Website: www.francisbennion.com
Doc. No.1964.002.NFB *International and Comparative Law Quarterly*
Vol.13 pp. 574-616
For full version of abbreviations click 'Abbreviations' on FB's website.

THE INTERACTION OF ENGLISH LAW WITH CUSTOMARY LAW IN WEST AFRICA

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IN spite of the circumstances under which English law was received in any part of West Africa, whether by settlement conquest or cession, the change of sovereignty did not result in the disappearance of customary laws. Indeed, customary laws are enforced by the courts established by the British administration so long as they are not repugnant to natural justice, equity and good conscience, nor incompatible, either directly or by implication, with any local law for the time being in force.[1] The contact of the West African countries with the Europeans has resulted in the existence of at least two legal systems, the imported and the indigenous, each applied in the main by an almost entirely separate system of courts, while in some areas, such as Northern Nigeria and the Gambia, Islamic law represents yet a third system. The aim of this article is to contribute examples of the interaction of the two main systems.

A. INTERACTION WITH RESPECT TO THE JURISDICTION OF COURTS

The general rule is that local courts or customary courts have[1] jurisdiction to hear and determine cases governed by customary: law. Thus in Western Nigeria customary courts as they are called have power to administer " *the appropriate customary law* specified in section 20 [2] in so far as it is not repugnant to natural

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[1] See, *e.g.,* Northern Region Nigeria High Court Law. N.R. No. 8 of 1955, s. 34.

[2] "Western Nigeria Customary Courts Law, No. 26 of 1957, incorporated in Cap. 31 of }he 1959 Revision, s. 20 (1): "In land matters the appropriate customary law shall be the customary law of the place where the land is situated." s. 20 (2): "In all other civil causes and matters arising from inheritance the appropriate customary law shall, subject to subsections (1) and (4) of this section be the customary law applying to the deceased." s. 20 (3) (b): "In all other civil causes and matters the appropriate customary law shall be the law of the area of jurisdiction of the court." s. 20 (4): Where the customary law applying to land prohibits, restricts or regulates the devolution on death to any particular class of persons of the right to occupy such land, it shall not operate to deprive any person of any beneficial interest in such land (other than the right to occupy the same) or in the proceeds of sale thereof to which he may be entitled under the rules of inheritance of any other customary law."

justice, equity and good conscience, nor incompatible either directly or by necessary implication with any -written law for the time being in force." [3] In Northern Nigeria, section 20 of the Native Courts Law, 1956, provides that in civil jurisdiction only, native courts, as they are called, are empowered to administer the native law and custom *'prevailing* in the area of the jurisdiction of the court, or binding between the parties, so far as it is not repugnant to natural justice, equity and good conscience, nor incompatible with any written law for the time being in force. In the Gambia as well as in Northern Nigeria there are special courts with jurisdiction to administer Moslem law. The Mohammedan court in Bathurst administers Sharia law of the Maliki School in all causes and matters between or exclusively affecting " Moslem Africans " relating to civil status, marriage, donations, testaments and guardianship.[4] Again in Northern Nigeria, the Sharia Court of Appeal is empowered to administer, observe and enforce the observance of the provisions of " Moslem law of the Maliki School as customarily interpreted at the place where trial at first instance took place." [5] In these days where the system of transport is much improved, the indigenous courts are often confronted with some kind of internal conflict of laws. Some guidance with a view to solving this problem was given by the High Court in the Northern Nigerian case of *Osuagwu* v. *Dominic Soldier* [6] in a civil appeal from a native court. The court suggested that " where the law of the court is the law prevailing in the area but a different law binds the parties as where two Ibos appear as parties in the Moslem court in an area where Moslem law prevails, the native court will—in the interests of justice—be reluctant to administer the law prevailing in the area, and if it tries the case at all, it will—in the interests of justice—choose to administer the law which is binding between the parties." There is a presumption to the effect that customary law prevailing in a particular area is imminent in the breasts of the customary court judges. Thus proof by evidence of customary law is not necessary before customary courts whose judges are familiar with the customary law.[7] If the judges are not familiar with the customary law, then they have to ascertain the customary law on a particular point in the usual manner, by inviting the evidence or assistance of, for example, expert witnesses, referees, chiefs or other persons whom that court considers to have special knowledge of customary law.

[8] Western Nigeria Customary Courts Law, No. 26 of 1957, s. 19.
[4] Mohammedan Law Recognition Ordinance, No. 10 of 1905 (Gambia), e. 6.
[5] Sharia Court of Appeal Law. 1960, N.E. No. 16 of 1960, s. 15.
[6] (1959) N.R.N.L.B. 39. 41.
[7] *Ababio II* v. *Nsemfo* (1947) 12 W.A.C.A. 127, 128, *per* M'Carthy J".

The court may also look at works of authority. Sections 66 and 67 of the Ghana Courts Act, 3 960 (C.A. 9), make elaborate provisions for the ascertainment of customary law even though the present law is that " any question as to the existence or content of a rule of customary law is a question of law for the court and not a question of fact." It is yet to be seen whether the local courts in Ghana can sort out the various provisions. In the Ghana case of *Lororneke* v. *Nekegho* [8] where the question involved, *inter alia)* was the application of Urhobo customary law by the Accra municipal court which was binding between the parties, counsel argued that before the Accra native court could administer Urhobo customary law which was not a native customary law prevailing within its jurisdiction, it must have evidence of that law by an expert such as a professional lawyer, the holder of an official situation which required and therefore implied legal knowledge, or such other person who from his profession or business has had peculiar means of becoming acquainted with Urhobo customary law. This argument was accepted in principle by the court except that with reference to the present case the High Court was of opinion that the evidence of the customary law given in the native court was not given by persons who fell within the meaning of experts.

The exception to the general rule that indigenous courts should administer customary law is, that with the evolution of such courts, more power is gradually being given to the courts to administer certain statutory provisions based ultimately on English law.[9] This is explained by the fact that the personnel of the local courts is rapidly changing from one comprising traditional chiefs and headmen who are not literate in English to that consisting of educated members of the community. In Western Nigeria, for example, judges of Grade A Customary Courts must have qualified as legal practitioners.[10] Further, it is provided that no person is qualified to be appointed as the president or vice-president of a Customary Court Grade B, or a Customary Court of Appeal unless he is literate in the English language. The local courts in Ghana are staffed by educated men and women versed in customary law, and the criminal jurisdiction of the local courts enables the courts to enforce certain provisions of the Criminal Code, or to hear and determine charges brought, *e.g.,* under the provisions of the Mosquitoes Ordinance and the Labour Ordinance and to impose

[8] (1957) 3 W.A.L.R. 306, 308.

[9] By the Customary Courts (Jurisdiction in Statutory Criminal Offences) Order in Council, 1959, Customary Courts Grades " C " and " D " in Western Nigeria are empowered to enforce, *e.g.,* certain sections of the Criminal Code and the whole provisions of the Road Traffic Ordinance, 1947.

[10] Western Region Customary Courts Law, Cap. 31, s. 6.

the penalties provided.[11] Customary criminal offences have been completely superseded in Northern Nigeria with the enactment of the Northern Nigerian Penal Code Law, 1959; consequently native courts in Northern Nigeria have to convict accused persons not under native law and custom but with reference to the Penal Code.

With respect to civil procedure and evidence, the central governments are endeavouring to introduce English procedure and rules of evidence with the result that customary procedure is gradually being assimilated by the English law. In Ghana, for example, it is no longer permissible to commence actions in the local courts by the swearing of an oath.[12] Section 86 (1) of the Ghana Local Courts Procedure Regulations, 1962, stipulates that " Every civil cause shall be commenced by a summons issued at the instance of the plaintiff." Section 21 also provides that all the proceedings in a local court and notes of all evidence given before it shall be recorded in English by the local court. In matters of procedure, native courts in Northern Nigeria are expected to be " guided " by the new Criminal Procedure Code.[13] Although the Nigerian Evidence Ordinance [14] and other statutes containing the rules of evidence do not apply to the customary courts of Western Nigeria, yet some of the basic rules of evidence observed in the higher courts are set out in the *Customary Courts Manual* for their guidance. In Ghana, the duty has fallen on the shoulders of the High Court to ensure that the local courts observe the basic principles of evidence and procedure. Thus in 1957, the then Court of Appeal observed that the rule restated in the English case of *Crease* v. *Barrett* [15] that declarations in relation to title to land are admissible only on proof that the declarant was an occupier proved to be in possession of the land in question, applied with full force in the native courts.[18] Again in the Ghana case of *Kannin* v. *Kumah & ors.*[17] the Appeal Court had this to say: " We do not think that a piece of evidence which is inadmissible in a

[11] Courts Act. C.A. 9. 1960. s. 146.

[12] Which was allowed by, *e.g.*. the old Native Courts (Colony) Regulations made under the Native Courts (Colony) Ordinance, Cap. 98 (Laws of the Gold Coast (1954)). For case-law on the subject see, *e.g.*, *Yerenchi* v. *Akuft'o* (1905) Ren. 366 at p. 383; *Inspector-General of Police* v. *Panijin,* D.Ct. 1929-31, p. 64; *Osumina* v. *Arhinful & Awotwe* (1957) 2 W.A.L.R. 282. s. 1 of the Local Courts Procedure Regulations, 1962, however, provides that " Subject to the provisions of the Act and these Regulations the procedure and practice of local courts shall be regulated in accordance with customary law," but there is very little of this left as a result of the 1962 Regulations.

[13] N.R. No. 11 of 1960. '

[14] Laws of the Federation of Nigeria and Lagos. 195S Revision, Cap. 62.

[15] (1835) 1 CM. & R. 926.

[16] In *Du v. Yaw* (1957) Civil Appeal No. 33/57 cyclostyled judgments of the Court of Appeal 79 at p. 83.

[17] (1959) G.L.R. 54 at p. 57.

court of law (apart from evidence as to tradition, which may be hearsay) can be admissible in a native court." The case law on the subject of admissibility of evidence by the customary courts in Ghana shows that although such courts are not bound by the strict rules of evidence, the higher courts will not countenance the admissibility of any sort of evidence in such courts. In the case of *Kivamin* v. *Kwaiku,*[18] Hall J. restated the principle as follows:

> " I do not consider that it is to be expected that a native tribunal should require such strict proof of a document as is required by an English court, but at the same time, there must be some limit to the acceptance of uncertified copies of proceedings and such like documents without proof whatsoever, as in this case."

Another factor which has contributed to the streamlining of the local courts system in West Africa today is the fact that the class of persons over whom the local courts have jurisdiction is gradually being widened. In the early days the jurisdiction was limited to a certain class of persons.[19] In Ghana for example under the old Native Courts Ordinance, persons from the West Indies and Sierra Leone, Syrians and Indians were exempt from the jurisdiction of such courts.[20] In 1951, the Korsah *Report on Native Courts in the Gold Coast* recommended that the time had come for the jurisdiction of local courts to be extended over all persons, without distinction of race or origin. It was stated in the report as follows:

> " As any modern secular State develops, if it is to keep free of communal or racial strife, there comes a time when special courts for particular classes of inhabitants must give way to general courts for all manner of men. We think the time has come now in this country, and we therefore recommend that

18 F.C. 1926-29, p. 137. Followed in *Dzudu* v. *Brihiam* (1943) 9 W.A.C.A. 137 and in *Ntsin* v. *Ekutey & Efaah* (1957) 3 W.A.L.E. 11.

19 In the pre-Republican court system of Ghana native courts had jurisdiction over the following persons:

(a) persons of African descent who were normally subject to African customary law. Thus a native of the former colony of Sierra Leone was held not to be subject to the jurisdiction of the native courts: *Short* v. *Morris* (1958) 3 W.A.L.R. 339;

(b) persons whether of African descent or not whom the Governor-General had directed to be subject to the jurisdiction of a native court, and

(c) persons, whether of African descent or not, who had at any time instituted proceedings in any native court (Native Courts (Colony) Ordinance, Cap. 98, Laws of the Gold Coast (1951 Rev.), s. 10); now repealed.

For the various definitions of the word " native " see Allott's *Essays,* p. 173 *et seq*.

