SIERRA LEONE FAMILY LAW

being a

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by

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ABSTRACT

This thesis concerns Sierra Leone Family Law. The law is examined from the viewpoint of the pluralistic system - general, Islamic and customary laws - applicable in the country. The thesis is divided into three Parts. This being a pioneering work, it is necessary to give first an explantory outline of the country and its legal system and how family law works within that system. Part One, which contains four chapters, is devoted to this preliminary explanation.

The Second Part deals with non-customary family law. It is mainly an analysis of the general law and Islamic law, but it also considers specific areas in family law in which there are conflicts in the pluralistic legal system . The highlights of this Part are: statutory marriage (Chapter 5); the essentials of a valid statutory marriage (Chapter 6); matrimonial relations (Chapters 7 and 8); matrimonial property (Chapter 9); matrimonial reliefs (Chapter 10); termination of marriage(Chapter 11); the parent-child relationship (Chapter 12); and succession to property under non-customary law (Chapter 13).

Part Three discusses customary family law. The information contained in this Part is derived partly from previous published and unpublished sources, and partly from the personal field investigations of the present writer. The method of exposition of the customary laws is by topics rather than by ethnic groups, though with each topic, ethnic/local variations are indicated where relevant. This Part begins with an introduction showing how the present writer collected his data on customary law. Chapter 14 examines the nature and character of customary-law marriage. Chapters 15 and 16 analyse the formation of a customary-law marriage and the essential requirements for such marriage

respectively. The husband and wife/wives relationship in the compound/polygamous family is dealt with in Chapter 17. Chapter 18 discusses the termination of a customary-law marriage. The parent-child relationship under customary law is examined in Chapter 19. Finally, Chapter 20, dealing with succession under customary law, concludes the thesis.

ACKNOWLEDGEMENTS

This work would not have been completed had it not been for the help and encouragement of a number of people and institutions.

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Note on Sierra Leone law reporting

A great obstacle to anyone embarking on research into a Sierra Leone legal topic is the dearth of reported case-law. Until 1969 when the African Law Reports (Sierra Leone series) were begun, law reporting in Sierra Leone has been negligible. Throughout the long period of the country's legal history, the only law reports have hitherto been (a) M.F.J. McDonnell's Sierra Leone Law Reports, 1912-1924 (one volume); (b) E.S. Beoku-Bett's Sierra Leone Law Recorder, 1950 (three volumes); and (c) Sierra Leone Law Reports, 1960-1963 (three volumes) published by Sweet & Maxwell, London. None of these reports contains sufficient material in any one area of Sierra Leone law in order to kindle enthusiasm for research into that field. Despite this obstacle, the present writer has tried to supplement the few Sierra Leone reported cases with unreported ones which he himself discovered, and he has drawn abundantly on relevant case-law from other Commonwealth countries, notably from Britain, from which much has been borrowed by the Sierra Leone Courts themselves.

CASES

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ABBREVIATIONS

A.C.	Appeal Cases
Ad & E	Adolphus and Ellis Reports
All.E.R.	All England Reports
ALR S.L.	African Law Reports [Sierra Leone]
App. Cas.	Appeal Cases
art.	article
A.S.A.L.	Annual Survey of African Law
B. & S.	Best and Smith Reports
Beav.	Beavan
Bos. & Pul (N.R.)	Bossanquet and Puller
Bro.C.C.	Brown (by Belt)
C.A.	Court of Appeal
cap.	chapter
C.B.	Common Bench
C.C.	Current Cases [Ghana]
C.P.D.	Common Pleas Division
Ch.	Chancery Division
Ch.D.	Chancery Division
Cl. & Fin	Clarke and Finnelly
Cowp.	Cowper
Cr. App. R.	Criminal Appeal Reports
Cr. & Ph.	Craig and Phillips
De G.F. & J.	De Gex, Fisher and Jones
Div.Ct.	Divisional Court [Ghana]
Dougl.	Douglas
E.A.	Eastern [or East] Africa Law Reports
East.	East's Term Reports
Esp.	Espinasse

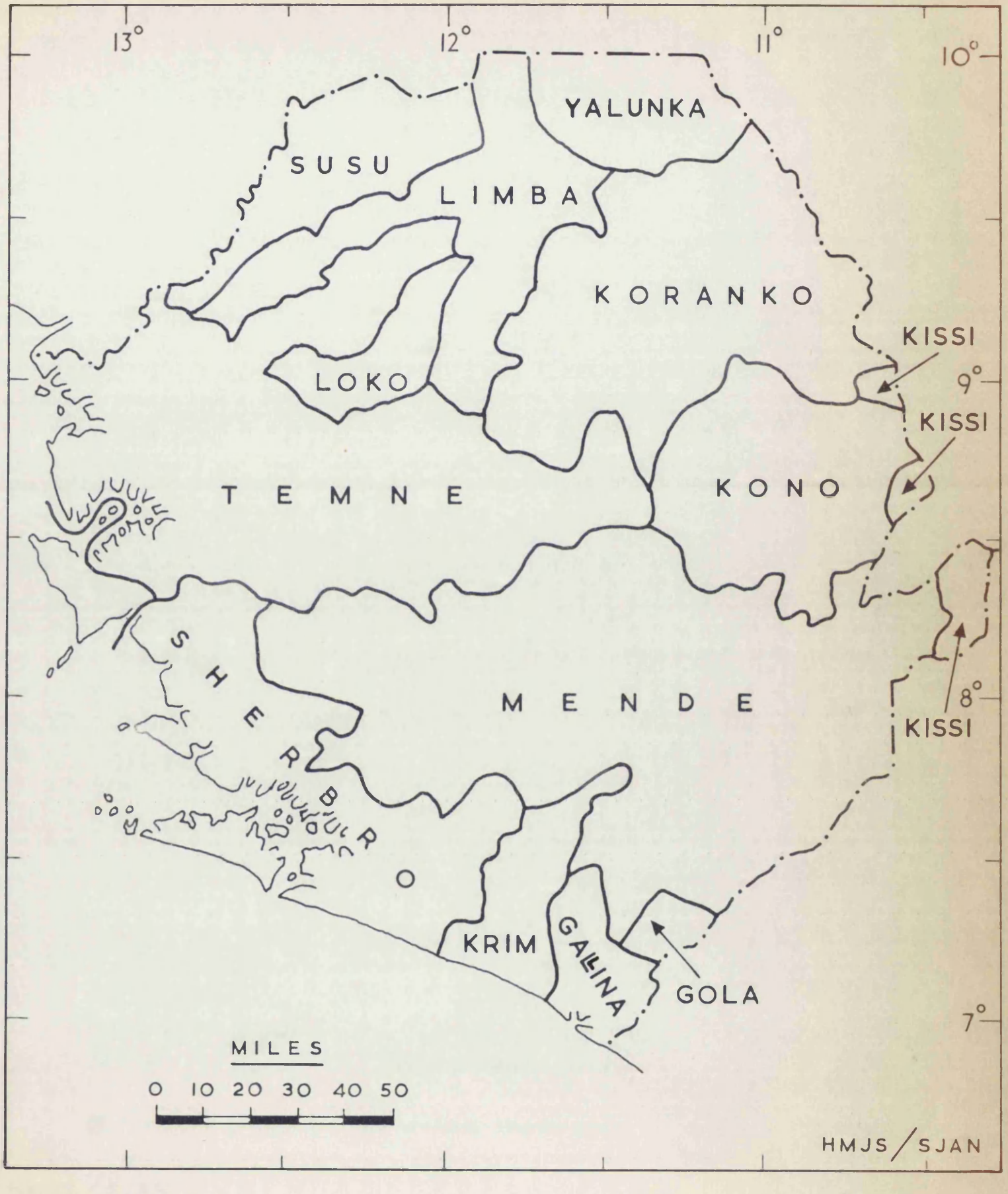
G.L.R.	Ghana Law Reports
H & N.	Hurlstone and Norman
Hag. Con.	Haggard (Consistory)
H.L.C.	House of Lords Cases
H.L. Cas.	House of Lords Cases (Clark)
I.C.L.Q.	International and Comparative Law Quarterly
I.R.	Irish Reports
J.A.L.	Journal of African Law
J.C.P.C.	Judicial Committee of the Privy Council
J.P.	Justice of the Peace and Local Government Review
K.B.	King's Bench
Ld.Raym.	Lord Raymond
L & C.	Leigh and Cave
L.J.Ch.	Law Journal Chancery
L.L.R.	Lagos Law Reports
L.Q.R.	Law Quarterly Review
L.R.C.P.	Law Reports Common Pleas
L.R. Ch.D.	Law Reports Chancery Division
L.R. Eq.	Law Reports, Equity Cases
L.R. Ex.D.	Law Reports, Exchequer Division
L.R. Ir.	Law Reports Ireland
L.R.P.C.	Law Reports Privy Council Appeal Cases
L.R.P. & D.	Law Reports Probate and Divorce
L.R.Q.B.D.	Law Reports Queen's Bench Division
L.R. Sc. & Div.	Law Reports Scotch and Divorce Appeals
L.T.	Law Times
M & G.	Manning and Granger
M.L.R.	Modern Law Review
M. & S.	Maule and Selwyn
M. & W.	Meeson and Welsby
Macq.	Macqueen (Session Cases)

Mer.	Merivale
N.L.R.	Nigerian Law Reports
N.M.L.R.	Nigerian Monthly Law Reports
P.	Probate Division
P.C.	Privy Council
P.D.	Probate Division
P.N.	Public Notice (Sierra Leone)
Peake Add.Cas.	Peake, Additional Cases
Phil.	Phillimore Reports
Plowd.	Plowden's Commentaries
Q.B.	Queen's Bench
Q.B.D.	Queen's Bench Division
r.	rule
R & N.	Rhodesia and Nyasaland Law Reports
reg.	regulation
Ren.	Renner's Reports [Ghana]
Rob. Eccl.	Robertson
s.	section
S.C.	Supreme Court
S.I.	Statutory Instruments
S.L. Law Recorder	Sierra Leone Law Recorder
S.L.L.R.	Sierra Leone Law Reports (1960-63)
S.L.L. Reports	Sierra Leone Law Reports (1912-24)
S.L.S.(O.S.)	Sierra Leone Studies (Old Series)
S.L.S.(N.S.)	Sierra Leone Studies (New Series)
Sar.F.L.R.	Fanti Law Reports (2nd selection) by Sarbah.
Sim.(N.S.)	Simons, New Series
S.R.L.R.	Southern Rhodesia Law Reports
Str.	Strange, J. (ed. by Nolan)
Sw. & Tr.	Swabey and Tristram
T.L.R.	Times Law Reports

Temp.Res.	Term Reports (by Durnford and East)
Ves.Jun.	Vesey, Junior
W.A.C.A.	West African Court of Appeal
W.A.L.R.	West African Law Reports
W.L.R.	Weekly Law Reports
W.R.N.L.R.	Western Region of Nigeria Law Reports

Table A

Distribution of Ethnic Groups



PART ONE

THE LEGAL SYSTEM

CHAPTER 1

THE COUNTRY, THE PEOPLE, AND THE CONSTITUTIONAL DEVELOPMENT

A. THE COUNTRY

(i) Location and physical features [1]

Sierra Leone lies on the West coast of Africa between 6°55' and 10° North Latitude and between 10°16' and 13°18' West Longitude. On its northern and south-eastern frontiers are the states of Guinea and Liberia, respectively. The territory covers an area of approximately 27,927 square miles, and for administrative purposes is divided into a Western Area and three Provinces, namely the Eastern Province, the Northern Province and the Southern Province.

The Western Area consists of two regions. One is a small, mountainous peninsula of approximately 256 square miles containing a range of thickly-wooded hills rising to a height of about 2,000-3,000 feet, with a wide estuary beside it protruding into the Atlantic Ocean from the coastal plain. At the mouth of the estuary is the capital city, Freetown. The other is Sherbro Urban District, comprising the townships of Bonthe Sherbro and York Island lying about 100 nautical miles along the west coast, south of the Peninsula.

The Provinces physically comprise two types of land. The Eastern and Northern portion consists of savannah land which rises to form an upland plateau elevating generally to a height of about 1,500 feet, broken by irregular mountain ranges of a height of between 3,000 and 6,000 feet. The Western and Southern portion

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1. We can, in a work of this nature, give only a brief outline of the geography of the country. For a recent detailed work on this topic, see Sierra Leone in Maps, University of London Press Ltd., (2nd ed., by J.I. Clarke), 1969.

is a woodland with ranges of hills rising to about 1,000 feet. The centres of the Provinces are Kenema (Eastern), Makeni (Northern), and Bo (Southern).

(ii) History [1]

The country became independent on 27 April, 1961. On 19 April, 1971, it became a Republic within the British Commonwealth of Nations. Formerly, it was a British dependency consisting of a Colony and a Protectorate. The Colony oomprised what is now the Western Area. The Protectorate has for a long time been the same territory, but for the sake of administrative convenience, it has been subdivided from time to time into three units of unequal size.[2] At independence, the Colony and Protectorate were redesignated the Western Area and Provinces, respectively.

Origins of the Colony

The Colony was founded in the eighteenth century. In 1772, the Court of King's Bench in England decided the classic case of Somerset v. Stewart.[3] This case concerned the right of a master over his slave, and in it Lord Mansfield delivered a judgment which heralded the emancipation of some 1,400 slaves, who were then held in bondage in England, the victims of the wave of slave trading which had swept along the west coast of Africa during the past centuries. Lord Mansfield said:

> "The state of slavery is of such nature, that it is incapable of being introduced on any reasons, moral or political. It's odious that nothing can be suffered to support it. Whatever inconvenience, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England;

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1. The most comprehensive modern work on the history of Sierra Leone is C. Fyfe, A History of Sierra Leone, O.U.P., 1962.

2. The present divisions are the Northern Province, the Eastern Province, and the Southern Province. See map at p.iv.

3. (1772) Lofft 1.

and therefore, the black must be discharged." [1]

The immediate result of emancipation was that thousands of African ex-slaves were left on their own to roam along the streets of England in search of food and work. Some British philanthropists, among whom Granville Sharp, William Wilberforce, Henry Thornton and Dr. Henry Smeathman figured prominently, formed an association, the St. George's Bay Company,[2] for the purposes of helping the "Black Poor", as the ex-slaves were called. On the advice of Dr. Smeathman, who had previously spent four years on the West African coast as a naturalist, Sierra Leone was selected as a suitable site for the settlement of the ex-slaves. Under the Company's auspices, the first batch numbering about 400, together with 60 white women, left England on Christmas Day, 1786, and arrived in Sierra Leone on 8 May, 1787.

On their arrival, a grant of 20 square miles [3] was made to them by King Tom. They found a site for the settlement, and named it Granville Town in honour of Granville Sharp, the Chairman of the Company. Disease and sporadic attacks from the inhabitants of the neighbouring lands would have completely wiped out the settlement had it not been for two more batches of ex-slaves

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1. Ibid., p.19. Note that Lord Mansfield has been quoted as declaring in this case that "as soon as any slave sets foot on English ground he becomes free." See T.O. Elias, Ghana and Sierra Leone, the development of their Laws and Constitutions, London, 1962, p.219. Elias gives the reference of the case as (1772) 20 St.Tr.1. The present writer searched in vain for this Report, but the Lofft Report cited by the present writer which contains the full judgment of Lord Mansfield does not contain Elias' quotation.

2. The Company was incorporated by RoyalCharter in 1791, and renamed "The Sierra Leone Company".

3. This was by the Treaty of 11 June, 1787, between King Tom and the Company. The Treaty was declared invalid by another King, Naimbana, by the Treaty of 22 August, 1788, but the grant remained. The area was increased from time to time by Treaties with other kings: see, for example, the Treaty of Peace of 1807 made between the Governor of Sierra Leone and Kings Firama and Tom in A. Montagu: The Ordinances of Sierra Leone, London, 1857-81, Vol.II, pp.272-3.

sent again from England in 1788 and 1790. In 1792, they were reinforced by 1,131 African ex-slaves from Nova Scotia.[1] The latter joined the former to found Freetown. Eight years later, some 550-800 Maroons [2] from Jamaica arrived. In 1807, the slave trade was abolished by a British Act of Parliament. The result was that from time to time, the population of the settlement was increased by the inflow of liberated Africans,[3] recaptive from slave ships.

Again in 1807, the Sierra Leone Company surrendered its

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1. These were African slaves who had fought on the British side in the American War of Independence. As a reward for their services, they were promised a certain quantity of land in Nova Scotia on which they could settle as free men. Though as many as 3,000 of them went to Nova Scotia for this purpose, the promise was not fulfilled. Under the aegis of Governor Clarkson of the Sierra Leone settlement, their leader Thomas Peters was introduced to the Sierra Leone Company, which expresed willingness to receive them into Sierra Leone upon the production of satisfactory testimonials of their character. For the history of these people, see F.W. Butt-Thompson, Sierra Leone in History and Tradition, London, 1926.
2. These too were ex-slaves of African origin, believed to have come from the African Cormantine Coast in what later became known as the Gold Coast (now Ghana). They were taken to Jamica during the slave trade in the sixteenth and seventeenth centuries and served under their Spanish masters. When Britain took over Jamaica from the Spanish, there were frequent revolts amid these slaves against their new masters. The final revolt came in 1690, after which they asserted their freedom and settled in the eastern and northern parts of Jamaica. They were called Maroons, probably because they were thought to be fugitives - Note: Spanish for fugitive is cimaroon, or probably because the Spanish referred to them as Moors. The Spanish for Moor is muruno. In 1738, Governor Edward Trelawney of Jamaica made a grant of 1,500 acres of land to them on which they established settlements. This kind of gesture did not result in everlasting peace. In 1773, the Maroons rose in rebellion again. When the rebellion was finally crushed in 1791, the Maroons were first despatched into exile in Nova Scotia, but they too, were later introduced to the Sierra Leone Company. For their history, see F.W. Butt-Thompson, ibid., pp.120-131. See also generally, R.C. Dallas, The History of the Maroons, Frank Cass & Co. Ltd., London (new impression), 1968.
3. These were Africans from the West Coast of Africa who were being transported into slavery. With the abolition of slavery, the ships which carried them were seized on the high seas and tried in Freetown by the Admiralty Court, and later by the Court of Mixed Commissions. Following the decisions of these Courtsm the slaves were freed. For the establishment of these Courts, see Chapter 2.

political functions and administration of the settlement to the British Crown and the settlement was declared a Crown Colony by an Act of Parliament,[1] which took effect from 1 January, 1808.

In 1822, the Colony became the administrative headquarters of the British West African Settlements, the other territories being the Gold Coast and the Gambia. Lagos joined them in 1861. This arrangement was short-lived; twelve years afterwards, the Gold Coast and Lagos were separated from the settlements. Gambia was also separated in 1888.

None of the administrative arrangements hitherto mentioned affected the physical size of the Sierra Leone Colony, except that in 1861 Bonthe Sherbro was added to it.[2] Thereafter, it has since been the same size.

Origins of the Protectorate [3]

Up to the 1890s, apart from the 1861 accretion to the Colony, both the Sierra Leone Company and the British Crown during their respective regimes, did not demonstrate any territorial ambitions over the lands immediately adjacent to the Sierra Leone settlements. The adjacent lands remained under the full control and jurisdiction of their indigenous tribal chiefs. Though frequent inter-tribal wars within the hinterland made the Colony's position rather precarious, the Government of the Colony took no further action than the establishment of a police force in 1890 to guard its frontier. Meanwhile, as a result of trade, contacts between the people of the Colony and the hinterland became frequent;

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1. An Act for transferring to His Majesty, certain Possessions and Rights vested in the Sierra Leone Company within the Colony of Sierra Leone, dated 8 August, 1807: 47 Geo.3 C.44.
2. See Colonial Office Minute No.267/277 by the Hon. T.F. Elliott, Assistant Under-Secretary on Governor Blackhall's despatch No. 18, of 16 February, 1863.
3. On the evolution of the Protectorate, see generally C. Fyfe, Sierra Leone INheritance, London, O.U.P., 1964, pp.252-277.

and yet neither tribal wars nor trade prompted the British Crown to adopt an expansive policy over the hinterland.

It was the French who sparked off a forward policy in the British Crown. By 1890, the former were laying claims to territories from the Sahara Desert to the Liberian frontiers. It was, therefore, felt in British circles that any further attitude of unconcern would leave the Crown with a Colony confined to a tiny coastal strip.[1] Eventually, boundary agreements [2] were concluded with the French, the purpose of which, from the British standpoint, was to allow an extension of British sphere of influence. To follow up these agreements, the Governor of the Colony by Royal Proclamation, declared a Protectorate over the hinterland on 31 August, 1896.

B. THE PEOPLE

According to the 1963 Census,[3] the population of Sierra Leone was 2,180,000 inhabitants who, for certain legal purposes, may be divided into two distinct classes, namely, native and non-native. A native is defined by section 4 of the Interpretation Act, 1971, as:

> "Any person who is a member of a race, tribe or community settled in Sierra Leone (or the territories adjacent thereto) other than a race, tribe or community -
>
> (a) which is of European,Asiatic or American origin;
>
> (b) whose principal place of settlement is in the Western Area."

---

1. See Confidential despatch of Lord Knutsford,Secretary of State, to the Officer administering the Government of Sierra Leone, of 1 January, 1890, Colonial Office Minute 806/325, pp.2-4.
2. i.e. Agreements of 10 August, 1889, and 21 June, 1895, see C. Fyfe, Sierra Leone Inheritance, London, O.U.P., 1964, p.13.
3. Central Statistics Office, Freetown, Quarterly Statistical Bulletin, 1963.

The section goes further to define a non-native as:

"Any person other than a native"

According to the above definitions, the term "native" would be applicable to any person who belongs to any of the tribes in Sierra Leone or those on the borders of Sierra Leone and Guinea, and Sierra Leone and Liberia, which are either autochthonous to Sierra Leone or migrant but have settled so long in Sierra Leone that they are now recognised as indigenous.[1] The autochthonous tribes are the Mende, Loko, Susu, Sherbro,[2] Gola, Krim and Gallina.[3] The migrant tribal population consists of the Limba,[4] Kono, Koranko, Kissi, Yalunka, and Temne. The 1963 Population Census stated that the tribes constituted 96·6% of the country's population, while the non-tribal people were 3·4%.

Ethnically, while it may be true that the tribes have over the ages established themselves in different and specific parts of the country,[5] there has been the tendency to migrate internally, and several ethnic groups may now be found in places which they had

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1. For a terse but interesting, historical analysis of these tribes, see Lord Hailey: Native Administration in the British African Territories, Part III, West Africa, Sierra Leone, H.M.S.O. (1951), pp.294 et seq.
2. The Sherbro tribe is divided geographically into two sections, separated by the Temne Chiefdoms and the northern part of the Western Area. Those settled in the North are called Bullom, while those occupying the Southern territory are called Sherbro.
3. These are also called Vai; but it is proper to reserve the latter name for the language of the tribe.
4. Lord Hailey expresses doubt as to whether or not the Limba were a migrant people. However, a study of the early history of this tribe shows that they were, in fact, such. See R.H. Finnegan: Survey of the Limba People of Northern Sierra Leone, H.M.S.O. (1965), p.14.
5. A map showing the distribution of the tribes, their established location and ethnic divisions is at p. *liv*. There are a number of African tribes, namely the Foulah, Kru and Mandingo, which form 3·1%, 0·2% and 2·3% of the population of Sierra Leone. These are, however, omitted from the map and our discussion in this thesis, because they are regarded both politically and legally as aliens from the neighbouring Liberia and Guinea.

not originally inhabited.[1] The impact of such migration has been two-fold. Firstly, tribal ghettos have arisen in the cosmopolitan city of Freetown, and in large townships in the Provinces in which the manners, laws and customs of the tribe are retained side by side with other laws and customs of other tribes which are found in the area. Secondly, in the wake of migration, there has been the tendency for some of the tribes to superimpose their innate cultures on the peoples of their new residence. In this regard, specific mention must be made of the Mende and Temne tribes which share between them 60·7% of the country's population.[2]

Mende influence in the southern part of the country has been so great that culturally and linguistically, the Gola, Krim and Gallina tribes are now almost extinct, having integrated with the Mende. This is also true for most of the Southern Sherbro. In the North-West, along the coastline, the Temne too have almost absorbed the Northern Sherbro.

Tribal people have had many things in common. At first, their religious outlook did not penetrate beyond ancestral worship; but later, the vast majority embrased Islam and now, a good many are Christians.[3]

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1. Some of the reasons which have been adduced for internal migration are: trade, missionary activities, spread of education, the development of mining, the advent of road construction and employment facilities. See M.E. Harvey, "Ethnic groups" in Sierra Leone in Maps, (ed. Clarke), p.36.

2. According to the 1963 Population Census, the Mende and Temne compose 30·9% and 29·8% respectively, of the population.

3. Writing in 1959, J. Spencer Trimingham gave the population of Sierra Leone as 2,350,000, of which 72% were Animists, 25% Muslims and 3% Christians. See his Islam in West Africa, Oxford, Clarendon Press, 1959, Appendix V. There is no other available data on the issue, but it is doubtful how accurate these figures are. Most non-natives are either professed Christians or Muslims. Even the vast majority of the people referred to as Animists are professed Muslims and many are Christians. Hardly can a citizen of Sierra Leone be found who does not claim membership of one or the other of the Muslim and Christian religions. Whether they zealously practice the faith is another issue with which we are not concerned here.

As is seen from the definition above, the non-native class is wide enough to encompass both non-nationals and nationals of Sierra Leone who do not fit into the native class. For our present purpose, the most important group in the non-native class is that of the Creoles. "Creole" is a generic term for any descendant of the settlers of the Colony of Sierra Leone, namely the ex-slaves from England, Nova Scotia and Jamaica, and those liberated Africans who were rescued from slave ships in the nineteenth century. Creoles have always been territorially identified with the Western Area of the country.

By virtue of their early introduction to, and long-standing association with Western civilization, the Creoles are to a great extent, Europeanized in culture and habit. During the colonial era, it was apparent that the British Administration treated them differently from the aboriginal natives. Legally, for instance, they were "British subjects", whilst the natives were merely "British-protected" persons. Culturally, religiously and socially too, they behaved just as if they were Englishmen living in England. The only Courts available to them in the Colony were the British-established type. Only recently has it been made possible for them to seek and obtain remedies in the Local Courts.[1] Basically, Creoles practise the Christian faith. But the community of the descendants of the liberated Africans who settled in the city of Freetown prefer Islam.

In modern times, a third class has socially emerged, though it is without legal significance as a class. The advance of education coupled with the influence of Western culture has brought

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1. S.13 of the Local Courts Act, 1963; Act No.20 of 1963 now extends the jurisdiction of the Local Courts to all persons within the area where the Court is located. Such persons include Creoles and other non-natives. This section is discussed in detail in Chapter 2.

into existence a new social élite drawn from the tribal groups. These educated and Westernized natives too, like the Creoles, have adopted, in many ways, Western manners and habits, and yet despite their acquired social status, they are in law still regarded as natives.

The effort to escape from one's legal background has not been one-sided. Among the non-natives also there are certain individuals whose mode of life is that of natives. They spend their lives among natives in such places as villages, homesteads, and provincial towns, inter-marry with them and conduct some, if not all, of their affairs in accordance with customary law. These, too, have not been accorded any special legal status, at any rate before a non-native court, and are still regarded in law as non-natives.[1]

C. THE CONSTITUTIONAL DEVELOPMENT [2]

(i) Development up to 1924

Before 1924, the Colony and Protectorate of Sierra Leone were administered as two separate territorial and constitutional entities.

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1. In tribal society, however, once they have integrated into that society they are treated on equal basis as natives.
2. Detailed accounts of the Constitutional development of the country are given by: T.O. Elias, op.cit., pp.217-260; M. Kilson, Political Change in a West African State, A Study of the Modernization Process, Harvard University Press, Cambridge, Mass., 1966; J.R. Cartwright, Politics in Sierra Leone, 1947-1967, Toronto, University of Toronto Press, 1970; H.J. Fisher, "Elections and Coups in Sierra Leone, 1967" in the Journal of Modern African Studies, 7, 1969, pp. 611-636; G. Collier, Sierra Leone: Experiment in Democracy in an African Nation, New York; New York University Press: London, University of London Press Ltd., 1970, pp.3-35.

The Colony

Prior to 1799, both the executive and legislative powers over the settlement were vested in the Court of Directors of the Sierra Leone Company. By a Royal Charter of Justice of 5 July, 1799, the office of Governor was set up and, with it, a Council.[1] Under that Charter, the executive and legislative functions of the Court of Directors of the Company were transferred to the Governor and his Council. Again, in 1863, by another Charter of Justice,[2] the Governor and his Council were split into a separate executive council and a legislative council.

The Protectorate

Between 1896 and 1913, a system of indirect rule prevailed whereby the chiefs and their principal men constituted both the executive and legislative organs. Their law was the law of the land; only the royal prerogative could invalidate it. In 1913, however, the legislative power was divided between the chiefs and the Legislative Council of the Colony.[3] By the Sierra Leone Protectorate Order in Council of that year, the Legislative Council of the Colony was empowered to legislate for the Protectorate.

(ii) Development in 1924 and after

In 1924, the Legislative Council was reconstituted with the Protectorate having more representation on it than the Colony.[4] In addition, a political union between the Colony and the Protectorate was evolved. The two entities were no longer regarded as

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1. This Charter of Justice was revised both in 1808 (by the Charter of 9 August, 1808) and in 1821. See Montagu, The Ordinances of Sierra Leone, Vol.III, pp.144-196.
2. The Charter of 27 May, 1863; Montagu, op.cit., Vol.III, pp. 193-196.
3. Though in case of conflict, the legislative powers of the Council probably prevailed over that of the chiefs.
4. Of the 11 elected unofficial members, 7 were to be elected from the Protectorate, of whom 3 were to be Paramount Chiefs.

two separate territories, but as a single political unit, namely Sierra Leone, consisting of a Colony and a Protectorate.

Further reforms in 1951 [1] brought an increase in the representation of the Protectorate in the Legislative Council to two-thirds of the elected unofficial members. In protest at this constitutional change, the Sierra Leone National Council was formed, which later emerged as a political party, the first in the country, representing the feelings of the Creole [2] community of the Colony. In opposition to the National Council, the Sierra Leone Peoples Party was established, having as its declared policy the unity of the peoples of the country.[3]

The election of the unofficial members of the 1951 Legislative Council had not been fought on party lines, but with the establishment of the two parties, the members took sides.

Another significant reform in 1951 was the reconstitution of the Executive Council.[4] Of the 21 elected members of the Legislative Council, 15 indicated their support for the Sierra Leone Peoples Party, whilst 6 stood for the National Council. Out of the members of the majority party, the Governor selected 6 to serve in the Executive Council.

In 1956, the Legislative Council was redesignated the House of Representatives. Elections took place in the following year on a party basis, and the Sierra Leone Peoples Party was returned with a majority.

The composition of the Executive Council changed further

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1. By a new constitution of that year, i.e. The Sierra Leone (Legislative Council) Order in Council, 1951, S.I. (1951), No.611
2. For the meaning of Creole, see ante, p.10.
3. See Lamina Sankph: The Two P's or Politics for the People, Freetown, 1951; see also Fyfe, op.cit., pp.329-335.
4. i.e. By the 1951 Constitution.

in 1958. The official members, except the Governor, who remained as President until 1960, withdrew from the Council. Cabinet government was established and the leader of the Sierra Leone Peoples Party, Dr. M.A.S. Margai, became the first Prime Minister.

Following a constitutional conference held in London in April and May, 1960, the country became independent on 27 April, 1961.[1] Parliamentary government subsisted from independence to 23 March, 1967, when following a general election and the appointment of Mr. S. Stevens, leader of the All Peoples Congress, as Prime Minister, a military coup temporarily brought a halt to it. A third military coup in April, 1968, restored civilian rule to the country. The country became a Republic on 19 April, 1971. Two days afterwards, Dr. Siaka Stevens was sworn in as the first Executive President.

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1. For the Report on the Constitutional Conference, see Cmnd. 1029/1960.

CHAPTER 2

THE COURTS AND SOURCES OF LAW

A. THE COURTS

(i) The early Courts [1]

In addition to the establishment of a Governor and Council, the Charter of 5 July, 1799, which we have already mentioned, also set up two civil courts of first instance, namely a Court of Requests for the recovery of small debts, and a Mayor's Court to hear and determine the more important civil cases, and one criminal court of original jurisdiction, viz., the Court of Quarter Sessions.

Consequent upon the abolition of slavery, a Vice-Admiralty Court was constituted by Order in Council of 16 March, 1808, for the trial of ships captured on the high seas dealing in slaves. This Court was active until 1819 when it was superseded by The Court of Mixed Commissions.

By the Police Court Ordinance of May, 1810, a police court presided over by a Magistrate was established. This Court eventually took over the jurisdiction of the Courts of Requests.[2] At first, appeals from the lower courts lay to the Governor and his Council, but later with the arrival of the first Chief Justice in 1811, this jurisdiction was transferred to him; his court then became known as the Court of the Recorder of Freetown. The Charter of 9 August, 1808, abolished the Mayor's Court and replaced

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1. A concise history of the early courts in the Colony is given by J.J. Crooks in his History of the Colony of Sierra Leone, Frank Cass & Co. Ltd., London (new impression), 1972.

2. See s.43 of Courts Ordinance, 1946 (now repealed); the jurisdiction still remains vested in the Magistrate's Court. And now see s.11 of Courts Act, 1965.

it by the Court of the Recorder of Freetown. An Ordinance No. 10 of 1858 [1] abolished the Court of Quarter Sessions and the Court of Recorder of Freetown, and in their stead constituted a Supreme Court having: (a) the same original jurisdiction as that of the common law and equity courts in England; and (b) criminal and civil appellate jurisdiction over decisions from lower courts. Since the inception of the Supreme Court, a considerable amount of reorganization took place from time to time in its panel, as well as in its sphere of jurisdiction. In 1971, it was redesignated a High Court.[2]

In 1866, another Court, the Court of Summary Jurisdiction, was set up,[3] having power to try personal actions where the claim amounted to no more than £100. As with the other lower courts, appeal from this court lay to the Supreme Court.[4]

To examine the cases of violent or inexplicable deaths, a Coroner's Court was established in 1872.[5] This Court is still in existence today.

(ii) The Early Courts in the Protectorate

Prior to the declaration of the Protectorate, the only

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1. See in particular ss.1, 5 and 44. As will be seen shortly, the Statute Law (Amendment) Act, 1961, changed all Sierra Leone "Ordinances" into "Acts". In order to avoid ambiguities however, we shall retain the use of "Ordinance" for those statutes by that name which are already repealed, and call "Acts" those which continue to exist after 1961.
2. The present High Court is constituted under the Courts Act, 1965, and the Constitution, Act No.6 of 1971, s.66(1).
3. Ordinance No.5 of 1866. See A. Montagu: Ordinances of the Settlement of Sierra Leone (1861-1867), Vol.III, p.104, published in London, 1868.
4. The Court of Summary Jurisdiction was abolished by the Administration of Justice Ordinance, 1876 (Ordinance No.4 of 1876). The jurisdiction of the Court was transferred to the Supreme Court.
5. Ordinance No.8 of 1872. See A. Montagu: Ordinances of the Settlement of Sierra Leone, (1870-1874), Vol.V, p.54, London, 1875.

court which the British Administration established to deal with the affairs of the hinterland was concerned with crimes. The Supreme Court Ordinance, 1881, gave jurisdiction to the Supreme Court of the Colony to try criminal offences arising from the hinterland, such trials to take place either in the Colony or in the place where they were committed. Hitherto, the courts in the territory, which later became the Protectorate, were the indigenous tribunals.

The Protectorate Ordinance, 1896,[1] recognised the existing courts of native chiefs as courts of record having jurisdiction in civil disputes in which the sole parties were natives,[2] and in addition, set up two other Courts: (a) the District Commissioner's Court, for the hearing and determining of minor disputes between non-natives resident in the Protectorate, and (b) the Court of the Chief and District Commissioner for the hearing of minor criminal cases in which only natives were involved. For dealing with civil matters where the amount claimed exceeded £50, and also grave criminal matters arising in the Protectorate, a Circuit Court

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1. No.20 of 1896. This Ordinance was repealed in 1898, but the portion dealing with the courts was re-enacted by the Protectorate Ordinance of that year. By various Ordinances and Acts since 1896 - the most important of which were the Protectorate Ordinance, 1901; the Protectorate Courts' Jurisdiction Ordinance 1903; the Protectorate Native Law Ordinance, 1905; the Protectorate Native Law Ordinance, 1924; Protectorate Courts Jurisdiction Ordinance, 1932; Protectorate Courts Jurisdiction (Amendment) Ordinance, 1937; and the Local Courts Act, 1963 - considerable reorganisation has taken place in the "native" (now "local" since the Local Courts Act, 1963) system, as the system of native judicial administration recognised by the 1896 Ordinance became known. The result is that at present there are local courts of first instance, Group Local Appeal Courts to hear appeals from the former, and a Local Division of the High Court to hear appeals from local courts from both their original and appellate jurisdiction. See H.M.J. Smart, "The Local Court System in Sierra Leone", Sierra Leone Studies, New Series No.22, January 1968, pp.31-44, for a history of the development of Local Courts up to 1963.

2. For the legal meaning of the words "native" and "non-native" as used in Sierra Leone, see ante, pp.7-8.

consisting of a sole judge of the Supreme Court of the Colony was established in 1903.[1] The District Commissioner's Court and the Court of the Chief and District Commissioner were abolished in 1946,[2] and their jurisdiction taken over by the Magistrate's Court. The Circuit Court was also abolished in the Courts Ordinance, 1946,[3] and replaced by the then Supreme Court.

(iii) Appeal Courts outside the Country

The highest and final Court of Appeal was formerly the Judicial Committee of the Privy Council. This Court had a long-standing connection with the country, dating as far back as the Charter of 1808.[4] By an Order in Council of 1 March, 1867, appeals lay to the Judicial Committee from final judgment of the Supreme Court for sums above £300.[5]

An intermediate appellate machinery introduced in 1928 was the establishment of the West African Court of Appeal.[6] On attainment of independence by Ghana and Nigeria, the two countries which together with Sierra Leone and the Gambia had recognised the appellate jurisdiction of the West African Court of Appeal, withdrew from it and the Court became known as the Sierra Leone and Gambia Court of Appeal. When Sierra Leone achieved independence in 1961, she set up her own Court of Appeal, which then superseded

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1. By the Protectorate Courts Jurisdiction Ordinance, 1903; No.6 of 1903.
2. By the Courts Ordinance, 1946; see in particular s.41.
3. Ibid.
4. Ante, p.12
5. Statutory Rules and Orders, 1904, Vol.VI, 'Judicial Committee', p.81. See A.W. Renton and G.W. Phillimore: Colonial Laws and Courts, London, 1907, p.274.
6. Recognised in Sierra Leone by the West African Court of Appeal (Civil Cases) Ordinance No.9 of 1929, and the West African Court of Appeal (Criminal Cases) Ordinance No.10 of 1929.

the Sierra Leone and Gambia Court of Appeal.[1]

(iv) The Present Court System

The Privy Council

The Judicial Committee of the Privy Council continued to be the highest and final Court of Appeal until the Republican Constitution [2] came into effect on 19 April, 1971, which abolished the Court as the country's highest Court of Appeal for appeals after that date.[3] However, under ss.11 and 12 of the Constitution (Consequential Provisions) Act, 1971,[4] any appeal or petition for leave to appeal that was pending before the Privy Council continued to be heard by it after the entry into force of the Republican Constitution. Under these provisions, an appeal would be regarded as pending if the records were registered, and in the case of a petition for leave to appeal, if such petition was filed in the office of the Privy Council before the commencement of the Republican Constitution.

S.12(2) provides that an order made by the Privy Council on an appeal that lies to it either before or after the Republican Constitution came into force is enforceable in the same manner as it was enforced before the commencement of the Republican Constitution.

The Supreme Court

This is the new highest and final court of appeal which took the place of the Privy Council since the country became a Republic. It was established under S. 66 of the Republican

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1. The Sierra Leone Constitution, 1961, S.79.
2. Act No.6 of 1971.
3. S.11 of the Constitution (Consequential Provisions) Act, 1971; Act No.9 of 1971.
4. Act No.9 of 1971.

Constitution. At least three Justices constitute a quorum. Qualification for appointment as a Justice of the Court is entitlement to practise as an advocate or solicitor in a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth, or in a court having jurisdiction in appeals from any such court, and has been so entitled for not less than ten years.

The Supreme Court has no original jurisdiction but hears appeals from the Court of Appeal with the leave of the Supreme Court itself, which may be granted only upon condition that within a period to be fixed by the Court, but not exceeding three months from the date of the hearing of the application for leave to appeal, the appellant provides a security to the satisfaction of the Court in a sum not exceeding Le 1,000.[1] This condition is probably intended to minimize the hearing of groundless appeals. The court also hears appeals from the Court of Appeal with leave from that Court, if such leave was granted before the 19 April, 1971.[2]

The procedure for appeals is governed by the procedure in Appeals to the Supreme Court (Adaptation) Order, 1971,[3] and the Supreme Court Rules (Adaptation) Order, 1971.[4]

The Court of Appeal [5]

This Court is also established by section 66 of the Republican Constitution. Its judges are Justices of Appeal having the same professional qualification and entitlement to practice as the Supreme Court Justices. As also with the Supreme Court, three

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1. ⊤.2 of The Procedure in Appeals to the Supreme Court (Adaptation) Order, 1971. P.N. No.34 of 1971.
2. Ibid., ⊤.17.
3. Ibid., P.N. No.34 of 1971.
4. P.N. No.35 of 1971.
5. For a detailed analysis of the Court system in Sierra Leone before the country became a Republic, see H.M.J. Smart, "Sierra Leone" in Allott's Judicial and Legal Systems in Africa (2nd ed.) Butterworths, London, pp.9-20.

justices constitute a quorum.

Generally, the Court has such jurisdiction and powers as are conferred upon it by the Republican Constitution and any other law.[1] Specifically, following the old Appeal Court which it replaced, the Court gives opinions on questions of law on cases stated by a Judge of the High Court.[2] The primary jurisdiction of the Court is to hear appeals from the High Court.[3] In turn, an appeal from the Court of Appeal lies to the newly-constituted Supreme Court except appeals pending before the Judicial Committee of the Privy Council before 19 April, 1971. In civil cases, appeal lies where the matter in dispute or amount is not less than Le 1,000 and against final decisions in (a) disciplinary proceedings against members of the medical, dental and legal professions, and (b) proceedings for the dissolution or nullity of marriage. Appeal lies as of right in criminal cases.[4]

The High Court

As with the other Superior Courts of Record, the High Court is established by section 66 of the Republican Constitution. The period of entitlement to practice as an advocate or solicitor in order to qualify as a High Court Judge is reduced to seven years under the present Constitution. This Court replaces the old Supreme Court and its constitution and powers remain the same as those of the old Court.[5] These are examined more fully in Chapter 3 herein.

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1. S.66(1) of the Republican Constitution.
2. Ss.53(3), 68 of Courts Act, 1965; s.4(1) of Act No.9 of 1971.
3. S.72 of Act No.6 of 1971.
4. S.70(1) of the Courts Act, 1965; Act No.31 of 1965.
5. In order to avoid anachronism, throughout this thesis the expression "Supreme Court" will be retained when referring to that Court which in 1971 was redesignated "High Court" for all matters affecting the Court before that date. In order to obviate confusion, when we wish to refer to the present highest Court of Appeal in the country, we shall call it the "new Supreme Court".

The Magistrates' Court

These are also Courts of Record established under the Courts Act,1965, the Courts Act (Amendment) Decree,1967,[1] and the Children and Young Persons Act.[2] They are of three classes, namely, the ordinary magistrates' courts, a special magistrates' court sitting in the Western Area alone to decide matters affecting customary law, and juvenile courts. A juvenile court comprises a single magistrate and two or more justices of the peace. The composition and jurisdiction of the other two classes of magistrates' courts are discussed in Chapter 3. Here, we should, however, point out that the change of the country from a Monarchy to a Republic did not affect the constitution and powers of the magistrates' courts and other lower courts.

Customary-Law Courts

For want of a better term, we use "Customary-law courts" as a generic term for those Courts whose primary law is customary law. They range from the Local Appeals Division of the High Court, the District Appeals Court, the Group Local Appeals Court, and then to the Local Court. They were established by the Local Courts Act, 1963,[3] and are situated in the Provinces. The lowest is the Local Court from which an appeal lies to either the Group Local Appeal Court or the District Court. An appeal from the District Cour goes straight to the Local Appeals Division of the High Court, while an appeal from the Group Local Appeal Court must go through the District Court before reaching the Local Appeal Division of the High Court. From this latter Court, an appeal

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1. N.R.C. Decree No.56, dated 26 October, 1967.
2. Cap.44 of the revised Laws of Sierra Leone, 1960.
3. Act No.20 of 1963.

lies to the Court of Appeal, and then finally to the new Supreme Court.[1]

B. THE SOURCES OF SIERRA LEONE LAW

The sources of Sierra Leone law are: (i) the general law; (ii) Islamic law, and (iii) Customary law.

(1) The General Law

The term "general law" [2] is used to describe English law as applied in Sierra Leone, and such local adaptations and modifications that have been made of it. The courts that primarily administer it are the British-established system of courts of the colonial era and non-customary courts of the post-independence period, as opposed to the customary local courts, the indigenous system of traditional courts in the Provinces. The general law consists of: (i) local enactments, and (ii) received English law.

Received English law is of two kinds:-

(a) "Adopted law", which is defined by section 4 of the Interpretation Act, 1971, as:

> "any Act of the United Kingdom or English Parliament or an Order in Council or other legislative instrument made thereunder otherwise than by an Authority in Sierra Leone which has effect in Sierra Leone."

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1. We can state here only the presence of these customary-law courts in the Sierra Leone judicial system at the expense of devoting time and space to matters which are more relevant to the subject-matter of this thesis. The present writer has, however, fully dealt with these Courts in Allott's Judicial and Legal Systems in Africa, pp.16-20, and in an article entitled "The Local Court System in Sierra Leone", S.L.S. (N.S.), No.22, pp.31-44.

2. This term is first used in the Local Courts Act, 1963; s.2 of which provides, inter alia, "... 'general law' includes the common law, equity and enactments in force in Sierra Leone, except insofar as they are concerned with customary law ..." S.4 of the Sierra Leone Constitution,1971, defines "general law" as meaning "the Common law, equity and all enactments in force in Sierra Leone."

In this category will fall those statutes of the United Kingdom Parliament which applied automatically to Sierra Leone as Imperial Statutes,[1] as well as those statutes which are adopted from time to time by the local legislature.[2]

(b) Non-statutory English law which serves as the residual law of Sierra Leone. In this group, are the common law and the doctrines of equity.

Authority for Application

Note that the Constitution, 1971, s.93(1) provides that:-

> "in this Constitution, unless a contrary intention appears - ... 'law' includes (a) any instrument having the force of law made in exercise of a power conferred by law ..."

Note also that the Constitution in s.33 further provides that:-

> "Subject to the provisions of this Constitution, Parliament shall be the supreme legislative authority for Sierra Leone."

The effect of both sections is that any law passed by the Sierra Leone legislature will answer to the description of "general law".[3]

Apart from Imperial Statutes which before the country became a republic applied in Sierra Leone automatically, and those statutes which are from time to time adopted by specific legislation, the rest of English law applies in Sierra Leone as a result of a reception statute.[4]

Before we discuss the content of this Statute, it is necessary to show how English law was introduced into Sierra Leone.

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1. e.g. The Merchant Shipping Act, 1894.
2. These are also of two kinds: (a) those which come within the reception date (see below), and (b) those which are outside the reception date, e.g. the adoption of the English Perjury Act, 1911; Forgery Act, 1913; and Larceny Act, 1916, by the Imperial Statutes (Criminal Law) Adoption Act, 1933.
3. Except that which falls within the definition of customary law. See post, p.40
4. "Reception Statute" is used here for the Sierra Leone Act of Parliament which provides that so much of English law at a particular date, shall apply as the residuary law of Sierra Leone.

According to Halsbury's Laws of England,[1] there are three forms of settlement. First, occupation of territory may be authorised by the Crown, possession taken in the name of the Crown, and settlers introduced. Secondly, the Crown may recognise as British territory settlements made by British subjects without previous authority. Thirdly, uninhabited islands or areas in the Arctic or Antarctic may be formally annexed.

Sierra Leone is listed as one of the territories acquired by settlement of the first type.[2] This statement is true for the country as from 1808 when it was declared a Crown Colony although the Sierra Leone Company from England had occupied part of it in 1787, as we have seen earlier. Authority for the informal introduction of the English Common law into the settlement of the Sierra Leone is afforded by Renton and Phillimore,[3] who wrote:

> "Sierra Leone, having been acquired by occupancy and not by conquest or cession, is a 'plantation' and therefore the common law of England prevails in it."[4]

At the initial stages, however, no direct legislative authority could be found for the application of English law to Sierra Leone. Its introduction was informal. Early evidence of it was the introduction of the English frank-pledge system.[5] But

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1. 3rd ed., vol.5, p.544.
2. Ibid.
3. Colonial Laws and Courts, London, 1907, p.273.
4. This statement presumably does not apply to the territory that later became the Protectorate in which English law was applied by Ordinances in Council since the declaration of the Protectorate in 1896.
5. Under this system, an English town was, for the purpose of local government, divided into tithing, i.e. districts of ten families. The headmen of the families elected one of them as a tithingman to watch over the interests of the ten families. The tithing men, in turn, elected one of their numbers as a hundreder to be in charge of every hundred or district of ten tithings.

unlike England, the township [1] was divided into districts of twelve instead of ten families. The whole body of tithingmen and hundreders sat with the Governor and his Council to review all proposed legislation before it became law. Another evidence was in the Charters of Justice of 1799, 1808 and 1821. But neither the frank-pledge system nor any of the Charters of Justice contained a clear and precise statement that English law should apply to Sierra Leone. Nevertheless, the settlers applied the current common law because it was the law known to them and to which they had been accustomed. They also applied locally-enacted law, but only when it was not contrary to English law. For example, the Charter of 1808 referred to the Governor and Council as having power -

> "to enact laws, statutes and ordinances not repugnant to the laws of England but as near thereto as circumstances would permit."[2]

Consequently, laws passed by the Governor and Council had to be sent to Westminster for approval within six months of enactment and any law so disapproved or disallowed ceased to have effect. In this legislative process, by virtue of the background of the persons concerned with it, English law was gradually introduced. The same background made English law the more welcome by judges and laymen who embarked on judicial functions.

The first express provision for the application of English law came in 1857. By s.2 of Ordinance No.96 of that year, all laws and statutes which were in force in England on 1 January, 1857 were extended to Sierra Leone insofar as local circumstances permitted.[3] The reception date was altered to 1 August, 1862,

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1. i.e. the area in Freetown which was first occupied by the settlers.
2. See Montagu, op.cit., vol.III, p.183.
3. See Montagu: op.cit., Vol.I, p.295.

by s.2 of Ordinance No.3 of 1862. Supreme Court Ordinances [1] since 1862 retained the date, but the Supreme Court Ordinance of 1881 [2] changed it to 1 August, 1880. This date has been adhered to ever since. The 1881 Ordinance first introduced the phrase "all laws and statutes", but, as with its predecessors, it made no mention of "the common law and equity". The reception statute in its present form was first enacted by s.37 of the Courts Ordinance [3] which came into effect on 1 January, 1946.[4] The present reception statute is the Courts Act, 1965, s.74 of which provides that:

> "subject to the provisions of the Constitution and any other enactment the common law, the doctrines of equity and the statutes of general application in force in England on the 1st day of January, 1880, shall be in force in Sierra Leone."[5]

The interpretation of the phrase "the common law", the doctrines of equity and the statutes of general application in force in England on the 1st day of January, 1880," has not been without difficulty. [6]

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1. See Act No.8 of 1864; Act No.7 of 1876.
2. Act No.9 of 1881, s.19.
3. Cap.7 of the revised Laws of Sierra Leone, 1960 (now repealed).
4. Note that T.O. Elias, op.cit., p.271, erroneously gives the first reception statute as Ordinance No.3 of 1862. Presumably, the learned jurist lost sight of Ordinance No.96 of 1857, as nowhere in his book does he make reference to it.
5. The provision with local variations in regard to the reception date, i.e. the date delimited by the reception statute, is found in the reception statutes of a number of ex-British dependencies, e.g. in Nigeria, the date is 1 January, 1900:- see the Interpretation Act, Cap.89 (1958 Ed.) Laws of the Federation of Nigeria; in Ghana, the date was 24 July, 1874:- see the Courts Ordinance of 1 July, 1935, Cap.4, Vol.1 of the Laws of the Gold Coast (1951).
6. For concise but very apt meanings of the terms "common law" and "equity", see Park, op.cit., pp.5-13.

"The common law, the doctrines of equity ..."

So far as the common law and doctrines of equity are concerned, there are two schools of thought as to the time limit of their application. One school, of which Allott [1] is the most eloquent advocate, maintains that the reception date applies to the common law and equity no less than it does to the statutes of general application. The other school, led by Park,[2] would not impose any such restriction, conceding that the applicable common law and equity are those in currency and not merely those that existed at the reception date. In short, the argument of this school is that the reception date applies only to the statutes. Whichever view is taken in this highly academic controversy,[3] it is submitted that the phrase in s.74 of the Courts Act is a nebulous one, one whose content cannot be satisfactorily ascertained without reference to the construction which the Sierra Leone courts have placed upon it.

It must be pointed out and borne in mind that in Sierra Leone there is at present, no separate provision like s.17 of the Gold Coast Ordinance,[4] and s.16 of the High Court of Lagos Law [5] to which the two contenders seem to address themselves respectively, and which they agree provide for a "timeless" application of English law in divorce and matrimonial causes and matters in

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1. Essays in African Law, p.31, and New Essays in African Law, Butterworths, 1970, pp.31-34.
2. The Sources of Nigerian Law, pp.20 et seq.
3. See Sir Kenneth Roberts-Wray, "The adaptation of imported law in Africa" in [1960] J.A.L., pp.66-77, where the writer appears to hold a modified view of the Allott thesis.
4. The section provided that the Gold Coast Supreme Court was to exercise matrimonial jurisdiction, "in conformity with the law and practice for the time being in force in England."
5. The section also reads as follows:- "The jurisdiction of the High Court in ... matrimonial causes and proceedings may ... be exercised by the Court in conformity with the law and practice for the time being in force in England."

those countries. Formerly, there was a similar provision [1] in Sierra Leone, but no agreement among Sierra Leone Courts as to whether it had a "timeless" effect in Sierra Leone.

In Richards v. Richards,[2] the question was which English rules of procedure should apply in a matrimonial cause. The answer depended on the construction placed on s.6 of the Supreme Court Ordinance.[3] Holding that it was the current English law that applied as opposed to English law as at 1 January, 1880, Tew, C.J. had this to say:-[4]

> "It is agreed that it has been the invariable practice of this Court to follow the current English practice and I think the procedure is correct."

About two years after this decision, without any reference to it, the West African Court of Appeal took a diametrically opposed view in the Sierra Leone case of Godwin v. Crowther,[5] by holding that the phrase "the law for the time being in force" which appeared in the Ordinance meant the law in force at the time the reception statute was passed. Delivering the judgment of the Court, Macquarrie, J. said:-[6]

> "It appears to me that strong evidence should be required if the intention of the legislature is to effect such unusual purpose as the wholesale application of all English law whatever it might be on

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1. i.e. s.6 of the Supreme Court Ordinance, 1904, which stated:- "The jurisdiction hereby conferred on the Supreme Court in probate, divorce and matrimonial causes and proceedings may subject to this Ordinance and to rules of Court be exercised by the Court in conformity with the law and practice for the time being in force in England." This provision was repealed by the Supreme Court Ordinance, 1933.
2. Unreported; decided by the Supreme Court of Sierra Leone on 11 March, 1932.
3. i.e. The 1904 Ordinance, now repealed.
4. At p.542 of the Supreme Court Judgment Book, No.1.
5. (1934) 2 W.A.C.A. 109.
6. Ibid., p.111.

> the subject in question as well as those of divorce and matrimonial causes. No such evidence exists."

The other two learned judges [1] concurred with him.

Applying the doctrine of precedent and the hierarchy of Courts here, one would tend to conclude that Godwin's case stood as authority over Richard's because Godwin's was decided by a higher court. However, Godwin's case was heavily undermined by a subsequent case, again decided by the West African Court of Appeal. In Taylor v. Taylor,[2] a Nigerian case, in which one of the judges was the Chief Justice of Sierra Leone and Butler-Lloyd, J. who took part in Godwin's case, an opinion contrary to that in Godwin's case was taken by the Court without reference to either Richard's case or Godwin's case. Butler-Lloyd, J. concurred with Kingdon, C.J. without giving reasons and without perhaps the least suspecting that he had contributed to the opposite view ten months earlier. Later practice in Nigeria, Ghana and Northern Rhodesia followed the principle in Taylor v. Taylor.[3]

Our conclusion, therefore, is that,so far as Sierra Leone is concerned, the question whether s.6 of the Supreme Court Ordinance conveyed a "timeless" implication was one which remained unsettled. Therefore, the contrast on which Allott and Park stood, i.e. the "timeless" application of English law in divorce and matrimonial matters, cannot be of much help to Sierra Leone in the interpretation of the phrase "the common law, the doctrines of equity and the statutes of general application in force in England on the 1st day of January, 1880."

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1. i.e. Butler-Lloyd, J. and Deane, C.J. at 112-113, respectively.
2. (1935) 2 W.A.C.A. 348.
3. See the Nigerian case: Whyte v. Commissioner of Police [1966] N.M.L.R. 215 at p.218; the Ghana case: Ashong v. Ashong (1968) C.C. 26; the Northern Rhodesian case: In the matter of the Estate of Frederick Ntonga [1964] J.A.L. 41, High Court.

As we have said earlier, guidance for interpretation must be sought from the Sierra Leone Courts themselves. As a rule, these Courts have not in the least hesitated to hold as applicable law under s.74 of the Courts Act, 1965, any recent development in the English common law and equity. Post-1880 English decisions have been cited with approval in the Sierra Leone Courts with the utmost frequency as pre-1880 cases. For example, English cases like D.P.P. v. Smith [1] and "The High Trees" case, [2] have been cited and accepted as authority for the propositions which they supported without question. This judicial attitude, in our submission, is accentuated not so much by the desire to give a "timeless" interpretation to the phrase as by the desire for convenience and expediency.

"The Statutes of general application in force in England ..."

It is important for our topic to know what statutes of general application in force in England are applicable in Sierra Leone. The reason is that the family law of a given country takes into account the race, the religion and the culture; in short, the background, of the peoples of that country. One must, therefore, be wary of transporting statutes which have been enacted taking these factors into consideration to a people with a different background without making modifications in the applicability of the statutes in order to suit the local conditions of the country in which they are transplanted.

All the authorities are in agreement that statutes of general application are limited to the reception date. Nevertheless, there is difficulty of interpretation in respect of the class of English statutes which should be regarded as being "of general application in England". No satisfactory definition of

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1. [1960]3 All.E.R. 161.

2. [1947]K.B. 130.

the expression has been preferred either in Sierra Leone or in any other country which has a similar provision in its reception statute. Definitely, private local Acts cannot be within the expression. Conversely also, not all public Acts apply throughout the country or to all classes of persons. It will, therefore, be incorrect to say that all such Acts are statutes of general application. Here again, as with the common law and equity, one has to look for guidance to the courts of the territory in which an English statute is to apply as a statute of general application.

In Sierra Leone, the Courts have not adopted a hard and fast rule as to which English statutes are of general application and therefore, applicable to Sierra Leone, and which ones are not. Apart from one case,[1] in which the West African Court of Appeal in an appeal from the Supreme Court of Sierra Leone held that the English Appellate Jurisdiction Act, 1876, was not an enactment of general application in England and therefore, not applicable to Sierra Leone, the general tendency has been to regard all English statutes which fall within the reception date as being of general application.[2] They apply to Sierra Leone subject only to s.11 (1) of the Interpretation Act, 1971, which provides that whenever -

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1. In the Matter of the Public Lands Acquisition Ordinance (1945), 11 W.A.C.A. 31. See, in particular, the judgment of Kingdon, C.J. at p.33.

2. c/f Allott: New Essays in African Law, pp.50-54, where he gives ten requirements in which an English statute qualifies as "of general application". They are summarised as follows:- (i) It must be a public general Act of Parliament; (ii) It must be in force in England at the relevant date even though it had been subsequently amended or repealed; (iii)) It need not be applicable by all courts in England nor to all classes of persons nor in all localities; (iv) It must be suitable for general application outside England; (v) It must not be peculiarly and solely adapted to English local conditions; (vi) It must be suitable for import into a given country; (vii) A ruling must be made by a court of the receiving country that a statute is of general application and that ruling must remain unreversed; (viii) It may apply only to a particular case or class of persons; (ix) The consequence of ruling whether or not a statute is of general application should be considered; (x) The statute of general application should not be inconsistent with a subsequently enacted local statute.

any Act of the United Kingdom or English Parliament applies in Sierra Leone, "it shall be read with such verbal alternatives as to names, localities, courts, officers, persons, moneys and otherwise as may be necessary to make the same applicable in the circumstances." This attitude is perhaps a reflection of the "Englishness" of Sierra Leone judges.[1]

Somewhat similar to the point at issue, is also the tendency of Sierra Leone courts to accept English decisions as authority for the interpretation of local statutes which are couched in the same language as English Acts of Parliament, for example, the Sierra Leone Matrimonial Causes Act, 1949.[2] This Act contains almost the same grounds [3] for divorce and nullity of marriage as the English Matrimonial Causes Act, 1950, and English cases on the interpretation of terms like cruelty, desertion, and non-consummation of marriage have been applied indiscriminately to interpret the same terms used in the Sierra Leone Act. In our submission, such a practice should be deprecated. English judges sitting in England interpret these terms by taking into consideration, inter alia, the social and cultural background of the British people. It is in this light that Sierra Leone judges should look at them. An act by a husband like coming home late at night in a drunken state, which an English judge may regard as an act of cruelty,[4] should not indeed be regarded per se as cruelty in Sierra Leone, bearing in mind the background of the community in which the

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1. All Sierra Leone judges and lawyers are British-trained. The country has not, as yet, a Law School.
2. Cap.102 of the revised Laws of Sierra Leone, 1960.
3. Except that insanity is not a ground for divorce in Sierra Leone.
4. See Hall v. Hall [1962] 3 All E.R. 518.

husband lives.

(ii) Islamic Law [1]

The majority of Sierre Leone Muslims, like those in other parts of West Africa, belong to the Maliki School of the Sunni Sect.[2] The Sharia does not apply in Sierra Leone as a system of law in the same way as the "general law" and customary law, but it may apply either as (a) part of statute law; or as (b) part of customary law.

(a) Islamic Law as part of Statute Law

The only reference to Islamic (Mohammedan) law in Sierra Leone is in the Mohammedan Marriage Act.[3] The Act stipulates that,

> "Every marriage entered into and subsisting between persons professing the Mohammedan faith and domiciled in the Colony and Protectorate which is valid according to Mohammedan law (hereinafter called a Mohammedan marriage) shall be valid for all civil purposes."[4]

It goes on to say that "Proof according to Mohammedan law of the existence, past and present, of a Mohammedan marriage or of a dissolution of a Mohammedan marriage, shall be received in evidence, by all the Courts in the Colony." [5] It further provides that Mohammedan Marriages and final divorces may be registered; [6] that

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1. On Islamic Law in Sierra Leone generally, see J.N.D. Anderson: Islamic Law in Africa, H.M.S.O., London, 1954.
2. There are a few foreign Muslims and members of the Ahmaddiya sect.
3. Cap.96 of the revised Laws of Sierra Leone, 1960, passed in 1905.
4. Ibid., s.2.
5. s.3.
6. s.5.

"the Registrar, when requested so to do, shall enter a record ... of any Mohammedan marriage or final divorce, if satisfied that such marriage or final divorce is in accordance with Mohammedan law." [1] S.9, which regulates succession on intestacy, enacts that,

> "if any party to a Mohammedan marriage and being at the date of his death a Mohammedan, shall die intestate, the real estate and personal of such intestate shall be distributed in accordance with Mohammedan law"

the persons entitled to take out letters of administration being "the eldest son of the intestate if of full age according to Mohammedan law",[2] and failing him "the eldest brother of the intestate, if of full age according to Mohammedan law",[3] with a proviso that,

> "a creditor, not being a Mohammedan, may apply to the Court for letters of Administration and, notwithstanding that letters of administration have already been granted to another person, the application of such creditor shall be granted ... unless the previous grantee shall pay the debt, or prove to the satisfaction of the court that nothing is owing from the estate of the intestate to the applicant."

The section continues that "save as regards distribution or any other matter expressly provided for in this section, the estates of the intestate ... shall be administered in accordance with the law of the Colony," [4] and that,

> "in the event of there being at the time a Tribal Authority of a race which is Mohammedan, the Official Administrator shall, in the absence of any direction given by the Chief Justice to the contrary, consult such authority as to what is the Mohammedan law as to distribution of an intestate's estate."[5]

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1. s.6(1).
2. s.9(2)(a).
3. s.9(2)(b).
4. s.9(3).
5. s.10.

Looking at the substance of the Mohammedan Marriage Act in regard to applicable Islamic law as part of Sierra Leone family law, one significant point stands out clearly. It is that the Act does not give any court whatsoever power to enquire on its own accord whether or not the formalities of a Mohammedan marriage or divorce were complied with according to Islamic law. Registration of a marriage or divorce by a Registrar selected from among the Mohammedan community is prima facie evidence of compliance with the norms of the Sharia. The ultimate result is that in many cases, what is usually registered as a Mohammedan marriage or divorce is in form and content a customary law marriage or divorce.[1]

A distinctive feature of a Mohammedan marriage is that the wife has the same rights under the Married Women's Maintenance Act as a wife married under the Christian or civil marriage Acts.[2]

(b) Islamic Law as part of Customary Law

True, Sierra Leone Muslims do observe the ritual ordinances of their religion but they, except perhaps the small Aku Muslim community in Freetown, scarcely apply or are knowledgeable of Islamic law. Even among this minority, though the ceremony of marriage is normally carried out in accordance with the tenets of Islamic law, other requirements stipulated by the Sharia, such as the payment of dower to the wife by the husband as distinct from the marriage consideration, are not strictly observed. In the field of intestate succession, they adhere to the rules of the Sharia only when a dispute is in contemplation. Among the majority of Muslims in the Provinces not even the ceremony of marriage is conducted in the manner ordained by the Sharia.

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1. For the effect of this, see Chapter 10, pp. 338-339

2. See J.N.D. Anderson, op.cit., p.295.

Customary law usually takes the place of Islamic law in many situations.

As we shall also see later, the non-customary courts have no power to hear any matrimonial cause under Islamic law. They have power only to receive evidence of a valid marriage and a valid dissolution of that marriage under Islamic law as supplied to them. Nevertheless, because of s.2 of the Mohammedan Marriage Act, which provides that a Mohammedan marriage "shall be valid for all civil purposes",[1] it would appear that non-customary courts can accommodate a matrimonial suit between parties to a Mohammedan marriage and apply the general law. It is submitted, however, that "civil purpose" under the Act does not include a matrimonial cause; for under the Matrimonial Causes Act a Mohammedan marriage is not a "marriage" and the spouses are not "husband and wife".[2] A Mohammedan marriage, therefore, assumes the status of a customary marriage and matrimonial relief would have to be sought from a Local Court or from other sources, probably ad hoc tribunals.[3] The position is the same for Mohammedan marriages in the Provinces since the Mohammedan Marriage Act does not apply to the Provinces.[4]

(iii) Customary Law

Customary law or "native law and custom", as it was formerly called, was the law of the indigenous tribunals in the whole of Sierra Leone before the colonial era. The Protectorate Ordinance, 1896,[5] for the first time officially recognised it as the

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1. Islamic Law would therefore, be regarded as part of the general law.
2. S.2 of the Matrimonial Causes Act, 1949, cap.162.
3. A tribal headman or some highly respected local Muslim usually constitutes the tribunal. Usually, such matters are referred to the jamaat (local Muslim Community).
4. See Chapter 4.
5. Ordinance No.20 of 1896.

law of the courts of the native chiefs in the Protectorate. Later, s.6 of the Protectorate Courts Jurisdiction Ordinance [1] provided for the application of this law by District Commissioners Courts and Circuit Courts in the Protectorate. The provisions were substantially re-enacted in the Courts Ordinance,[2] and finally reproduced in the Courts Act, 1965.[3]

There is no legislation in Sierra Leone specifically pertaining to customary family law, but it is submitted that customary family law is recognised and applied by the Courts because it constitutes a substantial part of the whole body of customary law for whose application provision is made. Besides, there are references in the Marriage Amendment Acts, 1965 [4] to the recognition of customary-law marriage as a bar to a subsequent statutory marriage, not to mention the fact that on a number of occasions, the general law courts have granted reliefs, though non-matrimonial, based on customary marriages in exercise of their power under s.76 of the Courts Act, 1965.[5]

The current statutory provisions in Sierra Leone for the recognition and application of customary law are found in the Constitution,[6] the Native Courts Ordinance,[7] the Local Courts Act, 1963,[8] and the Courts Act, 1965.[9]

Note that the Constitution, 1971, ... s. 93(1) provides that:-

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1. Act No.6 of 1903.
2. Cap.7 of the revised Laws of Sierra Leone, 1960, s.38
3. Act No.31 of 1965.
4. Acts Nos. 48 & 49 of 1965.
5. See the unreported cases decided by the Supreme Court at Freetown, namely, Alpha Suliman v. Mballey, 199/43; Brown v. Jelaney, 363/45; Suliman v. Foday, 607/33.
6. Act No.6 of 1971.
7. Cap.8 pf the revised Laws of Sierra Leone, 1960.
8. Act No.20 of 1963.
9. Act No.31 of 1965.

> "In this Constitution, unless a contrary intention appears - ... 'law' includes - ... (b) customary law and any other unwritten rule of law ..."

After continuing the policy of the Protectorate Ordinance, 1896, in giving recognition to native courts as courts of law, the Native Courts Ordinance, 1933 [1] in s.5 stated:

> "The Native Courts and the Combined Courts shall administer justice in accordance with native law and custom so far as the same is not repugnant to natural justice, equity and good conscience or incompatible, either directly or indirectly with any Ordinance applying to the Protectorate but subject always to the provisions of this Ordinance."

The Native Courts Ordinance has been repealed by s.50(1) of the Local Courts Act, 1963.[2] There is no express clear provision in the Local Courts Act, as it was in the Native Courts Ordinance that customary law shall be the law of the Local Courts, and s.5 of the Native Courts Ordinance is not saved. But s.13(2) of the Local Courts Act in giving jurisdiction to the Courts over persons within its territorial limits provides that "where there is no provision of customary law the general law shall apply". This provision may be subject to two interpretations:

It may mean that wherever in the Act no provision is made for the application of customary law, then the general law will apply, in which case the general law automatically applies as the law of the local courts, since the Act does not specifically provide for the application of customary law. It may also be interpreted that customary law is the primary law of the court, but in any case, where customary law cannot apply because either there is none or for some reason or the other, it is impracticable or

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1. Which is Cap.8 of the revised Laws of Sierra Leone, 1960. It was formerly Cap.50 of the revised Laws of Sierra Leone, 1946.
2. No.20 of 1963.

inappropriate to apply one, then the general law will apply as the secondary law. It is submitted that the second interpretation is the more reasonable and should be preferred. To adopt the first interpretation would be not only a reduction of the issue to absurdity but also a flagrant disregard of the intention of the legislature which can be gathered from the Act as a whole.[1]

The terms "native law and custom", "native customary law", and "customary law" appear to be used synonymously in Sierra Leone legislation.[2] "Native law and custom" itself has never been defined by any Ordinance or Act, but s.2 of the Local Courts Act, 1963, defines "customary law" as meaning:-

> "any rule, other than a rule of 'general law', having the force of law in any chiefdom of the Provinces whereby rights and correlative duties have been acquired or imposed which is applicable in any particular case and conforms with natural justice and equity and not incompatible either directly or indirectly, with any enactment applying to the Provinces, and includes any amendments of customary law made in accordance with the provisions of any enactment."

Power to other courts, presumably to general-law courts [3] to apply

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1. A statute must be read as a whole and a construction made of all the parts together. See C.E. Odgers, The Construction of Deeds and Statutes, London (5th ed.), by G.Dworkin, 1967, p.237.

2. e.g. ss.11 and 39 of the Courts Ordinance 1946 (now repealed). The terms are used as such in the legislation of other West African Common Law Countries, e.g. Nigeria. See L.C.B. Gower, 'Nigerian Statutes and Customary Law' in The Nigerian Law Journal, Vol.1, No.1, November, 1964, p.73, note 3; A.E.W. Park, The Sources of Nigerian Law, London, 1963, p.2, footnote 2.

3. In Brima Kormor v. Nicholas Coosah and Asinu K. Lamin (1960-1), 1 S.L.L.R. p.66, Cole J. sitting in the Supreme Court, applied "native law and custom" in a case where both parties were natives. The plaintiff, an illiterate, owned a building in Kailahun in the Eastern Province of Sierra Leone. Some time in 1952, the chiefdom people of Luawa Chiefdom, Kailahun, decided to give Paramount Chief Ngobeh a house which was then occupied by the second defendant. Consequently, the second defendant was asked to leave the house. The plaintiff agreed to allow the second defendant to occupy his building rent-free. Two months after the second defendant took possession, the plaintiff was asked by the Paramount Chief, in the presence of the second defendant, to sign a document which, as he was told, concerned with his allowing the second defendant to live in his house. In fact, the document was a conveyance which purported to transfer to the second defendant all the interests of the plaintiff

/Contd. on p.41.

customary law is conferred by the Courts Act, 1965. After stating in s.74 the local statutory law and the residual law that is in force in Sierra Leone, s.76 provides:-

(1) "Nothing in this Act shall deprive any Court when determining matters arising in the Provinces in its civil jurisdiction, of the right to observe and enforce the observance of, or shall deprive any person of the benefit of any customary law existing in the Provinces and not being repugnant to natural justice, equity and good conscience nor incompatible either directly or by necessary implication with any Act applying to the Provinces."

(2) "Subject to sub-section 3 such customary law shall, except where the circumstances, nature or justice of the case shall otherwise require, be deemed applicable in all cases and matters where it shall appear to the Court that substantial injustice would be done to any party by a strict adherence to the rules of any law other than customary law."

(3) "No party shall be entitled to claim the benefit of any customary law if it shall appear either from the express contract, or from the nature of the transaction out of which any cause or matter may have arisen, that such party agreed that his obligations in connection with such transaction should be regulated exclusively by any law referred to in Section 74 or any Act of Sierra Leone and in cases where no express rule is applicable to any matter in controversy, the Court shall be governed by the principles of justice, equity and good conscience."

Some significant points raised by s.76 will be discussed at their respective relevant places. For our present purpose, we must only draw attention to certain prerequisites which may be deduced from the statutes herein mentioned for the application of

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Note 3. from p.40 - continued:

in the building. On the strength of the document, the second defendant entered into an agreement with the first defendant for the letting of the building. When the first defendant tried to evict the plaintiff from the building, the plaintiff brought an action for possession, damages and mesne profits. The Court held, inter alia, that according to native law and custom which bound the parties, the document was invalid since the prior consent of all the relatives of the plaintiff was not obtained before its execution.

customary law by a local court as well as by a general-law court. First, customary law must not be inconsistent with any enactment, local and, probably, adopted.

To begin with the first requirement, it would now seem that customary law must conform with any statutory provision relating to the area of its operation. Thus, a customary law rule which lays down that a parent has the jus vitae necisque over his child expressly contravenes the Offences against the Persons Act, 1861,[1] and the Prevention of Cruelty to Children Act, 1926,[2] so that if he maliciously wounds that child or if the child, being under 16 years of age, is wilfully neglected by him in a manner likely to cause him unnecessary suffering or injury to health, that customary law rule will not apply. So would be the fate of a customary law rule requiring a widow to be subject to "widow inheritance" within the deceased husband's family in the face of an enactment to the effect that upon the death of a man who had been a party to a customary marriage, his widow is free to remarry whomever she loves.[3]

But it has not always been the rule that customary law must conform with every statutory enactment in force in Sierra Leone and which applies to the Provinces. Before 1961, the position seemed to be that customary law should be compatible with only local enactments because prior to the Statute Law (Amendment) Act, 1961,[4] only Sierra Leone local legislation was referred to as "Ordinances", whilst English adopted statute law was alluded

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1. This is the English Offences against the Persons Act, 1861, which applies in Sierra Leone as "adopted law" by virtue of s.74 of the Courts Act, Act No.31 of 1965. For the meaning of "adopted law", see *ante* p.23
2. S.4 of Cap.31 of the revised Laws of Sierra Leone, 1960.
3. See the Sierra Leone Cabinet directive dated 27 April, 1964. For details of this directive, see Chapters 15, 16 and 18.
4. Act No.48 of 1961.

to by the term "Act" or "Statute"; and the repugnancy clause as it then was specifically mentioned "Ordinance" and not "Act" or "Statute".

Now, all the three pieces of legislation already mentioned refer to such "Ordinance" or "Act" or "Enactment" as "applies to the Provinces". The Statute Law (Amendment) Act, 1961, changed the titles of all Sierra Leone Ordinances to "Acts". This explains why the Courts Act, 1965, has "Act" in its repugnancy provision though the explanation for the use of the word "enactment" therein cannot derive from the Statute Law (Amendment) Act. What is true, at any rate, with the passage of the Interpretation Act, 1961,[1] is that the words "Act", "Ordinance" and "Enactment" have come to mean the same thing, for s.3 defines an "Act" as including:-

> "... an Ordinance and any order, proclamation, order in council, rule, regulation or bye-law duly made under the authority of an Act, Ordinance, Order of Her Majesty in Council or any other legislative enactment applicable to and in force in Sierra Leone ..."
> "... enactment includes legislation of any type whatsoever having the force of law in Sierra Leone ..."

From the plenitude and clarity of the Interpretation Acts, we can safely conclude that customary law must now be consistent with the local as well as adopted legislation pertaining to the Provinces.[2]

Secondly, customary law must not contravene the principles of natural justice, equity and good conscience.

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1. Act No.46 of 1961. This Act was repealed by the Interpretation Act, 1965, which itself has been replaced by the Interpretation Act, 1971. S.3 of the 1961 Act was the same as s.2 of the 1965 Act and s.3 of the 1971 Act, except that the 1971 Act has "Act" instead of "Ordinance" in its definition.

2. cf. L.C.B. Gower: "Nigerian Statutes and Customary Law" in Nigerian Law Journal, Vol.1, No.1, November, 1964, pp.73-92.

As regards the second prerequisite, one must exercise caution in declaring a rule of customary law repugnant to natural justice, equity and good conscience,[1] merely because the principles it stands for are foreign to another legal system. Questions of incompatibility should not be decided without reference to the religious, social and cultural background of the community in which the law is intended to operate. This does not, of course, mean that the rule must be accepted as compatible solely because it is agreeable to the persons for whom it is intended.[2] To be unacceptable, the rule must actually offend against the conventional principles of morality of mankind in general. The point is made vigorously by Allen, who commenting on the application of customary law in the then British Colonies, had this to say:[3]

> "... It is clear that when a dominant people is dealing with the customs of a different civilization and of different religions the test of reasonableness, morality and public policy must be looked at from an angle somewhat different from that which would be appropriate in the conditions of English society. In general, British administration has endeavoured to leave indigenous customs intact, however alien they may be to Western and Christian notions; but where they are considered to violate elementary considerations of humanity and decency, they are either rejected by the Courts or, more frequently, suppressed by legislation."

Thus, a custom that permits a man to practice sororal polygamy [4]

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1. For a good definition of "natural justice, equity and good conscience", see A.N. Allott: Essays in African Law, pp.197-199; and New Essays in African Law, pp.158-164.
2. See Park, op.cit., p.70.
3. Law in the Making, 7th ed., 1964, p.158.
4. i.e. One man marrying two or more sisters. This custom traditionally persisted among the Kono and Kissi in Sierra Leone and it is still in vogue among these tribes in some chiefdoms.

or a woman to indulge in adelphic polyandry [1] is not inconsistent with this branch of the repugnancy clause even though these institutions may be viewed with the utmost abhorrence by British standards of morality. But one that permits a man to obtain a divorce on the grounds of his wife's persistent adultery and thus entitle him to the return of the marriage consideration which he paid for her without giving the wife an opportunity to refute the allegation made against her would clearly, in our submission, run counter to the repugnancy clause and will not be upheld.[2]

We have not been able to come across any Sierra Leone Court decision holding a rule of customary law to be caught by the repugnancy provision.[3] It would appear that it is the legislature that has been active in giving a verdict on this

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1. i.e. One woman concurrently marrying two or more brothers. This custom does not exist in Sierra Leone but was, in olden times, common in certain tribal societies like among the Nayars in India. See Radcliffe-Brown: African Systems of Kinship and Marriage, p.75.
2. There is no known Sierra Leone Court decision to support this statement, but the principle of natural justice which it conveys is one known even to traditional societies.
3. But see Shakeen v. Duralia, (1912-24) S.L. Law Reports, where a native custom to the effect that a person who lets a canoe to another, can place goods and passengers of his own in it in the presence of an agreement for exclusive possession which showed clearly that a custom to the contrary could not be invoked. See also Regina v. Members of Kholifa Chiefdom Native Court (1962) 2 S.L.L.R., p.3. In this case, the applicant was convicted by a local court for convening a secret meeting without the consent and knowledge of the Paramount Chief contrary to customary law. In the course of the proceedings, one of the court members had become ill and had been replaced by another without the trial beginning de novo. The applicant applied to the then Supreme Court to set aside the proceedings in the local court on the grounds that they were abortive, void and a nullity and contrary to the principles of natural justice. The Supreme Court, Benka-Coker, C.J. upheld the application on the ground that the trial was a nullity but remained silent on the issue as to whether or not the principles of natural justice were contravened.

matter. The legislature has done so in the fields of customary court procedure and customary criminal law, but there has been very little activity in the sphere of substantive customary family law. This caution, if one may call it so, may be a reflection of the desire to see customary family law develop side by side with the general law.

Thirdly, customary law must be current customary law. This prerequisite is satisfied if a rule of customary law which has become obsolete or one that is no longer regarded as having the force of law in the local community is excluded. A rule becomes obsolete when the majority of the people among whom it operates cease to have regard for its existence and prefer a more modern version of it in the regulation of their relationships. A classic example is the rule which was traditionally in vogue among the Mende that a man of means who intended to marry a woman must give as part of the marriage consideration [1] (tolei) a gbali (sing.) or gbalisia - (pl.) (native-woven cloth) to the woman's parents. As will be seen in Chapter 16, in modern Mende-land, a money payment has now superseded the gbali.

Current customary law may be one that has subsisted throughout the ages, or one which now exists in a modified form. There are at least three agents of modification: (a) the people themselves through changes in usage; (b) the District Councils as provided in the District Council Act,[2] and (c) the central

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1. For the definition of a marriage consideration inconnection with a customary law marriage, see Chapter 16, at pp. 561-563

2. S.40 of the District Council Act (cap.79 of the revised Laws of Sierra Leone, 1960) provides: "... it shall be lawful for a District Council, with the approval of the Governor in Council, to make rules altering or modifying native customary law in the district, and all native courts in the said district shall take cognisance of all rules so made."

legislature,[1] Agents (b) and (c) [2] are the best methods for unification, but if used with indiscretion they may produce a "customary law" which does not depict the customs and traditions of the people concerned.

Though, as we have seen, customary law applies in Sierra Leone, it is not easily ascertainable. There are no properly-kept records of local court decisions, very few, if any at all, reported decisions of superior courts and a dearth of legal writing on the law. In the absence of these, the evidential repository is the "breasts" of the local court judges and of the elders, whose interpretation of the law at times varies in accordance with the mood in which the enquirer finds them.

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1. See the definition of "customary law" in s.2 of the Local Courts Act, 1963, which states that customary law "... includes any amendment of customary law made in accordance with the provision of any enactment." e.g. s.6 of the Protectorate Act, *Cap. 60* provides "the legal status of slavery and slavery in any form whatever is abolished throughout the Protectorate." This section amends a prior customary law which gave right to a slave-owner in the Protectorate to recapture his run-away slaves. See R. v. Salla Silla and R. v. M'Fa Nonko and others (unreported) decided by the Supreme Court in Freetown in 1927 in which such a right was successfully upheld.
2. It is better to regard modification by these two agents as "enacted" customary law.

CHAPTER 3

CONFLICT OF LAWS

A. NOMENCLATURE AND DEFINITION

(i) External Conflict of Laws

The judicial and legal systems of countries are not uniform in every respect. Consequently, problems of conflict of laws arise from time to time whenever an issue before the Courts of one country contains a foreign element. It is then the function of the Courts to ascertain which of several potentially applicable legal systems should be chosen in order to resolve the issue; for this purpose, a body of rules have been formulated by every country.

Several terms have been used by writers to describe this body of rules voluntarily chosen by a given country as part of its municipal law for the decision of cases which have a foreign complexion. The commonest of these terms are "Comity",[1] "Extra-territorial Recognition of Rights",[2] "Intermunicipal Law",[3] "Private International Law",[4] and "The Conflict of Laws".[5] None of these names commands universal approval, and Cheshire has shown one flaw or another in the use of some of these terms; for example, he says that the expression "Private International Law" has the

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1. Robert Phillimore, Commentaries upon International Law, Private International Law or Comity, Vol.IV, (3rd ed.), 1889.
2. Holland, Jurisprudence, 13th ed., 1924, p.424.
3. F. Harrison, On Jurisprudence and the Conflict of Laws, Oxford, Clarendon Press, 1919, p.130.
4. J. Story, Commentaries on the Conflict of Laws, 8th ed. by G. Melville Bigelow, 1883; Cheshire, Private International Law, 8th ed., 1970.
5. Story, op.cit.; Dicey and Morris, A Digest of the Laws of England with reference to the Conflict of Laws, 8th ed., 1967; Graveson, The Conflict of Laws, 6th ed., 1969.

tendency to be confused with "Public International Law".[1] Jean-Gabriel Castel [2] has miserably attempted to minimize the confusion by defining "Private International Law" as "the rules which apply to cases arising between private persons (or state) engaged in private transactions with contact with two or more legal units", and "Public International Law" as "the rules which deal with the activities of states and not private persons." This attempt, to say the least, creates as much confusion as it tends to avoid, for in the modern conception of Public International Law, private persons can be the subjects of that law - a typical example being found in the doctrine of acquired rights.

"The fact is that", as Cheshire rightly says,

> "no title can be found that is accurate and comprehensive, and that the two titles 'Private International Law' and 'The Conflict of Laws' are so well known to, and understood by lawyers that no possible harm can ensue from the adoption of either of them."[3]

But, although he concedes that the two terms can conveniently be used interchangeably, Cheshire prefers "The Conflict of Laws" because as he maintains, "it is a little unrealistic to speak in terms of private international law if the facts of the case are concerned with England and some other country under the British flag."[4]

We shall, for our discussion which follows, adopt Cheshire's preference with an additional prefix to it, i.e. "External". The reason is that in a country like Sierra Leone, as in many other African countries, the legal system is pluralistic and other problems of conflict arise within it which have nothing to do with the

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1. Cheshire, Private International Law, 8th ed., 1970, p.14.
2. Cases on the Conflict of Law (Toronto), 1960, p.1.
3. op.cit., p.15.
4. Ibid., p.5.

laws of foreign countries. We shall, therefore, use the term "External Conflict of Laws" to describe the body of rules voluntarily chosen by Sierra Leone for the decision of cases which have a foreign complexion.

