGATIONS.

Maintenance and advancement.

A child has a right to maintenance and advancement by his parents on whom there is, therefore, a correlative duty. Under customary law, however, this right and the correlative duty only exist as between legitimate (including legitimated) children and their parents. For although a man may be compelled to marry a girl who is with his child, on pain of having to pay damages to her parents, he cannot be compelled to maintain the girl or her child otherwise than by paying the necessary damages.[1] The position under the general law is a little different in that a putative father may be compelled to make contributions to his child's maintenance by means of affiliation proceedings.[2]

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1. Contrast the position in Ghana where it has been repeatedly held that a natural father is under a duty to maintain the child, and that native and non-native putative fathers alike are under this obligation: Duncan v. Robertson, in Sarbah's Fanti Law (2nd edn.) p.134; Davie v. Nassar, W.A.C.A. Cyclostyled Judgements, March, 16th 1953; and Adjei and Dua v. Ripley (1956) 1 W.A.L.R. 62.
2. Note that these proceedings do not vest the putative father with parental rights; neither do they legitimate the child. Their purpose is to make the "father" maintain his child up to a stipulated age.

The parental duty of maintenance is primarily that of the father who is in law bound to house and clothe and maintain his wife or wives and their children to the best of his ability, having regard to his material resources and the children's age and needs. This duty can be enforced by court order at the instance of the child's mother or, presumably, another member of the wider family of which the father is a member - subject, of course, to the statutory limitations on representation in law suits already discussed. A father who has been in breach of his duty in this respect, with the result that a third party has had to carry the burden of maintenance of his children, may be ordered by a court of competent jurisdiction to reimburse that other person. This is true whether the other person in question is a kinsman, a member of the wife's maiden family, or the wife herself (assuming in this last case that she did so out of her own separate property), especially where the spouses are living apart.[3]

This customary and common law duty is reinforced by a number of provisions which place a duty on parents, in common with other persons in charge of children under fourteen, to supply their children with the necessaries

3. Cf. Folarin, op.cit., p.29.

of life.[4] A parent who fails in this duty without lawful cause is guilty of a misdemeanour.[5] If he did so in circumstances which amounted to desertion or abandonment of the child, and if any grievous harm (e.g. starvation or exposure to the elements) were likely to result to the child, the offending parent would be guilty of a felony.[6]

Custody, care and protection.

Parents have inherent rights and obligations regarding their legitimate (including legitimated) children, and in the case of mothers, also regarding their illegitimate children, - subject to a number of qualifications and modifications introduced by legislation. In general, it would be an offence, civil or criminal or both according to circumstances, for a third party unlawfully to interfere with these parental rights, and, conversely, for parents to neglect their duties to their children. In theory, these rights and obligations attach primarily to the father in the case of legitimate children whether or not the parents are living together.[1] In practice,

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4. Ss. 300 and 301 of the Criminal Code (Federal).
5. Ibid., s. 339.
6. S.341.

1. In the absence of an indication to the contrary and except where the context will not so permit, "legitimate" will hereafter be used to include "legitimated"; and "parents" will be used to include "guardian".

however, actual custody and care of children are in the hands of the mother, especially in the case of young children and in polygamous families, so long as the parents are living together. It is usually where the parents are living apart as a result of divorce or separation that the father's primary rights and obligations re-assert themselves, subject, as will appear presently, to certain statutory qualifications. We shall now briefly examine the legal consequences of this principle that parents are entitled to their children's custody, and are under a legal duty adequately to exercise it and to protect their children.

(a) Abduction and kindred offences.

It is a misdemeanour, punishable by up to two years imprisonment, for any person to take an unmarried girl under eighteen years of age out of her parents' custody or protection, against the will of such parents, and with intent that she may be "unlawfully carnally known by any man." [2] It is, however, a good defence that the accused person believed on reasonable grounds that the girl was above the age of eighteen. [3] But an intent to have or permit unlawful sexual connexion with an unmarried girl is not essential to constitute the offence of abduction where the girl concerned is under the age of sixteen. [4]

2. Criminal Code, S.225.
3. Ibid.
4. Loc. cit., s. 362.

In this latter case, too, it is no defence that the accused person believed the girl to be above sixteen; neither does it make any difference that the girl was taken away with her full consent or indeed at her own suggestion.[5] It is a felony, punishable with up to fourteen years imprisonment, for any person to take, entice away or detain a child of any sex under the age of twelve years, or knowingly to receive or harbour a child so taken away - with intent in each case to deprive the parents of the possession of the child.[6] But it is a good defence on a charge under this section that the accused person took away the child on a bona fide claim of right, or, in the case of an illegitimate child, that the accused was the child's mother or claimed to be its natural father as the case may be.

(b) Seduction

Subject to the statutory provisions relating to abduction and kindred offences, and to the provisions of the Criminal Code relating to rape and indecent assault on females, seduction in the sense of having an unlawful sexual relation with an unmarried girl or divorced woman is neither an actionable civil wrong nor a criminal offence. There are a number of suggestions to the contrary. Talbot,

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5. Ibid., s.363 (a), (b).
6. Ibid., s.371 (1), (2).

for instance, says of the Kalabari that in such circumstances the guilty man is fined at a joint meeting of his family and that of the girl concerned.[7] Even if this was the law when the author wrote, it is no longer possible in law for the families or anyone else to impose a fine on an alleged offender in respect of an unwritten law. A similar statement by Omoneukanrin on Itsekiri law[8] must also be read in the light of what has just been said about immunity from punishment for any offences other than those specified in some written law. Ajisafe said of Yoruba law that[9] "When a man carnally knows a fully grown-up girl hitherto unbetrothed, he is made to pay a certain fixed and reasonable amount to the parents as dowry and take the woman for wife." It is submitted, however, that something more than mere sexual relation is required to evoke this "sanction" on a man. A better view, in our submission, is that expressed by Forde on Yako law when he said that if a girl becomes pregnant before being betrothed to anyone, her lover is under an obligation to marry her: the girl's father can "insist on the youth's obligation to provide marriage money and take her as a wife after the birth of the child"[10] - a point also made by Simmons on Efik law.[11] Even this

7. Peoples of Southern Nigeria, Vol. III, p.645.
8. Op.cit., p.50.
9. Op.cit., p.57.
10. Forde, Marriage and the Family among the Yako in South-Eastern Nigeria, p.19.
11. Loc. cit., p.156.

statement must, however, be qualified to the extent that the man concerned must either take the girl as wife on payment of the necessary bride price, or pay an agreed compensation to her parents for having "spoilt" their child, that is, for having ruined the girl's chances of finding a desirable spouse and consequently her parents' expectation of a reasonable bride price. The rule, then, is that illicit sexual relations without *more* is not actionable; but that if the girl becomes pregnant as a result, her seducer is under a legal obligation to marry her or, alternatively, pay reasonable compensation to her parents. What compensation is reasonable in any given case is a question of fact, and is either determined by mutual agreement between the two families concerned or fixed by the courts in the light of the surrounding circustances including the girl's moral repute and the boy's character generally.

(c) Right to child's services.

It is an actionable wrong for any person unlawfully to deprive a parent of his/her right to a child's services, domestic or contractual. If the child in question is under twenty-one years of age, there is a presumption that he/she performs some domestic services however nominal. But this presumption does not extend to children of twenty-one or over, and so, the onus is on the parent in such a case to prove by evidence that

the child did perform some domestic services while living with him.[12]

(d) Abandoning, or giving away, a child.

A parent who, being able to maintain his child, "wilfully and without lawful or reasonable cause deserts the child and leaves it without means of support, is guilty of a misdemeanour, and is liable to imprisonment for [up to] one year."[13] It would, presumably, be a good defence to a charge under this section that the parent deserted/ /abandoned the child because he had not the wherewithal to maintain it. It would also be a good defence to show that, at the material time, the deserting parent was mentally unbalanced (the act would then not be "wilful"); or that he had contracted a dangerous and highly infectious or contageous disease which, had he not deserted as he did, would in all probability have affected the child (he would then be acting with "reasonable cause", assuming of course that he could also satisfactorily account for his failure to arrange a temporary transfer of custody in those circumstances).

The Children and Young Persons Law, 1958, of the Eastern Region makes it an offence to place one's child in moral danger; to give a child into the custody

12. See further, Bromley, pp.345-53, for details and cases on the common law. See also the standard works on tort.

13. S.372 of the Criminal Code (re-enacted as s.313 of the Western Region's Criminal Code. "Child" here is a person under the age of twelve years.

or possession of anybody other than the child's grandparent or a descendant of such a grandparent; or for anyone other than a child's grandparent etc. to receive the child into his custody or possession. But it is a good defence to show that such a transfer was in the child's interest and that the child was in no moral danger as a result; or that the transfer was in accordance with customary law, the latter not being repugnant to natural justice, morality or humanity, or inconsistent with some written law. [14] "Moral danger" is defined to include "bondage and exposure to destitution, prostitution or immorality of any kind".[15]

A somewhat similar provision is contained in the Children and Young Persons Law, 1946, [16] of the Western Region.[17] Under this Law, it is a crime, punishable with up to seven years' imprisonment, [18] to "give or acquire the custody, possession, control or guardianship of a child ... in such circumstances that it may reasonably be inferred that such child has been sold or bartered or that by reason of such giving or acquiring such child may reasonably be inferred to be placed in moral danger. [19]

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14. No.6 of 1958, s.31(1). The punishment for an offence under this section ismimprisonment for up to 7 years.
15. S.31(5). Cf. s.30(b) of the Children and Young Persons Act (Cap.32 of the Federal laws, 1958 Revision), as regards Lagos.
16. Back-dated to 1st July, 1946; the same date as Cap.32 supra.
17. S. 38. 18. S.41.
19. S.38(1) Same def. of "moral danger" as above; see fn.16.

There is a presumption that the giving or acquisition of custody to or by a person who is not a member of the child's family [20] is in contravention of this provision;[21] but whether or not this presumption is rebuttable does not appear. It is, however, a good defence to a charge under the section to show that "such child was so given or acquired in accordance with native law or custom so far as such native law or custom is not repugnant to natural justice, morality or humanity or inconsistent with any written law." [22] There is power in the Governor of the Western Region, and the Minister for the time being responsible for child welfare and juvenile courts elsewhere, to make regulations prohibiting the giving or acquisition of children's custody either in specified areas or generally, any customary law to the contrary not withstanding.[23]

(e) Education: religious and secular

Parents have a right to decide which system of religious instruction or worship their children will receive or attend, and may even withdraw them from religious education altogether. This right has received statutory recognition. The Education Law, 1956, of the Eastern Region, for example, provides -

"If the parent of any pupil in attendance at any

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20. "Family" is not defined in any of the statutes under discussion.
21. S.32 (2).
22. Ibid., proviso.
23. Children and Young Persons Laws: s.40 (Western Region), s.31(2) (Eastern Region), and s.30(3)(Lagos) respectively.

> institution requests that he be wholly or partly excused from attendance at religious worship in the institution or from attendance at religious instruction in the institution or from attendance at both religious worship and religious instruction in the institution, then, until the request is withdrawn, the pupil shall be excused from such attendance accordingly."[24]

To guard against the natural temptation of school proprietors refusing or dismissing pupils who will not, or whose parents will not let them, attend religious services or instruction, it is provided that no person shall be refused admission or be prevented from attending as a pupil at school "on account of the religious persuation ... of himself or either of his parents."[25] Again, the principle that, as far as reasonably practicable, "every pupil shall be educated in accordance with the wishes of his parents" has received statutory recognition.[26]

The duty of parents to give their children adequate education, having regard to their means and the children's ability, has also been recognised by the legislatures.

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24. S.22(3). Cf. s.25 of the Education Law, Western Region, which, however, only refers to "public institutions"; and the Education (Lagos) Act, s.59(1) which also only refers to "any maintained or assisted school". But there is no reason to suppose that pupils in other schools could be compelled to attend religious instruction against their parents' wishes.
25. S.53(1): Lagos; s.19: W.Region.
26. S.18: Western Region, for instance.