20 See. *e.g.*. *Brown & ors.* v. *Miller,* F.C. 1920-21, p. 48.

local courts should have authority, as magistrates' courts now have over all persons." [21]

This recommendation has been accepted and enacted as section 96 (1) of the Local Courts Act, 1960. The jurisdiction of customary courts in the Regions of Nigeria varies with respect to persons. In Western Nigeria customary courts have jurisdiction over all Nigerians [22] whereas in the Eastern Region, the jurisdiction is over, *inter alia,* " persons of African descent, provided that the mode of life of such persons is that of the general community." [23] There is no doubt that in due course of time distinction with respect to race or tribe will be abolished in the whole of West Africa. It must also be noted that the customary courts have jurisdiction in civil causes where, *e.g.,* one of the parties is a non-native of the area of jurisdiction of the court, and also where the parties agree or may be presumed to have agreed that their obligations should be regulated, wholly or partly, by the customary law applying to that party.[24]

The general rule with respect to the jurisdiction of the " non-customary courts " is that such courts are to administer the applicable English law and local statutory laws. The received English law must always be applied so far only as the limits of the local jurisdiction and local circumstances permit; whilst the customary law to be enforced by the courts must be the law appropriate to the particular circumstances. In the Ghana case of *Welbeck* v. *Brown* [25] the Full Court (Bailey C.J., Smalman Smith J., Macleod J. dissenting) by a majority of two to one laid down the law that native custom, like English custom, in order that it may be recognised by the court, must be proved to have existed from " a time to which the memory of man runneth not to the contrary." This case was not mentioned in *Mensah* v. *Wiaboe,*[26] where it was held by the Divisional Court that section 19 of the old Supreme Court Ordinance, 1876, which states that customary law shall be enforced, " did not apply to native laws or customs introduced since the date of the Ordinance " *(i.e.,* 1876). A similar

[21] At p. 24.

[22] Customary Courts Law, Cap. 31, s. 17.

[23] Customary Courts Amendment Law, B.K. No. 12 of 1957, s. 3. which replaces s. 19 of the C.C.L., B.E. No. 21 of 1956. In Northern Nigeria the native courts have jurisdiction over, *inter alia,* " all persons who (i) permanently reside on the land within the area of jurisdiction of a native authority, and (ii) whose general mode of life is that of the general native community: ' Native Courts Law 1956, N.R. No. 6 of 1956, s. 15 (1). In the Gambia every district tribunal has jurisdiction over natives. " Native " means any member of an African race—District Tribunals Ordinance, Cap. 49. s. 2.

[24] *e.g.,* Western Nigeria Customary Courts Law. 1957. Cap. 31. s. 20.

[25] (1884) Sar.F.C.L. 185.

[26] 1921-25 Div.Ct. 170.

decision was given by the Land Court (Accra) in an unreported case which brought the date of the exclusion to 1935—the date of coming into force of the Courts Ordinance, No. 7 of 1935.[27] Without going into the merits of the three decisions just mentioned, it is sufficient to say that the judges concerned misdirected themselves as to the true meaning of the legislative provisions. They must have been influenced by the mode of proof of English customs before English courts. None of these dicta can be regarded as good law any more.[28] As the Korsah *Report on Native Courts* (1951) observed, in practice antiquity appears to matter little in the Supreme Court. Indeed by sections 59 and 60 of the Chieftaincy Act, 1961,[29] a House of Chiefs may either draft a declaration of what in its opinion is the customary law relating to any subject in force in the area or draft a statement of the changed customary law. When the Minister responsible is satisfied that effect should be given to the draft as submitted or modified, he shall make a legislative instrument embodying the draft.[30] In such a situation the courts will have no alternative but to enforce the law as so declared.

The legislative provision made in the Ghana Chieftaincy Act is not new. It is merely declaratory of the principle that has been recognised by the courts in West Africa for a long time past. That principle is that customary law is not static but fluid and flexible. In the Nigerian ease of *Lewis* v. *Bankole,*[31] Osborne C.J. made the following observation on the evolution of the land law in Lagos: " The idea of alienation of land was undoubtedly foreign to native ideas in the olden days but has crept in as the result of contact with European notions, and deeds in English form are now in common use." Again in *Brima Balogun &; ors.* v. *Oshodi* [32] Webber J., one of the judges of the Full Court, summarised the nature of customary law as follows:

> " The chief characteristic feature of native law is its flexibility—one incident of land tenure after another disappears

[27] *Cobla* v. *Gbehe,* Land Court, Accra cited in Korsah's *Report on NoticeCourts,* 1951, p. 16. See also Bennion, *Constitutional Law of Ghana,* p. 411.

28 *Welbech* v. *Brown* was described as " bad law " by Sir W. B. Griffith when he gave his evidence before the West African Lands Commission of 1913. Colonial Office African (West) No. 1047, Minutes of Evidence, questions 14259 and 14292, cited in Korsah's *Report,* p. 16.

29 Act 81.

[30] For example, see Declaration of Customary Law (Akwapim State) Order, 1960; L.I. 32.

31 (1909) 1 N.L.R. 81 at p. 104.

32 (1929) 10 N.L.R. 36 at p. 53; on appeal to the Privy Council as *Oshodi* v. *Balogun* (1936) 4 W.A.C.A. 1 the Judicial Committee allowed the appeal on substantive law but the views expressed by Webber J. on the features of customary law were upheld.

> as the times change—but the most important incident of tenure which has crept in and become firmly established as a rule of native law is alienation of land. For the last fifty years alienation of land has been recognised and adopted by the native. . . . "

It is clear, therefore, that what the higher courts have to administer must be not the native law or custom or usage of ancient times, but the existing native law or custom.[33] There are other rules regarding the recognition of customary law by the non-customary courts. Before the non-customary courts enforce a rule of customary law, it must not be repugnant to natural justice, equity and good conscience. Usually, the alleged customary law must also either be specifically pleaded in the writ or in counsel's opening speech before the court.[34] The rule governing the proof of customary law was laid down by the Privy Council in the Ghana ease of *Angu* v. *Attah* [35] as follows:

> " As is the case with all customary law, it has to be proved in the first instance" by calling witnesses acquainted with native customs until the particular customs have by frequent proof in the courts, become so notorious that the courts take judicial notice of them."

But one previous decision cannot be said to be frequent proof in the courts enabling them to take judicial notice of an alleged customary law rule.[3e] The rule that customary law must be proved before it was recognised by the so-called non-African courts originated from the fact that most of the early judges were Europeans who were not acquainted with the various rules of customary law on the West Coast of Africa. Not unnaturally they insisted on the proof of rules of customary law. As one judge put it in 1891, " Native law when not incorporated by judicial decision in the law of this land . . . must stand therefore on the same footing as foreign law, and must be proved by the evidence of expert witnesses." [37] The judicial Committee, the final Court of Appeal

[33] *Golighthy* v. *Ashrifi* (1955) 14 W.A.C.A. 676 at p. 684, *per* Foster-Sutton P.

[34] *Bonsi v. Adjcna* (1940) 6 W.A.C.A. 241; *Kwaku* v. *Addo* (1957) 2 W.A.L.B. 30(5 (Ghana).

[35] P.C. (1874-1928) p. 43. See also *Martin* v. *Johnson* (1936) 3 W.A.C.A. 91 (appeal from former British Cameroons).

[36] *Larinde* v. *Afiko* (1940) 6 W.A.C.A. 108 (Nigeria) at p. 110. " The court [in Lagos] will only take judicial notice of native law and custom, which may include Mohammedan law, after it has been established by decisions in this court": *per* Brook J. in *Administrator-General* v. *Tunwase* (1946) 18 N.L.R. 88 at p. 90.

[37] *Bimba v. Mansah* (1891) Sar.F.C.L. 137, *per* Bedwar Ag. J.; *Hughes* v. *Davies* (1909) Ben. 550 at p. 551, *per* Smith J.

for Gambia, Sierra Leone and Nigeria, had observed in one case[38] that it would be very convenient [for them] if the courts in West Africa in suitable cases would rule as to the native customs of which they think it proper to take judicial notice specifying, of course, the tribes (or districts) concerned and taking steps to see that these rulings are reported in a readily accessible form" These days most of the non-customary courts are presided over by African judges. But even African judges cannot be expected to know all the different customary laws existing in a particular country. Therefore rules of the judicial ascertainment of customary law are still necessary. The rules provided for by Western Nigerian Courts Law, 1957, have already been referred to.[39] As has been mentioned before, very elaborate rules have been set in the Ghana Courts Act, 1960, for the ascertainment of customary law.[40] The new rules have been discussed at length by Bennion in his *Constitutional Law of Ghana.*[41] Also, the subject of the ascertainment of customary law in Africa generally has been discussed by Dr. A. Allott in his *Essays in African Law.*[42]-

Some Conflictual Problems

In the Gambia, one of the legislative provisions enjoining the higher courts to enforce customary law is in these terms:

> " **(1)** Nothing in this Ordinance shall deprive the courts of the right to observe and enforce the observance, or shall deprive any person of the benefit, of any native law or custom existing in the Gambia, such law or custom not being repugnant to natural justice, equity and good conscience, nor incompatible either directly or by necessary implication with any law, for the time being in force." [43]

As is to be expected, the power conferred on both the superior courts and the local/customary courts to administer customary law has generated some conflict of law problems. When a civil case involving customary law which is normally justiciable before a local customary court is brought before a superior court, should the superior court try to determine that case or should it transfer the case to a customary court? In Ghana, section 132 of the Courts Act, 1960, provides that:

[38] *Amissah* v. *Krabah* (1936) 2 W.A.C.A. 30 P.C. at p. 31.
[39] *Supra,* p. 574.
[40] (C.A. 9), ss. 66 and 67.
[41] p. 416 *et seq*.
[42] p. 72 *et seq*.
[43] Gambia: Law of England (Application) Ordinance. Cap. 3. s, 5 (Laws of Gambia, 1955 Rev.).

> " Whenever it shall appear to any court that any civil cause or matter brought before it is one properly cognisable by a local court, the court shall stop the further progress of such civil cause or matter before it and refer the parties to a competent local court. . . . "

A similar provision is enacted by section 39 of the Eastern Nigeria Customary Courts Law.[44] Not unnaturally the various phrases used in the section have been the subject of judicial interpretation. First, what do the words " whenever it shall appear " to the superior court mean ? In the Ghana case of *Kofi* v. *Brentuo* [45] Graham Paul C.J., delivering the judgment of the West African Court of Appeal, had this to say:

> "It is no doubt the duty of the court to know the law and to apply that knowledge in considering judicially what ' appears ' or does not ' appear ' to the court. But the parties to the suit have a right to put before the court any facts of the particular case that might assist the court in that consideration. If a party, knowing such facts of the particular case, omits to bring them to the notice of the court, he cannot complain if the court comes to a conclusion without reference to the facts. Nor in our opinion can the Appeal Court entertain such a complaint. It is quite true that the omission of a party to put before a court facts showing that the court had no jurisdiction would not confer on the court a jurisdiction which it did not possess. But here the court, under section 14 of the Courts Ordinance,[40] had the necessary jurisdiction and could, and indeed must, exercise that jurisdiction unless and until it appears to the court that there are facts which by statute prevent such exercise of its jurisdiction." [47]

The same view was adopted by the Privy Council in the case of *Anima* v. *Ahyeye.*[48] To the Judicial Committee, the jurisdiction of the superior court is ousted only when the prescribed circumstances have " become apparent " or have been made apparent to the court. The fact that it is not always essential to take evidence or at any rate hear counsel's views before referring the parties to a customary court was emphasised in *Djabartey* v. *Ben-kumhene Antwi Awua II*[49] by Kingdon C.J. As the learned Chief Justice put it, " in some cases the question may be doubtful on

[44] E.R, No. 21 of 1956.
[45] (1944) 10 "W.A.C.A. 92.
[46] s. 14 of the Courts Ordinance, Cap. 4, 1936 Revision of the Laws of theGold Coast. It later became s. 15 of the Courts Ordinance, Cap. 4, 1951 Revision of the Laws of the Gold Coast.
[47] (1944) 10 W.A.C.A. at 96.
[48] (1955) 1 W.A.L.R. 40. 45 (P.C.).
[49] (1938) 4 W.A.C.A. 202, 207.

the face of the writ, and then, of course, it will be necessary to hear counsel's opening and perhaps take some evidence before it will ' appear to the court ' that the matter is one properly cognisable by a native tribunal. But as I read the section and more particularly the first word ' whenever,' it is the duty of the court, immediately it does ' appear ' [on the face of the writ] that the matter is so cognisable, to stop the case, and then it has no jurisdiction to do anything but to refer the parties to a competent tribunal."