(ii) Internal Conflict of Laws

We have already indicated that Sierra Leone has a pluralistic system of municipal law. This system has three different laws - the general law, Islamic law, and customary law - which are not geographically separated and which co-exist in the country. Allott has ingeniously devised the term "Internal Conflict of Laws" to describe conflicts between such laws.[1] In his view, the term refers to cases,

> "where a judge is required to choose between two or more systems or bodies of law which are not territorially distinct, i.e. which apply concurrently and without spatial separation within a single territorial jurisdiction."[2]

Farran[3] has suggested the expressions "co-operation of laws" and "Cohabitation of laws" as descriptions of the same concept. He deplores the use of the term "conflict of laws" within the Sudanese society, whose system of law is as pluralistic as that of Sierra Leone, because "How can the Sudan ever achieve unity - by no means yet established - ", he asked, "if even her laws are in perpetual conflict with one another."[4]

Allott[5] has ably exposed the fallacious nature of Farran's argument. "The use of the term 'conflict of law' does not imply that the affected systems are in perpetual conflict", he commented. He rightly concluded that "the conflict, and the conflict situation,

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1. New Essays in African Law, p.112.
2. Ibid., p.112.
3. Matrimonial Laws of the Sudan, London, 1963, p.vii.
4. Ibid.
5. New Essays in African Law, p.112.

are analogous to those which occur in Private International Law, and the term is therefore, apt.[1] We shall, therefore, with justification, use the term as suggested by Allott in our treatment of choice of law and choice of courts in matters arising within the Sierra Leone legal system.

B. EXTERNAL CONFLICT OF LAWS

Sierra Leone's rules of external conflict of laws are derived mainly from the received English law and to a very little extent, from local legislation. They deal with three questions, namely (i) the choice of law; (ii) the choice of courts, and (iii) recognition and enforcement of foreign marriages, judgments and decrees of divorce and nullity.

(i) The choice of law

The rules for the choice of law indicate the particular legal system - Sierra Leone or foreign - by reference to which a solution of the dispute must be arrived at. The basic determinant for the selection of the lex causae, i.e. the legal system that governs the matter, is what has been described as the connecting factor, i.e. "some outstanding fact which establishes a natural connection between the factual situation before the court and a particular legal system."[2] This factor is, however, not static but varies with the circumstances.[3] In matters connected with the family, Sierra Leone law owes a heavy debt to the English common law but in other matters, especially commerce, the country is a party to international bilateral and multilateral conventions.

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1. Ibid.
2. Cheshire, op.cit., pp.40-41. There is a vast literature on this point, and we can here state only some of the important ones. See J.D. Falconbridge, (1937) 53 L.Q.R. 235, 236; A.H. Robertson, Characterization in the Conflict of Laws, 1940, p.92; A. Nussbaum, 1940, 40 Columbia Law Review, 1937, 1461, 1464.
3. Cheshire, op.cit., p.41.

(ii) The choice of courts

Generally speaking, the Sierra Leone courts are open to foreigners, except that an alien cannot be a plaintiff before them. An action may lie against a defendant even when he is not personally present in the country, but leave of the High Court must be obtained for service of the writ upon him outside the jurisdiction of the Court.[1] Foreign sovereigns, ambassadors and representatives of certain international organisations, for example, the United Nations and its specialised Agencies, and the Organisation of African Unity, are immune from the jurisdiction of the Sierra Leone Courts.[2]

Specifically, the courts have no jurisdiction in certain proceedings affecting status for instance, a petition for divorce or nullity, unless the petitioner is domiciled or resident in the country.[3]

(iii) Recognition and enforcement of foreign marriage, judgments and decrees

(a) Recognition of foreign marriages

Prior to the passing of the United Kingdom Matrimonial Proceedings (Polygamous Marriage) Act, 1972, the attitude of the English Courts towards foreign marriages which were potentially polygamous has been neatly summarised by Judge Grant [4] in two basic propositions. The first is that neither party to the marriage was entitled to any English matrimonial relief, so that they could not in the English Courts successfully bring against one

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1. See Ord. VIII of the Supreme (sic.) (High) Court Rules, Vol.VI, of the revised Laws of Sierra Leone, 1960.
2. This is by bilateral and multilateral treaties to which Sierra Leone is a party.
3. See the Matrimonial Causes (Amendment) Act, 1961, Act No.16 of 1961, and the discussion on jurisdiction in divorce and nullity which follows in Chapter II, pp. 383-384.
4. Family Law, London, 1970, p.48.

another matrimonial proceedings of any kind, including a claim for maintenance. Secondly, that a marriage which was valid by each party's personal law and by the lex loci celebrationis was generally recognised as valid by English law except for the purpose of matrimonial relief.

The first of these propositions was derived from the judgment of Lord Penzance in a case, which has been misunderstood by many writers,[1] namely, Hyde v. Hyde.[2] In that case, an Englishman petitioned for divorce on the ground of adultery and bigamy. He had embraced the Mormon faith and married a Mormon lady in Utah in the United States of America, according to the Mormon rites. After three years' cohabitation with his wife, he renounced his faith and became a minister of a chapel at Derby in England. He then petitioned for a decree of divorce in England after his wife had contracted another marriage in Utah. His Lordship refused the decree on the ground that the matrimonial laws of England were adapted to monogamous marriage, and were wholly inapplicable to a polygamous marriage which his Lordship thought the Mormon marriage to be.[3]

The rule in Hyde v. Hyde has now been abolished in England[4] but it still remains as part of Sierra Leone law as the received common law. It is, however, not applicable to all Sierra Leone courts. As will be seen later, it applies to matrimonial causes before the Magistrates' Court and the High Court.[5]

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1. For more discussion on this, see later in this chapter.
2. (1866), L.R.1.P. & D. 130.
3. Batholomew (1964), 13 I.C.L.Q. 1022, 1031-1033 argues that though polygamy was part of the Mormon doctrine in the American Courts, a Mormon marriage was regarded by the law of Utah as monogamous.
4. The Matrimonial Proceedings (Polygamous Marriages) Act, 1972, impliedly abolishes the rule by providing in its s.1 that English Courts shall not be precluded from granting matrimonial relief because the marriage is a potentially polygamous one.
5. The Matrimonial Causes Act, cap.102 of the revised Laws of Sierra Leone, 1960.

The second proposition may be illustrated by the case of Baindail v. Baindail [1] which was the first clearly to admit that a polygamous husband had the status of a married man in English law, which precluded him from entering into a monogamous marriage in England. In that case, a Hindu man, while domiciled in India, married a Hindu woman, such marriage being potentially polygamous. During the subsistence of this marriage, he later went through an English marriage ceremony at a London Registry Office with an English woman. In a petition for nullity by the English woman when she discovered that her alleged husband already had a wife in India, the Court annulled the English marriage as being bigamous. The decision was a recognition that the polygamous marriage in India was a marriage in England though not for all purposes.

Lord Green, M.R. stressed that since the status of a person depended upon his personal law, the status of husband and wife conferred upon the parties to a polygamous marriage by the law of their domicile must be accepted and acted upon by other countries. One result of recognition of the status in England was the inability of one spouse to contract a subsequent monogamous marriage with a third party during the subsistence of the potentially polygamous marriage.

The rule in Baindail v. Baindail could not, in our contention, have applied in its entirety to Sierra Leone before 1965. Before that date, under the Christian and Civil Marriage Acts, it was possible for a spouse of a subsisting customary law marriage - which is polygamous - to contract a monogamous marriage with a third party; the second marriage was valid and not bigamous.[2] It was not the policy of the courts to distinguish between a

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1. [1946] P.122; [1946] 1 All E.R. 342.

2. For more discussion on this, see Chapter 6.

customary marriage contracted in Sierra Leone and one entered into elsewhere. Therefore, the spouse of a polygamous marriage contracted outside Sierra Leone could enter into a monogamous marriage with a third party which could be recognised as valid by the Sierra Leone courts.

Since s.1 of the Christian Marriage (Amendment) (No.2) Act, 1965,[1] the position would now seem to be on the same basis as the rule in Baindail v. Baindail, insofar as contracting a monogamous marriage during the subsistence of a polygamous marriage is concerned. But for the converse situation, whereby a party already monogamously married contracts a polygamous marriage, we concede that in Sierra Leone the subsequent marriage is recognised as valid by the customary law courts, though not by the general law courts.[2] It is our submission that such a marriage taking place outside Sierra Leone ought to be recognised by the customary law courts in Sierra Leone, though not by the general law courts.

Before a foreign marriage may be recognised in Sierra Leone, the received English common law rule is that it must comply with the lex loci celebrationis.[3] Thus, it must conform with the formalities as imposed by that law. As an exception to this rule, certain marriages, generally called "consular marriages", which take place in legations or High Commissions outside Sierra Leone, require special mention. Many of these do not generally conform with the lex loci celebrationis which may be fatal to their recognition. For such marriages entered into by Sierra Leone citizens abroad, the Foreign Marriage (Recognition) Act, 1966,[4] provides

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1. Act No.48 of 1965.
2. For more argument on this, see Chapter 16.
3. Scrimshire v. Scrimshire (1752), 2 Hag. Con.395; Dalrymple v. Dalrymple (1811), 2 Hag. Con.54; Warrender v. Warrender (1835), 2 Cl. & Fin. 488, 530; Harvey v. Farnie (1882) 8 App. Cas. 43, 50; Kenward v. Kenward, [1951] P.124; [1950] 2 All E.R. 297.
4. Act No.29 of 1966.

a remedy. S.2 of that Act says that,

> "All marriages between parties, one of whom at least is a citizen of Sierra Leone solemnized in accordance with the provisions of the United Kingdom Foreign Marriage Act, 1892, in any foreign country or place by or before a marriage officer as defined in section 11 of that Act shall be as valid as if the same had been performed in Sierra Leone in accordance with the provisions of the Civil Marriage Act."

The persons who may be appointed marriage officers under s.11 of the United Kingdom Foreign Marriage Act, 1892, include Ambassadors, Governors, High Commissioners and Consuls.[1]

The Sierra Leone Foreign Marriage (Recognition) Act, 1966, is the only statute in Sierra Leone which recognises "consular marriages" abroad.[2] The only other enactment on a somewhat similar issue is the Foreign Marriage Act;[3] but this Act is for the benefit in England of British subjects who contract such marriages in Sierra Leone.

What then is the legal status in Sierra Leone of "consular marriages" entered into abroad or in Sierra Leone by parties both of whom are non-Sierra Leone citizens and which do not comply with the lex loci celebrationis? Our contention is that under the present law, such a marriage is subject to the common law rule of locus regit actum and if it does not comply with the lex loci celebrationis, it is void. Because of international comity, however, it is desirable that such marriages should be accepted as valid by the states concerned and this can conveniently be done on the basis of reciprocity.

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1. Other members of the diplomatic staff are excluded. The United Kingdom Marriage Order, 1964, S.I. 1964 No.926, art.19, which includes such staff is of no application to Sierra Leone.
2. It appears from the Act that a Sierra Leone citizen cannot contract such marriages in Sierra Leone which is cognizable without compliance with the formalities of Sierra Leone Law.
3. Cap.98 of the revised Laws of Sierra Leone, 1960.

(b) Recognition of foreign judgments

Under the Maintenance Order (Facilities for Enforcement) Act as amended,[1] the President is empowered, if satisfied that reciprocal provisions have been made by the Legislature of any territory within the British Commonwealth for the enforcement within such territory of Maintenance Orders made by courts in Sierra Leone, by proclamation to extend the provisions of the Act to such territory. The Act provides for the registration and enforcement of Maintenance Orders made by the courts in such territories. This rule of reciprocity formally enacted for Maintenance Orders is erroneously applied in practice to other foreign judgments.

The law pertaining to the enforcement of foreign judgments is not, therefore, clear and we must resort to the relevant English law on the issue which is applicable to Sierra Leone under the reception statute.

Originally, under the common law, the recognition of foreign judgments was based on comity.[2] Later, the doctrine of obligation was evolved whereby it was considered a legal obligation on a judgment debtor to satisfy a judgment of a foreign court which could be enforced in England by action.[3]

"The judgment of a court of competent jurisdiction", Blackburn J. postulated, "imposes a duty or obligation on him to pay the sum for which judgment is given, which the courts in this country are bound to enforce."[4]

Following up judicial opinion, the United Kingdom

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1. Cap.101 of the revised Laws of Sierra Leone, 1960; as amended by the Maintenance Orders (Facilities for Enforcements)(Amendment) Act, 1957; Act No.10 of 1957.
2. See F. Piggott, Foreign Judgments and Parties out of Jurisdiction, (3rd ed.), 1908-10, Part I, pp.10 et seq.
3. Russell v. Smyth (1842), 9 M & W. 810, at p.919, per Parke, B.
4. Schibsby v. Westenholz (1870), L.R. 6 Q.B. 155 at p.159.

Parliament in 1868 gave a legislative sanction to the doctrine and made its application easy for countries within Britain and Ireland by passing the Judgment Extension Act. The Act rendered judgments obtained in the Superior Courts of one part in the United Kingdom effectual in any other part of the country without the judgment creditor having to bring a fresh action for its enforcement. This Act falls within Sierra Leone's reception date of English law, as it was a statute of general application in force in England. But how effectually can it be used by Sierra Leone vis-a-vis the countries therein named is doubtful.[1]

To sum up, therefore, the clearest conflict of law rule for recognition of foreign judgment in Sierra Leone is the common law doctrine of obligation. In modern times, however, when many sovereign states have emerged since the rule was formulated, and which are jealous of their acquired status, it is our contention that this rule is of very little practical effect in Sierra Leone. A more rational and practical rule, therefore, is one based on comity and reciprocity.

(c) The recognition of foreign decrees

Sierra Leone law is not very clear on the question of recognition of foreign decrees. For a better understanding of the Sierre Leone position, therefore, we should first refer to the relevant English law on the matter which may apply to Sierra Leone as received law in the absence of local statutory or case-law or by way of guidance.

The recognition of foreign decrees had its foundation in the common law rule that the propositus must be domiciled in the

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1. Because the nature of the Statutes tends to be localised, although it was of general application in England. An Order in Council extending its provisions to the British Colonies or Protectorates would, in our submission, enhance the possibility of its being used outside England.

country in which the decree was obtained.[1] This rule has given rise to what has been described as a "limping marriage",[2] i.e. a marriage regarded as valid in one country but void in another, since not every legal system in the world recognises the domicile concept as the jurisdictional basis for divorce or nullity.

A later improvement on the common law position came in 1953, when the English Court of Appeal modified the domicile concept in respect of foreign jurisdictions and held that, on the basis of reciprocity, an English court would recognise a decree pronounced by a foreign court, if that court assumed jurisdiction on the same basis that an English court would assume jurisdiction on the matter. In Travers v. Holley,[3] a husband and wife who were domiciled in England emigrated to Australia and purported to acquire a domicile in New South Wales. The husband, however, returned to England and reverted to his domicile, while the wife remained in Australia and there petitioned for divorce on the ground of his desertion, and the decree was granted. The English Court of Appeal recognised the decree even though it was not granted by the court of the common domicile of the parties. The justification for recognising the decree, however, was that the law of Australia had a provision similar to s.18(1)(a) of the English Matrimonial Causes Act, 1950.[4]

Since this decision, the rule has been extended and the English Court has recognised a decree of a foreign court where facts existed which would have given an English Court jurisdiction

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1. A fuller discussion of domicile follows shortly in this chapter. For domicile as the basis of divorce or nullity, see Chapter 11, p.383.
2. This expression has been used by a number of writers. For example, see Cheshire, op.cit., p.357; Bromley, Family Law (4th ed.), London, 1971, p.18; Grant, Family Law, London, 1970, p.126.
3. [1953] P.246; [1953] 2 All E.R. 794. The principle in this case was approved by the House of Lords in Brown v. Brown, [1968] 2 All E.R. 11.
4. Now s.40(1)(a) of the Matrimonial Causes Act, 1965.

although the grounds on which the foreign court granted a decree would not be recognised by English law.[1]

In a recent decision of the English House of Lords, Indyka v. Indyka,[2] the rule in Travers v. Holley was not only further extended but also stretched even to a breaking point. The facts were as follows:- In 1938, Indyka, a national of Czechoslovakia married a Czech wife in their country. When the Second World War broke out, he left his country and went to England where he acquired a domicile of choice. His wife refused to join him, and in 1949 she obtained a decree of divorce in her country. Ten years later, Indyka remarried in England which was not successful. The second wife instituted proceedings for divorce in England on the ground of cruelty. In his defence, Indyke contended, inter alia, that the divorce granted to his first wife in Czechoslovakia was invalid, which rendered his second marriage void. The House of Lords recognised the Czech decree and declared his second marriage valid on grounds which we may summarise in the following propositions:

First, an English court would recognise a foreign decree wherever a real and substantial connection is shown between the petitioner and the country or territory which granted the decree. The first Mrs. Indyka was born in Czechoslovakia and had always been domiciled there before the decree was obtained, and she was, therefore, really and substantially connected with that country.

Secondly, an English court would recognise a foreign decree based on a jurisdiction which the English court itself did not have at the time the decree was pronounced, but which it

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1. Robinson-Scott v. Robinson-Scott [1958] P.71; [1957] 3 All E.R. 473.
2. [1969] 1 A.C.33.

eventually has at the time when the recognition of that decree is an issue before the English court. Thus in 1949, when Mrs. Indyka obtained the Czech decree, the English court did not have jurisdiction to grant a divorce on a basis other than the domicile of the petitioner and the wife was not domiciled in Czechoslovakia at that time, since her husband was already domiciled in England.[1] But at the time that the recognition of the Czech decree was an issue before the English Court, that court was capable of exercising a divorce jurisdiction on the basis of residence.[2]

By reaching the second proposition, it is submitted, the majority of the House of Lords did not appreciate the difficulties that would ensue if there is some other matrimonial act or proceeding or one of the spouses dies intestate between the date of the foreign decree and the date of the English legislation as to the basis of jurisdiction. These difficulties were pointed out by Russell L.J. in his dissenting judgment in the Court of Appeal:

> "If the suggested effect be given to the statute, what would be the effect on a pre-1949 second marriage in England?"

He rhetorically asked:

> "Presumably", he continued, "it would validate the hitherto invalid marriage in England? But this", he rightly conceded, "seems an untenable position."[3]

His Lordship went on to further expose the unrealistic nature of the proposition by posing the following questions:

> "Suppose a relevant pre-1949 decree of divorce and a pre-1949 death of the husband intestate with estate in England, not having attempted marriage. The wife would in English law have rights to his estate accruing on his death as being his widow. Would the coming into operation

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1. Under English law, the domicile of a married woman is that of her husband. On this, see later in this chapter, pp.68-69
2. Jurisdiction was conferred by the Law Reform (Miscellaneous Provisions) Act, 1949, now s.40(1)(b) of the Matrimonial Causes Act, 1965.
3. [1967] P.233 at p.263.

> of the Act of 1949 deprive her of her rights? And, if so, would such deprivation be limited to undistributed assets?"[1]

The problems posited by Lord Russell are indeed real and it is our contention that a retroactive effect should not be given to a statute which confers jurisdiction on the Courts in these circumstances unless that statute is specifically ante-dated.[2]

To what extent are English decisions since Travers v. Holley on the recognition of foreign decrees based on grounds other than domicile are applicable to Sierra Leone as received common law is a question which we must now examine. Clearly, these decisions are based on statutory developments in England and are not, therefore, the adopted English common law, as is understood under s.74 of the Sierra Leone Courts Act, 1965. But we may point out that there is legislation in Sierra Leone on the issue of jurisdiction based on residence couched in substantially the same language as s.40(1)(b) of the English Matrimonial Causes Act,1965, i.e. s.5 of the Matrimonial Causes (Amendment) Act, 1961.[3]

Would the Sierra Leone courts be guided by the English decisions on the issue as is their wont when faced with the interpretation of local statutes couched in the same terms as British statutes? The English decisions based on recognition of foreign decrees from Travers v. Holley to Indyka v. Indyka are not stricto sensu interpretations of English statutes, but are rules evolved by the courts themselves in order to determine questions of external conflict of law, and there would be justification in applying them to Sierra Leone if they are suitable. We have pointed out the unsatisfactory nature of the decision in Indyka's case as a whole, but the reciprocity doctrine,introduced by Travers v.Holley,which

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1. Ibid.
2. The rules in Travers v. Holley and Indyka v. Indyka have been abolished in the United Kingdom, with retrospective date, by The Recognition of Divorces and Legal Separations Act,1971. See, in particular, ss.2 and 10(4) of the Act.
3. Act No.16 of 1961.

it did not abrogate is one which Sierra Leone Courts ought to adopt. Recognition of decrees on the basis of reciprocity is the only feasible and practical solution in an age when countries demand that their sovereignty - and thus, the decisions of their courts - must be recognised by other countries if the latter want theirs to be recognised too. The universal adoption of such a rule will remove the possibility of "limping marriages". In this regard, the law of one state vis-a-vis another can be reduced to the simple proposition: "If the courts of your country recognise the decrees of the courts of my country, our courts will do the same in respect of decrees of your own courts." In such a case, strict municipal legal rules will be mellowed in order to meet the realities of international intercourse. In the case of concurrent assumption of jurisdiction by the courts of two different states on the same issue, the rule that ought to apply is that the first decree should prevail. Consequently, if State A and State B are adjudicating a divorce proceeding between the same parties, the first decree ought automatically to discontinue proceedings in the other State, and this other State ought to recognise that decree. In no other manner can sanity be invoked in order to resolve such a complex problem of conflict of laws. In some cases, of course, injustice may result to individuals, but this is compensated by the complex conflict of law situation which is avoided.[1]

For non-self-governing territories, the problem may not be so acute because for many purposes the law of the governing state is the law of the dependent states. But as these countries attain

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1. Cff.Cotton L.J. in Sottomayor v. De Barros (1877) 3 P.D. at p.7, where his Lordship said: "No country is bound to recognise the laws of a foreign state when they work injustice to its own subjects." This statement is true as far as it goes, but because of international intercourse, states may recognise the laws of other states even though they are unfavourable to private individuals. This policy is present even at the municipal law level.

to sovereignty, any suggestion contrary to what the present writer has made would result in exacerbating the conflict of law problems. For example, the United Kingdom Colonial and Other Territories (Divorce Jurisdiction) Acts, 1926-1950 empowered the Courts of the Colonies and Protectorates to grant divorce to British subjects domiciled in England, if they were resident in the territory in which the divorce was sought, but only on the conditions that the grounds were those recognised by the existing law of England and that the decree was registered in England.[1] This was an Imperial Statute applicable to all the British Colonies and Protectorates.

On the attainment of Republican status, Sierra Leone has by s.13(1) of the Constitution(Consequential Provisions) Act,1971,[2] decided that,

> "On and after the 19th day of April, 1971, no Court having jurisdiction under the law of Sierra Leone shall by virtue of the Colonial and Other Territories (Divorce Jurisdiction) Acts of the United Kingdom Parliament 1926-1950 have jurisdiction to make a decree under those Acts for the dissolution of a marriage or as incidental thereto to make an Order as to any matter unless proceedings for the decree were instituted before the commencement of the Constitution."

The effect of this section is that from 19 April, 1971, a Sierra Leone divorce court can, in the case of a British subject domiciled in England, grant a decree of divorce on any ground other than those recognised in English law and there will be no need to register such decree in England. Whatever may be the fate of such a decree in England is a matter for the decision of the English courts. Presumably, as with all other foreign decrees, the current English law will apply.

Our conclusion to this part of our discussion is that,even though the reception statute provides for the application of English

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1. These Acts were originally intended for India, but were later extended to other British territories.
2. Act No.9 of 1971.

law to Sierra Leone as residual law, under certain circumstances, in the absence of definite rules made by the Sierra Leone legislature or the Courts themselves on the question of recognition of foreign decrees, it is difficult to state with precision what actually is the Sierra Leone law on the matter. The external conflict of law problem between Sierra Leone and England, created by the independence of the former and the absolute power vested in her to pass whatever law she thinks fit without recourse to, or questioning by, the British Parliament, is a novel situation which perhaps was not anticipated when the English conflict of law rules were evolved. Our advice, therefore, is simple: "Let Sierra Leone reappraise the situation and ascertain her own private international law."

(iv) Domicile [1]

Many matters of family relations and family property are in external conflict of laws governed by the lex domicilii of the propositus. These include the essential validity of a marriage, jurisdiction to grant a divorce or nullity decree, mutual rights and obligation of husband and wife, parent and child, legitimacy and legitimation, effect of marriage on property rights of husband and wife, the validity of wills of movable, and succession to movables.[2]

From this list, the importance of domicile can hardly be neglected in a discussion of family law.

We must point out from the outset that Sierra Leone's rules of external conflict of laws on the issue of domicile are substantially derived from the received English common law. How

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1. Some writers spell this word "domicil" and others "domicile". We shall adopt the latter.

2. Cheshire, op.cit., p.153.

How far such rules are of relevance to the Sierra Leone situation will be considered in this discussion.

Meaning of domicile

According to Sir George Jessell, "The term domicile is impossible of definition."[1] Despite this introductory discouraging remark, the English Courts have stated that in order to acquire domicile in a country, it is necessary that a person establishes his residence and has the intention to remain there permanently or indefinitely. An intention of indefinite residence is, nevertheless, not equivalent to permanent residence, if it is contingent upon an uncertain event. Lord Cranworth illustrated the difference in Moorhouse v. Lord [2] when he said:

> "The present intention of making a place a person's permanent home exists only where he has no other idea than to continue there without looking forward to any event, certain or uncertain which might induce him to change his residence. If he has in his contemplation some event upon the happening of which his residence will cease, it is not correct to call this even a present intention of making it a permanent home. It is rather a present intention of making it a temporary home, though for a period indefinite and contingent."

The early English decisions attempted to discover the necessary intention to establish domicile by considering such factors as a person's "taste, habits, conduct, actions, ambitions, health, hopes, projects ..." [3] "There is no act, no circumstance in a man's life, however trivial it may be in itself which ought to be left out of consideration."[4] In opposition to these statements, Dicey and Morris have rightly commented that there is no

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1. Doucet v. Geoghegan (1878), L.R.9 Ch.D. 441 at p.456.
2. (1863) 10 H.L. Cas. 272 at pp.285-286.
3. Casdagli v. Casdagli [1919] A.C.145 at 178 per Lord Atkinson.
4. Drevon v. Drevon (1864) 34 L.J. Ch. 129, 133.

circumstance or a group of circumstances which can furnish a definite criterion of the existence of the necessary intention.[1] These decisions are, therefore, arbitrary. However relevant these decisions might have been to the ages in which they were made, it is our contention that they are not in conformity with the facts of modern life. With increased world tension and mobility, one of the uncertainties of life is a man's intention to reside permanently or indefinitely in a given place.

Modern English cases are, however, very much aware of the present world situation and are prepared to hold that a person who intends to reside in a country indefinitely might be domiciled there, although he envisages the possibility of returning one day to his domicile of origin.[2]

Domicile of origin

The only means of ascertaining a person's personal law is on the basis of his domicile. For this reason, everybody has a domicile when he is born. This is known as the domicile of origin. In the English common law, a legitimate child takes the domicile of his father, an illegitimate or posthumous child that of his mother,[3] and a foundling where he is found.[4]

Domicile of choice

An adult other than a married woman, may acquire a domicile of choice. This is done if he leaves his domicile of origin

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1. The Conflict of Laws, 8th ed., p.93.
2. In the Estate of Fuld (No.3), [1968] P.675 at p.684. Scarman J. Henderson v. Henderson [1967] P.77; [1965] 1 All ER. 179.
3. Udny v. Udny (1869), L.R.1 Sc. & Div. 441 at p.457.
4. J. Westlake, A Treatise on Private International Law, (7th ed.) by N. Bentwich (1925), s.248; F.Wharton, A Treatise on the Conflict of Laws, (3rd ed.), by G. Parmele (1905), s.39; F.Savigny, A Treatise on the Conflict of Laws, translated into English by W.Guthrie, (1st ed.), 1869, pp.87-88.

and takes up residence in another country with an intention of living there permanently, all other things being equal.[1] There must be a concurrence of factum and animus though there need not be unity of time in their concurrence.[2] Thus, a man domiciled in Ghana may come to Sierra Leone on a holiday and noticing that there are better opportunities for him in Sierra Leone, ultimately decides to live there permanently. The domicile of choice is acquired not on his arrival but at the time that he forms the intention to stay permanently.

The domicile of choice is lost when the propositus departs from the country which he had made his domicile of choice with a similar intention of not returning there to make a permanent home. As soon as this domicile is lost, his domicile of origin revives until he acquires a fresh domicile of choice.

Domicile of dependence

Either because of non-age, physical dependence on others, or for the lack of mental capacity, certain persons are deemed by the common law to be incapable of acquiring a domicile of choice. This category of persons includes married women, infants and persons of unsound mind. We shall deal with only the first two classes, as they are more relevant to our subject.

(a) Domicile of a married woman

Both the received English common law and Sierra Leone local legislation deal with the matter, and we shall begin with the common law position. This is accurately summarised by Graveson [3] who says:

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1. Cheshire, op.cit., p.162.
2. Ibid., p.162.
3. The Conflict of Laws, 6th ed., London, 1969, p.219.

> "On marriage a woman takes the domicile of her husband, and her domicile remains the same as his so long as the marriage lasts. Any domicile of choice she may have at marriage is lost and her domicile of origin ceases to operate[1] ... If the marriage is valid or voidable only, the husband's domicile will attach automatically to the wife.[2] But if the marriage is a nullity, e.g. bigamous, the wife will retain her own domicile, and by the fact of living with the husband in the country of his domicile, she may acquire independently a similar domicile of choice to his."[3]

By way of supplementation we may add that a married woman cannot acquire a domicile of choice where she is separated from her husband, either judicially [4] or by agreement,[5] or where she is deserted by her husband who leaves the jurisdiction and acquires a domicile abroad.[6]

An example by way of illustration is as follows: Miss X who was born in Jamaica but is now permanently living in England, meets Mr. Y, domiciled in Sierra Leone, who is on a year's course in London and they get married. Upon the marriage, Miss X loses her English domicile of choice and becomes domiciled in Sierra Leone even before setting her foot in that country, because Mr. Y is domiciled there despite his temporary residence in England. If Mr. Y cannot consummate the marriage because he is impotent - a thing that renders the marriage voidable - Miss X still retains Mr. Y's domicile until she obtains a decree annulling the marriage, when she will revert to her domicile of origin (Jamaica) or domicile of choice (England) depending on which of the two countries she wishes to make her permanent home. If they go to Sierra Leone

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1. Dolphin v. Robins (1859) 7 H.L.C. 390.
2. De Reneville v. De Reneville [1948] P.100.
3. White v. White [1937] P.111.
4. A-G for Alberta v. Cook [1926] A.C. 444 P.C.
5. Dolphin v. Robins (1859) 7 H.L.C. 390.
6. H. v. H. [1928] P.206.

and Miss X discovers that, in fact, Mr. Y had married before and that marriage still subsists, her marriage to Mr. Y was void, and automatically her Sierra Leone domicile ceases and her domicile of origin (Jamaica) returns. If she wishes to live in Sierra Leone permanently, she acquires a domicile of choice quite independent of that of her ex-husband.

If the marriage is valid but a few months after arrival in Sierra Leone, the parties separate either by agreement or judicially, she still retains her husband's domicile and if Mr. Y goes to Ghana with the intention of permanent residence there, while Miss X wishes to go back to England and live there, her domicile of choice is that of her husband which is Ghana and not England. Similarly, if the break in cohabitation was caused by desertion by Mr. Y and not by an agreement to separate or judicial separation, Miss X's domicile is still in Ghana.

The above is an illustration of the common law position of a married woman's domicile. We may now examine the statutory inroad that has been made on it.

S.5 of the Matrimonial Causes (Amendment) Act [1] amending s.30 of the principal Act, reads as follows:

> "30(1) The Court shall have jurisdiction in proceedings by a wife for divorce, notwithstanding that the husband is not domiciled in Sierra Leone, if the wife is resident in Sierra Leone and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings."
>
> "30(2) Without prejudice to any jurisdiction exercisable by the Court apart from this section, the provisions of the preceding subsection shall apply to proceedings for nullity of marriage as they apply to the proceedings for divorce."

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1. Act No.16 of 1961.

The effect of this provision is to enable a wife petitioner for divorce on any of the recognised grounds or for nullity of marriage to have as if it were a "temporary" domicile for the purposes of the proceedings only if she has been resident in Sierra Leone for three years preceding the commencement of the proceedings and the husband is not at the time of such proceedings domiciled in the country. As jurisdiction of the Courts in such matters normally depends on the petitioner's domicile, but for the statutory provisions, the High Court will not have jurisdiction in the case of a married woman who is a petitioner because her domicile changes as frequently as her husband alters his domicile.

A criticism of this provision centres on the three years' residential condition. It causes undue hardship to a wife petitioner who is not a citizen of Sierra Leone, and who does not want to stay in the country but who has sufficient grounds for divorcing her husband who having gone abroad with the intention of living there permanently, has lost his Sierra Leone domicile. If, for example, her husband commits adultery a few weeks after their arrival in Sierra Leone and he immediately elopes with the adulteress to, say, Liberia, intending never to return, she is obliged to wait in Sierra Leone for the elapse of the statutory period before the High Court of this country can hear her petition.

Curiously, according to the new s.30(3) of the Matrimonial Causes Act, the three years' period must also elapse in the case of the wife whose husband has voluntarily changed his Sierra Leone domicile without deserting her and who desires to petition the High Court for maintenance against him.[1] This means that if she is not in employment or does not have the means of maintaining

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1. S.5 of the Matrimonial Causes (Amendment) Act, 1961, which introduces a new s.30(3) in the principal Act.

herself, she has to expose herself to the rigours of destitution until the statutory period expires. In a country like Sierra Leone where there is no provision for national assistance from the state, one can hardly see the justice of this piece of legislation.

The three years' period is omitted only where the husband is in desertion and is out of the country or has been deported or expelled from the country in which case the wife can institute proceedings for divorce, nullity or maintenance without a residential qualification.[1] But even this is of benefit only to a wife who has grounds other than desertion. Where her only ground is desertion, this provision entitles her to an immediate remedy from the High Court for maintenance only. But if she wants to institute divorce proceedings, she will have to wait for three years which is also the period during which desertion must last before a divorce can be obtained therefor.[2]

(b) Domicile of infants [3]

In the absence of Sierra Leone statute and case law on the domicile of a child, we may again resort to the English common law, which is also the Sierra Leone law on the matter.

At common law, an infant [4] who is legitimate and unmarried, possesses the domicile of his father as long as the father is alive,[5] and this domicile changes as frequently as the father

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1. The new s.30(4) introduced by s.5 of the Matrimonial Causes (Amendment) Act, 1961.
2. This last hardship, of course, has nothing to do with domicile, but is one common to all petitioners for divorce, husbands and wives alike.
3. On this topic generally see: Halsbury's Laws of England (3rd ed.), Vol.7, p.23.
4. In Sierra Leone, an infant is still a person under the age of 21 years.
5. See the English case of Forbes v. Forbes (1854) Kay 341, 353 per Wood V.C. Note that the other cases quoted herein on domicile are English cases.

acquires a domicile of choice. But the child's domicile of origin does not change; it continues to be the domicile of his father at the time of the child's birth.[1] However, when the father dies, the domicile [2] of the child becomes that of his mother during the period of her widowhood.[3] If she remarries, the child's domicile is not automatically affected by her acquisition of the new husband's domicile, if different from her ante-nuptial domicile.[4] Nevertheless, she can confer the domicile of the step-father on the child by taking a positive step to that effect, but she must do so in good faith and in the interest of the child.[5] Thus, she can effect a change in the child's domicile by taking the child to live with her permanently in the country of her new domicile.

In the case of an infant illegitimate child, his domicile is that of his mother.[6] It is as yet undecided whether this is affected by a subsequent marriage of the mother. In our submission, if the marriage is to the child's father and the child becomes legitimated,[7] he acquires the domicile of his father; but if the marriage is to some other man, the same principle as in the case of a legitimate child applies.

An infant, legitimate or illegitimate, cannot by himself

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1. Henderson v. Henderson [1967] P.77; [1965] 1 All E.R. 179.
2. This may be the child's domicile of origin if the mother has not changed her domicile since the child's birth or the mother's new domicile of choice if she has acquired a new domicile since the death of her husband.
3. Potinger v. Wightman (1817) 3 Mer. 67.
4. In re Beaumont [1893] 3 Ch.490.
5. Ibid., per Stirling J. at p.497.
6. Urquhart v. Butterfield (1887) 37 Ch.D. 357 (A Portuguese woman domiciled in England at the time she had an illegitimate child; held, that child's domicile was England.)
7. Legitimation per subsequens matrimonium is possible in Sierra Leone under customary law only.

acquire a domicile of choice. The choice is always that of the person on whom he is dependent.[1]

We have so far been dealing with an infant who is unmarried. We shall now consider the case of a child that marries during infancy. Does the marriage have any effect on his or her inability to acquire a domicile of choice? The answer to this question depends on the sex of the infant. In the case of a male child, it is settled that he cannot acquire his own domicile of choice independently of the person on whom he depended for his domicile were he single, although he can choose his own residence.[2] But a female infant, on marriage, loses the domicile of her parents and automatically acquires that of her husband.[3]

A short critique of the law of dependent domicile

The concept of dependent domicile arose in England at a time when husband and wife were regarded as one person in law with the wife's legal existence incorporated into that of the husband. Thus, the wife's domicile became dependent on that of the husband. The consequence of this rule, as we have indicated, is that should the wife be deserted, she should normally follow the husband to his new domicile in order to be able to obtain a divorce. What happens if the grounds of divorce in the husband's new domicile are different from that of his former domicile? The inevitable result is that the wife goes without a remedy. This is just one of the many hardships which the doctrine wroughts. Another example is that if the wife wants to make a will the deserted or separated wife has to comply with the lex domicilii of her husband. Upon this law also depends succession to her movable estate on her death intestate.

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1. Forbes v. Forbes (1854) Kay, 341.
2. Harrison v. Harrison [1953]1 W.L.R. 865.
3. See Graveson, op.cit., p.215.

Probably because of these hardships, which are tantamount to injustice, in some countries like Norway, Denmark and Russia, a wife's domicile is not dependent on that of her husband. There has been much criticism of the English doctrine of dependent domicile. According to Graveson, "the result of the unity of matrimonial domicile is that the married woman may dispose of her own property, make her own contracts, commit her own torts but never acquire her own domicile."[1] Lord Denning has castigated it as the "last barbarous relic of a wife's servitude."[2]

Small wonder, therefore, that the United Kingdom Law Commission [3] has recommended the abolition of the rule and has suggested that the domicile of a married woman should be determined independently of that of her husband.

Criticisms similar to those levelled in the case of married women may also be advanced for infants. We may recall that a change of father's domicile necessitates a change of an infant's domicile. If the father deserts the family or his marriage is dissolved and the mother is granted the custody of the children, what is the point of basing the child's domicile on that of the father? If the male child is married but wants to dissolve his marriage, should he have to go to his father's domicile, which, under the present law, is the child's domicile in order to be able to obtain a divorce? The American position renders more justice to infants in this respect. In most of the States in the United States of America, the father's domicile ceases to attach to his infant if the infant has been emancipated (i.e. from his parental

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1. 3 I.C.L.Q.. 149, p.159.

2. Gray v. Formosa [1963] P.259 at p.267.

3. Family Law Report on Jurisdiction in Matrimonial Causes (Law Com. 48, H.C. Paper 464, H.M.S.O.

control) by the father or if the infant is married or if he is abandoned by the father.[1] More specifically, the domicile of a minor in those States is that of the person with whom he lives.[2]

On the dependent domicile of infants, too, the United Kingdom Law Commission has recommended that the domicile of a married minor should be determined as if he or she were an adult. If this is implemented it would mean that a married infant, either male or female, will have his or her own independent domicile.

This critique, so far, has dealt with domicile in the English law context. We must now address ourselves to the application of the doctrine to Sierra Leone as part of the received common law.

Whatever statutory reform that is made in England will not automatically become law in Sierra Leone unless it is adopted. We must, therefore, consider the question in the light of the present law.

The doctrine of the dependent domicile of a wife sprang in England from the recognition of the husband as head of the elementary nuclear family. In Sierra Leone where there are various categories of families and marriages, such doctrine is, in our submission, applicable only in the case of a wife of a monogamous marriage. At customary law, the concept of domicile appears to be unknown since a wife can obtain a divorce anywhere without reference to the husband's domicile.

Secondly, in the case of a polygamous family when, on the death of the father both the wife and children pass into the guardianship of the head of the deceased husband's family, it is

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1. The second Restatement, s.22.

2. Ibid.

impossible for the domicile of an infant to become that of the mother if, for instance, she remarries outside the deceased's family. The guardian substitutes the infant's deceased father for all legal purposes. These are just a few of many complex situations which the domicile doctrine creates in African countries like Sierra Leone with a different social condition from that prevailing in England. Commenting on the hardship which the doctrine has created even in England, and the greater hardship that follows it outside the United Kingdom, Graveson has emphatically asked:

> "Is it not surprising that parts of the British Commonwealth should have found the rigid concept of English domicile irksome and unsuitable to their own special and very different social and geographical conditions?" [1]

Our conclusion, therefore, is that the doctrine of domicile requires modification in Sierra Leone to suit local conditions. For example, the termination of the dependent domicile of an infant at the age of majority is arbitrary. In Sierra Leone, an infant can voluntarily choose to leave or stay with his parents before or after 21 years of age,[2] depending on economic factors. The law should take cognizance of this fact. We may finally suggest that the proposals for change made by the English Law Commission on the law of dependent domicile with respect to married women and married infants ought to be adopted in Sierra Leone as they are sound and they remove injustice.

Unity of domicile

A person cannot have more than one domicile at the same

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1. Five Sheffield Jubilee Lectures, 1960, 85 at p.92.
2. This is still the age of majority in Sierra Leone. In England, the age is now reduced to 18 years. See s.1 of the United Kingdom Law Reform Act, 1969.

time.[1] Domicile signifies the connection of a person with a "law district",[2] i.e. a territory subjected to a single system of law. In the case of a federation or a country divided into a Colony and protectorate, this law district is generally represented by the particular area in which the propositus has established his permanent place of residence.[3] Thus, it is possible within the same country for a man to be domiciled in one part and not in the other.

At present, Sierra Leone is a single country or jurisdiction though it has a tripartite legal system which is, nevertheless, regarded as one legal system. Therefore, there is only one domicile in this country.

During the colonial days, however, when the country consisted of two territories - the Colony and a Protectorate - and two separate legal systems, one for each territory, there were two domiciles. With independence and the country now operating under one legal system, there is now a single domicile.

As the doctrine of domicile is capable of modification by legislation.[4] it was possible in colonial times to grant jurisdiction to the Courts of the Colony in matters arising in and affecting the Protectorate. Thus, the Supreme Court of the Colony had, inter alia, jurisdiction to grant decrees of divorce to persons married under the Civil Marriage Act and permanently resident in the Protectorate. A case which, in our submission, established that there were two domiciles in Sierra Leone, one in the Colony

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1. Cheshire, op.cit., p.160.
2. Dicey and Morris, op.cit., pp.12-13.
3. Cheshire, op.cit., p.160, cf.The Nigerian case of Odiase v. Odiase [1965] N.M.L.R. 196.
4. Cheshire, op.cit., p.160.

and the other in the Protectorate is Solomon v. Solomon.[1] In this case, a Syrian national whose domicile of origin was in Syria, but who was permanently resident in the Protectorate of Sierra Leone with no intention of returning finally to his country, petitioned for divorce in the Colony, and counsel for his wife objected to the petition on the ground that he was domiciled in the Protectorate and not in the Colony, and therefore, the Supreme Court of the Colony could not exercise jurisdiction in the matter.

Now, by art.14 of the Protectorate Order in Council, 1924, jurisdiction was granted by the King in Council to the courts of the Colony in respect of matters within the Protectorate which were within the jurisdiction of His Majesty in the Colony. One such matter was the dissolution of marriage contracted under the Civil Marriage Act. On the strength of this Order in Council, Beoku-Betts Ag. P.J. held that the Supreme Court in the Colony had jurisdiction to dissolve the marriage. Delivering his judgment, the learned acting Puisne Judge said:

> "As Article 14 created jurisdiction in the Protectorate for matters arising there as if they had occurred in the Colony, it in effect made Colony and Protectorate one for the purpose of jurisdiction. Domicile in a place where jurisdiction exists is sufficient, and if jurisdiction exists in the Protectorate the requirements of the law are fulfilled by domicile in the Protectorate."

This case, it is submitted, was rightly decided. It admits of two domiciles in the two territories then forming Sierra Leone. It is possible for the courts of one "law district" to be granted jurisdiction in matters affecting another "law district".

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1. Unreported. Decided by the Supreme Court at Freetown on the 14 October, 1944. See Vol.IV of the then Supreme Court Judgment Book, p.81. Also see another unreported case of Josei v. Josei decided by the same Court on 14 October, 1944, in which the learned Acting Puisne Judge took the same view.

and this was what happened in the instant case. This is the inevitable result with countries constituting a colony and protectorate, as we have indicated earlier.

C. INTERNAL CONFLICT OF LAWS

The pluralistic [1] system of laws operating within the wide compass of family law in Sierra Leone, together with the two systems of courts poses certain problems of conflict. First, there is the problem of choice of law. Second, there is the problem of choice of court.

(i) Choice of Law

The problem of choice of law presents itself in three shades:- (a) Inter-tribal conflict stemming from the multiplicity of customary laws; (b) conflict between customary law and the general law resulting, to some extent, from the division of powers between local courts and the general law courts; (c) which law applies to whom and in what part of the country.

(a) Inter-tribal conflict

As we shall see in Part III, similarities may be traced in the customary laws of the tribes in Sierra Leone and varying items in detail can also be found in them. Furthermore, two persons subject to the same customary law may bring an action before a court in an area where a customary law different from theirs predominates. A court confronted with any of these two sets of situations will have to advise itself as to which customary law to apply. Will it be that of one of the parties where there is difference between them? Or, will it be that of both of the

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1. We prefer the term "pluralistic" to "dual" in this context, because in family law, there are jurisdictions where the three systems: general law, Islamic law and customary law, co-exist.

parties as opposed to the lex loci of the court?

Neither statutory law nor case law in Sierra Leone is of guidance to us in this respect.

In dealing with the situation where two persons subject to the same customary law bring a case before a local court in an area where a different customary law prevails, some local courts have applied the customary law of the area in preference to that of the parties.[1] Customary law being unwritten but safely deposited in the "breasts" of the local judges, these judges empanelled from the same vicinity as the court tend to apply the customary law that is known to them, that is, their own customary law which is the predominant customary law of that area. Eventually, the law of the parties is thrown overboard. But in areas where a local court panel consists of persons whose horizon has been broadened by education and travel and have, therefore, become unparochial in outlook, it is normal for them to prefer the law of the parties. This approach, in our submission, is in the interest of justice and ought to prevail. The stringent attitude of the more conservative local courts in choosing the law of the area of the court is mellowed by s.14(2) of the Local Courts Act, 1963, which make it possible for the Judicial Adviser or a District Appeal Court of their own motion or on the application of a local court or any party to the proceedings to transfer any proceedings initiated before a local court to another local court, a Magistrate's Court or the District Appeal Court, any such proceedings so transferred to be commenced de novo. Using this procedure, the parties may have recourse to a local court which is equipped with judges knowledgeable of their own law. It is, however, not

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1. e.g. In the metropolitan town of Bo, the Kakua local court applies Mende customary law in all cases before it to which customary law is applicable. The same policy is adopted in Moyamba and Pujehun.

an entirely satisfactory process in practice as it is likely to cause the parties more expenses and inconvenience.

A general-law court faced with a similar situation, assuming that it has already satisfied itself that customary law should apply in the case before it, would apply the law of the parties. Not hampered in any way by the customary law of the area where it sits, if at all there is any, it will listen to evidence of the customary law it is to apply from the parties themselves, and will apply it on the personal-law basis.

The difficulty posed by the other situation, i.e. where the parties are subject to different customary laws, is even more complex than the first.

Many local courts have tackled the problem in the same manner as in the case where the parties' customary law is different from that of the area where the court sits, and have applied the latter law. Justice may appear to be done to the party whose own law happens to be that of the court. On the pontrary, if neither of the laws of the parties is the same as that of the court, injustice will be the lot of both parties. S.14(2) of the Local Courts Act cannot be of any help to either of the parties because to whichever court they go, recourse alone to that court will not solve the conflict. Ought we to interpret that part of s.13(2) of the Local Courts Act which states where there is, "no customary law the general law applies" as affording a solution; that a case of conflict between two or more customary laws should be regarded as a case of "no customary law" and therefore, apply the general law? The answer, it is submitted, must be in the negative, for there is not only one but two or even three customary laws different from that of the parties. As the interest of justice is paramount in all the legal systems, it is submitted that a choice as to which customary law should apply ought to

depend on the nature of the transaction between the parties, their conduct and the circumstances of the case.

A general-law court also cannot rule outright against customary law in favour of the general law, once it is established that this is a case to which customary law should apply. Nevertheless, it may regard the case as one on which there is no express rule as envisaged by s.76(3) of the Courts Act, 1965, and therefore, decide the question as to which customary law should prevail by applying the principles of justice, equity and good conscience. If the equities are equal, then it will, in all probability, be unjust to prefer one customary law to another, in which case the general law ought to apply.

Other territories like the Eastern,[1] and Northern [2] Regions of Nigeria, faced with similar problems to the ones we are discussing, have attempted a solution by making the law prevailing in the area of the jurisdiction of the Court or binding between the parties applicable. This arrangement, if adopted in Sierra Leone, may suit local courts but it may yet create another difficulty for general-law courts sitting in a place, like the Western Area, where no customary law prevails, at anyrate, legally. Perhaps a reasonable suggestion one could make is that before a local court or a general-law court, if the parties have the same customary law, or are agreed upon one customary law, that law should supersede all others. In case of conflict between the customary laws of the parties, the court should be guided by the principles of justice, and equity. Giving the court carte blanche to apply the law of the area where the court sits to the exclusion of all other customary laws is a derogation from this principle.

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1. See s.23(2) of the Eastern Region Customary Courts Law, 1963, cap.32, 1963, Laws of Eastern Nigeria.
2. See s.20(1) of the Northern Region Native Courts Law, 1963, cap.78, 1963 Laws of Northern Nigeria.

(b) Conflict between customary law and the general law

As we have seen, s.13(2) of the Local Courts Act, 1963, makes the general law applicable in the local courts, "where there is no provision of customary law". There is "no provision of customary law" if a transaction to which it is sought to apply customary law is one that is unknown to that law. For example, a breach of covenant of title in a sale or lease of land,[1] and an agreement for hire of premises [2] have been held to be transactions unknown to customary law. If the transaction is known to customary law but at least one of the parties is not ordinarily subject to that law, for instance, where he is a non-native, then, unless that party consents, customary law cannot apply to the transaction. This is not so because it is a case of, "no provision of customary law", but because it will be repugnant to justice, equity and good conscience to do so.[3]

To recapitulate, before a general-law court customary law applies as its secondary law upon certain conditions: (i) where the circumstances, nature and justice of the case render it essential to do so; (ii) where the parties have not contracted expressly or impliedly for its exclusion; (iii) where it appears to the court that substantial injustice would be done to any party by a strict adherence to the rules of any law other than customary law. These conditions are not alternative but cumulative.

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1. See the Gold Coast (now Ghana) case of Vanderpuye v. Plange and Ors. (1942) 8 W.A.C.A. 170, 171.
2. See the Ghana case of Asante v. Gold Coast Drivers Union (1957) 3 W.A.L.R. 5 at p.9.
3. See the judgment of Wiseham, C.J. in the Gambian case of Koykoy Jatta v. Menna Camara & Anor. (Civil Suit No.5 64/60) reported in [1964] J.A.L., p.35. An implied consent may be construed from a case where, before the transaction, the non-native party to it has been given sufficient warning that the transaction may be governed by customary law and he takes the risk to enter it.

To take the third condition first, it has been held in a Gold Coast case [1] decided in 1934, the principle of which ought to apply squarely in Sierra Leone, that for substantial injustice to be established, there must be something more than ordinary hardship to a party; the equities must be on the side of the party in whose favour it is sought to apply customary law.[2] Condition (i) is more or less an appendage of condition (iii).

The second condition appears to be fraught with more difficulty than the others. When can it be truly said that the parties have contracted to exclude the operation of customary law in in favour of the general law? Is marriage a contract of such a nature that it completely displaces one set of law for another?

On the question of contracts generally, caution must be exercised where illiterate persons are involved in holding that the exclusion of one system of law has been contracted for. There should be a prima facie presumption of exclusion, but it must be open to rebuttal. This point has been made vigorously by the Privy Council in the Gold Coast case of Kwamin v. Kufuor [3] to the following effect:-

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

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1. Koney v. Union Trading Co. Ltd. (1934) 2 W.A.C.A. 188.
2. Ibid. See in particular, the judgment of Kingdom, C.J. at p.192.
3. (1914) 1 Ren. p.808 at p.814.

Upon close examination of the wording of s.76(3) of the Courts Act, one could observe that it is only when a party has agreed that his obligations in connection with a transaction should be regulated exclusively by some other law that customary law is dropped.[1] Note that the section does not mention "rights". The conclusion that may be drawn from it is that a person is not barred from the benefit of customary law unless he has ostensibly agreed that an obligation of his own in connection with the transaction between him and another person is to be governed by the general law.

Taking now the question of marriage, one must bear in mind that marriage if at all a contract, is unlike many other contracts. Verily, it is a transaction between two persons or parties but its effects go far beyond the immediate parties and it affects the children of the union and sometimes third parties.

It may be argued that when a person marries, he agrees expressly or impliedly to be bound by all the consequences of the mode of marriage that he chooses, so that if he, being a native, decides to marry under the Christian Marriage Act or the Civil Marriage Act, the whole of his matrimonial relationships and rights, duties, and privileges occurring from this relationship will be regulated by the general law. Thus, he will be obliged to practice monogamy which is the essence of this kind of marriage.[2] Furthermore, all matrimonial causes and matters, property rights between him and his wife, choice of the matrimonial home, rights and duties inter se and the custody of children should be

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1. On a similar point arising from a similar legislation in Ghana, see W.C.E. Daniels, The Common Law in West Africa, London, 1964, p.372.

2. The general-law courts will zealously guard this obligation and will refuse to aid a party seeking to enforce his right to a second "wife". See Demby v. Bishop (1950) 3 S.L. Law Recorder, p.7.

determined by reference to the general law and not to customary law, except where statutory law provides otherwise. This argument may hold a firm ground if the parties to the marriage are aware of the nature of the transaction into which they are entering and have the intention to regulate their future lives in every respect in accordance with their newly acquired "status". But it cannot be of considerable weight in the case of, say, two illiterate natives who usually marry under the Christian Marriage Act, and whose only reason for doing so is that they have been told by their local pastor that it is against the will ofGod for a man to have more than one wife, and who, after the ceremony and for the rest of their lives continue to live like natives in a native milieu. To say that customary law cannot apply in certain matters affecting their married life, such as reasonable chastisement of the wife by the husband, property rights, and custody of the children, would be not only a mistaken attribute of absolute intention to the parties but also a flagrant disregard for the social circumstances of their relationship. Marriage is a social arrangement followed by legal consequences, and where the parties are not of questionable conduct towards each other judging by the standards set by their social community, these legal consequences must help to harden and not weaken that arrangement.

The fact that a person is married in one form or another ought not affect a transaction between that person and third persons. His personal law should always be the law applicable to that transaction unless there is an agreement to the contrary. Thus, if while married under the Christian Marriage Act a native commits adultery with the wife of another man married under customary law, he ought to be liable to be sued under customary law.[1]

Though the status of children is determined by the marriage

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1. See Coleman v. Shang [1959] G.L.R. 390.

of their parents, yet the children's personal law ought not be affected by such marriage. They must be able to choose for themselves any form of marriage even though their parents had selected some other.[1]

To summarise, one system of courts applies one system of law as its primary law. The secondary law only applies upon the fulfilment of certain conditions. The parties to a transaction can agree to be bound by one law and not the other but this agreement must be viewed warily. In questions of marriage and family law it will not be easy to arrive at a conclusion that a person has elected for all purposes to be bound by one system of law to the exclusion of the other. An election may be said to be made with regard to the essence of the particular kind of a marriage; for example, marriage in the Christian form must be deemed to be attended by the obligation to practice monogamy, and matrimonial causes affecting such marriage must ostensibly be governed by the general law. Other matters, like transactions with third parties and the determination of the personal law of the children, which are not directly connected with the kind of marriage of two people, must remain unaffected by their choice of law.

There is no authority in Sierra Leone in support of these propositions. But there are authorities in Nigeria and Ghana which, in our submission, ought to apply in Sierra Leone since all the countries concerned have the same social background and are presented with the same problems.

We must, however, begin on a disappointing note. In the Nigerian case of Cole v. Cole,[2] which concerned which law to apply

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1. See the Nigerian case of Smith v. Smith (1924) 5 N.L.R. 105 and the Privy Council case of Bamgbose v. Daniel [1955] A.C. 107.
2. (1898) 1 N.L.R. 15 at p.22.

- English or Customary - to the intestate estate of a Nigerian whose personal law as customary but who had in his lifetime contracted a Christian marriage, Griffiths J. applied English law because, as he said:

> "... a Christian marriage clothes the parties to such marriage and their offspring with a status unknown to native law."

By this statement, the learned judge implied that someone marrying under the Nigerian Marriage Ordinance must be taken to have opted out of his personal customary law completely.

This extreme view, which does not take into consideration the realities of life in an African country like Nigeria, has been open to criticism not only from legal writers,[1] but also from the Nigerian judiciary itself. In a later case, Smith v. Smith,[2] Van Der Meulen J. said in disapproving the Cole v. Cole doctrine:

> "It would be quite incorrect to say that all the persons who embrace the Christian faith or who are married in accordance with its tenets, have in other respects attained that stage of culture and development as to make it just or reasonable to suppose that their whole lives should be regulated in accordance with English laws and procedures."

The principle enunciated in the case of Smith v. Smith has been undermined by statute in Nigeria in making the general law rather than the customary law applicable in the case of persons whose personal law is customary law by marrying under the Marriage Act. We shall argue in Chapter 13 the merits and demrits of legislation in Sierra Leone on intestate succession to the property of a native, which law presents the converse situation of what obtains in Nigeria. What we approve here is the principle enunciated in

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1. See, for example, S.N. Obi, Modern Family Law in Southern Nigeria, London, 1966, p.48; . . Agbede, Conflict of Laws in Nigeria, an unpublished Ph.D. thesis of the University of London, 1970 at p.244.

2. (1924) 5 N.L.R. 102, 104

the above-quoted dicta of Van Der Meulen J. This principle may, however, be modified by statute where it is just and reasonable to do so.

The Ghana case of Coleman v. Shang [1] provides the exact answer to the problem which we are discussing. In that case, the Court of Appeal held:

> "We are of the opinion that a person subject to customary law who marries under the Marriage Ordinance, does not cease to be a native subject to customary law by reason only of his contracting that marriage. The customary law will be applied to him in all matters save and except those specifically excluded by statute."

Much as we approve this statement, it must be applied with caution. The statute which purports to exclude the application of customary law should take into consideration the manner of life and the social status of the person concerned since the date that he contracted the marriage. Otherwise injustice is likely to step in. A typical example is the present intestacy law in Sierra Leone with regard to natives.[2]

Can a "native" married under statute [3] sue in customary law for adultery?

This question presents the converse situation of that where a man married in accordance with a Marriage Act becomes liable in customary law for adultery with the wife of a man married under that law.

In the second situation, as we have seen, the adulterer is

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1. (1959) G.L.R. 390.
2. For fuller discussion on this issue in specific cases in the law of Sierra Leone, see Chapters 9 and 13. For the factors affecting the choice of law in such cases in many African countries, see generally, A.N. Allott, New Essays in African Law, pp.217-236.
3. Statutory Marriage is used here to denote marriage under the Christian and Civil Marriage Acts.

liable without reference to the fact that he is married in accordance with a marriage Act. His marital status is completely irrelevant since what he has done is not an incidental consequence of that status.

In the first situation, the fact that the complainant is married under Statute is relevant to the question whether, in fact, adultery has been committed under customary law.[1] Statutory marriage is not per se a marriage known to customary law. It is only when the marriage also conforms with the requirements of a valid customary marriage that a question of adultery can possibly arise under customary law. Otherwise, the complainant goes without a remedy in customary law, though he can pursue his right under the general law.[2] Where the marriage conforms with the requirements of both customary law and the general law, then he might obtain a remedy under either of them. In this case, he must elect.[3] This principle may be difficult to apply in practice, and depends upon the judicial interpretation of s.1 of the Christian Marriage (Amendment)(No.2) Act, 1965. That section provides that before obtaining a marriage licence in order to contract marriage under the Christian Marriage Act, a party to the intended marriage must make a statutory declaration to the effect that he believes, "... where the personal law of either of the parties is customary law that neither of the parties is a party to a subsisting marriage whether by customary law or otherwise." If the courts interpret this provision as meaning that a subsisting customary law between the parties makes a subsequent statutory marriage void, then no case of election arises and the complainant will have to fall on his customary law right.

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1. Though there is no doubt that it has been committed under the general law.
2. See s.20 of the Matrimonial Causes Act, cap.102 of the revised Laws of Sierra Leone, 1960.
3. See the Ghana case Ackah v. Arinta (1893) Sar.F.L.R. 79.

A fuller discussion of this section follows in Chapter 6. Here, we shall limit ourselves only to the point at issue.

Again, there is no Sierra Leone case law for our guidance, and we may yet resort to the law of other countries. Two Ghana cases are most helpful. In Ackah v. Arinta [1] the Gold Coast Court held that a husband of a Christian Marriage had no right of action under customary law for adultery committed with his wife even where the other party was subject to customary law under which such a claim was recognised. Presumably, the marriage in this case was not preceded or followed by a customary law marriage which might have raised the possible question of conversion.

Similarly, in another Ghana case, Akwapin v. Bundu,[2] the Gold Coast Divisional Court held that no prosecution lay for adultery committed with a spouse of a statutory marriage although adultery simpliciter was a criminal offence under the Ghana customary law at that time.

The raison d'etre of these cases, in our submission, ought to apply in Sierra Leone as the situation in which they were decided is similar to what prevails in Sierra Leone.

Our conclusion, therefore, is that a native married under the Christian or Civil Marriage Act cannot sue in customary law for adultery committed with a wife married under any of the Acts.

Can a "non-native" sue or be sued under customary law for adultery?

We shall first deal with the question whether he can be sued. Our discussion, which will follow later in this chapter, on the subjection of a non-native to customary law will indicate that there is nothing to prevent him from availing himself of the benefits and burdens of customary law if he chooses, as in the case

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1. (1893) Sar. F.L.R. 79.
2. Div. Ct. 1931-37, p.89.

of marriage. This he must, however, do before an action arises. The choice of customary law as secondary law is not the same thing as customary law becoming his personal law, as in the case of a native. This tenacious line of distinction leads us to the conclusion that he cannot be sued for adultery.

Now to the question whether he can sue. Where he is married under a statute, he cannot sue under customary law. His inability to do so is quite obvious because there is nothing to indicate that he wishes customary law to apply to him. If he is married under customary law, however, the position is not quite clear. Doubtless, he cannot invoke the general law provision for the award of damages for adultery because that provision applies only in the case of a Statutory Marriage. But he might be able to sue before a Local Court for damages for adultery, since such action is consequential upon a customary law marriage.

Breach of promise of marriage situation

There is a general consensus of opinion that at least before a formal betrothal, an action for breach of a bare promise of marriage is not maintainable in customary law.[1] Marriage in customary law is normally preceded by a period of negotiation which sometimes lasts for weeks, months, and even for years. This period of negotiation, in some instances, extends from the time when an infant girl is still in the womb of its mother up till the time of the formal betrothal. It is regarded more or less as a trial period during which the parties and the parents make up their minds with regard to the desirability of the union. It is also the period during which the intended bridegroom and his parents

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1. See Allott, Essays in African Law, p.223; T.O. Elias, The Nigerian Legal System (2nd ed.), London, 1962, p.294; A.K. Ajisafe, Law and Custom of the Yoruba People, 1924, p.73; on the other hand, there are now some reported cases from different parts of Africa where a breach of promise action under customary law has been allowed by the Courts.

pull their energies together to get the marriage consideration ready. Any promises to marry made within this period are regarded as a mere indication of an intention that at some future time a formal contract to marry will be effected. To put it in common law parlance, it is a mere "agreement to marry" and, therefore, not an enforceable contract. Any party to the agreement can withdraw at will and provided that he or she had not received any material benefit from the other or her or his family as a result of that agreement, can do so with impunity.

On the contrary, under the general law, a bare promise to marry made at any time by one person followed by a counter-promise by the other automatically gives rise to an enforceable contract to marry.[1]

No conflict of law problem is, therefore, expected to be encountered with regard to choice of law once it has been established that a promise to marry was one made under one system and not the other. The problem, however, is in arriving at the decision as to under what system of law the promise to marry was intended to take effect, in the absence of an express preference for one system.

Take for instance, the case of X, a native man, who makes a bare promise to marry Y, a native woman, and the latter reciprocates. As the position stands without anything more, the promise can be interpreted as one to marry under either the general law or customary law, for X has capacity to marry under either of them.[2] If both parties are Christians then there is a strong prima facie evidence of their intention to marry under the general law; but this is not conclusive. Further evidence must be adduced to

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1. Provided the parties have capacity to marry. See post, pp.193-201.
2. He can marry under customary law because that is his personal law and he can also marry under any of the marriage Acts.

displace an intention to contract a customary union. The station of life and education of the parties may also be of considerable weight. The weight of evidence in favour of marriage under the general law in the case of an educated native who is a professional man will be heavier than that in the case of an illiterate peasant leading a customary way of life. So with the manner in which the promise was made: mutual promises of marriage made by X and Y after, say, a night out at a cinema, plus the fact that both are educated and are Christians, will almost invariably point in the direction of a promise to marry under the general law, while a promise made by X to Y through an intermediary or through the parents, accompanied by the customary gifts of kola nut or headtie may raise some doubt as to the efficacy of the transaction under the general law; and if the parties are also illiterate and are animists, the balance will certainly be tipped in favour of customary law.

The dearth of decisions of Sierra Leone courts disables us to state definitely how these courts would deal with this issue if presented to them. But two Nigerian cases tend to show that one or other of the considerations, which we have mentioned, might have helped to influence the decision of the Nigerian courts and these considerations may be unquestionably adopted by the Sierra Leone courts with approval. The first case is Uso v. Iketubosin.[1] The dependent in this case, after promising to marry the plaintiff, broke his promise in 1957 by marrying another woman. It was held that English law governed the breach of promise. Unfortunately, the facts of the case, as reported, do not tell us whether the parties were Christians and whether they were educated or not, but it is recorded that damages were assessed with regard, inter alia,

1. (1957) W.R.N.L.R. 187.

to the "stations in life of the parties and all the circumstances". The other case is Aiyede v. Norman-Williams.[1] Both the plaintiff and defendant in this case were Nigerians and met in that country in 1945 where they mutually promised while they were infants to marry each other. They again met in London while they were pursuing further studies, and the plaintiff, now having reached his majority, confirmed his promise. The defendant later broke his promise by marrying another woman. Whichever view is taken of the promise in 1945, it will not be enforceable either under customary law or the general law: under customary law because it was a bare promise not followed by a formal betrothal; under the general law because the parties were minors when the contract was made in 1945. Coker, J. without giving express reasons for doing so, took the promise to be governed by the general (English) law. Presumably, the choice of English law was influenced by the education of the parties.

(c) Which law applies to whom and in what part of the country?

1. Sphere of operation of the general law

Sphere as to persons

In respect of persons, the general law applies to everyone, native as well as non-native, who contracts a non-customary marriage. But the extent to which the general law applies in the case of a native who contracts a non-customary marriage, but whose manner of life remains substantially native is one that is fraught with controversy. We have already examined this issue earlier and will do so later in our discussion on specific areas in family law.

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1. [1960] L.L.R. 253

2. See s.2 of the Infants Relief Act, 1874, and the discussion on breach of marriage under the general law in Chapter 3.

Sphere as to territory

Unless otherwise specifically provided by a statute, the general law is not confined to any particular part of the country. Wherever a court sits, provided the proper law to apply in the suit before it is the general law, that law applies.

Sphere as to areas in family law

The general law is the proper law to determine the validity of a non-customary marriage and its incidents. It deals with such aspects as matrimonial causes and proceedings;[1] property rights of the spouses during coverture;[2] privileges attached to the matrimonial stats;[3] succession to property;[4] the care and protection of children;[5] the rights and duties of spouses towards each other and towards their legitimate children;[6] and legitimacy;[7] to name a few. It is interesting to note that there is no general law on adoption and legitimation in Sierra Leone.

The general law also determines those incidents of a customary-law marriage for which the provision made under customary law is invalid as being repugnant to statute or to natural justice, equity and good conscience.

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1. See the Matrimonial Causes Act, No.9 of 1949, cap. 102 of the revised Laws of Sierra Leone, 1960.
2. Under the common law. See also The Imperial Statutes (Law of Property) Adoption Act, cap. 18.
3. Under the common law and local statutes, e.g. The Criminal Procedure Act, 1965, which deals, inter alia, with the evidence of spouses at criminal trials.
4. See the Administrationof Estates Act, 1946, cap.45 of the revised Laws of Sierra Leone, 1960. Except where the parties are natives. See s.26 of cap.95.
5. Under adopted law and various local Acts, e.g. The Prevention of Cruelty to Children Act, 1926, cap.31 of the revised Laws of Sierra Leone, 1960.
6. Ibid.
7. Under adopted laws.

2. Sphere of operation of Islamic Law

Sphere of operation as to persons

The provisions of the Mohammedan Marriage Act seem to apply to all persons in Sierra Leone, native as well as non-native, the only condition being that the marriage should be celebrated in the Western Area. In an early case decided by the Supreme Court in 1932, Sufan v. Jalloh,[1] it was held that the Act did not apply to natives. It is submitted that this case was wrongly decided. The court might have been misled by the fact that the Act applies only to a marriage contracted in the Western Area. This decision does not represent modern practice whereby the High Court accepts evidence of Mohammedan marriage contracted in the Western Area and divorces involving natives. Nor has there been any recent contention that the Act does not apply to natives. Sufan's case is probably an isolated one and may not be followed now. Evidence of current judicial thinking on the matter is afforded by the case of In re Allie (dcd.)[2] in which Smith C.J. said of a native who had died while permanently resident in the then Colony (now Western Area),

> "Although the testator was a native Mohammedan law might have become applicable to distribute his estate on intestacy, the fact that he made a will ... leads me to conclude that I must apply English law."

-- Sphere of operation as to territory

The Act relates to Mohammedan marriages contracted in the Western Area. So far as divorce of such marriage is concerned, it would appear that it can take place anywhere in Sierra Leone but in order that the divorce may be recognised by the courts of

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1. Unreported. Decided at Freetown on 11 June, 1932.

2. 1950-1956 A.L.R.S.L. 338, 341.

the Western Area, it should be registered. As there are no registrars of such marriages in the Provinces, the registration must obviously take place in the Western Area. Insofar as intestate succession is concerned, the Act applies to Muslim natives only when they die in the Western Area.

3. Sphere of operation of customary law

Sphere of operation as to person

(i) Application in traditional society

In traditional society, both natives and non-natives have always been found since the beginning of the colonial era and the establishment of trading links between the peoples of the then Colony and Protectorate. Through contact with people foreign to this society, there has been increasing modification of its features by the insertion of non-traditional ideas either informally or more directly through the control of the district commissioners.

Nevertheless, in the field of marriage, traditional society has never discriminated against non-natives as such, although it did not socially favour marriage between a native and a Creole.[1] Even in the case of a Creole, there was no legal bar. So long as the Creole was prepared to respect the tribal institutions, he was also most welcome.

Undoubtedly, a marriage between a native and a non-native has always been regarded as valid by the native or local courts so long as the essential requirements of such marriage under customary law are complied with. It is, therefore, strange that Fenton has argued that such a marriage cannot take place under customary law when he said:

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1. For the reasons, see Chapter 16, pp.543-544

> "They [non-natives] do sometimes go through the form of a native marriage but cannot sue for the refund of marriage money if the woman deserts them."[1]

This opinion, in our submission, does not accord with the law and practice of the local courts past and present. Customary law regards the payment of the marriage consideration and the consent of the parties and their relatives as the essential characteristics of a valid marriage.[2] Local courts have indeed granted relief to non-native complainants-parties to customary unions - the one obstacle before these courts had jurisdiction over non-natives being that non-natives, if they were defendants, understandably refused to submit to jurisdiction. That recognition and validity are accorded to such unions is inherent in the evidence of certain Mende chiefs given in the case of Kamanda Bongay v. Macaulay [3] decided by the Supreme Court of Sierra Leone. The chiefs gave testimony on succession to land under Mende customary law, but the principles enunciated apply squarely to the customary laws of other tribes in Sierra Leone. The evidence which was accepted by the learned Judge, although the Court arrived at its decision on another ground, ran as follows:-

> "If a settler [4] who has obtained a grant of land married a woman of the country [5] the land would on his death go back to the family to whom it belonged, and the wife and children would be absorbed into the woman's family, in the case of the non-

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1. Outline of Sierra Leone Native Law, Government Printer, Freetown, 1932, p.30. A further discussion on the capacity of a non-native to contract a customary law marriage follows later in this chapter.
2. For the details, see Chapter 16.
3. See the unreported judgment of Tew, C.J. of 5 March, 1931, in S.C. Judgment Book Vol.1, 427 at p.436.
4. "Settler" in this context refers to anybody who is foreign to the local community, not necessarily a Creole from the former Colony.
5. "Country" in this context probably refers to the local community.

> native, or in the deceased settler's family, in the case of a native of the Protectorate."

Presumably, by marriage in this context the chiefs were alluding to customary marriage, since Macaulay, a non-native, whose property was in dispute had contracted that form of marriage with a native woman.

(ii) Application according to statute

For a better understanding of the application of customary law to persons according to statute, it is necessary to review statutory provisions relating to the subject before 1963, as well as those at and after that date:

Pre-1963 statutory law

Pre-1963 statutory provisions indicated quite clearly that the native courts had jurisdiction over natives but not non-natives. This was explicit in s.7 of the Native Courts Ordinance,[1] which set out the constitution and jurisdiction of the Native Courts as follows:-

> "The Native Courts shall consist of the Native Courts as now existing according to native law and custom and such other Native Courts as may be established under this Ordinance; and such Courts shall have jurisdiction according to native law and custom -
>
> (1) to administer the estates of deceased persons, ... where such deceased persons are natives; and
>
> (2) to hear and determine -
>
> (a) all civil cases triable by native law arising exclusively between natives; ...
>
> (b) all criminal cases in which the accused and the person who is, or was, primarily affected by the alleged offence are both natives ..."

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1. Cap.8 of the revised Laws of Sierra Leone, 1960 (now repealed).

Native courts were not the only courts in which customary law could apply. It applied also in combined courts and in non-customary courts such as the old Supreme Court and the Magistrates' Courts. Though a lesser degree of scope was given to customary law in these courts, it applied to both natives and non-natives.

Under s.5 of the Native Courts Ordinance, a combined court had as much power as a native court to administer customary law. A combined court was a court consisting of the Paramount Chief of the Chiefdom in which it was established and a non-native who had settled in that chiefdom, both of whom acted as joint judges. It had jurisdiction in civil cases arising between natives and non-natives [1] where the subject matter in dispute did not exceed £5.[2] The effectiveness of the judgment of the Court depended on unanimity.[3] If the joint judges disagreed, the fees of the parties were returned and the matter had to be tried dé novo by other judges if any party so wished. Cases such as matrimonial disputes under customary law between a native and non-native frequently came before combined courts.

The Combined Court system fell into desuetude long before 1963 because of two reasons:- (a) the unanimity rule did not make it an effective avenue for the administration of customary law, particularly where non-natives were defendants. There was always bound to be disagreement between the joint judges when an action was brought against a non-native; (b) the limited jurisdiction of the court, i.e. jurisdiction in civil cases not exceeding £5, left without remedy in customary law more serious civil cases such as an action for the return of marriage consideration which on many occasions far exceeded £5.

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1. S.23 of the Native Courts Ordinance.
2. Ibid.
3. S.24 of the Native Courts Ordinance.

The Courts Ordinance of 1 January, 1946,[1] made customary law as administered by the then Supreme Court and Magistrates' Court applicable to natives and non-natives in well-defined circumstances. As regards actions between natives, customary law was observed "except where the circumstances, nature and justice of the case shall otherwise require ..."[2] With respect to actions between natives and non-natives, customary law applied "where it shall appear to the Court that substantial injustice would be done to any party by a strict adherence to the rules of any law other than native customary law ..."[3]

It must be noted that in actions solely between non-natives, neither the Native Courts Ordinance nor the Courts Ordinance, 1946, made a provision for the application of customary law.

1963 statutory law and after

S.13(2) of the Local Courts Act, 1963, states:-

> "The jurisdiction conferred by this section shall apply to all persons within the limits of the Court's jurisdiction ..."

S.13(1), which sets out the areas of actions in which the Court has jurisdiction, includes the word "persons" where "natives" was used in prior legislation.

It is clear, therefore, that both natives and non-natives are intended to be subjected to the jurisdiction of the Court. But now that a local court is empowered to apply customary law as well as the general law, one cannot safely conclude that the Statute intends an automatic application of customary law to non-natives whose personal law is not that law. Presumably, in the case of non-native, customary law only applies as secondary law in the presence of an agreement as such or in circumstances where

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1. Cap.7 of the revised Laws of Sierra Leone, 1960.
2. Ibid., s.38
3. Ibid.

it could be presumed that the parties would have intended no other law to apply in their transaction but customary law.

The other enactment which makes customary law applicable to natives and non-natives is the Courts Act, 1965. S.76(2) of it is simply a collation of the two provisions in s.38 of the Courts Ordinance, 1946, one relating to actions between natives, and the other to actions between natives and non-natives. What is of special significance with s.76(2) of the Courts Act, 1965, is that unlike its predecessor, no differentiation is now made between actions where the parties are natives and those in which at least one of them is a non-native.[1] The use of the word "any court" in s.76 instead of "the Supreme [High] Court and Magistrates' Court",[2] however, introduces some ambiguity. Does "any court" in this context include customary courts such as Local Courts; or does it refer to non-customary courts alone? If it includes customary courts, then customary law is not the primary law of these courts, but only applies "where it shall appear to the court that substantial injustice would be done to any party by a strict adherence to the rules of any other law than customary law"; in which case, s.13(2) of the Local Courts Act, 1963, must be deemed to be impliedly repealed by s.76 of the Courts Act, 1965. It is submitted, however, that this cannot be the correct position for, according to one of the canons of statutory interpretation,

> "where general words in a later Act are capable of reasonable and sensible application without extending them to subjects especially dealt with by the earlier legislation ... that earlier and special legislation is not to be held indirectly repealed,

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1. Where the sole parties are non-native, customary law will not ordinarily apply.
2. As used in s.38 of the Courts Ordinance.

> altered or derogated from merely by force of such general words, without any indication of a particular intention to do so."[1]

The subject of the law applicable by local courts is especially settled by the Local Courts Act, 1963. The Courts Act, 1965, on the other hand, generally deals with such non-customary courts as the High Court and the Magistrates' Court and the laws which these courts may apply. One may, therefore, reasonably conclude that "any court" as used in s.76 should be understood as meaning exclusively non-customary courts.

As a conclusion to this statutory review, it may be said that, generally, customary law formerly applied to natives as well as non-natives. More specifically, however, it now applies in appropriate circumstances, in actions between native and native, and native and non-native. Where the sole parties are non-natives, it is inconceivable whether it will apply at all without their choice.

Somewhat interlocked with the question as to whom customary law applies is the question in family law whether or not a non-native has capacity to marry under customary law.

(iii) Capacity of non-native to marry under customary law

The opinion of some writers [2] supports the proposition that a marriage under customary law in which at least one of the parties is a non-native is invalid at any rate under the general law on the ground that customary law applied to persons whose legal

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1. See dictum of Lord Selborne in Seward v. The Vera Cruz (1884) 10 App. Cas.59 at p.68. See also dictum of Somervell, L.J. in Harlow v. Minister of Transport [1951] 2 K.B. 98 at p.102; and R. v. Ramasamy [1965] A.C.1.

2. Fenton, op.cit., p.30 and ante, p.100 ; A. Phillips, "Marriage Laws in Africa", in Marriage Laws of Africa by A. Phillips and H.F. Morris, O.U.P., 1971, pp.75 et seq.; . Hollins "Notes on Mende Marriage Law", S.L.S. (O.S.) No.13 , 1928, p.33.

status is for the purposes of private law that of natives. It is submitted, with the greatest respect, that this opinion cannot be of considerable weight in Sierra Leone because, as we have seen, customary law does not apply to natives alone; it is also in some respect the law of non-natives even though the latter primarily have none of their own.[1]

Juristic opinion might have been influenced by factors including the classic case of Re Bethell [2] decided by the High Court in England and Savage v. Macfoy,[3] a decision of the Supreme Court of Southern Nigeria.

In Re Bethell, concerning an Englishman who went through a form of marriage according to African custom with a woman of the Barolong tribe while he was resident in what was then Bechuanaland, it was held that the child of the union was illegitimate under English law because the marriage was not "on the same basis as marriage throughout Christendom",[4] and was not in its essence "the voluntary union for life of one man and one woman - to the exclusion of all others." Stirling, J. based his decision on the ground that Bethell had no capacity under the law of his domicile to contract such a marriage since in English law, a monogamous marriage was the only one recognised by the courts.[5] It is submitted that these sentiments cannot apply to persons domiciled in Sierra Leone. Whereas English law in England recognises for its citizens only one form of marriage, i.e. a monogamous marriage

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1. See s.76 of Courts Act, 1965, Act No.31 of 1965.
2. (1888) 38 Ch.D.220.
3. (1909) Ren. 504.
4. In re Bethell (1888) 38 Ch.D.22- at p.234.
5. The decision was not based on the ground that the marriage was void under Tswana customary law, but on the ground that the English man whose lex domicilii recognised only monogamous marriages had no capacity.

Sierra Leone recognises both monogamous and polygamous marriages and Sierra Leone law does not discriminate between persons domiciled in the country in regard to the type of marriage into which they may enter. Note that Stirling, J. recognised the union in Bethell's case as valid under Tswana customary law.

In the Nigerian case of Savage v. Macfoy,[1] Macfoy who was born in Freetown of liberated African parentage and was, therefore, statutorily classed as a non-native in Sierra Leone, went to live permnanently in Nigeria, where he married under customary law a Nigerian woman of the Yoruba tribe. On his death, the wife brought an action to establish her right as administratix of her husband's estate. Macfoy was domiciled in Nigeria, but Southern Nigerian law just as Sierra Leone law regarded him as a non-native. Holding that the woman had no right to administer the estate since she was not the lawful wife of the deceased, Osborn, C.J. said:[2]

> "The common law of England is in force by virtue of section 14 of the Supreme Court Ordinance, as also the doctrines of equity and the statutes of general application which were in force in England on the 1st day of January, 1900, and this is the law ordinarily applicable to persons who are not subject to native law and custom. Claudius Macfoy was such a person. He came from Sierra Leone where polygamy is unlawful. By the common law a person is endowed with the capacity to contract only that kind of marriage known to the common law, viz. the voluntary union for life of one man and one woman to the exclusion of all others."

The learned Chief Justice must be taken to task for three propositions which his statement conveys, namely, (i) that the common law lays down that a person can validly contract only a monogamous marriage; (ii) that polygamy is unlawful in Sierra Leone; (iii) that a non-native is not subject to native law and

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1. (1909) Ren. 504.

2. Ibid. at pp.507, 508.

custom and, therefore, the common law ordinarily applies to him.

We shall begin with the first proposition. This proposition, it is submitted, is based on a misconception of the judgment of Lord Penzance in Hyde v. Hyde.[1] When he made the famous remark that, "marriage as is known in Christendom is the voluntary union for life of one man and one woman to the exclusion of all others", Lord Penzance was saying that it was to this type of marriage that the matrimonial law of England was adapted. That law, in his opinion, was wholly inapplicable to polygamous marriages, and it would be impossible to do justice to the parties if the law applicable to one institution were applied to a different institution so that a Mormon spouse polygamously married in Utah could not dissolve the marriage in England by means of a procedure which was devised for monogamous marriages.[2] The effect of his decision was purely negative; it said nothing positive as to the status of the parties. At the end of his judgment, after having laid down that the English court should accept no jurisdiction to enforce directly or indirectly in any way the obligations arising out of a polygamous marriage, Lord Penzance said:-

> "This decision is confined to that object. This Court does not profess to decide on the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor on the rights or obligations in relation to third parties which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England."[3]

Hyde v. Hyde is, therefore, no authority, as was thought by

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1. (1886) L.R. 1 P. & D. 130.
2. See C.K. Allen, "Status and Capacity" in L.Q.R., July 1930, p.277.
3. (1866) L.R. 1 P. & D. 130 at p.138.

Osborne, C.J. that the common law lays down that a person can validly contract only a monogamous marriage.[1]

In Sierra Leone, the principle of Hyde v. Hyde is clearly expressed in the Matrimonial Causes Act, 1949.[2]

S.2 of this Act states:-

> "In this [Ordinance] [Act] unless the context otherwise requires, court means the Supreme [High] Court; ... marriage means the union of one man and one woman for life to the exclusion of all others, and the expressions 'husband' and 'wife' shall be contrued accofdingly."

The matrimonial reliefs provided by this Act are limited to monogamous marriages under the Christian Marriage Act [3] and the Civil Marriage Act.[4] This is all that may be concluded from the Matrimonial Causes Act.

It is true that matrimonial reliefs may not be granted by the High Court under this Act in the case of polygamous marriages. But the High Court is not the only matrimonial court, nor is monogamous marriage the only marriage recognised by law in Sierra Leone. There are the Local Courts and there are customary marriages, which are potentially polygamous; and jurisdiction over such marriages is given to the Local Courts.

Now we turn to Chief Justice Osborne's statement that polygamy is unlawful in Sierra Leone. It may well be that he made this remark relying on his prior statement on the position of a polygamous marriage at common law, in which case the latter remark is as untenable as the first. If, on the other hand, he

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1. Nor does the case support Re Bethell which decided on rights of succession.
2. Cap.102 of the revised Laws of Sierra Leone, 1960.
3. Cap.95 of the revised Laws of Sierra Leone, 1960, now redesignated "Act", see Act No.48 of 1961.
4. Cap.97 of the revised Laws ofSierra Leone, 1960, now redesignated "Act", see Act No.48 of 1961.

made the pronouncement in reliance on the state of the law in Sierra Leone in general, it is submitted that he was wrong.

True, there are pronouncements which seem to suggest that effort has been made in the past to suppress polygamy in Sierra Leone, but no definite enactment can be found prohibiting that institution.

When the Colony of Sierra Leone was founded, the Rules and Regulations issued by the Governors of the St. George's Bay Company to the Superintendent and Council for the settlement instructed them, inter alia, as follows:-

> "You will take every proper means of discouraging polygamy where it has already been engaged in, the toleration of which seems unavoidable, but new engagements of this sort among those who settle on our lands, we think ought by no means to be permitted. The common arguments for it appear to us quite ill-founded, and the practice subversive of domestic peace as well as good order and morals."[1]

To execute this mandate, the Governor and Council enacted the Act of 8 October, 1808 (to which Osborne, C.J. does not refer in his judgment). Because of the interest this subject evokes, it is worth the while to set down the essential parts of this Act in extenso.[2]

The title runs as follows:-

> "An Act for declaring such children of the people called the Maroons as have been or shall be born before the first day of December 1808 to be entitled to the privileges of born in lawful wedlock [sic] and for regulating marriages among the said Maroons and for making provisions for the encouragement of good lawful marriages among the inhabitants of this Colony."