Hence the provision in the Education (Lagos) Act, for example that it shall be the duty of a parent whose child has been registered at a primary school "to cause him to receive full time education by regular attendance at the school ... until such time as he has completed his primary school course or until the end of the school year in which he attains his fourteenth birthday." [27] Hence also the provision elsewhere that a parent has a duty to cause his child "to receive efficient full time education suitable to his age, ability and aptitude either by regular attendance at shcool or otherwise." [28]

Chastisement

Parents have a right to chastise their infant children by such means and to such extent that are considered reasonable by society in the circumstances, having regard to the child's age and general behaviour. For the present purposes a person is an "infant" until he attains his puberty or is initiated (formally in some places) into adult life. Section 295 of the Criminal Code provides that a parent may correct his child, legitimate or illegitimate, who is under sixteen years of age, "for misconduct or disobedience to any lawful command." [1]

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27. S.19(1).
28. S.32: W. Region. See also the Infants Law, s.19, of that Region.

1. Sub-section (1).

If a parent lawfully entrusts "the governance or custody" of his child to another person, he may also delegate to the latter his own "authority for correction", including the power to determine in what cases correction ought to be inflicted." [2] Such a delegation is presumed in the case of a schoolmaster or a person acting as such, except insofar as it may be expressly withheld.[3]

No correction is justifiable which is unreasonable in kind or degree, having regard to the recipient's age and condition - physical and mental. Nor is correction justifiable if the child, by reason of his tender age or mental condition, is incapable of understanding its purpose. [4, 5]

Vicarious liability for wrongs, contracts etc.

As we have seen on more than one occasion, a parent's customary liability for his child's wrongs [1] has now disappeared to the extent that it is no longer absolute. A parent will only be held liable for his child's wrongful act or omission if at the material time the child was "acting for" him (i.e. as his authorised

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2. Sub-section (4).
3. Sub-section (4)
4. Sub-section (6)
5. On the customary law, see: Basden, Among the Ibos, p.67; Talbot, Woman's Mysteries ...., p.90; Partridge in 10 J.A.S., p.423; Egharevba, op.cit., p.13.

1. See, e.g. Ellis, op.cit. (1894) p.177; Egharevba, op.cit. (3rd edn., 1949) on Yoruba and Bini laws respectively.

agent, the authorization being either express or implied), or if the act or omission occurred on account of the parent's neglect of his duty to exercise proper control over the child. A parent will, for example, be liable for any damages done to a neighbour's crops or other property by his cattle while being driven to or from the grazing grounds. The technicalities of the law of England on the subject of cattle trespass have no place in customary law). This is because the child would, in such a case, be acting as his parent's agent. But a person could not be held liable for his child's act of vandalism which results in damage to a third party. For example, a child who breaks a neighbour's water pots, wine jars, glass windows or wind-screen will not thereby render his parents liable to the injured party. But where there is a duty to exercise proper and effective control over the child, and the parent on whom this duty lies neglects to carry it out, he will be liable to the injured party. Thus if after due warning a parent fails to restrain his stone-throwing child by all reasonable means, he will be liable to a neighbour whose pots, window or wind-screen is broken. Similarly, a parent will be liable to any person injured by any act of his mentally defective child if the circumstances show that he had failed in his duty to keep the child under

reasonable restraint.[2]

The old customary law rule that a father was under a duty to pay the marriage expenses for his sons' respective first wives [3] is now moribund, if not obsolete. So too is the rule that a father should pay his first son's title-taking expenses in societies where titles with a political or administrative significance were open to anyone who could pay for them (as among the Onitsha Ibo, for instance).

A number of liabilities were imposed on parents by the various Children and Young Persons legislations already referred to. Where a child or young person is charged with any offence, for instance, his parent may be ordered by the court to give security for the child's good behaviour.[4] If the charge is proved, the parent may be ordered to pay damages or costs or to provide security for the child's good behaviour; [5] provided, that is, that the parent has been requested to attend but failed to do so, or that he has otherwise been given an opportunity of being heard.[6] In the same way, a parent may be required to attend at a court in which his child is being tried for an offence,

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2. Cf. Ajisafe, op.cit., p.5.
3. Elias, Groundwork, pp.296 and 297.
4. S.10(2) (W. Region): s.11 (2) (E. Region); s.10(2) (Lagos).
5. S.10(3) (W. Region): s.11 (1) (E. Region); s.10(3) (Lagos).
6. S.10(4) (W. Region); s.11 (4) (E. Region); s.10(4) (Lagos).

during all stages of the proceedings.[7] Finally, a parent may be ordered to pay any fine, damages or costs awarded in connexion with his child's trial, unless the court is satisfied "that he had not conduced to the commission of the offence by neglecting to exercise due care of the child or young person".[8] Indeed, where the child offender is a "child" (defined as a person under the age of fourteen) as opposed to a "young person" (defined as a person between the ages of fourteen and sixteen), the courts must order that the fine, damages or costs shall be paid by the parent, subject to the qualification already indicated.[9]

Loss of parental rights and authority.

A parent may lose his rights or be relieved of his responsibilities in respect of a child by renouncing the child or being renounced by him; when the child is of age or exceeds the relevant age under a given statute; by forfeiture (following conviction for certain crimes); or by surrender in the case of juvenile delinquents. We shall now say a few words on each of these modes of escape from or loss of parental duties and rights.

To what extent, if at all, a parent has a legal right to renounce his child and so lose his rights and

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7. S.9 (W.Region); s.10 (E. Region): s.9 (Lagos).
8. S.10(1) (W. Region); s.11(1) (E.Region); s.10(1) (Lagos).
9. Ibid. These provisions (note 8) are virtually identical to s.429 of the Criminal Procedure Act. See also, Criminal Procedure Act, s.427 (h), (i).

responsibilities towards him (andvice versa) is not clear. Perhaps a parent has no such right if the child concerned falls within the definitions of "child" and "young person" in the Criminal Code and the various Children and Young Persons legislations already referred to. For a parent to renounce a child in such a case would probably be held to constitute desertion or abandonment contrary to s.372 of the Criminal Code; it would almost certainly amount to "exposure to destitution" contrary to s.31, s.38 or s.30 of the Children and Young Persons Laws/Act of the Eastern and the Western Regions and the Federal Territory of Lagos respectively.[10] In the case of older children, however, this right probably does exist: such children would have attained their puberty under customary law anyway. Perhaps, too, a child has a right to renounce his parents and so relieve them of their parental obligations towards him. But here again a child who is old enough and independent enough to do this would be considered an adult under customary law anyway, so that the question is of more academic than practical importance.

A person can surrender his parental rights and responsibilities to some extent where he can prove to the

10. On a parent's criminal responsibility and cognate matters, see footnotes 13-23 under "Abandoning or giving away a child", ante.

satisfaction of a juvenile court that he cannot control the child in question. The court will then make such orders as it sees fit regarding the care and custody of the child, such as committing him to the care of a third party or to an approved institution.[11] Even then the court may by order require the parent to make some financial contribution towards the child's maintenance wherever he may be.[12]

In much the same way, a parent can forfeit his parental rights in certain circumstances. Where a child happens to be in the custody of a person other than his parent, and the latter applies to the court for an order for the child to be delivered up to him, the courts may decline to make the order asked for if it is satisfied that the parent-applicant had abandoned the child or had "otherwise so conducted himself that the court should refuse to enforce his right to the custody of the child".[13] Again, where a parent had abandoned or deserted his child, or had in breach of his duty, allowed his child to be brought up at another person's expense, the court will not make an order restoring the child to the undutiful parent unless the latter satisfies the court that he is a fit person to have custody of the child.[14] Finally, where a child

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11. Children and Young Persons Law, s.28 (E.R); s.34 (W.R.); s.27 (Lagos).
12. Ditto, s.29(1) (E.R.); s.35 (1), (2) (W.R.); s.28 (Lagos).
13, 14. Infants Law (W.R.), ss.16 and 18. Cf. the Custody of Children Act, 1891 of England, S.1, which perhaps applies as a statute of general application in Lagos and the Eastern Region.

comes within a long list of cases, a juvenile court may make such orders regarding his custody and care by persons other than his parents as the court thinks fit, having regard to the child's interests. One of the orders that may be made is that the child shall be committed "to the care of any fit person whether a relative or not, who is willing to undertake the care of him." And the circumstances which would justify such an order include parental neglect to maintain or to exercise proper control over the child; a parent's incapacity or unfitness to look after the child by reason of his addiction to drink or to crime; and exposure to "moral danger" generally.[15] The Punishment of Incest Law, 1955, of the Eastern Region has another provision similar to this, in s.2(5) which reads, in part: "On the conviction of any male person of [incest] or of an attempt to commit the same, the court may divest the offender of all authority over the female person against whom the offence is committed". For the purposes of the section "incest" is defined as having carnal knowledge of a person who, to the offender's knowledge, is his daughter or grand-daughter, inter alia, whether by lawful marriage or not.

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15. Children and Young Persons Law: s.26 (E.R.); s.33 (W.R.); s.26 (Lagos).

A child's right to his parents' citizenship and domicil.

The 1960 Constitution made the acquisition of Nigerian citizenship by a child born in pre-independence Nigeria dependent on whether or not any of his parents or grandparents were born there. Section 7 (1) provides that a person who was born in the country and who was a citizen of the United Kingdom and Colonies on the 30th day of September, 1960, became a Nigerian citizen on the first day of October, 1960.

> "Provided that a person shall not become a citizen of Nigeria by virtue of this subsection if neither of his parents nor any of his grandparents was born in the former Colony or Protectorate of Nigeria."

In the same way, a child who was born outside the country before independence acquired Nigerian citizenship if, but only if, his "father was born in the former Colony or Protectorate and was a citizen of the United Kingdom and Colonies ..." or would have been but for his prior death.[1] A child born on or after independence, outside Nigeria, becomes a Nigerian citizen at birth if at that date his father was a Nigerian citizen otherwise than by birth.[2] Conversely, a child born in the country does not acquire a Nigerian citizenship by virtue of such birth if, at the

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1. S.7 (2).
2. S. 11.

date of his birth, (a) neither of his parents was a Nigerian citizen and his father had diplomatic immunities or (b) his father was an enemy alien and the birth occurred at a place under enemy occupation.[3]

A legitimate child acquires his father's domicil at the date of his birth, if this took place in his father's lifetime. A legitimate child born after his father's death receives his mother's domicil at the date of his birth; so does an illegitimate child.[4] A child legitimated by subsequent marriage acquires his father's domicil; but whether this is the father's domicil at the date of the child's legitimation or at the date of his birth is not clear. Perhaps it is the latter.[5] The same principle also applies, presumably, to a child legitimated by acknowledgement.

Until he comes of age, a child has no capacity to change his domicil by his own act. But until that event, his domicil changes automatically with any change in his father's. After the father's death, but not before, the mother may change the child's domicil. Even then, she can only do so if she exercises her power to change the child's domicil for his benefit.[6] Thus, while the mother's domicil changes to that of her new husband if she re-marries, that of the child need not do so, even if he is actually living with his mother.[7]

3. On registration of persons of Nigerian descent born outside the country, and of persons of alien descent born there, see the Nigerian Citizenship Act, 1960, s.3, subss.(2) and (4), and s.4(1), as amended by the Nigerian Citizenship Act, 1961, s.3A, esp. subss (1), (2).
4. Rayden, op.cit., p.32
5. Rayden, ibid.
6. Rayden, p.43.
7. See generally, Bromley, pp.14-15.

Inheritance rights of parent and child.

Scope. Inheritance is obviously too large a subject to be dealt with in any detail in a treatise of Family Law. We shall therefore be content with a brief treatment of the more important problems which confront the courts by reason of the existence side by side of divergent inheritance rules derived from English law and from local customary laws. These problems include the question how far, if at all, daughters can now be said to have a right to inherit their father's property on intestacy; to what extent a man's children can now inherit his property in a matrilineal or a mixed-descent society; how far the old doctrine of primogeniture found especially among the Bini and the Ibo can still be regarded as good law in modern society; what changes, if any, result from the fact of a man's being married under a monogamous legal system; and the effect of illegitimacy on a child's inheritance rights under the general law as well as under the various customary laws.