The second one which calls for comment is the expression " properly cognisable " by a local court or customary court. Normally this expression involves a question of jurisdiction. There seem to be three views on its meaning. One view is that the expression means " peculiarly suitable for decision." That is to say, it means that matters to which the customary law of the locality applies and does not include modern commercial matters or issues governed by a law which local or customary courts are not suited by experience to apply. For example, in the opinion of the *Report of Native Courts* by Sir Arku Korsah, it would not cover a suit for damages brought against a garage proprietor who undertook to repair a lorry from which the gearbox disappeared while it was in his custody.[50] Another view is that the expression covers any civil cases which customary courts have jurisdiction to try and determine. In this view of the matter the expression " properly " is regarded as redundant. The two views are not really conflicting. The third view is more extensive than the two just mentioned. Here the courts must lift the veil to ascertain whether a cause or matter is properly cognisable by a customary court. In the Ghana case of *Denkyera State* v. *Abura State* [51] Coussey P., delivering the judgment of the West African Court of Appeal, observed as follows:

> " I am unable to hold that a land cause in which the members of a native court being subjects of the stool, have necessarily, by reason of local conditions, the same interest as the stool and State in which the native court is established, is properly cognisable by that native court. That interest, in my opinion, is sufficient to create a real bias such as to render undesirable the institution of the suit in the native court having jurisdiction over the area."

When a Land Division of the old Supreme Court of the Gold Coast was established in 1944 it was provided that

so *Report on Native Courts,* 1951. p. 17.
[51] (1956) 1 W.A.L.R. 235, 239.

> " a land court shall have exclusive original jurisdiction to hear and determine any cause or matter relating to the ownership, possession or occupation of land
>
> (a) Where there is no native court competent to try the cause or matter."[52]

This last provision made it clear that the Lands Division had exclusive original jurisdiction in suits relating to the ownership, possession or occupation of land where there was no native court competent to try the case. If, however, there was a native court, in the area competent to try the case, the second question arose as to whether the case was a suit " relating to the ownership, possession or occupation of land." If it does *appear* to the court that any civil cause or matter is cognisable by a native court or that the suit is one relating to the ownership, possession or occupation of land, then and only then, is the concurrent jurisdiction of the Supreme Court or the Land Division ousted. Thus the ousting of the jurisdiction of the superior court is effective only when the prescribed circumstances become apparent or have been made apparent to the court.[53] Such is the view taken by the Judicial Committee in cases which have come before them from Ghana and Nigeria. In the Nigerian case of *Akisatan* v. *Thomas* [54] one of the questions involved was the meaning of the old Supreme Court Ordinance.[55] The jurisdiction conferred on that court was defined by section 12 in the following terms:

> " Subject to such jurisdiction as may for the time being be vested by the Ordinance in native courts, the jurisdiction by this Ordinance vested in the Supreme Court shall include all His Majesty's civil jurisdiction. . . . Provided that . . . except in suits transferred to the Supreme Court . . . the Supreme Court shall not exercise original jurisdiction in any suit which raises any issue to title to land or as to the title to any interest in land which is subject to the jurisdiction of a native court nor in any matter which is subject to the jurisdiction of a native court relating to marriage family status, guardianship of children, inheritance or disposition of property on death."

[52] Gold Coast Courts (Amendment) Ordinance. No. 33 of 1944. The relevantsection later became section 24 (4) of the Courts Ordinance. Cap. 4. Lawsof the Gold Coast 1951. The Courts Ordinance, Cap. 4 (1951 Rev.), is now repealed by the Courts Act. 1960, C.A. 9, but the problem still remains.

[53] *Amino,* v. *Aheije* (1955) 1 W.A.L.R, 40 at p. 45 (P.C.).

[54] (1950) 12 W.A.C.A. 90. 91 (P.C.).

[55] Nigeria: No. 23 of 1943, s. 12.

It was contended before the Judicial Committee that the effect of the opening words of the section " subject to such jurisdiction as may for the time being vested by Ordinance in Native Courts " was to oust the jurisdiction of the Supreme Court and to vest exclusive jurisdiction in a native court in any matter in respect of which jurisdiction had been vested by Ordinance in that native court. Their lordships did not completely accept that contention. To them the words " subject to " are equivalent to " without prejudice to." They held further that since there was a power to transfer a suit from the Supreme Court to a native court, it is clear that the Ordinance contemplates that there may be concurrent jurisdiction in the two courts. In an earlier case, *Ademola* v. *Thomas* (1946) [50] the Judicial Committee had interpreted section 12 in this manner:

> " It appears to us that no other reasonable interpretation can be given to them than that the Supreme Court shall exercise its jurisdiction subject to that of the native court so that, where a native court has exercised the jurisdiction or is exercising the jurisdiction vested in it by Ordinance, the jurisdiction of the Supreme Court shall not supersede it and shall not be exercised in the same matter."

Thus their lordships would regard it as a question of limitation of jurisdiction rather than a question of ouster of jurisdiction. The difference seems to be rather blurred.

In Ghana, the bone of contention here has been the meaning of the words " relating to " " ownership, possession or occupation of land." The words " relating to " has been described in an English case by Greene M.R. as a " very wide phrase." [57] In another case [58] Brett L.J., defining words similar to those used in R.S.C., Ord. 31, r. 12, *viz., "* relating to any matter in question," said

> " It seems to me that every document must be properly held to relate to matters in question in the action which not only would be evidence, but which it is not unreasonable to suppose does contain information which *may*—not which *must*—either directly or indirectly—enable the party . . . either to advance his own case or to damage the case of his adversary. . . ."

As will have been observed the phrase " relating to " is one which it is not easy to define and it is not surprising that the judges in

[56] (1946) 12 W.A.C.A. 81, 83.

57 *M.W. Investments* v. *Kilburn Envoy* [1947] Ch. 370.

58 *Compagnie Financiere* v. *Peruvian Guano Co.* (1882) 11 Q.B.D. 55.

West Africa here usually considered every case on its own merits rather than stick to a hard and fast ruling on the subject. There have, however, been attempts to define it. In *Kofi* v. *Brentuo,*[59] Graham Paul C.J. delivering the judgment of the West African Court of Appeal was of opinion that the words " relating to " must be interpreted in the strict sense. In the view of the Appeal Court, " a suit relating to the ownership, possession or occupation of land must mean in this connection a suit in which some issue *of fact or law is raised for the court's decision* as to the ownership, possession or occupation of land." In their ordinary meaning the words " suits relating to the possession of lands " mean something wider than the words " suits claiming possession to lands." But it is not necessary to go to the opposite extreme and suggest that they mean " all suits connected in some way or other with the possession of lands." [60] The words cannot be regarded as equivalent to " in some way connected with." [61]

It is clear, therefore, that the best way for the courts to approach this problem concerning the jurisdiction of the two courts is to consider each case on its own particular facts.[62] Thus in the English case of *Re Staines* [63] it was held that an action by an heir-at-law against an administratrix for an account of rents received by her, was not " a cause or matter relating to real estate " within the meaning of the Rules of the Supreme Court, Order 51, r. 1. The court in that case looked at the issues it had to try in the action and as it had not to try any issue as to real estate, it held that the action was, from the court's point of view, not a cause or matter relating to real estate. The courts in West Africa have proceeded on the same lines. Thus it has been held that claims for rent and / or tribute in respect of cocoa farms are suits relating to the occupation of land within the jurisdiction of a native court.[64] The reason is that the failure of the tenant to pay his tribute would entitle the landlord to re-enter on forfeiture; therefore it is a clear case of a suit relating to the possession or occupation of land.[65] However, where a claim was brought under the Rents (Control) Ordinance, as was the case in *Tackie* v. *Nelson,*[66] it was held by the West African Court of Appeal that a native court had no jurisdiction and that the Land Court, being a division of the Supreme Court, had

[59] (1944) 10 W.A.C.A. 92 at p. 94.
[60] *Djabartey* v. *Awua II* (1938) 4 W.A.C.A. 202, 207. *per* Kingdon C.J.
[61] *Ibid,* at 209. *per* Webb [sic] C..T.
[62] *Kwow* v. *Eku II* (1934) 2 W.A.C.A. 180. *per* Kingdon C.J. [63] (1886) 33 Ch.D. 172.
[64] *Agyeman & ors.* v. *Panin* (1940) 6 W.A.C.A. 11. See also *Kwow* v. *Eku II* (1934) 2 W.A.C.A. 180. '
[65] *Akrasi* v. *Koio* (1951) 13 W.A.C.A. 243. 245.
[66] (1949) 12 W.'A.C.A. 419.

jurisdiction. It has also been decided that a claim for specific performance of a contract for sale of land as a suit relating to ownership of land, and also where it was specifically pleaded that the land was to be granted and conveyed by a deed of conveyance that amounted to an agreement between the parties that the obligations under the contract should be regulated by English law and therefore the jurisdiction of native courts was excluded.[67] Further, where no question of title is involved an action of trespass relating to land governed by customary law may be brought in the High Court or Supreme Court.[68]

We have so far been discussing the jurisdiction usually conferred on the customary courts in West Africa with respect to suits relating to the possession, etc., of land. Customary courts are sometimes granted jurisdiction in succession cases. Local courts in Ghana have jurisdiction in:

> " Suits and matters . . . relating to succession to the property of any person who had at the time of his death a fixed place of abode within the area of jurisdiction of the local court where the law applicable to the disposition is customary law." [69]

It may be asked why there is a distinction made between suits relating to the possession of land and suits relating to succession to property. One answer is that the question under which local and particular suit fell has been important as deciding which local court had jurisdiction. Before the Ghana Courts Act, 1960, the distinction of the two suits was necessary because there were different channels of appeal for land cases and succession cases. Not unnaturally, the question often arose as to whether a suit before a local court was one relating to a land case or a succession case. In *Hagan & ors.* v. *Adum &* ors.[70] it was argued before the Judicial Committee of the Privy Council that suits and matters relating to succession included only suits as to the right to succeed, and did not include such matters as valuation of the estate, a declaration as to the amount of the share to which a successor was entitled or the distribution of the estate. The idea behind the contention was to oust the jurisdiction of the customary courts in that suit. Their lordships rejected that contention saying that they saw no reason for such a narrow construction of those words. In their opinion " suits and matters relating to the succession to property " also

[67] *Hervie* v. *Nana Wirisi III* (1947) 12 W.A.C.A. 256.
[68] *Sei* v. *Ofori,* F.Ct. 1926-29, p. 87.
69 Ghana Courts Act, 1960, C.A. 9, s. 98 *(c).* which re-enacts an earlier provision in the former Courts Ordinance.
[70] (1939) 5 W.A.C.A. 35.

included distribution of the property which naturally came within the meaning of those words, and valuation of the estate which was also necessarily incidental to the ascertainment of the shares for the purpose of distribution. Further, their lordships were of opinion that there was no reason why in those particular circumstances, letters of administration should not be obtained in an " English type court," and the proceedings relating to the distribution of the estate should be dealt with by a local court. In *Arhin* v. *Pobee* [71] Adumua Bossman J. suggested that the test for determining such a question should be: " has the claimant to establish his succession to a deceased native as a *sine qua non* to getting the relief he claims? " If the answer is in the affirmative, then that cause or matter is a suit relating to succession, in which case the jurisdiction of the Land Court is ousted. But it must be remembered that that, however, will not prevent a claimant from going to a High Court to obtain letters of administration.

B. INTERACTION WITH RESPECT TO THE PARTIES AND NATURE OF THE TRANSACTIONS

1. *The Parties*

The legislative provisions which empower the non-customary courts to enforce customary law also stipulate the circumstances in which the rules of customary law ought to be applied or excluded between parties to a transaction. In other words they prescribe the circumstances under which English law is to be applied in place of customary law. After stating that nothing in the Ordinance shall deprive the courts of the right to observe and enforce customary law, the Gambian Law of England (Application) Ordinance Cap. 3, section 5 provides further:

> " (ii) Such laws and customs shall be deemed applicable in causes and matters where the parties thereto are natives, and also in causes and matters beween natives and non-natives where it may appear to the court that substantial injustice would be done to either party by a strict adherence to the rules of English law.
>
> " (iii) No party shall be entitled to claim the benefit of any local law or custom, if it shall appear either from express contract or from the nature of the transactions out of which any suit or question may have arisen, that such party agreed that his obligations in connection with such transactions should

[71] (1958) 3 W.A.L.R. 455. 457. See also *Vanderpuye & ors.* v. *Botchicay* (1956) 2 W.A.L.R. 16 (P.C.).

