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# Family Law in Nigeria

E. I. NWOGUGU

Heinemann Studies in Nigerian Law

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C. S. Ola
*Income-Tax Law and Practice in Nigeria*

E. I. Nwogugu
*Family Law in Nigeria*

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To
Mike, Obiora, Ada
and Ifeyinwa

# Addendum

Since the book went to press, The Lagos State Government has amen
ded The Lagos State (Applicable Laws) Edict, 1968. This chang
*inter alia* has affected the law on intestate succession within that Stat
and our discussions at pp 287–95. By section 1 of The Lagos Stat
(Applicable Laws) (Amendment) Edict, 1972 (No 11 of 1972) th
Administration of Estates Law, 1959, of Western Nigeria, now applie
to Lagos State with the modifications stipulated in Part 2 of Th
Lagos State (Adaptation of Laws) (Miscellaneous Provisions) Orde
1972 (LNLS 16 of 1972). These modifications relate principally to th
differences in the land law between the Western State and Lagos State

Although the 1972 Edict does not expressly repeal section 36 of th
Marriage Act, it is submitted that succession being a subject within
State legislative competence, the Lagos State Edict should apply t
the exclusion of section 36.

With this change, the law of intestate succession in Lagos State is nov
substantially the same as in the Western and Mid-Western States a
discussed at pages 298–301.

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# Foreword

I welcome the invitation to write this foreword to Dr Nwogugu's book *Family Law in Nigeria*, because it is a detailed and often analytical study of this important branch of our customary law, and it supplies a real need in the evolution of our family law. Since the pioneer study of Kasunmu and Salacuse, *Nigerian Family Law*, was published in 1966, a number of changes have taken place in the field of both judicial decisions and statute law. Probably the most fundamental changes have been brought about by the Matrimonial Causes Decree of 1970, which represents the first indigenous legislation on the subject, thereby putting an end to the erstwhile incorporation into our law of English matrimonial causes enactments since 1857 as well as the decisions based upon them.

The Decree has also settled once and for all certain important problems that have hitherto troubled our courts and generations of lawyers and law students; an example is the provision that there is only one domicile for the whole of Nigeria, despite the federal structure and the several jurisdictions; another example is the introduction of the concept of granting a divorce at the suit of either party on the main ground that the marriage has irretrievably broken down, which is nearer to our traditional attitude to marriage, although it must be admitted that a similar change has taken place in other legal systems in recent years. These and other changes, including a reconsideration of the legal problems of adoption in legislation on the subject, would seem to justify the publication of this book, which more than merely updates the existing book on the subject.

There is also a freshness of approach in such familiar areas as legitimacy and legislation, succession under the received English law and local legitimation, as well as under customary law (which includes Islamic law where relevant), and parental rights and obligations in respect of children. The last chapter on 'The Extended Family' is a necessary complement to the author's interesting study of a dynamic society such as ours which, in spite of its desire for economic and industrial change, is irrevocably committed at once to the ideal of remaining itself, and to the achievement of a measure of unity in diversity.

If there is an area of our law in which dependence upon English textbooks and legislation ought to be considerably reduced if not entirely eliminated, it is in the field of our personal law, which from very early times since our British connection has been recognized and reserved for the exclusive operation of our customary courts and laws

throughout the component units of modern Nigeria. All the relevant local statutes have uniformly provided for the application of customary law, by the traditional tribunals sitting as courts of first instance, in all disputes relating to the family, land tenure and inheritance, and chieftaincy matters. Dr Nwogugu's book will make it even less necessary in the future to resort to non-Nigerian sources in the field of family law.

Teachers and students of law in our universities and the Nigerian Law School will find in this book a useful *vade mecum* and an indispensable guide to many of their problems, while social scientists and welfare workers will be able to use it with profit in their day-to-day work.

*Dr T. O. Elias*
*Chief Justice of Nigeria*

*The Supreme Court of Nigeria,*
*Tafawa Balewa Square,*
*Lagos, Nigeria*

# Preface

In every community the law relating to the family commands great attention and importance. This is because the family is the base of the community and is therefore vital to its continued existence.

The development of family law in Nigeria has reflected the political, economic, and social changes in the country. Prior to the establishment of British institutions, customary-law rules governed all aspects of matrimonial relationships. With the introduction of the general law and British-type courts, a dual system of family law was created. However, customary law continues to govern the family life of the bulk of Nigerians. Up to 1970, the various English legislations on matrimonial causes were applied directly to Nigeria in spite of its different social and economic background. This was certainly unsatisfactory. The Matrimonial Causes Decree 1970 marked the starting point of the quest for fashioning an indigenous law on matrimonial causes to suit local circumstances.

A growing similarity is now noticeable in the development of family law in Commonwealth countries. Consequently a study of this nature cannot be undertaken in isolation from the law and judicial decisions in other Commonwealth jurisdictions.

The preparation of this work was prompted by the far-reaching changes effected by the Matrimonial Causes Decree 1970 and the need for a comprehensive volume dealing with all aspects of the subject. Part I deals with the contract to marry, celebration of the marriage union and the legal effects of marriage. In Part II, matrimonial relief is examined including the jurisdiction of the courts, nullity, the dissolution of marriage and other matrimonial suits like restitution of conjugal rights. Part III is concerned with the relations between parent and child. The rules relating to succession and the extended family are discussed in Part IV.

I am indebted to Dr D. I. O. Ewelukwa, who read through the entire manuscript and made very useful suggestions. At various stages in the preparation of this work, I had the privilege of discussing knotty points with some of my colleagues in the Faculty of Law. In the various discussions held in this respect, they generously gave of their learning and understanding of problems. However, the responsibility for all errors or omissions remains mine. The staff of the Central Judicial Library, Enugu, was most helpful in my search for references. The bulk of the typing of the manuscript was done by the staff of the Faculty of

Law. I wish to record my appreciation of the understanding and courtesy shown me by Mr James Currey and the staff of my publishers. Last but not least, my wife's understanding and encouragement sustained me throughout the preparation of this work.

E. I. NWOGUGU

# List of Abbreviations

## JOURNALS

| | |
|---|---|
| *BYBIL* | British Yearbook of International Law |
| *CLJ* | Cambridge Law Journal |
| *ICLQ* | International and Comparative Law Quarterly |
| *JAL* | Journal of African Law |
| *JICL* | Journal of Islamic and Comparative Law |
| *LQR* | Law Quarterly Review |
| *MLR* | Modern Law Review |
| *NLJ* | Nigerian Law Journal |
| *Sol J* | Solicitors' Journal |

## LAW REPORTS

| | |
|---|---|
| AC | Law Reports: Appeal Cases |
| ALR | Australian Law Reports |
| All ER | All England Law Reports |
| All NLR | All Nigeria Law Reports |
| CCHCJ | Selected Judgments of the High Court of Lagos (Cyclostyled) |
| CLR | Commonwealth Law Reports |
| CLY | Current Law Yearbook |
| Ch D, Ch LR | Law Reports: Chancery Division |
| CP, CPD | Law Reports: Common Pleas |
| DLR | Dominion Law Reports |
| ECSLR | East Central State Law Reports |
| ENLR, ERNLR | Eastern Nigeria Law Reports |
| ER | English Reports |
| Eq | Law Reports: Equity Cases |
| Exch D | Law Reports: Exchequer Division |
| Ex D | Law Reports: Exchequer Division |
| FLR | Federal Law Reports |
| FNLR | Federal Nigeria Law Reports |
| FSC | Selected Judgments of the Federal Supreme Court |
| GLR | Ghana Law Reports |
| HL, HL Sc Div | Law Reports: House of Lords Scottish Division |

| | |
|---|---|
| KB<br>QB | Law Reports: King's Bench<br>Queen's Bench |
| LJ | Law Journal Reports |
| LJKB *or* QB | Law Journal, King's Bench *or* Queen's Bench |
| LJP | Law Journal, Probate |
| LLR | Lagos High Court Reports |
| LN | Law Notes |
| LR | Law Reports |
| LT | Law Times |
| MNLR | Mid-Western Nigeria Law Reports |
| NLR | Nigeria Law Reports |
| NMLR | Nigerian Monthly Law Reports |
| NNLR<br>NRNLR | Northern Nigeria Law Reports |
| NZLR | New Zealand Law Reports |
| P<br>PD<br>P & D | Law Reports: Probate Division |
| Qd R | Queensland Law Reports |
| SASR | South Australian State Reports |
| SC | Monthly Judgments of the Supreme Court of Nigeria (Cyclostyled) |
| St R Qd | Queensland State Reports |
| SR (NSW) | State Reports: New South Wales |
| TLR | Times Law Reports |
| UILR | University of Ife Law Reports |
| VR | Victorian Reports |
| VLR | Victorian Law Reports |
| WACA | West African Court of Appeal Reports |
| WALR | Western Australia Law Reports |
| WLR | Weekly Law Reports |
| WN | Weekly Notes |
| WNLR<br>WRNLR | Western Nigeria Law Reports |
| WR | Weekly Reporter |

**Old Reports** (Decisions of English Courts prior to 1866)

| | |
|---|---|
| Atk | Atkyns' Reports, Chancery |
| B & C | Barnewall & Cresswell's Reports |
| B & S | Best & Smith's Reports, Queen's Bench |
| CBNS | Common Bench Reports: New Series |
| CP | Cooper's Probate Cases |
| Camp | Campbell's Reports: Nisi Prius. |
| Clay | Clayton's Reports and Pleas of Assizes at York, 1631–50 |
| Car & Kir or Car & K | Carrington & Kirwan's Reports |
| Car & P or C & P | Carrington & Payne's Reports |

| | |
|---|---|
| De G F & J | De Gex, Fisher and Jones's Reports, Chancery |
| De G J & Sm | De Gex, Jones and Smith's Reports, Chancery |
| De G M & G | De Gex, M'Naghten and Gordon's Reports, Chancery |
| Dick | Dickens' Reports, Chancery |
| Dow & Ry | Dowling and Ryland's Reports, Kings Bench |
| E & B | Ellis and Blackburn's Reports, Queen's Bench |
| E B & E | Ellis, Blackburn and Ellis' Reports, Queen's Bench |
| Esp | Espinasse's Reports |
| Exch | Exchequer Reports (Welsby, Hurlstone & Gordon) |
| F & F | Foster & Finlason's Reports |
| H & N | Hurlstone and Coltman's Reports, Exchequer |
| H L Cas | Clark's Reports, House of Lords |
| Hag Ecc | Haggard's Ecclesiastical Reports |
| Hare | Hare's Reports, Chancery |
| Holt NP | F. Holt's Reports: Nisi Prius |
| K & J | Kay & Johnson's Reports |
| Lee | Sir G. Lee's Ecclesiastical Judgments |
| Lev | Levinz's Reports, King's Bench and Common Pleas |
| M & W | Meeson & Welsby's Reports, Exchequer |
| Mer | Merivale's Reports, Chancery |
| Moll | Molloy's Reports, Chancery (Ireland) |
| Peake | Peake's Reports, Nisi Prius |
| P Wms | Peere Williams' Reports, Chancery and King's Bench |
| Ph | Phillips' Reports, Chancery |
| Phillim | Phillimore's Ecclesiastical Reports |
| Rob | Robinson's Scotts Appeals |
| Sp Ecc | Spinks Prize Court Cases |
| Sw & Tr | Swabey & Tristram's Reports, Probate & Divorce |
| Term Rep | Term Reports (Durnford & East) |
| Ves | Vesey's Reports |
| Ves Sen | Vesey Senior's Reports |
| Y & J | Younge & Jervis' Reports |

**OTHERS**

| | |
|---|---|
| Ag | Acting |
| B | Baron |
| CB | Chief Baron |
| CJ | Chief Justice |
| CJN | Chief Justice of Nigeria |
| CWSNALN | Central-Western State Native Authority Legal Notice (now to be found in *Kwara State Gazette*) |

| | |
|---|---|
| ENLGN | Eastern Nigeria Local Government Notice (in *Eastern Nigeria Gazette*) |
| ER | Eastern Region of Nigeria |
| HMSO | Her Majesty's Stationery Office |
| LC | Lord Chancellor |
| LJ | Lord Justice |
| LN | Legal Notice |
| LR | Law Reports |
| MR | Master of the Rolls |
| NA | Native Authority |
| NALN | Native Authority Legal Notice |
| NESLALN | North-Eastern State Local Authority Legal Notice (in *North-Eastern State Gazette*) |
| NRLN | Northern Region of Nigeria Legal Notice |
| NR | Northern Region of Nigeria |
| P | President of the Probate, Admiralty and Divorce Division |
| S | Section |
| WR | Western Region of Nigeria |
| WRLN | Western Region of Nigeria Legal Notice (in *Western Region Gazette*) |

# Introduction

## A THE FAMILY

This study is concerned with the law relating to the family. The family is the smallest unit in the social structure of every society. It is generally accepted that the family is the basis of every human community, and the family may be regarded as the nucleus of society. The term 'family' does not lend itself to easy and precise definition. In one sense, the family may be defined so as to include all persons with a common ancestor. Under this wide connotation, the family may embrace a large body of persons related by blood to a common ancestor. The relationship may be traced through males, as in patrilineal societies, or through females, as in matrilineal societies. Sometimes, the group included in the wide definition of 'family' is referred to as the 'extended family' – a concept which is prevalent in Nigeria, as is the case in most other unindustrialized societies. Green aptly defines the 'extended family' as:

> . . . a group of closely related people, known by a common name and consisting usually of a man and his wives and children, his son's wives and children, his brothers and half brothers and their wives and children and probably other near relations . . .[1]

In contrast, the term 'family' may be given a much more restricted connotation. It may refer to a smaller group consisting of a household – the man, his wife or wives, the children and, probably, the dependants who live with him. This is much closer to the concept of family in English law, which is restricted to the man, his wife and children. In Nigeria the picture is slightly different, because in some cases the law admits the taking of more than one wife. The extended family is usually a corporate body which may own property, such as land, in which its members have rights.

For the purposes of this study, the family will be treated as a unit comprising the man, his wife or wives, and the children. We shall be concerned with the law which regulates the relationship of this group *inter se*, and their relations with the extended family.

## B NATURE OF MARRIAGE

### 1 Marriage as a universal institution

Marriage is a universal institution which is recognized and respected all

[1] Green, M. M., *Land Tenure in an Ibo village* (Lund Humphries, London 1941), 2–3.

over the world. As a social institution, marriage is founded on, and governed by the social and religious norms of society. Consequently, the sanctity of marriage is a well-accepted principle in the world community. Marriage is the root of the family and of society.

## 2 Types and definition of marriage in Nigeria

Unlike in most European countries, two systems of marriage are recognized in Nigeria – the monogamous and the polygamous. These two systems of marriage differ fundamentally in character and incidents. It is therefore important to keep this dualism in view in every consideration of the marriage laws in Nigeria, in order to avoid any confusion. In every case concerning marriage, the lawyer in Nigeria first has to determine the type of marriage involved before he can apply the appropriate law.

### (A) MONOGAMOUS MARRIAGE

A monogamous marriage in Nigeria is the same as in England. It is the marriage which Lord Penzance described in *Hyde v Hyde*[2] as '. . . the voluntary union for life of one man and one woman to the exclusion of all others'. There are three aspects of this definition which deserve further elaboration. In the first place, the marriage must be a voluntary union. Thus there must be free consent of both parties to the union. The absence of genuine consent will vitiate the agreement. Second, the marriage should be a union for life. This does not imply that the union should be indissoluble. The cardinal requirement here is that at the time of contracting the marriage the parties intend that it should be for life unless dissolved earlier by a process prescribed by law. Thus in *Nachimson v Nachimson*,[3] it was held that a Russian marriage which according to the local law could be dissolved by mutual consent or at the will of one of the parties with merely formal conditions of official registration was in fact a union for life and a monogamous marriage. Third, it must be a union of one man and one woman to the exclusion of all others. The marriage must, therefore, be monogamous as it does not admit of taking more than one wife during the subsistence of the marriage. According to the Interpretation Act 1964,[4] a monogamous marriage is 'a marriage which is recognized by the law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage'.

The laws which govern the celebration and incidents of monogamous marriage in Nigeria are found principally in the Marriage Act 1914[5] and the Matrimonial Causes Decree 1970.[6]

[2] (1866) LR 1 P & D 130, 133.
[3] [1930] P 217.
[4] No. 1 of 1964 section 18.
[5] Cap. 115 *Laws of the Federation of Nigeria*, 1958.
[6] Decree No. 18 of 1970.

(B) POLYGAMOUS MARRIAGE

A polygamous marriage may be defined as a voluntary union for life of one man with one or several wives. Its essential characteristic is the capacity of the man to take as many wives as he pleases. The mere fact that at a given moment he has only one wife does not affect the character of the marriage so long as the capacity of taking more wives is retained. Generally, there is no limit to the number of wives a husband could take under the polygamous system. This invariably depends on his affluence.[7]

The fact that there may be plurality of wives does not affect the basic premiss that the polygamous marriage is usually intended to last for life. Moreover, while in times past there were child marriages which were often contracted without the consent of the girl, the modern trend and practice is to obtain the consent of both parties to the union.

Polygamy in Nigeria is a customary-law institution. Therefore, the character and incidents of that system are governed by customary law. There is no single uniform system of customary law prevailing throughout Nigeria. The term 'customary law', therefore, covers a multitude of systems of law which differ from one locality to another. Customary law possesses three unique features: it is unwritten; it must be 'a mirror of accepted usage'[8] in the area where it is applied; and its rules change with time.[9]

Exceptions to the unwritten character of customary law occur in some parts of Nigeria where the rules relating to matrimonial causes have been set down in writing. In the Northern States, a Native Authority may record in writing a declaration of what in its opinion is the native law and custom relating to any subject within its area of jurisdiction. Such a declaration may apply throughout the area of its authority, or in a specified part thereof. If the Military Governor of the State is satisfied that such a declaration accurately records the native law and custom with respect to the subject to which it relates, he may by order direct that the written declaration should be the native law and custom in force with respect to that subject.[10] Moreover, the native authority may also, with the approval of the State Military Governor, modify in writing the customary law relating to any subject, so long as such modification is not repugnant to natural justice, equity and good conscience or incompatible with any statute. Similar provisions are

[7] Under Islamic Law, which is also customary law, a man may take not more than four wives.

[8] Bairamain, FJ, in *Owonyin v Omotosho* [1961] All NLR 304, 307.

[9] Osborne, CJ, in *Lewis v Bankole* (1909) I NLR 81, 101.

[10] Native Authority Law, Cap. 77 *Laws of Northern Nigeria 1963* Section 49. Declarations have been made by Bui, Borgu, Idoma and Tiv Native Authorities – The NA (Declaration of Bui Native Marriage Law and Custom) Order 1964 (NALN 9 of 1964); The NA (Declaration of Borgu Native Marriage Law and Custom) Order 1961 (NALN 52 of 1961); The NA (Declaration of Idoma Native Marriage Law and Custom) Order 1959 (NALN 63 of 1959); The NA (Declaration of Tiv Native Marriage Law and Custom) Order 1955 (NRLN 149 of 1955).

found in the Local Government Laws of the Western, Mid-Western and Lagos States.[11]

In the Western, Mid-Western and Lagos States, Local Government Councils have power, *inter alia*, to make by-laws regulating customary-law marriages, quantum of dowry, child betrothals, and the custody and maintenance of children of customary law.[12] But the Commissioner for Local Government or any other appropriate Commissioner may by order make model adoptive by-laws in respect of any of these matters, which local authorities may adopt if they so desire. By-laws adopted in accordance with this system have the same force and effect as if they had been made by the council concerned.[13] Two adoptive by-laws relating to customary-law rules on marriage, divorce and custody of children, and on the registration of marriages, have been made.[14] Similar rules on adoptive by-laws exist in the Eastern States, though in relation to matrimonial cause they apply only to the registration of customary-law marriages.[15]

In the Eastern States, the age of marriage and quantum of dowry in respect of customary-law marriage are regulated by the Age of Marriage Law 1956 and the Limitation of Dowry Law 1956 respectively. The details of these recordings of customary law, and other laws or rules relating to customary-law marriage, will be examined in the appropriate portions of this work.

In Nigeria the term 'customary law' generally includes Islamic law.[16] Although there are Moslems all over the country, Islamic law is applied only in the Northern States. Even in those areas, it is not the only customary law. The history of the Northern States left them with the imprints of three systems of customary law – the indigenous pagan customs of the area, the pagan customs introduced by its different conquerors, and the Fulani and Islamic law (the teaching of the Koran). Each of these systems operate in different parts of the Northern States. Thus while Islamic law is more prevalent in the Northern Emirates, the indigenous customs are more pronounced in the Bauchi-Plateau area. Generally speaking, Islamic law is applied on a territorial rather than on a personal basis. Consequently, the judicial application of that system of law is confined to the Moslem Emirates of the North. There are no Moslem courts in the Southern States of Nigeria, and Islamic law is not specifically applied even in the Yoruba areas, where a large proportion of the population is Moslem. In these areas, the law that applies is either the indigenous customary law or a mixture of local customary law and some rules of Islamic law.[16a] The operative law is

[11] Local Government Law Cap. 68 *Laws of Western Nigeria*, 1959 Section 78.
[12] id., Section 68 (32–35).
[13] id., Section 83.
[14] The Marriage, Divorce and Custody of Children Adoptive By-Laws Order 1958; The Registration of Marriages Adoptive By-Laws Order 1956 (WRLN 4 of 1957).
[15] Local Government Law Cap. 79 *Laws of Eastern Nigeria*, 1963 Sections 84 and 90.
[16] High Court Law, S 2, *Laws of Northern Nigeria*, 1963.
[16a] *Ayoola v. Folawiyo* (1942) 8 WACA 39; Adesanya, 'Marriage according to the local Islamic rites in Southern Nigeria' [1968] 2 *JICL*, 26, 27–29.

quite different from the Islamic law that obtains in the Moslem Emirates of Northern Nigeria. In *The Estate of Alayo, Deceased*,[17] the question of the distribution of the estate of an intestate Yoruba woman from Ijebu land arose. The deceased was an Ijebu, and a Mohammedan. She was married according to Moslem rites. There was no divorce up to the time of her death, but she had ceased to live with her husband for about forty-five years before her death. She was survived by her husband, an adopted child and some collaterals – the descendants of her maternal grandfather. It was argued on behalf of some of the claimants that distribution of the estate should be governed by Islamic law, while others urged the court to apply Ijebu law and custom. Brooke, J, held that Ijebu was not a Moslem area and pointed out that there was no provision for the application of Moslem law there. The proper law to govern the distribution was Ijebu law and custom.

Although Moslem law is not an indigenous system of law, it satisfies some of the cardinal principles of customary law where in fact it has been adopted as the established usage by the local community. In the main, it is the Maliki School of Islamic Law which is applied in Nigeria, with local variations. Over the period of their concurrent existence, Islamic law and indigenous customary law have cross-fertilized each other.

## 3 Legal characteristics of marriage

### (A) CONTRACT

Marriage is a contract whereby the parties thereto enter into legal relations involving rights and obligations. This statement is true of both the monogamous and the polygamous systems of marriage. But the contractual aspects of the two systems differ in material respects. In monogamous marriages, the contractual elements are fully developed on the lines of the English law of contract. But in customary-law marriages, the applicable rules are undeveloped and uncertain because customary law has no developed or precise rules governing contractual relations.

While the monogamous marriage has some features in common with ordinary civil or commercial contracts, it differs *sui generis* in various areas from civil contracts. Like ordinary contracts, a monogamous marriage is consensual in origin. It is the mutual consent of the parties that brings the agreement into being. Furthermore, the contract creates reciprocal rights and obligations for the parties thereto. But, unlike an ordinary commercial contract, a marriage contract requires special forms and ceremonies for its solemnization.[18] Besides, once the agreement is concluded, the law imposes obligations on the parties, which

[17] (1946) 18 NLR 88. See Anderson, J. N. D., *Islamic Law in Africa*, Colonial Research Publication No. 16 (HMSO, London 1954), 172, 222.

[18] *Mordaunt v Mordaunt* (1870) LR 2 P & D 109, 126.

cannot necessarily be varied by agreement.[19] In this respect, unlike commercial contracts, the parties cannot by themselves fix the detailed terms of their contract. Again, the grounds on which a marriage may be void or voidable are in many ways different from those for the nullity of commercial contracts. With regard to dissolution, the parties to a marriage cannot of their own will dissolve it, as is the case in commercial contracts,[20] nor is the marriage contract discharged under the doctrine of frustration. Except in the case of the death of one of the spouses, a marriage may only be brought to an end by a decree of a court of competent jurisdiction.

Like its statutory counterpart, customary-law marriage is contractual in nature. But here there are two distinct aspects of the contractual relationship. The first is the agreement between the parties themselves, involving the physical union of the spouses. Of some importance is the loose contractual relationship between the two families, resulting in their union as manifested in the marriage itself. The systems of levirate marriage and sororate marriage are attributable to the later contractual aspect of customary-law marriage. Thus while the death of a spouse may terminate the physical union of the parties it does not affect the contractual relationship between their families. This, for instance, explains the need for parental consent, and why in some communities it is possible for a brother or other male relation of a deceased husband to marry his widow without the requirement of a new dowry.

The contractual elements of customary-law marriage derive their character and efficacy from the customary rules of contract. Customary law has not developed the concept of executory contract, in which the promise of one party is given in return for the promise of the other. In practice, customary law knows only of executed contracts where one party or both have performed their obligations. Where only one party has performed his obligations, a customary court may not compel the other to perform also, and specific performance is rarely if ever decreed. Usually, the customary-law relief for breach of an agreement is a decree of restitution *in integrum*.[21]

These characteristics are reflected in the customary contract of marriage. For instance, customary law does not provide any remedy for the breach of promise to marry. But, on the other hand, customary-law marriages differ from ordinary customary contracts. The solemnization of the marriage requires special forms and ceremonies unknown to ordinary contracts. The requirement of bride-price as a *sine qua non* of a customary-law marriage has no counterpart in other customary-law contracts. Furthermore, some of the rights and obligations of the parties prescribed by customary law are not always subject to the agreement of the parties.

[19] ibid., e.g. the obligation of the husband to maintain his wife – *Hyman v Hyman* [1929] AC 601.

[20] *Moss v Moss* [1897] P 263, 267.

[21] Elias, T. O., *The Nature of African Customary Law* (Manchester University Press, 1952), 146–8, 154–5.

(B) STATUS

Marriage is not a mere contract, but one that creates status.[22] The status created by marriage is recognized not only in the country where the parties are domiciled but universally.[23] Through the contract the spouses belong to a special class whose rights and obligations are prescribed by law. Such rights and obligations are unique, and attach only to persons who have acquired that marital status. For instance, in cases of monogamous marriage a wife may in certain circumstances pledge her husband's credit for necessaries to maintain herself and her children.[24] Again, a husband has a right of action against anyone who commits a tort against his wife, thereby depriving him of her consortium.[25] Further, for the maintenance of the matrimonial peace the law deprives a spouse of the right to sue the other in tort.[26]

Customary-law marriage is also regarded as creating status. In some areas, for example, a husband has a right of action for damages against anyone who commits adultery with his wife.

(C) SANCTITY OF MARRIAGE

Sanctity of marriage is a principle recognized and enforced by law. Every society makes laws that regulate and promote the institution of marriage. In Nigeria, a number of legal rules are directed at promoting marriage and invalidating all acts which may interfere with that institution. The law in certain circumstances presumes the existence of valid marriage even though there may not be strict proof that a valid marriage has in fact been celebrated. For instance, where marriage appears to have been celebrated between and by proper persons, the law presumes that a valid marriage has thereby come into existence unless the contrary is satisfactorily proved – *omnia praesumuntur rite esse acta.* Thus, the mere absence of proof of the regularity of a marriage ceremony will not displace it. In *Onwudinjoh v Onwudinjoh*[27] the validity of the marriage between one Jeremiah and Agnes was in issue. Agnes deposed that she was married to Jeremiah in Emmanuel Church, Makurdi in 1926 under the Marriage Act. The church is a Church Missionary Society building and the celebrant was the Reverend Ejindu, who had died. It was therefore argued that the purported second marriage by Jeremiah to Chinelo under native law and custom during the subsistence of Agnes' marriage was void. The court accepted the evidence of Agnes and two other witnesses that the banns of marriage were published and that Agnes went through a religious ceremony of marriage in 1926. But the defendants, children of Chinelo, contended that the religious ceremony was not a valid marriage, much less a marriage under the Marriage Act. In support of this view, it was pointed out that there was

[22] *Sottomayer v De Barros* (1879) 5 PD 94; *Fasbender v AG* [1922] 2 Ch 850, 858.
[23] *Nachimson v Nachimson, supra,* at 223.
[24] *Miss Gray Ltd v Earl Cathcart* (1922) 38 TLR 562; *Harrison v Grandy* (1865) 13 LT 369.
[25] *Winsmore v Greenbank* (1745) Willes 577, 125 ER 1330; *Best v Samuel Fox* [1952] AC 716.
[26] This has been modified with regard to action for the protection of the wife's property.
[27] (1957) 11 ERNLR 1.

no proof that the church was properly licensed, that the registrar's certificate of notice was issued, or that the requirements of the Act were complied with. The evidence of an official of the Makurdi marriage registry that all records of that office prior to 1950 were lost or destroyed was accepted.

In spite of the doubts raised by the defence, Ainley, CJ, held that a valid marriage under the Act was celebrated by Agnes and Jeremiah. In coming to this conclusion, the learned judge applied the legal presumption in favour of marriage. He said:[28]

> Am I to assume that the Rev. Ejindu was a fraud or did not know his legal duties? Am I to assume that the Church Missionary Society permitted the celebration of marriages in an unlicensed church? Am I to assume that because forty-year old records cannot be produced from an office in Makurdi that this lady was not lawfully married to the man she lived with for twenty years after a religious ceremony in a church? I do not think so. I think that I am entitled to presume, in the circumstances, that the church was duly licensed and that the proceedings in the church were in accordance with the law.

Moreover, in a case where the validity of a marriage celebrated in St Mary's Catholic Church, Port Harcourt, was in issue, Idigbe, J, (as he then was) found the marriage valid under the Marriage Act on the ground that:

> Where there is evidence of marriage having been performed in this country in accordance with the rules of the church and parties to it have lived as husband and wife and cohabited together, everything necessary to ensure the validity of the marriage should be presumed in the absence of decisive evidence to the contrary.[29]

Again, there is a legal presumption of marriage from cohabitation and repute. Where a man and a woman have lived together as husband and wife over a long period of time and are generally known as such, the law presumes that the cohabitation resulted from a valid marriage unless the contrary is clearly proved.[30]

In protecting the institution of marriage, the law frowns on certain types of contracts that interfere with the sanctity of marriage. A contract the object or effect of which is to prevent a person marrying or which is a deterrent to marriage is void as being contrary to public policy.[31] Moreover, the law strikes down marriage brokerage contracts, by which

[28] id. at 3–4.

[29] *Akuwudike v Akuwudike* (1963) 7 ENLR 5, 7. In *Anyaegbunam v Anyaegbunam* SC 18/1973, 19 April, 1973 (1973) 4 SC 121, the Supreme Court refused to apply the maxim *omnia praesumuntur rite esse acta* because the petitioner offered no evidence that a marriage was in fact celebrated.

[30] *Re Shephard* [1904] 1 Ch 456.

[31] *Re Fentem* [1950] 2 All ER 1073.

a person procures a marriage between two parties for reward.[32] Again, the law declares void a promise by a married man to marry a person who knows him to be already married as being contrary to public policy and an encouragement to immorality.[33]

[32] *Hermann v Charlesworth* [1905] 2 KB 123.
[33] *Shaw v Shaw* [1954] 2 QB 429; *Wild v Harris* (1849) 7 CB 999, 137 ER 395.

# PART I

# MARRIAGE

# 1
# Contract to Marry

## A STATUTORY MARRIAGE

### 1 Nature of Contract

When two parties enter into a contract to marry, their agreement does not refer merely to going through a series of ceremonies. In fact it would be strange if after the celebration of the marriage one party refused to partake in the association on the ground that he had fulfilled his obligation. The contract goes much deeper. While it refers partly to the ceremonies, the pith and substance is that the parties thereby enter into a union as husband and wife, with all the rights and obligations attached thereto. Thus, the contract relates in essence to the parties living as husband and wife and in accordance with matrimonial rights and obligations. It is a contract to create a status, and the contract is fulfilled when the parties acquire, and live fully in realization of, that status.

### 2 Form and evidence

The contract to marry, like ordinary commercial contracts, may be created orally or in writing. In the latter case, the contract need not be a formal document embodying the mutual promises of the parties. The courts may be able to elicit a contract from correspondences which passed between the parties. The contract comes into existence by the mutual exchange of promises by the parties to marry each other. At that point, there is the *consensus ad idem*. The promise of one party is given in consideration of the promise of the other party. It has been held that there is valuable consideration where at the request of the defendant and on a promise of marriage, the plaintiff travels a long distance for the marriage.[1]

The promise to marry must relate to marriage under the Marriage Act. If it is a promise to marry under native law and custom the rules of English law will not apply. Thus, it is necessary to prove not only a promise to marry but also to show that the projected marriage is a monogamous one under the Marriage Act.[2]

### 3 Capacity

A party to a contract to marry under the monogamous system must

[1] *Harvey v Johnston* (1848) 6 CB 295, 136 ER 1265.
[2] *Olusanya v Ibadiaran* (1971) 1 UILR 149.

possess the necessary capacity. Several factors are relevant in this respect.

(A) SINGLE STATUS

Generally, the law requires that a party to a contract to marry must possess the single status, that is not being, at the time of the promise of marriage, married to a third party. In *Wilson v Carnley*,[3] the Court of Appeal laid down the general principle that a contract to marry to which a married person is a party is against public policy and morals and is therefore void. The attitude of the law in such cases was explained by Channell, J., in *Spiers v Hunt*[4] as follows:

> The tendency of such a contract is to make the husband in thought, if not in deed, unfaithful to his wife. In certain cases it might even lead to a crime. Its very possible result is sexual immorality.

In both *Spiers v Hunt* and *Wilson v Carnley*, the defendant was to the knowledge of the plaintiff a married man when he promised to marry the plaintiff. The courts refused to enforce the agreement because it tended to be contrary to public policy.

But this rule may not be regarded as being of general application in the light of the House of Lords decision in *Fender v St John Mildmay*.[5] In that case the defendant had obtained a decree nisi of divorce when he promised to marry the plaintiff. The House, while recognizing that the marriage was still subsisting, by a bare majority held that the contract was not void and that the plaintiff could recover damages for its breach. To reach this decision, the House distinguished *Spiers v Hunt* and *Wilson v Carnley* from the case before them. First, it was pointed out that generally the decree nisi was regarded as strong evidence of the end of a marriage, as there are few and exceptional cases in the experiences of the judges where a decree nisi was not made absolute. Second, the House made the important point that in the two earlier cases the spouses were living together, and any promise of marriage made by either of them was likely to impair the marriage and encourage adultery. But in the case before them, the parties were already living apart and there was very little left of the marriage. Lord Atkin remarked that after the decree nisi 'the bottom had dropped out of the marriage' and nothing but the mere shell was left.[6]

The admission of the decision in *Fender v St John Mildmay* as an exception to the general rule raises the question of the extent to which public policy can be stretched to invalidate marriage contracts involving married persons. On this point the House of Lords was divided in *Fender v St John Mildmay*. Lord Atkin was willing to exclude from the general rule of invalidity cases where the marriage had completely

[3] [1908] 1 KB 729.
[4] [1908] 1 KB 720, 724.
[5] [1938] AC 1.
[6] id. at 21.

broken down. He cites the examples of where a man whose wife has fled with a lodger, leaving the children in his charge, contracts to marry another respectable woman as soon as he is free, and where a husband is living with another woman and has a child by her. The learned Lord expressed the view that in both cases the spouses had ceased to owe themselves any duty which in 'the interests of themselves or the public will be impaired by a promise to marry a third person when free'.[7] But Lord Wright chose the decree nisi 'as marking the line of division and demarcation'.[8] Lord Thankerton agreed with Lord Wright's view. In the court of first instance in *Wilson v Carnley*[9] Channell, J, expressed the view that public policy will not invalidate cases in which a man's wife is in a lunatic asylum or where a man's wife has asked him to marry a particular person in the event of her death. On appeal, Vaughan Williams, L J, rejected those propositions.[10] Phillimore, J, also pointed out in *Spiers v Hunt* that 'while there may not be injury to the lunatic consort, there remains the objection of probable sexual immorality'.[11] The Privy Council considered as void a promise to marry made while a divorce was pending.[12] Further, it has been held that where the defendant has petitioned for the nullity of a voidable marriage, his promise to marry the plaintiff is void.[13] But where the marriage is void *ab initio* there is no room for a plea of public policy, as in the eyes of the law the parties have never been married to each other. Further, it does not require a court decree to pronounce such a marriage void.

Whether the plaintiff, in an action for breach of promise, where the other party is married to a third person, can recover damages depends to a large extent on the state of that party's knowledge and the moral turpitude of the transaction. Where the defendant was, to the plaintiff's knowledge, married at the time the promise of marriage was made, the claim will fail on the application of the maxim *ex turpi causa non oritur actio*.[14] On the other hand, if the plaintiff lacked knowledge of the defendant's marital status, then he is not *in pari delicto* with the defendant, and can recover damages for the breach of the promise to marry.[15]

### (B) INFANCY

The capacity of an infant to enter into a contract of marriage is governed by the general rules of the law of contract. At common law, an infant may enforce a contract to which he is a party, but the infant cannot be

[7] id. at 17.
[8] id. at 51.
[9] [1907] 23 TLR 578, 579.
[10] [1908] 1 KB 729, 739.
[11] [1908] 1 KB 720, 725.
[12] *Skippy v Kelly* (1926) 42 TLR 258.
[13] *Siveyer v Allison* [1935] 2 KB 403.
[14] *Wilson v Carnley* [1908] 1 KB 729; *Spiers v Hunt* [1908] 1 KB 720.
[15] *Wild v Harris* (1849) 7 CB 999, 137 ER 395; *Millward v Littlewood* (1850) 5 Ex 775, 155 ER 339; and *Shaw v Shaw* [1954] 2 QB 429 (CA).

sued on the contract as a defendant during his infancy. However, if he ratified the contract on his coming of age, he would be fully bound by it. This common-law rule has been altered by statute, the Infants Relief Act 1874, which has been declared a statute of general application in force within Nigeria.[16] Section 1 of that statute invalidates all contracts made by an infant except those in respect of necessaries. In *Labinjo v Abake*[17] the defendant, an unmarried girl of eighteen years of age living with her parents, was sued for the price of goods sold and delivered to her. The Police Magistrate held that the Infants Relief Act 1874 was in force in Nigeria, and dismissed the action on that ground. The plaintiff appealed to the Divisional Court, which allowed the appeal on the ground that the Act, as applied to Nigeria, should be read with modifications, and that a native should be considered to come of age when he or she attains the age of puberty. The defendant appealed to the full Court. It was held:

(i) that the Divisional Court was wrong in holding that the term 'infant' as used in the Infants Relief Act 1874, could be given a different meaning from that of the English Common Law;
(ii) that if there is a native custom whereby an unmarried girl living with her parents or guardian will not be held liable for the price of goods supplied to her for trading purposes without the consent of her parent or guardian, the Court could consider whether such custom should not be applied in this case instead of English Law.

The wholesale adoption in Nigeria of the age of twenty-one as the age of majority may be open to question. Under the various systems of native law and custom, a person is generally regarded as coming of age when he attains the age of puberty. This is consonant with the traditional social system in which individuals assume family responsibility before they attain majority in English law. For instance, a boy who has attained the age of puberty may be the head of a household in traditional society. Could it be properly argued that such a person cannot be held responsible for his promise to marry under the monogamous system, or for his other contractual promises? The two systems have, however, been brought nearer together in those countries where the voting age and the age for civil responsibility have been reduced to eighteen.[18]

Section 2 of the Infants Relief Act 1874 provides that:

No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract

[16] *Labinjoh v Abake* (1924) 5 NLR 33.
[17] ibid.
[18] See the English Family Law Reform Act 1969, by which a person attains full age on reaching the age of 18 instead of 21 (section 1). Cf. the *Ontario Law Reform Commission Report on Family Law, Part II, Marriage* (Department of Justice, Toronto 1970), which recommends a similar line of action. The voting age in the USA has been reduced to 18.

made during infancy, whether there shall be or shall not be any new consideration for such promise or ratification after full age.

This provision, therefore, bars the enforcement of any ratification made by a person when he comes of age of an earlier promise during his infancy. But this section does not apply to fresh contracts made by a person after his attainment of majority. It is for the courts to determine in each case whether or not a promise made on the attainment of full age is a ratification of a previous one, or a brand-new promise which is enforceable. The distinction between ratification and new promise has been clearly brought out in decided cases. In *Coxhead v Mullis*,[19] the parties became engaged while the defendant was still an infant. After he came of age, the parties continued on the same terms as before. Eventually, the defendant broke off the engagement. It was held that the plaintiff's action for breach of promise had to fail because the defendant's action was no more than a ratification of the earlier promise. A different decision was reached in *Ditchman v Worrall*,[20] where the facts were substantially the same. There, the infant defendant promised to marry the plaintiff. But three months after the defendant's twenty-first birthday, the plaintiff, at his request, fixed a day for their wedding, which he approved. He failed to marry her. On an action for breach of promise, it was held that the defendant's conduct after attaining majority could be construed as a fresh promise to marry, and that the plaintiff could recover for the breach of that promise.

(c) PARENTAL CONSENT

Parental consent is not necessary for a valid contract to marry if the parties are of age. This question came up for a judicial opinion in *Ugboma v Morah*.[21] In that case, an exchange of promise to marry made during infancy by two Ibos was later repeated in adult life in circumstances which made it a new agreement. The defendant, who was sued for breaking his promise, argued that in Ibo customary law a woman does not have the capacity to enter into a contract of marriage without parental consent. As no such consent was given in this case, there was no consideration for the defendant's promise, and consequently no action could lie for breach of his promise. Waddington, J, rejected this contention and stated that[22]:

> It cannot possibly be argued that where the parties are of age the withholding of consent by their parents is a bar to them contracting a Christian marriage. Parties can undoubtedly contract a valid marriage under the Marriage Ordinance without their parents' consents if they are of age. It cannot therefore be a defence to this action to say that

[19] (1878) 3 CPD 439; *Northcote v Doughty* (1879) 4 CPD 385.
[20] (1880) 5 CPD 410.
[21] (1940) 15 NLR 78.
[22] id. at 81.

plaintiff lacked the necessary capacity to make a valid promise to marry defendant unless her parents consented to him.

**4 Breach of Contract**

Two elements are necessary to constitute a breach of promise of marriage. First, it must be proved to the satisfaction of the court that there was a promise of marriage under the Marriage Act. Second, it must be shown that one party to the agreement has failed or refused to honour his obligation. When these basic grounds are established, the injured party, who may be the man or the woman, may sue the other for the breach of the contract and claim damages therefor. Even then, no damages may be recovered:

> . . . unless his or her testimony is corroborated by some other material evidence in support of such promise. The fact that the defendant did not answer letters affirming that he had promised to marry the plaintiff is not such corroboration.[23]

What constitutes material evidence is a question of law for the courts. Cockburn, CJ, laid down the criterion: 'The evidence given in corroboration need not go the length of establishing the contract; if the evidence supports the promise it is enough.'[24]

Two decided cases bring out clearly the attitude of the courts in this respect.[25] In *Bessela v Stern* the plaintiff in a breach-of-promise suit alleged that the defendant had seduced her and had repeatedly promised to marry her. Her sister gave evidence that at an interview she had with the defendant when she discovered her sister's condition, she upbraided him for the ruin and disgrace he had brought on the plaintiff. On that occasion, the defendant said, reported the sister, that 'he would marry her and give her anything', but added that she (the sister) must not expose him. The sister further stated that, after the plaintiff's confinement, she overheard a conversation between the plaintiff and the defendant in the course of which the plaintiff said to the defendant, 'You always promised to marry me, and you don't keep your word.' To this statement the defendant said he would give her some money to go away. It was held that this amounted to material evidence in corroboration of the promise.[26]

The opposite view was reached in *Wiedmann v Walpole*,[27] where in an action for a breach of promise of marriage the plaintiff stated that she and the defendant met at an hotel in Constantinople in September 1882. The defendant had intercourse with her and remained with her

[23] Section 176 Evidence Act, Cap. 62 Laws of Nigeria, 1958; *Olusanya v Ibadiaran* (1971) 1 UILR 149.

[24] *Bessela v Stern* (1877) 2 CPD 265, 271.

[25] These decisions were based on section 2 of Evidence (Further Amendment) Act 1861, which is substantially similar to section 176 of the Nigerian Evidence Act.

[26] See *Hansen v Dixon* (1906) 96 LT 32.

[27] [1891] 24 QB 537.

for a few days, giving her £100 when they parted. He also promised to marry her there. In November 1882, the plaintiff, by the defendant's arrangement, went from Constantinople to Cannes to be introduced to his mother. The plaintiff produced at the trial copies of letters written by her to the defendant after meeting the defendant's mother, in which she reminded the defendant of his promise to marry her. He gave her no reply to these letters. She also produced the defendant's signet ring, which she alleged he gave her in Constantinople. The defendant answered that the ring had dropped on the floor of the dressing room, and that she had picked it up and refused to return it. It was held that the defendant's failure to reply to her letters did not constitute evidence corroborating the plaintiff's testimony of such a promise unless there were mitigating circumstances for the defendant's omission to answer evidence in the particular case. There were, however, no such special circumstances. Further, the court refused to construe the production of the defendant's signet ring as corroboration, as there might have been several explanations of how the plaintiff came by it other than through a promise of marriage.

(A) NATURE OF BREACH

Generally a breach of promise to marry may take one of two forms – non-performance, or anticipatory breach.

*(i) Non-performance.* There may be non-performance where the time for performance is fixed. Thus, where the parties agree to marry on a particular day, the failure or refusal of one party to turn up for the marriage constitutes a breach.[28] If, on the other hand, no specific date is fixed, the law implies that the promise is one to marry within a reasonable time or at the request of one party.[29] In both instances, the basic charge is the failure of the defendant to perform his obligation when performance is due.

An interesting instance of non-performance was portrayed in the case of *Martins v Adenugba*.[30] The parties were engaged. In September 1942 the defendant informed the plaintiff's parents that he had completed preliminary arrangements for the marriage to take place on 17th September. On the appointed day, the defendant took the plaintiff to the Marriage Registry in Lagos. The defendant went into the registry alone, leaving the plaintiff outside. He came out after a while and informed the plaintiff and her relations that they had been married. After this incident, the parties proceeded on the same day to St Peter's Church, Lagos, for blessing in the Church. The plaintiff was induced to believe that she was married to the defendant. She lived with the defendant from September 1942 to December 1945, when she left him on account of his cruel conduct. On enquiry then, she discovered that no valid marriage had actually taken place. She instituted an action for breach

[28] *Lock v Bell* [1931] 1 Ch 35, 43.
[29] *Hick v Raymond* [1893] AC 22.
[30] (1946) 18 NLR 63.

of promise. Brooke, Acting CJ, held that this was a proper cause of action and that she was entitled to recover damages. The court pointed out that, alternatively, she could have sued on deceit.

However, where the promise is made subject to a condition precedent, there can be no breach until the condition is fulfilled or satisfied. This principle was brought out clearly in *Aiyede v Norman-Williams*,[31] where the parties, while studying in England and Ireland respectively, agreed to marry each other. But the defendant made his promise conditional on obtaining the consent of his father to the proposed marriage. He, therefore, wrote to his father requesting his consent to the proposed marriage. For various family reasons his father refused to give his consent. In 1959, the defendant married another woman and was sued by the plaintiff for breach of his promise to marry her. Coker, J (as he then was), who found as a fact that there was a condition precedent to the defendant's promise, held that:[32]

> Where the promise is only to be carried into effect on or after the happening of a certain contingency that contingency must happen before the promise becomes actionable. The promisee is however entitled to sue as on the breach of an executory contract where the promisor does any act whereby he would be incapable of performing the contract if and when the agreed contingency arrives.

Thus, as the necessary consent was not obtained the plaintiff's case was dismissed. Similarly, in *Cole v Cottingham*,[33] it was held that a promise made to a woman to marry her as soon as her business is settled should be construed as a conditional promise, which is not actionable unless the condition is shown to have been performed or fulfilled.

*(ii) Anticipatory breach.* A breach of contract may occur by the outright repudiation of obligation by a party, or by such conduct on his part that puts it out of his power to perform his obligations.

The first case may occur where, before the contractual date for performance, a party to the contract announces his intention not to perform. Such outright repudiation may found an action for breach. The other party to the agreement may treat the repudiation as a wrongful termination of the contract, and could bring an immediate action, as in the case of a breach of the agreement. On the other hand, he may treat the repudiatory statement as inoperative, and await the date for performance. In that case, he keeps the contract alive for the benefit of the other party as well as his own. The innocent party in such circumstance remains bound by his obligation, and may by this act enable the repudiating party to change his mind.[34] In *Frost v Knight*,[35] the plaintiff

[31] [1960] LLR 253.
[32] id. at 266.
[33] (1837) 8 Car & P 75, 173 ER 406.
[34] *Hochfer v De la Tours* 2 E & B 678; 22 LJ (QB) 455, 118 ER 922.
[35] (1872) LR 7 Exch 111.

promised to marry the defendant after the death of his father. During his father's lifetime, he announced his intention of not fulfilling his promise. The defendant, without waiting for the father's death, brought an immediate action for breach of promise to marry her. It was held that the defendant was entitled to recover damages for the plaintiff's act, which constituted a breach of the contract.

The second arm of anticipatory breach may occur where one party to an agreement by his own act puts it out of his power to perform his obligations. Such is the case where a party to a contract to marry marries another person. Thus, in *Uso v Iketubosin*,[36] the defendant promised to marry the plaintiff in 1947. In 1957 the defendant married another woman in breach of his promise to the plaintiff. Irwin, J, held that the defendant's act constituted a breach, for which the plaintiff was entitled to damages.

(B) JUSTIFICATION FOR BREACH

*(i) General defences.* A defendant in an action for breach of promise may plead some justification for the breach. He is entitled to all defences available to a defendant in an action for breach of an ordinary contract. Thus, fraud, duress or misrepresentation may provide a good defence for an action for breach of promise. In *Wharton v Lewis*[37] the defendant in an action for breach of promise successfully pleaded that he had made his promise under fraudulent and false representations about the plaintiff's former situation and the circumstances of her family. Abbott, CJ, found that the plaintiff's representation that her father would leave property for her on his death whereas in fact the father had recently compounded with his creditors, induced the defendant to make his promise. It could, therefore, be pleaded in defence.

Again, the defendant may plead that the contract to marry had been brought to an end by mutual agreement of the parties, or that the plaintiff has exonerated and discharged him from his obligation. In *Davis v Bomford*[38] it was held that where, after the defendant had expressed a desire to terminate an engagement, no correspondence took place between the parties for two years, the jury might infer that the plaintiff had exonerated the defendant from his promise before breach.

*(ii) Special defences.* Beside the general defences, a defendant in an action for breach of promise may raise certain specific defences which are personal to the plaintiff. It may be pleaded that there is some actual moral, physical or mental infirmity in the plaintiff which makes him unfit for marriage. Phillimore, LJ, in *Jefferson v Paskell* pointed out that:[39]

[36] [1957] WRNLR 187.

[37] (1824) 1 C & P 529, 171 ER 1303.

[38] (1860) 6 H & N 245, 158 ER 101; *Lowe v Piers* (1868) 98 ER 160, 163. *King v Gillett* (1840) 6 H & N 245, 151 ER 676; *Aiyede v Norman Williams* [1960] LLR 253, 269–272; *King v Gillett* (1840) 7 M & W 55, 151 ER 676.

[39] [1916] 1 KB 57, 70.

> . . . On principle it would seem that there must be some cases of mental or physical infirmity (as has been decided that there are cases of moral infirmity) which supervening after the promise, or, I would add, first coming to the knowledge of the party after the promise, will justify him or her in refusing to marry . . .

This defence presupposes the existence of four basic factors:

(1) That the plaintiff is suffering from some moral, physical or mental infirmity. It has been held that such a condition exists where the man is of bad character;[40] when the woman is loose and immodest and pregnant by a man other than the defendant;[41] where the woman has had an illegitimate child some years earlier;[42] where the man is of violent and ungovernable temper and threatens to ill-treat the defendant;[43] where one party is suffering from tuberculosis.[44] While these illustrations relate to the person of the plaintiff, it is no defence to plead the supposed status in life of the plaintiff, for example that he was regarded as wealthy when in fact he is a poor man.

(2) The infirmity must be such as to render the plaintiff unfit for marriage. Whether a particular infirmity is such as to make a party unfit for marriage is a matter of fact to be decided by the court in each case. Further, the infirmity must not be of a temporary nature, which can be cured by medical treatment. If, for instance, the infirmity merely makes the plaintiff unfit for marriage on a particular date, but is such that he may recover within a reasonable time for the ceremony, the court may not regard such an infirmity as a defence. The position may be different where the plaintiff is suffering from a prolonged or permanent illness.[45]

(3) The defence is applicable only where the defendant discovered the infirmity after the contract to marry was made, or where the infirmity only began to develop after the making of the contract. The knowledge of the defendant at the time of the contract is of importance. If he was aware of the other party's infirmity at the time of contracting, then it is only reasonable to assume that he accepted that other party along with the infirmity. In this respect, the discovery of the infirmity or its development after the making of the contract is not a new element supervening after the contract was made, so frustrating it.[46]

(4) In order to succeed, it is necessary for the defendant to show that in fact some actual infirmity in the plaintiff exists. Mere suspicion is not enough. Even if the defendant honestly believes that the plaintiff is unfit for marriage as a result of the suspected infirmity, he has not necessarily discharged the burden on him. In *Jefferson v Paskell*, for

[40] *Baddeley v Mortlock* (1816) Holt NP 151, 171 ER 195.
[41] *Irving v Greenwood* (1824) 1 C & P 350, 171 ER 1226.
[42] *Bench v Merrick* (1844) 1 Car & K 463; 174 ER 893.
[43] *Leeds v Cook* (1803) 4 Esp 256, 170 ER 711.
[44] *Jefferson v Paskell* [1916] 1 KB 57.
[45] id. at 70.
[46] See Powell, R., 'Frustration of a promise to marry' (1961) 14 *Current Legal Problems*, 100.

instance, it was held that while tuberculosis could make a party to an engagement unfit for marriage, the defendant had not proved in fact the existence of that infirmity. Similarly, the defence in *Baddeley v Mortlock* was dismissed, as the defendant could not prove that the plaintiff was in fact a man of bad character.

So far, it is uncertain whether a defendant can plead his own infirmity in defence of an action for breach of promise of marriage. The question came up squarely for decision in *Hall v Wright*.[47] There, the defendant was sued for breach of promise to marry the plaintiff. The defendant pleaded in defence his own supervening ill-health – a serious disease occasioning bleeding from the lungs, from which he was still suffering. He had been warned that the excitement of marriage would endanger his life. In the Queen's Bench, the judges were equally divided in their opinions.[48] Erle, J, who considered the defence as good, remarked that:[49]

> . . . a contract to marry is assumed in law to be made for the purpose of mutual comfort, and is avoided if, by the act of God or the opposite party, the circumstances are so changed as to make intense misery instead of mutual comfort the probable result of performing the contract.

On the other hand, Lord Campbell, CJ, refused to recognize the defence of the personal infirmity of the defendant. He did not consider such infirmity as taking the substance out of marriage, for though the woman could not have children thereby, there might be other benefits:

> . . . she might nevertheless have been affectionately attached to him, and might have innocently desired to enjoy the consortium vitae with him; she might have obtained rank and station in society as his wife; and, as his widow, she might have been dowable of his land.[50]

On appeal to the Exchequer Chamber, the court decided by a majority of four to three that the defendant could not plead his infirmity in defence of an action for breach of promise.[51] Two of the minority judgments are interesting. Baron Watson held the view that the expression 'incapable of marriage' meant two things – either incapable of going through the ceremony of marriage or incapable of performing the functions required in the married state. On either interpretation, he thought, a plea of personal infirmity of the defendant was a good defence.[52] Baron Bramwell took the opportunity in his judgment to

[47] (1858) EB & E 746; (1858) EB & B 765 (Exch Ch); 120 ER 688, 695.
[48] 120 ER 688.
[49] id. at 692.
[50] id. at 695.
[51] (1858) EB & B 765; 120 ER 695 – Williams, J, Martin, B, Crowder, J, and Willes, J. Dissent by Pollock, CB, Bramwell, B, and Watson, B.
[52] 120 ER 695, 698.

reply to the opinion expressed by Lord Campbell, CJ, in the court below. Arguing that the defendant could plead his own infirmity, the learned judge observed:

> Can it be doubted, then, if death were the certain result of the fatigue and excitement of the ceremony, that the defendant would be excused, or that impotency supervening on the promise would excuse him? Could he be bound, in performance of his promise, to commit suicide, or go through a ceremony which would be a nullity? But, if the certainty of a fatal result would excuse, so would great danger to it. If impotency would, so surely should great danger; if death from the exercise of capacity, more so . . . but to possess the lawful means of gratifying a powerful passion with the alternative of abstaining or perilling life is indeed to incur a risk of intense misery instead of mutual comfort . . .[53]

The minority opinions seem much more reasonable than the majority. First, the infirmity pleaded supervened the promise to marry, and so was not within the knowledge of both parties at the making of the contract to marry. Second, the infirmity was an act of God, well outside the control of the defendant. Surely the position would be otherwise where the infirmity was self-induced on the part of the defendant, probably to enable him to avoid the contract. Last, the position in such cases falls well within the principle of frustration in the law of contract.

In fact the minority opinion of Baron Bramwell was approved later in *Gamble v Sales*,[54] which was an action for breach of promise of marriage. In defence of the action, the defendant pleaded that he was seriously injured on active service during the first world war. By 1918, he was physically and mentally a wreck and therefore unfit for marriage. Darling, J, held that if the alleged fact were established the defence would succeed, as such a marriage would be dangerous to the defendant's life and disastrous to the state by resulting in the birth of idiotic children. But the defence failed because the defendant failed to prove his plea.

### (c) DAMAGES FOR BREACH

As in commercial contracts, the quantum of damages in action for breach of promise of marriage is subject to the rules of remoteness. The successful plaintiff may recover for damages which flow directly from the breach, or which were within the contemplation of the parties at the time of the promise.[55]

Damages awarded by the courts in this respect usually fall under three heads:

*(i) General damages.* Under this head, the plaintiff may recover for the

[53] id. at 700–701.
[54] (1920) 36 TLR 427.
[55] *Finlay v Chirney* (1888) 20 QBD 494; *Quirk v Thomas* [1916] 1 KB 516.

loss of the marriage. In this respect, the compensation may relate to the loss of the consortium of the other party. Where the plaintiff is a woman, she may claim for the loss of status of a married woman, by which she would have been entitled to support and maintenance by her husband.[56]

It is appropriate under this head to adduce general evidence as to the defendant's property and position in life. This would go to show what would have been the plaintiff's situation in society if the defendant had not broken his promise.[57] Thus, where the defendant was a minor government official and the plaintiff a prosperous trader it was held that there was no great loss of establishment or share of the defendant's affluence.[58]

*(ii) Injured feelings, wounded pride, etc.* In *Berry v Da Costa*, Willes, J, laid down the law succinctly, that:

> . . . in an action for a breach of promise of marriage, the jury are not limited to mere pecuniary loss which the plaintiff has sustained, but may take into their consideration the injured feelings and wounded pride . . .[59]

Among the factors that may increase the damages awarded are the seduction of the plaintiff, if a woman, by the defendant on the basis of a promise to marry her,[60] harsh and unfair treatment, and the lowering of her prospects of marrying another man.[61] On the other hand, it may be pleaded in mitigation of damages that the woman is in a bad state of health,[62] or, in the case of a man, that he is of a violent temper or has a bad reputation.[63]

*(iii) Special damages affecting property.* Damages may be awarded in respect of money spent or financial loss sustained by the plaintiff as a direct result of the defendant's breach of his promise. These may include money spent on durable articles intended for use on the wedding day or in the matrimonial home,[64] refreshments and other forms of entertainment for the wedding day, and frustrated hopes of a settlement. In *Shaw v Shaw*,[65] the defendant falsely represented to the plaintiff that he was a widower, and promised to marry her. The parties went through a ceremony of marriage. After the death intestate of the

[56] *Quirk v Thomas* [1916] 1 KB 516, 533, 539.
[57] *James v Biddington* (1834) 6 Car, 589, 172 ER 1377, per Alderton, B.
[58] *Ugboma v Morah* (1940) 15 NLR 78.
[59] (1866) LR 1 CP 331, 333.
[60] *Ugboma v Morah, supra, Berry v Da Costa, supra.*
[61] *Uso v Iketubosin* [1957] WRNLR 187; *Berry v Da Costa, supra.*
[62] *Gamble v Sales* (1920) 36 TLR 427.
[63] *Baddeley v Mortlock* (1816) Holt NP 151, 171 ER 195.
[64] *Uso v Iketubosin* [1957] WRNLR 186 – where the claim was rejected as the property was in the plaintiff's possession.
[65] [1954] 2 All ER 639.

defendant, the plaintiff discovered that her marriage with the defendant was null and void. On an action for breach of promise of marriage, the Court of Appeal held that she could recover £1,000 damages, which is what she would have been entitled to if she had been the widow of the deceased. Again, it has been held that loss suffered as a result of the plaintiff giving up a profitable business in consideration of a promise to marry cannot be regarded as arising from the breach of promise to marry. But such facts may be given in evidence as an aggravating circumstance.[66]

It has been suggested that the quantum of damages recoverable in a breach-of-promise action in Nigeria may be affected by the nature of relief provided by the indigenous customary law to which the parties are subject. In *Ugboma v Morah*, Waddington, J, expressed the view that in assessing damages:

> It is impossible to ignore the fact that in the customs of plaintiff's people, the custom into which both she and the defendant were born, there is no conception in the least comparable to that of damages for breach of a promise of marriage.[67]

While the learned judge was disposed to assess damages for the breach at a high figure, he allowed this factor to mitigate considerably the amount of damages he awarded. The action of the learned judge in this respect may well be open to criticism, for it involves the mixing up of two different legal systems. There is no legal justification for refusing the full remedy provided by English law merely because there is no comparable remedy in customary law. It was because the transaction was one unknown to customary law that English law was applied to the case.

*(iv) Recovery of engagement ring and presents.* When an engagement is broken, one of the immediate problems is usually that of the rights of the parties in relation to the engagement ring and presents exchanged *inter se* or given to them by third parties. Dealing with the legal nature of the engagement ring, Shearman, J, stated that:

> . . . it still retains its character of a pledge or something to bind the bargain or contract to marry, and it is given on the understanding that a party who breaks the contract must return it.[68]

In that case, action was brought to recover a diamond engagement ring which had been given by the plaintiff to the defendant on their engagement. Later, the defendant broke off the engagement without just cause.

[66] *Quirk v Thomas* [1916] 1 KB 516.
[67] (1940) 15 NLR 78, 82.
[68] *Jacobs v Davis* [1917] 2 KB 532, 533.

It was held that the defendant was bound to return the ring. A similar decision was reached in *Cohen v Sellars*.[69]

In these two cases, the principle was laid down that the party in breach of the engagement forfeits thereby any claim to the engagement ring. Thus, if the lady is guilty of breach, she is obliged to return the ring. On the other hand, where the man without just cause breaks off the engagement, he loses the right to reclaim the ring.

Turning to presents or gifts made between the parties *inter se*, a clear distinction is made between gifts which are absolute and free from conditions and those made in contemplation of marriage. With regard to the former, no claim can be made to them when the engagement is broken because they are out-and-out gifts made as between ordinary friends. But where the gift is made in contemplation of marriage, it becomes 'a wedding gift' to which certain legal conditions attach.[70] Here, as in the case of the engagement ring, the party in breach thereby forfeits any claim to such gifts. While the party in breach is obliged to return to the innocent party presents made by him in contemplation of the marriage, the innocent party, on the other hand, is entitled to keep such gifts.

Where the engagement is dissolved by the mutual consent of the parties, it has been held *obiter* that in the absence of agreement to the contrary, the engagement ring and presents made in contemplation of marriage must be returned by each party to the other.[71] Furthermore, where the marriage does not take place owing to the death or disability recognized by law of the party making such gifts, the reasonable inference is that the gifts should be returned to the donor.[72] But if the marriage takes place, it has been stated *obiter* that the engagement ring or gifts will, in the absence of agreement to the contrary, become the absolute property of the recipient.[73]

As regards gifts made by third parties in contemplation of marriage, the rule is that if the marriage does not take place such gifts must be returned to the donors.[74] Sometimes it is doubtful whether the gifts are made to the husband or wife or to both of them jointly. Generally the applicable principle in such cases is to discover the intention of donor. In some cases this may be ascertained by reference to the nature of the gift. Where the intention of the donor is discernible, it may be discovered that he made the gift to either of the parties or both. But where no clear intention is found, the courts have inferred that presents made by the relations or friends of the man were intended for him, while those coming from the woman's side belong to her.[75]

[69] [1926] 1 KB 537.
[70] *Robinson v Cumming* (1742) 2 Atk 409, 26 ER 646; *Jeffreys v Luck* (1922) 153 LT Jo 139.
[71] *Cohen v Sellars* [1926] 1 KB 536, 548.
[72] id. at 549.
[73] ibid.
[74] *Jeffreys v Luck* (1922) 153 LT Jo 139.
[75] *Hichens v Hichens* [1945] P 23, 26; *Samson v Samson* [1960] 1 WLR 190; Milner, A., 'Wedding Presents' (1960), 23 MLR, 440.

(D) INDUCING BREACH OF PROMISE

The innocent party in an action for breach of contract of marriage may recover damages not only against the other party to the agreement but also against any third party who induced such breach. Beside his contractual remedy, he is also entitled to action in tort.[76] But this is dependent on a number of factors.

The third party must be shown to have had actual or constructive knowledge of the contract, and to have intended to procure its breach.[77] Thus, where A is engaged to B and C induces B to break off the engagement, in order to make C liable it must be shown that he had knowledge of B being engaged to A.

What constitutes 'interference'? It has been laid down by the courts that it includes direct persuasion, or procurement, or inducement, applied to the contract-breaker by the third party, with the knowledge of the contract and the intention of bringing about its breach.[78] The defendant must have acted with the intention or purpose of causing damage to the plaintiff through the breach. It is immaterial whether the defendant acted with malice or not.[79]

The position where the third party by his negligence induces a party to a contract of marriage to breach the agreement has not been expressly decided. But the better view seems to be that there may not be liability on the part of the third party, unless it can be shown that he owes a duty of care to the plaintiff, and that the damage to the plaintiff was foreseeable.[80]

It must be established to the satisfaction of the court that a breach of the promise of marriage in fact occurred as a result of the third party's inducement. An action may lie against the third party even though the innocent party cannot maintain an action for breach against the other party to the contract.[81] Furthermore, only the party who is not in breach can sue in tort.[82]

The nature of the action for inducing breach of promise of marriage immediately raises the question of advice proferred by the parents or relations of a party to such agreement, leading to its breach. Surely it would be absurd to hold parents and relations liable in tort for protecting the interests of their child or relation, especially where the unsuitability of the plaintiff is an established fact. Stirling, LJ, thought *obiter* that parents in fact have a duty to offer such advice:[83]

[76] Street, H., *Law of Torts*, 3rd Edn (Butterworth, London 1963), 343.

[77] *British Industrial Plastics v Ferguson* [1940] 1 All ER 479.

[78] *Thomson v Deakin* [1952] Ch 646, 681, 691.

[79] *Lumley v Gye* (1853) 2 E & B 216, 118 ER 749.

[80] *Weller v Foot and Mouth Disease Research Institute* [1965] 3 All ER 560.

[81] *National Phonograph Coy v Edison-Bell Coy* [1908] 1 Ch 335, 368–9.

[82] *Williams v Hursey* (1959) 103 CLR 30.

[83] *Glamorgan Coal Company v South Wales Miners' Federation* [1903] 2 KB 545, 577. See also Lord Simon, LC, *obiter* in *Crofter Hand Woven Harris Tweed v Veitch* [1942] 1 All ER 142, 148. This view was applied in the Scottish case of *Findlay v Blaylock* (1937) Sc 21.

> I think that a father who discovered that a child of his had entered into an engagement to marry a person of immoral character would not only be justified in interfering to prevent that contract from being carried into effect, but would greatly fail in his duty to his child if he did not. This duty is recognized by the court.

On the other hand, such advice may be treated as a privileged statement between members of a family, which may not be a cause of action unless malice is proved.[84]

(E) SURVIVAL OF ACTION

The common-law principle relating to the survival of right of action for civil wrongs is enshrined in the maxim *actio personalis moritur cum persona*.[85] By this rule, the right of action for breach of promise of marriage does not survive against the estate of the promisor. But any special damage to the estate of the promisee caused by the breach may survive.[86]

This common-law rule is no longer in force in the six Northern States, the Western and Mid-Western States and the Lagos State, where it has been radically altered by statutes.[87] The law in these areas is that on the death of any person, all causes of action subsisting against or vested in him shall survive against or, as the case may be, for the benefit of his estate.[88] But where the right of action for breach of promise of marriage survives for the benefit of the estate of a deceased person, the damages recoverable in favour of that estate are restricted in two respects. First, exemplary damages are not recoverable.[89] Second, the damages recoverable shall be limited to such damage, if any, to the estate of the aggrieved party as flows from the breach.[90] Obviously, what is recoverable must relate to damage to the proprietary interest or right of the deceased innocent party. Such proprietary interest has been held to include what would have passed to a woman on the man's death intestate, if he so dies without fulfilling his promise.[91]

Moreover, where an action has survived, proceedings in respect thereof may only be maintained if they were pending at the death of the guilty party. Alternatively, the cause of action must have arisen not earlier than six months before his death, and the proceedings in respect thereof must begin not later than six months after representation is

[84] *Todd v Hawkins* (1837) 8 C & P 88, 173 ER 411.
[85] *Rose v Ford* [1937] AC 826, 833; *Kirk v Todd* (1882) 21 Ch D 484, 488.
[86] *Finlay v Chirney* (1888) 2 QBD 494; *Quirk v Thomas* [1916] 1 KB 516; *Riley v Brown* (1929) 98 LJKB 739.
[87] For the Northern States see: Civil Liability (Miscellaneous Provisions) Law, Cap. 23 *Laws of Northern Nigeria* 1963; for the West and Mid-West: Administration of Estates Law 1959, Cap. 1 *Laws of Western Region* of Nigeria 1959; for Lagos State see: Civil Liability (Miscellaneous Provisions) Act 1961, No. 33 of 1961.
[88] North S 3(1); Lagos S 3(1); West and Mid-West S 15(1).
[89] North S 3(2)(a); West and Mid-West S 15(2)(a); Lagos S 5(a).
[90] North S 3(2)(b); West and Mid-West S 15(2)(b); Lagos S 5(b).
[91] *Shaw v Shaw* [1954] 1 QBD 429, 441 per Denning, LJ.

made.[92]

Although the right of action for breach of promise to marry is still part of our law it is increasingly being regarded with disfavour. There is hardly any rational basis in contemporary society for granting financial compensation as relief in respect of a party's refusal to honour his promise to marry. Undoubtedly, the time is overdue to give a decent burial to this anachronism, inherited from English law. Even our former colonial masters have found this branch of the law too out of tune with the times to be retained.[93]

## B CONTRACT TO MARRY UNDER CUSTOMARY LAW

Marriage under customary law may be preceded by betrothal. The customary-law rules relating to betrothal and its incidents differ materially from the contract to marry under English law. Consequently, it is important to ascertain in each case the type of marriage to which the promises of the parties relate.

### 1 Age

In Nigeria customary law does not generally lay down any lower age-limit for betrothal. Girls may be betrothed at an early age, sometimes from birth. In some areas, a father may indicate his desire to secure a child which is *en ventre sa mere*, if born a female, as a wife for his son. This is achieved by sending gifts of firewood to an expectant mother. At the birth of the child, if a female, the intention may be strengthened by some betrothal gifts made to the mother of the child. In Ibo custom, such gifts include a ball of white chalk which the mother rubs on the baby. Later, the claim over the child is further consolidated by occasional presents to the child and her mother, and frequent visits by the parents of the intended husband. The betrothal may be with an infant son.[94] While betrothal at birth is known, it is more usual when the girl has attained the age of about five. Child betrothal involves many evils. In the first place, it provides an easy avenue for the slave trade, as slave traders claim that their child victims are their wives. Second, it involves committing a child who is incapable of expressing his or her wish to a marriage arrangement. Further, it may involve the defiling of infants.

[92] North S 3(3); West and Mid-West S 15(3); Lagos S 3(2). Note that in accordance with S 15(3)(b) of the Administration of Estate Law the cause of action must not have arisen earlier than three years before the death of the promisee.

[93] The English Law Reform (Miscellaneous Provisions) Act 1970 abolishes actions for breach of promise of marriage and makes provisions with respect to the property of, and gifts between persons who have been engaged to marry.

[94] Forde, Daryll and Jones, G. I., *The Ibo and Ibibio Speaking Peoples of South Eastern Nigeria*, Ethnographic Survey of Africa, Western Africa Part III (International African Institute, London 1950), 77; Meek, C. K., *Report on Social and Political Organisation in Owerri Division* (Government Printer, Lagos 1933), 47; Forde, Daryll, *The Yoruba Speaking Peoples of South Western Nigeria*, Ethnographic Survey of Africa (International African Institute, London 1951), 28; Okojie, C. C., *Ishan Native Law and Custom* (John Okwesa & Co, Yaba, Lagos, 1960), 101.

But this stricture is to some extent ameliorated by the fact that neither consummation nor domestic union takes place until after the girl has attained the age of puberty.

Betrothal gifts merely indicate the intention on both sides to make and accept bride-price, and to see the children involved married at a future date. It does not constitute a contract. It is merely a type of social relationship without legal incidents.

Some effort has been made to stem the incidence of child betrothal in the Eastern States. In these areas, the age of betrothal has been laid down by the Age of Marriage Law 1956,[95] which applies solely to marriages under customary law. Section 3(1) of the Law provides that: 'A . . . promise or offer of marriage between or in respect of persons either of whom is under the age of sixteen shall be void.' Further, by Section 6(2), 'No court shall in adjudicating any matter or executing any decree or order recognize any . . . promise or offer of marriage, which is avoided by Law.'

### 2 Parties to the agreement

According to the practice under customary law, the usual parties to a betrothal are the parents or guardians of the spouses-to-be. But where the prospective bridegroom is *sui generis*, particularly where he is a widower or is taking a second or subsequent wife, he may conclude a betrothal on his own without the participation of his family.

### 3 Consents

Two types of consents are relevant here: consent of the parties and parental consent.

#### (A) CONSENT OF THE PARTIES

Where the parties are capable of granting their consent, customary law requires that they consent to the betrothal. The modern trend is for the parties to agree beforehand to marry each other before the betrothal arrangement is undertaken.

If the parties are adults, the formal proposal is made by the father or guardian of the man during the first visit of the family of the prospective bridegroom to the parents of his wife-to-be. On that occasion, the wife-to-be is brought into the joint family meeting and asked expressly whether she approves of the man as her prospective husband. She may give her answer by a nod or affirmative reply. Usually, in Ibo custom, she indicates her acquiescence by handing over the remainder of a glass of wine, out of which she has drunk, to the man or the eldest member of his family. Sometimes both the man and the girl are formally asked to indicate their approval of each other before the first joint family meeting. If the bride-to-be is of tender age the parents' or guardian's consent is regarded as sufficient for the betrothal. The same is true where the prospective bridegroom is not capable of expressing his consent.

[95] Cap. 6 of *Laws of Eastern Nigeria*, 1963.

(B) PARENTAL CONSENT

Where either of the spouses-to-be is of tender age, the consent of the parents or guardian is necessary for a betrothal. But in the case of a man of full age, he may become a party to a betrothal arrangement without the consent of his parents or guardian. On the other hand, parental consent is mandatory in the case of a bride-to-be, whatever her age. The explanation for this rule is that unless the parents consent there will be no proper person to accept the dowry, which is a basic element in customary-law marriage.

The picture which emerges from this set-up is that the betrothal agreement may operate on two levels, personal and family. Primarily, it is an agreement between the parties to marry each other. But this agreement often requires the approval of both families. Consequently, in addition to the primary contract between the parties, a secondary contract between their respective families may also be discerned. To a large extent the latter is a social contract, not intended to create legal relations.

### 4 The betrothal

The betrothal becomes effective on the agreement of the parties and their respective families and the payment of bride-price or dowry.[96] Up to this point there is no binding contract of marriage, and each party may withdraw from the arrangement.

### 5 Breach

(A) TERMINATION OF AGREEMENT

The betrothal may be terminated by the refusal of one party to go through the marriage, or by an outright repudiation of the agreement. The rescission may be effected by the family of either of the spouses-to-be, or, in the case of adults, by one of the parties to the contract to marry. Such termination of the betrothal may be for any reason or for no reason at all. The probable grounds of breach include *inter alia* that one of the parties is of bad character, or that one of the families has been found on investigation to be disreputable. Moreover, the breach may be due to the fact that one party has changed his mind, or that an oracle has forecast doom for the proposed marriage. There is never any question of legal justification for the breach. On the other hand, the betrothal may be brought to an end by the mutual agreement of the parties or their families.

(B) ACTION FOR BREACH

Generally, customary law does not provide a right of action for the breach of executory contracts because such mere exchange of promises is not regarded as constituting a contract. Moreover, even where the contract is executed, and is recognized as an agreement by customary law, there is no strict enforcement of the agreement. The customary-

[96] See Chapter 2, p. 49.

law relief is usually to return the parties to the *status quo ante*, without any grant of general or special damages. Consequently, under most systems of customary law in Nigeria there is no recognized right of action for breach or repudiation of promise of marriage. Furthermore, there is no legal obligation to compensate the innocent party for injured feelings or the loss of the marriage. Probably the only sanction for the breach is a moral one, exerted by the community to which the parties belong.

### (c) RECOVERY OF DOWRY AND GIFTS

In most areas customary law allows the recovery by the man of the bride-price and betrothal gifts when the betrothal comes to an end. Only substantial gifts made in contemplation of the marriage are recoverable. Gifts made out of mere affection or ostentation are not recoverable. The man's right of recovery is only slightly affected by his guilt. Where, for instance, his conduct is reprehensible, he may not recover all the presents, but this will not affect his claim to the full dowry or bride-price.

# 2
# The Marriage

## A STATUTORY MARRIAGE

From the time Nigeria became a British dependency till the present, the celebration of monogamous marriage here has been governed by statute law. It is, therefore, necessary to give a brief historical sketch of the statutory developments in this field.

### 1 Historical background

After the cession of Lagos to the British Crown in 1861, the first statutory provisions on marriage for the Settlement of Lagos came into existence in 1863. The Marriage Ordinance[1] of that year provided for 'the granting of licences for marriages in the Settlement of Lagos and its dependencies'. Further, the Registration Ordinance[2] of the same date dealt with the registration and solemnization of marriages within the Settlement of Lagos. In 1872 and 1873 respectively, there was a Divorce Ordinance[3] applicable also to the Settlement. These were repealed in 1877. While Lagos was part of the Colony of the Gold Coast, the Marriage Ordinance 1884[4] was enacted for that Colony. This was the first comprehensive piece of legislation dealing with various matters relating to the solemnization of marriages. It repealed all the earlier enactments. In 1886 Lagos was separated from the Gold Coast Colony, but the 1884 Ordinance continued to apply in Lagos.

It is significant that neither the 1884 Ordinance nor its predecessors applied to the then Protectorate of Nigeria. Consequently, outside the Colony of Lagos it was possible to contract either a customary-law marriage or a Christian marriage in accordance with the rites of the church. But in 1900 part of this gap was filled by the promulgation of the Marriage Proclamation[5] for the Protectorate of Southern Nigeria. Its provisions were similar to those of the 1884 Ordinance.

With the merger of Lagos Colony and the Protectorate of Southern Nigeria in 1906, the Marriage Proclamation was repealed and the 1884 Ordinance applied to the whole of the new political and administrative

[1] No. 10 of 1863.
[2] No. 21 of 1863.
[3] No. 2 of 1872 and No. 10 of 1873.
[4] No. 14 of 1884.
[5] No. 20 of 1900. This statute was amended by No. 22 of 1901, No. 6 of 1902 and No. 3 of 1903.

entity.[6] Meanwhile, the Protectorate of Northern Nigeria was left out of these developments. Up to 1907 there was no provision for statutory marriage in that part of Nigeria. But in that year, the defect was made good by the issue of the Marriage Proclamation 1907[7] for the Northern Protectorate. This piece of legislation, like its Southern counterpart, was similar to the 1884 Ordinance.

The merger of Northern and Southern Nigeria in 1914 made it imperative to streamline the marriage laws in the new political entity, Nigeria. This was achieved through the Marriage Ordinance 1914,[8] which applied throughout Nigeria. It repealed the Marriage Ordinance 1908, the Marriage Proclamation 1907, and the Foreign Marriage Ordinance 1913. With minor amendments, this statute still continues to regulate the celebration of monogamous marriages in Nigeria.[9] The 1914 statute is substantially similar to the 1884 Ordinance and based on the same principles of monogamy as the English law of marriage.[10] However, the cardinal principle of the Nigerian statute is that it made the celebration of marriage a purely civil function, leaving it open to the parties to observe any religious ceremony they may think fit.[11]

Although today the celebration of monogamous marriage in Nigeria is regulated by the Marriage Act, such marriage is usually referred to as statutory marriage. For the purposes of clarity this term will be used in our discussions.

## 2 Essential validity of marriage

The parties to a marriage under the Marriage Act must possess the necessary capacity.

### (A) AGE

The Marriage Act does not lay down any mandatory age for marriage. This vacuum on an important and fundamental matter is a serious omission which requires immediate remedial action. Before March 1970, when the Matrimonial Causes Decree[12] became effective, one school of thought held the view that the lacunae in the marriage law should be filled by applying the 'law and practice for the time being in force in England'.[13] If this were accepted, the English age of marriage prescribed by the Marriage Act 1949, which is sixteen years, would be

[6] Marriage Proclamation 1906 (No. 10 of 1906) and Marriage Ordinance 1908 (No. 95 of 1908).
[7] No. 1 of 1907 (*Laws of the Protectorate of Northern Nigeria*, 1910, 541).
[8] No. 18 of 1914.
[9] Marriage Act Cap. 115, *Laws of the Federation of Nigeria*, 1958.
[10] Marriage Act, 1949.
[11] Zabel, 'The legislative history of the Gold Coast and Nigerian Marriage Ordinance' [1969] *JAL* Vol. 13, 64–79, 158–178.
[12] No. 18 of 1970; LN 26 of 1970.
[13] Section 4 of State Courts (Federal Jurisdiction) Act, Cap. 177, *Laws of the Federation of Nigeria*, before its repeal by the 1970 Decree, Section 115(2).

applicable in Nigeria.[14] Whatever may be the validity of this point of view, the possibility of its application has been lost since the 1970 Decree came into force, banning the application of English law.[15]

Section 3(1)(e) of the Matrimonial Causes Decree 1970 makes a marriage void where either of the parties is not of 'marriageable age'. But nowhere in the statute is the term 'marriageable age' defined.[16]

In the absence of a statutory definition of age of marriage, recourse may be had to the common-law rule on the subject. Part of the received English law in Nigeria is the common law of England. Under the common law, a valid marriage may be contracted if the parties have attained the age of puberty – fourteen years in the case of a boy and twelve years for a girl.[17]

(B) PROHIBITED DEGREES OF CONSANGUINITY AND AFFINITY

The general rule is that the parties to a statutory marriage must not be within the prohibited degrees of consanguinity or affinity.[18] Before 1970, the prohibition of marriage within certain degrees of consanguinity and affinity was prescribed by section 33(1) of the Marriage Act, which still governs marriages celebrated before that date. However, the prohibited degrees in respect of marriages contracted since 1970 are now contained in the Matrimonial Causes Decree 1970. Under this statute, a marriage is prohibited if the woman is, or has been, the man's ancestress, descendant, sister, father's sister, mother's sister, brother's daughter, sister's daughter. Marriage is also prohibited on the ground of affinity between a man and his wife's mother, wife's grandmother, wife's daughter, wife's son's daughter, wife's daughter's daughter, father's wife, grandfather's wife, son's wife, son's son's wife, daughter's son's wife. The reverse position applies to a man. It is immaterial whether the relationship is of the whole blood or half-blood, or whether it is traced through, or to, any person of illegitimate birth.[19] But an exception has been made to this general rule. Section 4 of the Matrimonial Causes Decree 1970 enables two persons within the prohibited degrees of affinity who wish to marry each other to apply, in writing, to a High Court Judge for permission to do so. The judge may by order permit the applicants to marry each other if he is 'satisfied that the circumstances of the particular case are so exceptional as to justify the granting of the permission sought'.[20] It is necessary to ascertain what may

[14] Kasunmu, A. B., and Salacuse, J. W., *Nigerian Family Law* (Butterworth, London 1966), 66; *contra:* Phillips, A., 'Marriage Laws in Africa' in *A Survey of African Marriage Family Life*, 258.

[15] Section 8 of Matrimonial Causes Decree 1970 and Section 115(2)(d).

[16] See *Agu v Agu* Suit No. E/5D/70 (unreported), High Court, Enugu, 27 September 1971. 'Marriage Age' in the Australian Marriage Act 1961 (No. 12) is defined in S 11 of the statute as that of a male who has attained the age of 18 years or that of a female who has attained the age of 16 years.

[17] *Harrod v Harrod* (1854) 1 K & J 4, 69 ER 344.

[18] Section 3(1)(b) of the Matrimonial Causes Decree 1970 makes such marriage void.

[19] Schedule 1 (Section 3) MCD 1970.

[20] Sections 4(1) and 4(2).

amount to the 'exceptional circumstances' that will justify the judge permitting such unusual marriage. Nowhere in the statute is the phrase 'exceptional circumstances' defined. It is submitted that the phrase means situations that are beyond the ordinary and are sufficiently serious as to permit the celebration of a marriage which otherwise would be void. Such situations would not include the fact that the parties are very much in love with one another or have been engaged to each other for a long period. But, where the relationship is out of the ordinary, the position is different. An illustrative case is where parties who come from a village cohabit in a town without knowing the relationship between them, and beget a child. If they want to marry each other this may qualify as an exceptional situation.

Where the parties marry in pursuance of permission granted by the judge, their marriage will be valid notwithstanding that they are within the prohibited degree of affinity, but it may be annulled on any other ground.[21]

High Court judges do not possess inherent jurisdiction in this respect. They can fulfil this function only where the Head of the Federal Military Government has entered into an arrangement with the Governor or Administrator of a State for the fulfilling by judges of the High Court of that State of such functions.[22] Rules of court made under the Decree may include provisions for the practice and procedure with regard to such applications.[23]

Beside the strict legal considerations, the moral propriety of the exception allowed by section 4 of the Decree is important. It may be argued in support of the provision that section 4 applies only in 'exceptional circumstances'. While the contention may be valid, the section is nevertheless open to abuse and therefore dangerous, especially as the 'exceptional circumstances' may partly be created by the parties.

### (c) NEITHER PARTY MUST BE ALREADY MARRIED

Marriage under the Act is monogamous in nature, being a union of one man and one woman to the exclusion of all others. Consequently, a party to a subsisting statutory or customary-law marriage has no capacity to enter into another statutory marriage with another person. Non-observance of this rule makes the subsequent marriage void, and is an offence punishable by imprisonment.[24] A party to a subsisting marriage under customary law has no capacity to contract a statutory marriage with a third party.[25] But the same parties to the customary-law marriage may contract a subsequent and valid statutory marriage.[26]

[21] Section 4(3).
[22] Sections 4(4) and 4(5).
[23] Section 4(6).
[24] Section 370 of the Criminal Code, which prescribed seven years' imprisonment, and Sections 35 and 48 of the Marriage Act – which lays down five years' imprisonment. *R v Princewill* [1963] NNLR 54; *Craig v Craig* [1964] LLR 96.
[25] S 33(1) of Marriage Act; S 47 makes the act punishable with five years' imprisonment.
[26] S 33(1) of Marriage Act.

In the light of the above rules, it may be concluded that persons who may be parties to a valid statutory marriage are:

(i) persons who have not been previously married to a third party, either under the Marriage Act or under customary law;

(ii) persons who, having been previously married under the Marriage Act, have obtained valid decrees of divorce; and

(iii) in the case of a subsisting customary-law marriage, the parties thereto, so long as the subsequent statutory marriage is between them. If the subsequent marriage is between one of the parties to the customary-law marriage and a third party, then it is illegal. However, if a man is married to several wives under customary law, he may contract a valid statutory marriage with one of his customary-law wives, or with a third party, so long as he first obtains the dissolution of the other marriages.

(D) CONSENT OF THE PARTIES

The voluntary consent of the parties is a prerequisite for the celebration of statutory marriage. Absence of such consent, or the granting of it under duress or misapprehension, vitiates the agreement.[27]

(E) PARENTAL CONSENT

Where either party to a statutory marriage, not being a widow or a widower, is under twenty-one years of age, he or she must obtain the written consent of the father. But if the father is dead or of unsound mind or absent from Nigeria, the mother may give the necessary consent. Where both parents are dead or are of unsound mind or absent from Nigeria, the guardian of the minor can give the consent.[28] The written consent is to be signed by the person giving it. If the parent or guardian cannot write or is an illiterate, he may affix his mark to the document in the presence of a high court judge, or a magistrate, or a registrar, or person of similar status.[29] If there is no parent or guardian of such party residing in Nigeria and capable of consenting to the marriage, then the consent may be given by a state governor, or a high court judge, or any officer of or above the grade of assistant secretary in the civil service.[30]

It is important to determine whether parental consent is necessary for the celebration of valid statutory marriage. This point came up squarely for decision in *Agbo v Udo*.[31] The plaintiff contracted a statutory marriage with his wife. He later petitioned the court for the dissolution of the marriage on the ground of his wife's adultery with a co-respondent. The co-respondent contended that the wife was a minor at the time the marriage was celebrated, and that no parental consent was obtained, as required by the law. Consequently, there was no valid marriage between the applicant and his wife which the court might

[27] Section 3(1)(d) of the Matrimonial Causes Decree 1970.
[28] Section 18 of the Marriage Act.
[29] Section 19.
[30] Section 20.
[31] (1947) 18 NLR 152.

dissolve. It was held that notwithstanding the absence of parental consent the marriage was valid under Section 33(3)[32] of the Marriage Act. While the absence of parental consent does not vitiate the marriage, it is an offence punishable with two years' imprisonment for any person fully aware of the absence of such consent to marry or to assist or procure any other person to marry the minor.[33]

(F) SANITY

It is necessary that the parties to a statutory marriage are sane. If one of the parties is insane and therefore mentally incapable of understanding the nature of the marriage contract, the marriage will be void *ab initio*.[34]

## 3 Formal validity of marriage

The Marriage Act lays down certain preliminary formalities, which are to be fulfilled before the solemnization of marriage under that statute. Before embarking on the detailed examination of the formalities of marriage, it is necessary to draw attention to the position of marriage registrars.

The Head of State is empowered to divide Nigeria by order into marriage districts.[34a] For each district, there is appointed a registrar of marriages. Above the marriage registrar, there is a principal marriage registrar.[35] Every marriage registrar and the Principal Registrar have offices at places appointed by the appropriate central or state Commissioner.[36]

(A) PRELIMINARIES OF MARRIAGES

*(i) Notice of marriages.* The first step to be taken by persons who desire to marry under the Marriage Act is to complete and sign a notice of marriage in the prescribed form,[37] which may be done by either of the two parties. The form of notice is supplied gratuitously on application to the registrar of every marriage district.[38] When completed, the form is to be lodged with the registrar of the district in which the marriage is intended to take place. On receipt of the notice, the registrar enters its details in the Marriage Notice Book. The notice itself is then displayed on the outer door or public notice board of the registrar's office, and should remain so displayed until the registrar's certificate is granted

[32] This section validates all marriages except those invalidated in the preceding subsections of the section.

[33] Section 49 of Marriage Act.

[34] Section 3(1)(d)(iii) of the Matrimonial Causes Decree 1970.

[34a] Section 3 of the Marriage Act; Marriage (Designation of Districts) Order, 1971 LN 73 of 1971.

[35] Section 4 of the Marriage Act; Marriage (Appointment of Principal Registrar, Registrars, etc.) Notice 1971 of LN 72 of 1971.

[36] Section 5 of the Marriage Act; Marriage (Location of Marriage Offices) Directions 1971 LN 74 of 1971.

[37] Sections 7 and 8 of Marriage Act and Form A First Schedule. Where the applicant is an illiterate the form is in Form B First Schedule.

[38] Section 9.

or three months have elapsed. Inspection of the Marriage Notice Book is open to the general public during office hours without a fee.[39]

*(ii) Registrar's Certificate.* The registrar may, after twenty-one days and up to three months from the date of the notice, on the payment of the prescribed fee, issue his certificate to the applicant. But before doing so the registrar must be satisfied by affidavit of the applicant that:

(a) one of the parties has been resident within the district in which the marriage is intended to be celebrated for at least fifteen days preceding the granting of the certificate;
(b) each of the parties to the intended marriage, if not a widow or widower, is twenty-one years old or, where he or she is under that age, the requisite consent has been obtained in writing and attached to the affidavit;
(c) there is no impediment of kindred or affinity or any other lawful hindrance to the marriage; and
(d) neither of the parties to the intended marriage is married by customary law to any person other than the person with whom such marriage is proposed to be contracted.[40]

Such affidavit may be sworn before a registrar, or an administrative officer, or a recognized minister of religion.[41] The person taking such affidavit is required by law to explain to the maker what are the prohibited degrees of consanguinity and affinity. He must also explain the penalty imposed by law for contracting marriage under the Marriage Act with a third party while still married to another person under customary law, or for contracting marriage by customary law when already married by the Act. Failure to make these explanations is punishable with imprisonment for two years.[42] The person making the explanations must also sign a declaration thereon that he has given the required explanation and that the person making the affidavit appeared to fully understand it.[43]

The marriage must take place within three months of the date of the notice. Failure to comply with this requirement makes the notice and all proceedings consequent thereupon void. The parties have to give a fresh notice if they desire to contract a valid marriage.[44]

*(iii) Special licence.* In some cases, the procedure for the notice of marriage and the registrar's certificate may be circumvented. The Governor of a State may, if he is satisfied with the circumstances of a particular case, dispense with the giving of notice and the issue of the registrar's certificate. Then he may, if satisfied by affidavit that there is

[39] Section 10.
[40] Section 11(1).
[41] Section 11(2).
[42] Section 11(3).
[43] Section 11(4).
[44] Section 12.

no lawful impediment to the proposed marriage and that the necessary consent, if any, to the proposed marriage has been obtained, grant his own licence to the applicant.[45] The special licence will authorize the celebration of a marriage between the parties named therein by a registrar or a recognized minister of a religious denomination or body.

Special licence is granted, for instance, where, *inter alia*, the parties cannot wait for the prescribed period of twenty-one days after lodging a notice with a registrar. Further, such special licence is often granted where a public figure desires to contract a marriage quietly and without publicity.

*(iv) Caveat.* A caveat may be entered against the issue of the registrar's certificate by any person whose consent to the marriage is required by law, or by anyone who knows of any just cause why the marriage should not be celebrated. The caveat is entered by writing the word 'Forbidden' opposite the entry of the notice in the Marriage Notice Book and appending the writer's name, address and grounds on which he claims to forbid the issue of the certificate. Once this is done, the registrar may not issue his certificate until the caveat is removed.[46] He is required by law, in that case, to refer the matter to a judge of the High Court of the State. The judge is empowered to summon the parties to the intended marriage and the person who entered the caveat to appear before him. He must then require the caveator to justify his grounds for objecting to the issue of the registrar's certificate. The judge must hear and determine the case in a summary way, subject to a right of appeal to the Supreme Court.[47]

If the judge is satisfied that the grounds for opposing the issue of the certificate are insufficient, he may remove the caveat by cancelling the word 'Forbidden' in the Marriage Notice Book. He then writes below the entry and cancellation the words 'Cancelled by Order of the High Court', and signs his name there. The registrar then issues his certificate, and the marriage may proceed as if no caveat had been entered. In computing the three months' period in relation to the notice of marriage, the time that elapses between the entering of the caveat and its removal is not taken into account.[48]

The grounds on which a caveat may be successfully entered include, *inter alia*, that one of the parties to the intended marriage is already married to a third party, either under the Marriage Act or under customary law.[49] Where an existing marriage is alleged, it must be satisfactorily proved. Mere engagement or betrothal of one party to a

[45] Section 13. The licence is in Form D in the First Schedule.

[46] Section 14(1). Where the caveator is an illiterate the caveat shall be entered on his behalf in the Marriage Notice Book by the registrar on the verbal notice of such person – Section 14(2).

[47] Section 15.

[48] Section 16. The judge may award damages and costs to the party injured – Section 17.

[49] *In re Grace Spencer – Caveatrix* [1964] 2 All NLR 171.

third party is not enough. In *Olikagbue v Olikagbue*[50] the caveatrix, Victoria Olikagbue, entered a caveat with the registrar of marriages, Benin, against the proposed marriage between one Christopher Olikagbue and a woman, Anthonia E. Oghobanghase. The caveatrix alleged that she was married to Christopher Olikagbue in 1954 according to the customary law of their people of Owarrealubor, in the Agbor District of Mid-Western State. The respondent, Christopher, paid the customary dowry, and she was later 'led home' to the respondent as his wife, in the customary manner. There were six children of the marriage. In 1966 the respondent deserted her and arranged to marry Anthonia. Idigbe, CJ, held that a valid customary-law marriage was subsisting between the petitioner and respondent and that therefore the respondent could not marry Anthonia.

This case may be contrasted with the leading case of *In the Matter of the Marriage Ordinance (Beckley and Abiodun)*.[51] Beckley, a Lagosian, while living in Lagos, became engaged to Miss Alade of Lagos. He later left Lagos for Jos. While he was there, his father, at Beckley's request and authorization, effected the payment of dowry and celebration of the *Idana* ceremony in accordance with Yoruba customary law. Miss Alade continued to live with her parents in Lagos. Meanwhile, Beckley met Miss Abiodun in Jos and they agreed to marry each other. Notice of the intended marriage was given to the registrar of marriages at Jos. Beckley's father entered a caveat on the ground that the *Idana* ceremony in respect of Miss Alade constituted a valid marriage by Yoruba custom and so precluded a marriage under the Marriage Act with Miss Abiodun. It was held that:

> the performance of the *Idana* ceremony without a subsequent taking of the girl to the intended husband's house did not effect a marriage by Yoruba (Lagos) law and custom so as to preclude the intended husband from making a marriage with another person under the provision of the Marriage Ordinance.

(B) CELEBRATION OF MARRIAGE

When the parties to an intended marriage have obtained either a registrar's certificate or a special licence they may be married in one of two different ways.

*(i) Marriage in a licensed place of worship.* The Governor of a State is authorized by the Marriage Act to license any place of public worship within his State to be a place for the celebration of marriages. Such licence may also be revoked. Notice of the approval or revocation must

[50] Suit No. M/17/66 (unreported), Benin High Court, 22 September 1966; *In the matter of the Intended Marriage between Samson Omofowa and Miss Adiza Momoh (In Re Chief Ghafe II)* Suit No. M/1/68 (unreported), Ovie-Whiskey, J, High Court, Ubiaja, 23 February 1968.