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1. See L.E.C. Evans, S.L.S. (O.S.), No.18, 1932, p.72.
2. The writer was privileged to examine the original handwritten copy of this Act in the Library of the Commonwealth Office, Downing Street, London, as it was not possible to lay hands upon a printed copy. Any mistake in deciphering the writing is, therefore, deeply regretted.

The Act consisted of three parts: the first part merely legitimised the children of Maroons born before 1 December, 1808. The second part regularised marriages of Maroons who appeared before a Justice of the Peace before 1 December, 1808. It is the third part that made provisions for future marriages. It reads:-

> "And whereas there are many of His Majesty's subjects within this Colony not professing themselves to be of the Christian religion, whom nevertheless it is highly expedient, not to debar from the advantages of legal and regular marriage, in as much as the benefits resulting therefrom are among the most probable means of hereafter promoting the extension of the Christian Religion among the same -
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> "Be it enacted by the Governor and Council of this Colony and it is hereby enacted ...
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> "That from the 8th day of October 1808 if any man and woman shall present themselves before a Justice of the Peace in this Colony, and shall declare their intention to be married before the said Justice of the Peace, the Justice of the Peace shall first require enquiries and determine to his own satisfaction, whether there be any sufficient reason why such persons should not be joined together in marriage and if he declare that there is such reason, he shall be obliged to give an account thereof in writing, to any of the parties that require it, and if the Justice of the Peace shall see no sufficient reason why such persons shall not be joined together in marriage, he shall cause the parties respectively, in the presence of credible witnesses, to make oath after such manner as according to his knowledge of the Religion and customs of the party he shall believe to be of the greatest obligation that such party hath not any lawful wife or husband then living, and shall therefrom cause an entry to be made in a Register to be by him kept for that special purpose which entry shall be made and signed by the Justice of the Peace with the proper addition and also by the parties themselves, and shall be attested by two or more credible witnesses, besides the Justice of the Peace before whom the parties shall appear in their own handwriting -
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> "And the Justice of the Peace shall thereupon declare the parties to be lawfully married and the same shall be to all intents and purposes whatever truly and law-

> fully married. And the Justice of the Peace shall deliver a copy of the entry to either of the parties requiring it signed by himself and also by the witness who did sign the entry. And the Justice of the Peace shall carefully preserve the book of the aforesaid Register and shall deliver it to the Governor. And the Register and copy of same shall be sufficient evidence that such marriage was truly and lawfully contracted."

The most reasonable construction that may be put on this Act is that it gave legal effect to a monogamous marriage; this was to be the form of marriage for which relief could be obtained from the English courts in the then Colony. But the Act in no sense suggested that polygamous marriages are unlawful. As may also be seen, notwithstanding the fact that it applied to the Colony alone, any one - native as well as non-native - could avail himself of its benefits.

The present writer cannot find evidence of the express repeal of this Act,but it may be reasonably assumed that it is now superseded by the Christian Marriage Act,[1] and the Civil Marriage Act,[2] which are now the two statutes that regulate monogamous marriages.

As the Act of 1808 gave legal validity to a monogamous marriage, so two latter statutes, namely the Protectorate Ordinance, 1896,[3] and the Mohammedan Marriage Act, 1905,[4] accorded legal effect to polygamous marriages.

Now we turn to the third proposition that a non-native is not subject to native law and custom and, therefore, the common law ordinarily applies to him. From Savage v. Macfoy [5] it is

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1. i.e. Ordinance of 1 April, 1907, cap.95 of the revised Laws of Sierra Leone, 1960. Now redesignated "Act", See Act.48 of1961.
2. i.e. Ordinance of 12 September, 1910, cap.97 of the revised Laws of Sierra Leone, 1960. Now redesignated "Act", see Act No.48 of 1961.
3. Act No.20 of 1896.
4. Cap.96 of the revised Laws of Sierra Leone, 1960.
5. (1909) Ren. R. 504.

clear that the learned Chief Justice reached this conclusion from the fact that s.19 of the Southern Nigerian Supreme Court Ordinance, 1876, while stating generally that the Supreme Court shall not deprive "any person" of the benefit of any law or custom existing in Southern Nigeria specifically provided that such laws and customs should be deemed applicable in causes and matters between natives and Europeans where it appeared to the court that substantial injustice would be done to either party by a strict adherence to the rules of English laws. The learned Chief Justice opined that "any person" could not include a European. If this were otherwise, he asked, "what was the necessity for special provision as to the transactions between Europeans and natives?". It is submitted that this reasoning is untenable because Macfoy was not a European but an African whose lex domicilii recognised both monogamous and polygamous marriages. The fact that he was an African but a non-native did not make his position any worse.

Sierra Leone law has always recognised monogamous and polygamous marriages. Marriage under the Christian Marriage Act has always been open to natives as well as non-natives. All Sierra Leone citizens have always been free to contract marriage under the Mohammedan Marriage Act, the only requirement being that the parties must be Muslims. Formerly, when it was intended that natives should not marry under theCivil Marriage Act, there was express legislation to that effect.[1] But nowhere in Sierra Leone statute or case law has it ever been laid down that a non-native cannot marry under customary law.

The Sierra Leone counterpart of s.19 of the Southern Nigerian Supreme Court Ordinance, 1876, is s.76 of the Courts Act,

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1. S.4 of the Civil Marriage Act which is now repealed by the Civil Marriage (Amendment) (No.2) Act, 1965, Act No.49 of 1965.

1965, which has already been quoted in full. As has been seen, s.76 contains no special provision for natives and non-natives, or natives and Europeans, but uses the words "any person". That section behoves any court to apply customary law in civil matters arising in the Provinces subject to the usual repugnance clause, where it appears to the court that substantial injustice would be done to any party by a strict adherence to the rules of any law other than customary law. Whether or not a non-customary court has jurisdiction over any specific civil matter like a matter affecting a customary marriage is a question which is quite distinct from that whether a person has capacity to marry under customary law, although both are linked together. At this juncture, it will be useful to distinguish between (i) which Courts can exercise jurisdiction over a customary marriage? (ii) which law will the Courts apply? (iii) which law governs a party or transaction in a given legal relationship?

(i) Which Courts can exercise jurisdiction?

As will be seen later, the general-law courts formerly had no jurisdiction in matters affecting customary marriage and divorce if the marriage was exclusively between "natives".[1] The proper forum for these was a customary law court. Therefore, if such a matter was brought before a general-law court, it would not adjudicate but would refer it to a local court. Where oneparty to the customary marriage was a non-native, however, it would appear that the High Court had jurisdiction. For the Courts Ordinance, 1946, which at present partly regulates the jurisdiction of the High Court, deprived the High Court of jurisdiction over a customary marriage only where the marriage was exclusively between natives.

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1. S.11 of the Courts Ordinance, 1946.

If one party was a non-native and the marriage took place in the Provinces, it is submitted that the High Court had jurisdiction under s.11 of the Native Court Ordinance, 1946.[1]

But this jurisdiction was concurrent with that of a local court which according to s.13 of the Local Courts Act, 1963, has jurisdiction in all civil matters governed by customary law between all persons within the limits of the courts jurisdiction. Now, under s.21 of the Courts Act, 1965, the High Court has lost its jurisdiction over any customary marriage whatsoever.

(ii) Which law will the Courts apply?

The question of choice of law generally has already been adequately discussed earlier in this chapter.[2] Here, it will suffice only to determine which law, customary or general, is applicable in the case of a customary-law marriage to which a party is a non-native. Before a general law court the application of customary law will depend on two factors: (a) whether the marriage took place in the Provinces, and (b) whether it appears to the court that substantial injustice would be done to any party by a strict adherence to the rules of any law other than customary law. Otherwise, it is the general law that will be the law of the Court. If customary law applies it must be that of the native party to the transaction. In the case of a local court, if one party is a native and the other is a non-native, customary law would seem to apply in preference to the general law because s.13(2) of the Local Courts Act makes provision for the application of the general law in a local court only in the absence of any customary law. Where there is a native party,

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1. This jurisdiction will, however, not extend to matrimonial causes since under s.2 of the Matrimonial Causes Act, the High Court has jurisdiction in matrimonial causes only when the marriage is monogamous.

2. Ante, pp. 80-105

there is customary law to apply, i.e. the customary law of the native party. But difficulty in connection with the interpretation of s.13(2) of the Local Courts Act is envisaged where both parties to the purported customary marriage are non-natives. For example,Tom and Susan, both Creoles from Freetown, spent most of their lives at Gbendembu Village in the Bombali District where they became tribalised. Thirty years ago, they married at Gbendembu according to what was purported to be Loko customary law. They are now living in Bo, and Tom has instituted divorce proceedings before the Kakua local court. Which law will the Kakua local court apply, customary law or the general law? If the parties are taken to have no customary law at all, the validity of the purported Loko marriage itself will be at issue; in which case the general law will apply. But if the court regards the Loko marriage as a marriage for the parties, it will apply customary law the only difficulty remaining being which customary law to apply - Loko customary law, the adopted law of the parties or Mende customary law, the territorial customary law of the Kakua chiefdom.

(iii) Which law governs a party or transaction in a given legal relationship?

In determining this question, regard must be paid to the intention of the parties. This is explicit in s.76(3) of the Courts Act, 1965, which states that no party shall be entitled to claim the benefit of any customary law if the intention throughout the transaction was that some law other than customary law should apply, i.e. the general law. Accordingly, if a native enters into marriage under the Christian Marriage Act, the law that governs that marriage will be the general law.[1] He cannot be heard to say that his personal law is customary law and that that law should

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1. i.e. for purposes of matrimonial reliefs.

apply to that transaction. But does this option for a non-customary marriage mean that the native will cease to be bound by customary law in all other transactions into which he may enter subsequently, for example, a contract dealing with the transfer of property? It has been argued already in this chapter that he is not deprived of the privileges to avail himself of customary law insofar as other legal relationships are concerned.

Conversely, a non-native who contracts a customary marriage will be bound by customary law insofar as the essence of that marriage is concerned. For example, he can take a second wife under customary law without committing adultery. But customary law may not apply automatically in every other given legal relationship.

The social circumstances of the parties must be taken into consideration together with any assumed intention for the application of any law to a person other than his personal law.

The legislature must have been aware of this when it enacted in s.26 of the Christian Marriage Act that marriage between two parties, one of whom is a native, has no effect on the property of such native.

In conclusion to this discussion whether a non-native can contract a customary marriage, it may be said that despite the opinion of legal writers and judges to the effect that customary law is by its nature primarily meant for natives, and that a person whose personal law is English law cannot lawfully enter into transactions like marriage under customary law, in Sierra Leone where the present tendency is now to move from personal law to territorial law, it is possible for persons to identify themselves clearly and lawfully with every aspect of their territorial law.

Sphere of operation of customary law with respect to territory

In general terms, customary law applies throughout Sierra Leone. In specific terms, however, it is the particular customary law of an area that normally applies in that area. If no customary law operates at the venue of the court, for example, in the Western Area, it is the customary law of the parties that applies. This simple principle is difficult of application in practice because of (a) the frequent migration and admixture of tribal groups, and (b) the possibility that the two parties before the court may be subject to two different customary laws. We have already considered the way in which the courts deal with these conflict of laws problems.[1]

(ii) Choice of Courts

This problem may be properly approached from the standpoint of the jurisdiction of the Courts.

Jurisdiction of the courts in matrimonial and other matters connected with the family

In Sierra Leone, the original jurisdiction of the courts in matrimonial and other matters concerned with the family is vested in the Local Court, the Magistrates' Court and the High Court.

Jurisdiction of the Local Court

According to s.13(1) of the Local Courts Act, 1963,[2] a Local Court has jurisdiction, inter alia,

> "(b) to hear and determine -
>
> (i) all civil cases governed by customary law ...

1. Ante, pp.80-82

2. Act No.20 of 1963.

" (ii) all civil cases governed by the general law where the claim, debt or matter does not exceed ...

Provided that jurisdiction shall not extend to any of the following cases -

(aa) cases relating to the civil status of any person ...

(dd) any action founded upon ... seduction or breach of promise of marriage."

The jurisdiction outlined in s.13(1) may be subdivided into two groups:-

(i) Jurisdiction over matters governed by customary law

Encompassed within it are actions dealing with customary marriage, divorce and other matrimonial causes arising from a customary marriage. This jurisdiction seems to be exclusive at any rate where the marriage or divorce is between parties who are natives and are married under customary law. Where at least one of the parties is a non-native it would appear that jurisdiction is concurrent with that of the High Court.[1] But a later Act completely deprived the High Court of jurisdiction in such a case.[2] Apparently, questions concerning seduction, breach of promise of marriage and cases relating to the civil status of a person fall outside the jurisdiction.[3] It is not very clear what "cases relating to civil status" entail. Presumably, legitimacy of a child whether of a customary marriage or otherwise is a question of civil status and cannot be decided by a local court. But matters affecting the custody and guardianship of children arising from a customary marriage do not affect the status of the children as such; instead, they are rights possessed by the parents and other claimants. They can, therefore, answer to the description

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1. See the Second Proviso (a) (ii) of s.11 of the Courts Ordinance, 1946, cap.7 of the revised Laws of Sierra Leone, 1960.
2. S.21(a)(ii) of the Courts Act, 1965; Act. No.31 of 1965.
3. Ibid.

of "claims founded on customary marriage" which are excluded from the jurisdiction of the High Court and which, therefore, fall within the jurisdiction of the local court.[1]

(ii) Jurisdiction over matters governed by the general law

Seemingly, the type of matrimonial matters that may come within this description are those normally vested in the Magistrates' Court for purposes of statutory marriages. This machinery might have been contrived to enable the typically native women who marry under statute to obtain maintenance from their husbands from Local Courts; but the class is not closed to any one married under statute.[2]

In addition to the foregoing, a Local Court has jurisdiction to try any matter referred to it by the High Court or the Magistrates' Court whenever it appears to either of them that proceedings before it are properly cognizable by a Local Court.[3] Utilizing this, the High Court or the Magistrates' Court can transfer to a Local Court a matter which should have properly been instituted in the latter court.

Jurisdiction of the Magistrates' Courts

A Magistrate's Court has power to order maintenance to be paid by a husband to a married woman whom he has deserted for the benefit of herself and her children.[4] The Act which confers this power does not define a "married woman". However, in our submission, married woman in this context ought to mean a woman

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1. This is because they come within the wide class of "civil cases governed by customary law".
2. Though it is highly improbable that non-natives married under statute will seek redress in these courts.
3. In the exercise of their inherent powers.
4. Under the Married Women's Maintenance Act, 1888, cap.100 of the revised Laws of Sierra Leone, 1960.

married under a statute,[1] including a marriage under the Mohammedan Marriage Act. Therefore, a woman who is customarily married cannot invoke the aid of a Magistrate's Court under the provisions of the Married Women's Maintenance Act. The Court also has jurisdiction over the enforcement of maintenance orders made in England or Ireland.[2] Furthermore, it can make enforcement orders in bastardy proceedings.[3]

Jurisdiction is expressly excluded in actions for seduction, breach of promise of marriage, in matters relating to divorce, matrimonial causes and succession to property and to the wardship of infants and the care of infants' estates.[4] There is no definition in the Courts Act, 1965, or in any other Sierra Leone enactment for the term "matrimonial cause", but the term has now got an established meaning since it was first defined by the English Supreme Court (Consolidation) Act, 1925, as "any action for divorce, nullity of marriage, judicial separation, jactitation of marriage, and restritution of conjugal rights."[5]

Special Magistrates' Courts

This is a Court established by the Courts Act (Amendment)

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1. Under the principle of Hyde v. Hyde (ante), a Magistrate's Court being a general-law (English) court, its matrimonial machinery is unsuited for customary marriages. The position in Sierra Leone is not altered by s.76 of the Courts Act, 1965. The court can recognise a customary marriage without granting reliefs to parties to such marriage. But it would seem that since the Courts Act (Amendment) Decree, 1967, a Special Magistrates' Court can now grant such reliefs.
2. Under the Maintenance Orders (Facilities for Enforcement) Ordinance, cap.101 of the revised Laws of Sierra Leone, 1960.
3. Under the English Bastardy Act, 1872, and the local Bastardy (Amendment) Act, 1961.
4. Under s.7 and the Third Schedule of the Courts Act, 1965.
5. S.225.

Decree, 1967.[1] It should sit in the Western Area and have the same jurisdiction as a Local Court sitting in the Provinces. To exercise its jurisdiction it must be composed of at least two special justices of the peace and two assessors who must be experts in customary law. The assessors sit as an advisory body on customary law to the special justices. The court must adjudicate solely on matters involving customary law.

Though provision is made by the Courts Act (Amendment) Decree for the application of customary law by a special Magistrate's Court in the Western Area, no enthusiasm has been shown by it to apply this law. Two reasons are responsible for this. First, the Chief Justice has not, as yet, drawn up a list of experts in customary law as required by the decree. Secondly, the idea of establishing in the Western Area a Magistrate's Court which is virtually a Local Court would appear to be strange to other Magistrate's Courts which had been accustomed to "English" law. As the population of the Western Area is substantially native, such a Court will provide an answer to the problems of persons married under customary law who, hitherto, seek in vain the help of the ordinary Magistrate's Courts for the settlement of questions affecting their marriage.

Jurisdiction of the High Court

Generally, the jurisdiction of the High Court is regulated by ss.18 and 21 of the Courts Act, 1965.

S.18(1) states:-

> "The Supreme [2] [now High] Court shall exercise the jurisdiction and powers conferred

1. N.R.C. Decree No.56 dated 26 October, 1967. See Annual Survey of African Law, 1969, pp.53-54.

2. See s.66 of the Republican Constitution, 1971; Act No.6 of 1971, which established a High Court, replacing the Supreme Court which existed prior to that Constitution. The new High Court possesses the same jurisdiction as the old Supreme Court as spelled out in the Courts Act, 1965.

> upon it by the Constitution and any other enactment."

S.18(2) provides that, except the jurisdiction is excluded otherwise,

> "... The Supreme [High] Court shall exercise unlimited original and supervisory jurisdiction in all cases and matters in the same manner and with the same powers and authorities as immediately before the commencement of this Act."

There is no provision in the Constitution pertaining to the High Court's jurisdiction in family matters. The enactment relating to such matters before the Courts Act, 1965, part of which still applies by virtue of s.18(2) is the Courts Ordinance, 1946. S.11 of the Ordinance confers on the High Court:

> "... all the jurisdiction powers and authorities, which are vested in or capable of being exercised by Her Majesty's High Court of Justice in England ... Provided further that nothing in this Ordinance shall be deemed to invest the Court with jurisdiction in regard to -
>
> (a) any question arising exclusively between natives - ... (ii) relating to marriage or divorce by native customary law or any matrimonial claim founded on such marriage, or
>
> (b) the administration of estates of deceased persons who are natives where such estates lie within the jurisdiction of any native court,
>
> or to oust the jurisdiction of any native court in such matters."

S.13 of the Court Ordinance gives a further power to the High Court to appoint and control guardians of infants and their estates.

Ostensibly, from s.11 the High Court has matrimonial jurisdiction as is possessed by the High Court in England.

Jurisdiction is excluded in the case of marriage and matters affecting it where the marriage is a customary one and contracted by two natives. The section, however, leaves open the question of a possible customary marriage where one of the

parties is a non-native. If it is resolved that such a marriage is valid, which as we have argued earlier, ought to be the case, then two alternatives would seem to be open to the Court. It may either send the case to a local court or a special Magistrates' Court or it can try it. But if it chooses the last course, its jurisdiction will be heavily curtailed. It can possibly grant the normal reliefs [1] that are granted by local courts under customary law, but it cannot grant reliefs under the Matrimonial Causes Act,[2] because the reliefs obtainable under this Act is available only to persons married either under the Christian Marriage Act or under the Civil Marriage Act. This handicap, therefore, tends to show that the proper place for questions affecting such marriages is customary courts. Probably, it was in recognition of this fact that the Courts Act, 1965, did not repeat the phrase "any questions arising excludively between natives" but precisely excluded the High Court's jurisdiction in matters affecting any customary marriage irrespective of whether or not the parties are natives. S.21(a)(ii) reads:

> "Nothing in this Act shall be deemed to invest the Supreme [High] Court with jurisdiction in regard to -
>
> (a) any action or original proceedings -
>
> (b) to establish the existence or dissolution of any marriage governed by customary law or relating to any claim founded upon such marriage."

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1. For example, the Supreme Court gave judgment in favour of an aggrieved husband or the return of marriage consideration by the family of a wife who had left her husband on a number of occasions in Alpha Sulaiman v. Mballey judgment No.199 of 1943; Brown v. Jelaney, judgment No.362 of 1945; Jackson v. Weeks, judgment No.363 of 1945. All the judgments are unreported. In each case, at least one of the parties was a non-native.
2. Cap.102 of the revised Laws of Sierra Leone, 1960.

Conclusion

Because of the pluralistic nature of the Sierra Leone legal system, a discussion on conflicts of law is bound to occupy a great deal of space in a thesis on Sierra Leone family law. However, in order that this work may not be thrown out of balance, it is necessary to end at this stage the present discussion which is on a rather general basis. We should, nevertheless, intimate that the instant discussion is not exhaustive and that there are many internal conflicts of law in specific aspects of family law which we have not discussed in this chapter because to do so will make the work incoherent. These internal conflicts will be considered in their respective places in subsequent chapters.

CHAPTER 4

THE FAMILY AND FAMILY LAW

A. THE FAMILY

Definition of family

Family law being the subject-matter of this thesis, it is essential at this stage to attempt at a definition of the word "family" as it is used in the Sierra Leone context. We shall try to do so from two standpoints: (a) the sociological standpoint; (b) the legal standpoint.

(a) The sociological standpoint

When sociologists speak of "family", they do not allude to a single identifiable social institution which generally has the same structural absolutes in every case. Basically, however, a family is a kinship group marked by kinship relationships.[1]

If the group consists of a man and his wife and their children, whether they are living together or not, Notes and Queries on Anthropology [2] calls it the elementary or simple

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1. A possible schematic division of family groups in traditional society could be made along the following lines:-

RESIDENTIAL UNIT	FAMILY
(Nuclear family households)	Parental family (1. simple (2. Compound/ polygamous
(Extended family households)	(1. Grandparental family, i.e. father's father; father; children's children + wives.
based on lineage segments	(2. Fraternal family - group of full brothers with their own parental families. (3. Soroal family - group of full sisters with their dependants.

2. Sixth ed., London, p.70.

family;[1] where the group consists of (a) a man and two or more wives and their children (polygamous), or (b) a woman with two or more husbands and her children (polyandrous), or (c) a married widow or widower having children by a former marriage, it is called a "compound" family.[2]

Sometimes also, particularly in traditional societies, after setting up an elementary or compound family a man retains in his household his adult children and their respective spouses with their own children. For every purpose he is regarded as the head of the household and the members engage in communal labour on the farm under his guidance. This type of institution is named a patrilineal extended family.[3]

Much terminological confusion has arisen between extended families and another institution whereby one of the types of family just described is augmented by relatives of the husband or wife, like younger brothers and sisters, the children of friends, or young and articulate men of the community who require the protection of an influential member of their community in return for their services. This institution is really an association of diverse families or groups of people with or without any kinship relationship who live together and form a functioning domestic

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1. The term "elementary" family to describe this group is also used by Radcliffe-Brown: African Systems of Kinship and Marriage, London, 1950, p.4; P. Bohannan, Social Anthropology, 1963, p.73. "Nuclear" family is used to define the same entity by Bohannan: ibid., p.73, and G.P. Murdock, Social Structure, New York, 1949. J.A. Barnes, "Kinship" in Encyclopedia Britannica, Vol.13, 1955, p.404, uses the preceding terminologies in slightly different situations. He says, "The association of a married couple with their young children is called a nuclear or parental family. The elementary or simple family is the unit consisting of a man and his wife and all their children, whether young or old, living at home or outside it, married or unmarried."
2. Notes and Queries on Anthropology, p.70. See also Radcliffe-Brown, ibid., p.5.
3. Radcliffe-Brown, op.cit., p.5.

unit. It is a conglomerate, enlarged household marked by propinquity and not necessarily by kinship relationship. If this relationship is missing, it will be improper to call the institution a family even though the members regard themselves as such, because a family is a kinship group marked by kinship relationships.

Only the elementary or simple family exists in a Christian and modern society such as England. But in Sierra Leone where the society is not typically Christian and less developed, the other types can also be found.

In Sierra Leone, two groups of people normally set up elementary or simple families. One is the Christians who by reason of their religious inclinations are obliged to practise monogamy. The other is the non-Christians whose initial economic situation does not allow them to acquire an additional wife. In the case of the latter group, the arrangement lasts as long as no improvement in their economic position takes place.

The compound polygamous family prospers among the non-Christian natives and, in a modified form,[1] among the Muslims. The reason for the existence of this type of family is highly debatable. One may argue that it is due to concupiscence, another may contend that it is a means to the accumulation of wealth as a stepping stone to social prestige and political power.[2] In the writer's opinion, each case must be dealt with on its merits. To some men the compelling force is concupiscence; to others it is wealth. For if concupiscence is the only rationale, how

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1. Islamic law allows a Muslim to have a maximum of 4 wives.

2. L. Mair, New Nations, London, 1963, p.69, suggests that one of the strongest reasons for polygamous marriages is the desire to be sure of progeny. For the view that plurality of wives is in a polygamous society a mark of importance and prestige; see E.Cotran: "The Changing Nature of African Marriage" in Family Law in Asia and Africa, ed. J.N.D. Anderson, London, 1968, p.17. For the view that polygamy is a form of capital investment, see K. Little: The Mende of Sierra Leone, London, 1967, p.142. Note: Polyandry is not practised in Sierra Leone.

would one explain a chief having up to 300 wives, most of whom he would not even see for years?[1] If, on the other hand, it can be explained solely in terms of wealth and its adjuncts, how can one account for the persistence of the practice today among poor men to whom a woman is economically more of a liability than an asset?

The extended family is an extension of the compound family and thus is found again among non-Christian natives and Muslims.[2] The group normally breaks up, and new groups of the same kind are formed, when a man obtains permission to leave his parents or parents-in-law, taking his wife and children with him.

In the Provinces, many families have lived as part of a household. A household may consist of elementary as well as compound polygamous families. To form a household the founder, usually a man, settled on a homestead either alone initially, or with a group of other interested people,usually young men.[3] They married and their wives bore children and lived together with them. A distinctive feature of a household among the Temne, Limba, Susu and Yalunka is that it is usually a kinship group in which the head is caretaker of the family property and cares for and meets the needs of the younger members. A Mende household or mawei, however, is a social and economic unit. It includes blood and affinal relatives and strangers to the kinship group. Formerly, slaves augmented the numbers. The members of the mawei work on the farm of the head, the mawe-wui; they are expected to collect

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1. Tradition has it that one Mende Chief, P.C. Borbor Gbepka of Bumpe, Bo District, in the Southern Province, had more than 300 wives.

2. What is normally called an extended family in Sierra Leone is an elementary or simple family, augmented by junior brothers or sisters and cousins of the spouses, and not what sociologists mean by the term.

3. They lived together in the same compound consisting of anything from a single house (partitioned into several rooms, each of which was apportioned to a male married member) to a main house for the head of the household, and small out-houses for other male members and their wives and children.

palm-fruit for him, hunt and fish for him, and also repair his house. In return, he provides them with the necessaries of life like food, clothing and lodging, and above all, takes responsibility for their behaviour in the community. The difference in the constitution of a household among, say, the Temne and the Mende, probably explains the existence of the rule of exogamy among the former, and endogamy among the latter.

The household system, in Sierra Leone, as most inventions, originated from necessity. In the days when tribal warfare and civil strife were rife, people found it necessary to organize themselves into groups in order to ward off attack by an external enemy. Gradually, however, the system assumed social and economic significance. Nowadays, with the impact of education and the quest for opportunities elsewhere, the structure of the household in the provinces is changing. As more and more people move into larger towns, the number in the household in villages is becoming smaller. Conversely, the elementary families in the larger towns are augmenting to include younger brothers, sisters and wards, and the structure of the household in those places is becoming large.

(b) The legal standpoint

From the legal point of view, the word "family" presents as much difficulty as it does from the sociological standpoint.

For example, in English case law, the attempts made by judges to arrive at a definition do not point in the same direction. In one case, family has been held to mean children;[1] in another, heirs;[2] and yet in a third, descendants.[3] Each of

1. In re Terry's Will,(1854) 19 Beav.580.
2. See dictum of Wiskens, V-C in Burt v. Hellyar (1872) L.R.14 Eq. 160 at 164.
3. Williams v. Williams (1851) 1 Sim (N.S.) 358.

these cases fails to convey the fullest meaning of the word as is used in the phrase "family law", because each deals with only one set of situations, i.e. the disposition of property where a testator bequeathed or devised a piece of property to a family under such circumstances that either the husband or the wife, or both of them are intended to be excluded. As we shall see shortly, these decisions can be explained in some way or another.

For example, in re Terry's Will,[1] the testator couched his bequest in the following term:

> "I give and bequeath to the three children of my late cousin Hannah Johnson, the sum of £1,000 to be equally divided between them, share and share alike and in case they should die before me I give and bequeath their respective portions to their respective families."

One of the children of Hannah Johnson predecased the testator. It was held that the children by the deceased child took the deceased's share to the exclusion of any other relative.

Another illustration is afforded by Williams v. Williams.[2] In that case, the testator stated in a codicil in the form of a letter to his wife:

> "It is my wish that you should enjoy everything in my power to give using your judgment as to where to dispose of it amongst your children when you can no longer enjoy it yourself: but I should be unhappy if I thought it possible that anyone not of your family should be the better for what, I feel confident, you will so well direct the disposal of."

It was held in this case that family included "descendants" of the wife, and was not confined to children, and that the wife was entitled to the property absolutely.

In both cases cited, as we have seen, it is clear that the family as a social unit consisting of at least a husband and a

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1. (1854) 19 Beav. 580.

2. (1850) 1 Sim (N.S.) 358.

wife, with or without children, was not the one envisaged by the respective testators. For in each case, an important element in this unit was out of the picture. In the first case, the parent of the legatee, i.e. the deceased child of Hannah Johnson could not come within this type of "family". In the second case, the testator himself was missing from the social unit.

While holding that the word "family" can mean one thing in a given situation, judges have, nevertheless, been aware that the meaning can vary as the circumstances change. In Williams v. Williams,[1] Cranworth, V-C, had this to say:

> "The word 'family' is one of doubtful import, and may, according to the context mean children, or heir, or next-of-kin."

In Blackwell v. Bull,[2] Lord Langdale, M.R., outlined the possible meanings of the word when he said:

> "It is evident that the word 'family' is capable of so many applications that if any one particular construction were attributed to it in wills, the intention of testators would be more frequently defeated than carried into effect ... under different circumstances it may mean a man's household, consisting of himself, his wife, children and servants; it may mean his wife and children, or his children excluding his wife; or in the absence of the wife and children, it may mean his brothers and sisters, or his next-of-kin, or may mean the genealogical stock from which he may have sprung."

The conclusion to which these cases and obiter dicta may lead one is that there is no single and final legal definition of the word "family". The meaning, therefore, depends on the context in which one desires to use it. Thus, in the preceding cases, the Courts were concerned with the construction of wills and they interpreted the word "family" in order to give effect to the

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1. (1851) 1 Sim (N.S.) 358.

2. 1 Keen 176 at p.181.

testators' intentions.

English law, as we have seen in Chapter 2, is part of the general law of Sierra Leone. Therefore, the discussion which we have undertaken may be of relevance to the interpretation of the word "family" when it is used in Sierra Leone law. But Sierra Leone statute and case law have given their own interpretation and meaning in certain situations and let us examine them.

In re Bangura (deceased) in re the Workmen Compensation Ordinance, 1939,[1] the issue before the Supreme Court of Sierra Leone in its appellate jurisdiction, was whether the applicants, who were the wives of the deceased, could claim compensation under the Workmen Compensation Ordinance as members of the deceased's family in the absence of children of the deceased. S.3(1) of the Ordinance defined members of a family as:

> "(a) when used in relation to a native, any one of those persons mentioned in the first schedule."
>
> "(b) when used in relation to any person not being a native, wife, husband, father, mother, grandfather, grandmother, step-father, step-mother, son, daughter, grand-son, grand-daughter, step-son, step-daughter, brother, sister, half-brother, half-sister."

The first Schedule to the Ordinance read:

> "Mother, father, wife, son, daughter, brother, sister, father's father, father's brother."

Allowing the claim of the applicants, Brace, Ag. C.J. held that the fact that wife is used in the singular did not mean that only a wife of a monogamous union could claim under the First Schedule as a member of the family. Wives of a marriage under native law and custom could claim as well. In a judgment that amounts to a recognition by the general-law courts of a customary marriage

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1. Unreported. Decided on 7 April, 1945.

for certain purposes, the learned Acting Chief Justice had this to say:

> "The percentage of marriages by native law and custom is overwhlemingly greater among natives in the Protectorate than by Christian marriage and that must have been in the minds of the legislature when this Ordinance was passed. In my opinion, for the purposes of this Ordinance, marriages by native law and custom must be recognised in both Colony and Protectorate and I consider that these applicants were legally wives and as such members of the family of the deceased as defined by section 3(1) of the Ordinance."

In three cases dealing with the recovery of possession from a statutory tenant of a dwelling-house on the ground that the landlord required the house as a residence for his family, the Sierre Leone courts have also had to consider the content of the word "family". The cases deal with s.12(1)(d) of the Rent Restriction Act,[1] which provides as follows:-

> "Where the rental value of any dwelling house or shop has been determined under this Ordinance or is in course of being so determined, no order or judgment for the recovery of possession of such dwelling house or shop or the ejectment of a tenant therefrom shall be made or given by any court unless - in the case of a dwelling house, it is reasonably required by the landlord for occupation as a residence for himself or his family or for some person engaged in his wholetime employment ..."[2]

In the first case, Benjamin v. Renner,[3] Graham Paul, C.J. rejected the plaintiff's plea that he wanted the dwelling house for the occupation of his married daughter whom he contended to be a member of his family. The plaintiff, who was the landlord, wanted recovery of his dwelling-house from a tenant for the

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1. Cap.52 of the revised Laws of Sierra Leone, 1960.
2. This section was formerly reg.12(1)(d) of the Defence (Rent Assessment) Regulations, 1941.
3. (1950) 3 S.L. Law Recorder, 26.

occupation of his married daughter and her husband. Giving reason for his decision, the learned Chief Justice said:

> "It seems clear to my mind that the daughter's husband is not ad hoc a member of the family of his father-in-law. The father is not required to provide a home for the residence of his married daughter. That is the obligation of the husband."[1]

The second case is Spencer v. Gibson.[2] In this case, Dobbs, Ag. P.J. held that the mother of a landlord who cooked for him and took care of his house was a member of his family for the purpose of recovering possession of the premises which the landlord required for the occupation of him and his mother.[3]

In the final case, Mohyeddin v. Nicol,[4] Massally, J. was of the opinion that "family" in law consisted of a parent and children, and he ruled that according to the evidence before him, the house was not required for a child or "anybody of that category". The learned judge did not explain what he meant by the phrase, "anybody of that category" which he used in his judgment. After the judge had made it clear that family consisted of a parent and children, it will be unsafe to hold that by that phrase wards and dependants are envisaged. Probably, he had in mind persons engaged in the wholetime employment of the landlord, for these are specifically mentioned in the Act as persons for whose occupation recovery of possession of premises could be sought and obtained.

Our conclusion on the definition of the word "family" in

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1. Ibid., p.27.
2. (1962) 2 S.L.L.R. p.84.
3. Dobbs, Ag. P.J. relied on the Dictionary of English Law by Earl Jowitt, Vol.1, p.784, which states:- "In English Law the word "family" is a popular and not a technical expression: Burt v. Hellyar, (1872) L.R. 14 Eq.160."
4. 1968-69 A.L.R. S.L. 247.

the general law, therefore, is that there is no single definition. The use of the word varies with circumstances, namely: the construction of wills, statutory definitions and common law presumptions other than the construction of wills.

Traditional customary laws also form part of the law of Sierra Leone. We must examine, therefore, the definition of "family" in customary law also.

The difficulties that attend the definition of the word "family" in the general law are also present in the case of customary law. The difficulties under customary law are even more accentuated because, under the general law, only one form of family exists, i.e. the elementary family, whereas under customary law there are other types of family. The word "family" is a term conveniently used in Sierra Leone customary law to describe a variety of groupings which may fall into one of two main categories: (a) residential family units such as households; (b) unilateral descent groups such as clans and lineages.[1]

If one asks a Loko man, for example, who the members of his family are, his immediate reaction will be to find out whether one is referring to his close and immediate relatives, like father, mother and children (nindegai), or to members of his household (ndugai) or to his lineage (nyalehunblα). For the same categories of persons, the Mende man would enquire about his bondesia, mabla and ndehun blaa, respectively, while the Yalunka man would think of his dembayana, tandena and kabila. The Limba call members of their immediate family and lineage impo, and their household, bonsho. The Susu use kabile and dembaya for descent group and residential household respectively. The Temne and the Sherbro have a generic name, abonsho and ramde respectively

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1. This is the same under African customary laws generally. See A.N. Allott, "Family Property in West Africa: Its Juristic Basis Control and Enjoyment" in J.N.D. Anderson (ed.) Family Law in Asia and Africa, 121, 125.

whenever they refer to any family relationship.

In a rather loose connection, the word family is also used by some tribes to mean one particular descent group, the clan. Among some tribes, a clan consists of a group of persons with a common surname, dispersed in wide geographical areas, who claim their descent from an eponymous ancestor. As a rule, any particular clan belongs to a specific tribe but where a clan belonging to one tribe has the same name as a clan belonging to another, the members of both clans regard themselves as one. Thus Sayers [1] points out that:

> "apart from the importance of the family name from an historical point of view its main feature socially is the bond which it creates between all men possessing it. It is stronger than nationality or speech. A Temne Kamara, and a Koranko Kamara, feel at least as much sympathy for each other as would be a Temne Kamara for a Temne Bangura ... All Kamaras regard themselves as members of a brotherhood."

The clan system was a common feature among tribes settled in the North, the Kono of the East, and the Gallina of the South.

The Temne call a clan abuna and it is known by such names as Kamara, Bangura, Kanu, Sisi, Kuroma, Lugbu, Sahno, Yalu and Ture, to name some of them.[2]

The name of a clan in Limba, Yalunka and Koranko languages is sie (pl. sienu). Thomas [3] mentions some Limba clan names as Kamara, Kargbo, Konteh, Utari, Biyelimbe, Ninken, Ukoda, Obali, Umun, Dema, Karn, Kemoin and Ninka. Some of these names are the

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1. E.F. Sayers: "Notes on the Clan or Family: Names common in the Area inhabited by Temne-speaking People", S.L.S.(O.S.), No.10, 1927, 14 at p.36.
2. See M. McCulloch: Peoples of Sierra Leone, International African Institute, London, 1950, pp.56-57.
3. Anthropological Report on Sierra Leone, Part I, London, 1916, pp.139-140.

names of animals, each animal being the totem of its clan. Yalunka clan names listed by the same author [1] are Kamara, Dumbwiya, Sise, Yatara, Kwiate and Yatana. These too are associated with animals - totems of the clans. Thomas [2] also mentions Koranko clans as Sise, Kurumu, Kaire, Mara, Toli, Monko and Dau.

The Susu call clan siya. Common Susu clan names listed by Sayers [3] are Bangura, Fofana, Dumbwiya, Sanu, Yare and Kaba. Thomas [4] tabulates Loko clan names as follows:- Kiowa, Lobo, Yahipomo, Bandea and Burebo. The name of a clan among the Kono is dambi. Langley [5] gives a list of them as Nyeni; Koma; Sawa, Koawa, Tangoe; Mangfune, Kawi, Yimini; Foade, Yokone; Ymane, Mongone; Pengusa; Dumbia; Dai; Kamala; Gbense; Siloe; Konde; Sanoe; and Takoe.

The Gallina too, seem to have had clans. Despicht [6] mentions that three most important clan names among the Vai (Gallina) are Massaguoi, Kpaka and Rogers.

There are characteristics of clans which need mentioning here. One is the rule of exogamy. Formerly, among such tribes as the Temne, marriage was forbidden between members of the same clan. Nowadays, however, the rule seems to be relaxed among some abuna. The other is the retention of the clan name by a married woman. For example, if Bangura, a Temne man marries Kamara, a Temne woman, Kamara will retain her maiden name and will be called and known by it for all purposes.

Despite the afore-mentioned characteristics and the fact

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1. Ibid., p.140.
2. Ibid., p.141.
3. Ibid., pp, 54-77.
4. Ibid., p.141.
5. "The Kono People of Sierra Leone", Africa, 5, 1 January, 1932. p.61 at pp. 62,63.
6. "A Short History of the Gallinas Chiefdoms" in S.L.S. (O.S.) No.21, 1939, p.5.

that members of the same clan regard themselves as belonging to the same brotherhood, the clan is outside the scope of our discussion of Sierra Leone family law, since this law deals with the most intricate relationship of husband and wife or wives.

Legal identity of the compound and other corporate families

Now we have to examine whether the entities which we sociologically call by the generic name "compound family", "extended family", and the "household family" and which exist in Sierra Leone, are each a single or multiple families as recognised by law.

The compound family

At first it would appear that what is sociologically a compound family is, in law, a group of separate families each of which having as its basis a common factor, i.e. the same husband. One may be encouraged in this belief by the fact that in each separate family unit, as in the elementary family, could be found well-defined rights and duties as between the husband and wife from the day the particular marriage is contracted to the day it is dissolved. Secondly, since the different marriage contracts do not usually take place together, one would also tend to think that whenever the husband takes a wife, a separate legal entity comes into being. Thirdly, the argument for legal separation gathers momentum from the fact that dissolution of a union with one wife does not result in the breaking of the husband's legal relationship withthe other wives. Nevertheless, for the union with one wife to possess a distinct legal existence, not withstanding the children and privileges that are the normal concomitants of that union, no third party should normally benefit or be subject to liability in consequence of the relationship. It should be for all purposes, simply a legal edifice having as its component parts the husband, the wife, children and probably the

respective families of the spouses, with the husband and wife constituting its foundation.

The Union with each wife is both socially and legally linked with the unions with other wives. One consequence of this web is that each wife owes to, and is owed by the others, certain duties. This is illustrated by the position which the senior wife occupies in a compound family. A junior wife must be consciously and reverently aware of the superior position of the senior wife whose commands she must obey. Flouting her authority amounts to a wrong not only against the husband but in a graver measure against the senior wife, so that before the wrong can be expiated the wrongdoer must assuage the senior wife, sometimes with an apology alone and at other times, with an apology coupled with a fine, depending on the gravity of the wrong. Another result is the position of the children of the compound family. In determining seniority in the family, the group is taken as a single unit and not as separate institutions. Thus, the most senior child is not necessarily the first-born surviving child of the most senior wife but the first-born living child in the group, even if its mother is the most junior wife.[1]

Because of this inter-relationship, it will be quite inappropriate to maintain that a compound family comprises separate families for all legal purposes. It is better to consider its legal identity in a given set of situations. Where the husband and wife relationship alone is at the fore, each marriage should be regarded as giving rise to a separate family. But where it is the group that is the focus of attention, the association is analogous to a corporation in English law with the husband

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1. C/f the position of the eldest sone of the "great" wife in the tribal law of the Kgatla. See I Schapera, Married life in an African Tribe, London, 1939, pp.105; 174.

enjoying a position similar to that of a preference shareholder.

Other corporate families

As we have seen, each of the other corporate families consists structurally of two or more compound families. They are legally regarded as such except in the one case where the corporate body is deemed to be wider than the normal compound family. This is where property rights are concerned. If property is given to, say, "the X extended family", that property legally goes to the lineage. To follow the legal concept of the family in the matter of distribution of the property would, of course, be chaotic as thousands of claimants would be involved. Usually, in the case of personal property, it is distributed among the nearest ascertainable relations. If the subject-matter is land, it is preserved for the use and enjoyment of all members of the lineage group.

We can now arrive at the conclusion that apart from the disposition of property, in which case family may include any kin whomsoever, family law in Sierra Leone deals with elementary and compound families, and it is in this light that we shall discuss Sierra Leone Family Law.

The legal significance of the family

The legal significance of the family stems from the fact that important legal issues between husband and wife and their relationship with third parties are decided by reference to it. In customary law, for example, marriage affects the acquisition or disposition of property by a woman, the consent of whose husband is generally required in order to give the transaction legal force. This was the same under the general law with a married woman before 1933.[1]

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1. See the Imperial Statutes (Law of Property) Adoption Act, cap. 18 of the revised Laws of Sierra Leone, 1960.

A man who inflicts a wrong on a woman may also find himself civilly liable to the woman's husband or to her father if she is unmarried and she is living under her father's protection. Under customary law, again, certain offences committed against the state by injury to an individual were formerly deemed to be legal injuries to that individual's family, for which the wrongdoer must make recompence either with his own life or with material compensation.

In the general law, because of family connections, certain persons may be held vicariously liable for the offences of others.[1]

Examples of the significance of the family may also be found in the law of evidence: thus, in appropriate situations, a spouse may be incompetent or uncompellable to give evidence in a case in which the other spouse is involved.[2]

Succession to property on a person's death intestate provides another example of the importance of the family. The fact that the deceased belonged to a family would determine the distribution of his estate. It is only in rare cases that an outsider succeeds to the property of a deceased who dies intestate, and when this happens, it is in the absence of a living ascertainable member of his family.[3]

Finally, there are rights and duties in favour and owed by spouses inter se and in respect of their children, all of which result from the family relationship.[4]

There are other areas [5] of the law in which the family

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1. e.g. s.23 of the Childrens and Young Persons Act, cap.44 of the revised Laws of Sierra Leone, 1960. See further, Chapter 12.
2. See the Courts Act, 1965, and Chapter 8.
3. e.g. In the Estate of Jacob Wyse (dcd.), unreported, decided by Supreme Court at Freetown on 12 February, 1957.
4. These are discussed at length in Parts TWO and THREE herein.
5. e.g. In questions of citizenship and nationality.

plays a significant role, and we have mentioned only some of the principal ones. We intend, in this thesis, to highlight the most important of these areas.

B. FAMILY LAW

Definition of family law

Though in English law the word "family" used by itself may have various meanings, yet in that law the phrase "family law" is used to describe the field of law which concerns only the most intricate domestic relations as between husband and wife, and parent and child.[1] Thus, it is the sociological elementary family with which English family law deals. Certainly, this is part of the family law that would be considered in Sierra Leone, but only part; for African customary laws present what are not found in England, namely, the compound family and the extended corporate groupings of relatives with separate legal identities, and this is equally part of Sierra Leone family law.

Family law or family laws?

As there are different types of families in Sierra Leone, so there are different types of laws that relate to them. The general law, for example, principally pertains to the English-type family - the elementary family - while customary law, in general, and Islamic law, in specified areas, regulate the traditional type families: the compound and other corporate families.

Again, what we call by the single name "customary law" is in substance, customary laws of the various tribes in the country. Basically, similarities may be found in the principles of these customary laws, but marked differences may also be discernible in their institutions and procedures.

1, See Bromley, op.cit., p.1.

In particular, Mende family law has infiltrated a good many neighbouring tribes like the Sherbro, Krim, Gola, Gallina and the peoples of the lower Kono land. This is not so much by reason of territorial contiguity as by the fact that the Mende were in the past of warlike tendency and cultural imperialists - characteristics which resulted in their infiltration into the lands of other tribes. But whereas the Mende actively encouraged an institution like marriage between a man and his mother's brother's daughter, the Sherbro, for example, frowned upon it as incestuous.

Similarly, there are similarities in the family laws of the Temne, Susu, Limba and Yalunka, all of whom belong to a wide linguistic group - the Mande-speaking peoples. These similarities together with points of differences will be dealt with in due course.

One reason for the similarities may be the influence of the Temne who, like the Mende, were also warlike. Another may be the religious and cultural impact of the Mandingo tribe from neighbouring Guinea.[1]

Over the years, there has been tribal migration to the Western Area. The result is that as the peoples of these tribes intermingle and mix with the Creoles in a milieu which is by tradition non-native, major differences in custom are lost in the process and the element that remains becomes coloured with Christian ideas coupled with Creole customs.

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1. The religion mentioned here is Islam. On the influence of Islam in West Africa generally, see J.S. Trimingham: Islam in West Africa, Oxford Clarendon Press, 1959. On Mandingo influence in Sierra Leone specifically, see C.H. Fyfe, The Sierra Leone Inheritance, p.4. The Mandingo tribe with its emphasis on the practise of Islam has had a tremendous influence on the tribes originally settling in the North of Sierra Leone.

Reference has been made here to Creole customs, a point which deserves elaboration. The Creoles have their own customs in marriage, funeral, and in many areas of family life. The question we are faced with is whether these customs, at least the ones that are regarded as binding, fall within the definition of customary law so as to be recognised also by the Courts or whether they are attended by merely social and moral sanctions? The first answer that may come to mind is that they are of no legal relevance; for the Creoles are not natives, and in addition their family relationships are principally regulated by the general law.[1] The latter statement may be true where the Creoles concerned are Christians and choose to marry in the statutory manner. But where the Creoles are non-Christians and choose to "marry" otherwise than in church, registry, or mosque, the answer is not easily ascertainable. Since, as has been argued earlier, there is no law to prevent a Creole from marrying in a customary manner, it is necessary to investigate whether there is a Creole customary law which, in this case, can apply as customary law as we know it.[2] Customary law as is applied in Sierra Leone is defined by statute as:[3]

> "Any rule, other than a rule of general law, <u>having force of law in any chiefdom of the Provinces</u> ..."

Does a Creole customary law come within this description? The phrase "having force of law in any chiefdom of the Provinces" may be subject to two interpretations: first, it may mean that the law must be one which is recognised by and identified with a

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1. The general-law courts would, therefore, not recognise as binding on them any Creole customary law.

2. i.e. Such law that can have a binding force on a customary law court.

3. S.2 of the Local Courts Act, 1963, No.20 of 1968.

particular area in the Provinces; for example, Mende customary law with Mende land and Temne customary law with Temne land. In short, the law must be genuinely and traditionally connected with a specific area of the Provinces, not necessarily the lex situs of the tribunal. Secondly, it may mean any law other than the general law which a local court sitting in the Provinces recognises as binding in the particular case before it. If the first interpretation is preferred, then it is submitted, "Creole customary law" is not customary law in Sierra Leone, because it has no reference to any particular area in the Provinces. If, on the other hand, the second interpretation prevails, then the answer to the question depends on what view the local court takes. It is highly improbable, in our submission, that a local court will rule in favour of the application of Creole customary law. It is a law foreign to it and to its judges. If such a case occurs, the local court, if it assumes jurisdiction, will apply either the local customary law or the general law. This, it ought to do in the situation where a Creole chooses to marry according to some tribal law.

Our conclusion, therefore, is that "Creole customary law" is of no legal import, though its moral and social relevance are felt everywhere in the community.

We may also conclude that the different laws already mentioned, namely, the general law, Islamic law and the various customary laws of the tribes together form a single body of laws, i.e. "the law of Sierra Leone". It is, therefore, not out of place to use a single term "family law" to signify this embodiment.

PART TWO

NON-CUSTOMARY FAMILY LAW

INTRODUCTORY NOTE

In comparison with other Commonwealth African countries such as Ghana, Nigeria and Tanzania, there has been little local legislative activity in the family law field in Sierra Leone. To a large extent, therefore, the applicable general family law in Sierra Leone consists of the received English law, statutory and common.

It would seem neither desirable nor useful to attempt to recapitulate here the whole of the English law relating to marriage, divorce, children and succession, within the family as it applies in Sierra Leone; not only is this not necessary, but it would throw the work seriously out of balance. I have, therefore, called attention to the more significant features of English common and statute law as it has been imported to Sierra Leone, and which applies to those areas where there is no local statute.

Where there is provision for the application of Islamic law, I have also tried to call attention to the more significant features of that law in accordance with the Maliki school of the Sunni sect to which the vast majority of Sierra Leone Muslims belong.

I have tried to consider the suitability of each imported law and how it fits in with the rest of the legal system and with the social background of the people of Sierra Leone.

CHAPTER 5

STATUTORY MARRIAGE

Statutory marriage is used in this context to describe a marriage which is celebrated in accordance with the following Acts in force in Sierra Leone:-

1. The Christian Marriage Act [1]
2. The Civil Marriage Act [2]
3. The Foreign Marriage Act [3]
4. The Foreign Marriage (Recognition) Act [4]
5. The Marriage of British Subjects (Facilities) Act [5]
6. The Mohammedan Marriage Act [6]

The Christian Marriage Act provides for marriage services conducted in church, and the Civil Marriage Act for marriages which take place before a Registrar. Marriages under both Acts are monogamous and are designed essentially for citizens of Sierra Leone. The Foreign Marriage Act deals with marriages by parties of whom one at least is a British subject, and it ensures that the marriage so conducted is valid in law as if it had been solemnized in the United Kingdom. The Foreign Marriage (Recognition) Act gives recognition in Sierra Leone to marriages entered into abroad between parties, one of whom at least is a citizen of Sierra Leone, provided the marriage is solemnized in accordance with the provisions of the United Kingdom Foreign Marriage Act, 1892. The Marriage of British Subjects (Facilities) Act provides for cases in which British subjects resident in Sierra Leone wish to marry

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1. Cap.95 of the revised Laws of Sierra Leone, 1960.
2. Cap.97 of the revised Laws of Sierra Leone, 1960.
3. Cap.98 of the revised Laws of Sierra Leone, 1960.
4. Act No.29 of 1966.
5. Cap.99 of the revised Laws of Sierra Leone, 1960.
6. Cap.96 of the revised Laws of Sierra Leone, 1960.

British subjects resident in the United Kingdom. Under this Act, a certificate for marriage obtained in the United Kingdom is valid in Sierra Leone as if the marriage is going to be conducted in Sierra Leone. The Mohammedan Marriage Act does not lay down any rules or procedures governing Mohammedan marriages, but merely recognises the validity of such marriages for all civil purposes and permits all courts in the Western Area, and any other judicial tribunal constituted by law or consent of the parties to receive in evidence proof according to Mohammedan Law of the existence of such marriage.

Our particular concern in this discussion is with marriages taking place under the Christian Marriage Act and the Civil Marriage Act, as it is marriages under these Acts and their legal effects on the parties thereto and their children that constitute the main body of Sierra Leone Non-Customary Family Law. Of marriages under the Mohammedan Marriage Act, quite apart from specific areas, such as married women's maintenance and evidence of spouses, the emphasis is on customary law.

When the Mohammedan Marriage Act speaks of "proof according to Mohammedan law of the existence of a Mohammedan marriage", one would normally expect to see proof of a marriage in accordance with the canons of the sharia as interpreted by the Maliki School of the Sunni Sect. Such proof, of course, would be readily available in a country where Islamic law regulates the day-to-day affairs of persons professing the Mohammedan faith.

Quite apart from the fact that there are no Kadi courts in the country manned by personnel knowledgeable in Islamic Law, and that no qualification in Islamic law is prescribed for a Registrar of Mohammedan Marriages whose duty is to register a Mohammedan marriage after satisfaction that it is in accordance with Islamic law, the vast majority of persons who profess the Mohammedan faith are natives, the Aku Mohammedan élite from Freetown notwith-

standing. The native Muslims regulate their marriages and family transactions to a great extent in accordance with native law and custom. With the more advanced Muslim communities in Freetown, like the Aku and Mandingo, many of whom are well grounded in Islamic education, one would imagine that strict adherence would be made to Islamic law in the contracting of marriages; but as one prominent Muslim told the present writer,"we cannot do so with utter disregard of our custom".[1] An amalgam of the provision of Islamic law and the customs of a particular Muslim community is in practice what is always deemed as a Mohammedan marriage.

A. HISTORY OF STATUTORY MARRIAGE

From the beginning of the settlement in Freetown in 1787, it was the policy of the Directors of the Sierra Leone Company to stamp out polygamy and encourage monogamy.[2] To this end, a chaplain was always at hand to perform the ceremony of marriage according to the rites of the Church of England. This was the only marriage regarded then as legal. The experiment on the early settlers from England and Nova Scotia was successful. The reason was that they professed Christianity. But not so on the Maroons who, for some reason or other, at first, did not profess themselves to be of the Christian religion. A Maroon man would cohabit with one or more women without going through the prescribed form of marriage ceremony.

So disappointed were the Directors of the Company that in 1801, the Governor and Council expressed dissatisfaction at the way the Maroons had been conducting themselves. A Resolution[3]

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1. Personal information from Alhaji Nasiru, Imam of Fourah Bay Mosque, Freetown.
2. See L.E.C. Evans, S.L.S. (O.S.), No.18, 1932, pp.26, 72.
3. Ibid, p.72

of that year provided that :

> "every marriage henceforth to be contracted among the Maroons, be solemnised by the Governor of this Presidency, or in his absence by the senior member of council on the spot during the vacancy occasioned by the want of a chaplain."

The Resolution continued that,

> "no marriage henceforth contracted be valid or legitimate or communicate to the offspring of each marriage the rights of inheritance or succession, unless solemnised as stated above."

The Resolution seemed to have had very little or no impact at all on the Maroons; for they ignored it and preferred to contract marriage before a justice of peace. Up to 1808, although these unions were apparently monogamous, since a justice of peace would not tolerate any party to a marriage who appeared to him to be already in cohabitation with another spouse, they were not regarded as legal.

Thus gave rise to the Act of 8 October, 1808.[1] This Act is the first documentary evidence of the existence of a Marriage Act in Sierra Leone. Though its objects were to legitimise children of Maroons born before the first day of December, 1808, and to regulate marriage among the Maroons, the Act for the first time recognised the existence of a legal marriage between the parties where after taking an oath in the presence of credible witnesses that they had no lawful wife or husband living, the parties to the marriage were registered as husband and wife by the Justice of the Peace.

It can be seen from the above that up to 1808 a legal marriage could take place in only two sets of situations. First, where the marriage was celebrated in accordance with the rites of the Church of England. Secondly, in the case of Maroons, where the parties acknowledged each other as husband and wife before a Justice of the Peace.

A marriage celebrated by a Christian Minister of Religion

1. For a full text of this Act, see ante pp. 111 - 112.

other than a Minister of the established Church of England, was still not legally recognised. Nor was a de facto marriage between a man and woman, which to all intents and purposes was monogamous, but which had not been formally celebrated in a public place or registered either because the parties had not received perfect instruction in the Christian religion as was required in the case of marriage in church, or because of some other reason.

An Ordinance to regulate marriages in the Colony of Sierra Leone and Its Dependencies passed by the Legislative Council on 10 March, 1859, brought these marriages within the class of legal marriages.[1] The Ordinance validated retrospectively a marriage performed by a Minister of Religion other than a Minister of the Church of England, commonly known as marriages by Dissenters.[2]

So far as a de facto marriage was concerned, it became legal if, within a year from the coming into operation of the Ordinance, the parties solemnized the marriage ceremony before a clergyman of the Church of England, or any other Minister of the Christian religion.

The 1859 Ordinance for the first time required parental consent in the case of marriage of persons under age. Such consent could be given by the Chief Justice of the Colony upon petition to him on that behalf, where a parent or guardian was non compos mentis, or absent from the Colony or otherwise incapable in law or in fact of consenting, or induced unreasonably and improperly to withhold the consent, or was dead. Under the Ordinance

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1. Ordinance of 10 March, 1859. See A. Montague: The Ordinances of the Colony of Sierra Leone, Vol.II, 1858-1860, p.53.
2. The Ordinance followed in the wake of the St. Helena Marriage Ordinance No.1 of 1850, which took the first step in the Colonies to enable Ministers of other Christian religious persuasions to celebrate valid marriages in a form other than in accord with the rites of the Church of England. See Zabel, Shirley: "The Legislative History of the Gold Coast and Nigerian Marriage Ordinances", [1969] J.A.L. 64.

persons under age could only marry by special licence.

The Ordinance also provided for the compulsory registration of all marriages taking place before Ministers of religion. A marriage register book was to be kept in every place of divine worship where marriages could be celebrated. A marriage entry in the register should stipulate whether the marriage was had by banns or licence, and if both or either of the parties married by licence was under age, and not a widow or widower, that the requisite consent was obtained. These particulars must be followed by the signatures of the officiating Minister, the parties married, and two attesting witnesses.

The immediate forerunner of the present Marriage Acts is the Protectorate Marriage Ordinance, 1903.[1] This Ordinance, which was designed to regulate the law of marriage between Christians resident within the Protectorate, did not apply to natives except those Christian natives who obtained special permission from the District Officer of the district in which they were resident.[2]

The provisions of the Ordinance were far-reaching indeed. In addition to the usual stipulations with respect to registration, it required one of the parties to an intended marriage to give notice in writing to the Registrar of the district in which the marriage was intended to take place.[3] After being satisfied by affidavit that (a) one of the parties to the intended marriage had been resident within the town or village where the marriage was intended to be celebrated for a period of at least fifteen days, (b) the requisite consent had been obtained where necessary, and (c) there was no impediment or any lawful hindrance to the

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1. Ordinance No.19 of 1903.
2. S.48.
3. S.6.

marriage, the Registrar issued a certificate.[1] A caveat could be entered against the issue of a certificate by any person whose consent was necessary for the marriage, but which had not been obtained, in which case a court order was necessary.[2] As an alternative to the Registrar's certificate, the Governor could issue a licence.[3]

Other innovations included grounds on which a marriage was rendered null and void. These were:- (a) where the parties were within the prohibited degrees of consanguinity and affinity in accordance with the law of England; (b) where both parties knowingly and wilfully acquiesced in its celebration under a false name or names, or without the Governor's licence or the Registrar's Certificate as the case might be, or by a person not being a licensed minister.[4] Penalties were imposed for bigamy,[5] and in the case of an unmarried person, for knowingly marrying someone who was already married,[6] and for procuring marriage by the making of a false declaration,[7] or by personation.[8]

The present Christian Marriage Act and Civil Marriage Act were enacted in 1907 and 1910 respectively. The latter is to be read as one with the former.[9] The Christian Marriage Act, applicable throughout the country, repealed the previous marriage ordinances. Its distinctive feature with respect to parties was that whereas a non-native could marry under it after either the publication of banns or the obtaining of a licence, it was

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1. S.10.
2. S.13.
3. S.13.
4. S.30.
5. S.38.
6. S.39.
7. S.40.
8. S.44.
9. S.1, Cap. 97 of the revised Laws of Sierra Leone, 1960.

obligatory on a native to have banns published before marriage could validly take place. Likewise the Civil Marriage Act was not formerly applicable to a native, probably because the Act did not require the publication of banns. The reasons for these discriminatory provisions have been held to be two-fold.[1] First, it was felt that marriage was a transaction which affected both Church and State, with the Church having a more vital role to play. A native who was a Christian could be a first generation Christian as Christianity went into the Protectorate at a much later date than it reached the Colony. The Church, therefore, sought to exercise as much control over the native Christians as it had already done over the non-natives. With this aim in view, it was believed that the period which elapsed between the publication of the banns could be used to meet the parties to the intended marriage and instruct them in the Christian doctrine in order to enable them to appreciate more fully their responsibilities as Christian families. Secondly, since the publication of banns allowed for greater publicity than the issue of a licence, it provided ample opportunity for notifying relatives or other interested persons of the parties to the intended marriage who might be living away from the place of the celebration of the marriage.

Whatever be the merits of these arguments, when the country achieved independence, with the institution of a common nationality status, the need arose for a unification of legal status and the accompanying privileges in all spheres but, more so, in regard to the opportunities of marriage. The Christian Marriage (Amendment) (No.2)[2] Act and the Civil Marriage (Amendment) (No.2) Act [3] have

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1. Personal communication: This is the view held by Canon H.A.E. Sawyerr, Principal of Fourah Bay College. Canon Sawyerr spent a good deal of his missionary life in the Provinces at a time when natives were obliged to publish banns before they could contract Christian marriages.

2. Act No.48 of 1965.

3. Act No.49 of 1965.

now put natives on equal footing as non-natives with respect to these opportunities.[1]

B. PRELIMINARIES OF A STATUTORY MARRIAGE

The engagement

An enagement or a gage [2] or "put stop" as it is commonly known in Mohammedan and Creole societies respectively normally precedes a statutory marriage. It marks the readiness of the parties to enter into the bonds of marriage. Sometimes also, where there has not been a promise of marriage previously made by either side, the ceremony constitutes that promises.

(i) Time of engagement

(a) Christian and Civil marriages

The engagement takes place only when the parties have reached marriageable age. In olden days, a girl and a boy must usually be 18 and 21 years of age respectively before either could marry. These were the ages at which a girl or boy was considered ripe for confirmation in the Christian Church. A person who was thus confirmed could marry thereafter as confirmation was regarded as the advent to adulthood. In recent times, however, confirmation no longer marks the attainment of puberty since young persons are now confirmed at an earlier age than before. The minimum marriageable age limit, nevertheless, seems to remain unaltered.[3]

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1. The Amendment Acts now make it possible for natives to marry after publication of banns and to contract marriage under the Civil Marriage Act. See s.1 of Act No.48 of 1965, and s.1 of Act No.49 of 1965.

2. Gage is a Creole word, an abbreviation perhaps of the English word "engagement".

3. This is not a legal rule but one of practice and it may vary in accordance with the circumstances of the parties.

(b) Mohammedan marriage

The gage takes place about a week after the "putting of the Kola" [1] if the marriage is imminent.

Where for some reason, the parties are not yet ready to marry, it may occur after a longer period has elapsed after the ceremony of putting the Kola. What is important is that the gage should take place very close to the time at which the parties intend to marry.

(ii) Procedure

(a) Christian or Civil marriages

On the day agreed upon by the families of the man and the woman, a delegation is sent late in the evening from the man's family to the woman's house where representatives of the woman's family will be waiting to receive them. A covered calabash is brought containing a bible, the engagement ring, bitter kola, needles, alligator pepper (ataray) and a bottle of brandy or whisky. In return, the woman's family provides some drinks. On reaching the house, the delegation is deliberately kept waiting outside for a while whilst all doors leading to the house are firmly locked. After a barrage of knocks at the main entrance, the mission discloses its intention metaphorically, saying that it has been sent in quest of a beautiful rose [2] in the garden of the premises.

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1. This is a ceremony by which the man and his family express their intention to have the woman as wife of the man. It is similar to betrothal in customary law. It simply takes the form of a delivery of two or more kola nuts with the message of intention through a messenger sent by the man's to the woman's family.

2. In Sierra Leone, the rose is regarded as one of the most valuable flowers. The prospective bride is referred to as a "rose" probably because of her value to her parents. Giving a rose to a person is a sign of affection. This practice probably originated from the Creoles who were the first to have had contact with Western civilization where it is common for friends to give flowers to friends.

At first the delegation is not let in, on the ground that it may consist of enemies who have gone to cause harm to the occupants of the house. The mission insists that it intends no harm but has come for a worthy cause. After much exchange of words in order to establish the friendly and harmless nature of the visit, the delegation is finally allowed into the house.

The visitors renew their request for the beautiful rose, and one teenage girl after another is presented to them and repeatedly asked whether they have seen the rose. Each time they reply in the negative.

Eventually, the woman, elegantly dressed, is presented to them, and they exclaim that they have seen the object of their mission. After a short prayer, the bible and the ring are handed over to the young woman and the ceremony ends with a party.

(b) Mohammedan marriage

When the gage is in contemplation the same messenger whose services were enlisted for the ceremony of putting the kola, is usually again sent to the family of the woman, in order to have a date fixed for the wedding. A date is not fixed on the first visit but the head of the woman's family tells the messenger that the paternal and maternal families of the woman must first be consulted. He is shown the day on which he should return.

Meanwhile, a representative of the man's family, usually an elderly man of standing in the community, fixes the date beforehand with the head of the woman's family, so that on the second visit of the messenger, he is shown the date and he communicates it to the head of the man's family. Sometimes, however, especially if the marriage is to take place within a short time from the gage, time is vital and the date for the engagement is agreed upon with the messenger on his first visit. Apart from the date, the messenger is also told of the venue where the two

families should meet in order to perform the gage ceremony. Against the appointed date, the man's family prepares the following items which must be given to the woman's family:-

(i) The "dowry": The amount varies in accordance with the financial situation or importance of the man or his family. Formerly, it used to range from Le.10 to Le.40. Now, the minimum is about Le.40 and a prosperous man can give Le.200 or more. In the olden days, coins [1] must be given as dowry. Nowadays, bank notes are acceptable, but no cheques are allowed.[2] The "dowry" is primarily meant for the equipment of the bride and the purchase of the paraphernalia of the matrimonial home. (ii) A sum of money intended for the woman's family: This amount, though a token gift, plays a similar role as the marriage consideration in customary law marriages. (iii) A calabash, containing at least 100 kola nuts. (iv) A calabash containing bitter kola, and alligator pepper (ataray). (v) A calabash full of cooked rice flour (fura). (vi) Two packets of sweet biscuits. (vii) A mug of ginger beer. (viii) An envelope containing the gage ring.

The Mandingo Muslims omit items (iv) and (vii), and instead of calabash as container they use an Indian mat in which they wrap the above items. Items (iv)-(vii) are symbolic of the ambivalence of married life with its mixture of strains, stresses and happiness.

On the evening of the appointed date, a procession preceded by unmarried girls carrying the above items and singing songs in praise of Allah and the prophet Mohammed, leaves the man's house. When the group arrives at the venue, the messenger asks for admission, which is not granted at the first request.

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1. Half-crowns.

2. Cheques are not allowed probably because of fear of dishonour.

After making repeated pleas for admission, he is eventually allowed to enter along with his train. As if he has no prior knowledge of it, a representative of the woman's family enquires into the purpose of the mission. The messenger from the man's family replies explaining why they have come. Speeches are delivered first by a female and then by a male representative of the woman's family. The request is eventually granted and the floor is then open to everybody to comment on the qualities of the woman.

The items which have been brought are checked and certified to be correct by a female elder of the woman's family, after which the leader of the whole assembly (usually an Imam) concludes the business of the day with a prayer for the couple and their respective families.

(iii) Legal effects of the engagement

In regard to marriages under the Christian and Civil Marriage Acts, the engagement constitutes the promise to marry, if there has been no previous promise breach of which might give rise to an action for damages.[1] For a Mohammedan marriage no breach of promise lies. The difficulties surrounding the choice of law in the event of an alleged breach where the parties to the agreement had not stipulated beforehand under which particular legal system they intended to marry, have already been discussed earlier in this thesis.[2]

Our concern here, therefore, is the legal effect of the engagement where it has been established that the parties intended to contract marriage under either the Christian Marriage Act or Civil Marriage Act. An agreement to marry is at common law like

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1. See s.29 of the Christian Marriage Act, cap.95.

2. Chapter 3.

any other simple contract. Thus, in order for the agreement to be valid there must be offer and acceptance accompanied by lawful consideration, intention to create legal obligations and legal capacity. The agreement must not be vitiated by misrepresentation, mistake, duress and under influence, and the object must be lawful.

Of particular interest, a promise to marry may be oral but no action for breach of promise lies unless the testimony of the complainant is corroborated by some other material evidence.[1] Thus, in Williams v. Macfoy,[2] the plaintiff alleged that the defendant had asked her to marry him, saying he had conceived a genuine love for her and that she agreed. It was held that two pieces of evidence, namely, a letter written by the defendant to the plaintiff's mother, in which he said "I shall marry her" and the evidence of a witness who saw the defendant four years later when he admitted the promise but put forward two reasons for not carrying it out, namely, that she had been rude to his mother and had used fetish, were sufficient material evidence to corroborate the promise. Mere silence is not an admission unless it is reasonable to expect that if the statement made about the promise to marry were untrue, it would be met with an immediate denial.[3]

The mutuality of the promises by each party to marry the other constitutes the consideration, although some other kind of valuable consideration may be given than an express promise to

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1. Bessela v. Stern (1877) 2 C.P.D.265.
2. Unreported. Decided by the then Supreme Court at Freetown on 3 December, 1937. See the Supreme Court Records, Vol.2, 1937, p.198.
3. See Bowen, L.J. in Wiedemann v. Walpole [1891]2 Q.B. 534.

marry. Thus, in the English case of Harvey v. Johnston,[1] it was held that the plaintiff's going to Ireland at the request of the defendant to marry him was valuable consideration for the promise.

Perhaps because infants cannot be properly said to have reached the age of discretion so as fully to appreciate the responsibilities of marriage, the law affords them protection if they are reluctant to execute promises to marry entered into during infancy.

At common law, an infant can sue but cannot be sued upon a contract to marry. S.2 of the United Kingdom Infants Relief Act, 1874,[2] goes further to stipulate that no ratification made by a person after reaching full age of any promise or contract entered into during infancy, whether or not there is new consideration for the promise or ratification, shall give rise to a cause of action. Thus, in the English case of Coxhead v. Mullis,[3] the parties became engaged while the defendant was still an infant. When he came of an age they continued on the same terms as before. Later, the defendant broke off the engagement. It was held that their relationship after the defendant's reaching his majority was no more than a ratification of the promise made during infancy and the plaintiff could not succeed in her action for breach of promise.

On the other hand, a fresh promise made by a party after he has come of age is actionable. This was the case in Ditcham v. Worrall[4] where three months after the defendant's 21st birthday,

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1. (1848) 6 C.B. 295.
2. Applicable in Sierra Leone as a statute of general application.
3. (1878) 3 C.P.D. 439.
4. (1880) 5 C.P.D. 410.

he requested the plaintiff to fix a date for the wedding and assented to the date suggested by the plaintiff.

On grounds of public policy, there are certain agreements pertaining to marriage which the courts have regarded as illegal. So would be the case if one of the parties to an engagement to marry is already married.[1] But not so where the marriage still technically subsists, though in reality it is dissolved, as in the case where an engagement takes place after a decree nisi has been obtained by one of the parties.[2] In Macfoy v. Reffell,[3] the then Supreme Court of Sierra Leone was faced with the novel situation whereby the defendant, James Reffell, promised in 1935 to marry the plaintiff, Olive Macfoy, but only in consideration of her allowing him to have sexual intercourse with her, and upon the condition that such intercourse should result in the birth of a child. The plaintiff agreed to the proposal and allowed the defendant to have connection with her in 1935, as a result of which a child was born in 1936. A year later, the defendant affirmed his willingness to be bound by the agreement of 1935, but he never fulfilled his promise.

Relying on the House of Lords decision in the case of Fender v. Mildmay, [4] counsel for the plaintiff argued that the defendant's clear indication that he regarded himself as bound by the agreement made in 1935, given in 1936 after the illicit intercourse had taken place, was free from the taint of the original bargain and could be sued upon as the basis of the claim in this case. The court rightfully rejected counsel's contention on the

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1. Wilson v. Carnley [1908] 1 K.B. 729.
2. Fender v. Mildmay [1937] 3 All E.R. 402.
3. Unreported. Decided by the Supreme Court at Freetown on 14 August, 1942. See the Supreme Court Records, Vol.3 (1942), p.304.
4. [1937] 3 All E.R. 402.

ground that the factual situations in both cases were different. Whereas in Fender's case, the plaintiff made two promises to marry before divorce proceedings were instituted, which were obviously illegal, but after the decree nisi, instead of affirming the previous promises, he made a fresh promise that he would marry the defendant; in the present case, no fresh promise was made after the illicit sexual connection which resulted in the birth of the child, but merely an affirmation of the promise made before the illicit sexual relations began. In the law of contract, a clear distinction is drawn between a fresh promise made after one tainted with illegality and an affirmation of a promise that is originally illegal.[1] The former is enforceable, provided a fresh consideration is given for the fresh promise, whereas the latter is void and unenforceable even though a fresh consideration may be given for it. The Court, therefore, had no hesitation in holding that Macfoy failed in her action, though considering the justice of the case, Graham Paul, C.J. opined that the defendant had a moral obligation to provide some compensation to the plaintiff, since to her detriment she had relied on the defendant's word of honour.

This case serves as a warning to young women who, being desperate to marry, easily fall prey to the dictates and amorous blandishments of unscrupulous men. Socially, extra-marital intercourse resulting in the birth of a child is not as reprehensible in present-day Sierra Leone as it might appear to have been twenty years ago. Evidence of the change of outlook could be seen in 1965 when it was sought by legislation to make all children born to a citizen of Sierra Leone, whether married or not, as legitimate.[2] One may submit that the interests of society would be

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1. See Anson's Law of Contract (23rd ed. by A.G. Guest), 1969, pp. 3640367.

2. For details, see Chapter 12, pp.404-406.

better served if legal validity were afforded to contracts such as the one in Macfoy&s case than if they were totally disallowed. This is not, of course, a plea for the encouragement of promiscuity and immorality. Where it is found, as in Macfoy's case, that the parties' avowed intention is to marry - which could have been upheld but for an immoral condition attached to it - the condition ought to be declared void without prejudice to the validity of the contract itself based on the mutual promises to marry. Miss Macfoy was surely by any standards more virtuous than a woman who, without any such condition being imposed upon her, voluntarily gives herself to a man after mutual promises of marriage have been made, and who must succeed in law in an action for breach of promise if the man later refuses to marry her.

(iv) Remedies for breach

A breach of promise occurs where one party unjustifiably refuses by words or conduct to marry the other after the making of the contract to marry. A promise to marry which does not ascertain the time is a promise to marry within a reasonable time upon request.[1] The breach may also be anticipatory as in the case where one party marries someone else other than the plaintiff whom he had promised to marry.[2] No specific performance but only damages are awarded for a breach of promise of marriage. In this regard, s.29 of the Christian Marriage Act provides:

> "In no case whatsoever shall any suit or proceeding be had in any court or before any jurisdiction whatsoever to compel the celebration of any marriage by reason of any promise or marriage contract entered into, or by reason of seduction, or of any cause whatsoever which shall arise after the passing of this Ordinance, any law or usage to the contrary notwithstanding:

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1. Harrison v. Cage (1698) 1 Ld. Raym. 386.

2. Short v. Stone (1846) 8 Q.B. 358.

> Provided always that nothing herein contained shall prevent any person aggrieved from suing for, or recovering, damages in any court, or by any proceeding wherein and whereby damages may be lawfully recovered for breach or promise of marriage or for seduction or other cause as aforesaid."

(v) Justification for breach

A person against whom a breach of promise action is taken is entitled to two types of defence. First, he can set up any general defence available to a defendant in an action for any breach of contract, namely, incapacity, misrepresentation, mistake, duress, undue influence and illegality, or he can plead that because of what had transpired between him and the other party after the agreement came into force, he ought to be exonerated if he now refuses to execute his promise. Thus, in the English case of Davis v. Bomford [1] it was held a good defence and evidence of discharge by agreement where the plaintiff and the defendant had discontinued correspondence for a long time. Such discontinuance of correspondence, it is submitted, must occur through the deliberate act and intention of the parties, so that if the parties stop seeing or writing to each other for some extraneous reason as, for example, one of them is on an expedition in a distant or remote place from where it is impossible to communicate with the other, an agreement to discharge each other cannot be inferred however long the break in correspondence may be particularly if the defendant is still single.

The defendant can also plead that before the defendant issued the writ, he, the defendant offered to perform the contract of marrying the plaintiff but that the plaintiff refused.[2]

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1. (1860) 6 H & N 245.
2. Taylor v. Davies, 1950-56 ALR S.L. 124 per Kingsley, J. approving Halsbury's Laws of England, 2nd ed., Vol.16, p.558.

Secondly, the defendant can show that since his entry into the agreement with the plaintiff, he has discovered a special peculiarity with the plaintiff which justifies him in refusing to marry her.[1] Thus, one party may prove that the other suffers from some moral and physical infirmity which makes him or her unfit to marry.[2] At common law, it would also be a good defence if the plaintiff is insane. It is doubtful, however, whether in Sierra Leone, insanity would be a good defence since it is not a ground for divorce under the Christian and Civil Marriage Acts.

(vi) Damages for breach of promise

The common-law position on the question of damages for breach of promise of marriage was put quite succinctly by Wills,J. in the case of Berry v. Da Costa:[3]

> "The jury are not limited to the mere pecuniary loss which the plaintiff has sustained, but may take into consideration her injured feelings and wounded pride."

Thus the damages recoverable may go far and beyond what a plaintiff in an action for breach of other contracts would be entitled to. These may be classed under two heads, namely, general damages and special damages.[4]

Under general damages would fall claims for loss of consortium and in the case of the woman, for deprivation of the status of a married woman. In assessing these damages, regard will be had to the position of the offending party, usually the man, in the community; for a man of standing who has promised

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1. See Bromley, 3rd ed., p.21.
2. See Jefferson v. Paskell [1916] 1 K.B. 57, direction of Phillimore, L.J. C.A. at pp.70 and 73.
3. (1866) L.R. 1 C.P. 331, 333.
4. On the common law position for damages for breach of promise of marriage generally, see Bromley, Family Law, 3rd ed., 1966, pp.23-25.

his hand in marriage to a woman, should expect the woman to live up to the expectations of both the man and other members of the society. So that a man who lives in grand style and who jilts his fiancee would be expected to leave her, as far as monetary compensation is concerned, in no inferior situation as she would have been if the marriage had taken place. The position of the woman and her prospects of marriage, insofar as they are affected as a result of the breach, are also important factors in determining the quantum of damages. A virgin who has been seduced and abandoned is likely to receive more by way of damages than a common prostitute finding herself in a similar position. Punitive damages may even be awarded in the former case, whilst in the latter only a solation for the treatment meted out to her will be awarded. Thus, in Williams v. Macfoy,[1] Macquarrie, J. refused to award punitive damages in a case where the defendant refused to marry the plaintiff who had had two children by different men. Special damages may be awarded to recover expenses incurred by the plaintiff in contemplation of the marriage. Thus, the engagement ring, bible, furniture to be used in the matrimonial home and financial transactions entered into for the purchase of the bridal dress and household paraphernalia are items recoverable under this head. So would be expenses incurred on the hiring of halls for the entertainment of guests at the wedding feast, the printing of invitation cards for the wedding, and the purchase of provisions and refreshments for the celebration. It is doubtful whether a claim for special damages would lie for the maintenance and education of an illegitimate child who is a product of an

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1. Unreported. Decided on 3 December, 1937, by the Supreme Court at Freetown. See the Supreme Court Records, Vol.2 (1937), p.198.

intimacy between the plaintiff and defendant in contemplation of marriage: In Macfoy v. Refell [1] a claim for special damage under this head was made in the pleadings but was dropped by the plaintiff's counsel before consideration could be given to it by the court. Also in Williams v. Macfoy [2] the court did not give a ruling on the issue since it was found as a fact that the defendant was given adequate financial assistance to the plaintiff in order to maintain the two children born of their intimacy. On a balance of probabilities, however, it would be safe to assume that Sierra Leone courts would not award damages in such a case. A proper remedy, in my submission, would be for the mother to seek and obtain an affiliation order against the putative father in bastardy proceedings.

Gifts: Generally speaking, at common law, where a person voluntarily and without fraud, duress or undue influence makes a gift of property to another, such gift is not recoverable if the donor changes his mind.[3] On the other hand, if the gift is not transferred to the intended donee but the donor merely promises to do so, the donee cannot succeed in an action for breach of contract should the donor fail to transfer the gift, unless the promise was under seal or consideration for the promise has been given by the donee.[4] These rules apply with equal force to gifts between engaged couples but with one reservation. In the case of gifts which are in contemplation of marriage, the English case law before 1970 seems to be that they are recoverable by the

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1. Unreported. A decision of the Supreme Court at Freetown on 14 August, 1942.
2. Unreported. Decided by the Supreme Court at Freetown on 3 December, 1937.
3. Milroy v. Lord (1862), 4 De G.F. & J. 264.
4. Ibid.

innocent party if the marriage does not take place.[1]

But in Sierra Leone, the position is not so clear-cut. In Cole v. Macauley [2] the plaintiff's step-son was engaged to the daughter of the defendant. After the engagement, the relatives of the prospective husband sent money to the defendant for the purchase of the bridal dress. The prospective wife admitted that the money was paid to her and that she spent it. The marriage did not take place because the plaintiff broke off the engagement. In the Magistrate's Court, judgment was given in favour of the plaintiff, but on appeal to the Supreme Court, Graham Paul, C.J. in reversing the decision, had this to say obiter: "There may be or may not be some recourse against the prospective bride if she was to blame for the contract of marriage failing."

Apart from this case, there is a dearth of authority on the issue. The reason for allowing the recovery of these gifts is that they are conditional gifts which become absolute only on the celebration of the marriage. At times, it is difficult to draw a sharp distinction between a gift which is in contemplation of marriage and one which is not; for the question that always comes to mind is whether one party would have given the other any gift whatsoever if marriage had not been in the contemplation of both parties. Pre-engagement gifts, of course, would steer clear of this doubt, as these are based on merely friendly considerations, but not so with gifts after the parties have become engaged. The answer has been sought in the nature and character of the gift. Bromley [3] suggests that if the gift is made to

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1. Jacobs v. Davis [1917] 2 K.B. 532; Cohen v. Sellar [1926] 1 K.B. 536; Robinson v. Cummings (1742), 2 Atk. 409.
2. Unreported; decided by the Supreme Court at Freetown on 6 August, 1940.
3. Family Law, 3rd ed., p.28.

the donee as an individual, then it is an ordinary gift and cannot be recovered unless the giving was induced by fraud or undue influence, but if it is made as the donor's future spouse then it is one in contemplation of marriage and recoverable. Therefore, gifts such as an engagement ring and furniture for the matrimonial home could be gifts in contemplation of marriage, whereas gifts such as jewellery and clothes as ordinary gifts.[1] This classification, it is submitted, is difficult to defend unless there is clear evidence that the donor did not contemplate marriage when making the gift. Since by their engagement the parties have shown a clear intention of their readiness to marry, every substantial gift that passes between them thereafter ought to be regarded as in contemplation of marriage, unless a contrary intention is shown by evidence to the satisfaction of the Courts.[2]

Conclusion

As with many areas of the general law, actions for breach of promise of marriage occupy a place in Sierra Leone Family Law as a result of the adoption of the English common law in Sierra Leone. In this conclusion, we shall examine whether there is justification for their continued existence in Sierra Leone Law.

These actions have been abolished in England by s.1 of the Law Reform (Miscellaneous Provisions) Act, 1970, following the recommendation of the United Kingdom Law Commission.[3] It is, therefore, an irony that they are still maintainable in Siena

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1. Ibid.
2. English law on this matter is very much revolutionized at present. S.3(1) of the Law Reform (Miscellaneous Provisions) Act, 1970, mow provides that "a party to an agreement to marry who makes a gift of property to the other party on the condition (express or implied) that it shall be returned if the agreement is terminated shall not be prevented from receiving the property by reason only of his having terminated the agreement."
3. Law Com. No.26 (Breach of Promise of Marriage), 1969.

Leone. We are not suggesting their abolition in Sierra Leone merely because they have been abolished in England. On the contrary, we intend to assess the arguments both in favour and against their retention before reaching a conclusion as to their place in Sierra Leone Family Law.