1. Rights under customary law

Classification Inheritance rules under customary law may be said to fall into four distinct patterns in the patrilineal societies, with a fifth broad pattern for the matrilineal areas; the basis of this classification being whether all children, all sons, first sons or no children at all are entitled to inherit from their parents. These five patterns may be designated:

(a) The Yoruba

(b) The Bini

(c) The Ijaw

(d) The Ibo, and

(e) The Ekoi systems of inheritance.

It must be warned, however, that the patterns themselves are not as clear-cut as these names would suggest; that there are wide varieties even within the same ethnic group; and that the names adopted here are not intended to suggest that only five ethnic groups are covered in the discussion. What we have called the Ekoi system covers all matrilineal and mixed-descent societies, while the "Ibo" system covers all societies not within one of the other named ethnic groups.

(a) The Yoruba system

The traditional Yoruba law was that where a man died intestate, his disposable landed property (i.e. the land itself, houses and economic trees and plants) was inherited by his sons, while his movable property went to his junior brothers (i.e. those younger than himself in age).[1] Nothing went to his senior brothers in age, or to his daughters. As between the sons, the eldest (called the Dawodu) was entitled to a larger share than any of the others by virtue of his position as the new head of his

1. Omoniregun v. Sadatu (1888), Lagos Reps of Certain Judgments of the Supreme Ct., p.15; Re Hotonu (1892), -do- p.18; Lloyd, Yoruba Land Law, pp.293 & 296; Partridge, "Native law and custom in Egbaland", loc.cit., p.428; Kasunmu, opcit., p.180.

father's family.

These traditional rules have now been modified in two respects. First, all children are now entitled to inherit from their father on intestacy irrespective of sex.[2] Secondly, the Dawodu is no longer entitled to a larger share of the estate. The modern law therefore is that all the legitimate (including legitimated) children of a man are entitled to succeed to his disposable landed property on the basis of equality. Neither infancy nor the fact that a daughter is already married at the date of the father's death or the date of distribution of the estate affects a child's inheritance right. In Salami v. Salami [3] the High Court of the Western Region had occasion to consider the inheritance rights of an infant daughter of an Abeokuta Yoruba. She had been taken by her mother to the French Cameroons shortly after her father's death in 1927. Fifteen years later, and while she was still an infant, the other two surviving children of the father distributed the estate between them leaving nothing for their absent sister. In 1953 she returned to Abeokuta and demanded a share of the inheritance only to be met with the statement that women had no inheritance rights in their father's property, and that in any case she was a

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2. Lopez v. Lopez (1924) 5 N.L.R.47 (A Full Court decision per Combe, C.J., Van der Meulen and Tew, JJ.); Savage v. Macfoy, ante, see also Coker, op.cit., pp.227-45, 249-52, 264-83, and the cases discussed therein; Salami v. Salami, infra.
3. (1957) W.R.N.L.R.10.

minor when the said property was distributed. In her action to enforce her right to a share in her father's estate, Irwin, J. held that neither the daughter's minority, nor her absence abroad, nor again the fact that she was a woman affected her right to inherit under Yoruba law.[4]

It is often said that illegitimacy has no adverse effect on a person's inheritance rights. This, as we have endeavoured to show, is not strictly true, if we exclude from the list of illegitimate children persons who have been acknowledged by their natural fathers. Such persons, as we have said, are not illegitimate; they are "persons legitimated by acknowledgment". But what is the legal position of a child born to a man by an illicit sexual union and not in any way acknowledged by him in his life time? Such a person is illegitimate and has no rights or interests in his putative father's estate either in his life time or on his intestacy. This, in our submission, is implied in the West African Court of Appeal decision in Young v. Young and others [5] in which it was held that a man to whom land had been devised as "family property" under a will was under no obligation to obtain the consent of his unacknowledged putative child to a conveyance of the said land.

4. See also: Coker, supra; Ajisafe, op.cit., p.8; Forde, The Yoruba-speaking peoples of south-western Nigeria, pp.24-6; Lloyd, "Some notes on the Yoruba rules of succession ....", loc.cit., p.22; Folarin, op.cit., pp.84-6; Partridge, "Native law and custom in Egbaland", loc.cit., p.428.
5. (1953) W.A.C.A. Civil Appeal No.3631, Cyclostyled Report.

The devisee had obtained the consent and signature of his legitimate children to they conveyance in 1944; in 1950 he acknowledged the illegitimate child for the first time; and shortly after this the latter brought an action against him and the legitimate children claiming that as he did not consent to the conveyance as a member of the Young family, the conveyance was invalid and should be set aside. The West African Court of Appeal held, inter alia, that as the first proved act of acknowledgment by the putative father occurred long after the land had been sold and so ceased to be family land, and since the then members of the family all consented to the conveyance, the child so acknowledged had no right to upset the conveyance. The Court held in effect, therefore, that until duly acknowledged, an illegitimate child was not a child of his putative father in law, was not a member of the latter's family, and had no rights or interests in the property of the said family. If this reading of the Court's decision is correct, the conclusion appears inescapable that unless and until he is acknowledged as his own by the putative father, an illegitimate child has no inheritance rights in the intestate estate of such a "father".

Distribution of a man's property among his children is done (a) per capita, where all the children were born to the deceased by one and the same woman; and (b) first

per stirpes, where there are children born of more than one woman; then per capita as between the children of the same mother.[6] (As already explained, a stirps is used in this work to mean the children of each mother in what we have called a non-homogeneous family.) In Dawodu v. Danmole,[7] the doubts thrown on this well-known Yoruba principle of distribution by a decision of Jibowu, C.J. in the court of first instance were dispelled first by the Federal Supreme Court and finally by the Privy Council. In that case a man was survived by nine children born of four different wives. The question before the court was whether the man's intestate estate should be divided into four parts (per stirpes) or into nine parts (per capita). The Privy Council, upholding the Federal Supreme Court's rejection of Jibowu's decision in the court below, held that distribution should be in four parts. The Privy Council also held that this principle of distribution was not repugnant to natural justice, equity or good conscience as the trial court had said it was.

The inheritance rights of children in their mother's intestate estate are governed by the same rules as

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6. Folarin, p.84; Lloyd, Yoruba Land Law, pp.37, 85, 296 (on the question of acknowledged illegitimate children constituting stirpes), 297 (children of a deceased child take what would have been their father's or mother's share had the latter survived the intestate).
7. "The Times", July 26th, 1962: per Lords Evershed, Jenkins and Guest.
For the F.S.C. decision, see (1958) 3 F.S.C.46.

those just discussed with reference to a father's estate, with two differences arising from the nature of things. First, a child's illegitimacy has no effect on his inheritance rights over his mother's property; this is because whatever his status, he is his mother's child. Secondly, the question of distribution is more straightforward in this case, being always done per capita.

If a child dies intestate, his disposable property is inherited by his parents but only in the absence of any surviving children or brothers and sisters of the whole blood. That is, where the deceased child is survived by his own children as well as by his parents, the former will take to the exclusion of the parents; similarly, where a person is survived by brothers and sisters of the whole blood as well as by his parents, the former will take to the exclusion of the parents. But where a person is survived by his parents and half-brothers and/or half-sisters, the parents have a prior claim to the inheritance.[8]

(b) The Bini system

The most outstanding characteristic of Bini law of inheritance (as far as the succession rights of a deceased person's children are concerned) is the principle of primogeniture. Where a man is survived by children

8. Adedoyin v. Simeon (1928) 9 N.L.R.86. This case was concerned with the rival claims of an illegitimate child's mother and half-sisters. But the propositions stated in the text were given as expert evidence before the court.

born to him by one wife only, his disposable property passes to his eldest son in its entirety. Any obligation on him to ppovide for his younger brothers and sisters out of the estate or to give them a share thereof is moral, not legal. Where the deceased is survived by children born to him of more than one wife, his property passes to the eldest sons, one from each "house" or stirps. Once more there is a moral but no legal obligation on these first-sons and heirs to make gifts out of their respective shares of the estate to their younger siblings.[9]

The same principles govern succession to a man's property under Ishan law. But in the latter society, an elder son and heir who does not carry out his obligations, if any, with regard to his father's funeral only has a life interest in the estate; a younger brother who performs these duties will be entitled to what remains of the estate after the death of the legal heir.[10]

A mother's property is also inherited by her sons, usually by the eldest son exclusively. But household utensils and articles of personal adornment are shared by her daughters, if any.[11]

(c) The Ijaw system

Under Ijaw customary law, children of "big dowry"

9. Bradbury and Lloyd, op.cit., p.46.
10. Ibid., p.77
11. Ibid., p.47.

marriages inherit from their fathers; those of "small dowry" marriages inherit from their maternal uncles or some other maternal relations with whom they had established a special legal association known as the yekune.[12] In the former case, the basic principle of inheritance is primogeniture, the eldest son taking to the exclusion of all other children in a simple (homegeneous) family while the first sons by the various wives take jointly in a composite family as under Bini law. Here again, there is a moral obligation on the heir or heirs to cater for the ordinary needs of his/their younger brothers and all their sisters of whatever age. Failing sons, a man's disposable property descends to his eldest surviving brother.[13]

A "small dowry" marriage child's right to inherit from his maternal uncle or other maternal relation as above described exists even if the deceased is also survived by his own children, and even if the latter are "big dowry" marriage children.[14] But it is not clear whether a nephew's rights supersede or co-exist with those of the deceased's own eldest son or sons as the case may be.

The above rules represent the orthodox Ijaw customary law of inheritance. There is, however, a growing

12. See Williamson, loc.cit., p.56, on the Okrika Ijaw. The yekune rites place an uncle in the position of a legal father to the nephew concerned.
13. Talbot, Peoples of Southern Nigeria, Vol.III, p.689 ff. and Table of inheritance.
14. Cf. Williamson, ibid., p.56.

practice whereby children claim their father's property on intestacy whether or not they were born of a "big dowry" marriage.[15] Similarly, many children now resist any claims made by their "small dowry" marriage cousins to their deceased father's estate.

Succession to a woman's property is governed by the same rules as those described above with reference to Bini law. In this connection, it makes no difference whether a woman's children are all born of a big dowry or a small dowry marriage or whether some belong to one group and some to the other.

(d) The Ibo system.

There is primogeniture in the Ibo customary law of inheritance to the extent that (a) the eldest son of a deceased man is exclusively entitled to any property which vested in him by virtue of his position as a family head; (b) the eldest son is entitled to the ownership and possession of the father's obi (i.e. principal house) subject, however, to the right of occupancy of any members of the family who may have been put into possession of any part thereof by the deceased in his life time; and (c) pending distribution, the eldest son takes control of the estate as manager and care-taker for the family. But unlike the position under Bini law, the obligation on the eldest son

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15. Williamson, loc.cit., p.59.

to cater for the needs of the junior members of the family out of the estate is not moral but legal, as far as landed property is concerned. The eldest son in a simple, and the eldest male members of the various branches (*isekwu*) in a composite family cannot be compelled by legal action to share the father's money or other movable property with the other children; but he/they can be so compelled to share the land, houses and economic trees and plants (less the special portion of the estate already indicated) with them if he fails without just cause to perform his duties as the new family head as well as he should.

Distribution of the estate is done *per capita* in a homogeneous family, and *per stirpes* in a composite one.

A woman's movable property (other than money) passes to her daughters on intestacy.[15a] In general, the eldest daughter is entitled to a number of items (some kitchen ware and articles of clothing), while the bulk of the estate goes to the youngest daughter (an example of ultimogeniture). But there are local variations. In some places, all daughters inherit jointly; in others, the eldest daughter takes exclusively.

Money is inherited by sons - usually by the eldest son who, however, is under a duty to perform the funeral and second-burial rites.

15a. Cf. Esenwa, *loc.cit.*, p.80. (The author also describes in the same place some modern developments on children's inheritance rights on intestacy generally.)

Failing daughters, all the movable property of a deceased woman descends to her sons; the general rule being ultimogeniture, with the same local variations as in the case of daughters.