[51] (1943) 17 NLR 59; Caveat – *Re proposed marriage between Ayorinde and Aina* [1964] LLR 71; on Ibo custom see *Ikedionwu v Okafor*, Mbanefo, CJ (1966–67) 10 ENLR 178.

be published in the State Gazette.[52]

The parties may have their marriage celebrated in a licensed place of worship by any recognized minister of the church, denomination or body to which such place of worship belongs. The marriage must be celebrated with open doors between 8 a.m. and 6 p.m. in the presence of at least two witnesses beside the officiating priest. Such celebration must be in accordance with the rites or usages of marriage observed in such church, denomination or body.[53] Consequently, it is contrary to the law, for instance, for a Methodist priest to solemnize a marriage in a licensed Salvation Army Church, either according to the rites of the Salvation Army or according to those of his own church. In all cases, it is important that the celebrant must be a recognized minister of religion of the church. Whether a person can answer to that description depends on the rules and procedures of the particular church or denomination with regard to the holding of the office of priest. A marriage performed by a person who is not a recognized minister of the religious organization is void.[54]

A minister of religion is enjoined not to celebrate any marriage if he knows of any just impediment to such marriage. Further, it is mandatory that he should not solemnize a marriage until the parties thereto deliver to him the registrar's certificate or a special licence.[55] Moreover, he must not celebrate any marriage except in a licensed place of worship, or other place mentioned in a special licence.[56]

It may be necessary to determine at what point in the church proceedings the marriage is in fact contracted. Marriage in church is essentially marriage *per verba de praesenti*, that is, a declaration by the parties before witnesses, including an ordained priest, that they accept each other as husband and wife. This is the essential part of the church service. The reciprocal taking of each other for wedded wife and wedded husband till parted by death constitutes the act of marriage. The subsequent giving of the ring, the joining of hands, and publication of the fact of marriage by the minister are symbolical and declaratory of a marriage that has already taken place by the consent of the parties.[57]

Immediately after the celebration of any marriage, the officiating minister is required to complete the marriage certificate in duplicate. He must also enter the same details, which include, *inter alia*, the names of the parties, the date of the marriage and the names of the witnesses, on the counterfoil.[58] The duplicate copies of the certificate are signed by the officiating minister, the parties, and two or more witnesses to the marriage. Furthermore, the counterfoil must bear the priest's

[52] Section 6.
[53] Section 21.
[54] Section 33(2)(d).
[55] Section 22.
[56] Section 23.
[57] *Beamish v Beamish* (1859–61) 9 HL 274. Per Willes, J, at 330, per Lord Campbell, LC, at 339; 11 ER 735.
[58] Section 25.

signature. The priest is then obliged to hand over one copy of the certificate to the parties and transmit the other, within seven days, to the registrar of marriages for the district in which the marriage took place. The registrar must file the copy of the certificate remitted to him.[59]

Nigeria does not provide for marriage to be celebrated in any particular church. Moreover, the Marriage Act makes no provision for the publication of banns of marriage, as are required for marriages in the Church of England.[60] But some Nigerian churches insist on the publication of banns of marriage before persons are married. Usually, the banns are published by being read aloud at morning services on three successive Sundays. While this custom is not based on the law but on the rites and practice of the church, it serves some useful purpose. The publication of banns enables the religious community to be aware of the proposed marriage, so that anyone who has knowledge of any impediment to the marriage may come forward and acquaint the priest with it. Once any valid objection is raised to the celebration of the marriage, the priest is obliged to refuse to go through with it.

The various churches celebrate marriages for their own members and converts. There is no legal obligation on a priest to marry any persons who desire to contract a marriage. He may refuse the celebration of marriage, even for members of his church, especially where the religious requirements have not been fulfilled. Section 107 of the Matrimonial Causes Decree 1970 provides that a minister of religion shall not be bound to solemnize the marriage of a person whose former marriage has been dissolved, whether in Nigeria or elsewhere, otherwise than by death. This provision does not seem to achieve any legal objective. As has been pointed out, there is no legal obligation on a minister of religion to celebrate any marriage in Nigeria. Where a divorced party is involved, very little if any difference is made. But the provision may be relevant only in relation to the observance of the religious rules of some denominations. For instance, the Catholic Church does not accept the dissolution of marriages by secular courts. Consequently, a marriage which has been so dissolved remains intact in the eyes of the Catholic Church. For this reason, the church may refuse to marry a party whose former marriage has been dissolved. The Protestant churches are also reluctant to marry a divorced party. It is difficult to understand why the law of a country which cannot in any way claim to be religious should make such strenuous efforts to preserve the religious norms of some denominations. It is submitted that the value of this provision is marginal.

*(ii) Marriage in a registrar's office.* Parties who have obtained a registrar's certificate or a special licence may, as an alternative, contract a marriage before a marriage registrar in his office and in the presence of the two witnesses. The celebration of the marriage must take place

[59] Section 26.
[60] See Part II of the Marriage Act 1949.

with open doors between 10 a.m. and 4 p.m.[61]

After the registrar has received the certificate or licence from the parties, he addresses the parties either directly or through interpreters in the following terms: 'Do I understand that you, A.B., and you, C.D., come here for the purpose of becoming man and wife?' If the parties answer in the affirmative, he is required to make certain explanations of the character of the proposed marriage to them.[62] The explanations contain the following salient points. First, such marriage, if celebrated in a registrar's office, is valid without the need for any other civil or religious rites. Second, the marriage cannot be dissolved during the lifetime of the parties except by a decree of a court of competent jurisdiction. Third, it is an offence – bigamy – for a party to the marriage to contract another marriage during the subsistence of the first one.

The marriage is solemnized by each of the parties taking each other as husband and wife in the presence of witnesses. After the marriage, the registrar must complete the marriage certificate in duplicate. He, the parties and the witnesses sign the certificate; one copy is given to the married couple while the other is filed in the registrar's office. As in the case of a minister of religion, he fills in and signs the counterfoil.[63]

*(iii) Marriage under special licence.* A special licence may authorize the celebration of marriage at a place other than a licensed place of worship or the office of a registrar of marriages, but the marriage must be celebrated by a minister of religion or a registrar. Such marriage may be celebrated either as in a registrar's office or as in a licensed place of worship.[64]

*(iv) Marriage in Nigerian Diplomatic Missions.* The Marriage Act (Amendment) Decree 1971[65] provides for the valid celebration of marriages outside Nigeria in a Nigerian diplomatic or consular mission office. It is essential that one of the parties to the marriage is a Nigerian citizen, and the marriage must be contracted before a Nigerian diplomatic or consular officer of the rank of Secretary or above. Such marriages have the same legal effect as those contracted before a marriage registrar in Nigeria.

*(v) 'Church Marriage'.* It is a common practice in Nigeria for the various religious denominations to celebrate marriages between their members which have no relevance to or connection with the Marriage Act. For instance, a Roman Catholic marriage is a monogamous one, which must be performed before a priest and two lay witnesses after the necessary banns have been published. Such marriage is celebrated provided that no reasons are given by anyone which may prohibit the

[61] Section 27.
[62] ibid.
[63] Section 28.
[64] Section 29.
[65] No. 14 of 1971 (came into effect on 24 March 1971).

marriage. The necessary formalities are those for marriage under the rites of the Roman Catholic church. The marriage is regarded as valid by the church in spite of the fact that it does not comply with the provisions of the law. In general, the Roman Catholic Church insists that its members must be married in accordance with the rites of that church. Where members of the church have gone through a form of 'civil marriage' they must, in order to obtain recognition by the church as husband and wife, go through a form of marriage under the rites of the church. After the celebration of a 'church marriage', the Roman Catholic Church issues a certificate of marriage which is different from that in Form E of the First Schedule to the Marriage Act.[66] Such practice is common to various other religious bodies in Nigeria.[67]

It is a matter for great concern that religious bodies in Nigeria are often very eager to celebrate marriage according to their respective rites even when the place of celebration is not licensed for marriages under the Act. In a great number of cases, little or no attention is given to the provisions of the Marriage Act. Ministers of religion are known to encourage the celebration of such 'church marriages' even though they are fully aware of the provisions of the law. It is incumbent on the hierarchy of the various churches to bring to the attention of their ministers and members the importance of complying with the law of the land. In this respect, it may be necessary to instruct the priests in the basic requirements of the law of marriage. It is pertinent to emphasize that the celebration of 'church marriage' is contrary to the law. Section 22 of the Marriage Act provides that:

> A minister shall not celebrate any marriage if he knows of any just impediment to such marriage, nor until the parties deliver to him the registrar's certificate or the licence issued under section 13.

Failure to comply with this provision may constitute an offence punishable with five years' imprisonment.[68]

In *Obiekwe v Obiekwe*,[69] Palmer, J, was called upon to determine the validity of a marriage celebrated at the Holy Ghost Roman Catholic Church, Enugu, on 30 December 1961, without the parties thereto complying with the provisions of the Marriage Act. The learned Judge, after remarking on the indifferent attitude to the law of the officiating priest, pointed out that:

> As the law of Nigeria confers upon priests and ministers of religion the right to officiate at marriages recognised by the state, it is their duty to make themselves familiar with the Ordinance and to see that

[66] See the evidence of Rev Father O'Mahoney in *Akuwudike v Akuwudike* [1963] 7 ENLR 5.
[67] For instance, the Qua Iboe Church – *Udeiwed v Udeiwed*, Suit No. A/M30/63 (unreported), High Court, Aba, Idigbe, J, 18 December 1963.
[68] Section 43.
[69] [1963] 7 ENLR 196.

people who come to them to be married understand their legal position.[70]

With regard to the validity of 'church marriage', Palmer, J, enunciated the law succinctly thus:

> A good deal has been said about 'church marriage' or 'Marriage under Roman Catholic Law'. So far as the law of Nigeria is concerned, there is only one form of monogamous marriage, and that is marriage under the Ordinance. Legally a marriage in a Church (of any denomination) is either a marriage under the Ordinance or it is nothing. In this case, if the parties had not been validly married under the Ordinance then either they are married under Native Law and Custom or they are not married at all. In either case the ceremony in church would have made not a scrap of difference to their legal status.[71]

*(vi) 'Church Blessing'*. Beside solemnizing marriages otherwise than in accordance with the Marriage Act, some religious denominations in Nigeria perform the 'church blessing' of marriages. For instance, some religious organizations in Nigeria insist that their members who have married otherwise than in accordance with their prescribed religious rites must have their marriages blessed in their churches. Thus where Roman Catholics contract a civil or customary-law marriage, they may have it blessed by a Catholic priest. Such 'church blessing' does not constitute a marriage, nor does it add anything to an existing civil marriage. In *Martins v Adenugba*[72] a priest blessed a customary-law marriage on 17 September 1942. He issued, in a printed form, a certificate to the parties in respect of that ceremony. It was later contended that there was a valid marriage under the Marriage Act. The court held that the ceremony of the 17th September was merely the blessing of a customary-law marriage, and therefore did not constitute a marriage.

Another interesting decision in this respect is the Ghana case of *Setse v Setse*.[73] The Reverend Theophilus Setse was a minister of the Presbyterian church. In August 1950 he requested a fellow Presbyterian minister, the Reverend Nyalemegbe, to 'bless' his marriage to Grace Atrase, as approved by the Presbyterian church. Mr Setse informed the Reverend Nyalemegbe that he did not desire a marriage under the Ordinance, and no banns were published. The ceremony of 'blessing' was accordingly performed. No marriage return was sent to the Principal Registrar of Marriages in respect of the ceremony, but the Reverend Nyalemegbe nevertheless issued a certificate of marriage under the Ordinance. Both parties to the blessing signed it. They lived together as man and wife and had three children. In November 1957 the wife petitioned for restitution of conjugal rights, alleging that she

[70] at 197. [71] at 199.
[72] (1946) 18 NLR 63. [73] [1959] GLR 155.

was lawfully married to Setse. Commissioner Minnow held that the 'blessing' ceremony did not constitute marriage under the Marriage Ordinance. Consequently, the court had no jurisdiction to grant the relief sought.

### (c) PROOF OF MARRIAGE

There are several methods of proving a statutory marriage. By section 32 of the Marriage Act, every marriage certificate filed in the office of a marriage registrar, or entry in the marriage register, or a true copy of either certified by the registrar of the district, is admissible in any court of law as evidence of the marriage to which it relates. Section 32 of the Marriage Act, therefore, deals with the proof of marriage by the production of a copy of a certificate of marriage filed in the office of the registrar of marriages. It does not, however, cover, for instance, an extract from a Church Register or other certificate of marriage not appropriately filed. Nevertheless, such documents may be treated as copies of public documents which under section 116 of the Evidence Act [73a] are admissible in evidence as proof of the matters to which they relate.[73b] By section 86 of the Matrimonial Causes Decree 1970, a court may receive as evidence of the facts stated in it a document purporting to be either the original or a certified true copy of any certificate, entry or record of birth, death or marriage alleged to have taken place, whether in Nigeria or elsewhere.

Section 86 of the Decree does not refer either expressly or by implication to the earlier provision of the Marriage Act. The important question is whether the two provisions are co-extensive, or whether the subsequent provision repealed the former by implication. It is clear that both provisions are not contradictory. Rather they are complementary in the sense that section 86 of the Decree has a wider scope and includes the former. Consequently, while before 1970 admissible evidence of a statutory marriage consists only of the official marriage certificate or entry in the marriage register, now a marriage may be proved by a document which purports to be a copy of 'any certificate, entry or record'. This is particularly relevant where the marriage is celebrated in a licensed place of worship and the official marriage certificate was not issued to the parties nor an entry made in the appropriate book. It is now possible under the Decree to prove the marriage by a certificate of marriage issued by or under the authority of a religious denomination which does not comply with the provisions of the Marriage Act. The Decree also admits any entry or record of marriage kept by such organization.

Again, while the certificate or entry under the Marriage Act relates only to marriages celebrated in Nigeria under that statute, the document or entry referred to in the Decree may deal with a marriage celebrated abroad. While, however, under Section 86 of the Decree the document

[73a] Cap. 62 of the *Laws of Nigeria*, 1958 as amended by the Adaptation of Laws (Miscellaneous Provisions) Order 1964 (LN No. 112 of 1964).

[73b] *Phillips v Osho* SC 180/69.

or entry is admissible as evidence of its contents – that is, the marriage and details of its celebration – it is still open to the other side in a matrimonial proceeding to contend that the marriage so proved is not a valid one under the Marriage Act.[74] A marriage alleged to have been celebrated abroad may be challenged on the ground that it is invalid by the *lex loci celebrationis*.

In *Anyaegbunam v Anyaegbunam*,[74a] the parties were married at the Church of the Holy Name of Mary, Abatete, in the East Central State on 28 January 1961. The marriage was celebrated by Reverend Hugh Roche, who issued the parties a 'Certificate of Marriage' which was not in the form prescribed in Form E in the First Schedule to the Marriage Act. In December 1971 the wife petitioned for judicial separation. The husband raised a preliminary objection that the court had no jurisdiction to adjudicate on the petition because the marriage was a customary marriage followed by church marriage or church blessing. Only the respondent gave evidence during the court hearing in the course of which the Certificate of Marriage was tendered. The respondent in his evidence bluntly denied contracting a monogamous marriage with the petitioner. In the court of first instance, Phil-Ebosie, J, held that there was a valid marriage between the petitioner and respondent in 1961. This marriage, the learned judge held, was a valid monogamous union because the petitioner intended to contract a monogamous marriage and believed the church marriage had that effect. On appeal, the Supreme Court held that it was the petitioner's task to prove that there was a valid monogamous marriage, and that she had failed to discharge that burden. Consequently, the court came to the conclusion that the court of first instance had no jurisdiction to hear the petition. With regard to the proof of the marriage, the Supreme Court stated thus:

> To our mind, this document, described by the person who wrote it as a 'Certificate of Marriage' is not in the form prescribed in Form E in the First Schedule to the Marriage Act. It could not even be regarded as a public document nor could it be described as 'the original or a certified copy of any certificate, entry, or record of . . . marriage'.

The court's rejection of the Certificate of Marriage was in effect based on the fact that it was not in the form prescribed in Form E of the First Schedule to the Marriage Act. It is respectfully submitted that this interpretation of section 86 of the Matrimonial Causes Decree 1970 distorts the plain language of that provision. The section refers to the original or a certified copy of 'any certificate, entry or record of birth, death or marriage . . .'. The phrase 'any certificate' in the section is not qualified anywhere, and therefore cannot be restricted to a

[74] *Akparanta v Akparanta* [1972] 2 ECSLR 779.
[74a] SC 18/1973 of 19 April 1973 (1973) 4 SC 121.

certificate in Form E. If this was intended it would have been clearly expressed therein. This view is strengthened by the fact that the 'certificate . . . of marriage' in the section relates to a marriage 'alleged to have taken place whether in Nigeria or elsewhere'. Certainly, foreign countries need not necessarily issue a certificate of marriage in Form E. Therefore, a certificate of marriage other than in Form E issued abroad is admissible under this section. Lastly, the object of admitting a document under section 86 is to enable a court 'receive as evidence the facts stated in it', that is, that a marriage was in fact contracted between the parties. Having received 'any certificate' as evidence of a marriage, the next issue is whether this certificate is evidence of a monogamous marriage.

Probably the Supreme Court was led to adopt this restrictive interpretation of section 86 by the fact that the only party who gave evidence was disputing the nature of the marriage and it was easy to require at the outset that a certificate (in Form E) which was previously the only form of certificate of a monogamous marriage should be tendered. If this dispute as to the nature of the marriage did not exist, then the certificate tendered plus any extrinsic evidence that the marriage was monogamous under the Marriage Act would have been accepted. The Supreme Court itself expressed the view that a monogamous marriage can be proved by means other than the production of a certificate in Form E.

In its present form, the Marriage Act is far from satisfactory and therefore requires urgent modification. First, it should clearly define the age of marriage and thereby put an end to the present uncertainties on this point.[74b] Second, while the Act allows the parties to a subsisting customary-law marriage to contract a subsequent statutory marriage,[74c] it is silent on the legal implications of such an act. It is submitted that such an important matter should not be left to conjecture. Third, it is irrational for the statute to punish in all cases parties to a statutory marriage who contract a subsequent customary-law union.[74d] A distinction should be made between the case where a party to a statutory marriage marries another party under customary law, and the celebration of the customary-law marriage between the same parties to the prior union. The first should be made punishable but not the latter. If the same statute permits a subsequent statutory marriage between the spouses of a customary-law union it cannot, without being regarded as discriminatory, punish the reverse situation. It is submitted that the two systems of marriage should be given equal weight, and the parties to one be free to marry in accordance with the other, with clearly pre-

[74b] The present trend is to adopt the age of eighteen – see Section 1 of the English Law Reform Act 1969; *Ontario Law Reform Commission Report on Family Law, Part II, Marriage* (Dept of Justice, Toronto 1970); *Report of the Commission on the Law of Marriage and Divorce* (Government Printer, Nairobi, Kenya, August 1968).

[74c] Section 33(1) of the Marriage Act.

[74d] Section 48.

scribed incidents.[74e] Fourth, the Marriage Act and the Criminal Code prescribe different punishments for bigamy.[74f] This is obviously unsatisfactory, as the term of imprisonment imposed in each case may depend on which of the statutes a person is charged under. A uniform punishment should be laid down in each of the statutes. Moreover, it should be clearly stipulated that when there is a subsisting statutory marriage the offence of bigamy is committed when one of the spouses contracts either a subsequent statutory marriage or a customary-law marriage.[74g]

**4 Recognition of monogamous marriages celebrated abroad**

Nigerian courts will recognize a monogamous marriage celebrated abroad if it complies with the *lex loci celebrationis* as to form and if each of the parties thereto possess the capacity to marry each other under the law of his or her antenuptial domicile.[75] Where such marriage would have been void if celebrated in Nigeria the proper test for recognition has been stated by Simon, P, in *Cheni v Cheni*, thus:

> What I believe to be the true test [is] whether it is so offensive to the conscience of the English [Nigerian] court that it should refuse to recognise and give effect to the proper foreign law. In deciding that question the court will seek to exercise common sense, good manners and a reasonable tolerance.[76]

A marriage celebrated abroad will be treated as monogamous here if it is recognized by the law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage.[77]

The non-customary rules on matrimonial causes in Nigeria apply with equal force to monogamous marriage celebrated under the Marriage Act or abroad.

**5 Jactitation of marriage**

This remedy is available where a party has falsely boasted and persistently asserted that he or she is married to some other person.[77a] The latter may in such circumstances petition for jactitation of marriage

[74e] For instance, under Section 11 of the Tanzania Law of Marriage Act 1971 (No. 5 of 1971), marriages contracted in Tanganyika may be converted from monogamous to polygamous type or vice versa, by a joint declaration by the husband and wife before a judge or magistrate. The only exception to this rule is the conversion of a Christian monogamous marriage: Read, J. S., 'A milestone in the Integration of Personal Laws: The new Law of Marriage and Divorce in Tanzania', Vol. 16 [1972] *JAL* 19, 23, 25.

[74f] Cf. Section 48 of the Marriage Act and Section 370 of the Criminal Code.

[74g] See the doubts on this matter discussed in *R v Princewill* [1963] NNLR 54.

[75] Dicey, A. V. and Morris, J. H. L., *Conflict of Laws*, 8th Edn (Stevens, London 1967), 254–270.

[76] [1965] P 85, 99.

[77] Section 18(1), Interpretation Act 1964. *Ogwurike v Ogwurike* (1972) 1 ECSLR 40.

[77a] Section 52 of the MCD 1970.

in order to obtain a court order which will silence the false and malicious allegation. Only a party who claims to have been misrepresented can petition for a decree.[77b]

The court has absolute discretion whether or not to make a decree. If the petitioner does not come to the court with clean hands, he may be denied relief. It may, for instance, be shown that the petitioner acquiesced in the representation. This is the case where he authorized the representation at an earlier date and later turned round to complain of it.[77c] The jurisdiction of the High Court in respect of a petition for jactitation of marriage is the same as for divorce.

## B CUSTOMARY-LAW MARRIAGE

There are essential and formal requirements for the celebration of valid customary-law marriages. Although the details of such requirements vary from one locality to another, the broad principles are sometimes similar.

### 1 Capacity

The parties to a customary-law marriage must possess the capacity under that law to marry each other.

#### (A) AGE

Most systems of customary law in Nigeria do not prescribe any age for the solemnization of customary-law marriage. This lacuna in the rule of customary law has to a large extent encouraged a high incidence of child marriage, with all its attendant evils. While in some areas child betrothal is rampant, marriage does not in fact take place until the parties have attained the age of puberty.

Where a girl under sixteen years[78] marries under customary law, the consummation of that marriage does not constitute the sexual offence of having unlawful carnal knowledge of her under the Criminal Code Act.[79] This is because Section 6 of the Code defines 'unlawful carnal knowledge' to exclude sexual relations between husband and wife. Usually, where a provision of the code applies only to the husband and wife of a statutory marriage, this is clearly specified.[80] In the absence of such qualification it is submitted that 'husband and wife' includes the parties to customary-law marriage, which is a system of marriage

[77b] *Ex parte Campbell* (1862) LJPN 60.

[77c] *Thompson v Rourke* [1893] P 70.

[78] In the three Eastern States and the Western and Mid-Western States, the reference is to girls below the age of eleven, or above eleven but below thirteen years.

[79] Section 218 of the Criminal Code Act (defilement of girls under 13); S 221 (defilement of girls under 16 and above 13). See also S 222 (indecent treatment of girls under 16), Cap. 42 *Laws of the Federation of Nigeria*, 1958. The corresponding provisions for Western and Mid-Western States are Sections 156, 159 and 160 of the Western Code; and for the Eastern States Sections 218, 221 and 223 of the Criminal Code: Cap. 30 *Laws of Eastern Nigeria*, 1963.

[80] See, e.g., Sections 10, 33, 34 and 36 of the Criminal Code Act.

recognized by Nigerian law.[81]

In some parts of the country, the minimum age for customary-law marriage has been fixed by legislation. The age of marriage under customary law is governed in the three Eastern States of Nigeria by the Age of Marriage Law 1956.[82] Section 3(1) of the Law provides that 'A marriage . . . between or in respect of persons either of whom is under the age of sixteen shall be void'. If a party to such a void marriage is charged with any of the sexual offences under the Criminal Code arising from having unlawful carnal knowledge of a girl, it is a good defence to prove that the accused had reasonable cause to believe that the girl in question was his wife.[83]

By section 4(1) of the Law, it is an offence punishable with six months' imprisonment or a fine of two hundred Naira for any person to ask, receive or obtain any property or benefit of any kind for himself or for any other person on account of a marriage which is void under the Law. Similarly, it is an offence to give, confer on, or procure from any person any property or benefit in relation to such void marriage. In these cases, ignorance of the parties' age is no defence unless the accused can prove that he took reasonable steps to verify the ages of the parties to the marriage.[84] When the age of a person is in issue in a prosecution under the Law, the opinion of a qualified medical practitioner on that question is sufficient and cannot be questioned in any court.[85]

Under Section 6, no court shall take cognizance of any marriage that is made void by this legislation. This provision seems too wide for the purpose of attaining the objectives of the statute. It is submitted that, at least, it should be made possible for courts to determine the validity or invalidity of a marriage. This section should therefore be construed accordingly so as to make its contents reasonable.[86]

It is doubtful whether in practice this statute regulates the age of marriage in the three Eastern States. There is strong evidence that its provisions are disregarded in the celebration of customary-law marriages.

In four Native Authority areas in three of the Northern States of Nigeria – Biu (North-Eastern State), Idoma, and Tiv (Benue – Plateau State), and Borgu (Kwara State) – the marriageable age for girls has been fixed by the various Declarations of Native marriage law and custom Orders made in respect of these areas. The following ages for girls have been prescribed for the respective areas: Biu – fourteen

[81] Brett, L. and McLean, I., *Criminal Law and Procedure* (Sweet & Maxwell, London 1967), 456.

[82] Cap. 6 of *Laws of Eastern Nigeria*, 1963. This Law does not, as has been erroneously construed in some quarters, deal with marriages under the Marriage Act; S 2 of the Law clearly states that 'marriage' in the Law means a marriage according to customary law.

[83] Proviso to S 3(1).

[84] Section 4(2).

[85] Section 5.

[86] From the point of view of application, this Law has little or no effect on the practice and procedure of marriage in the three Eastern States.

years;[87] Idoma – twelve years;[88] Tiv – age of puberty;[89] and Borgu – thirteen years.[90] In Borgu and Idoma,[91] any man who marries a girl below the stated age, and the father or guardian of such girl who permits such marriage, are guilty of an offence punishable with a fine of ₦100 or imprisonment for six months, or both.

(B) CONSENTS

Two types of consent are relevant to the celebration of customary-law marriage – consent of the parties and parental consent.

*(i) Consent of the parties.* Generally, the consent of the parties is an important element in the celebration of customary-law marriage. Whenever the parties are capable of expressing their consent to the marriage, such consent is expressly demanded and obtained before the marriage.

In *Osamwonyi v Osamwonyi*,[92] the petitioner went through a marriage under the Marriage Act with the respondent in Lagos on 21 June 1967. On 6 July 1968, the petitioner filed a divorce petition on the ground, *inter alia*, that in 1964 the respondent was lawfully married to Patrick Goubadia according to Benin native law and custom and that the said marriage was not dissolved until 14 August 1967 by a Benin customary court, which ordered the refund of £60 (₦120) dowry to the said Goubadia. It was established in evidence that some time before 1966, the said Goubadia in contemplation of a proposed statutory marriage and unknown to the respondent at the time, paid the respondent's father the sum of sixty pounds (one hundred and twenty Naira) as dowry. On learning about the payment, the respondent in September 1966 rejected any proposal of marriage by Patrick Goubadia and the whole idea of marriage between them was abandoned. The respondent averred that she never gave her consent to or entered into a marriage with the said Goubadia. The Supreme Court, upholding the decision of the court of first instance, held that the consent of the bride-to-be was a condition precedent to a marriage under Benin customary law. As no such consent was given, there was in fact no subsisting customary-law marriage at the time the respondent married the petitioner.

The importance of consent of the parties cannot be over-emphasized. If a party objects to the marriage, he or she may refuse to go through with the ceremony. Even in those areas where child marriage is still in vogue, the consent of the parties is required when they come of age.

[87] Native Authority (Declaration of Biu Native Marriage Law and Custom) Order 1964, Section 1(a).
[88] Native Authority (Declaration of Idoma Native Marriage Law and Custom) Order 1959, Section 2(1)(a).
[89] Native Authority (Declaration of Tiv Native Marriage Law and Custom) Order 1955, Section 2(a).
[90] Native Authority (Declaration of Borgu Native Marriage Law and Custom) Order 1961, Section 2(1)(a).
[91] Borgu S 2(2), Idoma S 2(2).
[92] SC 295/69, 6 October 1972; (1972) 10 SC 1.

At that point, any party who did not in fact consent to the marriage may abrogate the union by abandoning the other party.

It may constitute an offence to detain a girl of any age against her will with the intent to marry her. Section 361 of the Criminal Code Act[93] provides that:

> Any person who, with the intent to marry . . . a female person of any age, or to cause her to be married . . . by any other person, takes her away, or detains her against her will, is guilty of a felony and is liable to imprisonment for seven years.

Originally, this section was intended to combat the practice of marriage by capture which was prevalent in some parts of Nigeria. But it may also punish any person who takes away or detains a girl against her will on the pretext of a marriage contract subsisting between him and her family.

The modern trend is for the parties to a customary-law marriage to agree in advance between themselves to marry each other. This agreement is then communicated to their parents or guardians, who then set in motion the customary-law machinery for effecting the desired marriage.

In Biu, Idoma, Tiv and Borgu Native Authority areas,[94] the consent of the girl is an important element in the celebration of customary-law marriages.

It is doubtful whether as a general rule the absence of consent of a party vitiates the marriage. Probably the better view is that its absence renders a marriage voidable, and enables the party who has not consented to contract out of the marriage either before or after its solemnization.

*(ii) Parental Consent.* Parental consent is necessary and in some cases mandatory for the celebration of a valid customary-law marriage. Support is lent to this principle by the fact that to some extent customary-law marriage is a transaction between two families. The requisite consent is that of the father, or guardian who is *in loco parentis* to the prospective spouse.

For a girl, parental consent is mandatory under customary law even where she has attained majority. The reasons are not difficult to find. Without the consent of her father, for instance, the bride-price cannot be properly paid. Moreover, the formal giving away of the bride may not take place. These are two constituent elements of a valid customary-law marriage. On the other hand, an adult male may contract a valid marriage without the consent of his parents.

The declarations of customary law of marriage in Biu, Idoma, Tiv and Borgu provide for parental consent on the first marriage of a girl.

[93] Cap. 42 *Laws of the Federation of Nigeria*, 1958.

[94] Biu Declaration S 1(b); Idoma Declaration S 2(1)(b); Tiv Declaration S 2(b); Borgu Declaration S 2(1)(b).

The father or guardian may refuse such consent at his discretion, without being required to give reasons. In the case of a second or subsequent marriage, the father or guardian must be consulted, but his refusal of consent does not constitute a bar to the marriage. Refusal in the latter case may be for specific reasons; for instance, the suitor may have refused to pay the bride-price demanded, or may have committed adultery with a wife of some relations of the prospective bride.[95]

Exceptions to the requirement of parental consent exist in those areas of the Lagos, Western and Mid-Western States of Nigeria where the Marriage, Divorce and Custody of Children Adoptive By-Laws 1958[96] are in force. In these areas, it is possible to do without the consent of parents who are adamant. Section 5 of the By-Laws provides:

> When any parent or guardian of a bride refuses his or her consent to a marriage or refuses to accept his or her own share of the dowry, the bride, if she is eighteen years of age or above, and the bridegroom jointly may institute legal proceedings in a competent court against the parent or guardian to show cause why he or she should refuse consent or to accept his or her share of the dowry; and if the court is of the opinion that no sufficient cause has been shown, it shall order that the marriage may proceed without the consent of such parent.

This provision assumes that either a man or a woman acting as the parent or guardian of a child may give the necessary consent. This is in accordance with Yoruba customary law, under which the head of a family may be male or female. Second, although the section dispenses with parental consent in certain circumstances, there is no clear indication as to how in practice the procedures for marriage could continue if the parent refuses to relent. For instance, in such a situation the question as to who should accept the bride-price and formally hand the girl over to the husband's family is left unanswered by the section. Construed ordinarily, the provision involves either the forfeiture of the bride-price or its payment into court. Possibly a way out of these uncertainties is to include a new provision which will expressly authorize the customary court to step into the shoes of the recalcitrant parent for the purposes of the particular marriage.

### (c) STATUTORY PROHIBITION

In Nigeria, a person who is a party to an existing statutory marriage or monogamous marriage recognized by law, lacks the capacity during the continuance of such marriage of contracting a valid customary-law marriage.[97] This rule came up for consideration in *Onwudinjoh v Onwudinjoh*,[98] where one Jeremiah married Agnes under the Marriage

[95] Biu Declaration Sections 1(c) and 2; Idoma Declaration Sections 2(1) and 3; Tiv Declaration S 2(c); Borgu Declaration S 2(1)(c) and Section 3.
[96] WRLN 456 of 1958.
[97] Section 35 of Marriage Act, Cap. 115, *Laws of the Federation of Nigeria*, 1958.
[98] (1957–58) 11 ERLR 1.

Act in 1926. Subsequently, during the lifetime of Agnes, Jeremiah purported to marry one Chinelo by native law and custom. Ainley, CJ, held that by reason of Section 35 of the Marriage Act Jeremiah was incapable of contracting a valid marriage under customary law with Chinelo.[99]

(D) PROHIBITED DEGREES OF CONSANGUINITY AND AFFINITY

In most systems of customary law in Nigeria the prohibited degrees of consanguinity for marriage are much wider than those applicable to marriage under the Marriage Act. Usually, minor lineages are exogamous. But where major lineages are widely dispersed, exogamy tends to be inconvenient and burdensome and is modified by reducing the scope of the prohibited degree of consanguinity. On the other hand, village exogamy exists in various communities in Nigeria. Sometimes this extends to a group of villages.

The general rule in some areas of the country is that marriage is forbidden between persons who are related by blood, no matter how remote the relationship is. This rule obtains among the Ibos, Yorubas, Ijaws and Itsekiris. Once blood relationship can be traced between the parties, most systems of customary law prohibit their marriage. Sometimes, where the blood relationship is quite distant and not directly traceable, intermarriage may be allowed after the performance of sacrifices of expiation. Such sacrifices are regarded as severing the relationship, thus leaving the parties free to intermarry.

With regard to affinity, customary law in many parts of Nigeria prohibits the marriage of a man with persons to whom he is related through marriage. For instance, it may constitute an abomination for a man to marry his wife's mother, wife's daughter, wife's grandmother or wife's son's daughter. But exceptions are made in a few cases. It is sometimes permissible for a man to marry his wife's sister, either as a second wife or after the death of his first wife. Generally such marriage, though not expressly prohibited, is not approved by the families of either the man or the woman, the major reason for this being their reluctance to put all their eggs in one basket. Again, on the death of a married man, his adult sons may 'inherit' his wife or wives, but not of course their own mother. It is often possible too for a father to 'inherit' his deceased son's wife.

(E) STATUS BAR

Customary law in some parts of Nigeria prohibits the intermarriage of so-called 'free citizens' and members of some castes, for instance, a slave – 'osu'.[100] An *osu* is, *inter alia*, a person who is a slave or has been offered symbolically in sacrifice to idols, or a descendant of such person. The *osu* is therefore subject to some legal or social disability or social stigma. But this obnoxious rule which established the *osu* and disabled

[99] id. at 3; *Craig v Craig* [1964] LLR 96.
[100] Cap. 1 *Laws of Eastern Nigeria*, 1963.

them from freely marrying other members of the community has been, to all intents and purposes, abrogated in the three Eastern States by the Abolition of the Osu System Law 1956.

The Law abolished for all time the *osu* system, and made it unlawful.[101] The *osu* system is defined to include '. . . any system, status, institution, or practice which implies that any person is subject to a legal or social disability or social stigma which is similar to, or nearly similar to, that borne by an *osu*'.[102] Henceforth, all persons who were previously regarded as *osu* are free from the handicaps of that status, and are able to exercise all the rights and privileges of other members of their community. The law makes it an offence punishable with a fine of 100 Naira or six months' imprisonment for any person to enforce any disability whatsoever relating to marriage against another on the ground of the *osu* system.[103] Furthermore, it is an offence to preclude anyone from the observance of any social custom, usage or ceremony.[104] The abetment of this offence is also punishable.[105] Consequently, from 1956, all the customary incapacities imposed by the *osu* system with regard to marriage have ceased to be of any legal consequence. Despite its altruistic motive, this piece of legislation has failed to alter the attitude of the people in the areas where the *osu* system existed. Accordingly, discrimination still continues against *osu* in matters relating to marriage.

### (F) POSITION OF NON-NATIVES OF NIGERIA

It is relevant to determine whether non-natives of Nigeria possess the capacity to contract customary-law marriages here. The rules which regulate the application of customary law in any particular case are contained in the various High Court Laws.[106] The courts are directed to apply customary law in any civil matter where the parties are natives of Nigeria or persons of Nigerian descent. But in cases between natives and non-natives,[107] the courts are to apply English law or any other law, unless it appears that substantial injustice to either of the parties would result from the strict application of such other law.

The position of non-Nigerians was considered in two decided cases. In *Savage v Macfoy*,[108] Claudius Macfoy, who was born in Freetown, Sierra Leone, of liberated slave parents, came to live and work in Lagos. While there, he purported to marry a Yoruba girl, Susannah Savage, in accordance with Yoruba customary law, in 1900. Macfoy died intestate in 1906. Susannah claimed that as his widow she was entitled to administer his property. Osborne, CJ, held that Macfoy was not subject

[101] Section 3.
[102] Section 2.
[103] Section 6.
[104] ibid.
[105] Section 10.
[106] East: Cap. 61 *Laws of Eastern Nigeria*, 1963; North: Cap. 46, *Laws of Northern Nigeria*, 1963; West and Mid-West: Cap. 44, *Laws of Western Nigeria*, 1959.
[107] The High Court Law for the Eastern states refers to persons of Nigerian descent.
[108] (1909) 1 Renner's Gold Coast Reports 504.

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[100] Cap. 1 *Laws of Eastern Nigeria*, 1963.

them from freely marrying other members of the community has been, to all intents and purposes, abrogated in the three Eastern States by the Abolition of the Osu System Law 1956.

The Law abolished for all time the *osu* system, and made it unlawful.[101] The *osu* system is defined to include '. . . any system, status, institution, or practice which implies that any person is subject to a legal or social disability or social stigma which is similar to, or nearly similar to, that borne by an *osu*'.[102] Henceforth, all persons who were previously regarded as *osu* are free from the handicaps of that status, and are able to exercise all the rights and privileges of other members of their community. The law makes it an offence punishable with a fine of 100 Naira or six months' imprisonment for any person to enforce any disability whatsoever relating to marriage against another on the ground of the *osu* system.[103] Furthermore, it is an offence to preclude anyone from the observance of any social custom, usage or ceremony.[104] The abetment of this offence is also punishable.[105] Consequently, from 1956, all the customary incapacities imposed by the *osu* system with regard to marriage have ceased to be of any legal consequence. Despite its altruistic motive, this piece of legislation has failed to alter the attitude of the people in the areas where the *osu* system existed. Accordingly, discrimination still continues against *osu* in matters relating to marriage.

### (F) POSITION OF NON-NATIVES OF NIGERIA

It is relevant to determine whether non-natives of Nigeria possess the capacity to contract customary-law marriages here. The rules which regulate the application of customary law in any particular case are contained in the various High Court Laws.[106] The courts are directed to apply customary law in any civil matter where the parties are natives of Nigeria or persons of Nigerian descent. But in cases between natives and non-natives,[107] the courts are to apply English law or any other law, unless it appears that substantial injustice to either of the parties would result from the strict application of such other law.

The position of non-Nigerians was considered in two decided cases. In *Savage v Macfoy*,[108] Claudius Macfoy, who was born in Freetown, Sierra Leone, of liberated slave parents, came to live and work in Lagos. While there, he purported to marry a Yoruba girl, Susannah Savage, in accordance with Yoruba customary law, in 1900. Macfoy died intestate in 1906. Susannah claimed that as his widow she was entitled to administer his property. Osborne, CJ, held that Macfoy was not subject

[101] Section 3.
[102] Section 2.
[103] Section 6.
[104] ibid.
[105] Section 10.
[106] East: Cap. 61 *Laws of Eastern Nigeria*, 1963; North: Cap. 46, *Laws of Northern Nigéria*, 1963; West and Mid-West: Cap. 44, *Laws of Western Nigeria*, 1959.
[107] The High Court Law for the Eastern states refers to persons of Nigerian descent.
[108] (1909) 1 Renner's Gold Coast Reports 504.

to customary law in Nigeria and therefore had no capacity to contract a valid customary-law marriage. The fact that he had acquired a domicile of choice in Nigeria did not make him subject or entitled to the benefits of customary law. Macfoy's relations with other persons were to be governed by English law, which does not allow polygamy. The learned judge considered the exception in the Supreme Court Ordinance 1876, as amended, which enabled the application of customary law in transactions between natives and Europeans – where injustice would be caused by the strict application of English law. He concluded: '. . . I cannot hold that that applies to a contract of polygamous union when expressly repugnant to the English law'.

In the subsequent case of *Fonseca v Passman*,[109] a Portuguese National, Julio Fonseca, came to reside in Nigeria in 1924. He purported to marry an Efik girl in accordance with Efik customary law in 1926. At the time of the marriage, he was domiciled in Portugal. He died intestate. The Efik woman claimed to be his widow and took out a summons to determine whether she or the deceased's creditors should be entitled to Letters of Administration in respect of the deceased's estate. Hedges, J, held that the deceased, being a European, lacked the capacity to contract a customary-law marriage in Nigeria while domiciled in Portugal. The learned judge said *obiter* that the position would have been the same if the deceased had been domiciled in Nigeria.

It is submitted that the principle which is established by these cases is that a person who is not subject to customary law cannot contract a marriage by that law unless he is domiciled in Nigeria.

There is some doubt as to the continued validity of the decision in *Savage v Macfoy*. If the facts of that case were to recur some Nigerian courts might not now reach the same conclusion. In the Northern States, for instance, *Savage v Macfoy* is no longer good law, because customary law is now applicable to any person whose parents were members of any tribe or tribes indigenous to some part of Africa, or one of whose parents was a member of such tribe.[110] Consequently, on the facts of that case, Macfoy may now be regarded as a person who is subject to customary law in the Northern States and may therefore contract a customary-law marriage. However, in other parts of the Federation the decision may still be valid, as only Nigerians are subject to customary law in these areas.[111]

[109] (1958) WRNLR 41. See *Short v Morris* 3 WALR 339; *Nelson v Nelson* (1951) 13 WACA 248.

[110] Area Courts Edict 1967 S 15(1) Kwara State; No. 2 of 1967 – Kano State; No. 4 of 1968 – Benue-Plateau State; No. 2 of 1967 – North-Central State.

[111] S 2 of the Western Region Customary Courts Law 1958, which applies to the Western and Lagos States. The section defines 'Nigerian' as 'a person whose parents were members of any tribe or tribes indigenous to Nigeria and the descendants of such persons, and includes any person one of whose parents was member of such a tribe'. See also Customary Courts Edict 1966 S 17 – Mid-Western State; S 11 Customary Courts No. 2 Edict 1966 – Eastern Region – for the Eastern States.

## 2 Bride-price

It is a well-established principle of customary law in Nigeria that the payment of bride-price or dowry is essential for a valid customary-law marriage. Some writers refer to the customary payment as 'bride-price' while others prefer to term it 'dowry'. The latter term, dowry, may lead to some confusion, as it has another meaning in relation to marriages in other countries. Ordinarily, in Europe and other countries, 'dowry' refers to the property a woman brings to her husband. However, the two terms are interchangeable in Nigeria. In Yoruba custom, bride-price is known as *Idana*.[112]

Bride-price or dowry has been accurately defined as:

> . . . any gift or payment, in money, natural produce, brass rods, cowries or in any other kind of property whatsoever, to a parent or guardian of a female person on account of a marriage of that person which is intended or has taken place.[113]

From this definition the following characteristics of bride-price are discernible:

It is a gift or payment;
it may be in money, natural produce, or any other kind of property;
it must be paid to the parent or guardian of the bride-to-be;
it must be paid on account of a marriage of a female person; and
it must be paid for a marriage which is intended or has taken place.

We shall consider these characteristics seriatim.

### (A) THE NATURE OF BRIDE-PRICE

Taking the first two elements together, bride-price is a gift or payment. Whether it is one or the other depends on the local variation of the general rule. Historically, bride-price usually took the form of labour provided by the suitor for the parents of the girl. Such labour was accompanied by a small cash payment, and drinks. But with the advent of modern economic ideas, bride-price has mainly taken the form of money payment. Payment with other types of property occurs rarely in some localities.

*Quantum of bride-price.* Generally, customary law does not fix the quantum of bride-price for customary-law marriage. The quantum varies from one locality to another. Sometimes, the amount of the bride-price may be the subject of negotiation between the two families. In other cases, the man's family is merely asked to pay what it considers fit and proper for a daughter-in-law. In some cases, the bride-price paid

[112] *Savage v MacFoy* (1909) Renner's Gold Coast Reports 504; *Beckley v Abiodun* (1943) 17 NLR 59.

[113] Section 2, Limitation of Dowry Law, Cap. 76, *Laws of Eastern Nigeria*, 1963. Cf. the definition in Section 2 of the Marriage, Divorce and Custody of Children Adoptive By-Laws Order 1958 – 'a customary gift made by a husband to or in respect of a woman at or before marriage'.

reflects the affluence of the suitor or his family.

In parts of Nigeria, there are statutory limitations on the amount of bride-price payable in respect of customary-law marriages. The Limitation of Dowry Law 1956[114] regulates the quantum of bride-price or dowry in the three Eastern States of Nigeria. This Law fixes the amount or value of bride-price in respect of customary-law marriage at sixty Naira, where no incidental expenses of the marriage are paid.[115] But where there are incidental expenses, the amount of bride-price must not exceed fifty Naira, and the incidental expenses should not exceed the sum of ten Naira[116] in amount or value.[117] 'Incidental expenses' of a marriage are defined as 'customary gifts or payments, other than dowry, made or incurred, on account of a marriage, before, at the time of, or after marriage'.[118] To constitute incidental expenses, therefore, the gifts or payment must, in accordance with the local custom, differ from the actual bride-price itself. Further, such gifts or payment must be made on account of the marriage. All gifts or payments which are made out of mere affection, therefore, do not qualify under this definition as incidental expenses.

It is an offence to pay or to receive as bride-price any amount in excess of the maximum prescribed by the Law.[119] Moreover, it is also an offence to incur any incidental expenses above the maximum figure of ten Naira. The offence is punishable, on conviction, with a six months' imprisonment.[120]

The courts are also precluded from entertaining or continuing any suit or proceeding or making any decree or order or executing such order if the claim involved in such a suit is contrary to the Law.[121] The same limitation of jurisdiction applies where the decree or order of a court would offend against the provisions of the Law. In *Okeke v Okoye*[122] the plaintiff/respondent claimed as against the appellants in the Udoka District Court, Grade 'A', Awka Division, that he, being the eldest son of his deceased father, was (in accordance with the customary law of the area) the person entitled to the bride-price payable on one Ifechukwu Okoye, daughter of his late father. The case was transferred to the Chief Magistrate's Court, Awka, by the Customary Court Adviser. The Magistrate found as a fact that the first defendant/appellant had received the sum of sixty Naira and three goats in respect of the marriage of Ifechukwu. He therefore made an order for the sixty Naira and three goats to be paid over to the plaintiff. On appeal to the High

[114] Cap. 76 *Laws of Eastern Nigeria*, 1963.
[115] Section 3(a).
[116] Section 3(b).
[117] The market value in the locality in which the marriage is intended to take place or has taken place.
[118] Section 2.
[119] Section 4(a) and (b).
[120] Section 4(c).
[121] Section 5.
[122] Suit No. o/26A/1965 (unreported), Egbuna, J, Onitsha High Court, 28 March 1966.

Court, the defendants argued that the order of the Magistrate was illegal, being contrary to Section 5 of the Limitation of Dowry Law. Section 5(b) provides that:

> No court shall make any decree or order if the claim involved in such suit or proceeding or if the passing of the decree or order or if such execution would be in any way contrary to any provision of this Law.

Egbuna, J, upheld the defendant's submission. But, the learned judge changed the order of the Magistrate to read 'thirty pounds' (sixty Naira) and not 'thirty pounds and three goats'. Unfortunately, the Limitation of Dowry Law has been honoured more in the breach than in the observance, in almost all the areas where the statute continues to govern the quantum of bride-price paid in respect of a marriage.

The Marriage, Divorce and Custody of Children Adoptive By-Laws Order 1958,[123] which has been adopted in parts of Lagos, and the Western and Mid-Western States of Nigeria, prescribes a standard bride-price of twenty Naira.[124] But this figure may, subject to the approval of the Commissioner for Local Government, be varied by a resolution of a Local Council which has adopted the By-Laws.[125]

Declarations of customary law of marriage in the Biu,[126] Borgu[127] and Idoma[128] Native Authority areas prescribe the maximum bride-price for each area. In Biu, the bride-price must not exceed thirty Naira. Bride-price in the Borgu area consists of money not exceeding thirty Naira including *Sadaki*,[128a] cloths not exceeding ten including headties, and kolanuts not exceeding two hundred. However, the Local Authority (Modification of Bornu Native Law and Custom Relating to Marriage) Order 1971[128b] makes a distinction between the bride-price and dowry, although by its definition, the latter seems to include the former. Section 4 provides that the bride-price shall not be less than two Naira, which is the current value of one-quarter of a dinar, and not more than twenty Naira. The dowry as stipulated in Section 5 consists of cash not exceeding twenty Naira; clothing not exceeding forty Naira in value; one hundred kolanuts; two bottles of scent; one handful of sandalwood; one cigarette tinful of 'gurumbal'; one cigarette tinful of 'algama'; two pieces of soap; and two bottles of vaseline.

### (B) PERSON TO WHOM BRIDE-PRICE IS PAYABLE

A father is the right person legally entitled to receive bride-price paid in respect of his daughter. On his death, the right devolves on the head

[123] WRLN 456 of 1958. [124] Schedule A. [125] Section 15.
[126] Section 4(1). [127] Section 5(1). [128] Section 5(1).
[128a] This is the dower of Islamic law. In theory it is the absolute property of the wife, but in practice it is often taken by her father.
[128b] NESLALN 10 of 1971.

of his immediate family.[129] In the absence of both, the guardian or person *in loco parentis* becomes entitled to receive the dowry of his ward. Except in Yorubaland, where a woman may be the head of a family, the mother of the bride is never entitled to receive the dowry. But she invariably receives part of it in addition to gifts from her son-in-law.

In the riverine areas of Ijaw, the wife of an *igwa* or 'small dowry' marriage and her children belong to her family rather than to the family of the husband. Consequently, the bride-price paid in respect of a daughter of such marriage goes to her maternal uncles or other members of her mother's family.

(C) THE BRIDE-PRICE MUST BE PAID IN RESPECT OF THE MARRIAGE OF A GIRL

There is no provision in customary law for payment by the parents of the girl to the man, as obtains in countries like India.

(D) WHEN BRIDE-PRICE IS PAID

Although customary law provides for the payment of bride-price, it does not insist that the payment must be completed before the marriage is contracted. In most instances the dowry is not paid in one instalment. The common practice is to spread out the payment over a period of time. This merely means that the validity of a marriage does not depend on the full payment of the agreed bride-price, for the payment is rarely completed.

(E) EFFECT OF PAYMENT OF BRIDE-PRICE

The payment of bride-price or part thereof does not *per se* constitute valid marriage under customary law. But it creates a special relationship between the parties to the intended marriage. One effect of this special relationship, which exists in other systems of customary law, is that if the girl becomes pregnant by some other man before the marriage takes place, the suitor is by custom entitled to claim the child – a custom which has been condemned by the superior courts.[129a]

(F) WAIVER OF BRIDE-PRICE

It seems that so long as the parties acknowledge that bride-price is essential for marriage, the parent of the girl may waive part of it so that the suitor is merely asked to make a token payment. Waiver of the whole bride-price is unusual.

### 3 Celebration of the marriage

After the customary-law requirements as to capacity and bride-price have been met, the marriage itself is contracted. In most systems of customary law in Nigeria, there is no marriage until the bride is led to the house of the bridegroom or his parents and formally handed over by

[129] *Okeke v Okoye* Suit No. o/26A/1965 (unreported), Egbuna, J, Onitsha High Court, 28 March 1966.

[129a] *Edet v Essien* (1932) 11 NLR 47.

her parent or guardian to a representative of the bridegroom's family. It has been judicially decided that a valid Yoruba or Ibo marriage is not contracted until the formal handover of the bride takes place.[130] In Ibo custom the ceremony is sometimes known as *Iduno*. In *Osamwonyi v Osamwonyi*[130a] the Supreme Court held that according to Bini customary law, payment of dowry alone without cohabitation as well does not constitute a valid customary marriage. Customary-law marriage may be contracted by proxy.

## 4 Islamic-law marriage

Although marriage under Islamic law possesses most of the features of customary-law marriage already discussed, it is necessary to consider that system of marriage separately.

We shall deal briefly with the requirements of a valid Islamic-law marriage.

### (A) CONSENTS

*(i) Parental consent.* As in other systems of customary law, parental consent is necessary for the valid celebration of marriage under Islamic law. In the case of a girl there must be a marriage guardian, whose consent to the marriage is mandatory. This position is usually occupied by the father or guardian of the bride-to-be.

*(ii) Consent of the parties.* The parties to Islamic-law marriage must freely consent to the union. But under the Maliki School of Islamic law, a father has the right to conclude marriages on behalf of his infant sons and virgin daughters (*jabr*). The exercise of this right results in child marriage and is fraught with the danger of facilitating the slave trade. But its rigour is ameliorated by the fact that the child has the option to repudiate the contract on attaining the age of puberty.[131]

### (B) SADUQUAT OR DOWER

This is the marriage payment or bride-price paid in respect of an Islamic-law marriage by the suitor. There is no prescribed amount of the saduquat. Often it varies from one locality to another.

### (C) PROHIBITED DEGREES IN MARRIAGE

Islamic law prohibits marriage between persons related by affinity or consanguinity. Moreover, a Moslem is prohibited from marrying a pagan but not a Christian woman. On the other hand, a Moslem woman is precluded from marrying a non-Moslem.

### (D) THE MARRIAGE CEREMONY

The marriage is solemnized by a Mallam in the presence of at least two

[130] *In the Matter of the Marriage Ordinance (Beckley v Abiodun)* (1943) 17 NLR 59; *Ikedionwu v Okafor* (1966–67) 10 ENLR 178. The same is true of Bini Customary Law.

[130a] SC 295/69, 6 October 1972.

[131] Anderson, J. N. D., *Islamic Law in Africa*, Colonial Research Publication No. 16 (HMSO, London 1954).

upright Moslem witnesses.[131a]

### 5 Proof of customary-law marriage

Unlike statutory marriage, a customary-law marriage must be strictly proved in judicial proceedings.[132] The best evidence is that of persons who witnessed or took part in the marriage. Quashie-Idun, CJ (as he then was), stated the law clearly thus:

> I would here stress that it is very important that Native Customary Marriage should be properly proved when it becomes an issue in any case. The best proof must come from a person who witnessed the marriage ceremony or took part in it or from the parent of the woman to whom dowry was paid or who gave the woman away in marriage.[133]

This rule does not make the parties to the marriage or persons interested in it incompetent to testify as to the fact of the marriage but deals rather with the insufficiency of the evidence of such witnesses.[134] However, the Supreme Court held in *Agongo v Aseleke & Others*[135] that the uncontradicted evidence of a party to a customary-law marriage was sufficient to establish the marriage. Consequently, the rule discussed above applies only where the evidence is challenged, in which case there is need for additional evidence to prove the marriage.

The requirement of strict proof of customary-law marriage arises from the fact that there is no ready and reliable record of customary-law marriages to which a court called upon to determine the existence of such marriage may rely upon. In the case of statutory marriage there is a compulsory and reliable system of registration, which constitutes evidence of any marriage.

### 6 Registration of customary-law marriages

There is no principle of customary law that requires the recording of customary-law marriages. But, on the other hand, the various steps leading up to and including the marriage itself are marked by public ceremonies which, to some extent, provide evidence of the marriage. The value of such evidence is severely restricted because it places

[131a] Anderson, op. cit. at 204–207; Chief Sodeinde, *Islamic Marriage Ceremony* (Lagos 1968). For an account of Islamic marriage in Southern Nigeria see Elias, T. O., *Groundwork of Nigerian Law* (Routledge & Kegan Paul, London 1954), 287; Adesanya, S. A., 'Marriage according to the local Islamic rites of Southern Nigeria' (1968) 2 *JICL* 26, 34–42. The so-called Islamic marriage in Southern Nigeria has little in common with the strict Islamic marriage.

[132] *Lawal v Younan* (1961) 1 All NLR 245, 251; *Igbokwe v UCH Board of Management* (1961) WNLR 173; *Abisogun v Abisogun* (1963) All NLR 237.

[133] *Adepeju v Adereti* (1961) WNLR 154, 155; *Igbokwe and Anor v UCH Board of Management* [1961] WNLR 173, 175, per Quashie-Idun, Ag J, in *Lawal v Younan* [1959] WNLR 155, 159 approved by the Supreme Court [1961] WNLR 197, 202; [1961] 1 All NLR 245, 251; *Abisogun v Abisogun* [1963] 1 All NLR 237, 242. But see *Agongo v Aseleke and Others* [1967] NMLR 21.

[134] Kasunmu: 'Proof of polygamous marriage in Nigerian High Courts' [1969] *JICL*, 27.

[135] [1967] NMLR 21, 22.

reliance on the memory of persons who witnessed or participated in the ceremonies. If they die their knowledge will be lost for future generations.

Varying degrees of effort have been made in some parts of Nigeria to provide for the registration of customary-law marriages. In the three Eastern States, the Local Government Law[136] authorizes local authorities to make by-laws for the registration of customary-law marriages within their jurisdiction. Most of such by-laws already made do not make registration compulsory. Nor have they prescribed any penalty for non-registration.[137]

The Registration of Marriages Adoptive By-Laws Order 1956[138] applies in those parts of the Lagos and Western and Mid-Western States[139] where the By-Laws have been adopted. Under the By-Laws, the husband in a customary-law marriage celebrated after it came into force must register it with a marriage registrar within one month of the date of the marriage. The registrar in this respect is a person appointed by a local-government council to register marriages. The registration is effected by the registrar recording the particulars of the marriage in the proper books of the Council. Any person may on the payment of the appropriate fees inspect or make copies of the contents of the marriage register. Failure to attend before a registrar or to supply the details of the marriage is an offence punishable on conviction by a fine of four Naira.

In the six Northern States, the Native Authority Law[140] empowers Native Authorities to provide for the registration of marriages within their areas of jurisdiction. Some of the by-laws made in this respect prescribe sanctions for non-registration.[141]

The overall picture of efforts to register customary-law marriages is unsatisfactory. First, there is no systematic and compulsory registration in some parts of the country. Second, even in those areas where the local-government bodies are empowered to make by-laws for registration, it is not compulsory for the bodies to exercise this power. Third, where by-laws for registration are in force, the resulting record may be of doubtful validity, because the registrar can only record such particulars of the marriage as are supplied to him. He does not record facts which are either within his personal knowledge or certified as true in a certificate.

It is hoped that an efficient and compulsory system for the registration of customary-law marriages will eventually be devised. The existence of such a system would help to clarify the point at which marriage is established. It might also solve the problems arising from the present

[136] Cap. 79 *Laws of Eastern Nigeria*, 1963, Sections 84 and 90.
[137] See for instance, *The Kalabari Council Registration of Marriages, By-Laws 1965*, ENLGN No. 1 of 1966.
[138] WRLN 4 of 1957.
[139] Over twenty Councils have adopted the By-Laws.
[140] Cap. 77 *Laws of Northern Nigeria*, 1963, Section 38.
[141] See, for instance, the Igala Native Authority (Registration of Marriages) Rules 1968, CWSNALN 5 of 1968.

requirement of strict proof of customary-law marriages.

### 7 Other types of customary-law marriage

Besides the strict bride-price marriage, which is the commonest type, and the one most widely contracted, there are other relationships which are regarded as marriage in customary law. Some of them possess the characteristics of a bride-price marriage, while others display different and unique features.

#### (A) SORORATE MARRIAGE

On the death of a wife, the widower may be presented with a substitute by her family without a fresh marriage procedure. In such cases, the first marriage is regarded as continuing, with the new wife taking the place of the dead woman.

#### (B) 'WOMAN TO WOMAN' MARRIAGE

Under some of the customary laws in Nigeria, certain marriages are contracted which may superficially be described as the union of two women. However, there is much more in such cases than meets the eye. The true position in each case is that there is a man in whose name the marriage is contracted. Some illustrations may serve to bring out this point. Sometimes, a barren woman, as a means of securing her position in the family, provides her husband with funds for the bride-price in respect of a new wife who is expected to bear children in her place.[141a] The marriage is in fact contracted in the name of her husband and there is no question of one woman being married to the other.

In some parts of Nigeria, a single but prosperous woman may be said to 'marry' another woman. The same is sometimes said of a widow. In such cases, the true situation is that the woman or widow arranges for the marriage of another woman as a means of ensuring the continuity of the male line, thereby preventing the extinction of the family. A good illustration is the case where no male survives in the family line. An unmarried female member of the family or a surviving widow may provide the bride-price for a new wife, who is expected to produce a male successor. Usually, internal family arrangements are made whereby the new wife bears children by a specially chosen paramour. In such cases, the marriage is in fact contracted in the name of the deceased father or husband as the case may be, and may be regarded as a type of 'ghost marriage'.

These marriages retain the basic characteristics of the traditional bride-price marriage and are, therefore, not of a different order.[141a]

#### (C) 'BIG DOWRY' AND 'SMALL DOWRY' MARRIAGE

In the riverine areas of Ijaw, for instance, Okrika, there are two types

[141a] Esenwa, F. E., 'Marriage Customs in Asaba Division', *The Nigerian Field* (1948) Vol. XIII No. 2; Talbot, P. A., *Tribes of the Niger Delta: their religions and customs* (Frank Cass, London 1967), 195–6; Obi, S. N. C., *Modern Family Law in Southern Nigeria* (Sweet & Maxwell, London; African Universities Press, Lagos 1966), 157.

of marriage; the incidents of each depend on the quantum of the bride-price paid. Where the *iya* or 'big dowry' marriage is contracted, the woman becomes part of her husband's family and her children belong to that family also. But in the *igwa*, or 'small dowry' marriage, the woman remains part of her original family and her children become members of their mother's family and inherit from it. But the distinction between these systems of marriage is rapidly breaking down. This has been due to social and legislative changes, of which the Eastern Region Limitation of Dowry Law 1956 is the most significant. This statute, it will be recalled, limited dowry in respect of customary law to not more than thirty pounds. The effect, therefore, is to blur the distinction between the dowry payable in respect of *iya* and *igwa* marriages. Other factors are the declining economic importance of the 'house' system and the acceptance of European and Christian ideas of monogamy.[141b]

(D) WIDOW 'INHERITANCE' MARRIAGE

On the death of a man his widow may become a wife to a member of his family. By the act of 'inheritance' the widow becomes the wife of the new suitor, with no addition to the original bride-price. Usually, the widow elects whether to remarry within her late husband's family, and chooses the member of that family she prefers to marry. Some communities allow sons to inherit their fathers' wives (other than their own mother); others admit brothers and other relations only.

## C THE RESULTANT EFFECT WHERE STATUTORY MARRIAGE IS PRECEDED BY CUSTOMARY-LAW MARRIAGE BETWEEN THE SAME PARTIES

It is a common practice in Nigeria for parties who intend to contract a statutory marriage to marry first under customary law. The parties, therefore, become man and wife under customary law before the solemnization of the statutory marriage. This practice may be explained by the fact that though Western civilization and Western culture have permeated Nigerian society, most people, even the most sophisticated, understandably regard themselves as bound by the customary law of their place of origin. The Nigerian Marriage Act has given validity to this practice by enabling persons who are married under customary law to marry each other under the statute.

Some important legal questions arise from this practice. It is uncertain whether the statutory marriage supersedes, for all intents and purposes, the previous customary-law marriage, or if the customary-law marriage is merely put into abeyance, to revive after the subsequent statutory marriage has come to an end. There is also the question of whether both marriages co-exist. These and other related questions deserve some comment.

Some of these questions arose in two decided cases. In *Asiata v*

[141b] Williamson, K., 'Changes in the Marriage System of Okrika Ijo', *Africa* Vol. XXXII (1962), 53, 58–60.

*Goncallo*,[142] Alli Elese, a Yoruba, was taken to Brazil as a slave. There he married Selia, an African freed woman. They were married first in accordance with Moslem rites, and then in accordance with Christian rites in a Christian church in Brazil. There were two daughters of the marriage. Subsequently, Alli Elese returned to Lagos with Selia. There, during the lifetime of Selia, and after the passing of the Marriage Ordinance 1884, he married Asatu in accordance with Moslem rites. By Asatu he had one child, Asiata, the plaintiff in the case. On the death of Alli Elese, the question arose as to which of his children should be entitled to his estate. The court had to decide whether the marriage with Asatu was legal. If the Christian marriage superseded the previous customary union, then Asatu's marriage might have been invalid. On the other hand, if the Moslem union remained valid, Elese could validly contract a second Moslem marriage. The Divisional Court held that since Alli had contracted a Christian marriage outside the Colony, the case of *Cole v Cole*[142a] applied, so that the second marriage was invalid. On appeal, the Full Court held that the Christian marriage was merely one as to form. Consequently, the marriage to Asatu was legal and her children were entitled to participate in the distribution of the estate of Alli.

The court adduced a number of reasons for reaching this conclusion. First, the parties were taken against their will as slaves to Brazil, which is a Christian country. Second, the court pointed out that Nigeria was not a Christian country, and by the customary law (including Islamic Law) which is applicable, a man can legally have several wives. Third, emphasis was given to the fact that the parties lived and died as Moslems. It was merely by the accident of their being in Brazil as slaves that they had to comply with the local form of marriage, which was Christian. Last, it was said that Selia did not object to the second Moslem marriage.[143] However, the decision of the court here reflects the special circumstances of the case. Consequently, the decision does not lay down general principles of law applicable in ordinary cases where a customary-law marriage precedes a statutory union between the same parties. It is, therefore, submitted that this case is not an authority for the proposition that a subsequent statutory or Christian marriage does not supersede a previous customary-law union.

The other relevant decision is *Ohochuku v Ohochuku*.[144] The parties were Nigerians and Christians. On 1 January 1949 they were married by customary law at Akarahia, Isiokpo, Nigeria. In 1950 the husband proceeded to study in England. The wife joined him there in 1953. On 24 July 1953 they went through a second ceremony of marriage at St Pancras register office in London. They did so to enable the wife to produce a marriage certificate in England, and not because they had any doubt about the validity of the Nigerian marriage. Later, the wife petitioned for divorce. Wrangham, J, pronounced a divorce *nisi* for the

[142] (1900) 1 NLR 41.
[142a] [1898] 1 NLR 15.
[143] id. at 42–3.
[144] [1960] 1 All ER 253.

dissolution not of the Nigerian marriage but of the marriage in London. He took this step on the ground that English courts of divorce have no jurisdiction to dissolve polygamous marriages.

This case cannot be regarded as an authority for the view that a decree of divorce granted in respect of a subsequent monogamous marriage does not dissolve a previous customary-law union. The case involved a conflict-of-law problem. By English conflict-of-law rules, English courts do not possess jurisdiction to dissolve polygamous marriages, although such marriages are recognized for the purposes of determining status and other matters. Consequently, the unwillingness of the judge to dissolve the customary-law union is understandable.

The attitude of a Nigerian court faced with similar facts would understandably be different. It is submitted that according to Nigerian law the decree *nisi* would dissolve both marriages. Wragham, J, accepted the evidence of Nigerian law to this effect.

Again, with regard to the incidents of marriage, the correct legal position is that parties married under the Marriage Act are entitled only to the rights and obligations of that system. Whatever customary-law rights they have acquired from the previous customary-law marriage are superseded. But matrimonial relief can only be sought in respect of acts or events which took place after the celebration of the subsequent statutory marriage.[145]

To answer the questions raised earlier, the correct position is that a subsequent statutory marriage supersedes a previous customary-law union. Support for this view is found in two legal principles. First, the relationship into which parties enter by solemnizing a statutory marriage is one which is unknown to customary law. Therefore a different system of law will apply to the situation. Second, marriage under the Marriage Act clothes the parties to it with rights and obligations which are unknown to customary law.

Some points remain to be disposed of in this connection. It is uncertain where a subsequent statutory marriage is dissolved, if the husband retains his customary-law right under the earlier union to reclaim the bride-price. So far as the writer is aware, the point has not been raised squarely before any court in Nigeria. On principle, there are no valid grounds for depriving the husband of that customary-law right.

But it seems that the answer depends on the characterization of the husband's claim for a refund of bride-price as either a matrimonial or a contractual right. If the right is regarded as a matrimonial right, then on principle its enforcement will be lost by the conversion of the customary-law marriage into a statutory one. The effect of the conversion is to substitute the matrimonial rights under statutory marriage for those of customary law. Bride-price is not a feature of statutory marriage, and there is neither the obligation to pay it nor the right to claim its refund under that system.

On close examination, the obligation to pay dowry and the right to

[145] *Ali v Ali* [1966] 2 WLR 620.

its refund are not matters arising out of the relationship of husband and wife. They cannot therefore be properly regarded as matrimonial rights. Rather they arise from a contract entered into in contemplation and in consideration of the marriage, and are therefore contractual rights.

Support for this view is found in the principle formulated in two English cases, in spite of the fact that they dealt with Greek dowry and Indian dower, which differ radically from the Nigerian dowry. In *Phrantzes v Argenti*,[146] a daughter, a Greek national, brought an action in England against her father to enforce the payment to her of marriage dowry as prescribed by Greek law. By Greek law a father was obliged to constitute, on behalf of his daughter entering on marriage, a dowry in accordance with his fortune, the number of his children, and his social position. Parker, CJ, held that the action was an action *in personam* to compel the father to pay dowry, which was enforceable in England.

In *Shahnaz v Rizwan*,[147] the parties were married in India in accordance with Islamic law. The marriage certificate provided that the wife was to have deferred *mehar* or dower. After the dissolution of the marriage, the wife brought an action in England for the recovery of the dower on the ground that the claim was a contractual one enforcing a proprietary right arising out of a lawful contract of marriage. In reply, the husband argued that the court had no jurisdiction as the marriage was polygamous in character, and that, moreover, the claim was in the form of a matrimonial relief. Winn, J, refused to regard the claim as a matrimonial right arising from the relationship of husband and wife. In the opinion of the learned judge, the action was one to enforce a contract entered into in contemplation of or by reason of a polygamous marriage.[148]

On the other hand, there is the important point that the customary-law right of a husband to claim the refund of dowry is not incompatible with the rights and obligations of statutory marriage, nor is its application repugnant to national justice, equity and good conscience.

Again, if the subsequent statutory marriage is void *ab initio*, could the parties thereto be regarded as husband and wife under the preceding customary-law marriage? This question may be vital, not only as between the parties to the purported statutory marriage, but also as to the legitimacy of their children born after that marriage. It is submitted that the invalidity of the subsequent statutory marriage does not detract from the effectiveness of the prior customary-law union. The parties, to all intents and purposes, remain legally married under that system, and their children should be regarded as legitimate issues of a customary-law marriage.

Where the subsequent marriage is voidable, it will have the same effect on a previous customary-law marriage as a non-defective statutory marriage. Consequently, a decree of nullity in respect of the voidable statutory marriage will dissolve all marital ties between the parties.

[146] [1960] 2 QB 19.
[147] [1964] 3 WLR 759.
[148] At 766.

# 3
# Legal Effects of Marriage

## A STATUTORY MARRIAGE

At some time in the development of the common law, the husband claimed the right to exercise power and dominion over his wife. The right claimed covered, *inter alia*, moderate chastisement of the wife and control of her movements.[1] But since the decision of the Court of Appeal in *R v Jackson*, in 1891,[2] the shackles of servitude fell from married women, and they acquired considerable freedom of action. Today, the married woman is virtually mistress of her own household. She may follow any profession of her own choosing, acquire and dispose of property, and enjoy freedom of movement without hindrance from her husband. In spite of these developments, the relationship of the husband and wife continues to occupy a special position in our law.

Statutory marriage confers on the husband and wife rights and obligations that are peculiar to persons who have acquired that status. These rights and obligations relate, *inter alia*, to consortium, maintenance, property, and other civil matters. We shall defer for later consideration the right to maintenance,[3] and the property rights[4] of husband and wife.

### 1 Consortium

By the fact of marriage the spouses owe each other a number of duties, which are collectively referred to as consortium. Each spouse has the right to the other's consortium.[5] Consortium is not amenable to easy or precise definition, but it has been described as 'the living together as husband and wife with all the incidents that flow from that relationship'.[6] Consortium is a name for what a spouse enjoys by virtue of 'a bundle of rights some hardly capable of precise definition'.[7] The duties which spouses owe each other in their domestic life are not fixed. They vary according to the particular circumstances of each marriage and the

[1] Bacon, M., *New Abridgment of the Law*, 7th Edn (1832), Vol 1, 693.
[2] [1891] 1 QB 671.
[3] See Chapter 9, p. 197.
[4] See Chapters 14 and 15.
[5] Scrutton, LJ, in *Place v Searle* [1932] 2 KB 497.
[6] Bromley, P. M., *Family Law*, 3rd Edn (Butterworth, London 1966), 157.
[7] Per Lord Reid in *Best v Samuel Fox & Co Ltd* [1952] AC 716, 736, [1952] 2 All ER 394, 401.

parties thereto. In general, these duties are more matters of common knowledge than the subject of legal definition. For instance, it is generally accepted that the husband is the breadwinner, while the wife is primarily responsible for the running of the household. But the position may be reversed in particular cases. In spite of the variables, it is necessary to draw attention to a number of attributes of consortium which have at least been dealt with by the courts.

### (A) CHANGE OF NAME

On marriage, a wife may use her husband's surname.[8] She may retain the surname even after the marriage has been brought to an end either by divorce or death of the husband.[9] It has been held that a husband has no right to stop his divorced wife by injunction from using his name unless she is doing so for the purpose of defrauding him or others.[10] Sometimes a wife, for professional or other reasons, may not take her husband's name on their marriage. Although the change of name by a married woman is effected by custom, there is no legal obligation to change it.

### (B) DUTY TO COHABIT

One of the primary incidents of consortium is the duty of the spouses to cohabit. But this duty is not absolute, being subject to the circumstances of the parties. Cohabitation does not necessarily imply that a husband and wife are living together physically under the same roof.[11] Where, for instance, the nature of their employment so demands, the spouses may live apart for most of the time. Obvious examples are where the husband is on military service abroad,[12] or if his business takes him away from the matrimonial home for a major part of the year. In such cases, the living apart is by the mutual consent of the parties. Even then, the spouses are regarded as cohabiting in the wider sense of the term. Withdrawal from cohabitation may constitute the matrimonial offence of desertion. Desertion may arise either from physical withdrawal from the matrimonial home or from withdrawal from cohabitation in the wider context.[13]

Where the spouses choose to live together in a matrimonial home, they may face the problem of where to locate the home. Each of the spouses may want the home to be as near as possible to his or her place of work. Ordinarily, the claim of the husband may prevail, he being the breadwinner. But where both parties contribute to the family budget, the location of the matrimonial home is a proper matter for mutual agreement.[14]

[8] *Re Fry* [1945] Ch 348; *Cowley (Earl) v Cowley (Countess)* [1901] AC 450, 460.
[9] *Fendall v Goldsmith* (1877) 2 PD 263, 264.
[10] *Cowley v Cowley* [1901] AC 450.
[11] *Bradshaw v Bradshaw* [1897] P 24.
[12] *R v Creamer* [1919] 1 KB 564 (CA).
[13] Lord Merrivale in *Pulford v Pulford* [1923] P 18, 21.
[14] *Dunn v Dunn* [1949] P 98 per Denning, LJ, at 103.

(c) SEXUAL INTERCOURSE

The parties to a marriage owe each other the duty to consummate it. Failure to consummate that arises from the impotence of one spouse may constitute a ground for nullity.[15] The duty to have mutual sexual intercourse does not terminate with the consummation of the marriage. It continues to be effective throughout the duration of the marriage. But impotence which is subsequent to the consummation does not constitute a ground for nullity. The right to sexual intercourse with each other must be exercised reasonably, and with due regard for the health and disposition of the other spouse. Consequently, while there is a duty to have sexual relations, a spouse is not bound to submit to excessive sexual demands of the other party, which may, for instance, be detrimental to that party's health. If such inordinate sexual demands, or the wilful refusal of one party to have intercourse at all, injures the health of the other, such conduct may fall within Section 15(2)(c) of the Matrimonial Causes Decree 1970[16] as evidence of the irretrievable breakdown of the marriage.

As marriage imports the consent of the spouses to sexual relations, a husband cannot be guilty as principal in the first degree of rape on his wife.[17] But he could be an accomplice or an accessory to the offence of rape committed on his wife by a third party. If, on the other hand, the husband's exercise of his right of intercourse involves the use of force or violence he may be guilty of wounding or causing actual bodily harm.

(D) MUTUAL DEFENCE

The law confers on every individual the right to use such reasonable force as is necessary to defend himself against an assault. If the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person assaulted believes on reasonable grounds that he cannot otherwise defend himself from death, he may use such force as may cause the death of the assailant.[18] Whenever it is lawful for a person to use force in self-defence against an assault, any other person acting in good faith may lawfully use a like force in aiding the person assaulted.[19] Thus, a spouse may use such force as is necessary in aiding or defending the other spouse who is assaulted. Moreover, a spouse may use force, if necessary, in order to resist actual or unlawful violence threatened to the other spouse in his presence.[20]

## 2 Remedies for interference with right of consortium

By marriage, each spouse is entitled to the consortium of the other. The husband is, for instance, entitled to the society and services of his wife.

[15] MCD 1970 Section 5(1)(a).

[16] See Chapter 6, p. 133.

[17] *R v Miller* [1954] 2 All ER 529.

[18] Criminal Code Act, Sections 286 and 287; Okonkwo, C., and Naish, M., *Criminal Law in Nigeria* (Sweet & Maxwell, London 1964), 219–226.

[19] Criminal Code Act, Section 288; Okonkwo and Naish, op. cit. at 221; Brett and McLean, *The Criminal Law and Procedure* (Sweet & Maxwell, London 1967), 666.

[20] Criminal Code Act, Section 32(3).

Consequently, it is an actionable wrong for a third party to violate this right. Interference with consortium may arise in a number of circumstances.

(A) ENTICEMENT

Each spouse is entitled as of right to the consortium, services, society and assistance of the other spouse. Consequently, any third party who wrongfully and unlawfully entices, or procures, or induces a spouse to violate this duty commits a wrong against the other spouse, who can claim damages therefor.[21]

By the very nature of action for enticement, it is not enough to show that a spouse has left the other and lived apart. It is necessary, in order to succeed, to prove that there was some positive act on the part of the defendant, which induced the spouse to leave or remain apart from the other spouse. Such act should be clear and unambiguous.[22] Furthermore, the defendant must have intended that the spouse should leave the other, and such separation must in fact have taken place.[23] Thus, where the defendant said to a married woman 'Come on, Gwen. We will go', the Court of Appeal held that there were facts on which a jury could find that the defendant enticed the woman.[24] In *Sharples v Barton*,[25] the respondent's wife fell in love with the appellant. They both confessed their relationship to the respondent. Subsequently, the respondent's wife left the matrimonial home and went to live with the appellant. The West African Court of Appeal held that there was no definite interference by the appellant, or any procuring, inciting or persuading by him which caused the actual departure of the wife from her husband's house. Once the positive act of enticement is established, it is not necessary to show that the enticed spouse's will was overborne by the defendant.[26]

Although an action for enticement may be against anyone who deprives a spouse of the consortium of the other spouse, there may be exceptions. Denning, LJ (sitting in the Queen's Bench Division), held that such action cannot be brought against the mother-in-law of the husband.[27] It is submitted that the exemption may cover both parents of a wife, for they owe her the parental obligation to be interested in her affairs. It has been held that an action for enticement may lie against a brother or brother-in-law of a wife who induced or persuaded her to leave her husband.[28]

A related problem is that of the status of advice given to a spouse. If a

[21] *Place v Searle* [1932] 2 KB 497, *Winsmore v Greenbank* (1745) Willes, 557; 125 ER 1330; *Smith v Kaye* (1904) 20 TLR 261; *Adu v Gillison* [1962] WNLR 390; *Gray v Gee* (1923) 39 TLR 429; *Welton v Broadhead* [1958] CLY 3297 or *The Times*, 19 June 1958.

[22] *Sharples v Barton* (1951) 13 WACA 198; *Solomon v Chukwuani* [1972] 2 ECSLR 619.

[23] *Smith v Kaye* (1904) 20 TLR 261; *Adu v Gillison* [1962] WNLR 390; *Newton v Hardy* [1933] All ER 40.

[24] *Place v Searle* [1932] 2 KB 497.

[25] (1951) 13 WACA 198.

[26] Per Slesser, LJ, in *Place v Searle* [1932] 2 KB 497, 520.

[27] *Gottlieb v Gleiser* [1957] 3 All ER 715.

[28] *Smith v Kaye* (1904) 20 TLR 261.

spouse solicits the advice of a third party, who gives such advice in good faith, he will not be liable.[29] Thus, in *Adu v Gillison*,[30] the expatriate wife of a Nigerian sought the advice of her doctor on the question of separating from her husband to enable her to re-adjust herself and restore her emotional equilibrium, which had been disturbed by domestic conflicts. The advice offered, in good faith and on strong medical grounds, was that a period of separation from her husband would do her good. Somolu, J, held that since the defendant tendered his advice in good faith and on medical grounds, he was not liable for the departure of the plaintiff's wife. Where the advice was gratuitous and volunteered, the position might have been different, as the enticed party might not have decided to depart or even thought of departing.[31]

Proof of adultery is not sufficient to support an action for enticement. Indeed, it is even not necessary in most cases to prove adultery between the defendant and the enticed spouse.[32] In some cases, however, the existence of such adultery may serve as evidence of the enticement alleged.

There are defences to an action for enticement. As the intention of the defendant is a necessary ingredient of the wrong, it will be a good defence to prove that the defendant did not know that a spouse was married. Again, it has been established that where the defendant acted on 'principles of humanity', because the plaintiff had ill-treated the other spouse, there is a good defence.[33] It does not seem to make any difference that the spouse's account to the defendant of such ill-treatment is true or false.[34]

A separate action in tort lies for 'harbouring' a married woman against the will of the husband without lawful excuse. But a wife has no reciprocal right.[35]

(B) LOSS DUE TO BREACH OF CONTRACT

Where there is a contract between a husband and a third party, the latter may, in breach of his contractual duty to the husband, interfere with the husband's right to the consortium of his wife. In that case, the husband is entitled to recover damages for the loss of the services and companionship of his wife.[36] In *Jackson v Watson*,[37] the plaintiff's wife died as a result of eating tinned salmon bought by the plaintiff from the defendants, who were grocers and provision merchants. He sued the

[29] *Smith v Kaye* (1904) 20 TLR 261.
[30] [1961] WNLR 390.
[31] See *Smith v Kaye*, *supra*.
[32] Scrutton, LJ, in *Elliott v Albert* [1954] 1 KB 650, 662; *Newton v Hardy* [1933] All ER 49; *Sharples v Barton* (1951) 13 WACA 198; *Tietie v Okpodu* (1964) MNLR 180.
[33] *Philp v Squire* (1791) Peake 114, 170 ER 99.
[34] *Berthon v Cartwright* (1796) 2 Esp 480, 170 ER 426.
[35] *Winchester v Fleming* [1957] 3 All ER 711, reversed on another ground [1958] 3 All ER 51. *Krifa v Gbodo* Suit No. W/24/1969 (unreported), Ovie-Whiskey, J, High Court, Warri, 31 July 1969.
[36] *Frost v Aylesbury Dairy Company* [1905] 1 KB 608 (CA); *Sellars v Best* [1954] 1 WLR 913, 919.
[37] [1909] 2 KB 193.

defendants for breach of statutory warranty. The plaintiff claimed that before her death, his wife rendered services to him by looking after his house and family of seven children. By her death, the plaintiff had lost her services, and would be put to expenses in hiring persons to perform the said services. It was argued for the defendants that the death of a person cannot ground an action for damages. The Court of Appeal held that in a case arising from contract, the cause of action arises on breach, and the death is not an essential part of it. Death is only an element in ascertaining the damages to which the plaintiff is entitled.[38] The plaintiff was, therefore, entitled to recover for the loss of the services of his wife.

(c) LOSS DUE TO DEFENDANT'S TORT

The tortious act of a third party against a wife may give rise to claims against him by the wife and the husband respectively. The wife's claim would be for the injury suffered as a result of the wrongful act of the defendant. On the other hand, the husband would be entitled to recover for the loss of the consortium or services of the wife caused by the act of the third party.[39] The husband's own cause of action *per quod consortium amisit* would be distinct from any claims that might be made by his wife. Consequently, if the wife's claim is subject to her contributory negligence, this would not affect the quantum of her husband's damages.[40] The House of Lords has regarded the husband's right of action against a person who negligently injures his wife as an anomaly in the present day, which should not be extended to a wife in the case of a tort depriving her of the husband's consortium.[41]

Although a wife is not entitled to recover for the loss of her husband's consortium, it seems that she may obtain damages for matters which are somehow incidental to the loss of consortium. In *Lampert v Eastern National Omnibus Company Ltd*[42] the wife was disfigured by injuries received in a motor accident, for which the defendant was liable. She claimed, *inter alia*, damages for the loss of her husband by estrangement in consequence of her disfigurement. Hibery, J, held that she could recover anything lost by the departure of her husband by reason of her injuries, that being an element of damage flowing from the tortious act. But she was disentitled to damages in the particular case, because the parties had been estranged before the accident. Moreover, even where damages are to be awarded under this head, they may not be substantial, because the value of the consortium of a husband who can abandon his wife merely because of such disfigurement must invariably be insignificant.

*Measurement of damages.* It is necessary to determine the measure of damages to which the husband is entitled in cases of this nature.

[38] id. at 204, 207.

[39] *Hare v British Transport Commission* [1956] 1 All ER 578; *Best v Samuel Fox & Co Ltd* [1952] 2 All ER 394; *Kirkham v Boughey* [1957] 3 All ER 153.

[40] *Mallett v Dunn* [1949] 1 All ER 973, [1949] 2 KB 180.

[41] *Best v Samuel Fox & Co Ltd* [1952] 2 All ER 394 (HL).

[42] [1954] 2 All ER 719.

He is entitled to damages for medical and nursing expenses incurred as a result of the wife's injuries. This claim arises from the fact that the husband has a legal duty to provide proper maintenance and comfort for his wife.[43] Second, the husband can also recover for loss of the wife's services, which impelled him to perform the domestic services himself or to secure the services of a servant or housekeeper.[44]

On several occasions, the question has been considered as to whether a husband who has stayed away from work so as to attend to his injured wife can recover his lost earnings as part of the damages flowing directly from the defendant's injury to his wife. In *Behrens v Bertram Mills Circus Ltd*[45] the husband and wife, who were midgets, were wounded by elephants in a circus. Both husband and wife performed together at the circus. In an action against the owners and controllers of the animals, the husband claimed for the loss of earnings for the period when he was fit to work and his wife was unfit. Devlin, J, held that the husband was entitled to recover because his refusal to go on tour without his wife was, in the exceptional circumstances of the case, reasonable. If he had gone on tour, he would have been entitled to compensation for the cost of necessary domestic help and for the loss of his wife's society.[46] In that case, the cost of paying for domestic assistance plus the damages for loss of consortium would have exceeded his loss of earnings by staying at home. The husband's action was, therefore, a reasonable step in mitigation of damages for which he was entitled in law to recover.[47]

Although the correctness of this view was doubted in *Kirkham v Boughley*,[48] it was re-asserted in *McNeill v Johnstone*.[49] There, it was held that an American air-force officer who obtained a month's leave without pay to stay near his injured French wife, who was in a hospital over 160 miles from their home, could recover damages for loss of his earnings.

Another head of claim which has featured prominently in this field is the claim for the cost of visiting an injured wife who is in a hospital. Diplock, J, stated the law here clearly:

> Visits by a spouse may well be a factor in the recovery of a patient, and a visit to a wife in hospital may thus be a proper step in mitigating the damage sustained by loss of consortium by reducing the period during which the consortium is lost; but if the sole justification for the visit is the comfort or pleasure that it gives to the husband, then its cost is not recoverable.[50]

[43] Per Lord Goddard, CJ, in *Best v Samuel Fox & Co* [1952] 2 All ER 394, 399, approved by Diplock, J, in *Kirkham v Boughey* [1957] 3 All ER 1953, 156.
[44] *Lawrence v Biddle* [1966] 1 All ER 575.
[45] [1957] 1 All ER 583.
[46] at 597.
[47] Diplock, J, in *Kirkham v Boughey* [1957] 3 All ER 153, 157.
[48] ibid.
[49] [1958] 3 All ER 16.
[50] *Kirkham v Boughey* [1957] 3 All ER 153, 156; approved by Devlin, J, in *McNeill v Johnstone* [1958] 3 All ER 16, 19.

It has been doubted whether damages can be recovered for the mere impairment of consortium as distinct from total loss of it (even though temporary). In *Best v Samuel Fox & Co. Ltd*,[51] the husband sustained serious physical injuries in consequence of the negligence of the defendants. As a result of the injuries he became incapable of sexual intercourse. He was awarded substantial damages for his injuries. But the wife claimed damages for loss of her husband's consortium in that she was deprived of the opportunity of having further children and of normal marital relations. Her claim was dismissed. But both the Court of Appeal and Lord Goddard in the House of Lords held that consortium was one and indivisible, and that nothing was recoverable for mere impairment of consortium. Lord Goddard referred to a number of situations where elements of consortium may be lost while the marriage subsists, and where neither of the spouses is entitled to compensation.[52] Lord Reid dissented from this view. The learned Lord was of the opinion that impairment of a wife's capacity to assist her husband was enough to found an action.[53]

Lord Reid's view was approved and applied in *Lawrence v Biddle*.[54] The plaintiffs, husband and wife, claimed damages for injuries suffered by the wife in a motor accident in 1963. The husband's claim included damages for impairment of consortium – that as a result of the accident they had been sleeping in different rooms and his wife, formerly a very good companion and housewife, had lost interest in cooking and social life. Further, he had to do housework, which formerly was not the case. The agreed medical evidence indicated 'comparatively minor injuries' to the leg, from which the wife had almost recovered after treatment. Brabin, J, held that although the loss of the wife's consortium had never been total, he was entitled to damages for its impairment. In this type of case, damages are based, in the main, on the loss of *servitum* (the wife's services), and here the husband had been constrained as a result of the temporary loss of such services to do more housework.[55]

Even where a husband is entitled to damages for loss of consortium or its impairment, it has been suggested that general damages should not be substantial. Thus, in *Hare v British Transport Commission*, Lord Goddard, CJ,[56] taking this view, awarded the husband £20, in addition to a special damage award of £58 for the legitimate expenses the husband incurred on account of his wife's absence. But this view has been rejected, and it is thought that in an appropriate case, damages might be substantial.[57]

[51] [1952] 2 All ER 394.
[52] *Best v Samuel Fox & Co Ltd* [1952] 2 All ER 394, 399.
[53] id. at 401.
[54] [1966] 1 All ER 575; *Toohey v Hollier* (1955) 92 CLR 618; Lord Goddard in *Hare v British Transport Commission* [1956] 1 All ER 578.
[55] at 580–1. But see *Shuaibu v Maiduguri* [1967] NMLR 204.
[56] [1956] 1 All ER 578, 579.
[57] *Sellars v Best* [1954] WLR 913, 919; *Lawrence v Biddle* [1966] 1 All ER 575, 580–1.

(D) DAMAGES FOR ADULTERY

By Section 31 of the Matrimonial Causes Decree 1970, a spouse may, in a petition for divorce based on the adultery of the other spouse, claim damages against the co-respondent for the adultery. The right to claim damages for adultery may be exercised by either a husband or a wife. If the court dissolves the marriage on the basis of the adultery, or a set of facts which includes adultery, it may award such damages as it deems proper against the co-respondent.[58] But if the adultery has been condoned, whether subsequently revived or not, or if a decree of divorce based on the adultery or on facts including adultery is not granted, damages cannot be awarded.[59] It is important to note that the right to damages for adultery is tied up with the grant of a decree of divorce based on adultery or on grounds which include adultery. There is, therefore, no separate right of action for adultery independently of a petition for divorce.[59a]

Exemplary or punitive damages are not awarded for adultery. The damages awarded are not intended to punish the co-respondent, but to compensate the injured spouse.[60] The principles that guide the award of such damages were admirably discussed by McCardie, J, in *Butterworth v Butterworth*.[61] Although these principles were in that case laid down in relation to a husband's right to recover for adultery committed by his wife, it is submitted that they are valid for situations where either spouse is entitled to damages for the other's adultery.

Let us now turn to the consideration of the relevant principles.

*(i) The actual value of the wife or husband.* There are two aspects of this head of claim – the pecuniary and the consortium aspects. The pecuniary value of a spouse is not necessarily his or her fortune or earnings. In the case of a wife as claimant, the fact that she is entitled to be maintained by her husband will be a relevant factor to be taken into account.[62] But where the wife commits adultery her fortune or earnings are not relevant, as by modern law the husband has no legal right to these. The main factor in assessing the pecuniary loss is the loss by a spouse of the services of the other spouse.[63] In the case of a husband, for instance, the important consideration is the loss of the services of the wife as a housekeeper, a mother to his children, and a partner or an associate in his business.

[58] Matrimonial Causes Decree 1970, Section 31(1).

[59] MCD S 31(2). *Bernstein v Bernstein* [1892] P 375, [1893] P 292; cf. S 4(1) of the English MC Act 1965, which provides for a right of action for damages for adultery independent of a petition for divorce. *Irinoye v Irinoye* Suit No. HD/66/71 (unreported), Lambo, J, High Court, Lagos, 6 March 1972 (CCCHCJ/3/72, 145); *Agu v Agu* Suit No. E/5D/70 (unreported), Phil-Ebosie, J, High Court, Enugu, 27 September 1972.

[59a] Section 31(1) MCD 1972; *Agu v Agu*, Suit No. E/5D/70, ibid; *Aja v Aja* (1972) 1 ECSLR 140 (where the respondent petitioned for judicial separation on the ground of the respondent's adultery).

[60] *Butterworth v Butterworth* [1920] P 126; *Mohommed v Mohommed* (1952) 14 WACA 199.

[61] [1920] P 126.

[62] *Petrie v Petrie* (1963) 4 FLR 15.

[63] *Pritchard v Pritchard* [1967] 2 WLR 264; [1966] 3 All ER 601.

With regard to consortium, it seems that in the light of the present law, only the husband is entitled to recover for the loss of the society and services of his wife. This will, of course, depend on the wife's purity, moral character and affection, and her general qualities as a wife and mother. If she is of loose character, or passes herself off as a single woman, or thrusts herself on the co-respondent, there are strong indications that her value as a wife is minimal. In *Adeyinka v Ohuruogu*[64] the petitioner claimed damages against the co-respondent for adultery committed with his wife. It was found on the evidence that the petitioner's wife was a loose woman – a heavy drinker who had committed adultery with various men and was in the habit of frequenting night clubs and staying out late. The Supreme Court, therefore, held that the wife's conduct made her consortium of no value to the husband petitioner. Moreover, where the marriage has broken down before the association with the co-respondent, the adultery will not occasion any loss to the petitioner. The important point here is not the mere living apart of the parties, but the relinquishing by the petitioner of his rights to the consortium of the other spouse.[65] In *Evoroja v Evoroja*,[66] the spouses were married at the Catholic Church, Warri on 28 March 1945. On 10 May 1954 the respondent left the matrimonial home for her father's home. In spite of the husband's pleadings, and intervention by many people, she refused to return to the matrimonial home. In July 1957 the respondent and the co-respondent were living together as husband and wife in the house of the co-respondent. The husband claimed against the co-respondent damages for adultery committed with his wife. Morgan, J, held that the husband was not entitled to damages as the adultery complained of took place after the wife had left the matrimonial home and clearly confirmed an intention to live apart from the petitioner. This case, it is submitted, was wrongly decided, for the learned judge based his judgment on the mere fact that the parties were living apart at the time the adultery was committed. The correct basis for the decision would be that the marriage had broken down and the husband had relinquished his right to his wife's consortium at the time the adultery was committed. Even then, it is doubtful whether on the facts it can really be found that the husband in fact abandoned his wife's consortium.

It has been suggested that damages for loss of consortium are today 'vestigial' and should therefore be modest.[67]

[64] [1965] 1 All NLR 210.

[65] *Adeyinka v Ohuruogu* [1965] 1 All NLR 210; *Adeleke v Adeleke*, Suit No. ND/32/66 (unreported), Alexander, J, High Court, Lagos, 4 May 1968; *Adeyemi v Adeyemi* Suit No. HD/32/68 (unreported), Adefarasin, J, High Court, Lagos, 10 March 1969; *Weedon v Timbrell* (1793) 5 Term Rep. 357, 101 ER 199; *Winter v Henn* (1831) 4 C & P 494, 172 ER 793; *Evans v Evans* [1899] P 195; *Thompson v Thompson* [1961] LLR 94 (damages paid by co-respondent for condoned adultery, which was revived).

[66] [1961] WNLR 6.

[67] *Pritchard v Pritchard* [1967] 2 WLR 264; Diplock, L J, suggested the test of a reasonable man – 276.

*(ii) The injury to a spouse's feeling and the blow to his honour.* The injury and blow to the honour of a spouse arising from the adultery of the other spouse depends to some extent on the conduct of the co-respondent. Such injury may be aggravated by breach of trust or friendship, treachery, or gross insult on the plaintiff by the co-respondent. In calculating the quantum of damages under this head, regard should be had to changing social norms. The assessment will be in respect of the impact of the adultery on the particular spouse, considered against the background of 'contemporary habits, thought, feeling and action'.[68] Diplock, LJ, in *Pritchard v Pritchard,* was of the opinion that the damages should be calculated in the light of a spouse's 'rational resentment, not his mere idiosyncratic ire'.[69]

*(iii) Co-respondent's fortune.* Ordinarily, the co-respondent's fortune is not a relevant consideration in the assessment of damages for adultery.[70] But in *Butterworth v Butterworth,* McCardie, J,[71] was of the opinion that the manner in which the co-respondent used his fortune had a direct bearing on the question of damages. According to the learned Judge, the co-respondent's fortune may be relevant in ascertaining the value of a wife and may aggravate the injury to the husband's feelings. This view has been rejected by Diplock, LJ,[72] who argued that in present-day conditions, adultery committed with a person of lower material and social status may be more likely to aggravate the injury to the feelings of a spouse than that committed with a more wealthy co-respondent.[73]

*(iv) Character and conduct of spouses.* The character and conduct of the spouses are of importance in assessing damages for adultery. Apart from the question of inherent character, it may, for instance, be found that the negligence, harshness of language or cruelty of a spouse destroyed the affection of the other spouse and thereby undermined his or her matrimonial fidelity.[74]

*(v) Ignorance of the marital status of the respondent.* A co-respondent will not be requested to pay damages for adultery if it is satisfactorily proved that he had no knowledge that the respondent was married at the time the adultery was committed.[75] Usually, it is for the petitioner to prove that the co-respondent was aware of the marital status of the respondent.

[68] Per Scarman, LJ, at 280.
[69] at 276.
[70] *Scott v Scott* [1957] P 1, [1956] 2 WLR 1121.
[71] [1920] P 126, 148.
[72] *Pritchard v Pritchard* [1967] 2 WLR 264, 277.
[73] ibid.
[74] *Butterworth v Butterworth* [1920] P 126, 145.
[75] *Darbishire v Darbishire* (1890) 62 LT 664; *Adeyinka v Ohuruogu* [1965] 1 All NLR 210.

Damages awarded for adultery may be substantial. There is no rule that it should be confined to a conventional sum.[76] The court has power to determine the manner in which damages ordered in respect of the adultery of a spouse may be paid or applied. In an appropriate case, it may direct that the damages be settled for the benefit of the respondent or the children of the marriage.[76a]

### 3 Loss of right of consortium

The right of a husband to the consortium of his wife may be lost in a number of ways:

(A) AGREEMENT TO LIVE APART

The spouses may mutually agree to live apart. Such agreement may be embodied in a formal document known as a separation agreement. This agreement suspends some aspects of the right of consortium.[77]

(B) JUDICIAL SEPARATION

An order of judicial separation granted by a court of competent jurisdiction dispenses with one of the most fundamental aspects of consortium – cohabitation. It relieves the spouses of the obligation to cohabit.