The main arguments in favour of their retention in England were stated by the Law Commission as follows:- (i) the action provided a means whereby a girl who became pregnant during the engagement might be able to recover more from the man than she could obtain from affiliation proceedings alone;[1] (ii) there was the need for the law to provide a remedy for some of the financial hardships which might result from the ending of an engagement.[2] The salient arguments for their abolition have been summarised by Cretney [3] as being: (i) that it was contrary to public policy to allow the threat of legal action to force marriage on an unwilling party;[4] (ii) that the threat of an action was sometimes used "to compel overly-apprehensive and naive defendants into making settlements in order to avoid the embarrassing and lurid notoriety which accompanied litigation."[5]

The arguments for the retention of the actions are, in our submission, completely inapplicable to Sierra Leone. Firstly, in the few actions for breach of promise of marriage that have been tried in Sierra Leone, general damages have not been awarded. On the contrary, the courts have shown a tendency to depart from the principle for the award of general damages as established by

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1. Ibid., para.13.
2. Ibid., para.18.
3. 33 M.L.R. 534.
4. An early statement to this effect was made by Lord Mansfield in Atchinson v. Baker (1796) Peake Add. Cas.103.
5. Pavlicic v. Vogtsberger, 136 A 2d.127 (1959) cited by Cretney, op.cit., p.534.

Willis, J. in Berry v. Da Costa.[1] Thus in Taylor v. Davies,[2] Kingsley, J. showing a distaste for the action, said:

> "There has long been a school of thought which has held that breach of promise actions should be abolished, the argument being that the plaintiff has invariably escaped to her benefit, of course, what must have turned out a disastrous marriage. I am satisfied that this is the case here, so that even had I found for the plaintiff the damages on a general score, at any rate, would have been purely nominal."

That the attitude of the Sierra Leone courts remained the same even where a child was born to the engaged couple before the man was in breach of promise to marry is evidenced by the judgment of Graham Paul, C.J. in Macfoy v. Reffell, to which case we have already referred.[3]

Secondly, as to the financial hardship which may result from the ending of the engagement, a party can, if she is able to prove damage and that there was an intention to create legal relations, sue in contact for the recovery of such financial loss; but a blanket action for breach of promise of marriage would not be an appropriate remedy.

We, therefore, submit that actions for breach of promise of marriage ought to be abolished in Sierra Leone since they do not seem to be serving any useful purpose. We adopt the main arguments for the abolition of the actions in England and, in particular, we stress the idea of public policy. Experience has shown that marriage is one institution into which people should not be forced to enter if they are not fully prepared or have the

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1. (1866) L.R. 1 C.P. 331, 333; see ante, p.168
2. 1950-56 A.L.R. S.L. 124.
3. Ante, p.165

slightest disinclination for it; it will not be in their own interest and in the interest of society. In this regard, Sierra Leone customary law seems to be far ahead of the general law. In customary law, the parties are free to break off their betrothal at any time without incurring liability for breach of promise. We must, however, concede that although we advocate the abolition of the breach of promise of marriage action, a party in breach ought not to benefit from his conduct to the financial disadvantage of the innocent party. Therefore, gifts and presents given in contemplation of marriage by the innocent party to the party in breach ought to be refunded.

CHAPTER 6

THE ESSENTIALS OF A VALID STATUTORY MARRIAGE

A. MARRIAGE UNDER THE CHRISTIAN AND CIVIL MARRIAGE ACTS

(i) Preliminary Formalities

In Sierra Leone, the degree of state control which is exercised over the preliminary formalities of marriage under the Christian Marriage Act is very slight. Religious bodies enjoy a considerable amount of latitude in this respect. Unlike some other British ex-dependencies like Nigeria, where the parties to an intended marriage must obtain either a certificate from the Registrar of Marriages or a licence from the Governor of a region, in Sierra Leone, the parties to an intended marriage have a choice either to obtain a licence from the Registrar of Marriages, or to have banns of marriage published. Banns may be published in a public place of worship, but such a place need not be officially approved for the purpose.

If the parties elect to have banns of marriage published, one of them must, two days at least before the first publication of the banns, supply to the minister who ordinarily officiates at the place of worship where the publication is to take place, full names of the parties intending to marry together, with a description of their respective places of residence.[1] Banns must be published in a place where the parties have resided for at least 15 days before the first publication, and if they have resided in different places, banns must be published in these places.[2] If the parties are of different persuasions, then banns must be published in each of the public place of worship of their respective religious denominations.[3] The publication of banns must

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1. S.4 of the Christian Marriage Act.
2. Ibid., s.5(1).
3. Ibid.

take place on three successive Sundays during divine service and before the congregation.[1]

Where the parties choose to marry after obtaining a licence, one of them must appear personally before the Registrar-General, if in Freetown, or a District Commissioner, if in the Provinces or Sherbro Island, and must make a statutory declara- with respect to the absence of an impediment of consanguinity or affinity or any other lawful hindrance to the marriage and that the necessary consents have been obtained, where necessary.[2] Upon satisfied with the facts stated in the declaration, the appropriate issuing authority grants the licence.

As can be seen, it is more expeditious to marry after obtaining a licence than after publication of banns, since in the former no residential qualification is required. The publicity that attends the publication of banns is also absent in the case of the licence.

The marriage may be celebrated within three months of the date of the last publication of banns or of the date of the licence, and the celebration must take place in the presence of at least two witnesses. S.9 of the Christian Marriage Act provides that it shall be lawful for a minister of a Christian denomination to celebrate the marriage within three months of the date of the licence. It is interesting to note that marriage celebrated after the expiry of the period is none the less valid, though the celebrant will be guilty of an offence under s.15 of the Act. But a marriage that is not celebrated in the presence of two witnesses at least is void. Every marriage that is celebrated in a place of public worship must be registered by the officiating minister in a marriage register book kept in that place for that

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1. S.5(2).

2. S.6(1)+(2)

purpose.[1] Non-registration does not invalidate the marriage. It is inconceivable, however, whether this will ever occur since "signing" of the marriage register by the parties to the marriage, their relatives and close friends has, in Sierra Leone, become fashionable and a prominent feature of Christian marriage celebrations.[2]

Marriage under the Civil Marriage Act takes place after the obtaining of either a Registrar's certificate or President's licence. For the purpose of the certificate, the country is divided into districts, each having a Registrar of Marriage.[3] The Western Area constitutes a district and its Registrar is the Registrar-General. The District Commissioners in Sherbro Island and the Provinces are the Registrars in their respective districts.

A party to an intended marriage must give a signed notice of intention to marry to the Registrar of the district in which he or she wishes to marry.[4] After receiving the notice, the Registrar must enter it in a Marriage Notice Book and must display a copy of the notice on the outer door of his office, where the notice should remain until the certificate has been granted or until a period of three months has elapsed.[5]

In order to obtain the certificate, one of the parties must appear personally before the Registrar and swear an affidavit admitting the following facts:- (a) that one of them has

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1. S.11.
2. The custom is prevalent in Sierra Leone whereby relatives and close friends of a bride and bridegroom, who attend the marriage ceremony in the church, sign the marriage register immediately after the couple. To those who are called upon to sign, it is an indication of their closeness and importance to the families of the bride and bridegroom.
3. S.3 of the Civil Marriage Act.
4. S.4.
5. S.6.

resided within the district where the marriage is to take place for at least 15 days before the granting of the certificate; (b) that (i) in the case of a party to the intended marriage whose personal law is customary law, he or she is not less than 18 years of age; (ii) in every other case, he or she is not less than 21 years of age; (c) where one of the parties is under the age of 18 or 21, as the case may be, that the necessary consent has been obtained or dispensed with; and (d) that there is no impediment of consanguinity or affinity or other lawful hindrance to the marriage.[1]

The Civil Marriage Act does not specify what is any"other lawful hindrance to the marriage" on account of which the Registrar can refuse to issue his certificate. As this Act is not intended to be self-sufficient, reference should be made to the Christian Marriage Act in order to ascertain what any other lawful hindrances are. It is submitted that they are grounds on which a marriage is rendered void. Commenting on an identical phrase appearing in the Nigerian Marriage Act, Kasunmu and Salacuse [2] maintain that the grounds are not necessarily grounds which would render a marriage void, since the Registrar could refuse a certificate on the grounds that the residential requirement under s.11(i)(a) of the Nigerian Marriage Act has not been complied with and non-compliance with that section does not invalidate the marriage. It is submitted that this interpretation cannot apply to the Sierra Leone situation. Whereas, the phrase is used alone in s.11(i)(c) of the Nigerian Marriage Act so as to render such interpretation reasonable, in the Sierra Leone Civil Marriage Act the phrase is used after the express mention of impediments

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1. S.7(a),(b)+(c) as amended by s.2 of Act No.48 of 1965.
2. Nigerian Family Law, London, Butterworths, 1966, pp.64, 65.

of consanguinity and affinity which are grounds that render a marriage void. It is a principle of statutory interpretation that where a particular class is spoken of and general words follow, the class first mentioned is to be taken as the most comprehensive and the general words treated as referring to matters eiusdem generis with such class.[1] "Any other lawful hindrance", therefore, would be a hindrance that makes a marriage void in the same manner as consanguinity or affinity. Since the grounds stated in the Civil and Christian Marriage Acts which can invalidate a marriage are: (a) non-obtaining of the Registrar's Certificate; (b) impediments of consanguinity or affinity; (c) the existence of a previous marriage between one of the parties to the intended marriage and a third party; (d) celebration of marriage under a false name or false names with the knowledge of the parties; and (e) celebration in the presence of less than two witnesses;[2] and (a) is not a necessary prerequisite for a Registrar's certificate,whilst (d) is inapplicable to the issue of the certificate, it is submitted that "any other lawful hindrance" would be (i) the parties knowingly giving a false name or names, and (ii) one of the parties being already married.

Before he issues the certificate, the Registrar must see that no objection to the marriage has been filed in the Marriage Notice Book. S.10 of the Civil Marriage Act empowers any person who objects to the marriage to enter a caveat against the issue of the Registrar's certificate by writing the word "Forbidden" opposite the entry of the notice in the Marriage Notice Book. The person who enters the caveat must state in the book his name and address and the grounds on which his objection is founded.

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1. See Maxwell: The Interpretation of Statutes, 12th ed., London, 1969, p.297.
2. S.10 of the Christian Marriage Act, and s.15 of the Civil Marriage Act.

When this happens, the Registrar must refer the matter to the Chief Justice who examines the justification for the caveat by calling upon the person who enters it to show cause why the Registrar's Certificate should not be issued. Upon being satisfied that the objection is groundless, theChief Justice must order the removal of the caveat and the Registrar becomes free to issue the Certificate.[1]

The Certificate must be issued, if at all, not before 21 days and not after 3 months from the date of the notice. The marriage must be celebrated within 3 months after the date of the notice. S.8 of the Civil Marriage Act provides that if the marriage is not celebrated within 3 months of giving notice, the notice and all proceedings consequent thereupon shall be void and fresh notice must be given before the parties can lawfully marry. This section appears to be in conflict with s.10 of the Christian Marriage Act which, after enumerating grounds on which a marriage shall be void (not including celebration after a period of three months from obtaining banns or licence), provides that:

> "Save as aforesaid every marriage celebrated under the provisions of this Ordinance shall be valid until it be lawfully dissolved."

It must be remembered that s.1 of the Civil Marriage Act provides that that Act must be read and construed as one with the Christian Marriage Act, the latter being referred to as the principal Act.

It is submitted, however, that since it is a principle of statutory interpretation that where two statutes are in conflict the latter prevails, s.8 of the Civil Marriage Act supersedes s.10 of the Christian Marriage Act since the Civil Marriage Act is the latter statute. The effect, therefore, is that whereas for marriages under the Christian Marriage Act celebration after

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1. S.11.

3 months from the date of the last publication of banns or licence is not fatal to the marriage, celebration of marriage under the Civil Marriage Act 3 months after notice of intention has been given makes the marriage void.

The President's [1] licence may be obtained in lieu of the Registrar's Certificate. No notice is required as in the case of the Registrar's Certificate but before the licence is obtained, an affidavit must be sworn before the Registrar-General that there is no lawful impediment to the proposed marriage and that the necessary consent, if any, has been obtained. It is not clear whether only one party to the intended marriage should make the affidavit. Probably, the affidavit of one will suffice.

It is noteworthy that the affidavit must be sworn before the Registrar-General only and not before any of the other Registrars in the other districts, although any one of them can be named in the licence as the person before whom the marriage can be lawfully celebrated.

For marriages under the Foreign Marriage Act, a notice of intention to marry must also be given by one of the parties to the Registrar-General.[2] The party giving the notice must have had his or her usual place of abode in any town or village in the Western Area for at least one week. The notice must contain particulars with respect to the names of the parties, their marital status, occupation, age, residence and whether consent, if any, has been obtained. The usual procedure then follows as in the case of a Civil Marriage for the obtaining of the Registrar's

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1. S.9 of the Civil Marriage Act empowered the Governor to issue this licence. Because of the constitutional changes that have taken place since the passing of the Act, the power is now exercised by the President. See s.15 of Constitution (Consequential Provisions) Act, 1971; Act No.9 of 1971.
2. S.2 of Cap.98 of the revised Laws of Sierra Leone, 1960.

Certificate.

How far these formalities, apparently borrowed from English law, fit Sierra Leone circumstances is a question to which we should now address ourselves.

Firstly, the primary object of the introduction of these formalities in England was to avoid clandestine marriages which, in any event, are very rare indeed in Sierra Leone. In Sierra Leone, marriage is an elaborate social occasion and hardly can two people perform the ceremony without the knowledge of many people either in their neighbourhood or from far away.

Secondly, the Registrar of marriage in the Western Area is the Registrar-General of Sierra Leone, and that of each district in the provinces is the District Officer of each respective district. The duty imposed on the Registrar by the Marriage Act is just incidental to their numerous administrative activities and almost invariably, in practice, that duty is delegated by them, though unlawfully, to some junior officer in their departments since the Registrars themselves may be too busy on some more important matter in and out of their offices. Note that a district officer is expected to make frequent tours throughout the chiefdom in his district. It is only in very rare cases, and there is evidence that they occurred only during the colonial period, that the Registrars were zealous that the formalities under the Marriage Acts were complied with.

One example in which an expatriate district commissioner in 1938 insisted that the letter of the law was complied with was an incident in which a Roman Catholic Priest was threatened with prosecution under the Christian Marriage Act, because he had celebrated a marriage at Bonthe Sherbro between two Syrian nationals, one of whom had not resided in Bonthe for at least fifteen days, as required by the Christian Marriage Act, and the banns of the

marriage had not been published on three consecutive Sundays but three times of which two were not on Sundays.

Replying to a query [1] on the issue, the Reverend Father Bauman, the Roman Catholic Priest concerned, said:-

> "It is perfectly true that the said marriage took place on last Sunday, 9th instant, and the duplicate certificate has already been sent to the Registrar. In doing such, I believed to be perfectly in the keeping of the law. I had been told that the law requires either a licence or three consecutive publications. These (publications) were given on New Year's Day, the Sunday following, and on Epiphany, last Thursday, the day of public worship. Such I had been told long ago was required and not necessarily three Sundays."[2]

From the wording of s.5(2) of theChristian Marriage Act, the information given to the Reverend Father on the publication of banns was definitely wrong since that section specifically requires publication on "three successive Sundays" or "three Sundays following each other" on which church services are held.

Not being satisfied with the explanation of Father Bauman, the District Officer, Bonthe, who seemed to have taken the correct view on the matter, appealed to the Honourable Commissioner, Southern Province, who, in turn, asked for a legal opinion from the Attorney General's department.

The opinion contained very important points and it is necessary to quote it in full:[3]

The Solicitor-General advised as follows:

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1. The query is contained in a letter written by Mr. D. Cox, the District Commissioner, Bonthe. The letter is dated 11 January, 1938.
2. Father Bauman's letter is dated the same day, i.e. 11 January, 1938. Both letters are found as Memo of P.2. file J.A/4 and Memo of P.3. file J.A/4 kept in the District Commissioner's office, Bonthe Sherbro.
3. The opinion is Minute of P.9. file J.A/4 dated 25 January, 1938.

"In view of the explanation given by Father Bauman which would probably be accepted by the Court, I do not advise a prosecution. With reference to the District Commissioner's statement in paragraph 4 of his memorandum No.B 131/1938(4) of the 12th January, 1938 that 'under cap.25 section 10, the marriage is obviously invalid'[1] this is not the case. It is now settled law by a long series of decided cases that despite any statutory provisions to the contrary, a marriage is valid although solemnised without either banns or licence, unless both parties were aware of the defect at the time of the ceremony (Greaves v. Greaves (1872) L.R.P.D. 423). The test as to validity in all cases of alleged breach of statutory provisions under the Marriage Acts is 'what did the parties believe at the time' as the following case will show:- where a ceremony of marriage between a Protestant and a Roman Catholic was performed by a Roman Catholic man, according to the rites of his church, in the sacristy of a Roman Catholic chapel at four o'clock in the afternoon in the presence of witnesses, but with closed doors; and no notice was given to the registrar, nor certificate issued by him: Held not withstanding the absence of the statutory formalities the marriage was valid (In re Knox[2] (27 English and Empire Digest, 63)

Sgd. A.R.W. Sayle,
Solicitor General
25/1/38 "

The opinion of the learned Solicitor-General was, in our submission, wrong. He was obviously misled in his application of English law to the instant case, because he had no justification for the application of that law.

First, from the reception statute,[3] which prevailed in Sierra Leone at the time when he wrote the opinion, English statues as at 1 January, 1880, applied in Sierra Leone only when

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1. Now s.10 of the Christian Marriage Act, Cap.95 of the revised Laws of Sierra Leone, 1960, which states that marriage without the publication of banns or licence is invalid.
2. (1889) 23 L.R.Ir. 542.
3. Act No.9 of 1881.

there was no local enactment on the matter at issue. But there was a Sierra Leone Act on the matter, i.e. the Christian Marriage Act.

Secondly, the English statute on which the decision in Greaves v. Greaves [1] was based was s.22 of the Marriage Act, 1823, which provided that:

> "If any persons shall knowingly and wilfully intermarry ... without due publication of banns or licence ... the marriage of such persons shall be null and void."

True, the Judge in the case of Greaves v. Greaves held that the marriage was valid under this provision because one party was not aware that a licence was necessary and the marriage which was to have taken place after the obtaining of a licence was celebrated without it. But the basis of the judgment was that s.22 used the words knowingly and wilfully which indicated that both parties to the marriage must with knowledge wilfully marry without compliance with the said formalities.

But the Sierra Leone Act is couched in a completely different language. S.10 of the Christian Marriage Act reads:-

> "No marriage celebrated in a public place of worship of a Christian denomination shall be valid -
>
> (a) unless the parties thereto have caused banns of marriage to be duly published or herein before provided or have obtained a licence ..."

It is quite clear from this provision that theSierra Leone Act does not use the words "knowingly" and "wilfully" and it will, therefore, be inaccurate to apply the decision in Greaves v. Greaves to its interpretation.

In English law, the absence of these words in a statute

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1. (1872) L.R.P.D. 423.

have been held to mean that they should not be supplied by the courts thus demanding mens rea and attributing an intention to the legislature which it never possessed when passing the statute concerned.

> "If a statute contains an absolute prohibition against the doing of some act", observed Lord Goddard, "as a general rule, mens rea is not a constituent of the offence." [1]

This has always been the rule in non-criminal cases. It is only in the interpretation of penal statutes that the requirement of guilty intention and knowledge has been emphasised even though a statute might be silent on the issue. In some penal statutes, one or more of the words "knowingly, maliciously, fraudulently or negligently" are used, but in others the legislature may leave unexpressed some of the mental elements. In the latter case, the English courts have turned on the wording of the particular enactment or, where there is ambiguity, upon the governing intention of the Act in which it is contained or the set of Acts relating to the subject matter. The reason why the court goes into all this trouble is to protect the liberty of the individual because of the punitive nature of a penal statute. As Goddard, L.C.J. put it:

> "It is of the utmost importance for the liberty of the subject, that a court should always bear in mind that unless a statute either clearly or by necessary implication rules out mens rea ... the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind." [2]

But the general attitude of the English courts has been that even in the case of penal statutes, the courts should tread

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1. Harding v. Price [1948] I.K.B. 695, 701.

2. Brend v. Wood (1946) 62 T.L.R. 462, 463.

warily in supplying mens rea when it is not stated by the legislature. This point was made quite clear in R. v. Sleep:

> "Mens rea may be dispensed with", said Cockburn, C.J., "by statute, although the terms which should induce us to infer that it is dispensed with must be very strong."[1]

The recent tendency in England is to interpret the express words of the statute without inferring an intention. Thus in Warner v. Metropolitan Police Commissioner, Lord Wilberforce said:

> "There is no need, and no room for an enquiry whether any separate requirement of mens rea is to be imported into the statutory offence. We have a statute absolute in its terms. No separate problem of mental elements in criminal offences in my opinion arises: the statute contains its own solution as to the kind of central penalties by the courts."[2]

We can give scores of examples in which the English courts have interpreted even a penal statute as its words clearly expressed and only inferred an intention of guilty knowledge, where the statute does not express it, in order to safeguard the liberty of the subject. But there is no example in which these courts have applied the same principle of inferring the presence of a guilty knowledge or intention in non-criminal cases where the section of the statute or the necessary implication from the statute as a whole does not warrant it.

Coming back to our main point, we observe that in s.10 of the Christian Marriage Act, the grounds on which a Christian Marriage is void are clearly stated, and the section goes further to say that the breach of no other matter not stipulated in that section should invalidate the marriage. This is, of course, a non-penal statute. It will, therefore, be wrong to infer words like "knowingly" or "maliciously" into s.10. Consequently, in

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1. (1861) L & C 44, 53.

2. [1968] 2 W.L.R. 1303, 1353.

that section, knowledge and wilfulness are irrelevant and marriage contracted without the formalities of publication of banns or obtaining a licence is void.

Similarly, the decision of In re Knox [1] was misapplied by the learned Solicitor-General in his opinion on the Sierra Leone Act, because that case was concerned with the interpretation of s.39 of the United Kingdom Matrimonial Causes relating to Marriage in Ireland Act, 1870, in which it was stipulated that:

> "... any marriage solemnized by a Protestant Episcopalian clergyman between a person who is a Protestant Episcopalian and a person who is not a Protestant Episcopalian, or by a Roman Catholic clergyman between a person who is a Roman Catholic and a person who is not a Roman Catholic, shall be void to all intents in cases where the parties to such marriage knowingly and wilfully intermarried, without due notice to the register, or,without a certificate of notice duly issued ..."

By coincidence, however, in Sierra Leone, a marriage contracted without notice to the Registrar or without a certificate of notice duly issued is not void, not because of the decision in In re Knox [2] or the United Kingdom Matrimonial Causes Act, 1870, but because that defect in formalities is not one of those recognised by s.10 of the Sierra Leone Christian Marriage Act as rendering a marriage invalid. But under s.22 of the Sierra Leone Christian Marriage Act, a prosecution would lie against the person responsible for such defect.

Our conclusion is that it was the District Commissioner, Bonthe, and not the Solicitor-General,that was right after all.

One other difficulty in applying English formalities to Sierra Leone is exemplified by what is meant by "a public place of worship" as is used in s.9 of the Sierra Leone Christian Marriage Act. In England, the expression "registered building"

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1. (1889) 23 L.R.Ir. 542.

2. Ibid.

is used as including any place certified by a Registrar-General as a place of "religious worship" [1] and the Registrar's Office.

In Sierra Leone, there is no definition in the Christian Marriage Act or by the Courts for the expression "public place of worship". One would probably think that it is a place where people usually meet in order to offer prayers in the manner of a particular religious denomination - what one would normally call a "church". But in Sierra Leone, though Christianity has permeated most of the country, churches are not found in every town or village where there are Christians. It is of common occurrence that Christians living in a village spend weeks, or even months, without holding a church service because of the unavailability of a church in the area or of a resident priest. For sometime now the practice has been in vogue, whenever practicable, of holding religious services in ordinary places, like a house or even a court-barri in the Provinces.

In 1938 again, the District Commissioner of Kailahun wanted to know the legal consequences of such practice and wrote to the Honourable Commissioner, Southern Province about it.[2] The District Commissioner, as Registrar of marriages for the Kailahun district, had been asked to grant marriage licences for a Christian ceremony to be performed in one case in a room in a private house, and in another case, in a court-barri and he had accordingly granted the licences.

The Honourable Commissioner, in his reply,[3] could not find any law to disallow the licence to be granted in such circumstances but he referred the matter for an opinion to the Attorney-General.

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1. Places of Worship Registration Act, 1855.
2. Memo of P.17 file J.A/4 dated 22 February, 1938.
3. Memo of P.18 file J.A/4 dated 27 February, 1938.

A. Selwyn Bodley, the learned Crown Counsel on behalf of the Attorney-General advised that,[1]

> "A public place of worship is a building or other similar structure or any part thereof which has been specially designated and set aside by a group of persons of the same religious denomination for the observance of religious rites and ceremonies and to which the public at large have access or are accustomed to resort without interferance."

While we do not quarrel with the definition preffered by the learned Crown Counsel particularly when s.9 of the Christian Marriage Act contains,immediately following the phrase "public place of worship", the words "belonging to the said denomination", we concede that in view of difficulties prevailing in Sierra Leone, which we have already pointed out, adherence to this definition will reduce the celebration of valid Christian marriages to a minimum.

It is our contention that these difficulties can be circumvented if Ministers of religion would register certain places, like a private residence or a court-barri, as places of public worship belonging to a particular religious denomination. This can be done under s.27 of the Christian Marriage Act, which states:

> "Ministers who desire to celebrate marriages under this Ordinance shall forward from time to time to the Registrar-General adequate descriptions of the place or places of worship wherein or in respect of which marriage register books are intended to be kept."

If a religious service can be held in a private house or in a court-barri as it frequently happens now in Sierra Leone, should such places not be constituted ad hoc public places of a religious denomination for the purpose of marriage under the Act?

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1. Minute of P.20 file J.A/4 dated 28 February, 1938.

One may ask.

In conclusion, we submit that some of the present formalities need re-thinking and that the local social conditions in Sierra Leone should be taken into consideration. For example, there is no justice in making a Christian marriage void on grounds of non-compliance with the formalities regarding publication of banns and obtaining of a licence. These formalities may be necessary in England because of the social background of the people and the large population of that country which make it possible for clandestine marriages to be contracted if the formalities were not followed. In Sierra Leone, however, with its small population and the social tendency of publicising marriages, the law ought not take the strict view as it does at present. With this difference in social background which makes the law in regard to the formalities more suitable to England than for Sierra Leone, why should innocent non-compliance with the formalities of publication of banns or the obtaining of a licence render the marriage void in Sierra Leone but not in England?

There are many instances in Sierra Leone when one or other of these formalities has not been complied with, mainly through ignorance of the law on the parties concerned, and yet following the religious ceremony the spouses have lived together for years as married couples. Would it be just to invalidate such marriages because an unscrupulous spouse now finds in the non-compliance with the requisite formality a loop-hole for declaring the marriage void when it suits his convenience? This is a question for the consideration of the legislature and in a future law reform, retroactive validity ought to be given to such marriages.

(ii) Capacity

(a) Age

The Marriage Acts do not contain any express provision as to the age of marriage. In the absence of such provision the English common Law rule would seem to be applicable in Sierra Leone by virtue of s.74 of the Courts Act, 1965.

At common Law, in order to contract a valid marriage, the parties must have reached the age of rational consent which was fixed at 7 years.[1] The marriage, nevertheless, remained voidable until the parties reached the age at which it might be consummated, which was 14 years for boys and 12 years for girls. "Voidable" in this sense has a special meaning: it means that either of the parties could avoid the marriage without taking any nullity proceedings in court. If the parties cohabited together and consummated the marriage after attaining to the requisite ages, then the marriage became valid.[2]

A slight improvement on the common law for the marriage of females would appear to be made by the Prevention of Cruelty to Children Act.[3] S.6 makes it a felony for anybody "unlawfully" to have sexual intercourse with a girl under the age of 13, whilst s.7 creates a misdemeanour for a person "unlawfully" and carnally to know a girl under the age of 14. The effect of both sections, therefore, would seem to be the prohibition of "unlawful" sexual intercourse with a girl under 14 years of age. These sections, however, are open to three interpretations. Firstly, that sexual intercourse taking place within marriage is

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1. See J. Jackson: The Formation and Annulment of Marriage, London, Butterworths, 2nd ed., p.26.
2. For the age of marriage at common Law, see generally: J.Jackson op.cit., pp.25-26.
3. Cap.31 of the revised Laws of Sierra Leone, 1960.

not prohibited because this cannot be "unlawful", in which case, proof of marriage between a man and a girl under 14 negatives an offence. Secondly, that the sections do not prohibit marriage with a girl under the age of 14, but the marriage cannot lawfully be consummated until the girl has reached that age. Thirdly, that marriage with a girl under 14 is prohibited since sexual intercourse is incidental to the status of marriage. It is submitted that the first interpretation is to be preferred otherwise there would not have been the need for the use of the word "unlawfully". If this view is correct, then the common Law position with respect to the age of marriage remains unaffected by the Prevention of Cruelty to Children Act since this Act does not state a minimum age at which a valid marriage can be performed.

(b) Status

Under this heading will be discussed the types of persons who can validly contract a statutory marriage.

As we have seen in Chapter 5, before 1965, natives could not contract a valid marriage by licence under the Christian Marriage Act, nor could they marry at all under the Civil Marriage Act. The Mohammedan Marriage Act has always been open only to persons who profess the Mohammedan faith.

The 1965 reforms were aimed at the unification of the classes of persons who can validly contract marriage under the Christian and Civil Marriage Acts. S.1 of the Christian Marriage (Amendment) (No.2) Act, 1965, now extends marriage by licence to every 'person' but makes it a condition to the issue of the Registrar's certificate, for a party to the intended marriage whose personal law is customary law to make a statutory declaration that he or she is not a party to a subsisting marriage whether by customary law or otherwise. The Civil Marriage (Amendment) (No.2) Act, 1965, also includes persons whose personal law is customary law in the class of persons who can contract

marriage under the Civil Marriage Act but, unlike the Christian Marriage (Amendment) (No.2) Act, imposes no obligation on them to declare that they are not parties to a subsisting marriage. This condition is imposed in a previous amendment, i.e. the Civil Marriage Amendment Act, 1965,[1] and no reason seems to be adduced for its being dropped in the later Act. The omission would probably have been due to an oversight. Since the Civil Marriage Act must be construed as one with the Christian Marriage Act, one can foresee that the Courts would read this condition within the provisions of the Civil Marriage Act.

S.1 of the Christian Marriage (Amendment) (No.2) Act does not state whether non-compliance with its provision makes the marriage void. This section repeals and replaces s.6 of the principal Act and it consists of other grounds on which a marriage may be void or valid namely, consanguinity or affinity (a diriment impediment) and non-consent where necessary (a merely prohibited impediment). S.7(3) of the Christian Marriage Act and s.15 of the Civil Marriage Act are of some guidance here. These sections provide, inter alia, that no marriage shall be valid under the respective Acts "between persons either of whom is already married to some person other than a party to the intended marriage."

"Already married" in this provision would,before 1965, be interpreted to exclude marriage under customary law because s.16 of the Christian Marriage Act states that customary marriage is not a marriage on which the crime of bigamy can be founded. That section provides that,

> "Whoever is guilty of bigamy shall on conviction be liable to imprisonment, with or without hard labour, for any period not exceeding seven years. For the purpose of this section, a marriage made in accordance with native law and custom shall not be deemed to be a marriage."

Similarly, s.17 of the Christian Marriage Act imposes a

1. Act No. 12 of 1965.

penalty on an unmarried person going through a marriage ceremony with a person whom he or she knows to be already married to another person. This section, too, does not regard marriage in accordance with native law and custom as marriage for the purpose of an offence under that section.

The overall effect of ss.16 and 17, therefore, was that before 1965, it was possible to marry by customary law and without going through any special process of divorce, a party thereof could leave the other spouse and marry another in church by banns, and the latter marriage was legal and with impunity. By making marriage under customary law now a ground of prohibition from any other form of monogamous marriage, the Christian Marriage (Amendment)(No.2) Act has, in our submission, set a customary marriage on the same plane as a monogamous form of marriage insofar as a diriment impediment to a monogamous marriage is concerned. The position would, therefore, now appear to be that before a party to a customary marriage can validly contract a monogamous marriage, at any rate with a third person, he or she must first of all obtain the appropriate divorce from the spouse of the customary marriage; otherwise, the customary marriage will be a bar to any subsequent monogamous marriage as long as the customary marriage subsists.

The Amendment Act in this respect has been lamented as a serious threat to the effort of the Christian Church in eliminating polygamy. One prominent clergyman strikes a rather disappointing note when he says :

> "Here there is no room for a Christian marriage after marriage by native customary law. It seems, therefore, that at best the church is only able to bless the marriage, if the parties are Christians unless the proposed formula 'I acknowledge thee' is adopted. In view, however, of the multiple valency of marriage by Native Customary law, the

> Christian demands of marriage are seriously threatened. The protagonists of polygamy for African Christians will find much relief in this aspect of the Amendment Acts."[1]

It is now very clear from the above, that marriage contracted with a third party under either the Christian Marriage Act or the Civil Marriage Act by one person during the subsistence of a customary marriage with another person, renders the subsequent statutory marriage void.

What, however, still remains uncertain is the fate of a statutory marriage contracted in accordance with either the Christian or Civil Marriage Act by the same persons after they have entered into a customary union. This is of very common occurrence among natives in the Provinces who are Christians. Whenever they wish to marry, they usually undergo the customary form first, after which they celebrate the marriage in church.[2] Prior to the Christian Marriage (Amendment)(No.2) Act, 1965, marriage in accordance with the Christian Marriage Act preceded by a customary law marriage between the same parties was valid because for the purposes of capacity under the principal Act, a prior customary marriage was no marriage at all. What then, we may ask, is the effect of s.1 of the Christian Marriage (Amendment)(No.2) Act read in conjunction with s.7(3) of the Christian Marriage Act and s.15 of the Civil Marriage Act?

The three sections are open to two interpretations. One is that a subsisting customary marriage between the same persons is a bar to a subsequent marriage in accordance with the two

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1. Harry Sawyer: "Sierra Leone's Marriage Laws: Amendment Acts, 1965", in The Sierra Leone Bulletin of Religion, Vol.7, No.1, June, 1965, p.22.
2. The illiterate natives regard the Church ceremony as a blessing of their customary-law marriage, whilst those who are educated regard the church marriage as the real marriage which is preceded by the customary ceremony only to please their relatives who may be illiterate.

Marriage Acts. The other is that so long as the subsequent marriage is between the same parties the existing customary marriage between them does not affect the validity of the subsequent statutory marriage. If the object of the amending Act was merely to give recognition under the general law to a customary marriage, the subsistence of which between, say, X and Y makes it impossible for X to contract marriage under the Christian or Civil Marriage Act with Z but not to prevent X and Y from entering into such marriage, then the second interpretation is to be preferred. In our submission, this must have been the intention of the legislature since both s.7(3) of the Christian Marriage Act and s.15 of the Civil Marriage Act contain the phrase "other than a party to the intended marriage".[1] If the second interpretation is correct, then the possibility arises for two marriages between the parties to be subsisting side by side. The Sierra Leone courts have not as yet ruled on the fate of the two marriages.

In a country like Nigeria where statutory law clearly states that a customary law marriage between two persons is a bar to a subsequent marriage under the Marriage Act between one of them and a third person,[2] it is possible for the same parties to a subsisting customary law marriage to contract a subsequent marriage under the Marriage Act. A case which was decided by the English High Court in 1960 is of guidance. In Ohochuku v. Ohochuku [3] the parties were Nigerians who after contracting a customary law marriage in Nigeria went to London and married again

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1. In order to remove all doubt the words "with a third party" should have been used immediately after the words "subsisting marriage" in s.1 of the Christian Marriage (Amendment)(No.2) Act, 1965.
2. Ss.11(a) and 33(1) of the Marriage Act, cap.115.
3. [1960] 1 All E.R. 253; [1960] 1 W.L.R. 183.

in a registry. There was no doubt as to the validity of the customary marriage, the parties entering into the registry marriage only for the certificate which the wife wanted as proof of her marital status while in England. When the wife later petitioned for divorce on the ground of the husband's cruelty, Wrangham J. dissolved the registry marriage, thus indicating that it was hitherto valid.

Much ink has been spilt over the correctness of this decision by writers,[1] and it is not our intention to join in the debate beyond the extent that we are in agreement with Agbede,[2] who has correctly pointed out that those who attack the decision do so from certain misconceptions. Firstly, the critics misapply to the instant case decisions wherein the English courts have held a subsequent monogamous marriage void in one case when it was preceded by another monogamous marriage, and in another case when a spouse already polygamously married purported to enter into a subsequent monogamous marriage with a third person. Secondly, they assume that a subsequent monogamous marriage can convert a pre-existing customary law marriage between the same parties only when the marriage takes place in Nigeria and not, as in the instant case, in England. Thirdly, they think that, by upholding the subsequent marriage, Wrangham J. recognized two inconsistent statuses of marriage created by the customary marriage and the registry marriage.

In fairness to the learned judge, the only conclusion that one can legitimately draw from his judgment is that he recognized the subsequent monogamous marriage because the parties

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1. Webb (1960) 23 M.L.R. 327; Griew, (1960) 9, I.C.L.Q., 508; Furmston, (1961), I.C.L.Q., 185; Kasunmu & Salacuse, Nigerian Family Law, 95, 97; Agbede, 17, I.C.L.Q., 735.
2. Op.cit., 736 et seq.

had capacity under English law to contract it since neither was a party to a pre-existing monogamous marriage with the other or to a potentially polygamous marriage with a third party. His Lordship left the fate of the customary marriage undecided though he commented that, from his information, that marriage too was dissolved automatically by his decree. The relevance of this decision to our instant discussion is the information which Wrangham J. received (probably from Dr. Elias, the expert witness in the case), that the court's decree would dissolve the customary marriage also. Recently, in Teriba v. Teriba & Rickett,[1] the Nigerian High Court, Aguda J. commenting on the effect of a customary-law marriage followed by a registry marriage between the same parties said:

> "the true position is that the customary marriage is converted by the Act marriage which in effect supersedes it. Therefore, if the Act marriage is subsequently dissolved, the customary marriage cannot revive."

If the views in the Ohochuku and Teriba cases are correct, then the customary marriage would still be in existence during the registry marriage, but, instead of continuing to be polygamous potentially, it becomes monogamous as from the date of the registry marriage. This amalgamation or merger of the customary marriage with the registry marriage is popularly referred to as "conversion" [2] or "monogamization".[3] The result of the amalgam is that so long as the parties remain married in accordance with the law that provides for monogamy, they cannot

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1. 1/211/67 of 2 July, 1969, cited in Annual Survey of African Law, Vol.3, 1969, p.37.
2. Daniels, op.cit., p.379; Higgins, 26 M.L.R., p.205; Agbede, op.cit., p.735; Kasunmu & Salacuse, op.cit., p.90.
3. Webb, 12 I.C.L.Q., p.672; Kasunmu & Salacuse, op.cit., p.90.

invoke their rights and liabilities under the customary marriage, but when the monogamous marriage is dissolved they can invoke rights which are consequent upon the termination of the customary law marriage. Thus, in the Southern Rhodesia case of Mchenje v. Kunake,[1] the right of a husband - party to a monogamous marriage - to sue his father-in-law for refund of dowry after the dissolution of the monogamous marriage with a wife with whom he had a pre-existing customary-law marriage was recognised.

It is our contention that the conversion theory subsumed in the Ohochuku and Mchenje cases and recently upheld by the Nigerian High Court in Teriba's case, ought to apply to Sierra Leone under similar circumstances. Therefore, the effect of s.1 of the Christian Marriage (Amendment)(No.2) Act, 1965, together with s.7(3) of the Christian Marriage Act and s.15 of the Civil Marriage Act ought to be that a customary law marriage between two parties is converted into a monogamous marriage if the same parties contract a subsequent marriage under the Christian or Civil Marriage Act. Our contention presumes that the subsequent marriage is valid by itself, i.e. that the essentials for its validity are observed without reference to the pre-existing customary-law marriage. Otherwise, the church or registry ceremony would be regarded as a mere blessing or confirmation of the customary-law marriage.

(iii) Consent

Tied up with the question of age is that of consent. As marriage is a contract between two parties, it is essential that such parties must give their free consent to the transaction. Without this consent it will be impossible for the parties

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1. [1912] S.R.L.R. 107.

to marry at all and any attempt by them to do so would amount to what one might term a matrimonium non existens. As has been discussed earlier, a boy and a girl under the ages of 14 years and 12 years respectively were incapable of giving a rational consent at common law to a valid marriage between them. Similarly, even though a perfect marriage could be contracted between a boy and a girl above the ages of 14 and 12, since until persons had reached their majority they would normally be under the titulage of another person, it has been quite usual from ancient times for parties to a marriage to have to seek consent from third parties, usually their parents or guardians.[1]

In Sierra Leone, the law is regulated by both the Christian and the Civil Marriage Acts as amended in 1965. Because of the difficulties that may attend the interpretation of the relevant sections, it is necessary to set them down in extenso: S.1 of the Christian Marriage (Amendment)(No.2) Act makes it a condition precedent to the granting of a licence that a party to an intended marriage should make a Statutory Declaration, inter alia,

> "where either of the parties not being a widow or widower shall be under the age of twenty-one years in the case of a person whose personal law is not customary law and eighteen years in the case of a person whose personal law is customary law, that the consent of the person or persons whose consent to the marriage as required by the appropriate law has been obtained, or that there is no person having authority to give such consent."

S.2 of the Civil Marriage (Amendment)(No.2) Act also makes it a condition to the issue of the Registrar's Certificate that one party to the intended marriage should swear an affidavit, inter alia,

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1. Jackson, op.cit., p.24.

> "that each of the parties to the intended marriage (not being a widower or widow) is -
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> (i) in the case of a person whose personal law is customary law not less than eighteen years of age; and
>
> (ii)in every other case, not less than twenty-one years of age,
>
> and when one of the parties is under the age of eighteen or twenty-one as the case may be, that the consent of the person or persons whose consent to such marriage is required by law, has been obtained."

S.7(2) of the Christian Marriage Act as amended by the Christian Marriage (Amendment)(No.2) Act, 1965, provides that no marriage may be celebrated under the provisions of the Act

> "between persons of whom each or either not being a widow or widower is under the age of twenty-one years in the case of a person whose personal law is not customary law and eighteen years in the case of a person whose personal law is customary law, unless the consent of the father, or if he should be dead or unable for any reason to give such consent, then, of the mother, or if both parents be dead or unable for any reason to give such consent, then of the guardian or guardians, if any, of such person, or of a Judge of the Supreme Court or District Commissioner under section 8 hereof, be first obtained."

The most important feature of the above provisions is the difference in age of consent between persons having customary law as their personal law and those who do not. The reduction of the age of persons whose personal law is customary law to 18 years may be in recognition of the fact that according to their customs, a person of 18 is considered mature enough to take care of his or her own affairs without parental intervention.[1]

Such an assumption would, in my submission, be based on wrong premises because in customary law, however old the parties to a marriage may be, the consent of their parents is essential to the validity of that marriage.[2] The reverse situation would

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1. But see in general, Chapter 19, pp. 683-684

2. See Chapter 17, pp. 557-559, 560-561.

have been more rational if it was the age of the party whose personal law is not customary law that was reduced for, but for the statutory provisions herein, the personal law of such persons does not require any parental consent to marriage.

The consent required under s.7(2) of the Christian Marriage Act is that of the father, or if he is dead or unable for any reason to give his consent, that of the mother. If the consent of a parent cannot be given for any of the above reasons then that of the guardian or guardians should be obtained. S.8 of the Christian Marriage Act provides further that if it is impossible to obtain the requisite consent because there is no parent or guardian or such parent or guardian is incapable of giving such consent, or unreasonably withholds such consent, then the consent in writing of a Judge of the High Court or, in the case of a marriage intended to be celebrated in a district in the Provinces, of the District Commissioner of that district, will suffice. It is interesting to note that the right of a parent or guardian who unreasonably refuses to give his or her consent is superseded by that of a Judge or a District Commissioner.

S.1 of the Christian Marriage (Amendment)(No.2) Act requires the consent of the person or persons whose consent is required by "the appropriate law", i.e. the general law, in the case of a person whose personal law is not customary law, and customary law for a person whose personal law is customary law. Since the persons who normally give their consents under the two systems of law are not necessarily the same, this provision is in conflict with s.7(2) of the Principal Act which stipulates the same persons whose consents are necessary whether or not the parties share the same personal law. The situation is rendered even more ambiguous by s.2 of the Civil Marriage (Amendment)(No.2) Act, which requires the consent of the person or persons whose

cpnsent is required by "Law". This section drops the word "appropriate", which leaves it open under which law the consent is to be determined.

Under the rules of statutory interpretation, one could assume that the Amendment Acts being later statutes prevail over the parent Acts. But s.7(2) of the Christian Marriage Act is itself amended by s.2 of the Christian Marriage (Amendment)(No.2) Act by the insertion immediately after the words "twenty-one years" of the words "in the case of a person whose personal law is not customary law and eighteen years, in the case pf a person whose personal law is customary law", and the quotation of that section above is in its amended form.

There are, therefore, in fact, three amendments, the latest of which is s.2 of the Civil Marriage (Amendment)(No.2) Act. If this amendment is to prevail over the others, as it should, then the conflict still remains unresolved. But since, the Civil Marriage Act is to be construed as one with the Christian Marriage Act, it is submitted that an amendment to one Act should be construed as one with an amendment to the other. This being the case, the amendment to the Civil Marriage Act should read as if it relates to the Christian Marriage Act. The overall effect, therefore, is that s.7(2) of the Christian Marriage Act as amended by s.2 of the Christian Marriage (Amendment)(No.2) Act prevails, as it is later than s.1 of the Christian Marriage (Amendment)(No.2) Act.

(iv) Prohibited Degrees

A marriage celebrated under the provisions of the Christian Marriage Act,[1] and the Civil Marriage Act,[2] between persons who are related within the prohibited degrees of consanguinity or

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1. S.7(1)
2. S.15(b)

affinity according to the Law of England is void. Consanguinity is blood relationship either in the direct or collateral line. Affinity is the relationship which arises through marriage and exists between one spouse and the relations of the other spouse.[1]

Because of the use of the phrase: "according to the Law of England", the prohibited degrees of consanguinity and affinity that would make a marriage void in Sierra Leone become a matter for speculation.

At this stage, it might be useful to give a brief outline of the development of English Law on marriage between kindreds and affines.

Down to the Marriage Act of 1835, Lord Lydhurst's Act, marriage between persons within the prohibited degrees of consanguinity and affinity as laid down in a table prepared by Archbishop Parker in 1563, was only voidable and annullable by a decree of an Ecclesiastical Court. After the Act, such a marriage became void.

In this century, perhaps because of social pressures, Archbishop Parker's list has been subject to a number of modifications. Thus, in 1907 marriage was permitted between a man and his deceased wife's sister.[2] Later, a man could marry his deceased's brother's widow.[3] Further, the Marriage (Prohibited Degrees of Relationship) Act, 1931, permitted marriage between persons and their deceased spouses' nephew, niece, uncle or aunt and between persons and their deceased nephew's niece's uncle's or aunt's widow or widower. The 1907 and 1921 Acts have been

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1. Affinity must be created by marriage and carnal knowledge without marriage is insufficient. See Pa gani v. Pa gani L.R.1 P & D 223. Wing v. Taylor (F.C. Wing), (1861) 2 Sw & Tr. 278
2. The Deceased Wife's Sister's Marriage Act, 1907.
3. The Deceased Brother's Widow's Marriage Act, 1921.

repealed and replaced by Marriage Act, 1949.[1] The 1949 Act itself has been amended by the Marriage (Enabling) Act, 1960, making it possible for persons to marry within the degrees of affinity permissible under the 1931 Act if, death apart, the former marriage came to an end by a decree of divorce or nullity. This Act repealed the 1931 Act.

This brief survey shows that English law on prohibited degrees of consanguinity and affinity has not been static.

In the application of English law to Sierra Leone in regard to kindred and affinity, therefore, three questions have to be examined. Should it be English law as at the reception date, i.e. 1st day of January, 1880? Or English law at the date of the Christian Marriage Act, i.e. 1 April, 1907? Or the current English Law?

(a) English law as at 1st day of January, 1880

Read with s.74 of the Courts Act, 1965, s.7(1) of the Christian Marriage Act seems to allow the application of English law at a date other than that stipulated in the Reception Statute. S.74 of the Courts Act, 1965, which provides for the residual

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1. The prohibited degrees of relationship specified in s.1(1) and Part 1 of the First Schedule to the Marriage Act, 1949, areas follows:-
Mother-Father; Daughter-Son; Father's mother-Father's father; Mother's mother-Mother's father; Son's daughter-Son's son; Daughter's daughter-Daughter's son; Sister-Brother; Wife's mother-Husband's father; Wife's daughter-Husband's son; Father's wife-Mother's husband; Son's wife-Daughter's husband; Father's father's wife-Father's mother's husband; Mother's father's wife-Mother's mother's husband; Wife's father's mother-Husband's father's father; Wife's mother's mother-Husband's mother's father; Wife's son's daughter-Husband's son's son; Wife's daughter's daughter-Husband's daughter's son; Son's son's wife-Son's daughter's husband; Daughter's son's wife-Daughter's daughter's husband; Father's sister-Father's brother; Mother's sister-Mother's brother; Brother's daughter-Brother's son; Sister's daughter-Sister's son.
Part 11 of the First Schedule has been repealed by s.1 and Schedule of the Marriage (Enabling) Act, 1960.

law of Sierra Leone, makes English law at 1880 applicable subject, inter alia, to any other enactment.[1] The Law of England, therefore, as provided for in s.7(1) of the Christian Marriage Act cannot be properly interpreted by reference to 1880 otherwise one would not be adhering to the provisions of the Reception Statute.

(b) English law at the date of the Christian Marriage Act, i.e. 1 April, 1907.

Where, as in this case, no date is fixed for the application of English law, the rule is usually followed that a statute is presumed to speak from the date of its enactment.[2]

In the East African case of Hassanali R. Dedhar v. Special Commissioner, etc. of Lands,[3] Briggs, J.A. delivering the first judgment of the Court of Appeal held that where a local ordinance makes provision for the application of "the principles of English law and the doctrines of equity", English law to be applied is the law in force at the time when the ordinance came into force. "If the intention were otherwise", he opined, "one would expect to find words such as 'applicable from time to time' or 'for the time being in force'."

If this view is correct, then in the absence of Sierra Leone case law on the point, the prohibited degrees of kindred and affinity according to English law that is applicable to Sierra Leone should be the law as at 1 April, 1907. Thus, in Sierra Leone, a statutory marriage between a man and his deceased wife's sister or between a man and his deceased' brother's widow would be void. So would be one between a man and the divorced wife of his brother or the sister of his divorced wife.

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1. i.e. any other enactment in Sierra Leone.
2. See Lord Esher, M.R. in Sharpe v. Wakefield (1888) 22 Q.B.D. 239 C.A., at p.242. See also the Nigerian case of Johnson v. U.A.C. Ltd. (1936) 13 N.L.R. 13.
3. [1957] E.A. 104, C.A.

(c) Current English law:

Phillips [1] has suggested that from the wording of s.7 of the Christian Marriage Act, the intention was probably that the local law should be linked with the law for the time being in force in England, not with English law as it was at the date when the Act was passed. Two cases from Malawi and Nigeria do not appear to lend support to this view and they indicate how the courts of those countries may react if faced with the task of interpreting this provision.

In the Malawi case of Mtemanyama Estate v. Kitty,[2] the High Court of Nyasaland was faced with the interpretation of s.40 (a) of the Nyasaland Marriage Ordinance, 1902, which provided that the estate of an African married under the Ordinance should be:

> "distributed in accordance with the provisions of the law of England relating to the distribution of the personal estate of intestates."

This was what Southworth J. had to say in connection with this provision:

> "Apply the normal rules of interpretation, when reference is made in section 40(a) to the law of England, this can only be interpreted as a reference to the law of England as it stood at the time when the Marriage Ordinance, 1902, was passed."[3]

A similar provision as s.40(a) of the Nyasaland Marriage Ordinance appeared in the Nigerian Marriage Act, 1914. S.36 of the Nigerian Act stipulated that the distribution of a deceased's estate was to be in accordance with the law of England. In Johnson v. U.A.C.,[4] Butler Lloyd J. was of the opinion that the Ordinance

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1. Marriage Laws in Africa, p.161, n.1.
2. 1957 R. & N. 234.
3. Ibid., p.244.
4. (1936) 13 N.L.R. 13.

spoke from the date of its enactment, namely, 1914.[1]

In order to support Phillips' view, the West African Court of Appeal has held that the phrase "for the time being in force" should be used in the statute concerned when reference is made to the application of English law.[2] It is quite clear, therefore, that since this phrase is not used in s.7 of the Sierra Leone Christian Marriage Act, judicial opinion outside Sierra Leone is diametrically opposed to Phillips' suggestion. As there has not been as yet any Sierra Leone decision on the interpretation of the Sierra Leone provision, it is difficult to dismiss Phillips outright particularly when his suggestion was merely a speculation. Because of the tendency of the Sierra Leone courts to apply the current English law when there is doubt about time limitation, a typical example being the way they have used the reception statute in relation to the applicable English common law and doctrines of equity,[3] it is quite reasonable to assume that they will apply the current English law in their interpretation of s.7 of the Christian Marriage Act. This, in our submission, they ought to do despite the fact that we have decried

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1. Doubt has been expressed by Kasunmu & Salacuse, op.cit., p.61, on the correctness of this decision. Their doubt is based on the fact that s.33 of the Nigerian Marriage Act incorporated the substance of the provisions of the Deceased Wife's Sister's Marriage Act, 1907. The learned writers hold that if Butler Lloyd were correct, the 1907 Act would have applied automatically instead of being expressly re-enacted in s.33. We may add that Butler Lloyd J. has never been consistent in his view of the time limit of English law. See Godwin v. Crowther (1934) 2 WACA, p.111 at p.112; Taylor v. Taylor (1935) 2 WACA 348, in which cases Butler Lloyd J. took completely different views on the same matter. For a discussion of these cases, see Chapter 2, pp.29-30.
2. Taylor v. Taylor, (1935) 2 WACA 348.
3. See Chapter 2, p.31.

their tendency of doggedly following English law in aspects of Sierra Leone law where it is inappropriate to do so. The reason for our present contention is that developments in English law on the topic under review since the passing of the Sierra Leone Christian Marriage Act reflect the social background and attitudes of the Sierra Leone peoples, although these were never in the mind of the English legislature when the amendments to English law were made. Marriage between a man and his deceased wife's sister or between a man and his deceased brother's widow or between a man and the divorced wife of his brother or the sister of his divorced wife - such marriages made permissible in England by Acts since 1907 - are recognised under the existing customary laws of Sierra Leone. If the general law of Sierra Leone were to take a different view, the dissatisfaction that was expressed in England against the pre-1907 stringent rules relating to affinity would surely be felt in Sierra Leone as well.

(v) Proper Names of the Parties

Before publication of banns, a notice of the full names of the parties to the intended marriage must be given to the Minister who publishes the banns.[1] Likewise, in order to obtain a licence one of the parties to the intended marriage must give the Registrar of the District in which the marriage is to take place, notice of marriage which, inter alia, should contain the names of the parties.[2]

Ss.10(c) and 15(c) of the Christian Marriage Act and Civil Marriage Act respectively provide that marriage contracted under the Acts shall be void,

> "if celebrated under a false name or false names with the knowledge of both parties."

1. S.4 of the Christian Marriage Act.
2. S.4 of the Civil Marriage Act.

The sections do not demand that the true Christian names and surnames by which the parties are born should be stated. The object of the sections probably is to ensure that the parties are sufficiently identified by the public at large. Therefore, what seems to be required is the name by which the party is generally known to the public.

An assumed Christian name or surname should suffice provided it is not used for a fraudulent purpose.[1] But difficulty may arise where the person is known by one name in the local community where the marriage is to take place, while the public at large knows him by another. Sir William Scott [2] suggests that, in such a situation, the marriage should be in the true name of the party. One would add a proviso that the party should not intend any concealment. To remove all doubt, therefore, it is submitted, the party ought to use both sets of names.

In order to invalidate a marriage because of its celebration in a false name or names, both parties must know the true facts at the time. If one party knows of the falsity but the other does not, such knowledge on the part of the guilty alone does not invalidate the marriage, but he will be guilty of an offence under the Acts.[3]

The Acts also require the status of the parties to be indicated upon publication of banns or in the notice of marriage prior to obtaining a licence. A wilful misdescription of a status even by both parties does not, however, nullify the marriage, though it may result in a criminal offence punishable under

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1. See R v. Billingshurst (1814) 3 M & S 25D. See also Dancer v. Dancer [1948] 2 All E.R. 731 C/f Chipchase v. Chipchase [1941] 2 All E.R. 560; [1942] P.37.
2. See Pougett v. Tomkyns (1812) 3 M & S 262, at 263, n.
3. Ss. 18 & 20 of the Christian Marriage Act and Civil Marriage Act respectively.

the Acts.[1]

(vi) Marriage Must be Celebrated Before Two Witnesses

For a marriage before a Minister of Religion or a Registrar to be valid, it must be celebrated in the presence of at least two witnesses.[2] It is not clear whether the Minister or the Registrar, as the case may be, can be a witness of a marriage in which he officiates. The intention probably is that there should be at least two witnesses besides the Minister or the Registrar, but this is not borne out by the Acts.[3]

B. MOHAMMEDAN MARRIAGE

As we have seen earlier, courts in the Western Area are enjoined by the Mohammedan Marriage Act to receive in evidence proof, according to Islamic law, of the existence of a Mohammedan marriage, but not necessarily to rule whether a marriage considered as such conforms with the tenets of the Sharia. It is, therefore, here intended to give an outline of the essential requirements of a valid marriage in Islamic law and to show the extent to which Sierra Leone Muslims comply with these requirements.

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1. Ss.17 & 20 of the Christian Marriage Act and Civil Marriage Act, respectively.
2. Ss.10(d) & 15(d) of the Christian Marriage Act and Civil Marriage Act, respectively.
3. See s.14 of the Christian Marriage Act, c/f s.22 of the English Marriage Act, 1949, which reads: "All marriages solemnized according to the rites of the Church of England shall be solemnized in the presence of two or more witnesses in addition to the clergyman by whom the marriage is solemnized." Unlike the Sierra Leone provision, which makes the marriage void for lack of the requisite witnesses, the position in England is that the section is merely directory and not mandatory so that a marriage that is witnessed by only one person besides a clergyman is valid. See Wing v. Taylor (1861), 2 SW. & Tr. 278.

Before we do so, however, it is necessary to discuss two preliminary questions: (a) Who is a Mohammedan? (b) Which Mohammedan law is envisaged by the Mohammedan Marriage Act?

(a) Who is a Mohammedan?

By way of convenience, it is worth while to repeat the relevant provision of the Mohammedan Marriage Act. S.2 states:

> "Every marriage entered into and subsisting between persons professing the Mohamedan faith and domiciled in the Colony or Protectorate which is valid according to Mohammedan law ... shall be valid for all civil purposes."

A Mohammedan is a person who professes the Mohammedan faith which implies the acceptance of the Unity of God and the prophetic character of Mohammed.[1] There are in the world a wide variety of Mohammedans. There are the Sunnites divided into four schools,[2] and the Shiites. Consequently, stricto sensu, all these should be considered when reference is made to Mohammedans,[3] in the Mohammedan Marriage Act. What is essential is the practice of the religion. Therefore, a child of Mohammedan parents who converts to Christianity cannot during that period contract a Mohammedan marriage while a Christian who becomes a Muslim can validly enter into a Mohammedan marriage if at the time he professes the Mohammedan faith.

The section also requires that the Mohammedan must be domiciled in Sierra Leone. Consequently, a staunch Muslim missionary from Pakistan or any country outside Sierra Leone, living in this country cannot enter into a valid Mohammedan marriage

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1. See Ameer Ali, Mohammedan Law, Calcutta, 1912, Vol.II, (5th ed.), 22.
2. The Hanafi, Shafii, Maliki and Hanbali.
3. See the Indian case of Jiwan Khan v. Habib (1933) 14 Lahore 518, in which it was held that the term covers all Sunnites as well as Shiites.

cognizable by the courts nor can he avail himself of the other provisions of the Mohammedan Marriage Act unless and until he acquires a Sierra Leone domicile. Similarly, a Muslim who is a Sierra Leone citizen domiciled abroad who is temporarily resident in Sierra Leone finds himself in the same disadvantageous position as a non-citizen domiciled outside Sierra Leone.

(b) Which Mohammedan Law?

The Mohammedan Marriage Act does not make reference to any particular Mohammedan law. As there are important points of difference between the laws of the four schools of the Sunni sect, as well as between those and the laws of the Shiites, the question "which Mohammedan law" becomes capable of a variety of answers. Probably, compliance with the laws of any school or sect is sufficient as there is no officially established school or sect in Sierra Leone. This, in fact, resolves a possible question of conflict of law that may arise where two Mohammedans of different sects or schools marry.

Even though no school or sect is officially established in the country, the vast majority of its Muslims regard themselves as belonging to the Maliki School of the Sunni sect. For this reason it will be in order in discussing Islamic law in Sierra Leone to lay emphasis on the Maliki School.[1]

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1. Reference to Islamic law, hereafter, unless otherwise stated, is reference to that law according to the Maliki School and on this generally, see T.P. Hughes: A Dictionary of Islam, London, 1895; Al-Haj Fazlul Karim: Al Hadis, Book II, Calcutta, 1939; A.A.A. Fyzee: Outlines of Muhammadan Law, 3rd ed., O.U.P., 1964. Note that there is in Sierra Leone a few foreign Muslims and members of the Ahmaddiya sect. To deal with the law of the minority group in detail will throw this work out of balance. Nevertheless, where there are striking differences between Maliki law and the other schools, these will be pointed out from time to time.

The Essentials for a Valid Mohammedan Marriage

Marriage (nikah) according to Islamic law is simply a civil contract and its validity does not depend upon any religious ceremony. It, therefore, requires no priest (Imam) and no sacramental rites. In Sierra Leone, however, a religious ceremony should, as a social practice, always take place, usually in a mosque before an Imam.

The contract need not be in writing. Its validity depends on the capacity of the parties; their consents; permissible degrees of consanguinity, affinity and fosterage; the presence of witnesses,[1] and proclamation. It is essential that dower is paid to the bride, otherwise the marriage is irregular if it is not consummated. But the marriage is ratified by consummation.

(i) Capacity

(a) Age

Islamic law stipulates that a Muslim of sound mind who has attained maturity can enter into a contract of marriage. Maturity is reached at puberty, which is marked by the first appearance of ihtilam.[2] If ihtilam does not appear, the presumption, among the Shiites and the Hanafi, is that maturity is reached at the completion of the 15th year.[3] It is generally supposed that ihtilam cannot take place below the age of 12 years for a boy and 9 years for a girl.

A minor, i.e. a person below the age of puberty, cannot

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1. Witnesses are not necessary in Miliki law, but the other schools require them.
2. In the case of a boy ihtilam is the ejaculation of semen; for a girl it is the appearance of the menstrual blood. See Al-Haj Fazlul Karim, op.cit., pp.724-5.
3. Karim, op.cit., pp.724-5; and Hughes, op.cit., p.315.

by himself [1] enter into a valid contract of marriage, but his guardian can do so on his behalf.[2]

Among Sierra Leone Muslims there is no ascertainable rule with regard to the age of marriage. But it is settled practice that both parties should reach puberty. For a girl, puberty is determined either at her first menstruation or when she has undergone clitoridectomy, usually at 15, which takes place upon initiation into the Sande or bondo society.[3] A male must be circumcised but since this may occur at a very early age it does not mark the state of puberty. Ability to maintain oneself and a wife is always regarded as a prerequisite for marriage. Sierra Leone Muslims steadfastly adhere to this practice even though the parents or relatives of the bridegroom are wealthy and magnanimous enough to assume the economic responsibilities of the bridegroom.[4] In practice, therefore, men do not normally marry before the age of 21, at which age they are considered to be on the threshold of the ability to pursue some trade or profession from which they can earn their living.

(b) Number

A Muslim man may marry not more than four wives but a Muslim woman is allowed only one husband.

This rule is of rigid application only among the stricter Muslims in Sierra Leone, more particularly among the Aku Muslims

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1. The male here includes the female.
2. The Hanafi School holds that a minor given in marriage by a father or grandfather can repudiate on reaching puberty. This is known as Khiyar al-bulugh or the option of puberty. See Fyzee, op.cit., p.91.
3. This is a secret society in which a girl is taught the art of womanhood. The Mende call it sande while the Temne call it bondo.
4. This seldom happens as a man is expected to undergo his own marriage expenses to show that he is able to maintain another person.

in Freetown and among the native Muslims in the Western Area and in the Northern Province. In the South, however, the rule is more relaxed and many a man who professes Islam may be found with more than four wives. The reason may be that, in the South, Islam is not as deep-seated as in the other parts of the country.

(c) Differences of Religion

Islamic law stipulates that a woman who is a Jewess or Christian can lawfully be taken in marriage, but no Muslim woman can be given in marriage to a man who is a Jew or Christian.[1]

Stricter Muslims in Sierra Leone are in this regard more inflexible than their law. Marriage is completely discouraged even between a Muslim man and a Christian woman unless the latter converts to Islam before the marriage.[2] Small wonder, therefore, that the Mohammedan Marriage Act recognises as valid only those Mohammedan marriages which are between persons professing the Mohammedan faith.

(d) ᶜIdda

ᶜIdda is the period during which a woman whose marriage has been dissolved by death or divorce is prohibited from remarrying. It lasts for four months and ten days in the case of death. For divorce, it lasts for three menstrual cycles. In either case, if the woman is pregnant until delivery.

There is on record that among the Susu, a devout Muslim tribe in Sierra Leone, ᶜidda was observed for four months and six

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1. Jews and Christians are referred to as the "people of the Book" (Ahlikitab). See Karim, op.cit., pp.638, 639.
2. In which case she is already a Muslim before the marriage. Among tribal people, however, a Muslim marriage can be contracted by a Muslim man and a non-Muslim girl, but the latter is compelled to practice Islam, at least the religious ordinances, after she has become a member of the man's household.

months in the cases of death and divorce respectively.[1]

Nowadays, however, only the ᶜidda of death appears to be observed in the country, and even that is limited to the period of the funeral obsequies which lasts for forty days. The ᶜidda of divorce is commonly ignored even by the stricter Muslims.

(ii) Consent

Both the bride and bridegroom, if of full age, must be consenting parties to their marriage. In the case of a minor girl or a woman who has not married before, she can be given in marriage by her father or her executor (wasi) without her consent. In Maliki law, the consent of an adult virgin must be accompanied by that of her guardian and that law insists on the presence of the guardian and his actual participation in the giving of consent. Among the Hanafis and the Shiites no guardian is required.[2]

Consent must be given by a declaration (ijab) made by one contracting party or his agent followed by an acceptance (qabul) from the other or her agent at the same meeting.

The requirement of consent is zealously met by all Muslims in Sierra Leone. As marriage does not usually occur during the woman's minority, her consent is always solicited and obtained. This is now true even for the native Muslims who, in the olden days, gave their young daughters in marriage without their consent. Apart from the consent of the bride and bridegroom, that of their respective families must also be given. For this reason, a family gathering consisting of representatives of the two families must be summoned at which the final arrangements are settled and the marriage consideration is paid.

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1. M.Aubert: "Laws and Customs of the Susus", S.L.S. (O.S.) No. 20, Dec. 1936, 67 at pp.70, 71.

2. Hughes, op.cit., 315.

(iii) Degrees of consanguinity, affinity and fosterage

(a) Consanguinity

A man is prohibited from marrying his mother,[1] daughter,[2] sister, paternal aunt,[3] maternal aunt, brother's daughter and sister's daughter.

(b) Affinity

Persons prohibited within the degrees of affinity include mother-in-law, daughter-in-law, wife's sister during the subsistence of the marriage, son's wife and step-mother.

(c) Fosterage

A man cannot marry his foster mother, i.e. mother that has suckled him, nor foster sister unless the foster brother and sister were nursed by the same mother at intervals widely separated. For the fosterage to be a bar, the child should have been suckled at least fifteen times or for a day and night. Among the Shafi, it is necessary that it should heve been suckled four times. The Hanafi require suckling only once.

Most of the prohibited degrees of consanguinity and affinity as entrenched in Islamic law herein mentioned are recognised by Sierra Leone Muslims in general. Specifically, however, a Mende Muslim man can marry his mother's brother's daughter or the widow of his father other than his own mother - a practice that is abhorred by the Temne and Susu Muslims. Also, among the Kono, a man is allowed to marry the sister of his wife during the subsistence of the first marriage. This departure from the

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1. Mother includes all female ascendants both in the male and female line.
2. Daughter includes all female descendents whatsoever, i.e. daughter of son or daughter of daughter.
3. Paternal aunt includes grandfather's and grandmother's sisters.

Sharia is a manifestation of the strong influence of tribal custom.

The prohibition on the ground of fosterage is generally limited to the foster mother alone and in this case there is no laid down period during which the suckling should have taken place.

(iv) Witnesses

The Quran prescribes that two male witnesses (or one male and two female witnesses) must always be present at a Muslim marriage.[1] But according to Maliki law, a marriage contracted without witnesses raises a shubha and is merely defective.[2]

Sierra Leone Muslims adhere fervently to the presence of witnesses. The Ahmadiyya, a minority group, require two males, one from the woman's side and the other from the man's. The Maliki prefer two male representatives from each side. In addition, there are also a god-father and a god-mother drawn from outside the two families. These play a more vital role during the life of the marriage for they act as custodians to whom all disputes during the marriage between the spouses are referred before ever divorce is pursued.

(v) Proclamation

A Muslim marriage cannot take place in secret. It must be publicly proclaimed otherwise it will be regarded as a clandestine sexual relation amounting to fornication. Proclamation is done by the delivery of a sermon (khutbah) to the couple in

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1. 2:282 Q.

2. For more information on this point, see Chapter 10, pp.332-337

the presence of witnesses, the beating of drums and the holding of a marriage feast (walimah).

The proclamation of a Muslim marriage is, in Sierra Leone, a very impressionable affair.[1] On the morning of the wedding, the bridegroom and his party walk their way to the mosque singing Arabic songs. They are followed by the bride's party dressed in colourful attire (ashobi). The bride and bridegroom sit in separate parts of the mosque. The custom of the Aku Muslims at Fourah Bay in Freetown is for the bride and the bridegroom to occupy separate mosques. The officiating Imam sits in the male mosque from which he communicates with the female mosque through a crier.

The Imam delivers a sermon to the couple in which he advises them as to their marital responsibility and their rights and obligations towards each other.

Verses are read from the Quran after which the godfather of the bridegroom hands over the wedding ring to the Imam and the Imam back to him. The ring is finally taken to the bride by the Registrar of marriages. As soon as it is delivered, the mosque drum (tabuli) is beaten seven times for a man's first wedding or five times for a subsequent one, each stroke delivered at systematic intervals. After the prescribed strokes, the bridegroom may request a repetition of the strokes.

When the ceremony is over, the husband meets his wife for a short while outside the mosque and they depart for their respective homes, each accompanied by relatives, friends, well-wishers and dancers. Late in the evening of the wedding day, the husband and his party call at the houses of the wife's

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1. For a description of celebration among a Freetown community, see O. Bassir: "Marriage rites among the Aku (Yoruba) of Freetown", Africa, Vol.24, 1954, p.251.

relations where the wedding feast will be in full swing and they give money to these relations. Finally, the wife is brought to the husband's house escorted by her god-mother and her train.

Another aspect of the proclamation of a Muslim marriage in Sierra Leone is registration. Islamic law itself does not require marriages to be registered by certificate but the general law of Sierra Leone makes provision for such registration of the marriage.[1] For this purpose, every mosque keeps a register in the custody of a registrar appointed by the local jamaat. He issues the marriage certificate which must contain the names of the parties to the wedding, their addresses, age and father's names and occupations. A certified copy in English and Arabic of the certificate must be sent to the Registrar-General of Sierra Leone within a week of the making thereof.[2]

(vi) Dower

At the time of marriage, Islam requires a marriage settlement, i.e. dower (Mahr or sadaq) to be made upon the wife. The minimum laid down by Maliki law is 3 dirhams.[3]

The object of the dower is that the wife should have an independent proprietary position and should be free to spend charitably or make gifts to her relations out of her separate property. The institution of the dower is a practical acknowledgement by the prospective husband of the independent proprietary position of the future wife and her right to maintain and acquire separate property which the husband cannot bring to his

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1. S.5 of the Mohammedan Marriage Act, cap.96.
2. S.6(2) of the Mohammedan Marriage Act, cap.96.
3. According to the Encyclopaedia of Islam by M.T. Houtsma & Ors, Leiden-London, 1913-1937, Vol.I, p.978, a dirham is a silver coin 2.97 grammes in weight. Three dirhams have been valued at 2/- sterling. See S. Vesey-Fitzgerald: Muhammadan Law; An Abridgement, O.U.P. London, 1931. p.63.

own use.

Among many Sierra Leone Muslims dower and the marriage consideration, i.e. payment made or services rendered by the bridegroom and his family to the family of the wife, are hardly distinguishable. The marriage consideration is usually regarded as taking the place of the Islamic dower.

Where money is paid, part of it is expected to equip the wife in preparation for her marital role. But the stricter Muslims do draw a line of distinction between the two payments. Alhaji Gibril Gadri Saccoh, Imam of the Mandingo Muslim community in Freetown, reports [1] that whenever a marriage consideration is paid the wife's parents always ask the husband's parents: "Is everything all right?". This question is answered in the affirmative only when the dower has accompanied the marriage consideration.

In the olden days, the dower, where separately paid, did not exceed 70 cents.[2] Today, there is no fixed amount. It is discretionary depending upon the financial circumstances of the prospective husband and his affection for the wife. It now usually takes the form of gold, oxen, houses, or money, ranging from Le.200/00 to Le.300/00 among the well-to-do Muslims.

Conclusion

To sum up, Muslims in Sierra Leone comply with some but not all the requirements of a valid marriage as laid down by the

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1. Personal communication.

2. 100 cents = one leone; 2 leones = one pound sterling. A leone is abbreviated "Le." Sierra Leone changed her currency from the pound and penny to the leone and cent in August 1965.

Sharia.[1] The reason is partially the strong influence of customs and partially the lack of knowledge by the vast majority of them of the rules of the Sharia.

Judicial notice is commonly taken of this influence and the general law oourts are always accommodating in accepting as a Mohammedan marriage one that is represented to them as such. There has not been any reported instance when the validity of a Mohammedan marriage has been questioned before the Sierra Leone courts but the possibility of such occurrence should not be excluded.

Diehard Muslims may justifiably deprecate the practice of misrepresenting as Muslim marriages ones which do not conform with the Sharia and they may argue that the Islamic law of marriage must be strictly observed by all Muslims in the country.[2] They are right legally insofar as the Western Area is concerned, but such a step, in our submission, will be both a complicated and retrograde one to take. First, the majority of Muslims are tribal people and illiterate in Islamic law and, except for the ritual ordinances of their religion, they conduct their daily lives in accordance with customary law. It will, therefore, be impracticable to compel them to comply with a jurisprudence which is quite alien to them and to their courts. Secondly, the introduction of a third system of law in its strict form, as Anderson rightly concedes, will retard the eventual fusion of customary law and the general law which must surely be the ultimate goal.[3] If individual Muslims so desire they are always

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1. For the legal effects of non-compliance, see Chapter 10, pp.338-339
2. See "A jutting submitted to the Constitutional Committee of the Sierra Leone Muslim Congress" by Alhaji Sheik Gibril Sesay; unpublished.
3. Islamic Law in Africa, p.299, footnote 5.

free to follow the dictates of Islamic law in their personal lives or even in family matters if the family consents.[1]

The only appropriate and desirable reform insofar as marriage is concerned is the extension of the jurisdiction of the High Court to hear matrimonial causes in accordance with the relevant principles of the Sharia. This will meet the needs of the stricter or better educated Muslims. At present, the High Court has jurisdiction to hear matrimonial causes in respect of only Christian and civil marriages and there are no Qudi Courts in the country so that the only avenues open to the stricter or educated Muslims are ad hoc arbitral tribunals or customary law courts, but to appear before the latter they consider it as infra dignitatem.

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1. Ibid.

CHAPTER 7

MATRIMONIAL RELATIONS I

A. INTRODUCTION

In this and the next chapters of this Part, except as otherwise stated, husband and wife relationship is that created under the Marriage Acts (including the Mohammedan Marriage Act). For we have seen that once a marriage is proved to be in accordance with Islamic law its incidents are governed by the general law except for divorce and intestate succession.

The general law on husband and wife is mainly the received common law and local statutory modifications that have been made of it.

At common law, a husband and wife were regarded as one legal person.[1] This was, however, an imperfect unity since, as between the couple, the husband in some cases [2] occupied a position higher than that of the wife; and vis-a-vis third parties, the husband had a right to sue for certain wrongs inflicted upon his wife while the wife had no corresponding right. Lush J. gave a very stimulating and succinct exposition of this legal unity when he said:

> "It is a well-established maxim of the law that husband and wife are one person. For many purposes, no doubt, this is a mere figure of speech, but for other purposes, it must be understood in its literal sense."[3]

Unity indeed was a mere figurative expression when it came to the ownership of property. The husband was at the same

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1. Blackstone, Commentaries, 1, 442.
2. e.g. property.
3. Phillips v. Barnett (1876) 1 Q.B.D. 436, 440.

time absolutely entitled to his own property and possessed an absolute interest in his wife's chattels and choses in possession and had power to dispose of her leasehold interest in his lifetime. In Sierra Leone, it was not until the Married Women's Property Ordinance, 1875,[1] that the Sierra Leone married woman gained absolute control over certain properties acquired by her. They included earnings, deposits in savings banks, stocks and shares, and, in limited circumstances, property devolving on her own intestacy.

In 1907, the Sierra Leone Christian Marriage Act went a step further to allow a native woman married according to Christian rites a free hand in the enjoyment of her property so long as her personal law permitted her to hold it independently of her husband.[2]

It was in 1932 that the last link of proprietary dependence was broken with the passing of the Imperial Statutes (Law of Property) Adoption Act.[3] This Act gave capacity to a married woman to deal with her property as if she were a femme sole.

The legal indivisibility of husband and wife, in the common law, results in the acquisition of rights over each other's person which, if invaded, gives rise to remedies in favour of the spouse whose right had been so infringed. These rights are (a) the right to consortium, and (b) the right to maintenance. The right to consortium is one exercisable against third parties by either spouse as the case may be whilst the right to maintenance is one enforceable by the wife against the husband.

The relationship of husband and wife also affects rights

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1. No.7 of 1875.
2. See s.26 of the Christian Marriage Act, cap.95 of the revised Laws of Sierra Leone, 1960.
3. Cap.18 of the revised Laws of Sierra Leone, 1960.

and duties in areas of private and public law. The treatment of these will be postponed to the next Chapter. It is intended in this Chapter to examine the right to consortium and the right to maintenance.

B. RIGHT TO CONSORTIUM

Consortium has been described by one learned judge as a "bundle of rights some hardly capable of precise definition"[1] arising from the fact that the spouses live together as husband and wife. The emphasis is on conjugal society and services "or comfort and services".[2] Thus the spouses have mutual rights to sexual intercourse, protection, and the enjoyment of each other's company. The husband has right to the domestic services of the wife, while the wife is entitled to the use of her husband's name, rank and title, and to be maintained by him. Though cohabitation is the visible sign that consortium is subsisting it is nevertheless not essential,[3] since in this modern age circumstances such as the quest for occupation or education may force a husband to live apart from his wife. For example, H (husband), a civil servant, living with his wife and family in Freetown, is transferred to Kenema; W (his wife), who is employed as a teacher remains in Freetown with the children who are attending school. If the separation is mutual and there is the intention of resuming cohabitation whenever circumstances permit, there is no break in consortium.

During cohabitation, the spouses are expected to treat

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1. Lord Reid in Best v. Samuel Fox & Co. Ltd. [1952] 2 All E.R. 394, 401; [1952] A.C. 716, 736.
2. See A Century of Family Law, London, 1957, edited by Graveson and Crane, p.101.
3. Lord Goddard, Best v. Samuel Fox & Co. Ltd. [1952] A.C. 716, 733-734.

each other with the utmost civility and gentleness. Thus, a husband has no right to inflict corporal punishment on his wife or to restrain her movements without resorting to due process of law.[1] The demands for sexual intercourse must be reasonable; one spouse cannot insist on having sexual intercourse when the other is in poor health or when the method employed is unnatural (e.g. coitus interruptus),[2] nor may a husband insist on sexual intercourse with full knowledge that he is suffering from a venereal disease.[3]

Breach of Consortium

(i) Breach by one spouse

The duty to cohabit was at common law never enforced through a legal remedy by a wife against her husband. Apart from petitioning for judicial separation or divorce, which is not a step to bring the spouses together, a deserted wife was not able by means of legal sanction to force the husband to continue to cohabit with her. But the husband could.[4] The Sierra Leone Matrimonial Causes Act, 1949, now puts the husband and wife [5] on the same footing. Either spouse is permitted to

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1. Lord Leigh's Case (1674) 3 Keble 433; R. v. Jackson [1891] 1 Q.B. 671; and the Sierra Leone unreported case of Elliott v. Elliott decided by the Supreme Court on 1 April, 1948.
2. See Bromley, op.cit., 96.
3. Foster v. Foster [1921] P.438, C.A.
4. This was by a petition for restitution of conjugal rights made to the common law courts.
5. Husband and wife here are probably those arising as a result of a Christian or Civil Marriage, because s.2 of the Matrimonial Causes Act defines marriage as "the union of one man and one woman for life to the exclusion of all others." Mohammedan marriage, therefore, which is potentially polygamous, would seem to be excluded, and the common law position stands with respect to such marriages.

petition for restitution of conjugal rights where the other is in breach of duty to cohabit.[1] There is no penalty for disobedience but where the petitioner is the wife, she can apply to the High Court to order the husband to make such periodical payments to her as may be just,[2] and to order the payment of alimony.[3] If the applicant is the husband, the High Court has power to order a settlement of the wife's property to be made for the benefit of the husband and of the children of the marriage, or to order part of the profits of the wife's trade or earnings to be periodically paid to the husband for his own benefit or to the husband or a third party for the benefit of the children of the marriage.[4]

Diligent research has not revealed any instance when the right to petition for restitution of conjugal rights has been invoked before the Courts in Sierra Leone.[5] In many cases, the aggrieved party who wants the other spouse back resorts to reconciliation and negotiation through friends and relatives. If social pressures prove futile, the party contents himself with either remaining aloof or seeking a remedy for judicial separation or divorce when the appropriate time comes.

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1. S.17.
2. S.18.
3. S.21(4)
4. S.22(2) of the Matrimonial Causes Act, cap.102.
5. Throughout its long history, the remedy was seldom used in England. For example, in the three years 1965-1967 there were 105 petitions (60 by husbands and 45 by wives) and 31 decrees made (11 granted to husbands and 20 to wives); see the Great Britain Law Commission Published Working Paper No.22 dated 17 February, 1969, p.3. For the abolition of the remedy in England and reasons for its continued existence in Sierra Leone, see Chapter 10, pp.341-343.

The existence of the right to petition for restitution of conjugal rights is, nevertheless, in Sierra Leone, of especial significance for the deserted wife who wants to be properly and adequately maintained but who does not wish to take proceedings for divorce and judicial separation. True, she can apply for maintenance to the Magistrate's Court, but she may require maintenance above the limit which Magistrates' Courts are entitled to order. Since the High Court has no power to make an order for maintenance except consequentially to other proceedings, she must first apply for an order for restitution of conjugal rights and upon disobedience of it by the husband she can apply to the High Court to make an order for periodical payments.

(ii) Breach by a third party

A third party's invasion of the right to consortium between a husband and wife gives rise to certain causes of action. They are (a) damages for loss of consortium, (b) damages for harbouring the wife, (c) damages for enticement and (d) damages for adultery. All except damages for loss of consortium cannot now be recovered in English law.[1] But being common law remedies, in the absence of local statutory provisions, they are still recoverable in Sierra Leone.

(a) Damages for loss of consortium

A third party may deprive one spouse of the consortium of the other by the commission of a tort or a breach of contract[2] against the plaintiff's spouse.

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1. By ss.4 and 5 of the Law Reform (Miscellaneous Provisions) Act, 1970.

2. See the English case of Jackson v. Watson & Sons [1909] 2 K.B. 193 in which a husband recovered damages for the loss of his wife through food poisoning after eating salmon sold to her by the defendants.

However, where interference with consortium does not result in the death of one spouse or the cessation of cohabitation the common law rule is that the husband can recover damages for wrongs inflicted on the wife, but the wife has no similar right. This was established in the case of Best v. Samuel Fox & Co. Ltd.[1] In that case, the husband, through the negligence of the defendants, sustained serious injuries which rendered him sexually incapable. For these injuries he recovered damages. Six months later, his wife brought an action for the loss of her husband's consortium with the allegation that though her husband was so young - thirty years old - she had been deprived of the opportunity of having further children. It was vehemently argued on behalf of the wife that it was anomalous in modern times to deny to a wife a legal remedy which in identical circumstances was open to the husband. The House of Lords unanimously held that an action could not lie at the instance of the wife. The Board opined that if there was to be equality of rights among the spouses the husband's right should be extinguished instead of extending it to the wife.

The raison d'etre for allowing the husband a right while denying it to a wife is that historically a husband had a quasi-proprietary interest in his wife. Any interference therefore with his wife - his property - became actionable. But the wife never had any proprietary right in the husband and she, therefore had no action.

(b) Damages for harbouring a wife

On the same historical grounds as with actions for loss of consortium, a wife cannot recover damages if a third party

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1. [1952] 2 All E.R. 394, H.L.; [1952] A.C. 716.

harbours her husband.[1] But the husband's right to do so was recognised in the case of Philp v. Squire [2] in which the plaintiff's wife went to the house of the defendant to whom she was related by marriage and represented herself to have been ill-used by the plaintiff. The defendant received her and allowed her to live with him after he had been notified by the husband not to harbour her. The claim failed on some other ground but, holding that such action was known to the common law, Lord Kenyon C.J. said:

> "The ground of this action is that the defendant retains the plaintiff's wife against the inclination of her husband, whose behaviour he knows to be proper; or from selfish and criminal motives. But where she is received from principles of humanity the action cannot be supported."[3]

Since 1791, there seems to be no English case on the subject. Small wonder, therefore, that Devlin J. (as he then was) took the opportunity in Winchester v. Flemming [4] of regarding such action as obsolete. In holding that the action had no place in present-day England, the learned judge had this to say:

> "The reason why harbouring was considered objectionable was because it interfered with the economic process by which a wife, refused food and shelter elsewhere than in the matrimonial home, would eventually be forced to return to it. This is no longer an accepted method of effecting a matrimonial reconciliation ... What if she was driven to seek public assistance? Would the Crown or some local authority then be liable for harbouring? In a society that is organised on the basis that everyone is in the last resort to be housed and fed by the State, the bottom has dropped out of the action for harbouring."[5]

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1. Winchester v. Flemming [1958] 1 Q.B. 259.
2. (1791) Peake 114, 115.
3. Ibid., 115.
4. [1958] 1 Q.B. 259.
5. Ibid., p.265.

The sentiments expressed by Devlin J. clearly represent the social and economic positions in England for which they were intended. Considering the Sierra Leone situation, however, where there is no welfare state as in England, the last resort of a runaway wife is the house of a relative or a lover. Actions for harbouring wives ought, therefore, to be entertained by the High Court even though at present their occurrence may be negligible, if any at all. The only reported Sierra Leone case is Demby v. Bishop [1] in which the plaintiff's claim was dismissed because being already married to one woman under the Christian Marriage Act, he instituted an action for harbouring a second woman married under customary law.