The landed property of a woman is inherited by her sons, if any, as women cannot inherit land on intestacy under Ibo law. Here again, the eldest son takes charge of the land pending final distribution. But all the sons are entitled to shares if and when distribution is decided upon.

Failing children, a woman's property is inherited by her husband or his heir if he is already deceased. The only exception to this rule is that a woman's ante-nuptial landed property descends in her maiden family and not to her husband or his heir.[16] In the case of an unmarried woman, inheritance is by her brothers and sisters. The former inherit the land if any; the latter take the movables. In both cases the rules relating to distribution are similar to those which govern distribution among a woman's sons and/or daughters.[17, 18, 19]

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16. Cf. Nwugege v. Adigwe (1934) 11 N.L.R.134.
17. It will be recalled that the "Ibo" system of inheritance includes all the societies in southern Nigeria which are not specifically named under (a), (b), (c) or (e).
18. On the Ibo, see Basden, Among the Ibos of Nigeria, p. 80 ff.; Basden, Niger Ibos, pp.267-8; Thomas, Anthropological Report on the Ibo ...., I, pp.86-94; Forde and Jones, op.cit., pp.20-21; Meek, Law and authority..., pp.319-20; Horton, "The ohu system of slavery in a northern Ibo village-group" (1954) 24 Africa 311-336, at pp. 316-7; Jones, "Ibo land tenure" (1949) 19 Africa 309-323, at pp.315-6; Ardener, loc.cit., p.88; Talbot, Peoples of southern Nigeria, pp.687-8, of Vol.III; Esenwa, loc.cit., pp.80-81
19. On the Ibibio, including the Efik, see Forde, Efik traders, p.14; Forde and Jones, op.cit., pp.75-6; Talbot, Life in southern Nigeria, pp.218-9.

(e) The Ekoi system.

Among the matrilineal societies of Ekoi (including the Yako) and the mixed-descent Ibo peoples of Afikpo and Ohafia areas, movable property is inherited primarily by brothers of the whole blood. Under the orthodox customary law, such property goes to the deceased's eldest surviving brother.[20] Failing brothers, the eldest son of the deceased person's eldest sister inherits.[21] There is, however, a strong indication that matrilineal succession is losing favour with the people, and that succession by one's children rather than nephews is being progressively accepted in these places.

Land, too, is inherited by brothers, or by nephews (where there are no brothers). But in the latter case, the heir must elect between staying on among his father's people (in which case he normally obtains all the land he needs for residential and farming purposes from them) and going over to his maternal uncle's people to receive and enjoy his inheritance there. This once again is the traditional law. More and more people are now challenging the rights of their father's brothers and nephews to inherit the estate. Parents, for their part, now adopt various devices to circumvent

20. Talbot, In the shadow of the bush, p.314.
21. Forde, Marriage and the family ... Yako, pp.45 and 69; Forde, "Double descent among the Yako" in African systems of kinship and marriage (Radcliffe-Brown and Forde, eds.), pp.307 and 328.

the doctrine of matrilineal descent; these include wills, inter vivos gifts and getting wives from patrilineal societies.[22]

2. Rights under the general law.

Lagos. Section 36 of the Marriage Act provides that where a person who is subject to customary law contracts a marriage in accordance with the provisions of that Act and dies intestate "leaving a widow or husband, or any issue of such marriage", his personal property and disposable real property shall be distributed in accordance with the law of England relating to the distribution of the personal estates of intestates, any customary law to the contrary notwithstanding, provided that real property which the deceased had no right to dispose of by will as well as any part of the estate which under English law would become "a portion of the casual hereditary revenues of the Crown" shall be distributed in accordance with customary law rules. This provision also applies to the intestate estate of an issue of a marriage contracted under the Act. The relevant English law is contained in the Statute of Distribution, 1670 and a similar enactment of 1685.

The effect of this section for our present purposes is that where a man who was married under the Act dies intestate leaving no widow, his children are entitled to

22. Cf. Chubb, Ibo Land tenure (2nd edn.), paras.41-2.

the net estate, share and share alike; if the deceased was survived by a widow as well as children, the latter will take two-thirds of the net estate - the other one-third going to the widow.[23] Similarly, two-thirds of the disposable property of a woman married under the Act and dying intestate will, if she is survived by a husband, be distributed equally among her children irrespective of sex; if she left no husband, the said property will go to her children absolutely.

The Privy Council has held on a case from Ghana that the term "widow" in the Ghana equivalent of s.36 (ante) means any widow who survives the deceased, and need not be a woman married under the Marriage Act.[24] In other words, once a man contracts an 'Ordinance marriage' (as marriages under the local marriage legislations are called in common law West Africa), his intestate estate will be inherited in accordance with the pre-1914 law of England (for Lagos) whether or not he later contracts a customary law marriage. Presumably then English law will also apply to the distribution of the intestate estate of a woman who was first married under the Marriage Act and later, following a divorce or her husband's death, under customary law.

Section 36 has no very striking effect on the succession rights of Lagos Yoruba children in their parents'

23. See Williams on Executors, Vol. II, pp.891-899.
24. Coleman v. Shang [1961] 2 All E.R.406.

property. Almost the only result of its operation is that the actual shares received by each child will be diminished to the extent that the surviving parent is entitled to one-third of the net estate. But in the case of a non-Yoruba family, the result could be quite startling. For it would mean, for instance, that an Ekoi child or the Ijaw child of a "small dowry" marriage who, as we have seen, has no inheritance rights over his father's property, will acquire such rights. In the same way, the Bini principle of primogeniture will be superseded by the English law doctrine of equality. (We have seen that the effect on a widow's rights is even more revolutionary.)

This section will certainly apply to any real property which the deceased had in Lagos, since the lex situs governs succession to real property. But will it also apply to the personal property of a person whose native community is not Lagos but who lived and died in Lagos? Again, will the section apply to the "issue" of a marriage under the Act beyond the first degree; in other words, will it apply to grandchildren and remoter issue? These and similar questions are yet to be raised or answered in the courts. But whichever way they are answered, one fact stands out clearly, and that is that the section very badly needs amendment and clarification. For it was either badly drafted by some person or persons who did not stop to give the matter any serious thought, or else it was deliberately

left loose and ambiguous by a draftsman who hoped that in working out its implications and inherent problems the courts would seize the opportunity to extend the application of English law in the country and so anglicise the customary law, as the Full Court had done in 1898.[25]

Western Region

The inheritance rights of a prent and his or her children inter se are governed by s.49 of the Administration of Estates Law, 1959, of the Western Region - an enactment which, however, only applies to the intestate estates of persons who contracted a Christian marriage.[26] If the deceased left some issue but no spouse, his net estate (or the residue thereof in the case of partial intestacy) is held in trust for sale for the said issue.[27] If, on the other hand, the deceased left a spouse in addition to issue, the latter are entitled to (a) two-thirds of the net estate or residue and (b) the reversion on the other one-third which is held on trust for the surviving spouse.[28] Distribution as between the issue is on the basis of equality. Where the deceased left one or both parents but no

25. For further doubts and queries on the section, see Obi, op.cit., espp pp.220-222. For bold statements invdving rather ambitious reforms, see Cole v. Cole (1898) 1 N.L.R.15.
26. S.1.
27. S.49(1) (ii).
28. S.49(1)(i)(2).

spouse and no issue surviving, the net estate or residue goes to the sole surviving parent absolutely or to both parents equally as the case may be. (That is, where both parents are living, division is done on the basis of equality too.[29]) Brothers and sisters only take in the absence of a surviving child, spouse or parent.[30]

Eastern Region

Section 36 of the Marriage Act (supra) does not apply to the Eastern Region or anywhere else outside Lagos; neither is there any local statute regulating intestate succession there. But until 1957, there was a strong tendency on the part of the courts to hold that because a person contracted a Christian form of marriage, he must be presumed to have adopted the law of England as it stood early in 1900 as the proper law that would regulate succession to his intestate estate. In Re Emodie, Administrator-General v. Egbuna [31] it was held by Ames, J. (as he then was) that English law, not Ibo customary law, should govern the succession rights of the relatives of an Ibo man who contracted a Christian marriage at Port Harcourt and died in the Provinces (i.e. outside Lagos), leaving a widow, a brother and an illegitimate daughter by another woman. The case,

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29. S.49(1)(iii) and (iv).
30. S.49(1) (v). Note also that no relations more remote than "uncles and aunts of the half-blood" can inherit in any event. In the absence of any of the persons enumerated above, the property goes to the Crown as bona vacantia!
31. (1945) 18 N.L.R.1. See also Coker v. Coker (1943) 17 N.L.R.55 (by Brookes, J.) and Gooding v. Martins (1942) 8 W.A.C.A.108.

said the learned judge, was covered by Cole v. Cole. But in 1957, Ainley, C.J. said in Onwudinjoh v. Onwudinjoh [32] that Cole v. Cole "itself and the whole line of cases decided by reference to it may one day be called in question by the Federal Supreme Court." [33] It is therefore probable that in future the mere fact of having contracted a Christian marriage will no longer be regarded as a sufficient basis for the application of English law as opposed to the local customary law to the distribution of the intestate estate of a Nigerian so married.

Meanwhile, however, the position would appear to be that such an estate will be inherited in the same way and by the same persons as we have already discussed in the section on Lagos.

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32. (1957) II E.R.L.R.1.
33. Ibid., at p.5. For an earlier expression of doubts on the correctness of the decision in Cole v. Cole, see Smith v. Smith (1924) 5 N.L.R.102, per Van der Meulen, J. at p.104.

CHAPTER THIRTEEN.

ADOPTION AND GUARDIANSHIP.

Scope of inquiry.

In this Chapter we shall briefly examine the customary law relating to adoption and guardianship. The general (English) law on these subjects will not be considered for three reasons: first because this work is mainly concerned with customary law; secondly because, insofar as these subjects are covered by principles of English law or by local statutes based thereon, there is a wealth of readily accessible literature on them; and thirdly because adoption and guardianship other than in accordance with customary law are so rare in occurrence in southern Nigeria that there is little point in discussing them at the present stage of our legal development.

A. ADOPTION.

Who may adopt

Every adult male person who is *sui juris* has a legal right to adopt any child of his choice. There is nothing in customary law to prevent a person from adopting a complete stranger; but in practice, most cases of adoption occur between blood relations. Again, there is nothing in law to prevent a man from adopting a child even if he is obviously in no position, economically, to provide the child

with adequate maintenance, education or training for a good career; but since few if any parents or guardians would ever give their child or ward as the case may be to an adoptive parent who is in no economic position to cater adequately for the child, the result is that only comparatively well-to-do people ever adopt in practice. Finally, it is legally possible, but extremely rare in practice, for one adult to adopt another adult; in which case perhaps this may be done without the consent of the adopted person's family. Any adult female person, too, may adopt anyone of her choice. But in the case of a married woman or an unmarried one who is still under the effective as well as formal legal control of a male relation, the consent of her husband or guardian as the case may be should be (and invariably is) obtained. As in the case of male adoptive parents, it is normally well off women who enter into adoption relationships. In practice, too, it is almost only childless men and women who adopt; though there is nothing in the law to prevent a person who has children of his or her own from adding to their number by adoption.[1]

Methods of adoption

Adoption may be formal or informal. In the former case, there is usually a meeting of representatives of the

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1. See generally, Thomas, Anthropological report on the Edo-speaking peoples of Nigeria, p.89; Partridge, "Native law and custom in Egbaland", loc.cit., p.423; Forde, "Double descent in a semi-Bantu community" (1937) 37 Man, p.66; Folarin, p.36; Forde, Marriage and the family among the Yako, pp.106-107; and Elias, op.cit., pp.301-302.

two families involved, viz. those of the prospective adoptive parent and child. Parental rights and responsibilities are there transferred and accepted, and the proceedings generally end with a commensal meal.[3a] As a variant of this, there is a meeting of members of the adoptive parent's family and perhaps also a number of his friends invited for the occasion. The adoptive parent presents the child to this meeting and informs them of his intention thereafter to regard him as his own child.