## B RELATIONS BETWEEN HUSBAND AND WIFE

### 1 Contracts between husband and wife

The contractual relationship between husband and wife at common law is governed by the common-law doctrine of the legal unity of the spouses. There are three aspects of the common-law rule in this field. First, a man cannot contract with his wife during marriage, because by the doctrine of the legal unity of the spouses a husband and wife are regarded as one legal person. Consequently, to allow them to contract with each other will amount to the man contracting with himself. Moreover, at common law a married woman lacks contractual capacity. Second, at common law, marriage makes void any contracts made between husband and wife when they were single. Third, by the rule of procedure, a husband has to be joined to his wife as a co-plaintiff or co-defendant in any action by or against her. A husband cannot therefore sue a wife, or a wife a husband.[78]

The common-law rules were altered by the Married Women's Property Act 1882, as amended in 1893. These pre-1900 statutes satisfy the test for being regarded as statutes of general application in

[76] Per Willmer, LJ, in *Pritchard v Pritchard* [1967] 2 WLR 264, 272. But see the judgment of Diplock, LJ. In that case £2,000 was awarded.

[76a] S 31(4) of the MCD 1970; *Williams & Oniteere*, Suit No. WD/16/70 (unreported), Adefarasin, J, 17 March 1971.

[77] See Chapter 9, p. 198.

[78] Blackstone, Sir W., *Commentaries on the Laws of England*, Book 1, 1st Edn (Oxford 1765), Ch 15; 442; 18th Edn ed. J. Williams (London 1821–2), 504.

Nigeria, and are so treated here.[79] But in the Western and Mid-Western States, a local statute – the Married Women's Property Law 1958[80] – is in force. We shall first examine the statutory law applicable to the rest of Nigeria, and later enquire into the differences, if any, introduced by the law of the Western and Mid-Western States.

The Married Women's Property Act 1882 emancipated the married woman from most of her contractual disabilities under the common law. It enabled a married woman to enter into binding contracts and to maintain action in contract against anyone in respect of her separate property as if she were a *feme sole*.[81] Every contract to which she is a party is deemed to be in respect of, and binding upon her separate property.[82] Further, the statute removed the procedural principle against actions between husband and wife. It is no longer necessary for a husband to be joined with his wife in an action by or against her. She now has a separate procedural capacity.[83]

In determining the effects of the statute on the contractual relationship between husband and wife, it is necessary to treat ante-nuptial and post-nuptial contracts separately.

With regard to ante-nuptial contracts, section 12 of the 1882 Act confers on a married woman civil right of action against all persons, including her husband, for the protection and security of her separate property as if she were a *feme sole*. Also, a married woman may be sued by third parties on her ante-nuptial contracts.[84] But the 1882 Act does not seem to abolish the common-law rule that a married woman is not liable to her husband on ante-nuptial contracts. In *Butler v Butler*,[85] the husband sued his wife to recover various sums he lent her both before and after their marriage. The court of first instance held that she was liable to repay the money lent after the marriage, but not the pre-marriage loan, which was irrecoverable. An appeal was made only on the first leg of the judgment, which dealt with the post-marriage loan, and the Court of Appeal confirmed the decision of the lower court in this respect.

As to post-nuptial contracts, the effect of the 1882 legislation is to enable a married woman to enter into, and render herself liable in, contract in respect of and to the extent of her separate property. She can sue and be sued to that extent by both her husband and strangers.

The Married Women's Property Law 1958, which applies to the Western and Mid-Western States, is a re-enactment partly of the English Law Reform (Married Women and Tortfeasors) Act 1935, and

[79] Park, A., *The Sources of Nigerian Law* (African Universities Press, Lagos; Sweet & Maxwell, London 1963), 24–36; *Ogedegbe v Ogedegbe* [1964] LLR 209; *Asomugha v Asomugha* CCHCJ/12/72, 91.
[80] Cap. 76 *Laws of Western Nigeria*, 1959.
[81] Married Women's Property Act 1882, Sections 1 and 12.
[82] Married Women's Property Act 1893, Section 1.
[83] Married Women's Property Act 1882, Section 1(2).
[84] Section 13. [85] (1884) 14 QBD 831.

partly of the Married Women's Property Act 1882. Section 1 of the 1958 Law, which is similar to the corresponding section of the Law Reform (Married Women and Tortfeasors) Act 1935, makes a married woman 'capable of rendering herself and being rendered liable in respect of any . . . contract, debt or obligation' and also 'of suing and being sued . . . in contract or otherwise in all respects as if she were a feme sole'. This provision, like its English counterpart, made far-reaching changes in the common law and the Act of 1882, which still applies to the rest of Nigeria.

In the first place, Section 1 of the 1958 Law swept away the limitation of the married woman's capacity and liability in contract to her separate property. She thereby became fully emancipated in the exercise of her contractual rights. With regard to ante-nuptial contracts, the words of the section are sufficiently wide to render a married woman liable for contractual liability incurred before her marriage, for it makes her not only capable of rendering herself liable in contract but also of 'being rendered liable' as if she were a *feme sole*. The provision, therefore, removed the rule in *Butler v Butler*,[88] thereby rendering a married woman liable to her husband for ante-nuptial debts. By so doing, a mutuality of rights and obligations is achieved in the ante-nuptial contractual relations of husband and wife. In the case of post-nuptial contracts, Section 1 of the 1958 Law confirms the freedom of the married woman to sue and be sued by both her husband and third parties in relation to contractual liabilities, and her freedom to contract with anyone she desires. The Law, therefore, gave a decent burial to the common-law doctrine of the unity of husband and wife in contracts.

Contracts between husband and wife are generally subject to some other rules of law. First, it is necessary, to constitute a contract, that the parties thereto have the intention to create legal relations.[89] But the courts are slow to imply such intention where the subject-matter of the agreement pertains to domestic matters. In *Balfour v Balfour*,[90] the Court of Appeal declared that a domestic arrangement between husband and wife would not be enforced by the courts. Usually, the onus is on the party who alleges a binding contract in such cases to prove the necessary intention. The burden may be easily discharged where the subject-matter of the agreement is not essentially within the domestic sphere, as where husband and wife enter into an ordinary commercial contract.

Second, contracts between husband and wife are subject to the rules of public policy. Where such contracts are contrary to public policy the courts will declare them void. While, for instance, the married status is created by contract, spouses cannot, in most cases, alter the agreement. It is, for example, contrary to public policy for spouses to contract before marriage not to live together.[91]

[88] See note 85.
[89] *Rose & Frank v Crompton & Bros Ltd* [1925] AC 445 (HL).
[90] [1919] 2 KB 571 (CA).
[91] *Brodie v Brodie* [1917] P 271.

Third, the contractual capacity of a married infant is limited, as in the case of other infants, by common law and the Infants Relief Act 1874.

**2 Husband's liability on wife's contract**

The question of a husband's liability on his wife's contract has come before the courts on many occasions. It is therefore necessary to examine the basis and extent of such liability, and the defences which are open to the husband.

It is a well-established rule of law that marriage *per se* does not *ipso facto* give a wife the power to act as the agent of her husband so as to make him liable for her contracts.[92] Subject to this rule, there are four situations in which a husband may be liable for his wife's contract:

(A) WIFE'S EXPRESS AUTHORITY

A husband may expressly authorize his wife to contract as his agent, either with a particular individual or generally. In the exercise of such authority, the wife acts merely as an agent, and her principal, the husband, is fully liable for her contracts. The legal position is the same where, although the wife had no express authority at the time she entered into the contract, her act was later ratified by her husband.[93]

(B) WIFE'S APPARENT AUTHORITY

The husband may by a course of conduct indicate to third parties that he had authorized his wife to contract on his behalf. Where, for instance, a husband usually pays cash for goods bought by his wife, the tradesman can infer that the wife has his authority to pledge his credit.[94]

(C) WIFE'S USUAL AUTHORITY

Marriage by itself does not authorize a wife to bind the husband by her contracts. If, however, the wife cohabits with her husband and manages his household, there is a presumption of fact that she is his agent and has authority to pledge his credit in all domestic matters which are ordinarily entrusted to a wife.[95] The authority conferred in this respect relates to the reasonable supply of goods and services for the benefit of the husband, his wife, children and household, that is, contracts for the supply of necessaries. Such necessaries must be sufficient to maintain herself at a level suitable to her husband's station in life. The presumption of authority raised by cohabitation and management of the household is one of fact and not a conclusion of law. Consequently, it may be rebutted by evidence in appropriate cases.[96]

*Necessaries.* The wife's usual authority to pledge her husband's credit

[92] *Debenham v Mellon* (1880) 6 AC 24.
[93] *West v Wheeler* (1849) 2 Car & Kir 714; 175 ER 298.
[94] *Wallis v Biddick* (1873) 22 WR 76.
[95] *Freestone v Butcher* (1840) 9 C & P 643, 173 ER 992; *Emmet v Norton* (1838) 8 C & P 506, 173 ER 594; *Debenham v Mellon* (1880) 6 AC 24, 32.
[96] *Debenham v Mellon, supra.*

is limited to the purchase of 'necessaries'. This term is not restricted to the bare necessaries of life like food, clothing, medicine and lodging. It also includes those goods and services which are suitable in kind and sufficient in quantity and necessary in fact according to the position in life of the husband.[97] It is for the husband to determine his standard of living.[98] If he adopts a simple inexpensive mode of life, his wife cannot pledge his credit in order to live up to high-society level. Similarly, if the husband assumes a standard of living beyond his means, he cannot grumble if his wife commits him to that extent in the purchase of goods and services. There is, therefore, no closed list of what may amount to necessaries. In each case, the court has to decide as a question of fact, whether the goods or services in question were reasonable, having regard to the standard of living adopted by the husband. The burden of proof lies on the tradesman to establish that the goods he supplied are in fact necessaries.[99]

The usual authority by which a wife is entitled to pledge her husband's credit may be rebutted by several methods.[100]

(i) Where the husband has expressly warned the tradesman not to supply goods on credit, the warning vitiates the actual authority of the wife. The tradesman thereby becomes aware of the absence of authority to pledge the husband's credit, and therefore cannot rely on it.[101]

(ii) If the married woman is already sufficiently supplied with the articles in question, they cannot pass as 'necessaries'.[102] The tradesman who deals with a married woman may run the risk of supplying goods which he is unaware that she is already sufficiently supplied with. It seems such a risk is inherent in dealings with married women, and the tradesman will not be heard to complain when he discovers that the goods supplied are not in fact necessaries.[103]

(iii) Again, it will constitute a good defence to prove that the wife was supplied with a sufficient allowance or sufficient means for the purpose of buying the articles without pledging the husband's credit.[104] The rationale of this defence was explained by Sir Richard Collins, MR:

> The arrangement as to the allowance of £2,000 which I have mentioned, clearly implied, I think, that that fund was to be substituted for any authority of the wife to pledge the husband's credit, which

[97] *Morgan v Chetwynd* (1865) 4 F & F 451, 176 ER 641; *Jolly v Rees* (1864) 15 CBNS 628, 143 ER 931.

[98] *Harrison v Grady* (1865) 13 LT 369; *Phillipson v Hayter* (1870) LR 6 CP 38.

[99] *Phillipson v Hayter* (1870) LR 6 CP 38.

[100] These are discussed in *Miss Gray v Earl Cathcart* (1922) 38 TLR 562.

[101] *Watson's Case* (1647) Clay 125; *Etherington v Parrot* (1703) Holt KB 102, 90 ER 955.

[102] *Montague v Benedict* (1825) 3 B & C 631, 107 ER 867; *Atkins v Curwood* (1837) 7 C & P 756, 173 ER 330; *Miss Gray v Cathcart* (1922) 38 TLR 562; *Callot v Nash* (1923) 39 TLR 292.

[103] See Lord Macnaghten in *Paquin Ltd v Beauclerk* [1906] AC 148, 164.

[104] *Remmington v Broadwood* (1902) 18 TLR 270; *Dennys v Sargeant* (1834) 6 C & P 419 NP, 172 ER 1302; *Reneaux v Teakle* (1853) 8 Exch. 680, 155 ER 1525; *Jolly v Rees* (1864) 15 CBNS 628, 143 ER 931.

> might be prima facie presumed from the fact of cohabitation, and therefore negatives the existence of such an authority.[105]

It is immaterial whether or not the tradesman was aware of the existence of the wife's allowance.[106]

The allowance or means must be supplied by the husband, for as McCardie, J, thought in *Callot v Nash*,[107] the mere fact that a wife has a separate and large income does not by itself exonerate the husband from the obligation of providing her with necessaries. McCardie's *dictum* that a husband is obliged to pay the dress bills of his rich wife was criticized by Denning, LJ, in the Court of Appeal in *Biberfield v Berens*.[108] Denning, LJ, drew a clear distinction between items of 'household necessaries' for which a husband is responsible no matter how rich his wife is, and 'her own necessaries' like dresses and hats, for which she ought to provide from her ample means. In his opinion, the age of complete dependence of the wife on her husband is gone. He concluded, therefore, that:

> At the present day, when a wife is in nearly all respects equal to her husband she has to bear the responsibilities which attach to her freedom. If she is a rich woman, I see no reason why her own means should not come into the family pool just as his do.[109]

These strictures were *obiter* as the case in point was one in which the wife was living apart from her husband. But the opinion reflects the modern trend in judging the relationship of husband and wife.

(iv) The actual authority of a wife will also be rebutted if it is shown that the husband expressly forbade his wife to pledge his credit.[110] It is necessary that the husband's prohibition be clear and unequivocal. Thus, mere dissatisfaction expressed on the part of the husband at the extent of the wife's expenditure is not sufficient.[111] Again, it is not material whether or not the tradesman knew of the prohibition.

(v) The wife's usual authority may be negatived where the order, though for necessaries, was excessive in point of extent or extravagant in relation to the husband's income.[112] Thus, in *Callot v Nash*, McCardie, J, held the view that an army captain's wife could be properly dressed

[105] *Morel Brothers & Co Ltd v Earl of Westmoreland and wife* [1903] 1 KB 64, 73 (CA). Confirmed by the House of Lords [1904] AC 11 (HL).

[106] ibid.

[107] (1923) 39 TLR 292.

[108] [1952] 2 QB 720, 782.

[109] ibid.

[110] *Debenham v Mellon* (1880) 6 AC 24.

[111] *Shoolbred v Baker* (1867) 16 LT 359; *Morgan v Chetwynd* (1865) 4 F & F 451, 176 ER 641, where Cockburn, J, made the following distinction: '"You must not order any more goods on my credit" is a prohibition; but "if you go on in this way I shall stop your credit", is rather a threat of future prohibition than an actual and express prohibition.'

[112] *Freestone v Butcher* (1840) 9 Car & P 643, 173 ER 992; *Walter v Aldridge* (1884) 1 TLR 138; *Miss Gray v Earl Cathcart* (1922) 38 TLR 562.

for less than £200 a year, rather than the £2,000 which she actually spent on dresses.[113] It will be recalled that in that case the husband was not held liable, because the wife contracted for herself and not as the husband's agent.

(vi) The agency of a wife may be rebutted in appropriate cases by evidence that she has a separate income entirely under her control. Where a wife has separate income of her own, it may be proved that the tradesman gave credit not to her husband but to the wife exclusively, knowing that she was a married woman. Such may be the case if the available evidence shows that the tradesman had on previous occasions sent invoices and bills to the wife, who paid from her separate bank account.[114]

But the mere fact that a wife has separate income does not preclude her from exercising her usual authority to purchase necessaries.[115] In each case, the court must be satisfied that the tradesman was dealing with a wife on her own and not as an agent of the husband[116] before discharging the husband from the obligation to pay.

### (D) WIFE AS AGENT OF NECESSITY

A wife who is deserted or turned out by her husband has the power to pledge his credit for necessaries.[117] The wife is made an agent of her husband in this respect not merely because of the fact of marriage but for the case of necessity. This is brought out by the fact that the wife's power extends only to the purchase of necessaries. However, if the deserted wife has sufficient means to support herself in a manner suitable to her husband's station in life, she cannot pledge his credit for necessaries.[118] Consequently, it is the necessitous circumstances of the wife which constitute the necessity.

Agency of necessity differs from usual agency arising from cohabitation and management of the household in two respects. While the former usually arises when the wife is deserted and not in possession of sufficient means to maintain herself adequately, the latter comes into being only by the fact of cohabitation and the wife's management of the household. Furthermore, the former is irrevocable as it derives solely from the husband's legal duty to maintain his wife, while the latter is only a rebuttable presumption of fact.

As the wife's agency of necessity is tied up with the rights of a deserted wife we shall postpone its further consideration to a later part of this work.[119]

[113] (1923) 39 TLR 291.

[114] *Freestone v Butcher* (1840) 9 C & P 643, 173 ER 992.

[115] *Seymour v Kinscote* (1922) 38 TLR 586; *Callot v Nash* (1923) 39 TLR 292.

[116] E.g. where she contracted as a principal. *Paquin Ltd v Beauclerk* [1906] AC 148 per Lord Roberson and Lord Atkinson; *Lea Bridge District Gas Co. v Malvern* [1917] 1 KB 803.

[117] *Manby v Scott* (1663) 1 Lev 4, 83 ER 1065; *James v Warren* (1706), Holt KB 104, 90 ER 956; *Emmett v Norton* (1838), 8 C & P 506, 510, 173 ER 594; *Eastland v Burchell* (1878) 3 QBD 432.

[118] *Biberfield v Berens* [1952] 2 QB 770, 785.

[119] See Chapter 9, p. 192.

(E) TERMINATION OF WIFE'S AUTHORITY

It is necessary to determine the circumstances in which a wife's authority to pledge her husband's credit may be terminated.

*(i) Express prohibition.* The wife's express or implied authority to act as her husband's agent can only be revoked by express prohibition to the wife which is brought to the knowledge of the tradesman. The same is true of the case of the wife's usual authority to pledge her husband's credit.[120] But no notice of termination to the tradesman is required where the presumption of authority is rebutted, for example where the wife is provided with an adequate allowance, for in such cases there is no authority to be terminated.

*(ii) Husband's insanity.* In *Yonge v Toynbee*,[121] the Court of Appeal decided that the authority of an agent is determined by the lunacy of his principal even though the agent is ignorant of the fact of the lunacy. The Court was of the opinion that in such a situation, the agent is personally liable for any contract he enters into on behalf of his principal, for having implicitly warranted the existence of the authority which he assumed to exercise. But this view was rejected in *Drew v Nunn*,[122] where a tradesman sued a husband to recover the price of goods supplied to the defendant's wife while the defendant was insane. The defendant's wife had his implied authority to pledge his credit, for he had on previous occasions paid for goods supplied to his wife. He later became insane and was confined to an asylum. The plaintiff was ignorant of this fact when the goods were ordered and supplied. On this action, which was brought after the husband recovered sanity, the Court of Appeal held that the defendant was liable for the price of the goods. The Court reached this conclusion on the ground that where a person holds another as his agent, the principal will be bound by the acts of the agent until the determination of the agency is brought to the knowledge of a third party.[123] On the other hand, it has been held that a wife's express authority to pledge her husband's credit is determined by his subsequent insanity.[124]

In *Read v Legard*,[125] the plaintiff supplied necessaries to the wife of the defendant while the latter was insane. On his recovery, the husband was sued by the plaintiff to recover the price of the goods supplied. It was held that the defendant husband was liable. From the judgments,

[120] Powell, R., *The Law of Agency*, 2nd Edn (Pitman, London 1961), 400–402.
[121] [1910] 1 KB 215 (CA). The court refused to follow *Smout v Ilbery* (1842) 10 M & W 1, 152 ER 357.
[122] (1879) 4 QB 661; *Richardson v Du Bois* (1869) LR 5 QB 51.
[123] id. at 667.
[124] *Daily Telegraph v McLaughlin* [1904] AC 776, 779.
[125] (1851) 6 Ex 636, 155 ER 698.

it seemed that the court regarded the case as one of agency of necessity rather than usual agency, because the defendant's obligation was said to be founded on the fact of marriage. Martin, B, explained the obligation thus:

> . . . by contracting the relation of marriage, a husband takes on himself the duty of supplying his wife with necessaries, and if he does not perform that duty, either through his own fault or in consequence of a misfortune of this kind, the wife has by reason of that relation an authority to procure them and the husband is responsible for what is so supplied.[126]

With regard to the wife's usual authority to pledge her husband's credit, its determination may depend on whether the detention of an insane husband in a hospital or an asylum may be regarded as bringing cohabitation to an end. It seems that in the latter case, the confinement takes a more profound nature and may be regarded as bringing cohabitation to an end.

*(iii) Husband's death.* In *Smout v Ilbery*,[127] the defendant's deceased husband had been in the habit of paying the plaintiff for meat supplied to his household in England. He left England for China in March 1839 and died abroad in October of the same year. But the news of his death was not received in England until March 1840. During his absence, the plaintiff continued to supply meat to his family up to the receipt of the news of his death. The plaintiff sued the widow for the price of meat supplied after Mr Ilbery's death but before the news was communicated to her. It was held that the widow was not liable, as she originally had full authority to contract on behalf of her husband. The decision may be criticized on the ground that today it is generally accepted that principal–agent relationship is terminated by the death of either party. When the wife purchased the meat after the husband's death, she had ceased to have the usual authority of a wife, for there was no husband whose credit she could pledge. She might, however, have been liable for breach of warranty of authority.[128]

When a wife contracts in reliance on her express authority, it seems that death may determine the agency when the fact has been brought to the knowledge of the tradesman.

### 3 Husband and wife in the law of tort

At common law, the relationship of husband and wife in the law of tort is guided by two rules. First, no act committed by one spouse against the other during marriage can amount to a tort. Moreover, common law prohibits one spouse from suing the other during marriage or con-

[126] id. at 643; *Re Wood Estate, Davidson v Wood* (1863) 1 De G J & Sm. 465, 46 ER 185.
[127] (1842) 10 M & W 1, 152 ER 357.
[128] Powell, *The Law of Agency*, op. cit., 388–9; In *Yonge v Toynbee* [1910] 1 KB 215 (CA), the court refused to follow *Smout v Ilbery*.

tinuing an action commenced before the marriage.[129] But this area of the law is now governed by statutes. We shall examine the position in Nigeria except for the Western and Mid-Western States, where a different statute applies.

With the exception of the Western and Mid-Western States, the position of husband and wife in the law of tort is governed by the Married Women's Property Act 1882. This statute is not as explicit on the relationship of husband and wife in the law of tort as it is on their relationship in contract. Section 1(2) of the Act makes a married woman 'capable . . . of being sued, either in contract or tort, or otherwise, in all respects as if she were a *feme sole*'. Taken by itself, the section is sufficiently wide to give a right of action to husband and wife against each other both in tort and in contract. However, the section is to be read subject to Section 12, which provides that 'no husband or wife shall be entitled to sue each other for a tort', except where such action is taken by the wife for the purpose of protecting her private property. Therefore, the Act in effect reaffirms the common-law rule against tortious actions between husband and wife. In *Ralston v Ralston*[130] it was held that a wife could not sue her husband for mere defamation unless the action was for the protection or security of her separate property. Therefore, subject to the qualification in Section 12, neither spouse can sue the other for a tort committed either before or during marriage. But where a husband commits a tort against his wife in the capacity of an agent of a third party, the wife could recover against his principal.[131]

With regard to third parties, the combined effect of Section 1(2) and Section 12 of the Act is to enable third parties to sue a married woman in respect of both ante-nuptial and post-nuptial torts. Her husband also becomes liable to third parties for the tort of his wife, and it is necessary for the plaintiff to join him as co-defendant.[132] The married woman can also sue third parties for ordinary tortious acts, and for acts that have caused damage to her separate property. But the overall liability of the wife may be met only out of her separate property.

Tortious liability of spouses in the Western and Mid-Western States is governed, as in the case of contracts, by the Married Women's Property Law 1958.[133] By Section 3[134] of that statute, a married woman is capable of rendering herself and being rendered liable for torts. She

[129] *Phillips v Barnet* (1876) 1 QBD 436; See the instructive discussion by Kahn-Freund, O., 'Inconsistencies and Injustices in the Law of husband and wife' (1952) 15 *MLR* 133, 140–54.

[130] [1930] 2 KB 238; *Webster v Webster* [1916] 1 KB 714.

[131] *Smith v Moss* [1940] 1 KB 424; [1940] 1 All ER 469.

[132] *Seroka v Kattenburg* (1886) 17 QBD 177; *Beaumont v Kaye* [1904] 1 KB 292; *Edwards v Porter* [1925] AC 1. If the wife dies, the cause of action is put to an end and the husband is no longer liable; but if the husband dies, the action does not abate – Erle, CJ, in *Capel v Powell* (1864) CBNS 743, 144 ER 298.

[133] Cap. 76 *Laws of Western Nigeria*, 1959.

[134] This is a re-enactment of Section 1 of the English Law Reform (Married Women and Tortfeasors) Act 1935.

is also capable of suing or being sued in respect of such torts. This capacity is restricted to her dealings with third parties, as Section 10 lays down that 'no husband or wife shall be entitled to sue the other in tort'. But the section also gives the married woman capacity to sue all persons, including her husband, for the protection and security of her own property as if she were a *feme sole*. Action in torts could, therefore, be brought by or against a married woman in respect of ante-nuptial[135] or post-nuptial torts by third parties only, without restriction to her separate property. Under the Law, the husband is not liable for any tort committed by his wife and could not be sued or made a party to any legal proceedings brought in respect of any such tort.[136]

We shall now turn to two matters which are common to both the 1882 Act and the 1958 Law: action by a married woman in tort for the protection and security of her separate property, and the summary jurisdiction of the High Court in respect to questions between husband and wife as to property.

### (A) REMEDIES FOR PROTECTION AND SECURITY OF MARRIED WOMEN'S PRIVATE PROPERTY

Both the 1882 Act[137] and the 1958 Law[138] conferred on the married woman the power to institute civil proceedings against all persons, including her husband, for the protection and security of her own property as if she were a *feme sole*. This is a clear exception to the general rule prohibiting tortious action between husband and wife. But the wife's right of action is strictly limited to the protection of her private property. So, where a married woman in an action against her husband alleged that she lost her job as a result of the husband's act and therefore sued him for damages for false imprisonment and malicious prosecution, it was held that the action would not lie because it was not for the protection of her separate property.[139]

By Section 24 of the 1882 Act, 'property' includes a right of action. In *Gottliffe v Edelston*,[140] an unmarried woman sustained injuries through a man's negligent driving and issued a writ against him, claiming damages in respect thereof. Before the trial of the action, she married him. It was held that her right of action was not such a thing in action as would constitute her separate property under the Act. But in *Curtis v Wilcox*,[141] the Court of Appeal held that a claim by a wife against her husband for damages in respect of an ante-nuptial tort is a right of action within Section 24 of the Act. Consequently, the right was part of her separate property, which she could protect against her husband

[135] Section 11.
[136] Section 12 (See Section 3 of the Law Reform (Married Women and Tortfeasors) Act 1935.
[137] Section 12.
[138] Section 10.
[139] *Tinkley v Tinkley* (1909) 25 TLR 264.
[140] [1930] 2 KB 378; *Chant v Read* [1939] 2 KB 346.
[141] [1948] 2 KB 474; [1948] 2.

by an action in tort.

A husband has no correlative right of action against his wife for the protection of his separate property,[142] nor can he sue her for any other tortious act. Thus, it has been held that a husband cannot, during coverture, sue his wife in respect of an ante-nuptial tort.[143] Again, a husband was refused a right of action against his wife for an injunction to restrain her from pledging his credit.[144] As this inequality is not founded on any reasonable or justifiable grounds, it is submitted that there is a strong case for conferring a similar right on a husband.

(B) INQUIRY AS TO OWNERSHIP OR POSSESSION OF PROPERTY

Although a husband cannot sue his wife in tort for the protection of his property, special statutory provisions exist for the settlement of disputes between husband and wife as to the ownership or possession of property.[145] Whenever there is any such dispute, either spouse may apply by summons in a summary way to any judge of the High Court of the division in which either party resides to determine the question. The judge may make such order with respect to the property in dispute, and as to the costs of the application, as he thinks fit.[146] Furthermore, he may adjourn the determination of the issue to enable any inquiry that he deems appropriate to be made in respect of the matter in question.[147] Any order which is made by the judge is subject to appeal. Disputes between husband and wife as to the ownership or possession of the matrimonial home are dealt with by the courts under this provision.[148] In considering the right of the deserted wife to live in the matrimonial home, the House of Lords held in *National Provincial Bank v Hastings Car Mart Ltd*[149] that her rights were of a personal nature and did not attach to the land. Consequently, the deserted wife cannot resist a claim from a genuine purchaser of the matrimonial home from her husband, whether the purchase took place after or before desertion.

The prohibition of action for tort between husband and wife creates great hardship for third parties. Where, for instance, a third party is adjudged to pay damages to a spouse in respect of a tortious act for which he and the other spouse are responsible, he cannot recover a contribution from that other spouse. The reason is that the spouse who is partly to blame is not by law a tortfeasor who would, if sued, have been liable

[142] *Butler v Butler* (1885) 14 QBD 831.

[143] *Baylis v Blackwell* [1951] 2 TLR 1245.

[144] *Webster v Webster* [1916] 1 KB 714.

[145] Married Women's Property Act 1882 S 17; Married Women's Property Law 1958 S 17; *Asomugha v Asomugha* CCHCJ/12/72, 91.

[146] *Joseph v Joseph* [1900] P 217; *W v W* [1951] 2 TLR 1135. *Edet v Edet* (1966–67) 10 ENLR 90.

[147] *Phillips v Phillips* (1888) 13 PD 220; the enquiry may continue notwithstanding dissolution of the marriage by decree absolute – *Hichens v Hichens* [1945] P 23.

[148] *Ogedegbe v Ogedegbe* [1964] LLR 209; *Bendall v McWhirter* [1952] 2 QB 466; *Short v Short* [1960] 1 WLR 833.

[149] [1965] AC 1175 overruled *Bendall v McWhirter* [1952] 2 QB 466.

in respect of the same damage.[150] In *Chant v Read*,[151] a wife was killed as a result of collision between a motor-cycle ridden by a third party and a motor-car driven by her husband. The husband claimed damages as an injured party and as the administrator of his wife's estate. The third party counter-claimed for contribution from the husband as a joint tortfeasor. The court held that the counter-claim had to fail, as the husband was not a tortfeasor in respect of his wife's estate.

The bar on spouses suing each other in tort is an anachronism, which was based on the need for preserving the unity of husband and wife. This rule has outlived its usefulness and in modern times has nothing to offer to the harmony of the matrimonial home. It is submitted that a change in the law is long overdue, so as to enable spouses to sue each other in tort. Even in England, from where we borrowed this rule, it has been found unreasonable and unsuitable, and therefore changed.[152]

### 4 Death of spouse

Under the common law, it was not a civil wrong to cause the death of a human being. Lord Ellenborough, CJ, in 1808 laid down the rule that 'in civil court the death of a human being cannot be complained of as an injury'.[153] The anomaly of this rule was that while a husband, for instance, could recover for injury done to his wife, he was deprived of any cause of action if the wife was killed by the wrongful act of a third party. This common-law rule subsisted until 1846, when it was modified by the Fatal Accidents Act, usually known as the Lord Campbell Act.[154] The Federal Supreme Court has held that the Fatal Accidents Acts are statutes of general application in Nigeria, and as such their provisions have full effect here.[155]

Since 1956 the English Fatal Accidents Acts 1846 and 1864 have been replaced by local legislations, which adapt the Imperial Acts to local conditions.[156] All the statutes in this field in various parts of Nigeria have substantially similar provisions.

Section 1 of the Fatal Accidents Act 1846 is re-enacted in the local legislations. Action under that provision is brought for the benefit of the members of the immediate family of the deceased, which includes

[150] See Civil Liability (Miscellaneous Provisions) Act 1961 S 8(1)(c), Torts Law 1958 (WR) S 14(c); Torts Law 1962 (ER) S 5(1)(c); Civil Liability (Miscellaneous Provisions) Law (NR) S 4(1)(c).

[151] [1939] 2 KB 346; *Drinkwater v Kimber* [1952] 2 QB 281.

[152] Law Reform (Husband and Wife) Act 1962.

[153] *Baker v Bolton* (1808) 1 Camp 493, 170 ER 1033; *Osborne v Gillett* (1873) LR 8 Ex D 88; *Admiralty Commissioners v S.S. Amerika* [1917] AC 38.

[154] This Act and the Fatal Accident Act 1864 are together known as the Fatal Accident Acts.

[155] *Lawal v Younan* [1961] 1 All NLR 245; *Eguriase v U.A.C.* [1959] WRNLR 72; *Jirigho v Anamali* [1958] WRNLR 195.

[156] East [the three Eastern States] Fatal Accidents Law 1956, Cap. 52 of *Laws of Eastern Nigeria*, 1963; North [the six Northern States] Fatal Accidents Law 1956, Cap. 43 *Laws of Northern Nigeria*, 1963; West and Mid-West States: Torts Law 1958, Cap. 122 *Laws of Western Nigeria*, 1959; Lagos State: Fatal Accident Act 1961, No. 34 of 1961. *Okafor v Nnodi* [1964] NMLR 132, 135.

the parents, children, and widow, widows or widower of the deceased.[157] If the deceased is not subject to customary law, the action is brought by, or in the name of, the executor or administrator of the deceased. But if the deceased is subject to customary law, the court shall have regard to option of his immediate family, by such person as the court is satisfied is under customary law entitled or empowered to represent the deceased or his estate.[158] Where there is no executor or administrator, or if action is not brought within six months after the deceased's death, an action may be brought in the name of the immediate family by any member of that group.[159] All actions under the statute must be commenced within three years after the death of the deceased.[160] Where the deceased is subject to customary law, the court shall have regard to that system of law in the assessment of damages.

In assessing damages, no account is to be taken of any sum paid or payable on the death of the deceased under any contract of insurance.[161] Damages awarded by the court may include reasonable funeral expenses incurred by the persons on whose behalf an action is brought.[162] The damages awarded may be reduced proportionally if the death was partly as a result of the deceased's fault.[163]

Damages recoverable by a spouse as a result of the other's death must be distinguished from the right of action which survives for or against the estate of a deceased person. While the former accrues to the individual dependants of the deceased, the latter is for the benefit of the deceased's estate. Consequently, the right derived under the latter is in addition to, and not in derogation of, the right conferred by the fatal accidents statutes on members of the deceased's immediate family.[164]

## 5 Husband and wife in criminal law

Special provisions are made in criminal law regarding the criminal liability of husband and wife. These rules recognize the particular relationship of married people and the need to foster and preserve marital harmony and unity.

### (A) HUSBAND'S COMPULSION

The mere fact that a woman committed an offence in the presence of her husband does not automatically raise the presumption that he

[157] *Jirigho v Anamali* [1958] WRNLR 195.
[158] East S 4(1); North S 4(1); West and Mid-West S 4; Lagos S 3(2).
[159] *Adekambi v Ibironke* [1958] WRNLR 81.
[160] East S 6; North S 6; Lagos S 4.
[161] East S 7(3); North Sections 7(1) and 7(2); West and Mid-West S 6(1); Lagos S 6(1).
[162] East S 7(4); North S 7(3); West and Mid-West S 6(1); Lagos S 6(2).
[163] East – Torts Law 1962 S 3(5) Cap. 125 *Laws of Eastern Nigeria*, 1963; West and Mid-West – Torts Law 1958 S 1 Cap. 122 *Laws of Western Nigeria*, 1959; North – Civil Liability (Miscellaneous Provisions) Law 1957 S 5(4) Cap. 23 *Laws of Northern Nigeria*, 1963; Lagos – Civil Liability (Miscellaneous Provisions) Act 1961 S 13.
[164] North – Civil Liability (Miscellaneous Provisions) Law 1957 S 3(5); Lagos – Civil Liability (Miscellaneous Provisions) Act 1961 S 6 and Law Reform (Torts) Act 1961 S 4(3).

compelled her to do so. But the wife of a statutory marriage[165] is not criminally responsible for an act which she is actually compelled by her husband to do in his presence, provided that such an act is not an offence punishable by death or one in which grievous bodily harm is an element.[166]

(B) LIABILITY AS ACCESSORY AFTER THE FACT

A person who receives or assists another who is, to his knowledge, guilty of an offence, in order to enable him to escape punishment, is an accessory after the fact of the offence. But the wife of a statutory marriage does not become an accessory by helping or assisting her husband to escape punishment. Nor is she guilty if in her husband's presence and by his authority she assists his confederates to escape punishment. Similarly, a husband does not become an accessory by assisting his wife.[167] The rationale for this rule seems to be that the bond between husband and wife is such as will impel a spouse to come to the aid of the other in circumstances in which an offence is committed.[168]

(C) CONSPIRACY

A husband and wife of a statutory marriage are not criminally responsible for conspiring between themselves alone, for they are considered in law as one person.[169] This protection is lost if there is a third party to the conspiracy.

(D) PROPERTY OFFENCES

Every wife of a statutory marriage has a criminal and civil right of action against all persons, including her husband, for the protection and security of her separate property as if she were a *feme sole*. But proceedings under this provision are subject to the general rule as to the liability of husband and wife for offences committed by either with respect to the other's property.[170]

Generally, a husband and wife cannot steal from each other, being one person in law. When a husband and wife of a statutory marriage are living together, neither of them incurs criminal responsibility for doing any act with respect to the other's property. But this defence is lost when the act is committed by a spouse who is 'leaving or deserting' or 'when about to leave or desert the other'. Moreover, this defence does not avail where the act is accompanied by an intention to injure or defraud

[165] The Criminal Code uses the term 'Christian marriage', which is defined in S 1 of the Code as 'a marriage which is recognized by the law of the place where it is contracted as a voluntary union for life of one man and one woman to the exclusion of all others'. In Nigeria this is marriage under the Marriage Act 1914.

[166] Criminal Code Act S 33 Cap. 42 *Laws of the Federation of Nigeria*, 1958.

[167] Criminal Code Act S 10.

[168] Okonkwo, C., and Naish, M., *Criminal Law in Nigeria* (Sweet & Maxwell, London 1964), 180.

[169] Criminal Code Act S 34. *Keshiro v I.G.P.* (1955–56) WRNLR 84.

[170] Criminal Procedure Act S 148; Married Women's Property Act 1882 S 12.

some other person.[171]

Beside this rule, a husband or wife may be criminally responsible for an act done in respect of the property of the other, which would be an offence if they were not husband and wife. However, in the case of a statutory marriage, neither husband nor wife can institute criminal proceedings against the other while they are living together.[172] But proceedings may be brought against a spouse by the state.

(E) UNLAWFUL CARNAL KNOWLEDGE

A husband cannot be guilty of an offence of unlawful carnal knowledge of his wife.[173] Consequently, he cannot commit rape on his wife. This rule is not restricted to the parties to a statutory marriage, but includes the husband and wife of a customary-law marriage.[174] A husband could, however, be guilty of indecent assault on his wife.[175]

## 6 Husband and wife in the law of evidence

In the law of evidence, special consideration is given to the relationship between the husband and wife of a statutory marriage.[176]

(A) COMPETENT WITNESS

In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, are competent witnesses.[177] Moreover, in criminal cases, the accused person, his wife or her husband, and the wife or husband of any person jointly charged with him and tried at the same time, are competent to testify.[178] The law makes it clear that in spite of the relationship of marriage, each spouse is a competent witness for the other.

(B) COMPELLABLE WITNESS

When a person is charged with the offences specified in Section 160(1) of the Criminal Code Act, the wife or husband of such person shall be a competent and compellable witness for the prosecution or defence without the consent of the person charged. But in other cases, the husband or wife of such person is a competent and compellable witness only on the application of the person charged.[179] However, the failure of the wife or husband of any person charged with an offence to give evidence is not to be made the subject of any comment by the prosecution.[180]

[171] Criminal Code Act S 36.
[172] ibid.
[173] Criminal Code Act S 6. Offences covered by this provision include defilement of girls under 13 (S 218), defilement of girls under 16 and above 13 (S 221), and rape (S 357).
[174] Where the existence of Christian marriage is a constituent element of a defence it is clearly specified in provisions of the Criminal Code Act, e.g. Sections 10, 33, 34 and 36.
[175] Section 360. *Alawusa v Odusote* (1941) 7 WACA 140.
[176] Evidence Act, Section 2(1).
[177] Evidence Act, Section 157 Cap. 62 *Laws of the Federation of Nigeria* 1958.
[178] id., Section 158.
[179] Evidence Act S 160(2). *R v Idiong and Umo* (1953) 13 WACA 30.
[180] id., S 160(4).

(c) COMMUNICATIONS DURING MARRIAGE

Except in suits between a married couple, a husband or wife cannot be compelled to disclose any communication made to him or her during the marriage by the other spouse. Further, a spouse cannot be permitted to disclose any such communication except with the consent of the spouse who made it.[181] By making communications between husband and wife privileged, the law seeks to ensure that spouses can freely confide in each other.

(D) EVIDENCE OF SPOUSE AS TO ADULTERY

The parties to any proceedings instituted in consequence of adultery, as well as the husbands or wives of such parties are competent to give evidence in the proceedings. But any witness, including the husband and the wife, may be compelled to answer a question which may show that he or she has committed adultery, if proof of the adultery is material to the decision of the case.[182] Apart from this instance, no witness may be compelled to answer any question tending to show that he or she is guilty of adultery unless the witness has given evidence in the proceedings in disproof of the alleged adultery.[183]

### 7 Distinction in effects of types of marriage

It is significant that both the Criminal Code Act and the Evidence Act confer special defences only on husbands and wives of statutory marriages. An illustrative case in point is the different defences available in criminal charges to a wife of a statutory marriage and a woman married under customary law. The former may plead in defence to a criminal charge that she was compelled by her husband to commit the wrongful act in his presence. This defence, of course, is not available to the wife in customary-law marriage. She has to fall back upon the defence that she did the act in order to save herself from immediate death or grievous bodily harm threatened by some other person.[184]

There are no apparent or convincing reasons why in a non-Christian country like Nigeria a distinction should be drawn between the status conferred by statutory and customary-law marriages.[185] By Nigerian law, marriage under both systems of law is valid and binding, and the status of husband and wife is conferred on the spouses of such marriages.

[181] id., S 163. Matrimonial Causes Decree 1970 S 83. *Theodoropoulas v Theodoropoulas* [1963] 2 All ER 772; *McTaggart v McTaggart* [1949] P 94; *Obayemi v Obayemi*, Suit No. SC 346/1966 (unreported), Supreme Court, 19 May 1967.

[182] Matrimonial Causes Decree 1970 S 85(1).

[183] Evidence Act S 162.

[184] Criminal Code Act, Section 32(4).

[185] E.g. in *Mawji v The Queen* [1957] AC 126, the Privy Council interpreted the provision of the Tanganyika Criminal Code on conspiracy between husband and wife to cover the spouses of a customary-law union. In Tanganyika equal recognition and legal effect are now given to all types of marriage. All wives now have equal status irrespective of the form of marriage – sections 9, 10 and 56 of the Law of Marriage Act 1971; Read, J. S., 'A milestone in the Integration of Personal Laws: The New Law of Marriage and Divorce in Tanzania' Vol. 16 [1972] *JAL* 19, 26.

It is suggested that this anomaly should be rectified by statutory amendments, which will give equal privileges in these branches of the law to all husbands and wives.

### 8 Nationality

The effect of marriage on the nationality of the spouses depends in each case on the provisions of the applicable law. A female non-Nigerian citizen does not automatically acquire Nigerian citizenship by marriage to a Nigerian citizen. But she may acquire Nigerian citizenship by registration.[186] Similarly, when a female Nigerian citizen marries a national of a foreign state, whether or not she acquires the nationality of her husband will depend on the law of his country. However, there is no rule of Nigerian law that enables a Nigerian woman married to a foreigner to retain her Nigerian citizenship.[187]

## B CUSTOMARY-LAW MARRIAGE

### 1 Consortium

The spouses of customary-law marriages are entitled to each other's consortium. Customary law requires the cohabitation of the spouses. However, as in English law, cohabitation here implies a 'state of things' rather than mere living under the same roof. Furthermore, each spouse is entitled to the society and company of the other.

Under customary law, each spouse owes the other a duty to submit to the other's reasonable sexual demands. The reasonableness of the demands is a question of fact, to be determined in the light of the surrounding circumstances.

### 2 Mutual protection

Customary law recognizes the right of mutual protection by the spouses to a customary-law marriage. Each spouse is entitled to the assistance of the other in case of danger to life or limb. The right of mutual defence under the criminal law is the same as in the case of statutory marriage, which has already been discussed.[188]

### 3 Remedies for interference with consortium

(A) RANGE OF REMEDIES

Unlike English law, customary law has not developed a full range of remedies for interference with the right of consortium. For instance, there is no general right of action for damages for wrongfully inducing a spouse to leave the other. If, however, the inducement involves or is accompanied by adultery, damages may be obtained in customary law for the adultery. It is important to note that enticement is a common-law concept. Thus, where an action is framed and argued on the basis of the tort of enticement, customary courts will lack jurisdiction to adjudicate

[186] Nigerian Citizenship Act 1960, Sections 3B and 3C (No. 43 of 1960).
[187] Cf. Sections 14 and 19(2) of the British Nationality Act 1948.
[188] See p. 63.

the matter. The tort of enticement is unknown to customary law, and customary courts have no power to administer common law, which includes torts.[188a] Where a right of action in customary law similar to that on the basis of enticement is alleged to exist, it must be satisfactorily proved.

Again, if a spouse is injured as a result of the negligence of a third party, customary law does not provide any right of action for interference with consortium. The same is true of loss of consortium caused by the breach of contractual obligation.

(B) DAMAGES FOR ADULTERY

However, one of the remedies developed by customary law for interference with consortium is in respect of the commission of adultery with a married woman. In some parts of Nigeria, customary law confers on the husband a right of action for damages against a third party who commits adultery with his wife. Where, on the other hand, the husband commits adultery, the wife has no corresponding right of action. But she may regard the adultery as a ground for divorce.

The husband's right of action for damages is independent of any action for divorce on the ground of the wife's adultery. Consequently, he could recover damages even when the marriage is still subsisting. If, however, the marriage is dissolved on the ground of the adultery, the husband is in addition entitled to the refund of the bride-price.

In *Chawere v Aihenu and Johnson*,[189] the first defendant was originally the wife, under Yoruba customary law, of one Algbohandi, from whom she was seduced by the plaintiff. The plaintiff thereupon paid £20 (₦40·00) to the husband as a refund of the bride-price. Later, the first defendant was sent away by the plaintiff and went to live with the second defendant. The plaintiff then claimed that the first defendant was the wife of the second defendant. He also claimed the sum of £4 10*s*. (₦9·00), being the cost of a sewing machine he gave the first defendant. The Divisional Court held that the mere fact that the first and second defendants were living together did not amount in customary law to marriage between them. The learned judge was of the opinion that while the plaintiff could not recover the bride-price paid in respect of the first defendant, he could have recovered damages for the adultery of his wife if he had made a claim in that respect. In *Eshareturi v Okere*,[190] both husband and wife, who came from Agbarha in the Ughelli area of the Mid-Western State, were married under customary law. The defendant committed adultery with the wife of the plaintiff. Obaseki, J, held, on appeal, that the defendant was liable under customary law to pay damages to the plaintiff for the adultery.

[188a] *Akintayo v Atanda* [1963] 2 All NLR 164.

[189] (1935) 12 NLR 4.

[190] Suit No. W/29A/66 (unreported), Obaseki, J, High Court, Warri, 28 February 1967; *Aladetoyinbo v Adedipe*, Suit No. AD/10A/69 (unreported), Odumosu, J, High Court Ado-Ekiti, 24 June 1970. See the application of the custom in *Krifa v Gbodo* Suit No. W/24/1969 (unreported), Ovie-Whiskey, J, High Court, Warri, 31 July 1969.

(c) HARBOURING A RUNAWAY WIFE

Under some systems of customary law in Nigeria, a husband has a right of action for the recovery of his wife from any person who harbours her without just cause. This right of action may be exercised against her parents, relations or any other person who harbours her. In *Erurhobare v Otebrise*,[191] the plaintiff's wife, one Omatre, was harboured without just cause and against the husband's wish by her parents, the defendants. The plaintiff brought an action against the defendants in the Adeje Customary Court in Sapele Judicial Division for the return of his wife. The court found in favour of the plaintiff, and ordered the defendants to return the plaintiff's wife within two weeks of the date of the order. On appeal, Eboh, J, upheld the finding of the lower court as being in consonance with the local and applicable customary law. In the opinion of the learned judge, it would have been wrong to apply the principles of English law or common law to the instant case. Contrary to the contention of the appellant, the court found that the custom in question was not contrary to natural justice, equity and good conscience.

Although it was not clearly stated in the judgment, it is assumed that the wife, Omatre, was willing to return to her husband. In fact the appellant did not raise this issue in the appeal. If the contrary was the case, it will be wrong in principle to compel an unwilling wife to return to the matrimonial home. Such an order may also violate her freedom under customary law to desert her husband.

[191] (1971) 1 UILR 33.

# PART II

# MATRIMONIAL RELIEF

# 4
# Matrimonial Causes – Jurisdiction

## A STATUTORY MARRIAGE

### 1 Historical background

Since the cession of the Colony of Lagos to the British crown in 1861 matrimonial causes in Nigeria have been regulated by English law. The result was that the various English statutes on this subject were applied to Nigeria even though they were primarily fashioned to meet English needs. There was, therefore, an obvious vacuum in Nigerian law, which called for some legislative initiative to provide the country with an indigenous law in this field. This need was met by the Matrimonial Causes Decree 1970.[1] The new Decree followed the path blazed by the Matrimonial Causes Act 1959 of Australia,[2] which has found ready acceptance in other Commonwealth countries such as New Zealand,[3] Canada[4] and the United Kingdom.[5] It is based substantially on the Australian Matrimonial Causes Act 1959, and to a minor extent on the new English Divorce Act of 1969. To some extent, its novelty lies principally in the modifications which it made to the provisions of the Australian and English statutes. The 1970 Decree should be regarded as an encouraging first step in the quest for an indigenous law on matrimonial causes, fashioned specifically to reflect our social and economic values and suitable for solving our domestic problems.

The 1970 Decree defines 'matrimonial causes' to include proceedings for a decree of dissolution of marriage, nullity of marriage, judicial separation, restitution of conjugal rights, or jactitation of marriage.[6]

### 2 Jurisdiction

Under the Republican constitution of Nigeria, 1963, the Federal Government has exclusive legislative jurisdiction in all matters relating to 'marriages other than marriages under Moslem law or other customary law; annulment and dissolution of, and other matrimonial causes relating to, marriages other than marriages under Moslem law or other

[1] No. 17 of 1970. Otherwise cited as MCD 1970.
[2] Matrimonial Causes Act 1959. This Act was amended by the Matrimonial Causes Act 1965 (No. 99 of 1965).
[3] Matrimonial Proceedings Act 1963.
[4] Divorce Act 1969.
[5] Divorce Act 1969.
[6] Cf. S 2(1) of High Court of Lagos Act S 2(1).

customary law'.[7] Only the Federal Government, therefore, could legislate on matters connected with statutory marriages in Nigeria. The Federal Government by statute conferred jurisdiction in divorce and matrimonial causes on the then regional High Courts.[8] The jurisdiction thus conferred in respect of these matters was similar to the one exercised by Her Majesty's High Court in England.[9] Consequently, none of the inferior courts including the Magistrates' Courts had jurisdiction in matrimonial causes arising from statutory marriages.

The exclusive jurisdiction of the High Courts in matrimonial causes was far from being satisfactory. While there may be good reasons of public policy for conferring jurisdiction for dissolution of statutory marriages only on High Courts, the same could not be said of the jurisdiction to grant minor matrimonial reliefs. For instance, there were no compelling reasons for not enabling the Magistrates' Courts to deal with matrimonial reliefs such as the grant of maintenance allowance or the making of orders for judicial separation.[10] This view is strengthened by the fact that Magistrates' Courts were more readily accessible to remote localities than the High Courts. Moreover, proceedings in Magistrates' Courts would have saved time and expense for litigants and relieved the traditional congestion in the High Court lists.

The Matrimonial Causes Decree 1970 has gone some way to meet these shortcomings. It has conferred jurisdiction in matrimonial causes on the High Court of every State in the Federation.[11] But once maintenance is ordered in proceedings in a High Court, a Magistrates' Court or a District Court in any state has jurisdiction to enforce payment in a summary manner.[12] This jurisdiction of courts of summary jurisdiction is specific and of limited scope. It is submitted that this development, though welcome, falls short of what is adequate in this field. These courts could profitably be empowered to make orders for maintenance and judicial separation.

The jurisdiction of the courts to entertain proceedings in matrimonial causes is based largely on the domicile[13] or residence of the parties. If a court lacks jurisdiction, the parties to the suit cannot by consent or otherwise confer jurisdiction on it. We shall deal briefly with domicile and residence as the basis for jurisdiction.

### (A) DOMICILE

Domicile is a term that denotes a person's permanent home. It is

[7] S 69; item 23 of the Schedule (part I) of the Exclusive Legislative List.

[8] Regional Courts (Federal Jurisdiction) Act S 3, Cap. 117 *Laws of Nigeria*, 1958, now known as State Courts (Federal Jurisdiction) Act.

[9] See the various High Court statutes – Lagos (Cap. 80) S 16; East (Cap. 61) S 11; North (Cap. 49) S 13(1); West and Mid-West (Cap. 44) S 8.

[10] See, for instance, the powers of Magistrates' Courts in respect of Matrimonial Causes in England – Matrimonial Proceedings (Magistrates' Courts) Act 1960.

[11] Section 2(1).

[12] ibid., and Section 114(1).

[13] *Le Mesurier v Le Mesurier* [1895] AC 517; *Shyngle v Shyngle* (1923) 4 NLR 94; *Jones v Jones* (1938) 14 NLR 12.

distinct from nationality, which refers to the political entity to which one owes allegiance. While the two may coincide, it is possible in a federation to have more than one domicile, in which case each of the territorial and legislative units will constitute a separate domicile. But a person can have only one domicile at any given point of time. So he can acquire a new domicile only after he has abandoned the old one. Moreover, a person must always have a domicile, i.e., he cannot be without one.

*(i) Domicile of origin.* At birth every person receives a domicile, which is his domicile of origin. In the case of a legitimate or legitimated child, it is the domicile of the father at the time the child was born. But an illegitimate or posthumous child takes the domicile of the mother.[14] Where the parents are unknown, it seems that the domicile of origin of the child is that of the country in which he is found.[15]

The domicile of a legitimate child changes with that of his father. On the father's death, he will depend on his mother for a change if the change is in his interest.[16] An illegitimate child depends on his mother for change of domicile. If both parents of the infant are dead, or if he is a foundling, his domicile probably changes with that of his guardian.[17]

*(ii) Married woman's domicile.* On marriage, a woman automatically acquires the domicile of her husband. While the marriage subsists, the woman cannot acquire a domicile of her own. Her dependent domicile changes automatically with that of the husband.[18] If the marriage is void *ab initio* the woman will not acquire the husband's domicile, because in law there is no marriage at all: she will retain her last domicile, and can change it at will. On the other hand, where the marriage is voidable, being a valid and subsisting marriage until made void, the woman acquires the domicile of her husband.[19]

When the marriage is either nullified or terminated by death or divorce, she ceased to depend on the husband for her domicile.[20] But she does not thereby automatically revert to her last domicile before marriage. At that point, she retains her husband's last domicile before the event until she acquires a new domicile of choice.[21]

*(iii) Domicile of choice.* Since infants and married women have a

[14] *Udny v Udny* [1869] 1 HL Sc Div 441; *Urquhart v Butterfield* [1887] 37 Ch D 357; *Enwonwu v Spira* [1965] 2 All NLR 233.
[15] Dicey, A. V. and Morris, J. H. C., *Conflict of Laws*, 8th Edn (Stevens, London 1967), 84 Rule 6(3).
[16] *Re Beaumont* [1893] 3 Ch 490; *Potinger v Wrightman* [1817] 3 Mer 67, 36 ER 26.
[17] *Douglas v Douglas* [1871] 12 Eq 617; *Urquhart v Butterfield* [1887] 37 Ch D 357.
[18] *Lord Advocate v Jaffrey* [1921] 1 AC 146; *Attorney-General for Alberta v Cook* [1926] AC 444; *H v H* [1928], 206; *Herd v Herd* [1936] P 205.
[19] *De Reneville v De Reneville* [1948] P 100; *Salveson v Austrian Property Administrator* [1927] AC 641; *Chapelle v Chapelle* [1950] P 134.
[20] *Re Wallach* [1950] 66 TLR 132.
[21] *Re Scullard* [1957] Ch 107.

domicile of dependence, they cannot change it or acquire an independent domicile as long as they retain their dependent status. However, the infant on attaining majority or the married woman on the termination of the marriage can acquire a domicile of choice. Excluding infants and married women, any person can change his domicile by acquiring a domicile of choice. To do so, the person must satisfy two conditions. He must establish residence in a new place and must, at the same time, have an intention to make it his permanent home.[22] Neither residence nor the necessary intention alone is enough to found a new domicile. The two must operate concurrently.[23]

*Animus manendi* is the one important factor in a domicile. Once there is the necessary intention a concurrent residence of any duration is enough to create a new domicile of choice. If the necessary intention exists, a person who is in a temporary residence on duty, such as a soldier posted abroad, may acquire a domicile of choice in his place of duty.[24]

As a person can only have one domicile at any given time, to acquire a new domicile of choice there must be the abandonment of the old one. An existing domicile of origin goes into abeyance on the acquisition of a domicile of choice. But a domicile of choice is lost by the person leaving the place with an intention never to return there permanently. If a domicile of choice is lost and a new domicile is not acquired immediately, the domicile of origin automatically revives so as not to leave the person without a domicile.[25] This domicile of origin remains effective until a new domicile of choice is acquired.

*(iv) Domicile in Nigeria or in a state?* Up to 1951, Nigeria was governed as a unitary state, and it was assumed that for all purposes there was a common Nigerian domicile.[26] But from that year Nigeria became a federation[27] and the question of whether there is a common Nigerian domicile or different regional domiciles came to the fore.

In *Attorney-General for Alberta v Cook*[28] the Privy Council held that in Canada, the domicile of a person settled in one of the Provinces of Canada is in that particular Province, though the Dominion Parliament has legislative power to dissolve the marriage. In reaching this conclusion the Board pointed out that:

> Uniformity of law, civil institutions existing within ascertained territorial units, and juristic authority in being there for the administration of law under which rights attributable to domicil are claimed, are indicia of domicil, all of which are found in the Provinces. Unity

[22] *Re Martin* [1900] P 211, 231; *Bowie v Liverpool Royal Infirmary* [1930] AC 588.
[23] *Bowie v Liverpool Royal Infirmary* (ibid.); *Bell v Kennedy* [1868] HL Sc Div 307.
[24] *Donaldson v Donaldson* [1949] 65 TLR 233; *Stone v Stone* [1958] 1 WLR 1287; *Cruikshanks v Cruikshanks* [1957] 1 WLR 564.
[25] *Udny v Udny* [1869] 1 HL Sc Div 441; *Re Lloyd Evans* [1947] Ch 695; *Harrison v Harrison* [1953] 1 WLR 865.
[26] See *Shyngle v Shyngle* (1923) 4 NLR 94; *Jones v Jones* (1938) 14 NLR 12.
[27] Nigeria (Constitution) Order-in-Council 1954.
[28] [1926] AC 444.

of law in respect of the matters which depend on domicil does not at present extend to the Dominion.[29]

Opinion was divided among Nigerian High Courts as to whether there was a single Nigerian domicile, or if each region or state constituted a separate domicile.[30] One school of thought held the view that there is a single Nigerian domicile. This view is founded on the fact that the Federal Legislature has exclusive legislative competence in matrimonial causes. In the exercise of this competence, it has by statute conferred jurisdiction on the state High Courts and prescribed the law to be applied. The result is that there is uniformity of law and jurisdiction, both deriving from the same source.[31] Consequently there can only be one Nigerian domicile.

The other school of thought argues that each of the old regions (now states) constitute a domicile. Hurley, Ag CJ, in *Okonkwo v Eze*,[32] stated clearly some of the grounds put forward by this school. First, by the State Courts (Federal Jurisdiction) Act the jurisdiction of the High Court in matrimonial causes is exercised in conformity with the law and practice for the time being in force in England. The jurisdiction of the High Court in England in relation to this subject is confined to cases where the husband is domiciled in England. Similarly, the jurisdiction of the High Court of a region (state) should be confined to cases where the parties are domiciled in that region or state.[33] Second, it is stated that jurisdiction in respect of legitimacy and succession to movables depends on domicile. Neither of these subjects is within the exclusive legislative competence of the Federal Legislature. Each unit of the Federation may legislate in regard to them independently of the Federation and one another. Domicile in relation to these matters, therefore, lies in the component units of the Federation. There cannot be one domicile for legitimacy and succession and another for marriage, for a person cannot have more than one domicile at a time.[34] A further argument put forward in support of regional or state domicile is that the Federation is composed of independent and sovereign units, each with its own legislature and courts of justice. Legislative power in the Federation is shared between the Federal Government and the units. Where a region or state legislates in relation to legitimacy, for instance, it confers jurisdiction on its courts only with regard to the matter in

[29] id. at 450.

[30] See discussions of this subject by Karibi-Whyte, A. G., 'Nigerian Divorce Domicile – Federal or Regional' (1964), *Nigeria Lawyers' Quarterly* Vol. 1 No. 1 (January–June), 9–18; Atilade, P. A., *Nigerian Bar Journal* [1964] Vo. 5, 56–66.

[31] *Nwokedi v Nwokedi* [1958] LLR 94 (Onyeama, J, as he then was, who decided this case, later changed his mind); *Udom v Udom* [1962] LLR 112; *Ettarh v Ettarh* Suit No. LD/23/1962 (unreported), Adefarasin, J; *Odunjo v Odunjo* [1964] LLR 43; *Odiase v Odiase* [1965] NMLR 196; *Jonah v Jonah* Suit No A/10/68 (unreported), Uche Ome, J, High Court, Asaba, 17 October 1969.

[32] *[1960] NNLR 80.*

[33] id. at 80–81; *Arinze v Arinze* [1966] NMLR 155.

[34] *Okonkwo v Eze* [1960] NMLR 80, 81–82.

hand, and not on all High Courts in the country.[35]

The dispute that has raged on this subject was unfortunately among the High Courts. There was no opportunity for the Supreme Court to express an opinion on this matter. In the face of the uncertainty generated by the decisions of the High Courts on this subject, there was an urgent need for the government to step in and establish some reliable rule on such an important question of the law, which closely affects the personal life of citizens.

*(v) Jurisdiction based on domicile.* Section 2(2) of the Matrimonial Causes Decree 1970 provides that matrimonial causes – proceedings for a decree of dissolution of marriage or nullity of marriage, or judicial separation, or restitution of conjugal rights, or jactitation of marriage – may be instituted only by a person domiciled in Nigeria. For this purpose, a person domiciled in any State of the Federation is domiciled in Nigeria, and may institute proceedings in the High Court of any State, whether or not he is domiciled in that particular State.[36]

The effect of the new law was to create one Nigerian domicile for matrimonial causes only. It does not purport to create, nor has it created, a single Nigerian domicile for all purposes. In fact the relevant provision refers to 'a person domiciled in any state of the Federation . . .', thereby confirming that for other purposes a person may be domiciled in one of the States. It seems that this rule has effected a fundamental change in the common-law rule that a person can possess only one domicile at any given time.[37]

Special provisions are made in the Decree as to the domicile of married women. As has been mentioned earlier, under the common law a married woman possesses her husband's domicile throughout the subsistence of the marriage. This rule may in certain circumstances cause hardship to the married woman. For instance, if she desires to divorce her husband she is compelled to follow him to the court of the country in which he has acquired a domicile. In fact, the husband has the opportunity of changing his domicile from time to time in order to avoid being divorced by his wife. He could claim to have abandoned any domicile he might be alleged to have. To alleviate this difficulty, the Decree presumes a deserted wife who is domiciled in Nigeria either immediately before her marriage or immediately before the desertion to be domiciled in Nigeria, thereby giving the courts jurisdiction under Section 2(2).[38] There are two requirements of the provision. First, the married woman must be domiciled in Nigeria immediately preceding her marriage or immediately before the desertion. With regard to the latter, it was held in *Zanelli v Zanelli*[39] that where an Italian who

[35] De Lestang, CJ, in *Machi v Machi* [1960] LLR 103; *Uchendu v Uchendu* [1962] LLR 101; *Adeyemi v Adeyemi* [1962] LLR 70.

[36] Section 2(3) of MCD 1970. A similar solution was adopted in Australia Matrimonial Causes Act 1959 S 23: *Lloyd v Lloyd* [1961] 2 FLR 349.

[37] *Lloyd v Lloyd* [1961] 2 FLR 349; [1962] ALR 279.

[38] Section 7(a).

[39] [1948] 64 TLR 556.

acquired an English domicile of choice deserted his wife by returning permanently to Italy, the wife was to be presumed to be domiciled in England immediately before the desertion. Second, the married woman who seeks the privilege of this provision must show that she is a deserted wife at the time she commences proceedings.[40]

*(vi) Jurisdiction based on residence.* The Nigerian court will assume jurisdiction under the Decree in respect only of a married woman if she is resident in Nigeria at the date of the institution of the proceedings, and has been so resident for the period of three years immediately preceding that date. In such a case, the woman is deemed to be domiciled in Nigeria at the date of the proceedings.[41] Two tests are laid down here. It must be shown, in the first instance, that she was resident in Nigeria at the time of the institution of proceedings. Residence connotes physical presence that is permanent, and not merely fleeting or transitory.[42] Consequently, she must have a permanent place of abode in Nigeria at the prescribed date. The second arm of the rule requires a proof that she has been 'so resident'[43] for a period of three years immediately preceding the institution of the suit. This means that the residence must have been continuous over the period in question. A mere temporary absence from Nigeria on business or holidays will not constitute a break of residence. In *Stransky v Stransky*[44] it was held that where a woman, while maintaining a home in England, spent fifteen months abroad with her husband posted there on duty, the period of residence in England was not broken. On the other hand, where a wife lived with her husband in Canada for five months, without leaving any semblance of a home in England, the period of her residence was regarded as severed.[45]

### 3 Law to be applied

Up to 17 March 1970,[46] the High Courts were enjoined to exercise their jurisdiction, subject to state laws on practice and procedure, 'in con-

[40] ibid. See also the Australian decisions in *Moscovitch v Moscovitch* [1939] SASR 359; *Whitely v Whitely* [1947] WALR 50.

[41] S 7(b). See the problem in enforcing a comparable provision of S 18(1)(b) of English MCA 1950 – *Adeoye v Adeoye* [1961] All NLR 792; *Arinze v Arinze* [1966] NNLR 155 at 157.

[42] *Levene v I.R.C.* [1928] AC 217; *Matalon v Matalon* [1952] 1 All ER 1025.

[43] Compare S 18(1)(b) of the English Matrimonial Causes Act 1950, which uses the words 'resident' and 'ordinarily resident'. It has been debated whether these two terms mean the same thing or not – *Hopkins v Hopkins* [1951] P 116; *Stransky v Stransky* [1954] P 428; McClean: Vol. II 1 CLQ [1962] P 1153. It does not seem that there is any substantial distinction between 'so resident' and 'ordinarily resident'.

[44] [1954] P 428; *Lewis v Lewis* [1956] 1 WLR 200.

[45] *Hopkins v Hopkins* [1951] P 116.

[46] The date on which the Matrimonial Causes Decree 1970 came into force – see Legal Notice No. 26 of 1970.

formity with the law and practice for the time being in force in England'.[47] The repeal of this provision was one of the most important achievements of the 1970 Decree. Henceforth, the jurisdiction conferred on State High Courts by the Decree is to be exercised in accordance with its provisions.[48]

The bulk of the law of matrimonial causes is now contained in the 1970 Decree, though the celebration of marriages is still regulated by the Marriage Act. The supremacy of the Decree is established by S 115(4), which provides that in case of inconsistency between the Decree and any other law, the Decree 'shall prevail and that law shall be void to the extent of the inconsistency'. The Decree applies exclusively to statutory marriage.[49] Thus for the first time English matrimonial causes law ceased to apply in Nigeria and is replaced by a local statute.

## 4 Reconciliation

It has always been the attitude of courts dealing with matrimonial causes to try as much as possible to effect reconciliation between the spouses. For this reason, no admission made by a spouse in a civil case is admissible in evidence if it is made either on an express condition that evidence of it is not to be given, or in circumstances from which the court may infer that the parties agreed that evidence of it should not be given.[50] Moreover, where the court hears a petition for divorce it usually gives some consideration to whether there are prospects of reconciliation between the parties.[51] The duty of the courts to encourage reconciliation under the old law was residuary and of a general nature. Consequently it was often dealt with vaguely, and resorted to after the court had examined the allegations of the spouses.

A radical change was made to the question of reconciliation by the Matrimonial Causes Decree 1970.[52] For the first time, the duty of the court to effect reconciliation in matrimonial causes was clearly stated. The court before which a matrimonial proceeding is instituted is obliged to give consideration throughout the course of the suit to the possibility of reconciling the spouses, unless the case does not admit of such effort. If at any time it appears to the judge either from the nature of the case and the evidence in the proceedings or from the attitude of

[47] Regional Courts (Federal Jurisdiction) Act 1958, S 4 (Cap. 177 *Laws of the Federation of Nigeria*, 1958) – now repealed by S 115(2) of MCD 1970. This provision was re-enacted in all State High Court Statutes – *Egwunwoke v Egwunwoke* [1966] NMLR 147; *Arinze v Arinze* [1966] NMLR 155. It meant that Nigerian Courts will apply English law from time to time – *Harrison-Obafemi v Harrison-Obafemi* [1965] NMLR 446.

[48] Section 8.

[49] Section 114(1)(b) of the MCD 1970.

[50] Section 25 of the Evidence Act. Cap. 62 *Laws of Nigeria*, 1958.

[51] For instance, in considering whether to exercise its discretion in favour of the petitioner's adultery the court considers among other things whether if the marriage is not dissolved there is prospect of reconciliation between the spouses – *Blunt v Blunt* [1943] AC 517. See also S 1(2) of the English MCA 1965, which makes a special provision with regard to reconciliation in cases of desertion.

[52] Sections 11–14.

the parties or their counsel that there is a reasonable possibility of reconciliation, he may adjourn the proceedings.[53] Such adjournment is for any of the following purposes:

(a) To afford the parties an opportunity of being reconciled.[54] This implies a reconciliation effected *inter se*, probably without a third party's intervention; or

(b) The judge may, with a view to effecting a reconciliation, and with the consent of the parties, interview them in chambers. The parties may be interviewed with or without counsel as the judge considers appropriate in the particular case.[55] If his effort at reconciliation fails, he ceases to be qualified, unless requested by the parties to the proceeding, to continue to hear and determine the suit. In the absence of such request, the suit must be heard by another judge[56]; or

(c) The judge may nominate a person of experience or training in marriage conciliation or, in special circumstances, some other suitable person, to endeavour (with the consent of the parties) to effect reconciliation.[57] A marriage conciliator, before embarking on his functions, must make and subscribe to an oath of secrecy. The oath requires him not to disclose to any person any communication or admission made to him in that capacity except in so far as such disclosure is necessary for the proper discharge of his functions.[58]

The law allows at least fourteen days from the date of the adjournment to enable any efforts at reconciliation to yield fruits. But after the expiration of that period, the judge is bound, at the request of either of the parties to the proceeding, to resume the hearing. Where he has been disqualified from doing so, the suit will be heard by another judge.[59] Evidence of anything said or any admission made in the course of effecting a reconciliation is not admissible in any court or tribunal, or in proceedings before any person, whether appointed by law or not.[60] Thus, where the judge appoints a priest or welfare officer to mediate in the dispute, any admission made in the course of effecting the reconciliation is not admissible in evidence. However, where the person engaging in the reconciliation of the spouses is not appointed by a judge under Section 11 of the Decree, anything said or any admission made in the course of his mediation will be admissible in evidence unless Section 25 of the Evidence Act applies.

A few points emerge from this new arrangement. First, the consent of the spouses is important in every effort at effecting reconciliation. In the absence of such consent, no basis for reconciliation exists. Second,

[53] Section 11(1).
[54] Section 11(1)(a).
[55] Section 11(1)(b).
[56] Section 12.
[57] Sections 11(1)(c) and 114 of the MCD 1970.
[58] Section 14.
[59] Section 11(2).
[60] Section 13.

the judge is invested with the additional responsibility of making a personal effort to reconcile the spouses. As Nigerian judges are known to be saddled with the burden of long case-lists, it is doubtful if they will find time to perform this function effectively. Third, there is a dearth of persons with experience or training in marriage conciliation, and a positive effort must be made to produce such persons in order to ensure the effectiveness of this arrangement.

Besides the general arrangement for reconciliation discussed here, there are other provisions of the Decree which are intended to encourage reconciliation of the spouses.[61] These will be discussed in their appropriate places.

### 5 Rules of Court

Under Section 112(1) of the Decree, the Chief Justice of Nigeria is authorized to make rules for or in relation to the practice and procedure of the courts having jurisdiction under that statute. But before making the rules, he is required by law to hold prior consultations with the Chief Justices of the States and the Presidents of the Courts of Appeal in the States. So far no rules have been made in the exercise of this power. However, as a transitional arrangement, the Decree provides that the rules of court in force immediately before the commencement of the Decree in respect of divorce and matrimonial causes shall continue to operate with necessary modifications until expressly revoked by new rules made in exercise of section 112(1) of the Decree.[61a]

## B CUSTOMARY-LAW MATRIMONIAL CAUSES

### 1 Jurisdiction

All customary courts in Nigeria possess original and unlimited jurisdiction in 'matrimonial causes and matters between persons married under customary law or arising from or connected with a union contracted under customary law'.[62] On the other hand, with the exception of the East Central State, state High Courts and Magistrates' Courts do not possess original jurisdiction in matrimonial causes arising under customary law. The statutes establishing the High Courts clearly provide that: '. . . the High Court shall not exercise original jurisdiction in any matter which is subject to the jurisdiction of a customary court

[61] Section 17 and 60.

[61a] Section 112(4) of the MCD 1970. In the three Eastern States, the English Matrimonial Causes Rules 1957 as amended up to 1960 apply – *Adibuah v Adibuah* (1972) 1 ECSLR 127, *Aja v Aja* (1972) 1 ECSLR 140. For the rest of Nigeria, the English Matrimonial Causes Rules 1968 apply – *Adigwu v Adigwu* Suit No. A/9/69 (unreported), High Court, Agbor, 9 October 1970.

[62] Customary Courts Edict 1966 S 18, and Second Schedule – No. 38 of 1966 (Mid-West State); Area Courts Edict 1967 S 17, and First Schedule – No. 2 of 1967 (North-Central State, Kwara State and Kano State), No. 4 of 1968 (Benue-Plateau State).

relating to marriage, family status . . .' [63] But there are three instances in which a High Court or Magistrates' Court may assume original jurisdiction in respect of customary-law matrimonial causes. The first is where the Military Governor or the Administrator of a State so directs by an order.[64] Second, where a suit is transferred from a customary court to a High Court or Magistrates' Court, that court exercises original jurisdiction in the suit.[65] Third, in the unusual case where there is no customary court to exercise original jurisdiction in an area, the High Court or Magistrates' Court in the area may be vested with original jurisdiction. This was the case in 1966–67, when after the military take-over customary courts in some parts of the country were dissolved. In the absence of customary courts, Magistrates' Courts were vested with original jurisdiction in matters relating to matrimonial causes under customary law.[66]

In the East Central State, where customary courts have been abolished, the High Court and Magistrates' Courts are now vested with original jurisdiction in matrimonial causes and matters between persons married under customary law.[66a]

Appeals lie from the customary courts in the first instance to the Customary Courts of Appeal, or in the Northern States, to the Upper Area Courts. These courts have both original and appellate jurisdiction in all matters relating to matrimonial causes under customary law. In the Mid-Western State, appeals lie from the customary courts to the Magistrates Court, and then to the High Court.[67] In some of the Eastern States and the Western State a party may appeal on a decision of a Customary Court of Appeal to the High Court.[68] But in the six Northern States, appeals lie from the Upper Area Court to the Sharia Courts of Appeal in all cases involving questions of Moslem personal law. Such matters are described as follows:

(a) any question of Moslem law regarding a marriage concluded in accordance with that law, including a question relating to the dissolution of such a marriage or a question that depends on such a marriage relating to the family relationship or the guardianship of an infant;

[63] High Court Law (Western Region) S 9(1); High Court Law (Northern Region) S 17(1); High Court (Mid-Western Nigeria) 1964, S 10(2); Magistrates' Court Law (Western Region) S 19(4) *Omodion v Fasoro* [1960] WNLR 27; *Nwafia v Ububa* [1966] NMLR 219; *Adaware v Okpodi* Suit No. W/84/70 (unreported) Atake, J, High Court, Warri, 19 April 1971.

[64] ibid. See also Magistrates' Court Law (Western Region) S 20; High Court Law (Northern Region) S 17(2)(a).

[65] High Court (WR) S 9(1); High Court (NR) S 17(2)(b).

[66] Customary Courts Edict 1966 (ER) S 3; Customary Courts (Suspension of Warrants) Edict 1966 (Mid-West) S 3.

[66a] High Court Law (Amendment) Edict 1971 S 3; Magistrates' Court Law (Amendment) Edict 1971 S 5. It is doubtful whether the Magistrates' Courts in the Eastern States have original jurisdiction in respect of dowry under the ER Limitation of Dowry Law 1956.

[67] Customary Courts Edict 1966, Sections 50–52.

[68] Customary Courts (No. 2) Edict 1966, S 50; Customary Courts Law 1958, Section 48.

(b) where all the parties to the proceedings are Moslem, any question of Moslem law regarding a marriage, including the dissolution of that marriage, or regarding family relationship . . .[69]

In all other cases, a party may appeal to the High Court.

### 2 Law applicable

The customary courts administer the native law and custom prevailing in the area of the jurisdiction of the court, or binding between the parties. Such customary law is applicable in so far as it is neither repugnant to natural justice, equity and good conscience nor incompatible either directly or by necessary implication with any written law for the time being in force.[70] In the Northern States, customary law includes Moslem law as modified by the custom of each locality. The Sharia Court of Appeal is enjoined to apply Moslem law of the Maliki School as customarily interpreted at the place where the trial took place in the first instance.[71]

### 3 Reconciliation

It is significant to note that customary courts are given a general mandate in all civil matters, including matrimonial causes, to promote reconciliation among the parties to suits before such courts.[72] No specific reconciliation procedures are laid down for customary courts. Consequently, each court has a free hand in determining the best approach to each case. Reconciliation is important in matrimonial causes under customary law because strong family and other relations make it difficult to apply the strict rules of customary law. In many cases family and other social pressures are brought to bear on the parties, making it imperative for them to submit to reconciliation, either by their families or by any other person.

[69] Area Courts Edict 1967, Section 54; Sharia Court of Appeal Law 1960, Sections 10 and 53(5), (Cap. 122, *Laws of Northern Nigeria*, 1963).
[70] Customary Courts Edict 1966, Sections 22 and 23 (Mid-West State); Area Courts Edict 1967, Sections 20 and 21; Customary Courts Law 1958, Sections 19 and 20.
[71] Sharia Court of Appeal Law 1960, Section 14.
[72] Customary Courts Law 1958, Section 25 (West).

# 5
# Nullity

Nullity of marriage should be distinguished from the other matrimonial causes. Matrimonial reliefs like divorce, judicial separation and restitution of conjugal rights are available in respect of valid and existing marriages. But a suit for nullity is one by which a party seeks to establish that owing to some defect there was never a marriage in the first place.

## A VOID AND VOIDABLE MARRIAGE

An invalid marriage may be void or voidable.[1] The distinction between these is of great importance. A void marriage is one that has never been in existence. Such a marriage is void *ab initio*, and the parties thereto have never acquired the status of husband and wife. A voidable marriage, on the other hand, is one that is good while subsisting, but may be annulled at the instance of one or both parties owing to some existing defect. Contrary to the rule in commercial contracts, a party to a voidable marriage cannot simply bring it to an end. The marriage can only be annulled by a court of competent jurisdiction. In the case of a void marriage, it is not necessary to obtain a court decree because the parties have never been husband and wife. However, a decree may be obtained in respect of a void marriage, merely to allay doubts. Such a decree simply declares the existing fact – that there has never been a marriage. Lord Green in *De Reneville v De Reneville*[1a] succinctly put the distinction between void and voidable marriages thus:

> a void marriage is one that will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it: a voidable marriage is one that will be regarded by every court as a valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction . . .

Any person may assert the invalidity of a void marriage. But where the marriage is voidable, only one of the spouses can do so, because until it is annulled, the marriage is valid. Again, on the death, for instance, of a husband to a void marriage, his relations or executors may challenge

[1] Section 34 of MCD 1970.
[1a] (1948) P 100, 111 (CA).

the validity of the marriage in order to show that the surviving spouse is not his widow. Such action may be taken to establish that she is not entitled to his property. But if the marriage is simply voidable, it cannot be questioned by third parties because up to the death of the husband it was a valid and subsisting marriage. The wife in such a case has all the rights of a widow.

*Approbation*

A marriage that is void *ab initio* cannot be given legal effect by the conduct of the parties thereto. However, in the case of a voidable marriage a party to it may by his act put it out of his power to obtain a decree of nullity. By his conduct that party forfeits the right to challenge the validity of the marriage. Lord Watson clearly explained this principle in *G v M*,[2]

> . . . in a suit for nullity of marriage there may be facts and circumstances proved which so plainly imply, on the part of the complaining spouse, a recognition of the existence and validity of the marriage, as to render it most inequitable and contrary to public policy that he or she should be permitted to go on to challenge it with effect.

Approbation may arise from the overt act of a party to the marriage,[3] or from delay in petitioning for nullity,[4] or as a result of accepting the material benefits of the marriage.[5] While the courts may refuse a decree of nullity on the grounds of approbation, the modern judicial attitude is to treat that as a discretionary bar. Consequently, the court may in the exercise of its discretion grant a decree in spite of the approbative conduct of a party.

## B GROUNDS ON WHICH MARRIAGE MAY BE VOID

Section 3 of the Matrimonial Causes Decree 1970 lays down grounds on which a marriage celebrated after the commencement of the Decree may be void *ab initio*. Sub-section (1) of that section makes it clear that the grounds of invalidity enumerated therein are exhaustive. The Decree gives five grounds on which a marriage may be void.

### 1 Existing lawful marriage

By Section 3(1)(a) of the Matrimonial Causes Decree 1970, where either of the parties to a marriage is at the time of its celebration lawfully married to some other person, such marriage will be null and void. The first situation is where a customary-law marriage precedes a statutory

[2] (1885) 10 AC 171, 197–8 (HL).

[3] For instance, where the husband petitioner consented to two adoptions it was held that the adoptions involved a representation to the court that the joint adopters were husband and wife: *W v W* [1952] 1 All ER 858.

[4] *Scott v Scott* [1959] 1 All ER 531. But a delay may be satisfactorily explained away – *Clifford v Clifford* (1948) 1 All ER 394.

[5] *Nash v Nash* [1940] 1 All ER 206.

marriage with a different person.[5a] This is dealt with in Section 33(1) of the Marriage Act, which provides that:

> No marriage in Nigeria shall be valid where either of the parties thereto at the time of the celebration of such marriage is married by native law or custom to any person other than the person with whom such marriage is had.[6]

This sub-section applies only to statutory marriages celebrated in Nigeria under the Marriage Act. Where the marriage is contracted outside Nigeria, the provision does not apply. In that case, the validity of the foreign marriage will properly be determined by the application of the conflict rules as to the capacity to marry.

The position where the subsequent statutory marriage was celebrated outside Nigeria was considered in *Adegbola v Folaranmi, James Johnson*.[7] In that case, one Harry Johnson, a native of Awe in the then Oyo Province, married a woman, Oniketan, by native law and custom, and they had one child, Adegbola, the plaintiff in this action. Johnson was later captured as a slave and taken to Trinidad in the West Indies, where he was converted to the Christian faith. He then married one Mary Johnson there in a Catholic Church. At the date of the marriage, Johnson's wife by customary law, Oniketan, was alive and living at their home at Awe. In 1876, Harry and Mary Johnson returned to Lagos, where Harry Johnson died intestate in or about 1900. On the subsequent death of Mary Johnson, Adegbola claimed to inherit a house built by her father in Lagos. It became necessary to determine the validity of the Christian marriage. The Divisional Court held that the Christian marriage must be presumed valid. On appeal, the Full Court confirmed the opinion of the lower court. To reach this conclusion the court stated:[8]

> Although there is no direct evidence that the native polygamous marriage which Harry Johnson contracted before he was seized as a slave was dissolved, I think that the proper presumption on the facts is that Harry Johnson, before he contracted his marriage with Mary Johnson, considered that he and his partner to the native marriage were absolved from all obligations to one another . . . and that he was free to contract a Christian marriage . . .

[5a] *Ojo v Ojo* Suit No. A/4D/72 (unreported), High Court, Aba, Umezinwa, J, 1 December 1972.

[6] As amended by the MCD 1970 S 115(1). The commission of the prohibited act is an offence punishable under the Marriage Act with five years' imprisonment – S 47. This punishment is not applicable where the monogamous marriage was celebrated outside Nigeria. It is doubtful whether the prohibition is also punishable under S 370 of the Criminal Code – *R v Princewill* [1963] NNLR 54; Brett, L., and McLean, I., *Criminal Law and Procedure* (Sweet & Maxwell, London 1967), 737–740. *A G of Ceylon v Reid* [1965] AC 720; *Marasinghe*, M.L. 'Monogamy, Polygamy and Bigamy' (1968) *JICL* Vol. 2, 54.

[7] [1921] 3 NLR 89.

[8] at 92.

Further, the court found that Harry Johnson, at the time of his Christian marriage, had been in the West Indies for some thirty-five years, during which he was separated from his customary-law wife and became converted to Christianity.

It is submitted that the court erred grievously in holding that because Johnson considered himself absolved from his customary-law marriage he was, therefore, free to contract a Christian marriage. Customary-law marriage is not dissolved by a party to it considering himself discharged from that union. To dissolve a customary-law union the necessary procedure must be followed. In the present case, although the parties had lived apart for thirty years, the customary-law marriage was still subsisting because the dowry had not been refunded. This act constitutes, in most cases, the termination of a customary-law union. While that marriage subsisted, Harry Johnson, being a married man by his *lex loci domicilii*, did not have the capacity to contract a monogamous marriage with Mary in Trinidad. Consequently the Christian marriage should have been void. The fact that he was taken to the West Indies against his will may be relevant in determining whether he in fact intended to contract a monogamous marriage, or if he merely complied with the *lex loci*, without intending thereby the legal consequences of that law.

This case was decided purely on the facts and common law. The Marriage Act 1884, which imposed a prohibition similar to that contained in Section 33(1) above, was enacted some years after Johnson contracted the Christian marriage, and therefore was not applied by the court in reaching its decision.[9] Moreover, the Christian marriage was celebrated outside Nigeria.

But Section 33(1) was considered in *Oshodi v Oshodi*,[10] where a wife, Folashade, petitioned for divorce on the grounds of cruelty and adultery. The respondent contracted a valid marriage in 1954 with one Sikiratu, under Yoruba Islamic law and custom pertaining to the Ahmadia. In 1955, the respondent and the petitioner were married under Yoruba law and custom. The petitioner knew of the 1954 marriage, and all three lived together before the petitioner and respondent left for England. In 1956, the petitioner and the respondent went through the English form of marriage. The respondent contended that the English marriage of 1956 was a nullity, and that consequently the petitioner was not entitled to the reliefs sought. Caxton-Martins, Ag J, stated that as the 1956 marriage was not celebrated in Nigeria, Section 33(1) was not relevant. He held *obiter* that if the petitioner and respondent had married in Nigeria under the Marriage Act a caveat would have been successfully lodged, as the 1954 marriage was an existing valid marriage.[11] On the validity of the English marriage, the learned judge was of the view that the answer to the question 'is to be found in the reasonings in *Asiata v Goncallo*'.[12] On the basis of that reasoning he concluded that as the

[9] at 91.
[10] [1963] 2 All NLR 214.
[11] at 216.
[12] [1900] 1 NLR 41.

respondent had not 'renounced his faith as a follower of the Holy Prophet' the 1954 marriage was still subsisting, and the English marriage was therefore a nullity.[13]

It is submitted that the learned judge reached the right conclusion but on a wrong reasoning. If the judge's reasoning is followed it will mean that nobody who is a practising Moslem or pagan can ever validly contract a statutory marriage. The decision in *Asiata v Goncallo* should be restricted to the particular facts of that case. The correct approach to this problem seems to be via the rules of conflict of laws. Capacity to marry is determined by the *lex domicilii* of the parties. If by that law a person is regarded as a married man he cannot contract a valid monogamous marriage with another person.[14] Applying this rule, the respondent was by the law of Nigeria, which was his *lex domicilii*, a married man at the time he went through the English marriage. He therefore lacked the capacity to contract the subsequent monogamous marriage in England.[15] Consequently that marriage was void.

The converse situation is where a person who is married under the Marriage Act purports to contract a customary-law union with a third party during the subsistence of the first marriage. By Section 35 of the Marriage Act:

> Any person who is married under this Ordinance, or whose marriage is declared by this Ordinance to be valid, shall be incapable during the continuance of such marriage, of contracting a valid marriage under customary law . . .

It is necessary under this provision that the subsisting statutory marriage must have been contracted in accordance with the Marriage Act in Nigeria. Any customary-law marriage which a party to such statutory marriage purports to contract subsequently is null and void. In *Onwudinjoh v Onwudinjoh*,[16] one Jeremiah married a woman named Agnes under the Marriage Act in Makurdi in 1926. Subsequently, Agnes being alive, Jeremiah purported to marry one Chinelo by native law and custom. Ainley, CJ, held that by reason of Section 35 of the Marriage Act the customary-law marriage was null and void.

But Section 35, being confined to marriage under the Marriage Act, does not, it is submitted, apply to cases where the subsisting marriage is a monogamous one contracted outside Nigeria. On principle, it seems that a monogamous marriage contracted abroad will also invalidate a

[13] at 217.

[14] The second marriage constitutes the offence of bigamy *stricto sensu* in Nigerian law – see Section 370 of the Criminal Code Act, *R v Princewill* [1963] NNLR 54; Allott, A., *Journal of African Law*, Vol. 8 [1964], 36.

[15] *Srini Vasan v Srini Vasan* [1946] P 67; *Baindail v Baindail* [1946] P 122; *Kaur v Ginder* (1958) DLR (2d) 465. Dicey, A. V. and Morris, J. H. L., *Conflict of Laws*, 8th Edn (Stevens, London 1967), 286.

[16] [1957] 11 ERLR 1; *Craig v Craig* [1964] LLR 96; *Nnodim v Nnodim* Suit No. HOW/29/64 (unreported), Nkemena, J, High Court, Owerri, 2 August 1967.

subsequent customary marriage in Nigeria. In *Asiata v Goncallo*[17] a Yoruba man, Elese, was taken to Brazil as a slave. There he married Selia, an African freed woman, first in accordance with Moslem rites, and subsequently in a Christian church. Later Elese returned with Selia to Lagos, where, during the lifetime of Selia and subsequent to the passing of the Marriage Ordinance 1884, he married Asatu in accordance with Moslem rites. The court had to determine the validity of the marriage with Asatu. Griffith, J, held the subsequent customary-law marriage valid on the following grounds:

(i) that Elese's presence in Brazil was not free, he being taken there as a slave;
(ii) that Nigeria was not a Christian country, and by customary law a man can legally have several wives;
(iii) that Elese was a bona fide follower of the Prophet, and as such was legally entitled to marry several wives; and
(iv) that Selia did not appear to have raised the slightest objection to her husband's subsequent marriage.

Although the Marriage Ordinance 1884 contained a prohibition similar to Section 35 of the current Marriage Act, it was not applied to the case as the Christian marriage was celebrated in Brazil. It is submitted that this decision is not a good authority for the proposition stated above. First, there are the particular facts of the case, such as the compulsory journey to Brazil. Second, it is not correct to suggest that because Elese was a bona fide Moslem throughout his life he could not contract a valid monogamous marriage. The decision here should have been limited to its special facts.

The third situation is where a person who is a party to a subsisting statutory marriage purports to contract another marriage with a third party either under the Marriage Act or under a foreign marriage law. The position is the same where a person who is married under a monogamous system abroad attempts to marry a third party in Nigeria under the Marriage Act. In both cases, the subsequent marriage is void *ab initio* as the person lacks the capacity to contract such marriage during the subsistence of the previous one.[18]

### 2 Prohibited degrees of affinity or consanguinity

Any statutory marriage celebrated in Nigeria by parties who are within the prohibited degrees of consanguinity or affinity will be void.[19]

It is important to note that the provision of the Decree relating to the prohibited degrees of affinity or consanguinity relates only to marriages celebrated after that statute came into force.[19a] Consequently, a clear

[17] [1900] 1 NLR 41.
[18] The second marriage constitutes the offence of bigamy *stricto sensu* in Nigerian law – see S 370 of the Criminal Code Act, *R v Princewill* [1963] NNLR 54; Allott, A., *Journal of African Law* Vol. 8 [1964], 36. *Jaundoo v Khayam* Suit No. WD/11/71, Taylor, CJ, High Court, Lagos (unreported), 13 September 1971.
[19] S 33(1) of Marriage Act; MCD 1970 Section 3(1)(b).
[19a] S 3(1) of MCD 1970.

distinction must be made as to the rule applicable to marriages contracted before 1970 and after that date.

Prior to the promulgation of the 1970 Decree, the prohibited degrees of marriage were dealt with in Section 33(1) of the Marriage Act, which provides:

> A marriage may be lawfully celebrated under this Ordinance between a man and the sister or niece of his deceased wife, but save as aforesaid, no marriage in Nigeria shall be valid which, if celebrated in England, would be null and void on the ground of kindred or affinity . . .[19b]

The determination of the applicable English law depends on the construction of Section 4 of the Regional Courts (Federal Jurisdiction) Act, which enjoins the High Courts to exercise their jurisdiction in respect of matrimonial causes 'in conformity with the law and practice for the time being in force in England'. This provision has been construed by the Nigerian courts to import the English law in force from time to time.[19c] The modern English law on prohibited marriage is found in the Marriage Act 1949, as amended by the Marriage (Enabling) Act 1960.

The Matrimonial Causes Decree, however, provides a full list of the prohibited degrees of affinity or consanguinity, which applies to marriages celebrated after 17 March 1970.[20]

It will be recalled that in certain circumstances it may be possible for persons within the prohibited degree of affinity to marry each other with the consent of a High Court Judge.[21]

### 3 Formal invalidity – invalidity by the *lex loci celebrationis*

The formal validity of a marriage is governed by the law of the place of celebration. It is this law that determines whether the local rules as to form were complied with.[22] Consequently, a marriage which is invalid by reason of failure to comply with the form prescribed by the *lex loci celebrationis* is void.[23]

Where the marriage is celebrated in Nigeria, the rules applicable to its formalities are contained in the Marriage Act. Section 33(2) of the Act provides that 'a marriage shall be null and void if both parties knowingly and wilfully acquiesce in its celebration' without compliance with some formalities prescribed by the Act. The operative words in the section are 'knowingly and wilfully', which imply that the mental state

[19b] This section has now been repealed by Sections 8 and 115(1)(d) of the MCD 1970.

[19c] Prior to 1970 Nigerian courts have applied the English statutes on matrimonial causes as were in force from time to time. It has been argued that the phrase 'for the time being in force' may mean the current English law, or the law of England when the Marriage Act was passed, or the law of England as at 1900 – Kasunmu, A. B., and Salacuse, J. W., *Nigerian Family Law* (Butterworth, London 1966), 60–63.

[20] Schedule I of the MCD 1970.

[21] Section 4 of the MCD 1970.

[22] *Apt v Apt* [1948] P 83 (CA).

[23] Section 3(1)(c) of the MCD 1970.

of the parties is an important factor in determining whether or not a marriage is void. For a marriage to be void under this provision, it must be shown that both parties to the marriage had knowledge of the defect in the formalities but wilfully agreed to its celebration.[24]

(A) PLACE OF CELEBRATION

A marriage under the Marriage Act must be celebrated in a Registrar's Office or a licensed place of worship, or a place prescribed in a special licence. A marriage celebrated in any place other than these will be void *ab initio*.[25] So a marriage will be invalid if celebrated in a church that is not licensed, or in a private home (unless authorized in a special licence), or in any other unauthorized place. To invalidate such a marriage, however, it must be proved that the parties were aware of the defect but proceded to have the marriage celebrated at the place.

(B) CELEBRATION OF MARRIAGE UNDER FALSE NAME OR NAMES

Where both parties to a marriage under the Marriage Act are aware that it is celebrated under a false name or names such marriage will be void *ab initio*.[26]

(C) CELEBRATION WITHOUT A REGISTRAR'S CERTIFICATE OR A SPECIAL LICENCE[27]

The circumstances in which a marriage may be void for being celebrated without either a registrar's certificate or special licence have been discussed in a number of interesting cases. In *Akuwudike v Akuwudike*,[28] the parties were married on 31 May 1958 at St Mary's Catholic Church, Port Harcourt, in the presence of a Roman Catholic priest and two witnesses. No notice of marriage was given in accordance with the Marriage Act, and the registrar's certificate was not issued to the parties. The priest in fact performed a 'Roman Catholic marriage', which was not in compliance with the Marriage Act. Later, the wife petitioned for divorce. It was contended on behalf of the respondent that the court had no jurisdiction to entertain the petition as the marriage was performed solely in accordance with the rites of the Roman Catholic Church, without compliance with the requirements of the Marriage Act. Moreover, it was argued, as the marriage was celebrated without the necessary certificate the marriage was void. Idigbe, J (as he then was), held that:

> . . . if it was the intention of the parties to get married under the

[24] *Obiekwe v Obiekwe* [1963] 7 ENLR 196.
[25] Marriage Act Section 33(2)(a).
[26] id. S 33(2)(b). Marriage under a false name is also an offence punishable with five years' imprisonment – Section 45.
[27] Section 33(2)(c) of the Marriage Act.
[28] (1963) 7 ENLR 5. See also *Udeiwed v Udeiwed*, Suit No. A/M. 30/63 (unreported), decided by the same judge on 18 December 1963; *Uwaemelulam v Uwaemelulam* Suit No. A/1D/72 (unreported), High Court, Aba, 10 July 1972; *Akparanta v Akparanta* (1972) 2 ECSLR 779.

> Ordinance and they believed that they went through a form of marriage recognised by law (i.e. the Ordinance), then if the marriage had been performed by a Minister of religion in a place of worship licensed under the Ordinance (Cap. 115) for the purpose, the marriage – in my view – would not be void *merely* by reason of non-compliance with sections 11 and 13 unless it was affirmatively shown that parties (both parties) wilfully and knowingly failed to comply with the said sections – see subsections 33(2) and (3) of Cap. 115.[29]

The learned judge found that the petitioner had no knowledge of the legal requirements of a valid marriage under the Marriage Act. Further, it was her intention and belief that she was going through a marriage recognized by both the Church and the Act. It could not, therefore, be held that she wilfully and knowingly acquiesced in any irregularity intended by her husband and the officiating minister. Consequently it was held that her marriage was valid, and the court had jurisdiction to dissolve the marriage. The *dictum* of the learned judge lays great emphasis on the intention of the parties at the time of the celebration of the marriage.