A defendant sued for harbouring has the same defence available as a defendant sued for enticement and this will be considered shortly.

(c) Damages for enticement

A person is liable on the tort of enticement who without lawful justification procures, persuades or entices one spouse or is in some way positively responsible for that spouse leaving the other. The essence of the wrong is the deliberate breaking up of the marriage by a stranger through his persuasion or other positive inducement. Sexual misconduct with the spouse or the mere alienation of affection [2] are not necessary ingredients. Thus, in the West African Court of Appeal case of Sharples v. Barton [3] in which a wife voluntarily left the matrimonial home

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1. (1950) 3 S.L. Law Recorder, p.7.
2. In Gottlieb v. Gleiser [1958] 1 Q.B. 267, 268, Denning L.J. (as he then was) said that though an action for alienation of affections was allowed to be brought in most of the States in the United States of America, the law of England does not permit such actions.
3. (1951) 13 W.A.C.A. 198.

and went away with her lover, with whom she had committed adultery, it was held that the plaintiff husband could not succeed in an action for enticement against the lover in the absence of proof that the lover had procured, persuaded, or enticed the wife into leaving the plaintiff. But in the English case of Place v. Searl,[1] where the defendant said to the plaintiff's wife, "Come on, Gwen, we will go", following a dispute between Gwen and her husband before she left the matrimonial home, the Court of Appeal in England was of opinion that the words were capable of amounting to enticement.

Until 1923, it was established common law that a husband could bring an action for enticement,[2] but it was doubtful whether there was a converse right. In that year, Darling J. sitting in the Queen's Bench Division of the High Court of England, in the case of Gray v. Gee,[3] ruled that a wife could bring such an action just as the husband.[4] Giving reasons for his opinion, the learned judge said that the married woman had always been possessed of the right to sue but because of procedural difficulties before 1882 she could not sue in tort in her own name. These difficulties having been removed by the Married Women's Property Act, 1882 (which does not apply in Sierra Leone [5]) she was now free to bring the action. The opinion of Darling J. has been approved in subsequent cases [6] without the reasons adduced by him. But in Best v. Samuel Fox & Co. Ltd.,[7] the House of Lords refused the wife's claim for loss of

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1. [1932] K.B. 497.
2. Winsmore v. Greenbank (1745) Willes 578.
3. (1923) 39 T.L.R. 429.
4. The plaintiff, however, lost the action on the facts stated before the jury.
5. The Imperial Statutes (Law of Property) Adoption Act, 1932, cap. 18 of the revised Laws of Sierra Leone, 1960, allowed the married woman to sue or be sued in her name.
6. Place v. Searle [1932] 2 K.B. 497, and Best v. Samuel Fox & Co. Ltd. [1952] A.C. 716.
7. [1952] A.C. 716, 731-2, 735, 736.

consortium, one of the reasons being that such a claim was allowed the husband on the ground that historically he had a quasi-proprietary right in his wife but not the converse situation. On the other hand, Darling J. in Gray v. Gee supported his opinion on the ground that historically

> "in this country (England) a woman was never the chattel of her husband. He had 'potestas' over her and the children but 'potestas' and 'proprietas' were very different things."[1]

His Lordship came to the conclusion that there was no distinction to be drawn to the effect that the husband could bring the action for enticement because his wife was his property and that the wife could not because her husband was not her property.[2]

The opinion expressed in Gray's case and Best's case on the married woman's position vis-a-vis her husband are diametrically opposed to each other but they are the grounds on which, on the one hand, she has been given the right to sue for enticement and, on the other, she has been refused the right to sue for loss of consortium and for harbouring the husband.

The English courts have now lost the opportunity of reconsidering the wife's position in respect of the torts of enticement and harbouring.[3] The duty now rests on the shoulders of the Sierra Leone judges. In carrying it out they have one of two choices to make. Either to raise the wife to the level of the husband and allow her to sue for every interference with her consortium or to take the advice of the House of Lords in Best's case that the husband's right is an anomaly and should be extinguished

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1. (1923) 39 T.L.R. 429, 431.
2. Denning J. in Gottlieb v. Gleiser [1958] 1 Q.B. 267, 268 held the view that historically the wife was considered to be the property of her husband.
3. The Law Reform (Miscellaneous Provisions) Act, 1970, by its s.5, has abolished them in England.

instead of extending it to the wife if there is to be equality between the sexes.

In Gottlieb v. Gleiser [1] Denning L.J. described an action for enticement as "not in keeping with the times" and refused to extend it to permit a husband to sue his mother-in-law who had substantially interfered with his marriage to the point of breaking it down resulting in the wife returning to her parents.

> "When a man takes to himself a wife", he said, "he takes her parents to be his parents and they become his parents-in-law; he becomes part of their family."

This statement is practically as true for Sierra Leone as it is for England. In the Sierra Leone society, though on marriage a wife theoretically abandons her family to set up a new one with her husband, it is socially recognised that she can resort to her parents in times of hardship and the parents have a social responsibility to receive her. Thus, in Antoh v. Crowther [2] an action by a husband against his father-in-law failed. The wife had originally left the matrimonial home with the husband's consent to reside with her father for the observance of a funeral ceremony for an aunt but later refused to return to her husband alleging, which was false, that he lived on her immoral earnings.

It will be a defence to an action for enticement as well as for other offences against consortium that the plaintiff ill-treated the other spouse and that the victim was forced to leave the plaintiff through fear of bodily injury.[3] The defence is based on the principle of humanity. Honest belief by the defendant that ill-treatment had been meted out to one spouse by the other is

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1. [1958] 1 Q.B. 267, 268, 269.
2. Unreported; decided by the Supreme Court of Sierra Leone in 1949.
3. The English cases: Philp v. Squire (1791) Peake 114; Berthon v. Cartwright (1796) 2 Esp. 480.

probably sufficient.[1] It is also probably a defence that the defendant did not know that the plaintiff's spouse was married.[2]

(d) Damages for Adultery

According to s.20 of the Sierra Leone Matrimonial Causes Act, a husband can sue independently for, or include in a matrimonial suit for divorce or judicial separation, a claim for damages against another man who has committed adultery with the petitioner's wife. A claim for damages under this provision is based on tort and is not a matrimonial relief and is maintainable even after the death of the wife.[3]

Such claims are frequently included in petitions for divorce or judicial separation, but, until recently, there was doubt whether they could be made in an independent action in tort. In Wilson v. Genet and Wilson[4] the High Court of Sierra Leone ruled that the claim can be made independently, though Forster J. refused to award damages on the ground that the alleged adultery occurred when the spouses were separated, the wife being as if she were a femme sole during the period of separation. The learned judge professedly relied on the decision in the English case of Gardner v. Gardner.[5] Granted that in Gardner's case the jury awarded no damages. But they declined to do so not because there was separation simpliciter between husband and wife but because the wife was of very little value to the husband from the inception of the marriage, since she had developed irregular and intemperate habits soon after the

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1. Ibid.
2. McCardie, J. in Butterworth v. Butterworth & Englefield [1920] P.126, 151 C/f Sir Henry Duke, P. in Smith v. Smith & Reed [1922] P.1.
3. Tambiah, J.A. in Wilson v. Genet and Wilson, unreported, a decision of the Sierra Leone Court of Appeal dated 11 May, 1970.
4. 1968-1969 A.L.R. S.L. 53.
5. (1901) 17 T.L.R. 331.

marriage and long before she had met the co-respondent or separated from her husband. The legal position in that case was stated clearly by Gorell Barnes J. approving the opinion of the President in Evans v. Evans and Platts,[1] when the President summed up to the jury as follows:

> "It cannot be denied that there have been thrown out at different times and in various cases suggestions tending to show that where a husband and wife have become separated the husband cannot afterwards claim damages. That, however, is not the law. No doubt the fact of separation having taken place is an element, but is only one among several elements to be considered ... If you think that separation took place before any adultery was committed ... it is quite right to take that into account as a very important element operating in diminution of the damages ... The breaking up of the matrimonial home is not by any means the only element to be considered in such cases as this."

According to the above authority, therefore, a husband is not precluded from recovering damages because there has been a separation between himself and his wife before the adulterous association occurred. Separation may be relevant only when considering the quantum of damages.

When Wilson's case went on appeal, the Sierra Leone Court of Appeal [2] in fact, though without citing the foregoing authorities, awarded damages to the husband/petitioner. In the opinion of the Court, the first defendant, Genet, was responsible for the separation between Wilson and his wife and adultery had taken place after the separation.

The principles on which damages are awarded in such cases were summarised by Tambiah J.A. as follows: only compensatory

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1. [1899] P.195.
2. Wilson v. Genet and Wilson, Civ. App. 25/68. Unreported, decided by the Court of Appeal of Sierra Leone on 11 May, 1970.

but not punitive damages are recoverable, and two main considerations apply to arrive at an assessment; first, the financial value of the wife to the husband depending on her fortune and her ability and assistance in the home or business;[1] secondly, the injury to the husband's feelings, the blow to his marital honour and the hurt to his matrimonial and family life. Damages under this head are, however, moderate and the use of wealth or status by an adulterer is not a factor to aggravate them.[2]

As we have seen, the right to recover damages for adultery is available only to the husband. A wife does not have a corresponding claim of this kind against a woman who has committed adultery with her husband.

C. RIGHT TO MAINTENANCE

Maintenance of a wife by a husband is a universal concept which is known to every legal system. The reverse situation is known, though only recently, to only few countries like England. Sierra Leone law differs from English law in this respect, although provision is made in Sierra Leone law whereupon on dissolution of marriage or decree of judicial separation or upon an order for restitution of conjugal rights, settlement of the wife's property on the husband or children of both can be made.

When it comes to the question of maintenance while husband and wife are cohabiting, Sierra Leone law adheres strictly to the common law principle that it is the husband's duty to provide his wife with the necessities of life. This principle was echoed by Lord Hodson in McGowan v. McGowan [3] and summarised by Bromley [4] in

1. Approving McCardie J. in Butterworth v. Butterworth and Englefield [1920] P.126.
2. Approving Diplock J. in Pitchard v. Pitchard [1966] 3 All E.R. 610.
3. [1948] 2 All E.R. 1032, 1034.
4. Op.cit., 402.

the following terms:

> "The husband's duty . to provide his wife with the necessities of life is prima facie complied with if he provides a home for her. The wife has no right to separate maintenance in a separate home unless she can justify living apart from her husband. A man may fail to maintain his wife even though he is cohabiting with her, and he must still provide her with necessities, for example, food and clothing ... His obligation remains if the spouses are obliged to live apart, for example, owing to the illness of one of them, provided that the wife is not in desertion."

In Sierra Leone, both the common law and statute law protect the married woman's right to maintenance on condition that she remains faithful whatever be the conduct of the husband.

(i) Common Law

At common law this protection is afforded by the doctrine of agency by presumption of law.[1] It is a doctrine under which a husband is held liable for the debts incurred by his wife on the presumption that he has authorised her to pledge his credit. The obligation of the husband to support his wife arose from the fact that until the late nineteenth century, in England, women could not own any separate property at law and so could not be made liable for debts.

The common law does not, however, provide maximum security for the wife as would be expected, for the concept of the wife's presumed authority is severely curtailed. Thus, if she is provided with necessaries according to the station of life of the husband,[2] or if the husband expressly forbids her to pledge his credit even if she has not been provided with adequate maintenance,[3]

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1. See the standard works on Agency, particularly Bowstead, Fridman and Stoljar.
2. Phillipson v. Hayter (1870) L.R. 6 C.P. 38.
3. See Fridman: Agency, 3rd ed., p.83.

or if she commits adultery even though the husband remains ignorant of it,[1] she is deprived of the right to maintenance. The authority to pledge the husband's credit also depends on the fact that both husband and wife are cohabiting in a domestic establishment.[2]

If there is a cessation of cohabitation, the agency by presumption of law comes to an end but if the wife is deserted, another agency relationship arises by operation of law, i.e. agency of necessity.[3] Through this doctrine, a deserted wife can pledge her husband's credit even though she may be expressly forbidden to do so. But agency of necessity also lasts as long as the wife remains chaste.

Developments in social security and the amelioration of the wife's economic position in the event of desertion by her husband have resulted in the abolition by statute of the concept of the wife's agency of necessity in English law,[4] but as the common law is part of Sierra Leone law the doctrine is still applicable in Sierra Leone. The retention of the doctrine in Sierra Leone law is justifiable since there is no social welfare state in the country.

(ii) Statutory law

Under statute law there is no provision in Sierra Leone whereby a married woman, during cohabitation, can apply to the courts for an order for maintenance where the husband has wilfully

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1. Govier v. Hancock (1796) Term. Rep.603. But if the husband connives at or condones the adultery the wife will continue to have the authority; Wilson v. Glossop (1885) 20 Q.B.D. 354; Harris v. Morris (1801) 4 Esp. 41.
2. Debenham v. Mellon (1880) 6 App. Cas. 24, H.L.
3. Fridman, op.cit., pp.70-73.
4. S.41 of the Matrimonial Proceedings and Property Act, 1870.

neglected to provide reasonable maintenance for her without instituting proceedings for divorce or judicial separation. It is the deserted wife, the divorced or judicially separated wife and the one whose marriage has been annulled, that are protected. Sierra Leone law, in this regard, corresponds to English law before 1949.[1]

The deserted wife in Sierra Leone has two options open to her. Apart from invoking her common law right as agent of necessity, she can apply to a Magistrate's Court for maintenace under the Married Women's Maintenance Act;[2] or she can petition the High Court, first for an order for restitution of conjugal rights and upon a decree thereof being disobeyed by the husband, for a subsequent order for periodical payments to be made to her by the husband.[3]

These provisions are, with respect, grossly inadequete even for the persons intended to be benefited.

First, the effort of the wife to invoke her common law right can be severely forestalled by a recalcitrant husband. While in law he cannot withdraw the wife's assumed authority as agent of necessity, he can, in practice, prevent tradesmen from carrying on business with the wife. This is frequently done by

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1. By s.5 of the United Kingdom Law Reform (Miscellaneous Provisions) Act, 1949, it became possible for the first time in England for a married woman to petition for maintenance on the ground of the husband's wilful neglect to maintain her or their children without her having to institute some other matrimonial proceedings.

2. Cap.100 of the revised edition of the Laws of Sierra Leone,1960. The application can be made by a wife, including a Muslim wife, married under statutory law. See Mustapha v. Mustapha (1950) 3 S.L. Law Recorder, p.20.

3. S.18(1) of the Matrimonial Causes Act, cap.102 of the revised Laws of Sierra Leone, 1960. Note that a Muslim wife is deprived of remedies under this Act.

announcements in newspapers that the wife has left the matrimonial home (which may not be the case) and that anybody who wishes to give her credit does so at his own risk.

Secondly, under the Married Women's Maintenance Act,[1] maintenance depends upon proof of desertion. This may be a colossal task for the wife to undertake if she has been separated from her husband in circumstances in which it may be difficult to cast the blame on the husband. In such a case, only the chivalrous magistrate would strain the law and bend it in the wife's favour, with the threat of the appeal court hanging over him like the sword of Damocles.

In Elba v. Elba,[2] one of the issues before the Sierra Leone High Court in its appellate jurisdiction was whether a Magistrate's Court was right in finding that a husband had deserted his wife, so as to make a claim to maintenance available to the wife under s.2 of the Married Women's Maintenace Act. The facts were that the husband and wife were living together when the husband, having had notice to quit his home, moved to another. The wife did not go with him nor did she raise any objection to going with the husband to live in the new premises. The summons was taken out on 5 March, 1965, and it was during the course of the proceedings that the husband moved to the new premises on 29 June, 1965. The magistrate, in the course of his judgment, stated that he came to the conclusion that the husband did not want the wife any more, and ruled that the husband deserted the wife on the day that he changed residence. On appeal to the High Court, Harding J. held that the evidence before the magistrate did not amount to

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1. S.2 of cap.100 of the revised Laws of Sierra Leone, 1960.

2. 1967-1968 A.L.R. S.L. 74.

desertion on the part of the husband.[1]

Thirdly, the jurisdiction of the Magistrates' Courts is limited to ordering a maximum of Le 8 (four pounds) a week for the maintenance of the wife and the children of the marriage.[2] If, as the law suggests, the wife is entitled to be maintained in accordance with the station of life of the husband, that status cannot be maintained by the wife of a husband in the higher income group [3] if the wife is deserted and has no occupation or profession upon which to embark. The situation can be saved by either extending the jurisdiction of the Magistrates' Courts or granting jurisdiction to the High Court to order maintenance while the marriage subsists without first going through the cumbersome procedure of petitioning for an order for restitution of conjugal rights.[4]

Fourthly, the machinery for the enforcement of maintenance orders is not very helpful to the wife. Under the Married Women's Maintenance Act,[5] if the husband is in default he can be brought before a Magistrate's Court on a warrant for his arrest for contempt. The Magistrate may direct the amount due to be recovered by distress and sale of the goods and chattels of the

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1. However, earlier in his judgment, Harding J. expressed the opinion that on the evidence before the Court, the Magistrate could have found that the husband was guilty of constructive desertion. It is difficult to figure what he meant by this statement since he took the contrary view in his final decision.
2. S.2(6) of the Married Women's Maintenance Act, cap.100 of the revised Laws of Sierra Leone, 1960.
3. The top-ranking civil servants and men in commerce and industry and the professions earn a minimum of Le 4,000 per annum.
4. For details of financial provisions consequent upon a petition for restitution of conjugal rights, see further Chapter 10, pp.342-343.
5. S.4 of the Married Women's Maintenance Act, cap.100 of the revised Laws of Sierra Leone, 1960.

husband, if he has any, or may commit him to prison for any term not exceeding three months. In many instances, however, the property of the husband is not available for distress to be levied upon; nor is he brought before the court as the process servers always complain that he cannot be found.

In the case of default to make periodical payments subsequent upon a petition for an order for restitution of conjugal rights, even the perfunctory enforcement provision as in ordinary maintenance orders is not available. Instead, the wife is left with the alternative of pledging the husband's credit for necessaries supplied to her [1] which, as we have said earlier, is not so satisfactory.

Where proceedings are instituted for the dissolution or annulment of the marriage or for judicial separation, there are provisions for the maintenance of the wife. First, in the case of a decree for judicial separation, the court can order the husband to pay alimony to the wife.[2] Secondly, in the course of proceedings for divorce or nullity, the wife can be paid by the husband alimony pendente lite [3] which the court can make permanent after the appropriate decree.[4] This will take the form of a gross sum of money or annual sums of money for any term, not exceeding the wife's life,[5] and/or a monthly or weekly sum during the joint lives of the husband and the wife.[6]

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1. S.15(1)(b) of the Matrimonial Causes Act, cap.102 of the revised Laws of Sierra Leone, 1960.
2. Ibid.
3. S.21(3): But it was held by Webber C.J. sitting in the Supreme Court in Dove v. Dove, unreported, that if it appears that the husband has no means or very small means, the Court may refuse to grant alimony either pendente lite or permanent. See Supreme Court Records, Vol.II (1935),p1.
4. S.21(1) and (2) of the Matrimonial Causes Act, cap.102 of the revised Laws of Sierra Leone, 1960.
5. S.21(1).
6. S.21(2).

The nearest that Sierra Leone statutory law has gone to provide maintenance through the High Court for a married woman without going through the process of terminating the marriage or seeking judicial separation is s.4 of the Matrimonial Causes(Amendment) Act, 1961.[1] That section allows a married woman who has grounds for judicial separation and whose husband has wilfully neglected to provide reasonable maintenance for her or the infant children of the marriage, to apply to the Court for periodical payments which may be secured or insecure depending on the discretion of the Court. It must be emphasised that application can only be made under this section if the wife has grounds to be judicially separated from her husband, otherwise the Court cannot be of any assistance to her even though it may be proved that the husband has wilfully neglected to provide reasonable maintenance.

As with maintenance orders in the case of desertion, these provisions are inadequate, since there is probably no attachment of the earnings of a defaulting husband. In petitions for judicial separation, restitution of conjugal rights, and applications under s.4 of the Matrimonial Causes (Amendment) Act, 1961, the position appears to be put quite clearly and succinctly by s.15(1)(b) of the Matrimonial Causes Act [2] which reads:

> "If alimony has been ordered to be paid and has not been duly paid by the husband he shall be liable for necessaries supplied for the use of the wife."

S.15(1)(b) applies to judicial separation but s.18(1) of the Matrimonial Causes Act and s.4 of the Matrimonial Causes (Amendment) Act, 1961, provide that the same method for the enforcement of an order for alimony in the case of judicial

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1. Act No.16 of 1961.

2. Cap.102 of the revised Laws of Sierra Leone, 1960.

separation shall apply to restitution of conjugal rights and application under s.4 of the Matrimonial Causes (Amendment) Act respectively.

For petitions for divorce or nullity, however, statutory law remains silent on the issue of enforcement. Vigilant and discreet legal practitioners have, therefore, interpreted this silence to mean that the methods of enforcement open to a judgment creditor under the general law, i.e. fi fa, sequestration, charging order and garnishee order, are also available to a wife whose husband has defaulted on an order to maintain her. In one case, Bangura v. Bangura;[1] the wife/applicant successfully obtained a garnishee order from the High Court against the banker of her husband and received arrears of maintenance ordered by the High Court under s.21 of the Matrimonial Causes Act. This was, however, only possible because the husband operated a bank account into which his salary was paid monthly, and because the solicitor of the bank in question was also the solicitor of the wife. Other wives may not be so fortunate; for invariably, as soon as it is suspected that garnishee proceedings are to be instituted, the husband withdraws every single cent he may have at the bank.

So far, in our present discussion, we have seen that the maintenance provisions both at common law and statutory law are not as satisfactory as they should be. The enforcement provisions are inadequate; a maintenance order is not available in the Magistrate's Court or High Court unless a matrimonial offence has been committed by the husband, or proceedings are under way for the termination of the marriage; and in the case of the Muslim wife, the rights open to other wives married under statute given

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1. Unreported, decided by the High Court at Freetown on 21 December 1971.

by the Matrimonial Causes Acts, are closed to her. A bid for law reform in Sierra Leone should, in our submission, take these shortcomings into consideration. Maintenance during cohabitation should be ordered by both the Magistrate's Court and the High Court for all wives married under statute, including a Muslim wife, on the ground of the husband's wilful neglect to provide reasonable maintenance without the obligation on the wife to prove that the husband has committed a matrimonial offence.

At present, an attempt is made to fill this lacuna in the law by the Social Welfare Department. Wives of all marriages who cannot make out a case under the existing laws in order to be entitled to a court order against their husbands for maintenance and whose husbands neglect them and their children, frequently appeal to the Social Welfare Department where, after hearing the husband and wife, the officer may make an award in favour of the wife.[1] Compliance with the award depends on the goodwill of the husband because there is in this process also no enforcement measure. Moreover, the making of the award depends on the attendance of the husband before the Social Welfare Officer so that if the husband is not available, as happens very frequently, the wife goes without a remedy.

The same maintenance provisions open to other wives married under statute law who obtain divorce or judicial separation, or whose marriage has been annulled should be available to Muslim wives as well. At present, as the Muslim wife cannot proceed under the Matrimonial Causes Acts on divorce, though the general law recognises such divorce as valid "for all civil purposes", she is left without a court order for maintenance against the

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1. This action taken by the Social Welfare Department has no statutory authority and it is extra-judicial.

husband and must content herself with any provision that a magnanimous husband may make on her behalf, which he is not obliged to make under either Islamic law or the general law.

Furthermore, one of the sanctions for disobedience of a maintenance order ought to be the attachment of the husband's salary. This will be a very effective weapon because in Sierra Leone the average working husband has an employer.

So far, we have dealt with the maintenance of the married wife. This disuussion will be incomplete if it fails to make observations on the maintenance of the married man as well.

In Sierra Leone today, unlike in the olden days, there is equality of opportunity, educational as well as occupational, for both men and women.[1] This egalitarian attitude is reflected in the incomes earned by both sexes. A working woman is not paid less because of her sex; the emphasis is on educational attainment and experience. Consequently, there are many working wives in the country who receive large incomes and in some families, even earn more than their husbands. In short, the wife has overstepped her traditional place in the family, which was the home. In these circumstances, one would wonder whether the time is not ripe for making a wife with the means, contribute to the upkeep of the family or maintain her husband if he happens to be indigent and destitute. Of course, there are a good many wives who are the real breadwinners in their families, but they are so out of their own volition and humanity and not from any legal compulsion.

Traditionalists may argue that in the African context,

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1. Though education is not free, a bright and intelligent boy or girl can be sure of pursuing his or her education from the primary school level to university on government or other scholarships. Though nepotism and corruption cannot be ruled out in every case, an educated woman can acquire the same kind of job and the salary as a man of the same educational standard.

marriage brings about a relationship whereby there is as if it were a division of labour: the wife to serve the husband faithfully and the husband in turn, to provide her with food, clothing and shelter; that whatever be the circumstances, it is the husband who is in duty bound to maintain the wife and children of the family and that there is no reciprocal obligation on the wife.

Perhaps it is a reflection of this awareness that in Sierra Leone, in the general law, there is no provision for ordering a wife to maintain her husband. Such a possibility had never existed even at common law.

But statute law, although it does not make maintenance possible during cohabitation, nevertheless provides for the settlement of the wife's property where a wife refuses to resume cohabitation after an order for restitution of conjugal rights has been made against her or where the High Court grants a decree for divorce or for judicial separation. The relevant statutory provisions contained in the Matrimonial Causes Act [1] are as follows:

> "22(1). If it appears to the court in any case in which the court pronounces a decree for divorce or for judicial separation by reason of the adultery, desertion or cruelty of the wife that the wife is entitled to any property either in possession or reversion, the court may, if it thinks fit, order such settlement as it thinks reasonable to be made of the property, or any part thereof, for the benefit of the innocent party, and of the children of the marriage or any or either of them."
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> "22(2). Where the application for restitution of conjugal rights is by the husband and it appears to the court that the wife is entitled to any property, either in possession or reversion, or is in receipt of any profits of trade or earnings the court may, if it thinks fit, order a settlement to be made to the satisfaction of the court of the property or any part thereof for the

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1. Cap.102 of the revised Laws of Sierra Leone, 1960.

> benefit of the petitioner and of the children of the marriage or either or any of them or may order such part of the profits of trade or earnings, as the court thinks reasonable, to be periodically paid by the respondent to the petitioner for his own benefit, or to the petitioner or any other person for the benefit of the children of the marriage, or either or any of them."

The cumulative effect of the foregoing provisions is that they protect the innocent husband where the wife is wholly responsible for the breakdown of the marriage. The object, perhaps, is to compensate the husband for the loss of consortium deliberately brought about by the wife.

We have seen that though an attempt is made by statute to alleviate the proprietary condition of the husband where the marriage breaks up without his fault, there is still disparity between the position of the husband and that of the wife regarding maintenance generally.

In 1966, the legislature saw the need for achieving uniformity and extending the existing maintenance provisions to the husband when it proposed the Maintenance of Dependants Bill.[1] Owing to a fortuitous combination of circumstances,[2] the Bill never became law, but because of its importance in the history of maintenance law in Sierra Leone it is worthwhile to comment on its relevant articles.

The Bill, inter alia, sought to repeal the Married Women's Maintenance Act.

Article 1 defined marriage to include a Mohammedan marriage[3]

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1. No.71 dated 15 September, 1966. See the Sierra Leone Gazette, Vol.XCVII, dated 15 September, 1966.
2. A general election came in March 1967, in which the government was defeated. The Bill was not adopted by the military government which followed.
3. Mohammedan Marriage was added as a matter of emphasis and clarification; since the Married Women's Maintenance Act was passed on 3 July 1888, and the Mohammedan Marriage Act on 3 August 1905 it was not clear whether the provisions of the 1888 Act applied to Mohammedan marriage, though in practice Magistrates entertained applications from Muslim wives.

while article 2(i) imposed a legal obligation on parties to a marriage to maintain each other, provided that if the wife was to maintain the husband he must be "incapable of maintaining himself". Article 3 stated that:

> "any persons entitled to maintenance may apply by summons to a Magistrate for an order for payment to him (or her) of a monthly sum for maintenance ... The Magistrate shall fix a monthly sum having regard to all relevant circumstances including in particular (a) the means of the person or persons liable to provide the maintenance; (b) the earning capacity of and any other means which the persons entitled to such maintenance may have for his support."[1]

The Bill was not as far-reaching as would be expected because no spouse was entitled to maintenance under it

> "who shall be proved to have committed a matrimonial offence unless such offence was condoned or forgiven."[2]

Moreover, the amount payable as maintenance did not exceed Le. 25 (twenty-five leones) per month.[3] As with previous legislation, the Bill also failed to provide proper and effective enforcement action against a defaulter.

Nevertheless, the Bill was a milestone in the history of the husband's claim to maintenance by the wife. However, whatever was meant by the phrase "incapable of maintaining himself" remains a matter for speculation. Clearly, it would include incapability arising from sickness or personal injury, but it is debatable whether it would include incapability arising from drunkenness, drug addiction or unemployment. Any future legislation on this matter must, therefore, define the phrases with exactness and clarity.

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1. Art.3(2).
2. Art.2(2).
3. The schedule to the Bill.

CHAPTER 8

MATRIMONIAL RELATIONS II

A. CONTRACT

It is convenient to begin this heading by posing a series of questions. If a married woman obtains credit from a tradesman for goods supplied to her and she defaults in payment, what are the courses open to the tradesman? Can he sue the husband or the wife or both of them? Does it make any difference if the credit was obtained before the marriage took place? What is the position if the husband takes a loan of, say, Le 100 from his wife and later refuses to pay? Can the wife sue him for the recovery of the money?

Satisfactory answers to these questions depend on three issues: (i) the husband's liability for the debts, contracts and obligations generally of his wife before marriage; (ii) the wife's capacity to contract in her own name during marriage; and (iii) the effect of contracts, debts and obligations between husband and wife.

(i) The husband's liability for his wife's ante-nuptial contracts

At common law, a husband was liable for his wife's debts and contracts entered into before marriage whether or not the husband knew about them or acquired any interest in them.[1] His liability was joint with that of the wife. This was one result of the doctrine of marital unity. Thus, he could not be sued alone if the wife was alive nor could he be sued at all if the wife was dead. In England, the common law position was modified by

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1. See C.A. Morrison in A Century of Family Law, 1957, pp.117, 118.

statutes between 1870 and 1935. In Sierra Leone, however, the first step was taken in 1875. While retaining the husband's liability for his wife's ante-nuptial contracts, the Sierra Leone Married Women's Property *Ordinance, 1875*[1] limited it to (i) the value of the wife's personal estate in possession which shall have vested in the husband; (ii) the value of the choses in action of the wife which the husband shall have reduced into possession or which with reasonable diligence he might have reduced into possession; (iii) the value of the chattels real of the wife which shall have vested in the husband and wife; (iv) the value of the rents and profits of the real estate of the wife which the husband shall have received; (v) the value of the husband's estate or interest in any property which the wife, in contemplation of her marriage with him, shall have transferred to him or to any other person; (vi) the value of any property which the wife, in contemplation of her marriage with the husband, shall, with his consent, have transferred to any person with the view of defeating or delaying her existing creditors.

The position in Sierra Leone remained unaltered until 1932 when s.4 of the Imperial Statutes (Law of Property) Adoption Act [2] enacted that:

> "So much of English law as specially restricts the acquisition holding or disposition of real or personal property by a married woman as such, whether on her own behalf or as executrix, administratrix or trustee, or limits her capacity to sue or be sued in her own name, shall have no force or effect in the Colony."

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1. The *Ordinance* combined the English Married Women's Property Act, 1870, and its Amendment Act of 1874. The Sierra Leone *Ordinance* retained the liability of the husband for his wife's ante-nuptial contracts which was abolished by the English 1870 Act, but revived by the English 1874 Act.

2. Cap.18 of the revised Laws of Sierra Leone, 1960.

The preceding legislation, it is conceded, did not affect the husband's liability for his wife's ante-nuptial contracts. All it did was to permit a married woman to acquire, hold or dispose of property as if she were a femme sole, and to render her capable of suing or being sued like any single woman.

In 1949, however, the husband's responsibility for his wife's pre-marital contracts was terminated. From then onwards, only the wife could sue or be sued on them. S.2 of the Imperial Statutes (Law of Property) Adoption (Amendment) Act,[1] repealing and replacing s.6 of the principal Act provided that:

> "The husband of a married woman shall not, by reason only of his being her husband, be liable -
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> (a) in respect of any tort committed by her whether before or after the marriage or in respect of any contract entered into or debt or obligation incurred by her before the marriage, or
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> (b) to be sued, or made a party to any legal proceedings brought, in respect of any such tort, contract or obligation."

The 1949 Act presumably had a retroactive effect in respect of contract, even if proceedings thereof were pending on the date that the Act came into operation.[2] The present position, therefore, is that a husband is not liable either jointly or severally for contracts entered into by his wife before they are married.

(ii) The wife's capacity to contract in her own name

The doctrine of marital unity of husband and wife coupled with the fact that the wife had no property made it impossible for

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1. No.14 of 1949. This was achieved in English law by s.3 of the Law Reform (Married Women and Tortfeasors) Act, 1935.

2. The proviso to the new s.6 of the Imperial Statutes (Law of Property) Adoption Act as contained in s.2 of the Amendment Act, No.14 of 1949, is retroactive with respect to torts unless proceedings had been instituted before 31 December, 1949. The proviso makes no mention of contracts.

a married woman to contract on her own behalf at common law. At equity, however, since property settled on her was regarded as her separate property, she could contract but only in reference to that separate property.[1] Even in respect of such property, she did not bear personal liability.[2] If there was a breach, recourse had to be made to the trustees of her estate. It can be seen, therefore, that though in equity a married woman had rights as if she were a single woman, she did not thereby become a femme sole having full capacity to contract.

The Married Women's Property Ordinance, 1875[3] enabled a married woman in Sierra Leone to sue or be sued on a contract involving an employment, occupation or trade she carried on separately from her husband, as if she were a femme sole.

We have seen that it was the Imperial Statutes (Law of Property) Adoption Act that made a Sierra Leone married woman a femme sole with full capacity to sue or be sued in her own name. Therefore, since that Act, if a married woman obtains credit from a tradesman, she must be personally liable independently of the husband, unless it can be proved that she acted as her husband's agent.

(iii) The effect of contracts between husband and wife

At common law, ante-nuptial contracts made between husband and wife, when single, were discharged upon marriage.[4] So far as contracts during marriage were concerned, because of the doctrine of legal unity a man could not contract with his wife for

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1. Owens v. Dickenson (1840) Gr. & Ph. 48, 54.
2. Durrant v. Ricketts (1881) 8 Q.B.D. 177.
3. Ss.8 and 9 of Ordinance No.7 of 1875.
4. Blackstone, Commentaries, Book I, cap.15, 1st ed. (1765) p.442; 18th ed. (1821) p.504.

> "to covenant with her would be to covenant with himself."[1]

Consequently, it was impossible for husband and wife to sue each other.

Equity took a rather flexible line. In Butler v. Butler[2] a wife, who was carrying on a business of her own as a provision dealer, obtained loans, at her request, from her husband in order to pay her debts incurred in the course of her business. The husband lent her the sums of money both before and during their marriage. Deciding the case at first instance, Wills J. held that in respect of the ante-nuptial liabilities of the wife to the husband, the action could not lie but that he had a right of action against her for the post-nuptial loans. On appeal against that part of the judgment with respect to the payment of the post-nuptial loans, the Court of Appeal was of the opinion that an action was maintainable in equity, but only to the extent of the wife's separate property.

> "Where a wife was not protected by a restraint upon anticipation, she could give her separate property to her husband and could contract with him as to it; as if she were a femme sole, her husband could sue her in a court of equity, and she as plaintiff might sue him by her next friend."[3]

This equitable rule was anticipated in Sierra Leone by the Married Women's Property Ordinance, 1875,[4]

Thus stood the position until the passing of s.4 of the Imperial Statutes (Law of Property) Adoption Act. As we have seen earlier, this section did away in Sierra Leone with English

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1. Ibid.
2. (1885) 16 Q.B.D. 374.
3. Ibid., per Cotton L.J., p.378.
4. Ss. 8 and 9. The Ordinance allowed a married woman to sue her husband or be sued by her account of her separate property.

law that restricted the acquisition, holding or disposition of property by a married woman or which limited her capacity to sue or be sued in her own name.

Commenting on the effect this provision on the ability of husband and wife to sue each other it would be inaccurate to say that,

> "today in Sierra Leone, a wife is a femme sole but as between husband and wife there are no remedies for the protection of the property of either spouse."[1]

The Supreme Court of Sierra Leone had at least on one occasion interpreted the section to mean that a married woman now has full capacity to sue or be sued by her husband. In Smythe v. Smythe and Cole,[2] a married man took out a writ of summons [3] against his wife and the wife made an application for the writ to be set aside on the ground that a husband could not take civil proceedings against his wife in Sierra Leone. Counsel for the wife argued that s.4 of the Imperial Statutes (Law of Property) Adoption Act did not mean what it said and that the Act could not expel English law from Sierra Leone by a simple statement that it shall have no force or effect thereon. Holding that the action was maintainable, Aitken, acting C.J., rightly exposed the absurdity of this contention when he said:

> "Section 4 of the Imperial Statutes (Law of Property) Adoption Act provides that so much of English Law as limits the capacity of a married woman to sue or be sued in her own name shall have no force or effect in the Colony (Sierra

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1. See Marcus Jones: The Aureol Review, Government Printer, Freetown, Vol.1, No.2, dated 15 April, 1969, p.33.
2. Unreported, decided by the Supreme Court on 20 June, 1933. See the old Supreme Court Judgment Book, Vol.I, p.609.
3. The judgment did not specify the cause of action but the decision is based on capacity to bring civil actions between husband and wife. The action was definitely not about a matrimonial relief.

> Leone). It seems to me, therefore, that unless we find some local enactment which limits the capacity of a married woman to sue or be sued in her own name, her capacity to sue or be sued is just the same as that of any femme sole ... If an Ordinance does not mean what it says then by what process of ... divination can we discover what it does mean.?"

Smythe's case, therefore, decided that whatever that was in English law that prevented a married woman from suing or being sued by her husband was abolished in Sierra Leone law by the Imperial Statutes (Law of Property) Adoption Act. English law on this point consisted of the common law, equity and modifications made thereon by statutory law before the passing of the Imperial Statutes (Law of Property) Adoption Act in 1932. By doing away with English law, therefore, the 1932 Act completely displaced from Sierra Leone law any provision of English common law, equity and statutory laws [1] that prohibited a married woman from suing or being sued by her husband or third parties.[2]

One might ask the question why was it necessary for the Sierra Leone legislature to enact in 1949 the Imperial Statutes (Law of Property) Adoption (Amendment) Act if, since the 1932 Act, a married woman could bring actions in contract against her husband or third parties in her own name? The answer is that the 1932 Act dealt merely with difficulties in the way of a married woman with respect to her capacity to contract, but it did nothing to affect the husband's common law liability for his wife's antenuptial contracts entered into with third parties. The object

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1. Generally, English statutory law after the 1st day of January, 1880, does not apply in Sierra Leone. See s.74 of the Courts Act, 1965.

2. The Imperial Statutes (Law of Property) Adoption Act, however, is not of retrospective effect: Bankole-Bright v. Bankole-Bright (1950) 3 S.L. Law Recorder, p.23.

of the 1949 Act was to abolish this liability.[1]

Under Sierra Leone law, therefore, a married woman now has full power to enter into a contract with her husband or with a stranger. But agreements between spouses must be viewed with caution. If an agreement savours of a mere domestic arrangement without an intention to create legal obligations, it will not be enforceable between a husband and wife.[2]

B. TORT

As in the case of contracts, the common law imposed limitations on a married woman's liability to her husband and to strangers in tort. A married woman could sue or be sued in tort by a stranger only if her husband was joined as plaintiff or defendant with the wife.[3] No tortious liability could arise between spouses [4] and neither spouse could sue the other in tort during marriage or continue during marriage an action started when they were single.[5] Thus, if a husband, in a fit of jealousy grabbed his wife's dress and tore it, suspecting that it was a present from a lover, the wife could not sue him at common law in tort, not even after the marriage had been dissolved.

The first statutory advance in Sierra Leone law was made by the Married Women's Property Ordinance, 1875[6] which enabled a wife to maintain an action for the recovery of her separate property

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1. The Liability was abolished in English law by s.3 of the Law Reform (Married Women and Tortfeasors) Act, 1935.
2. See the English case of Balfour v. Balfour [1919] 2 K.B. 571.
3. Bromley, op.cit., p.124.
4. Phillips v. Barnett (1876) 1 Q.B.D. 436.
5. Lush, Husband and Wife, 4th ed. (1933) pp.573 et seq.; Kahn Freund: "Inconsistencies and Injustices in the Law of Husband and Wife", 15 M.L.R. (1952) 140-154.
6. S.8 of Ordinance No.7 of 1875.

against anyone including her husband. No corresponding right, however, was given to the husband to sue his wife in tort with respect to his own separate property.

As we have argued earlier, the Imperial Statutes (Law of Property) Adoption Act removed every restriction placed on a married woman at common law in respect of dealings with property, and made her a femme sole capable of suing and being sued in tort by her husband and strangers. In this respect, Sierra Leone law went ahead of English law since under the latter law, actions in tort between spouses were not possible until the Law Reform (Husband and Wife) Act, 1962.

But as with contracts, English law preceded Sierra Leone law in abolishing the husband's liability for torts committeed by his wife.[1]

On the authority of Smythe v. Smythe and Cole, therefore, the law is that in Sierra Leone husband and wife can sue each other in tort. And, on the basis of the Imperial Statutes (Law of Property) Adoption (Amendment) Act, 1949, a husband is no longer liable for the torts committed by his wife nor can he be made a party jointly with her in any proceedings in tort instituted by or against the wife by reason only of his being her husband.

C. CRIME

With certain exceptions,

> "The doctrine of unity has never applied generally in the criminal law so as to make a husband vicariously liable for his wife's crimes or to prevent either of them from being liable in most cases

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1. Abolished In English law by s.3 of the Law Reform (Married Women and Tortfeasors) Act, 1935, and in Sierra Leone by the Imperial Statutes (Law of Property) Amendment Act, 1949, Act No.14 of 1949.

for a crime committed against the other."[1]

These exceptions will be considered shortly. Before we do so, however, it is necessary to clarify whether the criminal doctrines which we are about to discuss apply to spouses of any sort of marriage in Sierra Leone. As received common law, the criminal doctrines clearly apply to Sierra Leone. There is, however, no case-law in Sierra Leone to show that they apply to every type of marriage recognised as valid by Sierra Leone law. The decision of the Privy Council in the case of Mawji v. R.[2] is, therefore, of some guidance here. In that case, one of the main points at issue was whether the English rule that a husband and wife cannot be convicted of conspiracy which was incorporated into the criminal law of Tanganyika was applicable to the spouse of a polygamous marriage. The Board held that the rule applied to any husband and wife of a marriage valid under Tanganyika law and that a polygamous marriage being one of the marriages so recognised, the rule applied to it. Delivering the opinion of the Board on the issue, Lord Somervell of Harrow had this to say:

> "In the oriminal law of Tanganyika the words Husband and Wife if unqualified are not restricted to monogamous unions. If it is desired to deal with monogamous as distinct from other marriages express words are used. For example, section 155 of the Criminal Procedure Code deals in subsection (1) with the wife or husband of a person charged being a competent witness for the prosecution. Sub-section (2) restricts the competence in the case of a wife or husband of a monogamous marriage ... It is clear, of course, that the marriages primarily contemplated by the rule in England were monogamous marriages, but the rule being now part of the criminal law of Tanganyika, their

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1. Bromley, op.cit., p.128. For a fuller treatment of this topic, see Glanville Williams: "Legal Unity of Husband and Wife", 10 M.L.R. (1947) 20.
2. [1957] 1 All.E.R. 385, P.C.; [1957] A.C. 126.

> Lordships are of opinion that it applies to any husband and wife of a marriage valid under Tanganyika law."

The position in Sierra Leone is identical to that in Tanganyika then. Firstly, three forms of marriage are recognised by Sierra Leone law and they include both monogamous and polygamous marriages. Secondly, except with regard to the competence and compellability of spouses to give evidence in criminal cases[1] in which one of the spouses is an accused, the criminal law of Sierra Leone does not distinguish between the spouses of the different forms of marriage. It is, therefore, our contention that the criminal doctrines ought to apply to all sorts of marriages valid under Sierra Leone law, except where provision is made, expressly or impliedly, in the law to prefer one form of marriage to another.

(i) Marital coercion

The common law doctrine of marital coercion provided that if a married woman committed a crime other than treason or murder in the presence of her husband, there was a rebuttable presumption that she committed it under the husband's coercion and he and not she was prima facie liable on it. Thus, the burden was cast on a husband whose wife committed a criminal offence in his presence to prove that she did so of her own volition and independently and not through any force on his part.

The doctrine was abolished in English law by the Criminal Justice Act, 1925. This Act is of no application in Sierra Leone and there does not seem to be any local legislation directly on

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1. Under the Sierra Leone Criminal Procedure Act a spouse of a customary marriage is competent and compellable to give evidence against the other but spouses married under the Christian, Civil and Mohammedan Marriage Acts are generally not competent and compellable. For details, see pp.277-281.

the matter. Strictly speaking, therefore, as the English common law is the basis of the Criminal law of Sierra Leone, in the absence of any local legislation to the contrary, it would appear that the doctrine subsists as part of Sierra Leone law. However, despite diligent research, the present writer has not been able to discover any case in which the doctrine has ever been invoked in Sierra Leone. It probably became obsolete long before Independence.

Though there does not seem to be a direct legislation on marital coercion, a provision in the Sierra Leone Constitution would appear to suggest that the doctrine cannot any longer be invoked in the country. S. 9(4) of the Constitution states that:

> "Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty."

In short, the onus of proof of every crime is on the prosecution and not the accused. Thus, if a husband is charged with a crime committed by his wife in his presence, if there is any allegation of coercion on the part of the husband, it is the prosecution that must prove it and not for the husband to prove the contrary. If this interpretation is correct, then the rule of marital coercion no longer obtains in the law of Sierra Leone.

(ii) Conspiracy

At common law, a husband and wife could not be convicted of the crime of conspiracy if they are the sole conspirators.[1] If a third party joins them, all of them could be convicted of the crime.[2] Glanville Williams limits the extent of the rule

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1. Glanville Williams traces the origin of the rule to the doctrine of unity or to the doctrine of the wife's subordination; see: "Legal Unity of Husband and Wife", 10 M.L.R. (1947) 20.
2. R. v. Cope (1718/19) 1 Str. 144.

that spouses cannot commit the crime of conspiracy only to inchoate crimes, and argues vehemently that the rule cannot apply if the crime is consummated.[1]

While admitting that a husband and wife can be guilty of a consummated crime, it is submitted that none of the authorities cited by Glanville Williams supports a conviction on the ground of conspiracy. The reason for each conviction could be explained otherwise than on account of conspiracy. Thus in R. v. Abbott[2] husband and wife had planned to commit suicide, and the husband bought poison some of which the wife gave to him and took the rest herself. The wife died but the husband lived. The husband was convicted of murder. It is submitted that the husband's conviction arose from the fact that he was an accessory to the fact of his wife's self-murder (suicide) and not because of any agreement between the spouses to die. If, for example, there was no such agreement but the husband bought the poison knowing that his wife intended to kill herself by it, the husband would still have been guilty of accessory before the fact. These views seem to be accepted by Glanville Williams himself who, when commenting on another case, R. v. Crofts,[3] says:

> "The decision seems to involve the proposition that every conspirator who is absent when the crime is committed becomes when the crime is committed, an accessory before the fact."[4]

Indeed, a conviction for conspiracy would lie not because the crime has been consummated but because of the mere agreement to carry out the criminal intent.

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1. Glanville Williams, op.cit., 22-24.
2. (1903) 67 J.P. 151.
3. [1944] K.B. 295.
4. Glanville Williams, op.cit., 23, 24.

(iii) Accessory after the fact

Another exception to the rule that marital relationship does not affect crimes committed by spouses is the rule that a wife cannot become an accessory after the fact to a felony committed by her husband, even if she received him with full knowledge that he had committed a felony; nor does she become a principal offender in the case of treason.[1] This rule is one-sided and does not provide a corresponding protection for the husband.[2]

(iv) Rape and Indecent Assault

In his Pleas of the Crown, Hale [3] was of the opinion that a husband cannot be guilty of rape upon his wife

> "for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."

This statement has been generally accepted as the correct position at common law, but with the condition that the act of sexual intercourse takes place at a time when the husband is entitled to his wife's consortium.[4] Thus, if they are separated either judicially or by a deed with a non-cohabitation or non-molestation clause, the husband loses his right to consortium and will be guilty of rape if he has intercourse with the wife without her consent.[5] Though a man cannot be guilty of rape on his wife as

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1. See Hale, I Pleas of the Crown, 47, 621; Coke, 3rd Institute 108.
2. Ibid.
3. Vol.I, p.629.
4. See obiter dicta of the judges in the English case R. v. Clarence (1888) 22 Q.B.D. 23. The Court was constituted by Lord Coleridge, C.J., Pollock and Huddleston, B.B., Stephen, Manistry, Mathew, A.L. Smith, Wills, Grantham, J.J. (Field, Hawkins, Day and Charles J.J. dissented).
5. The English case of R. v. Clarke [1949] 2 All E.R. 448.

principal in the first degree, it would appear that he can be guilty as an accessory to a rape on his wife.[1]

The same legal position between husband and wife as regards rape applies in case of indecent assault.[2] In either case, although a husband may be entitled to an acquittal on the offence of rape or indecently assaulting his wife, he can be convicted of assault upon her if the facts so warrant. Thus, he can be guilty of assault if he uses unreasonable force or violence to have sexual intercourse with his wife,[3] or if he shaves the pubic hairs of his wife without her consent.[4]

(v) Criminal Libel

The case of R v. Lord Mayor of London [5] established the common law rule that a wife cannot prosecute her husband for defamatory libel upon her. In that case, one Emma Vance laid an information before the Lord Mayor of London upon an application for a summons against Alfred Vance, her husband, for maliciously publishing in the Daily Telegraph that she was in no way related to him or his family, meaning thereby that she was not his wife. Reviewing the authorities, Smith J. was of the opinion that libel was not one of the offences for which statute had modified the common law that husband and wife could not take criminal proceedings against each other. It is submitted with respect, that in holding that prosecutions could not be between spouses for libel, Smith J. established an exception to the rule of criminal liability between husband and wife. As has been seen earlier, the

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1. Alawusa v. Odusote (1941) 7 W.A.C.A. 140, 141, a decision of the West African Court of Appeal.
2. Ibid.
3. The English case of R. v. Miller [1954] 2 All E.R. 529.
4. Alawusa v. Odusote (ante).
5. (1886) 16 Q.B.D.772.

doctrine of marital unity has never applied generally in the criminal law to prevent either spouse from being liable for a crime against the other.

(vi) Larceny

It is in the crime of larceny that the doctrine of conjugal unity is most apparent. At common law, as the property of the wife passed into the possession of the husband, and the wife was regarded as having some interest in her husband's property, husband and wife were incapable of stealing from each other. According to statutory law, also, spouses cannot in general still steal from each other. S.36(1) of the Larceny Act,[1] while empowering a married woman to protect her property under the Act is if she were a femme sole provides that:

> "no proceedings under this Act shall be taken by any wife against her husband while they are living together as to or concerning any property claimed by her, nor while they are living apart as to or concerning any act done by the husband while they were living together concerning property claimed by the wife, unless such property has been wrongfully taken by the husband when leaving or deserting or about to leave or desert his wife."

S.36(2) makes a wife criminally liable to her husband in respect of his property in circumstances similar to those in which the husband may be liable to the wife.

From the foregoing statutory provisions, it is quite clear that so long as the spouses are cohabiting one cannot commit a criminal offence against the property of the other. Even after

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1. The Imperial Statutes (Criminal Law) Adoption Act, cap.27 of the revised Laws of Sierra Leone, 1960. This was the English Larceny Act, 1916, and it applies in Sierra Leone as adopted law.

cohabitation has ceased, a prosecution cannot be maintained for an act of interference with property which occurred during the period of cohabitation unless the property is wrongfully taken away at the time that cohabitation is about to come to an end.

The section suggests that there may be wrongful dealings with each spouse's property with impunity while the parties "are living together" which if done by a stranger may amount to an offence or offences under the Act. The parties would be deemed to be "living together" even though they are temporarily separated from each other so long as the intention to occupy the same domestic establishment whenever possible is there.[1]

The meaning of the phrase "when leaving or deserting or about to leave or desert" is one that also calls for comment. At what appropriate time during the course of living together can it be said that one spouse is about to leave or desert the other so that a wrongful misappropriation of the other's property amounts to an offence under the Larceny Act? For example, is a husband "about to leave or desert" who after spending money yesterday entrusted to him for safe-keeping by his wife, today sees another woman who takes his fancy and elopes with her without any intention of returning to his wife? It is necessary that there should be an intention to "leave or desert" at the time that the wrongful dealing with the other's property occurs before a prosecution would lie at the instance of the spouse whose property has been interfered with? There is no known Sierra Leone decision on this point, but in English law from which the provision is borrowed, it has been held that the interpretation of the phrase is a question of fact for the jury and it depends upon the circumstances of each case. In R. v. King,[2] the prosecutrix who was a

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1. See the English case R. v. Creamer [1919] 1 K.B. 564.

2. (1919) 10 Cr. App. R. 44.

widow with two children and who had a house full of expensive furniture, got married to the accused. After the marriage, the parties lived together at a house to which the furniture was transferred. Some time afterwards, the wife became ill and went to live with her parents, leaving the matrimonial home locked up with the furniture. Later, she was joined by her husband at her parent's house. While they were there the husband sold all the wife's furniture without her authority, and against her wish, and six weeks afterwards ceased to reside with his wife. Throughout the time they were living with the wife's parents, the husband would stay away during the day and join the wife at night time. On these facts, the jury convicted the husband of larceny, thus maintaining that when he sold the furniture the husband was"about" to leave his wife. The Court of Criminal Appeal refused to set aside the jury's finding on the ground that the word "about" had no special legal meaning, and that the jury were entitled to bring the verdict which they did after considering the position in life of the parties, the amount and value of the furniture and the circumstances in which it was disposed of. According to King's case, therefore, the test for determining when one spouse is leaving or about to leave the other is an objective one.

If the circumstances attending the departure can be conveniently linked with the act of appropriating the other's property, then the perpetrator did so when he was about to leave. Sometimes it is not easy to discover this link. In King's case, the fact that the husband sold the furniture which was to be used in the matrimonial home without providing a substitute showed clearly that he had formed the intention to leave long before he actually did. It was from the date of that intention that he was about to leave, not a few minutes before the physical leaving

But in the example we gave earlier about the eloping husband, more information must be elicited before we can conclude whether or not he converted his wife's money when he was about to leave. The history of the marriage generally must be taken into account. If the marriage had been a happy one until the day of the elopement, the departure must probably be due to the frailty of human nature and would not be linked with the conversion so as to show that the crime was committed when the husband was about to leave. But if the marriage has been unhappy or the husband has been in the habit of forming illicit associations with other women, then the conversion would be linked with his departure and he would, therefore, be deemed to have committed the crime with a view to leaving and so he did when leaving or about to leave.

It is of great importance to be able to discover this link otherwise the line between wrongful acts committed by a spouse while "living together" and those committed when leaving or about to leave would be blurred.

Since, as we have seen, one spouse cannot steal the property of the other while they are cohabiting, a question which needs investigation is whether a third party can be convicted for receiving property alleged to have been stolen by one spouse from the other.

The position at common law is exemplified by the case of R. v. Kenny [1] in which it was held that since a wife could not steal her husband's goods, an adulterer receiving from her the goods which she had taken from her husband, could not be guilty of receiving stolen goods. A later case, R. v. Payne,[2] however, decided that an indictment which charged, as a common law misdemeanour, the unlawful receiving by a person of money stolen by

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1. (1877) 2 Q.B.D. 307.

2. [1906] 1 K.B. 97.

the wife of the prosecutor was good.

Since the passing of the Larceny Act, 1916, however, it would appear that a person can be guilty of receiving goods stolen by one spouse from the other under s.33 of the Act.[1]

D. EVIDENCE

The competence and compellability of one spouse to give evidence in proceedings in which the other is a party depends on whether the proceedings are civil, criminal or matrimonial.

(i) Civil

In the absence of local legislation on the issue, English statutory law as at the reception date, i.e. 1 January, 1880, applies in Sierra Leone.[2] The relevant statute is the Evidence Amendment Act, 1853. S.1 of that Act provides that the husband or wife of parties to a civil suit is a competent and compellable witness to give evidence on behalf of either or any of the parties to the suit. But with regard to communications between husband and wife, s.3 of the Act states:

> "no husband shall be compellable to disclose any communication made to him by his wife during the marriage and no wife shall be compellable to disclose any communication made to her by her husband during the marriage."

The effect of these provisions is to enable one spouse to give evidence in a suit in which the other is a party either for the plaintiff or the defendant and to render communication between spouses privileged.

The interpretation of the expression "husband and wife" in the Sierra Leone context is fraught with problems. Should it

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1. See Russell on Crime, 12th ed., London, 1964, Vol.2, p.1030.

2. S.74 of the Courts Act, 1965; Act No.31 of 1965.

include spouses to the four forms of marriage recognised by law, i.e. Christian, civil, Mohammedan and customary, or should it be confined to only the first two categories, since these would have been intended when the Evidence Act, 1853, was passed in England? There is no legislation in Sierra Leone, like the Criminal Procedure Act, 1965, in regard to evidence in criminal matters, excluding spouses of a customary marriage from enjoying this privilege in civil proceedings. In our submission, therefore, the principle enunciated in Mawji's case [1] ought to apply in civil cases and spouses of a customary marriage should be included in the interpretation of "husband and wife" in s.3 of the Evidence Act, 1853.[2]

With regard to Muslim spouses, it is submitted that they too enjoy the privilege provided by the Evidence Act, 1853. A Mohammedan marriage is valid for all civil purposes under the general law, and, there being no rule of law to exclude them, the spouses are subject to the general law of which the Evidence Act is a part.

Now that we have concluded that the Evidence Act applies to spouses of all sorts of marriage recognised by law in Sierra Leone, the next question is whether the expression "husband and wife" includes a widow, widower or divorced person. Here, English law will be of invaluable help to us. The case of Shenton v. Tyler [3] decided that the words "husband and wife" do not include a widow or widower or

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L. [1957] 1 All E.R.385; P.C. [1957] A.C.126. See p.264 herein.

2. The statutes of various East African countries make the spouses of the parties to civil proceedings competent witnesses. See, for example, the Kenya Evidence Act, cap.80,s.127(1); Zanzibar Evidence Decree, s.120 of cap.5; See further H.F. Morris: Evidence in East Africa, Sweet & Maxwell, 1968, p.186; J.S. REad: "When is a wife not a wife?", Journal of the Denning Law Society, University College of Dar-Es-Salaam, Dec.1966, pp.46-75.

3. [1939] 1 Ch.620.

divorced person. In that case, a widow refused to answer interrogatories on the ground that they concerned matters which had passed between herself and her deceased husband and were, therefore, privileged. Simonds J. in the court of first instance ,[1] ruled that every communication between husband and wife made during marriage was privileged to a widow after the death of her husband. On appeal, the Court of Appeal reversed the decision of Simonds J. and held that the Act related only to husbands and wives during the subsistence of the marriage, and not to widowers, widows or divorced persons.

Another matter which needs consideration is the extent of the privilege during the subsistence of the marriage. English case-law again suggests that the privilege is that of the parties and they can waive it,[2] and that it does not extend to a third person who overhears the communication between husband and wife.[3] Such third persons can give evidence of what occurred between the spouses. Thus, in McTaggart v. McTaggart,[4] husband and wife had an interview with a probation officer and later in proceedings between them gave evidence about it. It was held that the probation officer could give evidence of what was recited to him by the husband and wife.[5]

With their well-established practice of accepting English decisions on the interpretation of English statutes applicable to the country, Sierra Leone Courts will probably take the same view

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1. i.e. Chancery Division of the High Court.
2. McTaggart v. McTaggart [1948] 2 All E.R. 754.
3. Hamp v. Robinson (186) 16 L.T. 29 cf. Denning J. in Mole v. Mole [1950] 2 All E.R. 328.
4. [1948] 2 All E.R. 754.
5. c/f Mole v. Mole [1950] 2 All E.R. 328, in which Denning J. said that if the parties had not given evidence as they did in McTaggart v. McTaggart there would have been privilege.

as the English Courts in interpreting the Evidence Act.

(ii) Criminal

At common law, one spouse could not give evidence against the other except in the case of offences against the person or liberty of the other party to the marriage.[1] In such cases, a spouse is both competent and compellable.

The Sierra Leone statute on the subject is the Criminal Procedure Act, 1965.[2]

As to criminal proceedings generally, s.86 states that:

> "where a person charged with an offence is married to another person by a marriage other than a Civil or Mohammedan marriage, such last-named person shall be competent and compellable witness on behalf either of the prosecution or of the defence."

With regard to a spouse who is the accused either solely or jointly with other persons, s.87 stipulates that the wife or husband of the person charged is a competent witness for the defence, provided

> "(c) the wife or husband of the person charged shall not, save as in this Act mentioned, be called as a witness in pursuance of this Act except upon the application of the person so charged."

On the same point of giving evidence in criminal cases, s.90(a) says:

> "the wife or husband of a person charged with an offence under sections 48 to 55 of the Offences against the Person Act, 1861, (i.e. offences relating to rape, abduction and defilement of women) may be called as a witness either for the prosecution or defence and without the consent of the person charged."

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1. Phipson on Evidence, 11th ed., 1970, p.603.

2. Act No.32 of 1965.

The effect of s.86 is to draw a sharp distinction between spouses whose marriage is civil or Mohammedan and those who undergo some form of marriage other than by civil or Mohammedan rites. The second category of persons obviously refers to persons married under customary law, for this is the only form of marriage other than "civil" or Mohammedan recognised by Sierra Leone law. "Civil", as used in this context, includes a Christian marriage for, s.91 of the Criminal Procedure Act clarifies the position by providing that:

> "for the purposes of section 86 to 90 (which deal with evidence of husband and wife) 'civil marriage' means a marriage which is recognised by the law of the place where it is contracted as the voluntary union for life of one man and one woman to the exclusion of all others."

Therefore, according to s.86, while spouses to a customary law are competent and compellable witnesses for the prosecution or the defence, parties to a civil or Mohammedan marriage (as defined by s.91) are neither competent nor compellable.

Perhaps quite contrary to the intention of the legislature only spouses of a "civil marriage" as defined by s.91 are covered by the provisions of s.87 and 90(a) because s.91 further defines "husband and wife" as meaning "a husband and wife of a civil marriage as defined in this section". S.91 raises doubt as to the fate of a Mohammedan marriage for the application of ss.87 and 90(a).

Clearly under s.87(c), except as provided in s.90(a), a spouse of a Christian or civil marriage is neither a competent nor a compellable witness for the prosecution where the other spouse is an accused but is a competent witness for the defence upon the application of the person charged. S.87(c), however, does not give any indication whether or not the spouses are also compellable witnesses. They are probably not since the word

"compellable" is not used in this section. This means that an unwilling spouse cannot be compelled to give evidence for the defence even if it may be the wish of the other that he or she should do so.

Since Mohammedan spouses are apparently not included in s.87,the privilege permitted to an accused who is a spouse to a Christian or civil marriage, is not open to them. Thus, the Mohammedan spouse of a person charged is not competent to give evidence for the defence nor can he or she be called to testify in offences mentioned in s.90(a).

If the legislature did not intend this situation to exist in respect of a Mohammedan marriage but wanted the spouses of such marriage to be on the same plane as spouses of civil and Christian marriages, the definition of "husband and wife" in s.91 would have been wide enough to include husband and wife of a Mohammedan marriage. This intention can be subsumed from s.86 but is rendered negative by s.91. According to the canons of statutory interpretation, s.91 being the latter provision prevails over s.86.

Though, in general, spouses to a civil or Christian marriage are not competent and compellable witnesses for the prosecution or defence when their spouses are charged with an offence, they are competent but probably not compellable if the offence is one of rape, abduction or defilement of women,[1] or an offence of personal violence by one spouse,to the other for which at common law the spouses are both competent and compellable.[2] To these must be added offences under the Prevention of Cruelty to Children

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1. S.90(a) of the Criminal Procedure Act, 1965; Act No.32 of 1965.
2. See s.90(b) of the Criminal Procedure Act.

Act and the schedule to that Act.[1]

In order to be competent under s.90(a) of the Criminal Procedure Act, it is submitted that the offence need not be committed against the spouse of the accused; it is sufficient if the offence is against any woman whomsoever. Moreover, under the section, the consent of the person charged is unnecessary.

There is a lacuna in the law with regard to offences against the property of one spouse committed by the other, for which a prosecution may lie. There is no indication either in the provisions of the Criminal Procedure Act, 1965, or in the Larceny Act, 1916, whether if a person is charged with an offence against the property of his or her spouse the latter is a competent and compellable witness for the prosecution. Strictly speaking, the cumulative effect of the provisions in the Criminal Procedure Act is to render such a spouse incompetent and uncompellable.

If this interpretation is correct, then the hazards of failure in a prosecution for an infringement of a proprietary right of one spouse by the other are great because invariably the key witness for the prosecution will be the spouse whose property has been interfered with. If he or she is to be excluded from giving evidence, the prosecution becomes impracticable. An enactment making spouses competent and compellable witnesses under such circumstances is therefore desirable.

With regard to communications between spouses, s.87(d) of the Criminal Procedure Act states:

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1. See s.29 and the Schedule of the Act, cap.31 of the revised Laws of Sierra Leone, 1960.

> "Nothing in this Act shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage."

The privilege herein mentioned persists in trials in which one spouse is charged and the other is competent to give evidence either for the prosecution or for the defence. The effect of the section is that an unwilling spouse cannot be compelled to give evidence for or against the other spouse if the object is to reveal some oral or written information made to him or her by the other spouse during the marriage.

Whatever is the precise meaning of the word "communication" as used in s.87(d) is a matter on which one can merely speculate. Undoubtedly, it includes oral or written information between spouses intended to be for each other. It is submitted that if one spouse received information from the other intended to be passed on to a third party or if the information, though primarily intended for the spouses alone, is intercepted by a third person in the course of its communication between the spouses, it is not privileged.

The meaning of "husband and wife" here too requires some clarification. From our discussion earlier, it is submitted that it means "husband and wife" of a Christian or civil marriage. Should the marriage be in existence for the spouses to avail themselves of this privilege or does the privilege continue where the marriage has come to an end through divorce or nullity proceedings or by the death of one of the spouses? Contrary to what has been held in civil proceedings, there is an inference in English case-law for the proposition that in criminal cases the privilege continues even though the marriage has been terminated. In R. v.

Algar [1] a husband was prosecuted for forging his wife's signature on cheques drawn on a bank. Before the prosecution occurred the marriage was annulled on the ground of the husband's impotence. The ex-wife was called as a witness for the prosecution during the trial for forgery. The former husband was convicted but his conviction was quashed by the Court of Criminal Appeal because the ex-wife was held to be incompetent to testify to things which occurred during their marriage.

The Appeal Court in Algar's case did not examine the argument that undoubtedly existed in favour of competence without compellability. It, therefore, exceeds what statutory law stipulates here in Sierra Leone with regard to communications between spouses. As can be seen, the decision is in conflict with s.87(d) of the Criminal Procedure Act. While that section speaks of uncompellability without mentioning incompetence which leads to the assumption that spouses are competent witnesses to disclose communications between each other if they wish, Algar's case decides against competence. It is now left to Sierra Leone Courts to choose which way to follow. It is submitted, however, that the correct way is to follow what s.87(d) says and nothing more, otherwise the Courts will be taking upon themselves the functions of the legislature.

(iii) Matrimonial [2]

Generally speaking, matrimonial proceedings between spouses are subject to the rules of other civil proceedings. Thus a husband and wife of parties to matrimonial proceedings are

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1. [1954] 1 Q.B. 279.
2. "Matrimonial" is used here to mean proceedings between husband and wife or prospective husband and wife consequent upon marriage or its breach.

competent and compellable witnesses on behalf of either or any of the parties to the suit. In special situations, however, there are limitations to matrimonial proceedings which are not found in ordinary civil actions. These relate to evidence with regard to breach or promise of marriage, adultery and marital intercourse.

(a) Breach of promise of marriage

Concerning breach of promise of marriage, s.2 of the English Evidence Further Amendment Act, 1869,[1] requires that the evidence of the plaintiff must be corroborated by "some other material evidence in support of such promise". The other material evidence need not go to the length of establishing the contract: if the evidence supports the promise it is sufficient.[2]

(b) Adultery

In respect of adultery, s.28(1) of the Matrimonial Causes Act [3] states:

> "The parties to any proceedings instituted in consequence of adultery and the husbands and wives of the parties shall be competent to give evidence in the proceedings, but no witness in any such proceedings, whether a party thereto or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery unless he or she had already given evidence in the same proceedings in disproof of the alleged adultery."

There is no reported case law nor has the present writer been able to discover any unreported decision in Sierra Leone law on the construction of this section. We may, therefore, again

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1. Which applies in Sierra Leone as a statute of general application in England before 1 January, 1880.
2. See Williams v. Macfoy, ante, Chapter 5, pp.162, 170.
3. Cap.102 of the revised Laws of Sierra Leone, 1960.

have recourse to English law which contains a similar provision[1] by way of guidelines to possible interpretation by Sierra Leone Courts.

The English Courts have rigidly confined the provision to cases in which the proceedings can stricto sensu be said to have been instituted as a result of adultery. These include petitions for divorce or judicial separation founded on adultery and petitions for damages against a male adulterer, but not to proceedings concerning the maintenance and status of a child,[2] an action by a wife against another woman for loss of her husband's consortium due to enticement,[3] and an intervention by the King's Proctor on the ground of condonation of adultery.[4]

The "alleged adultery" used in the section has been interpreted to have a wider meaning than the adultery alleged in the petition. It means the adultery which the question tends to show and to which objection is taken.[5]

Other phrases in the section which have received the attention of the Courts are (i) "shall not be liable to be asked", (ii) "tending to show", and (iii) "given evidence is disproof".

In Dobbs v. Dobbs and Savage,[6] Donovan L.J. held that the phrase "shall not be liable to be asked" contemplates questions by or on behalf of a party other than the party by whom the witness is called. In the same case, the learned Lord Justice impliedly

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1. S.43(2) of the Matrimonial Causes Act, 1965, formerly s.32(3) of the Matrimonial Causes Act, 1950.
2. Nottingham Guardians v. Tomkinson (1879) 4 C.P.D. 343; Evans v. Evans and Blyth [1904] P.378.
3. Elliott v. Albert [1934] 1 K.B. 650.
4. Sneyd v. Sneyd and Burgess (1925) 42 T.L.R. 106.
5. See Wilmer L.J. in Dobbs v. Dobbs and Savage [1962] 2 All E.R. 900, 901.
6. [1962] 2 All E.R. 900, 902.

interpreted the term "tending to show" to mean revealing to the tribunal of fact for the first time, when he opined that the section ceases to operate if the witness personally or through his counsel volunteers the evidence that he has committed adultery.

In Boothroyd v. Boothroyd and Slater,[1] it was held that evidence given in disproof of adultery is not confined to one which is a simple denial of adultery. In that case a husband petitioned for dissolution of marriage on the ground of the respondent wife's adultery with the corespondent. The wife in her examination-in-chief was not asked whether she had committed adultery but in her examination on behalf of the co-respondent, without testifying that she had not committed adultery with the co-respondent, she gave an innocent explanation of the presence of the co-respondent's car outside her flat at a late hour. In cross-examination on behalf of the husband, a question put to her directed to supporting an inference of adultery was held to be admissible on the ground that she had given evidence in disproof of adultery.

S.28(1) of the Matrimonial Causes Act [2] relates to proceedings before the High Court. So far as the Magistrates' Courts are concerned, the relevant provision is s.3 of the Evidence Further Amendment Act, 1869,[3] which reads as follows:

> "The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding: Provided that no witness in any proceeding whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been

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1. [1963] 3 All E.R. 625; [1964] P.82.
2. Cap.102 of the revised Laws of Sierra Leone, 1960.
3. Which applies in Sierra Leone as a statute of general application in England as at 1 January, 1880.

> guilty of adultery, unless such witness shall have already given evidence in the same proceedings in disproof of his or her alleged adultery."

The sense of this provision is practically the same as that of s.28(1) of the Matrimonial Causes Act.

It is apparent that under the existing law this provision cannot be invoked before the Sierra Leone Magistrates' Courts. This section too speaks of "proceeding instituted in consequence of adultery". Unlike England, summary proceedings for separation or maintenance orders on the ground of adultery which are "proceedings instituted in consequence of adultery" are unknown in Sierra Leone. The only matrimonial proceeding likely to arise before the Magistrates' Courts between spouses is in respect of maintenance under the Married Women's Maintenance Act. Such proceeding , however, is in consequence of desertion. The only reference to adultery is where the Court can refuse to make a maintenance order against the husband on the ground that the wife had committed adultery which must be proved by the husband. It is submitted that this power exercisable by the husband is a shield and not a sword and the proceeding is, therefore, not one in consequence of adultery.

The preservation of this privilege in English law has been open to criticism from both the Royal Commissions [1] and learned jurists.[2] Basically, the privilege found a place in English law as one of the heads of the privilege against self-incrimination. Arguing for its abolition, Rosen says that:

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1. The Gorrell Commission Report (1912) Cmd. 6478 paras. 381-386; The Denning Committee on Procedure in Matrimonial Causes (1947) Cmd. 7024 paras. 70-74; The Royal Commission on Marriage and Divorce (1956) Cmd. 9678, paras. 933-935.

2. L.Rosen: "The Privilege against self-incrimination as to adultery should it be abolished", 23 ML.R. 275; J.A. Andrews: "Evidence of Adultery", 77 L.Q.R. 390; Cross on Evidence, London, 3rd ed., 1967, 237, 238.

> "it has no basis in reason, it is anomalous, an anachronism, operates capriciously and unjustly."

One way in which the privilege can lead to injustice is illustrated by Haynes v. Haynes and Sawkill.[1] In that case, a husband petitioned for divorce on the ground of the wife's adultery. The wife in her answer alleged cruelty on the part of the husband. During the trial, the husband was asked a question which tended to show that he had been guilty of adultery. It was held that an objection to the question was proper.

Despite the tremendous move for abolition, the privilege still subsists in English law. But this is no reason why one should plead for its continued existence in Sierra Leone law. So far as the Magistrates' Courts are concerned, it is completely useless; and in respect of the High Court it would appear that very little, if any, attention is paid to it in the course of litigation. The existence of it in Sierra Leone law can only be explained from the habit of transplanting English statutes to the country without consciously weighing their effect and practicability. This is one area in which the Sierra Leone legislature can tidy the law in the event of law reform.

(c) Marital intercourse

This is governed by the Evidence (Marital Intercourse) Act,[2] s.2 of which states:

> "Notwithstanding any rule of law, the evidence of a husband or wife shall be admissible in any proceedings to prove that marital intercourse did or did not take place between them during any period: Provided that a husband or wife shall not be compellable in any proceedings to give evidence of the matters aforesaid."

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1. [1960] 2 All E.R. 401.
2. Cap.103 of the revised Laws of Sierra Leone, 1960.

Again, this rule is identical with s.43(1) of the (English) Matrimonial Causes Act, 1965.[1] It abolished the rule in Russell v. Russell,[2] which laid down that neither a husband nor a wife was permitted to give evidence of non-intercourse after marriage to bastardize a child born in wedlock. The statutory provision goes beyond cases in which the legitimacy of children is involved and covers any other case to which marital intercourse may be relevant, for example, proceedings for nullity on the ground of non-consummation of the marriage or for divorce or judicial separation in which condonation is an issue.

Though this rule also is under fire from jurists,[3] it is submitted that no substantial reason has been advanced for its abolition. It saves spouses from the embarrassment and distaste of having to go into and be cross-examined on matters of such peculiar intimacy in a court of law unless he or she is willing to undergo the ordeal.[4] It should, therefore, remain intact.

E. NATIONALITY OR CITIZENSHIP OF A MARRIED WOMAN [5]

Unlike domicile, marriage does not automatically confer the nationality or citizenship [6] of a husband on his wife. In

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1. Formerly s.7 of the Law Reform (Miscellaneous Provisions) Act, 1949, and s.32(1) and (2) of the Matrimonial Causes Act, 1950.
2. [1924] A.C. 687, H.L.
3. Cross, op.cit., p.240.
4. See Evershed, M.R. in Re Jenion (deceased) Jenion v. Wynne [1952] 1 All E.R. 1228, 1233.
5. Married woman, in this context, is a woman married according to any form recognised as valid by the law of Sierra Leone. It, therefore, includes the wife of a customary marriage.
6. In Sierra Leone, as in many other countties, there is no distinction between nationality and citizenship. Both terms are used interchangeably and are synonymous. However, 'nationality' is commonly used in the event of a conflict between an individual of one state and another state whilst "citizenship" is of common usage in the municipal law context.

all respects, the wife retains her own nationality unless some positive step is taken by her to acquire the nationality of her husband. Thus if a Sierra Leone man marries a Sierra Leone woman both of them retain their Sierra Leone citizenship independently of each other. Similarly, where a marriage takes place between a Sierra Leone man and a Ghanaian woman the woman remains a Ghanaian until she has fulfilled the statutory conditions for the acquisition of Sierra Leone citizenship. We are, therefore, only concerned here with the acquisition of Sierra Leone citizenship by a non-Sierra Leone woman who marries a Sierra Leone man.

It has been thought by some people [1] that with the adoption of a Republican Constitution [2] on 19 April, 1971, which replaced the Independence Constitution of 1961 but which contained no provision for citizenship law, there is no law in Sierra Leone on citizenship which means that it is now impossible to talk in terms of who are Sierra Leone citizens and who are not. This thinking is, in my submission, the result of a mere cursory glance at the numerous pieces of legislation that ushered in the Republican era. A close analysis of these enactments, however, will reveal quite the opposite.

Granted that the Republican Constitution contains no law on citizenship and that the Constitution (Consequential Provisions) Act, 1971,[3] repealed the 1961 Constitution which had provisions on the matter. But s.96 of the Republican Constitution contains the following statement:

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1. Personal communication from some Sierra Leone lawyers.
2. Act No.6 of 1971.
3. Act No.9 of 1971.

> "The provisions of the Constitution (consequential Provisions) Act, 1971, and of any Act relating to citizenship shall not be amended, repealed, re-enacted or replaced unless the Bill incorporating such amendments repeal, re-enactment or replacement is supported at the final vote thereupon by the votes of not less than two-thirds of the members of Parliament."

In short, s.96 retains every legislation on citizenship in force before the declaration of the Republic until it is altered by an Act of Parliament with at least a two-third majority. No such Act has as yet been passed. We shall, therefore, look at the acquisition of Sierra Leone citizenship by a non-Sierra Leone wife from the viewpoint of the current law which is the law as it was before the country became a Republic. These are contained in the Sierra Leone Nationality and Citizenship Act, 1962,[1] and the Constitution (Consolidation of Amendment) Act, 1965.[2] Both statutes make the acquisition of Sierra Leone citizenship dependent upon registration on application.

S.3(3) of the 1962 Act stipulates that

> "Subject to the provisions of subsection (4) any woman who is or has been married to a citizen of Sierra Leone may, on making application therefor to the Minister in the prescribed manner, be registered as a citizen of Sierra Leone whether or not she is of full age and capacity."

Under this section a woman of any nationality other than Sierra Leone nationality, married to a Sierra Leone citizen, may upon application be registered as a Sierra Leone citizen.

According to subsection (3) mentioned above, such woman cannot be registered until she has made a written declaration in

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1. Act No.10 of 1962.

2. Act No.52 of 1965.

the prescribed form of her willingness to renounce her present nationality and has taken an oath of allegiance to the President and the Constitution of Sierra Leone.

The combined effect of subsections (3) and (4) is to make the only qualification by a married foreign woman for the acquisition of Sierra Leone citizenship, the fact of being married to a Sierra Leone man. Unlike other foreigners who wish to naturalise, she need not be of full age and capacity.[1] Thus, a married woman who is under the age of 21 or who is a lunatic can be registered as a citizen but a spinster or a male subject to the same disabilities is disqualified.

The above statutory provisions deal with married women other than persons who were British subjects and British protected persons before the date of Sierra Leone independence.

As regards British subjects and British protected persons before the 27th April, 1961, s.3 of the Constitution (Consolidation of Amendments) Act, 1965, provides that:

> "any woman who on the 26th day of April, 1961, was a citizen of the United Kingdom and Colonies or a British protected persons and who is or had been married to a person (a) who becomes a citizen of Sierra Leone by virtue of section 1 of the Constitution; or (b) who, having died before the 27th April, 1961, would, but for his death, have become a citizen of Sierra Leone by virtue of that section, shall be entitled, upon making application in such manner as may be prescribed, to be registered as a citizen of Sierra Leone."

The section contains a proviso similar to that of s.3(4) of the 1962 Act with respect to the renunciation of some other citizenship.

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1. With respect to age and capacity for registration as a Sierra Leone citizen generally, s.2(3) of the Sierra Leone Nationality and Citizenship Act says: "A person shall for the purposes of this Act be of full age if he has attained the age of twenty-one years and of full capacity if he is not of unsound mind."

Within the class of persons for whom provision is made by s.3 of the 1965 Act would be a married woman born in Sierra Leone of Sierra Leone mother and foreign father, but who is not automatically a Sierra Leone citizen because her father or father's father is not a negro of African descent.[1]

Under the foregoing Acts, it would appear that it is immaterial whether the husband is alive or dead or that the marriage has been dissolved by divorce or nullity at the date that the woman applies to be registered as a citizen.[2] It is submitted, however, that a woman whose marriage is void ab initio cannot register under the provisions of the Acts because there being in law no marriage at all from the beginning she cannot be considered as a married woman.[3]

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1. There are many people in the country who fall in this category. In 1967, a test case was instituted on their behalf, i.e. Akar v. Attorney-General of Sierra Leone [1970] A.C. 853, with a view to the automatic acquisition of Sierra Leone citizenship by birth. The Privy Council gave the opinion that those who had become citizens on 27 April, 1971, could not be deprived thereof by the 1965 Act on the ground that it was a discriminatory piece of legislation on the basis of race. At the time that the opinion was delivered, the country was still a monarchy and the highest court of Appeal was the Privy Council. The decision was obviously ignored by the Executive as no step was taken to implement it. For details of this case, see chapter 12.
2. S.3(3) of the 1962 Act and s.3 of the 1965 Act speak of a woman who "is or has been married".
3. Quaere: whether a woman whose marriage is void but who obtains Sierra Leone citizenship before the fact is discovered can retain it. This would depend on whether or not she knew at the time of application that the marriage was void. See s.9 of Act No.10 of 1962.

CHAPTER 9

MATRIMONIAL PROPERTY

A. CONFLICT OF LAWS

A discussion of matrimonial property law in Sierra Leone must begin with the examination of two questions. Firstly, what type of marriage did the parties contract as a result of which they are husband and wife? Secondly, what is the non-marital legal status of the parties; is one or both of them a native or natives? When the answer to these questions are ascertained, a question of conflict of law arises which requires especial treatment.

If the answer to the first question is customary marriage, then the second question does not arise, for customary law would apply to determine the property rights of the spouses. So would the general law cover those issues emanating from a Mohammedan marriage.

But if the marriage is under the Christian or Civil Marriage Acts, one must look at the personal legal status of the parties. If one or both of the spouses is or are a native or natives, their rights in property would appear not to be governed by the general law by reason only of the fact that the marriage is one under the Marriage Acts. Customary law would seem to apply to the property of the native, while the general law governs that of the non-native. This is the conclusion one would arrive at after a cursory glance at s.26 of the Christian Marriage Act, which says that:

> "A marriage celebrated under this Ordinance[1] to which one of the parties is a

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1. S.26 is enacted under the Christian Marriage Act, but it is submitted that it applies to marriage under the Civil Marriage Act as well, since the two Acts are to be construed as one: See s.1 of the Civil Marriage Act.

> native shall not have any effect on the property of such a native; Provided that nothing herein contained shall have the effect of preventing the parties to such marriage from coming to an agreement with respect to the control and enjoyment of their respective properties or of preventing such parties from disposing, by legal procedure and means, of their respective properties after their respective deaths. The property of parties to a marriage celebrated under this Ordinance shall, if both be natives, be subject in all respects to the laws and customs of the tribe or tribes to which the parties respectively belong."

The foregoing principle is very clear on the question of which law to apply in cases where the properties of the spouses are defined with sufficient and reasonable certainty. We may give hypothetical examples by way of illustration:

(a) X, while a spinster, inherited two houses in Freetown and in the Provinces from her father. She later married Y and during the marriage she received a gift of Le 400 from her mother with the knowledge of her husband. Y, too, before and during the marriage bought properties consisting of furniture, a house and a boat. X was a Loko (native) and Y a Creole (non-native). The marriage took place in 1930 and in the same year the husband claimed part of his wife's properties as of right.

(b) A, a Kono man (native) married B, a Limba woman (native), under the Christian Marriage Act. On the eve of the marriage B received Le 20 from her father with which she does petty trading during the marriage. Out of the proceeds she buys utensils for use in the matrimonial home. Assume that there is a custom among the Limba that if a woman is possessed of such property, the beneficial ownership vests in her husband, but such custom is unknown to the Kono.

(c) C and D are both Mende and they marry. C is given jewellery by her father, the fact of the gift being

unknown to D at the time that the gift was made. Assume that among the Mende the husband is entitled to the property under such circumstances.

Under illustration (a), Y would have no interest in X's inherited lands and the legacy despite the fact that under the general law, as we shall see later, a husband before 1932 had beneficial interests in his wife's property, both real and personal, except what was termed her "personal estate". X's property would be subject to her customary law alone, under which, among many Loko, a husband possessed no greater interest in the property of his wife than that of a trustee.

With respect to (b), as the spouses belong to two different tribes, A's property is subject to Kono customary law, while B's will be governed by Limba customary law. According to B's customary law, the utensils belong to the husband. It is submitted that A will become entitled to them even though his own customary law takes the contrary view on the matter. That law is relevant only when dealing with his own property.

As regards (c), D becomes beneficially entitled to C's jewellery.

Doubt may, however, arise in a case of disputed ownership of property as to the applicable law where one or both spouses are natives. An illustration may again be of some help to us here.

(a) H (husband) gives W (wife) Le 1,000 with which to trade. W opens a shop and in the space of 5 years produces a profit of Le 4,000, with some

> of which H buys furniture, spending the balance on completing a house which he has started to build before the marriage. H is a Temne. Assume that there is a custom among the tribe that, so long as a husband has properly maintained his wife, any property bought or acquired under those circumstances, belongs to the husband. Throughout the marriage H spends lavishly on W.

Now, does customary law apply in such a case? Our submission is that it cannot, because this is a case of disputed ownership which is not covered by s.26. That section states, inter alia, that:

> "marriage shall not have any effect on the property of such native."

The application of this part of the section assumes that there must first of all be property belonging to the native. It does not envisage questions relating to disputed ownership where the Court has to decide who the owner is.

But if the parties are both natives, it is submitted, the issue is determined by customary law for, the section says that the property of the parties, if both are natives, is

> "subject in all respects to the laws and customs of the tribe or tribes to which the parties respectively belong."

The phraseology of this part of the section suggests that the general law cannot apply at all. Consequently, proprietary questions like ownership and occupation of the matrimonial home, gifts, and the effect of death, separation, divorce and nullity on the property of native spouses to a Christian or civil marriage would appear to come under the purview of customary law instead of the general law.