In an informal adoption, there are no meetings and no public declarations. The adoptive parent receives the child (usually an orphan or the child of a near knisman) into his home and treats him as he would his own child, and the child for his part regards and treats him as his father or mother as the case may be. The great weakness of this mode of adoption is that it is sometimes impossible to tell whether a given relationship is one of guardian and ward or of (adoptive) parent and child.[3b] One may have to wait for many years to discover what the true position is: if the child stays on in the adoptive family as a member thereof after he has come of age, the relationship is deemed to have matured into adoption. (This situation is most frequently encountered in cases where a woman has an illegitimate child with one man and later brings the child with

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3a, 3b: Cf. Forde, Marriage and the family among the Yako, pp.106-107.

her to the matrimonial home on being married to another man. The child is then brought up by his mother's husband and treated in all respects as if he were a member of the latter's family.)

Legal incidents of adoption

Adoption confers the same rights and imposes the same duties upon a child, vis-à-vis his adoptive parent or parents and his/their family, as attach to a child who was born outside wedlock and subsequently legitimated in one of the ways already described. In other words, from the date of the adoption, the child concerned becomes the lawful child of his adoptive parent and a member of his family for all practical purposes. But the child's link with his family of birth survives to the extent that he cannot lawfully marry any member or near relation thereof.[3c]

B. GUARDIANSHIP

Guardianship relationships classified.

Guardianship may be general or restricted in scope. In the former case, the guardian assumes custody and control over the child and his property rights, if any. In the latter, the guardian's rights and duties are restricted either to the person or to the property rights of the child. It

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3c. On the legal incidents of adoption, see Thomas, Anthropological report on the Edo-speaking peoples ...., p.89; Forde, "Double descent in a semi-Bantu community", loc.cit., p.66; Folarin, op.cit., p.36. An adoptive child is said to have no inheritance rights in his adoptive parent's intestate estate: Partridge on the Egba (ante), at p.423. But see Elias, ante, p.302.

impossible, therefore, to have two guardians (or sets of guardians) in respect of one and the same child - one responsible for his personal welfare and the other for his property rights and interests.[1]

Appointment of guardians

(a) Who may appoint

Subject to what has been said about unlawfully giving or accepting custody or control of children, parents have a right to appoint one or more guardians for their infant child. Under the traditional customary law, where both parents are alive but cannot agree on the need or the right person to appoint, the wishes of the father prevail; for, as between the parents, a child is regarded as being in his father's custody and under his control, as we have seen. Where the father is already deceased, the mother has a right to appoint a guardian, at all events in modern customary law.[2]

If both parents are dead, a customary court may appoint one or more guardians, depending on the number of persons who apply for appointment, the needs of the child or children and the ability of the prospective guardians to cater for these needs adequately.[3] Failing parental and

1. Cf. Egharevba, op.cit., p.39 on Bini law.
2. See, e.g., Infants Law (W.Region), ss.2, 8 and 11. Also Leith-Ross, op.cit., p.65; Forde and Jones, op.cit., pp.20-21.
3. Customary Courts Law (E.Region), s.25(1), (W.Region), s.23(1); Infants Law (W.Region), ss.8 and 11.

judicial appointment, the family head has a right to appoint by virtue of his general position as "father" of the whole group.[4]

(b) Who may be appointed

Parents have a right to appoint any person of their choice, whether or not he is a kinsman, and many parents do appoint comparative strangers. The family head, too may appoint anyone of his choice, and often appoints a stranger. But his choice may be successfully challenged by court action at the instance of other members of the family, and sometimes by the child's maternal uncle - if there is reason to believe that the proposed appointment is not in the best interests of the child.

(c) How appointment is done

A guardian may be appointed by deed, by will, by way of judicial decision and record, or by word of mouth accompanied by actual physical transfer of the child. The first two methods are gaining in popularity with the increase in literacy in recent years. The third is also becoming increasingly popular as society grows more and more impersonal, and as more people live in isolation from their kinship groups and family heads. But by far the greatest number of appointments are still done by word of mouth in the manner and circumstances here indicated.

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4. Ajisafe, p.4; Partridge (supra), p.424; for general discussion on appointment by family heads.

Where a deed is used, this is usually executed by the child's father alone; or, if he is deceased, by the mother alone; or else by the family head alone. Occasionally, however, the deed is executed by both parents, or by the mother and the family head.

Sections 25(1) and 23(1) of the Customary Courts Laws of the Eastern and Western Regions respectively provide, in identical terms, that "In any matter relating to the guardianship of children, the interest and welfare of the child shall be the first and paramount consideration". A Customary Court must, therefore, consider all representations made to it by any party interested in the child's welfare before arriving at a decision as to who should be appointed; for only in this way could the Court be in possession of all the facts relevant to the question of the child's welfare.

Legal incidents of guardianship

The relationship of guardian and ward carries with it most of the mutual rights and obligations which attach to parents and children inter se. In other words, as far as rights over the person and of control are concerned, a guardian may be said to step into the shoes of the child's legal parents.

Some idea of the extent and nature of the resulting relationship and its legal incidents can be seen

from a brief consideration of a few statutory provisions and customary law examples. Section 164 of the Labour Code provides that no person shall continue to employ an infant under the age of 16 if he has notice that such employment is against the wishes of the infant's guardian (or parent). S.295 of the Criminal Code gives to guardians the same powers as it does to parents in relation to the administration of corporal punishment on a child and the delegation of such powers to a third party, such as a schoolmaster. A guardian, like a parent, may be required by a court to attend at the trial of his ward, and may be compelled to do so.[5] So may he be ordered to pay any fine, damages or costs awarded by the court: indeed, any such fine, damages or costs must be paid by the guardian where the child involved in under 14 years of age, unless the guardian cannot be found or has not conduced to the commission of the offence by neglecting to exercise due care of the ward.[6] Again, a guardian may represent or be represented by his ward in legal proceedings before a customary court in the same circumstances and subject to the same limitations as a parent may represent or be represented by his/her child.[7]

Guardianship differs from adoption (even if the

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5. Children and Young Persons Law, s.10 (E.Region), s.9 (W. Region).
6. Ibid., s.11 and s.10 respectively.
7. Customary Courts Law, s.32(1) and s.28(4)(a) of the Eastern and Western Regions respectively.

two relationships are sometimes difficult to distinguish from each other, as we have seen) in at least two fundamental ways. First, a ward has no right of inheritance in his guardian's intestate estate by reason only of the relationship. Secondly, while an adoptive child cannot, a ward can marry a member of the guardian's family if he otherwise has legal capacity to do so.[8]

Guardianship and property rights.

A guardian is under a legal duty to take proper care of his ward's property, if any, and may be liable for culpable waste or misappropriation in certain circumstances. The general rule is that so long as the guardian takes reasonably good care of such property, and so long as he provides adequate maintenance and advancement for the child, he need not account strictly for the use of the property and its proceeds. It would be too much to expect a non-literate guardian (and all guardians were of this category until the last few decades) to keep separate accounts of his own and his ward's properties. Hence the rule that he may keep part of the proceeds of the latter's property or enjoy the property itself in spicie so long as he caters for the ward reasonably well, having regard to all the circumstances of the case. The presumption is, apparently, that part of the maintenance and advancement costs of the

8. I.e., if he does not come within the prohibited degree of blood relationship. Cases of wards being given their guardians' daughters in marriage are not infrequent.

child is from time to time borne out of the guardian's own resources - a presumption that is borne out by the facts in the vast majority of cases.[9]

This principle that a guardian need not account strictly for the property of his ward was given some grudging recognition in Martins v. Martins.[10] In that case an orphan had money deposited in a bank for him out of the estate of his father. Later, his uncle with whom he lived and who was his guardian applied to the court for permission to withdraw part of the funds for the purpose of acquiring landed property as an investment for the child. The application was granted; the money was duly withdrawn; but none of it was used in the purchase of landed property or any other property. Part of it was, however, used with the infant's consent and for his benefit - being spent on his school fees, necessaries and general maintenance. On attaining majority, the ward brought an action against his guardian for account. Butler Lloyd, J. held that notwithstanding the fact that the guardian had not used any part of the money for the purpose for which its withdrawal was permitted, yet he should be given credit for such part of the funds as were actually used with the child's consent

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9. A guardian, says Ajisafe, "is entitled to the use of the ward's land and the fruits accruing therefrom during the tenure of his office." Op.cit., p.4 Cf. Folarin, op.cit., p.53. See also:- Egharevba, op.cit., p.39; and Partridge, "Native law and custom in Egbaland", loc.cit., p.424.
10. (1940) 15 N.L.R.126.

and for his benefit. This list must, however, be closely scrutinized; and the guardian must make good any sums not coming within the approved list of expenses, the court held.

Termination of guardianship.

Guardianship comes to an end in one of several ways. First it will naturally come to an end when the child becomes an adult as understood in the local community. Secondly, guardianship is terminated by the ward's marriage, as a general rule. In the case of a female ward, this function devolves on her husband or, if he is himself a child of tender years, on his parent or guardian. But the guardian of a female child's property need not cease to act by reason only of the child's marriage. For he may have to be responsible for the upkeep and management of the property until the owner is old enough to take over control, and actually does so, if the property in question is land or a house. As we have seen, such property does not come under the husband's control by reason of the fact that he is married to its owner (and will not be inherited by him or by any member of his family apart from any children that that wife may have borne him.)

Thirdly, an appointment made by parents or the family head may be revoked by them or by a court of law; and a court may, of course, revoke its own appointment for any sufficient cause. Finally, a guardian has a right

(which, however, is rarely exercised) to surrender his rights and responsibilities if, among other reasons, he becomes physically or mentally incapable of taking good care of the child or his property or both; if he has to go abroad on transfer or to take up a new employment or calling, and it would be deleterious to the child's personal or property interests for the relationship to be maintained in the circumstances; or if the child turns out to be a wilful delinquent. In this last case, the guardian may surrender his responsibilities at proceedings in a juvenile court, as already seen in connexion with parents and their children.

Guardianship ad litem.

For the sake of completeness, mention should be made of a concept which resembles true guardianship in name, though in little else. This is guardianship ad litem. It arises because, subject to one exception[11], an infant [12] has no legal capacity to institute or defend an action in court.[13] He must sue by his next friend, and defend by a guardian ad litem.[14]

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11. Where an infant sues for wages, not exceeding £100, due to him for work as a domestic servant, for piece work or otherwise. See, e.g., Magistrates Court Law (E. Region), s.37.
12. I.e. a person under the age of twenty-one years.
13. Savage v. Johnson (1926) 7 N.L.R.53 (Tew J.)
14. Cf. Magistrates Courts Law (E. Region), s.39.

A guardian ad litem is appointed by the court after an action has been brought by or against the infant. In theory, any one may be appointed. In practice, however, such an appointment usually means no more than a confirmation by the court of a choice made outside the court by the infant himself or on his behalf by his parent or a person in loco parentis; and the "guardian" may in fact be the child's parent or his ordinary guardian. Hence our earlier remark that this functionary resembles a guardian properly so called in little more than his official title.

CHAPTER FOURTEEN.

DISSOLUTION OF FAMILY TIES.

Scope of inquiry

The question whether or not the family ties between parents and their children could be severed and, if so, how this could be done has already been discussed in the Chapter on "Parent and child". In the present Chapter, we shall deal with the law relating to the dissolution of marital relations (a) by act of the parties, that is by divorce, and (b) by operation of law, that is by death in certain cases. The discussion here will be devoted mainly to customary law, but there will be occasional references to the general (English) law by way of contrast or comparison.

It will not be necessary to pursue the question whether or not customary law recognizes divorce. For whatever the legal position in the past, and in spite of many assertions to the contrary,[1] divorce is now an accepted socio-legal fact everywhere in southern Nigeria.