In the subsequent case of *Obiekwe v Obiekwe*,[30] the facts were different. The parties were married at the Holy Ghost Roman Catholic Church, Enugu, on 30 December 1961. Although the respondent gave the statutory notice of marriage, the registrar's certificate was not obtained before the celebration of the marriage. The wife later petitioned for judicial separation. In reply, the respondent contended that their marriage was not valid under the Marriage Act as no registrar's certificate had been obtained. As the parties were already married under customary law, the respondent contended that all they wanted was a religious ceremony, which did not constitute a legal marriage under the Act. The case for the petitioner was that she did not know precisely what formalities were necessary and left everything to her husband. She knew that notice of marriage had been given, and she assumed that all the necessary requirements had been complied with. She intended to be married under the Marriage Act. Palmer, J, found that neither party was aware of the necessity of obtaining the registrar's certificate. The petitioner did not know whether any certificate had been issued or not and was ignorant of the fact that the certificate was necessary. He, therefore, held that the petitioner did not knowingly and wilfully acquiesce in the celebration of the marriage without a registrar's certificate. Interpreting the phrase 'knowingly and wilfully' the learned judge said:

> 'knowingly' by itself might be ambiguous, but 'wilfully' must, I think, mean a deliberate act. The attitude of mind must, I think, be 'I know

[29] (1963) 7 ENLR 5, 6.

[30] (1963) 7 ENLR 196. See also *Onwudinjoh v Onwudinjoh* [1957] Vol. II, ERLR 1; Ezeani, A. O. N., 'The Legal Effect of Religious Marriages' (1965) *NLJ* Vol. 1 No. 2, 227.

there ought to be a certificate; I know there is *not* a certificate: nevertheless I shall go through the ceremony'.[31]

From the decided cases it is clear that both parties to the marriage must have been guilty of knowingly and wilfully celebrating the marriage in spite of the known defect. Furthermore, the invalidity will only operate when the action of the parties is deliberate, and taken with full knowledge of any existing defect.

A number of important principles emanate from the decided cases. Where the parties marry in church without observing the requirements of the Marriage Act but intend the marriage to be valid under that statute, then the marriage will be regarded as valid under the Act.[31a] If, on the other hand, they comply with the requirements of the Act without intending to marry under it, the marriage will be governed by the Act irrespective of their intention.[31b] However, the non-observance of the Marriage Act coupled with the absence of intention to comply with its provisions will result in a union which is invalid under the Act.[31c]

For a church marriage to be regarded as valid under section 33(2) of the Marriage Act the following factors are essential:

(i) the parties, or at least one of them, must have intended to contract a union recognized both by the Act and the particular church celebrating the marriage;
(ii) there must be a belief that they in fact contracted such a marriage;
(iii) at least one of the parties must be ignorant of the failure to comply with the provisions of the Marriage Act; and
(iv) The petitioner must give evidence in proof of the marriage and as to his intention to contract a valid statutory marriage. Thus, where in *Anyaegbunam v Anyaegbunam*[31d] only the respondent gave evidence in the court below and denied contracting a statutory marriage with the petitioner, the Supreme Court held that the petitioner had failed to discharge the burden of establishing the existence of a valid monogamous marriage under the Marriage Act. Consequently the appeal court found that the court of first instance had no jurisdiction to hear a petition for judicial separation.

### (D) MARRIAGE NOT CELEBRATED BY A MINISTER OF RELIGION OR A REGISTRAR OF MARRIAGE

A marriage under the Marriage Act must be celebrated either by a recognized minister of some religious denomination or body or by a registrar of marriages. Non-compliance with the requirement makes

[31] (1963) 7 ENLR 196, 198.
[31a] *Akuwudike v Akuwudike* [1963] 7 ENLR 5.
[31b] *Ozobu v Ozobu* Suit No. E/33/1961 (unreported), High Court, Enugu, Reynold, J.
[31c] *Dick Mbagwu v Laura Mbagwu* Suit No. A/4D/69 (unreported), High Court, Aba, Umezinwa, J, 21 June 1972.
[31d] SC 18/1973.

the marriage void *ab initio*.[32] Whether a person is a minister of any religious denomination depends on the rules and organization of that body, but it must be proved that the celebrator of a marriage under the Act is a recognized minister of a religious body or denomination. As in the previous cases, the requirement of the parties celebrating the marriage in full knowledge of the defect applies here also.

Except for the defects considered above, no marriage celebrated under the Marriage Act will be void for non-compliance with the formalities.[33]

### (E) RETROSPECTIVE VALIDATION OF MARRIAGES WHICH ARE VOID OWING TO FORMAL DEFECTS

It has been pointed out in the preceding sections that failure to observe some formalities under the Marriage Act makes a marriage void *ab initio*. Sometimes, innocent parties contract marriages which are formally invalid owing to some defect arising from the technicalities of this branch of the law. For instance, by reason of the administrative changes in some parts of Nigeria resulting from political developments, doubts arose as to the validity of marriages celebrated in these areas. These marriages were celebrated in districts and offices not properly constituted under the Marriage Act and by officers not duly appointed registrars of marriages under that statute. The position was almost the same with regard to marriages purportedly contracted under the Marriage Act in the three Eastern States during the period of the civil war.

The Marriages (Validation) Decree 1971[33a] has now retrospectively validated these marriages, so that they are deemed always to have been valid, as if they had been celebrated with the due observance of the requirements of the Marriage Act.

## 4 Lack of Real Consent

It is a cardinal principle of our law that the parties to a marriage must have freely consented to the union. Absence of consent will invalidate the marriage. Where a party has not given any consent at all the matter is obvious. But the more common cases are where, although there is an apparent consent, a party did not in fact give his true or real consent. We shall here consider the cases where a party's consent may be negatived by various factors.

*Fraud or Duress.* Where the consent of one party to a marriage was obtained by duress or fraud the marriage will be void because it lacked the true consent of that party.[34] Duress or fraud vitiates consent. Fraud

[32] Marriage Act, S 33(2)(d). By S 43 of the Act 'whoever performs as a marriage officer the ceremony of marriage, knowing that he is not duly qualified so to do . . . so that the marriage is void . . . shall be liable to imprisonment for five years.' The state of mind of the accused is a material ingredient of the offence – see *R v Kemp* [1964] 1 All ER 649 (CCA) on the corresponding provision of the English Marriage Act 1949.

[33] Marriage Act, Section 33(3).

[33a] Decree No. 46 of 1971.

[34] *MCD* 1970, Section 3(1)(d)(i).

implies some dishonest misrepresentation by a party to the marriage by which the consent of the other was obtained. The consent may, for instance, have been obtained by fraudulent misrepresentation as to material facts. Where consent is proved to have been obtained by fraud, the marriage is annulled not because of the presence of fraud but because of the absence of consent. By the fraud the dishonest party procured the form without the substance of agreement.[35]

Duress, on the other hand, means in this respect such compulsion as affects the mental attitude of the party whose consent is in question. It has to be shown that the duress created a state of fear or apprehension which prevented that party from freely consenting to the marriage. In *Szechter (orse Karsov) v Szechter*, Sir Jocelyn Simon, P, formulated the effect of duress thus:

> In order for the impediment of duress to vitiate an otherwise valid marriage, it must . . . be proved that the will of one of the parties thereto has been overborne by genuine and reasonably held fear caused by threat of immediate danger (for which the party is not himself responsible), to life, limb or liberty, so that the constraint destroys the reality of consent to ordinary wedlock.[36]

It is irrelevant that the party whose consent was so obtained is more susceptible to pressure than a person of ordinary courage.[37] In *Scott v Selbright*,[38] the respondent threatened the petitioner before the marriage that unless she agreed to marry him he would see that bankruptcy proceedings would be instituted against her and would falsely allege that he had seduced her, and would finally shoot her. The petitioner was induced by these threats to marry him. She later petitioned for nullity. It was held that the marriage was void.

The duress need not have come from the other party to the marriage. It may have originated from a third party. In *H v H*,[39] the petitioner was a Hungarian and the respondent husband a French citizen. At the time the communists took over the government of Hungary she was in Hungary and became apprehensive for her safety as she came from a wealthy and influential family. There was evidence that people of her social class were being imprisoned by the new régime. She therefore decided to leave the country, and to do so she required a passport, which the Hungarian authorities would not give her. She entered into an arrangement with a French national to marry him for the sole purpose of obtaining a French passport thereby. They never intended to be husband and wife, and no cohabitation followed. With the French passport, she travelled to England, where she petitioned for nullity. It was

[35] *Moss v Moss* [1891] P 263, 268–9.
[36] [1971] 2 WLR 170, 180; cf. *Singh v Singh* [1971] P 226.
[37] *Scott v Selbright* (1886) 12 P 21, 24.
[38] ibid. *Hussein v Hussein* [1938] P 159; cf. *Cooper v Crane* [1891] P 369.
[39] [1953] 2 All ER 1229; *Mclarnon v Mclarnon* [1968] 112 SJ 419; *Buckland v Buckland* [1967] 2 All ER 300; [1967] 2 WLR 1506.

held that fear for her life, which was the prime reason for the marriage, vitiated her consent.

It is immaterial that in fact the party making the threat was incapable of executing it. All that is necessary is for the party whose consent is in issue to have believed that the threat was real, so as to affect the consent. In *Parojcic v Parojcic*,[40] both the petitioner and her father were nationals of Yugoslavia. After fighting with anti-communist forces, the father came to England in 1947. The petitioner and her mother, after suffering many hardships, joined him in England in 1956. On arrival in England, the petitioner's father insisted that she must marry the respondent, whom he personally approved. The petitioner naturally refused. This led to several quarrels between the father and daughter, during which he threatened to send her back to Yugoslavia if she did not marry the respondent, and she replied that she would rather commit suicide than return there. As a result of the pressure, the petitioner married the respondent and later petitioned for nullity. Davies, J, held that the petitioner's consent was negatived by the father's threats. Whether he could have sent her back to Yugoslavia or not was immaterial; both of them believed it was possible, and this made the threat more real to the petitioner.

*Mistake.* It is not every type of mistake that will invalidate a marriage. If, for instance, A voluntarily agrees to marry B thinking that B had a fortune, and it turns out after the marriage that B is a debtor, the marriage will not be decreed invalid. A married the person he intended to marry, and the wealth or poverty of that party is not a material consideration for the validity of the marriage.

But there are cases where the mistake of a party will make the marriage void *ab initio*. This is so only where the consent of a party to the marriage is not a real consent because that party is mistaken as to the identity of the other party or as to the nature of the marriage performed.[41] Mistaken identity will invalidate a marriage only where, for instance, X desires to marry Y but in fact married Z. A good illustration of the mistake as to the nature of the ceremony is seen in the case of *Valier v Valier*.[42] An Italian national who had only a smattering of English came to reside and work in England. There he met and became friendly with an unscrupulous English girl. One day, she said that she wanted to meet him at an office, and said that he was to sign a paper there. In fact the office turned out to be a marriage registry, where the parties were duly married. The husband did not understand that the ceremony was in fact a marriage: he believed that it was one of betrothal only. There was no subsequent cohabitation or consummation of the marriage. Lord Merrivale held that the marriage was void because: 'Matrimony is the acceptance by the mutual consent of the parties of the married state with knowledge of the nature of the undertaking and generally of the

[40] *[1959] 1 All ER 1.*
[41] *MCD 1970, Section 3(1)(d)(ii).*
[42] *[1925] 133 LT 830.*

consequences of the tie which is created'.[43] The Italian was mistaken as to the nature of the ceremony, and therefore did not give his free consent to the marriage that in fact took place. He never intended to go through a marriage ceremony with the respondent.

*Insanity.* A marriage is null and void where the consent of one of the parties is not real because that party is mentally incapable of understanding the nature of the marriage contract.[44] This is obviously the case where the party in question is insane. Singleton, L.J, *In the Estate of Park*,[45] formulated the test applicable in such cases as follows:

> was the [party] . . . capable of understanding the nature of the contract into which he was entering, or was his mental condition such that he was incapable of understanding it? To ascertain the nature of the contract of marriage a man must be mentally capable of appreciating that it involves the responsibilities normally attaching to marriage. Without that degree of mentality, it cannot be said that he understands the nature of the contract.

### 5 Marriageable age

Under Section 3(1)(e) of the Matrimonial Causes Decree, a marriage is null and void if either of the parties is not of marriageable age. As has been pointed out earlier, neither the Marriage Act nor the Decree prescribes any marriageable age. In the absence of any defined age-limit, it has been suggested that resort should be had to the common-law age of marriage. This omission is an obvious oversight on the part of the draftsman, who probably erroneously thought that the age was stated in the Marriage Act.[46] Owing to this lacuna in the law, it is submitted that Section 3(1)(e) of the Decree has no effect whatsoever until some age-limit is fixed by law. It is hoped that this defect will be remedied as soon as possible.

## C GROUNDS ON WHICH MARRIAGE IS VOIDABLE

The grounds on which a marriage celebrated after the commencement of the Matrimonial Causes Decree will be voidable are laid down in Section 5 of that Decree. These grounds are exclusive because the section stipulates that such marriages '. . . shall be voidable in the following cases but not otherwise . . .' This means that the grounds that make a marriage voidable under the old law have ceased to apply to all marriages celebrated after 17 March 1970. The same grounds are also applicable to marriages celebrated before that date, apart from some cases of pending proceedings to which the transitional provisions are

[43] at 832; *Nane (Sykiotis) v Sykiotis* [1966] 57 DLR (2nd) 118.
[44] MCD 1970 Section 3(1)(d)(iii).
[45] [1954] P 112, 127; [1953] 2 All ER 1411, 1430 (CA).
[46] A similar provision to S 3(1)(e) is contained in S 18(1)(e) of the Australian Matrimonial Causes Act 1959. But in that case the age of marriage was defined in the Marriage Act 1961, S 11.

applicable. Let us now turn to the examination of the grounds.

### 1 Incapacity to consummate marriage

A marriage is voidable where either of the parties to it is incapable of consummating the marriage.[47] Incapacity to consummate a marriage means that the party in question is impotent. Impotence should be clearly distinguished from sterility. The latter term refers to the incapacity to procreate children. On the other hand, an impotent person is one who is incapable of having normal sexual relations. Consequently, a person may be capable of having normal sexual intercourse, but nevertheless be sterile.[48]

To consummate a marriage there must be ordinary and complete sexual intercourse. Where sexual relations are partial or imperfect there will be no consummation.[49] Consummation, therefore, requires the full penetration of the female organ by the male in the ordinary sense. Does the use of contraceptives or the practice of *coitus interruptus* amount to consummation? In *Baxter v Baxter*,[50] the House of Lords held that a marriage is consummated where the spouses use contraceptive sheaths or other mechanical forms of contraception. It left open the question whether a marriage is consummated by the practice of *coitus interruptus*. But it seems that the present law is that penetration without ejaculation is sufficient to constitute consummation.[51]

In order to make a marriage voidable the incapacity to consummate must exist both at the time of the marriage and at the hearing of the petition.[52] If, therefore, the incapacity existed at the time of the marriage but was cured before the petition, the marriage will not be voidable.[53] The incapacity to consummate may be due to physical defect, such as a malformation of the sexual organs. Such incapacity may also arise from psychological causes. In the latter case the incapacity may be *quoad hunc* or *quoad hanc* – that is, in respect of a particular person.[54] This is the case where a person is capable of having sexual relations but is incapable of doing so with a particular person. The cardinal point here in support of nullity is the inability of a spouse to consummate the marriage in question.

Where a marriage is not consummated after a reasonable period and the respondent refuses to submit to medical examination, there may be

[47] MCD 1970, S 5(1)(a). This ground of nullity was established in England by the ecclesiastical courts. It formed part of the modern law of nullity without being made a statutory ground by the various English Matrimonial Causes Acts.

[48] *L v L* [1922] 38 TLR 697.

[49] Per Dr Lushington in *D-E v A-G* (1845) 1 Rob 279, 163 ER 1039.

[50] [1948] AC 274 overruling *Cowen v Cowen* [1946] P 36 (CA).

[51] *R v R* [1952] 1 All ER 1194, [1952] 1 TLR 1201; *White v White* [1948] P 330; *Cackett v Cackett* [1950] P 253. *Contra – Grimes v Grimes* [1948] P 323.

[52] MCD 1970 Sections 5(1)(a) and 36(1).

[53] *S v S* [1956] P 1; *S v S (orse W)* [1962] 3 WLR 396; *Brown v Brown* [1828] 1 Hag Ecc 523, 162 ER 665.

[54] *G v G* [1924] AC 349; *G v G* [1871] 2 P & D 287.

a presumption that the respondent is incapable. In *Akpan v Akpan*,[55] the parties were married in London on 28 January 1965. Throughout the period of their cohabitation in England and their journey back to Nigeria they shared the same bed, but there was no sexual intercourse. The respondent attempted several times to have intercourse but was never successful. On each occasion, he could have no *erectio*. The medical inspector's report and the medical evidence established that the petitioner was able to consummate the marriage. But the husband respondent refused to submit to medical examination. It was held that failure to consummate the marriage was due to the incapacity of the respondent.

The question has arisen as to whether a person born biologically male who has undergone a sex-change operation can contract a valid marriage and consummate it. In *Corbett v Corbett*,[56] Ormrod, J, held that a male who has undergone a sex-change operation was physically incapable of consummating a marriage, and that using the artificial cavity could never constitute a true intercourse.

Before a marriage is declared voidable on the ground of incapacity to consummate, the court must be satisfied that the defect is not curable,[57] that is, cannot be cured by medical treatment.[58] It seems also that the position is the same if the defect can only be remedied by an operation attended by danger to life.[59] Furthermore, a marriage is not voidable on this ground unless the respondent refuses to submit to such medical examination as the court considers necessary for the purpose of determining whether the incapacity is curable. Where the incapacity is curable, the marriage may not be voided unless it is shown that the respondent refused to submit to proper treatment.[60] An impotent person can petition for nullity on the ground of his impotency if it is proved that he was not aware of the existence of the incapacity at the time of the marriage.[61]

It is significant that the related though different ground of wilful refusal to consummate a marriage is not a ground for nullity under the 1970 Decree.[62] There is some justification for this change. Wilful refusal to consummate is the definite decision of a sexually potent spouse, which should not make a marriage voidable. Rather it should be a ground for dissolving the marriage. In fact Section 15(2)(a) of the Decree makes the wilful and persistent refusal to consummate the marriage a ground for divorce.

[55] Suit No. WD/12/67 (unreported), High Court, Lagos, 27 July 1968.
[56] [1970] 2 WLR 1306 [1970] 2 All ER 33.
[57] MCD 1970 Section 36(1)(a).
[58] *SY v SY* [1963] P 37 (CA) [1962] 3 WLR 526.
[59] Per Karminsky, J, in *S v S* [1956] P 1, 11.
[60] MCD 1970 Section 36(1)(a) and (b) *SY v SY* [1963] P 37.
[61] MCD 1970 S 35(a); *Harthan v Harthan* [1949] P 115 (CA); *Pettit v Pettit* [1962] 3 WLR 919 (CA).
[62] Wilful refusal to consummate a marriage is a ground for nullity under English law – MCA 1950 Section 8(1)(a), MCA 1965 Section 9(a); *Horton v Horton* [1947] 2 All ER 871 (HL); *Jodla v Jodla* [1960] 1 WLR 236; *Dolor v Dolor* [1964] MNLR 98.

### 2 Unsoundness of mind, mental disorder and epilepsy

A marriage is voidable if at the time of its celebration one of the parties was of unsound mind, or a mental defective, or subject to recurrent attacks of insanity or epilepsy.[63] If, therefore, any of these mental deficiencies arose only after the marriage it will not void the marriage.

Unsoundness of mind means insanity, and involves the incapacity of a person to manage himself and his affairs.[64] A 'mental defective' is defined in the Decree as:

> as person who, owing to an arrested or incomplete development of mind, whether arising from inherent causes or induced by disease or injury, requires oversight, care or control for his own protection or for the protection of others and is, by reason of that fact, unfitted for the responsibilities of marriage.[65]

Thus the mental deficiency may exist at birth, or arise subsequently as a result of disease or injury. The unsoundness of mind need not be absolute idiocy, but could be weakness of understanding. It may not be continued insanity, but delusions and irrationality on particular subjects.[66] Once it is shown that the propositus suffers from some mental deficiency at the time of the marriage, the court would not embark on an assessment of the extent of the derangement.[67] However, mere dullness of intellect is distinct from insanity.[68]

A spouse who is of unsound mind or a mental defective is regarded by the law as being incapable of carrying on a normal married life.[69] The other party to the marriage is, therefore, allowed to petition for the nullity of the marriage.

Where a spouse is at the time of the marriage subject to recurrent attacks of insanity or epilepsy, the marriage will be voidable. This is so if the insanity recurs periodically, with intervals of quiescence in between.[70] While, therefore, the marriage may in fact take place during a lucid interval, it is mandatory in order to come within this provision that the spouse must at that time be subject to further recurrence of attacks of insanity.[71] Thus in *Hunponu-Wusu v Hunponu-Wusu*[72] the wife had suffered two fits of unsoundness of mind before the marriage, but was not insane at the time the marriage was celebrated. She suffered two fits of insanity after the marriage. The Supreme Court held that she was subject to recurrent attacks of insanity at the time of the marriage.

[63] MCD 1970 S 5(1)(b).
[64] *Smith v Smith* [1940] P 179; *Whysall v Whysall* [1960] P 52, 64–65.
[65] Section 5(2) of the MCA 1970.
[66] *Portsmouth v Portsmouth* [1828] 1 Hag. Ecc. 355, 162 ER 485, 611.
[67] *Hancock v Peaty* [1867] LR 1 P & D 335.
[68] *Harrod v Harrod* [1854] 1 K & J 4, 69 ER 344.
[69] *Whysall v Whysall* [1960] P 52, 66; *In the Estate of Park* [1954] P 89, 127.
[70] *Smith v Smith* [1940] P 179, cf. *Bennett v Bennett* [1969] 1 WLR 430; [1969] 1 All ER 539.
[71] *Bennett v Bennett* [1969] 1 WLR 430; [1969] 1 All ER 539.
[72] SC66/1968 (unreported), 7 February 1969; *Smith v Smith* [1940] P 179.

Recurrent attacks of epilepsy are also regarded as in the same category as recurrent insanity.

The burden of proving that a party was insane at the time of the marriage lies on the party asserting it.[73] But a marriage will not be decreed voidable at the petition of the party suffering from the mental deficiency or epilepsy.[74]

### 3 Venereal disease

A marriage is voidable where at the time of its celebration either party was suffering from a venereal disease in a communicable form.[75] If it cannot be shown that the party in question was suffering from the disease at the time of the marriage, the disease will not constitute a ground for nullity. However, subject to the two years' rule, it may constitute a ground for divorce on the basis of adultery[76] or cruelty.[77]

The party alleging the venereal disease in a communicable form may prove it in various ways, including the calling of medical evidence. But if a spouse proves that he or she is suffering from venereal disease and that he or she has not had intercourse with any other person, a rebuttable presumption is raised that the venereal disease was contracted from the other spouse. The respondent could rebut the *prima facie* case against him by medical proof that he is not suffering and has not suffered from the disease.[78]

A decree of nullity in respect of a voidable marriage cannot be granted at the suit of the party suffering from venereal disease in a communicable form on the ground of that disease.[79] The grant of a decree of nullity on the ground of venereal disease in a communicable form is also subject to other rules. These are discussed in paragraph 5 below.

### 4 Pregnancy of the wife by a person other than the husband

Where at the time the marriage was celebrated the wife was pregnant by a person other than the husband, the marriage will be voidable at the option of the husband.[80] A wife so pregnant cannot obtain a decree of nullity on the ground of her pregnancy.[81] Moreover, a decree of nullity cannot be granted on this ground if the court is of the opinion that by any reason it would, in the particular circumstances of the case, be harsh and oppressive to the respondent, or contrary to the public interest, to make a decree.[82] For instance, the court will refuse to make the decree if the petitioner had knowledge of the pregnancy at the time of the marriage, as this would amount to an approbation of that fact. Similarly,

[73] *Durham v Durham* [1185] 10 PD 80, 1 TLR 338.
[74] MCD 1970 Section 35(b).
[75] MCD 1970 Section 5(1)(c).
[76] *Gliksten v Gliksten* [1917] 33 TLR 203.
[77] *Browning v Browning* [1911] P 161.
[78] *Anthony v Anthony* [1919] 35 TLR 559.
[79] MCD 1970 Section 35(b).
[80] Section 5(1)(d).
[81] Section 35(c).
[82] Section 36(2).

the conduct of the petitioner since the marriage may be such as to stop him from petitioning the court for relief. Such may be the case, for instance, where the husband obtained knowledge of the pregnancy after the marriage and approved of it, or if he had encouraged the association which gave rise to the pregnancy when the marriage was imminent.[83] Moreover, the courts will refuse a decree where the petitioner with full knowledge of the facts and without just cause allows his right to lapse.

In *W v W (No. 4)*,[84] the husband petitioned for nullity on the ground that his wife was pregnant by some other person at the time of their marriage. He sought to prove that the child born soon after the marriage was not his by requesting the court to order blood tests of the spouses and the child. The Court of Appeal held that it had no inherent or statutory power to order such a blood test, which in any case would not settle the matter conclusively. But where the parties submit to blood tests the result may corroborate other evidence to the same end in proof of paternity of the child.[85]

### 5 Other restrictions in respect of Section 5(1)(b), (c), or (d)

The Decree imposes three further restrictions on the granting of a decree of nullity in respect of marriages which are voidable by reason of insanity, venereal disease or pregnancy at the time of the marriage.[86] These restrictions, which apply to the three grounds, are complementary to the other rules discussed above in relation to each of the grounds. First, no decree of nullity can be made on any of the above grounds unless the court is satisfied that the petitioner was, at the time of the marriage, ignorant of the facts constituting the grounds.[87] If he had knowledge of the grounds at the time of the marriage, he will be said to have approbated the disease or conduct of the other spouse. Second, in order to obtain a decree it must be shown that the petition was filed not later than twelve months from the date of the marriage.[88] It seems that the period of one year is to be construed strictly, and is therefore not subject to the equitable rule that where a man is ignorant of his rights owing to their fraudulent concealment by another, a period of limitation begins to run against him only from the date of his discovery of the fraud.[89] Third, for the decree of nullity to be granted it has to be proved that marital intercourse has not taken place with the consent of

[83] The restrictions in Section 36(2) in respect of Section 5(1)(d) are virtually the same as those in Section 37, which also apply to Section 5(1)(d) except for the twelve months' period for instituting proceedings. It is, therefore, doubtful if it is necessary to subject Section 5(1)(d) to both provisions.

[84] [1963] 2 All ER 841 (CA), [1964] P 67 decided on Section 8(1)(d) of the English MCA 1950, which is similar to section 5(1)(d) of the Decree.

[85] *Liff v Liff* [1948] WN 128.

[86] Section 37 of the MCD 1970.

[87] Section 37(a).

[88] Section 37(b).

[89] *Chaplin v Chaplin* [1948] 2 All ER 408, [1949] P 72 (CA).

the petitioner since he discovered the existence of the facts constituting the ground.[90]

In *Smith v Smith*,[91] the Court of Appeal considered a similar provision in the English Matrimonial Act 1937. The parties were married on 7 July 1945. From 13 September 1944 to 7 July 1945 the husband had been serving in the army in Europe. On 16 July 1945, the marriage having been duly consummated, the husband returned to Germany. In September 1945 the husband received a letter from his wife telling him of her pregnancy, and he was satisfied that he was responsible for it. He was demobilized in January 1946, and on 3 February of the same year he went to live with his wife. On 8 February the child was born – exactly seven months after the marriage. The husband made inquiries and discovered that the child was a full-term child, i.e., that it had been born nine months after intercourse. He subsequently had intercourse with his wife on 25 February. The court held that the belief by the husband that at the time of the marriage the wife was pregnant by another man was not a condition precedent to the operation of the provision. He did not have to be positively convinced of the existence of that fact. It was sufficient to show that he possessed knowledge of the facts from which a reasonable person would have drawn the conclusion that the respondent had been pregnant by some third person, and that with knowledge of those facts, he nevertheless had marital intercourse with the wife. Moreover, since the husband's suspicion was aroused when the child was born, and he had made inquiries which confirmed that suspicion, it was held that the provision barred him from obtaining a relief, as he had had sexual intercourse with the wife after the suspicion was confirmed.[92]

### 6 Marriage voidable by reason of consanguinity or affinity

A marriage celebrated after the commencement of the 1970 Decree will be voidable if the parties were at the time of the marriage within the prohibited degrees of consanguinity or affinity specified in Schedule I of the Decree.[93] However, a marriage contracted before the Decree came into force may be voidable on the grounds of consanguinity or affinity only if one of the parties thereto was, at the time of its celebration, within the prohibited degrees of relationship prescribed by the Decree. If, therefore, a party to the marriage was within a degree of consanguinity or affinity prescribed by the old law[94] but not contained

[90] Section 37(c); *C v C* [1962] 106 *Sol J* 959, [1962] *CLY* 1019 of S 9(2)(c) of the English MCA 1965, *Watts v Watts* [1968] 112 *Sol J* 964.

[91] [1947] 2 All ER 741, [1948] P 77 (CA).

[92] *Chaplin v Chaplin* [1949] P 72.

[93] Sections 3(1)(a) and 3(2).

[94] Under the Nigerian Law before the 1970 Decree came into force, it seemed that the prohibited degrees of consanguinity or affinity were those prescribed by English law as on 1 January 1900. It is doubtful whether the prohibited degrees of relationship contained in the English Marriage Act 1949 as amended by the Marriage (Enabling) Act 1960 applied in Nigeria. On this question see: Kasunmu, A. B., and Salacuse, J. W., *Nigerian Family Law* (Butterworth, London 1966), 58–63.

in Schedule I to the Decree, that fact will not make the marriage voidable now. But if a party was not within the prohibited degrees of consanguinity or affinity laid down by the old law but is so by the 1970 Decree, the marriage will not be treated as voidable under the provisions of the Decree.[95]

### 7 Non-application of Decree to marriages celebrated before the Decree

The provisions of the Decree relating to the grounds for nullity do not affect the validity or invalidity of marriages celebrated before the commencement of the Decree.[96] However, the validity or invalidity of such marriages will be determined on the grounds of nullity that were applicable before 17 March 1970. Under the old law the grounds on which a marriage was void were, besides those stipulated in Section 33 of the Marriage Act, non-statutory. The non-statutory grounds were mistaken identity, mistake as to the nature of the transaction, consanguinity, bigamy, nonage, insanity, and threat, fear or duress. All these have now been made statutory grounds under the Matrimonial Causes Decree.[97] On the other hand, most of the grounds on which a marriage was voidable were statutory.[98] The statutory grounds were wilful refusal to consummate, unsoundness of mind, venereal disease, and pregnancy of the respondent by some person other than the petitioner. With the exception of wilful refusal to consummate, which is made a ground for divorce by the Decree, the other statutory grounds are re-enacted in the 1970 Decree.[99] The only non-statutory ground – incapacity to consummate the marriage – is now a ground under the Decree.

## D CONFLICT OF LAWS

The validity or invalidity of a marriage will not be affected or determined by any provision of the 1970 Decree where it would not be in accordance with the rules of private international law to apply such provision to that marriage.[100] Consequently, the nullity provisions of the Decree are applied subject to the conflict-of-law rules.

## E EFFECT OF DECREE OF NULLITY

It has been pointed out earlier that a void marriage does not need a court decree to bring it to an end because the marriage never existed. Where, however, a decree of nullity is granted in respect of a void marriage the decree is merely declaratory of an existing fact. But a decree of nullity under the Decree in respect of a voidable marriage annuls the marriage with effect from the date on which the decree becomes absolute.[101]

[95] Section 3(3).
[96] MCD 1970 Section 6(1).
[97] MCD 1970 Section 3(1).
[98] Matrimonial Causes Act 1965, Section 9.
[99] MCD 1970 Section 5.
[100] MCD 1970 Section 6(2).
[101] MCD 1970 Section 38(1).

Thus, the decree has no retrospective effect. The result is that up to the date the decree is made absolute all transactions entered into by the spouses either *inter se* or with third parties are valid as the acts of husband and wife. Moreover, it is expressly provided that a decree of nullity in respect of a voidable marriage does not render illegitimate a child of the parties born since, or legitimated during the marriage.[102]

## F INVALID MARRIAGES UNDER CUSTOMARY LAW

There are circumstances in which a customary-law marriage may be void or voidable.

### 1 Void marriages

Customary-law marriage may be void in the following instances:

(A) PARENTAL CONSENT

It has been pointed out that parental consent is an essential requirement of a valid customary-law marriage. Absence of such consent makes the marriage void because there will be no valid arrangement for the payment or waiver of the bride-price. Moreover, in the absence of such consent there cannot be a proper 'giving away of the bride'. An exception to this general rule exists in the Western State, where a competent customary court may order a marriage to proceed without parental consent.[103]

(B) PROHIBITED DEGREES OF CONSANGUINITY AND AFFINITY

Customary law prohibits marriage between persons within certain degrees of consanguinity or affinity. Marriage between persons related by blood is prohibited, though sometimes a man may marry his wife's sister. Marriage between persons within the prohibited degrees of relationship is void and may, in addition, constitute an abomination. The only exception to this rule is where a distant and inconsequential relationship is severed by sacrifices of expiation, thereby enabling the parties concerned to marry each other validly.

(C) NON-PAYMENT OF BRIDE-PRICE

Bride-price is an essential constituent of a customary-law marriage. Consequently, failure to make the customary payment, except where it is waived, makes the marriage void. The same is true of marriage in Islamic law without the payment of *saduquat* or dower.

(D) CUSTOMARY-LAW MARRIAGE BY NON-NIGERIANS

A customary-law marriage between a native of Nigeria and a non-native is void. Thus, it was held in *Savage v MacFoy*[104] and *Fonseca v Pass-*

[102] ibid., Section 38(2).
[103] Section 5 W. Region Marriage, Divorce and Custody of Children Adoptive By-Laws Order 1958.
[104] [1909] Renner's Gold Coast Reports 504.

*man*[105] that the marriage of a Yoruba girl to a Sierra Leonean and the marriage of an Efik girl to a Portuguese were void because the bridegroom in each case was not subject to customary law.[106]

(E) MARRIAGE BY MALIKI LAW

By Maliki law, a marriage will be void if prohibited by reason of consanguinity, affinity or fosterage.[107] Furthermore, a marriage which is contracted for a specific period (*mutah*), or one based on hire (*muwakkat*), is void.[108] A void marriage has no legal effect in Islamic law, and the children of it are illegitimate.

### 2 Voidable marriages

It seems that the only known case of voidable marriage under customary law is child marriage. In our discussion of the consent of the parties to customary-law marriage, it was pointed out that where a party is an infant the consent of the parents is enough for the marriage. Although parents may consent on behalf of their infant children, the infant is free to confirm or void the marriage so contracted on the attainment of majority. In the case of an infant girl, for instance, she may, on reaching the age of puberty, refuse to be a party to the marriage. Her parents are in that case obliged to refund the bride-price to the husband.[109]

### 3 Irregular (*fasid*) marriages

Under the Maliki School of Islamic Law, a Moslem cannot be lawfully married to more than four wives at the same time. If he marries a fifth wife while there are four subsisting marriages, the marriage is not void but merely irregular.[110] An irregular marriage is unlawful. But the unlawfulness is relative or temporary and not absolute. This is because the marriage is not unlawful *per se* but for some extraneous cause.[111] Thus such marriage is not void, as it may be regularized by the man divorcing one of his four wives.

An irregular marriage is a hybrid, being neither valid nor void. Before such a marriage is consummated, it has no legal effect whatsoever. But once consummation takes place, it attracts some of the legal consequences of a valid marriage – the wife is entitled to dower, she is bound to observe the *idda*, which is the waiting period after the termina-

[105] [1958] WRNLR 41.
[106] See Chapter 2, p. 47.
[107] Mulla, Sir P. F., *Principles of Mohammedan Law* 15th Edn (Eastern Law House Private, Calcutta 1961), 227–228; Fyzee, A. A., *Outlines of Mohammedan Law*, 2nd Edn (Oxford University Press, London 1955), 94.
[108] Ruxton, F. H., *Maliki Law* (Luzac, London 1916), 96; Fyzee, op. cit., 99–100.
[109] Talbot, P. A., *In the Shadow of the Bush* (Heinemann, London 1912), 111; Ward, E., *Marriage Among the Yorubas* (Catholic University of America, Washington 1937), 17; Basden, G. T., *Among the Ibos of Nigeria* (Seeley, Service & Co, London 1921), 69.
[110] Mulla, *Principles of Mohammedan Law*, 15th Edn (1961), op. cit., 225; Fyzee, *Outlines of Mohammedan Law*, 2nd Edn (1955), op. cit., 78.
[111] Mulla, op. cit., 229; Fyzee, op. cit., 94; Bello Daura, 'The Limit of Polygamy in Islam' [1069] *3 JICL 21*.

tion of a marriage, and the children of the marriage are legitimate. However, as in a void marriage, the spouses are not entitled to inherit each other's estate, and the wife has no right to maintenance.[112] Either party to an irregular marriage may terminate it either before or after consummation by using words which indicate an intention to separate. No divorce or court intervention is necessary.[113]

### 4 Inchoate marriages

Instances of inchoate marriage usually arise from the failure to 'give away' the bride, which is one of the constituent elements of a valid customary-law marriage. This is not a case of a marriage being void or voidable, but one of no marriage having come into existence. The absence of the 'giving away' ceremony prevents the completion of a valid marriage.

Questions of inchoate marriage usually arise in connection with either the capacity of a person to marry or the affiliation of children.

In *Re Intended Marriage of Beckley and Abiodun*,[114] Beckley and Miss Alade were engaged to be married in Lagos. Later Beckley left for Jos, and while there authorized his father to pay the bride-price or perform the *idana* ceremony on his behalf. Meanwhile, Beckley met another girl at Jos and they decided to marry each other. He gave the necessary notice, and his father filed a caveat on the ground that the *idana* ceremony constituted a marriage with Miss Alade. It was held that the performance of the *idana* ceremony without the formal 'giving away' of the bride did not constitute a valid marriage. Consequently, Beckley was not married to Miss Alade, and was therefore free to marry another person.

The question of affiliation may arise in respect of inchoate marriage. In *Edet v Essien*,[115] a case which arose in the old Calabar Province, the appellant had paid dowry for Inyang Edet when she was still a child, but there was no cohabitation. Subsequently, the respondent agreed with the girl to marry, obtained her parents' consent and paid dowry to them. He then took Inyang Edet as his wife and they cohabited as such. There were two children of the marriage. But the respondent did not repay to the appellant the dowry which the latter had paid in respect of Inyang. The appellant claimed the two children on the ground that by customary law Inyang was his wife and he was entitled to any children she might bear to anyone until the dowry paid was refunded to him. The Divisional Court sitting at Calabar held that even if the customary law as alleged by the appellant was definitely established, it could not be enforced because it was repugnant to natural justice, equity and good conscience. It is significant in this case that there was no evidence that the alleged custom was proved. In the absence of satisfactory proof that

[112] Mulla, op. cit., 230; Fyzee, op. cit., 95.
[113] Mulla, op. cit., Fyzee, op. cit.
[114] [1943] 17 NLR 59; *Ikedingwu v Okafor* (1966–67) 10 ENLR 178.
[115] [1932] 11 NLR 47.

such a custom existed, the case would have been decided more appropriately on the ground that there was merely an inchoate marriage between the appellant and Inyang. However, if the custom had been proved, then the conclusion would have been that the appellant was married to Inyang, and that the provision for voiding unreasonable customs might apply.

# 6
# Dissolution of Marriage
# I: Statutory Marriage

Before embarking on the discussion of the grounds for divorce in respect of statutory marriages in Nigeria, it is necessary to deal with the rule as to the time for the presentation of a divorce petition.

## A THE TWO YEARS' RULE

Except where divorce proceedings are based on wilful and persistent refusal to consummate, adultery, or the commission of rape, sodomy or bestiality, no proceedings for divorce may be instituted within two years of a marriage without the leave of the court.[1] This rule aims to deter people from rushing into ill-advised marriages and escaping from them at the initial encounters with the wear and tear of married life.[2]

But the Decree adds a proviso by which a court may grant leave to institute proceedings within the prohibited period:

> on the ground that to refuse to grant the leave would impose exceptional hardship on the applicant or that the case is one involving exceptional depravity on the part of the other party to the marriage.[3]

The construction of this provision turns on the word 'exceptional'. In each case, the test is whether the hardship or depravity is of an exceptional character. To be exceptional, the conduct or hardship must be of a grave nature. In *Bowman v Bowman*,[4] Denning, LJ, discussed the meaning of 'exceptional depravity' or exceptional hardship. The learned justice was of the opinion that the mere commission of adultery by a spouse with a third party within the first three years of the marriage would be ordinary depravity. But if the adultery were coupled with other matrimonial offences like desertion or cruelty, then the offence, if not stigmatized as exceptional depravity, might involve exceptional hardship. In *Akere v Akere*,[5] the respondent was charged with inordinate sexual demands when the applicant was in poor health, adultery,

[1] MCD 1970 Section 30(1), and (2).
[2] See Bucknill, LJ, in *Fisher v Fisher* [1948] P 263, 264 (CA).
[3] MCD 1970 Section 30(3).
[4] [1949] P 353, 350.
[5] [1962] WNLR 328; *Majekodunmi v Majekodunmi* [1966] NMLR 191; *V v V* [1966] 3 All ER 493.

and infecting the applicant with venereal disease. Duffus, J, held that the case was one of exceptional hardship or exceptional depravity.

It is important to note that the operative part of the provision is that to refuse to grant leave would impose exceptional hardship on the applicant, or that the case is one involving exceptional depravity on the part of the other spouse. The words of the provision refer to present hardship, or that which may be imposed in the future by the failure to grant leave to petition.[6] It does not seem to cover hardship suffered in the past. In the case of exceptional depravity, the act or conduct must by necessary implication be in the past, that is, already committed by the respondent.

Although the depraved conduct of the respondent may be evidence of the exceptional hardship imposed on the applicant, an application need not be based on both arms of the provision. An applicant may, for instance, allege that the conduct of the respondent, which does not constitute exceptional depravity, did impose exceptional hardship on him. Consequently a party may apply on either or both arms of the rule.[7] Furthermore, in determining whether there is a case of exceptional hardship or not, the approach should be subjective and not objective. The test should be whether the particular applicant, and not a reasonable man, is suffering or is likely to suffer exceptional hardship if he has to wait for two years before being able to present a petition for divorce.[8] To grant an application for a petition to be filed within two years of the marriage it is not necessary to prove the alleged hardship or depravity, since this would involve deciding whether the grounds of the proposed petition are true. These are matters to be dealt with at the hearing of the petition itself. All that is necessary is for the court to make a provisional finding, that is, to come to a conclusion that the allegations made in the affidavits filed by the application are such that, if true, they would amount to exceptional hardship or depravity.[9] In forming a conclusion, the judge may take into consideration the affidavits filed in opposition. If the affidavits in opposition are more likely to be true, the judge may refuse to grant leave to petition. But if in the proper exercise of his discretion a judge of first instance grants leave to present a petition or refuses to do so, his decision will not be reviewed or reversed on appeal.[10]

In dealing with an application for leave to petition, the court is required to have regard to the interests of any children of the marriage. It should also take into account the question of whether there is any

[6] *Osborn v Osborn* (1961) 2 FLR 29; cf. S 2(2) of MCA 1965, which includes the word 'suffered', which has been interpreted to cover the present and future – *Brewer v Brewer* [1964] 1 WLR 403 (CA); *W v W* [1966] 2 All ER 889.

[7] See, e.g., *Hillier v Hillier* [1958] 2 All ER 261 (CA), based on exceptional hardship only; *Majekodunmi v Majekodunmi* [1966] NMLR 191 (exceptional hardship).

[8] *Hillier v Hillier*, ibid.

[9] *Winter v Winter* [1944] P 72; *W v W* [1966] 2 All ER 889.

[10] *Winter v Winter* [1944] P 72; *Fisher v Fisher* [1948] P 2.

reasonable probability of reconciliation between the parties before the expiration of the two-year period.[11]

If at the hearing of the divorce proceedings, after leave has been granted, the court is satisfied that such leave was obtained by misrepresentation or concealment of material facts, it may do one of two things. The court may adjourn the hearing for such a period as the court thinks fit, or it may dismiss the petition on the ground of the misrepresentation or concealment of material facts.[12] If in such a case there is a cross-petition, the court may dismiss the cross-petition along with the main one or adjourn both. But where the court decides to hear and determine the cross-petition, it is bound to hear and determine the petition also.[13] However, the dismissal of a petition or cross-petition as stated above does not preclude the spouses from initiating subsequent proceedings on the same or substantially similar facts as those that constituted the grounds of the dismissed petition or cross-petition.[14] Moreover, proceedings may be instituted after the expiration of the two years' period, based on matters which occurred during that period.[15]

## B GROUNDS FOR DIVORCE

There have been opposing views on the basis of divorce decrees. One school of thought holds the view that marriages should be dissolved on the commission of a matrimonial offence by one spouse. The matrimonial offence theory derives from the old ecclesiastical courts in England, which originally had exclusive jurisdiction in the dissolution of marriages. This theory was reflected in the pre-1969 English statutes governing the dissolution of marriages, which formed part of Nigerian law on this subject.[16] Up to 1970, the offence theory, therefore, held sway in our laws on divorce. The other school of thought is of the opinion that the offence doctrine should be condemned, and in its place there should be a criterion of irretrievable breakdown of marriage.[17]

The Matrimonial Causes Decree 1970 achieves a compromise between the two views. Section 15(1) of the Decree declares that either party to a marriage may petition for its dissolution on the ground 'that the marriage has broken down irretrievably'. But sub-section 2 returns to the traditional offence doctrine: such breakdown can be established by proving any of the alternative facts listed therein. At least three of these – adultery, cruelty and desertion, each in a modified form – are included in the list. The other grounds, some of which consist of various

[11] MCD 1970 Section 30(4).
[12] Section 30(5).
[13] Section 30(6).
[14] Section 30(7).
[15] Section 30(8).
[16] The offence theory was approved by the British Royal Commission on Divorce 1951–55 (Cmd 9678).
[17] See the Report of a Group appointed by the Archbishop of Canterbury in January 1964 to examine the English divorce laws – *Putting Asunder: A Divorce Law for Contemporary Society* (S.P.C.K., London 1966) paras. 53–68.

periods of *de facto* separation, of course exemplify the breakdown approach. What we have now, therefore, is a mixed doctrine, and Section 15 represents a compromise between the irretrievable breakdown principle and the matrimonial offence theory – a compromise which is unlikely to satisfy the protagonists of either school.

However, the spirit of the new Decree is to jettison the outmoded 'fault' theory and replace it with the breakdown principle. But the fault theory still survives in some respects – that is, in determining liability for maintenance and costs.

The Decree makes irretrievable breakdown the only ground for the dissolution of marriage.[18] It then stipulates eight situations, each of which constitutes such irretrievable breakdown. The enumeration of the situations is exclusive in the sense that a marriage cannot be dissolved on any other grounds except those stipulated in the Decree.[19]

We shall now turn to the examination of the grounds for dissolution of marriage.

**1 Wilful and persistent refusal to consummate**

The wilful and persistent refusal of a spouse to consummate the marriage is a fact for the grant of a decree of divorce.[20] Wilful and persistent refusal to consummate means 'a settled and definite decision come to without just cause and in determining whether there has been such a refusal the judge should have regard to the whole history of the marriage'.[21] The word 'persistent' implies that the refusal is a continuous act rather than an isolated case of refusal. Consequently, for a court to find that there is wilful and persistent refusal to consummate, it must be satisfied that the marriage had not been consummated up to the commencement of the hearing of the petition.[22]

What constitutes wilful and persistent refusal to consummate will depend on the facts of each case. But it must be shown that the refusal was a conscious and free act of the respondent. Mere neglect to comply with a request is not necessarily the same as refusal.[23] Moreover, before there can be a refusal, there must be a request, direct or implied, and an opportunity to comply with such a request must exist.[24] The fact that a

[18] Section 15(1). Section 15(2) lists the situations which amount to 'irretrievable breakdown' of marriage. Cf. the test formulated by the Archbishop of Canterbury's Group Report – 'Does the evidence before the court reveal such failure in the matrimonial relationship, or such circumstances adverse to that relationship, that no reasonable probability remains of the spouses again living together as husband and wife for mutual comfort and support?' – *Putting Asunder*, op. cit., para. 55.

[19] Section 15(2). It is submitted that an enumeration of what constitutes irretrievable breakdown of marriage is preferable to giving the judge *carte blanche* to try the issue of irretrievable breakdown. Cf. Chapter VI, *Report of the Commission on the Law of Marriage and Divorce* (Government Printer, Nairobi, Kenya, August 1968); *Putting Asunder*, op. cit., para. 28.

[20] Section 15(2)(a).

[21] Per Jowitt, L J, in *Horton v Horton* [1947] 2 All ER 871, 874.

[22] MCD 1970 S 21; *Oladele v Oladele* CCCHCJ/12/72, 119.

[23] *S v S (otherwise C)* [1954] 3 All ER 736.

[24] *Owobiyi v Owobiyi* [1965] 2 All NLR 200.

husband habitually uses contraceptives in spite of his wife's protests does not constitute a refusal to consummate.[25] In fact, a marriage is consummated where the husband can have full intercourse but is incapable of making his wife conceive a child. The same may be true where *coitus interruptus* is practised.[26]

**2 Adultery**

By Section 15(2)(b) of the 1970 Decree there is an irretrievable breakdown where, since the marriage, the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent.

Adultery is the voluntary act of sexual intercourse committed by a spouse with a person of the opposite sex, not being the husband or wife, during the subsistence of the marriage. The element of free will is fundamental to the commission of adultery. So, where a spouse has extra-marital sexual intercourse without his or her real consent there will be no adultery. Where, for instance, a wife is raped this does not constitute adultery.[27] Moreover, it has been held that where an insane spouse engages in sexual intercourse with a third party, the M'Naghten rules apply to the finding of adultery. Consequently, adultery cannot be established against the insane party if he does not know the nature of his act is wrong.[28] Where a spouse has extra-marital intercourse while under the influence of alcohol or drugs so that he or she does not understand the nature and consequences of his or her act, the position is akin to insanity, and adultery will be negatived.[29]

Once the husband establishes an act of intercourse between his wife and a third party the burden of proof is then on the wife to show that the intercourse was without her consent.[30] But if at the close of evidence the court is uncertain whether the case is one of adultery or rape, it must dismiss the petition. In a case involving adultery it is immaterial that the marriage has been consummated.[31]

For adultery to be found, the intercourse need not be complete, as would constitute the consummation of marriage. But there must be some penetration of the female organ by the male.[32] So, when the parties indulge in sexual gratification which does not involve some penetration, adultery will not be found.[33]

The question as to whether artificial insemination constitutes adultery has so far remained unsolved. No case has to date been decided on this

[25] *Baxter v Baxter* [1948] AC 274.
[26] *White v White* [1948] P 330, *Cackett v Cackett* [1950] P 253; *contra: Grimes v Grimes* [1948] P 323.
[27] *Clarkson v Clarkson* (1930) 143 LT 775 per Lord Merrivale.
[28] *S v S* [1962] P 133; It is doubtful whether mental weakness has the same meaning as insanity.
[29] *Hanbury v Hanbury* [1892] P 222.
[30] *Redpath v Redpath* [1950] 1 All ER 600 (CA).
[31] *Patrick v Patrick* (1810) 3 Phillim 496, 161 ER 1396; *Waters v Waters* (1875) 33 LT 579.
[32] Per Singleton, LJ, in *Dennis v Dennis* [1955] P 153, 160 (CA); *Rutherford v Richardson* [1923] AC 1.
[33] *Dennis v Dennis (supra); Sapsford v Sapsford* [1954] P 394.

point in Nigeria. But there are conflicting Commonwealth decisions on the point. In the Canadian case of *Oxford v Oxford*[34] it was held that the artificial insemination of the wife with the sperm of the co-respondent amounted to adultery. But the contrary was decided in Scotland in 1958.[35]

If a woman accused of committing adultery is a *virgo intacta* this is not conclusive proof that the offence was not committed. It merely makes the burden of proof heavy.[36]

(A) STANDARD OF PROOF OF ADULTERY

The Decree requires that adultery must be proved to the reasonable satisfaction of the court. This standard of proof is also required for all other matrimonial matters under the Decree.[37] To attain this standard of proof, the evidence must be such as satisfies the court as to the truth of the alleged adultery. It cannot be said that a court is reasonably satisfied unless the facts are such as would lead the guarded discretion of a reasonable and just man to the conclusion that adultery was committed. The evidence in such a case must appear precise and not loose or inexact. If the court entertains reasonable doubt as to the truth of the allegation then it cannot be said to be satisfied.[38]

(B) EVIDENCE

It is not necessary to adduce direct evidence to prove adultery because in almost all cases it will be impossible to procure such evidence. Therefore, the commission of adultery may be inferred from the surrounding circumstances, such as undue familiarity coupled with opportunity, improper behaviour, and suspicious circumstances. It may also be established by confessions or admissions. Each case must depend on its particular facts. A good illustration of suspicious circumstances leading to the conclusion of adultery is found in the case of *Adeyemi v Adeyemi*.[39] The husband petitioner at night visited his wife, who was living apart from him. There he found the respondent and co-respondent locked up in a dark room. When the door was opened as a result of his banging, he saw his wife sitting on the bed with only a wrapper thrown carelessly around her body. The co-respondent's shirt was not properly tucked into his trousers. It was held that the circumstances in which the

[34] (1921) 58 DLR 251.

[35] *Maclennan v Maclennan* (1958) SLT 12. See Bartholemew, G. W., 'Legal Implications of artificial insemination' (1958) Vol. 21 *MLR* 236.

[36] *Chalmers v Chalmers* (1930) 46 TLR 269, 270; *Thompson v Thompson* [1938] P 162.

[37] S 82 of the MCD 1970. The same standard of proof is prescribed by S 96 of the Australian Matrimonial Causes Act 1959. See *Bringinshaw v Bringinshaw* (1938) 60 CLR 336; *Wright v Wright* (1948) 77 CLR 191. Under the old Nigerian law proof beyond reasonable doubt was required – *Akinyemi v Akinyemi* [1963] 1 All NLR 340, S 137(1) of the Evidence Act.

[38] *Briginshaw v Briginshaw* (1938) 60 CLR 336.

[39] Suit No. HD/32/68 (unreported), Adefarasin, J, Lagos High Court, 10 March 1969. *Ihpi v Ikpi* [1957] WNLR 59, where the court refused to draw the inference as it did not believe the petitioner's allegation.

respondents were found pointed conclusively to the commission of adultery.

*(i) Familiarity.* Mere proof of familiarity between the respondent and co-respondent is not enough to establish adultery. It has to be shown in addition that there was the opportunity to commit adultery. In *Akinyemi v Akinyemi*[40] the respondent and co-respondent, who were fond of each other, were found kissing and embracing in the early hours of the morning. Before then, they had spent over five hours together outside for which no proper account was given. The Supreme Court held that this was a proper case to draw the inference of adultery, as there was evidence of inclination to each other and of opportunity. Where adultery is alleged to have been committed with the same person as in an ante-nuptial incontinence, evidence of illicit intercourse or familiarity prior to the marriage may be admissible.[41]

Adultery may be inferred where the parties spent a night in a room or a hotel. In the latter case, it has to be proved that they stayed in the same room. The evidence must be precise in order to avoid the danger of collusion.[42]

*(ii) Birth of a child.* Adultery may be established by the birth of a child by the wife of which the husband cannot possibly be the father.

The birth of a child during the continuance of a valid marriage between the spouses or within 280 days after its dissolution is conclusive proof that the child is legitimate. But the husband may prove adultery by clear and conclusive evidence that he did not have access to his wife during the period the child could have been conceived.[43] Such evidence may be that he was abroad at the material time. In fact, either party to the marriage may give evidence to show that the spouses did not engage in sexual intercourse at any particular time, even though such evidence may prove that a child born during the marriage is illegitimate. But a spouse is not compellable to give such evidence if it will bastardize the child.[44]

Evidence of adultery may be adduced from the period of gestation. It has been held that a child born 174 days after the earliest date on which intercourse could have taken place is legitimate.[45] On the other hand, the birth of a child 360 days after intercourse between the spouses has

[40] [1963] 1 All NLR 340; *Akemu v Akemu* Suit No. WD/51/66 (unreported), Taylor, CJ, Lagos High Court, 6 November 1967. The court refused to draw the inference of adultery in *Oloko v Oloko* [1961] WNLR 101; *Lewis v Lewis* [1960] LLR 215.

[41] *Weatherley v Weatherley* (1854) 1 Sp Ecc & Ad 193, 164 ER 112.

[42] *Woolf v Woolf* [1931] P 134 (CA); *Raspin v Raspin* [1953] P 230.

[43] S 115(3) of the MCD 1970, which repealed S 147 of the Evidence Act; *Akparanta v Akparanta* Suit No. E/14D/70 (unreported), High Court, Enugu, 14 December, 1972.

[44] S 84 of the MCD 1970. S 147 of the Evidence Act has been repealed by S 115(3) of the MCD 1970.

[45] *Clark v Clark* (No. 1) [1939] P 228.

been regarded as evidence of the wife's adultery.[46]

The bearing of a child by the co-respondent of which the respondent is the father is also proof of adultery. This may be established where the respondent registers the child in his name.[47]

*(iii) Venereal disease.* The fact that a spouse is suffering from venereal disease which is not contacted from the other spouse raises a presumption of adultery. But the presumption may be rebutted by proof that the disease was contacted innocently or otherwise than by adultery.[48]

*(iv) General cohabitation.* Adultery may be presumed from the general cohabitation of the respondent and co-respondent in the same house as husband and wife. In *Evoroja v Evoroja*,[49] the respondent left the matrimonial home for her father's home in May 1954. It was established by evidence that in July 1957 the respondent and the co-respondent were living together as husband and wife in the house of the co-respondent. Morgan, J, held that even though there was no satisfactory evidence that the respondent was pregnant, adultery had been satisfactorily proved. Similarly bigamy is *prima facie* evidence of adultery.[50]

*(v) Confessions and admissions.* Confessions and admissions may provide evidence of adultery. But confessions are regarded with suspicion and caution by the courts, particularly if the confessing party desires to obtain a divorce.[51] Usually, the courts require that confessions be corroborated.[52] But there is no rule of law or practice which precludes the courts from acting on uncorroborated confessions. In *Lafin v Lafin*,[53] the court accepted the uncorroborated confession of the wife which was contrary to her interests.

The confession or admission of a spouse is evidence against that party alone.[54] Consequently, the confession of a respondent that he committed

[46] *Preston-Jones v Preston-Jones* [1951] AC 391. Taylor, CJ, in *Elumeze v Elumeze* Suit No. HD/41/64 (unreported), doubted whether the periods of gestation considered in English cases are binding on Nigerian courts in view of the 280 days mentioned in S 147 of the Evidence Act (now S 115(3) of the MCD 1970). It is submitted that the English cases merely provide guide-lines. The 280 days refers specifically to cases of birth after dissolution of marriage.

[47] *Okosi v Okosi* Suit No. WD/40/69 (unreported), Adefarasin, J, Lagos High Court, 29 January 1970.

[48] *Butler v Butler* [1917] P 224, where the respondent contracted syphilis by kissing before marriage.

[49] (1961) WNLR 6; *Omagbemi v Omagbemi* Suit No. WD/36/66 (unreported), Kazeem, J, Lagos High Court, 28 April 1967.

[50] *Ellams v Ellams* (1916) 33 TLR 123.

[51] *Lafin v Lafin* [1967] NMLR 401; *Collins v Collins* (1916) 33 TLR 123; *Marjoram v Marjoram* [1955] 1 All ER 1, 7.

[52] Corroboration may be in the nature of a letter – *Martins v Martins and Forgie* Suit No. 1/155/63 (unreported), Morgan, J, Ibadan High Court. See the unsatisfactory case of *Ademola v Ademola and Thomas* [1957] WNLR 208.

[53] [1967] NMLR 401; *Odumody v Odumody* [1964] 2 All NLR 100.

[54] *Rutherford v Richardson* [1923] AC 1, 6; *Inglis v Inglis* [1967] 2 WLR 488.

adultery with the co-respondent is no evidence against the latter. It may, therefore, be possible in that case to find that the respondent committed adultery, but not that the co-respondent has done so.[55] For instance, a petition for divorce may allege that the husband, X, committed adultery with Z. X may confess to the adultery alone. On the facts, the court may find that X committed adultery with Z but not that Z committed adultery with X. Z will then be dismissed from the suit.[56]

*(vi) Competence and compellability of witnesses.* A party to matrimonial proceedings who voluntarily gives evidence as a witness on his own behalf, or any other witness who is called by a party, may be asked and is bound to answer any question that may show that he has committed adultery if proof of that adultery would be material to the decision of the case.[57] Except in this case, a witness is not liable to be asked or bound to answer a question the answer to which may tend to show that he has committed adultery.[58] It is, therefore, clear that except where the proof of adultery is material to the decision of a case, the parties and their witnesses have absolute protection against incriminating questions as to adultery. Where the privilege exists, it is immaterial that the witness denied the adultery or attempted to rebut the evidence of adultery.

### (c) '. . . AND THE PETITIONER FINDS IT INTOLERABLE TO LIVE WITH THE RESPONDENT'

Section 15(2)(b) of the Decree requires not only the commission of adultery by the respondent but also that the petitioner finds it intolerable to live with the respondent.[58a] An important problem of interpretation arises here: whether the function of the word 'and' in the provision is disjunctive or conjunctive. In other words, the question is whether the commission of adultery and intolerability are dependent issues. A close reading of Section 15(2)(b) of the Decree suggests that the main theme of the provision is the commission of adultery, and that the intolerability depends on the adultery. Thus, the petitioner can only find further cohabitation with the respondent intolerable as a result of the latter's adultery. In *Roper v Roper*,[59] Faulks, J, interpreting a similar provision of the English Divorce Reform Act 1969, held that the second arm of the provision should read: '*and in consequence* of the adultery the petitioner finds it intolerable to live with the respondent'.[59a] Although

[55] *Crawford v Crawford* (1886) 11 PD 150; *Collins v Collins* (1916) 33 TLR 123.
[56] *Rutherford v Richardson* [1923] AC 1, 6; *Crawford v Crawford* (1886) 11 PD 150.
[57] MCD Section 85(1).
[58] ibid., Section 85(2).
[58a] *Egbueje v Egbueje* [1972] 2 ECSLR 747.
[59] [1972] 1 WLR 1314. *Eyo v Eyo* Suit No. WD/36/71 (unreported), High Court, Lagos, Adesanya, J, 20 September 1971; *Agu v Agu* Suit No. A/8D/71 (unreported), High Court, Aba, 16 August 1972; *Ibeawuchi v Ibeawuchi* Suit No. 0/6D/72 (unreported), High Court, Onitsha, 19 February 1973.
[59a] *Roper v Roper* ibid at 1317; *Agu v Agu* [1972] 2 ECSLR 452.

Lloyd-Jones, J, reached the opposite conclusion in *Goodrich v Goodrich*,[59b] it seems that on balance the conclusion of Faulks, J, represents the true spirit of the provision.

Whether or not the petitioner finds it intolerable to live with the respondent is a question of fact and the test is subjective. However, the court is not bound to accept the *ipse dixit* of a petitioner that he finds it intolerable to live with the respondent. Some reason or explanation for that assertion should be given in order to enable the court to ascertain the genuineness of the petitioner.[59c]

(D) JOINDER OF CO-RESPONDENT

If in a petition for a decree of divorce a spouse is alleged to have committed adultery with a specified person, that person must be made a party to the proceedings unless the rules of court provide otherwise.[60] But where the co-respondent is made a party to the proceedings the court on his application may dismiss that person from the proceedings if it finds that the alleged adultery is not established.

(E) DAMAGES FOR ADULTERY[61]

The right of action for damages for adultery which is conferred on each spouse has been discussed earlier.[62]

### 3 Conduct which the petitioner cannot reasonably be expected to bear

Another illustration of the irretrievable breakdown of marriage is where since the marriage the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.[63] The conduct of the respondent which is in issue must have occurred since the celebration of the marriage. The term 'behaviour' in the context of Section 15(2)(c) means something more than a state of affairs or a state of mind. It has been construed to import: 'action or conduct by one (spouse) which affects the other. Such conduct may either take the form of acts or omissions or may be a course of conduct and . . . it must have some reference to the marriage'.[63a]

The phrase 'cannot be reasonably expected to live with the respondent' in sub-Section 15(2)(c) poses an objective test in contradistinction to sub-Section 15(2)(b). But the word 'the petitioner' in paragraph (c) means the particular petitioner in the case under consideration and not an ordinary, reasonable petitioner. Consequently, the right test under

[59b] [1971] 1 WLR 1142, [1971] 2 All ER 1340; *Adebiyi v Adebiyi* Suit No. I/277/70 (unreported), Fakayode, J, High Court, Ibadan, 18 February 1972 (the respondent committed adultery and deserted the petitioner); *Labode v Labode* Suit No. HD/70/70 (unreported), High Court, Lagos, 28 February 1972. See also *Rayden's Law and Practice in Divorce and Family Matters* (ed. Jackson, J., Turner, C. F., Booth, M., and Morris, E. W.), 11th Edn (Butterworths, London 1971).

[59c] *Roper v Roper* [1972] 1 WLR 1314, 1317. *Oseni v Oseni* CCHCJ/12/72, 110.

[60] MCD 1970 S 32(1); S 13(1) Matrimonial Causes Rules 1968.

[61] Section 32(3) of the MCD 1970. [62] See pp. 69–72.

[63] MCD 1970 Section 15(2)(c). [63a] *Katz v Katz* [1972] 1 WLR 955, 959–60.

that paragraph is to consider whether it is reasonable to expect this petitioner to put up with the behaviour of this respondent. In applying this test, it is necessary to consider not only the established behaviour of the respondent but also to inquire into the character, personality, disposition and behaviour of the petitioner. Thus, a violent petitioner can reasonably be expected to live with a violent respondent.[63b] The appropriate standard of behaviour under Section 15(2)(c) has been aptly summed up by Sir George Baker, P, thus:

> It is for the judge not the petitioner alone to decide whether the behaviour is sufficiently grave to fulfil that test, that is, to make it unreasonable to expect the petitioner to endure it, to live with the respondent. . . . The court must consider the effect of the behaviour on the particular petitioner and ask the question is it established, not that she is tired of the respondent, or, colloquially, fed up with him, but that she cannot reasonably be expected to live with him. In a sense, it seems to me wrong to call it, as we are apt to do, unreasonable behaviour. It is behaviour that causes the court to come to the conclusion that it is of such gravity that the wife cannot reasonably be expected to live with him.[63c]

Situations envisaged in paragraph (c) are enumerated in Section 16 of the Decree. But this enumeration is not exhaustive, for Section 16 makes it clear that they are 'without prejudice to the generality of Section 15(2)(c).' It is therefore clear that Section 15(2)(c) is not restricted to the situations mentioned in Section 16.[64]

### (A) ILLUSTRATIONS IN SECTION 16

Let us first examine the cases enumerated in Section 16. It is relevant to point out initially that some of the situations provided in Section 16 are applicable to both the husband and wife, while others may apply only to a husband or a wife.

*(i) Rape, sodomy or bestiality.* Where the respondent has committed rape, sodomy or bestiality since the celebration of the marriage, the petitioner cannot reasonably be expected to live with the respondent.[65] Rape, sodomy or bestiality are grave misconducts which an innocent spouse cannot be expected to tolerate as part of the wear and tear of marriage. In fact, they are criminal offences which are so grave as to justify the other spouse obtaining a decree of divorce.

Evidence that a spouse was convicted after the marriage of rape or other sexual offence in Nigeria or elsewhere is evidence that that spouse

[63b] *Ash v Ash* [1972] 2 WLR 347; *Pheasant v Pheasant* [1972] 2 WLR 353; *Richards v Richards* [1972] 1 WLR 1073.

[63c] *Katz v Katz* [1972] 1 WLR 955, 959–60; *Babalola v Babalola* CCHCJ/11/72, 110; *Sogbetun v Sogbetun* CCHCJ/10/72, 97.

[64] *Ude v Ude* Suit No. E/1D/70 (unreported), Agbakoba, J, High Court Enugu, 24 July 1970; *Johnson v Johnson* CCHCJ/11/72; *Anakwenze v Anakwenze* [1972] 2 ECSLR 708.

[65] MCD 1970 Section 16(1)(a).

committed adultery with the person on whom the rape or other sexual offence was committed.[66] Moreover, evidence that a married person was convicted after the marriage of sodomy or bestiality in Nigeria or elsewhere shall be evidence that that spouse committed sodomy or bestiality.[67] A certificate of the conviction of a person for the crimes of rape, sodomy or bestiality by any court in Nigeria, if signed by the appropriate officer of the court, shall be evidence of the fact and date of conviction. If the certificate also shows that a sentence of imprisonment was imposed, it will be evidence of the sentence also.[68]

If in a petition for a decree of divorce a spouse is alleged to have committed rape or sodomy with a specified person, that person must, unless otherwise provided by rules of court, be served with notice of the allegation. He will then be entitled to intervene in the proceedings to defend himself.[69]

*(ii) Habitual drunkenness or intoxication.* The petitioner cannot reasonably be expected to live with the respondent where, since the marriage, the respondent has, for a period of at least two years, been a habitual drunkard or habitually been intoxicated by reason of taking or using to excess any sedative, narcotic or stimulating drug or preparation.[70] Similarly, the petitioner is entitled to the dissolution of the marriage if during a part or parts of the specified period the respondent has been a habitual drunkard, and for the other part or parts of the period, been habitually intoxicated.

A habitual drunkard is one who as a matter of habit consumes intoxicating liquor to an extent that makes him incapable of controlling his actions or affairs.[71] The mere fact that a person is a heavy drinker does not necessarily make him a habitual drunkard. However, the vital question is the condition which his addiction to drinks produces, and not necessarily or solely the extent to which he consumes intoxicating liquor.[72] The word 'habitual' imports such frequent occurrence as constitutes a habit. A drunkard, on the other hand, is one who is accustomed to excessive use of alcoholic liquor. Consequently, it will be sufficient to prove that the respondent has been subject to numerous and continued bouts of drunkenness. If there is a considerable period of sobriety, for instance nine months, it may not be said that the respondent is a habitual drunkard. It is immaterial whether the

[66] Section 87(1)(a) of MCD 1970.
[67] MCD 1970 Section 87(1)(b).
[68] MCD 1970 Section 32(2).
[69] MCD 1970 Section 32(2).
[70] MCD 1970 Section 16(1)(b), *Johnson v Johnson* CCHCJ/11/72, 94.
[71] Compare the definition of 'habitual drunkard' in the English Matrimonial Proceedings (Magistrates' Court) Act 1960 S 16(1) – 'A person who by reason of habitual intemperate drinking of intoxicating liquor (a) is at times dangerous to himself or to others, or incapable of managing himself or his affairs, (b) so conducts himself that it would not be reasonable to expect a spouse of ordinary sensibilities to continue to cohabit with him.'
[72] *Dalgleish v Dalgleish* (1955) 93 CLR 595; *Alexander v Alexander* [1962] ALR 465; (1962) 3 FLR 84.

abstinence was voluntary or induced by other factors.

Habitual intoxication caused by the excessive use of drugs is a condition commonly found among drug addicts.

An important aspect of the respondent's record as a habitual drunkard or a drug addict is that his intemperate consumption of intoxicating liquor or drugs causes him to neglect his marital obligations.

The two years' period must occur after the celebration of the marriage but before the presentation of the petition. But it is not clear whether it should immediately precede the presentation of the petition. Unlike some other provisions of the Decree, for instance Section 15(2)(d), sub-Section 16(1)(b) does not stipulate that the period in question must come immediately before the petition. If, however, there is an intervening period between the two years of habitual drunkenness and the presentation of the petition, it will be a question of fact whether the conduct has been condoned. Nevertheless the sub-section envisages one continuous period of two years.

*(iii) Frequent convictions and habitual leaving the spouse without support.* There is also compliance with Section 15(2)(c) where, since the marriage, the respondent has within a period not exceeding five years suffered frequent convictions for crime and been sentenced in the aggregate to not less than three years' imprisonment. In addition, the respondent must have habitually left the petitioner without reasonable means of support.[73]

Thus, for a wife to obtain a decree of divorce on the ground of her husband's frequent convictions, she must establish that he has within one period of five years, (a) suffered frequent convictions for crimes; (b) been sentenced to an aggregate of three years' imprisonment or more; and (c) left her habitually without reasonable means of support. The two arms of sub-Section 16(1)(c) are not mutually exclusive but form a composite offence. While the five years' period must precede the presentation of the petition, it is not necessary that it should immediately precede the presentation of the petition.[74]

It is mandatory that the crimes, convictions and sentences must have occurred after the marriage.[75] In determining the frequency of the convictions, therefore, the conduct and convictions of the husband before the marriage are not to be taken into account.[76] The word 'frequent' suggests that the convictions should be recurrent, or occurring at short intervals. The emphasis is on the frequency of convictions and aggregation of sentences rather than on the actual period of imprisonment.[77] Hence, while the sentences must have amounted in the aggregate to imprisonment for three years, it is not necessary that the husband should have been actually imprisoned for that period.

[73] MCD 1970 Section 16(1)(c).
[74] *Stott v Stott* [1933] VLR 346.
[75] *Stott v Stott* [1933] VLR 346; *Walton v Walton* (1938) 38 SR (NSW) 322.
[76] *Budge v Budge* [1940] VLR 405; *Bell v Bell* [1937] VLR 144.
[77] *Bell v Bell* [1937] VLR 144.

In reckoning the aggregate period of sentences of imprisonment, where a person is sentenced to imprisonment in respect of more than one crime and the sentences are to run concurrently, the period of concurrent sentences is to be taken into account once only.[78]

What is a reasonable means of support is a question of fact to be decided having regard to all the circumstances of the case.[78a] Thus if no means of support is provided the situation will come within the ambit of Section 16(1)(c)(ii). But where the respondent provides some means of support, the court will consider the degree and circumstances in order to determine if it is reasonable. Whether the means of support is reasonable has to be judged by the husband's standard of living.[78b] However, the maintenance must be reasonable at the time of the application.[78c]

Although there are two parts to sub-Section 16(1)(c), they create a composite ground for divorce. This is supported by the fact that the parts are linked by a conjunctive, 'and', and not by a disjunctive, 'or'. Consequently, both the imprisonment and the habitual failure to support the petitioner should occur during the same period. In the Australian case of *Weiler v Weiler*,[79] the High Court considered the meaning of Section 16 of the New South Wales Matrimonial Causes Act 1899,[80] which is identical to Section 16(1)(c). The facts were that on 14 August 1914 the respondent was convicted of two different criminal offences, and was sentenced for each offence to two years' imprisonment, the sentences being concurrent. Later, on 3 July 1916, he was convicted of seven criminal offences and was sentenced for each offence to three years' imprisonment, the seven sentences being concurrent. The respondent was serving the latter sentences when the petition for divorce was presented by his wife. She led evidence to establish that in January 1914 the respondent left her and since then had not contributed to her support. Isaacs, J (who read the judgment of the court), interpreted Section 16 of the 1899 Act thus:

> The offence is composite, but we do not think its elements are mutually exclusive. The sub-section does not allow the wife to obtain a divorce merely because within the last five years her husband has been frequently convicted for such serious offences as have led to his imprisonment for three years or more . . . nor does it allow her to get that relief merely because during that period she had been habitually left without means of support. But if within that period both things

[78] MCD 1970, Section 22.

[78a] *Morton v Morton* [1942] 1 All ER 273, 277.

[78b] *Scott v Scott* [1951] 1 All ER 216, 217–218 [1951] P 245, 248; *Ehigiator v Ehigiator* [1966] 2 All NLR 169, 177.

[78c] *Tulip v Tulip* [1951] 2 All ER 91, 97, [1951] P 378, 389.

[79] (1918) 25 CLR 109.

[80] The Section gives a wife the right to petition for divorce on the ground 'that her husband has within five years undergone frequent convictions for crime and been sentenced in the aggregate to imprisonment for three years or upwards and left the petitioner habitually without the means of support'.

concur, she has the right to petition – other conditions existing. A man who has been convicted and imprisoned (say) for the whole five years may yet have left his wife well provided for out of his means. Or he may have left her for the whole period in utter poverty, and dependent on her own labour . . .[81]

The court therefore held that the wife would succeed, as her husband had habitually left her without any means of support while he was in prison.

In *Nwuga v Nwuga*,[82] the wife petitioner sought for the dissolution of the marriage on the ground of her husband's cruelty. She alleged, *inter alia*, that she was the breadwinner of the family throughout their stay in the United Kingdom. Taylor, C J, found that the alleged cruelty was not proved. But the learned Chief Justice went on to consider whether the alleged failure of the husband to support his wife came within the provision of Section 16(1)(c)(ii) of the Decree. In doing so he treated the sub-section as exclusive of the other arm of sub-Section 16(1)(c). Neither the facts of the case nor the judgment referred to sub-Section 16(1)(c)(i). It is submitted that the Chief Justice was erroneous in his view that proof of facts which satisfy sub-Section 16(1)(c)(ii) alone would have been sufficient for the purposes of Section 16(1)(c). As has been pointed out, the two arms of the sub-section create one ground for divorce under Section 16(1).

The word 'habitually' means that the conduct of the respondent in leaving the petitioner unprovided for is continuous, recurrent or persistent. When this factor is coupled with the element of frequent convictions of the respondent, there is conduct that may excuse the petitioner from living with the respondent.

*(iv) Imprisonment.* It is a fact for divorce under Section 16(1)(d) that since the marriage, the respondent has been in prison for a period of not less than three years after conviction for an offence punishable by death or imprisonment for life, or for a period of five years or more, and is still in prison at the date of the petition.[83] The first arm of this provision requires that the respondent must have been in prison for at least three years and must still be in prison at the date of the petition. However, the second arm is not free from ambiguity. It may be argued that it is open to two different interpretations. On the one hand, it may be construed to mean that the respondent has actually been in prison for at least three years pursuant to a conviction for an offence in respect of which the penalty could be death or life imprisonment or imprisonment for at least five years. Alternatively, the provision may mean that the respondent has been in prison either for at least three years, where his conviction was for an offence punishable by death or life

[81] (1918) 35 CLR 109, 112.
[82] Suit No. WD/59/70 (unreported), High Court, Lagos, 23 November 1970.
[83] MCD 1970 Section 16(1)(d).

imprisonment, or that he has been in prison for a period of at least five years, regardless of the nature of the offence.

In *Symes v Symes*,[83a] the Supreme Court of Tasmania was called upon to interpret section 28(h) of the Australian Matrimonial Causes Act 1959–1966, which is identical with section 16(1)(d) of the Decree. There, the respondent had been in prison for three years, having been convicted of manslaughter and sentenced to five years' imprisonment. Under Tasmanian law, manslaughter was punishable by imprisonment for a period not exceeding twenty-one years or by fine or both, at the discretion of the judge. At the time of the petition, the respondent had served three years of his sentence and he was still in prison at the time of the hearing. Chambers, J, adopting the first interpretation, held that a ground for divorce under section 28(h) of the Act had been made out. The learned judge reached this conclusion on the ground *inter alia* that section 28(h) represents one of a series of grounds based on conviction suffered by the respondent all of which possess the common characteristic that the offence is serious. He argued that the other sub-sections of Section 28 of the Act (that is the provisions corresponding to Sections 16(1)(a) and (e) of the Decree) which deal with serious offences do not require that the respondent be actually imprisoned or even sentenced to imprisonment. Consequently it may be assumed that beside the seriousness of the offence, actual imprisonment is unnecessary. He, therefore, found evidence of the seriousness of the offence in Section 28(h) in the requirement that the respondent should actually have served a period of imprisonment of at least three years.[84]

*(v) Attempt to murder and assaults.* Another fact for the dissolution of marriage is related to offences of attempt to murder and assaults. A marriage may be dissolved on the ground that since its celebration and within a period of one year immediately preceding the date of the petition the respondent has been convicted of having attempted to murder or unlawfully to kill the petitioner. Alternatively, the petition may be grounded on the fact that within the stipulated period the respondent was convicted of having committed an offence involving the intentional infliction of, or the intent to inflict, grievous harm on the petitioner.[85] Both arms of the provision involve the commission of serious offences, which constitute a threat to the life of the petitioner.[86] It will be unreasonable to expect a spouse who runs the risk of losing his life at the hands of the other spouse to continue with the marriage.

[83a] *Australian Law Journal* vol. 46 (1972), 195–6.

[84] This interpretation is in accord with the intention of the framers of the Australian Act as confirmed by the Attorney-General in the Parliamentary Debates (Hansard, House of Representatives Vol. 25, 2841). See Toose, P. B., Watson, R. S., and Benjafield, D. G., *Australian Divorce Law and Practice* (Sydney, Law Book Coy, 1968) para. 365.

[85] MCD 1970 Section 16(1)(e).

[86] See the Criminal Code Section 320 (attempt to murder); Section 355 (unlawful infliction of harm).

*(vi) Habitual and wilful failure to support.* A marriage may be dissolved on the ground that the respondent has habitually and wilfully failed during the two years immediately preceding the date of the petition to pay maintenance to the petitioner under a court order or a separation agreement.[87] The order must be one made by or registered in a court in Nigeria.[88] In the case of a separation agreement, the maintenance should be one agreed to by the parties. Failure to pay the maintenance must have continued throughout the statutory period. Moreover, it must have been so frequent and continuous as to be habitual. In order to enable the court to determine whether the failure to pay is habitual it must possess all the relevant facts.

The failure of the respondent to pay maintenance for the petitioner must be wilful. The word 'wilful' connotes a deliberate act or decision on the part of the respondent. For the petitioner to obtain relief under this provision, it must be shown that the conduct of the respondent was deliberate. Thus, where the respondent who is in a position to pay maintenance chooses not to provide it, his refusal is wilful. But a court will not make a decree under Section 16(1)(f) unless it is satisfied that the petitioner made reasonable but futile attempts to enforce the maintenance order or agreement.[89]

*(vii) Insanity.* Insanity is a fact for divorce if the respondent is, at the time of the petition, of unsound mind and unlikely to recover. In addition, it must be proved that since the marriage and within the period of six years immediately preceding the date of the petition, he has been confined for a period or periods of not less than five years in one or more institutions in or outside Nigeria where persons of unsound mind are confined.[90] Insanity as a ground for divorce must be distinguished from insanity as a ground for nullity.[91]

There is no distinction between insanity and unsoundness of mind.[92] The test for unsoundness of mind is whether the respondent by reason of his mental condition is capable, according to the standard of a reasonable person, of managing himself and his affairs.[93] 'Unlikely to recover' means that it is improbable that the respondent's mental health will be restored to a state that will enable him to manage his affairs. To meet this test the petitioner must satisfy the court that on the balance of probability the respondent will not recover from the insanity.[94]

[87] MCD 1970 Section 16(1)(f).
[88] See Chapter 9, p. 207.
[89] MCD 1970 Section 23.
[90] ibid., Section 16(1)(g).
[91] See *ante*, Chapter 5, p. 119.
[92] *Smith v Smith* [1940] P 179.
[93] *Whysall v Whysall* [1959] 3 All ER 389; *Robinson v Robinson* [1964] 3 All ER 232 [1965] P 192.
[94] *Davis v Davis* [1943] SASR 203; *Read v Read* [1944] SASR 26; *W v W* [1952] NZLR 812. 'Unlikely to recover' is a less stringent requirement than 'incurable' or 'having no reasonable prospect of recovery'. Cf. English MC Act 1965 S 1(1)(iv) – 'incurably of unsound mind'. It is doubtful whether 'recover' means discharge from confinement, or the restoration of perfect mental health – *W v W*, *supra*.

It makes no difference whether the unsoundness of mind is congenital or was caused by a supervening mental illness.[95] Once the court decides that the unsoundness of mind exists in a form from which the respondent is unlikely to recover, it will not be concerned with the degree of insanity. It is immaterial that the insanity is not violent.[96] A spouse may be a raving lunatic and unlikely to be cured, but such unsoundness of mind is not a ground for divorce unless it has resulted in the prescribed confinement.[97]

The total of five years' confinement must have occurred since the marriage and within the six years immediately preceding the date of the petition. Moreover, the period of confinement may be one continuous period, or several periods that total five years. The word 'confinement' has been defined by Fair, J,[98] as:

> the exercise of control over [a] period without such relaxation for a substantial time as would indicate that the person was entirely free from control and was treated as a person from whom the condition of confinement had been removed.

Consequently, confinement is to be treated as a status rather than as a physical fact of restraint under lock and key.[99] A person may, therefore, be 'confined' even though during the period of confinement he is allowed to leave the institution for a day.[100] This view is supported by the fact that the law does not insist on the continuity of the confinement. Confinement during the statutory period must have been in an institution which by law is established or meant for persons of unsound mind.[101] A marriage will not be dissolved under this provision unless the court is satisfied that at the commencement of the hearing of the petition the respondent was still confined in such an institution and was unlikely to recover.[102]

### (B) CRUELTY

As has been pointed out earlier, Section 16 is not exhaustive of the situations which come under sub-Section 15(2)(c). The sub-section covers, in addition, cases of cruelty. In *Udeh v Udeh*,[103] Agbakoba, J, held (under Section 15(2)(c) of the Decree) that the cruelty proved

[95] *Robinson v Robinson* [1964] 3 All ER 232, [1965] P 192.
[96] *Randall v Randall* [1939] P 131; *Shipman v Shipman* [1939] P 147, 157.
[97] *Shipman v Shipman, supra.*
[98] *W v W* [1940] NZLR 400, 402.
[99] *Safford v Safford* [1944] P 61, 68; *Anderson v Anderson* [1957] St R Qd 226. *Contra Hurren v Hurren* [1971] VR 459.
[100] *W v W* [1940] NZLR 400.
[101] Such institutions are designated by statute in Nigeria – see Lunacy Act, Cap. 112 *Laws of the Federation of Nigeria* 1958; Lunacy Law – Cap. 81 *Laws of Eastern Nigeria*, 1963; Cap. 73 *Laws of Western Nigeria*, 1959; Cap. 69 *Laws of Northern Nigeria*, 1963.
[102] MCD 1970 Section 24.
[103] Suit No. E/1D/70 (unreported), Agbakoba, J, High Court, Enugu, 24 July 1970. *Anakwenze v Anakwenze* Suit No. E/19D/72 (unreported), High Court, Enugu, 14 December, 1972.

constituted conduct which the petitioner could not reasonably be expected to live with.

Prior to 1970, legal cruelty meant such conduct as causes either danger to life, limb or health, bodily or mental, or a reasonable apprehension of such danger.[104] The 1970 Decree has created a new concept of cruelty whereby the emphasis has shifted from injury or its apprehension to whether the conduct of the respondent is such that the petitioner cannot reasonably be expected to live with the respondent. The new test, therefore, is whether the respondent's conduct will in the opinion of a reasonable man justify the petitioner living apart.[104a] This concept seems to be reflected in the dicta of Lord Pearce in *Gollins v Gollins*, where he stated that:[105]

> It is impossible to give a comprehensive definition of cruelty, but when reprehensible conduct or departure from the normal standards of conjugal kindness causes injury to health or an apprehension of it, it is, I think, cruelty if a reasonable person, after taking due account of the temperament and all the other particular circumstances would consider that the conduct complained of is such that this spouse should not be called on to endure it.

Thus, where there is injury to the petitioner or a reasonable apprehension thereof, he may not be reasonably expected to live with the respondent. The respondent's conduct by which the petitioner cannot reasonably be expected to live with the respondent may take a variety of forms, including those which may constitute cruelty under the old law. Such conduct may include physical assaults, humiliating treatment, nagging, and the use of juju. In *Johnson v Johnson*[105a] it was held that unreasonable refusal of sexual intercourse, nagging, habitual intemperate drinking of alcohol and inordinate sexual indulgences of the respondent with all sorts of women, particularly with housemaids, were weighty and unreasonable acts to call the petitioner to endure.

As a general rule, the courts do not consider a single act of cruelty sufficient to evoke the application of section 15(2)(c). In *Okafor v Okafor*,[105b] Oputa, J, explained the relevance of cruelty to the section thus: 'This implies not just one solitary act of cruelty but a behaviour pattern, based maybe on cruelty or other grounds which lead the court to infer that cohabitation can no longer subsist between the parties'. It was held in that case that where on the same occasion the respondent beat the petitioner, pushed her down and locked her up, the acts did not amount to that sustained behaviour envisaged by Section 15(2)(c).

[104] *Russell v Russell* (1897) AC 395 (HL); *Adaramaja v Adaramaja* (1962) 1 All NLR 247; *Williams v Williams* (1966) 1 All NLR 36; *Obayemi v Obayemi* (1967) NMLR 212; *Nabham v Nabham* (1967) NMLR 192; *Mgbakor v Mgbakor* (1959) Vol. III ENLR 37; *Beckley v Beckley* (1961) WNLR 47.

[104a] *Jordan v Jordan, The Times*, 9 June 1972.

[105] (1963) 2 All ER 966, 992. [105a] CCHCJ/11/72, 94.

[105b] Suit No. o/6D/71 (unreported), High Court, Onitsha, 13 November 1972; *Megafu v Megafu* Suit No. o/7D/71 (unreported), High Court, Onitsha, 13 December 1972.

However, as in the old concept of cruelty, there may be cases involving a single but serious act of cruelty which will satisfy the requirements of the section.[105c]

(c) OTHER REPREHENSIBLE CONDUCT

It is possible for some other conduct of the respondent which may not amount to or constitute cruelty to fall within the ambit of Section 15(2)(c). In *Oladetohun v Oladetohun*,[106] the husband petitioner, who was a clergyman, petitioned for divorce on the ground that the marriage had broken down irretrievably because the wife indulged in the use of charms and black juju. Cruelty was neither alleged nor proved. Adefarasin, J, held that the conduct of the wife was such that a reasonable husband who is averse to juju or charms could not be reasonably expected to live with her. Similarly, where a spouse is satisfactorily shown to practise witchcraft, that may be such reprehensible conduct that the other spouse will not reasonably be expected to continue their cohabitation.

Where a spouse petitions for divorce under sub-Section 15(2)(c), and the parties have cohabited with each other for a period or periods not exceeding six months after the occurrence of the final incident found by the court in support of the petition, that period should be disregarded in determining whether the ground is established.[107] It is mandatory that during the six months' period the parties must have lived with each other in the same household.[108]

The six months' period is intended to encourage reconciliation between the parties. Although it is not expressly provided that the cohabitation must have taken place with a view to reconciliation, the provision envisages that further cohabitation after the occurrence of the final incident may create an opportunity for reconciliation. It will therefore not be necessary to prove that reconciliation was the intention behind the further cohabitation. If the cohabitation exceeds six months it seems that the inference will be that the petitioner has condoned the acts complained of.

### 4 Desertion

Under Section 15(2)(d) of the 1970 Decree, a marriage will be regarded as having broken down irretrievably where the respondent has deserted the petitioner for a continuous period of at least one year immediately preceding the presentation of the petition.

Desertion is 'the separation of one spouse from the other with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse'.[109] To constitute desertion, therefore, four

[105c] *Reeves v Reeves* [1862] 3 Sw & Tr 139; 164 ER 1227.
[106] Suit No. HD/111/70 (unreported), High Court, Lagos, 6 July 1971.
[107] MCD 1970 Section 17(1). [108] ibid., Section 17(3).
[109] *Rayden's Practice and Law of Divorce* (ed. Jackson, J., and Turner, C. F.), 9th Edn (Butterworth, London 1971), 165.

elements must be present at the same time – the *de facto* separation of the parties, *animus deserendi*, lack of just cause for the withdrawal from cohabitation, and the absence of the consent of the deserted spouse.

We shall now examine each of these elements:

(A) DE FACTO SEPARATION

*De facto* separation implies the bringing to an end of cohabitation by severing all marital obligations.[110] The most obvious case of desertion occurs when one spouse physically departs from the matrimonial home.[111] But there are other instances of separation. A spouse who is desirous of leaving the matrimonial home does not always have an alternative place to go to. Rather than leave, he may continue to live there, but he repudiates all marital obligations. In such a case, there will be desertion just as in the case of physical departure. As Lord Merrivale, P,[112] pointed out, 'desertion is not the withdrawal from a place, but from a state of things'. Consequently, there may be desertion where the parties continue to live under the same roof. The test is whether there is one household or more.

This may be illustrated by contrasting two cases. In *Hopes v Hopes*[113] the parties were married in 1916. From 1934 the wife started to occupy a separate bedroom because as the husband had to leave very early for work he went to bed early and objected to his wife coming to bed after he had retired. Marital intercourse ceased between the parties. The husband kept very much to his bedroom but shared the other parts of the house with his wife and daughters. Although the wife refused to wash or mend his clothes, she cooked for him and he had his meals in a common dining room with his wife and daughters. The husband eventually left the matrimonial home. It was held that as there was still one household the wife was not guilty of desertion. In *Walker v Walker*[114] the parties lived in the same house but the wife withdrew to a separate bedroom, which she kept locked. She refused to perform any domestic duties for her husband, who therefore did the household jobs for himself. He had most of his meals outside, but on Sundays the parties were compelled to use the same kitchen, though at different times. They communicated with each other by the exchange of notes. It was held that the parties were not living together in the same household and that the wife was therefore guilty of desertion.

There may be *de facto* separation but no desertion where the parties are living apart against their will, for instance, by imprisonment or internment.[115]

[110] Per Evershed, M. R., in *Perry v Perry* [1952] 1 All ER 1076, 1082 (CA).
[111] *Rosanwo v Rosanwo* [1961] WNLR 297; *Shyngle v Shyngle* (1923) 4 NLR 94.
[112] *Pulford v Pulford* [1923] P 18, 21.
[113] [1949] P 227.
[114] [1952] 2 All ER 138 (CA); *Naylor v Naylor* [1962] P 253.
[115] *Beeken v Beeken* [1948] P 302 (CA).

(B) ANIMUS DESERENDI

Besides *de facto* separation, there must be the *animus deserendi*, that is, the intention to withdraw from cohabitation permanently. There is no such intention where a spouse is temporarily absent from the other, for instance, on holidays or business.[116] The same is true where the separation is due to mutual consent.

Where a spouse voluntarily abandons the matrimonial home there is a presumption that he intended to desert *animus deserendi*. The desertion, therefore, starts at the moment of his departure.[117] But if in the course of separation due to mutual consent one of the parties forms the intention to withdraw permanently from the other, desertion starts from the moment the intention was formed. In *Agu v Agu*,[118] the parties, a Nigerian and a German lady, were married in England in July 1952. The husband petitioner returned to Nigeria in August 1958 on the mutual agreement that he would first settle down and later send for his wife and children. In 1960 the petitioner booked passages for the respondent and their children to join him in Nigeria. The respondent cancelled the booking on the ground that she was nervous to make the journey, and later made it clear that she would not make the journey. In May 1963 the petitioner made an unsuccessful journey to Germany to persuade her to return. It was held that the respondent was in desertion from 1960, when the *animus deserendi* supervened. Similarly, if separation is involuntary, for example owing to imprisonment, it may be turned into desertion by the subsequent *animus deserendi* of a spouse.[119]

Whether an insane person is capable of forming the necessary *animus* is a question of fact. It has to be proved in each case that the necessary *animus* exists, so as to make the insane party guilty of desertion.[120] If insanity merely supervened it will not necessarily terminate the desertion.

(C) LACK OF JUST CAUSE

There will be no desertion if the spouse who has withdrawn from cohabitation has a good reason for doing so. It is clear that where one spouse is guilty of adultery or other matrimonial misconduct the other spouse will have a reasonable cause for living apart. In fact if the innocent party fails to withdraw he may forfeit his right to matrimonial relief on the ground that he has condoned or connived at the misconduct.[121]

[116] *G v G* [1964] P 133.
[117] *Sowande v Sowande* FSC 130/1962 (unreported), 28 June 1963.
[118] Suit No. E/ID/1966 (unreported), Oputa, J, Enugu High Court, 18 July 1966; *Tinubu v Tinubu* [1959] WNLR 314.
[119] *Beeken v Beeken* [1948] P 302 (CA).
[120] *Perry v Perry* [1963] 3 All ER 766; *Kaczmarz v Kaczmarz* [1967] 1 All ER 416.
[121] *Beigan v Beigan* [1956] P 313.

In *Sowande v Sowande*,[122] the petitioner, a Nigerian, married the respondent, an American, in London in 1936. Shortly after the outbreak of World War II in 1939 the United States Government offered passages to its citizens who wished to return to the United States. The respondent, against the wishes of the petitioner, took advantage of the offer and returned to the United States. She never returned to the matrimonial home. Dickson, J, held, in the court of first instance, that the outbreak of hostilities in Europe was a good excuse for her departure from England. On appeal, the Supreme Court held that the war was not a just cause for the wife to leave the matrimonial home without the husband's consent. In *Sode v Sode*,[123] the wife respondent left the matrimonial home in Zaria in 1946 against the wishes of the husband. She gave as her reasons for leaving the dullness of social life in Zaria and the discomfort she suffered as a result of the harmattan. It was held that her reasons were not good grounds for deserting her husband.

The general principle is that any conduct which makes the continuance of matrimonial cohabitation virtually impossible will provide a good excuse for a spouse to desert.[124] On this principle, it seems that any conduct which will justify the dissolution of a marriage under Section 15(2)(c) of the 1970 Decree may also provide a just cause for desertion. Sometimes a good cause for desertion which is independent of the petitioner's conduct may exist. A spouse may, for instance, withdraw from cohabitation on account of ill-health or imprisonment.[125] But mental illness, except where it constitutes a threat to the health of other members of the family, is not *per se* good cause for withdrawal from the matrimonial home.[126]

Again, a reasonable but mistaken belief by a spouse in the existence of a good cause for separation based on the conduct of the other spouse may be a good defence for desertion. In *Glenister v Glenister*,[127] the husband, a member of the Armed Forces, complained that his wife infected him with gonorrhea when he was home on leave. On his return on a subsequent occasion he found three men in the matrimonial home (one of whom was in the bedroom with his wife), and was refused admission into the house until the following morning. He therefore concluded that his wife had committed adultery. It was held that his belief that adultery might have been committed by the wife was reasonable in the light of the wife's conduct. But a husband is not justified in leaving his wife simply because he has been told by his mother that his wife has committed adultery.[128] The test of reasonable belief that the other spouse has committed misconduct must be an objective one.

[122] [1960] LLR 58 reversed by the Supreme Court: FSC 130/1962 (unreported), 28 June 1963.
[123] Suit No. HD/35/1966 (unreported), Alexander, J, Lagos High Court, 6 June 1967.
[124] *Jackson v Jackson* (1932) 146 LT 406.
[125] *Keeley v Keeley* [1952] 2 TLR 756; *Wickens v Wickens* [1952] 1 TLR 1473.
[126] *G v G* [1964] P 133.
[127] [1945] P 30; *Ousey v Ousey* (1874) LR 3 P & D 223.
[128] *Beer v Beer* [1948] P 10.

(D) ABSENCE OF CONSENT

A spouse who leaves the matrimonial home without the consent of the other spouse may be in desertion. If there has been a separation by mutual agreement, desertion will supervene once one party withdraws his consent to that state of affairs. In *Ikpi v Ikpi*,[129] the parties were married in 1944 and lived at Ibadan. In November 1950 the husband was transferred to Zaria. There was an agreement between the spouses that the wife should remain at Ibadan as she was expecting a baby and maternity facilities were not assured at Zaria. The wife was to join him in Zaria in February 1951 if maternity facilities in Zaria were guaranteed. Later the husband wrote assuring the wife of maternity facilities in Zaria. The wife refused to join him on the ground that she would not get a teaching appointment in Zaria. It was held that as the husband had put an end to the agreed separation the wife was in desertion when she refused to join him in Zaria.