This viewpoint, resulting from the present state of the

law does not reflect the social, political and economic position of many natives in present-day Sierra Leone.

The last 40 or so years have seen a revolution in the position of natives in the Sierra Leone society. At the time of the passing of the Christian Marriage Act in 1906, very few natives were educated and enjoyed social and economic amenities open to their non-native counterparts. Their properties did not go beyond domestic paraphernalia, trade implements and the farm and its proceeds. For those who married as Christians, the ceremony was probably only an expression of the dictates of their religion and they entered into it merely to demonstrate to their religious superiors that they were following the teachings of Christ. Property and religion, for these native Christians, were not synonymous and they did not allow their marital status to interfere with the proprietary rights.

But today, a number of indigenous Sierra Leoneans now have as high a standard of education and standard of living as many non-natives; the sharp separation of cultural tenets upon which the section was predicated no longer exists. It is true that there are still in the Sierra Leone society many natives who marry in church but who lead an entirely native form of life. If the law is to serve the purpose of all members of the society equitably, property rights should be determined not by reference to personal law alone - native or non-native - but by reference to the educational, social and economic standing of the individual in the community. In short, the yardstick should be the individual's way of life.

B. THE GENERAL LAW ON MATRIMONIAL PROPERTY

The move towards equality of the sexes among the non-natives has been one major factor underlying the evolution of the general law of matrimonial property. To understand the present law, it is necessary to outline its doctrinal development.

From the outset, Sierra Leone law incorporated the inequalities of the position between husband and wife which English law developed through the common law for, the residuary law of the country includes the common law of England and the doctrines of equity.

(1) The Common Law

At common law, a husband became on marriage for most purposes the absolute master of his wife's property.[1] Shakespeare viewed the position lightheartedly when Petruchio said of his wife, Kate,

> "I will be master of what is mine own; she is my goods, my chattels; she is my house, my household stuff, my field, my barn, my horse, my ox, my ass, my anything."[2]

This dominion over the wife produced the following results in the field of property.[3] While the husband was entitled to his own property absolutely independently of his wife, except a life estate in a third of his freehold property in possession to which she became entitled as dower if she survived him, he had certain rights over his wife's property.

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1. Blackstone's Commentaries, Vol.(i), p.442; Vol.(ii), pp.433-435; Dicey: Law and Public Opinion in England (2nd ed.), 1962, pp. 371-395.
2. The Taming of the Shrew, Act III, scene 2.
3. For an exhaustive treatment of the subject, see Blackstone's Commentaries, Vol.(ii), pp.433-435; Dicey, op.cit., pp.371-395.

So far as pure personality was concerned, he was entitled to it absolutely.[1] Other items of the wife's personality over which he could exercise the power of ownership were choses in action which he had taken step to reduce into possession. In respect of leasholds he had the power to receive the income therefrom and to dispose of them inter vivos but not by will, and if the wife died before him, he became absolutely entitled to them.[2]

As regards the wife's freeholds, the estate by the coverture gave him the rents and profits arising from it,[3] while his tenancy by the courtesy entitled him to a life estate if he survived her and there was a child of the marriage who could inherit from her. Apart from the foregoing property rights, gifts between the spouses were void.

(2) Equity

Equity partly rescued the wife from the dilemma into which she had been placed by the common law with the development of two doctrines. One was the doctrine of the equitable separate estate through which property could be given to the wife by the husband or outsiders for her "sole and separate use". The effect of this was to put the property beyond the reach of the husband. The other was the doctrine of restraint upon anticipation. Under this doctrine, property could be given to the

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1. See statement to the effect by Aitken, Ag. C.J. in Foster v. During, unreported, a decision of the Supreme Court of Sierra Leone, dated 3 July, 1933, mentioned in Vol.I of the old Supreme Court Records, p.613.
2. See the English cases: Bracebridge v. Cook (1572) Plowd. 416; Re Bellamy (1884) 25 Ch. D. 620.
3. The English case Robertson v. Norris (1848) 11 Q.B.D. 916 decided that the husband could dispose of the rents and profits without the wife's concurrence and that his estate lasted only for their joint lives.

wife in a will or by a settlement with a clause preventing the property from being alienated by way of sale, gift, or mortgage or any future liability by the wife whilst allowing her to receive the income derived therefrom.

(3) Statutory Reform

The first statutory intervation in Sierra Leone came in 1858. The Matrimonial Causes Ordinance [1] of that year extended the concept of the wife's separate property to any property she acquired during the period of a judicial separation or after a protection order has been made against the husband on the ground of his desertion.

A second local Act was the Married Women's Property Ordinance, 1875.[2] The Ordinance conferred on the wife an independent beneficial interest in all her earnings,[3] in deposits in banks and investments in public securities made in her name,[4] in the rents and profits of any freehold property descending to her as heiress or co-heiress of an intestate,[5] in any personal property devolving on her as next-of-kin of an intestate,[6] and in any amount not exceeding £100 to which she became entitled by deed or will.[7]

In 1881, the United Kingdom Conveyancing Act[8] made gifts

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1. No.7 of 1858. See Montague: Ordinances of the Colony of Sierra Leone, 1858-1860, Vol.II, p.28. This Ordinance substantially had the same provisions as the United Kingdom Matrimonial Causes Act, 1857.
2. No.7 of 1875.
3. S.2.
4. S.3.
5. S.6.
6. S.5.
7. S.5.
8. S.50. This Act applies to Sierra Leone as an Imperial Statute See the Schedule to the Imperial Statutes (Law of Property) Adoption Act, cap.18 of the revised Laws of Sierra Leone, 1960.

between husband and wife effective at law and in 1887 the local Intestates Act [1] abolished both the wife's right of dower and the husband's tenancy by courtesy.

Power to a married woman to dispose of by will as effectually as if she were a femme sole of any land or estate or interest in land which she was seised of in her own right was conferred by the same Intestates Estates Act.[2] But there was a proviso to the effect that it must be acknowledged by a judge.

Finally, the Imperial Statutes (Law of Property)Adoption Act, 1932, abolished in Sierra Leone all that was in English law before the Act came into operation which restricted the acquisition, holding or disposition of any property by a married woman. This is a very important piece of legislation in that it brought the married woman, at least the one married after the date on which the Act came into force, into equality with her husband insofar as property rights were concerned. Thus, the husband no longer has any estate or interest in her property qua marriage and she becomes free to deal with her property in any manner she likes. Since this Act, there is no longer any distinction between what is her separate property and what is not. Any property that she acquires or is given to her becomes hers independently of any interest of the husband.

Significantly, although this goal had been achieved in English law when the Married Women's Property Act, 1882,[3] was passed, the Sierra Leone Imperial Statutes (Law of Property) Adoption Act, 1932, in a way, forged the married woman in Sierra

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1. No.8 of 1887.

2. S.50. S.7 of Act No.23 of 1938 abolished the requirement of acknowledgment before a judge, for marriage before 1933.

3. This Act does not apply in Sierra Leone.

Leone ahead of her counterpart in England. Restraints upon anticipation were impliedly totally abolished in Sierra Leone since 1933, whilst English law had to wait until sixteen years later.[1]

However, there is a degree of uncertainty as to the extent of the Imperial Statutes (Law of Property) Adoption Act. Is it retroactive or not? Does it apply to women married before the Act as well as those married after? Does it cover property acquired after the Act where the woman was married before the Act came into force? These questions have seized the attention of the judges and the decided cases thereon are conflicting. The earlier decisions tend to show that the Act is not retroactive, whilst the latter decide the opposite.

In Bankole-Bright v. Bankole-Bright,[2] Macquarrie Ag. C.J. held that the Act was not retroactive and ruled that real property acquired before 1932 by a woman married in 1911 was not separate property and was governed by the law before the 1932 Act came into force so if the disposition by her of such property was to be effective, it must be done with the husband's concurrence and the deed must be acknowledged by her under the Fines and Recoveries Act, 1833.

This case was followed by Lane Ag. C.J. in two subsequent cases affecting the properties of the same married woman, namely Bright v. Dalmas [3] and Bankole-Bright v. United African Company Ltd. and Bankole-Bright.[4] The first requires elaboration.

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1. By the Married Women (Restraint upon Anticipation) Act, 1949.
2. Unreported: A decision of the Supreme Court at Freetown on 5 April, 1937. See the Supreme Court Record, Vol.II (1937), p.163.
3. Unreported: Decided by the Supreme Court at Freetown on 22 September, 1939.
4. (1950) 3 S.L. Law Recorder, p.23.

In Bright v. Dalmas, without the concurrence of the plaintiff and without an acknowledgement by her before a judge as was required by law before the 1st day of January, 1933, the plaintiff's wife in December 1933 sold to the defendant her share in a house to which she became entitled in 1915. The plaintiff's contention was that the amendment to the law did not affect his rights of disposition of his wife's property which had vested in him prior to the amendment being brought into force. On these facts, the learned Acting Chief Justice found for the plaintiff, one of his reasons being that:

> "the title (to the property) was not one that she acquired after the amendment to the law, her interest having persisted throughout."

In short, property acquired after the Act by a woman married before the Act would be subject to the law after 1933. In this case, non-retroactivity means that the Act will not apply to property acquired before its date but will do so to property obtained thereafter. In either case, the date of the marriage is probably irrelevant; what is important is the time that the married woman acquires the property.[1]

In a more recent case,[2] however, Bairamian C.J., without any reference to the former cases, held that the Act was retroactive. In that case, the plaintiff made an application to the Supreme Court in order to reseal in Sierra Leone a grant of probate issued in England. The defendant and the testator married in 1911 and separated in 1932. Before the separation the testator

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1. See also In the Estate of Sybil Julia Hamilton (deceased) Lewis and Anor v. Gill: Unreported. Decided by the then Supreme Court at Freetown on 6 January, 1950, in which Beoku-Betts J. held that the Act was not retroactive. The property involved was one acquired by the married woman before the date of the Act.

2. In the Matter of the Estate of A.M.B. Bright (deceased), Bright and Bright v. Bright, 1957-60, A.L.R. S.L. 102.

was entitled to two houses in Freetown which she later purported to dispose of by will to her children, the plaintiffs, whom she named as executors. She died in 1956. The defendant resisted the application and counterclaimed the houses on the ground that they belonged to him or that he had an estate by the courtesy [1] which he acquired in them before the Imperial Statutes (Law of Property) Adoption Act, 1932, came into operation.

Finding in favour of the plaintiffs, on the issue of the retroactive effect of the Act, the learned Chief Justice said:

> "No distinction was made in section 5 between women married before and women married after January 1st 1933, any more than in section 4, or between property acquired before and property acquired after that date. Consequently, if a married woman disposed of her property by will the disposition would take effect at her death and the property would go at once to her executors without being subjected to an estate by the courtesy for the remainder of her husband's life should he survive her."[2]

On appeal, the West African Court of Appeal [3] decided in favour of the plaintiff but for reasons quite different from that adduced in the Court below. The Court held that by virtue of s.4 of the Imperial Statutes (Law of Property) Adoption Act, the deceased wife could have made a will at any time after 1932 disposing of property and she made her will in 1956. Thus the case lays down the principle that property acquired by a married woman before 1932 could effectually be disposed of by will by her without the intervention of her husband. But there is a dictum to the effect that the principle would not apply in

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1. The contention that the husband had acquired an estate by courtesy was abandoned on appeal, probably because it was later discovered that this estate was abolished by the Interstates' Act, 1887.
2. At p.107.
3. Bright v. Bright's Executors, 1957-60, A.L.R. S.L. 182.

the case of dispositions made by her inter vivos, for Hearne, Ag. P. said:

> "But how could the deceased dispose of her properties by will, it was asked, if she could not dispose of them during her lifetime? The answer is that she could not do so during her lifetime independently of her husband's rights, but she could do so by will because his rights were determined by her death."[1]

Why the Court drew a distinction between a disposition by will and one inter vivos in determining whether or not the 1932 Act was retroactive is difficult to explain. If the raison d'etre, as would appear, is that the husband's rights are terminated by the death of the wife in the case of a will, are these rights not very much alive before that date, which puts them in the same position as those rights affected by a disposition inter vivos?

As we have seen, the opinion of the highest court on the point of retroactivity is that of the West African Court of Appeal; and, on the issue of property acquired by a married woman before 1933, it is that it is subject to the law before the amendment and that a married woman could not even after the amendment dispose of such property inter vivos without the complicity of her husband.

In deciding what the correct view is in regard to the retroactive effect of s.4 of the Imperial Statutes (Law of Property) Adoption Act, it is submitted that two questions must be investigated: (a) when was the property acquired? (b) When was it disposed of? The exact time of the marriage of the woman may be relevant, but the process by which the property is disposed of should be irrelevant. It is a canon of statutory interpretation that a retroactive operation is not to be given to a statute so

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1. At p.187.

as to impair an existing right.[1] If the property was acquired before 1932 but disposed of after that date, in the case of a woman married before 1932, her husband's interest in it, which he acquired before the Act came into force, should not be extinguished. But if the property is acquired after 1932 and disposed of, whether or not the woman was married after 1932, the property ought to be free from any interest of the husband. Similarly, if the property is acquired by the woman before 1932 but she marries after that date and disposes of the property, her husband should have no interest in it. Our conclusion, therefore, is that none of the decided cases which we have considered here is satisfactory.

(4) The Present Law

The present law on matrimonial property is the law since 1 January, 1933, and it can be summarised as follows:-

Marriage as such does not now affect the proprietary rights of the parties. If the marriage is celebrated after 1932, whatever a spouse owns at the time of its celebration or thereafter prima facie continues to be his or her property.[2] Where, however, the marriage was celebrated before 1933 and the wife became entitled to property before that date, it is subject to the husband's common law rights unless the wife disposes of the property by will, in which case those rights will be extinguished.[3]

The basic rules outlined above are of easy application

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1. The English case: In re Athlumney [1898] 2 Q.B. 547 at p.552.
2. Bankole-Bright v. Bankole-Bright (supra), unreported; Bright v. Bright, 1957-60, A.L.R. S.L. 102; Bankole-Bright v. U.A.C. and Bankole-Bright (1950) 3 S.L. Law Recorder, 23.
3. Bright v. Bright's Executors, 1957-60, A.L.R. S.L. 182.

where the property rights of the spouses are clearly defined or where the marriage subsists as a successful union, in which case questions with regard to who owns what may never arise. But when an item of property is communally used, jointly acquired or is regarded as forming part of the household property, for example, the matrimonial home and presents given to the spouses at and during the marriage, if the marriage later breaks down, a dispute as to ownership is bound to arise and the aforementioned rules become difficult to apply. In this case, it is the duty of the courts to formulate principles in order to resolve any conflict.

We shall now examine how the courts do or ought to resolve questions of conflict between spouses in given situations.

(a) The Matrimonial Home

In Sierra Leone, the acquisition of a freehold estate in real property by young people is virtually the reserve and privilege of the professionals, top civil servants, successful businessmen and the children of the wealthy. These are in the minority. As the mortgage system, on the scale that is practised in Western countries like England, is unknown in this country,[1] the majority of married couples live in rented houses or rooms as the matrimonial home. Those from this group who manage to build houses have to do so on a stringent budget and the building is not completed until later in life, years after they have married. Questions regarding ownership (but not possession) of the matrimonial home are, therefore, infrequent. Nevertheless, it is necessary here to deal with the law on the ownership of the matrimonial home as it is an important element of matrimonial property law.

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1. Except for an influential few who may receive bank loans to build their houses.

(i) Ownership

There is a dearth of Sierra Leone case-law on the matter. We may, therefore, yet again resort to English case-law for guidance. It is safe to do so because English law on the issue is to a great extent case-law which may be relevant to Sierra Leone not withstanding the fact that the procedure by which the spouses can invoke the Court's jurisdiction in England arose from statute law[1] which is not applicable in Sierra Leone.

The English courts have formulated two principles which govern not only the matrimonial home but also other property which the spouses may acquire in circumstances which make it impossible to determine who contributes what. One is that if there is evidence of an agreement between the spouses with respect to the property in question, the agreement is conclusive.[2] The other is that in the absence of an agreement, the respective proprietary interests of the spouses depend upon their inferred intention.[3] This intention is subject to a presumption of advancement where the husband purchases property in the name of the wife solely, and to the presumption of a resulting trust if the purchase is by the wife in the name of the husband.[4]

By applying these principles the courts have rejected the claim of one spouse who makes no direct contribution to the purchase of property but who might have contributed indirectly with her services.[5] For example, the wife may have, over a period of

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1. The Married Women's Property Act, 1882, s.17.
2. Pettitt v. Pettitt [1970] A.C. 777.
3. Re Roger's Question [1948] 1 All E.R. 328 C.A.
4. Per Lord Upjohn in Pettitt v. Pettitt [1970] A.C. 777, 813.
5. The House of Lords in Gissing v. Gissing [1970] 2 All E.R.780; c/f Denning L.J. in Fribance v. Fribance [1957] 1 All.E.R. 357, 360 C.A.

years, contributed to living expenses such as buying food, clothing the children and paying the house boy or by services in a manner that makes it possible to say that she has enabled the husband to accumulate savings from his own earnings with which he buys the property in dispute.

It is submitted, in this case, as Bromley has rightly put it:

> "an equitable knife must be used to sever the Gordian knot and an equal division will be the only possible solution."[1]

In this regard, Sierra Leone courts ought not to be guided by the English superior courts. As we have pointed out earlier, the acquisition of a house in Sierra Leone in many cases requires a great deal of sacrifice. In families where the wife does not earn and the husband is the sole breadwinner, all the domestic chores are the responsibility of the wife and without her diligence the husband will not be able to make savings in order to build a house. Similarly, in families where both the husband and wife go to work, it has become the practice for the husband and wife to share the domestic responsibilities. Under these circumstances, therefore, property acquired by either and intended for common use, for example, the matrimonial home and furniture, should belong to them equally.

(ii) Occupation [2]

The position at common law which, in our submission, is the law applicable in Sierra Leone, is that whoever is entitled to the beneficial interest by virtue of the right to the other's consortium arising from marriage, each spouse is entitled to

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1. op.cit., 382.
2. For a more intensive treatment of the spouses' occupation of the matrimonial home, see Bromley, op.cit., 386 et seq.

occupy the matrimonial home at any rate during the subsistence of the marriage unless the spouse who claims the right of occupancy has lost his right to consortium through his or her conduct. The wife's position is even more secured in that if she is deserted by the husband, she can continue to remain in the matrimonial home unless she loses her right to maintenance by committing adultery. This right, however, has been held both in England and Sierra Leone to be a mere equity which does not protect the wife from eviction by a bona fide purchaser for value with notice.[1]

This statement of the law has been applied in Sierra Leone in both the case where the matrimonial home is owned by one of the spouses and where the house is rented from a landlord.

In the latter case, there are numerous instances when a husband who is a tenant deserts the wife and leaves the matrimonial home and the landlord gives notice to the wife to quit the premises even though the wife is prepared to pay the rent and she has not done any unlawful act to warrant her eviction. The courts have applied the "mere equity" rule with the utmost stringency and have given possession to the landlord. There is nothing in the existing law to protect such a wife. It is submitted that a law which gives a spouse in such a case equal protection to that afforded a statutory tenant would obviate some of the injustices which may currently occur.[2]

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1. See the English case, National Provincial Bank Ltd. v. Ainsworth [1965] 2 All E.R. 472; Taylor v. Hogan, 1957-60 A.L.R. S.L. 280. The headnote of the latter case, a Sierra Leone case, states that a deserted wife in occupation of the matrimonial home, has the right to remain in occupation as against a purchaser of the home from her husband, the owner, who does not give strict proof of title.

2. English law protects such a wife by giving her rights of occupation: See ss.1(5) and 7 of the Matrimonial Homes Act, 1967.

(iii) Choice and location

A decision with regard to the choice and location of the matrimonial home is one which must be made by both spouses jointly. The opinion of each spouse must be respected by the other and each must act reasonably. This was the principle enunciated by Bankole Jones Ag. J. (as he then was) in Jones v. Jones.[1] In that case the parties lived with the husband's mother in Freetown soon after the marriage. Later they lived at Makeni, where the husband was employed as a civil servamt. On leaving the civil service while at Makeni, the husband had to give up government quarters and he requested the wife to return to his mother's house where they had previously lived in Freetown to wait for him. The wife went back to Freetown and looked for other accommodation, refusing to join her husband at his mother's house on his return. Thereupon there was no resumption of co-habitation between the parties, but the wife sent one of the children of the marriage to the husband's mother to be looked after by her. No satisfactory reason was given by the wife, in the Court's opinion, to justify her refusal to join her husband at his mother's house. In fact, the wife struck the learned trial acting judge as:

> "a woman of the world who is only out to have a good time, a woman of extremely good looks and seductive charms caring not one whit about seriously setting up a home with her husband and always ready and willing to shove off her maternal duty in the bringing up of her children."[2]

On these facts, the Court found the wife guilty of desertion and on the choice and location of the matrimonial home, the learned

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1. 1957-60, A.L.R. S.L. 287.
2. Ibid. at p.294.

Acting Judge adopted with approval the opinion of Denning L.J. in Dunn v. Dunn,[1] where the learned Lord Justice said:

> "The decision where the home should be is a decision which affects both the parties and their children. It is their duty to decide it by agreement, by give and take, and not by the imposition of the will of one over the other. Each is entitled to an equal voice in the ordering of the affairs which are their common concern ... If such an arrangement is frustrated by the unreasonableness of one or of the other, and this leads to a separation between them, then the party who has produced the separation by reasnn of his or her unreasonable behaviour is guilty of desertion."[2]

(b) Wedding presents and gifts to a married couple

Whether the gift is by one spouse to the other or by a third party to the spouses, the intention of the donor is vital in deciding to whom the gift beneficially belongs. If the intention is expressed, then ownership vests in accordance with that intention.

If no intention is expressed, then there should be an inferred intention depending upon the nature of the gift and the donor.

Gifts of a personal nature, for example, dresses and jewellery, are obviously intended for the spouse with whom they are connected by reason of sex. Thus, items that are traditionally for the use of a male alone given by third parties will go to the husband. Similarly, gifts which are purely feminine will be the property of the wife.[3]

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1. [1948] 2 All E.R. 822.
2. Ibid., p.823, 824.
3. Despite the modern practice among young people of one sex wearing clothes that are traditionally used by the other.

But if the gift is one of a non-personal nature, for example, real property, asset and household paraphernalia, given by a third party, it ought to be the property of both spouses equally irrespective of whether or not the donor is a friend or relative of one spouse and not the other. English law allocates a gift in these circumstances to the spouse whose relative or friend was the donor.[1] It is submitted that the intention here is misplaced if applied in Sierra Leone. Whenever a third party makes a gift of such a nature to a wedded couple without expressing to whom it should belong, the experience of everyday life in Sierra Leone indicates that it is a means of setting up the couple in life as a single unit and not as individuals. An inferred intention should, therefore, reflect this experience.

As for acquisitions by one spouse in the name of the other, they are subject to the doctrines of equity. If a husband acquires property in his wife's name, he will be taken to have intended to make a gift of that property to the wife.[2] This is because he has a common law duty to maintain the wife. But if the wife acquires property in the husband's name, there is a resulting trust in her favour. In either case, evidence may be adduced in rebuttal of the presumed intention.

(c) Protection of property rights between spouses

Certain remedies are available for the infringement of proprietary rights by one spouse or by a stranger against the other. Thus an action for damages in tort for conversion, detinue and trespass, or proceedings for an injunction may be at the instance of the aggrieved party.

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1. Samson v. Samson [1960] 1 All E.R. 653.

2. i.e. by the presumption of advancement.

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Formerly, while a married woman could maintain a civil action or criminal prosecution against her husband or a third party for interference with her separate property,[1] no corresponding remedy was available to the husband against his wife. The position of both husband and wife is now the same. As we have indicated earlier, both can now sue each other and third parties in contract and tort. So far as criminal liability for larceny and kindred crimes is concerned, however, as we have seen,[2] one spouse cannot prosecute the other for acts committed "while living together".[3] But he or she can do so in respect of other crimes, in particular, for malicious damage to property.

Conclusions

Though it would appear that matrimonial property law in Sierra Leone is very much simplified, the new Supreme Court, the highest court in the country, has yet to rule on the extent of the Imperial Statutes (Law of Property) Adoption Act, 1932, in order to resolve the differences of opinion among the lower courts. Moreover, because of the lack of local judicial authority or legislation covering specific areas like the ownership and occupation of the matrimonial home and gifts to a married couple, there is a degree of uncertainty as to what the law is, and there seems to be a great area of speculation. In the event of a dispute between spouses concerning property, too much reliance cannot be put on English law in determining the intention of the donor, in the case of a gift from an outsider. This should be resolved by taking into consideration the social

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1. S.8 of the Married Women's Property Ordinance, 1875, No.7 of 1875.
2. Chapter 8, pp.270-274
3. S.36 of the Larceny Act, 1916.

condition of the country.

There is no justification in present-day Sierra Leone for applying solely a person's pre-marital personal law to the ownership and disposition of property. That personal law may be relevant but other factors like the type of marriage contracted and the spouses' way of life should be taken into consideration.

Finally, the present procedure for the protection of their proprietary rights inter se whereby the spouses resort to open court in the same manner as any other litigant in respect of all actions, is undesirable. Provision should exist whereby matters affecting matrimonial property can be heard on summons by a judge in chambers. This will prevent disclosure to the public at large of intimate matters affecting marriage.

CHAPTER 10

MATRIMONIAL RELIEFS

A. NULLITY OF MARRIAGE

(1) Nullity of Marriage under the Christian and Civil Marriage Acts

Nullity distinguished from Divorce

A decree of nullity may be either a declaration that a marriage has never existed in law, though it may have been so in fact, or a declaration that a subsisting marriage should cease to exist. The former is appropriate though unnecessary where the marriage is void; the latter is essential for the termination of a voidable marriage. Nullity proceedings differ from divorce in their effect. Where a decree of nullity is granted as in voidable marriages, the marriage is for certain purposes regarded as never having been in existence, whereas divorce does not relate back but affects only the present and future status of the parties.

Distinction between Void and Voidable Marriages

The distinction in the common law between void and voidable marriages was originally blurred. For instance, in an earlier edition of Rayden on Divorce, a voidable marriage was defined as one

> "declared to have been and to be absolutely null and void to all intents and purposes in the law whatsoever, and the petitioning spouse declared to have been and to be free from all bonds of marriage."[1]

As one commentator rightly puts it, if the marriage has been absolutely null and void and the spouse has been free from the

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1. 4th ed., Form 95, p.705.

bond of marriage there is ground for suspicion that the marriage was not voidable but really void ab initio.[1] The distinction has now been clearly defined by Lord Green M.R. in the English case, De Reneville v. De Reneville [2] when he said:

> "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."

It is important to know whether a marriage is void or voidable because certain legal consequences flow therefrom which depend on the character of the marriage. First, for a voidable marriage, there must always be a decree of nullity before the marriage can come to an end, and the decree must be obtained during the lifetime of both of the parties; so that, if one spouse dies before the decree, the marriage can never be avoided.[3] In the case of a void marriage, a nullity decree is not necessary, though it is desirable as evidence that the marriage is not in existence at all, and a decree can be obtained even when one party is dead. Secondly, a voidable marriage must be annulled before a subsequent marriage can be validly contracted, whereas a party to a void marriage can enter into another marriage validly without taking steps to terminate the first marriage. Thirdly, only the spouses can challenge the validity of a voidable marriage.[4] On the other hand, a stranger who has sufficient interest can

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1. F.H. Newark, "The operation of Nullity Decrees", 8 M.L.R. (1945) 203, 204.
2. [1948] 1 All E.R. 56, 60.
3. A v. B (1868) 1 P & D. 559 (voidable marriage).
4. Ibid.

institute proceedings to declare a marriage null and void.[1]

Grounds on which a statutory marriage is void

Under this heading, by statutory marriage is meant marriage under the Christian and Civil Marriage Acts. It may not serve a practical purpose to consider a Mohammedan marriage as such because, as we have seen, proof according to Islamic law of the existence of such marriage is conclusive evidence before the Sierra Leone courts. Such proof is usually afforded by the production of the marriage certificate or the register of marriage of the particular jamaat (Muslim community)where the marriage took place. Once a Mohammedan marriage has been proved to be in existence, past or present, the Sierra Leone courts do not in practice, enquire into its validity. For purpose of completeness, however, we shall at the end of this Chapter outline the grounds on which a marriage may be annulled in Islamic law and examine the views which Sierra Leone Muslims take of nullity of a Mohammedan marriage.

We have already discussed in detail in Chapter 6 the essentials of a valid statutory marriage. In this Chapter, therefore, we shall merely outline those essentials, the absence of which make the marriage void. The relevant statutory provisions are s.10 of the Christian Marriage Act and ss.8 and 15 of the Civil Marriage Act. Under these provisions, a statutory marriage is void on the following grounds:

(i) Non-publication of banns of marriage or marriage contracted without obtaining a licence or Registrar's Certificate:

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1. Faremouth v. Watson (1811) 1 Phil. 355 (void marriage).

Where the marriage is to be celebrated in church, failure to have banns published on three successive Sundays or three Sundays following each other in which services are held or to obtain a licence from the appropriate Registrar will invalidate the marriage. Similarly, for a civil marriage before a Registrar, the marriage will be null and void if the Registrar's Certificate or the President's licence as the case may be, has not been obtained.

(ii) Marriage within the prohibited degrees:

There is no indication about the knowledge or intention of the parties. Probably, a marriage between persons within the prohibited degrees without knowing the facts as such will, nevertheless, be void since the policy would appear to be the prevention of such marriages.[1]

(iii) Marriage between persons either of whom is already married to some person other than a party to the intended marriage:

"Already married" in this context, as we have seen,[2] formerly meant already married in accordance with Christian or Muslim rites or under the Civil Marriage Act, so that a customary marriage did not bar a party thereto from contracting a subsequent Christian or Civil marriage with a third party. Since the Christian Marriage (Amendment) (No.2) Act and the Civil Marriage (Amendment)(No.2) Act, both of 1965, however, a previous customary marriage is now a bar to a subsequent Christian or Civil marriage with a party other than the spouse of the customary marriage.

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1. This is an interesting point but the position does not seem to be very clear, even in English law. The present writer searched in vain for a decision of the English courts wherein this issue has been discussed and settled.
2. Chapter 6.

(iv) Marriage celebrated under a false name or false names with the knowledge of both parties:

As we have said earlier, knowledge of the falsity by both parties is vital in order to invalidate the marriage. Therefore, if only one party has been fraudulent in concealing her correct name whilst the other party knows nothing about the concealment, the marriage will be valid though the fraudulent spouse will be guilty of an offence under ss.18 and 20 of the Christian Marriage Act and Civil Marriage Act respectively.

(v) Marriage not celebrated in the presence of two witnesses.

(vi) Marriage not celebrated within three months after the date of notice:

It should be remembered that the first step to be taken in order to contract a marriage under the Civil Marriage Act is that one of the parties to the intended marriage must give a written notice to the Registrar of the district in which the marriage is intended to be celebrated, and the notice should state, inter alia, that the marriage will take place within three months from the date of such notice. All necessary steps must be taken to contract the marriage within this time limit otherwise a marriage contracted thereafter will be void. It is significant to note that this provision is in respect of a civil marriage only. A marriage under the Christian Marriage Act celebrated after the expiry of three months from the date of the licence or the date of the last publication of banns is nevertheless valid though the Minister concerned will be guilty of an offence under s.22 of the Act.[1]

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1. Whereas s.8 of the Civil Marriage Act expressly states that marriage not contracted within the stipulated period is void, s.9 of the Christian Marriage Act merely provides that it shall be lawful for a Minister to celebrate marriage on any day within the period of three months from the last publication of banns or the date of the licence.

The above are the only grounds provided by statute on which a statutory marriage contracted in Sierra Leone will be rendered void. Both the Christian Marriage Act and the Civil Marriage Act make this clear when their ss.10 and 15 respectively, after stating the grounds on which a marriage is void, provide that:

> "save as aforesaid every marriage celebrated under the provisions of this Ordinance shall be valid until it be lawfully dissolved."

Thus grounds like fear, consent, mistake and lack of consent (not mentioned by the Acts) on which marriage being a contract may at common law, be rendered void, would not seem to invalidate a statutory marriage in Sierra Leone. It is difficult to defend the absence of these grounds. How can a marriage be valid without the consent of the parties or if the consent is induced by mistake, fear or duress? Can it be argued that the grounds mentioned in the Acts rendering marriage void are not exhaustive but supplementary to other grounds at common law? An affirmative answer to the last question would have been correct but for the preceding quotation from the Marriage Acts which contains the phrase "save as aforesaid". Ss.10 and 15 categorically state that in the absence of any of the elements stated in the Acts that would render a marriage void the marriage will otherwise be valid until it is by law dissolved.

Sierra Leone is unique as being the only ex-British West African dependancy with such a provision in both Marriage Acts enacted during the colonial era. The Christian Marriage Act of the Gambia,[1] and the Marriage Acts of the Gold Coast,[2] and

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1. S.14 of the Christian Marriage Act, cap.23 of Vol.I of the 1966 edition of the revised Laws of the Gambia. But note that s.16 of the Civil Marriage Act, cap.27 of the Gambian laws, has the same provision as the Sierra Leone Acts.
2. S.42 of the Marriage Ordinance, cap.127.

Nigeria [1] all left the door open for the entry of common law grounds where statutory law was silent on the issue. For example, both the Gold Coast and Nigerian Marriage Acts after enumerating the grounds on which a marriage is void merely conclude:

> "But no marriage shall, after celebration, be deemed invalid by reason that any provision of this Ordinance other than the foregoing has not been complied with." [2]

In short, a marriage is not rendered void because the provisions of the Act other than the ones specifically mentioned in the respective Acts have not been adhered to. Small wonder therefore that Kasunmu and Salacuse [3] rightly argue that the requirements of a valid statutory marriage in Nigeria are not spelt out in the Marriage Act and that other grounds known to the common law on which a marriage would be invalidated ought to be read into Nigerian law. In the present state of the law such a plea cannot be made for Sierra Leone.

Grounds on which a statutory marriage is voidable

S.3(i) of the Matrimonial Causes Act [4] provides that:

> "in addition to any other grounds on which a marriage is by law void and voidable, a marriage shall be voidable on the ground of (a) non-consummation owing to wilful refusal; (b) suffering from a venereal disease in a communicable form at the time of the marriage; (c) pregnant by some person other than the other spouse at the time of the marriage."

S.3(i) is quite precise on the grounds rendering a marriage voidable; it enumerates the statutory grounds and leaves the door open for the inclusion of common law grounds. These common

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1. S.33(3) of the Marriage Ordinance, cap.115.
2. S.42 of the Ghana Marriage Ordinance, cap.127; and s.33(3) of the Nigerian, cap.115.
3. Op.cit., p.161.
4. Cap. 102 of the revised Laws of Sierra Leone, 1960.

law grounds would be grounds on which a contract of such a nature can be avoided. They are fraud, misrepresentation, duress fear [1] and non-age.[2] We shall now deal with the statutory grounds in detail because they raise issues which are of peculiar interest to Sierra Leone. We must first of all begin by saying that this is an area in which there has not been found any Sierra Leone Court decision, reported as well as unreported, and because of the sociological factors inherent it will be quite unsafe to rely solely on English decisions as guide lines for interpretation.

(a) Non-consummation owing to wilful refusal

(i) What is consummation?

Consummation of the marriage takes place when the spouses have sexual intercourse after the celebration of the marriage. According to Dr. Lushington in the English case in D-E v. A-G [3] such intercourse must be ordinary and complete, not partial and imperfect. This opinion arose from a case where the wife's sexual organ was so deformed that complete, but not partial, penetration by the male organ became impossible. But it also implies that the husband himself must be sexually capable of fully penetrating the wife.

In an African society such as in Sierra Leone, the sexual act in marriage is of primary importance. In most of the tribal languages marriage literally means sexual intercourse, so that if a man wants to ask for the hand of a woman in marriage he says it literally "I want this woman for sexual intercourse" (in Mende:

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1. For a detailed analysis of these grounds see Bromley, op.cit. 81, 82.
2. See Chapter 5.
3. (1845) 1 Rob. Eccl. 279, 298.

nya longo a nyahei ji soo va). The essential object of sexual intercourse in marriage is the procreation of children and it is believed that that aim can only be achieved if sexual intercourse is complete. This contrasts remarkably with sexual intercourse which forms the basis of an action for woman damage and adultery. In customary law, the mere expression of the desire to have sexual intercourse with another man's wife is regarded in many communities as sufficient to found an action for woman damage whilst under the general law, sexual intercourse, however slight it may be, by a married person with another to whom he or she is not married, amounts to adultery.

Because of the emphasis on procreation as the basis of marriage in the African context it is doubtful, though in English law it is accepted, that coitus interruptus [1] and intercourse with the use of contraceptives [2] would amount to consummation of the marriage. If these practices are accepted as sufficient consummation in Sierra Leone society, it is an adoption of foreign attitudes without having regard for local social convictions. In Sierra Leone, it is the ambition of every parent as well as friends and well-wishers of a newly married couple that a child should be born as soon as is biologically possible , so that a marriage which is fruitless after its first year becomes the subject of much gossip about the ante-nuptial promiscuity of the wife or the existing impotence of the husband. Of course, in highly developed societies, it is possible to conceive a child without any act of sexual intercourse,[3] but so far as my researches go fecundation ab extra is unheard of in Sierra Leone.

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1. Cackett v. Cackett [1950] 1 All E.R. 677.
2. See Baxter v. Baxter [1948] A.C. 274.
3. i.e. by fecundatio ab extra.

Therefore, unnatural sexual intercourse ought not to be accepted, at any rate for the purposes of consummation of marriage.

(ii) Wilful refusal

Any act on the part of one spouse, without just excuse, which makes consummation impossible would amount to wilful refusal. Thus, if one spouse insists on using unnatural methods to effect intercourse, the other will be justified in refusing whilst the party who insists on the unnatural method will be wilfully refusing to consummate. Genuine sickness but not mere malingering will be a just cause and so would be the suckling of a young baby.[1] If one spouse is living in adultery, the other will be justified in refusing consummation for to agree to sexual intercourse would be condoning the other's adultery.[2]

Impotence apart, it is inconceivable that a marriage in Sierra Leone will ever be non-consummated on the ground of wilful refusal.

(iii) Impotence

Impotence is not mentioned in the Matrimonial Causes Act as a ground for annulling a marriage but is of relevance in determining whether a marriage is consummated.

The impotence of a spouse, though a natural phenomenon, would in our submission, amount to wilful refusal in the Sierra Leone context because in this country sexual intercourse is the principal essence of marriage.[3] In this regard, knowledge on

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1. It is a common occurrence in the Sierra Leone society that many young women are pregnant by the prospective husbands before they are married, and the child is born within days or a few weeks after the celebration of the marriage. It is customary for women to suckle babies for at least nine months after birth, during which period the wife is not expected to have sexual intercourse allegedly for the health of the baby.
2. Because by contracting a monogamous marriage the parties are deemed to have opted out of polygamy.
3. Per Tejan-Sie C.J. in Cummings v. Cummings, 1968-9 A.L.R. S.L. 44, 52.

the party's part of his unfortunate condition at the time he enters into the union means that from the outset he has formed the intention to deprive the other spouse of sexual intercourse. But if impotence intervenes after the consummation, the marriage cannot be annulled nor can itbe the basis of a divorce. Nevertheless, it will be conduct that justifies the other in being in desertion and will probably be regarded as conduct which conduces the other spouse to commit adultery.

What is the degree of impotence that is necessary for annulling a marriage? Should it be impotence with respect to every woman or impotence in respect of a particular woman, i.e. the wife? These questions are important because, owing to some reasons,mental and psychological, one spouse may be impotent in relation to the other but not so insofar as other persons of the opposite sex are concerned. In Sierra Leone, tribal societies whenever impotence is an issue, the guilty party, usually the man, must be given a woman other than the wife in order to test his virility. If he is able to have sexual intercourse with that woman but unable to have it with his own wife, various causes such as witchcraft by the wife or the husband's disability due to a curse may be attributed, and it will not be regarded as impotence. Such a test is not available in the case of monogamous marriages as it amounts to adultery. There are many in the Sierra Leone communities who are of opinion, however, that a spouse of a monogamous marriage, at any rate, the husband, must be accorded this privilege. To do so, of course, will be giving vent to the inner consciousness of the people which according to Savigny should be the ultimate goal of law; but it is diametrically opposed to the monogamous character of a statutory marriage and ought, therefore, to be deprecated.

(b) Venereal disease in a communicable form

The presence of this ground in the Matrimonial Causes Act can only be explained by the fact that it is a relic of the colonial era representing the social and the highly sophisticated hygienic ideas in England. In England the attitude taken towards venereal disease is not the same as that shown to the disease by the average Sierra Leonean. Unlike impotence, which strikes at the very root of the marriage, venereal disease contracted by a husband is commonly regarded as just another sickness like, say, malaria or cholera, and it frequently meets with the sympathy of the wife once she knows about it. The occasional temper may only run high when the wife is infected but cools down as soon as a cure is obtained. Married couples have always tried to keep the sickness a secret to themselves, besides their doctor, and regard it as shameful even on the part of the innocent spouse for third parties to know about it. This accounts for the rarity and almost complete absence of actions for nullity based on this ground even when the disease is rampant among men in the country.[1]

(c) Pregnancy per alium

The law here speaks for itself and requires no further elaboration. By way of comment, however, it should be pointed out that the Sierra Leone society attaches enormous weight to a wife's fidelity which she must maintain right from the beginning of the marriage. A woman who, knowing that she is pregnant by one man, conceals this fact and marries another, is held socially in the same estimation as a common prostitute. This factual

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1. But the position is different if the disease is contracted by a wife. It is regarded as evidence of infidelity if she does not contract it from her husband and she may be divorced under customary law on that ground. The scale of immorality, therefore, seems to tip heavily against the wife in this respect.

situation is frequent where there is pregnancy before marriage; but, if it is not the doing of the prospective husband, the prospective wife is always careful to reveal it to the would-be husband for fear of the social, apart from the legal, consequences when found out. In practice, therefore, it seldom happens that the husband does not know of the wife's situation at the celebration of the marriage. Moreover, the chances of a husband's being ignorant of a wife's pregnancy at the time of marriage can, in Sierra Leone, be very slim because the parties would have had a long period of courtship before marriage. It rarely happens for a couple to know each other and marry within a very short time from the period of acquaintance. During that period of courtship, it is a social convention for the intended wife to refrain from having an affair with any member of the opposite sex other than the prospective husband.

Restrictions on decree of nullity

(a) Statutory

S.3(1) of the Matrimonial Causes Act [1] imposes three restrictions on nullity petitions based on the respondent suffering from venereal disease or pregnancy per alium. First, the petitioner must at the time of the marriage be ignorant of the facts alleged; secondly, he must institute nullity proceedings within a year from the date of the celebration of the marriage; thirdly, voluntary sexual intercourse with the other spouse must not take place from the discovery by the petitioner of the grounds for a decree.

It is submitted that, in determining "ignorance" with respect to the first restriction, an objective test should

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1. Cap.102 of the revised Laws of Sierra Leone, 1960.

apply,[1] but a mere suspicion ought not to be sufficient.[2]

(b) Common law and equity [3]

At common law and equity a petition for nullity based on wilful refusal will fail if the petitioner with knowledge of the facts and law entitling him to a decree annulling his marriage treats it as valid and subsisting before he takes steps to avoid it. Thus, if he takes advantages or derives benefits from the matrimonial relationship or lives for a long time together with the other spouse in the same house or family with the status and character of husband and wife after knowledge of everything which it is material to know, he cannot later seek to annul the marriage, for to do so would be unfair and inequitable.[4]

Overt acts like obtaining a matrimonial order,[5] and the adoption of a child [6] have been held by theEnglish Courts sufficient approbation of the marriage to prevent a later decree for nullity. It must be remembered, however, that knowledge of the factual situation and an overt act alone on the part of the petitioner will not deprive him of a nullity decree; he must also know the law entitling him to such decree. Knowledge of the law

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1. See the English case of Smith v. Smith [1947] 2 All E.R. 741, C.A. in which the Court of Appeal held that a petitioner cannot obtain a decree if he had intercourse with full knowledge of facts from which a reasonable man would conclude that he had grounds for a decree even though he personally refused to draw the conclusion.
2. See the English case of Stocker v. Stocker [1966] 2 All E.R.147.
3. For a fuller treatment of this see Bromley, op.cit., 61-69.
4. See Lord Selborne, L.C. in G v. M (1889) 10 App. Cas. 171, 186 H.L.
5. Tindall v. Tindall [1953] 1 All E.R. 139, C.A.
6. W v W [1952] 1 All E.R. 858, C.A.

here, it is submitted, must be constructive knowledge which he will be deemed to have if he has pursued any prior legal action on the basis that he is married to the other spouse.

Jurisdiction of the courts to annul a marriage

(a) Statutory

The High Court has statutory jurisdiction to hear proceedings for a decree of nullity in every case in which it may pronounce a decree of divorce.[1] This will be discussed generally in the chapter on Divorce.

(b) Common law

The new section 30(2) of the principal Act contained in s.5 of the Matrimonial Causes (Amendment) Act, 1961,[2] reads:

> "Without prejudice to any jurisdiction exercisable by the Court[3] apart from this section, the provisions of the preceding subsection [4] shall apply to proceedings for nullity of marriage."

The effect of this section is, inter alia, to recognise grounds at common law on which the High Court posesses jurisdiction to hear nullity petitions. These can be categorised into two. First, the basis of jurisdiction where the marriage is void. Secondly, the basis of jurisdiction if the marriage is voidable.

If a marriage is void the High Court has jurisdiction to annul it if (a) the marriage took place in Sierra Leone;[5]

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1. S.5 of the Matrimonial Causes (Amendment) Act, 1961, Act No. 16 of 1961.
2. Act No.16 of 1961.
3. i.e. the High Court.
4. Which deals with jurisdiction of the High Court in proceedings by a wife for divorce.
5. Ross-Smith v. Ross-Smith [1962] 1 All E.R. 344.

(b) only the petitioner is domiciled in Sierra Leone;[1] (c) both parties are resident in Sierra Leone at the time when proceedings begin.[2] But if the marriage is merely voidable, only one ground exists as the basis of jurisdiction, i.e. that both parties are resident in Sierra Leone.[3] It has been held that residence of the petitioner alone will not be sufficient to give jurisdiction to the Court,[4] but that residence of the respondent would suffice since the petitioner ipso facto submits to the jurisdiction by invoking it.[5, 6]

(2) Nullity of a Mohammedan Marriage

In Islamic law generally a marriage is either valid ab initio or valid, subject to ratification, or defective (invalid). Under Maliki law particularly, a marriage is either valid or defective.

A defective marriage is not one which might be classified as void or voidable as in the general law because the legal consequences which follow a defective marriage in Islamic law are not the same as those which result upon a void or voidable marriage under the general law. The rules in Islamic law are rather difficult and complex. In Maliki law, some defective marriages

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1. See Lord Green M.R. and Bucknill L.J. in De Reneville v. De Reneville [1948] 1 All E.R. 56, C.A. at pp.61, 64.
2. Ramsay-Fairfax v. Ramsay-Fairfax [1955] 3 All E.R. 695, C.A.
3. Ibid.
4. Per Lord Green, M.R. in De Reneville v. De Reneville (ante), at p.62.
5. Sim v. Sim [1944] 2All E.R. 344. This was a case on the jurisdiction of the Court to hear a petition for judicial separation but the statment of the law therein can apply equally to nullity proceedings.
6. The cases in Notes 5 (p.331), and 1-5 are English decisions but being common law decisions, they apply to Sierra Leone as the country's residual law.

raise a shubha, i.e. a semblance of validity, while others do not. A marriage which raises a shubha is perhaps equivalent to the Hanafi fasid marriage, the results of which is that the hadd penalty is not inflicted for zina. A marriage in Maliki law which has no semblance of validity may again be equivalent to the Hanafi batil which traditionally carried the hadd penalty.[1]

There are two types of shubha in Maliki law: (i) shubha-talmahall which exists as a result of differences of opinion among the schools or jurists in regard to impediment. It covers marriages without witnesses, marriage during pilgrimage, and shighar marriage; (ii) shubhat al-ishtibah in which there is uniformity among the schools that if the parties to the defective contract act in good faith in regard to an impediment and they are ignorant of the facts or of the law, certain legal consequences may nevertheless follow the marriage.

Lapanne-Joinville [2] has attempted to reduce the difficulties in the classification of defective marriages under Maliki law and has put them under three categories: (i) defective marriages which may be expunged only before consummation; (ii) those which are invalid ab initio but become valid after the marriage is consummated followed by a period of married life; (iii) those that are invalid irrespective of consummation and cohabitation for any length of period. We shall now examine which marriage falls under which category.

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1. D. Hinchcliffe, The Islamic Law of Marriage and Divorce in India and Pakistan States since Partition, an unpublished Ph.D. Thesis, London University, 1971, pp.61-66.
2. "Theorie des nullites de marriage en droit musulman malekite", Revue algerienne, 1951, pp.92-102.

(i) Defective marriages which may be expunged only before consummation

These are of two types: (a) a marriage defective because there is no dower or the property given as dower is not one permissible under Islamic law. Examples of the first type are: where the marriage contract stipulates that no dower should be paid; Shighar marriage, i.e. one that contains a stipulation like: "give me your sister and I give you mine without a dower." Examples of the second type are: where property is given as dower to which the donor has no legal right; where the dower consists of property forbidden by Islamic law, for example, wine, pork and impure oil; where the dower is an object which involves a great risk in its handling, for instance, a wild animal; and a promise to pay the dower without stipulating any precise time for its payment. (b) A marriage which is defective where two walis of equal rank each concludes a marriage between the woman and a different husband. In this case, the first marriage in time is presumed to prevail over the other, but if the second is consummated first, the second becomes validated and the first is rendered invalid.

(ii) Marriages defective ab initio but which are validated by consummation followed by a period of married life.

These are also of two types: (a) Where a woman of high social rank, who cannot be married without her consent has been given in marriage by a wali lower in rank to the one to whom the hierarchy of guardianship confers the right, the higher wali or if he is absent, a judge, can have the marriage annulled if it is proved that the husband is not the wife's social rank. But if the wali or the judge, as the case may be, has not acted and the parties consummate the marriage and live together for about three years or have two children, the marriage is validated;

(b) If an orphan girl who has not reached nubile age and has not been promiscuous is married without the permission of a kadi, the marriage is invalid; but there is a difference of opinion among the Maliki jurists as to the effect of consummation on the marriage. Abu 'l-Hassan says that the marriage cannot be validated, whilst Khalil (reporting Al-Mattiti's opinion) concedes that if the defect is not revealed until a substantial length of time has elapsed, it is cured by consummation.

The two categories of defective marriages which we have dealt with so far are shubha. The result is that as long as the necessary procedure for their dissolution has not been undertaken before consummation, in the first case, and before consummation followed by a period of cohabitation, in the second case, the marriage becomes validated and nothing can be done thereafter in order to invalidate it. But as we shall see shortly, the legal consequences of such a marriage are not exactly the same as those following a marriage which is valid ab initio.

(iii) Marriages invalid irrespective of consummation or a period of married life following consummation

These are marriages in which there is a defect in the contract to such an extent that the basic rules of contract are violated. For instance, where the prerequisite consent for the marriage was not obtained; where the marriage is between persons who are within the prohibited degrees of consanguinity, affinity and fosterage; and marriages between a Muslim woman and a non-Muslim even if the latter is converted to Islam after the marriage.

The effect of a defective marriage

The effect of defective marriages can conveniently be reduced to two basic rules: some defective marriages may only be

avoided by judicial decree. Others are invalid de jure without the pronouncement of a judicial talaq.

A judicial decree is necessary for marriages over which there is difference of opinion among the schools as to their defect. Those for which there is unanimity of opinion as to defect are null and void without a judicial intervention. We must now address ourselves to the specific defective marriages which require a judicial repudiation and those that do not and what the legal consequences are.

I. Defective marriages which require a judicial decree

These are of two kinds: (a) those which preserve the right of inheritance to the surviving spouse; and (b) those which do not preserve such right.

(a) Marriages which preserve the right of inheritance

They are as follows:- marriage contracted without witnesses but which is consummated; marriage concluded during the state of ihram, i.e. during pilgrimage; Shighar marriage; a marriage kept secret; and a marriage in which a slave is given as dower.

(b) Marriage which deprives the surviving spouse of the right to inheritance

These are:- marriage concluded while a party is in a state of sickness from which he is likely to die, such sickness not lasting for more than one year; optional marriages which are (i) marriage concluded without the attendance of a wali; (ii) marriage concluded by a woman or slave acting as wali; (iii) marriage concluded by a wali other than the father while the latter is absent but not far away; (iv) where two walis of equal rank marry the woman to two different husbands; (v) where two marriages are concluded with the same woman and the second

marriage is consummated first.

II. Marriages void de jure and which do not require judicial decree

These are as follows:- marriage between a Muslim and a non-Muslim; marriage by a woman when there is a pre-existing marriage to which she is a party; marriage with a woman in 'idda; marriage of a man with a fifth wife during the subsistence of marriages with four sives; marriage of a lover with his mistress; re-marriage with a woman who has been repudiated as a wife three times; marriage within the prohibited degrees of consanguinity, affinity and fosterage; re-marriage with a wife on whom lian has been sworn; marriage with a condition suspending it for some time; marriage contracted for a period fixed in advance; marriage concluded at different times by two walis of equivalent rank both authorised by the woman on two different occasions; marriage concluded at the same time by these two walis to two different husbands; marriage with a slave woman with a stipulation that the children of the marriage will be free. There are additional sanctions attending a marriage void de jure. Formerly, there was the penalty of hadd which was death of the parties to the marriage by stoning. Nowadays, the present writer is not aware that this penalty is used in any Muslim community. Next, there is a permanent bann on re-marriage in two cases: (i) marriage of a seducer with his mistress; (ii) marriage with a woman in 'idda where the marriage has been consummated.

A significant legal consequence of a defective marriage of any type is that the children are regarded as legitimate; the defect affects only the parties to the marriage. In this respect Islamic law takes a very liberal view as compared with the general law.

Nullity of Marriage as known among Sierra Leone Muslims

One cannot say with certainty which of the grounds rendering a marriage defective in strict Islamic law would have the same effect among Sierra Leone Muslims in practice, although the stricter Muslims allege that the same grounds stipulated by Islamic law would apply to them. When questioned about the legal sanctions that follow a defective marriage, these Muslims said that a defective marriage is regarded as valid for all legal purposes so long as the parties have been declared married by an Imam. In practice, however, the stricter Muslims abide by most of the rules imposed by strict Islamic law for the requirements of a valid marriage. But the more liberal Muslims, particularly some native Muslims, break the rules. Thus, a man may marry his step-mother;[1] he may marry two sisters concurrently;[2] and marriage with a woman in 'idda is not forbidden.[3] The stricter Muslims deprecate these practices as not being in conformity with Islamic law and rightly so. In fact, the practices are indicative of tribal custom.

Therefore, there is a struggle between strict Islamic law and local practice. The question now is which wins legally and why? Obviously, a Muslim marriage between persons one of whom is not a Muslim is not legally a Muslim marriage recognised even by the general law because the Mohammedan Marriage Act recognises Mohammedan marriages contracted by Muslims only. As regards the other conditions imposed by strict Islamic law, it

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1. A practise common among the Mende.
2. A Kono and Kissi custom.
3. There is no evidence that the 'idda of divorce is observed. The 'idda of death is observed only in a limited form lasting in many cases from seven to forty days; but its observance seems to be linked with tribal custom. On this, see further Chapter 18.

is submitted that non-compliance with any of them should render the marriage defective and the usual consequences of such defect ought to apply as a matter of law. Note that under the Mohammedan Marriage Act, a Mohammedan marriage that is valid under the general law for all civil purposes is one "valid according to Mohammedan law". Though it is our contention that the law should be adhered to, where it works injustice then there is room for law reform. As we have said earlier, Sierra Leone Muslims are more concerned with the practice of their religion than with the niceties of their very much complicated law. Therefore, the law ought to take local conditions into consideration. It will be very difficult to apply strict Islamic law in practice in Sierra Leone since, as we have mentioned earlier, the majority of the Muslims are not knowledgeable in that law and are governed by tribal law in most of their affairs. The stricter Muslims, of course, would not admit that this is the state of affairs, but the dearth of nullity proceedings among even them for defective marriages, shows that their desire for the application of strict Islamic law to the affairs of their everyday life is just a demonstration to give respectability to their religion rather than to its jurisprudence.[1]

B. JUDICIAL SEPARATION

Judicial separation as a matrimonial relief was introduced in Sierra Leone by the Matrimonial Causes Ordinance 1858.[2] The present legislation dealing with it is the Matrimonial Causes Act, 1949.[3]

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1. See Anderson, Islamic Law in Africa, pp. 297-300.
2. Act No.7 of 1858. See Montagu: Ordinances of the Colony of Sierra Leone, 1858-1860, Vol.II, p.28.
3. Cap.102 of the revised Laws of Sierra Leone, 1960.

From the outset, it should be remembered that the relief was commonly invoked by the wife [1] before 1950 when, as will be seen, the grounds for divorce were fewer than they are today, and when either spouse could obtain a decree for judicial separation on the grounds of the other's adultery, cruelty,[2] or desertion without cause for a minimum period of two years.[3] Ever since the grounds of divorce have been increased, there is scarcely any case of judicial separatinn. However, in order to meet the needs of a spouse who has a conscientious objection to divorce or who, because of the conduct of the other spouse, wishes to remain judicially separated with the hope for an ultimate reconciliation, the relief is still in existence and can be used in appropriate cases.

Under the present Matrimonial Causes Act, either spouse may present to the High Court a petition for judicial separation on any of the following grounds:-

i. any ground on which a petition for divorce might be presented.

ii. on the ground that the other spouse has failed to comply with a decree for restitution of conjugal rights,

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1. There is no reported case in Sierra Leone on judicial separation. Of four unreported cases discovered by the present writer, all were petitions by the wife based on cruelty. See next note.

2. Richards v. Richards, unreported; a decision of the Supreme Court at Freetown dated March, 1932; see Supreme Court Records (1932) Vol.I, p.541; Crown v. Crown, unreported: decided by the Supreme Court at Freetown on 28 July, 1948; see Supreme Court Records, Vol.5, p.210; Wright v. Wright, unreported; decided by the Supreme Court at Freetown on 3 May, 1946; see Supreme Court Records, Vol.4, p.410. Nelson-Williams v. Nelson-Williams, unreported: a decision of the Supreme Court at Freetown, dated 11 April, 1945; see Supreme Court Records, Vol.4, p.284.

3. S.8 of Act No.7 of 1858.

iii. any ground on which a decree for divorce a mensa et thoro might have been pronounced in England immediately before the commencement of the United Kingdom Matrimonial Causes Act, 1857.[1]

Where a decree of judicial separation has been granted, the parties are no longer obliged to cohabit,[2] but they remain husband and wife and none can remarry without having the marriage dissolved by divorce.

After a decree has been granted, upon the application of the spouse against whom it was obtained, theCourt may reverse it on the ground that it was obtained in his or her absence or, where the decree was based on desertion, that there was reasonable cause for the alleged desertion.[3] Rights and remedies possessed by third parties remain unaffected by the reversal of the decree.[4] Thus, if a tradesman had supplied necessaries to the wife during a period of judicial separation, her husband is not liable for payment if the decree is reversed, and the tradesman would have to proceed gainst the wife alone.

The same absolute and discretionary bars exist as in divorce,[5] but a petition for judicial separation can be brought within three years since the celebration of the marriage.[6]

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1. Before 1857 it was the Ecclesiastical Courts which had jurisdiction for divorce a mensa et thoro, and in addition to the present grounds for divorce, they could pronounce a decree on the ground of attempted sodomy and attempted bestiality.
2. S.14(2) of the Matrimonial Causes Act, cap.102 of the revised Laws of Sierra Leone, 1960.
3. S.14(3), ibid.
4. S.14(4), 16(1) and (2), ibid.
5. S.14(1) ibid.
6. For property and maintenance provisions after a decree of judicial separation, see Chapter 7.

C. RESTITUTION OF CONJUGAL RIGHTS

Where one spouse has brought cohabitation with the other to an end, that other, if he or she wants the spouse back, may petition the High Court for a decree or restitution of conjugal rights.

The Court may pronounce a decree ordering the departed spouse to resume cohabitation, if satisfied that the allegations contained in the petition are true and that there is no legal ground why a decree should not be granted.[1] It would be a legal ground in opposition to the granting of a decree if the petitioner is guilty of a matrimonial offence entitling the respondent to a decree of judicial separation or divorce or if the petition's conduct is such that it would be a just cause for the respondent to desert her.[2]

Disobedience to the decree is not punished by attachment but would entitle the petitioner to institute proceedings for judicial separation,[3] and also to obtain some financial or proprietary benefit from the respondent.[4]

There is no record to show that the remedy of restitution of conjugal rights has ever been used in Sierra Leone.[5]

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1. S.17 of the Matrimonial Causes Act, cap.102 of the revised Laws of Sierra Leone, 1960.
2. See dictum of Tejan-Sie C.J. in Cummings v. Cummings, 1968-69, ALR S.L. 44, 50.
3. 14(1) of the Matrimonial Causes Act, cap.102 of the revised Laws of Sierra Leone, 1960.
4. S.18(1) and (2), 22(2) ibid.
5. It was seldom used even in England. For example, between 1965-1967 there were 105 petitions out of which 31 decrees were made. See The Law Commission Published Working Paper No.22 dated 17 February, 1969, p.3. In Ghana there is evidence that application has been made for the decree on one occasion, though it was refused becuase the petitioner had committed adultery. See Schandorf v. Schandorf & Cofie [1962] 1 G.L.R. 133.

It would seem that whenever there is separation and one spouse wants the other back, he or she tries to achieve that purpose by reconciliation through their families and friends rather than make recourse to a court of law, for the latter method only exacerbates the already existing friction. In the Sierra Leone society an extra-judicial persuasion to resume cohabitation is bound to produce better results than one coming from a Court and whenever the former fails there is no prospect that the latter will succeed.

Arguments have been advanced for and against the retention of the remedy of restitution of conjugal rights,[1] and it has been abolished in England.[2] In Sierra Leone, however, there is one good reason why it should continue to exist: it is the financial and proprietary provisions consequential upon it.[3] In the case of the wife, as we have seen, it is the only method whereby she can obtain maintenance from her husband through a High Court order and in respect of the husband, it is the only situation where Sierra Leone law permits him to benefit judicially from the property of his wife during the subsistence of the marriage.[4] As soon as the proposals suggested in Chapter 7 are accomplished, the remedy will cease to serve any useful purpose.

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1. The Law Commission Published Working Paper No.22, dated 17 February, 1969, pp.4-7.
2. By s.20 of the United Kingdom Matrimonial Proceedings and Property Act, 1970.
3. See Chapter 7, p.232
4. Spouses have not invoked the financial provisions, probably out of ignorance of their existence.

D. JACTITATION OF MARRIAGE

Jactitation of marriage means a persistent boasting of a marriage, falsely alleged to have been celebrated between the boaster and the petitioner.[1] In order to put an end to the allegation, the petitioner can pray the High Court for a decree that the respondent should desist from any further boast of a marriage between them and should remain in perpetual silence on the subject.

Authority that this remedy exists in Sierra Leone law is derived from s.1 of the Matrimonial Causes Ordinance, 1858[2] which states:

> "... all jurisdiction in respect of suits of ... jactitation of marriage ... shall belong to and be vested in Her Majesty and such jurisdiction ... shall be exercised ... in a court of record to be called The Court of Divorce and Matrimonial Causes ..."

The present Matrimonial Causes Act makes no mention of the remedy but since the Act is only an amending Act, it is submitted that the relief can be obtained in Sierra Leone.

In order to succeed, the petitioner must prove the boasting, the falsity of the alleged marriage, and lack of consent on his part to be represented as married to the respondent. If the respondent merely used the petitioner's name, the latter cannot obtain a decree preventing the former from using that name because a person has no property in a name.[3] Thus, a woman who has been divorced from a man can continue to use the man's

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1. Rayden on Divorce, 11th ed., 1971, p.286.
2. No. 7 of 1858.
3. See the St. Lucia case of Du Boulay v. Du Boulay (1869) L.R. 2 P.C. 430 (J.C.P.C.).

name and title.[1]

Possible defences available to the respondent are firstly, a simple denial that the assertion was made;[2] secondly, that the subsistence of the marriage is true;[3] and thirdly, that the petitioner permitted the respondent to misrepresent them as married.[4]

Though it is primarily intended to check a person who falsely boasts of a marriage subsisting between him and the petitioner, a suit for jactitation of marriage can be used by parties who are de facto married but not sure as to its validity and therefore desire to obtain a decree that the marriage was valid.

As with restitution of conjugal rights, there is no reported case indicating that this relief has ever been used in Sierra Leone.

This relief too was threatened with abolition in England recently, as being inappropriate.[5] Originally the suit was for the purpose of obtaining a remedy for the inconvenience to which an individual might be exposed by the false assumption of the character of husband and wife on the part of another, between whom and the complainant no such relation existed.[6]

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1. See the English case of Cowley v. Cowley [1901] A.C. 450 in which a petition for an injunction by a peer against his ex-wife who married a commoner but continued to use the peer's title was rejected on the ground that though she had no legal right to the user, the woman couldnot be prevented from using the title.
2. See the English case of Hawke v. Corri (1820) 2 Hag.Con. 280.
3. See the English case of Lindo v. Belisario (1795) 1 Hag. Con. 216; (1796) 1 Hag. Con. App.7.
4. Ibid.
5. See The Law Commission Published Working Paper No. 34 dated 22 January, 1971.
6. Poynter, Ecclesiastical Court, p.269, cited in The Law Commission Published Working Paper No. 33, p.7.

The Law Commission conceded that false assertions that people are married are embarrassing but that the suit for jactitation is not the right vehicle, and that if relief is needed against the spreading of such false rumours, it must come with the appropriate reform in the general law of tort or crime, and not in matrimonial law.[1] Impressive though this argument may be, curiously, the relief is still obtainable in English law.

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1. Ibid., pp.7 and 8.

CHAPTER 11

TERMINATION OF MARRIAGE

A. MARRIAGE UNDER THE CHRISTIAN AND CIVIL MARRIAGE ACTS

A marriage contracted in accordance with the Christian or Civil Marriage Act may be terminated by either the death of one spouse, or by a decree in presumption that one of the parties is dead, or by a decree of divorce. The effect of death or a decree in presumption thereof or of divorce is that the parties cease to be husband and wife from the date of death or of the decree absolute. Neither death nor a decree is retrospective so that rights which had vested on the assumption of the matrimonial status of the spouses before the date of the termination of the marriage remain unaffected.

(1) Termination by Death or by Presumption of Death

Where one spouse dies, the marriage automatically comes to an end, and it is not necessary to dissolve it by judicial process. But where the spouse has disappeared in circumstances which make reasonable grounds exist for supposing that he is dead, the "surviving" spouse can petition the High Court for a decree of dissolution of the marriage.[1] The decree, in this case, is necessary because without it, if the "surviving" spouse contracts a subsequent marriage on the presumption that her "former" husband is dead but later happens to be alive, the subsequent marriage is void and she runs the risk of a prosecution and conviction for bigamy. On the other hand, if a decree has been obtained upon the same facts, the subsequent marriage will be valid and the former marriage will be deemed to have been terminated at any

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1. S.29(1) of the Matrimonial Causes Act, cap.102 of the revised Laws of Sierra Leone, 1960.

rate insofar as her capacity to enter into another marriage is concerned.

In order to obtain a decree, the "surviving" spouse must satisfy the Court that she has reasonable grounds for thinking that the other spouse is dead.[1] If the other spouse has for a period of seven years or more been continually absent from the petitioner and the petitioner has no reason to believe that he has been living within that time, the High Court will presume that he is dead unless the contrary is proved.[2] Mere absence for seven years is not sufficient to raise the presumption. If the absence can be explained otherwise than on the ground of death, the "surviving" spouse will not be entitled to a decree. It is submitted that even the circumstances surrounding the departure should be taken into consideration. Thus if the petitioner was in constructive desertion at the time of parting and the "dead" spouse left the country with a view to seeking his fortune in some other country, the court ought not to presume that he is dead even though circumstances like the outbreak in the country to which he went of civil war resulting in the loss of many lives may suggest that he is likely dead; for without these attendant circumstances prevailing in the country of his domicile of choice, he would not reasonably be expected to contact the deserting spouse. Before the courts can presume death, it is submitted, they must be sure that the parting was not the fault of the petitioner and that the marriage was reasonably a happy one before the other spouse disappeared.

Instances in which one spouse disappears entitling the other to a decree of presumption of death seem to be rare nowadays in Sierra Leone. The country is small and though the means

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1. Ibid.

2. Ibid., s.29(2).

of communication are not as advanced as those in highly industrialised countries, a person can hardly live in isolation in one part of the country to the extent that his whereabouts would not be known by anybody. The only instance in which the whereabouts of a person will not be known, with minimal search, is when he goes abroad without leaving a forwarding address. During wartime, however, for example, the local Hut Tax War in Sierra Leone in 1898 and the World Wars, with conscription into the army, disappearances were common and it was reasonable to assume that men who had not been seen at the end of hostilities had died in war.

(2) Termination by Divorce

(a) Historical background

For a better understanding of the present law of divorce, it is essential to begin with its historical background.

Before 1858, no court in Sierra Leone had jurisdiction to hear petitions for divorce, even though English law was then part of Sierra Leone law. There was no local equivalent of the Ecclesiastical courts which in England dissolved marriages a mensa et thoro.[1]

The only avenue open to spouses to dissolve their marriage, leaving them free to enter into any subsequent marriage, was by an Act of the local legislature. It would appear that this process was even more expensive in Sierra Leone than it was in England for while in England, because of the prohibitive expense, there were on the average less than two divorces a year by this means,[2] in Sierra Leone throughout its history there is on record

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1. A divorce a mensa et thoro pronounced by the Ecclesiastical courts in England relieved the parties from the duty to cohabit but they were not free to remarry.

2. Bromley, op.cit., p.203, note 9.

only one statutory divorce.[1]

But the procedure in Sierra Leone was less cumbersome than that which prevailed in England. After obtaining a verdict in an action for the tort of criminal conversation against the co-respondent - adulterer - the husband petitioner proceeded straight on to obtaining the divorce a vinculo matrimonii without having first to obtain a divorce a mensa et thoro.[2] In the case of the wife she could obtain a statutory divorce only by proving that her husband had committed incestuous, bigamous or aggravated adultery or rape, sodomy or bestiality.

Sierra Leone has had only two Matrimonial Causes Acts. The first was in 1858. That Act, following in the wake of the English Matrimonial Causes Act of the preceding year and a carbon copy of it, established a Divorce Court in Sierra Leone having the same jurisdiction as the Divorce Court established in England.[3] In addition to divorce, the court had jurisdiction to hear petitions for judicial separation and for restitution of conjugal rights.[4]

Though it did not expressly say so, the Act impliedly replaced statutory divorce, and empowered the new Divorce Court to grant both a divorce a vinculo matrimonii [5] and judicial separation, the latter having the same effect as a divorce a mensa et thoro which was before 1857 granted by the Ecclesiastical courts

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1. "An Act to declare the Marriage of Stephen Gabbidon and Maria Antoinette dissolved" dated 14 July, 1829; see Montagu: op. cit., Vol.I (1811-1857), p.22.
2. Because no Sierra Leone Court then had jurisdiction in respect of divorce a mensa et thoro.
3. S.1.
4. S.9.
5. Presumably, the intention was that the jurisdiction of the Court would co-exist with that of the legislature, but as the latter has been inactive ever since, it would appear that its jurisdiction is now obsolete.

in England.[1]

The Act did not affect the existing grounds of divorce , but made judicial separation obtainable by the husband or the wife on the grounds of adultery, cruelty or desertion without cause for two years and upwards.[2]

The second is the Matrimonial Causes Act,[3] which came into force on 1 November, 1950, and it incorporates the present divorce law of the country.

It is significant to note that the amendments made to English law in 1923,[4] and 1937,[5] were not incorporated into Sierra Leone law until the 1949 Act which again, is essentially a carbon copy of the English Matrimonial Causes Act, 1950.

This dogged addiction to English law by the Sierra Leone legislature is even more apparent on the part of the courts for, as we shall see shortly, they have reverently adopted almost in their entirety the decisions of English courts on, inter alia, concepts like adultery, cruelty and desertion.

Because cruelty and desertion in the case of husband and wife and simple desertion if the wife was the petitioner, became grounds of divorce only in 1949, there is almost a complete lack of divorce cases prior to that date,[6] and most petitions were for judicial separation.

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1. S.8.
2. Ibid.
3. Act No.9 of 1949.
4. The Matrimonial Causes Act, 1923.
5. The Matrimonial Causes Act, 1937.
6. There is only one case, and that unreported, which the present writer has been able to find, namely, Thomas v. Thomas, decided by the Supreme Court on 25 May, 1948; the Supreme Court Records Vol.5, p.156.

(b) Grounds for termination of marriage by divorce

The grounds for the dissolution by divorce of a marriage contracted under the Christian and the Civil Marriage Acts are found in s.5 of the Matrimonial Causes Act, 1949. Except for the absence of 'Insanity' as a ground in the Sierra Leone Act, these grounds are the same as those contained in the United Kingdom Matrimonial Causes Act, 1950. The result is that in their interpretation of the provisions of both this section and other sections of the Act, the Sierra Leone Courts have relied heavily on English case-law.

Under s.5 of the Sierra Leone Act, a petition can be presented to the High Court by either the husband or the wife on the grounds of adultery by the other spouse committed since the celebration of the marriage, desertion by the respondent without cause for at least three years immediately preceding the presentation of the petition or for cruelty to the petitioner by the respondent since the celebration of the marriage. The wife alone has a further ground, i.e. that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality.

(i) Adultery

According to Rayden, adultery is defined as:

> "consensual intercourse between a married person and a person of the opposite sex, not the other spouse, during the subsistence of the marriage."[1]

For the purpose of Sierra Leone law, it is worthwhile to examine some of the words used in this definition whichobviously would be adopted by the Sierra Leone courts when the need arises.

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1. Divorce, 11th ed., 1971, p.178.

First, "consensual". This connotes that the act of sexual intercourse must be voluntary.[1] Therefore, if there is any element like rape, insanity or drunkenness which negatives consent, the sexual intercourse by the involuntary party will be excusable, while that by the voluntary party will amount to adultery.

Secondly,"married". The marriage contemplated here is that in accordance with either the Christian Marriage Act or the Civil Marriage Act. Thus, a spouse of a statutory marriage as such having intercourse with a single person amounts to adultery. Similarly, if a spouse married in accordance with the Christian and Civil Marriage Act thereafter "marries" another woman under customary law,[2] or contracts a Mohammedan marriage, he will commit adultery if he has sexual intercourse with the second "wife". But the converse situation, where a spouse married customarily or in accordance with Muslim rites, "marries" another spouse under the Christian or Civil Marriage Acts, will not amount to adultery under the general law if the latter marriage is consummated, but the second marriage will be void and a ground for a conviction for bigamy.

Thirdly, "sexual intercourse". English cases have decided that sexual intercourse to amount to adultery may be partial and not necessarily complete; that what is important is penetration, however slight it may be. Thus, where there was an agreement coupled with an attempt to have sexual intercourse, and the parties undressed themselves and went to bed, but their effort did not materialise owing to a temporary impotence of the man,[3] and

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1. Ibid.
2. See the unreported case of Josei v. Josei where E.Beoku-Betts, Ag. P.J. sitting in the Supreme Court of Sierra Leone, held that marrying a woman under native law and custom after an ordinance marriage amounted to adultery.
3. The English case of Dennis v. Dennis (Spillett cited) [1955] 2 All E.R. 51.

where a wife masturbated the co-respondent,[1] it was held in both cases that there was no sexual intercourse and, therefore, no adultery.

The opinion of Karmiski J. in the latter case herein mentioned,[2] that masturbation does not constitute sexual intercourse to form adultery, has been adopted, obiter dictum, by Sir Samuel Bankole Jones P. in the Sierra Leone Court of Appeal case of Tuboku-Metzger v. Tuboku-Metzger and Pitierson,[3] and there is no doubt that if the facts of Dennis's case should occur in Sierra Leone, the Courts will arrive at the same decision as the English court.

Whether the afore-mentioned decisions conform with the mores of the Sierra Leone people is, however, questionable. As we shall see later,[4] any sexual advance made by a man to another man's wife is in customary law regarded as adultery, sufficient to base an action for "woman damage". This also represents the views of many non-natives in Sierra Leone.[5] No average Sierra Leone husband placed in the same situation as Mr. Dennis in the above-mentioned case would regard such conduct of his wife with another man as falling short of adultery.

Proof of Adultery

The burden of proof of adultery is on the person alleging the adultery, and there is a presumption of innocence on the part of the person accused of the adultery.[6] The burden can be

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1. The English case of Sapsford v. Sapsford and Furlado [1954] 2 All E.R. 373.
2. Ibid. at p.374.
3. 1967-68, ALR S.L. 156, 160 C.A.
4. Chapter 17, pp.621-622.
5. Personal communication.
6. Elliott v. Elliott, unreported, a decision of the Supreme Court at Freetown, dated 25 September, 1953; Williams v. Williams, (1960-61) I S.L.L.R. 92, 98; Wilson v. Wilson and Cousins, 1964-66, ALR S.L. 200, 202.

discharged by direct evidence of witnesses who actually saw the commission of the act. But as the parties are very rarely surprised in the direct act of adultery in every case almost the fact is inferred from circumstances that lead to it by fair inference and necessary conclusion.[1] In this regard, the courts usually look to evidence of association, coupled with opportunity and evidence of illicit affection and familiarity. Thus, in Glover v. Glover,[2] evidence that a wife and a co-respondent were seen in a room late in the night through a window in a compromising and suggestive position was held sufficient from which an inference could be drawn that they had committed adultery. Similarly, in Jones v. Jones [3] where the co-respondent and a wife were surprised in a room dressed in pyjama trousers with singlet and "nightie" respectively, coupled with evidence that both slept in the same room, it was held that adultery could be founded on these facts.

Proof of general cohabitation will be sufficient proof of adultery.[4]

The conduct of one spouse may also tend to show that she has committed adultery, even though it cannot be proved with whom she committed the adultery. Thus, if a wife gives birth to a child and on registration omits to give information of name, surname and rank and profession of the father, there is evidence

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1. Davies v. Davies, unreported, decided by the Supreme Court at Freetown in 1952 (Div.C 8/52); John v. John, 1957-60, ALR S.L. 77, 78.
2. Unreported, a decision of the Supreme Court at Freetown on 17 February, 1949.
3. Unreported, decided by the Supreme Court at Freetown on 14 February, 1945; see also Wilson v. Wilson and Genet, 1964-66, ALR S.L. 193, 197, and Wilson v. Wilson and Cousins, 1964-66, ALR S.L. 200, 202.
4. Wilson v. Wilson and Cousins, 1964-66, ALR S.L. 200, 202.

of adultery.[1]

The burden of proof may be lightened where the spouse charged with adultery admits or confesses it but this will be evidence against that spouse alone and not evidence against the party cited or the co-respondent.[2]

The evidence of one party, if believed, is sufficient to prove adultery, but the Court is loath to act upon the uncorroborated evidence of a single party, especially if such evidence is contradicted in his presence.[3]

The standard of proof of adultery is that required in criminal cases,[4] and where there is no direct evidence of adultery, the inference should be fair on the evidence, and the conclusion necessary in the circumstances.[5]

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1. Williams v. Williams, an unreported decision of the Supreme Court at Freetown, dated 10 May 1949, in which Tuboku-Metzger, Ag.P.J. applied the English case Mayo v. Mayo [1948] 2 All E.R. 869. See also Mambu v. Mambu, unreported, decided by the Freetown Supreme Court on 5 June, 1970.

2. See dicta by Beoku-Betts Ag.C.J. in Shonubi v. Shonubi, unreported, decided by the Supreme Court at Freetown on 7 June, 1948, and in Glover v. Glover (supra). See also Harding J. in Mambu v. Mambu, unreported (case Div.V.19/69) decided by the Supreme Court at Freetown on 5 June, 1970. But a confession of adultery by one party and the co-respondent constitutes evidence against them. See dicta of Boston Ag.J. in Jones v. Jones, unreported, a decision of the Supreme Court in Freetown on 18 December, 1953.

3. Dicta of Boston, Ag.J. in Elliott v. Elliott (supra), unreported.

4. See Shonubi v. Shonubi (supra); Wyse v. Wyse, unreported, decided by the Supreme Court at Freetown, dated April, 1949; Antoh v. Antoh, unreported, see Vol.7 of the old Supreme Court records, p.295; Williams v. Williams and Pyne Bailey. 1960-61, I, S.L.L.R. 92; Wilson v. Wilson and Cousins, 1964-66, ALR S.L. 200. All these cases are based on the decision of the English Court of Appeal in Ginesi v. Ginesi [1948] 1 All E.R. 373, and on earlier editions of Rayden on Divorce, e.g. 9th ed. (1964) p.149.

5. John v. John, 1957-60, ALR S.L. 77, 80, W.A.C.A.

(ii) Cruelty

Legal cruelty, to be a ground for divorce, has been defined by Boston Ag. P.J. as:

> "conduct of such a character as to have caused danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such danger."[1]

The test required in cruelty is subjective not objective; it is to be seen as "this conduct by this woman to this man".[2] In short, the gravity of the conduct of the respondent is to be judged on the effect it has on the petitioner, and not on a hypothetical reasonable man.

A deliberate intention to injure the other spouse or malignity is not essential to establish legal cruelty. If the conduct of the respondent causes danger to the petitioner's life or health, mental or bodily, or a reasonable apprehension of it, cruelty will be established even though the petitioner does not intend the consequence of his acts. Thus, in Wright v. Wright,[3] where the respondent was so insane that he did not realise the nature of his acts towards the petitioner, and so intend them, it was held, in the absence of insanity as a ground for divorce, that the life of the petitioner being in danger through the acts

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1. In Cookson v. Cookson, unreported, decided by the Supreme Court at Freetown on 24 March, 1954. This decision adopted dicta by Lord Davey in the English case of Russell v. Russell [1897] A.C. 395, 468 and dicta by Lord Stowell in the English case of Evans v. Evans (1790) 1 Hag. Con.35. All Sierra Leone decisions on cruelty are in agreement with these dicta. For a more recent exposition see Macaulay v. Macaulay, 1967-68, ALR S.L. 14, 18.

2. Per Ames P. in Davies v. Davies, 1964-66, ALR S.L. 187, 188 C.A.

3. Unreported, decided by the Supreme Court at Freetown on 13 June, 1952. In this case, Kingsley J. deplored the absence of insanity as a ground for divorce in Sierra Leone and felt constrained to decide the issue on the basis of cruelty.

of the respondent, she, the petitioner, had established cruelty in order to entitle her to a decree for divorce.

A single act has been held to be incapable of constituting legal cruelty. In Pratt v. Pratt,[1] during a quarrel, a wife bit the penis of her husband and hit him on the side with a stick. The husband thereafter instituted divorce proceedings on the ground of cruelty based upon the facts. Holding that the facts did not amount to legal cruelty, Boston Ag.J. took the opportunity of interpreting s.5(c) of the Matrimonial Causes Act, which read as follows:-

> "A petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent (c) has since the celebration of the marriage treated[2] the petitioner with cruelty."

The learned acting Judge said:-

> "The word 'treat' (in the section) conveys the idea of a course of conduct and not merely an isolated act which may have taken place in the heat of temper and may be in self-defence. In my view, it should consist of a series of acts constituting the conduct of the respondent towards the petitioner which could be regarded as cruelty." [3]

If the test for cruelty is a subjective one as opined by Ames P. in Davies v. Davies,[4] it will be difficult in some cases to fit in with the requirement of a course of conduct on the part of the respondent. For the gravity and consequence of an

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1. Unreported. A decision of the Supreme Court at Freetown, dated 15 March, 1954.
2. My underlining.
3. Boston J. applied the English case of Astle v. Astle [1939] P.415. For cases where a course of conduct has amounted to cruelty, see: Leigh v. Leigh, unreported, decided by the Supreme Court at Freetown on 3 March, 1952; Cookson v.Cookson (ante); Davies v. Davies, 1964-66, ALR S.L.83. But where petitioner depends on a series of acts, accumulated minor acts may amount to cruelty: Wellesley-Cole v. Wellesley-Cole, 1967-68, ALR S.L. 65.
4. 1964-66, ALR S.L.187, 188.

act may vary from one individual to another. On a sickly or hypersensitive person, only a single act by the respondent may produce such a result that the petitioner suffers injury or apprehends danger to a degree greater than that in respect of a normal person. If the test is correct, therefore, a single act will be capable of amounting to legal cruelty depending on the individual on whom it is inflicted.[1]

Though in general the Courts have required a series of conduct to amount to legal cruelty as a ground for obtaining a divorce, they have, nevertheless, accepted a single act as sufficient to justify one spouse for leaving the other, making the doer a constructive deserter. Thus, in Macauley v. Macauley,[2] where a husband got drunk at a dance which he had attended with his wife and fought the wife outside the dance hall, it was held that his conduct was cruelty justifying the wife in leaving him the same night and that he, but not the wife, was in desertion.

Proof of Cruelty

As in adultery, the burden of proof of cruelty is on the party alleging it. In discharging this, he must give evidence of acts which are grave and weighty and not merely what may be described as the "wear and tear" of married life.[3] It has been held that indifference to the feelings of the other spouse is an act of great unkindness capable of reviving a condoned cruelty but not grave and weighty to amount to cruelty by itself.[4]

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1. Thus in Macaulay v. Macaulay, 1967-68, ALR S.L.14, one act of the wife when she poured icy-cold water on her husband while the latter was fast asleep, was held to be cruelty upon which a decree of divorce was granted. Also in Harris v. Harris, (1962) 2 S.L.L.R. 94, it was held to be cruelty where the wife placed juju in her husband's bedroom.

2. 1950-56 ALR S.L. 162

3. Macaulay v. Macaulay, 1967-68, ALR S.L. 14.

4. Ibid., pp.19, 20.

The standard of proof required to found cruelty as a basis for a decree of divorce is one that has given rise to controversy. In Wellesley-Cole v. Wellesley-Cole,[1] Beoku-Betts J. in the then Supreme Court of Sierra Leone adopted the standard as one on a balance of probabilities. In the Court of Appeal, Sir Samuel Bankole Jones P., delivering the full judgment of the Court, rejected the balance of probability rule and held that the standard should be higher than that but not as high as in criminal cases.[2] The learned President based his view on the construction which he put on s.7(2) of the Matrimonial Causes Act which says:

> "If the Court is satisfied on the evidence that (i) the case of the petitioner has been proved. ..."

In his view,

> "if the statute requires that the Court shall be satisfied before pronouncing a decree, it is clearly common sense that no court will be satisfied if it harbours reasonable doubt as to whether the case has been proved."[3]

And the learned President relied on the English case of Bater v. Bater,[4] where Bucknill, L.J. said:

> "If a high standard of proof is required because of the importance of a case to the parties and also to the community, divorce proceedings are the kind of case that requires that high standard."[5]

From this, Sir Samuel Bankole Jones P. finally concluded that in cruelty charges, the standard of proof should be higher than one on a balance of probabilities though not as high as in criminal cases.

This is judicial activism at its peak, but, with respect,

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1. 1967-68, ALR S.L. 65, 69.
2. 1967-68, ALR S.L. 210, 216.
3. Ibid., p.216.
4. [1950] 2 All E.R. 458.
5. Ibid, p.459.

the creation is open to criticism.