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1. See, e.g., Rev. Johnson, The history of the Yorubas, p.116 where it was said in 1921, "Divorce is very rare; so rare as to be considered practically non-existing". In strict legal theory, says Lloyd of Itsekiri law, "A ceremony performed before the ancestors to solemnize marriage can never ... be revoked": The Benin Kingdom and the Edo-speaking peoples, p.190. Ajisafe, too, says of the Yoruba of old, "Divorce is not permissible in native law": op.cit., p.58; but this should be read with a lawyer's view of the law as expressed by Folarin in 1939: The laws and customs of Egbaland, pp.30-32.

A. DIVORCE

Who may initiate proceedings, and how.

Everywhere in the past, and in the less sophisticated societies of today, divorce could be obtained either in court or extra-judicially; judicial proceedings being formerly only resorted to where a husband refused to accept a refund of the bride price (marriage consideration) which he paid on the wife, or where a wife refused to leave the matrimonial home on being asked to do so by the husband or, having left it, she (more usually her maiden family) refused to refund the bride price on request.

(a) Extra-judicial divorce.

Either the husband or the wife may initiate divorce "proceedings". In the one case, the man orders his wife out of the matrimonial home and back to her own people for one of the usual reasons which will be discussed presently, and duly informs his parents-in-law of his intention to bring the marriage to an end forthwith. Members of either or both spouses' families then attempt a reconciliation. If the attempts fail, the wife's parents decide whether or not they should wait until their daughter finds a new suitor before returning the bride price to the husband and having the marriage terminated. Where the wife is ordered out of the house through no fault of hers or for no sufficient cause,

her parents have a right to hold their hands until a new suitor is forthcoming and a re-marriage arranged. If, however, the woman is sent out through her own fault (e.g. because she is a habitual thief or adulterer), then as a general rule, the husband has a right to call upon her parents/family to refund whatever bride price he paid for her. Should they refuse or fail to do so, he has a right of action to compel hem, if he so desires. In parts of Iboland, however, a man who has himself ordered his wife out of the matrimonial home (whatever the reason) has no right to call upon her family to repay the bride price to him unless and until her re-marriage has been arranged.

In other cases, the wife leaves her husband and goes back to her own people or, in more recent times, to live on her own in one of the urban areas. The husband is then informed of his wife's intention to end their marriage relationship. If the wife left for no just cause, and if all attempts at reconciliation fail, her family will have to refund whatever bride price they receive for her to the injured husband. If they do not, the husband may bring an action against them to do so. Where, however, the wife left on account of the husband's fault (e.g. because of his cruelty to her, or because he has turned out to be an incorrigible rogue or an exceptionally indolent man), the woman's family need not repay the bride price till her

re-marriage has been arranged.

In yet other cases, the wife is recalled by her own family, either because they are dissatisfied with her husband as husband and son-in-law, or because there is a more worthy (usually more wealthy) admirer asking for the woman's hand in marriage. If the woman consents and so leaves her husband, the latter has a right of action to compel immediate refund to him of the bride price paid for his wife.

The tendency in more recent years is for the courts to decline to assist a man in recovering his bride price in full or even in part where the marriage broke down through his own fault, and, on the other hand, to order immediate refund of the bride price where the wife's fault or that of her maiden family has caused the break-up of marital relations.[2]

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2. See generally, on the Ibo: Leith-Ross, African Women. A Study of the Ibo of Nigeria, p.103; Basden, Among the Ibos of Nigeria, pp.76-77; Basden, Niger Ibos, p.239; Forde and Jones, op.cit., pp.18-20; Meek, Law and authority in a Nigerian tribe, pp.277-281; Wieschhoff, "Divorce laws and practices in modern Ibo culture", (1941) 26 J. Negro Hist., pp.302-310; Esenwa, loc. cit., p.75 and p.76. On the Ijaw: Talbot, Tribes of the Niger delta, p.216; Talbot, Peoples of southern Nigeria, Vol.III, p.439. On the Ekoi: Talbot, ibid., p.674; Talbot, In the shadow of the bush, p.113; Forde, Marriage and the family among the Yako ...., p.71; Forde, "Double descent among the Yako", loc.cit., p.325. On the Ibibio (Including the Efik) Forde, Efik traders of Old Calabar, p.14; Cotton, loc.cit. p.430 (to be read with caution); Simmons, loc.cit., pp.164-5; Forde and Jones, op.cit., p.77. On the Yoruba: Forde, The Yoruba-speaking peoples of south-western Nigeria p.28; Ward, The Yoruba husband-wife code, pp.110-111; Folarin, op.cit., pp. 30-31; Johnson, The history of the Yorubas, p.116. On the Edo: Bradbury and Lloyd, op.cit., pp.49 and 80.

(b) Judicial divorce.

As indicated above, recourse is had to the courts where the parties fail to reach agreement either on the question whether a marriage should be dissolved or not (as where a man refuses to accept a refund of the bride price he paid on his wife, or where a wife refuses to leave the matrimonial home on being asked to do so by her husband), or on the quantum of the bride price repayable in the event of the contemplated divorce being accomplished. As a general rule, and in the absence of any local legislation to the contrary, the customary courts (which alone have original jurisdiction in such matters) have no right to refuse to pronounce a "decree" of divorce on being asked to do so by a competent party - the competent parties being the husband and/or his family on the one hand, and the wife's family on the other. (There is, though, a growing practice whereby divorce decrees are made on the application of maltreated wives.) The court may attempt a reconciliation of the parties, and usually does. But if the attempt fails, it has no choice but to declare the marriage at an end, manifesting its disapproval of one or the other of the parties by its judgment as to the amount of bride price recoverable, the amount of maintenance allowance payable to a nursing mother where the child is too young to be separated from his mother, or the time limit within which the bride price must be repaid.

"Grounds" for divorce.

There are, strictly speaking, no "grounds" for divorce, if that term is used in its technical connotation of facts which the law requires to be established before divorce could be granted by the courts. As we have seen, a marriage may be lawfully dissolved by mutual consent- a state of affairs which is impossible at least in theory under the general law, in view of the fact that such mutual consent would constitute "collusion" which is an absolute bar to divorce under that law.[1] As already indicated, too, divorce could be secured without any recourse to the courts, with the result that there is no need for any set of facts which a party seeking divorce must prove in order to show that the marriage has become a complete failure and should be dissolved in the name of humanity.[2]

Nevertheless, there are a number of reasons and circumstances which are generally accepted as affording a party sufficient moral justification to seek to have his or her marriage dissolved. These include impotence or sterility on the part of the husband or sterility on the

1. Cf. Bromley, pp.139 and 142.
2. Jeune, President of the Probate Court, expressed the rationale for the rule against collusion in these words: "When the parties to a suit are acting in complete concert, the Court is deprived of the security for eliciting the whole truth, afforded by the contest of opposing interests, and is rendered unable to pronounce a decree of dissolution of marriage with sufficient confidence in its justice" Churchward v. Churchward [1895] P.7, at p.30. This statement assumes, inter alia, that the courts are better judges than the spouses themselves when a marriage has broken down, and that a decree which is desired and welcomed by both parties to the proceedings is not necessarily just.

part of the wife, since the main object of marriage is the procreation of children; cruelty on the part of either spouse, especially where this is accompanied by repeated acts of violence; excessive meanness by the husband towards his wife or her maiden family; indolence of either spouse, since this would not conduce to the proper care and maintenance of any children that may be born of the marriage; adultery by the wife, especially if repeated, as this is an indication that the woman concerned would not make a good mother to her daughters as far as morals are concerned; incest by either spouse, especially where this is committed with a member of the innocent spouse's family - the offending spouse is then considered far too defiled to continue cohabiting with the other spouse without drawing down the wrath of the ancestral gods; addiction to crime (e.g. theft, poisoning or gangsterism), because for one thing, few people if any would like to maintain their association with a habitual criminal if they can help it, for another since criminal proclivity is believed to run in the family, no spouse would willingly continue a marriage which is likely to result in the birth of criminals and social misfits. As we have seen in another context, a husband's adultery without more is not regarded as sufficient justification for divorce. (This is ibviously due to the fact that, as in many another country, there is a double standard

of sexual morality in southern Nigerian societies - one standard for the women and a much lower one for the men.) To constitute a "ground" for divorce, a husband's adultery must be accompanied by some other matrimonial wrong such as neglect of his duties to his own children or wife. That one spouse has contracted a dangerous and/or incurable disease is often a good reason for the other to divorce him; this is because, apart from the fact that a full and satisfying marital relationship would be difficult if not impossible in the circumstances, there is the real danger that children will not be born or, if born, will probably become infected. But in the case of spouses who have passed their prime, and in those societies where the procreation of children per alterios is accepted socially as well as legally, the fact that either spouse in the former case or the husband in the latter case has contracted an incurable disease does not normally lead to a dissolution of the marriage. For in the case of middle-aged or elderly couples, either enough children have been born of the marriage to justify its continued existence without any more children, or the parties have already reconciled themselves to a childless marriage. In the other set of circumstances, the main purpose of the marriage could still be achieved by the wife with the help of another man chosen for the purpose by her or for her by either or both families

involved in the marriage.[3]

What constitutes divorce,

and how is it obtained.

As in other systems of law, divorce under customary law consists in the dissolution of the marriage bond, with the consequent release of the spouses and their respective families from all marital obligations towards each other. Contrary to popular opinion in certain quarters, customary marriage is not dissolved by the mere fact that one spouse has left, or been sent away by, the other with the express intention of never again living together with him or her as husband and wife. Where this happens, there is no more than a voluntary separation: the parties remain husband and wife in the eyes of the law nonetheless. Some formality is required to bring the marriage to an end. In the traditional laws of most societies, this normally took the form of a symbolic cutting of the marriage links between the two families concerned and an exchange of oaths to the effect that neither family or its members would knowingly harm the other or any of its members by reason of the fact

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3. For more details see references in note 2 under the heading, "Extra-judicial divorce" supra. Also Kammer, loc.cit., p.60; Elias, op.cit. p.289 Egharevba, op.cit., p.20; Omoneukanrin, op.cit., pp.50-51; the Marriage, Divorce etc. Adoptive Bye-laws Order, 1958, of the Western Region, s.7; Thomas, "The Edo-speaking peoples of Nigeria" loc.cit., p.6; Welch, loc.cit., pp.172-3; Delano, An African looks at marriage, p.31; Kasunmu, op.cit., pp.153-154 and the cases cited there.

that the ties that bound them together were now broken. In the case of a judicial divorce, the dissolution was pronounced by the tribunal seised with the case, this being all the formality necessary in such circumstances.

In modern times, there is a tendency everywhere to dispense with the exchange of oaths, symbols or ceremonies of any kind. The modern procedure can be summarised in a few sentences. There is first a separation, which is brought about in one of the ways already described. Either simultaneously with this or subsequently, one of the parties informs the other that the marriage has come to an end for all practical purposes as far as he or she is concerned. The husband is next sent for to come and collect what bride price he has paid on his wife. (Alternatively, he demands a refund and the woman's family indicate their readiness and willingness to meet his demand on the subject.) A day is fixed for the repayment of the bride price. On the day so appointed, the husband takes with him some members of his family and/or trusted friends to the meeting place. (He may send other people to represent him, of course; or he may ask the special marriage guardian/middleman to act for him.) If the sum paid in the first place or repayable in the circumstances cannot be agreed upon, as it seldom is in the less sophisticated places where records and receipts are not used, recourse is had either to the law courts or

to a special tribunal chosen by the parties for that purpose. At last the sum due and repayable is agreed or adjudicated upon, and then paid to the husband or his representative. There is a final commensal meal or drink to show that there are no hard feelings. This brings the marriage to an end. (It should be noted that the husband may well be in arrear with his payment of some non-refundable customary dues, in which case this will be set off against any repayments due to him.)

So far we have been dealing with extra-judicial divorce, the only recourse to the courts in such a case being to determine the quantum of bride price or customary dues repayable. In a judicial divorce, one party to the marriage brings an action in court to have the marriage dissolved. More often than not, the petitioner is the wife acting alone or in concert with her family, praying the court to dissolve her marriage and compel her unwilling husband to accept a refund of his bride price. If the husband appears or is represented, the court usually attempts a reconciliation. If this fails, the court pronounces the marriage at an end, and adjudicates on the amount of bride price to be repaid, having regard, as we shall see shortly, to the conduct of the parties as observed by the court or proved to it, the duration of the marriage, and the number of children born of the marriage, among other factors. Where

the husband does not appear and is not represented, as often happens, the case proceeds nonetheless; the court pronounces the marriage at an end, having fixed the amount of bride price repayable to the husband or his family. This sum is then paid into court, and the marriage is well and truly dissolved.