> be regulated exclusively by English law or that such transaction is a transaction unknown to native law and custom."

There are of course verbal variations from country to country. The old Ghana provision (section 87 (1)) has been repealed but as the legal draftsmen of the new Courts Act admit, the change in Ghana's provision is one of degree rather than of substance.[72]

The first rule is that the courts must administer customary law if the parties thereto are natives. But the fact that both parties to a transaction are natives would not in itself give rise to the conclusion that native law and not English law would govern the" relationship. The question is whether the parties have [73] bound themselves in terms of English law or native law. When the parties are natives it only raises a presumption that native law applies. The word native has the meaning given to it by legislation. It means persons or class of persons subject to the jurisdiction of the customary courts. The definition of a " native " is not likely to include " an association of persons engaging in commercial trade under a business name or an incorporated business association." [74] The second deduction is that where one party is a native and the other party is a non-native, prima facie, English law would be applied to the transaction unless substantial injustice would be done by the strict enforcement of English law. In the case of *Koney* v. *Union Trading Co. Ltd.,*[15] which raised the question of the application of the statute of limitations, Kingdon C.J. restated the principle as follows:

> " On the other hand where one party is a native and one a non-native the native customary law only applies where it shall appear to the court that substantial injustice would be done to any party by a strict adherence to the rules of any other law. In other words it is a condition precedent of the application of the native customary law at all that there would be substantial injustice if it were not applied."

Graham Paul J. in the same case carried the distinction further with respect to the onus of proof. It was his view that where the parties to a cause or matter are natives the onus is upon the party who opposes the application of such native customary law to satisfy the court that it should not be applied.[76] The reason is that where the parties thereto are natives, customary law is deemed

[72] See Bennion, *op. cit.,* p. 416 *et seq. "*

[73] *Enimil* v. *Tuakyi* (1950) 13 W.A.C.A. 8, 9. *per* Smith J.

[74] *Asante* v. *Gold Coast Drivers Union* (1957) 3 W.A.L.R. 5.

[75] (1934) 2 W.A.C.A. 188 at p. 191.

[76] But see the view of Adumua-Bossman .J., cited in Bennion, *op. cit.,* p. 442.

or presumed to apply, subject to the nature of the transaction, unless it is rebutted. The other view put forward by the learned judge is that in causes and matters between natives and non-natives the onus is upon the party seeking to apply " such native customary law " to satisfy the court " that substantial injustice would be done to any party by a strict adherence to the rules of any law or laws other than native customary law." The latter view is formulated on the principle that in transactions between natives and a non-native some other law than customary law is deemed or presumed to apply unless rebutted. Such presumption was rebutted in the Ghana case of *Adjei & Dua* v. *Ripley*[77] where a European male entered into concubinal relations with an African woman, normally subject to native law and custom, and had a child by her, the old Supreme Court (now High Court) held that it is the common law of the country that his liabilities (and rights if any) should be determined by the same rules as would apply in similar circumstances to a man who is subject to native customary law. In an earlier case the court observed that the position of the one should be no worse nor better than that of the other.[78] It is doubtful whether even if the relationship had been that of marriage the reasoning given in *Re Bethell* [79] would have applied in this case. Further, since the High Court in *Ripley's* case decided that substantial injustice would be done by applying English law, it should be noted that that case could equally have been justiciable in the customary courts.

2. *Intention of the Parties*

It is implied that the parties must be parties to the suit before the court.[80] Thus in *Amuakwa* v. *Anyan* [81] the question at issue was whether the parties to the suit had agreed that their obligations in connection with a written agreement should be regulated by English law. The trial judge had found that the defendant was not a party to that agreement and that there was no evidence of any privity of contract between the plaintiff and the defendant. The alleged

[77] (1956) 1 W.A.L.R, 62.

[78] *Duncan* v. *Robertson,* Sar.F.L.R, 134.

[79] (1887) 38 Ch.D. 220.

[80] In Ghana this statement is subject to s. 5 of the Contracts Act, 1960, Act25, which provides that any provision in a contract " . . . which purports to confer a benefit on a person who is not a party to the contract, whether as a designated person or as a member of a class of persons, may subject to the provisions of this part, be enforced or relied upon by that person as though he were a party to the contract." Again, in the case of unilateralacts such as the making of a will, the intention that counts is that of the testator as evidenced in the will and not that of say, the beneficiaries. See, *e.g., Vaughan* v. *George* (1942) 16 N.L.R. 85, 86, *per* Butler Lloyd J.

[81] (1936) 3 W.A.C.A. 22.

agreements on which the plaintiff-appellant relied were not entered into with the defendant-respondent personally, but with certain persons who were alleged to represent some farmers. There was no evidence that the defendant-respondent ever authorised such persons who were not parties to the suit to represent him. On these findings the West African Court of Appeal ruled that it was " obviously impossible for the Court to hold that it appeared from the transactions out of which this cause has arisen that the parties expressly or by implication agreed that their obligations in connection with such transactions should be regulated by English law and not by native customary law." [82] Again in the case of *Villars* v. *Baffoe* [83] it was held by the Full Court that " A man cannot by simply taking out letters of administration oust the native law so far as the family [of the deceased] is concerned." It is clear that a party can by a unilateral act " agree " that his transactions should be regulated by English law without necessarily agreeing with any one. A person subject to native law and custom can change his name by deed poll, which is a deed made not *inter partes.* The common law rule that no one could sue on a deed made *inter partes* unless he was a party to it never applied to a deed poll, *i.e.,* a deed executed by one party as a unilateral act, so that any person with whom he purports to contract could enforce the contract.[84] Statements made under the English Statutory Declarations Act, 1835, also fall within this category of unilateral acts. The use of the word " agree " in relation to unilateral acts is a bit unfortunate. In a unilateral act one does not in the strict sense " agree " with anyone that one's transactions should be regulated by English law; but the inference to be drawn from the legislative provisions in Lagos,[85] Western Nigeria,[80] Eastern Nigeria,[87] Northern Region [88] and in Sierre Leone [89] is that such a course is possible. The ambiguity in expression has been eliminated by the Ghana Courts Act, 1960, where the following provision is made:

> " Subject to Rule 1, where an issue arises out of any unilateral disposition and it appears from the form or the nature of the disposition or otherwise that the person effecting

[82] See also *Nelson* v. *Nelson* (1951) 13 W.A.C.A. 248 at p. 250; *United Africa Co., Ltd. v. Apaiv* (1936) 3 W.A.C.A. 114.

[83] (1909) Een. 544.

[84] Megarry & Wade, *The Law of Real Property* (1st ed.), p. 670.

[85] High Court of Lagos Ord. No. 25 of 1955, s. 27.

[86] West Eeg. High Ct. Law, Cap. 44. s. 12.

[87] Eastern Eeg. High Ct. Law E.E. No. 27 of 1955. s. 22.

ss Northern Eeg. High Ct. Law N.E, No. 8 of 1955.

[89] Courts Ordinance. Cap. 7. s. 38.

> the disposition intended that such an issue should be determined according to the common law or any system of customary law effect should be given to the intention." [90]

As the legal draftsman responsible for this legislation explains the word " disposition " includes both the making of a will as well as execution of a deed by a unilateral act.[91] A careful reading of the provisions in the other West African countries shows that the word " agree " must be interpreted to mean " intend." " To intend," as Kenny explains, " is to have in mind a fixed purpose to reach a desired objective; the noun ' intention ' is used to denote the state of mind of a man who not only foresees but also wills the possible consequences of his conduct." [92]

The intention of persons subject to customary law may easily be ascertained in such branches of the law as contract, marriage, land tenure and the making of wills. But can it be ascertained easily in relation to torts ? Suppose that a person subject to native law and custom whilst driving a motor-car knocks down a village boy who decides to sue the motorist. Is the mere driving of a motor-vehicle to be equated with an intention or an agreement to have a civil wrong governed by English law? Suppose also that A calls B a " slave " in the English language, does that constitute slander according to English law, and is it slander according to customary law if the word was uttered in the vernacular ? [93]

The intention of the parties must be elicited from their conduct which is usually evident in some visible form, " but the reduction of the terms of such contract to writing would not *ipso facto* take it out of native law, unless the parties clearly intended that it should be so. . . ." [94] The far-reaching consequences of a judicial decision to the effect that the mere recording of a transaction takes it out of the purview of native law can readily be imagined.[95] Thus in an 1898 case [96] which turned on the application of the Statute of Limitation, Francis Smith Ag.C.J. had gone so far as to state that " writing to evidence a contract between natives is unknown to native law." Although this ruling may be regarded as rather extreme it must be remembered that the learned judge was talking about conditions in the nineteenth century. The principle to be adopted in ascertaining the intention of parties subject

[90] (C.A. 9), s. 66 (1), rule 3.
[91] Bennion. *op. cit.*. p. 454.
[92] *Outlines of Criminal Law* (18th ed.. 196'2). p. 31.
[93] See *Chuku* v. *Nltrumah* (1958) 3 W.A.L.R. 471; *Quacoe* v. *Dadson* (1958) 3 'W.A.L.R, 396.
[84] -4 i/iin v. *Mcnsah* (1912) Ren. 640.
[95] *Azzu* v. *Acardi* (1912) Ren. 677.
[96] *Arnarquayc* v. *Brocnner* (1898) Ren. 145.

to native law and custom who are illiterates from the point of view of the courts was enunciated by the Privy Council in *Kwamin* v. *Kufuor* [97] as follows:

> " When a person of full age signs a contract in his own language his own signature raises a presumption of liability so strong that it requires very distinct and explicit averments indeed in order to subvert it. But there is no presumption, that a native of Ashanti, who does not understand English, and cannot read or write has appreciated the meaning and effect of an English legal instrument, because he is alleged to have set his mark to it by way of signature. That raises a question of fact to be decided like other such questions."

The next question to be answered is the particular moment in time when the intention of the parties is to be ascertained. Can parties to a transaction conduct themselves as if they were negotiating according to customary law and then when the suit is before the court change their intention and ask that English law should govern the transaction? It is difficult to answer the question in the affirmative. There is, however, evidence to suggest that such a course is possible. We have already noted that in causes between natives and non-natives where it may appear to that court that substantial injustice would be done to either party by a strict adherence to the rules of English law, customary law will be applied. There is another short report of the Ghana case of *Mansah* v. Jufcins,[98] a case involving seduction. The court was aware that the parties were natives but, as in that case the parties expressed their desire that the case should be decided in all respects by English law, English law was applied. Perhaps the case can be explained on the ground that seduction is one of those cases where at the time of commission no question of intention of choice of law can arise.

The final comment to be made refers to that section which provides that no party shall be entitled to claim the benefit of any local law of custom, if it shall appear either from *express* contract or from the nature of the transactions that such party agreed that his obligations in connection with such transactions should be regulated exclusively by English law. According to Redwar's

[97] P.O. (1874-1928), 28, 36; (1914) Ren. 808, 814. See also *Dartey* v. *Ansah* <C *ors.* (1924) F.C., 1923-25, 181, 183; *Reindorf* v. *Marnan,* P.C. 1926-29, 152, 155; *Swanzie* v. *Djarnie,* Div.Ct. 1926-29, 178, 183; *Contra United Africa Co., Ltd.* v. *Apaw* (1936) 3 W.A.C.A. 114. In *Amuakwa* v. *Gurah* and *Amuakwa* v. *Peyin* (1932) 1 W.A.C.A. 261, the court found that an illiterate farmer in the Gold Coast (now Ghana) understands the meaning of the word " acre."

[98] Ren. 167.