If a party consents to the separation he cannot be held to complain of it. But the consent must be genuine and not obtained by duress, fraud or misrepresentation.[130] Thus where a wife told her husband to go to his mistress, but made him promise to return to her when he was fed up with the mistress, it was held that there was no real consent.[131]

Consent to separation may take the form of a separation agreement. Such agreement need not be in writing or embodied in a deed, but it must provide for the spouses living apart.[132] Where the spouses are parties to a separation agreement, the refusal by one of them, without reasonable cause, to comply with the other's *bona fide* request to resume cohabitation puts that party in desertion.[133]

Absence of consent on the part of a spouse is different from the matter of his wishes. Thus if there is no consent there may be desertion even though the petitioner is pleased to see the respondent go.[134]

(E) CONSTRUCTIVE DESERTION – 'SEPARATION WITH JUST CAUSE'[135]

It is not necessarily the party who lives separately or apart from the matrimonial home that is the deserter. He may have been compelled by the conduct of the other spouse, which constitutes just cause or excuse for living apart, to do so. Thus the real deserter is that party whose conduct is responsible for the cessation of cohabitation.[136]

[129] [1957] WNLR 59.
[130] *Holroyd v Holroyd* (1920) 36 TLR 479.
[131] *Bevan v Bevan* [1955] 1 WLR 1142.
[132] *Smith v Smith* [1945] 2 All ER 452; *Crabtree v Crabtree* [1953] 1 WLR 708.
[133] Section 19 of the MCD 1970.
[134] *Harriman v Harriman* [1909] P 123, 148.
[135] Although the term 'constructive desertion' is used in the marginal note of the Decree, the use of that term to describe the new concept has been criticized by Burbury, CJ, in the Australian case of *Manning v Manning* (1961) 2 FLR 257, 260–61, as confusing. The learned judge preferred to describe it as 'separation with just cause'.
[136] Section 18 of the MCD 1970.

*Unreasonable Conduct.*

Under the old law the emphasis in constructive desertion was on the expulsive conduct of the deserter, which compelled the other spouse to leave the matrimonial home.[137] But under the new statutory concept of constructive desertion the test is 'the reasonableness of the departure of the [petitioner] in the light of the [respondent's] conduct viewed objectively'.[138] Thus it is only necessary to prove conduct which constitutes just cause or excuse for the petitioner to live separately or apart from the respondent and which in fact causes him to do so. Although conduct which will be regarded as 'just cause or excuse' should be grave, it is not necessary that the conduct should constitute a matrimonial offence. However, it is necessary to consider the whole conduct of the parties before determining whether a defence of 'just cause or excuse' has been made out.

It is no longer necessary to prove *animus deserendi* in order to establish constructive desertion. Once it is established that there was a just cause or excuse for the petitioner to live apart there is no necessity to prove any intention on the part of the deserting spouse. Although Section 15 does not refer to any period of time, it seems that the elements of desertion prescribed in it must continue throughout the statutory period of one year laid down in Section 15(2)(d). Equally the dispensation with the requirement of subjective intention should also persist throughout that period.[139]

(F) PERIOD OF DESERTION

To constitute a ground for divorce, desertion must have lasted for a continuous period of one year immediately preceding the presentation of the petition. In determining whether desertion has been continuous, any one or more periods not exceeding six months during which the parties resumed living with each other in the same household are not regarded as a break in the continuity of the period. Apart from this, no period of cohabitation counts as part of the period of desertion.[140]

It is doubtful whether desertion for a period of one year should be a sufficient cause for the dissolution of marriage. In many cases the period may be insufficient to enable the deserting spouse to take a final decision on whether or not to return to the matrimonial home.

(G) TERMINATION OF DESERTION

Desertion, being an offence which must run throughout a stipulated period, may be brought to an end before the expiration of the statutory

[137] *Ilevbare v Ilevbare* [1958] WNLR 46; *Osunde v Osunde* [1961] LLR 29; *Apena v Apena* Suit No. WD/16/66 (unreported), George, J, Lagos High Court, Johnson, J, Ondo High Court, 1 June 1970.

[138] *Magaard v Magaard* (1955) 99 CLR 1, 5, 6.

[139] *Manning v Manning* (1961) 2 FLR 257, 260; *Fronten v Fronten* (1963) 4 FLR 314; *Jagger v Jagger* [1971] VR 589. Contrast *B v B* [1962] VR 378; *A v A* [1962] VR 619, 3 FLR 25.

[140] Section 17(2) of the MCD 1970.

period. If one of the four constituent elements of desertion ceases to exist at any given moment during the course of the prescribed period, desertion will come to an end.

*(i) Resumption of cohabitation.* The resumption of cohabitation by the spouses removes the element of *de facto* separation, thereby putting an end to desertion.

Whether or not there is resumption of cohabitation is a question of fact depending on the circumstances of each case. Ordinarily cohabitation is resumed where the parties resume residence under the same roof, and consortium is restored. The physical cohabitation must be accomplished by the mutual intention to set up a home.[141] Thus, desertion was held to continue where a wife in desertion returned to her husband because she had nowhere else to go, but refused to perform any marital duties.[142] On the other hand, if there is the necessary intention, cohabitation may be resumed even though the parties have no house to go to.[143]

Sexual intercourse *per se* without the intention to resume cohabitation will not displace desertion. In *Rosanwo v Rosanwo*,[144] the respondent husband had deserted the petitioner from December 1956 and was living with two other women. In 1959, when the petitioner was visiting her two daughters, she stayed with the respondent for three nights, during which sexual intercourse took place. Duffus, J, held that the petitioner's short stay with the respondent and the sexual intercourse which took place were not accompanied by an intention on both sides to set up a matrimonial home again. Consequently, the husband's desertion did not terminate.

The fact that cohabitation terminates desertion sometimes prejudices reconciliation. If, where one spouse is in desertion, the parties are willing to resume cohabitation in order to give the marriage a chance, the innocent party may thereby ultimately forfeit his right to matrimonial relief. In order to obviate this difficulty, Section 17(2) of the 1970 Decree provides that desertion will not be interrupted by any one or more periods not exceeding six months in the aggregate during which the spouses resume cohabitation in the same household. There are some important aspects of this provision. First, the exemption covers one or more periods not exceeding six months. Second, the living together must be in the same household. This implies that there must be the restoration of consortium. Third, Section 17(2) covers both the situation where the resumption of cohabitation is in consequence of reconciliation and where it is done with a view to effecting a reconciliation.[145] Undoubtedly, the provision will in the former case give the reconciliation

[141] *Mummery v Mummery* [1942] P 107, 110.
[142] *Bartram v Bartram* [1949] 2 All ER 270.
[143] *Abercrombe v Abercrombe* [1943] 2 All ER 465.
[144] [1961] WNLR 297.
[145] Compare Section 1(2) of the English MCA 1965, *Brown v Brown* [1964] 3 WLR 899.

an opportunity to take root and in the latter case provide the avenue to reconciliation.

*(ii) Offer to return : animus revertendi.* The loss of *animus deserendi* will terminate desertion. But such loss must not be tacit. It must be communicated to the other spouse by an offer to return. The deserted party is bound to accept a genuine offer or he will run the risk of being in desertion himself. Where a separation agreement[146] is in force, the refusal of one spouse, without reasonable justification, to comply with the other's *bona fide* request to resume cohabitation will, from the date of such refusal, put the party so refusing in desertion.[147] However, the justification, where it exists, must be reasonable in all respects, including the conduct of the other spouse since the marriage, whether that conduct took place before or after the agreement for separation.[148] It is necessary to determine the effect of an offer to resume cohabitation in respect of the new concept of constructive desertion. This question has been aptly answered by Burbury, C J, in the Australian case of *Manning v Manning*, thus:

> An offer to resume cohabitation is no longer relevant to intention to desert in cases of constructive desertion, but it may I think, be relevant to the question whether the initial expulsive conduct continues to occasion the separation. Much will depend upon the gravity of the initial misconduct. There may be cases where the initial misconduct was so grave that notwithstanding a spouse's refusal to resume cohabitation it may still properly be said to continue to occasion the separation.[149]

However, to terminate desertion the offer must be reasonable and genuine.[150] The reasonableness of an offer is a matter of fact. In *Ilevbare v Ilevbare*,[151] the husband, who was in desertion, expressed his willingness at a reconciliation meeting to receive his wife back if she accepted a code of conduct. The code required the wife, *inter alia*, to be prepared to take orders from the husband, to agree to do any farmwork, however menial, and to swear any form of oath the husband might deem fit. Thomas, J, held that the offer was unreasonable.

For an offer to be genuine the party making it must have both the intention of resuming cohabitation and the means of implementing it if it is accepted.[152] In the case of a simple desertion, it is only necessary to show that the deserter is genuinely willing to return to the other

[146] The agreement for separation may be written, oral or by conduct.
[147] Section 19(1) of the MCD 1970.
[148] Section 19(2) of the MCD 1970.
[149] *Manning v Manning* (1961) 2 FLR 257, 262.
[150] *Pratt v Pratt* [1939] AC 417.
[151] [1958] WNLR 46.
[152] *Fraser v Fraser* [1969] 1 WLR 1787.

spouse. The motive for doing so is irrelevant.[153] But where the party in desertion is guilty of a matrimonial misconduct the offer must be accompanied by proper expressions of regret for the past and a promise of better behaviour in the future.[154] However, the deserted spouse has a right to reject an offer to return if the deserting spouse has committed a matrimonial offence. This is so because the receiving back of the party in desertion will amount to condonation.

Sometimes the deserted spouse may be doubtful of the genuineness of the offer and may attach conditions to its acceptance. Such conditions must be reasonable. In *Pearce v Pearce*,[155] the parties were married in 1944 and went to London in 1950. In February 1951 the husband deserted the wife and went to live with one Miss Cameron. An order for maintenance was made against the husband, which he failed to comply with. In 1954, his solicitors wrote to the wife inviting her to return to the matrimonial home. The wife accepted the offer on condition that Miss Cameron left the husband, that the payment of the debt incurred by the husband as a result of his failure to pay the maintenance ordered was made, and that her freedom of worship would not be disturbed. The Supreme Court held that the wife's conditions were reasonable, and that by refusing to accept them the husband continued his desertion.

*(iii) Supervening consent.* The deserted spouse may bring the desertion to an end by subsequently giving his consent to the separation. Such consent may take the form of a separation agreement, or a judicial separation, or a separation order.

*(iv) Petitioner's adultery or other misconduct.* If the petitioner commits adultery which is known to the respondent, that will terminate the latter's desertion, because the adultery provides a good cause for living apart. The exception to this rule is where it can be shown that the respondent was not influenced by the misconduct in deciding to continue the desertion.[156] It is for the petitioner to prove that his conduct did not influence the other spouse's decision.

*(v) Insanity.* With regard to the initiation of desertion, it is for the petitioner to prove that an insane respondent is capable of forming the necessary intention to desert. On the question of the continuation of the desertion after insanity has supervened, the fact that the deserting spouse has become incapable of forming an intention to continue the desertion shall not terminate it if the court is satisfied that the desertion

[153] *Irvin v Irvin* [1968] 1 WLR 464 (where the husband returned on the advice of his solicitor).

[154] *Holborn v Holborn* [1947] 1 All ER 32, 34; *Lewis v Lewis* [1955] 3 All ER 598; [1956] P 205; *Theobald v Theobald* [1962] 2 All ER 863.

[155] FSC 257/1961, 16 April 1963.

[156] *Herod v Herod* [1938] 3 All ER 722; *Richards v Richards* [1952] P 307 [1952] 1 All ER 1384 (CA).

would probably have continued if the deserting spouse had not become insane.[157]

**5 Separation and respondent's consent to dissolution**

A marriage will be regarded as having broken down irretrievably where the parties have lived apart for a continuous period of at least two years immediately preceding the proceedings and the respondent does not object to a decree being granted.[158]

Mere physical separation for two years or more is not sufficient to constitute 'living apart' under the Decree. The marriage relationship does not end so long as the spouses *bona fide* recognize it as subsisting. Consequently, a petitioner has to prove not only the *factum* of separation for two years but also that he or she had ceased to recognize the marriage as subsisting and intended never to return to the other spouse. However, the petitioner's state of mind need not be communicated to the other spouse.[159]

Thus 'living apart' involves physical separation accompanied by the severance of consortium.[160] There must be a clear intention on the part of one or both spouses not to return to the other, and the treatment of the marriage as having come to an end.[161] Where, therefore, the parties are compelled by the pressure of external circumstances, such as absence on professional or business pursuits, ill-health, confinement in jail, or war, to live apart, the situation will not constitute 'living apart' under the Decree. Where, however, the parties live in the same household, they cannot be regarded as living apart.[161a] In this context, Section 15(3) of the Matrimonial Causes Decree 1970 is merely declaratory of the existing law on the situation where the spouses live under the same roof.[161b] The section does not lay down two separate requirements: first, that the parties must be living with each other, and second, that they must be living in the same household. The sole test is whether or not they live in the same household.[161c] In *Fuller v Fuller*[161d] the English Court of Appeal considered the application of Section 2(5) of the Divorce Reform Act 1969, which is identical with Section 15(3) of the Matrimonial Causes Decree 1970. There, the parties were married in 1949. In 1964 the wife left the matrimonial home to live with another man. The husband remained in the matrimonial home until 1968, when he fell ill and was admitted into hospital. On his

[157] Section 20 of MCD 1970.
[158] Section 15(2)(e) of MCD 1970.
[159] *Santos v Santos* [1972] 2 WLR 889 (CA).
[160] *Sharp v Sharp* (1961) 2 FLR 434; *Collins v Collins* (1961) 3 FLR 17; cf. *Wachuku v Wachuku* Suit No. I/108/70 (unreported), High Court, Ibadan, Aguda, J, July 1970.
[161] *Agunwa v Agunwa* [1972] 2 ECSLR 20; *Adigun v Adigun* Suit No. I/24/71 (unreported), High Court, Ibadan, 8 June 1971.
[161a] Section 15(3) of MCD 1970.
[161b] The law in this respect is to be found in *Smith v Smith* [1940] P 49; *Wilkes v Wilkes* [1943] P 41; *Hopes v Hopes* [1949] P 227.
[161c] *Mouncer v Mouncer* [1972] 1 WLR 321; *Hollens v Hollens* (1971) 115 *Sol J* 327.
[161d] *The Times*, 10 March 1973.

discharge he was incapable of looking after himself and went to live with his wife and paramour as a lodger, paying £7 a week. On the wife's petition for divorce, it was held that the words 'with each other' connotes the matrimonial relationship of living with each other as husband and wife. As the husband was a mere lodger, it was impossible to say that he and his wife were living with each other in the same household.

But there may be 'living apart' in cases of consensual or judicial separation. What is the position where a separation agreement or a separation order is in force? The effect of each is to suspend a number of marital rights and obligations, for instance, cohabitation and marital intercourse. In each case there may be a living apart under the Decree. In *Begho v Begho*,[162] the parties were married on 28 December 1944. They cohabited from 1944 to September 1961, when they started to live apart from each other. In February 1962, the wife was granted a decree of judicial separation on the ground of the husband's cruelty. The cruel conduct was found to include, *inter alia*, the fact that the husband threw his wife out of the matrimonial home because he no longer loved her. The husband petitioned for divorce in 1970 on the basis of Section 15(2)(e) and (f) of the 1970 Decree. Since 1961, when the parties separated, they had never lived together up to the hearing of the petition. The bulk of the statutory period on which the petitioner relied on for his petition was covered by the period after the spouses were judicially separated. Ovie-Whiskey, J, held that on the facts the husband was entitled to a decree of divorce under Section 15(2)(e) and (f) of the Decree. The living apart principle is free from the fault theory. It will, therefore, be applied irrespective of which spouse was in fact responsible for the separation.

Obviously, the object of the provision is to put an end to a state of affairs where a marriage has been deprived of all its substance, leaving only the empty shell – a marriage only in name. In such cases social considerations make it contrary to public policy to insist on maintaining a marriage which has in fact completely broken down and where there is no likelihood that cohabitation would ever be resumed.

The separation must be for a continuous period of at least two years immediately preceding the presentation of the petition. In determining whether the period of separation is continuous no account is taken of any one or more periods not exceeding six months during which the parties may have resumed living with each other.[162a] However, the parties will not be regarded as living with each other unless they live in the same household. The essence of this provision, as in the case of desertion, is to encourage reconciliation of the spouses. By disregarding any period or periods of less than six months during which cohabitation is resumed, the parties are provided with an opportunity of giving their marriage another trial without prejudice to any matrimonial relief

[162] Suit No. W/53/70 (unreported), High Court, Warri, 31 July 1970.
[162a] Section 17(2) and (3) of MCD 1970; *Santos v Santos* [1972] 2 WLR 889.

accruing to a party.

Even if it is established that the separation has lasted for the statutory period, it is necessary in addition to show that the respondent does not object to a decree being granted. Whether or not the respondent objects to a decree being granted is a question of fact. However, there must be some positive evidence of the fact that 'the respondent does not object to a decree being granted'. Mere inactivity on the part of the respondent is not enough.[163] Thus, where the respondent's counsel on her instructions wrote to the court Registrar that she had no objection to a decree of divorce being granted to her husband the requirement of Section 15(2)(e) was satisfied.[163a] Similarly, in *Kolawole v Kolawole*[164] the respondent's cross-petition for divorce was unequivocal evidence of his desire to bring the marriage to an end. On the other hand, the mere fact that the respondent does not contest a petition is not adequate evidence that he does not object to a decree of divorce being granted. There may in fact be many reasons why a respondent may decide not to contest a petition, reasons which have nothing to do with his objecting or not objecting to a decree being granted.[164a]

It seems that the respondent has a free choice to decide when best to exercise his right under Section 15(2)(e). Thus in *Odili v Odili* [165] the respondent in his answer indicated that he did not object to a decree being granted. However, in his evidence in court he changed his mind and objected to a decree. Oputa, J, held that the right to object was properly exercised. The effect of the subsequent conduct was at worst, to delete any evidence of the respondent's agreement to a divorce.

Under Section 15(2)(e) it is not necessary for a court to consider the motivations of the respondent in agreeing or objecting to a decree being granted.[165a]

A problem may arise where the respondent whose consent to a divorce is necessary suffers from mental illness. The resolution of such a problem turns on a question of fact. Whether a valid consent is granted in such a situation depends on whether the respondent had the capacity to understand the nature of the consent and to appreciate the effect and result of giving it.[165b] The same test, therefore, applies here as in determining whether an insane person has consented to a valid marriage, which is propounded *In the Estate of Park, Deceased*.[165c] It seems that a

[163] *Ibeawuchi v Ibeawuchi* Suit No. O/6D/72 (unreported), High Court, Onitsha, 19 February 1973.

[163a] *Okoro v Okoro*, Suit No. E/4D/67 (unreported), Agbakoba, J, High Court, Enugu, 10 February 1971.

[164] Suit No. HOY/8/168 (unreported), Odunlami, J, High Court, Oyo, 27 April 1970.

[164a] *Ibeawuchi v Ibeawuchi* Suit No. O/6D/72 (unreported), High Court, Onitsha, 19 Febuary 1973.

[165] Suit No. O/8D/72 (unreported), High Court, Onitsha, 12 March 1973.

[165a] ibid.

[165b] *Mason v Mason* [1972] 3 WLR 405.

[165c] [1954] P 89.

respondent may give a conditional consent to a decree of divorce being granted.[165d]

### 6 Three years' separation

Acceptable evidence of the irretrievable breakdown of a marriage is that the parties have lived apart for a continuous period of at least three years immediately preceding the presentation of the petition.[166]

The distinction between this provision and sub-Section 15(2)(e) considered above is the difference in the length of the period of separation and the requirement in the latter that the respondent should not object to a decree being granted. Besides these points of departure, the same interpretation is given in both sections to the facts of living apart and the continuity of separation.

It will be sufficient for the dissolution of a marriage under this head to show that the parties have been living apart for three years immediately before the presentation of the petition. There are serious doubts as to whether separation for three years is adequate for the dissolution of marriage. The period seems rather short in view of the fact that an 'innocent' spouse may be divorced against his or her will on this ground. A longer period than three years would be necessary to show adequately that the marriage has broken down. In this respect it is submitted that five years' separation is likely to be a much more satisfactory test.[166a]

A petitioner who is seeking the dissolution of his marriage on the basis of the separation of the spouses may proceed under sub-Section 15(2)(e) or 15(2)(f), depending on the facts of the particular case.

### 7 Failure to comply with a decree of restitution of conjugal rights

A marriage may be dissolved on the fact of irretrievable breakdown where the respondent has, for a period of not less than one year, failed to comply with a decree of restitution of conjugal rights.[166b]

This provision will come into effect where the respondent, in defiance of a court order, has refused to resume cohabitation with the petitioner for the statutory period. It is submitted that the period of one year or over must of necessity immediately precede the presentation of the petition. The core of the case against the respondent would be that he has failed to resume cohabitation with the petitioner in compliance with a court order to that effect. This, therefore, would imply that the refusal to cohabit must continue up to the presentation of the petition. If the

[165d] *Beales v Beales* [1972] 2 WLR 972.

[166] Section 15(2)(f) of the MCD 1970.

[166a] See para. 102 of the *British Law Revision Commission Report on Reform of the Grounds of Divorce: The Field of Choice* (1966) Cmd 3123; Section 2(1)(e) of the English Divorce Reform Act 1969; S 28(m) of the Australian Matrimonial Causes Act 1959–65 (5 years); S 21(1)(o) of the New Zealand Matrimonial Proceedings Act 1963 (7 years).

[166b] Section 15(2)(g) of the MCD 1970. For the relief of restitution of conjugal rights see Sections 47–50 of the MCD 1970, and pp. 189–191.

respondent is cohabiting with the petitioner at the time the proceedings are commenced then it cannot be said that he has failed to comply with the court order. Moreover, the statutory period of at least one year must be continuous, as any intervening resumption of cohabitation would constitute compliance with the judicial decree.

**8 Presumption of death**

A marriage may be dissolved on the fact that one party to it has been absent from the petitioner for such time and in such circumstances as to provide reasonable grounds for presuming that he or she is dead.[167] This fact may be established by proof of the respondent's seven years' continuous absence immediately before the petition, and of the fact that the petitioner has no reason to believe that the other party was alive at any time within that period. But proof of seven years' absence will not suffice if it is shown that the other party to the marriage was alive at any time within that period.[168] The burden is, therefore, on the petitioner to satisfy the court that nothing has happened within the seven years to give him or her cause to believe, as a reasonable man or woman, that the respondent is alive.

The presumption of death may be drawn from facts other than the seven years' absence. This will be the case, for instance, where there is other satisfactory evidence from which the presumption of death of the other spouse may arise. If the court is satisfied that there are reasonable grounds for making the presumption it may grant a decree of presumption of death and dissolution of the marriage.[169]

In the event of the respondent being found to be alive after the making of the decree of dissolution, the court may rescind the decree.

## C DEFENCES AND BARS TO A PETITION FOR DIVORCE

Ordinarily, a petitioner who has proved to the satisfaction of the court that the marriage has broken down irretrievably is entitled to a decree of divorce. But such a decree may be refused if an absolute or a discretionary bar applies to the case.

There are three absolute bars to a petition for divorce – condonation, connivance and collusion. On the proof of an absolute bar, the court is bound to dismiss the petition. But in the case of discretionary bars, the court has a discretion whether or not to dissolve the marriage if one of the defences is established. The discretionary bars are also three in number – petitioner's adultery, petitioner's desertion, and conduct conducing to the commission of a matrimonial offence.

**Absolute Bars**

**1 Condonation**[170]

Condonation implies the forgiveness of a spouse who has committed a

[167] Section 15(2)(h) of the MCD 1970.
[168] Section 16(2)(a) of the MCD 1970.
[169] Section 16(2)(b) of the MCD 1970.
[170] Section 26 of MCD 1970.

matrimonial misconduct and his or her reinstatement to the position of a spouse. Such forgiveness and reinstatement is of course on condition that no further matrimonial misconduct is committed.[171] The two main constitutive elements of condonation are therefore forgiveness and reinstatement.

It is necessary that the spouse who condones should be substantially aware of the matrimonial misconduct committed. There cannot, therefore be condonation without knowledge. The party who forgives must have knowledge of the misconduct which has been committed.[172] Thus, if W's husband, H, commits adultery with X and Y, and W, knowing only of the adultery with X, condones it, she cannot rely on it as evidence in support of her petition. W is not, however, precluded from seeking the dissolution of the marriage on the ground of the adultery with Y. Whether or not a spouse has knowledge of the misconduct is a question of fact.

Forgiveness alone without reinstatement cannot constitute condonation.[173] The spouse guilty of the matrimonial misconduct must be reinstated to the position of a spouse. Usually reinstatement takes the form of continuation or resumption of cohabitation. But the cohabitation must be accompanied by the mutual intention to live together as husband and wife.[174] The continuance or resumption of cohabitation raises a presumption of condonation. Whether a spouse who, after being aware of the matrimonial misconduct of the other party, continues marital cohabitation can be said to have reinstated the other is a question of fact.[175] But the longer the cohabitation the stronger will be the presumption that the offence has been condoned. There may be reinstatement without intercourse.

Sexual intercourse between the spouses may be evidence of condonation. In the case of a man, one act of sexual intercourse with his wife while he has knowledge of the matrimonial misconduct is conclusive evidence of condonation. The reason for this rule is that the wife's position may be prejudiced if she conceives as a result of the intercourse. Furthermore, it will be unfair for the husband to exercise his marital rights and at the same time seek the dissolution of the marriage.[176] The rule is less stringent where a wife participates in intercourse with knowledge of the husband's misconduct. In that case, the intercourse is not conclusive proof of condonation because the wife may not be a free agent: 'she was not her own mistress, had not the option of going away or had no place to go to or no person to receive

[171] *Bernstein v Bernstein* [1893] P 292, 303; *Swan v Swan* [1953] P 258, 291; *Isiakpere v Isiakpere* Suit No. W/43/1968 (unreported), Ovie-Whiskey, J, Warri High Court, 24 April 1970 (condoned adultery and cruelty).

[172] *Bernstein v Bernstein* [1893] P 292, 303; *Inglis v Inglis* [1967] 2 WLR 488.

[173] *Fearn v Fearn* [1948] P 241; *Ehigiator v Ehigiator* [1966] 2 All NLR 169, 173–4.

[174] *Keats v Keats* (1859) 1 Sw & Tr 334, 164 ER 754; *Rose v Rose* [1960] 3 FLR 56.

[175] *Swan v Swan* [1953] P 258.

[176] *Henderson v Henderson* [1944] AC 49; *Cramp v Cramp* [1920] P 158.

her or no funds to support her'.[177] If, on the other hand, she has forgiven her husband before the intercourse took place, condonation would be presumed against her.[178]

However, if condonation is induced by fraud or duress it will not constitute a bar to the petitioner obtaining divorce. Thus, it has been held that where a wife falsely represents to her husband that she was under the influence of drugs when she committed adultery, the subsequent marital intercourse between them does not constitute condonation.[179]

Except where the respondent is at the time of the petition of unsound mind and unlikely to recover therefrom, condonation applies to all other types of conduct constituting the facts on which a petition for divorce may be based.[180] However, a distinction must be made in relation to desertion. It is well established that condonation does not apply to simple desertion because the conduct constituting the cause of action is inchoate until the presentation of the petition. Moreover, like the other facts on which a petition may be based, the deserted spouse is obliged to receive back the other spouse if the latter makes a genuine offer to return.[181] But condonation may apply to a completed period of desertion.[182] Nevertheless, where the expulsive conduct in constructive desertion constitutes a matrimonial offence, it may be condoned and thereafter cannot be set up as a reasonable excuse for separation.[183]

As has been pointed out earlier, condonation is subject to the condition that the spouse responsible for the conduct constituting the basis of the petition should not commit a further matrimonial offence. Hence, a subsequent misconduct will revive the condoned offence. If, for instance, a wife guilty of adultery which the husband has condoned subsequently commits adultery, the husband may petition for divorce on either act of adultery.[184] The subsequent misconduct need not constitute facts on which a petition for divorce may be based. Conduct short of this will, if sufficiently grave and weighty, revive a condoned offence. In *Harrison-Obafemi v Harrion-Obafemi*,[185] the husband committed adultery, which resulted in the bearing of a child by the co-respondent in May 1953. The spouses continued to live together as husband and wife until 15 June 1963, when the husband left the matrimonial home. On 25 March 1964 he presented a petition for divorce. The wife cross-petitioned for divorce. Omololu, J, held that the husband's desertion, which had not lasted for the statutory period, revived the condoned adultery.

[177] *Baguley v Baguley* [1961] 2 All ER 635; 640; *Cramp v Cramp* [1920] P 158; *Rosanwo v Rosanwo* [1961] WNLR 297.
[178] *Morley v Morley* [1961] 1 All ER 428.
[179] *Prior v Prior* (unreported) mentioned in *Higgins v Higgins* [1943] P 58, 59.
[180] Section 26 of the MCD 1970.
[181] *Perry v Perry* [1952] P 203; *Rosanwo v Rosanwo* [1961] WNLR 297.
[182] *Mitchell v Mitchell* [1959] VR 184.
[183] *Howard v Howard* [1965] P 65; *Pizey v Pizey* [1961] P 101 (CA).
[184] *Thompson v Thompson* [1961] LLR 94; *Worsley v Worsley* (1730) 2 Lee 572, 161 ER 444.
[185] [1965] NMLR 446; *Williams v Williams* [1966] 1 All NLR 36; *Beard v Beard* [1946] P 8.

**2 Connivance**[186]

Where a petitioner has consented, encouraged or wilfully contributed to the commission of the misconduct on which a petition for divorce is based he will be refused a decree of divorce on the ground that he connived at the misconduct.

Connivance operates on the principle of *volenti non fit injuria*.[187] A spouse will not therefore obtain relief for misconduct in which he acquiesced or which he encouraged. In addition, there must be a corrupt intention, that is, it is necessary to show not only that a spouse acted in such a manner that the misconduct might result, but also that he intended that it should so result.[188]

Connivance may take the form of express consent to the misconduct.[189] In *Obiagwu v Obiagwu*[190] the parties were married in 1942. From 1944 the relationship of the parties started to grow cold because of the inability of the petitioner to bear children for the respondent. In 1954, the wife petitioner consented to the respondent cohabiting with one Patricia Nkwudo in the matrimonial home, for the purpose of the said Patricia bearing children for the respondent. As a result of the respondent's adultery with Patricia four children were born to the respondent. The wife then petitioned for divorce on the ground of her husband's adultery with Patricia. Oputa, J, refused to grant a decree of divorce on the ground that the petitioner connived at the respondent's adultery. Connivance may also be passive acquiescence, i.e. standing by and permitting the act to take place, if it is shown to have been done with the intention that the misconduct will be committed.[191]

Usually connivance precedes and accompanies the commission of a misconduct. But where the misconduct stretches over a period, a spouse may connive at its continuance after he has discovered it.[192] While primarily a spouse is guilty of connivance as a result of his own acts or omission, connivance by a petitioner's agent may be as effective as the petitioner's own connivance.[193]

Formerly, it was thought as a result of an *obiter* in *Gipps v Gipps*[194] that the rule was 'once connivance always connivance', which means, for instance, that connivance at adultery with one person will preclude obtaining divorce in respect of adultery with another person. In *Godfrey v Godfrey*,[195] the House of Lords held that there is no absolute rule of law that 'once connivance always connivance'. The test of whether connivance is spent is proof of whether or not there was causal

[186] Section 26 of the MCD 1970.
[187] *Rogers v Rogers* (1830) 3 Hag Ecc 57, 58, 162 ER 1079.
[188] *Gipps v Gipps* (1864) 11 HL Cas 1, 25; 11 ER 1230.
[189] *Gorst v Gorst* [1952] P 94.
[190] Suit No. O/5D/1966 (unreported), Onitsha High Court, 20 June 1967.
[191] *Rogers v Rogers* (1830) 3 Hag Ecc 57, 59, 162 ER 1079; *Lloyd v Lloyd* [1938] P 174, 183.
[192] *Rumbelow v Rumbelow* [1965] 2 All ER 767 (CA).
[193] *Poulden v Poulden* [1938] P 63.
[194] (1864) 11 HL Cas 1, 13.
[195] [1964] 3 All ER 154; [1965] AC 444.

connexion between the act of connivance and the subsequent misconduct.

### 3 Collusion[196]

Collusion implies an agreement, or acting in concert, to procure the initiation or prosecution of a suit for divorce with intent to cause a perversion of justice. To constitute collusion there must be two elements – agreement and improper motive or purpose.

The essence of collusion is that the spouses or the petitioner and respondent act in concert with the common intent to cause a perversion of justice. There cannot be collusion without agreement. Collusion will arise if the agreement is between the parties' agents just as it would if they acted personally.[197] Agreement between the parties to a divorce suit is treated as suspect because it often deprives the court of the freedom of eliciting the whole truth.[198] There is collusion where a party is bribed or induced to initiate or prosecute divorce proceedings. Hence, an agreement to obtain divorce where normally the courts will not grant a decree is collusive. Collusion, therefore, arises where a party by agreement commits or appears to commit a matrimonial offence,[199] or where on agreement a true case is established by false evidence. But every agreement is not collusive. A *bona fide* agreement relating to maintenance, damages, costs or custody, is not necessarily collusive.[200] On the other hand, excessive maintenance may be indicative of collusion, as it may be intended as an inducement to the initiation of divorce proceedings.

Besides agreement, there must be a corrupt intention or motive to cause a perversion of justice.[201] In *Noble v Noble (No. 2)*, Scarman, J, explained the importance of this element thus:[202]

> A collusive bargain is one with a corrupt intention. It is an agreement under which a party to the suit for valuable consideration has agreed either to institute it or to conduct it in a certain way: for example, the reluctant petitioner induced by the offer of some benefit to take proceedings against an eager respondent, or – closer to this case – a corespondent induced by a promise of some benefit not to defend a charge of adultery, or stronger still, to provide evidence or to bear witness at the trial against the respondent. If, upon a fair consideration of the circumstances, the parties intend by their agreement to match institution of suit or any aspect of its conduct with the provision of some benefit to the party instituting or in that aspect conducting the suit, here is, in my opinion, collusion. Unless there is this

[196] Section 27 of the MCD 1970.
[197] *Poulden v Poulden* [1939] P 63; *Lowndes v Lowndes* [1950] 1 All ER 999.
[198] Jeune, P, in *Churchward v Churchward* [1895] P 7, 31.
[199] *Crew v Crew* (1800) 3 Hag Ecc 123; 162 ER 1102.
[200] *Noble v Noble* (No. 2) [1964] P 250, 257.
[201] Section 27 of the MCD 1970. *Noble v Noble* (No. 2) [1964] P 250.
[202] *Noble v Noble* (No. 2) [1964] P 250, 257, approved by the Court of Appeal at 261–2.

matching of forensic proceeding against valuable consideration, there is no collusion . . . I would add that to refrain from raising a defence or to drop a charge while continuing with others, though negative acts, are of course as much part of the conduct of a suit as positive steps taken to institute or prosecute it, and if done or agreed to be done for valuable consideration would be collusive.

Thus, there will be collusion if for money or money's worth a party is induced not to defend or to suppress material facts. Similarly, where a wife is induced to present a petition on the promise of substantial lump-sum compensation, there will be collusion. However, a request for past evidence or agreement to facilitate proof of past misconduct is not collusive.

Collusion is not a permanent bar to a petition for divorce. Consequently, a party is free to present a fresh petition which is not collusive.

**Discretionary bars**

In the following cases the court has a discretion whether or not to make a decree for divorce.

**1 Petitioner's adultery**

The petitioner's adultery that has not been condoned is a discretionary bar, no matter what the facts for the petition for divorce. But where the adultery has been condoned it cannot serve as a bar unless it has been revived by a subsequent misconduct.[203]

Where a petitioner has committed adultery he must specifically request the court to exercise its discretion in his favour. In order to enable the court determine such a request, the petitioner must file with the Court Registry a discretionary statement setting out the full details of his adultery.[204] However, the failure to file a discretionary statement does not necessarily prevent a court from exercising its discretion.[205] Where there is a cross-petition, the court may exercise its discretion in favour of one party or both and dissolve the marriage. Similarly, it may refuse to exercise its discretion in favour of either or both parties.

**2 Petitioner's desertion**

The court has a discretion to refuse a decree of divorce in favour of a petitioner who has wilfully deserted the respondent before the commencement or the happening of the ground for the petition.[206] If, therefore, the petitioner has a good cause for deserting the other spouse, his conduct will not constitute a discretionary bar. It is significant that

[203] Section 28(a) of the MCD 1970.

[204] Rule 28 of Matrimonial Causes Rules 1957.

[205] *Tinubu v Tinubu* [1959] WNLR 314; *Chetwynd-Talbot v Chetwynd-Talbot* [1963] 3 WLR 1, cf. *Craig v Craig* (1942) 16 NLR 103; *Onwudiwe v Onwudiwe* [1957] WRNLR 98, where the court refused to exercise its discretion because of failure to file discretionary statements.

[206] Section 28(b) of the MCD 1970.

no specific period is prescribed for the desertion. Hence, desertion for a period less than the one year required in Section 15(2)(d) of the Decree may constitute a discretionary bar.

### 3 Conduct conducing

A court may refuse to grant a decree of divorce if the habits or conduct of the petitioner have conduced or contributed to the existence of the ground for divorce relied upon by the petitioner.[207]

It is not all the conduct of the petitioner that may conduce or contribute to the ground for divorce. The conduct in issue must involve some element of misconduct – for instance, desertion or adultery. There must be some wrongful act or omission that supports the demand for divorce.[208]

Proof of the petitioner's misconduct is not enough. In addition, there must be a causal connection between the habit or conduct complained of and the matrimonial offence on which the petition is based.[209] The conduct must be its immediate cause, and it is not enough to show that they were connected by a series of events. Hence, the conduct or habit must have contributed substantially to the respondent's offence. In *Burgess v Burgess*,[210] the parties were married in 1908. The husband respondent deserted his wife petitioner on 25 March 1912 and declared that he did not intend to return to the matrimonial home. He never contributed to the support of his wife and children. Eight months later, the wife formed an adulterous association with her employer. It was held that the continued desertion was not occasioned or conduced to by the petitioner's adultery.

### 4 Exercise of discretion

If a petitioner establishes a ground for the dissolution of marriage but discloses his own misconduct, which constitutes a discretionary bar, the court may refuse to grant a decree of divorce.[211] However, the exercise of discretion cannot arise when a petitioner has failed to establish, in the first place, a matrimonial offence by the respondent.[212] The court's discretion is unfettered, but it is usually exercised on the guide-lines of certain principles. These were summarized by Lord Simon, LC, in *Blunt v Blunt*[213] (to which the House of Lords agreed) and later

[207] Section 28(c).

[208] *Haevecker v Haevecker* (1936) 57 CLR 639, 655.

[209] *Hall v Hall* (1902) 21 NZLR 251; *Trinder v Trinder* (1915) 34 NZLR 78; *Haevecker v Haevecker* (1936) 57 CLR 639, 655.

[210] (1917) NZLR 563; *Duff v Duff* (1904) 23 NZLR 674; cf. *Negbenebor v Negbenebor* Suit No. B/7/68 (unreported), Ighdaro, J, Benin High Court, 30 December 1969.

[211] *Obayemi v Obayemi* [1967] NMLR 212, 216; [1967] 1 All NLR 161, where the Supreme Court held that once a petitioner has made out a ground for divorce then unless he has committed misconduct he is entitled to be granted a decree. The court has no discretion in such cases.

[212] *Adaramaja v Adaramaja* [1962] 1 All NLR 247, 253; *Williams v Williams* [1966] 1 All NLR 36, 43; *Lawson v Lawson* [1968] NMLR 307.

[213] [1943] AC 517, 525; *Enekebe v Enekebe* [1964] 1 All NLR 102.

amplified by Simon, P, in *Bull v Bull*.[214]

In *Bull v Bull*, it was stated that the facts to be borne in mind in the exercise of the court's discretion fall into three categories. The first consists of factors relating to the interests of the persons directly or indirectly affected by the suit. These include: whether there is a reasonable prospect of reconciliation between the spouses if the marriage is not dissolved; the position and interests of any children of the marriage; the interest of the party with whom the petitioner has been guilty of adultery, with special regard to their re-marriage; the interest of the petitioner, and in particular the point that the petitioner should be able to re-marry and live respectably; and the interest of any children born of the adulterous connexion.

The second category includes all other relevant factors relating to the married life of the parties. These may be gathered from answering the following questions: Was the petitioner or the respondent the more responsible for the break-up of their marriage? What was the nature of the misconduct that necessitated the prayer for discretionary relief? Was the party seeking discretionary relief partly, and if so to what extent, responsible for the break-up of any other marriage; and what was the general conduct of the party seeking discretionary relief, for example, his conduct towards the children?

These two groups of factors were summarized in what Lord Simon, in *Blunt v Blunt*, referred to as the interest of the community at large judged by maintaining a true balance between respect for the binding sanctity of marriage on the one hand and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down on the other.

The third group of factors is based on the principle that it is in the public interest that matrimonial relief should be granted on the basis of complete candour and truthfulness on the part of the party seeking relief.[215] The questions to be answered here include: What were the reasons for the original or subsequent non-disclosure of adultery by the party seeking discretionary relief? Was there perjury? Was the party seeking discretionary relief frank when first or subsequently questioned about the adultery and non-disclosure? And is the court finally satisfied that it has been told the whole truth by the party seeking discretionary relief, especially with regard to the course of the adultery making it necessary to pray for discretionary relief?

### 5 The rationale of absolute and discretionary bars

The absolute and discretionary bars that are prescribed by the 1970 Decree are by their very nature appropriate only to a divorce law based on the matrimonial-offence theory. They are clearly inappropriate to petitions for divorce based on separation as evidence of irretrievable breakdown. As separation is based on a fault-free concept, there would

[214] [1965] 1 All ER 1057.
[215] *Williams v Williams & Harris* [1966] 2 All ER 614 (CA).

be no relevant offence to connive at or condone. Moreover, the petitioner's adultery or desertion does not have any serious bearing on this new fact of separation. If, for instance, the adultery preceded the separation it might constitute one of the factors to be considered by the court in deciding whether or not to grant a divorce. A subsequent act of adultery should have no relevance whatsoever. It is therefore submitted that with the exception of collusion – in a modified form – the existing absolute and discretionary bars should be deleted from the Decree.[215a] Like the other bars, collusion as discussed in this study is unsuited to breakdown of marriage because once the marriage has broken down the spouses would be better advised to agree to end it rather than preserve a mere shell. But collusion also involves any agreement to deceive the court, which is of fundamental importance even to separation. It is therefore submitted that the bar of collusion as regards conspiracy to deceive the court should be preserved.[215b] Where, on the other hand, in the absence of agreement a party attempts to deceive the court, this may be treated as a discretionary bar.

An allied but important question is whether the protection of the various interests involved in a divorce suit should constitute a bar to the grant of a decree of divorce. There are, for instance, the interests of the respondent, the children of the marriage, and the public good, all of which have important bearing or whether a marriage should be dissolved. The courts should be given a general discretion – in the nature of a discretionary bar – to refuse a decree of divorce unless these interests are adequately protected.[215c]

## D THE DECREE

### 1 Restriction on making a decree of dissolution of marriage

Where both a petition for nullity of a marriage and a petition for dissolution of that marriage are before a court, no decree for divorce may be made unless the nullity petition is first dismissed.[216] The rationale of this rule is that the court has in the first instance to determine whether in fact there is a valid marriage which can be dissolved. If, for instance, the nullity petition succeeds, there will be no marriage in respect of which a decree of divorce may be granted.

### 2 Decree *nisi* and decree absolute

The same rules apply to dissolution of marriage and to nullity of a voidable marriage. Consequently, our discussions here on the decree of

[215a] Cf. Section 9(3) of the English Divorce Reform Act 1969, which removed all the old bars and defences.

[215b] *Putting Asunder* (S.P.C.K., London 1966), op. cit., para. 97, Appendix C para. 19; *Reform of the Grounds of Divorce: the Field of Choice* (HMSO, London 1966, Cmd 3123), para. 108.

[215c] *Putting Asunder*, op. cit., para. 96; *Reform of the Grounds for Divorce*, op. cit., para. 114–119. Cf. Section 30 of the New Zealand Matrimonial Proceedings Act 1963; Section 37 of the Australian Matrimonial Causes Act 1959–65.

[216] Section 29 of the MCD 1970.

dissolution of marriage are equally applicable to decrees of nullity of a voidable marriage.

A decree of dissolution of marriage is granted in two stages: first, a decree *nisi*, followed, after the expiration of a period of three months,[217] by the decree absolute.[218]

Where there are children of the marriage who are under the age of sixteen years at the date of the decree *nisi*, or who in special circumstances have attained the age of sixteen years at that date, special rules apply in determining whether or not to make the decree absolute. In such cases, the decree *nisi* will not become absolute unless the court has declared by order its satisfaction that proper arrangements have been made for the welfare, advancement and education of such children or that there are such special circumstances making it desirable that the decree *nisi* should become absolute notwithstanding that the court is not satisfied that such arrangements have not been made.[219] Where this special rule applies, the decree *nisi* will become absolute at the expiration of a period of three months from the making of the decree, or a period of twenty-eight days from the making of an order referred to above, whichever is the longer.[220] Otherwise, the decree *nisi* will become absolute after the expiration of a period of three months from the making of the decree. A decree *nisi* becomes absolute solely by force of the operation of Section 58(1) of the Decree. Consequently, the effect of the section is that a decree *nisi* becomes absolute automatically on the expiration of the prescribed period irrespective of whether or not the court registrar has prepared and filed a memorandum verifying that fact as required by Section 59 of the Decree.[220a]

Proper arrangements for the welfare of the children means something more than adequate, satisfactory or the best practicable arrangements. The requirement appears to be that they should be suitable to, or in conformity with, the demands of society.[221] If the court considers that the proposed arrangements are not proper but are the best practicable in the circumstances, this constitutes special circumstances under Section 57(1)(b), which will justify the court to direct that the decree be made absolute notwithstanding that the court has not declared under Section 59(1)(a) that proper arrangements for the welfare of the children

[217] Section 58(1)(b) of the MCD 1970.

[218] Section 59 of the MCD 1970.

[219] Section 57(1) of the MCD 1970. Failure to comply with the section renders the decree absolutely ineffective to dissolve the marriage and the decree *nisi* cannot become absolute. *Dern v Dern* (1961) 2 FLR 126; *Nowell v Nowell* (1961) 2 FLR 277. Cf. the effect of the similar Section 33 of the English MCA 1965 – which makes the decree absolute voidable at the instance of a spouse – *F v F* [1970] P1; [1970] 2 WLR 346; *P v P & J* [1971] 2 WLR 510 (CA), [1970] 1 All ER 616.

[220] Section 58(1)(a).

[220a] *Egwuatu v Egwuatu* Suit No. O/12D/71 High Court, Onitsha, 20 December 1972.

[221] *Woolley v Woolley* [1961] ALR 463, (1961) 2 FLR 114; *Reeves v Reeves* (No. 2) (1961) 2 FLR 280; cf. *Gund v Gund* (1961) 2 FLR 267; *Morton John v Morton John* (1961) 2 FLR 273.

have been made.[222] In the Australian case of *Brown v Brown*[223] the petitioner's husband, by whom the petitioner had one child, had four illegitimate children by a bigamous association with another woman. All five children were under six years of age. The means of the husband, who was employed as a driver, were inadequate to discharge his obligations to his wife and children. On a petition for divorce, Barry, J, held that he was not satisfied that proper arrangements for the welfare of the child of the marriage had been made. But having regard to the respondent's circumstances – his inability to discharge his obligations and the need to end the marriage – the arrangement actually made was the best practicable in the circumstances. The learned judge, therefore, ordered that the decree *nisi* be made absolute, notwithstanding that he was not satisfied that proper arrangements had been made. Proper arrangements for the welfare of the children of the marriage may be made by one spouse alone, and do not require the consent or co-operation of both spouses.[224]

Advancement of the children implies such financial provision for the future as will enable the children to set themselves up in life. Such provision can only be made by a spouse who is in a financial position to do so.[225] The Decree does not require that the court's declaration as to its satisfaction that proper arrangements have been made in respect of the welfare of the children should state what the arrangements are. However, if there are no children of the marriage involved, the decree *nisi* becomes absolute on the expiration of a period of three months from its making.[226]

The court of first instance or a court in which an appeal has been instituted may, either before or after it has disposed of the proceedings or the appeal, and having regard to the possibility of an appeal, order an extension of the time for making the decree *nisi* absolute. Moreover, the court is empowered to reduce the period, upon the expiration of which a decree *nisi* will become absolute, to such period, however short, as appears to the court to be proper in the special circumstances of the case.[227] A decree *nisi* does not become absolute in accordance with the rules discussed here where either of the parties to the marriage has died.[228]

Where a decree becomes absolute, the registrar or other proper officer of the court by which the decree is made is required to prepare and file a memorandum of the fact, and the date on which the decree became absolute. Any person may, on application and payment of appropriate fees, obtain a signed certificate that the decree *nisi* has be-

[222] *Reeves v Reeves* (No. 2) (1961) 2 FLR 280.
[223] (1961) 2 FLR 118, [1961] ALR 457.
[224] *Baker v Baker* [1961] ALR 792.
[225] *Morton John v Morton John* (1961) 2 FLR 273.
[226] S 58(1)(b).
[227] S 58(2)(b). *Cooper v Cooper* (1961) 2 FLR 303; *Alcock v Alcock* (1961) 2 FLR 333.
[228] Section 58(4).

come absolute. Such a certificate is evidence of its contents.[229] A decree *nisi* becomes absolute by force of the Decree and not by reason of the registrar's memorandum or certificate. Section 59 makes the registrar's certificate admissible but not conclusive evidence of its contents.[230]

Before a decree *nisi* becomes absolute, it may be rescinded on either of two grounds. A court may on the application of either party to the marriage rescind the decree *nisi* on the ground that the parties have become reconciled.[231] On the other hand, rescission may be ordered at the instance of either party where the court is satisfied that there has been a miscarriage of justice by reason of fraud, perjury, suppression of evidence or any other circumstance.[232]

The effect of a decree absolute is that a party to the marriage may marry again, as if the marriage had been dissolved by death.[233]

## E INTERVENTION

A non-party to any matrimonial proceedings may intervene to assist the court in eliciting the full facts of the case and thereby prevent the perversion of justice.

### 1 Intervention by the Attorney General

There are two different circumstances in which the Attorney General of the Federation may intervene in matrimonial causes. First, at the request of a judge the Attorney General may intervene to contest or argue any question arising in the proceedings.[234] Second, where the Attorney General has reason to believe that relevant matters have not been brought to the knowledge of the court in any proceedings for dissolution or nullity of marriage, judicial separation or restitution of conjugal rights, or in relation to the custody or guardianship of children, he may at any time before the decree is made absolute, intervene in the proceedings.[235]

In the exercise of his functions under the Decree, the Attorney General of the Federation may in writing delegate all or any of his powers and functions in respect of the entire Federation or a State to the Attorney General of a State.[236] Such delegation is revocable at will.[237]

### 2 Intervention by other persons

Any person may apply to the court for leave to intervene in proceedings for dissolution or nullity of a marriage, judicial separation or restitution

[229] Section 59.
[230] *Dern v Dern* (1961) 2 FLR 126, [1961] ALR 770.
[231] Section 60.
[232] Section 61.
[233] Section 33.
[234] Section 62 of the MCD 1970.
[235] Section 63.
[236] Section 64(1).
[237] Section 64(2).

of conjugal rights. If the court is satisfied that the applicant may prove facts relevant to the proceedings which have not been brought to the attention of the court, it may at any time before the decree absolute, by order authorize the person to so intervene.[238] The order may be made on such conditions as the court considers appropriate, including the giving of security for costs.[239]

A person who intervenes by leave of court will be deemed to be a party in the proceedings with all the rights, duties and liabilities of a party.[240]

### 3 Consequence of intervention

If an intervention takes place after the making of a decree *nisi* and the court is satisfied that the petitioner has been guilty of a collusion with intent to cause a perversion of justice, or that material facts have not been brought before the court, it may rescind the decree.[241]

## F RECOGNITION OF DECREES

### 1 Recognition of Nigerian decrees

A decree made by a court in Nigeria before or after the commencement of the 1970 Decree will be recognized as valid in all States of the Federation.[242]

### 2 Recognition of foreign decrees

(A) DOMICILE

A decree of dissolution of marriage made by a foreign court will be recognized in Nigeria if it was made by the court of the domicile of the petitioner or respondent at the time of the institution of the proceedings.[243] A court of the domicile here includes a court which annuls a marriage either in favour of a deserted wife who was domiciled in that foreign country immediately before her marriage or desertion, or in favour of a wife resident in that foreign country and who has been so resident for a period of three years immediately preceding the proceedings.[244] Thus, a foreign decree of divorce will be recognized in Nigeria if granted by the court of the domicile of the parties. So long as the foreign divorce is granted by the court of the domicile it is immaterial that it did so on a ground not recognized in Nigeria as a basis for divorce.

(B) RECOGNITION BY COURT OF DOMICILE

Nigerian courts will recognize a foreign decree of divorce granted by the

[238] Section 65(1).
[239] Section 65(2).
[240] Section 68.
[241] Section 66.
[242] Sections 80 and 81(1) of the MCD 1970.
[243] S 81(2)(b). The same test applies in the recognition of nullity of a voidable marriage. In the case of a voidable marriage the test is the domicile or residence of the petitioner or respondent in the foreign country – S 81(2)(b).
[244] Section 81(3).

law of the country where the parties are not domiciled if it would be recognized by the law of their domicile at the commencement of the proceedings.[245]

A foreign decree of divorce will not be recognized in Nigeria under (a) and (b) above if under the rules of private international law, recognition of its validity would be refused on the ground of denial of natural justice or fraud.[246]

(c) RULES OF PRIVATE INTERNATIONAL LAW

Apart from the two grounds for recognition already mentioned, any foreign dissolution of marriage that would be recognized under the rules of private international law will be recognized in Nigeria.[247]

In *Travers v Holley*,[248] the Court of Appeal held that English courts – and equally Nigerian courts – should recognize a jurisdiction which they themselves claim. The court came to this conclusion on the basis that the New South Wales statute under which a deserted wife obtained a decree of divorce was similar to what is now Section 7(a) of the Matrimonial Causes Decree. But the principle of *Travers v Holley* is not restricted to situations where the foreign law under which the foreign court assumed jurisdiction is substantially similar to Section 7 of the 1970 Decree. It will be enough if facts exist on which the Nigerian courts would assume jurisdiction.[249] Consequently, even though the foreign court assumes jurisdiction on grounds which are technically different from those recognized here, the decree may be recognized if there are facts which would give the Nigerian courts jurisdiction. For instance, it will be sufficient if the facts disclose that the wife has been resident in the foreign country for three years or more – a ground on which Nigerian courts would assume jurisdiction. However, a wife's residence for less than three years will not be sufficient.[250] As the special jurisdiction for divorce is recognized in Nigerian law only in respect of a wife, a foreign decree granted to a husband on the basis of his wife's three years' residence will not be recognized here.[251]

The principle of *Travers v Holley* was approved and extended by the House of Lords in *Indyka v Indyka*.[252] In that case, the House laid down

[245] Section 81(4). This principle of private international law was established in *Armitage v Att. Gen.* [1906] P 135, and followed in *Clark v Clark* (1921) 37 TLR 815. In the case of annulment the test is where either party was domiciled at the date of the annulment.

[246] S 81(7). See Dicey, A. V. and Morris, J. H. C., *Conflict of Laws* 8th Edn (Stevens, London 1967), 317–319.

[247] Section 81(5). *Benson & Abejide v Ashiru* [1967] NMLR 363, 365.

[248] [1953] P 246 (CA); approved by the House of Lords in *Indyka v Indyka* [1967] 3 WLR 510. See also *Carr v Carr* [1955] 1 WLR 422.

[249] *Arnold v Arnold* [1957] P 237; *Robinson-Scott v Robinson-Scott* [1957] 2 All ER 473; *Manning v Manning* [1958] 1 All ER 291.

[250] *Dunne v Saban* [1955] P 178; *Manning v Manning* [1958] P 112, 120.

[251] *Levett v Levett & Smith* [1957] 1 All ER 720 (CA).

[252] [1967] 2 All ER 689; [1969] AC 33; Latey, W. 'Recognition of Foreign Decrees of Divorce' (1967), 16 *ICLQ* 982; Webb, P. R. H., 'The Old Order Changeth – *Travers v Holley* Reinterpreted' (1967) 16 *ICLQ*, 997; Mann, F. A., 'Recognition of Foreign Divorces' (1968) 84 *LQR*, 18; Lipstein [1967] *CLJ* 182.

the further rule that a foreign decree of divorce will be recognized if there is a real and substantial connection between the spouse obtaining the decree and the country in which it is obtained. Such connection may be established by the wife-petitioner's nationality and permanent residence,[253] and the situation of the matrimonial home[254] within the jurisdiction which granted the foreign decree. It is immaterial that the husband is the petitioner, so long as the decree is ultimately granted to the wife or to both parties.[255]

In *Mountbatten v Mountbatten*,[256] it was held that a clear limit to the recognition of foreign divorce decrees is that the principles of *Travers v Holley* and *Armitage v Attorney-General* cannot be combined. Thus, for instance, Nigerian courts will not recognize a Mexican divorce obtained by a wife who was domiciled in Nigeria but has been resident in New York for more than three years, although it is recognized by the law of New York. However, in *Mather v Mahoney*,[257] Payne, J, held that a Nevada decree which was recognized in Philadelphia, where the wife-petitioner lived for most of her life, should be recognized in England. But *Mountbatten v Mountbatten* was neither cited nor considered in that case. It is doubtful whether in the present state of judicial authorities Mountbatten's case can be said to have been indirectly overruled by the Indyka case.

[253] *Angelo v Angelo* [1967] 3 All ER 314; *Brown v Brown* [1968] 2 All ER 11; cf. *Peters v Peters* [1967] 3 All ER 318; Webb 17 *ICLQ*, 209 (1968).
[254] *Blair v Blair* [1968] 3 All ER 639.
[255] *Tijanic v Tijanic* [1967] 3 All ER 976; [1968] P 181; *Mayfield v Mayfield* [1969] 2 All ER 219.
[256] [1959] P 43; [1959] 1 All ER 99.
[257] [1968] 3 All ER 223; [1968] 1 WLR 1773; Webb, P. R. H., 'Recognition of Foreign Divorce Decrees – A Further Postscript to the Indyka Case' (1969) 18 *ICLQ*, 453.

# 7
# Dissolution of Marriage
# II: Customary Law

Here, we shall be concerned with the rules which regulate the dissolution of customary-law marriages. It is important to point out initially that the customary-law rules relating to dissolution of marriage are not as well developed and stringent as in the case of statutory marriage. In spite of this, it is still true to say that customary law contains certain basic rules in respect of dissolution of marriages.

The modes for the dissolution of statutory and customary-law marriages should be kept apart, because a procedure which is effective in one system may not be appropriate in the other. For instance, a statutory marriage cannot be dissolved by the mere refund of dowry paid in respect of a preceding customary-law marriage between the parties. On the other hand, it would be futile to attempt to dissolve a customary-law marriage in one of the modes described in the preceding chapter.

Just as in the formation of a customary-law marriage the family sometimes plays an important role, so does it also in its dissolution. The mediatory role of the families of the spouses is a bedrock for the stability of the marriage. Throughout the duration of the marriage, the families are called upon at one stage or another to assist the spouses in the settlement of domestic disputes. Often, the marriage is continued as a result of sheer family pressures. On the other hand, the relationship of a spouse with the family of the other spouse may sometimes provide a ground for divorce. A husband, for instance, may divorce his wife on the ground that she is disrespectful to the elders of his family. Similarly, the family of a married woman may induce her to leave her husband because they do not, because of his conduct to them, regard him as a good son-in-law.

## A MODES OF DISSOLUTION

A customary-law marriage may be dissolved either by non-judicial divorce or by the order of an appropriate customary court.

### 1 Non-judicial divorce

Customary-law marriage may be dissolved without recourse to the law courts. This is a significant aspect of customary law, which has no counterpart in a statutory marriage. It would be wrong in principle to consider dissolution out of court to be contrary to natural justice merely because it does not conform to the procedures of statutory marriage

and English law.[1] In spite of the changes in the Nigerian legal system, non-judicial divorce is still an important institution of customary-law matrimonial causes. It is, therefore, inaccurate to state as Begho, J, did in *Re Briggs and Rosaline Osagie*,[2] that:

> In these modern days with an abundance of customary courts, I would hold that to constitute divorce, a person claiming to be a divorcee before a Registrar of Marriage must be able to show that he was granted divorce by a competent customary court.

The only known instance of the prohibition of non-judicial divorce was achieved by statutory modification of the customary law.[3]

Non-judicial divorce may be effected by the mutual agreement or unilateral action of the spouses. In the former case, where the spouses fall out, the families first attempt to reconcile them. If, in fact, the marriage has broken down and reconciliation fails, the spouses may agree before members of their families to bring the marriage to an end. In that case, the families may reach agreement on the repayment of the bride-price paid in respect of the marriage. If agreement is not reached on the quantum of bride-price to be refunded, the husband may resort to the customary court for a determination of his right.

Another method of bringing about a non-judicial divorce is by the unilateral action of a spouse. This procedure is open to either the husband or the wife. A husband, for instance, may on his own decision drive his wife away, intending thereby to bring the marriage to an end. On the other hand, a wife who has been grossly ill-treated by her husband may run away from the matrimonial home and return to her parents with the intention of breaking up the marriage. Her father or guardian may then proceed to refund the bride-price paid in respect of her marriage. However, in some areas, the right of terminating marriage by unilateral action is conferred only on the husband. Section 8 of the Biu Native Authority (Declaration of Biu Native Marriage Law and Custom) Order 1964,[4] provides that:

Husband and wife shall be deemed to be divorced:

(a) upon the granting of a divorce by a court on the application of

[1] See, for instance, the opinion of Osborne, CJ, in *Re Sapara* [1911] Renner's Gold Coast Reports 605, 613, that if customary marriage is dissoluble at will then such custom is repugnant to natural justice. But see *Okpanum v Okpanum* (1972) 2 ECSLR 561; *The Registrar of Marriages v Igbinomwanhia* Suit No. B/16M/72 (unreported), High Court, Benin, 5 August 1972.

[2] [1964] MNLR 95, 96; *Registrar of Marriages v Igbinomwanhia*, Suit No. B/16M/72 (unreported), High Court, Benin, 5 August 1972: Obaseki, J. While Section 58(1) of the Mid-Western State Customary Courts Edict 1966 made it an offence for any person to exercise judicial powers within the area of a customary court, sub-Section (2) excluded the voluntary submission of any civil disputes to arbitration. Sub-Section (2), therefore, preserves non-judicial divorce.

[3] See S 5(2) of the Native Authority (Declaration of Tiv Native Law and Custom) Order 1955 (NRLN 149 of 1955); S 9 of the Native Authority (Declaration of Idoma Native Marriage Law and Custom) Order 1959 (NRLN 63 of 1959).

[4] NRLN 9 of 1964.

either husband or wife; or

(b) upon oral repudiation of his wife by the husband in her presence before two adult male witnesses of full capacity; or

(c) upon repudiation of his wife by the husband in writing signed by himself and dated.

Under the Maliki School of Islamic Law in Northern Nigeria, a discontented married woman may obtain her release from the marriage by means of *khul*. The *khul* is a dissolution of marriage obtained by the wife with the consent of the husband in return for the payment of compensation to him. The compensation represents the dower, and sometimes other payments which the husband made in respect of the marriage. While primarily the wife pays the compensation, it may be paid by her parents or guardian. Maliki law, on the other hand, allows a court to order a husband to accept *khul* against his wish where two arbitrators appointed by the court have found that reconciliation is impossible.[5]

Another non-judicial mode of dissolution of marriage by one party under Maliki Islamic law in Northern Nigeria is by *talaq*. The *talaq* is a means of divorce which is open only to the husband at his discretion. When the *talaq* is pronounced only once or twice, it may bring the marriage decisively to an end except during the *idda* period. In the case of the third pronouncement of the *talaq*, or if the triple form is used in the first instance, the marriage is finally and immediately dissolved unless it can be shown that it was uttered in the heat of anger without any intention to end the marriage.[6]

One of the major defects of non-judicial divorce is the absence of record of the time at which and circumstances in which the divorce was obtained. In some Islamic countries, recent statutory changes have made it mandatory that the *talaq* must be registered in order to provide evidence of the divorce. But this is not yet the case in Nigeria. Mere requirement of registration without appropriate sanction may not achieve the necessary goal. The same may be said for non-judicial divorce under other systems of customary law. It may also be observed that non-judicial divorce, especially when achieved by the unilateral action of a party, leaves too much discretion with one spouse. In fact, the door is left wide open for the callous exercise of this discretion.

### 2 Judicial divorce

Both judicial and non-judicial dissolution of marriage exist side by side in most localities in Nigeria. However, it is only after family arbitration has failed to reconcile the spouses that a party may resort to the courts. Judicial dissolution of marriage seems to be gaining increasing popularity because it provides recorded evidence of the divorce.

[5] Anderson, J. N. D., *Islamic Law in Africa*, Colonial Research Publication No. 16 (HMSO, London 1954), 209; Ruxton, F. H., *Maliki Law* (Luzac, London 1916), 122–127.

[6] Anderson, op. cit., 213–214.

The judicial dissolution of customary-law marriages falls within the exclusive jurisdiction of customary courts.[7] However, with the abolition of customary courts in the East Central State, Magistrates' Courts now have jurisdiction 'to hear and determine matrimonial causes and matters between persons married under customary law'.[7a] Customary courts are required in the exercise of their jurisdiction to attempt at all stages of the proceedings to effect reconciliation between the spouses.[8]

While it is true that in general customary law has no standardized and strict grounds for dissolution of marriage, the customs of each locality include the accepted grounds on which marriage may be ended. In the case of non-judicial dissolution of marriage, non-compliance with or abuse of the accepted norms of behaviour may evoke a social rather than legal sanction. Families who have watched a man terminate his marriage callously may be unwilling to give their daughters in marriage to the same man. With regard to judicial dissolution, it is for the appropriate customary court to determine in each case whether the allegations of the applicant are, in the light of the local usage, sufficiently grave to justify the termination of the marriage. If the court is not satisfied that the marriage should be dissolved, it may send the dispute to the local head or other persons in the community where the spouses live for further attempts at reconciliation. There is of course a loophole to the refusal of the court to dissolve a marriage – the parties may then resort to non-judicial divorce. The man may then drive away his wife or she may abscond on her own, thereby bringing the marriage to an end.

## B GROUNDS FOR DIVORCE

### 1 General grounds

Customary law puts more emphasis on the fact that a marriage has broken down irretrievably than on the individual responsibility of a spouse for that failure. However, a party's fault may sometimes be relevant in determining when the dowry is repayable.

Technically there are no grounds for divorce under customary law because divorce may be effected by the mutual consent of the spouses. However, there are a number of reasons and situations which are generally regarded as providing sufficient moral cause for dissolving marriages. They include, *inter alia*, adultery (particularly by a wife),[9] loose character, impotency of the husband or sterility of the wife, laziness, ill-treatment and cruelty, lunacy, leprosy or other harmful diseases

[7] S 17(1)(b) High Court Law (NR) Cap. 49; S 9(1) High Court Law (WR) Cap. 44; *Okpakapa v Okoro and Anor*, Suit No. LD/634/1969 (unreported), High Court, Lagos, 22 May 1970.

[7a] Magistrates' Courts Law (Amendment) Edict 1971, Section 5.

[8] E.g. S 25 of the Customary Courts Law (Western State): Cap. 31 *Laws of Western Nigeria*, 1959.

[9] Adultery under customary law is also an offence under S 387 of the Northern Penal Code: Cap. 89 Laws of Northern Nigeria 1963. In *Obeya v Soluade & SG for BP State* SC 125/69 6 March 1970 it was held that S 387 of the Penal Code does not contravene the Nigerian Constitution.

which may affect the procreation of children, witchcraft, addiction to crime (for instance, poisoning, theft or gangsterism), and desertion. While in some cases the same terminology has been used here as in statutory marriage it should be borne in mind that the terms do not have exactly the same connotation under the two systems of law. For instance, desertion under customary law does not require separation for any specific period. Desertion by a husband is very rare, and in fact almost unknown in customary law, as a man cannot leave his family simply because of the behaviour of his wife. However, there could be constructive desertion, as a husband might expel his wife from the matrimonial home. Again with regard to adultery, the offence is much more applicable to a wife who is guilty of promiscuity. Ill-treatment and cruelty are hardly distinguishable. They include physical assaults and failure to maintain a wife and her children.[9a] Most of these merely go to show that the marriage has broken down.

**2 Statutory grounds**

In some parts of Nigeria, the basis for customary-law divorce are specified in statutory enactments which lay down the customary law on the subject. Under Section 7 of the Marriage, Divorce and Custody of Children Adoptive By-Laws Order 1958,[10] which applies to parts of the Western and Mid-Western States, the following grounds for divorce were prescribed:

> betrothal under marriageable age; refusal by either party to consummate the marriage; harmful diseases of a permanent nature which may impair the fertility of a woman or the virility of a man; impotency of the husband or sterility of the wife; conviction of either party for a crime involving a sentence of imprisonment of five years or more; ill-treatment, cruelty or neglect of either party for three years or more; venereal disease contracted by either party; lunacy of either party for three years or more; adultery; leprosy contracted by either party; desertion for a period of two years or more.

## C WHEN MARRIAGE IS IN FACT DISSOLVED

It is necessary to determine at what point in time a customary-law marriage is dissolved. Where the marriage is dissolved by a customary court the divorce takes effect from the issue of the court order even though the prescribed refund of dowry has not been made. The dowry repayable will in that circumstance assume the nature of a mere debt. In the case of non-judicial divorce, the marriage is dissolved when the

[9a] Forde, Daryll and Jones, G. I., *The Ibo and Ibibio-Speaking Peoples of South-East Nigeria* (International African Institute, London 1950), 18; Obi, S. N. L., *Modern Family Law in Southern Nigeria* (Sweet & Maxwell, London 1966), 366–7; Elias, T. O., *Groundwork of Nigerian Law* (Routledge & Kegan Paul, London 1954), 288–9.

[10] WRLR 456 of 1958. See also S 5(1) of the Native Authority (Declaration of Tiv Native Law and Custom) Order 1955, which prescribes the following grounds for divorce: ill-treatment of wife by husband, impotence of husband, insanity of husband, incompatibility.

bride-price is refunded to the husband. Until this happens, the marriage is regarded as subsisting even if the parties have been separated over a long period of time. In the *Registrar of Marriages v Igbinomwanhia*,[11] the caveators claimed to forbid the issue of the Registrar's certificate in respect of the proposed marriage of their father, the first respondent, and a third party on the ground that the first respondent was lawfully married to the mothers of the caveators under Bini customary law and that the marriages had not been legally dissolved. The first respondent alleged that both women had been separated from him for a long time, and in the case of the second wife the separation had lasted for eight years. Obaseki, J, held that under Bini customary law separation does not constitute divorce. A customary-law marriage can only be dissolved by the refund of bride-price. An unfortunate result of this custom is that any child born to the woman before the refund of the dowry, no matter who is the natural father, is considered the child of the husband.[12]

## D RETURN OF BRIDE-PRICE

Usually, the dissolution of a customary-law marriage is effected or accompanied by the refund of the bride-price paid in respect of that marriage. Where a domestic dispute leads to the non-judicial dissolution of the marriage, the refund of the bride-price is one of the important subjects to be settled by the family group that unsuccessfully attempts to reconcile the parties. It is, however, open to a husband to exercise or renounce his right to claim a refund of the bride-price. Any renunciation of that right must be made formally and unequivocally before the joint family group. In that case, the marriage will be regarded as dissolved from the time of the renunciation, and there will be no need for the bride-price to be actually refunded.[12a] A husband divorcing his wife among the Ibos, for instance, may not get the bride-price refunded until the wife re-marries – when the new bride-price, or part of it, is handed over to the former husband to the extent that satisfies what is refundable to him. Even so, the primary obligation to refund the dowry remains at all times that of the father or guardian of the woman. The family group decides on what is repayable. In the absence of agreement, the husband invariably resorts to the court to determine what is due to him. Where, on the other hand, a husband refuses the offer of his father-in-law to refund the bride-price, his wife may petition a court to dissolve the marriage and request an order that the outstanding amount to be paid into court to await its collection by the husband. If he fails to collect this, it may be forfeited to the public revenue.

In some parts of Nigeria, the husband may in certain circumstances be deprived of the refund of the bride-price. Under the Maliki Law in

[11] Suit No. B/16M/22 (unreported), High Court, Benin, 5 August 1972.

[12] This custom may be declared as repugnant to natural justice – *Edet v Essien* (1932) 11 NLR 47.

[12a] *Okpamum v Okpanum* [1972] 2 ECSLR 561.

Northern Nigeria, for instance, a customary court may dissolve a marriage without ordering a refund of the bride-price where the husband is guilty of wilful refusal to maintain his wife, physical ill-treatment of her or deliberate sexual desertion.[13] In Biu area, a husband who institutes divorce proceedings or repudiates his wife orally is deprived of the right to the refund of bride-price.[14]

### 1 What is recoverable

There is no uniformity in the various systems of customary law as to what is recoverable by the husband on the dissolution of the marriage. In some localities, the husband may recover only the bride-price, while in others, he may be entitled in addition to all incidental expenses, including gifts made to his wife's family.[15] Under the Itsekiri and Urhobo customary law, the husband is entitled to recover only the bride-price. In *Okoriko v Otobo*,[16] the plaintiff/respondent, in an action for the refund of bride-price, claimed the sum of £140 (₦280·00), made up of various sums of money paid to the defendant/appellant and other members of the plaintiff/respondent's wife's family to the tune of £120 (₦240·00), and £20 (₦40·00) actual bride-price. Kester, J, held that the plaintiff was entitled to the refund of only the £20 (₦ 40·00) bride-price paid. The rest, including two sums of £15 (₦ 30·00) and £60 (₦ 120·00), called 'Extra' and 'Grand' dowry respectively, were presents to the relatives of the woman and could not be recovered.

Sometimes, the amount of bride-price repayable diminishes according to the duration of the marriage or the number of children of the marriage. In *Okaludo v Omama*,[17] the husband claimed the refund of £60 (₦120·00), of which £22 (₦44·00) was the bride-price paid in respect of his wife. Morgan, J, sitting at Warri, upheld the decision of the customary court of first instance, which ordered the refund of only £10 (₦20·00) in accordance with the applicable customary law, by which the refundable bride-price diminishes according to the duration of the marriage.

Statutory limitations have been imposed in some parts of Nigeria on what is recoverable. The effect of the Limitation of Dowry Law[18] in the three Eastern States is to make the maximum bride-price recoverable ₦60·00. By Schedule B of the Marriage, Divorce and Custody of Children Adoptive By-Laws Order 1958,[19] which is applicable to parts of the Western and Mid-Western States (subject to modifications),

[13] Anderson, *Islamic Law in Africa*, op. cit., 210 and 212.

[14] Section 11 of Native Authority (Declaration of Biu Native Marriage Law and Custom) Order 1964 (NRLN 9 of 1964).

[15] In some parts of Northern Nigeria only the Sadaki is recoverable while in others all disbursements made by the husband in respect of the marriage may be recovered – Anderson, *Islamic Law in Africa*, op. cit., 210.

[16] [1962] WNLR 48; *Efejukwu v Macaulay* Suit No. S/8A/66 (unreported), Idigbe, CJ, High Court, Benin, 3 August 1966.

[17] [1961] WNLR 149.

[18] Cap. 76 *Laws of Eastern Nigeria*, 1963.

[19] WRLN 456 of 1958.

the maximum amounts recoverable in proceedings for divorce are as follows:

| | |
|---|---|
| (i) where marriage has not been consummated | ₦70·00 |
| (ii) where marriage has existed for less than one year | ₦60·00 |
| (iii) where marriage has existed for one year or more (but less than five years) | ₦50·00 |
| (iv) where marriage has existed for five years or more | ₦40·00 |

On the other hand, Section 7(2) of the Tiv Native Authority Declaration of Native Custom,[20] provides:

> In assessing the proportion of the bride-price to be returned to the husband, there may be taken into consideration:
> (a) the duration of the marriage;
> (b) the number of children born during the marriage;
> (c) the degree of blame, if any, attaching to the husband and wife:
> Provided that the monetary value of any farm work or other manual labour performed by the husband for the parents or guardian of the wife shall not be taken into consideration.

**2 Responsibility for repayment**

The primary responsibility for the refund of bride-price is that of the father of the bride or any other person who under the particular customary law is entitled to receive it. In *Essenu v Ejike and Oyenue*[21] the plaintiff claimed against the defendants for the refund of £150 (₦300·00) paid in respect of his wife, Agnes. The third defendant was the father of Agnes while the first two defendants were her guardians. Negotiations for the marriage were initiated with the first two defendants but concluded with the father, to whom the bride-price was paid. When Agnes deserted her husband it was agreed that £125 (₦250·00) should be refunded. The Orogun Grade C Customary Court held the three defendants liable. On appeal, Obaseki, J, held that only the father of Agnes was liable for the refund. The learned judge made the important point that if a father receives dowry paid on his daughter and shares it out among members of his family, that does not make the members of his family to whom he gave shares liable on a claim for refund of bride-price.

A woman, the dissolution of whose marriage is in question, cannot of her own right return the bride-price directly to her husband.[22] She cannot redeem herself. Even where she can provide the money, the actual repayment is the responsibility of her father or guardian.

The return of bride-price is usually effected at a meeting of both families and accompanied by some ceremony.[23]

[20] NRLN 149 of 1955.
[21] Suit No. W/IA/68 (unreported), Obaseki, J, High Court, Warri, 20 November 1968.
[22] *In Re Briggs and Rosaline Osagie* [1964] MNLR 95.
[23] id., at 96.

### 3 Time for refund

On the dissolution of a customary-law marriage, a court has absolute discretion in deciding when the repayment of bride-price should take place. Both in judicial and non-judicial divorce, there is no strict rule as to the timing of the refund of bride-price. But there are certain guiding principles. If the husband is responsible for the termination of the marriage, his right to a refund is put in abeyance until a re-marriage of his wife is arranged. He is then refunded with part or whole of the new bride-price. On the other hand, if fault for the dissolution rests with the wife or her family, the husband is entitled to immediate repayment.

## E RIGHT TO RE-MARRY

Customary law confers on each spouse a right to re-marry after the dissolution of their marriage. But under the Maliki School of Islamic Law applicable in Northern Nigeria, a divorced woman may not re-marry during the *Idda* period. The *Idda* period is either three menstrual periods or three lunar months. If she is proved to be pregnant the *Idda* lasts for the period of the pregnancy.[24]

Under the Borgu Native Authority Declaration of Customary Law, a divorced woman is prohibited from marrying within three months of her divorce.[25]

## F DISSOLUTION ON DEATH

The death of a customary-law wife terminates the marriage, except perhaps where there is a substituted marriage, which is usually adopted to continue the perpetuation of an existing good relationship between the two families concerned. But the death of a husband does not necessarily terminate the marriage. On the death of the husband his surviving widow has a number of options open to her. She may remain as a member of her husband's family, or return to her parents. If she decides to remain in the husband's family, she may marry a member of the husband's family or remain as the 'wife' of her dead husband. There is no right of inheritance with regard to the widow. Usually, marriage between her and a member of the husband's family is arranged with her consent. There is no payment of bride-price. A widow may marry the brother or son of her late husband. But a son cannot marry his mother under this arrangement. In *re The Estate of Agboruja*,[26] Ames, A. S. P., stated that the basis of the custom whereby a widow may marry a member of her deceased husband's family is to ensure her maintenance. On the other hand, she may remain as a wife of the deceased husband, especially if she has children. Any subsequent children she may have are regarded as the legitimate children of her husband. Where the widow is childless she may remain on her own, particularly if she is elderly. But a young

[24] Anderson, *Islamic Law in Africa*, op. cit., at 214.
[25] Section 17(1).
[26] (1949) 19 NLR 38.

widow usually seeks the protection and company of a man by marrying within her husband's family or returning to her parents.

If the widow returns to her parents and remarries, her father or guardian is obliged to repay the dowry paid in respect of the first marriage.

# 8
# Other Matrimonial Suits

## A JUDICIAL SEPARATION

The High Court has jurisdiction to grant decrees of judicial separation. Its jurisdiction, as in the case of divorce, is based on the domicile of the parties, or in the case of a wife, on her residence.[1]

### 1 Grounds for judicial separation

A decree of judicial separation may be based on one or more of the facts and matters which may ground a petition for dissolution of marriage as specified in Sections 15(2) and 16(1) of the Decree.[2]

Moreover, the prohibition on the institution of proceedings for a decree of divorce within two years of the date of the marriage except with the leave of court also applies to petitions for judicial separation.[3]

### 2 Bars and defences to a petition

All the bars and defences to a petition for divorce apply with equal force to a petition for judicial separation.[4] Thus, the absolute bars of condonation, connivance and collusion, and the discretionary bars, are applicable to any suit for a decree of judicial separation.

### 3 Effect of the decree

A decree of judicial separation relieves the petitioner from the obligation to cohabit with the other party to the marriage while the decree remains in operation.[5] Consequently, while the decree is in force, neither of the spouses can be in desertion. Furthermore, a husband who has intercourse with his wife against her will during the same period may be guilty of rape.[6] Apart from the matter of cohabitation, the decree does not otherwise affect the marriage or the status, rights and obligations of the parties to the marriage. The parties, therefore, remain, for all other purposes, husband and wife. The wife cannot, for instance, acquire a separate domicile from her husband during the operation of a decree of judicial separation.[7] Again, neither of the spouses is free, while

[1] See Chapter 4, pp. 99–100.
[2] Section 39 of the MCD 1970; *Aja v Aja* [1972] 1 ECSLR 140 (Judicial Separation granted on the basis of the petitioner's adultery).
[3] Section 40. [4] ibid. [5] Section 41.
[6] *R v Clarke* [1949] 2 All ER 448.
[7] *Attorney-General for Alberta v. Cook* [1926] AC 444; *Ford v Ford* [1947] 73 CLR 524.

the decree is in force, to re-marry, and all other bonds of married life remain intact.

While a decree of judicial separation is in force, either party to the marriage may sue the other party in contract or tort.[8] The wife is in that case treated as a *feme sole*.

If a spouse dies intestate in respect of any property during the continuance of a decree of judicial separation, that property shall devolve as if that party had survived the other party to the marriage.[9] The effect, therefore, is that the other party will not be entitled to the rights of a spouse on the intestacy of the deceased spouse.

Again, where a husband fails to pay maintenance ordered to be paid to his wife, he will be liable for necessaries supplied to her.[10] This is because the obligation of the husband to maintain his wife even when they are living apart is not abrogated by the decree of judicial separation. If the husband fails to pay the maintenance, her right to maintenance under the common law becomes effective.

During the subsistence of the decree of judicial separation, a husband and wife may jointly exercise any joint power conferred on them.[11]

### 4 Divorce and judicial separation

A decree of judicial separation is not a bar to either of the spouses subsequently petitioning for divorce on the same or substantially the same facts on which the judicial separation was ordered. In that case, the court may treat the decree of judicial separation as sufficient proof of the facts constituting the ground on which that decree was made. But the court will not grant a decree of divorce without the petitioner adducing evidence in support of the petition.[12]

### 5 Discharge of decree on resumption of cohabitation

The voluntary resumption of cohabitation by the spouses will bring a decree of judicial separation to an end. If after the making of a decree of judicial separation the parties voluntarily resume cohabitation, either party may apply for an order discharging the decree. The court may make an order discharging the decree if both parties consent to the order, or if it is satisfied that they have voluntarily resumed cohabitation.[13]

## B RESTITUTION OF CONJUGAL RIGHTS

The jurisdiction of the High Court in respect of a petition for divorce is the same as in the case of proceedings for a decree of restitution of conjugal rights.

[8] Section 42(1) of the MCD 1970.
[9] Section 42(2).
[10] Section 42(3).
[11] Section 43.
[12] Section 44.
[13] Section 45.

### 1 Ground for restitution of conjugal rights

A petition for a decree of restitution of conjugal rights may be based on the fact that the party against whom it is sought refuses, without just cause or excuse, to cohabit with and render conjugal rights to the petitioner.[14] The relief is one which is appropriate where matrimonial cohabitation has ceased and one party is anxious to resume normal married life.

On a petition for restitution of conjugal rights, the court can enforce cohabitation, but not sexual intercourse. Hence, a decree of restitution of conjugal rights cannot be granted where the respondent cohabits with the petitioner but refuses sexual intercourse.[15] A spouse may petition for restitution of conjugal rights even though the parties have not at any time cohabited.[16]

### 2 Sincerity of the petitioner

In order to make a decree of restitution of conjugal rights, the court must be satisfied that the petitioner sincerely desires conjugal rights to be rendered to him by the respondent and that he, on his part, is willing to render conjugal rights to the respondent.[17] The sincerity of the petitioner to restore consortium is, therefore, an important element. Sincerity in this context means a genuine desire to resume matrimonial cohabitation. There is no sincerity if the petitioner intends to use the decree as a means to some other ends.[18] It has, therefore, been held that there was no sincerity where a wife agreed to a proposal to resume cohabitation merely to provide a home for the children.[19] On the other hand, if there is a genuine desire to resume cohabitation, the decision of the petitioner to petition for divorce on the failure of the respondent to comply with the decree will not vitiate his sincerity.[20] The burden of proof of sincerity rests on the petitioner.

Beside the element of sincerity, the petitioner must, before instituting proceedings for a decree of restitution of conjugal rights, have made a written request for the resumption of cohabitation expressed in conciliatory terms to the respondent. If there are special circumstances which justify the absence of such request, the court may make a decree even though no request has been made.[21]

### 3 Notice as to home

Where a decree of restitution of conjugal rights is made in favour of a husband petitioner, he must give the respondent notice of the provision

[14] Section 47.
[15] *Orme v Orme* (1824) 2 Add 382; *Jackson v Jackson* [1924] P 19; *Tew v Tew* [1924] NZLR 113.
[16] Section 47. *Fassbender v Fassbender* (1938) 107 LJP 123; *Munro v Munro* [1950] 1 All ER 832.
[17] Section 49(a).
[18] *Palmer v Palmer* [1923] P 180, 183–4; *Harnett v Harnett* [1924] P 126.
[19] *Lacey v Lacey* (1931) 146 LT 48.
[20] *Palmer v Palmer* [1923] P 180; *Harnett v Harnett* [1924] P 126.
[21] Section 49(b).

made by or proposed by him for a home in order to enable the respondent to comply with the decree.[22]

**4 Defences to petition for restitution**

The refusal, without just cause or excuse, of the respondent to resume cohabitation is the ground for a decree of restitution of conjugal rights. If, however, the respondent has a good cause for his refusal to cohabit, he cannot be ordered by the court to resume cohabitation. Good cause includes absence on duty or business, or the commission of a matrimonial misconduct by the petitioner. In the latter case, the resumption of cohabitation may constitute condonation. A separation agreement does not constitute a defence to proceedings for a decree of restitution of conjugal rights.[23]

**5 Enforcement of decree**

A decree of restitution of conjugal rights cannot be enforced by attachment.[24] But a party who refuses to comply with the decree may be guilty of desertion.

[22] Section 50.
[23] Section 48.
[24] Section 51.

# 9
# Consequential Relief – Maintenance, Custody and Settlements

Part IV of the Matrimonial Causes Decree 1970 deals with the making of orders for maintenance, custody and settlements. The High Court is empowered under this part to make various orders in respect of the husband, wife and children of the marriage. Before undertaking a detailed discussion of the nature of the orders and the circumstances in which they may be made, it is necessary to ascertain the parties in respect of whom they may be made.

## A PARTIES IN RESPECT OF WHOM ANCILLARY ORDERS MAY BE MADE

### 1 'A party to a marriage'

The Decree provides for the making of ancillary orders in respect of a party to a marriage. Section 69 defines marriage to include 'a purported marriage that is void, but does not include one entered into according to Muslim rites or other customary law'. Thus, the parties to a purported marriage which is void by virtue of Section 3 of the Decree come within the ambit of Section 69. It also covers the husband and wife of a valid or voidable marriage contracted under the Marriage Act. The exclusion of marriages under Muslim law or other customary law is, of course, evidence of the traditional separation in Nigeria of the incidents of statutory marriage and marriage in accordance with customary law.

### 2 'Children of the marriage'

Ancillary orders may also be made in respect of the 'children of the marriage'. This term is defined in Section 69 of the Decree to include:

(a) any child adopted since the marriage by the husband and wife or by either of them with the consent of the other;

(b) any child of the husband and wife born before the marriage, whether legitimated by marriage or not; and

(c) any child of either the husband or wife (including an illegitimate child of either of them and a child adopted by either of them) if, at the relevant time, the child was ordinarily a member of the household of the husband and wife,

so however that a child of the husband and wife (including a child

born before the marriage, whether legitimated by the marriage or not) who has been adopted by another person or other persons shall be deemed not to be a child of the marriage.

This definition, which is not exclusive, obviously covers children born in lawful wedlock. The term 'adopted' in respect of a child is defined to mean 'adopted under the law of any place (whether in or out of Nigeria) relating to the adoption of children'.[1] In the Nigerian context, this definition is quite wide and may be construed to cover not only statutory adoption but also adoption under customary law.[2] But doubts as to the inclusion of customary-law adoption are raised by the requirement of joint adoption or the need of the consent of one spouse where the other alone adopts. Under customary law, the concept of joint adoption is unknown, and a woman cannot adopt a child. It seems, therefore, that in fact the reference here is to statutory adoption.

The second category includes illegitimate children of the husband and wife born before the marriage. It is irrelevant whether or not these children are subsequently legitimated under the Legitimacy Law by the marriage of their parents.

Of wider import is the third group described in paragraph (c), which encompasses any child of either the husband or wife. It includes a legitimate child of either spouse born before their marriage. Moreover, an illegitimate child of either spouse, or a child adopted by a spouse independent of the other, also comes within this group.

Any child within the definition of Section 69(c) may be the subject of an order under Part IV of the Decree if at the relevant time it is 'ordinarily a member of the household of the husband and wife'. The phrase 'relevant time' is defined in Part IV of the Decree as either:

(a) the time immediately preceding the time when the husband and wife ceased to live together or, if they have ceased on more than one occasion to live together, the time immediately preceding the time when they last ceased to live together before the institution of the proceedings; or
(b) if the husband and wife were living together at the time when the proceedings were instituted, the time immediately preceding the institution of the proceedings.

Whether a child is a member of the household of the spouses is a question of fact. Thus, if a child is regarded and treated by both spouses as such, that will be adequate proof of his membership thereof. But the mere fact that a child resides with the spouses does not *ipso facto* make

[1] Section 114(1) of the MCD 1970.
[2] Unlike the definition of marriage under the Decree, adoption under customary law is not expressly excluded. Further, the phrase 'law of any place' (in Section 114(1)) in respect of Nigeria could refer to the two systems of adoption under Nigerian law. Statutory adoption is provided for only in the three Eastern States and in Lagos State.

him a member of that household.[3]

The problem of interpreting Section 69 of the Decree came before Taylor, C J, in *Aneke v Aneke*.[4] In that case, the respondent was married to his first wife, X, in accordance with customary law. There was a female issue, P, of that marriage. Subsequently, on 25 August 1970, the respondent married Rosaline Aneke (née Bassey) under the Marriage Act. P lived with the respondent and Rosaline Aneke up to 27 October 1970. On 14 November 1970 P applied through her mother as her next friend against the respondent for maintenance and custody under and by virtue of Sections 70 and 71 of the 1970 Decree. As the marriage between the applicant's mother, X, and the respondent (her father) was under customary law, it was outside the provisions of the Decree. It was argued for the applicant that she was a child of the marriage between the respondent and Rosaline Aneke by virtue of Section 69(a) and (c) of the Decree. The learned Chief Justice found that Section 69(a) was inapplicable here as the child was at no time adopted. He, however, held that P was a child of the marriage in accordance with Section 69(c) at the 'relevant time', as defined also in Section 69. Nevertheless, the learned Chief Justice faced the decisive question as to whether in the absence of a dispute or proceedings between Rosaline Aneke and the respondent an application for maintenance and custody might be brought in respect of P. He formulated the question thus:

> . . . can a child of a man by a customary marriage, who by virtue of a subsequent marriage by the man to another woman under the Marriage Act, has become a member of the latter household by virtue of this Decree, bring an application for her maintenance and custody when there is no matrimonial dispute or proceedings between the parties to the marriage?[5]

A negative answer was given to this question. The judge found that there was an apparent conflict in relation to the status or position of the applicant to the party representing her. On the one hand, the applicant claimed to be a member of the household of the respondent and Rosaline, and on the other, brought an application through her natural mother under a customary-law marriage. He, therefore, concluded:

> In the particular case before me the applicant's mother being married under customary law has no access to these courts through the Matrimonial Causes Decree but is endeavouring as it were by the back door to gain entrance as the next friend of her child, a member of another household under Section 69(c) of this Decree.[6]

[3] *Zanon v Zanon* (1961) 2 FLR 109; *Egwunwoke v Egwunwoke* [1966] 2 All NLR 1.
[4] Suit No. M/186/70 (unreported), High Court, Lagos, 8 February 1971.
[5] ibid.
[6] ibid.

The judge also found it an alarming departure from the traditional practice to allow a child access to the courts against both or either of her parents with a view to asking for maintenance, and to decide who among them was to have her custody. It seems, therefore, clear that Part IV of the Decree does not provide for an application either by the child whose welfare is in question or by a third party who is not a husband or wife as defined in Section 69.

Let us now examine the main orders which a court can make under Part IV of the Decree.

## B ANCILLARY ORDERS

### 1 Alimony pendente lite

The High Court has statutory power to make an order for alimony pending suit in proceedings for divorce, nullity of marriage, judicial separation, restitution of conjugal rights, and jactitation of marriage.[7] An order may be made in favour of a husband or a wife.

Usually, a claim for alimony *pendente lite* is included in a petition for a matrimonial cause or in the answer to such a petition. Otherwise a separate application for alimony may be made by leave of a judge at any time during the proceedings.[8]

An order to alimony pending suit is strictly of a provisional nature. Its purpose is to ensure that a spouse is not destitute, but is well provided for, according to his or her standard of living, during the course of the proceedings.[9]

#### (A) QUANTUM

The courts have absolute discretion in determining the quantum of alimony to be awarded to a spouse. Usually, however, the courts tend to award such sum as would when added to the wife's income amount to one-fifth of the joint income of both spouses.[10] This, of course, is not a binding rule. In determining the award of alimony, the courts are enjoined by the Decree to pay regard to the means, earning capacity (not mere earnings), the conduct of the parties to the marriage, and all other relevant circumstances.[11] The means of a spouse refers to his or her financial resources, including prospective and contingent assets. All the circumstances and resources of a spouse should be evaluated before fixing the appropriate amount of alimony payable. Matters which are relevant here include the physical and mental resources of the spouse, the capital and other monies at his or her disposal, and the amount of his or her personal expenditure.[12] Thus, for instance, where a husband

[7] Sections 70(2) and 114(1)(a) and (b) of MCD 1970.
[8] Section 114(1) of the MCD 1970.
[9] *Coombs v Coombs* (1866) LR 1 P & D 218.
[10] *Negbenebor v Negbenebor* SC 144/1969, 28 May 1971; *Walls v Legge* [1923] 2 KB 240, 244; *Hawkes v Hawkes* (1828) 1 Hag Ecc 526, 162 ER 666; *Hill v Hill* (1864) 33 LJ 104.
[11] Section 70(2) of MCA 1970.
[12] *W v W* (No. 3) [1962] P 124. *Adesola Ibukun v Lawrence Ibukun* Suit No. WD/32/72 (unreported), Lambo, J., High Court Lagos, July 10, 1972 (CCCHCJ/7/72 P 64).

respondent maintains the children of the marriage and his parents these facts would influence the quantum of alimony to be awarded against him.[13] But if a spouse has adequate financial income there would be no good cause for the award of alimony in his or her favour. Each case is to be determined on its merits.[14]

For a wife, the alimony should be such as to enable her maintain a reasonable standard of living appropriate to the status of the husband. But alimony will not be granted merely to enable a spouse to improve her financial position.[15] The court may order security to be provided for alimony or periodical payments. Moreover, an order for alimony may be varied.[16]

(B) EFFECT OF GUILT

The fact that a spouse has been guilty of a matrimonial offence or that a matrimonial decree has been made against him or her does not disqualify that party for an award of alimony.[17] It is for the court to decide whether in the light of the conduct of a party and all the relevant circumstances alimony should be awarded. Where, for instance, the facts indicate that a party callously sought to wreck a marriage, that might be a good ground for rejecting a claim for alimony.

(C) PERIOD FOR WHICH PAYABLE

Alimony *pendente lite*, being a provisional order, lasts only during the period the proceedings are *pendens*. Consequently, an order becomes effective from the service of the petition until the issue of a decree absolute, in the case of dissolution of marriage, or a decree of judicial separation, or until the failure to comply with an order for restitution of conjugal rights.[18] Alimony may be granted for the period of the appeal to a higher court as the *lis* is in that case still pending.

On the death of either spouse while the suit is still pending, an order for alimony *pendente lite* ceases to have effect.[19]

**2 Permanent alimony**

In a suit for judicial separation, the High Court may make an order for permanent alimony in favour of a wife or husband.[20] Such an order for permanent alimony takes effect on the granting of the decree for judicial separation. The grant of alimony in such a case is based on the fact that in spite of the judicial separation the marriage is still subsisting and the parties remain husband and wife. Permanent alimony may also be

[13] *Onokpasa v Onokpasa* Suit No. S/10/69 (unreported), Eboh, J, High Court, Sapele, 30 January 1970.
[14] *Eaton v Eaton* (1870) LR 2 P & D 51; *George v George* (1867) LR 1 P & D 554.
[15] *Welton v Welton* [1927] P 162, 178.
[16] *Kirke v Kirke* [1961] 3 All ER 1059.
[17] Section 70(3) of MCA 1970. *Waller v Waller* [1956] P 300.
[18] *Meme v Meme* [1965] NMLR 391; *Onokpasa v Onokpasa*, Suit No. S/10/69 (unreported), Eboh, J, High Court, Sapele, 30 January 1970.
[19] *Scott v Scott* [1952] 2 All ER 890.
[20] Section 114, 70(2) of MCD 1970.

granted to a spouse on the dissolution of a marriage.[20a]

The permanent alimony may take the form of secured payment of a gross or periodic sum either for the life of a spouse or during the joint lives of the two parties. It may also be ordered to be paid during a fixed period.[21] Where an order is made pending the making of a further order, the payment of alimony may not be terminated by the dissolution of the marriage.

## 3 Maintenance

### (A) COMMON LAW

At common law, a husband is under a legal obligation to maintain his wife. In an earlier chapter, we examined the position where this obligation arose from the fact of cohabitation and the wife's management of the household.[22] Here, we shall be concerned with the situation where a husband deserts his wife or drives her out of the matrimonial home. In such a situation if he fails to provide her maintenance and she has no adequate means to support herself, she becomes, at common law, his agent for the purpose of obtaining necessaries – an agent of necessity.[23] The wife's agency of necessity is intended to enable her procure such necessaries for herself and her children as are suitable to her position and status of her husband. 'Necessaries' here include food, clothing, medical expenses and other basic needs, but do not include luxury. The tradesman who supplies the necessaries can sue the husband as the principal. Money lent to a wife living apart from her husband is not regarded as 'necessary' and is not, therefore, recoverable from the husband.[24] But, if the loan is made for the purpose of enabling her to purchase necessaries and she actually spent the money for that purpose, the husband would be liable for the loan just as in the case of necessaries actually supplied to her.[25]

A wife who has sufficient means of her own to purchase necessaries is not entitled to pledge her husband's credit, as there is in fact no necessity. This is the case, for instance, where she earns sufficient income to sustain herself adequately.[26] Moreover, for the husband to be liable for necessaries supplied to the wife, she must have contracted as an agent of the husband and not as the principal.[27] Where she is already adequately supplied with a particular necessary, her husband cannot be liable for any further supply of the same item. The husband will also avoid liability if he provides his wife with adequate maintenance.

[20a] *Olajide Smith v Mary Smith* Suit No. HD/4/72 (unreported), Adedipe, J, High Court, Lagos, 31 July 1972 (CCCHCJ/7/72 P 60), where for good reasons permanent alimony was refused.

[21] Section 73 of MCD 1970.

[22] See Chapter 3.

[23] *Emery v Emery* (1827) 1 Y & J 501, 148 ER 769; *Baker v Sampson* (1863) 14 CBNS 383, 143 ER 494.

[24] *Jenner v Morris* (1861) 3 De G F & J 45; 45 ER 795.

[25] *Weingarten v Engel* [1947] 1 All ER 425.

[26] *Bibenfield v Berens* [1952] 2 QB 770 (CA).