Where the action is brought by the husband or his family, the procedure is the same as above, except that it might be necessary in such a case to have the court's judgment regarding the repayment of the bride price executed. In cases of extreme dissatisfaction with a wife's character, a husband brings an action for divorce against his wife and/or her family and declares that he does not want any refund of the bride price whatsoever, and (still more rarely) renouncing any rights to any child she might be with at the time of the action. The court thereupon pronounces the marriage dissolved, and that is the end of the matter.

It should be mentioned as a closing remark that in modern times an ever-increasing proportion of divorces is obtained in court - a practice which was said to be well established in Calabar early in the century,[1] and in Egba-land in the 1930's.[2] This does not mean that extra-judicial

1. Cf. Cotton, loc.cit., who said in 1905, "A man can only divorce his wife by bringing her before the courts and giving sufficient reasons. A woman cannot divorce herself, but she can bring her husband before the courts, and obtain release from him if the court decides his guilt," (at p.430).
2. "... all cases of divorce," wrote Folarin in 1939, "are [now] done in court and adjudicated upon according to merit." Op.cit., at p.31.

divorce is no longer lawful; it simply means that as society becomes more and more impersonal, as less people become available for the often time-consuming and intricate business of ascertaining what payments have or have not been made and how much of this should be repaid in a given case in respect of a marriage which has probably subsisted for many years, it becomes progressively more convenient for all concerned to have such matters settled before a tribunal of full-time judges.[3, 4]

Legal effects of divorce

(a) On property rights of spouses

When a woman leaves her husband or is sent away by him pending a formal dissolution of the marriage, she is entitled to take away with her all her personal effects as well as any movable property which she brought to the matrimonial home or acquired during coverture by her own exertion in her own time or purchased with her own money (and, of course, any gifts made to her for her own separate use by her blood relations or friends). As a rule, however, she has no right to take away any property given her by the husband in circumstances which made it clear that the property was intended for her as a wife and house-keeper.

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3. Though customary court judges sit in rotation in most places, they do sit full-time whenever it is their turn to do so.
4. For further details on divorce generally, see also Kammer, loc.cit., p.60; Williamson, loc.cit., pp.55-56, both on the Kalabari Ijaw.

Thus she has no right to take away any cooking-utensils or furniture bought for her by the husband even if the furniture in question was intended for use in her own bedroom and was actually so used. If she took away any such property, she and her family will be liable for a fair compensation therefor.[1] Indeed, according to the strict letter of the customary law, a wife and her family must pay for any clothing, trinkets or other articles of dress which she was given by her husband and which she took away with her on being separated from him - the usual time for such payment being the occasion of the settlement and refund of whatever sum is due to the husband on account of the bride price and other customary dues.

The question of a wife's right to her landed property (i.e. buildings, economic plants and the land itself) is more difficult to state with any degree of confidence. This is because here we are faced with two conflicting but fundamental principles of customary law. The first is that a person is entitled to the fruit of his labour even where this takes the form of an improvement to another's land, provided only that the improvement was effected with the consent of the landowner in the first place. On this principle, then, a divorced wife should be entitled to the

1. This was probably what Basden had in mind when he said of Ibo law that a woman who was ordered out of the matrimonial home by the husband was thereby deprived of all property: Among the Ibos of Nigeria, p.77.

continued use and ownership of what was her landed property during the subsistence of her marriage. The other principle is that non-resident strangers cannot own permanent rights or interests in landed property if they have no intention of establishing any other legal relationship with the local community or any of its members. On this principle, a divorced woman, being now a non-resident stranger in her ex-husband's community (she has to be a stranger in the vast majority of cases on account of the rule relating to exogamy), could not retain her rights over her landed property in these circumstances. Happily, this dilemma never presents itself to the courts because the woman concerned always disposes of all her landed property before the marriage is dissolved. Even where she is driven out of the house by the husband or his family, she still can alienate such property; for though separated from the husband, she is not divorced until the bride price has been repaid or the marriage otherwise judicially dissolved. The woman and her family will not unnaturally play for time in a situation like this; and if, realizing this, the husband resorts to court action to obtain divorce, the inevitable delay entailed in litigation would afford the woman all the time she needs at least to give the property away if she cannot or will not sell it. In any case, she (or her family) can always apply to the court for time in which to straighten out her property rights:

the courts are not favourably disposed towards property-grabbing husbands, and so will almost certainly grant the time prayed for in these circumstances.

(b) On the bride price

There was uniformity in the law on the effect of divorce on the husband's claim to recovery of his marriage consideration (bride price), the general rule being that all the substantive bride price and customary dues were recoverable But now the rules vary from society to society unless regulated by statute. Even where a statutory maximum sum refundable has been fixed, there are still local variations as to what items within this limit should and should not be repaid.

The maximum bride price recoverable in the Eastern Region at the present moment is £30. This, in our submission, is the combined effect of s.3 of the Limitation of Dowry Law, 1956,[2] which sets a top limit to the amount of bride price payable in respect of any marriage at £30 (including "incidental expenses", where applicable), and s.5 of the same Law which bars the courts from entertaining any suits or making any decisions which would in effect violate the provisions of that Law.

Within this statutory limit there are, as indicated above, local variations. Thus among the Abiriba, for

2. No.23 of 1956, Laws of the Easter Region of Nigeria.

instance, there is said to be a reduction of ten shillings and one pound in the bride price paid, for every female issue or male issue of the marriage as the case may be.[3] All that can be usefully said by way of a general statement is that the proportion of bride price and in particular the customary dues ("incidental expenses") recoverable by a husband in divorce proceedings in respect of his wife diminishes with the duration of the marriage being dissolved and the number and sex of any children born of the marriage.

In those parts of the Western Region where the Marriage, Divorce and Custody of Children Adoptive Bye-Laws Order, 1958,[4] is in force, and to the extent that the figures therein stated have not been varied by the local authority,[5] the maximum sums recoverable on divorce are set out in the Schedule (Part B) to s.8 as follows:-

where the marriage has not been consummated: £35 (Full sum)

where the marriage has been consummated but has existed for less than one year: £30;

where the marriage has existed for one year or more but for less than five years: £25;

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3. Ekeghe, op.cit., p.48.
4. W.R.L.N. No.456 of 1958.
5. Two District Councils (Ijero and Odo-Etim) have adopted the Bye-Laws with increased dowries payable and refundable; the Ikorodu Divisional Council, on the other hand, adopted the Bye-Laws with decreased figures. See W.N.L.N. 160 of 1961, W.N.L.N. 324 of 1961, and W.N.L.N.304 of 1962 respectively.

where the marriage has existed for five years or more : £20.

In the bulk of the Region, however, the Bye-Laws do not apply at the moment; and in these places, as in the Eastern Region to the extent indicated, the amount of bride price recoverable is determined by the number of children born of the marriage as well as the duration thereof.

There are no statutory provisions regulating the time within which a deserting (or deserted) wife and/or her family should repay the bride price to her husband. Neither is there any statute law which provides that some repayment must be made. The customary courts or other tribunals trying the case have a free hand, therefore, in deciding how soon after separation the repayment shall be made. Each case is determined on its merits. But the modern rule may be said to be as follows. Where the separation is due to the culpable act or omission of the husband, he has no right to recover the bride price or any part thereof unless and until a re-marriage has been arranged by or for the wife. Where, on the other hand, the separation is caused by the culpable act or omission of the wife or her family, repayment becomes due and enforceable on demand.[6]

6. For the customary law, old and modern, see: Forde, Efik traders of Old Calabar, p.14; Simmons, loc.cit., p.165; Forde, Marriage and the Family among the Yako, p.53 ff.; Forde, "Double descent among the Yako", loc.cit., p.325; Elias, Groundwork, p.289 (to be read carefully); Ajisafe, p.58; Delano, The soul of Nigeria, pp.141-142; Folarin, pp.31-32; Bradbury and Floyd, p.49; Omoneukanrin, p.51; Okaludo v. Omama (1960) W.R.N.L.R.149 Temietan, p.76;

Cont.....

(c) On custody of children.

Jurisdiction and law applicable. The current practice is that questions relating to the custody of children are adjudicated upon by the superior courts in accordance with "English" law where such children are born of a Christian marriage, and by the customary courts in accordance with customary law in all other cases.[6a] This, on the face of it, is also the law; but the matter is not entirely free from doubt. It is true that s.13 of the High Court Law of the Eastern Region and the proviso to s.9(1) of the High Court Law of the Western Region each provides that the High Court shall not have original jurisdiction in matters relating to the family status, guardianship etc. of children where the customary courts have jurisdiction. It is also true that these Regional High Court Laws and that of Lagos provide for the application in these courts of the "law and practice for the time being in force in England" - including of course the law relating to the award of custody to one or the other of the parents - in all matrimonial causes, over which they have jurisdiction, as we have seen. Similarly, s.7 of the Infants Law of the Western Region provides that Part III of that Law which deals with the custody of children on divorce (among other matters)

Footnote 6 continued .....
Ellis, p.186; Leith-Ross, p.103; Kasunmu, pp.155-156; Basden, Among the Ibos, pp.76-77; Basden, Niger Ibos, p.240; Forde and Jones, p.18; Meek, Law and authority, p.281; Esenwa, p.75.

6a. See, e.g., Omodion v. Fasoro and Ibeji (1960) W.R.N.L.R. 27.

shall not apply to children subject to customary law on the subject; while the Marriage, Divorce and Custody of Children Adoptive Bye-Laws Order of that Region lays down rules for the award of custody by Customary Courts. The implication in all this would seem to be that questions relating to the custody of children of a customary marriage should be decided by Customary Courts applying customary law, and those relating to the custody of children of a Christian marriage should be determined by the High Court applying the current law of England.

But it is also a fact that s.22, s.12 and s.27 of the High Court Laws of the Eastern Region, the Western Region and Lagos respectively provide that the High Court "shall observe and enforce the observance of" customary law wherever applicable, and "shall not deprive any person of the benefit of such" law, and that customary law "shall be deemed applicable in any civil cause or matter" where the parties thereto are Nigerians. It is a moot point, to say the least, whether the statutory provisions discussed in the last paragraph above are sufficiently clear and unambiguous to be regarded as effectively depriving any Nigerian of the right to have the custody of himself or of his child determined by his local customary law by reason only that the child in question was born of a Christian marriage. This is another aspect of the law which badly

needs clarification by the legislature; for such an important question should not be left to speculation among lawyers or presumption by the courts, as it is at the moment.[7]

(i) Under customary law.

The general rule under customary law is that the right to the custody of children whose parents are divorced or separated belongs to the father, whatever the reason for the divorce or separation and whether the said father was the innocent or the guilty party. If, however, any of the children is too young to be separated from his mother, the latter is entitled to keep him until he is old enough for such separation, when the father may then demand him back.[8]

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7. It may be objected with some justification that since the question of children's custody is decided during divorce proceedings and at the same time as the decree of dissolution is pronounced, all these doubts and queries are of no more than academic interest. To this the answer is (a) that the question of custody may, and not infrequently does, arise as a result of a voluntary separation and long before any divorce petitions are presented to the courts; (b) that, as in Amachree v. Taria ((1923) 4 N.L.R.99) already discussed, the parties to a dispute over a child's custody may not be the child's parents themselves, one or both of whom may have died, but his maternal and paternal grandparental families;
(c) that the question of custody may only have arisen after a marriage has been dissolved as where, for example, unknown to a man, his child was en ventre sa mere at the time the divorce decree was pronounced; and (d) that even if the question of divorce has to be decided with reference to the law of England in a given case, it does not necessarily follow that custody rights too should be determined with reference to that law; to hold that it shall be so determined would, in our submission, be to revert to the now discredited theory that once a person contracts a Christian marriage or is a child of such marriage, all his personal law rights ipso facto fall outside the pale of customary law for all purposes.
8. Cf. on YORUBA law: Ellis, op.cit., 186; Folarin, op.cit, p.32. On ITSEKIRI law: Omoneukanrin, op.cit., p.46. On the EKOI: Forde, "Double descent among the Yako", loc.cit.