Comments[99] the word *exclusively* means *exclusively* by English law. It must be qualified by the statement that the English law referred to here is the English law which is applicable subject to local conditions. Where, as in Ghana for example, the English law relating to conveyancing is the law as was in force in 1874, it is pertinent to ask whether parties can contract that the English Conveyancing Act of 1881 should apply instead of the pre-1874 law.[1] An objection to this view can be taken in that the parties in their land transactions cannot create estates unknown to the law of that country. Besides, in the case of the conflict of the two types of English law, it is the *lex situs* which will prevail. It is curious that the various legislative provisions speak of obligations only and not " rights." If the provision were that no party who has agreed that his rights and obligations were to be regulated by English law, could have recourse to native law, then no doubt it would be necessary to examine whether a party has so agreed; but as the provision speaks only of obligations, a native is not debarred from recourse to or benefit of native law unless it appears that he has agreed that some obligations *of his own* in connection with a transaction between him and another party is to be governed by English law.[2]

Suppose that in a particular transaction the court is not able to come to a conclusion one way or the other whether English law or customary law is the proper law of the transaction, what is the best way to solve the difficulty ? The Judicial Committee and the West African Court of Appeal " have on more than one occasion pointed out the confusion which may well arise from attempts to engraft upon claims made under native law and custom incidents and phraseology appropriate only to English law." [3] Such confusion often arises but the court's attitude in such eases has not been very clear. Three instances of judicial attitude may be cited. In *Ackon* v. *Solomon* [4] Bossman J. submitted

> " that even if the parties have not a clear conception in their minds, their language and/ or utterances and actions will operate to make the contract fall on one side or the other side of the line, *i.e.,* indicate that from a legal point of view the

[99] Op. *cit.,* p. 66.

[1] The view expressed by R. J. H. Pogucki in his *Land Tenure in Ghana* (1957), P- 30 is that such a contractual submission is actually carried on in practice. The practice is not supported by judicial decisions.

[2] For detailed analysis of this provision see the judgment of Waddington J. m *Rotibi* v. *Savage* (1944) 17 N.L.R. 77. See also Bennion, op. n't., p. 441.

[3] *Thomas* v. *Holder* (1946) 12 W.A.C.A. 78 at p. 79 (Nigeria).

[4] Civil Appeal No. 6/1959 (unreported). Cited in Bennion, *op. cit.* 442, with approval.

contract between the parties is a customary one or else an English one."

This view, of course, presupposes that the court can *always* succeed in drawing a line between the two sides. But the ingenuity of the courts is not unlimited. The second view emanates from the decision given by Windsor-Aubrey J. in *Ferguson* v. *Duncan* [5] *:*

> " As I understand the position, native law and custom are not ousted even when the parties had no clear conception in their minds and contemplated a mixture of English law and native law or custom." [6]

This attitude also over-simplifies the issue. Is it to be taken to imply that even when on analysis if 75 per cent, of the transaction indicates that English law ought to be applied and 25 per cent, by customary law, customary law should nevertheless be applied ?

The third view is the oldest of the three and is supported by such learned judges as Sir William Brandford Griffith, Macleod and Redwar. Referring to section 19 of the old Supreme Court Ordinance of the Gold Coast Colony, 1876, which stated that " where no express rule is applicable to any matter in controversy the court shall be governed by the principles of justice, equity, and good conscience," [7] Sir Brandford Griffith explained that

> " These words show that the legislature was well aware that it could not lay down specific rules as to where native law and custom was to apply and where it was not to apply. It was aware that cases must arise for which it could not possibly provide, accordingly it framed the sanction [sic] in very general terms expressly specifying one particular class of transaction in which natives should not take advantage of native law and custom, and finally giving the Court large discretionary powers." [8]

Redwar also explained in his invaluable book [9] that " where no rule of law (English or native) is applicable, the case must be decided according to the principles of natural justice." There have

[5] (1953) 14 W.A.C.A. 316 at p. 317.

[6] See also *Henodji II* v. *Sallah,* D.Ct. 1931-37, 158, 160.

[7] No. 4 of 1876 Gold Coast Colony. Sir David Chalmers, the first C.J. of the Gold Coast who was responsible for the drafting of the Supreme Court Ordinance of 1876, admits that he was influenced by the Indian example. In this case it makes the third view even stronger. (The writer is indebted to Dr. D. N. Derrett, School of Oriental and African Studies, London, for this information.)

[8] *Cole* v. *Cole* (1898) 1 N.L.R. 15 at p. 21.

[9] *Op. cit.,* p. 65, Rule 4.

been actual cases in which the courts have adopted this interpretation. In the case of *Boodoo* v. *Bissa* [10] which involved the question of sale under a mortgage, Sir William Brandford Griffith is reported as stating that

> " It would be a very difficult matter to apply either English law or native custom entirely to the facts of this case. The parties concerned were mostly illiterate natives who used some of the forms of English law, and yet, to some extent guided themselves by native custom. It is not necessary to endeavour to unravel that tangle by means of native or English law. It is sufficient to apply the closing words of section 19 [11] of the Supreme Court Ordinance, and to say that this court is absolutely satisfied that justice was done by the court below."

In view of the ample support in favour of the third judicial attitude, it is a bit difficult to understand the new interpretation which Mr. Bennion seeks to put on this expression in his book on the constitutional law of Ghana.[12] The learned author after quoting the section in question goes on:

> " It must be noticed that this was not in terms a provision for coming to the rescue of the court where it was doubtful whether customary law or English law applied. . . . On the contrary, the court had first to decide which system of law applied and then fill in any gaps in that system with the aid of the principle here set forth."

As has been pointed out earlier this view presupposes that the court will *always* be able to find out which system applies. *Boodoo's* case however shows that Mr. Bennion's view is unconvincing. If, of course, the courts are able to find what customary law applies and then gaps remain to be filled, the courts can invoke the section as well. It is, however, not the same thing to suggest that the courts can *only* invoke that section when they have been able to find which system of law applies. If the legislature had been inclined to that view, they would clearly have stated that in cases where there is no express rule applicable to any matter in controversy *after the system of law has been ascertained,* the court shall be governed by the principles of justice, equity and good conscience.

Having considered the problem of conflict of English law with customary law in a general manner, it is now intended to discuss it

[10] (1910) Ken. 585. For another interesting application of the rule see *Ashon* v.*Eduah* (1908) Ben. 480.
[11] *Supra.*
[12] *Op. cit.,* p. 445.

with reference to some specific branches of the law. The list is by no means exhaustive.

1. CONTRACT AND OTHER OBLIGATIONS

We have mentioned a number of examples showing the attitude of the courts in evincing from a particular contract whether English law or customary law ought to govern the contract. The topics which generally fall under this category are those branches of the law of contract relating to such matters as promissory notes, hire-purchase agreements and other forms of debts, sureties and. guarantees.

Suppose that a person subject to customary law sues another on a contractual debt. A question may arise as to whether customary law or English law is the proper law of the debt. If English law is to be applied, a further question arises as to whether the English Limitation Act of 1623 [13] which is a statute of general application in West Africa except Western Nigeria [14] is available to bar the claim. In the Ghana case of *Quartey* v. *Akua,*[15] Smith Ag.C.J. observed that the Statutes of Limitation apply only in suits between natives when the evidence shows that the parties intended that their obligations should be regulated by English law. From the position of the parties and from the nature of the transactions out of which the suit arises, it can be inferred that the parties have *impliedly* agreed that their obligations should be regulated by English law. In which case the Statutes of Limitation will be applicable.[16] The mere making of a document in English does not necessarily imply such an agreement or intention [17] but in the Nigerian case of *Bakare* v. Cofcer,[18] Donald Kingdon C.J. has expressed the view that " the giving and taking of a promissory note is very strong evidence that the parties intended their transaction to be governed exclusively by English law." In a later case, *Rotibi* v. *Savage* [19] it was pointed out that " care should be taken against applying that principle where the document amounts to no more than the kind of ' paper ' which most natives nowadays like to have as evidence of a money transaction, and which at this day

[13] 21 Jac. 1, c. 16.

[14] Limitation Law, 1959, Cap. 64.

[15] (1895) D.Ct.Red. 138. See also *Koney* v. *Union Trading Co., Ltd.* (1934) 2 W.A.C.A. 188 at p. 190. See *Aradzie* v. *Yandor,* F.C. 1922, p. 91, but see *Tandoh* v. *Williams,* P.C. 1923-25. p. 18 (Ghana): *Henodji II* v. *Sallah,* Div.Ct. 1931-37, p. 158.

[16] *Adoo* v. *Bannerman* (1895) Div.Ct.Red. 139.

[17] *Parbi & anor.* v. *Muff at,* Div.Ct. (1921-25), p. 37 at p. 38, *per* Smyly C.J.

[18] (1935) 12 N.L.R. 31 at p. 32. See also *Yeboah* v. *Adane,* Div.Ct. 1921-25, p. 75 (Ghana).

[19] (1944) 17 N.L.R. 77, 82.

is, I suppose, quite a familiar object in most native courts, and frequently bearing an impressive array of stamps." In that case both parties were Nigerians, and under the native law and customs operative there, there was no period of limitation in an action for recovery of debt. The plaintiff lent the defendant a sum of £336 free of interest in 1933, and received from the defendant a is paper " which was merely an IOU or acknowledgment of the debt and not a promissory note. Although no part of the loan had been repaid, in the first part of 1941 the plaintiff made further loans to the defendant without interest. In the latter half of 1941 the defendant repaid £20 of the loan. In 1942 the plaintiff took an action against the defendant for the repayment of the balance. The defendant pleaded the Statute of Limitations as regards the first loan of £336. Waddington J., of the High Court at Owerri, rejected the plea that English law applied to defeat the plaintiff's claim on the, ground that the plaintiff had not agreed that his rights should be governed by English law. The plaintiff had done nothing more than lend the money free of interest, and had not entered into any obligations towards the defendant which he had agreed should be regulated exclusively by English law. Therefore the obligations were all on the defendant's side and the plaintiff was not deprived of the benefit of customary law as was provided for by section 16 of the Nigeria Protectorate Courts Ordinance, 1933.

As it has been mentioned earlier, special considerations arise where a party to a contract is an " illiterate native." That situation is governed by the rule in *Kwamin* v. *Kufuor*.[20] The question whether such a native has appreciated the meaning and effect of an English legal instrument is a question of fact to be decided upon the evidence. The expression " illiterate person " has been defined in one case to mean " a person who is unable to read the document in question in the language in which it is written, subject to the proviso that the expression includes a person who, though not totally illiterate, is not sufficiently literate to read and understand the contents of the document." [21]

2. TRANSACTIONS IN LAND

As a result of colonisation, there exist at least two systems of land tenure in West Africa today. Transactions in land may be governed either by the received English law or by the appropriate customary law. The basic rules for the ascertainment of the law applicable in the cases of contract also operate with regard to

[20] (1914) Ren. 808 (P.C.): and see *supra,* p. 594.
[21] *Paterson Zochonis & Co., Ltd.* v. *Gusau* & *anor.* (1961) N.R.N.L.R. 1, 2, *per* Bate J.

transactions in land.[22] In deciding which law ought to be applied the higher courts have always endeavoured to find out what the intentions of the parties actually are. Confusion has often arisen from attempts to engraft upon claims made under native law and custom incidents and phraseology appropriate only to English law. The technical expressions such as " in fee simple " have been used in land transactions which are supposed to be governed by customary law.

In most cases, however, the courts have been able to reach a conclusion one way or the other. English law has been held to apply where English conveyancing forms have been used to transfer land.[23] A conveyance forms no part of a sale by native law and custom; therefore mention of it in a receipt given by the vendor coupled with other circumstances indicates clearly that the transaction might be governed exclusively by English law.[24] It has also been decided that in a mortgage deed drawn as nearly as possible according to the English form of mortgage, with an express power of sale and given by a native to an English firm, the mere fact that no interest was expressed to be payable is not sufficient to convert the mortgage into a native mortgage.[25]

On the other hand, land originally held under native law is not readily converted to land held under English law as a result of subsequent dealings. In *Adjuah* v. *Wilson* [2G] Michelin J. was not prepared to hold that because a mortgage is executed in accordance with English law, in respect of land held under native tenure, and a sale takes place under such mortgage, the property being purchased by a native, such land by reason of these subsequent transactions ceases to be held under native tenure. A similar judgment was given by the West African Court of Appeal in *Enimil* v. *Tnakyi.*[27] In that case the land in dispute was held according to customary law. The interest of the former owner was seized and sold in execution and the purchaser mortgaged it. Later, the mortgagee, exercising his power of sale, sold his interest

[22] *i.e.,* if the parties are natives and make a contract concerning land, it raises a strong presumption that customary law applies: *Josiah* v. *Viesa* (1899) Ben. 148; *Lutterodt & ors.* v. *Lutterodt <£ ors.* (1915) K.-F. 1.