First, the learned President, though favouring Bucknill J.'s opinion in Bater v. Bater, lost sight of the fact that that Judge accepted the standard of proof as that required in crimimal cases [1] and nothing short of that.

Secondly, in practice, it will be difficult to establish a standard of proof intermediate between that required in civil cases and that for criminal cases. As the height of the new standards falls to be determined by the presiding judge, it is bound to vary from one judge to another, with the result that there will be no certainty about it. It will, therefore, be better to adopt either the balance of probability standard as in civil cases or proof beyond reasonable doubt as in criminal cases.

(iii) Desertion

Desertion consists of the unjustifiable withdrawal from cohabitation without the consent of the other spouse and with the intention of remaining separated permanently.[2]

According to Bromley,[3] four elements must exist before desertion can be proved, namely, (a) de facto separation, (b) the intention to remain in permanent separation, (c) the absence of consent on the part of the deserted spouse, and (d) the absence of reasonable cause for withdrawing from cohabitation. We shall now examine each in turn.

(a) De facto separation

Separation denotes a break in cohabitation, i.e. ceasing

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1. Earlier in his judgment at p.458.
2. See Bankoke Jones Ag.J. in Jones v. Jones, 1957-60, ALR S.L. 287, 293; Beoku-Betts J. in Wilson v. Wilson and Genet, 1964-66, ALR S.L. 193, 195.
3. Op.cit., p.161.

to live together as husband or wife. Where the parties live in separate places this is evidence of separation, but they may still be regarded as separated for the purpose of desertion where they live in the same place but do not live as husband and wife.[1]

Desertion may be either simple or constructive. It is simple where one spouse moves out of the matrimonial home, leaving the other spouse without that party's consent and with intention of staying away permenantly. Thus, in Wyse v. Wyse [2] where a wife, during World War II, found she could do better without her husband and not wanting him any longer, left the matrimonial home, it was held that she was in desertion.

On the other hand, if the conduct of one spouse is such as to compel the other to leave the matrimonial home, it is the spouse who remains that is in desertion and it is constructive desertion.[3] Brown-Marke J. explained the issue quite vividly in Coker v.Coker [4] when he said:

> "If without just cause or excuse one spouse persists in doing what he or she knows the other will not tolerate and that other leaves, the spouse who is so left is a deserter whatever his desire or intention may have been."

If the spouses are forced by circumstances to live apart, for example, where because of education or employment, one lives in one town and the other in another, so long as there is an

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1. This is known as desertion under the same roof.
2. Unreported, a decision of the Supreme Court at Freetown in April, 1953. See the Supreme Court Records, Vol.7, p.405.
3. Macauley v. Macauley, 1950-56, ALR S.L. 162.
4. Unreported, decided by the Supreme Court at Freetown on 10 August, 1970. In Boyle v. Boyle, 1964-66, ALR S.L. 464, 467, Cole Ag.C.J. said that conduct to amount to constructive desertion must be grave and weighty and one which could properly be regarded as expulsion in fact.

intention to come together again when circumstances permit, none will be in desertion. It is submitted that the position is the same where the circumstances that brought about the separation is the fault of one spouse, for example, where he is convicted of a crime and is undergoing a term of imprisonment.[1]

The period of separation must be three years at least preceding the date of the petition and it must be continuous.[2] Thus if there is break in separation, however short and for whatever reason, the period begins to run from the time of the final break.

(b) Intention

The deserting spouse must have the intention to bring cohabitation permanently to an end. The test of intention is objective. In the case of simple desertion, the mere separation by the deserter without just cause or excuse will be evidence that he intends to stay away permanently from the other spouse.

For constructive desertion, Brown-Marke J. has said that:

> "one must look to the facts; intention may aggravate the facts but its absence will not defeat such a charge."[3]

Whatever the learned Judge meant by this is a matter for speculation. Probably, he meant that if the deserting spouse expressly states that his intention is to force the other spouse to leave the matrimonial home the charge against him will be aggravated, but if he does not give any such indication he can, nevertheless, be guilty of desertion if on examination of his

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1. But it is also submitted that such conduct conduces to the other's adultery, if she is the wife and is left without adequate maintenance.
2. S.5(b) of the Matrimonial Causes Act, cap.102 of the revised Laws of Sierra Leone, 1960.
3. Coker v. Coker, unreported, decided by the Supreme Court of Freetown on 10 August, 1970.

conduct a reasonable conclusion can be drawn to the effect that it is his intention to drive the other spouse. If this interpretation is correct, then the test for constructive desertion is also an objective one. Thus, in Macauley v. Macauley, [1] it was held that a husband who beat up his wife at a dance, resulting in the wife leaving him that very night and never returning, was in constructive desertion.

In cases where there is involuntary separation, one party may later intend to bring cohabitation permanently to an end, and so be guilty of desertion.[2] In this case, an intention cannot be inferred but must be proved as a fact.[3]

(c) Absence of consent

If the parties have agreed to be separated there can be no desertion. But if one party later withdraws his consent to the separation, and the other unjustifiably refuses to resume cohabitation, the latter will be in desertion, from the date that he makes the refusal. Thus, in Antoh v. Antoh,[4] the wife had, with her husband's consent, gone to her father's home to partake in the funeral ceremonies of her step-mother. At the end of the ceremonies, she refused to return to her husband and cohabitation was never resumed. It was held that she was in desertion.

Furthermore, if one spouse turns out the other and the spouse who drove out later makes a genuine effort to resume cohabitation, but the deserted spouse refused, without reasonable cause, desertion ceases on the part of the spouse who originally deserted, but begins on the part of the spouse first deserted

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1. 1950-56 ALR S.L 162

2. Jones v. Jones, 1957-60, ALR S.L. 287, 293.

3. See Elba v. Elba, 1967-68, ALR S.L. 74.

4. Unreported, decided by the Supreme Court. See the Supreme Court Records, Vol.7, p.295.

because the continuing break in cohabitation is without the consent of the first deserter.

(d) Absence of reasonable cause

Before a spouse can be guilty of desertion, his conduct must be unreasonable and unjustified. That is, it must be a deliberate act on his part not precipitated by the conduct of the other spouse. Conduct on the part of the deserted spouse which constitutes reasonable cause for her being deserted must be either a matrimonial offence,[1] or one short of it, but it must be grave and weighty and such as to render it practically impossible for the spouses to live properly together.[2]

Thus, if one spouse associates herself with a person of the opposite sex, other than her spouse, to the extent that would lead any reasonable person to believe, in the absence of explanation, and he does believe that she is committing some misconduct with that person, the other spouse would be justified in leaving her.[3]

Similarly, sexual intercourse being the principal essence of marriage in Sierra Leone, as stated by Tejan-Sie C.J., if one spouse wilfully refuses it to the other, there will be just cause if she is deserted.[4]

Another example is ill-treatment by one spouse of the other which is not sufficient to found a charge of legal cruelty as a ground for divorce, but one that puts the other spouse in apprehension about her personal safety. If she leaves the matrimonial

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1. Williams v. Williams and Renner, (1960-61) 1 S.L.L.R. 70. But the matrimonial offence must be the cause of desertion so that if the deserting spouse was not affected by it he cannot make it an excuse for his desertion.
2. Cummings v. Cummings, 1968-69, ALR S.L. 44.
3. Ibid.
4. Ibid.

home on this ground, her desertion will be excusable.[1]

(iv) Rape, sodomy or bestiality

As we have seen, only the wife can petition for divorce on any of these grounds. The offence of rape[2] or sodomy may be committed against her or another person and she can succeed on either ground.[3]

Bars to a Petition for Divorce

Even though a matrimonial offence has been committed by one spouse which normally entitles the other to bring a petition for the dissolution of the marriage, certain factors may debar a spouse from obtaining a decree. These may be considered under three headings: (a) Restrictive, (b) Absolute, and (c) Discretionary.

(a) Restrictive

S.4(1) of the Matrimonial Causes Act provides that no petition for divorce can be presented to the Court unless at the date of the presentation of the petition three years have elapsed since the date of the marriage. This means that the parties must have married for at least three years before they can take a court action in order to dissolve the marriage. The Proviso to

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1. Mustapha v. Mustapha (1950) 3 S.L. Law Recorder, 20. This case was one based on desertion as a ground for maintenance, but, it is submitted that the law is the same for desertion as a ground for divorce.

2. But the offence of rape may only be committed by a man on his wife if they are separated and there is no obligation on the wife to cohabit with the husband. See dicta of Lynskey J. in the English case of R. v. Miller [1954] 2 All E.R. 529, 532.

3. It is doubtful whether, if the wife is a consenting party to sodomy to her, she can petition on that ground. In English law she cannot. See Donnovan, L.J. in T v. T [1963] 3 W.L.R. 261, 267.

the section, however, stipulates that if, before instituting proceedings for divorce, the petitioner can prove to the court "exceptional hardship" suffered by him or "exceptional depravity" on the part of the respondent, the Court may grant him leave to petition for divorce before the three years have passed.

The object of the restrictive provision is to give a chance for the marriage to succeed. Though one spouse has committed a matrimonial offence, if patience is shown by the innocent spouse, and contrition on the part of the guilty party, the marriage may succeed and it will be morally and socially wrong to terminate the union at this early stage. The Courts must, therefore, tread warily in finding "exceptional hardship" and "exceptional depravity". There is no reported case in which the Sierra Leone Courts have given examples of these catch phrases; but the English Courts have found exceptional hardship or depravity in the following instances:-[1] (a) where during the first six weeks of marriage a husband treated the wife with cruelty and said to her "If I can get my hands on you I will murder you"; (b) where one matrimonial offence is committed after the other; (c) in the case of adultery, if it is aggravated by some extraneous circumstance, for instance, the husband committing adultery within a few weeks of marriage, or committing adultery promiscuously with more than one woman, or with his wife's sister or with the maid in the house; (d) where a wife as a result of her adultery has a child by another man; (e) cruelty coupled with aggravating circumstances, such as drunkenness and neglect, brutality and perverted lust.

Because of the difference in social background between the peoples of England and Sierra Leone, it is submitted that

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1. These instances are mentioned in the judgments of Bucknill and Denning L.J.J. in Bowman v. Bowman [1949] P.353, 355-7.

only some but not all these occurrences will be instances of exceptional hardship or depravity in Sierra Leone. Adultery by a man with any of the attendant circumstances mentioned above is, in the Sierra Leone society, not regarded as more outrageous than a simple adultery, when committed by a wife. In the instant examples, the blame for the adultery is heavier on the adulteress than on the man, and the husband is not regarded as more immoral than the one who commits simple adultery.

In order to grant leave for a petition to be presented before the expiration of three years from the date of the marriage, the Court will have regard to the interests of any children of the marriage and to the question of a reasonable probability of reconciliation between the parties before the three years have elapsed.[1]

Where leave has been granted, if at the hearing of the petition it appears to the Court that the petitioner obtained it by misrepresentation or concealment of the nature of the case, the Court may either dismiss the petition without prejudice to any petition that may be brought after the expiration of three years upon the same ground, or pronounce a decree nisi subject to the condition that it should not be made absolute until the three-year period has expired.[2]

(b) Absolute

There are three absolute bars, namely, connivance, condonation and collusion, the proof of any of which prevents the Court from pronouncing a decree. They are provided for by s.7(2) of the Matrimonial Causes Act which enacts:-

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1. S.4(2) of the Matrimonial Causes Act, cap.102 of the revised Laws of Sierra Leone, 1960.

2. S.4(1), ibid.

> "If the Court is satisfied on the evidence that
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> (ii) where the ground of the petition is adultery, the petitioner has not in any manner been accessory to, or connived at, or condoned the adultery, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty; and
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> (iii) the petition is not presented or prosecuted in collusion with the respondent or either of the respondents;
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> the Court shall pronounce a decree of divorce, but if the Court is not satisfied with respect to any of the afpresaid matters, it shall dismiss the petition."

It is the duty of the Court to inquire into the question of connivance, condonation and collusion in addition to the facts upon which the petition is presented.[1]

(i) Connivance

As we have seen from s.7(2)(ii) of the Matrimonial Causes Act, connivance is a bar only in respect of adultery. In petitions based on adultery, the petitioner must state in his petition that he has not connived at the adultery of which he complains. Though of frequent use, however, the term "connivance" has not been precisely or comprehensively defined by the Sierra Leone Courts. It may, however, be said to occur when one spouse consents to the adultery of the other spouse or corruptly and intentionally permits it.[2] Thus, if one spouse expressly consents to the other committing adultery or being fully aware, stands by and permits the act to take place without taking steps to prevent it, he is deemed to connive at the adultery.

Where one spouse has not expressly given his consent to the adultery, it is not clear whether every omission on his part

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1. S.7(i), ibid.
2. See Lord Merriman P. in the English case of Churchman v. Churchman [1945] P.44 at pp.51, 52, where an attempt at a definition in English law has been made.

that results in the adultery makes him guilty of conniving at it. For example, having heard and suspected that his wife is committing adultery with the co-respondent, the husband sets a trap in order to prove that adultery has, in fact, taken place. His suspicions are based on reasonable grounds. Unfortunately, however, but for the trap adultery would never have taken place between the wife and co-respondent. The point may be illustrated as follows:-

On several occasions during the absence of H (husband), whose duty keeps him away from the matrimonial home for one night in a week, C (co-respondent) has been seen by a neighbour coming out late at night from H's matrimonial home in Freetown, and this has been reported to H. During this period, the relationship between W (wife) and C is cordial but has not resulted in adultery for fear that H might turn up at any time during the night. H, however, convinced that adultery has already taken place, wishes to prove it. He buys a return air ticket for Bonthe Sherbro, an island in Sierra Leone about thirty nautical miles from the nearest motorable coast and where aeroplane service connecting the mainland is twice a week, which means that H must be away for at least three days, as he does not like travelling by sea and this is well known to W. He is seen off by W at the air terminal but H comes down the bus at Wellington village about 11 miles from the airport and passes the night there. On the second night, convinced that H is at Bonthe, W and C commit adultery, for the first time, at the matrimonial home and are surprised by H.

It is submitted that on these facts, H ought not to be deemed to connive at the adultery, for he neither expressly consents to it nor can he be said to corruptly and intentionally permit it. All he has done is to make sure whether adultery,

which he had suspected, has in fact taken place. It will, however, be different if he throws the parties together before he believes that adultery has taken place.[1] Thus if, professing to be a friend of the wife, C is in the habit of visiting the matrimonial home, uninvited by H, and taking out W for a ride without the consent or dissent of H, though in his presence, but doing nothing to discourage the relationship, if adultery ensues, H will be deemed to have connived at it. The same result ought to be the case if adultery has already taken place before he knows of the relationship.

Connivance at adultery is based on express or implied consent. It is submitted, therefore, that once the conniving spouse has withdrawn that consent, he cannot be guilty of conniving at any adultery subsequent to the date of his withdrawal.[2] Nor will connivance at adultery with one person amount to connivance at adultery with another person unknown to the spouse against whom the bar is pleaded.

Although statutory law makes it a bar to divorce, hardly any petition has failed in Sierra Leone on the basis of connivance. The reason is that both the Sierra Leone husband and wife, married monogamously, are so sexually possessive that it is inconceivable that one spouse can connive at the adultery of the other. This acounts for the almost complete lack of case-law, reported as well as unreported, on the issue. In the unreported case of Antoh v. Antoh [3] where a wife alleged that her husband compelled her to practice prostitution, Kingsley J. did not

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1. For a similar view in English law, see Denning L.J. in Douglas v. Douglas [1950] 2 All E.R. 748, C.A. at p.758.
2. For the opposite view in English law, see Godfrey v. Godfrey [1964] 3 All E.R. 154, H.L.
3. Unreported. See Vol.7 of the old Supreme Court Records, p.295.

hesitate to dismiss the allegation as an abominable lie. Though he stated no reasons for the rejection of the evidence of the wife other than that she was glamorous and a woman of the world, the learned Judge could have been very much aware of the fact that the Sierra Leonean man would be the last person to see his wife committing adultery and do nothing, let alone encourage the association.

(ii) Condonation

Condonation is a bar to both adultery and cruelty. As with connivance, condonation, though widely used in petitions, has not been clearly defined by Sierra Leone Courts.[1] We may, therefore, use the definition afforded by Sir Jocelyn Simon P. in the English case of Inglis v. Inglis which appears to be a very good meaning of the term. He said:

> "Condonation is the reinstatement of a spouse who has committed a matrimonial offence in his or her former matrimonial position in knowledge of all material facts of that offence with the intention of remitting it, that is to say, with the intention of not enforcing the rights which accrue to the wronged spouse in consequence of the offence."[2]

In other words, before there can be condonation, there must be knowledge of the commission of the matrimonial offence followed by forgiveness and the reinstatement of the offending spouse to his or her prior position as husband or wife by the resumption of cohabitation.[3] It has been held in the Sierra

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1. But see Williams (S-T) v. Williams (L-A) and Sebastian, 1964-66, ALR S.L. 57, where Bankole Jones C.J. attempts a definition relying on Rayden on Divorce, 8th ed., (1960) p.234, para.19.

2. [1967] 2 All E.R. 71, 79-80.

3. Forgiveness without reinstatement does not amount to condonation so that if the spouse is not reinstated or refuses to be reinstated, there is no condonation: Williams (S.T.) v. Williams (L.T.) and Sebastian, 1964-66, ALR S.L.57.

Leone case of Wellesley-Cole v. Wellesley Cole,[1] that the voluntary act of sexual intercourse, in the absence of fraud or consent induced by fraud, is conclusive against a husband in settling the question of condonation. Whether this applies to a wife as well is undecided by the Sierra Leone Courts.[2] But it is submitted that it should: for in Sierra Leone a wife has the option to go to relations whenever it is intolerable for her to live in the matrimonial home. This is a socially recognised fact.

A matrimonial offence which has been condoned may be revived by a subsequent act of the spouse who has been forgiven and reinstated. A subsequent matrimonial offence revives the condoned offence.[3]

In the case of condoned cruelty, it has been held that any act of great unkindness is sufficient to revive it; the graver the matrimonial offence that has been condoned, the slighter is the act required to revive it.[4] For adultery, however, it is submitted that the act capable of reviving it should not fall short of a matrimonial offence. The reason is that in the case of cruelty, the health of the aggrieved spouse is at stake and a

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1. 1967-68, ALR S.L. 65 at 69 per Beoku-Betts J. relying on Hodson L.J. in the English case of Benton v. Benton [1957] 3 All E.R. 544, 548.

2. c/f the English case, Keats v. Keats and Montezuma (1859) 1 SW & Tr. 334, 347, where Sir Creswell Creswell held that sexual intercourse by the wife is not conclusive evidence of condonation because she "is hardly her own mistress; she may not have the option of going away; she may have no place to go to; no person to receive her ..." See the Sierra Leone case of Macaulay v. Macaulay, 1967-68 ALR S.L. 14, where Cole Ag.C.J. found condonation when a wife had sexual intercourse after cruelty meted out to her by her husband. In this case, however, the wife admitted condoning the cruelty.

3. Williams v. Williams and Pyne-Bailey, (1960-61) I, S.L.L.R. 92.

4. See Macaulay v. Macaulay, 1967-68 ALR S.L.14.

slight injurious conduct on the part of the offending spouse is likely to aggravate it. The same argument cannot be sustained for adultery.

(iii) Collusion [1]

Collusion is a bar to any of the matrimonial offences on which a petition for divorce can be based, namely, adultery, cruelty and desertion. What constitutes collusion has not as yet been decided by the Sierra Leone Courts. We may, therefore, once again resort to English law for guidance. Rayden defines collusion as "an agreement or bargain between the parties to the suit whereby the initiation of the suit is procured or its conduct provided for".[2] If one party merely stands by while the other pursues the proceedings as in the case of undefended suits, that party could be said to have impliedly consented to the other having a decree but this, in our submission, ought not to amount to collusion. Before collusion can be established, the parties or their agents must take a positive step, orally or in writing, to effect an agreement which results in one of the parties making it easy for the other to obtain a divorce.

It is not every agreement, however, which is in contemplation of a divorce proceeding that should amount to collusion. If a party who has a genuine ground for obtaining a divorce wishes before taking out proceedings to settle questions affecting property and to see whether an agreement could be reached extra-judicially concerning the maintenance and custody of the children and an agreement is reached on these matters, it is submitted that collusion should not lie.[3] But it is prudent that these matters should be left to the Court to decide or disclosed to the Court in the body of the petition otherwise there should be a presumption of collusion and the burden will be cast on the parties to rebut it, which will be a very heavy one indeed.[4]

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1. There is no Sierra Leone case law on collusion.
2. Divorce, 11th ed., p.318.
3. See Rayden, ibid.
4. Collusion has been abolished in English law by schedule 2 of the Divorce Reform Act, 1969.

(c) Discretionary

The proviso to S.7(2) of the Matrimonial Causes Act enacts that:

> "The Court shall not be bound to pronounce a decree of divorce and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery or if, in the opinion of the Court, the petitioner has been guilty -
>
> (a) of unreasonable delay in presenting or prosecuting the petition; or
>
> (b) of cruelty towards the other party of the marriage; or
>
> (c) where the ground of the petition is adultery or cruelty, of having without reasonable excuse deserted, or having without reasonable excuse wilfully separated himself or herself from the other party before the adultery or cruelty complained of; or
>
> (d) where the ground of the petition is adultery or desertion of such wilful neglect or misconduct as has conduced to the adultery or desertion."

From the above provision, the petitioner's adultery, unreasonable delay and cruelty are discretionary bars to relief on any matrimonial ground on which the petition is based. In addition, if the ground is adultery, the petitioner's desertion or wilful separation from the respondent or his conduct that conduced to the adultery may debar him from obtaining a decree. Furthermore, if the petition is based on cruelty, desertion and wilful separation may be additional discretionary bars. Finally, where the petition is founded on desertion, it will be a discretionary bar to relief if the petitioner's misconduct conduced to the desertion.

(i) Adultery

Rule 28 of the Matrimonial Causes Rules [1] provides that

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1. Cap.7 of the revised Laws of Sierra Leone (Subsidiary Legislation), 1960.

every party to a matrimonial cause praying to the Court for the exercise of its discretion to grant a decree of divorce notwithstanding that party's adultery should lodge in the Divorce Registry a discretion statement signed by him or his solicitor in which must be stated particulars of the acts of adultery committed and of material facts which the Court must know in order to enable it to exercise its discretion. Thus the mere fact that a spouse has committed adultery will not completely prejudice his chances of obtaining a decree,[1] but he must make a clean breast of it, either in a discretion statement as provided for in Rule 28 or in the body of his petition or answer.[2] If he does not disclose it to the Court by either of the methods stated above, for example, after the intervention of the Attorney-General, the Court may not exercise its discretion in his favour.[3]

The Court will exercise its discretion only when it is satisfied that the party seeking the discretion has made a case entitling him to a decree for divorce.[4]

In the exercise of its discretion, the Court is guided by the following principles laid down in Decker v. Decker,[5] and

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1. See Harris v. Harris, (1962) 2 S.L. L.R. 94, 97, where the Court described the adultery of the respondent praying for discretion as "bad" but nevertheless exercised discretion in her favour.
2. It is better to disclose particulars of adultery in a discretion statement rather than in the body of the petition because in the former case the particulars are known to the Court alone and not to the other party in the proceedings.
3. The Court may, nevertheless, exercise its discretion bearing in mind the principles stated in the next paragraph but one.
4. Tipson v. Tipson, 1964-66, ALR S.L. 161, 163.
5. 1964-66, ALR S.L. 334, where Cole, Ag. C.J. applied the principles enunciated by Sir Jocelyn Simon, P. in the English case of Bull v. Bull [1965] 1 All E.R. 1057, 1063-4. Note that Simon P. mentioned all the principles herein stated.

Navo v. Navo,[1] and which can be summarised as follows: (a) the position and interest of the children of the marriage; (b) the interest of the party with whom the petitioner has been guilty of adultery, with special regard to their re-marriage; (c) the question whether, if the marriage is not dissolved, there is a prospect of reconciliation between the petitioner and respondent; (d) the interest of the petitioner, and in particular, the interest that the petitioner should be able to remarry and live respectably; (e) the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down;[2] (f) the interest of any children born of the adulterous connection between the petitioner and the person with whom he or she committed adultery; (g) the interest of any children born of any adulterous connection formed by the respondent; (h) whether the petitioner or the respondent was the more responsible for the break-up of the marriage; (i) what was the nature of the misconduct which necessitates the prayer for discretionary relief? Was it, for example, with more than one man or woman? Was it promiscuous? Were there mitigating or aggravating circumstances? (j) whether the party seeking the Court's discretion was partly, and if so to what extent, responsible for the break-up of any other marriage; (k) what was the general conduct of the party seeking discretionary relief, for example, his or her conduct towards the children;

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1. 1967-68, ALR S.L. 124. In this case, Browne-Marke, J. applied the principle stated by Viscount Simons, L.C. in the English case of Blunt v. Blunt [1943] 2 All E.R. 76, 78. Note that Simons L.C. mentioned principles (a) to (e) herein stated.
2. See Williams (C.C.) v. Williams (V.E.S.), 1964-66, ALR S.L. 120, 123.

(l) on the successful intervention of the Attorney-General, would the Court have been likely to have exercised discretion in favour of the party seeking the discretionary relief if the facts now known had been before it on the original hearing? (m) what were the reasons for the original, or indeed any subsequent, non-disclosure of adultery? (n) was there perjury on the part of the party seeking discretionary relief? (o) was the party seeking discretionary relief frank when questioned about the adultery and non-disclosure? (p) is the Court finally satisfied that it has been told the whole truth by the party seeking discretionary relief?[1]

In addition to the foregoing principles the Court will consider the discretion statement.[2]

A discretion statement is not a weapon to be used against the person making it where the other has not grounded his petition on adultery and has not made out a case in support of it or of the respondent's cross-petition. In such a case, the Court will not grant a decree to the petitioner against the respondent solely on the admission of adultery in a discretion statement.[3]

(ii) Unreasonable delay

Unreasonable delay by a petitioner to present a petition for divorce when he has a ground amounts to a recognition by him of the existence and validity of the marriage. On the grounds of equity and public policy, therefore, the Court will not exercise its discretion in favour of the delaying party unless it is

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1. For an earlier adoption by the Supreme Court of Sierra Leone of the afore-mentioned principles laid down by Viscount Simons L.C. in Blunt v. Blunt [1943] 2 All E.R. 76,77, see Thomas v. Thomas, unreported, decided by the Supreme Court at Freetown on 25 May, 1948; see the Supreme Court Records, Vol.5, p.156. Note that the above principles apply to adultery as well as to the other discretionary bars.

2. Harris v. Harris,(1962) 2 S.L.L.R. 94, 97 per Bankole Jones J. approving the English case of Anstey v. Anstey [1962] 1 All. E.R. 741, 748.

3. Tipson v. Tipson, 1964-66, ALR S.L. 161, 163.

satisfied as to the reason for the delay.[1]

Delay by itself raises doubts as to the reliability of the evidence of the complaining party, but the doubts may be dispelled if satisfactory reason is given for the delay.[2]

Therefore, if the complaining spouse gives a valid explanation why he had not proceeded with the petition within a reasonable time from the moment that he knew that he had a ground to do so, the delay would not be regarded as unreasonable, and the Court can exercise its discretion in his favour.

Delay will be regarded as reasonable if by the nature of his employment, the petitioner spends most of his time outside Sierra Leone where he is domiciled. Thus, in Pratt v. Pratt,[3] H (husband) and W (wife) married in 1920. Two months later H, who was employed as a ship's cook, went on a voyage overseas. On his return, W refused to cohabit with him and shortly afterwards he had to go out to sea again, and he repeatedly did so until 1951 when he brought the petition. The Supreme Court, Kingsley J. held that the nature of H's employment was reasonable ground for commencing proceedings about thirty years after obtaining a ground, and he accordingly exercised his discretion in the husband's favour. Similarly, delay will be deemed to be reasonable if the petitioner had hoped that during the intervening period a reconciliation with the respondent could be accomplished. Thus in Decker v. Decker,[4] where the petitioner was deserted on 19 December, 1949, but instituted divorce proceedings only on 18 February, 1964, the Supreme Court exercised its discretion in

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1. Decker v. Decker, 1964-66, ALR S.L. 334, 339 per Cole Ag.C.J.
2. Ibid.
3. Unreported, decided by the Supreme Court at Freetown in 1951. See the old Supreme Court Records, Vol.7, p.242.
4. 1964-66, ALR S.L. 334.

her favour after the Court was satisfied that she had refrained from presenting the petition before then because her mother was trying her best to see if what was left of the marriage could be salvaged.

Another ground for reasonable delay is the petitioner's financial inability to pursue the proceedings because in Sierra Leone there is no legal aid system and divorce proceedings are prohibitively expensive.

In Harris v. Harris,[1] Bankole Jones, C.J., sitting in the Supreme Court, accepted the petitioner's reason for nine years' delay in presenting his petition that he never at any time earned very much and that he was a pastor of the Huntingdon Connection and a candidate-in-training for the ministry of religion.

The above-mentioned grounds of reasonable delay are not exhaustive and, in our submission, if for any reason it is beyond the power and competence of the petitioner to present the petition within a short time, for example, if he is incarcerated, the period of unreasonable delay should begin to run against him from the time he regains his liberty and not during the period of his confinement.

(iii) Cruelty

Though cruelty is a discretionary bar to a petition based on any matrimonial offence, it is commonly invoked in cases where the petition is founded on desertion and adultery.

In order to prevent the petitioner from obtaining the relief sought, his cruelty must have both preceded and contributed to the matrimonial offence of which he complains.[2] Cruelty by

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1. (1962) 2 S.L.L.R. 94.
2. Williams v. Williams and Renner, (1960-1) 1 S.L.L.R. 70.

the petitioner after the respondent's commission of the matrimonial offence upon which the petition is based would appear not to be a bar to the petition; though it is a ground for cross-petition by the respondent.[1]

(iv) Desertion or wilful separation

It is borne out by both statute [2] and case law [3] that desertion or wilful separation if to operate as a discretionary bar must have taken place before the adultery or cruelty complained of. It is difficult to establish desertion or wilful separation by the petitioner after the respondent has committed a matrimonial offence upon which the petition is grounded for, if he decides to terminate cohabitation either temporarily or permanently as a result of the respondent's conduct, he will be justified in doing so because to continue to live with the respondent may be evidence of condonation.

It is not clear what "wilful separation" means. Probably it is separation which is unjustifiable and which is intended to last only temporarily. If there is an intention to stay apart permanently either before or during the de facto separation, desertion results.

As no period is stated in the Act during which desertion should last before it can be pleaded as a discretionary bar, it is submitted that any length of period less than the three years required in the case of a ground for divorce will suffice.

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1. Ibid.
2. S.7(2) of Matrimonial Causes Act, Cap.102 of the revised Laws of Sierra Leone, 1960.
3. Williams v.Williams, (1960-61) 1 S.L.L.R. 70.

(v) Wilful neglect or conduct conducing

The Courts have tended to regard "wilful neglect" as wilful neglect by the husband to maintain the wife and the children of the family and have also conceived such neglect as conduct conducing to the wife's committing a matrimonial offence, particularly adultery.[1]

In our submission, there is nothing in S.7(2) of the Matrimonial Causes Act to warrant such narrow interpretation of the phrase "wilful neglect". If by deliberately failing to maintain his wife a husband can be guilty of "wilful neglect", then, it is submitted, in a society such as Sierra Leone in which it is considered as a wife's duty to carry out or supervise the performance of the domestic chores of the matrimonial home, if a wife fails to do so she is equally in wilful neglect of the husband.

The Courts have not distinguished "wilful neglect" from "conduct conducing" and tend to regard the former as one example of the latter.[2]

In general, a matrimonial offence by one spouse prior to the matrimonial offence of the other is conduct conducing to it,[3] but conduct that falls short of a ground for divorce will also suffice. Thus, if one spouse behaves in a manner as to create a reasonable cause for belief that she has committed adultery with another party, though this may not be the case, and the other spouse deserts as a result, the conduct of the first spouse will conduce to the other's desertion.[4]

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1. Thomas v. Thomas, unreported, decided by Supreme Court on 25 May, 1948; Williams v. Williams, 1964-66, ALR S.L. 120.
2. Ibid.
3. Williams v. Williams, (1960-61) 1 S.L.L.R. 70.
4. Cummings v. Cummings, 1968-69, ALR S.L. 44 where Tejan-Sie, C.J. applied opinion of Lord Merrian P. in the English case of Glenister v. Glenister [1945] 1 All E.R. 513, 519, and that of Willmer J. in another English case of Beer v. Beer [1948] P. 10, 13.

It is the conduct of one spouse towards the other which conduces to the latter's commission of a matrimonial offence that is a discretionary bar. Therefore, as in the case of delay, if circumstances beyond the spouse's control, such as imprisonment,[1] makes him neglect the other, it is submitted that his misconduct is not in relation to the other spouse and ought not to conduce to any matrimonial offence committed by the other.

(d) Jurisdiction

At common law, the jurisdiction of the High Court in divorce or nullity is based on the domicile of the parties.[2] Thus, if both parties to the marriage are domiciled in Sierra Leone at the time of the commencement of the proceedings, the Court will have jurisdiction to hear the petition.

However, because of the possibility that in case of the wife/petitioner, the husband may have abandoned his Sierra Leone domicile which at common law automatically terminates the wife's Sierra Leone domicile, statutory law has made an inroad on the common law.

According to s.5 [3] of the Matrimonial Causes (Amendment) Act, 1961,[4] a wife whose husband has surrendered his Sierra Leone domicile may petition for divorce or nullity based on residence, providing the following conditions are fulfilled.

Firstly, she must be resident in Sierra Leone and must have been ordinary resident there for three years immediately

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1. But the imprisonment should not be for an offence against the other spouse.
2. See the Privy Council case of Le Mesurier v. Le Mesurier [1895] A.C.517.
3. Amending s.30 of the Matrimonial Causes Act, cap.102 of the revised Laws of Sierra Leone, 1960.
4. Act. No.16 of 1961.

preceding the commencement of the proceedings.[1] Secondly, she must have been deserted by her husband or the husband should have been deported or expelled from Sierra Leone but immediately before his deportation or expulsion, he must have been domiciled in Sierra Leone.[2]

These statutory provisions create as much difficulty as they seek to remove. Inasmuch as they protect a wife who has lost her Sierra Leone domicile as a result of a change of domicile of the husband, and enable her to petition for divorce or nullity by basing divorce jurisdiction on "residence" they create the possibility of "limping" marriages.[3] To avoid this, a provision conferring a Sierra Leone domicile on the wife in such situations is necessary.

(e) Critique of the Divorce Law

As has just been seen, the general law on divorce in Sierra Leone is, in many respects, modelled on pre-1971 English law. A prominent omission, however, from Sierra Leone law is "insanity" as a ground for divorce. This is probably because in many African tribal societies insanity is regarded as a sickness which must be treated with compassion. As we shall see in Chapter 18, in Sierra Leone tribal society, one spouse divorces the other on the "ground" of insanity only when the insane spouse is prone to violence and becomes a threat to the life of the other.

Following the "Englishness" of the Matrimonial Causes

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1. The new s.30 of the Matrimonial Causes Act, cap.102, introduced by s.5 of the Matrimonial Causes (Amendment) Act, 1961.
2. Ibid. Note that s.5 of the Matrimonial Causes (Amendment) Act, 1961, is the same as s.18(1) of the English Matrimonial Causes Act, 1950.
3. For the decree may not be recognised by the spouses' lex domiciliii.

Act,[1] Sierra Leone judges have used the same yardstick as English judges to measure concepts like adultery, desertion and cruelty.

We shall begin with adultery. In the African context, adultery could be a "reason"[2] for divorce when committed by a wife but not so in the case of a husband, although an adulterous connection by him with another man's wife is an actionable wrong to that man, usually resulting in damages. Thus, a wife is generally expected to tolerate her husband's occasional associations with single women,[3] and more so, while the wife is a suckling mother and before the baby is weaned.[4] In short, adultery is more serious when committed by a wife than when it is the husband that is the guilty party. The general law, however, sets a different standard for spouses of a monogamous marriage. Therefore, while in favour of the retention of the practice of monogamy for spouses of a monogamous union, in our submission, a divorce law, even the general law, should be aware of social differences of people in an important matter like adultery, and should reflect it. Adultery should, therefore, be a ground for divorce only when its commission makes it intolerable for the parties to continue living together as husband and wife.

Secondly, there is no justification for desertion to last

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1. The Sierra Leone Act is modelled on the United Kingdom Matrimonial Causes Act, 1950.
2. Customary laws generally have reasons rather than grounds for divorce. For the Nigerian experience, see Kasunmu and Salacuse, op.cit., 175; Obi, op.cit., 366. For the Kenyan experience, see Read: Family Law in Kenya.
3. Except women within the prohibited degrees of consanguinity, affinity and fosterage.
4. Formerly, a wife was expected to suckle a baby for three years, during which period she must refrain from sexual intercourse. Nowadays, the more liberal Sierra Leoneans allow at least 9 months.

for three years before a party can use it as a ground for divorce. The experience of the Sierra Leone society shows that where one spouse deserts the other, if there is any prospect of reconciliation and resumption of cohabitation, friends and relatives of the spouses try to bring the parties together as soon as separation takes place. Where separation continues after their intervention, it augurs the end of the marriage, and hardly will the spouses ever come together again. It is, therefore, unnecessary to keep the petitioner waiting for three years before he can institute proceedings for divorce. If there is to be any time limit at all, it would be better to add to desertion the phrase "with no prospect of reconciliation", instead of the three year period, and if there is no resumption of cohabitation for two years after every effort has been made to bring the parties together, it should be conclusive that there is no such prospect.

Thirdly, certain acts such as drunkenness and beating up of a wife, which have been accepted as cruelty in English law ought not, per se, to be regarded as such in the Sierra Leone context.

No statistics are available but from personal observation, many Sierra Leone husbands who are not Muslims spend many an evening out with friends, drinking and chatting at local pubs while their wives stay at home looking after the children. Occasionally, some do get drunk but the majority pretend to be so on their return home, probably as a method of disregarding any reproach coming from the wife. This is a habit that has become a socially recognised fact of life in the Sierra Leone society. Therefore, drunkenness by the husband in the absence of personal violence to the wife ought not to amount to cruelty as a ground for divorce.

So far as beating a wife is concerned, it is generally

accepted by the Sierra Leone tribal society, though not by the general law, that a husband has the right to administer reasonable chastisement to the wife. This is an acceptance of the husband's position as head of the nuclear or compound family, with the right to administer instant justice when the occasion demands. This occasional chastisement, if reasonable and not brutal nor a frequent show of force, should be regarded as legitimate and should not be an act of cruelty for the basis of divorce.

The test of cruelty should depend on the circumstances and the attitude of society.

The Sierra Leone divorce law is based entirely on the matrimonial offence principle.[1] The present trend in many countries,[2] is in the direction of the breakdown principle, i.e. granting divorce upon proof that the marriage has broken down irretrievably. This could be a desirable step to take in Sierra Leone because the breakdown principle closely approximates to the African concept of divorce, whereby if for some reason the parties cannot continue living together as husband and wife, they bring the marital relationship to an end.

If the breakdown principle is adopted, then proof of any of the present matrimonial offences or, of grounds suchas two years' separation and wilful and persistent refusal of sexual intercourse, could be evidence of irretrievable breakdown of the

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1. For criticisms of this principle, see Putting Asunder, London 1966, paras.39-45; The United Kingdom Law Commission Report, Cmnd. 3121, para.25.

2. E.g. New Zealand: The Matrimonial Proceedings Act, 1963; Australia: s.28 of the Matrimonial Causes Act, 1959-66; England: s.1 of the Divorce Reform Act, 1969; Canada: See Report on Family Law Study, Project I, Divorce, Final Report, St. John's, December 1967, p.14; Nigeria: s.15 of the Matrimonial Causes Decree, 1970; See E. Cotran, "The Matrimonial Causes Decree, 1970", [1972] J.A.L., p.40; California: Governor's Commission on the Family, Report dated 15 December, 1966, p.26.

marriage. Thus, the offence itself will not per se become a ground for divorce.[1] In addition, as in the Nigerian Matrimonial Causes Decree, 1970,[2] the importance of reconciliation must be emphasised. There should be provision whereby spouses seeking a divorce should show that they have exhausted the possibility of a reconciliation through judicial or extra-judicial means. This is in keeping with divorce in the African context where it is normally granted or becomes operative, only when there is no longer any prospect of reconciliation.

With the advent of divorce as a result of breakdown of the marriage will inevitably go the present absolute bars for, as the United Kingdom Law Commission rightly said: "There would be no relevant offence to connive at, conduce to or condone."[3] Alternatively, Sierra Leone could borrow from Ghana law and make the sole ground for divorce that the marriage has broken down beyond reconciliation.[4] Because of the facts which have to be proved in order to establish that the marriage has thus broken down, this principle is simpler and less fraught with problems than the usual breakdown principle and its concomittant modes of proof. In the Ghana principle, one or more of the following facts must be shown in order to establish that the marriage has broken down beyond reconciliation: (a) that the respondent has behaved in

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1. See the unreported case of Forster v. Forster decided by the Supreme Court in Freetown on 7 September, 1942, in which Graham Paul C.J. seemed to be far ahead of his time when, even though adultery was proved, he granted the decree only on the additional finding that without it the marriage would not continue with happiness.
2. Ss.12, 13, 17(1) and (2) (Nigeria).
3. Law Commission Report, para.108.
4. Ss.1(2), 2(1) and (3) of the Ghana Matrimonial Causes Act, 1971. See H.F. Morris, "The Matrimonial Causes Act, 1971", [1972] J.A.L., p.71.

such a way that the petitioner cannot reasonably be expected to live with the respondent; or (b) that the parties to the marriage have, after diligent effort, been unable to reconcile their differences. Furthermore, under the Ghana Law, even though any of the facts may be established, the court will not grant a decree of divorce unless it is satisfied, on all the evidence, that the marriage has broken down beyond reconciliation. Thus, the primary motive is to grant a decree only when it is clearly established that at least one of the parties has formed the intention never to continue living together with the other as husband and wife, such intention formed as a result of the behaviour of the other.

At first sight, it would appear that such a law would permit divorce on the cheap because a party seeking it may refuse to reconcile with the other merely on the ground of the other's behaviour which on the application of an objective test would not be serious enough to afford a ground for a reasonable person to seek to terminate the marital relationship as a result. It has, however, been established in the Ghana case of Mensah v. Mensah [1] that in order to show that the respondent has misbehaved himself to an extent that the petitioner cannot reasonably be expected to live with him, mere trivialities will not suffice and that the conduct complained of must be sufficiently grave and weighty to justify such finding.[2] In the words of Hayfron-Benjamin J. "the parties must be expected to put up with ... the reasonable wear and tear of married life."[3]

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1. [1972] 2 G.L.R. 198.
2. Ibid. at 203, 204, per Hayfron-Benjamin J.
3. Ibid., p.204.

Such a reform, in our submission, does not make divorce relatively easy to the point of undermining the stability of marriage as a central social institution. All it does is, when the marriage has broken down beyond reconciliation, to enable

> "the empty legal shell to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation."[1]

As can be seen, it may be repeated that the Ghana principle is a simplified version of the irretrievable breakdown principle as adopted in other countries. Whereas the breakdown rule admits of specific items of conduct on the part of the respondent which the petitioner must prove in order to show that the marriage has broken down irretrievably, Ghana law puts every conduct of the respondent to the test and considers its impact on a reasonable person who, in our submission, ought to be the average African man or woman with his or her peculiar social attitudes, idiosyncracies and complexities, placed in a similar situation as the petitioner.

B. TERMINATION OF A MOHAMMEDAN MARRIAGE BY DIVORCE [2]

Here again, we shall outline the Islamic law of divorce and compare it with the practice of the Sierra Leone Muslims.

Under Islamic law, a husband has the right to divorce his wife without assigning any reasons and without any fault on her part. A wife, on the other hand, has the privilege of divorcing her husband in a number of prescribed cases only, namely, divorce

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1. Ibid., p.204.

2. For a comprehensive analysis of divorce at Islamic law, see Hughes, op.cit., 87-90; Karim, op.cit., 697-700; Fyzee, op. cit., 139-169; Coulson, N.J. a paper entitled "Islamic Law" contributed to a Colloquium on The Co-existence and Interaction of Different Laws of Marriage and Divorce in the British Commonwealth, held at Clare College, Cambridge, on 15 to 17 September 1958, under the auspices of the U.K. National Committe of Comparative Law.

with the mutual consent of the husband (khul^{c}); the husband's failure to maintain her; cruelty; desertion; neglect; the husband's affliction with a serious and contagious disease; insanity, and the husband's impotence.[1]

Procedure

Before a divorce is contemplated the spouses are enjoined to effect a reconciliation and should break the marriage bond only as a last resort when every effort at a settlement has failed. For the purpose of settling their differences, the parties must appoint two umpires, one from either side.[2]

Divorce can be effected by judicial process, mutual agreement or by talaq. The first two methods can be used by both husband and wife, but the last is the monopoly of the husband.

(a) Judicial process

This is the method commonly employed by the wife. It is also the usual procedure when a husband accuses his wife of infidelity, whereby both parties are made to appear before a judge and take an oath, after which the marriage is dissolved.[3]

(b) Mutual agreement

Where the parties do not want to continue the marital relationship, they can terminate it by mutual consent (mubara'a). If it is the wife who wants the divorce but under normal circumstances cannot get it because the husband is not guilty of the prescribed offences, she can persuade the husband in order to

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1. Impotence is the only ground upon which a wife may obtain a judicial declaration of divorce among the Hanafii.
2. This is not a legal necessity, but a matter of conscience as prescribed by the Quran.
3. The procedure is called li^{c}an.

release her by her paying an agreed price. This agreement for divorce, is known as Khul^{c}. In Maliki law, there is a compulsory khul^{c} when a dispute arises between the spouses which arbitrators are unable to settle and the fault is on the wife.

(c) Talaq.

A husband can at any time during the period after the wife's menstruation (tuhr) repudiate her and the repudiation amounts to divorce. This can be done in one of three ways. Firstly, by talaqu 'l-ahsan. The husband makes a single declaration of talaq during the woman's tuhr followed by abstinence from sexual intercourse during the wife's prescribed ^{c}idda which is three courses. The talaq is revocable until the period of ^{c}idda has expired. A divorce effected as such does not compel the divorced wife to marry another man and be divorced before she can again become the wife of the first husband, but if the first husband wants her back there must be a remarriage. Secondly, talaqu 'l-hasan. This is a declaration of talaq repeated three times, one during three successive tuhrs. There is the possibility of revocation until the third pronouncement. It is the best form of talaq and is used by a man determined to be rid of his wife. Thirdly, talaqu 'l-bida. The declaration is made three times in immediate succession or within one tuhr. The triple talaq is effective immediately and is irrevocable. In the case of talaqu 'l-hasan and talaqu 'l-bida, before a divorced wife can remarry the divorced husband, she must first marry another man, consummate the marriage, and divorce him.

The practice of Sierra Leone Muslims

As a rule, either spouse can divorce the other if the marriage has irretrievably broken down and no reason need be

given. In practice, however, among the purists, some reason must be adduced acceptable to the Imam of the local community where the divorce is sought.

Among the Hausa community [1] in Freetown, a husband may divorce his wife if she posed as a virgin on marriage but the contrary is proved when the marriage is consummated, or if during the marriage she commits adultery three times after having been warned on the first and second occasions. A wife, too, may divorce the husband for his inability or wilful refusal to maintain her, or neglect, and for his mouth emitting a pungent smell at night. In the latter case, however, the husband must first be warned.

The Aku Muslims [2] insist upon a ground at Islamic law before divorce is allowed. Nevertheless, sterility of the wife and adultery by either spouse are recognised reasons for divorce among them.

In addition to the grounds permitted at Islamic law, a Mandingo Muslim [3] wife may divorce her husband for persistent bad breath and impotence and either spouse can divorce the other for showing by deeds or omission, utter disrespect of the spouse's family. A husband cannot divorce a wife on the ground of her adultery, but such conduct is attended with severe punishment. In the olden days, both the adulterer and the wife were tortured to death. Nowadays, however, both are given 100 lashes each, stripped naked, and the adulterer is banished from the local community. This happens extra-judicially.

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1. Personal communication from Alhaji Buhari, Imam of Hausa Mosque, Freetown.
2. Personal communication from Alhaji Nasiru, Imam of Aku Mosque, Freetown.
3. Personal communication from Alhaji Gbril Succoh, Imam of Mandingo Mosque, Freetown.

Among the rest of the tribal Muslims,[1] mainly in the Provinces, a husband can divorce a wife without assigning any reason but if she is faultless, he must accompany her with money and return her to her parents. For a wife, unkindness shown to her by the husband is a sufficient reason for divorce. One act of adultery by the wife is in general, insufficient to entitle the husband to divorce her without paying some amount of money to her parents. But if she persistently commits adultery after being warned and reported to her parents, she can be divorced without any financial benefit to her parents.

Apart from those stipulated by Islamic law, the accepted reasons for divorce among the Ahmadiyya [2] include (i) the husband's persistent driving away of the wife with or without just cause; (ii) personal uncleanliness by either party; (iii) disobedience to the husband by the wife; and (iv) wife's wilful and persistent refusal of sexual intercourse. Adultery by the wife is not sufficient to divorce her but if she is manifestly immoral, testified to by four respectable residents of the locality, the husband must separate himself from her for four months after which, if she continues her conduct, she becomes liable to reasonable chastisement.

Procedure

As the HighCourt in Sierra Leone has no jurisdiction to dissolve a Muslim marriage and there are no Kadi's Courts, divorce by judicial process is virtually unknown. Nevertheless,

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1. Personal communication from Alpha Ibrahim Koroma, Imam of the Ngiyeya Road Mosque, Bo.
2. Personal communication from Mohamed Lamin Njai, a prominent Ahmadiyya missionary.

the tribal Muslims in the Provinces do, from time to time, resort to the local courts, but what is dissolved by these courts is a customary marriage where the alleged Mohammedan marriage also conforms with the requirements of a valid customary marriage.

In the Western Area, there are yet no established customary courts recognised by law. But the practice is prevalent whereby a Muslim who seeks divorce goes to the headman or a learned Imam (Alkali) who sits in a quasi-judicial capacity. These ad hoc judges have no judicial capacity at law,[1] but their decrees are respected by those who seek them and adhered to by the local community.

Divorces by talaq and by mutual agreement without arbitral intervention are not in vogue at all despite the opinion of one Imam [2] that an immediate divorce can be obtained upon one spouse pronouncing in a mosque in the presence of his or her parents, the Imam and the Muslim elders who witnessed the wedding that he or she is no longer married to the other spouse.

The usual procedure by which divorce is obtained seems to be as follows:

In case of a dispute the spouses first resort to the godparents of the marriage and if the dispute is not resolved, the godparents summon representatives of the families of the spouses and they try to strike out the differences and effect a reconciliation. Failing that, one or both of them goes to the local Imam or headman and indicates his intention of having a divorce. The Imam or headman makes a final effort to salvage the marriage,

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1. See s.12 of the Tribal Administration (Colony) Act, cap.78 of the revised Laws of Sierra Leone, 1960.
2. Personal communication from Alpha Ibrahim Koroma, Imam of the Ngiyeiya Road Mosque, Bo.

failing which he summons an ad hoc tribunal consisting of the elders of the local Muslim community (jamaat). If the tribunal is satisfied upon hearing evidence from both sides that one spouse has given sufficient reasons for a divorce, it pronounces a decree and communicates it to the Registrar who registers it. From the moment of the pronouncement of the decree, the marriage is legally dissolved, but registration is necessary as evidence of the dissolution. Divorce once effected as such is irrevocable, and in the event of a later reconciliation, the parties must re-marry in order to bring about the relationship of husband and wife. The stricter Muslims never contract a second marriage with a woman whom they have already divorced; but the more liberal native Muslims in the Southern and Eastern Provinces do.[1]

1. cf. Anderson, op.cit., p.296.

CHAPTER 12

THE PARENT AND CHILD RELATIONSHIP

In this Chapter, we shall discuss parent and child relationship under the general law.[1] A discussion of this relationship under customary law is deferred to Part III. Nevertheless, we shall make occasional excursuses into customary law here when the necessity arises.

The matters to which we shall address ourselves in this Chapter are legitimacy; nationality and citizenship; maintenance; custody; offences against children and the vicarious liability of parents for the conduct of their children; and finally, the loss of parental rights and authority. From our list the absence of legitimation and adoption stands out conspicuously. We shall not concern ourselves with them because under the general law of Sierra Leone legitimation,[2] and legal adoption [3] are unknown.

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1. Islamic law does not require any special treatment in a discussion of parent and child relationship because in Sierra Leone Islamic law does not apply to that relationship. Apart from the question of the legitimacy of a child of Muslim parents, which may be decided under Islamic law if the parents were married in accordance with Mohammedan law at the time that the child was conceived, the relationship of parent and child is governed by the general law. Customary law may also apply where the purported Mohammedan marriage is recognizable under customary law.
2. Legal adoption is used here as opposed to a de facto adoption or foster-parenthood whereby a foster-parent has a de facto control of the foster child without the legal consequences of parenthood. The latter is common in Sierra Leone.
3. There is no statutory law in Sierra Leone on legitimation or legal adoption. Since these concepts did not exist in common law and the English legislation on the matter does not apply in Sierra Leone, there is, therefore, no law in Sierra Leone on them.

A. LEGITIMACY

Conflict of Laws

We must point out from the outset that Sierra Leone has no local enactment resolving conflict of law problems. As the English common law is the country's residuary law we shall, therefore, begin this discussion by stating one important common law rule of conflict of law. It is that the legitimacy of a child is determined by the law of his domicile of origin, that is, the law of the father's domicile at the time of the child's birth.[1] In short, if the law of that domicile regards the child as legitimate, then he is clothed with that status everywhere.

This common law rule is of easy application in resolving external conflicts of law when the country of domicile of origin of the child has a unitary legal system. But it is fraught with difficulty if the country has a pluralistic legal system because an internal conflict of law problem results. Sierra Leone is one such country with its tripartite legal system, at any rate, in certain areas of the field of family law.

The question then that is pertinent is as follows: Once it has been established that the country of domicile is Sierra Leone, by what law will the legitimacy of a child be determined? Will it be the general law, Islamic law or customary law? Before we can attempt an answer, we must consider the validity of the marriage of the child's parents, for the issue of the child's legitimacy will depend heavily, though not entirely, on whether

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1. See the English cases: In re Don's Estate (1857) 4 Drewry 194 at p.297 per Kindersley V-C; Fenton v. Livingstone (1859) 3 Macq 497 H.L. at p.532 per Lord Brougham; In re Goodman's Trust (1881) 17 CH.D. 285 at pp.292, 296-7, per Cotton and James L.J.J. See also the Nigerian case: Re Adadevoh and Ors (1951) 13 W.A.C.A. 304 at pp.306, 308-9, per Verity, C.J.

or not there was a valid marriage subsisting between the parents when the child was conceived or born, as the case may be, or in the case of customary law, whether a subsequent valid marriage took place between the father and mother of the child after its birth.

In the first place, a child cannot be legitimate in Sierra Leone if at some time or other his parents had not contracted a marriage which is valid either under the general law or Islamic law or customary law, or there has not been acknowledgment of paternity under the last-mentioned law.[1] But as the requirements of a valid marriage are not the same for every branch of the Sierra Leone legal system, it is possible for a child to be regarded as legitimate under one law, for example, the general law, but illegitimate in accordance with another law, for example, customary law.

We shall consider two hypothetical cases:

(1) H and W, two natives aged 21 years, marry in accordance with the Christian Marriage Act without H's family paying any marriage consideration and without the consent of the parents of both. This marriage is valid under the general law but invalid at customary law, under which an essential requirement - consent of the parents - is absent. How then will the legitimacy of a child of such marriage be determined?

(2) H and W, two natives, contract a valid marriage under the Christian Marriage Act. During the subsistence of the marriage, H purports to contract various customary marriages with

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1. In Chapter 19, we discuss that a child can be legitimated under customary law without its natural father and mother having to marry each other.

other women. The marriage of H with W is valid under the general law, but H's subsequent customary marriages are void under that law. In customary law, however, as we shall see in Part III, the subsequent marriages are regarded as valid if they complied with the requirements of a valid customary marriage. We may yet again ask, how will the legitimacy of children born of all the marriages be determined?

The marriage of the parents alone will not be sufficient to determine a child's legitimacy - a status cognizable by each and every branch of the Sierra Leone legal system -especially when a child may be legitimated under customary law without the need for its parents to marry each other. Note that the Sierra Leone Courts have not as yet ruled on the matter.

In a Nigerian case in which a similar internal conflict situation existed, the West African Court of Appeal resolved it on the basis of the parents' personal law, and held that if the father of the child was a person subject to customary law, then the law to be applied in ascertaining the legitimacy of the children is the customary law applicable to the father.[1] Similarly, if the father was a person subject to the general law, then it is that law that determines the children's legitimacy.[2] With the present trend in Sierra Leone to apply customary law on a territorial rather than personal law basis,[3] it is difficult now to pinpoint who are persons subject to customary law and who are not. Formerly, however, and at present in specific areas such as intestate succession, where a child's right to succeed to the

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1. Re Adadevoh and Ors (1951) 13 W.A.C.A. 304 at p.309 per Verity C.J.
2. So would Islamic law apply in the case of a person whose parents are Muslims.
3. See s.13 of the Local Courts Act, 1963, Act No.20 of 1963.

property of his parent depends upon his legitimacy, Sierra Leone law has recognised three classes of people, namely, natives, non-natives and Muslims. To the first and second classes customary law [1] and the general law [2] respectively apply, and to the third, Islamic law,[3] all irrespective of the marriage of the spouses.

If we were to apply the test in the Nigerian case herein already noted to all natives in Sierra Leone, the law that determines the legitimacy of their children will be their respective customary law, whilst the general law and Islamic law will apply to non-natives and Muslims, respectively. Indeed, this might have been the intention of the legislature when the various intestate succession statutes were enacted.[4]

But the application of this test to our hypothetical cases mentioned earlier will, in our submission, produce the following alarming results:- In the first case, the children of the marriage contracted under the Christian Marriage Act will not be regarded as legitimate since the customary law of the parents does not regard them as such. In the second case, the children of the subsequent customary marriages of H will be regarded as legitimate whilst those of the marriage between H and W may be illegitimate according to the customary law of H and W if such marriage does not also comply with that law.[5] In either case,

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1. See s.43 of the Administration of Estates Act, cap.45 of the revised Laws of Sierra Leone, 1960; s.26 of the Christian Marriage Act, cap.95.
2. See the Administration of Estates Act, cap.45; s.26 of the Christian Marriage Act.
3. S.9 of the Mohammedan Marriage Act, cap.96.
4. The Administration of Estates Act, cap.45; the Mohammedan Marriage Act, cap.96.
5. This point was not considered by the court in Re Adadevoh and Ors (1951) 13, W.A.C.A. 304, perhaps because the father, the legitimacy of whose children was at issue, had no children by his Ordinance Marriage, and the children who were claiming were those of the customary marriages.

a non-customary marriage between H and W does not make their children legitimate unless it also conforms with their customary law. Consequently, children who would normally be regarded as legitimate under the general law would not succeed to their property whilst those regarded as illegitimate under that law would because they are legitimate children under customary law.

Another possible solution is that laid down by Petrides J. in the Nigerian case of Haastrup v. Coker,[1] the facts of which were as follows: H [2] contracted a Christian marriage in Sierra Leone with one W, by whom he had a number of children, two of whom survived him. During his lifetime and after entering the Christian marriage, he contracted various customary marriages with other women in Nigeria and was also survived by nine children of these marriages. One of the children of the Christian marriage sold certain land which belonged to his father, who had died intestate. The plaintiff, one of the children of the customary marriages, sought to set the sale aside on the ground that the land belonged to all the children of the deceased. Petrides J. dismissed the action on the ground that the plaintiff had no locus standi to dispute the defendant's title. The learned judge made no express pronouncement on the status of the plaintiff as the deceased's lawful child, but it must be assumed that he impliedly ruled that he was illegitimate, for he said:

> "I am of the opinion that, as it has been admitted that there was a Christian marriage ... and that such marriage was prior to the other marriages ... the principles

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1. (1922) 8 N.L.R. 68.
2. The nationality of H is not clear from the report. All that the report says is that he married according to Christian rites in Sierra Leone and went to Nigeria and succeeded his father. From his name, he could have been a Sierra Leone non-native.

> laid down in the case of Cole v. Cole[1] apply, and that this is not a case in which the court can observe the native law of inheritance."[2]

This case can be assumed as holding that where a valid non-customary marriage precedes a customary marriage, the latter is invalid and only the children of the former would be regarded as legitimate. If this principle is applied to Sierra Leone, then in the case of a deceased native who had contracted marriage under the Christian Marriage Act, his legitimate children, for the purposes of succession, would be those regarded as such by the general law. It is doubtful how far this principle can have practical effect in Sierra Leone in the face of s.43(2) of the Administration of Estates Act, under which the Administrator General administrating the property of a native, has to ascertain from the local court of the area to which the deceased native belongs, the names of the persons entitled to the residue of the estate, after payment of debts and the costs of the administration and pays that residue to such persons so ascertained. So far as children who are claimants are concerned, the Local Courts would not hesitate to nominate the children who are regarded as legitimate under customary law.[3]

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1. (1898) 1 N.L.R. 15. The relevant principle herein referred to is that laid down by Griffith J. to the effect that a Christian marriage clothes the parties thereto and their offspring with a status unknown to native law, meaning thereby that subsequent to the marriage the legal rights and obligations of the parties inter se and in respect of their children are to be determined without recourse to native law and custom. Note that this principle has not been followed by a number of Nigerian cases, notably Asiatu v. Goncallo (1900) 1 N.L.R. 42 and Smith v.Smith (1924) 5 N.L.R. 102.
2. (1922) 8 N.L.R. 68, 69.
3. Some local courts, however, in practice include children born of a marriage contracted in accordance with statute even when the marriage does not also comply with customary law. It is interesting to test the validity of such a practice. It is probably the influence of Western education as the present Court Presidents are now literate.

Because of the succession laws in Sierra Leone, it seems that the Adadevoh rule is appropriate in determining the legitimacy of a child. As has been seen, however, the rule produces startling results and must be deprecated.

A more effective approach would be to determine legitimacy for the purposes of every branch of the Sierra Leone legal system, so that if a child is regarded as legitimate under one branch he should possess that status for the purposes of the other branches. Once the parents are validly married under one law, the nullity of that marriage under another law should affect only the parties thereto, insofar as that law is concerned, but not their offspring. Legislation on this point is, therefore, necessary. An abortive step in this direction was taken in 1965 when the government published a Bill [1] declaring all children of any citizens of Sierra Leone born after its passing to be legitimate. The Bill went beyond what is contemplated here, since it proposed to make even children born out of lawful wedlock legitimate.

The Bill never became law,[2] but because of its revolutionary nature it is worth mentioning its salient provisions here.

Firstly, all children born of parents, one of whom was a Sierra Leone citizen after the commencement of the Act were to be legitimate, whether or not they were born in wedlock.[3]

Secondly, it provided for legitimation per subsequens matrimonium where the parents married under the Civil or Christian Marriage Acts after the commencement of the Act and the father was or at the date of the marriage resident in Sierra Leone.[4]

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1. Dated 3 September, 1965.
2. The Bill came under heavy fire from Sierra Leone's National Federation of Women's Organizations.
3. Art.2(1).
4. Art.2(2).

Thirdly, a person legitimated under the laws of the mother country by the subsequent marriage of his parents was to be treated as legitimate in Sierra Leone if his father was domiciled in that country at the date of the marriage.[1]

Fourthly, a legitimated person was to be entitled to take any interest (a) in the estate of an intestate dying after the date of legitimation; (b) under any disposition coming into operation after the date of legitimation; (c) by descent under an entailed interest created after the date of legitimation; in like manner as if the legitimated person had been born legitimate.[2]

Fifthly, the spouse, children or remoter issue of an illegitimate person who[3] died after the commencement of the Bill and before the marriage of his parents would, if living at the time of the marriage, have had the same interest of that deceased person who, if alive, would have been legitimated by the subsequent marriage of his parents.[4]

Sixthly, a legitimated person would have had the same rights and be subject to the same obligations in respect of the maintenance and support of himself or of any other person as if he had been born legitimate, and subject to the provisions of the Bill, any law relating to claims of damages, compensation, allowance, benefit, or otherwise by or in respect of a legitimate child would have applied in like manner as in the case of a legitimated person.[5]

Finally, after the commencement of the Bill if the mother of an illegitimate child died intestate without legitimate issue

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1. Art. 8(1).
2. Art. 4(1).
3. i.e. the illegitimate person.
4. Art.6.
5. Art.7.

surviving her, her illegitimate child would have been entitled to take any interest in her property to which he would have been entitled had he been born legitimate.[1] Similarly, the mother of an illegitimate child would have been entitled to any interest in the property of that child dying intestate to which she would have been entitled had the child been born legitimate, and she was the only surviving parent.[2]

The provisions of the Bill were a carbon copy of the United Kingdom Legitimacy Act, 1926. But the Sierra Leone Bill differed from the United Kingdom Act in three respects. Firstly, a child born out of wedlock after the commencement of the Sierra Leone Bill was to be legitimated. Secondly, a person could have been legitimated in Sierra Leone even if at the time of his birth one of his parents was married to a third person.[3] Thirdly, a legitimated person would seem to have had the same rights to succeed to real or personal property, dignity and title of honour as a person born legitimate.[4]

It is unfortunate that the Bill did not become law. At least it would have resolved the complex problem of internal conflicts of law, at any rate in deciding the legitimacy of children born after its commencement.

Who is legitimate or illegitimate under the general law? [5]

Under the general law,[6] a child is legitimate if he is

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1. Art.9(1).
2. Art.9(2).
3. The Bill omitted s.1(2) of the United Kingdom Legitimacy Act, 1926, which did not regard such child as legitimated.
4. The Bill also omitted ss.1(3) and 3(3) of the United Kingdom Legitimacy Act, 1926, which limited the rights of legitimated persons in respect of such matters.
5. There has been a great deal of change in the law of legitimacy in English law which, because they fall outside the reception date of English law in Sierra Leone, i.e. 1 January, 1880, do not apply to Sierra Leone. It is therefore, inappropriate to discuss these changes at length in this work.
6. Which is the English common law as received inSierra Leone.

conceived or born in lawful wedlock.[1] In other words, he must be born during the valid marriage of his parents or within a reasonable period after the dissolution of the marriage by divorce or death of the husband, but he must have been conceived before such dissolution.[2] The phrase "lawful wedlock" implies that a valid marriage must be in subsistence between the parents of the child at the time of his conception or birth. For this purpose, a valid marriage need not be confined to one contracted under the Christian or Civil Marriage Acts. A marriage that is valid at customary law and a valid Mohammedan marriage which are not void under the general law [3] should be regarded as valid marriage for the purpose of determining the legitimacy of the children. Any child born out of lawful wedlock is illegitimate. Moreover, a child of a void marriage is illegitimate whether or not a decree of nullity has been pronounced.

Children of a voidable marriage were at common law legitimate so long as the marriage remained in existence. But if it was annulled, the children became bastardised from the moment a decree was pronounced.[4]

Statutory law has now mitigated the common law rule in respect of children of voidable marriages. At first, children of a marriage that was annulled on the ground of venereal disease in a communicable form suffered by one spouse at the time of the

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1. See Graveson; The Conflict of Laws, 6th ed., p.378.
2. Dicey: Conflict of Laws (8th ed., 1967) 418, note 18.
3. But not so if the marriage is regarded as void under the general law, e.g. where a marriage valid at customary law is contracted with a third party during the subsistence of a valid marriage under the Christian Marriage Act. Note that in Islamic law, the child must be conceived in wedlock before he can be legitimate. The general law would, however, regard a child of an Islamic marriage born but not conceived during the marriage as legitimate.
4. Rayden on Divorce, 11th ed., p.364.

marriage were deemed legitimate by s.3(2) of the Matrimonial Causes Act, 1949.[1] Now, according to s.2 of the Matrimonial Causes (Amendment) Act, 1961:[2]

> "Where a decree of nullity is granted in respect of a voidable marriage, any child who would have been the legitimate child of the parties to the marriage if it had been dissolved, instead of being annulled, on the date of the decree shall be deemed to be their legitimate child notwithstanding the annulment."

No Sierra Leone Court has as yet ruled on the precise meaning of this provision. Nevertheless, in our submission, it puts a decree of nullity of a voidable marriage on the same basis as a decree of divorce insofar as the legitimacy of the children are concerned. As children of divorcees born or conceived before a decree of divorce remain legitimate, in spite of the dissolution of their parents' marriage, so would the children of a voidable marriage that has been annulled continue to be legitimate despite the annulment.

Commenting on a similar provision in Nigerian law, Obi [3] has expressed doubt. He rightly says that the phrase "at the date of the decree" could refer to the phrase "the legitimate child of the parties to the marriage" or to the phrase "if it had been dissolved instead of being annulled." Thus, he concedes, the section could read "any child who would have been legitimate at the date of the decree". From this, Obi concludes that "only children already born before the date of the decree of nullity could be legitimate."[4], but

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1. Cap.102 of the revised Laws of Sierra Leone, 1960.
2. Act No.16 of 1961. It has not yet been ruled upon whether or not this Act is retrospective. Compare with s.4(1) of the United Kingdom Law Reform (Miscellaneous Provisions) Act, 1949, repealed and substantially re-enacted by s.11 of the Matrimonial Causes Act, 1965.
3. Modern Family Law in Southern Nigeria, London, 1966, p.289.
4. Ibid.

> "children conceived during the subsistence of the marriage but born subsequent to its annulment would not be legitimate even if they were the joint biological product of the parties to the said marriage."[1]

In our submission, there is nothing in the section to justify differentiating between children "born" and children "conceived" at the date of the decree. The section speaks of "child" without the adjectives which Obi has supplied in his interpretation. The word "child", as used in the section, it is submitted, means a child born or conceived during the subsistence of the marriage up to the time of its annulment; for, without the annulment of the marriage, these are the children who would be normally regarded as legitimate if the marriage were valid for all purposes and not merely voidable. It is not, therefore, right to prefer one child to the other especially when the statute is silent on the matter. Our submission is fortified in that a child that is conceived during marriage is, nevertheless, legitimate if before his birth the marriage of his parents is dissolved; and the instant statutory provision aims at treating such child in the same manner as the child, the marriage of whose parents is annulled during his lifetime.

Presumption of Legitimacy

If a child is born to a married woman, her husband is presumed to be its father and thus the child is regarded as legitimate until the contrary is proved.[2] This presumption of legitimacy is commonly expressed in Sierra Leone by the Creole proverb "married woman nor day born bastar pikin (translated into English literally as "a married woman cannot give birth to an illegitimate

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1. Ibid.
2. In re Clarke (an infant) 1964-66 ALR S.L. 270 at p.273 per Bankole Jones C.J.

child"). Where the legitimacy of the child of a married woman is in issue, the burden of rebutting the presumption of legitimacy is cast upon the party alleging the illegitimacy, and in order to discharge it, that party must prove beyond reasonable doubt that the husband is not the father of the child, and the evidence to disprove legitimacy must be strong, distinct, satisfactory and conclusive.[1] Thus in re Clarke (an infant),[2] H (husband) and W (wife) married in April, 1956, and separated permanently three months afterwards. Thereafter, H had no access to W. Later in the year, W went to live with another man as man and wife and continued to do so until November, 1957, when she gave birth to a baby girl. This man fulfilled the responsibility of registering and christening the child and took her as his daughter, even sending her for some time to his mother in Ghana, during the lifetime of H. After the birth of the child W continued cohabitation with the man and had another child by him. The couple lived together until June, 1965, when W died. Meanwhile, H had died in 1960 while the marriage between him and W was still subsisting. On the question whether child born to W in November, 1957, was the legitimate child of H, it was held that in the absence of evidence from H and W, who were dead at the date of the proceedings, and after considering theconduct of the parties concerned and the circumstances existing at the time of conception and birth of the child as well as relevant facts both preceding and following them, the presumption of the legitimacy of the child was rebutted and that she was illegitimate.

Whether husband and wife can themselves give evidence to

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1. In re Clarke (an infant), 1964-66 ALR S.L. 270 at p.277 per Bankole Jones, C.J. adopting the English case of Morris v. Davies (1837) 5 Cl. & Fin.163, 215.

2. 1964-66, ALR S.L. 270.

prove or disprove the legitimacy of a child borne by the wife is a question which for a long time called for a negative answer. At common law, it was not open to the husband or wife to give evidence of non-access to bastardize a child born in wedlock even though there might be doubts as to the child's legitimacy.[1] The rule was, in English common law, founded on decency, morality and public policy affecting the children born during the marriage as well as the parties themselves.[2] The only person, therefore, who was competent to rebut the presumption of legitimacy was a stranger to the marriage. In certain cases, however, the rule was relaxed. Thus, in one case in which the legitimacy of a child born within a period less than the normal period of gestation was in issue, evidence of the husband that he did not have access to the wife before the marriage was held to be admissible.[3] Moreover, since the rule is primarily meant to prevent the bastardizing of a child, if there is no child to bastardize it will not apply. Thus, it was held inapplicable in a case where a child was still-born.[4] It must also be borne in mind that the rule was relevant only to proceedings involving questions of paternity or of bastardizing an issue but had no place in nullity actions where it was intended to prove that no intercourse took place between husband and wife,[5] and in a prosecution for incest where the accused sought to disprove guilty intention when he gave evidence that he did not know that the girl with whom he

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1. See the English cases: Goodright v. Moss (1777) 2 Cowp. 591, 592, 593 per Lord Mansfield; R. v. Sourton (1836) 5 Ad. & E 180, 188, 189 per Lord Denman C.J. and Littledale, J.; R. v. Kea, (1809) 11 East, 132; and Russell v. Russell [1924] AC687.
2. See Goodright v. Moss (1777) 2 Cowp. 591, 592, 593 and R. v. Kea (1809) 11 East, 132.
3. The Poulett Peerage [1903] A.C. 395.
4. Holland v. Holland [1925] P.101.
5. Farnham v. Farnham [1937] P.49.

was alleged to have committed incest was his daughter.[1]

The present position in Sierra Leone is now that spouses are free to give evidence of non-access in order to bastardize a child born during their marriage. This, it is submitted, is the effect of the Evidence (Marital Intercourse) Act,[2] s.1 of which states:

> "Notwithstanding any rule of law, the evidence of a husband or wife shall be admissible in any proceedings to prove that marital intercourse did or did not take place between them during any period:
>
> Provided that a husband or wife shall not be compellable in any proceedings to give evidence of the matters aforesaid."

Declaration of Legitimacy

Bromley [3] has rightly pointed out two very important situations in which the legitimacy of a person may be put in issue. One is when that person wishes to claim an interest in property. The other is where a husband in a matrimonial proceeding wishing to establish that the wife has committed adultery alleges that he is not the father of a child born by the wife. We may also add a third situation, that is, where a person wishes to succeed to a title of honour, say, a paramount chiefship or headship of a family.

In order to remove doubts about a person's legitimacy, s.19(1) of the Matrimonial Causes Act [4] provides that:

> "(1) Any person who is a natural-born subject of Her Majesty, or whose right to be deemed a natural-born subject of Her Majesty depends wholly or in part on his legitimacy or on the validity of any marriage, may, if

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1. R v. Carmichael [1940] K.B. 630.
2. Cap.103 of the revised Laws of Sierra Leone, 1960.
3. Op.cit., p.244.
4. Cap.102 of the revised Laws of Sierra Leone, 1960.

> he is domiciled in Sierra Leone or claims any real or personal estate situated in Sierra Leone, apply by petition to the court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother or of his grandfather and grandmother was a valid marriage or that his own marriage was a valid marriage."

Who may apply for a declaration of legitimacy?

Firstly, the applicant must either be domiciled in Sierra Leone or claim real or personal estate situated in Sierra Leone.

Secondly, he must be a natural-born subject of Her Majesty or his right to be deemed a natural-born subject of Her Majesty must depend wholly, or in part, on his legitimacy or the validity of any marriage.

Because of the constitutional changes in Sierra Leone since the passing of the Matrimonial Causes Act, 1949, it is necessary to clarify the term "natural-born subject of Her Majesty", and we must begin with the use of the term in Britain.

Before the British Nationality Act, 1948, came into force,[1] a natural-born subject of His Majesty was any person who acquired British nationality at birth. Such a person could be either one born in a territory which formed part of His Majesty's dominions at the time of that person's birth, or one born outside those dominions but whose father was a British subject at the time of the birth of that person.[2] Outside the group of natural-born subjects of His Majesty were children of persons entitled to diplomatic immunity, children of members of a foreign invading army, children of enemy aliens, of British-protected[3] persons,

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1. The Act came into force on 1 January, 1949.
2. For a fuller discussion of this point, see J. Mervyn Jones: British Nationality Law, London, O.U.P., 1956, pp.200-208.
3. British Protected Persons were British nationals (but not British subjects) only for the purposes of international law and were regarded as aliens. See Mervyn Jones, op.cit., 185, 186.

and of aliens. After the Act, insofar as our present discussion is concerned, the class of natural-born subjects of His Majesty remained the same but British protected persons for the first time acquired a status intermediate betwen aliens and British subjects, sharing some of the disabilities attached to aliens and at the same time, enjoying certain privileges not enjoyed by aliens.[1] Nevertheless, they did not become British subjects.

At the same time when the Sierra Leone Matrimonial Causes Act came into force, that is, on 1 November, 1950, natural-born subjects of His Majesty were as indicated above. Therefore, the children of the peoples of the Protectorate of Sierra Leone could not have been competent to apply for a declaration of legitimacy because their parents were not natural-born subjects of Her Majesty, as they were British-protected persons.

Since Independence, on 27 April, 1961, the people of Sierra Leone, British subjects as well as British protected persons, became citizens of Sierra Leone, and the former terms "British subject" or "British-protected person" are no longer applicable to the peoples of the former Colony and protectorate. In the light of the changed circumstances, therefore, it would be reasonable to assume that natives from the Provinces can apply under s.19(1) of the Matrimonial Causes Act. Adhering to the strict letter of the section, and according the privilege only to those citizens who but for independence would still have been regarded as British subjects, would be putting the clock back, and would be tantamonnt to a further step in perpetuating what we have already decried, that is, the treatment of the citizens of the same country as two different peoples. But this concession

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1. Mervyn Jones, op.cit., 186.

is made only for the citizens of Sierra Leone and for the citizens of those former British protectorates which have attained to independence and whose citizens have become Commonwealth citizens. Persons outside Sierra Leone who are not natural-born British subjects would still not avail themselves of the provisions of s.19 of the Matrimonial Causes Act.

Now that we have examined the meaning of the term "natural-born subject of Her Majesty", another matter we need to investigate is whether the children of persons married under customary law or in accordance with Muslim rites can apply under the section which we are discussing. S.19(6) of the Matrimonial Causes Act states that:

> "The provisions of the Act relating to matrimonial causes shall, so far as applicable, extend to any proceedings under this section."[1]

It must be remembered that s.2 of the Matrimonial Causes Act intended the provisions of the Act to apply to only monogamous marriages; for that section defines marriage for the purposes of the Act as "the union of one man and one woman for life to the exclusion of all others". It would, therefore, seem, at first sight, that only persons relying on monogamous marriages for their legitimacy can apply under s.19(1).

But from s.19(6) it is quite clear that neither a declaration of legitimacy under s.19(1) nor a declaration that a person is "a natural-born subject of Her Majesty", which is provided for under s.19(2) of the Act, is a matrimonial cause; for if such matters were regarded as such, it would not have been necessary for s.19(6) to be enacted.

The rule formulated by Lord Penzance in the English

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1. i.e. dealing with declaration of legitimacy.

case of Hyde v. Hyde,[1] which seems to have been the origin of s.2 of the Sierra Leone Matrimonial Causes Act and which, on the face of it, excludes jurisdiction in regard to polygamous marriages, has been confined to matrimonial reliefs; and despite the rule in Hyde v. Hyde, the English courts have shown themselves prepared to consider and determine questions relating to the validity of a polygamous marriage [2] and the legitimacy of the children of such marriages.[3] One may, therefore, submit that a child of a customary [4] or Mohammedan marriage who fulfils the other conditions imposed by s.19 can make an application under s.19(1). The expression "the provisions of the Act relating to matrimonial causes ... so far as applicable" used in s.19(6) would be interpreted to refer to the procedural aspects of the Act only and would not extend to the jurisdiction or lack of it of the High Court to hear petitions under s.19 where the marriage on which the petitioner relies for his legitimacy is a non-monogamous one.

B. NATIONALITY AND CITIZENSHIP

After dealing with the nationality and citizenship of a married woman,[5] we can now treat the two concepts as one and consider them from that viewpoint in relation to children.

The acquisition of Sierra Leone citizenship by children is one which has evoked much interest in Sierra Leone since Independence, culminating in the classic case of Akar v. Attorney-General

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1. (1866) L.R. I P & D 130.
2. Baindail v. Baindail [1946] P.122.
3. The Sinha Peerage Case [1946] 1 All E.R. 348 (H.L.) per Lord Mangham.
4. Note that under s.13(1) of the Local Courts, 1963, a Local Court has no jurisdiction over questions dealing with the status of an individual.
5. In Chapter 8.

of Sierra Leone.[1]

At first, the Constitution of Sierra Leone,[2] which came into effect on 27 April, 1961, provided by s.1(1) that:

> "every person, who, having been born in ... Sierra Leone, was on April 26th, 1961, a citizen of the United Kingdom and Colonies or a British protected person shall become a citizen of Sierra Leone on April 27, 1961;
>
> Provided that a person shall become a citizen of Sierra Leone by virtue of this subsection if neither of his parents nor any of his grandparents was born in the former colony or protectorate of Sierra Leone."

Similarly, s.1(2) conferred automatic citizenship on such a person born outside Sierra Leone before independence and whose father became or would, but for his death, have become a Sierra Leone citizen in accordance withthe provisions of s.1(1).

According to ss.4 and 5, a child born in or outside Sierra Leone, one of whose parents is a Sierra Leone citizen, becomes a citizen of that country by birth.

To resolve the conflict of dual citizenship, s.6 provided that an infant could have the citizenship of Sierra Leone and that of another country until he reached his majority when he would lose his Sierra Leone citizenship if he did not renounce the other.

Next, on 17 March, 1962, s.1(1) of the Constitution was amended by the Constitution (Amendment)(No.2) Act, 1962,[3] which inserted in s.1(1) after the words "every person" the words "of negro African descent". S.1(3) defined the phrase "person of negro African descent" as meaning:

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1. 1967-68 ALR S.L. 283 (S.C.), 381 (C.A.), [1970] AC.853 (P.C.).
2. P.N. 78 of 1961.
3. Act No.12 of 1962.

> "a person whose father and his father's father are or were negroes of African origin."

S.1(4) provided further that:

> "any person, either of whose parents is a negro of African descent and would, but for the provisions of subsection (3), have been a Sierra Leone citizen, may on making ... be registered as a citizen of Sierra Leone, but such person shall not be qualified to become a member of the House of Representatives or of any district council or other local authority unless he shall have resided continuously in Sierra Leone for twenty-five years after such registration or shall have served in the civil or regular armed services of Sierra Leone for a continuous period of twenty-five years."

The amendment was deemed to have come into operation on 27 April, 1961.[1]

The cumulative effect of these provisions is that whereas under the Constitution, as it stood in 1961 without an amendment, a child could become a citizen of Sierra Leone by birth if one of his parents or grandparents was born in Sierra Leone; with the amendment in 1962, there was a further qualification, that is, that his father or father's father should be a negro of African origin. As the amendment Act was retrospective, it reduced to "second-class" [2] citizens, falling within the provisions of s.1(3) of the 1962 Amendment Act, persons who were hitherto full and "first-class" citizens under the original provisions of the Constitution. Consequently, a child born in or outside Sierra Leone, one of whose parents is a citizen of Sierra Leone but having a father or father's father who is not a negro of African

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1. Ibid., s.1.
2. The expressions "first-class" and "second-class" were used by Counsel for the plaintiff in the Supreme Court to describe respectively persons automatically entitled to citizenship by birth and those who became citizens only on registration. The Act itself did not use the term.

origin no longer became a Sierra Leone citizen by birth.

There are many such people in Sierra Leone, and John Akar, the plaintiff in the aforementioned case, was one of them. In that case,[1] the plaintiff sought a declaration from the Supreme Court of Sierra Leone that the 1962 Amendment to the Constitution was ultra vires on several grounds, one of which being that the inclusion of the words "negro of African descent" made the Amendment a discriminatory piece of legislation on the basis of race.

The Supreme Court granted the declaration sought, but the Sierra Leone Court of Appeal reversed that decision. On appeal to the Judicial Committee of the Privy Council, it was held[2] that the added qualification for citizenship was essentially a racial one and, therefore, it contravened the Constitution and was invalid.

There is no doubt that the judgment was binding in Sierra Leone during the pre-Republican era. It is submitted that even though the country is now a Republic and a new Supreme Court within the country has now replaced the Judicial Committee of the Privy Council, the decision is still good law until it is reversed.[3]

Quite apart from the situation already discussed, s.2(1) of the 1961 Constitution places another stumbling block in the

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1. Akar v. Attorney-General of Sierra Leone, 1967-68, ALR S.L. 283 (S.C.); 381 (C.A.) [1970] A.C. 853 (P.C.).

2. Lords Morris of Borth-y-Gest, Hodson, Wilberforce and Sir Gordon Willmer (Lord Gest dissented).

3. In a tribute made to a deceased member of the Sierra Leone legal profession shortly after the country became a Republic, Justice C.O.E. Cole, the Chief Justice, said that Sierra Leone was no longer bound by decisions of the Privy Council. This assertion has no legal binding force, as it was merely an extra-judicial statement.

way of a child whose father or father's father is not a negro of African origin. In the case of a male child under 21 years of age, or a female under that age and unmarried, neither can directly apply to be registered as a citizen; it is the parent or guardian that must do so on their behalf.

The citizenship provisions of the 1961 Constitution are still in force and the provisions relating to the citizenship of children may be summarised as follows:-

A child becomes a citizen of Sierra Leone if one of his parents is a citizen of that country or if dead would have become a citizen had he not died. In addition, the child's father or paternal grandfather must be a negro of African origin. Secondly, where the father or paternal grandfather is not a negro of African origin, but the mother is and one of the parents is a Sierra Leone citizen, a parent or guardian can apply on the child's behalf to become a citizen of Sierra Leone. Thirdly, a child can during his minority possess dual citizenship, but unless he renounces the other on his reaching majority, he will lose his Sierra Leone citizenship. Finally, a child born in Sierra Leone does not become a citizen of that country if at the time of his birth his father enjoyed diplomatic immunity or was an enemy alien and the child was born in a place then occupied by the enemy.[1]

C. MAINTENANCE

(i) Legitimate children

At common law, neither the father nor the mother of a

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1. S.4(2)(a) and (b) of the 1961 Constitution.

legitimate child has a legal duty to maintain that child.[1] But the father has a moral duty,[2] and if the spouses are separated and the wife has custody of the child, she,[3] but not the child,[4] can enforce that moral obligation by pledging her husband's credit for necessaries supplied to her for the benefit of the child.

Statutory law in Sierra Leone has, however, imposed a legal duty on the parents to maintain their children in prescribed circumstances.