/cont....

Even among the matrilineal societies of Ekoi, and even in the case of children of "small dowry" marriages among the Ijaw, the custody of children belongs to their father if for any reason the marriage is terminated.[9] Thisnappears odd, in view of the fact that as already indicated elsewhere, children are "affiliated" to the family of theirnmaternal relations and not to that of their father in such cases. The explanation for this is perhaps that a father is entitled to the custody and control of his children all during his life time, and that it is only after his death that they can elect to go over to their maternal relations if they so desire.

The customary law is now subject, in those places where the Marriage, Divorce and Custody of Children Adoptive Bye-Laws Order, 1958, of the Western Region is in force, to the rule that in making an order for the custody and upbringing of a child in any proceedings the court shall always act on the principle that "the interest and welfare of the child shall be the first and paramount consideration."[10, 11]

Footnote 8 continued ...
P.325; Partridge, Cross River natives, p.256; On IBIBIO law: Forde and Jones, op.cit., p.77. On IJAW law: Talbot, Peoples of southern Nigeria, Vol.III, p.439; Talbot, Tribes of the Niger Delta, p.218. On IBO law: Basden, Niger Ibos, p.240. Also generally, Elias, op.cit., p.297. Talbot's statement that children "almost invariably go with" their mother "if she leaves her husband" (In the shadow of the bush, p.97) was probably intended to refer to children too young to be separated from their mother.

9. See under EKOI and IJAW in note 8 supra, for references.
10. S.14(1).
11. On some of the implications of this clause, see (ii) below.

(ii) Under the general law.

In cases governed by the general ("English") law, the basic rule is that referred to in the last paragraph above, viz. that the welfare of the child shall be the deciding factor in making any orders regarding his custody. The old common law rule that a father's right to his child's custody was absolute - so absolute indeed that he could lawfully claim from his wife the custody of a child at the breast[12] - is no longer good law. Section 12 of the Infants Law of the Western Region[13] provides, inter alia, that the High Court shall make such orders regarding the custody of, and the right of access of the parents to, a child as it thinks fit on the application of either parent and having regard to the child's welfare. S.15 provides that an agreement in a separation deed shall not be void by reason only that it contains a provision to the effect that the husband shall give up his right to the custody and control of a child of the marriage in favour of the child's mother. But the most detailed and felicitous provision is in s.24 which reads as follows:-

> "Where in any proceeding before any court the custody or upbringing of a child ... is in question, the Court in deciding that question, shall regard the welfare

12. For the rule at common law, see R.v. De Manneville (1804) 5 East 221. Also, Bromley, pp.303-4.
13. Cap.49 of the 1959 Revision.

> of the child as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, up-bringing ... is superior to that of the mother, or the claim of the mother is superior to that of the father."

These provisions in the Infants Law of the Western Region have done little more than assemble for easy reference the provisions of the Custody of Infants Act, 1873, the Guardianship of Infants Act, 1886, and the Custody of Children Act, 1891, (all of them Acts of the imperial parliament which almost certainly apply in Lagos and the Eastern Region as statutes of general application which were in force in England on the first day of January, 1900) as well as the provisions of the Guardianship of Infants Act, 1925 (also of England) which will or will not apply to Lagos and the Eastern Region according as the question of custody and guardianship of children is or is not regarded by the courts as an aspect of "matrimonial causes or matter".

The guiding principle then is the welfare of the child whose custody and upbringing are in question. Among the factors which the courts take into consideration in assessing a child's welfare are (a) his physical well-being, having regard to his age and general state of health;

(b) his educational requirements - religious as well as secular - considered in the light of each parent's religious conviction or absence of it,[14] and the comparative abilities of the parents to provide him with the appropriate form and standard of education suitable for his station in life; (c) the need for brothers and sisters to be brought up together wherever and whenever possible; (d) whether or not the child would be in "moral danger" of any kind if in the custody of one or the other of the parents, having regard to the character, mode of life, trade or profession of each parent; (e) the wishes of the parents, especially that of the innocent party to a divorce proceedings;[15] and (f) the wishes of the child himself, to some extent.[16] So great is the store set by the courts on this principle that they will refuse to enforce an agreement in a separation deed whereby custody is given to a parent, if the agreement is not considered to be for the benefit or in the best interest of the child himself.[17, 18]

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14. Re Besant (1879) 11 Ch.D.508.
15. Cole v. Cole (1941) 16 N.L.R.9, per Butler Lloyd, J.
16. Cf. Fitzgibbon, L.J. in Re O'Hara [1900] 2 I.R.232, at p.240.
17. Re Besant, ante. See also the proviso to s.2 of the Custody of Infants Act, 1873, of England.
18. For a detailed treatment of the whole subject, see Bromley, op.cit., pp.303-325, esp. 303-313, 318-325.

B. DEATH

Effect of death of a spouse.

The death of the wife terminates a marriage completely and for all purposes. It also abrogates all the usual customary rights and obligations which exist between the families of the two spouses by virtue of the marriage.

The death of the husband, on the other hand, does not necessarily terminate the marriage; more accurately, perhaps, a husband's death does not terminate the customary law status of his wife as a married woman. This is not, as is sometimes said, because there is the levirate anywhere in southern Nigeria; for, in our submission, there is no such institution there, at all events in modern family law. (Forde's statement that "The levirate is as foreign to the Yako as is the sororate"[1] is true of all societies in southern Nigeria.) It is rather because if a "widow" does not re-marry within her deceased husband's family - and she has complete freedom of choice in the matter today, whatever the position in the traditional society - and for so long as she is not married to any other person, then ~~first~~ she remains a member of that family to the same extent and for practically the same purposes as she was in her husband's

1. Marriage and the family among the Yako in south-eastern Nigeria, p.71; see also, ibid., p.69.

Life-time; secondly, any children she might bear after the husband's death are legitimate, being the legal children of the said husband - whoever the natural father of such children, and even if they were conceived after the death of their legal father as here described; thirdly, she retains her rights and interests in the matrimonial home as against her husband's heir or heirs, even if she has no inheritance rights in the estate, and whether or not she has any children surviving; and fourthly, even where she and her husband lived abroad all during their married life, so that they had nothing that could be called their matrimonial home in the husband's native village or town, a widow has a right, a propos her late husband's family, to be given land out of the family property (if any) on which to build a home and grow her crops for ordinary domestic (not commerical) purposes - the grant usually being said to be made in her husband's name where she has no male children, and in her children's name where she has them.[2] Some positive act (which in most places is now no more than a mere formality, and in some merely consists in a refund of the bride price) is required to bring the marriage to a final end and to terminate the married status of the woman conserned.[3]

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2. On the effect of a husband's death on the marriage generally, see Forde and Jones, op.cit., p.77; Egharevba, op.cit., p.76; Coker, op.cit., esp. pp.287-88; Kasunmu, op.cit., p.141. For a different view, see Williamson, loc.cit., p.55, and Forde, Marriage and the family among the Yako ...., p.60.
3. See under "Widow inheritance" below.

The death of a wife may or may not make any difference to the legal capacity of the surviving husband to contract a seoond marriage, depending partly on the type of marriage which is now dissolved by the wife's death and partly on the type of second marriage contemplated. Since a customary marriage does not affect a man's legal capacity to contract another customary marriage concurrently, the death of a customary law wife does not make any difference to her husband's capacity to contract any number of other customary marriages at will. But, since in view of the provisions of s.33(1) of the Marriage Act, a man cannot contract a Christian marriage during the currency of this customary marriage with another woman, the death of an only customary law wife leaves the husband free to contract a Christian marriage with a woman of his choice. Conversely, because s.35 of the same Act declares that any person who is married under the Act or whose marriage is declared valid by the Act shall be incapable of marrying any other person (than the current spouse) under customary law, the death of a Christian wife has a liberating effect on a man who wishes to take a customary law wife (or of course another Christian wife).

As far as women are concerned, every lawful marriage is an absolute bar on any other marriage during the subsistence of the current marriage: nowhere in souther Nigeria

is polyandry lawful. Besides, since as already indicated, the death of a customary law husband does not necessarily dissolve a woman's marriage to him, it follows that a husband's death does not of itself affect the wife's lack of capacity to marry. (As we have seen, a woman who remarries outside her late husband's family before her customary law marriage with her deceased husband has been formally dissolved is regarded as no more than a mistress to the second man; all the children of the second association belong in law to the deceased husband and his family). On the other hand, a Christian marriage is automatically dissolved by the death of either spouse. Therefore, the widow of this type of marriage is free to marry any other person of her choice in accordance with the requirements of either the general law or of customary law. What the effect of a husband's death would be on the legal capacity of a widow who was married to the same person by both customary law and Christian rites is not clear. (It has been suggested already that the two conflicting views on the matter, viz. (a) that the two marriages are independent of each other for all purposes so that the dissolution of one does not affect the existence of the other, and (b) that the customary marriage merges with the Christian marriage - whatever the order in which they were contracted - so that the dissolution of the Christian marriage means

the simultaneous dissolution of the customary one, are both plausible in their different ways and must await the verdict of the courts.)

"Widow inheritance".

It is a view widely held that in the traditional society a woman was inherited as a form of property by her husband's sons or other heirs, with the one exception that no son could inherit his own mother. How far, if at all, this view ever represented the law - as opposed to popular but non-obligatory practice dictated by the exigencies of life in societies with no insurance policies and no homes for old and disabled people - of any societies in southern Nigeria, it is now perhaps impossible to say with any degree of certainty. But one finds it difficult to see how in a society in which women were never completely removed from membership of their maiden families by the fact of their marriage away therefrom; where parents and guardians retained sufficient control over their daughters or wards as the case may be to be able to bring their marriage to an end by recalling them because, for instance, their husbands had not fulfilled part of their customary obligations to the said parents or guardian; where divorce could be obtained virtually by unilateral action, either by returning the bride price to a husband who only grudgingly accepted it or by paying the money into court in the

circumstances already discussed; and where a wife had a right during her husband's life time to leave him with or without cause given (as we have seen) and refuse to go back to the matrimonial home in spite of threats or entreaties - one finds it difficult to see how in these places and circumstances the same women could be siad to fall for distribution as pieces of property at the death of their husbands.

But whatever the law in the past, the legal position at the present moment is that a woman whose husband has just died can (after the lapse of the mourning period prescribed by local usage) elect either to remain attached to her husband's family or to go back to her maiden family or else to find her way into one of the big cities. If she decides to stay on in the late husband's family, she may either (a) marry one of the members thereof selected according to the local rules of practice on the matter or as arranged by mutual agreement among the family members as interested parties, or (b) remain on her own and "for her husband" (as it is popularly expressed), raising children to his name wherever possible. The right to stay on in the family is not dependent on the question whether or not the woman concerned has any children surviving. She has this right even if she has never had any children, and even if she is now too old to hope for the birth of any

children.[1]

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1. On the question of "widow inheritance", see: Basden, Among the Ibos ..., p.80; Basden, Niger Ibos, p.100; Forde and Jones, p.21; Meek, Law and authority..., p.284; Esenwa, p.74; Talbot, Tribes of the Niger Delta, p.218 ff; Talbot, Peoples of southern Nigeria, Vol. III, p.678; Forde, "Double descent among the Yako", loc.cit., p.324; Ajisafe, pp.84-85; Ward, Marriage among the Yoruba, p.18; Folarin, pp.44-45; Bradbury and Lloyd, p.47; p.80; Egharevba, p.76; Omoneukanrin, p.44, p.74; In re Agboruja (1949) 19 N.L.R. 38; Coker, p.38; Johnson, p.115; Ellis, p.185; Kasunmu, p.142; Thomas, "Marriage and legal customs of the Edo-speaking peoples" loc.cit., p.95.

APPENDIX :

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