[23] *Macan* v. *Addaquay* (1892) D.Ct.Eed. 139. Held that the principle laid down in the English case of *Wheeldon & Burrows* (1879) 12 Ch.D. 31 applied. See also *Quarshie* v. *Planqe,* F.C. 1926-29 . 246, 252 (Ghana); *Ocquaye v. Sampson.* Div.Ct. 1926-29 , 81; *Fawcett* v. *Odamtten.* F.C. 1926-29,' 339.

[24] *Kwesi-Johnson* v. *Effie* (1953) 14 W.A.C.A. 254.

[25] *Swanzy* v. *Bordoh* (1891) Eed. 197.

[26] F.C. 1926-29, 261. Contrariwise land originally held by a European will as a rule continue to be governed by English law during subsequent dealings: *Herminah Wettingh & ors.* v. *Bessabora* (1906) Een. 249.

[27] (1950) 13 W.A.C.A. 8. See also *Nelson* v. *Nelson* (1951) 13 W.A.C.A. 248. For another type of conflict see *Dofah* v. *Williams,* Div.Ct. 1920-21, 114; *Griffin* v. *Talabi* (1948) 12 W.A.C.A. 371.

in the land to the predecessors in title of the respondents. In view of the fact that the respondents had been kept out of possession for a period of over twenty years, the appellants' counsel argued that the English Statute of Limitations applied to bar their claim. The court was not inclined to the view expressed by appellant's counsel. It was held that what the respondents' predecessor in title bought was the right title and interest under native law of the original judgment debtor. Accordingly, English law did not apply.

3. MARRIAGE

The laws in most parts of West Africa at the moment recognise three forms of marriage. They are namely:

(a) marriage according to the various forms of customary law [28];
(b) marriage according to the rites of Mohammedan law [29]; and
(c) marriage similar to the English type marriage as provided for by local legislation.[30]

The main legal difference between the " English type " marriage and the other two types is that the former insists on monogamy whilst the latter two types accept polygamy. Quite often there is a combination of the two main types. It is feasible for a man and his wife already married according to " native law and custom " to " convert " their potentially polygamous marriage into a monogamous marriage in accordance with the provisions laid down by local legislation. Whether this amounts to partial or total conversion is debatable. Commenting on the relevant provisions in the Ghana Marriage Ordinance, No. 14 of 1884,[31] w *Re Isaac Ammetifi,*[*2] Hutchinson C.J. said: " I should have thought that persons already lawfully married could not be married over again." The doubt expressed by the learned Chief Justice is

[28] See *R. e Sapara* (1911) Ren. 605.
[29] See, *e.g.,* Marriage of Mohammedans Ordinance, Cap. 129, Laws of the GoldCoast, 1951 Rev. This Ordinance provides for the registration of marriages and divorces among Mohammedans. For the Gambia see the MohammedanLaw Recognition Ordinance, 1905. Cap. 31, Laws of the Gambia, 1955 Revision.
[30] For Ghana se the Marriage Ordinance, Cap. 127, Laws of the Gold Coast, 1951 Rev. A new Marriage, Divorce and Inheritance Bill has been published in January 1963, apparently to streamline the laws on this topic. For Sierra Leona see the Christian Marriage Ordinance, Cap. 95. Laws of Sierra Leone, 1960 Revision, and Civil Marriage Ordinance, Cap. 97. See also the Marriage Ordinance of Nigeria. Cap. 115 (Laws of the Fed. of Nigeria and Lagos, 1958 edition). Gambia: Christian Marriage Ordinance, Cap. 119; Civil Marriage Ordnance Cap. 120 (Laws of Gambia, 1955 Rev.). For the construction of the Marriage Ordnance in force in Lagos see *Martins v. Fowler [1926].*

tenable, but the legislation also makes double marriage possible. It provides, *inter alia,* that the second monogamous marriage shall have important consequences on the devolution of their property. One question that is not specifically answered is whether the parties to the converted marriage should, for the purposes of the Ghana Ordinance, be treated as husband and wife *de novo.* According to the Ordinance, the Registrar is to ask them the same questions as he would ask persons wishing to be married under the Ordinance for the first time. He

> " shall either directly or through an interpreter address the parties thus: ' Do I understand you AB and you CD that you are here for the purpose of becoming man and wife ' " ? [33]

The treatment of such persons by the provisions of the Ordinance as husband and wife *de novo* may seem legally anomalous, but perhaps such a course is necessary to obviate complicated questions of conflict of laws. Suppose that the pre-existing customary marriage is later found to be invalid, does such invalidity affect the marriage under the Marriage Ordinance ? Or suppose that a decree of divorce of the Ordinance marriage is granted to the parties by High Court, does the decree affect the marriage contracted according to customary law, even though the necessary formalities of customary law divorce have not been complied with ? A case in point is the Nigerian case of *Ohochuku* v. *Ohochuku.*[Si] In 1949, the parties were married according to the appropriate Nigerian customary law. Such a marriage was potentially polygamous in the sense that husband could lawfully marry other persons during the subsistence of the marriage. In 1950 the husband went to England where in January 1953 he was joined by the wife. In July 1953 the parties went through a monogamous ceremony of marriage at the register office at St. Pancras. They did this not because of any doubt about the validity of the Nigerian ceremony but because the wife found it desirable to have a marriage certificate which she could produce when required for practical purposes in England. Thereafter the parties became unhappy and the wife petitioned to the English court for divorce on the ground of cruelty by the husband. The Divorce Court in England having been satisfied that the husband had treated her with cruelty granted a decree of

[33] *Op. cit.*. Cap. 127, s. 36. The form of address used in Kenya is more realistic. It is: "Do I understand that you AB and you CD have been heretobefore married to each other by native law or custom, and that you come here for the purpose of binding yourselves loyally to each other as man and wife so long as both of you shall live? "

[34] [1960] 1 All E.R. 253.

divorce. The learned judge emphasised, however, that the decree of divorce referred *only* to the marriage at St. Pancras Register Office, i.e., the monogamous marriage. He was satisfied on the authorities that the Divorce Court in England would not assume jurisdiction to dissolve a polygamous marriage. One can very well understand the predicament of his Lordship when deciding that case. Although the decision is not being questioned, it is submitted that if the English case of *Thynne* v. *Thynne* [35] had been cited his Lordship might have derived some assistance from the ruling of the Court of Appeal. In that case, a man and a woman were married secretly on October 8, 1926. On October 27, 1927, they went through a second ceremony of marriage at which their friends were present. In 1953, the wife petitioned for divorce on grounds of adultery by the husband. A divorce was granted to dissolve the 1927 marriage. The woman married again and later on in a book which she wrote, she referred to the secret marriage of 1926. As a result of the publicity she sought liberty from the court to amend her former petition. The question involved was whether the 1926 marriage had been dissolved. The Court of Appeal held that the decree of divorce dissolved the marriage status and not the marriage ceremony.[36]

Sometimes parties to a customary law marriage, if they are Christians, go to church after the customary ceremony for it to be " blessed " by a religious minister. It must be noted that the church ceremony is not a marriage within the provisions of the local marriage laws. The church ceremony only " adds a religious sanction to a union already existing and lawful," [37] and it is not to be regarded as ousting customary law from applying to the rights and obligations of the parties concerned.

Legal consequences

Persons in West Africa who contract a marriage under the provisions of the marriage laws are deemed to have agreed that their obligations, rights and duties *in respect of the marriage* shall be governed not by " native law and custom," but by English law. Some of the earlier decisions on this point such as *Cole* v. *Cole* [33] went so far as to state that if persons contracted a " Christian "

[35] [1955] P. 272,

[36] See also R. H. Graveson, *Status in the Common Law* (1953). p. 62.

[37] Re *Ammetifi* (1889) Red. 157, but compare *Ackah* v. *Arinta* (1893) Sar.L.F.R. 79 and *Ashong* v. *Eduah* (1908) Ren. 480. See also *Randolph* v. *Hammond,* D.Ct. (1931-37), 37; *Martins* v. *Adenugba* (1946) 18 N.L.R. 63; Sef.se v. *Seise* (1959) G-.L.R. 155.

[38] (1898) 1 N.L.R. 15. 23. *per* Griffith T. Also reported in (1898) Red. 201. See also *Re Isaac Aanamun deed*. (1894) Sar.F.C.L. 221, 224.

marriage the persons to such marriage and their offspring were clothed with a status unknown to native law. In *Re Otoo* [39] which has now been overruled by *Coleman* v. *Shang* [40] Michelin J. (a Divisional Court judge) held that

> " when a person who is subject to native law or custom, alters his legal status, by contracting a marriage under the Marriage Ordinance, 1SS4, he is incapable of making such a will *[viz.,* according to customary law]. . . . The only form of which he can legally make is one in accordance with the provisions of English law."

That such an extreme view is not warranted by the realities of the actual situation is well illustrated by the later cases. Commenting on *Cole's* case [41] Van Der Meulen J., in *Smith* v. *Smith,*[42] observed that

> " It would be quite incorrect to say that all the persons who embrace the Christian faith, or who are married in accordance with its tenets, have in other respects obtained the stage of culture and development as to make it just or reasonable to suppose that their whole lives should be regulated in accordance with English laws and standards. Any such general proposition would in my opinion be no less unjust in its operation and effects than the converse proposition— with which I think the court must have been concerned in the case of *Cole* v. *Cole*—that because a man is a native the devolution of his property must be regulated in accordance with native law and custom, irrespective of his education and general position in life. The fact that a man has contracted a marriage in accordance with the rites of the Christian church may be very strong evidence of his desire and intention to have his life generally regulated by English laws and customs, but it is by no means conclusive evidence." [43]

The recent Ghana case of *Coleman* v. *Shang* [44] restated the principle that the only limitation which a marriage under the Marriage Ordinance can place on a person's right to have his case or matter determined in accordance with customary law,

[39] Div.Ct. 1926-29, 81. 86.

[40] [1961] 2 All B.R. 406 (P.C.); (1959) G-.L.R. 390 (C.A.).

[41] *Supra.*

[42] (1924) 5 N.L.R. 105.

[43] *Ibid,* at 107. "It is a presumption that can be rebutted and the question of what law should be applied depends on the circumstances in each and every case "—.Ajayi & *ors.* v. *White* (1946) 18 N.L.R. 41. 44, *per* Baker Ag.C.J. •

[44] (1959) G.L.R. 390 at p. 402.

is in matters relating to the said marriage [45] and to such matters only during the subsistence of such marriage, save as where otherwise provided by law. Some of the legal consequences may now be listed.

(1) A person who is already married by customary law cannot contract a monogamous marriage with any other person whilst the customary marriage is still subsisting. Similarly a person who has contracted a monogamous marriage is prohibited from marrying any other person under customary law while the monogamous marriage lasts. The performance of either marriage is an offence.[46]

(2) A person who has contracted a monogamous marriage cannot during the subsistence of the marriage expect to claim " benefits " accorded to parties married under customary law. As Aitken J. put it:

> " I am also clearly of opinion that a native of this country [Ghana] cannot have it both ways, that is, he cannot by marrying another native in accordance with the Marriage Ordinance, give himself the choice of asserting or defending his matrimonial rights either by petition in the Supreme Court as' circumstances may dictate or convenience may prescribe." [47]

In the Sierra Leone case of *Denby* v. *Bishop* [48] it was held that a plaintiff who has married according to the Christian form of marriage could not claim assistance from the court with reference to another wife " married " according to native law and custom. An interesting example relevant to this topic is the Ghana ease of *Akwapim* v. *BuduJ*[9] In that case a native tribunal convicted the appellant under the existing legislation for the offence of seducing another man's wife and sentenced him to a fine of £25 and in default, to three months' imprisonment with hard labour. The wronged husband and his wife had previously been married to each other under customary law, but at the time of the appellant's conviction they contracted a monogamous form of marriage under the relevant statutory provisions. On appeal, the Divisional Court quashed the conviction, not on the ground that

[45] This will include what is described as a "matrimonial cause." A "matrimonial cause" means any action for divorce, nullity of marriage, judicial separation, jactitation of marriage or restitution of conjugal rights—Judicature (Consolidation) Act, 1925, s. 225.