[27] *Callot v Nash* (1923) 39 TLR 292, 294.

*Termination of the husband's liability.* If a wife commits adultery, her agency of necessity is terminated, because a husband is not obliged by the law to maintain an adulterous wife.[28] The same is true where she is guilty of desertion.[29] On the husband's death, the wife's agency of necessity is automatically terminated. A decree of divorce or nullity will certainly produce the same effect. If the marriage is void *ab initio*, the husband may escape liability on the ground that the woman has never been his wife, but he can be liable to a third party from whom the woman, in the exercise of her apparent authority, purchased necessaries on credit. The position is probably different where the marriage is voidable. It may be argued in that case that the parties were husband and wife until the marriage was annulled. Consequently, the woman could, while she was a wife, pledge the husband's credit.[30] An order for maintenance made by a court in favour of a wife is a bar to her exercise of her agency of necessity.

(B) MAINTENANCE BY AGREEMENT

A husband and wife may enter into an agreement to live apart. Such a separation agreement, which releases each spouse from the obligation to cohabit with the other, may contain provisions for the maintenance of the wife. On the other hand, the spouses may while living apart conclude a maintenance agreement which obliges the husband to maintain his wife. Such agreement may be oral or written. While the spouses are free to enter into such agreements providing for maintenance, it will be contrary to public policy if they attempt thereby to oust the jurisdiction of the courts.[31] If the husband pays reasonable maintenance to his wife under an agreement, she cannot pledge his credit. But where he fails to pay the agreed sum, she may exercise her authority as the husband's agent of necessity. Where the maintenance provided in the agreement is inadequate, the wife may apply to the court for adequate maintenance.

### 4 Statutory provision of maintenance

Under Section 70(1) of the Matrimonial Causes Decree 1970 the High Court has power, on appropriate application, to make an order for the maintenance of a spouse or the children of the marriage. In the exercise of this function, the court has a free hand to make 'such orders as it thinks proper'. Consequently, the discretion of the court in this respect is unfettered. But the Decree directs that the court should have 'regard to the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances'.

[28] *Govier v Hancock* (1796) 6 Term Rep 603; 101 ER 726; *Wilson v Glossop* (1888) 20 QBD 354.
[29] *Jones v Newton and Llanidloes Guardians* [1920] 3 KB 381.
[30] *Fowkes v Fowkes* [1938] Ch 774 (obiter).
[31] *Hyman v Hyman* [1929] AC 601.

(A) 'MEANS AND EARNING CAPACITY OF A SPOUSE'

The means and the earning capacity of a spouse is relevant in determining whether in fact that spouse deserves to be maintained by the other. Thus, where a spouse has adequate means or income a good case cannot be made out for his or her maintenance. Moreover, a spouse with a smaller income may not be compelled to maintain the other if the latter has better means or income for maintaining himself or herself.

(B) 'CONDUCT OF THE PARTIES'

Again, the conduct of the parties to the marriage is a relevant consideration here. The Decree does not regard the fact that a decree of divorce was granted against a spouse as a bar to that spouse being maintained.[32] This is because the decree of divorce does not necessarily reflect the degree of culpability of that spouse in respect of the break-up of the marriage. The guiding factor is the conduct of the parties to the marriage. This test was applied in the English case of *Trestain v Trestain*.[33] In that case, a decree *nisi* was granted by the court of first instance to the husband on the ground of the wife's cruelty. On appeal, the Court of Appeal found that the husband's conduct was in fact responsible for the break-up of the marriage. It therefore held that the decree was not a bar to the wife's obtaining an award of maintenance. In the Australian case of *Cunningham v Cunningham*,[34] the wife committed adultery in the matrimonial home with a week-end visitor who was a complete stranger to her. Campbell, J, granted a decree of divorce to the husband and refused to award maintenance to the wife because her conduct was the main cause of the break-up of the marriage.

(C) 'ALL THE RELEVANT CIRCUMSTANCES'

The phrase 'all the relevant circumstances' in Section 70 gives the courts full scope to consider all the relevant factors in respect of any particular case. In Nigerian society, for instance, it is customary for a man who is employed to maintain not only his immediate family – wife and children – but also to contribute to the maintenance of his parents, brothers and sisters and other relations. Does such extended family responsibility fall within the scope of 'relevant circumstances' under Section 70? In *Giwa v Giwa*,[35] the wife applied for maintenance after a decree absolute. It was found by the court that the husband, besides maintaining his immediate family, had to contribute to the maintenance of his other brothers, a jobless relation and two elderly aunts. Sowemimo, J, in considering the relevance of this factor, said:

> The unfortunate thing with regard to Nigerians contracting marriage under either the English Laws or the local Marriage Act is that those

[32] Section 70(3).
[33] [1950] P 198.
[34] [1965] Qd R 210.
[35] Suit No. WD/40/67 (unreported), High Court, Lagos, 16 January 1970.

laws do not take into consideration the 'extended family' responsibilities of either the husband or wife as the case may be. The result has been that those English cases cited cannot be of much assistance if one has to take into consideration what is the accepted practice amongst the Yorubas as regards their attitude with regard to responsibility of their families having regard to the extent of the meaning of that term.

In fact acceptance of extended family responsibility is a common feature of most communities in Nigeria. It may, therefore, be said with a great measure of cogency that the extended family responsibility of either spouse is a relevant factor under the head of 'other relevant circumstances'.

(D) MAINTENANCE OF CHILDREN

The court's power to order the maintenance of the children of the marriage will, of course, be exercised in respect of the spouse who is in a better position to provide such maintenance. However, the court's power will not be exercised for the benefit of a child who has attained the age of twenty-one years unless there are special circumstances which justify such a step.[35a] The choice of the age of twenty-one is probably because it represents the age of majority, at which the child is expected to be capable of fending for himself. But the proviso, in case of exceptional circumstances, gives the rule a measure of flexibility.

(E) MAINTENANCE AFTER DIVORCE

Maintenance may be granted by the court in respect of a matrimonial cause which is pending or has been completed.[36] Thus, an order for maintenance may be in respect of a marriage which has already been dissolved or a decree of nullity of marriage. In the case of a woman, this involves the maintenance of a wife who has divorced her husband – a practice which has been the subject of judicial stricture. In *Coker v Coker*,[37] Udo Udoma, J (as he then was), observed:

> It is almost unprecedented in this country for a wife having divorced her husband to turn round and seek maintenance from the same husband. The very idea of maintaining a wife after divorce appears to me to be foreign to the African conception of marriage and divorce. A situation like the present cries aloud for distinct Nigerian rules. Although a wife ought not to be left destitute for having divorced her husband on justifiable grounds, yet on the other hand, it will be impolitic to give wives any great pecuniary interest in dissolving the marriage tie. Some golden mean ought to be struck.

[35a] Section 70(4) of MCD 1970.
[36] Section 114(1)(c) of the MCD 1970.
[37] Suit No. WD/19/1961 (unreported), High Court, Lagos, 7 January 1963. *Okafor v Okafor* Suit No. O/6D/71 (unreported), High Court, Onitsha, 13 November 1972.

This observation applies with equal force to the converse situation, where the maintenance is granted in favour of the husband. The need exists for fashioning rules here which will deal with the peculiarities of the local situation.

(F) SECURED AND UNSECURED MAINTENANCE

If the court orders the payment of maintenance, it may in addition prescribe the mode of payment in the form of a lump sum or a weekly, monthly, yearly or other periodic sum.[38] Moreover, in appropriate cases, the court may also require that such payment be secured.[39] Secured maintenance has special advantages. First, it is usually for the life of the spouse to whom maintenance is granted, and not the joint lives of the spouses. Consequently, where the spouse from whom payment is due pre-deceases the other, the maintenance will not terminate, but will be paid from the estate of the deceased. Again, secured maintenance may be assigned or a charge created on it.

It is, however, not necessary that the security for maintenance should be property. In some cases, it may take the form of a deed or instrument appropriately executed.[40] Such a document may be in the nature of an undertaking to comply with the order, or probably a guarantee provided by an acceptable third party. This may be the case where the spouse giving security for maintenance does not possess adequate property to secure its payment.

The security for the payment of a periodic sum or a lump sum cannot be increased or decreased unless material facts were withheld from the court or material evidence which was given before the court was false.[41]

## 5 Custody, guardianship, welfare, advancement or education of children of a marriage

In proceedings relating to the custody, guardianship, welfare, advancement or education of children of a marriage, the court is enjoined to regard the interests of those children as paramount.[42] Such interests include the physical, moral, and social. Besides this requirement, the court has full discretion to make such orders in this respect as it deems proper.

In determining the interests of the children, the courts usually take into account several factors, none of which is accorded overwhelming importance. All the relevant facts of each case are given due consideration.[42a]

[38] Section 73(1)(a)–(c) of the MCD 1970. In *Adibuah v Adibuah* Suit No. E/9D/71 (unreported), High Court, Onitsha, 4 August 1972, the court, after dissolving the marriage, ordered the payment of a lump sum of £1,000 (₦ 2,000), which is £200 per annum, capitalized over a period of five years.

[39] ibid.

[40] Section 73(1)(d).

[41] Section 73(3).

[42] Section 71(1), Section 24 Infants Law 1958 (WR); cf. Section 5, Guardianship of Infants Act 1886; *Jegede v Jegede* CCHCJ/12/72, 121.

[42a] *Re F (an infant)* [1969] 2 All ER 766, 768 per Megarry, J.

The conduct of the parties is taken into account in determining the award of the custody of a child. It is well established that the commission of adultery by a spouse does not automatically deprive that party of the right to custody.[42b] However, the fact that one spouse was solely responsible for the breakdown of the marriage must be taken into consideration.[42c] Where a party has deserted or abandoned the child this is a strong indication of his unfitness to have its custody. Thus, in *Ihonde v Ihonde*,[42d] the court refused to grant the custody to the wife petitioner, who had deserted her ten-months-old child and did not see it again for four years.

Again, the courts regard as relevant the ability of a spouse to provide the child with a good upbringing. Here the financial position of the parties is considered. Other things being equal, the fact that one spouse is in a much better financial position to bring up the child may be decisive.[42e] Moreover, the party who is in a position to offer the child good accommodation may be preferred.[42f]

Where the child is capable of expressing its own wishes, the court will take this into consideration. Usually the child is interviewed by the judge in chambers to ascertain its wishes. But such expression of wishes is not conclusive, as the court is the final arbiter of what is in the best interests of the child.[42g]

The age and sex of the child are matters of some consequence in the award of its custody. On balance, a child of tender age is better left with the mother, who provides the necessary motherly care. But there is no settled rule that such a child should remain in the custody of the mother.[42h] She may be disqualified where she has shown herself unfit for that task.

It is usually desirable that brothers and sisters should, as far as possible, be kept together so as to retain the advantage of their growing up together.[42i] However, where separation is inevitable the problem may be overcome by granting access to both parents so as to enable the children to meet regularly.[42j]

The character and personality of the parties are also taken into consideration. It is important to ensure that the award of the child to one spouse will not result in its physical ill-treatment or the danger of

[42b] *Willoughby v Willoughby* [1951] P 184.

[42c] *Re L (an infant)* [1962] 3 All ER 1; *Afonja v Afonja* (1971) 1 UILR 105; *Ihonde v Ihonde* Suit No. WD/85/70 (unreported), High Court, Lagos, 17 April 1972.

[42d] Suit No. WD/85/70.

[42e] *Ihonde v Ihonde*, Suit No. WD/85/70; *Adams v Adams*, Suit No. M/196/70 (unreported), High Court, Lagos, 29 March 1971.

[42f] *Re F (an infant)* [1969] 2 All ER 766.

[42g] *Re S (an infant)* [1967] 1 All ER 202, 210.

[42h] *Re B (an infant)* [1962] 1 All ER 872; *H v H & C* [1969] 1 All ER 262; *Aderogba v Aderogba*, Suit No. HD/52/58 (unreported), High Court, Lagos, 12 November 1971.

[42i] *Re Besant* (1879) 1 Ch D 508, 572.

[42j] *Re P (infant)* [1967] 2 All ER 229; *Re B* (1966) *The Times*, 5 April (CA); *Ononye v Ononye*, Suit No. E/6D/1970 (unreported), High Court, Enugu, 10 February 1971.

exposure to moral corruption. In *Agu v Agu*[42k] the court took into account in refusing the wife petitioner custody of her children the facts that she lived alone at Enugu in a single room and went to work daily except on Sundays – facts not conducive to the moral upbringing of the children.

A court hearing proceedings under Section 71 of the Decree may adjourn in order to obtain a report from a welfare[43] officer on such matters as it considers relevant and important. Any such report may be subsequently admitted in evidence.[44]

The court may make an order placing the child in the custody of one of the parents, in which case it may give to the other parent reasonable access to the child.[45] However, where the court considers it proper, it may place the child under the custody of a third party. This is usually the case where, in the opinion of the court, neither of the parents is a fit person to have custody of the child. Where custody is given to a third party, the court may grant to the parents reasonable access to the child.[46]

An order for custody or access to children may be enforced by attachment, committal for contempt of court, or the issue of a writ of sequestration.

## 6 Settlement of property

### (A) ORDER TO SETTLE PROPERTY

In any matrimonial proceeding, the court may require the parties to the marriage, or one of them, to make such settlement of property to which the parties or either of them is entitled (whether in possession, or in reversion) as the court considers just and equitable, for the benefit of all the parties, or one of them, and the children of the marriage.[47]

However, the property which will be ordered to be settled must be that to which the parties (or one of them) are entitled to either in possession or in reversion. A spouse cannot be ordered to settle property in which he or she has no right whatsoever, as that would be contrary to the legal principle *nemo dat quod non habet*. There is no restriction on

[42k] Suit No. E/5D/70 (unreported), High Court, Enugu, 27 September 1971; *Adams v Adams*, Suit No. M/196/70.

[43] A welfare officer is defined in Section 114(1) of the MCD 1970 as:

> 'a person authorized by the Attorney-General of the Federation by instrument in writing to perform duties as a welfare officer for the purposes of this Decree, being:
> (a) a person who is permanently or temporarily employed in the public service of the Federation; or
> (b) a person who is permanently or temporarily employed in the public service of a State and whose services have been made available for the purposes of this Decree in pursuance of an arrangement between the Federation and the State; or
> (c) a person nominated by an organization undertaking child welfare activities.'

[44] Section 71(2).

[45] Section 71(4).

[46] Section 71(3).

[47] Section 72(1) of MCD 1970.

the type of property which may be settled. It could be real or personal property. The court may order only such settlement as it considers just and equitable in the circumstances of the case. Thus, in determining the extent of the property to be settled, the court will consider all the circumstances of the particular case. For instance, the fortunes of the parties and their family responsibilities are matters to be properly taken into account. It is unlikely that a settlement will be ordered unless the income or property of the spouse ordered to settle property greatly exceeds that of the other spouse. There is no fixed proportion.

### (B) VARIATION OF ANTE-NUPTIAL AND POST-NUPTIAL SETTLEMENTS

The court may in any matrimonial proceedings make any just and equitable order regarding the application of the whole or part of any property covered by an ante-nuptial or post-nuptial settlement for the benefit of the parties, or either of them, and the children of the marriage.[48]

It is not necessary that the settlement to be varied must have been made by either or both of the parties themselves. It is enough if it was made by a third party, or either or both of the spouses. An ante-nuptial settlement is one made in contemplation of a particular marriage. Post-nuptial settlement, on the other hand, has been defined by Hill, J, in *Prinsep v Prinsep*,[49] in the following terms:

> Is [the settlement] upon the husband in the character of husband or in the wife in the character of wife, or upon both in the character of husband and wife? If it is, it is a settlement on the parties within the meaning of the section. The particular form of it does not matter. It may be a settlement in the strictest sense of the term, it may be a covenant to pay by one spouse to the other, or by a third person to a spouse. What does matter is that it should provide for the financial benefit of one or other or both of the spouses as spouses and with reference to their married state.

The important factor, therefore, is the substance of the transaction.

Where the court makes an order for the variation of a settlement, the order will relate to the application of the whole or part of the property involved. Fundamentally, the power of the court to vary settlements is intended to enable it make proper provisions for the spouses and their children. In the exercise of this power, the court should make only such orders as are just and equitable, having regard to the means of the parties, their earning capacity, their conduct, and the age and position of their children. If a matrimonial decree has been made, the court will take into account any new circumstances which may have arisen since the date of the decree.

[48] Section 72(2) of MCD 1970.

[49] [1929] P 225, 232: *Loraine v Loraine and Murphy* [1912] P 222; *Worseley v Worseley and Wignall* (1869) LR 1 PD 648.

(C) EXERCISE OF COURTS' POWER IN RELATION TO SETTLEMENTS IN FAVOUR OF A CHILD OF 21

Normally, the power of a court to order the settlement of property or the variation of a settlement is not to be exercised in favour of a child who has attained the age of twenty-one years unless there are special circumstances which justify the making of such an order.[50]

## 7 General powers of court in relation to maintenance, custody and settlements

Apart from having the power to make orders for maintenance, custody and settlement of property, the court has wide powers to enforce or ensure compliance with its orders. We shall discuss these under various heads:

(A) EXECUTION OF INSTRUMENTS

In order to ensure the effective performance of its orders as to maintenance, custody or settlement of property, the court may require a person to execute any necessary deed or instrument and to produce any relevant documents of title. It may, in addition, compel the performance of any other act or acts which will facilitate the execution of the court order.[51]

If the person who is directed to execute a deed refuses or neglects to do so, the court may appoint an officer of the court or any other person to execute the deed in his name. The person so appointed may also be authorized to do all such acts and things necessary to give validity and operation to the deed.[52] A deed executed by a person appointed by the court has force and validity as if it was executed by the person originally directed by the court order to do so.[53]

(B) APPOINTMENT OF TRUSTEES

The court has power to appoint or remove trustees in respect of parties to the marriage or children of the marriage.[54]

(C) TERMS AND CONDITIONS

In making an order relating to maintenance, custody or settlement of property a court may impose terms and conditions.[55] With regard to the custody of the children of the marriage, the court may attach terms and conditions to the grant of custody to a spouse. It may, for instance, prescribe that the children should not be taken out of its jurisdiction or that their religious faith should not be changed.

[50] Section 72(3) of the MCD 1970.
[51] Section 73(1)(d).
[52] Section 74(1).
[53] Section 74(2).
[54] Section 73(1)(e).
[55] Section 73(1)(i).

(D) POWER TO DISCHARGE, MODIFY, REVIVE OR VARY AN ORDER

The court has general supervisory powers over its orders for maintenance, custody or settlement of property. It may discharge an order where the party in whose favour the order was made re-marries, or if there is any other just cause for doing so. Moreover, the court may modify the effect of an order or suspend its operation either until a further order is made, or for a fixed period of time, or until the happening of a future event. A suspended order may be revived by a subsequent court order.

An order may be varied so as to increase or reduce any amount ordered to be paid.[56] But the court will only order such an increase or decrease of the prescribed amount if it is satisfied that the circumstances of those for whose benefit it was made have materially changed. In the alternative, it has to be shown satisfactorily that material facts were withheld from the court which made the order or varied it, or that material evidence given before such court was false.[57]

(E) POWER TO SANCTION AGREEMENTS

An agreement made between spouses either to oust the jurisdiction of the court with regard to maintenance or to attempt to control the court when its jurisdiction is invoked, is contrary to public policy and therefore void.[58] But under sub-Section 73(i)(k) of the Decree, the court may sanction an agreement whereby a spouse accepts a lump sum or periodic sums or other benefits in lieu of rights under an order for maintenance, custody or settlement of property, or in lieu of his or her right to seek such an order.

It is important to note that a promise by one spouse to the other to consent to an order being made by the court cannot be regarded as an agreement under sub-Section 73(1)(k). [59] The terms of the agreement should make it clear that the lump sum or periodic sums or other benefits are accepted in lieu of rights under a judicial order for maintenance, custody or settlement of property, or in lieu of the right to seek an order.[60]

Unless a sanctioned agreement expressly provides for its future variation, the Matrimonial Causes Decree does not confer jurisdiction on the courts to vary such agreements. Similarly, there is no right or power of the courts to reverse, rescind or cancel an agreement sanctioned under Section 73(1)(k).[61] Once an agreement between the spouses has been sanctioned by the court, the rights of the parties depend entirely on their contract. The court has no jurisdiction to en-

[56] Section 73(i)(j); *Sekoni v Sekoni* CCHCJ/10/72, 104.
[57] Section 73(2); *Esua v Esua* CCHCJ/11/72, 91. *Amadi-Emina v Amadi-Emina* (1971) 1 UILR 400.
[58] *Hyman v Hyman* [1929] AC 601.
[59] *Shaw v Shaw* (1965) 66 SR (NSW), 30, 40.
[60] id. at 42.
[61] *Sherwood v Sherwood* (1966) 9 FLR 282.

force those contractual rights as part of a matrimonial cause. Consequently, the rights of the spouses under the contract can only be enforced, as any other contractual rights, by the ordinary process of the law.[62] However, if a sanctioned agreement is in existence, the court has no jurisdiction to make a maintenance order in the future.

(F) RESIDUARY POWERS

Apart from its specific powers already mentioned, the court has a residuary power to make any other orders which it considers necessary to do justice in each particular case.[63]

(G) POWERS OF COURT TO MAKE ORDERS ON DISMISSAL OF PETITION

Where a petition for divorce, nullity of marriage, judicial separation, restitution of conjugal rights or jactitation of marriage has been dismissed, the court cannot make an order for maintenance, custody or settlement of property.[64] It may make an order for maintenance or custody only if three conditions are satisfied. First, the petition must be dismissed after a hearing on the merits. Second, the court must be satisfied that the proceedings for such were instituted in good faith. Third, there must be no reasonable likelihood of the parties becoming reconciled.[65] Even where these conditions are satisfied, no order for maintenance or custody can be made unless the court heard the proceedings for the order *at the same time as, or immediately after, the proceedings for the matrimonial relief*.[66] Thus, the power of the court to make orders for maintenance and custody under section 75 of the Decree can be exercised only when the application for such orders is included in a matrimonial cause or is immediately subsequent to it.[67]

## C ENFORCEMENT OF MAINTENANCE ORDERS

### Orders made in Nigeria

Several modes of enforcing maintenance orders made within Nigeria are prescribed by the Matrimonial Causes Decree 1970. These will be discussed *seriatim*.

(A) ATTACHMENT OR OTHER PROCESS

A court order for the payment of maintenance made in Nigeria may be enforced by attachment or other process such as sequestration of the respondent's property, writ of *fieri facias*, or garnishee order.[68] If the

[62] *Shaw v Shaw* (1965) 113 CLR 545; *Sherwood v Sherwood* (1966) 9 FLR 282.
[63] Section 73(1)(l).
[64] Section 75(1).
[65] Section 75(2).
[66] Section 75(3) (italics mine).
[67] *Esua v Esua*, Suit No. M/63/70 (unreported), Kazeem, J, High Court of Lagos, 4 December 1970.
[68] Section 88(1) of the MCD 1970.

attachment or other process remains unsatisfied for six weeks the respondent may be regarded as insolvent and may thereafter be kept in custody under the attachment order for a period not exceeding six months after the expiration of the initial six weeks. [69]

(B) RECOVERY OF MONEY AS JUDGMENT DEBT

The arrears of alimony or maintenance ordered by a court may be recovered as a judgment debt in a court of competent jurisdiction.[70]

(C) RECOVERY AGAINST DECEASED'S ESTATE

An order for maintenance may, by leave of court, be enforced against the estate of a deceased spouse on such terms and conditions as the court deems appropriate.[71]

(D) SUMMARY ENFORCEMENT OF MAINTENANCE ORDERS

An order for maintenance made by a High Court may be registered with any Magistrates' Court or District Court of a State in the Federation. Such a registered order is enforceable by the Magistrates' Court or District Court and, for this purpose, the Decree confers all the necessary powers on these courts. Section 91(1) stipulates that a registered maintenance order may be enforced 'in the same manner as if it were an order for maintenance of a deserted wife made by the court of summary jurisdiction'.[72] The section wrongly assumed that under the existing Nigerian law, courts of summary jurisdiction are empowered to make maintenance orders in respect of deserted wives. This misconception of the law is a clear example of the pitfalls that result from the incautious adoption of provisions of a foreign law. In fact one of the major shortcomings of the 1970 Decree is its failure to confer summary jurisdiction on Magistrates' and District Courts. These courts could speedily and cheaply deal with matters like maintenance, custody and other minor matrimonial reliefs.

(E) ENFORCEMENT OF MAINTENANCE ORDERS BY ATTACHMENT OF EARNINGS[73]

*(i) Application for an attachment order.* Where a person is entitled to payments under a maintenance order, he may apply either to the High Court that made the order or to the High Court or Magistrates' or District Court in which the order is registered for an attachment of earnings order.[74] Also, instead of a court making an attachment order under Section 88, or a court of summary jurisdiction enforcing a

[69] Section 88(2) and (3).
[70] Section 90(1): *Omole v Omole* [1960] NRNLR 19.
[71] Section 90(2).
[72] Courts of summary jurisdiction are Magistrates' Courts and District Courts.
[73] Section 92 and Schedule 3 of MCD 1970.
[74] Paragraph 3 of Schedule 3.

maintenance order registered with it, that court may make an attachment of earnings order.[75]

*(ii) Defendant's particulars.* In proceedings for an attachment of earnings[76] order, the court may order the defendant (i.e. the person liable to make the maintenance payments) to furnish a statement signed by him specifying the name and address of his employer, or, if he has more employers than one, of each of his employers; particulars of the defendant's earnings; and such particulars as are necessary to enable the defendant to be identified by any of his employers.

The court may also order an employer of the defendant to provide a signed statement containing particulars of all earnings payable by him to the defendant within a specified period. Such a statement shall be received in evidence and, in the absence of any contrary proof, be regarded as the required statement.[77]

*(iii) When an attachment order may be made.* If the defendant is in arrears of payment of maintenance up to four payments in the case of an order for weekly payments, or two payments in any other case, or if he has wilfully and persistently failed to comply with a maintenance order, the court may order his employer to attach part of his earnings.[78] But where the defendant's failure to make periodic maintenance payments is not due to his wilful refusal or culpable neglect, the court is not to make an order for attachment of his earnings.[79] 'Wilful' in this context means deliberate in the sense that the failure of the defendant to make the required payments must be intentional. 'Persistent' refusal implies that the action of the defendant in failing to comply with the maintenance order is habitual or continuous, rather than isolated.

The construction and application of the provisions of the Third Schedule to the Decree relating to the attachment of earnings came before the Ibadan High Court in *Bairbre Oloyede v Hector Oloyede*.[80] In that case, the applicant/petitioner applied under Section 88 of the 1970 Decree for an attachment of the respondent's salary for his failure to pay the alimony *pendente lite*, the maintenance of the children of the marriage, and payment of school expenses, which the court had earlier ordered. The applicant contended that the respondent was in default of the maintenance for two months and that the school fees were in arrears for three terms.

On his part, the respondent, who was employed by a statutory corporation, admitted that besides his normal salary of £114 3*s*. 4*d*.

[75] Paragraph 13.

[76] 'Earnings' is defined as the defendant's wages or salary, pension, annuity in respect of past services, payment by way of compensation for loss, abolition or relinquishment, or any diminution in emoluments, of any office or employment – Schedule 3, para. 1.

[77] Paragraph 25 of Schedule 3.

[78] Paragraph 4.

[79] Paragraph 5.

[80] Suit No. 1/81/70 (unreported), High Court, Ibadan.

(₦228·33), he received the sum of £86 16*s*. 8*d*. (₦173·67) by the end of September 1970 for the celebration of the Nigerian independence anniversary. He spent this sum in entertaining friends during the celebration. Again, the respondent received the sum of £450 (₦900·00) at the end of December 1970 as arrears of a new salary award. He spent it on repairs to his old car, part payment for a new car, and in settling debts owed by him to his friends. At the time the £450 was received, the order for payment of maintenance had been made and the respondent was in arrears for both the maintenance and the school fees of his children.

It fell to be decided whether the respondent could be said to have made the default in payment of the maintenance order through his *wilful refusal or culpable negligence* as envisaged by Clause 5 of the Third Schedule of the MCD 1970. Ademola, J, adopted Vice-Chancellor Sir L. Chadwell's definition of 'wilful refusal' as 'a refusal arising from an exercise of mere will or caprice and not from an exercise of reason'.[81] With regard to the phrase 'culpable neglect', the learned judge regarded as authority the definition of 'wilful neglect' by the High Court of Australia in *Cooper v Cooper*[82] as the deliberate omission of a husband to fulfil his duty to provide maintenance for his wife. Applying this test to the facts before him, Ademola, J, held that the respondent's conduct amounted to culpable neglect and that his refusal to pay the maintenance was wilful.

Clauses 6 and 7 of the Third Schedule to the 1970 Decree require an attachment of earnings order to specify the 'net earnings' of the respondent, the 'normal deduction rate' and the 'protected earnings'. The 'net earnings' are defined in relation to a pay-day as 'the amount of the earnings becoming payable on that pay-day, less any sum deducted from those earnings under any law relating to income tax'. Thus, monthly payments of tax by the respondent under the PAYE system are deductible, but not payments in respect of rent, vehicle advance, petrol credit or similar payments not required by any law in force.[83]

An order is also required to specify the 'normal deduction rate', which is regarded as:

> the rate at which the court considers it to be reasonable that the earnings to which the order relates should be applied in satisfying the requirements of the maintenance order but not exceeding the rate that appears to the court to be necessary for the purpose of:
> (a) securing payment of the sums from time to time falling due under the maintenance order, and
> (b) securing payment within a reasonable time of any sums already

[81] *In the Matter of The East India Docks and Birmingham Junction Railway Act, and of The Lands Clauses Consolidation Act. Ex parte Bradshaw* (1848) 60 ER 839.
[82] 65 CLR 162 at 177: *Re Young and Harston's Contract* (1885) 31 Ch D 168, 175: *Ehigiator v Ehigiator* [1966] 2 All NLR 169, 177.
[83] *Bairbre Oloyede v Hector Oloyede, ante.*

> due and unpaid under the maintenance order and any costs incurred in proceedings relating to the maintenance order that are payable by the defendant.[84]

The 'protected earnings rate' is defined in the 1970 Decree to mean:

> the rate below which, having regard to the resources and needs of the defendant and of any person for whom he must or reasonably may provide, the court considers it to be reasonable that the net earnings of the defendant should not be reduced by a payment under the order.[85]

In *Pepper v Pepper*,[86] Lord Merriman, P, formulated a simple definition of the two terms 'protected earnings' and 'normal deduction rate' thus:

> I will read the definition of 'protected earnings' in a moment. It means, putting it shortly, what the man is entitled to keep for himself and anyone for whom he is responsible; and secondly, what is the 'normal deduction rate', meaning the amount which the employer should be ordered to deduct and pay over to the wife, or in this case, to the collector to the court, in respect of the amount of what is called the 'related maintenance order', in other words, the order which it is sought to enforce and also any sum in respect of the payment of arrears which may be decided on.

What meaning can be attached to the phrase '. . . any person for whom he must or reasonably may provide . . .'? It suggests that the court should have regard to all the financial obligations of the respondent in order to determine what should be left for him. Lord Merriman, P, considered that the phrase

> would impel the court to consider the means of the parties, not indeed, to prefer the paramour and her expected child to the needs of the wife and her children, but to take into account the fact, . . . that there is just not the money to go round, and to find the fairest way that they can of apportioning the money.[87]

Consequently, in a case where the respondent earned a gross salary of £114 3*s*. 4*d*. (₦ 228·34) per month and paid £5 (₦ 10·00) per month tax on PAYE, his net earnings were £109 3*s*. 4*d*. (₦218·34). The respondent was ordered to pay maintenance of £17 10*s*. (₦35·00) a

[84] Schedule 3 para. 1.

[85] Schedule 3 para. 7. This provision is identical to Section 6(3)(b) of the Maintenance Orders Act 1958 of the United Kingdom.

[86] [1960] 1 All ER 529, 532–3. This case interpreted S 6(3)(b) of the Maintenance Orders Act 1958, which is identical to our law.

[87] at 534.

month and school fees of £14 2s. (₦28·20) per month. Thus 'the normal deduction rate' would be, by this order, £31 12s. (₦63·20) per month. The 'protected earnings' in favour of the respondent would then have been £77 11s. 4d. (₦155·10) monthly.[88]

*(iv) Duty of an employer on whom an order is served.* A copy of the attachment order must be served on the defendant's employer to whom it is directed. It should clearly identify the employee in respect of whom it is made. The order comes into force seven days after it is served on the employer to whom it is directed. It must also stipulate that payments under it are to be made to an officer of the court mentioned therein.[89]

On the receipt of the attachment order, the employer is required to pay to the designated court official on each pay-day the fixed deduction from the excess of the defendant's net earnings[90] over his protected earnings. Where the defendant is in arrears, this may also be liquidated from the excess. But if the net earnings are less than the protected earnings for any pay-day, these have first to be made good from another pay-day before deductions are made.[91] Where there are two or more attachment-of-earnings orders in relation to the defendant's earnings, his employer will satisfy them in the order of the respective dates on which they came into force.[92]

Any payment made by an employer in respect of an attachment-of-earnings order is a valid discharge to him as against the defendant to the extent of the amount paid.[93]

In an attachment-of-earnings procedure, the court is only bound to consider the earnings of the respondent from the particular profession or occupation in respect of which the application was made. The court cannot take into account the potential earnings of the respondent in some other occupation. Under the attachment-of-earnings procedure, the attachment order is directed to a particular employer to pay out of the wages which he is due to pay to an employee in respect of a particular employment. Consequently the limitation of the order is obvious, as it can only be directed to one employer.[94]

*(v) Discharge or variation of attachment order.* A court that has made an attachment order may vary or discharge it on the application of the recipient of the maintenance or the defendant. If the attachment order is varied, the variation order becomes effective seven days after it is served on the defendant's employer. An attachment order is discharged

[88] *Oloyede v Oloyede, ante.*
[89] Paragraph 10.
[90] 'Net earnings' is defined as the amount of the earnings becoming payable on a pay-day less any sum deducted from those earnings under any law relating to income tax – paragraph 1, Schedule 3.
[91] Paragraph 11.
[92] Paragraph 22.
[93] Paragraph 12.
[94] *Pepper v Pepper* [1960] 1 All ER 529, 535.

once a warrant of commitment or attachment is issued against the defendant for the enforcement of the maintenance order.[95]

*(vi) Sanction.* Failure by a defendant to comply with any requirement of an attachment order applicable to him is an offence punishable on conviction by a fine not exceeding two hundred Naira. It is, however, a good defence that he took reasonable steps to comply with the order. A similar offence is committed by any person who makes a statement in relation to the attachment proceedings which he knows to be false and misleading in a material particular or who recklessly furnishes a false and misleading statement.[96] It is also an offence to dismiss an employee or injure him in his employment or alter his position to his disadvantage merely because an attachment order has been made against him. If the employer is convicted, the court may order that the employee be reimbursed any wages lost by him and that he be reinstated in his old position or one similar to it.[97]

(F) ENFORCEMENT OF FOREIGN ORDERS

Under the Maintenance Orders Act 1921,[98] a maintenance order made by any court in England or Ireland may be registered and enforced in Nigeria. Once the order is registered, it has from that date 'force and effect and . . . all proceedings may be taken on such order as if it had been an order originally obtained in the court in which it is so registered'.[99] The court in which the order is registered is empowered to enforce it.[100] If the original order was made by a court of superior jurisdiction, it will be registered in a High Court, but in other cases the registration will be made in a Magistrates' Court.[101] There is a reciprocal provision for maintenance orders made in Nigeria to be registered and enforced in England and Ireland.[102]

Section 11 of the Act empowers the Head of State to extend the provisions of the Act to any Commonwealth country or British possession which has reciprocal provisions for the enforcement there of maintenance orders made by courts in Nigeria.[103]

A maintenance order registered in a Magistrates' Court is enforceable as if it were an order for the payment of a civil debt recoverable summarily. The order may be enforced by a warrant of distress or commitment that may be executed in any part of Nigeria.[104]

[95] Paragraph 15–17.
[96] Paragraph 32.
[97] Paragraphs 33 and 35.
[98] Cap. 114 *Laws of the Federation of Nigeria*, 1958, formerly known as Maintenance Orders Ordinance.
[99] Section 3(1).
[100] *Foley v Foley* [1959] LLR 82.
[101] Section 3(2).
[102] Section 4.
[103] The Act has been extended by proclamation to Australia, New Zealand, Ghana, Sierra Leone, Gambia, Guiana, Zambia, South Africa and Jersey – Vol. VIII, 1388, *Laws of the Federation of Nigeria*, 1958.
[104] Section 7.

## D TRANSACTIONS INTENDED TO DEFEAT CLAIMS

In any matrimonial proceedings, the court may set aside or restrain the making of an instrument or disposition of property by or on behalf of, or by the direction or in the interest of, a party, if it is intended to defeat an existing or anticipated order for costs, damages, maintenance or the making or variation of a settlement.[105] For the court to set aside a transaction, it must be shown that the main object of the respondent was to defeat the petitioner's claim. The court may order that any money or property dealt with by such instrument or disposition be taken in execution or charged with the payment of such sums for costs, damages or maintenance as the court directs. Alternatively, the court order may direct that the proceeds of the sale of such property be paid into court to await further orders.[106] In making an order, the court is to have regard to the interests of a *bona fide* purchaser or other persons interested in the property, and may make any order which is proper for the protection of the interests of such persons.[107]

Any person who acts in collusion with the party engaged in the fraudulent transactions may be ordered to pay the costs of any other party, a *bona fide* purchaser or other person interested in the property. He may also have to pay the costs of, or the costs incidental to, any such instrument or disposition, and the setting aside or restraining of the instrument or disposition.[108]

## E INDEPENDENT ACTION FOR ANCILLARY RELIEF

It is important to determine the circumstances in which an order for ancillary relief may be made. For instance, it may be necessary to ascertain if an action for ancillary relief may be brought under the MCD 1970 independently of proceedings for a principal relief.[109] The key to this problem lies in Section 114(1)(c) of the Decree, which defines 'matrimonial cause' as:

> Proceedings with respect to the maintenance of a party to the proceedings, settlements, damages in respect of adultery, the custody or guardianship of infant children of the marriage or the maintenance, welfare, advancement or education of children of the marriage, *being proceedings in relation to concurrent, pending or completed proceedings of a kind referred to in paragraph (a) or (b) above*, including proceedings of such a kind pending at, or completed before, the commencement of this Decree.

[105] Section 105(1) of the MCD 1970.
[106] Section 105(2).
[107] Section 105(3).
[108] Section 105(4).
[109] Before 1950, an independent action for maintenance could not be instituted – *Okpaku v Okpaku* [1947] 12 WACA 137. But Section 22 of the English Matrimonial Causes Act 1965, which applied to Nigeria up till March 1970, allowed such independent action.

This provision is quite specific that proceedings in respect of ancillary relief must be related to concurrent, pending or completed proceedings for a principal relief – that is – divorce, nullity of marriage, judicial separation, restitution of conjugal rights, or jactitation of marriage. Consequently, an independent action for ancillary relief is outside the jurisdiction of the High Court as prescribed in S 2(1) of the MCD 1970.[110]

Undoubtedly, this position may involve hardship for applicants who desire to obtain a relief such as maintenance or custody of children without wanting the dissolution of the marriage or other principal relief. Moreover, a Nigerian applicant cannot resort to courts of summary jurisdiction for such relief, as these courts lack jurisdiction in respect of ancillary relief. The principal cause of this unsatisfactory situation is our unfortunate wholesale adoption without regard to local conditions of a provision which was designed to suit the special constitutional set-up of a foreign country.[111]

## F COSTS

In all matrimonial proceedings, costs are in the absolute discretion of the court.[112] The court may make such order for costs or security for costs as it deems proper in the particular case before it. As a general rule, a successful wife is entitled to her costs. But an unsuccessful wife may be granted costs if she has obtained security for her costs. A successful husband may obtain costs against his wife where she has sufficient means of her own or has unnecessarily increased the husband's costs.[113] However, an unsuccessful husband is obliged to pay the wife's costs. An unsuccessful co-respondent is normally required to pay the full costs of the suit.[114]

## G MAINTENANCE UNDER CUSTOMARY LAW

The husband of a customary-law marriage is under a duty to maintain his wife. His responsibility in this respect is to provide her with neces-

[110] *Esua v Esua* Suit No. M/63/70 (unreported), High Court, Lagos, George, J. For the contrary opinion based on the argument that Sections 22 and 23 of the English MCA 1965, which provide for independent right of action, are similar to S 70 of the MCD 1970, see *Akinwunmi v Akinwunmi* Suit No. M/66/70 (unreported), High Court, Lagos, 19 March 1971; Kazeem, J, in *Esua v Esua*, Suit No. M/63/70, 4 December 1970; *Asomugha v Asomugha*, Suit No. M/139/72, High Court, Lagos, 10 July 1972 (CCCHCJ/7/72 P 63).

[111] S 114(1)(c) is identical to S 5 of the Australian Matrimonial Causes Act 1959–1965, on which our Matrimonial Causes Decree was modelled. Although an independent action for ancillary relief cannot be obtained under the Australian 1959–1965 Federal Act, state courts have concurrent jurisdiction in matrimonial causes and do provide for such action.

[112] Section 110 of the MCD 1970.

[113] *Baker v Baker* [1950] 1 All ER 812.

[114] On costs generally see Tolstoy, D., *The Law and Practice of Divorce and Matrimonial Causes*, 5th Edn (Sweet & Maxwell, London 1963), 204–217; *Rayden's Practice and Law of Divorce* (ed. Jackson, P., and Turner, C. F.), 9th Edn (Butterworth, London 1964), 475–484, 684–703.

saries including food, clothing, shelter and medical care. In parts of Northern Nigeria, the duty to maintain a wife under customary law is statutory. For instance, under Section 8(2)(c) of the Native Authority (Declaration of Borgu Native Marriage Law and Custom) Order 1961,[115] a wife has a right to maintenance by the husband, including the provision of food, clothing and housing at a standard commensurate with his means.

In 1965, a female member of the then Eastern Nigeria Legislature introduced a bill – The Married Women (Maintenance) Bill[116] – intended to make statutory provision for the maintenance of wives of customary-law marriages. Under the Bill, a customary court would have been empowered to make an order for periodic payment of maintenance to a wife if the husband had deserted her or had been guilty of persistent cruelty or wilful neglect to provide her with reasonable maintenance, or had ever compelled her to submit herself to prostitution. Unfortunately, the bill never became law.

By the principle of *Nafaga* under the Maliki School of Moslem Law applicable in Northern Nigeria, a husband is obliged to maintain his wife whether or not he has the means to do so and regardless of the wife's means. If a husband who lives in the same locality with his wife fails to maintain her, he will be ordered by an Alkali court to do so. If he disregards the order, his wife will be entitled to the dissolution of the marriage. Where the husband who has failed to maintain his wife lives in a different locality from her, he is usually granted a reasonable period to do so, after which the marriage may be dissolved for non-compliance.[117] The husband's duty to provide maintenance under Maliki Moslem Law is operative whether or not the parties are cohabiting. It is a duty that flows from the fact of marriage.

The husband's duty under customary law to maintain his wife is usually limited to the period of cohabitation, which includes any period when they are living apart as a result of the husband being away on duty. But if the living apart is a result of the husband or wife being in desertion, there is no generally recognized obligation to provide maintenance for the wife. The duty to maintain a wife is determined by the dissolution of the marriage. On the death of a husband, the maintenance of his wife will depend on her position in the family. If she marries a relative or son of her deceased husband, the duty to maintain her will devolve on the new husband. On the other hand, if she remains in the family without re-marrying, for instance, where she is old and has grown-up children, the obligation to maintain her is partly that of the children and partly

[115] NALR 52 of 1961. See also S 7(2)(c) of the NA (Declaration of Biu Native Marriage Law and Custom) Order 1964 (NALN 9 of 1964); S 8(2)(c) of NA (Declaration of Idoma Native Marriage Law and Custom Order 1959 (NALN 63 of 1959).

[116] Supplement to *Eastern Nigeria Gazette* No. 73, Vol. 14, 14 November 1965, Part C. The Bill was introduced by Mrs J. N. Mokelu, member for Enugu.

[117] Anderson, J. N. D., *Islamic Law in Africa*, Colonial Research Publication No. 16 (HMSO, London 1954), 210–211, 370–371.

that of the extended family. However, if she leaves the husband's family she has no right to be maintained by that family.

**Enforcement of maintenance**

Customary law does not provide judicial machinery for the enforcement of the husband's duty to maintain his wife. If he fails to discharge his obligation, the wife may resort to extra-legal processes. She may lodge a complaint with the husband's extended family. The family may bring pressure on him to maintain his wife. If this fails, the wife may be maintained by members of the husband's family as part of their communal responsibility. However, the parents or family of a wife who is left destitute by her husband may make strong representations to his family on his dereliction of duty. If no redress is obtained, they may recall the wife, or she may abandon her husband and re-marry. It is, therefore, a social rather than legal sanction that compels a husband to maintain his wife under customary law. For instance, the ill-treatment of a wife that takes the form of her husband leaving her without maintenance may make him and his family unpopular in the society. This often results in parents refusing in future to give their daughters in marriage to other members of his family.

The proposed Married Women (Maintenance) Bill 1965,[118] referred to above, sought to remedy this situation. It conferred jurisdiction on customary courts and provided that non-compliance with an order for maintenance made by a customary court might be enforced in the same manner as a judgment debt.

Although a customary-law wife has no right of action under customary law to enforce her maintenance by the husband, it is relevant to enquire if she is entitled to any such right under the common law. For instance, it may be asked whether a customary-law wife can pledge her husband's credit. It is an established principle of common law that a wife has no authority, by virtue of the marriage *per se*, to contract on behalf of her husband.[119] However, where a husband and wife cohabit, the wife is presumed to have her husband's authority to pledge his credit for necessaries. This presumption, which is based on the mere fact of cohabitation as man and wife,[120] also arises when a man lives with a woman to whom he is not married and allows her to pass as his wife.[121] Consequently, where the husband and wife of a customary-law marriage cohabit as man and wife it is submitted that the wife can pledge her husband's credit for necessaries. Moreover, a customary-law husband may expressly authorize his wife to pledge his credit or ratify a contract for necessaries she has entered into with a tradesman.

Where, on the other hand, a wife lives apart from her husband, she will have the authority, as his agent of necessity, to pledge his

[118] *Supra*, Section 5.
[119] *Debenham v Mellon* (1880) 6 App Cas 24.
[120] *Harrison v Grady* (1865) 13 LT 369.
[121] *Ryan v Sams* (1848) 12 QB 460; *Gomme v Franklin* (1859) 1 F & F 465, 175 ER 811.

credit for necessaries only if she has been deserted or turned out of the home without adequate maintenance.[122] The wife's authority derives from her status as a wife. In applying this common-law rule in Nigeria, due consideration should be given to local circumstances. Nigerian law recognizes two systems of marriage – statutory and customary-law marriage. Consequently, it is submitted that equal status should be accorded the parties to both.[123] Thus, a deserted customary-law wife should, like her statutory-marriage counterpart, be able to pledge her husband's credit for necessaries.

[122] *Wilson v Ford* (1868) LR 3 Exch 63; *Johnston v Sumner* (1858) 3 H & N 261.

[123] *In Mawji v The Queen* [1957] AC 126, 135, the Privy Council held that in the criminal law of Tanganyika, the words 'husband and wife' if unqualified are not restricted to monogamous unions.

# PART III

# RELATIONS BETWEEN PARENT AND CHILD

# 10
# Legitimacy and Legitimation

The question of legitimacy and legitimation are principally connected with status. It is, therefore, important to determine the status of a child at any given moment, as it has far-reaching legal consequences. For instance, the status of a child as legitimate or illegitimate is fundamental in determining his right to succession and maintenance.

A child may be born legitimate or acquire that status by subsequent legitimation.

## A LEGITIMACY

A child is legitimate at birth if born in lawful wedlock. In Nigeria, 'lawful wedlock' includes not only marriage under the Marriage Act but also customary-law marriage and Moslem marriage. These types of marriage are by the law of this country legal, and the issue of such marriages are legitimate.[1] To be legitimate at birth, the parents of the child must be lawfully married either at the time of his conception or at the time of his birth. Consequently, a child conceived during marriage but born after its dissolution is legitimate.

In strict customary law the concepts of paternity, marriage and legitimacy have no necessary connection. For instance, a child may be regarded as legitimate even though the natural parents are not married to each other and the person with respect to whom the child is legitimate is not its natural father. In Ibo custom, for instance, a man who has no male child may persuade one of his daughters to stay behind and not marry. The purpose of such an arrangement is for her to produce a male successor to her father, and thereby save the line from threatened extinction. Thus, any child she bears while remaining with her parents is considered the legitimate child of her father at birth. Any male child so produced has full rights of succession to the grandfather's land and title.[1a] Again, a barren wife may, in an effort to fulfil her obligation to bear children for her husband, 'marry' another wife for her husband –

[1] Ademola, CJN, in *Lawal v Younan* [1961] 1 All NLR 245, 250 [1961] WNLR 197, 201.

[1a] This custom is known as *Arewa* or *Arhewa* in Ishan custom and *Idegbe* in Western Ibo custom; see Bradbury, R. E. and Lloyd, P. C., *The Benin Kingdom and the Edo-Speaking Peoples of South-Western Nigeria, West Africa, Part XIII* (International African Institute, London 1957), 80; Thomas, N. W., 'The Edo-speaking peoples of Southern Nigeria' (1910) Vol. 10, *Journal of the Royal African Society*, 7–8; Rowling, C. W., *Notes on Land Tenure in Benin, Kukuruku, Ishan and Asaba Divisions of Benin Province* (Lagos, Government Printer 1948) para. 99.

that is, provide the dowry for the marriage. Children born of the other wife are regarded as the legitimate children of the husband. There are also instances of a child being regarded as the legitimate child of a man who is not its natural father. If, for instance, a widow remains in her late husband's family without re-marrying and her marriage with the late husband is not formally dissolved, any child she bears post-humously is regarded as the legitimate child of the late husband at birth.

This custom was judicially approved in *Nwaribe v President Oru District Court & Anor*[1b] as not being contrary to natural justice and equity. In that case, the husband of Oyibo died and she continued to live in the matrimonial home, in the family of the deceased. She became pregnant by the applicant, Nwaribe, while still living there, but before delivery she left to stay with her people. Subsequently, she took action in the customary court for a formal divorce. The court held that her marriage to the deceased, Obiora, was not dissolved by death in 1952, and awarded Oyibo's child to the brother of the deceased. Although the applicant did not participate in the customary-court proceedings, he challenged the decision of that court as being contrary to natural justice and equity. Egbuna, J, distinguished the case before him from *Edet v Essien*[1c] on the ground that in the case under consideration Oyibo continued to reside in her late husband's house after his death and became pregnant while staying there. There was no question of a claim to the child on the basis that the late husband was not refunded the dowry, as was the case in *Edet v Essien*. Moreover, the learned judge argued, the applicant did not appear to contest the issue of the custody of the child in the customary-court proceedings, and he was aware and admitted in his affidavit that by the custom of his locality the children were those of Oyibo's late husband. He therefore held that the custom was not contrary to natural justice and equity.

This decision is not free from difficulties. In the first place, no clear distinction is made between paternal rights in respect of legitimacy, and custody *per se*. The rules governing these two matters differ radically. Moreover, it is difficult to distinguish, as the learned judge did, the basic issue in this case from that in *Edet v Essien*. In the former case, the natural father of the child claimed it as against the deceased husband of its mother or his family, while in the latter the natural father's claim was against that of the former husband of the mother. Narrowed down, the basic question in both cases is the same – whether the claim of the natural father of a child should be preferred to that of the deceased husband of its mother, or her former husband to whom dowry has not been repaid. Moreover, although the two decisions stand in clear contrast to each other, one cannot be regarded as overruling the other as they are judgments of courts of equivalent jurisdiction – being High Courts presided over by a single judge. But on balance the decision in *Edet v Essien* is preferable to that in the case under consideration. Consequently the better view is that in cases of this nature, the children

[1b] (1964) 8 ENLR 24.

[1c] (1932) 11 NLR 47; See also *Mariyama v Sadiku Ejo* [1961] NRNLR 81.

should be regarded as belonging to their natural father even though that conclusion may be contrary to the prevailing custom.

With regard to the learned judge's contention that Nwaribe did not contest the issue of custody of the child in the customary court, it may be countered that on principle, delay should not defeat the claim of the natural father. If delay involved the maintenance of the child by a third party, the natural father should have been made to repay the maintenance costs as a condition of his being allowed to claim the child. Where no claim whatsoever is made by the natural father, any custom by which a child is deemed to belong to the deceased husband of its mother may be reasonable: as the mother is deemed to belong to her late husband's family, the child should belong there also.

The learned judge also raised the point:

> if the applicant knew that this is the custom of Otulu and conceived the woman whilst she was staying in the deceased husband's place as a member of that household he cannot be heard to complain to this Court that the decision of the native court was against natural justice.[1d]

It is submitted that the mere knowledge, at the time of acting, that a particular local custom would apply to one's conduct has nothing to do with the general validity of that custom. A custom which is considered generally unacceptable should not be observed, no matter what the state of mind of the applicant at the time he acted. Knowledge does not in this case constitute an estoppel.

From our discussions, it is clear that under customary law a child may be regarded as legitimate even though its mother never acquired the status of a lawful wife or widow, or even if the putative father is not the natural father of the child. As has been pointed out, some of the customs may not be approved by the superior courts. However, the practical problem which confronts every student of this branch of the law is that in spite of the condemnation of some of these customs by the courts, they are still regarded as governing the relationships of most people in actual life. It is only on the few occasions when disputes involving status come before the superior courts that their application is questioned. The result is that the views of the superior courts on the validity of such customs bear little or no relation to the actual practice in the villages.

### 1 Legitimacy of children of a void marriage

Ordinarily, any child born of a void marriage is illegitimate. But the position is not clear-cut where, in Nigeria, the void marriage was celebrated under the Marriage Act. It is customary for Nigerians who desire to marry each other to be married first under customary law before contracting a marriage in accordance with the Marriage Act. If the subsequent statutory marriage is therefore void, it is submitted that the customary-law marriage remains valid, and a child conceived or born after a statutory marriage will be legitimate at birth because of the

[1d] (1964) 8 ENLR 24, 26.

subsumed customary-law marriage.

In the absence of the preceding contention, there is no provision of Nigerian law whereby a child of a void statutory marriage may be regarded as legitimate. This situation may sometimes work hardship, for instance, where the parties reasonably believed that their marriage was valid. In some countries, children of such marriages are regarded as legitimate. By Section 2(1) of the English Legitimacy Act 1959, for instance, the child of a void marriage is considered legitimate if at the time of the act of intercourse resulting in its birth (or at the time of the celebration of the marriage if later), both or either of the parents reasonably believed that the marriage was valid. A similar provision in Nigerian law, it is submitted, will go a long way to alleviate the hardships of a void marriage.

**2 Legitimacy of children of a voidable marriage**

At common law, a decree of nullity in respect of a voidable statutory marriage was retrospective, thereby bastardizing the children of the marriage. But a major change has been effected in this respect by the Matrimonial Causes Decree 1970. By Section 38(1) of the statute, a decree of nullity in respect of a voidable marriage is effective only from the date on which the decree becomes absolute. Moreover, such decree of nullity does not render illegitimate a child of the parties born since, or legitimated during, the marriage.[2]

The child of a void or voidable customary-law marriage is not regarded as born legitimate. But such a child may, in some parts of the country, be legitimated by the subsequent acknowledgement of its natural father.

**3 Presumption of legitimacy**

*(i) Common Law.* A child born in lawful wedlock is presumed legitimate at common law until the contrary is proved.[2a]

*(ii) Statutory Law.* There is a statutory presumption in favour of legitimacy. Under Section 147 of the Evidence Act,[3] a child born during the continuance of a statutory marriage or within two hundred and eighty days after the dissolution of such marriage is presumed legitimate. But neither of the parents of such a child can testify to rebut this presumption.[4] However, the law has now been altered by the Matrimonial Causes Decree 1970.

Section 115(3) of the Decree, provides that:

Without prejudice to Section 84 of the Matrimonial Causes Decree

[2] Section 38(2).

[2a] *Egwunwoke v Egwunwoke* [1966] 2 All NLR 1, 3–4 [1966] NMLR 147.

[3] Cap. 62 *Laws of the Federation of Nigeria*, 1958.

[4] This was the old English rule as enunciated in *Russell v Russell* [1924] AC 687, which the Supreme Court has ruled is the rule under Section 147 of the Evidence Act – *Elumeze v Elumeze*, SC 79/68 of 18 July 1969.

1970, where a person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, the court shall presume that the person in question is the legitimate son of that man.

But by Section 84 of the Decree, both spouses are competent witnesses to give evidence or prove that the parties did not have sexual relations with each other at any material time. Consequently, each may adduce evidence to rebut the presumption of legitimacy of a child born during the marriage. But the spouses are not compellable to give such evidence if it will bastardize a child born to the wife during the marriage.

*(iii) Presumption of legitimacy in customary law.* A child born during the subsistence of a customary-law marriage is presumed legitimate.[5]

In many cases that come before the courts, the question of legitimacy is often intertwined with that of custody. This gives rise to some confusion, and it requires a careful reading of the cases to discern clearly the issues involved.

Some systems of customary law presume a child legitimate at birth even though born after the dissolution of the marriage and the repayment of bride-price. Under Igbirra Customary Law, for instance, any child born within ten calendar months of a divorce is regarded as the legitimate child of the former husband even though he cannot possibly be the father of the child.[5a]

Customary courts usually regard the customary-law presumption of legitimacy as irrebuttable. The unsatisfactory consequence of this rule is that the presumption is applied even when it is obvious that the child does not belong to the husband. While the customary courts have stuck to the practice of regarding the presumption as irrebuttable, the superior courts have always treated it as rebuttable. In *Edet v Essien*[6] the appellant was married[7] to W under customary law. W left him and went to live with the respondent, who did not repay the bride-price paid by the appellant on W. Two children were born to W and the respondent. The appellant claimed that the children were his under customary law. Carey, J, found that the alleged custom was not proved. The learned judge was of the opinion that even if the alleged custom was definitely established, he would, in the particular circumstances, refuse to apply it as being contrary to natural justice, equity and good conscience.

The attitude of the superior courts to presumption of legitimacy under customary law was again discussed in *Mariyama v Sadiku Ejo*.[8]

[5] *Ezekiel v Alabi* [1964] 2 All NLR 43.

[5a] *Mariyama v Sadiku Ejo* [1961] NRNLR 81.

[6] (1932) 11 NLR 47.

[7] The Commissioner of the Provincial Court found as fact that the appellant had paid dowry for Inyang Edet when she was still a child, and that subsequently the respondent, having agreed with the girl to marry, obtained her parents' consent and paid dowry to them (p. 48 of the report).

[8] [1961] NRNLR 81.

The appellant was the divorced wife of the respondent. After the divorce, she re-married. She gave birth to a child about fifteen months after she had last had intercourse with her former husband, but less than ten months after the divorce. The respondent claimed the child as his in accordance with Igbirra customary law, by which a child born within ten months of a divorce belongs to the former husband. In the customary court, the child was regarded as the legitimate child of the respondent in spite of the fact that he could not possibly have been the father. On appeal, Holden, J, declined to apply the custom, which he regarded as repugnant to natural justice, equity and good conscience. He observed:

> The native law and custom which respondent asks us to enforce would have this girl taken for life away from her natural parents, the appellant and her present husband and given to a total stranger. We feel that to make such an order would be contrary to natural justice and good conscience, and we are therefore not prepared to do so. We must not be understood to condemn this native law and custom in its general application. We appreciate that it is basically sound and would in almost every case be fair and just in its results. There is a similar provision in Muslim Law, and also in English Law, where there is a presumption in similar cases that the former husband is the father. That presumption we feel must be rebuttable if natural justice is to be done. In this case it has been clearly and absolutely rebutted . . .[9]

Certainly the attitude of the superior courts here is most commendable, as it would be wrong in principle to hand over a child to a total stranger merely because dowry has not been refunded, or on account of some other similar custom.

## B LEGITIMATION

Legitimation is the process by which a child who has not been born legitimate acquires legitimate status. The process of legitimation may be achieved by the subsequent marriage of the parents of the child or his acknowledgement, that is, by recognition of the paternity of the child by his natural father.

### 1 Legitimation by subsequent marriage

We shall consider separately the question of legitimation by subsequent marriage under statutory law and customary law.

#### (A) STATUTORY LAW

The legitimation of an illegitimate child through the subsequent marriage of its parents was first made possible in Nigeria by the enactment of the Legitimacy Act 1929.[10] This piece of legislation, though based substantially on the earlier English Legitimacy Act 1926, contained some variations intended to suit local conditions. The 1929

[9] At 83.
[10] Ordinance No. 27 of 1929.

enactment applied then to the whole country. With the introduction of federalism in Nigeria in 1954, legitimacy became a regional subject on which the various regional governments could legislate. Fortunately, the regional governments inherited and preserved the original enactment without alteration. This accounts for the fact that there is now uniformity in state laws on legitimacy.[11]

*(i) Legitimation by subsequent marriage.* By Section 3(1) of the Legitimacy Act:

> Where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in Nigeria, render that person, if living, legitimate from the commencement of this Act, or from the date of the marriage, whichever last happens.

The operation of Section 3(1) is based on the fulfilment of certain prerequisites. First, the parents of the illegitimate person must have subsequently married each other. The marriage must be a statutory one in accordance with the Marriage Act and not marriage under customary law. Second, the father of the illegitimate person must be domiciled in a state in Nigeria at the date of the marriage.[12] Third, it is essential that the person to be legitimated must be alive at the date of the marriage.[13] The legal effect of the subsequent marriage of the parents is to make the illegitimate person legitimate from the commencement of the Act or from the date of the marriage, whichever happens last. Thus, if the marriage took place before 17 October 1929 (the date of commencement of the Act) the illegitimate person will become legitimate as from that date. If, on the other hand, the marriage was celebrated after 17 October 1929, he will become legitimate as from the date of the marriage.

It is significant that there is no requirement that the parents of the illegitimate person must not be married to some other persons at the time the child is conceived or born. The absence of such requirement was a deliberate decision of the law-makers.[14] Consequently, the child of an adulterous union may be legitimated by the subsequent marriage

[11] See Legitimacy Act, Cap. 103 *Laws of the Federation of Nigeria*, 1958; Cap. 62, *Laws of Western Nigeria*, 1959 (for Mid-West State also); Cap. 75 *Laws of Eastern Nigeria*, 1963; Cap. 63 *Laws of Northern Nigeria*, 1963. References are to sections of the Legitimacy Act (Cap. 103). Its numbering is identical with those of the other statutes.

[12] It is only for the purposes of matrimonial causes that there is one Nigerian domicile (S 2(3) of MCD 1970).

[13] Section 3(1) states that the effect of the marriage is to '. . . render that person, *if living* legitimate . . .'

[14] For the legislative history of this provision see the *Nigerian Legislative Council Debates*, 1929, 30 September 1962. The dropping of Section 2(1) of the English Legitimacy Act 1926 (which prohibited the legitimation of adulterous children) from the Nigerian statute was decided by a free vote in the Council, and the voting was 17 in favour of dropping the English provision and 11 against.

of its parents in accordance with the Legitimacy Act. It is submitted that judicial doubts which were cast on this conclusion by Jibowu, J, in *Re Sarah Adadevoh*[15] and in *Alake v Pratt*[16] were due either to a misunderstanding of the Nigerian statute or a confusion of the pre-1959 English law with Nigerian law. In fact, the conclusion reached here was approved *obiter* by Brett, F J, in *Cole v Akinyele*.[17]

Section 9(1) of the Legitimacy Act makes provision for the situation where the father of an illegitimate person was domiciled in a foreign country. If at the time of the birth of the illegitimate person, his father was domiciled in country X, the law of which does not permit *legitimatio per subsequent matrimonium*, but at the time of his marriage to the mother of the illegitimate he was domiciled in country Y, by the law of which such legitimation is recognized, the illegitimate person will be recognized as legitimated in Nigeria. His legitimation will be by virtue of the subsequent marriage, and takes effect from the commencement of the Legitimacy Act or the date of the marriage, whichever happens last.

*(ii) Effect of legitimation.* A person legitimated by the subsequent marriage of his parents has the same rights and is under the same obligations in respect of the maintenance and support of himself or of any other person as if he had been born legitimate. Such a person is also entitled to all rights to claims for damages, compensation, allowance or benefit which are vested in a legitimate person.[18] Thus, on the death of his father as a result of the negligence of another, the legitimated person will be entitled to claim under the Fatal Accident statutes as a legitimate child. Stated briefly, the effect of legitimation is to confer on a person who was born illegitimate all the rights and obligations of legitimate persons.

*(iii) Rights of legitimated persons to interest in property.* One important consequence of legitimation is to enable the legitimated person, and his wife and children, to take, as from the date of the legitimation, interest in property on intestacy or disposition occurring after that date, as if he had been born legitimate.[19]

Where a legitimated person participates along with other children in the distribution of property according to seniority, he ranks as if he had been born on the date when he became legitimated. If, however, there are more persons who were legitimated at the same time, they will rank *inter se* in their natural order of seniority.[20]

The law makes special provision for an illegitimate person who dies

[15] (1951) 13 WACA 304; Suit No. AG 68 of 1952 (unreported). This judgment has been declared a nullity on the application of the principle of *res judicata* – see *In the Matter of the Estate of Herbert Macaulay – Deceased, in re Helena Smith and Others*, Suit No. M/209 and 220/66 (unreported) George, J, Lagos High Court, 10 April 1967.

[16] Suit No. 400/1951 consolidated with suit No. 4289 of 6 April 1954 (unreported).

[17] (1960) 5 FSC 84, 87.

[18] Section 8 of the Legitimacy Act.

[19] Section 5(1).

[20] Section 5(2).

after the commencement of the Legitimacy Act but before the marriage of his parents, leaving a spouse and children. If the deceased would have been legitimated by the marriage of his parents, which occurs during the life of his wife and children, the latter will be entitled to any interest in property as if the deceased had been born legitimate on the date of such marriage.[21]

(B) LEGITIMATION BY SUBSEQUENT CUSTOMARY MARRIAGE

There is a paucity, if not absence, of authority on the principle of legitimation by subsequent customary-law marriage. A probable reason for this state of affairs is the fact that some systems of customary law provide for legitimation by acknowledgement. It was, therefore, considered simpler to acknowledge an illegitimate child than to resort to legitimation by subsequent marriage.

The question of non-statutory legitimation, including that by subsequent customary-law marriage, was considered by Brett, F J, in *Cole v Akinyele*.[22] In that case, the deceased married a wife under the Marriage Act. During the subsistence of the marriage, the deceased formed an irregular association with the mother of the two appellants. One of the appellants was born during the deceased's wife's lifetime and the other, six weeks after her death. In considering the legitimacy of the first appellant, born during the continuance of the marriage, Brett, F J, stated that he would regard it contrary to public policy for the deceased during his lifetime to confer the status of a legitimate child on the first appellant by any other method than that provided by the Legitimacy Act.[23]

It is not easy to appreciate the basis on which Brett, FJ, rejected legitimation other than under the statute. In the Nigerian situation it is not rational to reject other methods of legitimation as being contrary to public policy merely because of the existence of a statutory marriage at the time the child was born. It has been pointed out that under the Legitimacy Act an adulterous child may be legitimated by the subsequent marriage of its parents. Public policy will not be more outraged if the child born during the subsistence of the statutory marriage is legitimated by acknowledgement or the subsequent marriage of the parents under customary law.

Attention should be drawn to the salient fact that the learned judge's remarks were directed at legitimation otherwise than under the Legitimacy Act of an illegitimate child born during the continuance of a statutory marriage. No reference was made therein to the instance where the child is born during the subsistence of a customary-law union. It is submitted that there are no convincing reasons why legitimation by a subsequent customary-law marriage should not have full legal effect.

The basic question in the case considered above should be proof that the relevant customary law provides for legitimation by subsequent

[21] Section 7.
[22] (1960) 5 FSC 84.
[23] id. at 88.

customary-law marriage. Once this is satisfactorily established, the customary-law rule as to legitimation should not be set aside on the ground of public policy.

**2 Legitimation by acknowledgement**

Under some systems of customary law an illegitimate child may be legitimated by acknowledgement.[24] Acknowledgement consists of any act of the natural father of an illegitimate child by which he recognizes the paternity of the child.

Unlike in English or statutory law, the existence of a valid marriage is not a pre-requisite of the operation of the principle of acknowledgement. Consequently, an illegitimate child may be legitimated by acknowledgement despite the fact that the parents have never been married to each other.[25]

(A) ACT WHICH CONSTITUTES ACKNOWLEDGEMENT

To constitute acknowledgement, the act or conduct of the illegitimate child's natural father must be such as to indicate or establish his acceptance of the child's paternity. It is not necessary that the act or conduct should be formal. Informal acts may, in appropriate circumstances, be enough.

It has been held that the performance of the customary naming ceremony eight days after the birth of a child is ample evidence of acknowledgement.[26] But in *Akerele v Balogun*,[27] it was contended in defence that the performance of the naming ceremony of the illegitimate child by his natural father outside his house was proof that he did not accept paternity. Although the court did not rule on this defence, it is submitted that its validity is doubtful. The failure to perform the ceremony in the natural father's house may be capable of being explained away. For instance, in this particular case, he was anxious to keep his association with the mother of the illegitimate child secret because of the difference in their ages.

Where the birth certificate of the illegitimate child bears the name of the natural father and was in fact obtained by him or on his instructions, there is clear evidence of the recognition of paternity.[28] But in *Young v Young*,[29] it was held that a baptism certificate bearing the name of the natural father cannot be regarded as an admission of paternity by him. The reasons adduced for this conclusion were that there was no indication in the document as to who was responsible for the baptism or who

[24] *Alake v Pratt* (1955) 15 WACA 20; *Phillip v Phillip* (1946) 18 NLR *Taylor v Taylor* [1960] LLR 286; *Abisogun v Abisogun* [1963] 1 All NLR 237; *Akerele v Balogun*, in re Folami [1964] LLR 99. See Nwogugu, E. I., 'Legitimacy in Nigerian Law' [1964] vol. 8 *Journal of African Law*, 96; Kasunmu, A. B., 'The Principle of Acknowledgement or Recognition of Paternity under Customary Law in Nigeria' (1964) 13 *ICLQ*, 1093.

[25] Per Ademola, CJF, in *Lawal v Younan* [1961] 1 All NLR 245, 250.

[26] *Phillip v Phillip* (1946) 18 NLR 102.

[27] [1964] LLR 99 at 101.

[28] id. at 102–3.

[29] [1953] WACA Cyclostyled Judgments (April–May 1953), 19.

gave the information contained in it, nor was there any other evidence which threw any light on the matter.[30] Consequently, if proper evidence is adduced to explain the circumstances in which the baptism certificate was issued and connect it to the parentage of the illegitimate child, it may constitute adequate evidence of admission of paternity.

An admission of paternity made in a letter addressed to the Chief Registrar of the Supreme Court of Nigeria has been held to amount to acknowledgement.[31]

Sometimes, the maintenance of the child by the natural father, including his education (that is, the payment of school fees) is regarded as evidence of acknowledgement.[32] But these acts are in themselves equivocal, as a man may maintain or educate any child. It is submitted that to be satisfactory, such act or conduct must be buttressed by other evidence linking the illegitimate child to the natural father.

### (B) IS ACKNOWLEDGEMENT A UNIVERSAL PRINCIPLE OF NIGERIAN CUSTOMARY LAW?

In *Lawal v Younan*,[33] Ademola, CJN, stated:

> In Nigeria, a child is legitimate if born in wedlock according to the Marriage Ordinance. There are also legitimate children born in marriage under Native Law and Custom. Children not born in wedlock (Marriage Ordinance) or who are not the issues of a marriage under Native Law and Custom, but are issues born without marriage can also be regarded as legitimate children for certain purposes, if paternity has been acknowledged by the putative father . . .[34]

The latter part of this statement is misleading because it suggests that the principle of legitimation by acknowledgement is recognized throughout Nigeria. In fact, most of the cases in which the courts accepted and applied this principle arose and were connected with the Yoruba tribe. However, in *Jirigho v Chief Anamali*,[35] a case which arose under the Fatal Accident statute, Duffus, J, held, as proved, that legitimation by acknowledgement is a principle of the customary law of the Kwale tribe in the Mid-Western State, to which the deceased belonged.

But there is yet no authority that acknowledgement is a principle of customary law in Eastern or Northern Nigeria. In Ibo customary law, for instance, the child of an unmarried woman is illegitimate, and it does not seem that it could be legitimated by the acknowledgement of its paternity. In *Onwudinjoh v Onwudinjoh*,[36] the deceased, during the continuance of his statutory marriage to Agnes, purported to marry

[30] id. at 22–23.
[31] *Young v Young* [1953] WACA Cyclostyled Judgments (April–May 1953).
[32] *Abisogun v Abisogun* [1963] 1 All NLR 237.
[33] [1961] 1 All NLR 245; [1961] WNLR 197.
[34] [1961] 1 All NLR 245, 250.
[35] [1958] WRNLR 195.
[36] (1957) Vol. II ERNLR 1.

one Chinelo under customary law. Chinelo's children claimed the right to share in the deceased's property on his intestacy. No evidence was led to establish that the principle of acknowledgement was part of the applicable Ibo customary law. Ainley, CJ, was, however, prepared to consider the application of this principle if satisfactorily proved.

The situation was quite different in the case of *Re Edu Dien*.[37] Edu Okputu Dien, who hailed from the Calabar Province of the former Eastern Region (now South-Eastern State), died there intestate, leaving a number of children born of customary-law marriages. He had also an illegitimate child, Okputu Edu Dien, whose paternity he acknowledged. The question for determination was whether the acknowledged child could participate in the distribution of the deceased's residuary estate. On the application of the Administrator-General, the Umon District Court (the local customary court) declared that in accordance with the customary law of the locality the child born out of wedlock was illegitimate. The court did not refer to any applicable customary rule by which such a child could be legitimated by acknowledgement. This conclusion was challenged by the Administrator-General, who urged the High Court to decline to follow the declared customary law as being contrary to natural justice, equity and good conscience. Alexander, J (as he then was), accepted the view that under Nigerian law a natural child could be legitimated by acknowledgement. He therefore refused to hold Okputu Edu Dien illegitimate by Calabar customary law as that conclusion 'would be incompatible with the established *law of Nigeria*'. The learned judge, therefore, applied the principle of acknowledgement even though it was shown not to be part of the applicable customary law. In some respects, the decision may be regarded as a judicial attempt to formulate a universal customary rule for the whole country. If this correctly represents the object of the decision, it is submitted that its implementation will be contrary to one of the fundamental tenets of customary law – its acceptance by the locality in which it applies.

There is no clear authority that acknowledgement of paternity is part of the customary law of the various localities in Northern Nigeria. One writer who made a survey of Igbirra customary family law came to the conclusion that if an unmarried woman gives her child to the natural father and he accepts it, the child is thereby legitimated and will be considered a member of his father's family.[38]

On the basis of the available evidence, it can be stated with certainty that legitimation by acknowledgement is part of Yoruba customary law, and is also recognized in the Kwale tribe of the Mid-Western State and Igbirra. But it cannot be elevated to the status of being a general principle of Nigerian law.

### (c) WHO CAN ACKNOWLEDGE?

It is well established in the decided cases that the right of legitimation

[37] Suit No. N/3/64 (unreported), Lagos High Court.

[38] Salacuse, J., *A Selective Survey of Nigerian Family Law* (Institute of Administration, Ahmadu Bello University, 1965), 73–4.

by acknowledgement is exclusively conferred on the natural father of an illegitimate child. The mother has no corresponding right.

A related problem is whether the right of acknowledgement is reserved in particular to fathers who are subject to customary law only. In *Savage v MacFoy*,[39] which has already been considered, it will be recalled that the court held that a purported customary-law marriage between a Sierra-Leonean resident in Lagos and a Lagos girl was void. Such marriage was not permissible or valid by the law of MacFoy's domicile of origin. But MacFoy on his death left some children of the association whose paternity he acknowledged. The court held that by the Yoruba customary-law principle of acknowledgement these children were legitimate and therefore entitled to share in the distribution of MacFoy's estate. It is submitted that this decision was wrong in principle. The court was inconsistent to declare the marriage void because MacFoy was not subject to customary law, and in another breath apply customary-law rules to legitimate the children of his association with the Lagos woman. It may, therefore, be concluded that the natural father who can legitimate his child by acknowledgement must be a person subject to customary law.

The right to acknowledge an otherwise illegitimate child is personally attached to the natural father, and cannot therefore be exercised by a third person on his behalf. Consequently, if on the father's death a relative or his family acknowledges the paternity of a child, the act will have no legal consequence.

### (D) TIME OF ACKNOWLEDGEMENT

It is pertinent to determine the time or times at which the right of acknowledgement may be exercised. A number of problems may arise in this connection. Must a father acknowledge his child only during his lifetime or the lifetime of the child? Is it necessary that the act or conduct of acknowledgement be made public during the lifetime of the father?

Taking the last problem first, all the decided cases deal with situations where the acknowledgement took place during the lifetime of the natural father and were made public then.[40] A hypothetical problem is where X during his lifetime wrote to Y, and in the letter accepted the paternity of an illegitimate child. Y kept the information to himself and made the letter public only after X's death. It is submitted that the letter in this case is a sufficient acknowledgement. It has been pointed out that acknowledgement may be an admission to someone, or an unequivocal act or conduct which indicates to third parties that the paternity of the child has been accepted. But the facts may be varied slightly, so that the letter though addressed to Y was not sent to him but was discovered amongst X's papers after his death. In the absence of any other act or conduct of the deceased which indicates acknowledgement, it is doubt-

[39] (1909) Renner Reports, 508.

[40] *Phillip v Phillip* (1946) 18 NLR 102; *Taylor v Taylor* [1960] LLR 286; *Abisogun v Abisogun* [1963] 1 All NLR 237; *Akerele v Balogun* [1964] LLR 99.

ful if such document alone will be satisfactory evidence of acknowledgement.

It may happen that the father accepted responsibility for the pregnancy but died before the child was born. Will such a child be regarded as being legitimated by acknowledgement? This situation came before the courts in *Oladele and Others v Akinshola and Another*.[41] The deceased died as a result of a motor accident allegedly caused by the defendants' negligence. The plaintiffs claimed compensation under the Western Nigeria Torts Law as the wives and children respectively of the deceased. It was alleged that the deceased married three wives. One of these women claimed compensation on behalf of herself and her child, who was born after the death of the deceased. The court found that this particular woman was not married to the deceased, but held that the question of acknowledgement did not arise as the child was born after the death of the natural father. There are strong reasons in support of this decision. The acknowledgement of pregnancy may be an imperfect act. This is so because on the birth of the child the purported father may, if still alive, realize that he has made a mistake – the child may resemble someone else, medical tests may show that he is not the father, or facts may come to light before or at the birth which show conclusively that someone else is the father – in which case he may ultimately refuse to accept the child as his. The inchoate act of acknowledgement of pregnancy must be perfected by the formal acceptance of the child at birth by its natural father. It is this latter act which carries the full legal effect of acknowledgement under customary law. Thus, if the purported father of the child dies before its birth, the better view is to hold that there was no legal acknowledgement.

Where the child dies before acknowledgement, it is submitted that the acknowledgement has no legal consequence because its object has ceased to exist.

### (E) RESTRICTIONS ON THE RIGHT OF ACKNOWLEDGEMENT

The judges of the superior courts in Nigeria have accepted the principle of acknowledgement under customary law with certain reservations. This attitude probably arises from their English law training. The problems which beset this aspect of the law were recognized by Brett, FJ, when he stated: 'When a man indulges in irregular unions, no rule regarding the legitimacy or legitimation of his children, however liberal, can altogether avoid anomalies.'[42] Let us now examine the various limitations which have been imposed on this customary-law principle, and evaluate them in relation to the prevalent legal and social background.

*(i) No legitimation if there are legitimate children.* This limitation was suggested by Jibowu, J, in *Re Sarah Adadevoh*.[43] In that case, the de-

[41] Suit No. AB/7/63 (unreported), Abeokuta High Court.
[42] *Cole v Akinyele* (1960) 5 FSC 84, 88.
[43] Suit No. AG 68 of 1952 (unreported).

ceased was the issue of a statutory marriage. He himself had married under the Marriage Act in 1898, but his wife had died in May 1899, leaving no issue. On his death, the deceased had left thirteen children, borne by eight different women. Some of these children were born before and others after the statutory marriage. The West African Court of Appeal held, on the question of succession on intestacy, that the status of the children was to be determined by their *lex domicilii*, which was Nigerian law. It therefore remitted the question of deciding which of the children were legitimate under the relevant customary law in Nigeria to a lower court.[44]

This reference was heard by Jibowu, J, in the old Supreme Court of Nigeria, Lagos Judicial Division.[45] The learned judge found that four of the women were married to the deceased by customary law and that their children were consequently legitimate at birth. The other women were the concubines of the deceased, but their children had been acknowledged by the deceased. Evidence of Yoruba customary rule of legitimation by acknowledgement was given and accepted by the court. Jibowu, J, held that it would be contrary to public policy to legitimate the second set of children by acknowledgement and thereby enable them to participate with the other children in the distribution of the intestate's estate. In his opinion, legitimation and succession to property through acknowledgement can only be effected when there is no marriage recognized by the law or no children of such marriage.

Jibowu's decision is open to criticism. It has not been established that the customary-law principle in question encourages loose and immoral living. In fact, his reasoning has not been followed subsequently. The principle which can be deduced from the decided cases is that illegitimate children born before any legal marriage (statutory or customary-law) may be acknowledged. Similarly, children born after such a marriage has come to an end are capable of being legitimated by acknowledgement.

In *Abisogun v Abisogun*,[46] the deceased husband married the plaintiff in 1930 under the Marriage Act. There was evidence that before the 1930 marriage the deceased had lived a promiscuous life; he had had five children (the defendants) by different women. It was alleged that the mothers of the five children were married to the deceased before 1930. Proof of these marriages would have invalidated the statutory marriage. The Supreme Court, however, held that the pre-1930 customary marriages were not proved, but as the children of the associations were acknowledged by the deceased they were his legitimate children. Conversely, it has been held that a child conceived during but born after the termination of a statutory marriage may be legitimated by acknowledgement.[47]

[44] (1951) 13 WACA 304.
[45] Suit No. AG 68 of 1952 (unreported).
[46] [1963] 1 All NLR 237; *Taylor v Taylor* [1960] LLR 286.
[47] *Cole v Akinyele* (1960) 5 FSC 84.

*(ii) No legitimation of children born during the subsistence of a valid marriage.* Some judges have expressed the view that children born out of wedlock during the subsistence of a valid marriage cannot be legitimated by acknowledgement. For purposes of clarity, we shall examine this view in respect of statutory marriage and customary-law marriages respectively.

*Statutory marriage*

In *Cole v Akinyele*,[48] the deceased, Albert Cole, in the course of his lifetime twice married under the Marriage Act. The first respondent was his sole surviving child by the first marriage, which was terminated by the death of the wife, while the second respondent was his widow by the second marriage. During the subsistence of the first marriage, the deceased maintained an irregular association with the mother of the two appellants. This association, the lower court held, was not proved to be a customary-law marriage, and even if it was so proved, it was contrary to Section 35 of the Marriage Act. The first appellant was born during the subsistence of the first marriage and the second some six weeks after the death of the first wife, when the deceased was a widower. Albert Cole died intestate and the appellants claimed to be entitled to share with the children of the first statutory marriage in the distribution of his estate.

On the claim of the first appellant, Brett, FJ, held:

> I would hold it contrary to public policy for him [the deceased] to be able to legitimate an illegitimate child born during the continuance of his marriage under the Ordinance by any other method than that provided in the Legitimacy Ordinance.[49]

To hold otherwise, the learned Federal Judge stated, would reduce the distinction between customary-law marriage and statutory marriage to a mere form of words.

With regard to the second appellant, the court pointed out that the decisive factor was not, as Kaine, J, held in the lower court, the time he was conceived, but the time of his birth. The fact that the second appellant 'was already in being' when the lawful wife died was not material in considering his status. Brett, FJ, therefore, concluded that as the second appellant was born at a time when his father was free to marry whom he chose, and was acknowledged by his father, he should be regarded as legitimate.

In *Olympio v Oluwole & Anor*,[50] Adefarasin, J, applying the principle in *Cole v Akinyele*, held that a child born by the deceased's concubine between the grant of a decree *nisi* and decree absolute in respect of his statutory marriage was born during the continuance of the marriage of

[48] (1960) 5 FSC 84.
[49] id. at 88.
[50] [1968] NMLR 469.

the deceased. Consequently, the child could not be legitimated by being acknowledged by the deceased.

*Cole v Akinyele* has also been approved and applied in subsequent cases.[51]

It is difficult to justify the distinction which Brett, FJ, made in respect of the status of the two appellants. Public policy is no more outraged at the time the first appellant was born than at the time the second appellant was conceived. If the prohibition of promiscuity is the guiding factor, the conduct of the appellant's parents was equally morally and legally wrong at the time of birth in the first case as at that of conceiving the second appellant.

*Customary-law marriage*

There is only one known case where the legitimation of a child by acknowledgement was rejected because of the child's birth during the continuance of a customary-law marriage. In *Oladele and Others v Akinshola and Another*,[52] X married Y under customary law. Y did not in fact pay any bride-price on X, who claimed that it was not customary for her parents to receive bride-price in respect of daughters given away in marriage. X later left Y and lived with the deceased, who was already married under customary law. The trial judge rejected X's contention that her marriage to Y had been dissolved, because no legal proceedings for divorce had been taken against Y. The judge held that a child of X and the deceased was illegitimate, and could not be acknowledged because he had been born in adultery. *Alake v Pratt* was not cited nor considered by the court.

It is submitted that there are no compelling reasons of public policy why an accepted principle of customary law cannot be applied merely because of the existence of customary-law marriage.

*(iii) Right of acknowledgement must exist at birth.* Another rule which emerges from *Cole v Akinyele* is that the right of acknowledgement must exist at the birth of the child, even though it may be exercised at any time during the child's life. It will be recalled that in that case a child K, born during the subsistence of a statutory marriage between X and Y, was held not entitled to be legitimated by acknowledgement at birth. The court was also of the view that such a child could not be acknowledged even after the death of the statutory-marriage wife.[53]

(F) EFFECTS OF ACKNOWLEDGEMENT

In *Lawal v Younan*, the Supreme Court held that if the paternity of an illegitimate child is acknowledged by his putative father, the child will

[51] *Abisogun v Abisogun* [1963] 1 All NLR 237; *Williams v Williams* Suit No. N/112/1963 (unreported), Lagos High Court; *Craig v Craig* [1964] LLR 96; *In the Matter of the Estate of Odulaja, Deceased* [1964] LLR 108; *Phillips v Osho* SC 180/69, 30 March 1972 (1972).

[52] Suit No. AB/7/63 (unreported), Abeokuta High Court.

[53] *Cole v Akinyele* (1960) 5 FSC 84, 87–88.

be regarded as legitimate 'for certain purposes'.[54] But the purposes were not enumerated. This restriction is not supported either in practice or by authority. The true legal effect of acknowledgement is to make an otherwise illegitimate child legitimate. He thereby acquires the same status as if he has been born in wedlock or legitimated *per subsequens matrimonium*. In *Alake v Pratt*,[55] Jibowu, J, denied children legitimated by acknowledgement of their father the right to share with other legitimate children in the distribution of their father's estate. The learned judge considered it contrary to public policy for children born in promiscuous intercourse to be placed on the same footing as children born in wedlock. This view, however, was rejected on appeal by the West African Court of Appeal, where Forster-Sutton, P, said:

> I do not think for one moment that the court intended that if such native law and custom were proved [by which in certain circumstances a child born out of wedlock is legitimated] and a child born out of wedlock was held to be legitimate under the law in Nigeria, there could in effect, be different grades of legitimacy . . .[56]

An acknowledged child is not legitimate only for the purposes of participating in the distribution of his father's estate. Like a child born legitimate, he could claim compensation against a third party under the Fatal Accident statutes for the wrongful death of his father,[57] or claim under the will of his father.[58]

It has not yet been determined whether the effect of acknowledgement is retrospective to the date of birth or not. On balance, the better view seems to be that acknowledgement should make the child legitimate from the time of his birth, irrespective of the time it was exercised. This view is supported by the fact that on the basis of the present law the right of acknowledgement must exist at the time of the birth of a child. Moreover, the choice of the date of birth introduces an element of certainty into what would otherwise result in chaos if any other date were chosen. For instance, how will the date of legitimation be determined where the act of acknowledgement is not formal, or is continuous?

Although it is suggested that the effect of acknowledgement should be retrospective, it should not affect completed property transactions. For instance, in *Young v Young*,[59] the first defendant, Benjamin Young and his two sons, born in lawful wedlock, by a deed dated 23 May 1944 conveyed property in Lagos which was devised under their predecessor's will as family property. The plaintiff, who was the natural son of Benjamin Young, was acknowledged by an admission made by

[54] [1961] 1 All NLR 245, 250.
[55] Suit No. 400/1951 (unreported).
[56] (1955) 15 WACA 20, 21.
[57] *Jirigho v Anamali* [1958] WRNLR 195.
[58] *Williams v Williams* Suit No. N/112/1963 (unreported), Lagos High Court.
[59] [1953] WACA Cyclostyled Judgments (April–May 1953), 19.

Benjamin Young in a letter written in June 1950 – six years after the execution of the conveyance. In the present action, the plaintiff sought to have the deed of conveyance set aside, as he, being a legitimate member of the family, had not participated in the disposition of family property. The West African Court of Appeal held that an acknowledgement of paternity made after property had ceased to be family property by being conveyed to bona fide purchasers for value by the then members of the family could not operate to make the conveyance voidable at the instance of the acknowledged person. In the opinion of the court, to hold otherwise would be contrary to the principles 'of justice, equity and good conscience'.[60]

An acknowledged person is entitled to participate in the distribution of property on intestacy or disposition which occurs after the date of his acknowledgement.

(G) LEGITIMACY BY CONDUCT

It is important to determine whether an illegitimate child can claim to be legitimate as a result of being treated as such. In *Phillips v Osho*,[60a] one Solomon Phillips and Christiana Vaughan were married under the Marriage Act on 25 April 1897 at Ogbomosho. There were four issues of the marriage, three of whom were the defendants/appellants in the suit. The plaintiffs/respondents, who were born out of wedlock during the subsistence of the statutory marriage, claimed that they were brought up and educated by their natural father. Mrs Christiana Phillips died intestate in 1924, leaving many houses and landed property in Lagos. Solomon Phillips, who survived her, died intestate in 1939, and left his wife's real property intact. Letters of Administration in respect of the personal estate of Solomon Phillips were granted to two of the defendants, who shared it among all the children of Solomon including the plaintiffs. Subsequently, the plaintiffs in an action sought a declaration that they as children of Solomon Phillips were beneficially and jointly entitled to share with the other children of Solomon in the distribution of his estate. Furthermore, the plaintiffs asked the court to order an account of all proceeds received as rent from the landed properties of Solomon Phillips. At the trial it was urged on their behalf that:

> inasmuch as the 1st and 2nd defendants, as administrators of the estate of the deceased, had by their conduct manifested that the plaintiffs were the children of the deceased, they were estopped from putting up a line of defence running counter to that by now suggesting or maintaining that the plaintiffs were not the legitimate children of the deceased.

The conduct relied upon by counsel included the distribution of a portion of the personal effects of the deceased amongst the plaintiffs

[60] id., 23–24.

[60a] SC 180/69 of 30 March 1972.

as beneficiaries and extending invitations to them to attend the family meeting of the deceased's children.

The Supreme Court had no hesitation in rejecting the plaintiff's contention and held, on the authority of *Cole v Akinyele*,[60b] that the plaintiffs were illegitimate. It distinguished the case of *Ogunmodede v Thomas*,[60c] on which the counsel for the plaintiffs relied, from the instant case. The conclusion of the court has, therefore, established beyond doubt that an illegitimate child cannot by the mere force of the conduct of others in treating him as a legitimate child acquire that status. However, such a child may be legitimated, if the facts permit, either by *legitimatio per subsequens matrimonium* or by acknowledgement.

## C ILLEGITIMACY

### (A) UNDER RECEIVED ENGLISH LAW

By the received English law, a child born out of lawful wedlock, that is, under the Marriage Act or some foreign law which prescribes monogamy, is regarded as illegitimate. This status deprives the child of the right to maintenance and succession in respect of its natural father. But the illegitimate child may be accorded these rights if subsequently legitimated under the Legitimacy Act.

### (B) CUSTOMARY LAW

The question of the existence of a status of illegitimacy under customary law has been contested by writers. Coker described the position under Yoruba customary law thus:

> It is generally supposed that there is no status of illegitimacy in native law and custom: this, however, is not correct, for there is a status of illegitimacy as opposed to that of legitimacy. The latter entitles the subject *ipso facto* to succeed to property; the former disentitles the subject from so succeeding, unless his rights are 'legalised by an acknowledgement of paternity' by the father. Generally speaking a child born in wedlock is legitimate from birth, whereas an illegitimate child can only be legitimated if he was duly acknowledged by his father. It is important to observe that the bastard is so regarded among the Yorubas, and is commonly called the *omo ale*, which literally means 'the child of an adulteress or an unmarried woman' . . .[61]

Put briefly, the sum total of this view is that a child who is not born in lawful wedlock or acknowledged has no right of succession under Yoruba customary law.

Dr Obi, after examining the position in Southern Nigeria, came to

[60b] (1960) 5 FSC 84.

[60c] FSC 337/1962 of 10 March 1966; Adegbite, L. O. 'A Disinheriting Estoppel?' Vol. VII *Nigerian Bar Journal* (1966), 53.

[61] Coker, G. B. A., *Family Property Among the Yorubas*, 2nd Edn (Sweet & Maxwell, London 1966), 266.

the conclusion that: 'a child born of an unmarried mother is illegitimate *at birth* – "unmarried" being used to include women whose marriages have been legally dissolved'.[62] This statement may be modified because, as has been noted, the child of an unmarried mother may be regarded as being born legitimate in respect of its maternal grandfather. In such cases no stigma is attached to the status of either the mother or her child.

The position is however different where in other instances an unmarried mother gives birth to a child. Some social stigma is usually attached to such a pregnancy, which in Ibo custom is referred to as *ime nkpuke*, which literally means 'pregnancy out of the matrimonial home'. Although the status of such a child may be regarded as illegitimate, its rights in respect of its natural father or the maternal grandfather are not easily described in English terminology. Usually the child of an unmarried woman is regarded as belonging to its maternal grandfather. Under some systems of customary law such a child may acquire the right of succession in respect of its maternal grandfather – a right exercised with other children of the grandfather. But is the child legitimate at birth, or legitimated? The answer is not simple, because the position under customary law cannot be readily translated into English-law terminology. However, practice tends to support the view that the succession right of such a child is not inherent in its status, but acquired by the goodwill of the grandparent and his family, and arising from the traditional love of children. Sometimes where the natural father of such a child has accepted paternity, paid the maternity bills and maintained the child and mother, he may be allowed to claim the child even though he does not marry its mother. Here again the child may succeed to the estate of its natural father. It is difficult to characterize the process of enjoying such right of succession. It is not clear if it should be described as the incident of being legitimate at birth, or that of legitimation, or adoption. On close examination the situation is seen to be akin to the principle of legitimation by acknowledgement in Yoruba customary law.

It may be said in conclusion that although the status of illegitimacy exists under customary law, the traditional love of children and the spontaneous willingness of the maternal grandfather or the natural father to accept the child removes the burdens attached to that status in English law. Customary law, therefore, leans heavily in favour of illegitimate children, so that they are not treated as bastards in the English sense.

[62] Obi, S. N. C., *Modern Family Law in Southern Nigeria* (Sweet & Maxwell, London; African Universities Press, Lagos 1966), 294.

# 11
# Adoption

Adoption is the process by which the legal relationship between a child and his natural parents is severed and re-established between the child and a third party or parties. The institution of adoption is important in society because it touches on status and therefore affects the rights and obligations of an adopted person.

In Nigeria, adoption may be effected either under statutory law or under the rules of customary law.

## A STATUTORY ADOPTION IN NIGERIA

Under the common law, the legal relationship between a child and his parents is inalienable. The result was that common law neither provided for nor recognized adoption. Hence, the institution of adoption is wholly a statutory creation.

Up to 1965, there was no statutory basis in any part of Nigeria for the adoption of persons. This lacuna in the law worked great hardship in the prevalent circumstances. There were, for instance, many couples who because they had no children of their own or wanted more children in the family, were anxious to adopt children. Sometimes, couples took children into the household on the understanding that they were being adopted. Moreover, various missionary societies in the country collected and cared for orphans and destitute children. Most of these children were, at one stage or another, handed over to members of the religious body under the guise of adoption. In the absence of any statute providing for adoption, these arrangements could not be regarded as legal adoption. At best, they might be described as foster parenthood or guardianship. The unfortunate result was that the child's natural parents or guardian might at any time assert their parental rights by demanding the return of the child. There was, therefore, a perpetual fear that the couple might lose the child to its natural parents in spite of the close relationship which may have developed between them.

The first known attempt at providing a statute on adoption was a private member's bill presented to the then Eastern House of Assembly in April 1958. The Eastern Region (Welfare of Illegitimate Children) (Adoption) Bill 1958[1] would have enabled the father of an illegitimate

[1] The Bill was dated 18 February 1958. For the debate on the Bill see *Parliamentary Debates, Eastern House of Assembly, Official Report, 2nd Session, First Meeting, 11th March–11th April, 1958* Cols. 664–682, 1 April 1958. The Bill was introduced by Mr G. C. Okeya, member for Owerri Division.

child to apply to the High Court for an adoption order in respect of the child. For an adoption order to be made, it would have been necessary to obtain the mother's consent unless there were exceptional circumstances which would justify a waiver of such consent. In all cases, the interests and welfare of the child were to be the primary considerations. Unfortunately, the Bill was not well received in the House and had to be withdrawn.

From 1958 also the Federal Government gave some thought to introducing legislation on adoption for the then Federal Territory of Lagos as it could not legislate for the entire country, adoption being a regional subject. At the same time, the Federal Government decided to consult with the Regional Governments on the nature of any statute on the subject. This was intended to ensure uniformity in any statutes which might be enacted and also to explore the possibility of having a single statute for the whole country. The Federal Government's efforts in this respect fizzled out without even producing a statute for the Federal Territory of Lagos.[2]

On its part, the then Eastern Region Government proceeded to draft legislation for Eastern Nigeria, after consulting with the Federal and Regional Governments to ensure that its proposals were in harmony with those of the Federal Government.

The result was the Eastern Nigeria Adoption Law 1965,[3] which came into force on 20 May 1965 and now applies to the three Eastern States.

After the creation of the twelve-states structure in Nigeria in 1967, the Government of Lagos State revived interest in the formulation of legislation on adoption for its territory. It will be recalled that Lagos State includes the former Federal Territory of Lagos, in respect of which the Federal Government had earlier thought of legislating on the same subject. In 1968 an Adoption Edict[4] was promulgated for the Lagos State.

Let us now turn to the consideration of the provisions of the Eastern Nigeria Adoption Law 1965, and the Lagos State Adoption Edict 1968. Both enactments are modelled on the earlier English Adoption Acts of 1950 and 1958.

### 1 Who may adopt

In both Eastern Nigeria and Lagos State any person, including the father or mother of a juvenile, may be authorized by court order to adopt the juvenile.[5] But a sole male applicant will not be allowed to adopt a female juvenile unless there are exceptional circumstances which in the opinion of the court justify the making of such an order.[6] The essence of

[2] *Parliamentary Debates, Eastern House of Assembly, Fifth Session (1965–66) First Meeting, 25th March, 1965* Cols. 44–45.

[3] No. 12 of 1965. For the Parliamentary history see *Parliamentary Debates, Eastern House of Assembly, Fifth Session (1965–66) First Meeting 23rd March–29th April, 1965* Cols. 44–50, 991–994.

[4] No. 14 of 1968, to be referred to subsequently as Lagos Edict.

[5] ER Law Sections 3(1) and 3(2); Lagos Edict Section 2(1).