[46] See, e.g., the Ghana Criminal Code. 1960, Act 29, ss. 264 and 265, but query ""nether the effect of the punishment is to invalidate the second "marriage."

[47] *Akwapim* v. *Budu,* Div.Ct. (1931-37). 89 at 90. See also *Ackah* v. *Arinta* - (1893) Sar.F.L.R. 79.

[48] (1943) 3 S.L.L.E. 7.

[49] *Supra*.

the sentence of the native tribunal was improper, but on the ground that at the time of the appellant's conviction, the wronged husband was married under the provisions of the Marriage Ordinance, and that therefore the jurisdiction of the native tribunal was ousted in so far as English law ought to govern the matrimonial rights of the wronged husband.

(3) A person who is married to another under customary law can only obtain his matrimonial rights in the customary courts.[50] In *Hyde* v. *Hyde* [51] Lord Penzance held that although customary marriage is a valid marriage by the *lex loci* it cannot be recognised by the English Matrimonial Court as a valid marriage in a suit instituted by one of the parties against the other for the purposes of enforcing matrimonial duties or obtaining relief for a breach of matrimonial obligations. *Hyde's* case was approved in *Baindail* v. *Baindail* [52] where Lord Greene M.R. said:

> " for the purpose of enforcing the rights of marriage, or for the purpose of dissolving a marriage it has always been accepted as the case, following Lord Penzance's decision, that the courts of this country [Britain] exercising jurisdiction in matrimonial affairs do not and cannot give effect to, or dissolve, marriages which are not monogamous marriages . . . rightly or wrongly the courts have refused to regard a polygamous marriage as one which entitles the parties to come for matrimonial relief to the courts of this country."

Thus in *Soiva* v. *Soiva,*[53] where a Ga woman who had entered into a potentially polygamous marriage with another Ga man in Ghana, applied to the English magistrates' court for a maintenance order against the man on the grounds of desertion, the Court of Appeal in affirming the decision of the Divisional Court, held that as the parties to a polygamous marriage were not entitled to the remedies or relief of the matrimonial law of England, the woman was not entitled to a maintenance order. A similar ruling has also been given by a High Court in Ghana.[54]

(4) In Ghana and in certain parts of Nigeria but not in Sierra Leone [55] if a person contracts a monogamous marriage, such a marriage has certain important consequences on the devolution

[50] ***Setse* v. *Setse* (1959) G-.L.R. 155. si**

[51] **(1866) L.R. 1 P. & D. 130.**

[52] **[1946] P. 122, 125. 126.**

[53] **[1960] 3 All E.R. 196; [1961] 2 W.L.R. 313 (C.A.). si**

[54] **Setse v. *Setse* 1959) G.L.R. 155.**

[55] **In Sierra Leone, the property of parties to a monogamous marriage if both are natives, is subject in all respects to the laws and customs of the community to which the parties belong. See Christian Marriage Ordinance.**

of his property on death intestate.[56] The relevant provisions may be broadly restated as follows:

> " When any person who is subject to native law and custom contracts a marriage in accordance with the provisions of the [Marriage] Ordinance and such person dies intestate . . . leaving a widow or husband or any issue of such marriage; and also where any person who is the issue of any such marriage as aforesaid dies intestate. . . .
>
> " The personal property of such intestate and also any real property of which the said intestate might have disposed by will, shall be distributed in accordance with the provisions of the law of England relating to the distribution of the personal estate of intestates [in 1884] any native law or custom to the contrary notwithstanding." [57]

The relevant law of England in 1884 is to be found in the Statute of Distribution, 1670,[58] and the Administration of Intestates Estate Act, 1685.[59] There are many cases illustrating the principle enumerated above, the most recent ones are the Privy Council cases of *Bamghose* v. *Daniel* [60] and *Coleman* v. *Shang*.[61] There is at least one case of the court below which expresses different

[56] See Marriage Ordinance of Nigeria, Cap. 115, s. 36 (Lagos only); Marriage Ordinance, No. 14 of 1884 (Gold Coast), now Cap. 127, Laws of the Gold Coast, 1951 Rev., ss. 48 and 49. The provisions on devolution of property of such persons have been criticised both in Nigeria and Ghana. See S. A. Crowther's comments on the Ordinance, published in (1906) 12 *Western Equatorial Africa Diocesan. Magazine* 184-188. In an editorial on the Marriage Ordinance of the Gold Coast, the *Gold Coast Leader* of July 8, 1905, described it as " a clumsy manufacture—a made-up law." It added " The Ordinance of 1884 was the outcome of ecclesiastical bungling aided and abetted by an administration eager to please the clergy without attempting to realise any necessity for the enunciation of proofs therefor." Indeed in May 1905. a Commission of Inquiry was ordered by the Gold Coast Government. Members of the Commission included Sir Brandford Griffith, J. M. Sarbah and J. P. Brown. They were to consider whether

(a) the provisions of the Marriage Ordinance. 1884. as to the succession to property of persons married under it and dying intestate, or any other provisions tended to prevent natives from being married under it:
(b) the said provisions tended to cause disputes in the family of a deceased intestate;
(c) the said provisions worked any practical hardship;
(d) a general law of succession to the movable or immovable property of an intestate, or to both, to take effect throughout the Colony, was desirable, and if desirable, whether it was feasible;
(e) it was desirable to introduce legislation to legitimate children born before marriage, and if desirable whether it was feasible;
(f) amendments to the Marriage Ordinance, 1884, were desirable. (See *Gold Coast Gazette*. May 13, 1905.)

[57] The summarv of the provision was taken from *Re Adnilevah A ors*. (1951) 13 W.A.C.A." 304. 305.

[58] 22 & 23 Car. 2. c. 10.

[59] 1 .Jac. 2. c 17

[60] [1955] A.C. 107.

[61] [1961] 2 All E.R. 406.

views on the interpretation of the relevant provisions of the marriage laws. In *Smith* v. *Smith* [62] Van Der Meulen J. held that although the fact that natives have married according to the rites of the Church of England raises a presumption that they intend that their lives, their actions and their property should be regulated by English laws and standards, yet that was not conclusive evidence of such an intention. Guided by these principles the learned judge held that it would be inequitable that the devolution of the property in dispute in that action should be governed by the English law of succession. This case can be distinguished from *Coleman* v. *Shang* [63] on the grounds that it was not the case that the deceased intestate had been married under the Marriage Ordinance. The learned judge was therefore entitled to make the comments he did to show the limits to be placed generally on the application of English law to Nigerian citizens.

Another feature of the provisions of the Marriage Ordinance mentioned is that section which provides for the application of English law to the intestate estate of issues of monogamous marriages. It is difficult to see why the devolution of the property of issues of monogamous marriages should be governed on their death intestate by the previous contracts of their parents, irrespective of whether, on coming of age, such children contract a monogamous or a customary form of marriage. In the Nigerian case of *Bamgbose* v. *Daniel,*[6i] the Privy Council affirming the judgment of the West African Court of Appeal observed:

> " that no question can arise as to the capacity of the deceased to enter into polygamous marriage by his local law. He himself was the child of a monogamous marriage, but that was no impediment to his contracting a marriage by native law and custom. Even a person who has himself contracted a monogamous marriage under the Ordinance is by section **37** of the Ordinance [55] prohibited from contracting a valid marriage under any native law or custom only during the continuance of the monogamous marriage."

Perhaps the main reason for this unjust provision was an attempt to wipe out polygamy in West Africa, but surely there are many other ways of doing it than by this means of visiting the choice of their parents on their children.[66]

62 (1924) 5 N.L.R. 105.
63 *Supra.*
64 *Supra.*
65 Now see Nigeria Marriage Ordinance, Cap. 115. See also *Ajavi* v. *White* (1945) 18 N.L.R. 41.
66 See the Ghana Marriage. Divorce and Inheritance Bill published in January 1963.

(5) It used to be the view, in Ghana at least, that if persons ordinarily subject to native law and custom marry under the provisions of the Marriage Ordinance, the only form of will which they can legally make is one in accordance with the provisions of English law. That is, they were prevented from disposing of their property by customary law.[67] Such persons disposing of their property according to customary law were regarded as having died intestate.[68] This theory has been rightly exploded in *Coleman* v. *Shang*.™ As the then Court of Appeal of Ghana put it, the making of a will is not a matter which arises out of a contract of marriage.

It must be remembered in this context that the English law to be applied by virtue of the provisions of the Marriage Ordinances must yield to the special circumstances existing in a particular country. Thus such words as " children " and " widow " should be extended to all persons regarded as legitimate children and lawful widows by the *lex loci.'*[70]

(6) In the sphere of criminal law and evidence some of the local laws make a distinction between the competence and compellability of witnesses according to whether they are married in the so-called Christian form or under customary law.

In Sierra Leone, Gambia and Nigeria spouses of customary marriage are competent and compellable witnesses against each other whilst those married under the Marriage Ordinances are not.[71] The Ghana version is phrased in such a way that there is no discrimination according to the type of the marriage of the spouses.[72]

Apart from express limitations such as those discussed above, persons who contract a monogamous form of marriage are not precluded from conducting their affairs according to customary law. In the Ghana case of *Sackey* v. *Okanta* [73] Smyly J. ruled that the fact that a person has contracted a Christian marriage does not disqualify him from administering an estate to which he is heir by native law.

[67] *Re Otoo,* Div.Ct. (1926-29), 84. 86, *per* Michelin ,T.

[68] *Re Anaman* (1894) Sar.F.C.L. 221.

[69] *Supra.*

[70] See *Bamgbose* v. *Daniel* [1955] A.C. 107; *Coleman* v. *Shang* [1961] 2 All E.R. 406. *Re F. A. Somefun* or *Re A. S. Williams* (1941) 7 W.A.C.A. 156, which decided that a person whose right depends on native law and custom and not on English law is excluded from the succession on death intestate of a person who is the issue of a marriage under the Ordinance, was not followed by the same West African Court of Appeal on the grounds that the decision was given *per incuriam.* The W.A.C.A. in *Bamgbose* v. *Daniel* (1952) W.A.C.A. Ill adopted the decision given by the same court in *Re Adadevoh d- ors.* (1951) 13 W.A.C.A. 304.

[71] See, *e.g.,* s. 77 of the Sierra Leone Criminal Procedure Ordinance, Cap. 39. Laws of Sierra Leone (1960 Rev.).

[72] Ghana Criminal Procedure Code. 1960. Act 30, s. 123.

[73] D & F. 1911-16, p. 88.

4. SUCCESSION AND ADMINISTRATION

There are three types of will recognised in West Africa. The first type comprises wills drawn up in a form according to the provisions of the Wills Act, 1837,[74] which is a statute of general application. The second type comprises those wills recognised as valid testamentary dispositions by native law and custom. The third type consists of wills made in accordance with the provisions of Mohammedan law. These are made by the Mohammedan' communities in the Gambia [75] and Northern Nigeria.[76] Two problems arise under this head. The first problem relates to the validity of wills whether made under English law or under customary law. In short, the question to be decided is the law governing wills made in the English form. The second problem relates to the method of construction to be given to the provisions of a particular testamentary disposition.

(a) *The Validity*

If a will is intended to be made in the English form, it must conform with the formalities laid down by the English Wills Act which are as follows:

(a) The will must be in writing.[77]
(b) The will must be signed by the testator, or by someone else in his presence and by his direction.
(c) The signature must be at the foot or the end of the will.
(d) The testator must either make or acknowledge the signature in the presence of two witnesses present at the same time.
(e) The witnesses must then sign in the presence of the testator.[78]

If these formalities are complied with [78] then it may be admitted to probate in the High Courts either in conformity with the law and practice for the time being in force in England or in accordance

[74] As amended by the Wills Act Amendment Act. 1852. Note that Western "Nigeria has her own Wills Law similar to the English Acts.

[75] The Bathurst Mohammedan court has jurisdiction in all causes and matters affecting Mohammedan natives relating, *inter alia,* to succession and testaments: Mohammedan Law Recognition Ordinance, Cap. 31, Laws of the Gambia, 1955 Rev.,' s. 9.

[76] Special provision is made for the application of Moslem law in Northern Nigeria. The Sharia Court is empowered to administer Moslem law which includes questions regarding wills or succession where the testator is a Moslem. See the Nigeria (Constitution) Order in Council. 1960, No. 1652, 3rd Schedule, s. 52 (5).