[6] ER Law Section 4(2); Lagos Edict Section 3(2).

this prohibition is to guard against the danger of sexual corruption of the female child. However, a joint adoption order will only be made in favour of a husband and wife.[7]

Where a married man or woman is the sole applicant for an adoption order, the court may require that the consent of the wife or husband of the applicant be obtained.[8] The object of this rule is to preserve family peace and harmony by ensuring that the adopted child is accepted by both spouses.

By both enactments, an adoption order will not be made in respect of a juvenile unless the applicant, or in the case of joint applicants, one of them is not less than twenty-five years old and is at least twenty-one years older than the juvenile.[9] In the Eastern states, there are two exceptions to this rule – the applicant must be the father or mother of the juvenile, or if its relative, should be at least twenty-one years old.[10]

### 2 Who may be adopted

The adoption laws in the Eastern and Lagos states provide for the adoption of juveniles, that is, persons under the age of seventeen years. However, in Lagos State there is a further restriction by which an adoption order may only be made in respect of a juvenile 'who is abandoned, or whose parents and other relatives are unknown or cannot be traced after due enquiry certified by a juvenile court'.[11] Thus while a juvenile whose parents or relatives are known and can be traced may be adopted in the Eastern states the reverse is the case in Lagos State.

In the absence of any specific prohibition in either statute on the adoption of married juveniles, it seems that such adoption may be validly effected.

### 3 Residence and nationality

It is an essential prerequisite to the making of an adoption order that both the applicant and the juvenile to be adopted must be resident in Eastern Nigeria,[12] that is, in any of the three Eastern states. Similarly, residence in Lagos State is mandatory under the Lagos State Adoption Edict 1968.[13] Residence connotes some degree of permanence. While, however, it is not necessary to show that the applicant has a home in the particular state or states, he must have a settled headquarters somewhere there.[14]

In the Eastern states, an adoption order will not be made where the applicant, or, in the case of joint application, either of the applicants,

[7] ER Law Section 3(2); Lagos Edict Section 2(2).
[8] ER Law Section 6(2); Lagos Edict Section 4(1).
[9] ER Law Section 4(1); Lagos Edict Section 3(1)(a).
[10] ER Law Section 4(1)(b) and (c).
[11] Section 1(1).
[12] ER Law Section 4(4)(a).
[13] Section 3(1)(b).
[14] *Re Adoption Application No. 52/1951* [1951] 2 All ER 931, [1952] Ch 16, which interpreted a similar provision (Section 2) of the English Adoption Act 1950.

is not a Nigerian citizen.[15] In the course of the debates on the Adoption Bill, the then Attorney General of Eastern Nigeria justified the inclusion of this provision on the ground that only the Federal Government is competent to legislate on citizenship. Consequently, it is only that government which can deal with adoption orders in favour of those who are not citizens of Nigeria.[16]

A somewhat different attitude is taken by the Lagos State Adoption Edict 1968 on this matter. Under that enactment, where an applicant for an adoption order is not a citizen of Nigeria, the court is empowered to postpone the determination of the application for a period of not less than six months and make an interim order in respect of that period.[17] But the Edict is silent on what is to follow after the expiration of the interim order. The Adoption Edict provides for a process which is unknown to common law. Consequently, where it fails to confer a specific power the inference is that the conferment of that particular power was not intended by the legislator.

This view finds support in Section 6(5) of the Edict, which stipulates that 'an interim [adoption] order shall not be deemed to be an adoption order within the meaning of this Edict'. The result, therefore, is that the position in Lagos State is the same as in the Eastern states, that is, that an adoption order cannot be made in favour of a person who is not a citizen of Nigeria. The interim order that could be made in Lagos State is, as its name implies, only a temporary measure, which does not seem to carry the legal consequence of adoption.

## 4 Consents required for adoption order

### (A) CONSENT OF A SPOUSE

Where a husband or wife is a sole applicant for an adoption order, the relevance of the consent of the other spouse has already been discussed.

### (B) PARENTAL CONSENT

With regard to parental consent, the position in the Eastern states differs radically from that in Lagos State. The Eastern Nigeria Adoption Law envisages the adoption of juveniles whose parents or relations are known. Consequently it provides that an adoption order may only be made with the consent of every person who is a parent or guardian of the juvenile.[18] The word 'parent' in respect of an illegitimate child means the natural father. Parental consent is made essential for adoption because of the serious legal consequences which adoption brings on the relationship between a juvenile and his natural parents. However, there are exceptions to the mandatory requirement of parental consent. First, a court may dispense with parental consent where a parent has failed to perform his parental obligations or has abandoned, neglected or

[15] Section 9.
[16] *Parliamentary Debates*, op. cit., col. 45.
[17] Section 7.
[18] ER Law Section 5(1).

persistently ill-treated the juvenile. The same rule also applies where the parent of a juvenile cannot be found or is incapable of giving his consent, or where his consent is unreasonably withheld.[19]

The question of unreasonable withholding of parental consent is one of fact, depending on the circumstances of the particular case. The issue is whether the parents' attitude to the juvenile is reasonable. While it is reasonable for a parent to refuse an adoption because it will sever his relationship with the child, the refusal may be callous. In that case, it may be said that the consent was unreasonably withheld. The test, according to Diplock, L J,[20] is: '. . . would a reasonable parent regard a refusal to permit the adoption of the child as involving a serious risk of affecting the whole future happiness of the child?' In interpreting a similar provision in the English Adoption Act 1950, a Divisional Court held that a father's inability to provide an immediate home for his child was not sufficient to make his refusal to an adoption order in respect of the child unreasonable. It would have been otherwise if his action was motivated by bad faith or was arbitrary.[21] But, where a parent who has given his consent withdraws it after the child has settled down with the applicants it may be held that the consent was unreasonably withheld.[22]

The second exception to the requirement of parental consent is found where an application for an adoption order was made within one year from 20 May 1965 (the date of the commencement of the Adoption Law). The court might, in such a case, have dispensed with parental consent if the juvenile had for a period of two years immediately preceding that date been brought up, maintained and educated under a *de facto* adoption.[23] This provision was obviously intended to regularize some of the *de facto* adoption arrangements which were in existence before the commencement of the Law.

Parental consent is not an essential ingredient in the making of adoption orders in Lagos State, because the 1968 Edict relates only to the adoption of juveniles whose parents or relatives are unknown and cannot be traced.

### (c) CONSENT OF A PERSON WHO IS NOT A PARENT OF THE JUVENILE

The Lagos State Adoption Edict,[24] like its Eastern counterpart,[25] provides for the requirement, in certain cases, of the consent of a person who is not a parent of the juvenile before an adoption order is made. This may be the case where, in the opinion of the court, the person whose consent is required has some rights or obligations in respect of the juvenile arising under a court order or an agreement or under customary

[19] Section 4(2).
[20] *Re C* [1964] 3 All ER 483, 495; Blom-Cooper, L. J., 'Adoption Applications and Parental Responsibility' (1957), 20 *MLR*, 473.
[21] *Hitchcock v W B* [1952] 2 All ER 119; [1952] 2 QB 561.
[22] *Re C* [1964] 3 All ER 483.
[23] Section 5(3).
[24] Section 4(2).
[25] Adoption Law, 1965 Section 6(1).

law. In determining the necessity for the consent of third parties, the court is usually assisted by a report prepared for that purpose by the Chief Welfare Officer or the Probation Officer.[26]

(D) NATURE OF CONSENT

In both the Eastern and Lagos States, consent to the making of an adoption order may be oral, or may be expressed in a document. Any document signifying the consent of a person to an adoption must be in the prescribed form.[27]

Any consent which is required by the two statutes under consideration may be given either unconditionally or subject to conditions with respect to the religious persuasion in which the juvenile is to be brought up, even where the identity of the applicant for the adoption order is unknown. But if the consent so given by anyone is subsequently withdrawn on the ground that the applicant's identity was unknown, that action will be deemed an unreasonable withholding of consent.[28]

### 5 Jurisdiction

Under the Eastern Nigeria Adoption Law, the jurisdiction to make an adoption order is conferred on the High Court, Magistrates' Court or Juvenile Court. An application for an order may be made to the High Court, Magistrates' Court or Juvenile Court, within the jurisdiction of which the applicant or the juvenile resides at the date of the application.[29]

In Lagos State, jurisdiction to make adoption orders is vested only in juvenile courts.[30]

### 6 Function of the court

By the Adoption Law 1965 and the Adoption Edict 1968, it is the function of the court before making an adoption order to be satisfied as to the fulfilment of certain pre-requisites.[31]

First, the court is to be satisfied that unless consent is dispensed with, every consent required by the Law has been obtained, and the person consenting understands the nature and effect of the adoption order. In the case of a parent, it is essential that he understands that the effect of the adoption order is to deprive him permanently of his parental rights. Second, the court is to ensure that if the adoption order is made it will be for the maintenance, care, education and welfare of the juvenile. For these purposes, adequate consideration should be given to the wishes of the juvenile himself, depending on his age and understanding. Third, it must be established that the applicant has not received or agreed to receive any payment or other reward in consideration of the adoption order, unless the court otherwise orders. Fourth, the applicant should

[26] ER Law Section 6(3); Lagos Edict Section 4(3).
[27] ER Adoption (Juvenile Courts) Rules 1966, para. 5.
[28] ER Law Section 5(4); Lagos Edict Section 4(4).
[29] Section 11(1).
[30] Section 8.
[31] ER Law Section 7(1); Lagos Edict Section 5(1).

be a person of good repute and commendable character.

The court may impose such conditions as it deems appropriate in an adoption order. For instance, it may require the adopter to make such financial or other provisions for the juvenile as the court considers just and adequate.[32]

### 7 Procedure for the making of adoption orders

The procedure for the making of adoption orders in Eastern and Lagos States is similar. An application for an adoption order must be made in the prescribed form and submitted to the registrar of the competent court.[33] On the receipt of the application, the court will appoint a guardian *ad litem* for the juvenile, to represent him in the adoption proceedings. The person to be appointed the guardian *ad litem* is the Chief Welfare Officer or the Welfare Officer in charge of the area where the juvenile resides, or a probation officer or some other person suitably qualified in the opinion of the court for the assignment. A parent or person having parental rights will not be appointed guardian *ad litem*.[34]

It is the function of the guardian *ad litem* to investigate the circumstances relevant to the proposed adoption and to report confidentially in writing to the court.[35] The object of this exercise is to safeguard the interests of the juvenile.

The applicant for an adoption order must inform the Chief Welfare Officer of his intention to adopt the juvenile at least three months before the order is made. Moreover, for at least three consecutive months immediately preceding an adoption order, the juvenile must have been continuously in the care and possession of the applicant.[36] This is intended to give both the applicant and the juvenile an opportunity of being familiar with each other. After their three months' stay together, the applicant will be able to decide if in fact he is sufficiently interested in the particular juvenile to adopt it. On the other hand, where the juvenile has attained the age of discretion he will be in a position, after staying with the applicant, to express his approval or disapproval of the proposed adoption arrangement.

### 8 Interim Orders

Both the 1965 Law and the Adoption Edict 1968 provide for interim orders. On application, the court may, instead of making an adoption order, make an interim order granting the custody of the juvenile to the applicant for a probationary period not exceeding two years. The interim order may be made on such terms, in respect of maintenance, education, supervision and welfare of the juvenile, as the court considers appropriate.[37] But the order will make it mandatory for the juvenile to be

[32] ER Law Section 7(2); Lagos Edict Section 5(2).
[33] ER Adoption (Juvenile Courts) Rules 1966, para. 3(1); Lagos State Adoption (Juvenile Court) Rules 1968, para. 1.
[34] ER Adoption Rules para 8(1) and (2); Lagos State Adoption Rules para. 3.
[35] ER Adoption Rules para. 9(1) and (2); Lagos State Adoption Rules para. 10.
[36] ER Adoption Law 1965, Section 4(4)(a) and (b); Lagos Edict Section 3(1)(c) and (d).
[37] ER Section 8(1); Lagos Edict Section 6(1).

under the supervision of a welfare officer, and not to be taken out of the State without the leave of court.[38]

### 9 Legal effects of adoption

Adoption in the Eastern and Lagos States has the same legal consequences.

#### (A) RIGHTS AND DUTIES OF PARENTS AND ADOPTER OF A JUVENILE

Adoption has the following statutory effects on the rights and duties of the parents and adopter of a juvenile:

(a) all rights, duties, obligations and liabilities, including any arising under customary law, of the parents of the juvenile or any other person, in relation to the future custody, maintenance and education of the juvenile (including all rights to appoint a guardian and to consent or give notice of dissent to marriage), shall be extinguished, and

(b) there shall vest in, and be exercisable by and enforceable against, the adopter all such rights, duties, obligations and liabilities in relation to the future custody, maintenance and education of the juvenile as if the juvenile were a child born to the adopter in lawful marriage.

The effect of an adoption order is, therefore, twofold. First, it severs all parental rights and obligations between the juvenile and his natural parents. Second, and of immense importance, it establishes the legal relationship of parent and legitimate child between the adopter and the adopted juvenile. The adopted child, thereafter, stands in relation to the adopter as a child born in lawful wedlock.[39] Where the child is adopted jointly by husband and wife, in respect of the custody, maintenance and education of the juvenile they are in the position of his natural parents.[40]

#### (B) PROHIBITION OF MARRIAGE OF ADOPTER WITH THE ADOPTED JUVENILE

With respect to marriage (including customary-law marriage), the prohibited degree of consanguinity is deemed to exist between the adopter and the adopted child. The same relationship is also created between persons adopted by the same or different adoption orders and between an adopted person and a son or daughter of the adopter.[41] Consequently, an adopted son, for instance, cannot marry the daughter of his adopter, because the effect of the adoption order is to create blood relationship between them. The legal prohibition of marriage between the adopter

[38] ER Law Section 8(2); Lagos Edict Section 6(2).
[39] ER Law Section 13(2); Lagos Edict Section 12(1).
[40] ER Law Section 13(3); Lagos Edict Section 12(2).
[41] ER Law Section 13(4); Lagos Edict Section 22(1).

and the adopted juvenile continues, even though the infant is subsequently adopted by another person.

(c) INTESTACY

On the death intestate of any person occurring after the making of the adoption order, his property shall devolve as if the adopted person were the lawful child of the adopter.[42]

(d) CONSTRUCTION OF SETTLEMENTS AND WILLS

Any reference in a disposition of property made by instrument *inter vivos* or by will after the date of an adoption order, to the 'child' or 'children' of the adopter, includes the adopted person.[43] It is important to note that in the case of a disposition made by will or codicil, the operative date is that of the testator's death.[44] For instance, X made a will in May 1964. In July 1967, he adopted *Y*. He died in December 1968. Y will be entitled to share wherever the will refers to the child or children of X. As a corollary, the adopted person ceases on his adoption to be regarded as a child of his natural parents in respect of testate and intestate succession. For the purposes of the administration of estates, a person adopted jointly by two spouses is regarded in relation to a child or adopted child of the adopters, as a brother or sister of whole blood. Otherwise, the adopted person will rank as a brother or sister of half blood.[45]

**10 Recognition of foreign adoption orders**

Section 20 of the Lagos State Adoption Edict 1968 clearly stipulates the rules for the recognition in that state of other adoption orders thus:

> Where any person has been adopted under the law of any part of Nigeria other than Lagos State, or under the law of any country other than Nigeria, the adoption shall have the like validity and effect as if it had been effected by an adoption order under this Edict.

Thus, the section equates the validity and effect of foreign adoption orders to those made under this Edict.

There is no corresponding provision in the Eastern Nigeria Adoption Law 1965. In the absence of any statutory rules on this matter, the questions of the validity and effect of foreign orders are to be determined under the conflict-of-law rules.

So far, the conflict-of-law rules applicable to the recognition of foreign adoption orders have not been finally determined either by the courts or by text writers. However, in spite of some uncertainties, it is still possible to state the law so far as has been ascertained.

Adoption is a question of status, and a person's status is determined

[42] ER Law Section 14(1); Lagos Edict Section 13.
[43] ER Law Section 14(2); Lagos Edict Section 14.
[44] ER Law Section 15(2).
[45] ER Law Section 15(1).

by the law of his domicile. Consequently, an adoption order made in accordance with the law of the domicile will be recognized as valid in Nigeria. But a distinction should be made between situations where there are common or different domiciles. There is a consensus of opinion that where the adopter and adopted juvenile are domiciled in the same country on the date of the adoption order, the adoption will be recognized in Nigeria no matter by what procedure it was effected.[46] However, where they are domiciled in different countries at the material date, opinions differ. One school of thought maintains that for the adoption order to be recognized in England and thus in Nigeria, it must be valid by the *lex domicilii* of both the adopter and the adopted juvenile.[47] The other view is that the adoption order will be recognized if made in accordance with the law of the adopter's domicile.[48]

Although there is no judicial authority on this point, it would seem that on the principle of *Armitage v A-G*[48a] a foreign adoption order which is recognized by the law of common domicile of the parties will be recognized here. Again, applying the rule in *Travers v Holley*, Nigerian courts may recognize an adoption order made by a foreign court on a similar jurisdictional basis to that of Nigerian courts.[49]

While a foreign adoption order may be recognized in Nigeria, it is not quite clear what effects will be given to such an order here. Obviously, such an order will be recognized for the purposes of custody and maintenance. But it is not settled whether a child adopted abroad can take property under succession governed by Nigerian law as a 'child' of the adopter. In *Re Wilby*,[50] it was held that a foreign adoption order will not be recognized for the purposes of an English intestacy. This conclusion has been criticized and now overruled by the Court of Appeal.[51] Both the court of first instance and the Court of Appeal in *Re Marshall*[52] were prepared to recognize a child adopted in British Columbia for the purposes of succession under an English will. But the claim in the particular case failed because by the *lex domicilii* the word 'child' should include an adopted child only in respect of a will or other instrument executed by the adopter.

In the absence of any authority on the circumstances or the extent to which a foreign adoption order may be recognized for succession purposes, there are three possibilities. First, the Nigerian courts may allow

[46] Cheshire, G. C., and North, P. M., *Private International Law*, 8th Edn (Butterworth, London 1970), 452; Scarman, Hon Mr Justice, 'English Law and Foreign Adoptions' (1962) 11 *ICLQ*, 635, 638; *Re MacDonald* (1962) 34 DLR (2nd) 14; affirmed (1964) 44 *DLR* (2nd) 208.

[47] Graveson, R. H., *The Conflict of Laws*, 6th Edn (Sweet & Maxwell, London 1969), 403.

[48] Cheshire and North, op. cit., at 456; Dicey, A. V. and Morris, J. H. C., *Conflict of Laws*, 8th Edn (Stevens, London 1967), 461–3.

[48a] [1906] P 135.

[49] *Re Valentine's Settlement* [1965] Ch 831; Cohn, E. J., 'In Re Valentine Settlement [1965] Ch 831' (1967) 83 *LQR*, 177.

[50] [1956] p 174; [1956] 2 WLR 262.

[51] *Re Valentine's Settlement* [1965] Ch 831; Jones, G. A., 'Adoption in the Conflict of Law' (1956) 5 *ICLQ*, 205, 210–213; Carter, P. B., 'Adoption' (1958) 34 *BYBIL*, 403–6.

[52] [1957] Ch 263; affirmed [1957] Ch 507.

the foreign adopted infant to succeed to property in Nigeria as a natural born child of the adopter. Second, the adopted child may be granted succession rights here if the foreign law under which he was adopted would have allowed him such rights. A third possibility is to treat the foreign adopted child as if he were adopted under the Law in Nigeria, and give him exactly the same rights of succession as a child adopted in Nigeria.[53] The major objection to the first two propositions is that the adopted child may be in a more favourable situation than he would otherwise have been, especially if the foreign law is less generous than its Nigerian counterpart. Moreover, the fact that legal adoption is possible in only a section of Nigeria makes the propositions inadequate. It is submitted that the third possibility represents the most acceptable view because it ensures equality of treatment to foreign and locally adopted persons. If succession rights were sought in a part of Nigeria which had no adoption law none would be granted, as there are no local equivalents. But in the case of states in which the Adoption Law is applicable, the same succession rights as are granted by the Law would be accorded.

## B ADOPTION UNDER CUSTOMARY LAW

Adoption is an institution known under some systems of customary law in Nigeria. But care should be taken to distinguish cases of adoption from guardianship, as the two are usually confused under customary law. The reason for this confusion is because guardianship involves the exercise of some parental rights, especially as regards custody, control and maintenance of an infant.[54] Cases of alleged adoption sometimes turn out, on closer examination, to be in fact guardianship arrangements.

While cases of guardianship under customary law are common, adoption is rare. Traditionally, children are regarded as the greatest gift that God can bestow on a couple or a family. Consequently, parents are most reluctant to part with their child or to lose all parental rights and obligations. Even when the parents of a child are too poor to undertake its maintenance, it is usual for members of the extended family to come to their assistance in order to ensure the continued family membership of the infant. For the latter reason, most cases of adoption under customary law are between blood relations. It is usual to adopt the orphan child of a relative.

### 1 Procedures for adoption

The adoption may be effected either formally or informally. In the former case, there are variations of the requisite ceremony. Under some systems of customary law, a meeting of the families of the prospective adopter and the infant to be adopted is held. At this meeting, a formal transfer of parental rights and obligations is effected with the approval of both families. In other places, a meeting of the elders of the adopter's family is held, at which he announces his intention to adopt a person and

[53] Dicey and Morris: *Conflict of Laws*, op. cit., at 473.
[54] E.g. *Martin v Johnson* (1936) 3 WACA 93.

thereby makes him his heir. The formal consent of the family is obtained and ceremonies performed to initiate the person to be adopted into the family. This, for instance, is the practice in Ishan in the Mid-Western State.[55]

In *Re Martin : Martin v Johnson and Henshaw,* Webber, CJ, described the formal procedure of customary-law adoption thus:

> The adoption of a son under native law and custom is a ceremony to be performed to which the family are bidden. The adopter nominates his or her adoptee to the family and the ceremony is over.[56]

While this description deals with the presence of the adopter's family, no mention is made of the requirement of family consent. It is not clear whether such consent is necessary in the particular custom the learned Chief Justice referred to.

Informal adoption takes the form of the adopter taking into his family the child of a relative or an orphan. The child is brought up and treated as the other children of the adopter. This arrangement if continued over a long period may mature into an adoption. Such will be the case if the child lives with the adopter for most of his life, loses connections with his family and acquires the status of a child and rights to succession in respect of the adopter. The process is one by which foster-parentage matures in time into adoption. In the Yako tribe of Benue-Plateau State, adoption is not marked by any formal ceremony by which a transfer of child-parent relationship is made. For instance, sometimes a child whose mother is dead or divorced may go to live with his maternal uncle. If he lives there for a long time he may be assimilated into the uncle's family. Much depends on whether the youth has actually severed most relations with his original family. But the crucial issue with regard to his being adopted is often the provision of funds for his marriage. If this is done by the uncle, the youth is expected to become a permanent member of the new family. Where, on the other hand, the funds are provided by his natural father or brothers the youth is under an obligation to return to his patrilineal kinsmen. Adopted children in Yako law (*yawunen*; sing. *owunen*) often remain permanently in the family of their adopters, where they are given farmland and a dwelling site.[57] In this area, however, the adoption of a sister's son is encouraged by the prevailing system of matrilineal inheritance of property. A similar practice to the one described above is found among the Okrika of Rivers State.[58]

Sometimes informal adoption is effected in a different situation. A widowed or divorced woman may on re-marriage bring, with the consent of her new husband, her child from the former union into his household. The child is then brought up by his step-father,

[55] Okojie, C. G., *Ishan Native Laws and Customs* (John Okwesa & Co, Yaba 1960), 90.
[56] (1936) 13 WACA 91, 92.
[57] Forde, Daryll, *Yako Studies* (International African Institute, London 1964), 72–3.
[58] Williamson K., 'Changes in the Marriage System of Okrika Ijo' *Africa* Vol. XXXII (1962), 56.

whose name he may take. With the passage of time the relationship may mature into an adoption. This is usually the case where the child's relationship with his patrilineal family becomes tenuous.[59]

Informal adoption is also found among the Yorubas, as is shown in the case of *Akinwande v Dogbo*.[60] In that case, X took the child of his deceased sister into his household and the child lived with him over a long period of time. During this period, X was responsible for the child's maintenance and upbringing. Thompson, J, held that the child was adopted by X under customary law. This decision brings out some of the defects of customary-law adoption. For instance, the facts that X maintained the child and was responsible for its upbringing are capable of being regarded as evidence either of guardianship or adoption. The distinguishing factor in the case seems to be the length of the relationship. Thus, where customary-law adoption is informal it may only be distinguished from guardianship by the continuation of the arrangement over quite a long period, that is, a much longer period than guardianship usually lasts for. Even this test is not quite satisfactory, because in the absence of a fixed period it may be impossible to determine at a given moment whether the relationship is one of guardianship or adoption. On the whole the better view is that each case should be determined on its merits. For instance, the fact that in addition to the other factors the child has lost connections with his original family may turn the scales.

**2 Who may be adopted**

Usually, only an infant is adopted under customary law. But in the absence of any rule to the contrary, it is possible to adopt an adult. The adoption of a married person is almost unknown.

**3 Who can adopt**

It seems that only males of full age have capacity to adopt children under customary law. This is true of both patrilineal and matrilineal societies. The reason behind this practice seems to be that in most systems of customary law, men play a significant role in determining the membership of a family.

Another related problem is whether a person married under the Marriage Act has capacity to adopt under customary law. On principle, the mere fact that a Nigerian is married under the Act should not deprive him of the capacity to adopt children under customary law. In fact there is nothing inconsistent between such a transaction and the obligations of marriage under the Act.

**4 Necessary consents**

From what has been said so far, it is obvious that the consent of the natural parents of a child is not mandatory in customary law. But the consent of the person to be adopted is fundamental in the forging of the new link. In the case of a child of tender age it is incapable of expressing

[59] This is found in parts of Iboland and Yako – see Daryll Forde, op. cit., 75.
[60] AB/26/68 of 14 July 1969 (unreported), Abeokuta High Court.

an opinion, but on the attainment of the age of discretion his consent will be mandatory, especially in informal adoption, to cement the relationship. If, for instance, he then decides to return to his original family there will be no adoption. With regard to the adopter, where he has more than one wife, it may not be necessary for him to obtain the consent of all of them. This is because a consenting wife will act as a mother to the adopted child. However, where there is only one wife, common sense dictates that in the interest of domestic harmony the wife should be consulted, although the husband will have the final word.

**5 Effects of adoption**

A child adopted under customary law normally takes the name of his adopter and is regarded as his legitimate child. In Yako, for instance, the adopted person and his children are forbidden to intermarry or have love affairs with the people of his adopter, as such relationships will be regarded as being incestuous.[61] The adopted child will succeed along with the other legitimate children of the adopter to the latter's property. Nevertheless, one major defect of customary-law adoption is that, unlike its statutory counterpart, it does not seem to effect a clear and permanent severance of the parental rights and obligations between the infant and his natural parents. There is always the risk that the adopted child may return to his natural parents. Moreover, there are no clear rules which deprive the adopted child of succession rights in his natural family. He may succeed to property both in the family of his adopter and also in respect of his natural parents.

[61] Forde, Daryll, *Yako Studies*, op. cit., 73.

# 12
# Parental Rights and Obligations in Respect of Children

In this chapter, we shall deal with the major rights and obligations of parents in respect of their children. In our discussion, a distinction will be made, in appropriate cases, between the effects of monogamous and customary-law marriages on the relationship of parent and child.

## A PARENTAL RIGHTS

### 1 Custody

(A) LEGITIMATE CHILDREN OF MONOGAMOUS MARRIAGE

*(i) As between parents.* Under the common law, a father had an absolute right to the custody of his legitimate children until they attained the age of majority.[1] Even on his death, any claim by their mother to custody could be defeated by the father's appointment of a testamentary guardian. Although equity followed the common law, it laid greater emphasis on the protection of the welfare of the child. In equity, the welfare of the child is of paramount consideration.

The common-law rule has now been altered by statutes. In discussing the statutory changes, a distinction will be made between the position in the Western and Mid-Western States on the one hand, and the rest of Nigeria on the other. This is prompted by the fact that while the pre-1900 English statutes of general application have ceased to apply in the Western and Mid-Western States, they continue to have legal effect in the other parts of Nigeria.

Taking first the position in Nigeria (other than the Western and Mid-Western States), the pre-1900 English statutes on custody are statutes of general application, which are still in force here. In order to understand the changes effected by the successive English statutes, it is necessary to examine their major provisions.

A marked change in the common-law rule was achieved by Talfourd's Act 1839, which empowers the Court of Chancery to give a mother the custody of her children until they attain the age of seven years, and access to them up to the age of majority. But the court can only make a custody order in favour of a mother who is not guilty of adultery. These provisions were enlarged by the Custody of Infants Act 1873. This Act

[1] *Thomasset v Thomasset* [1894] P 295.

enables the Court of Chancery to grant a mother access to, or custody of, her child who is under the age of sixteen. Section 2 of the Act, which is still in force, makes valid an agreement under a separation deed by which a father relinquishes the custody of his children to their mother provided the arrangement is for the benefit of the infants. The Guardianship of Infants Act 1886 further extended the provisions of the earlier statutes. It conferred on the court the power to make an order regarding the right of either parent to the custody of or access to the child under the age of twenty-one years, having regard to the welfare of the infant and the conduct of the parents. Such order may be subsequently altered, varied or discharged on the application of either parent.[2] Furthermore, the statute put an end to the power of a father to defeat the claim of the mother to custody on his death by the appointment of a testamentary guardian. Henceforth, on the death of a father, the wife will act jointly with any guardian appointed by him.[3] The Custody of Children Act 1891 dealt with the circumstances in which a parent may be deprived of the custody of his child.

These pre-1900 statutes, therefore, recognized the right of either parent to the custody of an infant. But in determining which parent is entitled to custody, regard is generally had to the welfare of the infant and the conduct of the parents.

In the Western and Mid-Western States, the operative law is contained in the Infants Law 1958.[4] This statute incorporates the provisions of both the pre-1900 English statutes already discussed and the English Guardianship of Infants Act 1925. The Infants Law has made the welfare of the infant paramount in all matters relating to its custody by providing that:

> . . . in any proceeding before any court in which the custody or upbringing of a child . . . is in question, the court in deciding that question, shall regard the welfare of the child as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, . . . is superior to that of the mother, or the claim of the mother is superior to that of the father.[5]

The 1958 Law also puts the equality of spouses in respect of the

[2] Section 5.
[3] Section 2.
[4] Cap 49, *Laws of Western Nigeria*, 1959.
[5] Section 24; *Afonja v Afonja* (1971) 1 UILR 105. The court held that it was in the best interests of the infant to be given to the custody of the mother, who was anxious to live with her all the time, than to be left in the custody of the father, who had arranged for the child to live with his sister-in-law during school term and to reside with him only during the holidays. Note that the English Guardianship of Infants Act 1925 does not apply in Nigeria, although some of its provisions are embodied in the WR Infants Law 1958. Some Nigerian judges have made the serious error of applying that statute – *Ehigiator v Ehigiator* [1966] 2 All NLR 169, 176; *Afonja v Afonja, supra.*

custody of their children on a formal basis. By Section 12(1) of the Law, either of the parents of a child may apply for the custody of or access to the child. The court may make such order as to the right of either parent to custody or access as it deems appropriate. But in making the order, the court is to have regard to the welfare of the child, the conduct of the parents and to the wishes of its mother as well as of the father. Any order made may be varied on the application of either of the parents. However, the power of the court with respect to the custody of or access to a child may be exercised notwithstanding that the mother of the child is then residing with its father.[6]

Under Section 12(3) of the Law, where the custody of the child is granted to its mother, the court may order that its father should pay to the mother such weekly or other periodic sums towards the maintenance of the child as the court considers reasonable in the light of the father's means. Nevertheless, no order for custody or maintenance made under Section 12 of the Law is enforceable, nor can any liability accrue thereunder while the mother of the child resides with its father. In addition, such order for custody or maintenance will cease to have effect if after a period of three months from the making of the order, the child's mother continues to reside with its father.[7]

A parent cannot recover custody of a child from the other parent by a writ of *habeas corpus*.[8] The basis of this rule is that as each parent has a right to the custody of the child, it cannot be said that the possession of the child by either parent is unlawful.

*(ii) As between parent and third party.* In a dispute, a parent may enforce his right to the custody of an infant against a third party by *habeas corpus* proceedings. A writ of *habeas corpus* will be granted if it is established that the child is unlawfully detained by the third party. Nevertheless, the court may refuse to grant the writ if it is satisfied that the parent has abandoned or deserted the child or has so conducted himself as to be disentitled to the custody.[9] Moreover, a parent may be refused the custody of his child if he has allowed the child to be brought up by another person at that person's expense for such a long time as would satisfy the court that the parent was unmindful of his parental duties. But the court may in such a case still grant the parent custody if it is established that with regard to the child's welfare he or she is a fit person to have the custody.[10]

Where custody has been refused to a parent but the child is being brought up in a different religion to that in which the parent has a legal right to require the child to be brought up, the court may order the

[6] Section 12(1) and (2).
[7] Section 12(4).
[8] *Ahize v Ahize*, Suit No. HOW/11M/67 (unreported), Nkemena, J, High Court, Owerri, 25 August 1967; *Ugoji v Okeke & Anor* [1964] 2 All NLR 148.
[9] Custody of Children Act 1891, Section 1.
[10] id., Section 3.

child to be brought up in accordance with the parent's desire.[11]

(B) CUSTODY OF ILLEGITIMATE CHILDREN

At common law, an illegitimate child was a *filius nullius*, and neither of the parents was strictly entitled to its custody. But the mother's obligation to maintain it involved a right to the child's custody.[12]

In the Western and Mid-Western States, the Infants Law applies to both legitimate and illegitimate children. Consequently, any dispute between the natural parents of a child over its custody is resolved on the basis that the child's welfare is of first and paramount consideration. The same rule applies to disputes between a natural parent of the illegitimate child and a third party. Subject to this rule, the custody of an illegitimate child may be claimed from the third party by its parent by *habeas corpus* proceedings.

The same rule applies in the rest of Nigeria under the Guardianship of Infants Act 1886 and Custody of Children Act 1891.

(C) CUSTODY IN MATRIMONIAL CAUSES

The Matrimonial Causes Decree 1970 makes provision for the custody of children of a marriage that includes both legitimate and illegitimate children.[13] Under the Decree, proceedings for the custody of an infant must form part of a petition for matrimonial relief. Section 71(1) of the Decree provides that in custody proceedings: '. . . the court shall regard the interests of [the] children as the paramount consideration.' Subject to this overriding principle, the court may make such order in respect of custody of a child as it deems appropriate. The order may place the child in the custody of either of its parents as the court thinks fit. On the other hand, the court may, if it considers it in the best interests of the child, place it in the custody of a third party. In the former case, access may be granted to the other parent, while in the latter both parents could be given access to the child.[14] An order made under the Decree could be varied or discharged on the application of either parent. Custody may be granted on such terms and conditions as the court considers appropriate in the particular case.

(D) DEPRIVATION OF RIGHT OF CUSTODY

In appropriate cases the court may deprive one or both parents of the custody of a child. This can be done where it is in the child's interest and welfare to do so. Besides, the Children and Young Persons Act empowers the court to deprive parents who are found unfit to exercise parental

[11] Section 4.

[12] *Enwonwu v Spiro* [1965] 2 All NLR 233; *Adu v Family Welfare Officer and Ruby Mae Lincoln*, Suit No. LD/14A/70 (unreported), Lambo, J, High Court of Lagos, 9 June 1970 – where the custody of an illegitimate child of a Nigerian and a female US citizen was granted to the mother.

[13] Section 71.

[14] Section 71(3) and (4). On the power of the court to make order for custody where the petition for the principal relief has been dismissed, see Section 75 of the MCD 1970.

rights of the custody of their children.[15]

*(i) Punishment of juvenile offenders.* A juvenile court may deprive the parents of an infant of its custody if the infant is under the age of seventeen years and has committed a criminal offence. The court may by a corrective order commit the young offender to the care and custody of a relative or other fit person. Alternatively, the corrective order may require the offender to be sent to an approved institution until he attains the age of eighteen years.[16] A juvenile may also be ordered to be detained in a remand home. In exceptional cases, such a juvenile may be detained in prison, but he will not be allowed to associate with adult prisoners.[17]

*(ii) Children in need of care and protection.* Under the Children and Young Persons Act, the parents of an infant in need of care and protection may be deprived of its custody, provided the infant is under the age of seventeen years.

There are two categories of infants who come under this provision. The first covers infants whose parents have failed to provide proper care, protection and guidance, and who are thereby exposed to moral or physical danger. It includes a child or young person who, *inter alia*,

(i) has a parent or guardian who does not exercise proper guardianship; or
(ii) who is found destitute, and has both parents, or his surviving parent, undergoing imprisonment; or
(iii) who is under the care of a parent or guardian who, by reason of criminal or drunken habits, is unfit to have the care of the child; or
(iv) who is the daughter of a father who has been convicted of the offence of having unlawful carnal knowledge of any of his daughters,[18]

and

(v) where there is reasonable cause to believe that the welfare of a child is endangered by a dispute to which a parent or guardian of the child is a party.[19]

[15] Cap. 32, *Laws of the Federation of Nigeria*, 1958. Similar statutes of the same title for other parts of Nigeria are Cap. 19, *Laws of Eastern Nigeria*, 1963 (for the three Eastern States); Cap. 21, *Laws of Northern Nigeria*, 1963 (for the six Northern States) and Cap. 20, *Laws of Western Nigeria*, 1959. Reference in the text is to the statute for Lagos, which has corresponding sections in the other statutes unless otherwise stated.

[16] Section 14(d) and (e), and Section 15.

[17] Section 14(j) and (k), and Section 15.

[18] Section 26(i).

[19] Section 1 of Children and Young Persons (Amendment) Act 1965. *Aíyebo and Akinbolaji v Family Welfare Officer & Salako*, Suit No. LD/46A/70 (unreported) Taylor, C J, High Court of Lagos, 25 June 1971.

The second group consists of children and young persons who have been proved to a juvenile court to be beyond the control of their parents and guardians.[20]

A juvenile court can make a corrective order in respect of an infant or juvenile who comes within the two categories. Such order will send the child to an approved school or commit him to the care of a fit person, whether a relative or not, who is willing to care for him.[21]

*(iii) Abandonment of parental rights.* By Section 1 of the Custody of Infants Act 1891, where a parent has abandoned or deserted his child or has so conducted himself that the court should refuse to enforce his right to custody, he may be denied the custody of the child.

*(iv) Court's discretion.* Under Section 71(3) of the Matrimonial Causes Decree 1970 the High Court may, if it considers that it is desirable to do so, make an order placing a child in the custody of a person other than one of the parents.

(E) CUSTODY UNDER CUSTOMARY LAW

Under most systems of customary law in Nigeria, the father has the absolute right to the custody of his legitimate or legitimated children. On the death of the father, the custody of the child is vested in the male head of the father's family, though the mother has the day-to-day care of the child. However, customary law recognizes that the father's absolute right will not be enforced where it will be detrimental to the child's welfare. For instance, where the child is of tender age, customary law requires that it should be left under the care of the mother. In such a case, the father's right is merely in abeyance, and may be exercised when the child could safely be separated from the mother.

The customary-law principle of the paramountcy of the infant's interest and welfare has been enshrined in statutory enactments in some parts of Nigeria. Section 15(2) of the Borgu Native Authority (Declaration of Borgu Native Marriage Law and Custom) Order 1961[22] provides that the custody of children should be granted to the father:

> . . . unless it shall appear to the court that their interest and welfare would be adversely affected, in which case it may, having due regard to local custom, award them to any person in whose custody their interest and welfare would be cared for. Provided that if any child has not been weaned the court shall order the child to remain in its mother's custody until it has been weaned.

[20] Section 27.

[21] Section 26(2) and Section 27.

[22] NALN 52 of 1961. See also Section 15(2) of the Native Authority (Declaration of Idoma Native Marriage Law and Custom) Order 1959, NALN 63 of 1959; Section 13(2) of Native Authority (Declaration of Biu Native Marriage Law and Custom) Order 1964, NALN 9 of 1964.

Similarly, Section 14(1) of the Marriage, Divorce and Custody of Children Adoptive By-Laws Order 1958[23] provides that in making an order for the custody of children, '. . . the interest and welfare of the child shall be the first and paramount consideration.'

The superior courts have consistently applied the principle of recognizing the child's interest and welfare as paramount in cases arising under customary law. For instance, in *Olayemi Kasebiye v Adeyemi*,[24] the trial customary court awarded the custody of the child to the father. This decision was sustained by the intermediate appellate court. On appeal, the High Court sitting at Jos acknowledged that the decision below was in accordance with the applicable customary law, but awarded the custody of the child instead to the mother in order more nearly to comport with the best interests of the child.

In most of the decided cases no clear distinction is drawn between claims for custody and claims for other paternal rights. However, the principles enunciated in them give some guidance in the consideration of claims for custody. It has been pointed out in our examination of the decisions in *Edet v Essien*,[25] *Mariyama v Sadiku Ejo*[26] and *Nwaribe v President Oru District Court & Anor* [26a] that the superior courts would set aside any custom by which paternal rights over a child are granted to a person other than its natural father as repugnant to natural justice, equity and good conscience. But this is subject to the welfare of the infant as discussed above. If the mother of the child is married to its natural father then there is a strong case for granting custody to the parents. In the absence of marriage, it may be in the best interest of the child, if it is of tender age, to stay with its mother.

With the exception of the East Central State, neither a High Court nor a Magistrates' Court has original jurisdiction in matters relating to custody under customary law. In *Omodion v Fasoro*,[27] the applicant and the respondent were married under customary law. The respondent had a child whose paternity was in doubt. The appellant wanted the custody of the child and applied for a writ of *habeas corpus* to enforce his right. Duffus, J, held that the High Court had no original jurisdiction to entertain the application.[27a] He also pointed out that the Infants Law 1958 did not apply to custody under customary law.

In the Maliki School of Islamic Law, the parents of a child are entitled jointly to its custody (*Hadana*) during the subsistence of the marriage. Where the marriage is dissolved by the death of the father or divorce, the mother is entitled to the custody of young children unless

[23] WRLN 456 of 1958.
[24] Civ App Suit No. JD/22A/60 (unreported), 1 September 1961.
[25] (1932) 11 NLR 47.
[26] [1961] NRNLR 81. See Chapter 10, p. 221.
[26a] (1964) 8 ENLR 24. Chapter 10, p. 221.
[27] [1960] WNLR 27. It is submitted that *Mgbeanulu v Okeke*, Suit No. HOW/34N/1966 (unreported), High Court, Owerri, 4 September 1967, in which Nkemena, J, granted a *habeas corpus* writ in respect of custody of a child born of a customary-law marriage, was wrongly decided.
[27a] Cf. *Ugoji v Okeke & Anor* [1964] 2 All NLR 148.

she re-marries outside the immediate family of the husband or shows herself unfit for the responsibility. The mother's right to custody lasts until, in the case of a boy, the attainment of the age of puberty, or in the case of a girl, until she marries. There are, however, local variations to this rule. At the end of the period of the mother's right to custody, the child has an option as to which parent he desires to live with. If the father is dead, residence will be taken up with the male members of his extended family. Nevertheless, the father or his male relations retains the right to the overall supervision of the child in most aspects of his life.[28]

## 2 The right to control and chastise

(A) UNDER STATUTORY LAW

Although the right of a parent to control and chastise his child is co-extensive with the right to custody, it deserves separate treatment. Its importance may be seen in determining whether a parent has a defence to criminal charges for corporal punishment imposed on the child in an attempt to correct him.

A parent has the right of reasonable chastisement of his or her child. By Section 295 of the Criminal Code,[29] a parent may correct by chastisement his or her legitimate or illegitimate child under the age of sixteen years 'for misconduct or disobedience to any lawful command'. Furthermore, a parent may delegate to any person to whom the custody of the child is entrusted, either permanently or temporarily, the power of correction. Such delegation of authority confers on school teachers the power to administer reasonable corporal punishment on children under their care. But the exercise of the parental right to correction must be reasonable. It cannot be justified if it is unreasonable in kind or degree, having regard to the age, and physical and mental condition of the child on whom it is inflicted.

(B) UNDER CUSTOMARY LAW

Customary law confers on parents the right of reasonable chastisement in respect of their children. If its exercise is excessive in kind or degree, customary law does not provide any legal sanction. But such matter can be dealt with by the elders of the family who, in appropriate cases, may impose sanctions. Moreover, any ill-treatment of a child under the guise of chastisement may amount to an offence under the general criminal law or the Children and Young Persons Act.

## 3 The right to determine religious upbringing

Often, the right of the parents to determine a child's religious upbring-

[28] Anderson, J. N. D., *Islamic Law in Africa*, Colonial Research Publication No. 16 (HMSO, London 1954), 214–215, 361–362. Ruxton, F. H., *Maliki Law* (Luzac, London 1916), 155.

[29] Reference to a section of the Criminal Code is the same as in the other Codes except that of the Western State, which has a different numbering. Consequently, it is only necessary to indicate the appropriate section of the Western State Code. WR Code, Section 232.

ing goes hand-in-hand with that of custody. Nevertheless, there are occasions when the issue of religious upbringing arises independently.

Under the common law, the father has an absolute right to determine a child's religious upbringing. As in the case of custody, this absolute right has been abrogated by statute.[30] The result is that both parents have equal rights to determine the religious upbringing of their child. But the welfare of the child is the first and paramount consideration.

By Section 4 of the Custody of Children Act 1891, where a court refuses to grant custody to a parent and the child is being brought up in a religion different from that in which the parent has a legal right to require that the child be brought up, the court may order that the child be brought up in the religion which the parent chooses. But before making an order, the court may consult the wishes of the child.

### 4 The right to service

(A) UNDER COMMON LAW

The parents of a child are entitled to his services while he resides with them. Usually, the services are of a domestic nature, but they may be contractual. Where the child is under twenty-one years of age, he is presumed to render services, no matter how nominal, to the parents. But if the child has attained the age of majority, the parents must prove that the child in fact renders some domestic services to them.

(B) UNDER CUSTOMARY LAW

As in the case of a wife, a father is entitled to the services of his children residing with him under customary law. The services include both domestic work in the household and farm-work.

### 5 Liability for interference with parental rights

Interference with parental rights may constitute a criminal act or a civil wrong for which damages may be recovered.

(A) CRIMINAL LIABILITY

There are a number of criminal offences under the Criminal Code in connection with the interference with parental rights.

*(i) Abduction.* It is a misdemeanour to take an unmarried girl under the age of eighteen years out of the custody of her parents without their consent so that she may be sexually known by any man.[31] Similarly, the unlawful removal of an unmarried girl under the age of sixteen out of the custody or protection of the parents without their consent is an offence. In the latter case, it is not a defence that the offender believed the girl to be above the age of sixteen or that the girl was removed with

[30] Section 4 of the Custody of Infants Act 1891; Section 19 of Infants Law 1958.

[31] Criminal Code, Section 225; WR Code, Section 165. It is a defence that the accused believed on reasonable grounds that the girl was of or above the age of eighteen years.

her consent or at her suggestion.[32]

*(ii) Child-stealing.* Section 371 of the Criminal Code[33] makes it a felony for anyone with the intent to deprive any parent of the possession of a child under twelve years of age, to take or entice away or detain the child forcibly or fraudulently. A person is equally guilty of the same offence if he, with the same intention, receives or harbours the child knowing it to have been so taken or enticed away or detained.

(B) CIVIL LIABILITY

It is a tortious wrong to deprive a parent of the services of his child. The interference with parental rights may take one of three forms:

*(i) Enticement.* The enticement of a child under the age of twenty-one years away from the parents is an actionable wrong, which entitles the father to an action for the resulting loss of the child's services. Thus, in *Lough v Ward*,[34] the plaintiff's daughter, aged about seventeen years, without the consent of her father, entered a communal establishment organized by the defendants. Although she was free to leave whenever she liked, she had no desire to do so. She could be seen by members of her family only in the presence of one of the defendants. The plaintiff, her father, sued for the loss of her services arising from her enticement by the defendants. It was held that her father was entitled to damages. If the daughter had attained the age of twenty-one years or over, it would have been necessary for the father to prove that she in fact rendered him some services.

*(ii) Seduction.* The basis of the action is that the respondent had sexual intercourse with an infant daughter of the plaintiff as a result of which the plaintiff lost her services. It is not necessary in all cases to show that the daughter became pregnant in consequence of the intercourse. The loss of services may be a result of her pregnancy and confinement, or may be due to some other cause arising from the intercourse, for instance, shock or nervous breakdown. All the plaintiff is required to prove is the carnal knowledge of his daughter and the consequent loss of her services. In *Adusanya v Ojuri*,[35] the plaintiff's daughter, Jumoke, was a schoolgirl aged thirteen years. She resided with her father in Lagos and performed various domestic duties for him, including the preparation of his breakfast and the cleaning of the motor-car and the house. Jumoke was seduced by the defendant, and in consequence she became pregnant and could not render any services to her father. The plaintiff sued for damages for seduction. Onyeama, J, as he then was, held that the father was entitled to damages for loss of the daughter's services.

An action for loss of services may be brought by a father irrespective

[32] Criminal Code, Sections 362 and 363; WR Code Sections 303 and 304.
[33] WR Code, Section 312.
[34] [1945] 2 All ER 338.
[35] [1964] LLR 123.

of whether the third party's conduct may give rise to civil or criminal proceedings.[36] As the loss of the daughter's services is at the root of the claim, if no loss of services is established, the claim will fail. Moreover, the daughter must be shown to be in the service of her parent both at the time of the seduction and also when the loss of services occurred.[37]

In assessing the quantum of damages, the court may, in appropriate cases, compensate the plaintiff also for injury to his pride and honour.[38]

*(iii) Fatal accident statutes.* In an earlier discussion of the Fatal Accident statutes in Nigeria, it was pointed out that persons who can claim as dependants of the deceased include his parents and children.[39] Thus, where the death of a child is caused by the wrongful act of a third party, so as to come under the statutes, the parents are entitled to damages.

## B PARENTAL DUTIES

### 1 Maintenance of children

(A) LEGITIMATE CHILDREN

*(i) Under common law.* A father is, at common law, under a duty to maintain his legitimate children. But this duty cannot be enforced. A child, unlike a wife, cannot pledge the credit of the father for necessaries.[40] Consequently, the father is not under a legal obligation to pay third parties for necessaries supplied to his infant child. However, a father may be obliged to reimburse the tradesman where he constituted the child his agent or otherwise authorized him to procure necessaries.

While a child cannot ordinarily pledge the father's credit, the right of the mother to do so in appropriate cases covers a child who is living with her. In the exercise of her right to pledge the husband's credit, the wife is entitled to purchase necessaries for herself and her children, depending on the husband's status in life.[41] Thus, a child can only benefit if the mother is entitled to pledge her husband's credit. If, therefore, she does not possess that right, the infant has no other remedy.

*(ii) Under statutory law.* The unsatisfactory position of the common law has been altered by statutes which provide the means for enforcing parental duty.

*Pre-1900 English statutes*

In Nigeria (except the Western and Mid-Western States), the pre-1900 English statutes on custody also provide for the maintenance of children. By Section 5 of the Guardianship of Infants Act 1886, the court may by order grant the custody of a child to the father or mother.

[36] *Mattouk v Massad* (1943) 9 WACA 8; [1943] AC 588 (PC).
[37] *Hedges v Tagg* (1872) LR 7 Exch. 283.
[38] Per Blackburn, J, in *Terry v Hutchinson* (1868) LR 3 QB 599, 602; per Atkinson J, in *Beetham v James* [1937] 1 KB 527, 533.
[39] See Chapter 3, pp. 84–85.
[40] *Mortmore v Wright* (1840) 6 M & W 482, 151 ER 502; *Blackburn v Mackey* (1823) 1 C & P 1, 171 ER 1076.
[41] *Bazeley v Forder* (1868) LR 3 QB 559.

In that case, it may also make an order in respect of the maintenance of the child. Again, if a parent claims the custody of his child by *habeas corpus* and the child is being brought up by another person at his own expense, the court may, if it grants custody to the parent, order that he pays the whole costs incurred in bringing up the child.[42] The parent is compelled in this way to perform the obligation which for some time he had relinquished to a third party.

*Infants Law* 1958

In the Western and Mid-Western States, the Infants Law 1958 contains an elaborate form of the provisions of the pre-1900 English statutes already discussed. By Section 12 of the Law, where the court grants the custody of a child to the mother, it may also order the father to pay towards the maintenance of the child such weekly or periodic sum as it considers reasonable. No such order for maintenance is enforceable while the mother resides with the father. Moreover, the order will expire if for a period of three months after it was made the mother of the child continues to reside with the father. The court also has a discretion to order a parent to repay the cost of the upbringing of his child by a third party.[43] In both cases, the payment ordered may be enforced by an order for the attachment of the parent's income.[44]

*Children and Young Persons Act*

If, owing to the neglect of a parent to exercise proper care, an infant under the age of seventeen is committed to an approved institution or to the care of an individual, the parent may be ordered to contribute towards the maintenance of the infant. The maximum maintenance which can be ordered under this provision is eight Naira per month.[45] The sum ordered to be paid may, on the application of either parent, be increased, reduced or rescinded.

*Matrimonial Causes Decree 1970*

Under Section 70(1) of the Matrimonial Causes Decree 1970, a court may order a parent to maintain the 'children of the marriage', including legitimate and illegitimate children, under the age of twenty-one years. Payment of maintenance in respect of children may be enforced by an attachment order against the income of the recalcitrant parent.[46]

(B) ILLEGITIMATE CHILDREN

*(i) Under common law.* Neither the father nor the mother of an illegitimate child is bound under the common law to maintain it.[47] This has, however, been modified by statutes. In Nigeria now some statutes have

[42] Custody of Children Act 1891, Sections 2 and 3.
[43] Sections 17 and 18.
[44] Section 22.
[45] Children and Young Persons Act, Section 28.
[46] MCD 1970, Section 92 and Schedule 3. See Chapter 9, p. 217.
[47] *Ruttinger v Temple* (1863) B & S 491, 122 ER 544.

created an obligation for a parent to maintain an illegitimate child.

*(ii) Pre-1900 Bastardy Acts.* A number of pre-1900 English Bastardy Acts provide for the maintenance of an illegitimate child by its natural father. In the absence of judicial pronouncement, it is uncertain whether these statutes can properly be regarded as statutes of general application in Nigeria. However, it seems that they satisfy the basic test for being regarded as statutes of general application – they are of general application in England and were in force there on 1 January 1900. Moreover, it cannot be said that these statutes are unsuitable to Nigeria or inapplicable in local circumstances.[47a] Another English statute which applies to infants – the Infants Relief Act 1874 – has been held to be a statute of general application here.[47b] It is, therefore, surprising that so far as is known, no Nigerian court has considered the applicability of these statutes. Nevertheless, in the light of the above argument it will be appropriate to consider the importance of these statutes. However, if they are accepted as applicable in Nigeria, they will have no legal effect in the Western and Mid-Western States, where English statutes of general application have been excluded.

The pre-1900 English statutes on affiliation began with the enactment of the Poor Law Amendment Act 1844. This statute was subsequently amended and consolidated in the Bastardy Laws Amendment Act 1872. The Act enables the mother of an illegitimate child to apply to the magistrates for an affiliation order in respect of the child. Section 3 of the statute provides that:

> Any single woman who may be with child or who may be delivered of a bastard child . . . may either before the birth or . . . within twelve months from the birth of such child or at any time thereafter, upon proof that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance . . . make application to any justice of peace acting . . . for the place in which she may reside for a summons to be served on the man alleged by her to be the father of the child . . .

If the application is made before the birth of the child, the woman is to make a sworn deposition stating who is the father of her child. At the hearing of the application, if the evidence of the mother as to the identity of the child's father is corroborated in some material particular, the justice may, if satisfied, adjudge the man to be the putative father of the bastard child. In addition, the justices may make an order for the payment of weekly maintenance by the putative father to the mother of the child, or to any other person to whom its custody is granted. Besides the

[47a] For a detailed consideration of the test for English statutes of general application see Park, A. E. W., *The Sources of Nigerian Law* (African Universities Press, Lagos; Sweet & Maxwell, London 1963) 24–35; Allott, A., *Essays in African Law* (Butterworth, London 1960), 21–7.

[47b] *Labinjo v Abake* (1924) 5 NLR 33.

maintenance, the putative father may also be ordered to pay the expenses incidental to the birth of the child.[48] Failure to make the prescribed payments will be punished by the attachment of both the person and goods of the putative father. An order for maintenance remains in force until the child attains the age of thirteen years or dies, whichever is the earlier.[49]

*(iii) Children and Young Persons Act.* Owing to the failure to apply the Bastardy Laws Amendment Act 1872 in Nigeria, affiliation complaints by mothers of bastard children are, in practice, directed to the Social Welfare Department. Usually, the Welfare Officers of the Department first attempt to mediate between the parties by persuading the putative father of the child to pay reasonable maintenance for its upkeep. If this fails to produce the desired result, the Department applies to a juvenile court under sections 26 and 28 of the Children and Young Persons Act for a maintenance order. Under these sections, it will be recalled, a court may order the maintenance of children in need of care and protection. If the court is satisfied of the paternity of the child, it may make the required order.

The major defect in this procedure is that the mother of an illegitimate child cannot, on her own, apply direct to the court for an affiliation order. She can only obtain relief through the Social Welfare Department. It is submitted that the law on affiliation is far from satisfactory. There is, therefore, an urgent need for comprehensive legislation in this area. Affiliation, being a matter within state competence, calls for action on the part of the individual states in the Federation. There is need for uniformity in the laws of the various states in this field. This may be achieved by all the states authorizing the federal legislature to enact for them a uniform law on the subject. Alternatively, the state may agree on a uniform text to be enacted individually.[49a]

In April 1958 an abortive attempt was made by a private member of the then Eastern House of Assembly to pilot a bill on affiliation through the House. The Bill – The Eastern Region (Welfare of Illegitimate Children) (Affiliation Orders) Bill 1958[50] – was modelled on the English Bastardy Laws Amendment Act 1872, but never became law. It would have enabled a single woman under thirty years of age who may be with child or who has been delivered of an illegitimate child to apply to a Magistrates' Court for a summons to be served on the man alleged by her to be the father of the child. If the court were satisfied, after considering all available evidence, it would adjudge the man to be the putative father of the illegitimate child. In addition, the court

[48] Section 4.

[49] Section 5.

[49a] See, for example, the uniform text of the Area Courts Edict of the Six Northern States.

[50] The Bill was initiated and promoted by Mr G. E. Okeya, member of Owerri Division. It is printed as Supplement to the *Eastern Region Gazette No.* 22, Vol 7 dated 27 March 1958. For the debate on the Bill, see: *Eastern House of Assembly Debate, Official Report, 2nd session, First Meeting, 11th March–11th April 1958*, Cols. 664–682, 1 April 1958. The Bill was rejected at the second reading.

might have been given authority to make an order for the putative father to make weekly payments not exceeding two Naira a week to the mother or any person having the custody of the child for its maintenance and education. Any payment which could have been ordered under the Bill would terminate at the death of the child, or on its attainment of the age of fifteen years, or on the marriage of its mother. Any such order would have been enforced against the putative father by distress and commitment.

*(iv) Matrimonial Causes Decree 1970.* It has been pointed out that a parent may be ordered under Section 70(1) of the Matrimonial Causes Decree to maintain an illegitimate child who has been accepted as a member of the household.

(C) MAINTENANCE UNDER CUSTOMARY LAW

Customary law imposes a duty on a father to maintain his children. A similar duty exists in the Maliki School of Moslem Law until the children attain the age of puberty.

The obligation to maintain is more effective where the child resides with both his parents than where he resides with the mother who is living apart from the father. In the latter case, the obligation is nominal in the sense that the father merely provides a token maintenance. Under Yoruba customary law, a father may in certain circumstances be obliged to pay the cost of the maintenance of his young child by a third party. According to the *Ibombo* (or maintenance expenses) custom of the Yorubas, the father of a child is obliged to repay the cost of maintaining his child where the mother, when in a state of pregnancy, has left her husband for another man, provided that the husband is responsible for the pregnancy. If the new husband maintains the child born by the wife until it is old enough to go to its father, he may claim *Ibombo*, which is one Naira per annum, from the father of the child.[51] *Ibombo* is claimable as between the former husband and the new one, and not, for instance, as between a father-in-law and a son-in-law. In *Popoola v Odeleye*,[51a] the appellant's daughter, D, was married to the respondent. After the birth of their first baby, the spouses quarrelled and D returned to her father with her child. The respondent sought unsuccessfully to recover his wife and child from his father-in-law. Later, the appellant brought an action for the recovery of the sum of ₦200, allegedly spent on the maintenance of the respondent's child, as *Ibombo*. Odunlami, J, dismissed the action on the ground that *Ibombo* is not claimable as between a maternal grandfather and the father of his grandchild. The learned judge explained that the rationale of *Ibombo*:

> is the pregnancy that the woman would take to the new husband who would nurse it until the child was born and would be old enough to go to its natural father and not the taking of a man's child to the

[51] *Adepeju v Adereti* [1961] WNLR 154.

[51a] Suit No. HOY/16A/69 (unreported), High Court, Oyo, 5 May 1970.

maternal grandfather of the child against the wish of the natural father.

There is no legal means under customary law to enforce the father's obligation to maintain his children. In practice, the wife of a customary-law marriage whose children are not maintained by their father may complain to the Social Welfare Department. The same procedure is adopted by the Department as in the case of illegitimate children, already described. Relief is obtained by the Department under the Children and Young Persons Act.

## 2 Physical protection

### (A) CHILDREN AND YOUNG PERSONS ACT

In the Eastern and Northern States, there is a statutory duty on the parents or other persons who have the custody, charge or care of a child, to protect it against physical or mental injury. This duty is created by the Children and Young Persons Law. For instance, under Section 32 of the Eastern Nigeria Children and Young Persons Law,[52] an offence is committed by any person above the age of seventeen years who has the custody, charge or care of a child or young person under fourteen years of age if that person:

(a) wilfully assaults, ill-treats, neglects, abandons, or exposes him or causes or procures him to be assaulted, ill-treated, neglected, abandoned or exposed in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight or hearing or limb or organ of the body or any mental derangement); or

(b) exposes him to the risk of burning by allowing him to be in any place near an open fire without any protection or guard against the risk of his being burnt or scalded or without taking any reasonable precautions against that risk; or

(c) leaves him at night unattended by any person over the age of seventeen; or

(d) leaves him unattended by any person over the age of seventeen in a motor vehicle.

The provision is sufficiently wide to cover not only the parents of a child but also school-teachers and even baby-sitters above the prescribed age. It proscribes wilful or deliberate conduct of a parent, including, for instance, failure to provide a child with adequate food, clothing or medical attention, and causing physical assaults to the child. Moreover, the provision extends to other acts, which though not deliberate are injurious to a child, as, for instance, exposing him to the risk of burning or leaving him unattended at night.

[52] Section 32 of the Children and Young Persons Act, *Laws of Northern Nigeria* 1963 Cap. 21. (The age of sixteen is used instead of seventeen in the Children and Young Persons Law, Cap. 19, *Laws of Eastern Nigeria*, 1963.)

(B) CRIMINAL CODE

*(i) Duty to provide necessaries.* The criminal law imposes a duty on the parents of a child to protect its physical well-being by providing it with the necessaries of life. Under section 300 of the Criminal Code,[53] when a person having the charge of another person who, because of age or any other cause, is unable to withdraw himself from such charge or to provide himself with the necessaries of life, a duty is imposed on the former to provide the person under his care with the necessaries of life. The person who has the charge is responsible for any eventuality to the life or health of the other person, which is caused by the failure or omission to perform the duty. It is immaterial whether the charge is undertaken under a contract, or imposed by law, or arises by reason of any act, lawful or unlawful.

If the omission to provide necessaries is reckless or careless and death results, the offence is manslaughter. On the other hand, where the wilful neglect to supply necessaries is accompanied by an intention to cause death, and death in fact occurs, the offence will be murder. A good illustration is the Queensland case of *R v MacDonald,*[54] which was decided under a provision similar to Section 300. The deceased girl, X, lived with H and W in a remote location where there were scarcely any visitors. X was the daughter of H by a former wife. Most of the household work, including the scrubbing of the floor and attending to W's two children, was done by X. She was poorly fed, badly clothed and completely neglected by H and W. In consequence, X's health weakened and she later died. It was held that by their neglect H and W intended to kill X; they were therefore convicted of wilful murder.

Again, Section 301 of the Criminal Code[55] makes it obligatory for every head of a family who has the charge of a child under the age of fourteen years, being a member of his household, to provide such a child with the necessaries of life. He will be held responsible for any consequences to the life or health of the child which may result from the failure to perform that duty, whether the child is helpless or not. Necessaries in these provisions include food, clothing, lodging and medical attention.

*(ii) Abandoning or exposing children.* By Section 341 of the Criminal Code,[56] it is a felony for any person unlawfully to abandon or expose a child under the age of seven years in a manner that is likely to cause it grievous harm. The offence created by this provision may, of course, be committed by both parents of a child, or by either of them.

## 3 Education

The absence in most parts of Nigeria of a system of free and compulsory system of education, even at primary level, has greatly minimized the

[53] WR Code, Section 237.
[54] (1904) St R Qd 151.
[55] WR Code, Section 238.
[56] WR Code, Section 284.

legal duty of parents to educate their children. Only in Lagos State and the Western State, where there is some form of free but not compulsory system of education, is a duty imposed on parents to educate their children. Section 32 of the Education Law[57] provides that:

> It shall be the duty of the parent of every child of primary school age to cause him to receive efficient full-time education suitable to his age, ability and aptitude either by regular attendance at school or otherwise.

No sanction is imposed for any failure to perform the duty.

Throughout Nigeria, there is statutory recognition of the right of parents to decide the type of religious instruction or worship their children will attend at school. For instance, in Lagos State and the Western State, the Education Law specifically enjoins that pupils are to 'attend such religious worship or receive such instruction as is in accordance with the wishes of their parents'.[58] A parent has the right to demand that his child who is a pupil in any institution be wholly or partly excused from religious worship or instruction in that institution.[59] Alternative arrangements may be made for the child to attend religious worship or instruction of the parent's choice at some other place.

## 4 Parental liability for children's acts

### (A) CRIMES

At common law, the parent of a child is not responsible for its criminal acts unless he acted also as a principal or accessory. But the Children and Young Persons Act has imposed such responsibility on a parent where the child's act is due to the failure of the parent to make adequate arrangement for its proper upbringing.

If a juvenile court imposes a fine, damages or costs in respect of an offence committed by a young person under the age of seventeen years, it may, and in the case of a child under fourteen years of age, it must, order that these should be paid by the parent or guardian of the child or young person.[60] Moreover, where the child or young person is charged with any offence, the court may order its parents or guardian to give security for his good behaviour.[61]

[57] The Education Law of Western Region (Cap. 34, *Laws of Western Nigeria*, 1959) has been adopted by and applies throughout Lagos State – Lagos State (Applicable Laws) Edict 1968, Section 3 and Schedule 2.

[58] Section 32.

[59] Education Law, Cap. 34, *Laws of Western Nigeria* 1959, Section 25; Cap. 36, *Laws of Northern Nigeria*, 1963, Section 30(1); Cap. 45, *Laws of Eastern Nigeria*, 1963, Section 23(3); Section 4(7) and (8) of the Public Education Edict 1970 (No. 2 of 1971) (East Central State).

[60] Children and Young Persons Act Section 10(1). *Commissioner of the Colony v Jones* (1947) 18 NLR 150.

[61] Section 10(2).

(B) CONTRACTS

A parent is not liable for the contractual obligations of his child. But the parent may become liable if he constitutes the child his agent or subsequently ratifies the agreement.

(C) TORTS

As with contracts, a parent is not liable for the tortious acts of his child. The liability of a parent may, however, arise where there is a master-and-servant relationship. In that case, the parent will be vicariously liable for the torts of his child committed in the course of his employment.

Another instance of parental liability occurs where the parent is negligent in exercising proper care and control over his child if that results in a tortious act by the child against a third party. The application of this principle can be seen in two of the decided cases. In *Bebee v Sailes*,[62] the defendant gave his son, aged about fifteen years, an air-gun as a present. The son, while shooting at a mill, broke a window in the building. As a result of a complaint received from the mill-owner the defendant promised to smash the air-gun, but did not do so. Later, the defendant's son, while playing with another boy, shot him in the eye. In an action for negligence against the defendant, it was held that he was negligent in allowing the boy to use the gun after receiving the complaint from the mill-owner. On the other hand, in *Donaldson v McNiven*,[63] the defendant, who lived in a populous district of a city, allowed his son aged thirteen years to have an air rifle on condition that it was never used outside the house. The son was allowed to use the rifle in the cellar. Without the defendant's knowledge, however, the son fired the air rifle in an alley-way used as a playground by other children and injured the plaintiff, a child of five. It was held that there was not such lack of supervision by the defendant of his son's activities as would constitute negligence. He was not therefore, liable in damages for his son's act.

[62] (1916) 32 TLR 413; see also *Newton v Edgerley* [1959] 3 All ER 337.

[63] [1952] 2 All ER 691. See also *North v Wood* [1914] 1 KB 629; *Gorely v Codd* [1966] 3 All ER 891.

# 13
# Guardianship

In common parlance, the term 'guardian' is often used to include parents, as the parents of a child are its natural guardians. But parenthood differs in one material respect from guardianship. The rights and obligations of parents in respect of their child arise from the fact of parenthood, while guardians are persons who are formally placed *in loco parentis* to a child, usually by appointment. But once a guardian is properly appointed, he steps into the shoes of a parent, and virtually all the rights and obligations of a parent in respect of a child are vested in the guardian.

Guardians may be appointed either for the person of the child or for his property. In the former case, the guardian has responsibility for the care and protection of the child, while in the latter, he is given legal control over the child's property. Although these two functions may be vested in two different persons, the modern trend is to regard the guardian's principal function as that of care of the ward's person, while at the same time he may also take charge of his property.

## A APPOINTMENT OF GUARDIANS

### 1 Testamentary guardians

The Tenures Abolition Act 1660 conferred on a father the power by deed or will to appoint a guardian or guardians for his children who are under the age of twenty-one and unmarried at his death. The appointment is for the child's infancy, that is, until he attains the age of twenty-one years, or for a lesser period. In *Re Parnell*,[1] the testator appointed two persons by his will to act as the guardians of his infant daughter. He also authorized the survivor of the guardians to appoint another person as guardian. It was held that under the 1660 Act the testator had powers to authorize another person to appoint a guardian, and that the appointment made by the survivor was therefore valid.

No corresponding right to appoint testamentary guardians was conferred by the Act on a mother. But her position was improved by the Guardianship of Infants Act 1886. By Section 2 of this Act, on the death of the father of a child, the mother will act as the guardian either alone, when no guardian has been appointed by the father, or jointly with any guardian appointed by him. The Act also conferred on the mother of an infant the power to appoint by deed or will a guardian or guardians

[1] (1872) LR 2 P & D 379.

for the child after the death of both parents, if the infant is at the material time unmarried.[2] If guardians are appointed by both parents, they will act jointly. Moreover, the mother may by will or deed appoint a guardian to act jointly on her death with the father of the infant. If on her death the father is found by the court to be unfitted to act alone as guardian, it may confirm the appointment of such guardian.[3]

Section 9 of the Infants Law 1958, which applies to the Western and Mid-Western States, completely equated the rights of the father and mother of a child to appoint testamentary guardians.[4] The Law also puts on an equal basis the right of a surviving parent to act as the guardian of their child, either alone or jointly with any guardian appointed by the other spouse. If guardians are appointed by both parents, they shall, after the death of the surviving parent, act jointly.[5]

It is not clear whether the infant for whose benefit a testamentary guardian is appointed must be unmarried at the death of the testator. Section 8 of the Tenures Abolition Act (which has not been repealed) clearly forbids the appointment of guardians for married infants. Except in the case of appointment of a guardian by deed or will by a mother, Section 3 of the Guardianship of Infants Act 1886 did not lay down a general prohibition in respect of married infants. The Infants Law 1958 leaves the matter open, thereby suggesting that a testamentary guardian could be appointed for a married infant. In spite of this state of the law, it is unusual for a court to appoint a guardian for a married infant, and it may remove one who has been so appointed.[6]

With regard to illegitimate children, the mother may appoint a testamentary guardian for the child.[7] On the other hand, the father has a comparable right if he had the custody of the child under an order made under the Guardianship of Infants Acts at the time of his death.

**2 Guardians appointed by the Court**

A statutory power has been conferred on the High Court to appoint guardians by various enactments. By Section 2 of the Guardianship of Infants Act 1886, on the death of a father, the mother of the child will act as the guardian, either alone, or jointly with any guardian appointed by the father. But if no guardian has been appointed by the father or if the guardian or guardians so appointed are dead or refuse to act, the High Court may appoint a guardian or guardians to act jointly with the mother.[8] In the case where a mother appoints a guardian by deed or will, such guardian is to act jointly with the father, but the High Court has power, if the father is unfitted to be the sole guardian of his child, to confirm the mother's appointment.[9]

[2] Section 3(1).
[3] Section 3(2).
[4] Section 9.
[5] Section 8.
[6] *Roach v Garvan* (1748) 1 Ves Sen 89, 27 ER 954.
[7] *Re A* (1940) 164 LT 286.
[8] Section 2.
[9] Section 3(2).

Under the Infants Law 1958, on the death of a parent the surviving parent is to act either alone or jointly with any guardian appointed by the deceased parent. Where, however, no guardian has been appointed by the deceased parent or if the guardian or guardians so appointed refuses to act, the High Court may appoint a guardian to act jointly with the surviving parent.[10]

In all parts of Nigeria except the Eastern States, the High Court Law provides that: 'The court shall have all and singular the powers and authorities of the Lord High Chancellor of England in relation to the appointment and control of guardians of infants and their estates . . .'[11] It will be recalled that in England infants have always been treated as being under the protection of the crown, who as the *parens patriae* has the prerogative of taking care of persons of tender age.[12] This jurisdiction of the crown was in the early history of English law delegated to the Lord Chancellor, who, as the 'keeper of the king's conscience', was responsible for exercising it. His powers included the appointment, control and removal of guardians. The Chancellor's powers later passed to the Court of Chancery, and are now vested in the Chancery Division of the High Court of England.

The powers and jurisdiction of the Lord High Chancellor of England in respect of children were discussed by Lord Chancellor Cottenham in *Re Spence*,[13] where he stated:

> . . . I have no doubt about the jurisdiction. The cases in which this court interferes on behalf of infants are not confined to those in which there is property. Courts of law interfere by *habeas corpus* for the protection of the person of anybody who is suggested to be improperly detained. This Court interferes for the protection of infants, *qua* infants, by the virtue of the prerogative which belongs to the Crown as *parens patriae*, and the exercise of which is delegated to the Great Seal.

In *Enwonwu v Enwonwu*,[14] Taylor, C J, considered the jurisdiction of the High Court of Lagos in relation to children. After examining the powers of the Lord High Chancellor in England the learned Chief Justice concluded that:

> By virtue of Section 18 of the High Court of Lagos Act this jurisdiction which is vested in the Lord High Chancellor in relation to the control or appointment of guardians of infants and is a part of the general and wider jurisdiction vested in the Lord Chancellor for the protection of

[10] Section 8.

[11] High Court Law, Cap. 44, *Laws of Western Nigeria*, 1959 S 10; Cap 49, *Laws of Northern Nigeria*, 1963, S 18; Cap. 80, *Laws of the Federation of Nigeria*, 1958, Section 18.

[12] *Field v Moore, Field v Brown* (1855) 7 De G M & G 691, 710, 44 ER 269.

[13] (1847) 2 Ph 247, 252, 41 ER 937. Applied in *Re AB, An Infant* (1884–85) 1 TLR 657. In *Ojule v Okoya* [1968] 2 All NLR 342 it was held that a grandfather is not *in loco parentis* to his grandson.

[14] [1965] 2 All NLR 239.

infants *qua* infants, is vested in this Court.[15]

This statement is true of the High Courts of other parts of Nigeria except the Eastern States.

In the Eastern States, the jurisdiction conferred on the High Courts by the High Court Law includes: '. . . the power to appoint or control guardians of infants and their estates . . .'[16]

Generally the High Court or Magistrates' Court in Nigeria has no original jurisdiction in any cause or matter relating to the guardianship of children under customary law.[17] However, with the abolition of customary courts in the East Central State, this jurisdiction has been vested since 1971 in the High Court and Magistrates' Courts.

The statutory powers of the High Court to appoint guardians are unlimited. Thus, the powers may be exercised during the lifetime of a parent if the court is of the opinion that the parent has abandoned his responsibilities or is unfitted to act. In addition, the court may exercise its powers when the parents of an infant are dead and the infant is in need of care and protection.

In the exercise of its powers in relation to guardianship of infants, the court regards the interests of the child as the paramount consideration.[18] Consequently, in determining who is to be appointed guardian, this principle will guide the action of the court. Thus, a person may be disqualified from being appointed a guardian because he is of bad character or otherwise unfit to protect the moral and physical welfare of the child. The preservation of the infant's interests may enable the court to take into account the wishes of the parents, if expressed, or those of the infant if he has reached the age of discretion.

*Guardians ad litem*

Whenever an infant is a defendant to a suit, he can defend the action only through a guardian *ad litem*.[19] Such guardian is appointed at the instance of the infant himself, or the other party to the suit. The court may appoint anyone whom it considers fit to act as guardian *ad litem* so long as the interests of the guardian do not conflict with those of the infant in the particular suit.[20] When appointed, the function of the guardian is to ensure the proper conduct of the defence to the case.[21]

## B RIGHTS OF GUARDIANS

Generally a guardian stands in relation to his ward as a parent in respect of his child. But we shall discuss the main differences.

[15] id. at 241.
[16] Section 11(2) High Court Law, Cap. 61, *Laws of Eastern Nigeria*, 1963.
[17] E.g. High Court Law ER Cap. 61, Section 14.
[18] Section 71(1) of the MCD 1970.
[19] Magistrates' Courts Law, Cap. 82, *Laws of Eastern Nigeria*, 1963, S 39.
[20] Magistrates' Courts Law, Cap. 82, *Laws of Eastern Nigeria*, 1963, S 17(d); Cap. 74, *Laws of Western Nigeria*, S 19(1)(c).
[21] *Okoji v Onyibe* [1962] NNLR 12, [1961] 1 All NLR 552: *Savage v Johnson* (1926) 7 NLR 53.

### 1 Custody

A guardian acting alone has a right to the custody of the ward, and may enforce his right against a third party by *habeas corpus*. Where a guardian acts jointly with a surviving parent, it is usual to grant the custody of the child to the parent. But the award of custody must be determined by the interest of the child.

### 2 Right to services

The guardian, unlike a parent, is not entitled as of right to the services of his ward. He cannot, therefore, bring an action for loss of services unless actual service is proved. But action may be brought by a guardian for the seduction or enticement of his ward.

### 3 Right to chastise and control

The rights of a parent to chastise and control his child are the same as that of a guardian.[22]

## C DUTIES OF GUARDIANS

As with parental rights, the duties of a guardian are similar to those of parents. There are, however, certain differences which deserve attention.

### 1 Maintenance

Under the common law, there is no duty on a guardian to maintain his ward except in respect of such property of the ward as may come into the hands of the guardian. However, in the Eastern and Northern States of Nigeria, Section 32 of the Children and Young Persons Law imposes a penalty on a guardian or any other person over seventeen years of age who has the custody, charge or care of any child or young person, for the neglect of the child. Again, Section 300 of the Criminal Code creates an obligation for a guardian to provide his ward with necessaries.

### 2 Physical protection

In the Eastern and Northern States of Nigeria, the Children and Young Persons Law imposes an obligation on guardians to ensure the physical and moral protection of children under their charge. A similar duty is also created throughout the country under the criminal law.[23]

### 3 Obligations in respect of the ward's property

#### (A) DUTY TO ACCOUNT

A guardian is under a duty, on the termination of the guardianship, to account to the ward for any property of the infant which has come into his hands. If money is paid to the guardian for the maintenance of the ward, it is presumed that the money was properly expended unless an abuse is clearly proved.[24]

[22] See Chapter 12.
[23] See Chapter 12.
[24] *Re Oldfield* (1828) 2 Moll 294; *Re Evans* (1884) 26 Ch D 58.

In *Martins v Martins*,[25] the plaintiff, who was an orphan, lived with the defendant, his uncle, during his infancy. The sum of £145, which was part of the estate of the plaintiff's father, was placed on deposit in the bank to the plaintiff's credit. While the plaintiff resided with the defendant, the latter, by means which amounted to an abuse of the process of court, obtained authority from the court to withdraw the money in the bank for the purpose of purchasing real property as an investment for the infant plaintiff. No real property was ever purchased. When the plaintiff attained majority, he brought an action for the return of the money. The defendant pleaded that the whole of the money had been spent, with the plaintiff's approval, for his benefit during his infancy; expenses defrayed included payment of school fees, purchase of necessaries, and maintenance. Lloyd, J, held that the list of payments and receipts produced by the defendant should be strictly scrutinized, and credit given only for items which were affirmatively shown to have been incurred with the infant's consent and for his benefit. The defendant was, therefore, held liable to repay the balance.

(B) UNDUE INFLUENCE

'Gifts which are made by a ward to his guardian during the guardianship or soon afterwards are presumed to have been made under undue influence and may, for that reason, be set aside. The burden is on the guardian to show that there was no undue influence – that is – that the ward acted on independent advice.[26]

### 4 Liability to third parties

The liability of a guardian for the ward's acts are exactly the same as that of a parent. In contract and tort, he will be liable for the ward's acts if he authorized or ratified them. Moreover, he will be liable in tort if his failure to exercise proper control over his ward results in injury to a third party. The responsibility of a parent under the Children and Young Persons Act for the criminal act of his child is the same as a guardian's.

## D DISPUTES BETWEEN GUARDIANS

Where two or more persons act as joint guardians and they are unable to agree on any question affecting the welfare of the child, any of them may apply to the High Court for directions. The Court has statutory power to make such order as to the matter in dispute as it considers appropriate.[27]

## E TERMINATION OF GUARDIANSHIP

Guardianship may be terminated in a variety of ways.

### 1 Death

The death of a guardian will bring his office to an end. In the case of

[25] (1940) 15 NLR 126.
[26] *Hylton v Hylton* (1754) 2 Ves 547, 28 ER 349, 562.
[27] S 3(3) Guardianship of Infants Act, 1886; S 14 Infants Law 1958.

joint testamentary guardians, the death of one guardian vests the guardianship in the survivor. But where joint guardians are appointed by the court, the guardianship is determined by the death of one guardian. The court, of course, has the power to re-appoint the surviving guardian. On the death of the ward, the guardianship is automatically terminated.

### 2 Attainment of majority

The functions of a guardian will cease when the ward attains the age of twenty-one years.

### 3 Marriage of ward

The legal effect of the marriage of a ward on guardianship is not totally free from doubt. It is well settled that guardianship is not terminated by the marriage of a male ward.[28] With regard to the marriage of a female ward, the guardianship is not terminated where the guardian is appointed by the court. But as regards testamentary guardians, Lord Hardwick seems to have expressed conflicting views. In *Mendes v Mendes*,[29] he expressed the opinion that the marriage of a daughter determines the guardianship. But in *Roach v Garvan*,[30] the learned Lord held that there was no precedent that guardianship is determined by the marriage of a female ward. As the Court of Chancery was not in the habit of appointing guardians for married females he was not minded to do so. It is at least obvious that where a female ward marries an infant, the guardianship will not be determined as the husband may still remain a ward. If the husband is an adult, there may be a strong case for terminating the wardship of the wife as the husband will be regarded as capable of looking after his wife.[31]

The various statutory provisions on the guardianship of infants do not provide guidance on this matter. Section 3(1) of the Guardianship of Infants Act 1886, which conferred on mothers the right to appoint testamentary guardians, provides that the guardian is to act on the death of both parents if the infant is then unmarried. The Infants Law 1958, on the other hand, makes no reference to the marriage of the ward.

### 4 Discharge and removal of a guardian by the court

A guardian, whether appointed by the court or under a will, cannot resign his guardianship without the leave of the court. The court may, however, on application by a guardian, release him of his obligation if that is in the best interest of the infant.

Besides the power to allow a guardian to resign, the High Court has the authority to remove a guardian whenever such a step will promote the welfare and interest of the ward. The removal may be due to misconduct

[28] *Eyre v Countess of Shaftesbury* (1724) 2 P Wms 103, 24 ER 659.
[29] (1748) 3 Atk 624, 26 ER 1157.
[30] (1748) 1 Ves Sen 89, 27 ER 954.
[31] *Eversley's Law of Domestic Relations* (ed. Stranger-Jones, L. I.), 6th Edn (Sweet & Maxwell, London 1951), 446–7.

of the guardian, or where he shows that he is unfit to discharge his functions. There is a corresponding power in the court to replace a removed guardian.[32]

Under the Infants Law 1958, a parent may appoint a testamentary guardian to act jointly with the surviving parent. If the surviving parent objects to his so acting, the appointed guardian may apply to the High Court. If the court refuses to make an order, this will have the effect of confirming that the parent will act as a sole guardian.[33] On the other hand, the court may order that the appointed guardian will act jointly with the surviving parent.

## F WARDS OF COURT

An infant is made a ward of court when he is placed under the special care and control of the court. In that case, the guardian of the infant becomes an officer of the court and acts only as directed by the court. He will be responsible to the court for his administration of the affairs of the child. As the infant ward of court thereby comes under the direct supervision of the court, any interference with the ward or the guardian in the exercise of his functions may constitute a contempt of court.

In Nigeria, an infant becomes a ward of court where an action or other proceedings relating to his person or property is instituted in the High Court.[34] This is quite unsatisfactory, as an unscrupulous person who has no real connection with an infant may make him a ward of court by merely settling a small sum of money on the infant and commencing an action for its administration. There is a strong and urgent need for the position to be regularized by legislation so that an infant can only be made a ward by an order of court made on application.[35]

*Supervisory powers of the court*

When a child is made a ward of court, the court has full powers to make orders as to its care and control. But the powers of the court in relation to the marriage of the ward or his removal from its jurisdiction demand special attention.

(A) MARRIAGE OF WARD OF COURT

Before a ward of court marries, the consent of the court must be obtained.[36] Such consent may be withheld where the proposed marriage is unsuitable for the infant. It is contempt of court for a ward to marry or attempt to marry without the approval of the court, and every person

[32] See the discussion of the general powers of the High Court to appoint guardians: p. 275.

[33] Section 9(4).

[34] *Stuart v Marquis of Bute, Stuart v Moore* (1861) 9 HL Cas 440, 11 ER 799; *De Pereda v De Manche* (1881) 19 Ch D 451, 455, 456; *Pendleton v Mackrory* (1790) 2 Dick 736, 21 ER 457.

[35] The common-law rule has been altered on these lines by statute in England – Section 9 of the Law Reform (Miscellaneous Provisions) Act 1949.

[36] *Re H's Settlement* [1909] 2 Ch 260.

who participates in effecting the marriage or the attempt at marriage is liable to punishment.[37]

(B) TAKING THE WARD OUT OF THE JURISDICTION OF THE COURT

The court is always reluctant to allow a ward to be taken out of its jurisdiction as this may impair the effectiveness of its control over the child. But in appropriate cases, the court may permit a ward of court to be taken out of its jurisdiction, for instance, for holidays.

It constitutes contempt of court to take a ward out of the court's jurisdiction without the consent of the court.[38]

## G GUARDIANSHIP UNDER CUSTOMARY LAW

The institution of guardianship is recognized under various systems of customary law in Nigeria. Like English law, customary-law rules on guardianship involve the placing of a person *in loco parentis* in relation to a child, thereby conferring on the person most parental rights and obligations. In customary law, guardianship is often confused with claim of paternity of a child.

### 1 Appointment of Guardians

(A) BY A FATHER

During his lifetime, a father is regarded as the natural guardian of his children. On his death, the right of guardianship devolves on his next male relation who is of age. Where the widow re-marries and is allowed to take her children to the new husband, he may act as their guardian. However, a father may by nuncupative will appoint a testamentary guardian.

(B) BY HEAD OF THE FAMILY

Where the surviving mother of an infant cannot undertake its care and protection due to infirmity or other causes, and in the case of an orphan, the head of the child's extended family is the proper person to appoint a guardian for the infant.

(C) BY THE CUSTOMARY COURT

With the exception of the East Central State customary courts have exclusive original jurisdiction in matters connected with customary-law guardianship.[38a] This includes the power to appoint guardians for infants. In the various enactments which deal with the powers of customary courts in this respect, it is expressly provided that: 'In any matter relating to the guardianship of children, the interest and welfare

[37] ibid.

[38] *Re Liddell's Settlement Trusts* [1936] Ch 365.

[38a] *Omodion v Fasoro* [1960] WNLR 27 Customary Courts Edict 1966 (Mid-West State) S 18(1) and Second Schedule; Area Courts Edict 1967 (Kano State) S 17(1), part 2 First Schedule; Customary Courts Law (Western State) S 18(1) and Second Schedule.

of the child shall be the first and paramount consideration.'[39] These statutes enable the customary courts to make orders as to guardianship of infants and to vary such orders either on the court's own motion or on application, if the interests of the child so demand. The High Court and Magistrates' Courts in the East Central State now have statutory jurisdiction to deal with all matters relating to customary-law guardianship.[40]

(D) WHO MAY BE APPOINTED

Unlike English law, customary law recognizes and gives effect to the close family ties which exist in a traditional society. Consequently, in the appointment of guardians, a conscious effort is made to restrict the appointment of guardians to members of the extended family of the infant. In fact, it may be stated that under customary law it is held to be in the best interests of the child to put it under the guardianship of a blood relation.

### 2 Functions of Guardians

A customary-law guardian steps into the shoes of the parent of the infant. The guardian's rights and obligations are almost identical to those of the parents.

### 3 Determination of Guardianship

(A) BY DEATH

The death of the ward or the guardian will automatically determine the guardianship. Customary law does not prescribe any definite age for the termination of guardianship. The obvious reason is that family ties, such as exist between the guardian and ward, endure longer in customary law than under English law. As a result, neither the attainment of the age of puberty nor marriage *per se* can be said to terminate guardianship.

(B) BY ORDER OF COURT

The customary court or in the East Central State the Magistrates' Court or High Court has power to determine guardianship if such action is in the best interests of the infant.

[39] See, for instance, S 23 of Kwara State Area Court Edict, 1967 (No. 2 of 1967); S 23 of Customary Courts Law, Cap. 31, *Laws of Western Nigeria*, 1959; S 24 Customary Courts (No. 2) Edict 1966 (Eastern Nigeria); S 25 Customary Courts Edict (Mid-West State) No. 38 of 1966.

[40] Section 3 High Court Law (Amendment) Edict, 1971, Section 5 Magistrates' Court (Amendment) Edict, 1971.

# PART IV

# THE FAMILY AND PROPERTY

# 14
# Succession under Received English Law and Local Statutes

Here, we shall be concerned with the non-customary rules of succession in respect of the spouses to a marriage and their children. The position under customary law will be postponed for consideration in the next chapter.

## A TESTATE SUCCESSION

In Nigeria, testate succession may be under either statutory law or customary law, as both systems of law recognize the disposition of property by will. But here we shall deal only with the rules of succession under statutory law.

In *Thomas v De Souza*,[1] it was held that the English Wills Act 1837 is a statute of general application in Nigeria. But this statute does not apply in the Western and Mid-Western States, where the law which applies to wills is contained in the Wills Law 1958.[2]

A Nigerian who is subject to customary law or Moslem law may make a will in accordance with the English Wills Act 1837, so long as the requirements of the statute are observed.[3] However, in *Rasaki Yinusa v Adesubokan*[3a] it was held by the Supreme Court that a Moslem may by a will made in accordance with the Wills Act 1837 freely dispose of his estate irrespective of any limitations imposed by Moslem Law on the distribution of the estate. Thus, he may by will deprive his heirs who under Moslem law are entitled to share his estate of their respective shares under that law.

### 1 Revocation of will by marriage

Under Section 18 of the Wills Act 1837, every will made by a man or woman is revoked by his or her marriage. When applied in Nigeria, the provision is open to the interpretation that it covers both monogamous and polygamous marriages, as both are recognized systems of marriage

[1] (1929) 9 NLR 81. For a full consideration of the provisions of the Wills Act See *Theobald on Wills* (ed. Marshall, O. R.) 12th Edn (Stevens, London 1963); Harvey, B. W., *The Law and Practice of Nigerian Wills, Probate and Succession* (Sweet & Maxwell, London; African Universities Press, Lagos 1968), Chapter 2.

[2] Cap. 133, *Laws of Western Nigeria*, 1959.

[3] *Apatira v Akanke* (1944) 17 NLR 149. The same view has been expressed in Ghana – see *Coleman v Shang* [1959] GLR 390, overruling *Re Otoo (deceased)* (Div Ct [1926–29] 84).

[3a] Suit No. SC 27/70 of 17 June 1971; [1972] *JAL* Vol. 16 No. 1, 84–88.

under Nigerian law. However, it is reasonable to confine the effects of the section to monogamous marriages, as this is the only system of marriage to which it was intended to apply in England. But Section 15 of the Wills Law expressly provides that a will is not revoked by a subsequent customary-law marriage.

There is one express statutory exception in Nigeria to the revocation rule laid down in section 18 of the Wills Act (and similarly in Section 15 of the Wills Law). This is to the effect that there is no revocation of a will by the subsequent marriage of the testator where it is made in the exercise of a power of appointment and the property thereby appointed would not pass in default of an appointment to the testator's heir, executor, administrator or statutory next-of-kin. Consequently, where the exercise of a power of appointment is involved, revocation is restricted only to those cases in which the instrument creating the power provides that in default of appointment the property is to devolve as on intestacy.[4]

**2 Property disposable by will**

A testator may by a valid will dispose of all real and personal estate which, at the time of his death, he is entitled to either in law or equity.[5] In Nigeria, a native cannot by will dispose of his interest in family land which has not been partitioned.[6]

**3 Gifts to children**

In the case of *Hill v Crook*,[7] the House of Lords established the principle that a gift in a will to the children either of the testator or of any other person is restricted, *prima facie*, to legitimate children only. But there are two instances where a gift to children may be construed to include illegitimate children also. The first is where the testator refers to the illegitimate children by name in the will, or expressly or impliedly states that they are to take as children. Second, illegitimate children may take under a will if from the facts known to the testator at the time the will was made, it is possible for illegitimate children, but not legitimate children, to take.[8] This is the case, for instance, where the testator devised property to the children of X, and at the time of making the will X has only illegitimate children and is, to the testator's knowledge, incapable of having further children.

A will generally takes effect as from the date of the testator's death. Consequently, a gift by will to the children as a class will include all the testator's legitimate children as at his death. But if the gift is to a particular class, for instance, only sons or daughters, members of that class may take exclusively. Thus, where a testator gave his residuary estate to his sons equally, and he had only sons at the date of making the will and three

[4] *Re Gilligan* [1950] P 32, 37; [1949] 2 All ER 401, 406.
[5] Wills Act 1837, Section 3; Wills Law 1958, Section 3.
[6] *Johnson v Macaulay* [1961] 1 All NLR 743. See Chapter 16.
[7] (1873) LR 6 HL 265.
[8] id. at 282–283.

daughters subsequently, it was held that only the sons were entitled to the gift.[9]

(A) TESTAMENTARY GIFT TO DECEASED CHILD

The general rule is that if a devisee or legatee predeceases the testator the gift will lapse. Section 33 of the Wills Act 1837[10] creates a statutory exception to this rule. By the section, where a child of the testator to whom property is given by will for an interest not terminable at or before his death, dies in the lifetime of the testator, survived by an issue who is living at the death of the testator, such gift would not lapse. The gift would then take effect as if the death of such child had happened immediately after the death of the testator, unless a contrary intention appears by the will. The effect of the section is to make the gift the absolute property of the pre-deceased donee and not that of the child whose existence at the death of the testator prevented the gift from lapsing.[11] Thus, suppose that A made a will in 1940 by which he bequeathed property to his daughter X, and X died in 1942, survived by a child Y. A died in 1945, survived also by Y. The legacy to X will not lapse because Y survived A, and the gift will form part of X's estate.

However, this rule does not apply where the gift is made to a class, for instance, the children of the testator. In that case, the will has the effect of bequeathing the property to the children of the testator who survived him.[12]

(B) THE RULE AGAINST DOUBLE PORTIONS

Equity presumes that a father or a person *in loco parentis* intends to treat his children alike and to distribute his estate equally among them. If, therefore, a father during his lifetime makes a gift of property to one of his children, and on his death bequeaths his estate to all his children, the rule requires, unless the presumption of equality is rebutted, that such child should bring into account what he has received in the testator's lifetime before taking a share under the will. This rule is expressed in the phrase, 'Equity leans against double portions.'[13]

The rule does not require a child to account for every gift or promise of a gift made by a parent or person *in loco parentis* during his lifetime. Only such gifts which are in the nature of advancement, or a permanent provision intended to establish a child in life are called into account. Whether a particular gift or promise of gift is an advancement or not is a question of fact depending on the circumstances of the particular case. In *Taylor v Taylor*,[14] Jessel, MR, drew an instructive distinction between mere bounty made to a child and gifts intended to establish the

[9] *Cappa v Pereira* [1966] NMLR 119 (FSC).
[10] A similar provision is contained in Section 28 of the Wills Law 1958.
[11] *Johnson v Johnson* (1843) 3 Hare 157, 67 ER 336; *Re Hurd, Stott v Stott* [1941] Ch 196.
[12] *Re Harvey's Estate* [1893] 1 Ch 567.
[13] This principle is contained in Section 53(1)(b) of the Administration of Estates Law 1959.
[14] [1875] LR 20 Eq 155.

child in life. Mere temporary assistance to a child like the payment of a son's debt is not an advancement by way of a portion.[15] But, the gift of a substantial sum of money to a child, or a payment made to a child on marriage, are usually regarded as advancement which must be accounted for. It is not necessary for this rule to come into effect that the gift should have been voluntary.[16]

The rule against double portions operates in relation to the satisfaction of portion debts by portions, the satisfaction of a portion debt by legacies, and the ademption of legacies by portions and portion debts.[17] However, evidence may be led to rebut the presumption that the testator did not intend to give a child double portions.

## B INTESTATE SUCCESSION

The non-customary law of intestate succession in Nigeria is in a state of utter confusion. In many cases, the applicable rules are difficult to discern, and even where they are known, the provisions are not readily subject to precise interpretation. The result of this state of affairs is that sometimes it is difficult to determine whether there are any precise applicable rules.

For the purpose of clarity, the position in different parts of Nigeria will be examined separately.

### 1 Lagos State

The law is to be found in Section 36 of the Marriage Act,[18] which provides that:

> (1) where any person who is subject to customary law contracts a marriage in accordance with the provisions of this Ordinance, and such person dies intestate, subsequently to the commencement of this Ordinance, 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 subsequently to the commencement of this Ordinance:
> 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 estates of intestates, any customary law to the contrary notwithstanding:

[15] *Re Scott* [1903] 1 Ch 1.
[16] *Re George's Will Trusts* [1949] Ch 154.
[17] *Snell's Principles of Equity* (ed. Megarry, R. E., and Baker, P. V.) 26th Edn (Sweet & Maxwell, London 1966), 297–307; Hanbury, H. G., *Modern Equity*, 9th Edn (Stevens, London 1969), 492–5.
[18] Cap. 115, *Laws of the Federation of Nigeria*, 1958.

Provided that:

(a) where by the law of England any portion of the estate of such intestate would become a portion of the casual hereditary revenues of the Crown, such portion shall be distributed in accordance with the provisions of customary law, and shall not become a portion of the said casual hereditary revenues; and

(b) real property, the succession to which cannot by customary law be affected by testamentary disposition, shall descend in accordance with such provisions of such customary law, anything herein to the contrary notwithstanding.

(2) Before the registrar of marriages issues his certificate in the case of an intended marriage, either party to which is a person subject to customary law, he shall explain to both parties the effect of these provisions as to the succession to property as affected by marriage.

(3) This section applies to the Colony only.

Section 36 is a long and complicated provision. In order to understand its full import it is necessary to examine the various facets of the section separately.

(A) GEOGRAPHICAL LIMITATION OF SECTION 36

Sub-section 36(3) limits the application of the section to 'the Colony only'. The former Colony of Nigeria is now known as Lagos State, which is described in the schedule to the States (Creation and Transitional Provisions) (Amendment) Decree 1967[19] as:

> The Federal Territory, and the Badagry, Epe and Ikeja Divisions (the boundaries of which are described in Schedules 1 to 4 of a Proclamation made under the Nigeria (Electoral Provisions) Order in Council, 1951 and published in the Gazette as Public Notice No. 116 of 1951).

By the Lagos State (Applicable Laws) Edict 1968,[20] the Western Nigeria Administration of Estates Law 1959, which applied in those parts of the Colony which were up to 1967 incorporated in the Western Region of Nigeria, has ceased to have effect in those areas. These areas have now reverted to the old Colony of Lagos, which, as has been explained above, is now Lagos State. Section 36, therefore, applies throughout the territory of Lagos State.

(B) 'ANY PERSON WHO IS SUBJECT TO CUSTOMARY LAW'

It is necessary to identify persons who are subject to customary law in the Lagos State. The Lagos State (Applicable Laws) Edict 1968[21] made the Western Region Customary Courts Law 1958 applicable to the whole State, with the exception of the city of Lagos. The Western

[19] No. 19 of 1967. [20] No. 2 of 1968, Schedule 2. [21] No. 2 of 1968.

Region Law applies customary law only to Nigerians.[22] The term 'Nigerian' is defined in the statute as: 'a person whose parents were members of any tribes indigenous to Nigeria and the descendants of such persons, and includes any person one of whose parents was a member of such a tribe'.[23] At the same time, the High Court of Lagos Act, which applies to Lagos State including the city of Lagos, makes only natives subject to customary law.[24] The term 'native' was defined by Section 3 of the Interpretation Act,[25] which has now been repealed, to include both 'native of Nigeria' and 'native foreigner'. While 'a native of Nigeria' is given the same meaning as in the Western Region Customary Courts Law, 'native foreigner' means 'any person (not being a native of Nigeria) whose parents were members of a tribe or tribes indigenous to some part of Africa . . .' It is submitted that the effect of the repeal of Section 3 is that the word 'native' could, in the absence of any substituted statutory definition, be re-defined by the courts, either in the same or in different terms.[26]

It may, therefore, be stated that for the purpose of determining persons who are subject to customary law in Lagos State, the relevant provision of the High Court of Lagos Act should be applied only to the City of Lagos, which has no customary courts. On the other hand, the position in the rest of the State will be determined in accordance with the Western Region Customary Courts Law.

(c) '. . . CONTRACTS A MARRIAGE IN ACCORDANCE WITH THE PROVISIONS OF THIS ORDINANCE . . .'

Section 36 of the Marriage Act is only applicable where a person who is subject to customary law marries under the provisions of the Act. Consequently, if such a person, for instance, contracts a monogamous union abroad or a customary-law marriage within Nigeria, Section 36 will not apply to the distribution of his property on intestacy. A different rule, which will be discussed later, becomes applicable in that case.

(d) '. . . SUCH PERSON DIES INTESTATE . . . LEAVING A WIDOW OR HUSBAND, OR ANY ISSUE OF SUCH MARRIAGE . . .'

The section applies where the *propositus* dies intestate after the commencement of the Act, that is, 31 December 1914. Thus, it will not operate where the death occurred before that date. With regard to the

[22] S 17. For similar provisions see: Customary Courts (No. 2) Edict 1966, S 11 (Eastern States); Customary Courts Edict 1966, S 17 (Mid-Western State). Cf. the position in the Northern States, where customary law applies to a person whose parents were members of any tribe or tribes indigenous to some part of Africa and the descendants of any such person and any person whose parents were members of such tribe – S 15(1) of Kano State Area Courts Edict 1967; S 15(1) of Kwara State Area Courts Edict 1967.

[23] Section 2.

[24] Section 27.

[25] Now known as Law (Miscellaneous Provisions) Act – see S 28 of Interpretation Act 1964.

[26] *Chapman v Kirke* [1948] 2 KB 450; *Maxwell on the Interpretation of Statutes* (ed. Wilson, R. and Galpin, B.), 11th Edn (Sweet & Maxwell, London 1962).

provision 'leaving a widow or husband, or any issue *of such marriage* . . .'[27] it is submitted that in spite of the position of the comma after the word 'husband', the widow, husband or issue must be such by virtue of a marriage under the Marriage Act. Thus, where H is married to W under the Marriage Act and has a child, and both the child and W predeceased him, the section will not apply. Similarly, if the deceased first contracted statutory marriage which is childless and subsequently married under customary law, leaving the customary-law wife surviving him, the section cannot apply as the surviving wife is not a widow 'of such marriage'.

(E) '. . . ALSO WHERE ANY PERSON WHO IS THE ISSUE OF ANY SUCH MARRIAGE . . . DIES INTESTATE . . .'

Section 36 is also applicable to the intestate estate of an issue of a statutory marriage who dies after the commencement of the Act. It is immaterial whether the issue married under the Marriage Act or under customary law.[28] The extension of a provision which, it seems, was made solely for persons who married in accordance with the Marriage Act to cases of marriage under customary law is anomalous. It is strange that even where the issue of a statutory marriage has deliberately contracted marriage outside the Act, succession to his property would take place under Section 36.

In its strict technical meaning, the term 'issue' consists of children, grandchildren and all other lineal descendants – and is generally a word of limitation. But, in practice, it often refers to 'children', that is, it designates persons.[29] It is submitted that the term is used in Section 36 in its latter sense of 'children', as this interpretation most closely accords with the import of the provision.

(F) TO WHAT PROPERTY DOES SECTION 36 APPLY?

The section applies to both personal and real property. It covers the deceased's personal property even though under customary law part or all of it may have become family property on his death. With regard to real property, the section obviously does not apply to 'real property the succession to which cannot by customary law be affected by testamentary disposition'. Such real property includes unpartitioned family property that was occupied by the deceased during his lifetime.[30] Its distribution will be in accordance with the applicable customary law. However, real property absolutely owned by the deceased, including family property which has been partitioned, is to be distributed in accordance with Section 36, as this may be disposed of by will. Freeholds of this nature only become family property on the death intestate of the owner.

[27] Italics mine. [28] *Re Sarah Adadevoh* (1951) 13 WACA 304.

[29] *Stroud's Judicial Dictionary of Words and Phrases* (ed. Burke, J.), 3rd Edn, Vol. 2 (Sweet & Maxwell, London 1952); *Dictionary of English Law* (ed. Jowitt, Earl and Walsh, C.) Vol. 2 (Sweet & Maxwell, London 1959).

[30] *Davies v Davies* (1936) 13 NLR 15.

Any real estate of the deceased which by English law will escheat to the State as *bona vacantia* will be distributed in accordance with customary law.

### (G) MODE OF DISTRIBUTION OF PROPERTY UNDER SECTION 36

The personal and real estate of the deceased will be distributed 'in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates'. An important result of this provision is that real property will, for the purposes of distribution, be considered as personal property.

As English statutory law on the distribution of personal property has changed from time to time, Section 36 does not clearly stipulate at what point of time or as from what date that law is to be deemed applicable.

Coker, J (as he then was), expressed the view in *Re Estate of Odulaja*,[31] and in his book,[32] that the reference to English law is as in 1884 – the date on which the first comprehensive Marriage Act, which was re-enacted in 1914, came into force. This view finds some support in the fact that when the legislature of the then Gold Coast (Ghana) introduced a modification of Section 36 into their law in 1909,[33] express reference was made to English law as at 19 November 1884. This was the date on which the predecessor of the modified section came into force in the Gold Coast and Nigeria. One practical effect of this view is that it excludes the application of the provisions of the Intestates Estates Act 1890, which is particularly beneficial to widows.

The second theory fixes the date for the English law applicable under Section 36 as in 1914. This view was expressed in *Johnson v United Africa Company*,[34] where the deceased married Dorcas Johnson in accordance with the Marriage Ordinance. He died intestate in 1926, leaving her and four children surviving. Also, he left some real property in Lagos. The defendants, in execution of a judgment debt obtained against Dorcas Johnson, attached the deceased's real property. By an interpleader summons, the eldest son of the deceased claimed that under the English Administration of Estates Act 1925, incorporated into Nigerian law by Section 36, the widow had no attachable interest in the property. In rejecting the contention that the English 1925 Act applied, Butler Lloyd, J, said:[35]

> . . . Section 36 of the Marriage Ordinance expressly declares that in circumstances such as the present real property of which the deceased could have disposed by will shall be distributed according to the law

[31] [1964] LLR 108.

[32] Coker, G. B. A., *Family Property Among the Yorubas*, 2nd Edn (Sweet & Maxwell, London; African Universities Press, Lagos 1966), 279. *Note:* 1864 is misprinted for 1884.

[33] Marriage Act.

[34] (1936) 13 NLR 13.

[35] id. at 14.

of England relating to the distribution of personal estates any native law or custom to the contrary notwithstanding. This Ordinance obviously speaks from the date of its enactment, namely, 1914, at which date the law in force in England was the Statute of Distributions which gave one-third to the widow and two-thirds to the children.

It is relevant to point out here that while the Marriage Act 1914 repealed the earlier Ordinance of 1884, it retained most of the provisions of the latter. Section 41 of the 1884 enactment appears in identical form as section 36 of the 1914 Act, which remains in effect now.

If 1914 is the operative date, widows can claim the benefit of the provisions of the Intestates Estates Act 1890.

The second theory has been criticized on the ground that it brings the reference date past 1900 and thereby conflicts with the rule which admits into Nigeria only statutes of general application in force in England on 1 January 1900.[36] This criticism finds support in the fact that the limitation to 1900 in respect of English statutes which are applicable in Nigeria is the general rule except where post-1900 statutes are expressly admitted, as is the case in matters relating to divorce and matrimonial causes before March 1970.[37] In the absence of such clear exception, it is submitted that the appropriate reference date is 1900. But the substance of this criticism is removed by the fact that the English law relating to the distribution of personalty on intestacy did not change between 1900 and 1914. Consequently, the practical effect of adopting 1914 as the operative date is the same as adopting 1900, which is the prescribed date. In either case, the English Intestates Estates Act 1890 will apply in Nigeria.

A third theory, which so far has not been put squarely before the courts, is that the current English law on distribution of intestates' estates is applicable under Section 36. This view may be summarily dismissed because generally the statutes which admit English statutes of general application in Nigeria limit them to those in force as in 1900. Where it is intended to apply post-1900 English statutes in Nigeria, an express exception is usually made, for instance, by providing that the court's jurisdiction will be in accordance with English law 'for the time being'.[38] It may, therefore, be concluded that the English Administration of Estates Act 1925 and subsequent statutes are not relevant to Nigeria as statutes of general application.

The rules of English law on the distribution of personal estates of intestates applicable under Section 36 are contained principally in the Statute of Distribution 1670, Administration of Estates Act 1685, and if *Johnson v United Africa Company* is good law, the Intestates' Estates Act 1890. Dealing first with the law of distribution up to 1884, if a man died intestate leaving a widow and issue, the widow was entitled to one-

[36] Kasunmu, A. B., 'Intestate Succession in Nigeria': *NLJ*, Vol. 1 (1964), 53.
[37] Regional Courts (Federal Jurisdiction) Act S 4 (now repealed).
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[36] Kasunmu, A. B., 'Intestate Succession in Nigeria': *NLJ*, Vol. 1 (1964), 53.
[37] Regional Courts (Federal Jurisdiction) Act S 4 (now repealed).
[38] ibid.

third of the estate. The residue was to be distributed in equal shares among the children; the issue of any dead child standing in the shoes of the parent. If there were no children or any legal representative of them, the wife of the intestate was entitled to one moiety of the estate and the residue was to be distributed equally amongst the next-of-kin of the intestate, who ranked in the same degree.[39] On the other hand, if the deceased left no spouse then his whole estate was to be distributed equally among his children, and if there were no children, it would devolve on the next-of-kin.[40] Where, however, after the death of the intestate, any of his children died intestate in the lifetime of his mother, leaving no wife or children, the brothers and sisters and the mother respectively of such a child were to share equally in the child's estate.[41]

In the case of the death intestate of a married woman, the husband was entitled to the whole of her estate.[41a] If there was no husband surviving, the estate went to the children.

The Intestates' Estates Act 1890[41b] increased the share of a widow in the estate of her husband. Where the intestate left a widow but no issue and the net value of his estate is under ₦1,000, the widow is absolutely and exclusively entitled to the whole estate. If, however, the net value of the estate exceeds ₦1,000, the widow is entitled, in the first instance, to ₦1,000 thereof absolutely. In addition, she is entitled to her share in the residue of the estate, which should be distributed in accordance with the pre-1890 statutes.

### (H) WHO ARE THE 'ISSUE' AND 'WIDOW' ENTITLED TO SHARES IN THE DISTRIBUTION UNDER SECTION 36?

The provisions of the English law which apply to Nigeria by force of Section 36 entitle the surviving 'issue' and 'widow' to shares in the intestate's estate. It is, therefore, necessary to determine who may qualify as 'issue' and 'widow' respectively, as Section 36 covers, *inter alia*, situations where the intestate married under customary law.

In the earlier cases,[42] the Nigerian courts adopted the attitude that 'issue' and 'widow' are to be interpreted according to English internal law and thereby excluded spouses and children of customary-law marriages. But the West African Court of Appeal, in *Re Adedevoh*,[43] rejected this view. Dealing with the interpretation of 'issue' under the relevant English statutes, the court, after reviewing the relevant authorities, held that 'legitimate children' are to be determined by the law of the

[39] Section 3, Statute of Distribution 1670.
[40] Section 4, Statute of Distribution 1670.
[41] Section 7, Administration of Intestates' Estates Act 1685.
[41a] *Williams & Idris v Facade & Wilson*, Suit No. IK/49/69 (unreported), Dosumu, J, High Court, Lagos, 6 September 1971 (real property of a wife who predeceased her husband intestate granted to the husband absolutely).
[41b] It has been held that this is a statute of general application in Nigeria – *Coker v Coker* Suit No. M/135/69 (unreported), High Court, Lagos, 2 June 1972 (CCCHCJ/6/72, 1).
[42] *Adegbola v Folaranmi* (1921) 3 NLR 89; *Re Somefun* (1941) 7 WACA 156; *Gooding v Martins* (1942) 8 WACA 108.
[43] (1951) 13 WACA 304; *Bamgbose v Daniel* (1954) 14 WACA 111, [1955] AC 107.

domicile of the parents at the time of the birth of the children – the domicile of origin. In the case in point, the domicile of origin of the children was Nigeria and therefore Nigerian internal law applied. Under that law, 'legitimate children' include – (a) children born of statutory or customary-law marriage; (b) children legitimated under the Legitimacy Act, and (c) children born out of wedlock (not during the subsistence of a statutory marriage) who are legitimated by acknowledgement under the applicable customary law.

Turning now to the construction of 'widow', the court in *Re Adedevoh* refused to express an opinion on the meaning of that term, as no claim had been put forward by any person as a widow of the deceased. But it stated *obiter* that such claim '. . . would be governed by the same principles as those which affect the claims of the appellants [the children] . . .'[44] In *Bamgbose v Daniel*,[45] it was contended for the appellants that the English Statute of Distribution could not be applied to polygamous unions because of the difficulty of applying its provisions to a plurality of wives. The Privy Council, though refusing to express any opinion on the rights, if any, of widows, rejected the submission on the ground that the rights of children should be considered independently of those of the 'widow'. However, the question as to who is a 'widow' for the purposes of distribution came squarely before the Board in *Coleman v Shang*,[46] an appeal from Ghana. In that case, the deceased, Stephen Coleman, an Osu man, married the plaintiff's mother (Wilhelmina) under the Ghana Marriage Ordinance in 1907. Wilhelmina died in 1904, and later the deceased married the respondent in accordance with customary law. On the death intestate of the deceased in 1958, the respondent claimed an interest in his estate. The Privy Council, upholding the judgment of the Ghana Court of Appeal, held that in applying the English Statutes of Distribution to Ghana, the words 'wife' and 'widow' meant '. . . all persons regarded as lawful wives or widows according to the law of Ghana . . .' Consequently, the respondent, though a widow of a customary-law marriage, was entitled as a spouse of a valid marriage under the law of Ghana to a share in the intestates' estate.

Although the Board in *Coleman v Shang* dealt with a case where there was only one customary-law wife, it is submitted that the same test is to be applied where there is a plurality of wives. The Board has held on appeal from Malaya that all the widows of the deceased are entitled to the widow's share under the English Statute of Distribution.[47]

It is, therefore, important to note that the meaning of 'issue' and 'widow', for the purpose of determining whether Section 36 is applicable to a particular situation, differs radically when these words are being construed in relation to persons entitled to shares on the intestacy.

[44] (1951) 13 WACA 304, 310.
[45] [1955] AC 107.
[46] [1961] AC 481 approving the decision of the Ghana Court of Appeal [1959] GLR 390.
[47] *Chang Thye Phin v Tan Ah Loy* [1920] AC 529, 543; *Choo Eng Choon's Estate* (1908) 12 Strait's Settlements Law Reports 120.

(I) TO WHAT PROPERTY DOES SECTION 36 APPLY?

As sub-Section 36(3) restricts the application of that section to what is now Lagos State, it is necessary to consider what property may be affected. For instance, is any of the following considerations relevant to the application of the section?

(a) marriage under the Marriage Act in Lagos;
(b) situs of property in Lagos State;
(c) death intestate within Lagos State; or
(d) that the deceased died outside but was domiciled in Lagos State.

On the authority of *Administrator General v Egbuna*,[48] it is submitted that it is irrelevant whether or not a marriage takes place within the geographical area of Lagos State. Section 36 is to be read as being subject to the rules of private international law on intestacy – the devolution of real property is governed by the *lex situs* while the *lex domicilii* of the intestate on death regulates the succession to his personal property. Consequently, Section 36 will apply to real property within Lagos State no matter what the deceased's domicile at his death, and to his personal property if he dies while domiciled within Lagos State.

(J) SITUATIONS OUTSIDE SECTION 36

*(i) Ruie in Cole v Cole.* It is quite clear from our analysis above that Section 36 is not applicable where, for instance, a person who is subject to customary law marries outside Nigeria and dies intestate while domiciled in Lagos State or leaving real property there. In that case, succession to the deceased's property will be governed by the rule in *Cole v Cole*,[49] where it was held that the English law of succession will apply as it would be contrary to natural justice, equity and good conscience to apply customary law. It will be recalled that in that case, William Cole, a native of Lagos, domiciled there, married Mary Cole in Sierra Leone in 1864. He later returned to Lagos where he died intestate in 1897, leaving surviving him the defendant and a son, Alfred Cole. The question for determination by the court was, what law governed the succession to his estate?

The decision of the court turned principally on the construction of Section 19 of the Supreme Court Ordinance 1876, which, while providing for the application of customary law in causes and matters relating to marriage, tenure and transfer of real and personal property, contained a proviso that:

> No party shall be entitled to claim the benefit of any local law or custom if it shall appear either from the express contract, or from the nature of the transactions out of which any suit or question may have arisen, that such party agreed that his obligations in connection with the transactions should be regulated exclusively by English law, and in cases where no express rule is applicable to any matter in con-

[48] (1945) 18 NLR 1.
[49] (1898) 1 NLR 15.

troversy, the Court shall be governed by the principles of justice, equity and good conscience.

Bradford Griffith, J, who read the judgment of the court, expressed its rationale thus:[50] '. . . a Christian marriage clothes the parties to such marriage and their offspring with a status unknown to native law'. Although *Cole v Cole* has been doubted and criticized,[51] its ratio remains valid as it has not been overruled.

*Cole v Cole* raises the fundamental question whether it can be presumed that a native by contracting a statutory marriage thereby renounces or becomes deprived of the rules of customary law. It is submitted that the mere contracting by a native of statutory marriage does not *per se* deprive him of the status of a person who is subject to customary law. While customary law continues to apply to such a person, it is obvious that matters specifically excluded by the marriage statute or the incidents of the statutory marriage will not be regulated by customary law. For instance, the marriage may only be dissolved in the manner prescribed by the statute, and not under customary law.

The authority of *Cole v Cole* was shaken in *Smith v Smith*,[52] where the deceased, who married in Sierra Leone according to the rites of the Church of England, died intestate in Lagos, leaving some real estate. Van Der Meulen, J, refused to apply the decision in *Cole v Cole* because he did not regard it as a general binding rule, but as merely rebuttable presumption that English law will apply. He remarked that:

> 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 law and customs, but it is by no means conclusive evidence. In my opinion the question as to what law it is equitable to apply in any given case can only be decided after an examination of all the circumstances of the case . . .[53]

The considerations which are to guide the court in determining whether or not to apply English law are stated to be 'the position in life occupied by the parties and their conduct with reference to the property in dispute. . . .'[54] While it is reasonable to expect that the relevant conduct should be that of the intestate, in *Smith v Smith* the court came to a decision on the basis of the conduct of the children of the intestate who, after the death of their father, continued to treat his real property as family property.

[50] id. at 22.

[51] For a criticism of the rule in *Cole v Cole* see Okoro, Nwakamma, *The Customary Laws of Succession in Eastern Nigeria and the statutory and judicial rules governing their application* (Sweet & Maxwell, London; African Universities Press, Lagos 1966), 179–194; *Onwudinjoh v Onwudinjoh* (1957) Vol. II ERLR.

[52] (1924) 5 NLR 105.

[53] id. at 107.

[54] *Ajayi v White* (1946) 18 NLR 41, 43.

In *Gooding & Bankole v Martins*,[55] the deceased first married according to the rites of the Roman Catholic Church at Abeokuta in 1906. The plaintiffs were the surviving children of the marriage. The marriage was subsequently validated. On the death of his wife, he married the defendant under customary law. On his death intestate, the West African Court of Appeal held that only the plaintiffs were entitled to inherit the deceased's property. Unfortunately *Smith v Smith* was neither cited nor considered by the court, and no consideration was given to the conduct of the deceased in contracting a customary-law marriage.

The manner-of-life theory as expressed in *Smith v Smith* and *Ajayi v White* leaves unresolved the basic question of determining when English law rather than customary law will apply to intestate succession. The criteria laid down in these cases are vague when interpreted in the light of the facts to which they were applied. Even when the mode of life under consideration is that of the testator, the court, in determining whether or not to apply English law, may embark on a difficult and unprofitable venture.

*Cole v Cole* raises another problem in relation to the particular date on which English law is deemed applicable. In that case, the English law applied was that in either 1863 or 1874. But suppose a case similar to *Cole v Cole* should arise today, will the courts apply English law as in Cole's case, or as on the date of the new situation? It is submitted that such a case will come within the general limitation on the application of English Statutes in Nigeria – that is, English law before 1 January 1900. This view finds support in the fact that exceptions to the dateline are usually expressly stated. On this proposition, the applicable English law will be similar to that which regulates succession under Section 36 of the Marriage Act. The important difference, however, is that while under Section 36 the English law is that which governs succession to personalty, distribution under *Cole v Cole* will be under English law both as regards personalty and realty. Thus, when the intestate's estate consists of realty, the rules of succession to realty under English law will apply and the eldest male child will inherit the estate. In fact in *Smith v Smith*, the eldest son of the intestate claimed to be absolutely entitled to the real estate under English law.

But *Cole v Cole* is open to the serious criticism that English law is applied no matter in what country outside Nigeria the marriage may be celebrated. Thus, the same law will govern the intestate succession whether the intestate married in either England or Burma. It is submitted that this and other problems which arise from the decision in *Cole v Cole* should be solved by amending Section 36 so that its provisions will apply to persons subject to customary law who contract statutory marriage either inside or outside Nigeria. This approach has been adopted in Section 48 of the Ghana Marriage Act.

[55] (1942) 8 WACA 108.

*(ii) Succession outside Section 36 and the rule in Cole v Cole.* Owing to the restrictions in Section 36 and the rule in *Cole v Cole*, there are persons not covered by these precedents, and it is relevant to determine what law will govern the intestate succession to the estates of such persons. Two obvious situations fall within this category. The first is where a person who is not subject to customary law marries under the Marriage Act and dies intestate, leaving property in Lagos. A similar case exists where a person who is not subject to customary law contracts a monogamous marriage outside Nigeria, but leaves property in Lagos on his death intestate. In both instances, it is assumed that the propositus died domiciled in Lagos State. Obviously, neither Section 36 nor the rule in *Cole v Cole* can be appropriately applied. What law, then, will govern the succession to the intestate's estate? It is submitted that in the present state of the law, such cases are clearly outside the ambit of customary law, and that English law as on 1 January 1900 is the most appropriate system to govern the situation. The consequences of applying that law will be similar to those where the rule in *Cole v Cole* is applied.

There is an urgent need for an express statutory provision to cover such cases. Section 36 should be amended to cover the succession on intestacy to the estate of a person not subject to customary law who marries either in or outside Nigeria.

### 2 West and Mid-Western States

The succession to the estate of an intestate in the Western and Mid-Western States is governed by the Western Region Administration of Estates Law 1959.[56]

#### (A) WHEN IS THE 1959 LAW APPLICABLE?

It is important to establish the situations in which the distribution of an intestate's estate will be governed by the 1959 Law.

*(i) Death after 1959.* Generally, the Law does not apply to any case where the death intestate occurred before 23 April 1959 – the date of the commencement of the Law.[57] In that case, on the authority of *Administrator-General v Egbuna*,[58] Section 36 of the Marriage Act may apply where the marriage is contracted under that Act. If the marriage was celebrated abroad, *Cole v Cole* may also apply. Otherwise, the rules of customary law may govern the situation.

*(ii) Administration governed by customary law.* The provisions of the Administration of Estates Law 1959 do not apply where the administration of the estates of a deceased person is executed by or under the authority of any customary court. Similarly, the Law is inapplicable where the distribution, inheritance or succession of any estate is governed by customary law, whether such estate is administered under

[56] Cap. 1, *Laws of Western Nigeria*, 1959.
[57] Section 1(2).
[58] (1945) 18 NLR 1.

this Law or by or under the authority of a customary court.[59] Thus, once the succession is subject to customary law it is immaterial that the actual distribution is done under the 1959 Law or by the customary court.

*(iii) Death intestate of a person married under the Marriage Act.* Section 49(5) of the 1959 Law provides that:

> Where any person who is subject to customary law contracts a marriage in accordance with the provisions of the Marriage Ordinance and such person dies intestate after the commencement of this Law leaving a widow or husband or any issue of such marriage, any property of which the said intestate might have disposed by will shall be distributed in accordance with the provisions of this Law, any customary law to the contrary notwithstanding.

This provision is similar to Section 36 of the Marriage Act already discussed. Persons who are subject to customary law in the Western State are Nigerians, and that State's Customary Courts Law defines 'Nigerian' as any person whose parents were members of any tribes indigenous to Nigeria. As in Section 36 of the Marriage Act, the deceased must have been survived by a widow, husband or issue of such statutory marriage. Only property which the intestate could have disposed of by will can be distributed in accordance with the 1959 Law. Thus, if the deceased lived in a family property before his death, such property cannot devolve by the Law. If the 1959 Law is applied, the residuary estate of the intestate (where there is no person to take in accordance with the Law) will not go to the crown as *bona vacantia*. Rather, such residuary estate will be distributed in accordance with customary law.[60]

*(iv) Application of the 1959 Law to cases of partial intestacy.* If the deceased leaves a will effectively disposing of only part of his property, the other part of the property not so disposed of will devolve in accordance with the provisions of the Administration of Estates Law 1959. But this is subject to some modifications. Where the deceased is survived by a wife or husband who acquires some beneficial interest under the will, the spouse's share in the estate will be diminished by the value, at the date of death, of the beneficial interest.[61]

*(v) Where the deceased is not a native.* Whether or not the Administration of Estates Law will apply to the intestate estate of a person who is not subject to customary law will depend on the rules of conflict of laws. Thus, the mode of distribution prescribed by that Law applies where the intestate died domiciled in the Western State of Nigeria. That Law, being the *lex domicilii*, will regulate the devolution of his personal estate

[59] Section 1(3).
[60] Section 49(5)(a).
[61] Section 53(1).

and will also govern succession to real property situated within the state as the *lex situs*. But, if the propositus dies domiciled outside the Western State, the 1959 Law will only apply to the distribution of his real estate situated within that State. It is immaterial that the non-Nigerian is married in accordance with the Marriage Act or has contracted a monogamous marriage outside Nigeria.

*(vi) Where a person who is subject to customary law marries outside Nigeria.* It is obvious that the 1959 Law does not apply to situations where a Nigerian who is subject to customary law marries outside Nigeria, for instance, where a Nigerian student marries in France. Such cases may be governed by the rule in *Cole v Cole*. But the English statutes of general application which are admitted by *Cole v Cole* are no longer operative in the Western State. It is submitted that the reasonable solution to this problem is to apply the provisions of the Administration of Estates Law rather than English law.

(B) DISTRIBUTION UNDER THE ADMINISTRATION OF ESTATES LAW

Section 49 of the Administration of Estates Law lays down the rules of succession to real and personal property on intestacy. For purposes of clarity these rules will be stated seriatim:

(i) If the intestate leaves a husband or wife but no issue, parent, brother or sister of the whole blood, the residuary estate will be held in trust for the surviving husband or wife absolutely.

(ii) If the intestate leaves a husband or wife and issue (with or without parent, brother or sister) the surviving spouse will take the personal chattels absolutely. In addition, the residuary estate of the intestate will be charged with the payment of a net sum of money equivalent to the value of one-third of the residuary estate, free of death duties and costs, to the surviving spouse, with interest at the rate of two and half per centum from the date of the death until the sum is paid or appropriated. Besides the provision of the said sum and interest thereon, the residuary estate (less the personal chattels) will be held as to one-third on trust for the surviving spouse during his or her life and then on statutory trusts for the children of the intestate. The remaining two-thirds will be held on statutory trusts for the issue of the intestate.

(iii) If the intestate leaves a husband or wife and parent, brother or sister of the whole blood but no issue, the distribution is as in (ii) above. But after the payment of the stipulated net sum and interest thereon, the residuary estate (less the personal chattels) is to be held as to one half in trust for the surviving spouse absolutely. The other half is to be held in trust for the surviving parent or parents, or where no parent survives, on statutory trusts for the brothers and sisters of the intestate.

(iv) If the intestate leaves issue but no husband or wife, the residuary estate of the intestate will be held on statutory trusts for the issue of the intestate.

In the absence of any person taking an absolute interest under the

rules discussed above, the residuary estate of the intestate will devolve on the State as *bona vacantia*. But the State may out of the property devolving on it provide for the dependants of the intestate.

(v) Where property is distributed on intestacy among the children of the deceased equity presumes that the father intends to preserve the family harmony by giving to his children almost equal portions. This principle is laid down in Section 50(1)(iii) of the Administration of Estates Law 1959, which provides that:

> Where property held on the statutory trusts for issue is divisible into shares, then any money or property which, by way of advancement or on the marriage of a child of the intestate, has been paid to such child by the intestate or settled by the intestate for the benefit of such child (including any life or less interest and including property covenanted to be paid or settled) shall, subject to any contrary intention expressed or appearing from the circumstances of the case, be taken as being so paid or settled in or towards satisfaction of the share of such child . . . and shall be brought into account, at a valuation (the value to be reckoned as at the death of the intestate) in accordance with the requirements of the personal representatives.[62]

This principle of hotchpot applies to both partial and total intestacy.[63]

**3 Eastern States**

Unlike the position in Western and Mid-Western states, there are no statutory provisions in the Eastern states which govern intestate succession. Moreover, the operation of Section 36 of the Marriage Act is restricted to the geographical area of Lagos State. Problems arise, therefore, if, for instance, a person subject to customary law in the Eastern states dies intestate domiciled in any of the states and leaving property there. A similar situation came squarely before the court in *Administrator-General v Egbuna*,[64] where Joseph Emodie, an Ibo, domiciled in the Protectorate, died there intestate, survived by his widow, a brother and sister. He was also survived by an illegitimate daughter. The deceased married Felicia at Port Harcourt in 1925 in accordance with the provisions of the Marriage Act. There were no children of the marriage. On his death intestate, he left property within the Protectorate. The point at issue was whether the personal estate should be distributed in accordance with the law of England or in accordance with Ibo customary law. It was argued for the defendants that as Section 36 of the Marriage Act was inapplicable, the estate should be distributed in accordance with customary law. In rejecting this proposition Ames, J, stated that:

[62] A similar provision is contained in Section 3 of the Statute of Distribution 1870.

[63] For a full discussion of the principle see Hanbury, H. G., *Modern Equity* (ed. Maudsley, R. H.) 9th Edn (Stevens, London 1969), 464–5.

[64] (1945) 18 NLR 1.

> Because Section 36 of the Marriage Ordinance applies only to the Colony, it does not follow the opposite, so to speak, is the law in the Protectorate. It only means that one must look elsewhere than to this section for guidance on this point . . . I do not think it necessary to look very far. It seems to me that the principle enunciated in the well known case of *Cole v Cole* covers the point. It is true that the matter in *Cole v Cole* occurred in the Colony, although the parties were married outside both the Colony and Protectorate. I do not know if the Marriage Ordinance then in force had a section corresponding to Section 36 of the Ordinance now in force; and it does not matter whether it did or not, because the decision in *Cole v Cole* was not based on the provisions of any Ordinance but on general principles concerning the application of native law and custom to such a case.[65]

This view has been criticized by learned writers who argue that in the absence of any prescribed law, customary law should govern the intestate succession of persons living outside the Lagos State who marry under the Marriage Act.[66] Furthermore, Ainley, CJ, in *Onwudinjoh v Onwudinjoh*,[67] doubted the validity of the rule in *Cole v Cole* when he said:

> . . . I do not decide this case upon the principle laid down in that case [*Cole v Cole*], for I think that, that case itself and the whole line of cases decided by reference to it may one day be called in question by the Federal Supreme Court.[68]

The application of the principle in *Cole v Cole* to the Eastern states will cover both the cases of marriage under the Marriage Act and also monogamous marriages contracted outside Nigeria. But, as in the Lagos State, there is a vacuum with regard to the situation where a person who is not subject to customary law contracts a monogamous marriage abroad or a statutory marriage inside Nigeria. It has been suggested that in such cases English law as at 1 January 1900 should be applied.

In 1965, an effort was made by the Government of the then Eastern Nigeria to lay down a statutory basis for the distribution of intestate estates. The Administration of Estates Bill 1965[69] was modelled on the Western State legislation of the same title, but there were significant differences. Only the areas of important differences need, therefore, be mentioned here.

The Bill defined 'wife' broadly to include the wife of a marriage under the Marriage Act, a wife of a marriage celebrated and registered in a Christian church, chapel or vestry, or a wife of a Muslim Law marriage or other customary marriage. The effect of this wide definition would have been that where there were two or more wives they would be

[65] at 2.
[66] Coker, op. cit., at 249–251; Okoro, op. cit. at 182–186.
[67] (1957) Vol. II ERLR 1.
[68] id. at 5.
[69] Extraordinary *Eastern Nigeria Gazette* Vol. 14 No. 66 of 17 September 1965.

equally entitled to share in the husband's estate.

Again, a similarly wide definition was given to the term 'child' to include the child of any of the types of marriage mentioned in the preceding paragraph. Furthermore, the Bill covered a child born out of wedlock during the subsistence of a statutory marriage if he was regarded as legitimate by the customary law of his father. In this respect, the Bill attempted to overrule the decision in *Cole v Akinyele*, and other similar decisions. Also included in the definition of 'child' were children legitimated under the Legitimacy Law and juveniles adopted under the Adoption Law 1965.

With regard to the distribution of the intestate's estate, the Bill sought to make revolutionary provisions as to persons entitled to share in the estate. Where the deceased was survived by children but both parents were dead, the remainder of the estate would have been held in trust for brothers and sisters, and also for 'other dependants, being first cousins or children of half-brothers or half-sisters for whose maintenance he [the deceased] was responsible at the time of his death'. This provision attempted to legalize the responsibility of the deceased in respect of members of his extended family which he acknowledged and carried out during his lifetime.

The Bill contained a chapter on 'Family Provisions' which is substantially similar to the English Inheritance (Family Provision) Act 1938, and the Intestates Estate Act 1952. Under that chapter, the court would have had jurisdiction where by the will or law of intestacy or otherwise, reasonable maintenance was not made for a dependant of the deceased, to order the payment out of the net estate of the deceased of a reasonable maintenance for the benefit of the surviving spouse or child.

There is no doubt that the 1965 Bill would have been the most comprehensive and revolutionary effort to put the law on administration of estates on a rational basis. Its most remarkable feature was that it attempted to reflect the local background of the people to whom it was intended to apply. In the then Eastern House of Assembly the Bill attracted the trenchant criticisms of some religious and women's organizations who objected to the entitlement of children legitimated under customary law and customary-law wives to share in the distribution of the intestate's estate. The Bill was then withdrawn to enable full consultations with these interested bodies. But the whole exercise was cut short by the military take-over in January 1966.

### 4 Northern States

As in the Eastern states, there is no statutory law in the Northern states which governs the distribution of intestate estates. Consequently, the position in these states admits of the decision in *Administrator-General v Egbuna* by which the rule in *Cole v Cole* may be admitted by analogy.

### 5 Intestate succession in respect of illegitimate children

(A) INTESTATE SUCCESSION BY AN ILLEGITIMATE CHILD

*(i) General rules.* Under the common law, an illegitimate child is not

entitled to any share in the intestate estate of either of his parents. Similarly, his parents could not take any property on the death intestate of the illegitimate child. This rule has been altered by the Legitimacy Act.[70] By Section 10 of the Act, where the mother of an illegitimate child dies intestate after 17 October 1929, leaving real or personal property, but not survived by any legitimate child, the illegitimate child, or if he is dead, his issue, is entitled to take any interest in the estate to which he or the issue would have been entitled if he had been born legitimate.

It is important to note that the illegitimate child can only succeed to the estate if there is no legitimate child. Thus, if the mother had a legitimate child who died leaving issue, that issue would take and thereby displace the illegitimate child. While there are reasons of policy which exclude illegitimate children generally from intestate succession in respect of the estate of the father, it is submitted that in case of the intestate estate of the mother an illegitimate child should be entitled to a share even if there are other legitimate children also.

Section 10(1) of the Act does not apply to a child who is legitimated *per subsequens matrimonium.*

*(ii) Succession by estoppel.* In *Phillips v Osho*[70a] the Supreme Court held that where an illegitimate child shares in the distribution of part of his natural father's estate with the legitimate children, he does not thereby become a legitimate child entitled, as of right, to a share of that estate as a beneficiary. To reach this conclusion, the court distinguished its earlier decision in *Ogunmodede v Thomas.*[70b] In that case, one Isaac Ogunmodede married Marian Smith in accordance with the Marriage Act in 1890. There was only one lawful child of that union – Patience Ajibabi. During the subsistence of the marriage, Isaac had affairs with other women as a result of which sixteen other children were born. Isaac acknowledged the paternity of these children. In 1909, Patience married one Mosaleira Thomas, the first defendant, under the Marriage Act. There was no issue of the marriage, but Patience had two illegitimate children, Dolapo Shullon (fifth plaintiff) and Dada Adams. The marriage was not a happy one as the parties lived apart for over twenty years. However, there was no divorce. Isaac, to whom the land in question belonged, died intestate survived by his wife, Marian, and daughter, Patience. Marian also died intestate, survived by Patience. On the death intestate of Patience, her husband, Thomas, obtained Letters of Administration in respect of her estate which included the land in dispute. Thomas sold and conveyed a portion of that land to the second defendant. The plaintiffs who

[70] Cap. 103, *Laws of the Federation of Nigeria*, 1958 (Lagos State). Similar statutes of the same title exist in the other parts of Nigeria – Cap. 62, *Laws of Northern Nigeria*, 1963; Cap. 75, *Laws of Eastern Nigeria*, 1963. Reference in the text is to the sections of the Legitimacy Act.

[70a] SC 180/69 of 30 March 1972.

[70b] FSC 337/1962 of 10 March 1966; Adegbite, L. O., 'A disinheriting Estoppel', Vol. VII *Nigerian Bar Journal* (1966), 53.

represented the sixteen children claimed in an action against Thomas (the first defendant) a declaration of title to the land and an order to set aside the sale by Thomas to the second defendant. It was argued for the plaintiffs that during her lifetime, Patience did not deal with her father's estate all on her own. She regarded it as property of herself and the illegitimate children of her father, Isaac Ogunmodede. For instance, she sold and conveyed portions of the land in dispute jointly with her half-brothers, as was evidenced in the deed of conveyance dated 25 October 1946. Her conduct was, therefore, regarded as an acknowledgement of the joint ownership under Yoruba customary law of the said property. The first defendant, her husband, was fully aware of the conveyance of 1946 and in fact advised his wife to execute it with her illegitimate half-brothers. He had knowledge of his wife's conduct in respect of her father's estate when he applied for Letters of Administration to administer her estate.

The Supreme Court held:

> On the face of this Exhibit (G) [the deed of conveyance], we are of the view that Mrs Thomas herself in her lifetime would be estopped from claiming this property as her individual property. It is, therefore, difficult to see how the first defendant, her husband on the death of his wife, could claim that the property devolved on him on the death of his wife, since section 36 would not operate to vest the property in him.

While the Supreme Court accepted that the plaintiffs were illegitimate and therefore not entitled to their father's estate, it recognized that they could, in certain peculiar circumstances as this one, be regarded as having been granted some interest in the estate or part thereof.

### (B) INTESTATE SUCCESSION TO THE ESTATE OF AN ILLEGITIMATE CHILD

On the death intestate of an illegitimate child after 17 October 1929, the mother, if surviving, is entitled to take any interest in the intestate's estate to which she would have been entitled if the child had been born legitimate and she had been the only surviving parent.

The operation of Section 10 is excluded where succession or inheritance is governed by customary law.

The legal position of illegitimate children in Nigeria is retrogressive and in fact far from being satisfactory. Our law tends to punish and discriminate against them by depriving them of various important legal rights in respect of their natural parents and other collaterals. This approach is manifestly in contrast with the contemporary trend in many countries whereby there is a progressive emancipation of illegitimate children from the unjustifiable discrimination arising from the facts of their birth – an issue over which they had no control. An example is the recent enhancement in some countries of the succession rights of illegiti-

mate children so that they are put on an almost equal footing with the legitimate ones. The effect is to reduce the significance of illegitimacy. A topical illustration is that of the changes in the legal position of illegitimate children in England effected by the new Family Law Reform Act 1969.[71] Under this statute, on the death intestate of either parent of an illegitimate child, the child can take an interest in the property to which it would have been entitled if it had been born legitimate.[72] Conversely, the parents of such a child are now entitled to succeed to its estate on intestacy as if the child had been born legitimate.[73] With regard to gifts by deed or will, Section 15(1) of the Act alters the old rule of construction which still applies in Nigeria by providing that any reference to the child, children or other relations of a person shall, unless the contrary intention appears, be construed as, or as including, a reference to any illegitimate child or other relation of that person. Moreover, the Act abolished the rule of public policy that a disposition in favour of illegitimate children not in being when that disposition is made is void.[74] Similar developments have also taken place in Sweden[75] and Western Germany.[76]

A strong case exists in Nigeria for the re-examination and improvement of the legal position of illegitimate children on the lines described above. In any such exercise the basic principle should be that illegitimate children are not to be punished for the stigma attached to their parents' conduct. Justice demands that they should be granted equal rights in respect of maintenance and succession with their legitimate brothers and sisters.

[71] This statute came into force on 1 January 1970. For a discussion of some of its provisions see Morris, J. H. C., 'The Family Law Reform Act 1969, Sections 14 and 15' Vol. 19 *ICLQ* (1970), 328–333.

[72] Section 14(1).

[73] Section 14(2).

[74] Section 15(7): Morris, op. cit., 330–3.

[75] Under the Swedish Inheritance Code 1969 the illegitimate child became a co-heir with other legitimate children. Such a child is entitled now to inherit not only from its father but also from the father's relatives. The father and his relatives are also now able to inherit from the child – Sundbert: 'Marriage or no Marriage: the directives for the revision of Swedish Family Law' Vol. 20 *ICLQ* (1971), 223, 226.

[76] The Law of Illegitimacy 1969 gave the illegitimate child an 'inheritance portion' in place of strict right of succession as a legitimate child – Bohndorf, M. T., 'The New Legitimacy Law in Germany' Vol. 19 *ICLQ* (1970), 299, 306–8.

# 15
# Succession under Customary Law

## A WILLS UNDER CUSTOMARY LAW

### 1 Nuncupative wills

The disposition of property by will is a principle recognized by customary law. In Ibo customary law, it is known as *Ike Ekpe*. Most customary-law wills are oral and, therefore, are nuncupative wills. This feature has led some writers[1] to conclude erroneously that there is no distinction between testate and intestate succession under customary law. It is submitted that as in English law, testate succession under customary law gives effect to the intention of the testator as expressed in the nuncupative will.

A customary-law will takes the form of an oral declaration made voluntarily by the testator during his lifetime. Such declaration may be made while the testator is in good health, or in anticipation of death.[2] Often, the declaration deals not only with the disposition of property but also gives directions as to the mode of burial and funeral ceremonies to be performed for the testator.

As in English law, a disposition of property by will under customary law becomes effective only if the testator possesses full mental capacity at the time the will was made. Furthermore, the identity of the subject-matter of the will must be specific so as to be easily identified. In the case of personal property, the particular item devised has to be specified – a gun, an elephant tusk, etc. Where land is given, the testator should appropriately describe the particular plot. A nuncupative will is not the usual method of general disposition of the testator's entire estate. The subject-matter of the will must be disposable, as the testator cannot give that which he does not own. Thus, a person cannot dispose of undivided interest in family or communal land by will, as he has no individual property therein.[3] On the other hand, any other property individually

[1] Elias, T. O., *Nigerian Land Law and Custom*, 3rd Edn (Routledge & Kegan Paul, London 1962), 228; Lloyd, P. C., *Yoruba Land Law* (Oxford University Press, London 1962).

[2] Cf. the definition of Meek; 'a declaration made voluntarily and orally by a person in sound mind, in expectation of death, in the presence of responsible and disinterested persons' – Meek, C. K., *Land Tenure and Land Administration in Nigeria*, Colonial Research Studies No. 22 (HMSO, London 1957), 182.

[3] *Johnson & Macaulay* [1961] 1 All NLR 743.

owned by the testator may be so disposed. The testator should also clearly identify the beneficiary.[4]

It has been suggested that for a nuncupative will to be valid, it must be made in the presence of disinterested witnesses.[5] Obviously, the presence of witnesses is necessary for the validity of oral wills. But whether such witnesses should be disinterested is another matter. It has been rightly pointed out that 'the presence of disinterested witnesses is necessary, not for purposes of validity, but for purposes of proof of the declaration'.[6] No specific number of witnesses is laid down, but the will is likely to be readily established by the evidence of more than one witness, especially if those witnesses are not beneficiaries.

The view has also been put forward that the effectiveness of a nuncupative will depends on the consent of the testator's family.[7] While this seems to be an essential feature of a customary-law will in Ghana (*Samansiw*), it is not essential in the testamentary disposition of private property in Nigeria. A testator is always free to dispose of his self-acquired property by a nuncupative will. The requirement of family consent may only be relevant in Nigeria in respect to the testamentary disposition of family property. Thus, while an individual cannot dispose of undivided interest in family land by will, he could, with the consent of the family, dispose of the family property in that manner.

Unlike the case of a *donatio mortis causa,* it is not necessary for the validity of a nuncupative will that the subject-matter of the will should be delivered to the beneficiary in the lifetime of the testator. However, *donatio mortis causa* resembles a customary-law will in that both take effect and are conditional on the death of the testator or donor.

The testator of a customary-law will has a free hand in the choice of the beneficiary, who may be a member of his family or a stranger.

**2 Written wills**

As Western education permeates our traditional society, there are increasing instances of customary-law wills being set down in writing. What is the effect of such a document? Should it, in order to be valid, comply with the provisions of the Wills Act 1837 or the Wills Law 1958? Writing is obviously not an intrinsic feature of customary law. The Nigerian courts have repeatedly held that the reduction into writing of an essentially customary-law transaction does not alter its nature. Writing in such cases is no more than mere evidence of the transaction.[8] *A fortiori* the reduction of a customary-law will into writing should not

[4] On the essential elements of nuncupative wills see Obi, S. N. C., *Ibo Law of Property* (Butterworth, London 1963), 206–208; Okoro, Nwakamma, *The Customary Laws of Succession in Eastern Nigeria and the statutory and judicial rules governing their application* (Sweet & Maxwell, London; African Universities Press, Lagos 1966), 73–75.

[5] Meek, op. cit.

[6] Obi, op. cit. at 206.

[7] Ollennu, N. A., *The Law of Testate and Intestate Succession in Ghana* (Sweet & Maxwell, London 1966), 273.

[8] *Rotibi v Savage* (1944) 17 NLR 77; *Nwabuoku v Ottih* [1961] 1 All NLR 487.

affect the nature of the disposition.[9] Writing *per se* is not conclusive evidence that the English form is intended.

If the testator intends to make a will in accordance with the English form then the document must comply with the requirements of the Wills Act 1937. Where, on the other hand, the testator intends to make a customary-law will but adopts the strict technical form prescribed by the Wills Act 1837, the document will be treated by the courts as an English will. If, however, the will is written but does not comply with the requirements of the Wills Act, it would be treated as valid under customary law.

In *Apatira v Akenke,*[10] the testator, a native of Nigeria who was born and lived his entire life as a Moslem, died leaving a will in English form which did not comply with the requirements of the Wills Act as regards signature and attestation. It was argued in favour of granting probate of the will that in spite of the statutory deficiencies, it should be treated as a will in Moslem form which, like the one in question, does not require any writing or attestation. Ames, J, refused to grant probate of the will on the ground that the testator intended to make a will in accordance with English law but failed to comply with the statutory requirements. Evidence of such intention was found in the fact that the testator purported to dispose of his estate contrary to the rules of Moslem law. It is submitted that the case was wrongly decided. There are no compelling reasons of policy why such a document should not be treated as a valid customary-law disposition if it conveys the testator's intention as in a valid nuncupative will.

Another interesting question may arise in connection with a written will. If, for instance, a native of Nigeria makes a will which is intended to be in the English form but fails to comply with the requirements of the Wills Act, can the court consider the validity of such a document under customary law? A negative answer was given to this question in *Apatira v Akanke.* But there are no compelling reasons of policy why such a document should not be treated as a valid customary-law disposition if it complies with the requirements of a valid nuncupative will.

### 3 Moslem wills

Under the Maliki school of Moslem law, a testator may dispose of part of his estate by will. There is no requirement of writing or of signing and witnessing as in the case of statutory law. A Moslem testator can only bequeath one-third of his estate to persons other than those who would traditionally be his heirs. The remaining two-thirds devolves on his traditional heirs.[10a] An heir cannot be a beneficiary, so that a bequest to him will alter the shares of his co-heirs in the remaining two-thirds unless all the heirs agree.[11]

[9] Okoro, op. cit. at 76.

[10] (1944) 17 *NLR* 149.

[10a] *Rasaki Yinusa v Adesubokan,* Suit No. Z23/67 (unreported), Bello, J, High Court, Zaria, 30 October 1968; [1970] Vol. 14 *JAL*, 56.

[11] Ruxton, F. H., *Maliki Law* (Luzac, London 1916), 371: Fyzee, A. A., *Outlines of Mohammedan Law,* 2nd Edn (Oxford University Press, London 1955), 306.

## B INTESTATE SUCCESSION

The patterns of intestate succession under customary law in Nigeria have almost as many variations as there are ethnic groups in the country. It is unnecessary in a book of this nature to discuss all the prevailing patterns of succession. Consequently, we shall examine only a few of the succession patterns.[12]

### 1 The Yoruba system (Lagos and Western States)

(a) Under modern Yoruba customary law of intestacy, the children of the deceased are entitled to his real property to the exclusion of other blood relations.[13] It seems that in Abeokuta, the traditional succession rights of brothers and sisters have survived to some extent.[14]

On the death of the intestate, his landed property devolves on his children as family property. This includes property acquired by the deceased, whether under English form[15] or by customary law, and family property under his control. But where the deceased makes a gift of his self-acquired land to a child or any other person during his lifetime, the property will not devolve as family property.[16]

While all the children of the deceased have rights to the family property, its management is under the control of the *Dawodu*, who is the eldest surviving son of the deceased.[17] All the legitimate children of the deceased are entitled to succeed to his disposable landed property. These include children born of customary-law marriage and those legitimated in accordance with the prevalent customary law, for instance, by acknowledgement. The children share equally, irrespective of sex or age. In *Salami v Salami*,[18] the plaintiff and the defendants were the only surviving children of one Salami Goodluck, a native of Abeokuta, who died intestate, leaving a house and farmland in Abeokuta. Soon after the death of the father in 1927, the plaintiff, then about seven years old, was taken to the French Cameroons by her mother and did not return to Abeokuta until 1953. Apart from some clothes and two chairs allocated to her at the time of her father's death, she had received no benefit from the estate. In an action for an account and partition brought by the plaintiff against her two brothers, Irvin, J, held that the plaintiff's right to inherit under Yoruba customary law could not be affected by her absence, minority or sex, and that the *Dawodu* (i.e. the

[12] For other illustrative patterns see: Derrett, J. D. (ed.), *Studies in the Laws of Succession in Nigeria* (Oxford University Press, London 1965); Elias, T. O., *Nigerian Land Law*, 4th Edn (Sweet & Maxwell, London 1971), 178–237.

[13] *Adeseye v Taiwo* [1956] Vol. 1 FSC 84; Coker, G. B. A., *Family Property Among the Yorubas*, 2nd Edn (Sweet & Maxwell, London; African Universities Press, Lagos 1966), Chapter 12.

[14] Kasunmu, A. B., and Salacuse, J. W., *Nigerian Family Law* (Butterworth, London 1966), 291.

[15] *Ogunmefun v Ogunmefun* (1931) 10 NLR 82, 83; See also *Lewis v Bankole* (1909) 1 NLR 82.

[16] *Bankole v Tapo* [1961] 1 All NLR 140; *Roberts v Wilson* [1962] LLR 39.

[17] *Lewis v Bankole* (1909) 1 NLR 82; *Salako v Salako* [1965] LLR 136.

[18] [1957] WRNLR 10: *Barretto v Oniga* [1961] WNLR 112; *Lopez v Lopez* (1924) 5 NLR 43; *Sule v Ajisegiri* (1937) 13 NLR 146; *Ricardo v Abal* (1926) 7 NLR 58.

eldest son) was not entitled to a greater share than the other children.

There are two systems of distribution recognized by Yoruba customary law – *Idi-Igi* and *Ori Ojori*. Under the *Idi-Igi* system, the estate is divided *per stirpes*, that is, equally among the mothers – wives of the deceased – the children taking the portion of their respective mothers. In the case of *Ori-Ojori*, property is distributed *per capita* among the children of the deceased. In *Danmole v Dawodu*[19] the deceased, Suberu Dawodu, was survived by nine children born of four wives. The question before the court was whether the intestate's estate should be divided into four parts (*per stirpes*) or into nine parts (*per capita*). Jibown, J, in the court of first instance, held that distribution on the basis of *Idi-Igi* was contrary to natural justice, equity and good conscience. The Privy Council upheld the Supreme Court's rejection of Jibowu's judgment and decided that the estate should be divided into four parts. In the opinion of the Board, *Idi-Igi* was the prevalent custom of the Yorubas; *Ori-Ojori* is a modern method of distribution for the avoidance of litigation. The Board also concluded that distribution in accordance with the *Idi-Igi* system is not contrary to natural justice, equity and good conscience.[20]

(b) An illegitimate child cannot succeed to the estate of the putative father until acknowledged by the father in accordance with Yoruba customary law.[21]

(c) The surviving spouse is not entitled under Yoruba customary law to succeed to the property of the other. In *Suberu v Sunmonu*,[22] the Federal Supreme Court held that by Yoruba custom a wife cannot inherit her husband's property. In the absence of surviving children, property which the intestate inherited will devolve on the members of the family from which it came. Thus, if the property came from a maternal ancestor it goes to his maternal relations, and *vice versa*.

(d) In *Johnson v Macaulay*,[23] Lambo, J, held that under Yoruba customary law the property of a woman devolves, on intestacy, upon her children in common. Consequently, the distribution will be *per capita*. But the descendants of predeceased children of the intestate share in the division of her real property *per stirpes*.

(e) On the death intestate of a child, his brothers and sisters will be exclusively entitled to succeed to his estate. Half-brothers and -sisters, being the children of a different mother, would not take any share. If there are no brothers and sisters, the property will devolve on the parents of the child.[24]

[19] (1958) 3 FSC 46; [1962] 1 All NLR 702 (PC).
[20] [1962] 1 All NLR 702; *Taiwo v Lawani* [1961] 1 All NLR 703; *Reis v Mosana* [1964] LLR 19.
[21] *Young v Young* (1953) WACA Civil Appeal No. 3631, Cyclostyled Report, 19.
[22] [1957] Vol. II FSC 33; *Caulcrick v Harding* (1926) 7 NLR 48.
[23] [1961] 1 All NLR 743.
[24] See evidence given in *Adedoyin v Simeon* (1928) 9 NLR 76, 77–78.

## 2 The Ibo system

### (A) SUCCESSION TO A FATHER'S ESTATE

The principle of primogeniture governs intestate succession in the predominantly patrilineal Ibo society. On the death intestate of an Ibo male, the eldest son will succeed to his estate. In the first instance, he succeeds to his father's status as the head of the family. Moreover, the eldest son is entitled by virtue of his position as the head of the family to some special property which he enjoys for his lifetime only. He is entitled to occupy his father's dwelling-house, and farm the compound or the immediately adjoining land. Sometimes, he is also given another piece of land specially reserved for the head of the family to farm.

The remainder of the real property is held by the eldest son as a trustee-beneficiary for himself and his brothers.[25] In Ibo custom only sons, to the exclusion of daughters of the deceased, can inherit his landed property.[25a] With regard to movable property, the eldest son is usually entitled to the personal effects of his deceased father, including his gun, dresses, elephant tusks and farm implements.[26]

The distribution of the intestate's estate may take either of two forms. In some areas the distribution is *per capita*, that is, the property is divided into as many portions as there are male children. In other areas distribution is on the basis of *per stirpes*, in which case the property is divided into as many portions as there are wives with male children.

Where the intestate has no male children, succession to his estate is by brothers of the full blood and half-brothers, the former having priority over the latter.

Under Ibo customary law, a wife has no succession rights to her husband's property. In *Nezianya v Okagbue*[27] the Supreme Court held that in accordance with Onitsha customary law, the widow cannot succeed to her husband's property. If the husband dies without a male issue, his real property descends to his family. But a widow is not a complete stranger to her husband's property under Ibo customary law. She is entitled as of right to occupy his dwelling-house or part of it, subject to good behaviour. If she does not marry any member of her husband's family but remains there, she is in addition entitled to be shown some portion of the husband's farmland to cultivate.

### (B) SUCCESSION TO THE ESTATE OF A MARRIED WOMAN

The general rule is that a woman's ante-nuptial property that she did not take with her to her husband's house remains at all times the property of her father's family. With regard to the property that she brought to her husband's house, a distinction is made between land and personal effects. On a wife's death intestate, her movable property is

[25] Okoro, op. cit. at 121; *Ngwo & Nwodei v Onyejena* [1965] 1 All NLR 352, 355; *Ejiamike v Ejiamike* [1972] 2 ECSLR 11.

[25a] *Uboma & Ors v Ibeneme & Anor* [1967] FNLR 251.

[26] Okoro, op. cit. at 117-127; Obi, op. cit. at 155-180.

[27] [1963] 1 All NLR 352.

inherited by her children – articles of personal adornment by her daughters and the rest by the sons. Obviously, a woman cannot bring real property to her husband's house. If she ceases to enjoy her right in real property on marriage, the land will devolve on her children or her father's family. What is the position if she continues to enjoy her ante-nuptial real property after marriage? Does such enjoyment confer a succession right thereto on the husband? In *Nwugege v Adigwe*,[28] it was held that by Onitsha customary law, where a married woman lived in her ante-nuptial house with her husband until her death, her father's family was entitled to succeed to the house.

Turning to a married woman's property acquired during coverture, her interests in land devolve on her sons by that marriage. Failing sons, her husband will succeed to the property, or in his absence, his successors. Movable property acquired during marriage is inherited by the children, as in the case of ante-nuptial property brought to the matrimonial home.[29]

(c) SUCCESSION TO AN INFANT'S ESTATE

Both the personal effects and real property of a male child devolve on his eldest full brother, and if there is none, on his father. In the case of a daughter, her movable property is inherited by her full brothers and father. Her articles of dress and ornaments go to her sisters.[30]

### 3 The Bini system

Succession under Bini customary law is governed by the principle of primogeniture. But unlike succession under Ibo customary law, on the death intestate of a father, the eldest son succeeds to all his disposable property to the exclusion of the other brothers and sisters. In practice, for the purposes of maintaining family peace and harmony, the eldest son at his discretion gives some part of the estate to his younger brothers.[31] In *Ogiamien v Ogiamien*,[32] the Federal Supreme Court expressed the view that there was nothing wrong with this custom, which is not unknown in some other highly civilized countries of the world.

The exclusive succession right of the eldest son is accompanied by the obligation to perform the deceased father's funeral ceremonies. In addition, the heir is obliged to provide maintenance for the younger children and other dependants of the deceased.

[28] (1934) 11 NLR 134.

[29] See generally Okoro, op. cit., at 135–138; Obi, op. cit., at 191–195.

[30] Okoro, op. cit., at 141–142; Obi, op. cit., at 195–196.

[31] Bradbury, R. E., and Lloyd, P. C., *The Benin Kingdom and the Edo-Speaking Peoples of South-Western Nigeria: Western Africa, Part XIII* (International African Institute, London 1957), 46–7; Thomas, N. W., *Anthropological Report on the Edo-speaking Peoples of Nigeria: Part I* (Harrison & Sons, London 1910). See the statement of Bini customary law of succession in *Ehigie v Ehigie* [1961] All NLR 842, 845. But Fatayi Williams, J, rejected the law stated therein on the ground that it was not established in evidence.

[32] [1967] NMLR 245, 247 [1967] 1 All NLR 191; *Osazuwa v Osazuwa*, Suit No. B/39/67 (unreported), Ighodaro, J, High Court, Benin, 31 October 1968.

The eldest son is also entitled exclusively to the estate of his deceased mother. However, the daughters usually take her personal apparel and household utensils.[33]

The Ishan customary law of succession is similar to the Bini, discussed above.[34]

### 4 The Ijaw system

The succession rights among the Ijaws depend on the type of marriage contracted by the person's parents. The children of the *iya* (or big-dowry) marriage and their mother belong to their father's family and have succession rights in that family. On the other hand, in the case of *igwa* (or small-dowry) marriage, both the children and their mother belong to their mother's family. The children will inherit from their maternal uncles or other maternal relations.

Where a man contracts an *iya* marriage, his intestate estate will devolve on his sons. Failing sons, his full brothers will inherit the estate. The distribution of the estate is *per capita*, the eldest son receiving the largest share while the smallest share goes to the youngest. The estate of a wife of an *iya* marriage devolves as in the case of Ibo patrilineal society already discussed.

The children of an *igwa* marriage inherit from their maternal uncles and other maternal relations. With regard to a wife of an *igwa* marriage, her property devolves on her sons and daughters; failing these on full brothers and sisters. Her husband and his family have no succession rights whatsoever in her estate.[35] The distinction between these two types of marriage and patterns of succession is rapidly breaking down. An instance in Okrika has been cited by a learned writer in which the children of an *igwa* marriage successfully claimed and succeeded to part of their father's estate.[35a] The modern trend seems to be that the children of *igwa* marriage sway to whichever side possesses more power, influence and property.

### 5 Systems in the Northern States

(A) ISLAMIC LAW

The rights of succession under Islamic law are set out in the Koran. Succession under Islamic law is to the net estate of the intestate after the payment of funeral expenses, debts, legacies and other charges. The shares which are inherited are of the following fractions only – $\frac{1}{2}$, $\frac{1}{4}$, $\frac{1}{8}$, $\frac{2}{3}$, $\frac{1}{3}$ and $\frac{1}{6}$ of the estate.

If a Moslem dies intestate, his estate must be shared among his heirs entitled to share his estate under Moslem law. His male children must have equal shares, and the female children a half-share each.[35b] A child

[33] Bradbury and Lloyd, op. cit., at 47.
[34] Okojie, C. G., *Ishan Native Laws and Customs* (John Okwesa & Co, Yaba 1960), 90.
[35] Okoro, op. cit., at 149–153.
[35a] Williamson, K., 'Changes in the Marriage System of Okirika Ijo' *Africa* Vol. XXXII (1962), 53, 59.
[35b] *Yinusa v. Adesubokan* [1970] Vol. 14 *JAL* 56.

may only be disinherited of his legal share if he is not a Moslem, or if he kills his parents with the intention to inherit their properties. The rules of distribution are as follows. On the death of a man intestate, his widow is entitled to one-quarter of the estate. But if there are children or grandchildren, her share will be reduced to one-eighth. Where there is a plurality of wives, they share the one-quarter or one-eighth equally between them. If a woman dies intestate, her widower is entitled to half her net estate, and if there are surviving children, to one-quarter.

With regard to the succession rights of children, a single daughter is entitled to half the net estate. If there are two or more daughters, they get two-thirds, divided equally among them. An only son will be entitled to the whole estate, or to the remainder after the payment of the shares of any ancestor who is entitled to succeed. Thus, if the deceased left a son and a father, the father takes one-sixth of the estate and the remainder devolves on the son. If there are sons and daughters they inherit the entire estate, or the remainder after the shares of the spouse and the ancestors have been paid in the appropriate proportions.[36] One significant point in the Moslem mode of distribution is that the estate is divided *per capita* and not *per stirpes*.

(B) OTHER SYSTEMS

It seems that customary law in some parts of Northern Nigeria is developing towards granting spouses succession rights in each other's intestate estate.[37]

## C JURISDICTION IN RESPECT OF INHERITANCE OR DISPOSITION OF PROPERTY ON DEATH UNDER CUSTOMARY LAW

In Nigeria, except in the East Central State, exclusive original jurisdiction is conferred on customary courts in respect of all matters relating to inheritance or disposition of property on death under customary law.[38] Thus, any disputes pertaining to these matters are referable in the first instance to the customary courts. The High Court and Magistrates' Courts have no original but only appellate jurisdiction in respect of these subjects.[39]

With the abolition of customary courts in the East Central State,

[36] Koran iv, 12; Ruxton, F. H., *Maliki Law* (Luzac, London 1916), 373–394; Fyzee, A. A., 343–352; Harvey, B. W., *The Law and Practice of Nigerian Wills, Probate and Succession* (Sweet & Maxwell, London; African Universities Press, Lagos 1966), 182–183.

[37] For instance, the position in Igbirra – see Salacuse, J. W., *A Selective Survey of Nigerian Family Law* (Institute of Administration, Zaria, 1965), 75–76.

[38] Customary Courts Edict 1966 (Mid-West State) S 18(1) and Second Schedule; Area Courts Edict 1967 (Kano State) S 17(1), part 2 First Schedule; Customary Courts Law (Western State) S 18(1) and Second Schedule.

[39] High Court Law, S 17(1) Northern Region), High Court Law, S 9(1) Western State), Magistrates' Court Law, S 19(4) Cap. 74, *Laws of Western Nigeria*, 1959. *Igbodu and two others v Amoo* [1957] WNLR 22; *Idowu & Anor v Adisa & Anor* [1957] WNLR 167; *Nwafia v Ububa* [1966] NMLR 219.

original jurisdiction was vested in the High Court and Magistrates' Courts in matters relating to inheritance or disposition of property on death under customary law.[40]

[40] High Court Law (Amendment) Edict 1971, S 3; Magistrates' Courts Law (Amendment) Edict 1971, S 5.

# 16
# The Extended Family

At the beginning of this study, we made a distinction between the nuclear and the extended family.[1] So far, our discussions have been concerned with the nuclear family and the relationship of its members. But a study of the law relating to the family in Nigeria will not be complete without giving due consideration to the institution of the extended family.

The extended family is a social institution. It is a unit made up of various nuclear families. Consequently, a person may have rights and obligations not only in his immediate family but also in the extended family of which he is also a member.

Membership of the extended family is acquired through belonging to the family of the founder of one of the constituent nuclear families. The primary mode of membership is by birth into the family. This covers all the legitimate children born into each nuclear family. Membership may also be acquired by marriage. In patrilineal societies, a woman becomes on marriage a member of her husband's family, and acquires certain rights and obligations therein. But in some matrilineal societies a wife does not become a member of her husband's family by the fact of the marriage.

The extended family is a corporate body and may be said to possess a legal personality. As a legal entity, the extended family may own and hold property, sue and be sued in its name and be responsible for the authorized acts of its agents. For instance, the family head may, in certain circumstances, act as the agent of the family.

## A THE FAMILY HEAD

The founder of the family is the head of the extended family. On his death, the headship of the family devolves on his eldest surviving son. In Yorubaland the head of the family is known as the *Dawodu*, in Hausa *mai gida*, while in the Ibo-speaking areas he is referred to as the *Okpala* or *Diokpa*. Except in Afikpo, Yako, and Yorubaland, the headship of the family is automatically inherited by the eldest male member on the death of the last holder of that position. A woman is never entitled to be the head of the family. Under Yoruba customary law, on the death of the *Dawodu*, his brothers and sisters are equally entitled to succeed to his

[1] See Chapter 1.

position, depending on their seniority. Consequently, the eldest member of the family, whether male or female, will be its head.[2]

Sometimes a family selects its leader rather than allow the normal rule of succession to operate. This is usually the case where, in the opinion of the members of the family, its eldest member is unfit to hold the position or does not command the loyalty of the majority of its members.[3] In some cases, a member other than the eldest member is selected to head the family because of his special qualities or social status.

The family head is a trustee and manager of the family property. He is responsible for the day-to-day administration of the family property. If there is a family council, the family head is usually its chairman, and he is assisted by the council in the exercise of his functions.

## B FAMILY PROPERTY

Basically, the extended family is a property-owning unit. The property of the family is any type of property the title to which is vested in the family as a corporate entity.[4] In the case of land, the title created thereby is neither a joint tenancy nor a tenancy in common.[5] In fact, the nature of the tenure in family property has no ready equivalent in English jurisprudence.

Primarily, family property consists of land and the houses built thereon. The corporate ownership of land is a common feature of the social organization throughout Nigeria. But the concept of 'family house' has a special significance in Yorubaland and in the matrilineal areas of Eastern Nigeria. A family house in Yoruba customary law has been described by Carey, J, as:

> a residence which the father of a family sets apart for his wives and children to occupy jointly after his decease. All his children are entitled to reside there with their mothers and his married sons with their wives and children. Also a daughter who has left the house on marriage has a right to return to it on deserting or being deserted by her husband. No one has a chargeable or alienable interest in the family house. It is only with the consent of all those entitled to reside in the family house that it can be mortgaged or sold.[6]

In other patrilineal societies like that of Iboland, the house of the founder of the family is inherited by his most senior male child, who has the

[2] *Lewis v Bankole* (1908) 1 NLR 81, 102.

[3] *Inyang v Ita & Others* (1929) 9 NLR 84.

[4] On family property generally see: Coker, G. B. A,, *Family Property Among the Yorubas*, 2nd Edn (Sweet & Maxwell, London; African Universities Press, Lagos 1966); Obi, S. N. C., *The Ibo Law of Property* (Butterworth, London 1963); Derrett, J. D. (ed.), *Studies in the Laws of Succession in Nigeria* (Oxford University Press, London 1965); Lloyd, P. C., *Yoruba Land Law* (Oxford University Press, London 1962), 76–85.

[5] For a full discussion of the nature of the tenancy created in family property see Coker, *Family Property Among the Yorubas*, 2nd Edn (1966), op. cit., 49–55.

[6] *Coker v Coker* (1938) 14 NLR 83, 86.

right to reside there. He is bound to accommodate his brothers and sisters in the house until the males establish their own households elsewhere or the females marry.

Family property may also consist of movable property. In this respect, the property must be regarded as vested in the corporate entity rather than in its individual members. This category of family property includes money (raised by collections or the proceeds of the sale of family land), and objects such as a crown, sword, staff of office, or ornament, which are handed down from generation to generation as heirlooms.

Although the concept of corporate ownership of land is known throughout Nigeria, the institution of family property seems to be established only in the southern part of the country. In Hausaland, Northern Nigeria, for instance, there is a family land-holding system known as *gandu* (plural: *ganduna*).[7] A *gandu* may consist of a man, his wives and family, and his married sons and their families, or in some cases, his brothers. The head of the household is known as the *mai-gada*, a position occupied by the eldest son of the founder of the family. The *gandu* system possesses some features of the family property system. For instance, on the death of the founder of the family, his children succeed to his land and farm it in common. But either the children or the grandchildren have a right to demand the partition of the family land at any time. Thus, the system does not seem to be a method of preserving the corporate ownership of land in the family.[8] It therefore lacks the essence of the family property system, which is the preservation of family land as corporate property for as long as possible. It may, therefore, be concluded that while some aspects of the family property system are found in the *gandu* or other customary systems of land-ownership in Northern Nigeria, the principles of family property have not been fully developed in these areas. Consequently, our discussions on family property will be confined to Southern Nigeria.

### 1 Creation of family property

Family property may be created either by the act of the parties or by the operation of the law. The first method includes the making of a will, purchase of property, occupation of vacant land and gifts, while the other method is the result of intestacy on the estate of the founder of the family.

#### (A) BY ACT OF THE PARTIES

*(i) By will.* One of the principal modes of creating family property by the act of the parties is by making a will. In Nigeria, a person of full age and capacity may make a will under the English Wills Act 1837 or the Wills Law 1958. It is also open to a Nigerian to make a nuncupative will,

[7] Smith, M. G., 'Hausa Inheritance and Succession' in *Studies in the Laws of Succession in Nigeria* ed. Derrett, J. D. (Oxford University Press, London 1965), 230, 241.
[8] id. at 243.

which is fully effective under customary law. A testator may in his will bequeath his land to his children or descendants as family property.

To create family property by will, it is not necessary to use the words 'family' or 'family property' in the devise. The test as to whether family property has been created is the intention of the testator. If the words used in the devise are such as could evince from the surrounding circumstances an intention to create family property the court will give them this construction. In *Abigail George v Ramotu Fajore*,[9] the testator, Ige George, by 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'. The plaintiffs, who were the surviving executors, brought this action against the widow of the testator to recover land in her possession. It was held that the plaintiffs would succeed as the land was governed by customary law. In construing the words of the devise, Butler Lloyd, J, said:

> It is a cardinal principle that in interpreting a will the court will be guided by the intentions 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 his issue.[10]

This case may be contrasted with the decision in *Young v Abina*.[11] In that case, the testatrix devised her real property to X 'his heirs executors and administrators upon trust to hold the same as family property for the use and benefit of all his relatives and the same should on no account be sold or partitioned by him, them or any of them'. In her lifetime, the testatrix granted a mortgage over the property in question and at her death the mortgage was still subsisting. She appointed executors under the will who duly proved it. After her death, her executors granted a fresh mortgage in respect of the land to a third party. Subsequently, X sold and conveyed the land to a different person. X's children brought an action against their father, the surviving executor as mortgagor, the personal representatives of the mortgagee (who was now dead), and the purchaser for an order setting aside the mortgage and conveyance and a declaration that the will constituted the property family property. The plaintiffs also asked for a full account of the rent and mesne profits. It was a common ground that under customary law the executors have no power to mortgage the property. The question then turned on whether the English Land Transfer Act 1879 applied in

[9] (1939) 15 NLR 1, 3.
[10] id. at 3.
[11] (1940) 6 WACA 180.

Nigeria by virtue of Section 14 of the then Supreme Court Ordinance. That Act gave trustees, executors and personal representatives statutory power to dispose of property by sale or mortgage.

The West African Court of Appeal, overruling *Re Sholu*,[12] held that the Land Transfer Act 1879 was a statute of general application in Nigeria, and applied in that particular instance. Customary law was not applicable in the case and therefore the trustees and executors acted within their statutory powers. The court justified its conclusion on the ground that:

> Here we have no question of native law and custom. We have as Exhibits in this case a will, two indentures of Mortgage and a Conveyance on sale, all of them couched in the jargon of the English conveyancer, all of them highly specialized documents to which the Land Transfer Act was designed to apply generally.[13]

It is submitted that the reasons adduced by the court relate solely to the nature of the will and other documents and not to the intention of the testator. Undoubtedly, the mere words of the documents may suggest the creation of an English-type tenancy, but a close look at the words of the devise indicated that the testatrix actually intended to create family property. The use of the jargons of English conveyancers should not be allowed to frustrate the attainment of that objective. The decision in *Young v Abina* should be regarded as bad law, or otherwise as restricted to the particular facts of that case.

The devise of property by will by the testator to his children does not violate the rule against perpetuities, as the interest vests immediately in the members and does not remain executory. In *Coker v Coker*,[14] the bequest in the testator's will was: 'I leave and bequeath my present dwelling house to the whole of my family or blood relative and their children's children throughout'. It was contended for the plaintiffs that the devise was void on the ground of uncertainty and that it contravened the rule against perpetuities. Carey, J, rejected this contention in these words:[15]

> It seems to me that there can be no question regarding the rule against perpetuities in that the bequest to 'the whole of the testator's family or blood relative and their children's children throughout' was not an executory devise or future limitation but took effect immediately on the death of the testator and the property affected thereby then vested.

In several cases, the testator, while creating family property by will, also appoints a trustee or trustees. What is the legal effect of such appointment? The attitude of the courts as shown in the decided cases is to treat

[12] (1932) 11 NLR 37.
[13] *Young v Abina* (1940) 6 WACA 180, 184.
[14] (1938) 14 NLR 83.
[15] id. at 85.

the appointment of trustees as not affecting the creation of family property.[16] If the appointment of such trustees is valid, what is their function in respect of the property devised by the will? There is no place in the scheme of family property for a trustee appointed by the testator. Under customary law, the head of the family or the family council is charged with the responsibility of managing the family property. Consequently, there will be no property left for the trustee to act upon. Moreover, unlike in English law, the legal estate in family property is vested in its members and not in the trustee. The property cannot, therefore, be disposed of or otherwise dealt with without their consent. The appointment of a trustee in respect of family property is an anomaly. Dr Coker concluded that the legal position of a trustee appointed in respect of family property is that 'such a trustee is a redundant figure in the scheme of family property [and] his status is unknown to native law and custom'.[17] There is no doubt that if the trustee is given any powers in respect of the family property, these will conflict with the functions of the family head.

There are situations in which it is imperative for a testator to resort to the making of a will in order to create family property. This is the case, for instance, where in the absence of a will, the law governing the intestacy does not provide for the creation of family property. A Nigerian whose estate will be governed on intestacy by Section 36 of the Marriage Act or Section 49 of the Administration of Estates Law (Western Region) can only create family property by a devise in a will. The same is true where on intestacy the rule in *Cole v Cole*[18] will apply.

*(ii) By purchase.* Family property may also be created by the purchase of real property for and on behalf of the family. The purchase may be made out of money collected by members of the family or from the proceeds of the sale of another family property. Such purchases are not unknown in urban areas and are regarded as an investment for future generations.

*(iii) By occupation.* In ancient times when tracts of virgin land lay unoccupied and uncultivated, it was usual for individuals to help themselves by settling with their families on any attractive piece of land. Thus, with the passage of time the land will pass from one generation to another and thus become family property.

*(iv) By gift.* Again, family property may be created by a gift. The gift may be *inter vivos* or by a will. Sometimes, a piece of land may be given *inter vivos* to an individual or even a family by name in appreciation of a good turn done to the donor.[19] On the other hand, property may be

[16] *Young v Young* (1953) WACA Cyclostyled Reports, May 1953, 19.
[17] Coker, op. cit. at 82.
[18] (1898) 1 NLR 15.
[19] *Awgu v Nezianya* (1944) 12 WACA 450.

devised in a will to a named family as a gift. In *Young v Young*,[20] the testatrix devised her real property:

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

The devise was treated as family property for the family of which Benjamin Young was a member.

(B) BY OPERATION OF LAW

It is a well-established principle of customary law that on the death intestate of the founder of a family, his real property is inherited by his children and becomes family property. The creation of family property by the operation of law requires the fulfilment of certain pre-conditions. First, the property in question must be wholly and privately owned by the deceased. Once this condition is satisfied, it does not matter how he acquired the property. It may have been obtained by purchase, or as a gift, or otherwise, but he must be the sole owner, and have absolute control over it. In *Miller Bros (Liverpool) Ltd v Ayeni*,[21] Van Der Meulen, J, considered the nature of individual ownership in land that became family property on intestacy thus:

> It is true that the father of the claimants and the defendant held this property under an English title, and if he had so wished, he could have disposed of it either by sale or by will without consulting any other person; he did not, however, do this, and as stated above, it has been admitted that on his death his children succeeded to the property according to native law [as family property].[22]

Second, the land must have remained the intestate's absolute property at the time of his death. Thus, land which is privately owned by a person does not descend as family property on the owner's death intestate, if during his lifetime he had earmarked it and allotted it to some individual. In that case the land is solely owned by the grantee and will not descend as family property.[23] Third, the law which governs the intestacy of the deceased founder of the family must provide for the devolution of his real property as family property. Thus, where an intestacy is governed by Section 36 of the Marriage Act or Section 49 of the Administration of Estates Law (Western Region) the real property of the deceased will not devolve as family property. The same situation will result where the

[20] (1953) WACA Cyclostyled Reports, May 1953.
[21] (1924) 5 NLR 42.
[22] id. at 44.
[23] *Bankole v Tapo* [1961] 1 All NLR 140; *Awgu v Nezianya* (1949) 12 WACA 450.

rule in *Cole v Cole*[24] applies so that English rules of intestacy will govern the distribution of the estate.

Fourth, the deceased must have left a family which will succeed to his real estate as family property. It has been argued that if the deceased is succeeded by only female survivors or one male survivor there is no perpetual body which will inherit the property as family property. In the first instance, the females will ultimately be married away from the family, and in the latter the sole male survivor will be a sole owner of the property, which he is free to sell. According to this view there must be at least two male survivors in order to ensure the continuity of the family[25] as a corporate entity. This view finds support in the social facts of most Nigerian communities, where males are necessary for the continuity of the family.

## 2 Rights of individual members in family property

Once land becomes family property, the tenancy created thereby is neither the English joint tenancy nor a tenancy in common. Each member of the family has an equal interest, but not a separate property, which can be disposed of *inter vivos* or by will. His interest does not devolve on his children on death intestate and cannot be attached by creditors.[26] In spite of these restrictions, the members of a family have various other rights in the family property, which deserve some consideration.

### (A) POSSESSION OF FAMILY LAND

A member of the family may be allocated a part of the family land either by the founder or its present head, for domestic or commercial purposes. Where a grant is made for commercial or other purposes it may be subject to a condition that the member will be allowed the use of the land until the family requires the land for other purposes.

If family land is granted to a member for the purpose of erecting a dwelling house, the grantee has some security of tenure. He is entitled to the quiet possession of his home so long as he is not at fault.

The distinction between the family grant of land for commercial or residential purposes was made in the case of *Manuel v Chief Bob Manuel*.[27] In that case, the plaintiff, a member of the Manuel family, was granted two pieces of family land to build shops on. He was given notice to quit by the head of the family. In fact he had not committed any breach of the conditions under which the tenancy had been granted to him. Webber, J, remarked:

There is, however, a vast difference in the tenure of a member of a

[24] (1898) 1 NLR 15.

[25] Obi, S. N. C., *Modern Family Law in Southern Nigeria* (Sweet & Maxwell, London 1966), 45–46.

[26] *Caulcrick v Harding* (1926) 7 NLR 48; *Johnson & Ors v Macaulay & Anor* [1961] 1 All NLR 743; *Oluwu v Desalu* (1955) 14 WACA 662.

[27] (1926) 7 NLR 101.

family occupying family land for dwelling purposes and that
member of a family occupying land for purposes of trade. I
former case the land is practically inalienable provided the
native laws as to conduct or abandonment are not transgressed, b
to land given for business purposes, different considerations ap
and it is quite within the native rule to add a condition to the term
the tenancy that it can be determined if the family requires the lan

The occupation of family land over a long period of time does
mature into private ownership.[29] At all times, the title to family l
vests in the family as a corporate body. Moreover, the improvem
of family property by one of its members does not alter its characte
Thus, it has been held that the private act of reclaiming family swam
land does not confer any special rights in the land reclaimed on the
dividual who reclaimed it as against the communal title of the family

Where family property takes the form of a family house, all t
members of the family have a right to reside therein. But this is rath
in the nature of a possessory right, because in most cases it is impra
cable for all the members to be accommodated in the family hou
owing either to its size or to the convenience of individual members. Th
juristic right of members to occupy the family house entitled them, whe
a part or the whole of the house is let out, to shares in the rent collecte
Those members who reside in the family house are obliged to maintai
it as a *quid pro quo* for the benefit they derive therefrom.[32]

### B) RIGHT TO ANNUAL FARMING PLOTS

Every year, all adult members of the family are entitled, on request, to
be allocated farming plots on the family land. Such requests are directed
to the family head or the family council, if there is one. The allocation
of farmland is usually on the basis of the need of each applicant and the
extent of the land available for cultivation. No member of the family has
a right to cultivate a patch of the family land without the prior consent
of the head of the family.

The right of members to the annual allotment of farmland is re-
stricted to its use for the planting of food crops. It does not entitle a
member to use the land for commercial farming such as cocoa or palm
plantation. Such usage of family land requires special negotiations,
which may include the payment of economic rent.

### (C) RIGHTS OF INGRESS AND EGRESS

Often it is not possible for all members of the family to reside in the
family house. For those members living outside, it is important to deter-
mine their rights of ingress and egress in respect of the family house.

[28] id. at 102.
[29] *Ifie & Ors v Gedi* [1965] NMLR 457.
[30] *Shelle v Chief Asajon* (1957) 2 FSC 65, 67.
[31] *Bassey v Archibong Cobham* (1924) 5 NLR 92.
[32] *Shelle v Chief Asajon* (1957) 2 FSC 65, 67.

This question came up for consideration in *Lewis v Bankole*.[33] In that case, the founder of the family, Chief Mabinuori, died in 1874, leaving a family of twelve children, the eldest of whom was a daughter. He possessed three pieces of land: on one, the family compound, he lived with his wives and some of his children and domestics; on another he built houses for his eldest daughter and two of his sons. The third piece was dedicated to the worship of the family fetish. In 1905, an action was brought by certain of Mabinuori's grandchildren against some of the occupants of the family compound, claiming, *inter alia*, a declaration of title to the family house. Osborne, CJ, in his judgment dealt with the rights of the non-resident members to ingress into and egress from the family house. The learned Chief Justice held that when a family meeting is held in the family house, all members of the family are entitled to attend, and for such an occasion would have such rights of ingress and egress as are necessary to permit their attendance. When the family council – a representative body – meets in the family house its members are entitled to enter and inspect the state of repair of the compound, as the general upkeep of the family compound is part of the responsibility of the council. However, apart from these specific instances, the learned judge was unable to find sufficient support for a 'general right of ingress and egress'. The non-resident members must moreover exercise their rights of ingress and egress reasonably so as not to 'interfere unnecessarily with the quiet enjoyment of the persons inhabiting the family compound'.[34] In *Thomas v Thomas*,[35] Butler Lloyd, J, described the non-resident member's right to the family house as one of reasonable ingress and egress. The reasonableness, of course, relates to the times of the exercise of the right, its frequency, and the overall convenience and comfort of the occupants of the family house.

In respect of family farmland, the members have a right of ingress and egress to collect certain produce of the land. For instance, the members may collect firewood from the family land, cut sticks for the support of yam shoots, or harvest palm trees. But this right is limited only to such produce as is required for their domestic needs. It does not include the right to cut timber on family land.[36]

### (D) RIGHT TO BE CONSULTED

It is a well-established rule of customary law that all members of the family have a right to be consulted in every important dealing with the family land. But this rule is not absolute. It has, for instance, been pointed out that the head of the family or the family council is responsible for the day-to-day administration of the family property. Consequently, the family head may exercise some of his powers in this respect without consulting the other members. He may, on his own authority, for example, let out part of the family land or house for short periods

[33] (1908) 1 NLR 81.
[34] id. at 104.
[35] (1932) 16 NLR 5.
[36] *Nwonogwu v Agbo* (1960) IV ENLR 28.

or allocate farmland to members of the family.[37] But where family property is to be sold or partitioned, the members must be fully consulted. The right to consultation is also limited in other respects. It will, for instance, be useless to consult minor or sick members. Again, the fact that members of the family do not live together may create practical problems in consulting every member. These factors are fully reflected in the prevailing customary-law rule, which prescribes that only the principal members of the family need be consulted. Osborne, CJ, held in *Lewis v Bankole*,[38]

> The right to be consulted is in my opinion fully established, but this does not mean that each individual grandchild is entitled to participate in the consultation; the evidence goes to show that there can only be one voice and one vote for all the children of a deceased child.

Thus, the obligation is to consult the principal representatives of the respective branches of the family and other prominent members.

(E) EQUALITY OF INTERESTS

The question whether the male and female members of a family have equal rights in the family property differs in various parts of Nigeria. Under modern Yoruba customary law, both male and female members have equal rights in the family property.[39] Thus, if the family land is partitioned or sold the female members are entitled to equal shares with their male relations.

In most other parts of Southern Nigeria, except perhaps the matrilineal societies, the female members of the family have only a limited right in the family property. The unmarried daughters and wives or widows are entitled as of right to reside in the family house. Moreover, a daughter whose marriage has been terminated by either divorce or the death of her husband has a right to be accommodated in the family house, provided, of course, that there is reasonable space. Again, female members of the family may, on request, be allotted farmland yearly on the family land. But they have no right to demand such allocation. Otherwise female members have no other rights whatsoever in family land. For instance, they are entitled neither to portions of the family land to build on nor to any share in the partition or sale of the land.[40]

### 3 Determination of family property

Family property may cease to possess its corporate character by out-

[37] *Thomas v Thomas* (1932) 16 NLR 5.
[38] (1908) 1 NLR 81, 103.
[39] *Lopez v Lopez* (1924) 5 NLR 50, 54; *Sule v Ajisegiri* (1937) 13 NLR 146.
[40] *Nezianya v Okagbue* [1963] 1 All NLR 352.

right alienation to a third party or by partition among the members of the family.[41]

(A) SALE

Family property may be alienated[41] by outright sale to a third party by the agreement of members of the family. But such sale requires consultation with and the consent of the principal members of the family or the representatives of its respective branches.

If a family member purports to sell family land as such without the necessary consents, the transaction is voidable at the instance of the other members whose consent is mandatory. But if a member sells family property as his privately owned land, the sale is void *ab initio*.[42] If, however, he is resident on or has been allocated the particular portion of land, he also forfeits his tenancy.[43] A sale of family land by the family head without obtaining the consent of its principal members is voidable. The law in this respect was clearly stated by Abbott, F J, in *Ekpendu v Erika*, thus:

> Briefly, then, the joint effect of the two decisions[44] is that a sale of family land which the head of the family carries out, but in which other principal members of the family do not concur, is voidable, while a sale made by principal members without the concurrence of the head of the family is void *ab initio*.[45]

Alternatively, the sale of family property may be ordered by the court. But the courts are reluctant to order the sale of family property except in exceptional circumstances. The general rule is that the courts will not order the sale of family property so long as it is capable of achieving the objective for which it was created.[46] In *Lewis v Bankole*, Osborne, C J,[47] stated that the court has power to order the sale of family property 'including the family house, in any cause where it considers that such a sale would be advantageous to the family, or the property is incapable of partition'. One situation in which sale may be advantageous to the family is where the family house, for instance, has become too small for its members. Or the wrangling among the members of the family may be so intense that it will be in the best interests of all concerned to order a sale of the family property. In *Ajibabi v Jura*, Gregg, J, referred to the relevance of this factor:

[41] On alienation of family property in Southern Nigeria see generally: James, R. W., and Kasunmu, A. B., *Alienation of Family Property in Southern Nigeria* (Ibadan University Press, 1966).

[42] *Lagos Executive Development Board v Oshodi & Momodu Aremu* (1952) 14 WACA 83.

[43] *Adagun v Fagbola* (1932) 11 NLR 110.

[44] *Esan v Faro* (1947) 12 WACA 135; *Agbloe v Sappor* (1946) 12 WACA 187.

[45] *Foko v Foko* [1965] NMLR 3 (1959) 4 FSC 79, 81; *Mogaji v Nuga* (1960) 5 FSC 107.

[46] *Ajibabi v Jura* (1948) 19 NLR 27.

[47] (1908) 1 NLR 85, 105; *Bajulaiye and Cole v Akapo* (1938) 14 NLR 10; *Onyekonwu v Okeke* (1961) V ENLR 48.

> Having regard to all the evidence adduced in this case and having regard especially to the attitude of the first and second defendants and to the state of relations between the plaintiff, who I hold to be entitled to a third share in the property, and the other defendants, I have no doubt that it would be in the interests of justice and would possibly avoid future wasteful litigation if the property in question were sold and the proceeds divided among the persons entitled thereto.[48]

(B) PARTITION

Another method by which family property may be determined is by partition. The partitioning of family land may be by the agreement of the family members or by an order of the court.

*(i) Partition by consent.* The members of a family may on their own initiative decide to partition the family land. This seems now to be the current trend. But before the family land can be partitioned, all the branches of the family, or at least the most important of them must have consented to the proposed action. If a branch of the family feels that partition will be oppressive, it may apply to the court to cancel the partition.[49]

*(ii) Partition by court order.* The members of a family or one of them may apply to the court for an order to partition the family land. Moreover, the court may on its own initiative order such partition if the justice of the case demands it. A court order for partition will only be made if there are strong reasons which will justify the determination of the corporate ownership of family property. Combe, CJ, stated one of such grounds for partition thus:

> Where there has been a persistent refusal by the head of a family, or by some members of the family, to allow other members of the family to enjoy their rights under native law and custom in family land, the court has exercised, and will continue to exercise, its undoubted right to make such order as will ensure that members of the family shall enjoy their rights, and, if such rights cannot be ensured without partitioning the land, to order a partition.[50]

*(iii) Method of distribution.* When family property is partitioned, the various branches will be entitled to shares. The distribution is *per stirpes*, that is, according to the number of wives by whom there are children.[51] Where the family is several generations old, the distribution will be among the principal branches. Then each branch will share among its sub-branches. In Yorubaland, the distribution *per stirpes* is effected whether a mother has male or female children because both males and

[48] (1948) 19 NLR 27.
[49] *Agaron v Olushi* (1907) 1 NLR 66; *Johnson v Onisiwo* (1943) 9 WACA 286.
[50] *Lopez v Lopez* (1924) 5 NLR 50, 54.
[51] *Danmole v Dawodu* (1958) 3 FSC 46; *Taiwo v Lawani* [1961] 1 All NLR 703.

females have equal rights in the family property. But in some other parts of Southern Nigeria, for instance in Iboland, distribution is only among the branches where there are male children, as females have no right in family land.

Where there is a consensus among the members of the family, the distribution may be *per capita*. This method may also be adopted in cases of dispute where the head considers it the best method of doing justice to all the parties.[52]

*(iv) The effect of partition.* Once family property is partitioned, each member acquires an absolute, alienable and inheritable interest in his share. In *Balogun v Balogun*, Graham Paul, CJ, stated the effect of the partition of family land thus: 'It is clear that the 1903 partition deed, to which all the members of the Okolo's family were parties, in this case effectually vested in each of the parties an absolute title to his or her share.'[53] The general effect of partition is, therefore, that the family property loses its character as such and parts of it are owned absolutely by its members.[54]

A distinction should, however, be made between the partitioning of family land and the grant of only occupational rights to individual members of the family. Whether a situation is one of partition of family land or the mere annual allocation of portions to its members is a question of fact. The yearly allocation of farmland to individual members of the family does not confer the right of ownership on the allottee.[55]

## 4 The obligations of membership of the extended family

Members of the extended family owe each other some obligations under the traditional social system. Perhaps the most important of such obligations is the responsibility of the employed or income-earning members of the family to maintain and assist their less fortunate relations. Those members of the extended family who earn a reasonable income have a deep sense of responsibility towards their unemployed or aged relations. This obligation, though not legal, has a strong moral force and in the traditional society may be backed by social sanctions.

The moral obligations which a member of an extended family owes to his relations often conflicts with his legal obligations to the members of his immediate family – his wife and children. The question of maintenance which has been mentioned is a good illustration. In *Giwa v Giwa*,[56] Sowemimo, J, pointed out the need for our laws to take into account the extended family responsibilities of Nigerians, especially in respect of maintenance. The law should be made to reflect fully the

[52] ibid.
[53] (1943) 9 WACA 78, 82.
[54] *Dosumu and Anor v Adodo* [1961] LLR 149.
[55] *Nwonogwu & Others v Agbo & Anor* (1960) IV ENLR 28; *Eze & Ors v Chief Owusoh* [1962] 1 All NLR 619, 622–3.
[56] Suit No. WD/40/67 (unreported), High Court, Lagos, 16 January 1970. See Chapter 9.

social needs and accepted norms of the people. Consequently, the law should be fashioned to meet this need.

## 5 The future of the extended family and the corporate ownership of property

In the light of the sweeping social and economic changes which have engulfed Nigeria, it is necessary to examine the future of the extended family system and the institution of family property. Indisputably, urbanization and industrialization have gone some way to weaken the links of the extended family system. It is common now for members of an extended family to be scattered in large towns, to which they are increasingly attached. This process correspondingly weakens their attachment to the village and loyalty to the extended family. The net result is that their loyalty is transferred to the city and their family rights and obligations are seen in the context only of the nuclear or immediate family. Again the demands of modern living have compelled many Nigerians to abandon their extended family responsibilities, as it would be suicidal, in some cases, to live up to them.

One of the greatest effects of the impact of Western civilization on the Nigerian scene is the emphasis on individual ownership of property. This has led to the increasing break-up of corporate ownership of land. It may be said in favour of this trend that sometimes corporate ownership may be unsatisfactory in a modern economy. For instance, the acquisition of land from a corporate group may involve protracted negotiations, which could frustrate an important and promising project.

But there is also much to be said on the credit side in respect to these institutions. Generally, the extended family provides the necessary cushioning whenever a member has fallen on hard times. This was exemplified by the experiences of the political crisis and civil war in Nigeria between 1967 and 1970, which showed the importance of the extended family in our social structure. In the former Eastern Region, for instance, most of the displaced persons who returned from other parts of the country found a ready welcome among members of their extended family. In addition, where the returnees had lost their tools of trade, the extended family played the significant role of helping them to find their feet. This was important, because no government in Nigeria then had the ready financial and technical resources to deal with a national disaster of such magnitude.

The institution of family property, moreover, has helped to check the reckless and indiscriminate disposition of land, and has thereby minimized the intricate social and political problems which would have otherwise resulted.

It seems that if left unchecked the acceptance of Western institutions will continue to erode the foundations of the extended family and corporate ownership of land. But this should not be allowed to happen. Experience has shown that these indigenous institutions are not completely incompatible with modern Western ideas. In fact they have been proved to be essential in the local circumstances. It is submitted that

positive efforts should be made to preserve them, as their outright disappearance will do more harm than good.

# Index of Cases

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*References specifically dealing with CUSTOMARY LAW only are preceded by an asterisk* ; in its absence the statutory or common law can generally be taken as applicable.*

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C. S. OLA

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He writes primarily for students of law and accountancy, and for civil servants in Internal Revenue departments, for whom it will be required reading. But every businessman will find it invaluable. Taxpayers generally, especially the self-employed, will read it with considerable interest. For Dr Ola does not see his subject simply from the official point of view but in terms of real men and women earning a living, contributing to the development of their country, and entitled to their rights.

He provides plenty of worked examples of actual tax problems, which will be of great benefit to the student, and his text is as rigorous as the subject demands; but it is by no means so formidable as to deter the layman, since its style is clear, straightforward, and not without humour.

This book will be the standard work on the subject for many years.

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