[77] *Sed quaere* it can be written in the vernacular language.

[78] Megarry & Wade, *The Law of Real Property* (1st ed.), p. 147.

[79] As the Wills Act is a statute of general application it must be noted that it applies in West Africa so far as local circumstances permit. It would appear that the Act can be construed with such verbal alterations, *not affecting the substance,* as may be necessary to render the same applicable to the matter before the courts: *Apatira* v. *Akanke* (1944) 17 N.L.R. 149 at p. 150.

with local enactments (if any) based on English law. In the Nigerian case of *Apatira & anor.* v. *Akanke & ors.*[80] Ames J. held that where a will was intended to be a will according to English law, the fact that the deceased was a native of Nigeria and a Mohammedan did not make any difference to the necessity of complying with the requirements of the Wills Act. The combined effect of the present case and the Ghana case of *Be Abaka* [81] is that a document of a native which purports to be made in the form of an English will but which is refused probate according to English law and practice, will not in the alternative be admitted to probate according to customary law. The courts can and often do grant probate to nuncupative wills or *samansew* (oral wills in Southern Ghana) made by West African natives but such wills must be made in accordance with customary law and in the case of oral wills the court must be satisfied of the veracity of the witnesses called to prove them.[82]

(b) *Construction*

As Cheshire puts it, " the province of construction is to ascertain the expressed intention of the testator, *i.e.,* the meaning which the words of the will, when properly interpreted convey." [83] Since a will is a unilateral act the primary duty of the courts is to ascertain the intention of the testator. If the courts are satisfied that the testator intended that English law should be applied in construing the will, the intention of the signatories to the will or of the beneficiaries is out of the consideration.[84] " In choosing a law to govern the construction," says Cheshire, " the desideratum is to discover that system with which the testator was most intimately acquainted, and which it is just to presume that he had in mind when drafting his testamentary dispositions." [85]

A case illustrating the court's attitude in this respect is the Nigeria one of *Jacobs* v. *Oladunni* Bros.[86] The defendants in that

[80] *Supra.*

[81] (1957) 3 W.A.L.R. 230.

[82] See Redwar, *Comments,* p. 20. "If these deathbed wishes of the deceased could be construed to amount to a *samansew* or nuncupative will the court, on sufficient proof would no doubt give effect to such wishes on an application being made for the probate of such will in solemn form "—*Be Otoo* (1927) Div.Ct. (1926-29), 84. 85. *per* Michelin Ag.C.J.

[83] Cheshire, *op. cit.*. p. 580.

[84] *Vaughan* v. *George* (1942) 16 N.L.R. 85; *Branca* v. *Johnson* (1943) 17 N.L.R. 70; *Solomon & ors.* v. *Allottey & ors.* (1938) 4 W.A.C.A. 91; *cf. Nartey* v. *Nartey* (1953) 14 W.A.C.A. 295 at 297.

[85] *Private International Law* (6th ed.), p. 581.

[86] (1935) 12 N.L.R. 1. But in *Giwa & ors.* v. *Otun & ors.* (1932) 11 N.L.R. 160 where a deed of trust contained a provision that the property was not to be sold without the consent of all the beneficiaries, it was held by Buller Lloyd J., that on the terms of the deed of trust, principles of English law and not native law and custom were to be applied.

case attached certain real property under a writ of *fi. fa.* against the property of three of the children of the testator. The testator had devised that property to all his children to " remain and be retained as a family property in accordance with native law and custom." The plaintiff, a fourth child of the deceased, brought an action claiming that the property be released from attachment since family property is protected from attachment for the individual debts of one or more of the members of the family. Counsel for the execution creditor argued that since the deceased acquired the fee simple of the property in question under a conveyance in English form, and since he had made a will in English form, from the terms of the will the children of the deceased were to be treated as tenants in common of the property under English law and that the shares of the three children who were judgment debtors could be attached by their judgment creditors and sold. Graham Paul J. was unable to accept the argument. The learned judge expressed his reasons thus:

> " The will is clear enough in its terms. It shows definitely the intention of the testator to preserve as a ' family property,' in accordance with Lagos native law and customs and usages the particular property in question. It is expressly devised to the children and their issues jointly for that purpose. The rights of the children are defined and limited by the terms of the will. And in a matter such as this relating as it does to inheritance or testamentary disposition by native to natives, I am not prepared to admit English law to defeat the express intention of a native testator. 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 in intestacy." [87]

Again in *George & anor.* v. *Fajore,*[88] a testator in his will devised certain real property in Lagos to twelve named persons " their heirs and assigns for ever as tenants in common without any power or right to alienate or anticipate the same or any part thereof." An action was brought by the plaintiffs to recover a portion of the property allotted to the defendant. Buller Lloyd J., distinguishing the present case from an earlier case decided by himself,[89] held that customary law ought to be applied to the construction of the terms of the will. As he put it:

[87] *Ibid,* at p. 2.

[88] (1939) 15 N.L.R. 1.

[89] *Giwa* v. *Ottin* (1932) 11 N.L.R. The distinction made by the learned judge between the two cases is a nice one.

> " It is a cardinal principle that in interpreting a will the court will be guided by the intention of the testator in so far as they can be ascertained from the document itself. In the present case I think it clear, notwithstanding the use of the words ' tenants ' in common, that the testator intended the property to be held in accordance with native law and custom and this being so I have no difficulty in holding that the defendant could acquire no interest upon the death of her son and the failure of the issue." [90]

On the other hand in *Branco & ors.* v. *Johnson* [91] a testator by his will devised certain real property to trustees " to let the same and collect rents " and after certain deductions " to distribute the balance equally." The testator added, referring to this property: " I desire and declare that my said houses shall never be sold." The parties were the beneficiaries under the will and the plaintiffs had wanted to sell the property, but the defendant objected on the grounds that it was the intention of the testator to create family property according to native law and custom. After reviewing the cases already discussed, Baker Ag.C.J. adopted the dictum of Buller Lloyd J. in *Giwa* v. *Otun.*[92] The learned Acting Chief Justice held that the bequest followed the English form in that the income from the properties had been left to the children for life with remainder over the children. " Considering these facts " said the learned judge, " I am of opinion that English law should be applied." Perhaps the last case can be reconciled with the earlier cases on the ground that in each and every case the courts must ascertain the intention of the testator which is as a rule a question of fact and not one of law. The principle as to the law to be applied is too well known by the courts to be lost sight of

Finally, a few words need be said about the effect of the grant of letters of administration in so far as it is germane to the problem under discussion. The purpose of administration of estates is stated in Snell's *Principles of Equity* as follows:

> " When a person dies, his assets must be collected and realised, his debts paid, and any surplus distributed to the persons beneficially entitled under his will or intestacy. These three tasks, known collectively as the ' administration of assets ' are the duty of his personal representatives, *i.e.,* his executors,

[90] *George* v. *F'ajore. ibid,* at p. 3.

[91] (1943) 17 N.L.R. 70.

[92] 11 N.L.R. 160, which case was distinguished from by Buller Lloyd himself m *George* v. *Fajore.*

if he has appointed any, and otherwise his administrators. The administration is normally conducted by the personal representatives out of court but difficult and complex administrations may take place in court." [93]

The difficulty that arises in some countries and particularly in Ghana is whether the obtaining of letters of administration necessarily means the application of English law to the whole transaction of distribution of the assets. In *Villars* v. *Bafjoe* [91] Purcell Ag.C.J. held that " a man cannot by simply taking out letters of administration oust the native law so far as the family is concerned. The administrator elects to be bound by English law, but his election to be so bound does not bind the family or the family property." Indeed a grant of letters of administration by the court in accordance with English law *only* prescribes the method of realising the assets of the deceased and does not supersede native law and custom. It rather enables the head of the family to realise the parts of the estate of which he might not otherwise be able to obtain possession.[93] As a rule letters of administration can be obtained in one court whilst proceedings relating to the distribution of the estate may be dealt with by another court, *i.e.,* the customary court.[96]

5. TRANSACTIONS UNKNOWN TO CUSTOMARY LAW

There is a general rule that parties are not entitled to claim the benefit of customary law if it appears to the court that such a transaction entered into by them is unknown to native law and custom. Leaving the question of conflict of laws proper aside, it may be said that in most cases the courts have applied English law to such transactions. Thus it has been held that a covenant of title has no existence in native customary law and, therefore, the rights and liabilities under a covenant of title can be ascertained only by reference to English law.[97] Agreement for the hire of premises has also been treated as a transaction unknown and unrecognised by native customary law in Ghana [98] and Northern Nigeria.[99] Indeed there are many branches of modern commercial law which fall out of the purview of customary law. It is therefore

[93] (24-th ed., 1954), p. 273.

[94] (1909) Ren. 544 at 550.

[95] *Pappoe* v. *Kweku,* F.C. (1923-25) 159.

[96] *Hagan & ors.* v. *Tanuah* (Consolidated) (1939) 5 W.A.C.A. 35. 40 (P.C.).

[97] *Vanderpuye* v. *Flange £ ors.* (1942) 8 W.A.C.A. 170 at 171.

[98] *Asante* v. *Gold Coast Drivers Union* (1957) 3 W.A.L.R. 5 at p. 9, *per* Adumua-Bossman J. See also *Sey* v. *Abadoo* (1885) Sar.F.C.L. 132. *Sed*

[99] *Ede* v.' *Sabongari* (1960) N.R.N.L.R. 83.

convenient that in such cases principles of English law should apply to commercial transactions rather than customary law, however developed.

6. MODIFICATION OF ENGLISH STATUTES BY CUSTOMARY LAW

The interaction of English law with customary law must not be taken to mean that in all cases it is English law which should be applied to modify customary law. It is a two-way process. If English law is to thrive in West Africa then its application must be modified sometimes by indigenous law to make it acceptable. It is only when it has thus been adapted that we can call it our own law. There is a growing tendency for modern legislation in West Africa to pass legislation which is suitable to both persons who are subject to customary law and persons who are not. The Workmen's Compensation Ordinances in Ghana [1] and Nigeria [2] are illustrative of this trend. In the Ghana legislation a member of the family for the purpose of the ordinance means, when used in relation to a native, any one of those persons mentioned in the First Schedule [3] according as the family is based on the paternal or the maternal system. Again in the Fatal Accidents Act, 1961, of Nigeria which provides for compensation for the families of persons killed in accidents, " immediate family" is defined as follows:

> " (a) in relation to a deceased person not subject to a system of customary law, includes :
>
> (i) the widow or widows, as the case may be;
>
> (ii) the widower;
>
> (iii) any parent; and
>
> (iv) any child.
>
> " (b) in relation to a deceased person who was subject to a system of customary law not being Moslem law, means in addition to any of the persons specified in paragraph (a) of this definition, surviving brothers and sisters of a deceased person which expression includes step brothers and step sisters;

[1] Cap. 94, Laws of the Gold Coast, 1954 Rev.
[2] Laws of the Federation of Nigeria & Lagos (1958). Cap. 22-2.
[3] First Schedule

Paternal System Mother, father, wife, son, daughter, brother, sister, father's father, father's brother.
Maternal System 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.

" (c) in relation to a deceased person who was subject to the system of customary law known as Moslem law, means the person entitled to share in the award of *diya* prescribed by Moslem law for involuntary homicide ' parent ' means the father or mother of the deceased person and includes any grandfather, grandmother, stepfather or or stepmother."

Legislation about children is another instance which raises a question on the definition of a " family " or a " head of a family." In the Ghana Adoption Act, 1962,[4] adoption of children does not only require the consent of the parents, but also:

" Where it appears to the court that any person who is not the parent of the juvenile, under any order of a court or agreement or under customary law, or otherwise, any rights or obligations in respect of the juvenile the court may if they think fit, require that that person's consent shall be obtained before the adoption order is made." [5]

The problem facing the parliamentary draftsmen is formidable with respect to commercial legislation. Section 9 (3) *(b)* of the Ghana Companies Code Bill defines a private company to be a company which by its regulations " limits the total number of its members and debenture holders to fifty." The question that arises is whether " a family " in the Ghanaian context is regarded as one person or not. Again what happens when by operation of the law of intestacy the share of a deceased native became family property.[6] These are some of the difficulties that must be faced sooner or later in West Africa.

[4] Act 104.
[5] *Ibid.* s. 4 (1).
[6] See clause 99 of the Ghana Companies Code Bill, 1962.