We shall first consider the relevant provisions of the Children and Young Persons Act.[5] Under s.23, where a child under the age of fourteen years resorts to crime as a result of neglect by the parents, if he is found guilty by a juvenile court of any offences punishable by a fine or compensation or costs are awarded against him at the trial, the court has power to order the parent of the child to meet the financial responsibility.[6] If the parent fails to discharge it, distress will be levied against him or her at the instance of the complainant.[7] Moreover, under s.30, if a child under the age of seventeen years is committed to the care of an institution, a fit person or an approved school, upon the application of the guardian, a court can make a contributory order against the child's parent for the maintenance of the child during the period that the child is in care.[8] Any amount

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1. Halsbury's Laws of England, 3rd ed., Vol.21, para.419, p.189.
2. Halsbury's, op.cit., para.420, p.189.
3. See the English case of Bazeley v. Forder (1868) L.R. 3 Q.B. 559
4. See the English cases of Shelton v. Springett (1851) 11 C.B. 452; Mortimore v. Wright (1840) 6 M & W, 482.
5. Cap.44 of the revised Laws of Sierra Leone, 1960.
6. S.23(1).
7. S.23(3).
8. See also ss.20 and 21 of the Prevention of Cruelty to Children Act, cap.31 of the revised Laws of Sierra Leone, 1960.

ordered by the court to be paid by the parent may be recovered by the person in whose favour it is made in the same manner as if it were a civil debt owing to him by the parent.[1]

It is not clear from s.23 and s.30 read together, which of the parents is liable for the maintenance of the child. In both sections, the word "parent" is used in the singular. Probably it is the parent who was liable to maintain the child at the time of the commission of the crime for which the child was found guilty or immediately prior to the giving of the child into the care of an institution, a fit person or an approved school. Thus, it is submitted, where the father and mother are cohabiting at the material time, it is the father who is the parent liable, because he has a duty to maintain the child at common law. In the event of the separation of the spouses and the child is in the custody of the mother, if the father fails to make adequate provision for the child's maintenance, he is again liable. But if, it is submitted, the father has provided necessaries for the child while in his mother's custody or if the father is dead, the mother ought to bear the responsibility of the subsequent unbecoming conduct of the child.

Secondly, under s.4 of the Prevention of Cruelty to Children Act,[2] if any person over the age of sixteen years, who has the custody, charge, or care of any child [3] neglects, abandons or causes the child to be neglected or abandoned in a manner likely to cause the child unnecessary suffering or injury to his health, that person is guilty of an offence. The section simply speaks of the person having "the custody, charge or care of the child".

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1. S.30(3).
2. Cap.31 of the revised Laws of Sierra Leone, 1960.
3. A "child" is defined by s.2 of theAct as a person under the age of sixteen years.

Therefore, while the child is living with his parents, since it is the father who has a common law moral duty to maintain the child, it is he who will be liable if the child is exposed to suffering or injury through neglect to provide maintenance for him. But as in the case of the Children and Young Persons Act, if the spouses are separated and the mother has the custody of the child, and the father has no obligation to maintain him, it is she who will be liable.

Thirdly, under the Matrimonial Causes (Amendment) Act,[1] if a father wilfully neglects to provide reasonable maintenance for the infant children of the marriage, upon the application of the mother, the High Court can order the father to make periodic payments to the mother. A wife, however, cannot enforce the child's right to maintenance against his father under this provision unless she has a ground to be judicially separated from her husband. Once such a ground is established, it is submitted, the court may make the order whether or not the spouses are still living together. This is the only statutory provision in Sierra Leone law whereby a wife can, during cohabitation, compel her husband to maintain the children of the family. Otherwise, she must exercise her common law right of pledging his credit.

Finally, in a petition for divorce, nullity or for restitution of conjugal rights, the High Court can order any of the parents to maintain the children of the marriage,[2] and may order property belonging to any of the spouses to be settled for the benefit of such children.[3] Under these provisions, in deserving cases, it is submitted, a maintenance order may be made against the mother of the children. An order for secured provision

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1. S.4 of Act No.16 of 1961.
2. Ss.22(2) and 24 of the Matrimonial Causes Act, cap.102.
3. Ibid., s.23.

for a child lasts only during the minority of that child, that is, when he is under the age of 21 years.[1]

(ii) Illegitimate children

At common law, neither the father nor the mother of an illegitimate child is liable to maintain him.[2] It was the parish in which the mother resided that was responsible for the child's maintenance.[3] Thus, the weapon of pledging the husband's credit for necessaries for the benefit of the children of the spouses which is used by the mother of a legitimate child is not available to the mother of an illegitimate child against the putative father. Any improvement in the lot of the illegitimate child is, therefore, absolutely statutory.

We must begin with the Act [4] for the Amendment and Better Administration of the Laws relating to the Poor in England and Wales, 1834. S.71 of this Act imposed upon the mother of an illegitimate child the obligation to maintain him until the child reaches the age of sixteen years, so long as the mother is unmarried or a widow. The obligation, however, lasts for the period of her lifetime and does not affect her estate on her death.[5] Furthermore, s.57 makes it an obligation on a man who marries a woman having a child at the time of the marriage to

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1. Ibid., s.24(3) proviso.
2. See dicta of Cockburn C.J. and Wightman and Blackburn J.J. in the English case of Ruttinger v. Temple (1863) 4 B & S 491, 495, 496.
3. See the case of R v. Hemlington in Note 2 to the English case of Simpson v. Johnson (1778) 1 Dougl. 9.
4. This Act applies in Sierra Leone as a statute of general application in force in England on 1 January, 1880. See s.74 of the Sierra Leone Courts Act, 1965, Act No.31 of 1965.
5. See Ruttinger v. Temple (1863) 4 B & S. 491.

maintain such child as part of his family, whether the child is legitimate or illegitimate, until the child is sixteen years of age, or until the death of its mother.

Next, it would seem that the provisions of the local Children and Young Persons Act apply to illegitimate children as much as they do to those that are legitimate, for s.2 defines a child simply as "a person under the age of fourteen years" and a young person as "a person who is fourteen years of age or upwards and under the age of seventeen years". What is doubtful, however, is the meaning of the word "parent" when used in relation to an illegitimate child. Probably, in this context, it means the mother, because according to s.27(1)(d) of the Act, a child or young person that may be entrusted to the care of an approved school or a fit person is one

> "found destitute, not being an orphan and having both parents or his surviving parent, or in the case of an illegitimate child or young person, his <u>mother</u>, undergoing imprisonment."

This section, it is submitted, impliedly recognises the duty of the mother of an illegitimate child to take care of him and to provide him with the necessaries of life and if she cannot perform that duty because she is incarcerated and the child becomes destitute, then the child can be sent to an approved school or given to a fit person. If a similar duty were imposed on the putative father the section would not have contained the word "mother" specifically and omitted the word "father".

The Prevention of Cruelty to Children Act [1] is more definite on the point at issue. Among the persons against whom a contribution order for the maintenance of a child can be made are a step-parent, a person cohabiting with the child's mother, and in the case of an illegitimate child, the child's putative

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1. Cap.31 of the revised Laws of Sierra Leone, 1960.

father.[1] Before such an order could be made, however, the person against whom it is intended to be made must be liable to maintain the child.

As will be seen shortly, in the case of a putative father, the liability to maintain his illegitimate child arises when there is an affiliation order against him in respect of that child. But the proviso to s.21 of the Prevention of Cruelty to Children Act seems to regard liability arising from some other source because the section states that when an affiliation order against the putative father has previously been made, the court will not make a contribution order against him unless it thinks it desirable in view of the special circumstances. An affiliation order apart, therefore, a putative father's liability to maintain his illegitimate child would be inferred from the Prevention of Cruelty to Children Act if the child is in the custody, charge or care of the putative father at that time when an offence under the Act is committed against the child.[2] This is the only reasonable inference that can be drawn from the provisions of the Act in the absence of an express statement stipulating when a person is liable to maintain a child, since a putative father has no common law duty to maintain his illegitimate child.

The clearest indication of the duty of a putative father to maintain his illegitimate child is found in the Bastardy laws,[3] but the initiative must be taken by the child's mother. Under

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1. Ibid., s.21.
2. The Act deals with offences committed against children under the age of 16 by persons under whose custody, charge or care the children are.
3. The English Bastardy Laws Amendment Act, 1872, which applies in Sierra Leone as a statute of general application in force in England before the 1st day of January, 1880, and the local Act to Increase Payments for the Support of Illegitimate Children, Act No.12 of 1961.

the English Bastardy Laws Amendment Act, 1872, the mother of an illegitimate child may apply to a Magistrate's Court for the father of the child to be adjudged the putative father and for an order that he should pay a weekly sum [1] for the maintenance, education and expenses incidental to the birth of the child, and if the child dies before the date of the order, for his funeral expenses.[2]

In order to succeed, the applicant must be a single woman. This term is not confined to an unmarried woman, but it includes a married woman who is reduced to the condition of a single woman by widowhood or otherwise.[3] Therefore, if the mother of the child has married since the birth of the child, and is at the time of the application living with her husband, she cannot apply under the Act for an affiliation order against the child's putative father.[4] The application must be made either before the birth of the child or within twelve months from his birth. But an application can be entertained outside this period if within twelve months after the birth of the child, the putative father has paid money for the child's maintenance.[5] Before the court can make an order, the applicant must give evidence which must be corroborated in some material particular by other evidence to the satisfaction of the court.[6]

Finally, the Law Reform (Miscellaneous Provisions) Act [7]

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1. The weekly maximum sum provided for by the Act is five shillings This has now been increased to thirty shillings by the Act to Increase Paymentsfor the Support of Illegitimate Children Act, No.12 of 1961.
2. S.4 of the Bastardy Laws Amendment Act, 1872.
3. See Roberts v. Leigh, 1964-66 ALR S.L. 80 at 83 per Cole J. adopting Lush J. in the English case of Stacey v. Lintell (1878) 4 Q.B.D. 291 at 294.
4. Ibid.
5. S.3 of the Bastardy Laws Amendment Act, 1872.
6. S.4, ibid.
7. Cap.19 of the revised Laws of Sierra Leone, 1960.

creates another avenue through which an illegitimate child can be maintained where any of his natural parents has been killed in an accident. S.3 of the Act enacts that for the purposes of claims under the Fatal Accidents Act, 1846-1864,

> "any illegitimate person shall be treated as being or as having been the legitimate offspring of his mother and reputed father."

D. CUSTODY

(i) Definition

The word "custody" used in connection with a child is capable of more than one meaning. Firstly, it may refer to the physical charge or control of a child and nothing more. For example, while my wife and I have an evening out we may leave our baby in the charge or control of a baby-sitter. All that the relationship between the baby and the baby-sitter involves is that the latter takes care of the former and protects him from immediate injury and harm. Secondly, custody may exceed physical control and include the power to administer reasonable chastisement to the child, to control his religion and education, and to protect, either physically or through the process of law, the child's person and proprietary interests against strangers. It also gives the custodian the right to the services of the child which, if invaded by a third party, gives rise to a cause of action at the instance of the custodian. Finally, it may entail the power to see the child temporarily and have the pleasure of his company. Thus, the father of a child may be empowered by a court of competent jurisdiction to visit or be visited by the child for, say, a day in a week, while the child is under the permanent care and control of the mother.

Our first example of "custody" amounts to a de facto con-

trol and it is more appropriate to call it "charge, care or control". The third may be correctly termed "access". It is the second that is equivalent to legal custody and it is in this context that the term will be used in this sub-heading and wherever we refer to custody of a child in a parent-child relationship.

(ii) Legitimate Children

Questions regarding the children's custody rarely, if ever, arise while the parents are cohabiting, and taking proper care of their children. As against strangers, both parents have the custody of their children. It is only when the spouses are separated or divorced or when the children are neglected and therefore need the protection of the state, that the issue as to who is entitled to their custody becomes relevant. We are, therefore, discussing the topic in this light.

At common law, the father had the right, as against the mother and other parties, to the custody of his legitimate children until they become of age,[1] except that in the case of a daughter, the right determined when she married under age.[2] The father could, however, be deprived of the child's custody, but not necessarily in favour of the mother, if he was a person unfit to remain in custody of the child or if his remaining so would be against the interest of the child.[3]

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1. i.e. 21 years.

2. See Halsbury's Laws of England, 3rd ed., Vol.21, para.425,p.192.

3. See the English case In re Taylor (an Infant), (1876) 4 Ch.D. 157 at 159 per Jessel, M.R. See also two other English cases: Ex parte Warner (1792) 4 Bro.C.C. 10 and De Manneville v. De Manneville (1804) 10 Ves.52. The father, in both cases, was deprived of the custody of his children. In the first case, the father who had no fixed residence was unable to provide for the children but wanted to force them out of a good school which they were attending and to abscond with them. In the other case, the father, a foreigner, was a profligate with drunken habits and he wanted to take the children out of the jurisdiction of the English courts. See also the headnote of the English case R. v. Grenhill (1836) 4 Ad & E 624.

As long as the father had custody, his right prevailed even after his death. Thus, he could by deed or will appoint a guardian of his legitimate children who were under age or unmarried (in the case of daughters),[1] and the guardian could act jointly with the mother of the children, or solely.

The right of the father has now been whittled down by statute law. There is no local enactment on the subject and so the relevant English statutes at the reception date [2] apply.

Firstly, by the Custody of Infants Act, 1839, the mother could be granted by the Court of Chancery the custody of the children under the age of seven, and beyond that age, access, for any period until the children reached their majority.[3] Under this Act, however, if the mother was proved in an action for criminal oonversation to have committed adultery she would be entitled to neither custody nor access.[4]

Secondly, the Custody of Infants Act, 1873, reserved the right of the mother to apply to the Court of Chancery for custody or access and altered the age of the child to 16 years up to which the mother could have the custody of the child.[5] Whatever happens after that age and before 21 is a matter for speculation. Probably, as the latter statutory developments in English law do not apply in Sierra Leone, the father again becomes entitled to

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1. This right was conferred by the Tenures Abolition Act, 1660, s.8
2. i.e. 1 January, 1880.
3. S.1 of the Custody of Infants Act, 1839.
4. Ibid., s.4.
5. The Custody of Infants Act, 1873, repealed the Custody of Infants Act, 1839. The latter Act did not, however, reserve the provisions of the former relating to depriving the wife of custody or access if she was guilty of adultery. That the commission of adultery is no bar in Sierra Leone to a mother having custody, see Spaine v. Spaine, 1964-66, ALR S.L. 249, 251-2 per Beoku-Betts J.

the same rights as under the common law.[1]

Sierra Leone case law, however, has adopted the principle that in deciding who is to have the custody of the infant children, regard must be had to the interests of the children.[2] It is these interests that are paramount. In arriving at a decision as to who should have custody, the courts have taken into consideration all the surrounding circumstances of the case, including the lives of the father and mother, both before and after the dissolution of the marriage, the age and sex of the child, its health and the effect on him on his being brought up in an environment separate from that which his brothers and sisters, if any, are living.[3] Where, after considering these interests, either parent is fit to have the custody, it is submitted, that the common law right of the father should prevail.[4]

Without resorting to court, the parents can agree as to who of the two should have a child's custody. Under the common law, such an agreement was void on grounds of public policy,[5] but now, by s.2 of the Custody of Infants Act, 1873, the agreement is valid, but not enforceable unless it is for the benefit of the

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1. The United Kingdom Custody of Infants Act, 1886, extended the right of the mother to have the custody of her children until they reach 21 years of age. Also, the Guardianship of Infants Act, 1925, enacted that neither the father nor the mother has a superior claim to the other in regard to the custody of their children.

2. See In the Matter of Zenebah Mustapha & Ors - Infants (1936) 3 S.L. Law Recorder 19; see the complete records of this case in the Supreme Court Records (1936) Vol.2, p.100. In the above case, the English case of In re Taylor (an Infant)(1876) 4 Ch.D 157 was considered and adopted. There is no local statutory law in Sierra Leone on the matter.

3. Spaine v. Spaine, 1964-66 ALR S.L. 249, 251-2 per Beoku-Betts J.

4. See Buck v. Buck, unreported, decided by the Supreme Court at Freetown on 24 March, 1924.

5. See Halsbury's Laws of England, 3rd ed., Vol.21, para.439, p.195.

infant child.

(iii) Illegitimate children

The reverse situation to that of a legitimate child existed at common law in regard to the custody of an illegitimate child. It was the mother and not the natural father that was entitled to it.[1] Note that Kasunmu and Salacuse [2] state, without citing an authority, that at common law neither the father nor the mother had the right to the custody of an illegitimate child. Professor James,[3] too, seems to subscribe to this view, relying on dicta of Maule, J. in Re Lloyd,[4] and of Ellenborough C.J. in R v. Hopkins.[5] It is submitted that there is nothing in these cases in support of Professor James's statement. In Re Lloyd, Maule J. was concerned with the interpretation of s.57 of the Poor Laws Act,1834, relating to the obligation of a man who married the mother of an illegitimate child to maintain that child as a member of his family. What Maule J. said was that according to this section, "the applicant's husband would appear to be the fit person" to have the child's custody. In the final analysis, however, neither contender had the custody because the child refused to go with either parent. In R v. Hopkins, it is conceded that Ellenborough C.J. expressed doubt whether the court could interfere on behalf of the mother of an illegitimate child whom the learned Chief Justice said "had no legal right to the person of the child." He said that that was a question of guardianship which

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1. See the English cases of R v. Hemlington reported in Note 2 of the case of Simpson v. Johnson (1778) 1 Dougl.7; Ex parte Anne Knee (1804) 1 Bos & Pul (N.R.) 148; R v. Nash (1883) 10 Q.B.D. 454.
2. Op.cit., at p.256.
3. Child Law, London, 1962, at p.37.
4. (1841) 4 M & G 547.
5. (1806) 7 East 579.

he was not deciding as it "belongs to the Lord Chancellor representing the King in Chancery". Surely, Professor James does not use "custody" as a synonym for "guardianship" which Ellenborough C.J. had in mind, for the Professor rightly says earlier,[1] that "custody" is narrower than "guardianship" and it is in the former context that he uses the word in the statement we are discussing. We concede that at common law a mother of an illegitimate child had no legal right to the guardianship of the child, otherwise it would not be possible for the court to deprive her of the child's custody when the child needed the state's protection. But she had right to the child's custody as against the putative father and strangers so long as the Chancery Court did not exercise its right of guardianship when the child was exposed to danger on its being left with her.

After this digression, we may now continue our main point and say that against the father, the mother's right of custody was absolute, even though from his circumstances, he might be better able to care for the child.[2] The mother, however, could be deprived of the child's custody only when there was apprehension that the child would be exposed to danger from being left with her.[3]

The modern trend of regarding the interests of the child as the paramount consideration when determining its custody appears to be the same for illegitimate as well as for legitimate

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1. Op.cit., pp.1-2.

2. Ex parte Anne Knee (1804) 1 Bos & Pul (N.R.) 148, 149 per Mansfield J.

3. Ibid.

children.[1] But before an illegitimate child can be given into the custody of a complete stranger where neither parent is suitable, the blood-relations on the mother's side must first be considered.[2] Though this principle emanated from the English doctrines of equity, it represents one of the few instances in which the general law takes cognizance of the social background of the Sierra Leone people; for, among the various tribes in the country, as will be seen in Chapter 19, an illegitimate child belongs to the family of its mother or a member thereof.

E. OFFENCES AGAINST CHILDREN AND THE VICARIOUS LIABILITY OF PARENTS FOR THE CONDUCT OF THEIR CHILDREN

A parent, guardian or someone in lawful control of a child has the power to control the child, but such power must be exercised cautiously and reasonably and must not be to the detriment of, nor result in danger, mental or physical, to the child. Sierra Leone law does not recognise a jus vitae necisque in dealings with children.

Power to control, however, entails the right to administer reasonable chastisement and anyone in lawful control of a child

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1. In re Clarke (an Infant) 1964-66 ALR S.L. 270 at 276. In this case, Bankole Jones, C.J. presiding over the Supreme Court of Sierra Leone, considered the child's interest as paramount and held that nobody has an absolute right to custody. In Anoff v. Fofanah 1967-68, ALR S.L. 357 at 359 where Dobbs J., also presiding over the Supreme Court of Sierra Leone, accepted the rule that the child's welfare is paramount, but said that it was not exclusive and that the wishes of the mother must prevail against those of the father, if having regard to her wishes the child's welfare is not impaired. It is submitted that the opinion of Dobbs J. is to be preferred.
2. See In re Clarke (an Infant) (supra) at p.276 per Bankole Jones J. adopting Jessel, M.R. in the English case of R v. Nash (1883) 10 Q.B.D. 454.

may administer such correction with impunity.[1] He is also duty-bound to look after the child properly and if he fails to discharge this duty and the child becomes destitute or falls into bad habits to the extent of contravening the law, the person under whose control the child is will bear the responsibility imposed by law.

In this sub-heading, therefore, we are concerned with the circumstances under which a parent, guardian or someone in lawful control of a child is criminally responsible for his dealings with the child, or is vicariously liable for the acts perpetrated by the child.

(i) Offences against children

The child is protected by the law even while it is in the womb of its mother. Thus, abortion is a crime carrying a maximum penalty of two years' imprisonment.[2] Similarly, it is an offence carrying the same penalty for anyone to conceal the dead body of a child, whether the child died before, at, or after its birth.[3] It is also the crime of infanticide punishable like manslaughter for a mother to cause the death of her child under the age of twelve months if, at the time of the act or omission that causes the death, she suffers from mental disturbance because she has not fully recovered from the effect of giving birth or because of the effect of suckling the child.[4]

Various other offences are created by the Prevention of

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1. See s.3 of the Prevention of Cruelty to Children Act, cap.31 of the revised Laws of Sierra Leone, 1960.
2. See ss.58 and 59 of the United Kingdom Offences against the Persons Act, 1861, which is in force in Sierra Leone as a statute of general application in England on 1 January, 1880.
3. Ibid.
4. Cap.28 of the revised Laws of Sierra Leone, 1960.

Cruelty to Children Act [1] in respect of acts and omissions against children under the age of sixteen years, and they may conveniently be classified into two divisions.

Firstly, those dealing with the physical and mental welfare of the child. It is an offence for any person over the age of sixteen years, who has the custody, charge or care of any child, wilfully to assault, ill-treat, neglect, abandon, or expose such a child or cause of procure such child to be assaulted, ill-treated, neglected, abandoned or exposed, so as to cause the child unnecessary suffering or injury to health, bodily or mental.[2] Neglect of the child will be inferred when the person liable to maintain it fails to provide adequate food, clothing, medical aid, or lodging for the child.[3] Moreover, if a child under the age of three years is found in bed suffocated to death and there is evidence that the child has been in bed with a person over the age of sixteen years who was drunk at the time, that person is deemed to have neglected the child.[4]

Secondly, there are offences dealing with the moral welfare of the child, and their gravity ranges in accordance with the age of the child. Thus, to have unlawful carnal knowledge of a girl under the age of thirteen years carries a maximum penalty of fifteen years' imprisonment,[5] while a similar offence against a girl between 13 and 14 years is punishable with imprisonment for a term not exceeding two years.[6] Indecent assault or an attempt

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1. Cap.31.
2. S.4(1).
3. S.4(1)(b).
4. S.5.
5. S.6.
6. S.7.

to have carnal knowledge of a girl under 14 years of age is also punishable with imprisonment not exceeding two years,[1] and so is procuring or attempting to procure any child, not being a common prostitute, or of known immoral character, to have unlawful sexual intercourse.[2]

A person in custody, charge or care of a child above the age of four years who allows the child to reside in or to frequent a brothel, commits an offence punishable by a fine and/or imprisonment for a period of not more than six months.[3] It is also an offence carrying a penalty of imprisonment not exceeding two years for such person to cause or encourage the seduction or prostitution or unlawful carnal knowledge of a child under the age of 16 years.[4] It is the duty of householders to prevent the presence of children in their premises for the purposes of unlawful sexual intercourse. If they fail in this duty, and it is proved that they induced or knew of the presance of the child for such immoral purpose, they are liable to the same penalty as a guardian who encourages the seduction of such children.[5] Similarly, any person who abducts an unmarried girl under the age of sixteen years from the possession and against the will of her father, mother or anyone under whose lawful control the girl is, is liable to the same punishment.[6]

Finally, a magistrates' court has power, on the complaint of any person that a girl under the age of sixteen years is, with

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1. S.9.
2. S.10.
3. S.8.
4. S.13.
5. S.11.
6. S.12.

the knowledge of her parents or guardian, exposed to the risk of seduction or prostitution, or of unlawful carnal knowledge or living a life of prostitution, to order her parent or guardian to enter into a recognisance to exercise due care and supervision in respect of the child.[1]

The above offences are additional to the general criminal liability for wrongs committed by one member of the society against another.

(ii) Vicarious liability of parents and guardians for the conduct of children

(a) Liability for Torts

As a rule, a parent is not vicariously liable for the torts of his or her children.[2] But where there is a relationship of master and servant between the parent and child or where the parent is negligent in the control of the child, he will be vicariously liable for the torts committed by the child.[3]

Vicarious liability arises in the case of master and servant relationship where the parent employs the child as his or her servant, and the child commits the tortious wrong in the course of his employment. Thus, for example, if the parent is a shop owner and employs his 18 year old son to sell the wares on the premises, if the son unlawfully assaults a customer while in the shop and during opening hours, the parent will be vicariously liable to the customer.

A parent is under a duty to control his child even when the child is not employed by him, a duty which he must carry out as a

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1. S.16.
2. Clerk & Lindsell on Torts, 13th ed., 1969, para.161, pp.100-1.
3. Ibid., para.161, p.101.

prudent parent. The discharge of this duty and the degree of care that is expected of the parent depend on the age of the child, its tendency to be mischievous, and its propensity to meddle with things that come its way.[1] Thus, if a parent is in possession of a dangerous object which he alone is able to control, he must not leave it lying about where the child can pick it up and cause harm to other people with it.[2] Similarly, he must not provide for the use of his child, objects that are intrinsically dangerous and likely to cause harm to other people without ensuring that the child will put such objects into proper use.[3]

The same principles apply in the case of a guardian and ward.

(b) Liability for contract

A parent or guardian is not, as such, liable for contractual obligations entered into by children under their care.[4] Where a parent or guardian, however, expressly or impliedly authorises a child to contract on his behalf, the parent or guardian will be liable on the contract if the child acts within the scope of his authority.[5] The position of the child in this respect is no different from that of an adult duly appointed as agent. In one respect, however, a father (but not a guardian) will be

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1. See Lord Esher, M.R. in the English case of Williams v. Eady (1893) 10 T.L.R. 41, 42.
2. See the Irish case of Sullivan v. Creed [1904] 2 I.R.317 where a father was held vicariously liable for injury caused by his 15 year old son who fired a gun which his father had carelessly left lying about loaded.
3. See the English case of Bebee v. Sales (1916) 32 T.L.R. 413 in which a father who had given his 15 year old son a present of an airgun was held liable for the son shooting another child with it after the father had been warned.
4. See Chitty on Contracts, General Principles, 23rd ed., 1968, para.437, p.206.
5. The child will be deemed to have acted as agent.

legally responsible for necessaries supplied to the child's mother, that is, if the necessaries are for the benefit of the child.[1] There is, strictly speaking, no vicarious liability for the contract if entered into by the child himself.[2] The father's liability arises only when it is the mother that contracts,and even so the marriage between the mother and father must be an existence and the parties must be cohabiting at the time that the mother pledges the credit of the child's father.

(c) Liability arising from crime

A parent or guardian in general has no liability for crimes committed by children under their care unless the crime is committed under circumstances whereby the child is deemed to have acted as an innocent agent of the parent or guardian.

Various liabilities are, however, imposed by the Prevention of Cruelty to Children Act,[3] and the Children and Young Persons Act.[4] For example, where a child under the age of seventeen years is charged with any offence, the court trying him may order his parent or guardian to attend the trial.[5] If the child is convicted and fined or ordered to pay compensation or costs, the court may, and if the child is under the age of fourteen years, must, order the parent or guardian to meet the financial responsibility unless the court is satisfied that the parent or guardian cannot be found or that he has not conduced to the

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1. See the English case of Bazeley v. Forder (1868) L.R. 3 Q.B. 559.
2. See the English cases of Shelton v. Springett (1851) 11 C.B. 452; Mortimore v. Wright (1840) 6 M & W 482.
3. Cap 31.
4. Cap.44.
5. Ibid., s.17.

crime through his neglect of the child concerned.[1] Before such order can be made against a parent or guardian, he must be afforded the opportunity of being heard, and where such opportunity has been given him, but he failed to attend court, the order will, nevertheless, be made in his absence.[2]

Finally, a parent or guardian of a child under the age of seventeen who has been committed to the care of an institution, fit person or approved school may be ordered by the court to contribute to the child's maintenance during the period of committal.[3]

F LOSS OF PARENTAL RIGHTS AND AUTHORITY

As we have seen, a parent cannot abdicate the duties imposed upon him in relation to his child without incurring some liability. In some cases where the parent is in breach of his duties, for example, the duty to take proper care of the child, a magistrate's court can take steps to prevent a repetition. Thus, if it is proved before that court that a parent has allowed his child or young person to be exposed to immorality, neglect or destitution, it can order the parent to enter into a recognisance to exercise due care and supervision in respect of the child.[4] In other cases, a breach of duty may give rise to the loss of parental rights and authority. Quite apart from the conduct of his parents, that of the child himself may result in the parent having to be deprived of his rights and authority over the child.

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1. S.23(1) of the Children and Young Persons Act, cap.44.
2. Ibid., s.23(2).
3. S.20(2), 20(3), 20(5) and 21 of the Prevention of Cruelty to Children Act, cap.31; and s.30 of the Children and Young Persons Act, cap.44.
4. S.16(1) of cap.31; s.27(1)(iii) of cap.44.

Finally, the right may be lost by operation of law.

We shall now examine in detail the circumstances under which parental rights and authority are lost.

(a) Voluntary loss

A parent can voluntarily surrender his rights and authority over and thus his responsibility for his child, but in order to be effective he must do it through a juvenile court.[1] It is quite inconceivable in Sierra Leone that a parent would want to lose legal custody of a child who is an asset to him and whom he is able to control. However destitute a Sierra Leone parent may be, so long as his child is properly behaved he would not like to part with him under circumstances which would deprive him of parental authority. Perhaps this is one reason for the absence of legal adoption in the country.

Nevertheless, where the parent is unable to control a child and has proved this before a juvenile court, the court may, after being satisfied that it is expedient to deal with the child in such manner and after ensuring that the parent understands its consequences, order that the child, if under the age of seventeen years, be sent to an approved school or be placed under the supervision of a probation officer, or a fit person, whether a relative or not, for a period not exceeding three years.[2]

(b) Involuntary loss

A parent may, against his will, be deprived of his rights and authority over his child under the following circumstances:

Firstly, where the parent commits an offence involving the

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1. See s.28 of cap.44.

2. Ibid.

child under the Prevention of Cruelty to Children Act.[1] In this case, the court trying the parent has power to order that the child be taken out of the custody, charge and care of the parent and be given to the care of a relative of the child or some other fit person for any period not exceeding the sixteenth birthday of the child.[2] The court will make the order if the parent is committed for trial or convicted or bound over to keep the peace for the offence.[3]

Secondly, where the character or situation of the child warrants it. This is regulated by the Children and Young Persons Act.[4] Under this Act, a child[5] or young person that has been found guilty of an offence other than homicide and is given a conditional discharge may be entrusted to the supervision of a probation officer whose duty is, subject to the control of the court, to visit or receive reports from the child, to see that the child observes the conditions of his recognizance, to report to the court on the child's behaviour and to advise, assist, and befriend the child.[6] During this period, although the child is under the de facto control of his parent, it is the court that has his legal custody. If the offence for which the child has been found guilty is not homicide or one punishable with imprisonment for more than seven years, the court may in addition or alternatively to a sentence, order the child to be given into the legal

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1. S.19(1) of cap.31.
2. Ibid
3. S.19(1) of cap.31 of the revised Laws of Sierra Leone, 1960.
4. Cap.44 of the revised Laws of Sierra Leone, 1960.
5. The word "child" used hereafter in this paragraph in relation to the Children and Young Persons Act, includes a "young person".
6. S.20 of cap.44 of the revised Laws of Sierra Leone, 1960.

cuatody of a fit person or institution, as directed by the court.[1] Similarly, where the child is guilty of an offence which, if committed by an adult will be punishable with imprisonment, the court may send the child to an approved school for any period not exceeding his eighteenth birthday.[2]

Furthermore, an administrative officer, police officer above the rank of sub-inspector, or any other authorised person, has power to bring a child before a juvenile court and the court can order the child to be sent to an approved school or committed to the care of a fit person, whether a relative or not, or an institution, until he is eighteen years of age or for a shorter period.[3] The court will make the order only when satisfied that one of the following facts has been established:[4] (a) that the child was found begging or receiving alms or in a place for that purpose; (b)that he was found wandering without a fixed residence and any visible means of subsistence or under no proper control of a parent or guardian; (c) that he is falling in bad associations, or exposed to moral danger,or beyond control; (d) that he is found destitute and at least one of his parents is alive, or being an illegitimate child, that his mother is undergoing imprisonment; (e) that the parent under whose care the child is, is of criminal and drunken habits; (f) that he is frequently in the company of a reputed thief, or a common or reputed prostitute; (g) that he is persistently ill-treated or

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1. Ibid., s.25.
2. Ibid., s.26.
3. But where the child is a female, the person into whose care she is committed can, with her consent, request the court to extend the period until she attains the age of 21 years. S.27(1)(ii) and proviso of cap.44.
4. These conditions are enumerated in s.27(1) of cap.44.

neglected by his parent; (h) that his place of residence is used for the purposes of prostitution or is otherwise living in circumstances calculated to cause, encourage or favour the seduction or prostitution of the child.

The third circumstance under which a parent may involuntarily lose his rights and authority over his child is when in matrimonial proceedings, the High Court rules that, in the interest of the child, another person or one parent as against the other, should have the custody of the child.[1]

Finally, a parent loses all rights and authority over a child when that child reaches his majority or marries under that age.[2]

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1. See s.24 of cap.102 of the revised Laws of Sierra Leone, 1960.
2. In Sierra Leone, an infant is still a person under the age of 21 and a person reaches his majority therefore at 21.

CHAPTER 13

NON-SUCCESSION UNDER CUSTOMARY LAW[1]

A. CONFLICT OF LAWS

Quite apart from the usual external conflict of law problem which arises when a Sierra Leonean dies domiciled in another country leaving property in Sierra Leone, or dies in Sierra Leone leaving property abroad, if he dies in Sierra Leone and leaves property there, there is a further problem of internal conflict of law with the country's pluralistic legal system in the law of succession. Here we shall address ourselves to this internal conflict and not to external conflict, as it is the former that is of peculiar significance to Sierra Leone family law of succession.

(i) Conflict in Testate Succession

The possible area of conflict is between customary law and the general law. Happily, Islamic law does not seem to come into the picture on this occasion because the Islamic law of testate succession would appear to be of no application in Sierra Leone.[2] A purported will under Islamic law would, therefore, have to comply with the provisions of the general law in order to be valid.

Conflict between customary law and the general law results from the fact that the formal requirements for a valid will are different in the two systems. Under customary law, a will

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1. In this Chapter, I have used much of the material in my article entitled "Inheritance to property in Sierra Leone" S.L.S.(N.S.) No.24, Jan. 1969, pp.2-25. The Chapter is, however, not only an enlarged form of that article, but also a revision of it since as a result of further research, I have had cause to modify or change some of the views expressed therein.
2. There does not appear to be any authority for the application of Islamic law of Testate Succession.

can be in any form, oral or written.[1] The essential requirements of such a will are that it must dispose of movable property only and must be proved by two credible witnesses.

Except with regard to registration of wills and the formal requirements of the wills of soldiers, there is no local enactment in Sierra Leone on testate succession. Therefore, the general law on the matter is the received English law, which is the Wills Act, 1837, as amended in 1852 and 1861. As regards form, the 1837 Act requires that a will must be in writing.

Because of the differences of formal requirements between customary law and the general law, a pertinent question that we must ask ourselves is whether a valid will made under customary law will be recognised as valid by the general law, despite the fact that such will does not comply with the formal requirements imposed by the general law? The immediate answer that will come to mind is a negative one. But s.2 of the Wills Amendment Act, 1861, introduces some ground for debate and the likelihood of a positive answer. That section provides that:

> "Every will ... made within the United Kingdom [2] by any British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal [3] estate be held to be well executed, and shall be admitted in England ... to probate, and in Scotland to confirmation, if the same be executed

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1. Written wills are of recent origin in customary law. On their validity, see Chapter 20.
2. The expressions "United Kingdom" and "British subject" must for the purposes of Sierra Leone law be understood to mean "Sierra Leone" and "Sierra Leone citizen" respectively as adopted law applies with local variations.
3. My emphasis. Note that in customary law, the disposition of movable property is valid. "Personal estate" as used in this section includes movables as well as chattels real. In our instant discussion, we are addressing ourselves to movable property only, as it is in respect of it that there is a possible conflict of law problem.

> according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made."

This section, it is submitted, permits a will executed in one part of the United Kingdom according to a form which may be different from that of English wills as provided for under the 1837 Act to be admitted to probate in England. As received English law applies to Sierra Leone with verbal and local variation, in the interpretation of this section it is necessary to have in mind the dual legal system in Sierra Leone and the formal difference between them in regard to the execution of wills. The section ought to be taken to mean that a will that is formally valid under one system of law in the country should be regarded as such under the other.

The effect of s.2 of the Wills AmendmentAct, 1861, with particular reference to Sierra Leone which we have just examined, has, from the reported cases, not yet been argued before and ruled upon by the Sierra Leone courts. The practice so far, however, has been to regard all wills that do not comply with the requirements of s.9 of the Wills Act, 1837, as invalid under the general law.

In Nigeria, however, where the same statutory provision applies and which operates under a legal system similar to Sierra Leone's, the Federal Supreme Court has come very near to deciding the point at issue. In the case of Apatira & Ors v. Akanke & Ors [1] a Muslim made a written will which did not comply with the requirements of the Wills Act, 1837, and it was sought to admit this will to probate. The argument of Counsel for the plaintiffs was that the will was valid, since, under Islamic law according

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1. (1944) 17 N.L.R. 149.

to the Maliki School, writing was not essential in order to validate a Muslim's will, much less the formalities of signing and witnessing. Ames J. accepted the argument of plaintiffs' counsel to the extent of the formal requirements of a valid will under Islamic law, but held that as the will was not intended by the testator to be a will made in accordance with Islamic law, because the testator made dispositions which were invalid under that law, the general law would not regard the will as valid since it did not comply with the formal requirements of that law. The case revolved on the intention of the testator. It would, therefore, appear from this judgment that if the will had complied with Islamic law in regard to the quantum of property disposable by will, the court would have upheld it even though it did not accord with the provisions of the general law.[1]

It is submitted that, even though Ames J. did not consider s.2 of the Wills Amendment Act when reaching his decision, he took the correct view of the law with regard to the fate of valid customary law wills which do not comply with the formal requirements of wills under the general law. If the testator intends his disposition to be a will under customary law and the will is formally valid under that law, it ought to be admitted to probate under the general law even though it does not comply with the general law provisions as to formal requirement. Our submission should, nevertheless, not be misunderstood as a plea that all valid customary law wills should be regarded as such by the general law. What is the important and deciding factor is the intention of the testator. If it was his intention, gathered from

1. Note: however, that in the resent case of Adesubokan v. Yunusa [1972] J.A.L. 82, the Supreme Court of Nigeria held that a Nigerian Muslim can by his will made in accordance with the Wills Act, 1837, dispose of the whole of his property and that the Wills Act supersedes Islamic law on the matter. Note further that in the instant case the testator purported to make a will in accordance with the Wills Act and not Islamic law.

evidence and the surrounding circumstances, to make a will under customary law, then our submission stands unshaken. But if there is any evidence that his intention was to make a will under the general law, non-compliance with the Wills Act ought to invalidate the will even though it conforms with the requirements of a valid customary law will. For example, reducing the will into writing will raise a presumption that the testator intended to make a will under the general law because, until recently, written wills were virtually unknown under customary law.

(ii) Conflict in Intestate Succession

One area for conflict is the legal division of the citizens of the country into native and non-native for the purposes of specific areas of the law, one of which is intestate succession regarding customary law as the personal law of natives, while the general law is the personal law of the non-natives, and the application of one's personal law to determine the descent of one's estate on intestacy. The problem is high-lighted when one marries under a system of law quite different from that of one's personal law and assumes a manner of life quite distinct from what is known by one's personal law; for example, an educated native contracting a marriage under the Christian or Civil Marriage Act and living a life in accordance with Western civilization.

Another area is the application of Islamic law to the distribution of the property of a Muslim, single or married in accordance with Muslim rites at the time of his death, without any further qualification as to whether the Muslim should be a native or non-native - to toe the line drawn by the general law.[1] Insofar as a native Muslim is concerned, there is a conflict

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1. S.9(1) of the Mohammedan Marriage Act, cap.96.

between this provision and the general law which provides that customary law should determine the distribution of the property of a native who dies intestate.[1]

We shall now discuss these problems in relation to marriage and we shall begin with statutory marriage contracted in accordance with the Christian and Civil Marriage Acts.

Under s.26 of the Christian Marriage Act, a marriage to which one of the parties is a native does not have any effect on the property of that native; and if both parties are natives the property of each is subject to the customary law of his or her own tribe. Thus, in either case the property of a native party to the marriage devolves on his intestacy in accordance with his customary law and that of the non-native under the general law. This conclusion is inherent in the Administration of Estates Acts also.[2]

The Civil Marriage Act has no provision similar to s.26 of the Christian Marriage Act. Probably, as before the Civil Marriage (Amendment)(No.2) Act, 1965, it was impossible for non-natives to contract marriage under the Civil Marriage Act, it would have been superfluous or unnecessary to insert in the Act a section relating to property rights of natives. But the 1965 Amendment now enables a native to enter into marriage in accordance with the Civil Marriage Act. The amendment, nevertheless, does not also make any provision in respect of the properties of the parties to the marriage. This may be an oversight. Presumably, the intention in the Civil Marriage Act (as amended) is the same

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1. S.43(1) of the Administration of Estates Act, cap.45 and s. 13(1) of the Local Courts Act, 1963, Act No.20 of 1963.

2. This Act provides for the Administration of Estates. S.43(1) specifically provides that the estates of a native shall be distributed in accordance with customary law.

as it is in s.26 of the Christian Marriage Act. It is a moot point whether, since the Christian Marriage Act and the Civil Marriage Act are to be read as one,[1] s.26 of the Christian Marriage Act should apply automatically to marriages contracted under the Civil Marriage Act as well, now that natives can contract marriage under the Civil Marriage Act. To remove doubt, however, it is desirable to have in the Civil Marriage Act a section similar to s.26 of the Christian Marriage Act. In the absence of such provision, one must look for guidance to s.43(1) of the Administration of Estates Act and s.13(1) of the Local Courts Act insofar as succession is concerned. The overall effect of these sections is that a native's property must on intestacy be distributed in accordance with customary law.

One may, therefore, safely conclude that a marriage under the Christian or Civil Marriage Acts has no effect on the property of a native and its distribution if that native dies intestate. The applicable law is the customary law of the tribe to which he belongs. Thus, if such marriage is between a native and non-native, on their death intestate, the native's property will devolve under customary law and that of the non-native in accordance with the general law. To put the whole process graphically, if X, a Mende man, marries Y, a Creole woman, under the Christian Marriage Act, on X's death intestate his property is distributed in accordance with Mende customary law, and if Y dies intestate her property devolves and is distributed under the general law.

Simple and straightforward as this may appear, it is a source of serious problems and injustice of the highest magnitude.

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1. See s.1 of the Civil Marriage Act.

First, under Mende law, Y would not be able to claim an interest in the estate of her deceased husband because she herself is under that law regarded as property and passes to a male relative of the deceased just like any other property. On the other hand, if it is Y who dies intestate, survived by X the whole of her property goes to X under the general law. The same hardship faces the Creole man who marries a native woman under the Christian or Civil Marriage Acts without first going through the formalities imposed by the customary law of the tribe of the wife. If the wife dies intestate, the husband cannot legally claim her property under customary law, as he is not regarded under that law as the lawful husband. But if the husband dies intestate, his wife, being regarded by the man's personal law - the general law - as a lawful wife, is entitled to at least one-third of the residue of his estate.

Perhaps these hardships can be circumvented in one of two ways: (a) by the introduction of special rules of succession to meet the case of inter-marriage; (b) by making a will.

With the present state of the law, however, the only feasible and practical solution is the making of a valid will by either party and the consequent prevention of intestacy. Presumably, this was anticipated by s.26 of the Christian Marriage Act which further provided that nothing in the section shall have the effect of preventing the parties to a marriage under the Act from disposing by legal procedure and means, of their respective properties after their respective deaths.

Next, we shall consider the effect of a Mohammedan marriage. Before we do so, however, we must investigate what the applicable law is when a native Muslim domiciled or permamently resident in the Western Area, dies intestate, for there seems to

be a conflict between s.9(1) of the Mohammedan Marriage Act,[1] and s.43(1) of the Administration of Estates Act.[2]

S.9(1) of the Mohammedan Marriage Act, on the one hand, makes Islamic law the applicable law for the distribution of the estate of a Muslim in the Western Area who dies intestate. The section does not specify whether the deceased should also be a native or non-native. As we have already pointed out, this section applies to natives as well as non-natives who have their permanent residence in the Western Area.

S.43(1) of the Administration of Estates Act, on the other hand, enacts that,

> "Notwithstanding anything contained in this [Ordinance] [Act], where any native dies intestate leaving assets in Sierra Leone which are not within the jurisdiction of any [Native][Local] Court [3] the distribution of such assets ... shall be according to native law and custom."

It is submitted that s.9(1) prevails over s.43(1) because s.43(1) is to be read subject to any other law in force which, for our present purpose, is s.9(1). This construction is not expressly borne out by either section but from other provisions of the Administration of Estates Act. For example, when it was intended that s.41 of that Act should prevail over any other law, the opening part of it specifically has the words "notwithstanding anything contained in this or any other [Ordinance] [Act]. The words "any other Ordinance" are absent in s.43(1).

Our submission is also justified by obiter dicta of Smith C.J. in Re Allie (dcd.)[4] to the effect that Islamic law

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1. Cap.96.
2. Cap.45.
3. Assets not within the jurisdiction of any local court are those which a native dies leaving in the Western Area.
4. 1950-56 ALR S.L. 338, 341.

could apply to the distribution of the estate of a native Muslim.

Having concluded that Islamic law is the applicable law when a Muslim, native or non-native, permanently resident in the Western Area, dies intestate, we must now investigate the effect of marriage.

It frequently happens in Sierra Leone for a native Muslim already married to four women in accordance with Muslim rites to exceed that number and marry other women in a manner recognised by customary law, or,conversely, for a native already married to four women in accordance with customary law later to embrace Islam and enter into further Muslim marriages with other women.[1]

In such a case, a special problem arises as to the applicable law on the death of the husband intestate. Is he to be regarded as married under Islamic law or customary law or both? Does marriage under one law affect marriage under the other?

If we are correct in our submission that Islamic law supersedes customary law so long as the deceased was at his death a Muslim, then only the Muslim marriages will be recognised for the purposes of intestate succession, in which case only the wives thereof will be treated as such for the distribution of the estate. But the children of the customary marriages will succeed because, as we have argued earlier, the non-recognition of the marriage of its parents by one law ought not to determine the legitimacy of the child for the purposes of succession.

In this connection, a wife customarily married to a native Muslim in the Western Area must beware. If she intends to succeed to the property of her late husband, she must also contract

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1. The stricter Muslims, however, regard such conduct as reprehensible and that the so-called Muslim who does this only pays lip-service to the religion.

a valid Mohammedan marriage with him in order to convert her prior customary marriage into a Muslim one.

From our instant discussion we may, therefore, conclude that unlike the other two forms of statutory marriage, the effect of a Mohammedan marriage contracted in the Western Area is that irrespective of the personal law of the parties they come under a new legal regime at least for the purposes of intestate succession. In the light of this consideration for a Mohammedan marriage based on religion, perhaps one can advocate a similar treatment for Christian and Civil marriages having regard to the manner of life of the parties concerned.

When two persons marry in church or in a registry, be they native or non-native, during their lives their legal relationship, insofar as the marital status is concerned, is governed by the general law. Thus, matrimonial reliefs such as maintenance, divorce, judicial separation and settlement of property on the dissolution of the marriage all come within the purview of the general law. In this regard, one must ask why should a different approach be taken to their marriage in respect of property rights on their death intestate?

The situation under review in which a person normally subject to customary law contracts marriage under statute is not one that is peculiar to Sierra Leone alone. In Nigeria and Ghana, a similar situation had existed. Formerly, in Nigeria, judicial opinions supported the proposition that a Christian marriage relieved the parties to it of the burdens and benefits, if any, of customary law.[1] Later, at least for intestate succession

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1. See Cole v. Cole (1898) 1 N.L.R. 15 at 22, where Brandford Griffith J. said "In fact a Christian marriage clothes the parties to such marriage and their offspring with a status unknown to native law". See also Adegbola v. Folaranmi & Ors, (1921) 3 N.L.R. 81 at 84 per Combe C.J. and Coker v. Coker 17 N.L.R. 55 at 57, 58 per Brooke J., both approving Cole v. Cole.

purposes, statutory law followed this view, for s.36(1) of the Nigerian Marriage Act [1] provided that customary law of intestate succession was inapplicable to the estate of a person who married under the Marriage Act. Ghana took what appears to be a more realistic view to intestate succession in its Marriage Act,[2] s.48 of which stipulated that if a person subject to customary law contracted an Ordinance Marriage, on his death intestate, two-thirds of his residuary estate would descend and be distributed in accordance with English law, whilst the remaining one-third goes under customary law. This section, therefore, takes into consideration both the marital status and personal law of the individual concerned. By adopting such a line, the Ghana Marriage Act subsumes that by contracting an Ordinance marriage one opts, though not wholly, for the application of the general law to his proprietary interests.

As we have said repeatedly earlier, one's mode of marriage is a very important, though not the only, factor in determing what law should govern his activities for the rest of his life. Apart from the usual legal incidents of the marriage which should be regulated by the law under which the marriage is contracted, the determination of proprietary rights, on his death just as in his lifetime, should pay regard to his manner of life. Thus, the self-acquired property of a native married in accordance with the Christian or Civil Marriage Act and who does not live a native form of life, should devolve under the general law. Property to which he might be entitled as a member of a corporate family group, for example, family land held in common with his tribal folk, should devolve under customary law. Similarly, for a native married in accordance with the Act, but who leads a

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1. Cap.115 of the revised Laws of the Federation of Nigeria and Lagos, 1958.
2. Cap.127 of the revised Laws of the Gold Coast, 1951.

native form of life thereafter, part of his self-acquired property should devolve under the general law and the other part under customary law. Such an arrangement would safeguard the interest of the wife in her husband's property which is recognised by the general law, but non-existent in some customary laws. As the non-customary marriage, to some extent, changes the status of the wife, that change should reflect in her proprietary rights.

B. SUCCESSION UNDER THE GENERAL LAW [1]

(1) Testate Succession

Who can make a Will?

S.3 of the Wills Act, 1837 reads:

> "every person can dispose by will of any real estate or personal estate which he shall be entitled to either at law or in equity, at the time of his death and which if not so disposed of, would devolve upon the heir at law or the customary heir of him if he became entitled by descent, of his ancestor or upon his executor or administrator."

The preceding section speaks of "every person" which means that anybody can make a will under the Act.

Marriage, however, has effect on wills. Firstly, by s.18 of the Wills Act, 1837, every will made by a man or woman is revoked by his or her marriage. The only exception to this rule is a will made in exercise of a power of appointment when the property thereby appointed would not, in default of appointment,

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1. It is not intended here to examine in detail the whole corpus of the law of succession. For this, reference should be made to the standard works. What we hope to do here is to give merely an outline, confining our discussion to the law as it relates to the family.

pass to the testator's heir, executor or administrator, or the person entitled as his or her next-of-kin under the Statute of Distribution, 1670.

Secondly, married women have not always had full testamentary capacity to dispose of their freehold estate by will, and the present law is not very clear about such dispositions made by women married before 1933. In order to understand the present law, we must begin with the pre-1933 law.

The English Statute of Wills, 1542,[1] invalidated any will disposing of land made by a married woman. In Sierra Leone,with the passing of the Intestates Estates Act, 1887,[2] the strict rule imposed by the 1542 Act was relaxed and a married woman became capable of disposing by will of any property, real or personal, which became her "separate property" under the Married Women's Property Act, 1875, provided that such will was acknowledged by her before a Supreme Court judge.[3] The proviso was removed by the Intestates Estates (Amendment) Act, 1938,[4] and after that date, a married woman had full testamentary capacity to dispose by will of any property belonging to her. But whether this rule is applicable to a woman married before the Imperial Statutes (Law of Property) Adoption Act, 1932, was a question which arrested the attention of the Supreme Court at Freetown in the case of In re Hamilton (decd).[5] In that case, a testatrix married in 1908, left her husband the following year and lived apart until she died in 1945, survived by her husband. In the same year,

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1. S.14.
2. Act No. 8 of 1887.
3. S.50.
4. S.7 of Act No.23 of 1938.
5. 1950-56 ALR S.L.1.

she bought freehold land out of money to which she was entitled as her "separate property". She made a will in 1944 without the acknowledgment of a judge of the Supreme Court and by it disposed of the said property. Beoku-Betts J. held that the woman was competent to dispose of the property as it was her "separate property" without requiring the acknowledgment of a Supreme Court judge. The learned trial judge rightly based his decision on grounds which may be summarised as follows: Firstly, before 1933 a married woman could dispose of by will of her "separate property"; secondly, the condition for acknowledgment before a judge in respect of such will was removed in 1938 after which she made her will; thirdly, though the Imperial Statutes (Law of Property) Adoption Act, 1932, was retrospective, its effect could only have been relevant if a woman married before that date had disposed of freehold property thereafter, such property not being her "separate property".

It would appear that if the property in question were not "separate property", Beoku-Betts J. would have been prepared to hold that the disposition by will made by a married woman of such property after 1933 would be subject to the pre-1933 property law.

But a later case, In re Bright (decd),[1] seems to blur the distinction between "separate estate" and non-separate estate. The facts of this case have already been stated, but in the interest of clarity, it is necessary to repeat them. Dr. and Mrs. Bright married in 1911 and lived together until 1932, when Mrs. Bright left him. At the time of separation, Mrs. Bright was seised of the freehold estate in two houses which she devised by will and died in 1956. The question for our present purpose was whether she could make a valid testamentary disposition of

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1. 1957-60, ALR S.L. 102.

the said property. In the Supreme Court, Bairamian C.J. held that she could, on the ground that the Imperial Statutes (Law of Property) Adoption Act, 1932

> "did not distinguish between women who married before 1933 and women who married after January 1st 1933 (or between property acquired before and property acquired after that date)."

On appeal, the West African Court of Appeal,[1] without addressing itself to the question whether or not the property concerned was "separate property", held that a proper disposition was made of the property because, in the words of Hearne, Ag.P.:

> "In Sierra Leone, testamentary capacity has been conferred on a married woman by legislation. By virtue of S.4 of the Imperial Statute (Law of Property) Adoption [ordinance][Act] the deceased could have made her will in 1956."[2]

By holding this view, the West African Court of Appeal has ruled that a woman married before 1932 can make a proper disposition by will of her property, whether "separate" or not or whether acquired before 1933 or after, so long as the disposition takes effect after 1932.

According to the doctrine of the hierarchy of courts, Bright's case is of superior authority to Hamilton's case, as the former was decided by a higher court than the latter. But we must repeat here a former submission which we made in connection with the retroactive nature of this Act [3] that a retroactive operation is not to be given to a statute so as to impair an existing right.

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1. Bright v. Bright Executors, 1959-60 ALR S.L.182.
2. Ibid., pp.186-7.
3. Chapter 9, pp. 305-306.

Requirements of a valid will

(a) Formal requirements

A will purported to take effect under the general law must comply with the requirements of the Wills Act, 1837, as amended. Under the Principal Act, the will must be in writing, signed at the foot or end by the testator or someone on his behalf and by his direction, and his signature must be attested by at least two witnesses [1] present at the same time, and the attestation must also be made in the presence of the testator.

The Wills Amendment Act, 1852 did away with the condition that the will must be signed at the foot or end and provided that the will shall be deemed to be properly executed if the signature is

> "placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will."[2]

A further amendment in 1861 altered the common law rule that the law governing the formal validity of a will which disposes of movable property is the lex domcilii of the testator at the time of his death. It enacted that a will made outside the United Kingdom [3] by a British subject is, as regards personal estate, properly executed whatever be the domicile of the testator at the time that the will is made or at the time of death, provided such will complies with the forms required either by the

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1. A will of a soldier in the army in Sierra Leone disposing of personal property may be attested by only one witness if such witness is an army officer or a Government medical officer in theWestern Area. See s.99(1) of the Royal West African Frontier Force Act, cap.179, of the revised Laws of Sierra Leone, 1960.

2. S.1.

3. The expressions "United Kingdom" and "British subject" must for the purposes of Sierra Leone law be understood to mean "Sierra Leone" and "Sierra Leone citizen" respectively.

law of the place where it was executed, or by the law of the place where the testator was domiciled when the will was made or by the law in force in that part of Her Majesty's dominions where the testator had his domicile of origin.[1] Furthermore, s.2 of the Amendment Act, 1861, provided that a will disposing of personal property is deemed to be properly executed if it complies with the forms required by the laws in force in that part of the United Kingdom where it was made.

We have already investigated, when discussing conflict of law, the effect of s.2 of the 1861 Act on wills properly executed in accordance with customary law. Here, we need, therefore, only to point out that under s.1 of the Amendment Act, a will disposing of personal property which is made outside Sierra Leone and is properly executed under the law of the country where it is made will also be deemed to be properly executed under the general law of Sierra Leone.

(b) Requirement with respect to capacity

Capacity to make a will under the general law is governed by both the common law and the Wills Act, 1837.

Under the common law, the testator must have a sound and disposing mind and memory at the time that he makes the will. The position was put quite vividly by Cockburn C.J. in the English case of Banks v. Goodfellow [2] when he said:

> "(The testator) ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who

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1. S.1 of the Wills Amendment Act, 1861.

2. (1870) L.R. 5 Q.B. 549, 567, quoting with approval the common law as stated by the United States Circuit Court for the district of New Jersey, in the case of Harrison v. Rowan, 3 Washington, at p.585.

> are the object of his bounty, and the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed, and the disposition of his property in its simple forms."

The important element, therefore, is the mental state of the testator at the time of the making of the will. In this connection, bodily health is irrelevant unless it also affects the testator's ability to understand the nature of his act.[1]

The Privy Council in the case of Christian v. Intsiful [2] also decided that old age, blindness or illiteracy would not amount to incapacity if the testator understood the document that is purported to be his will.[3]

Infancy also renders a person incapable of making a will for s.7 of the Wills Act, 1837, provides that a valid will can be made only by a person of 21 years of age or more. S.11 of the Act, however, seems to exempt soldiers in actual military service from the age requirement and they can make valid testamentary dispositions of monies which they earn in respect of services, even though they are under age.

The burden of proof of testamentary capacity is on the person propounding the will [4] and once that burden has been discharged

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1. Ibid.
2. (1953) 13 W.A.C.A. 347. See especially p.348, 349 per Lord Poster.
3. Quaere, whether verification of a document written for an illiterate person as required by the Illiterate Protection Act, cap. 104 of the revised Laws of Sierra Leone, 1960, is sufficient proof that the illiterate understood the nature of the document. It is submitted that in the absence of a vitiating element such as fraud, duress, undue influence, mistake or misrepresentation, it ought to be regarded as conclusive proof.
4. See Inniss and Stevens v. Wray, (1963) 3 S.L.L.R. 44, 45 per Bonkole Jones Ag.C.J., Beckley and Beckley v. Aubee and Faulkner 1968-69 ALR S.L. 190, 198 per Macaulay Ag.J.

in the absence of any vitiating element to avoid it, the High Court will give effect to the will and grant probate.

What property may be disposed by will?

We may yet again refer to the relevant provisions of s.3 of the Wills Act, 1837, which states that property which a person can dispose of by will is "any real and personal estate which he shall be entitled to either at law or in equity". This section must be read subject to the system of land tenure in Sierra Leone.

A non-native citizen can acquire property both real and personal in Sierra Leone except that in the case of land in the provinces, the maximum interest he can acquire in it is a leasehold estate not exceeding 50 years.[1] Whatever interest in provincial land he acquires, a non-native cannot devise it by will unless the disposition was specifically provided for in the document creating the interest.[2]

A native, on the other hand, can acquire any property, real or personal, anywhere in the country. Thus, he can acquire the freehold estate in land in the Western Area and can dispose of it by will. As he can also acquire "a bundle of rights"[3] over land in the provinces more than that permitted to a non-native, he can also dispose of them by will. In this case, however, a distinction is made between "self-acquired" property and "family"[4] land. The former he can devise but the latter not

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1. S.4 of the Protectorate Land Act, cap.122 of the revisedLaws of Sierra Leone, 1960.
2. Ibid., s.3(3)(e).
3. It is preferable to use the term "bundle of rights" rather than absolute interest because although for every purpose a native has rights of an absolute owner over self-acquired land in the provinces, his rights of alienation are limited.
4. "Family" used in this context means a corporate and not a nuclear family.

because "family" property does not belong to him absolutely.[1]

(ii) Intestate Succession

The general law of intestate succession has a remarkable variation depending on whether the deceased is a native or non-native.

The law in regard to non-natives

When a non-native dies intestate, a next-of-kin may apply to the High Court for a grant of letters of administration. If he is granted he can administer the estate within a month from the grant. Alternatively, upon receiving notice that a person has died intestate, the Administrator-General must serve on the widow, widower or next-of-kin a written notice signed by him and must, in three weekly publications in the Sierra Leone Gazette or in any other public paper, invite such next-of-kin to show cause within one month why he, the Administrator-General, should not administer the estate.[2]

At the expiry of a month without a satisfactory cause being shown to the High Court, the Administrator-General must apply to the court for a grant of letters of Administration.[3] When these are granted, he must make an inventory of the estate, file

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1. Compare the decision of the Supreme Court of Nigeria in the case of Adesubokan v. Yunusu [1972] J.A.L. 82 in which the Court held that a disposition of the whole of the testator's property under the Wills Act, 1837, took precedence over the Islamic law rule in accordance with the Maliki School that a testator cannot dispose of more than 1/3 of his property to non-heirs. In Nigeria, Islamic law applies as customary law. In the instant case, the property which the testator disposed of was his absolute property. Had the property been "family" property, such as the one with which we are concerned, he could probably have not disposed of it under the rule nemo dat quod non habet. See s.36(1)(b) of the Nigerian Marriage Act, cap. 115.
2. S.10(1) Administration of Estates Act, cap.45 of the revised Laws of Sierra Leone, 1960.
3. Ibid., s.10(2).

it in court and keep an account of all his receipts, payments and dealings with the estate. He must then sell the personal estate in order to meet the debts and funeral expenses of the deceased. If the personal estate is insufficient to meet these demands, he must then, either with the consent of the persons beneficially interested in the estate or by order of the court, sell the real estate.

After reimbursing himself for all reasonable expenses incurred in the administration of the estate and paying its creditors, he must pay the persons legally entitled on intestacy in accordance with the following table:[1]

(a) where the deceased left a widower he gets the residue of the estate;

(b) where the deceased left a widow and children, the widow receives one-third of the residue and the children or issue the remaining two-thirds which they share among them equally per stirpes;

(c) where there are children or issue but no widow the children and issue take the whole between them per stirpes;

(d) where there is a widow, but no children or issue, one half of the estate goes to the widow, the other half to the deceased's nearest relatives sharing equally between them whether they are of full or half-blood;

(e) Failing a widow or children or issue, the father gets the whole estate;

(f) failing a widow or children or issue, the mother, brothers and sisters are equally entitled to the residue, no distinction being made between them on the grounds of the extent of blood relationship. The child of a brother or sister who

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1. This table is a summary of the second schedule of the Administration of Estates Act, cap.45.

predeceases the intestate is entitled to his parents' share provided the intestate is survived by the mother or a brother or a sister;

(g) failing a brother, sister or child of a brother or sister, the mother is entitled to the whole residuary estate;

(h) if the deceased left no mother, the brothers and sisters take equally per stirpes;

(i) where there is no next-of-kin,[1] the residue goes to the Crown as bona vacantia.

With respect to personalty, the rules of distribution tabulated above are essentially a carbon copy of the English Statute of Distribution, 1670, which regulated the mode of distribution of personal estate of an intestate dying in England before 1925. But the Sierra Leone Administration of Estates Act stretches the pre-1925 English rules further by dealing with real estate in the same manner as personal estate.

In addition to the provisions of the Second Schedule of the Administration of Estates Act, s.29(1) arranges for the disposition of an intestate's property where he leaves no widow or widower or next-of-kin. Under this section, the Administrator-General must put the residuary estate into an "Intestate Fund" and must call upon all persons claiming to be interested in such estate "on legal, equitable or moral grounds, to present their petitions to the Court." Every such petition must state the place of residence of the claimant and the ground upon which,

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1. The term "next-of-kin" is defined by s.2 of cap.45 as including "any person other than a widow, or widower of a deceased person who by law would be entitled to letters of administration in preference to a creditor". Presumably, the term includes those persons other than the ones excluded who would be entitled to distribution under the Second Schedule of cap.45. See the case of In the Estate of Mopeh Palmer (dcd.), (1961) 1 S.L.L.R. 71, where Benka-Coker C.J. held that a person entitled under (f) or (g) of the table above was next-of-kin.

and the description of the estate in respect of which the claim is made,[1] and the petitioner must verify his claim by evidence to the satisfaction of the court.[2] The court will then make an order allotting the residue to the petitioner in a proportion as the court thinks fit.

The courts seem to have interpreted these provisions by not making blood relationship a qualification for entitlement but the degree of dependence the applicant had on the deceased. Thus, in Re Thomas (dcd),[3] out of six applicants who petitioned the court to be allotted shares of the estate of the intestate under s.29 of the Administration of Estates Act on the ground that they were "all petty traders and need the amount lying to the credit of the estate to enable them to carry on their trade and to maintain themselves", Kingsley J. allowed the claims of only two, whom he found to be in sincere and dire need of the money because they had presumably been dependent on the deceased during her lifetime. The learned judge, however, dismissed the claim of one on the ground that though a blood relation of the deceased, she was not dependent upon her; the claims of two, because their evidence was not believed; and the claim of a fourth because she failed to comply with s.29(4) of the Act.[4]

Similarly, in the Estate of Jacob Wyse,[5] the High Court

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1. S.29(4).
2. S.30(1).
3. 1950-56 ALR S.L. 188.
4. Note that in the course of his judgment, Kingsley J. adopted with approval the case of In Re Clarke (decd), Supreme Court, Civil Case No.35/40, unreported, in which Graham Paul C.J. dismissed the petitions of persons who merely averred that they were the lawful brothers of the deceased and nothing more, but upheld the claim in one case where there was no blood relationship but "special circumstances".
5. Unreported, decided by the Supreme Court at Freetown on 12, February, 1957.

upheld the claims of a paramour of the deceased and his niece, both of whom had obtained financial assistance from him during his lifetime and who were left destitute on his death.

The law in regard to natives

Where a native dies leaving estate in the provinces, its administration and distribution are governed by customary law.[1] But if he dies and leaves property in the Western Area, it is administered in the same manner as in the case of a non-native. But the distribution of the property is again in accordance with customary law.

In a discussion on the general law of succession, we shall limit ourselves only to the manner of ascertainment of customary law in order to enable the administrator to administer the estate.

A person entitled to distribution according to customary law who also wants to administer the estate has priority over the Administrator-General.[2] If such a person is not forthcoming, the Administrator-General administers the estate after which he applies for and obtains from the District Officer of the area of origin of the deceased a certificate showing the names of the persons entitled to the residuary estate according to customary law.[3] If the deceased was born or had prior to his death been permanently resident in Freetown, and had practically lost connection with his native town or village, the Administrator-General on the basis of fairness, dispenses with the certificate of the District Officer, and ascertains the mode of distribution from

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1. S.43(1) of theAdministration of Estates Act, cap.45 and s.13 of the Local Courts Act; Act No.20 of 1963.
2. In re Soloku (dcd), 1950-56 ALR S.L.8.
3. S.43(3). The District Officer ascertains from the local courts who these persons are.

the headman in Freetown of the tribe to which the deceased belonged.[1]

If after weighing the circumstances of each individual case, that headman is of opinion that some individual, for example, the wife, who is not normally entitled to a share under customary law, should have something, the practice has been for the Administrator-General to give that individual a share in the residue and to distribute the balance in accordance with customary law as ascertained from the local headman.[2]

Where there is no known person entitled by customary law, and there appears to be any person or persons who were dependent on the deceased or who would have been entitled had the deceased been a non-native, the President may direct the Administrator-General to pay the balance of the estate to such person or persons in such proportions as he may think equitable.[3]

C. SUCCESSION UNDER ISLAMIC LAW

(1) Testate Succession

Islamic law recognises the making of wills but the essential characteristics of a valid will under that law differ in many respects from those under the general law. For example, according to the Maliki School, writing, signature and attestation are

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1. There is no legal justification for this procedure as it is not provided for by the Administration of Estates Act or any other law in Sierra Leone.
2. Such a practice is against the provisions of the Act.
3. S.43(3). As a matter of law, wives who are not entitled to their husband's estate on intestacy in some customary laws may claim under this section. But the Administrator-General frequently gives them a share on equitable grounds, even when there are known persons entitled under customary law. He bases his authority for this on s.43(3). In our submission, this is wrong.

not necessary; moreover, a testator cannot by his will dispose of more than one-third of his property as bequest to persons who are not his heirs, nor can he by his will alter the prescribed shares of such heirs in the remaining two-thirds without their consent.

A good many Muslims in Sierra Leone mistakenly believe that they can make wills to take effect under Islamic law. This mistake perhaps originated from the conclusions reached at a meeting which the Muslim leaders in Freetown had with the Attorney-General of the Colony of Sierra Leone at the Foulah Town Mosque in Freetown on the 10th March, 1904,[1] a meeting which heralded the passing of the Mohammedan Marriage Act. At that meeting, the Muslim leaders expressed their desire for Islamic law to govern their wills which the Attorney-General accepted in principle. As can be seen, however, from the Mohammedan Marriage Act that ensued, the hopes of the Muslims did not materialise.

Neither the Mohammedan Marriage Act nor any other enactment provides for the application of Islamic law to wills made by Muslims.[2] Such wills must, therefore, comply with the general law.

(*ii*) Intestate Succession

Authority for the application of Islamic law of succession to the distribution of the estate, both real and personal, of a Muslim who dies intestate is s.9 of the Mohammedan Marriage

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1. A typed copy of the minutes of this meeting and the conclusions arrived at was obtained from Dr. Barbara Harrell-Bond, to whom the writer is very grateful.

2. In re Allie (dcd) 1950-56 ALR S.L. 338, 341, Smith C.J. presiding over the Sierra Leone Supreme Court left the issue open but applied English law to determine the validity of a will made by a Muslim because "he (the testator) made a will in the form recognised by English law."

Act.[1] That section goes on further to hierarchically enumerate the persons on whom the property devolves for administration as being (a) the eldest son of the intestate, if of full age according to Islamic law; (b) the eldest brother, also if of full age according to Islamic law, or (c) the Administrator-General.

It is not proposed here to probe into the intricate depths of distribution under Islamic law; this is appropriate in a treatise on Islamic law generally or succession specifically. Here, we must limit the scope of our analysis bearing our general subject-matter in mind.

What is intestacy?

When dealing with Islamic law of succession, it is necessary to have a very clear understanding of the word "intestacy". The word is used in the general law to connote a scheme of succession which is invoked only when the deceased fails personally to arrange the devolution of his property. Used in the Islamic law context, however, it carries the idea of a pre-arranged scheme under which the property of the deceased must descend, whether or not during his lifetime he has made provision for its devolution on his death. Thus, under the rules of Islamic succession at least two-thirds of the property of a Muslim must devolve under "intestacy" even if he had purported to devise the whole property by will. In what sense, therefore, are we to use the word for the purposes of our present discussion?

S.9(1) of the Mohammedan Marriage Act uses the word

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1. Note that Elias, op.cit., p.297, erroneously states that the Mohammedan Marriage Act provides that real estate shall be distributed in accordance with customary law. S.9(1) of the Act which deals with succession provides clearly that both real and personal estate shall be distributed in accordance with Islamic law.

"intestate" without any indication as to whether it should mean intestate according to the general law or Islamic law. As the section stands, it could mean either. Presumably, the general law concept was the one intended, but this is not borne out by the Act. We shall, therefore, use the general law concept only for the sake of convenience.

Who are entitled to the Estate? [1]

In Islamic law, a man's legal heirs succeed to his property on intestacy. They belong to two main groups:-

(a) The Quranic heirs

Under Maliki law, the Quranic heirs are twelve in number, namely: Husband, wife, father, grandfather, mother, daughter,[2] agnatic granddaughter, grandmother, germane sister, consanguine sister, uterine brother, and uterine sister.

(b) The Residuary heirs

They consist of the male agnates, asaba, of the deceased and belong to five classes in order of priority: (i) the son and his descendants (son's son how low soever); (ii) the father and his ascendants (father's father how high soever); (iii) the descendants of the father (the deceased's brothers and nephews, how low soever); (iv) the descendants of the father's father (the deceased's uncles and cousins), and (v) the descendants of the higher grandfathers in ascending order.

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1. For a detailed and more comprehensive analysis of Islamic law of succession, see N.J. Coulson: Succession in the Muslim Family, O.U.P., 1971; J.N.D. Anderson: Islamic Law in the Modern World, London, 1959, pp.59-80; Anderson and Coulson: Islamic Law in Contemporary Cultural Change, London, pp.77-85.

2. A daughter takes as a Quranic heir only when there is no son of the deceased. If there is a son, she succeeds as a residuary heir to half of what the son takes.

There is no place in the Maliki Islamic law of succession for the non-agnatic relations to succeed however close to the deceased they may be.[1] Thus, the mother's father, brother's daughter or daughter's child cannot succeed.

Mode of distribution

As a rule, the Quranic heirs must have their fixed shares before the Residuary heirs. However, as the estate may not be sufficient to satisfy the portions of all claimants, some of them may be excluded. But five of them are never excluded, namely, husband, wife, father, mother and daughter. Moreover, where the deceased is survived by a son, no other relative succeeds except these five named, who after receiving their shares, the son takes the residue with a daughter in the proportion of two to one.

Among the Residuary heirs, the nearest relative to the deceased alone inherits and priority is determined by three principles.

Firstly, a member of a higher class excludes a member of a lower class. The only exception to this rule is that brothers of the deceased in class (iii) are not excluded by the father's father in class (ii).[2] Secondly, among relatives of the same class, the nearest relative to the deceased excludes the other. Thus, if there is a son, the son's son will not succeed. Thirdly, among collaterals who are in the same class and within the same degree, a consanguine is inferior to a germane. For instance, a consanguine brother is excluded by a germane brother.

Without going into the arithmetical distribution of the

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1. In non-Maliki Sunni Law, the heirs belonging to the outer family succeed in the absence of a Quranic heir other than the spouse relict and any agnatic heir.

2. In Hanafi law, the father's father excludes all collateral.

estate, we shall draw attention to a point which is worthy of note.

The allocation of fixed shares results in the fragmentation or sale of real property. In order to satisfy the shares of the heirs, for instance, where a man dies survived by his wife, father, mother, a son and daughter, the first three receive one-eighth, one-sixth and one-sixth respectively, whilst the son and the daughter share the residue in the proportion of two to one, real property, if any, must either be partitioned or sold. A commendable practice has, however, existed among Sierra Leone Muslims in such a case to arrive at a family arrangement whereby the property is kept in the family and enjoyed by all those concerned. In re Banufe (decd),[1] the validity of such arrangement was put to the test. In that case, one Ibrahim Banufe, a Muslim, died intestate in Freetown, survived by three wives and nine children and left real property in Freetown. One of the houses which formed the estate was allocated to a son, Muctarr, who later died survived by his mother, maternal grandmother, maternal uncle and five consanguine sisters. On the son's death, a family meeting was held in which the elders of the tribe to which the deceased belonged decided that the mother should occupy the son's estate as a tenant at will until her death, and thereafter the property should go to the sisters absolutely, as the elders said it belonged to them. After the death of the mother, the sisters of Muctarr sought to claim possession and absolute ownership of this property and the claim was resisted by the maternal grandmother and maternal uncle of Muctarr, who claimed as next-of-kin of Muctarr's mother. The learned trial acting Chief Justice held that though as a rule Islamic law of intestate succession

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1. 1968-69 ALR S.L. 268.

should have applied in order to determine the rights of the claimants, he found, on the evidence, the existence of a valid family arrangement following the death of Muctarr which in equity displaced Islamic law. On the point of law, it is submitted that the decision is correct.

Equity favours family arrangements entered into fairly and reasonably for the benefit of all those who have any sort of claim to the property in question.[1] But such an arrangement may be expunged by a party on the ground that at the purported settlement he did not acknowledge the title of others in property in which he has a claim in exchange for their acknowledgment of his title to property in respect of which the other members of the family may have had a claim.[2] Other grounds on which a party may expunge the arrangement are (a) if he was misled as to his legal rights in respect of the property; (b) mistake, misrepresentation or undue influence which normally renders a contract voidable.[3]

On the facts of the instant case, however, it is debatable whether the purported family arrangement is one which Equity would favour. Throughout the meeting which followed Muctarr's death, the elders of his sect assumed that his sisters, but not the mother, had legal right to his property on his death intestate.[4] This was erroneously believed to be the law.[5] The meeting was

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1. On family arrangements generally, see J.D.M. Derrett: "Family Arrangements in developing countries" in Family Law in Asia and Africa (ed. J.N.D. Anderson), London, 1968, pp.156-181; Halsbury's Laws of England, 3rd ed., Vol.17, pp.215-230.
2. Derrett, op.cit., p.164.
3. Halsbury, op.cit., pp.226-228.
4. See p.271 of the report of the case for extracts of the evidence of two of the witnesses of the plaintiffs.
5. Under Islamic law, the mother takes a Quranic share of one-sixth where the deceased is survived by two or more sisters/brothers whether these last inherit themselves or not.

not intended to be a family gathering where the claims of all those having a legal right to the property were to be acknowledged after which a compromise was to be reached in order to retain the property in the family. Clearly, it was intended to distribute the property according to Islamic law but on moral grounds, the mother of the deceased was to be allowed to occupy the premises rent free for the rest of her life. No doubt, she agreed to this but perhaps, were she not misled as to the law by the elders, she would have taken a different line of action. On the other hand, it could be argued that since her legal right was in only one-sixth of the property, despite the misrepresentation, the arrangement that allowed her to occupy the premises rent free for the rest of her life was reasonable and fair in order to give legal effect to the arrangement.

The present writer, who was also counsel for the defendants in the instant case, subscribes to the view that the arrangement was unreasonable.[1]

Whatever view is taken of the instant case, before a family arrangement can be arrived at which displaces the Islamic law of succession, it is necessary that the parties concerned must be aware of their legal rights and there should be, as it were, a give and take in respect of those rights. Arrangements concluded in mistaken application of Islamic law will only be valid, if taking the legal rights of all the parties concerned, the arrangement is fair and reasonable.

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1. An appeal was lodged against the decision, one of the grounds being that the learned trial acting Chief Justice mis-directed himself as to the facts on which he established that there was a family arrangement capable of displacing Islamic law. Without considering this ground, the Court of Appeal allowed the appeal and set the decision of the Supreme Court aside on the ground that when Ibrahim Banufe died, his property vested in the Administrator-General and that the purported family arrangement was invalid on the ground that letters of administration had not been taken before the arrangement was made. The decision of the appeal court is unreported.

Presumably, the elders in Banufe's case intended to apply the Islamic law of intestate succession in accordance with their custom.[1] It is submitted that this is wrong under the present law, since the law does not admit custom but Islamic law *simpliciter*. But the application of Islamic law with tribal custom is a gloss on the law which is desirable and must be welcomed, since it not only suits local conditions but is also a move towards the unification of the pluralistic system of law in the country.

D. CONCLUSION

Our conclusions to this Chapter are by way of suggestions for reform in the existing law.

Social mobility is greatly on the increase in Sierra Leone, especially as regards children born to uneducated parents, who are now accepted as part of the élite which formerly was synonymous with the non-native, Creole population of Freetown. In many areas of opportunities, greater emphasis is being laid on acquired rather than inborn rights. Sooner or later, the law of succession will follow in the trail, even only for a short distance.

The tripartite division of Sierra Leone citizens for the sake of intestate succession which, at the moment, is based on birth and, to some extent, religion, will have to give way either to a single division embracing all citizens alike or a quadruple division, the fourth class comprising persons who have undergone one form of marriage alien to that of their personal law and have

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1. This is the way many people in Sierra Leone, Muslims and even lawyers, regard the intestate succession provision (personal communication).

assumed a manner of life different from that prescribed by their personal law.

Furthermore, unlike English law, Sierra Leone law makes no or inadequate provision for a member of a family or dependant of the deceased who is left unprovided for by the will or on the intestacy of the deceased to take a share in the estate. The Islamic law of succession, which disregards non-agnatic relations for succession purposes, must be modified in order to include them. This will be in conformity with the customs of the people of Sierra Leone. After all, the Islamic rules of succession were moulded after the customs of the people of Arabia. In regard to wills, either because of natural love and affection for the children or because of the selfish notion entertained by a handful of persons that a surviving spouse can take care of himself or herself, there is the tendency for testators to leave the lion's share of their estates to their children or other relatives bequeathing very little and in some cases, nothing at all to the surviving spouse. This practice is very common among testatrices. An Inheritance (Family Provision) law will rectify the foregoing inadequacies and practices.

Next, the Islamic rules of testate succession should be introduced to enable Muslims to make wills in accordance with Islamic law which should be regarded as properly executed and valid for the purposes of the general law. One hardly sees the efficacy, justice and logic in adopting the rules of intestate succession while leaving out those of testate succession.

Finally, the Mohammedan Marriage Act should extend to the provinces where there are a good many devoted and practising Muslims. That Islam has been fervently embraced by provincial

natives is evidenced by the popularity of the feast which marks the end of Ramadan in the provinces and the annual pilgrimages of provincial natives to Mecca.

PART THREE

CUSTOMARY FAMILY LAW

INTRODUCTION

Lawyers do not always describe the methods they use in their research. The reason is that legal material is usually documentary and the task of the researcher is reduced to the discovery of the material and using it in the manner appropriate to the subject matter of his research. The references contained in the final text are sufficient to provide guidance to someone embarking on similar work. But where the research is into a field on which there is little or no recorded material, it is necessary for the benefit of both the reader, in order that he may have a clear understanding of what he reads, and the future researcher into the same field, that the pioneer should state the methods by which his data were collected. Sierra Leone Customary Family Law is virtually unwritten. This is the first attempt by a lawyer to make a comprehensive analysis of it. In all, there are at least 12 tribes [1] in Sierra Leone, each having its own customary law. In theory, therefore, there is more than one customary law. In practice, however, there are resemblances as well as differences between the different customary laws. For these reasons, it is quite apposite to begin this restatement of Sierra Leone Customary Family Law with an outline of the sources of the law and a guide on the mode of presentation of that law.

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1. A 13th tribe, the Gola, is regarded more as belonging to the neighbouring Liberian State. We have no information on this tribe.

(1) Sources

(a) Previous writings

Hitherto, a few attempts have been made by anthropologists, scientists, ministers of religion and administrative officers to record the customs of some of the tribes of Sierra Leone. Little,[1] Finnegan [2] (both anthropologists), and Parsons[3] (a minister of religion) have written books on the Mende, Limba and Kono respectively. Hall [4] (an anthropologist) wrote on the Sherbro, whilst Alldridge,[5] Migeod [6] and Thomas [7] (all scientists) recorded their experiences with some of the tribes they came across in Sierra Leone. Each of these writings contains descriptions, some scanty, of the marriage customs of one or other of the tribes of Sierra Leone. In a publication by the Government Printer, Freetown, in 1917, Vergette (an administrative officer) produced a handbook captioned Certain Marriage Customs of some of the Tribes in the Protectorate of Sierra Leone. Despite the general nature of its title, Vergette's handbook was essentially a description of Mende marriage customs. Beside

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1. The Mende of Sierra Leone, Routledge and Kegan Paul, London (1st published 1951; revised ed. 1967).
2. Survey of the Limba People of Sierra Leone, H.M.S.O., London, 1965.
3. Religion in an African Society, E.J. Brill, Leiden, 1964.
4. The Sherbro of Sierra Leone, University of Pennsylvania Press, 1938.
5. A Transformed Colony Sierra Leone, Selby & Co. Ltd., London, 1910, reprinted by Negro Universities Press, Westport, Connecticut, U.S.A., 1970.
6. A View of Sierra Leone, Kegan Paul, London, 1926.
7. Anthropological Report on Sierra Leone, Part I, Harrison and Sons, London, 1916.

these books there are a number of articles in the Sierra Leone Studies,[1] a journal published in Sierra Leone under the auspices of the Sierra Leone Society, in the Sierra Leone Bulletin of Religion [2] and in other overseas journals,[3] on some aspects of tribal custom in Sierra Leone. Finally, the first attempt to record Sierra Leone customary law was made in 1932 by Fenton, then Secretary for Protectorate Affairs in Sierra Leone, in his Outline of Sierra Leone Native Law. This is a general handbook dealing with many areas of tribal law, including marriage and divorce. Its source is derived from material published in the Sierra Leone Studies, and from essays "buried in the archives of the Secretariat in Freetown."[4]

Each of the published works on Sierra Leone which we have mentioned in this introduction, except Fenton's, was probably never intended for lawyers despite the title of some of

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1. Mende: N.C. Hollins, "Notes on Mende Marriage Law", S.L.S., No.13, 1928, p.29; "Notes on Mende Law", S.L.S., No.15, 1929, p.57; A. Bokhari, "Notes on the Mende People", S.L.S., Nos.1 & 2, 1918, 1919.
   Temne: E.R. Langley, "Marriage Customs among the Temne", S.L.S. No.13, 1928, p.54; "The Temne, Their Life, Land and Ways", S.L.S., No.22, 1939, p.68.
   Susu: M. Aubert "Laws and Customs of the Susus", S.L.S. (O.S). No.20, 1939, p.67.
   Kissi: M. Aubert, "Kissi Customs", S.L.S., No.22, 1936, p.88.
   Koranko: K. Kamara, & D.S. Drummond, "Marriage Customs among the Korankos", S.L.S., No.16, 1930.
2. W.T. Harris, "Mende Marriage and the Law of Inheritance," Sierra Leone Bulletin of Religion, June 1959, p.10; Dec.1959, p.34.
3. K.M. Crosby, "Polygamy in Mende Country", Africa, Vol.10, July 1937; E.R. Langley, "The Kono People of Sierra Leone", Africa, Vol.5, Jan.1932, p.61; C.B. Wallis, "Tribal Laws of the Mende", Journal of Comparative Legislation, Vol.3, 1921.
4. See the preface to Fenton's handbook written by C.E. Cookson, who was Governor of Sierra Leone in 1932, the year that the handbook was published, [illegible].

them. The main concern of each writer seems to have been to record the life and customs of the people or of the experiences of the writer among the people. Fenton, on the other hand, claimed that he was recording matters bearing directly on law. He produced quite a useful handbook for someone who wants to have a bird's eye view of Sierra Leone customary law but, being a mere outline, the handbook omits "many qualifications and exceptions" to the law which Fenton contended would obscure his work.[1] These qualifications and exceptions, in our submission, are exactly what would appeal to lawyers. Besides, perhaps because the handbook was intended to be only an outline as the title suggests, the space in it devoted to family law is reduced to no more than ten pages and many important issues in family law that would interest a lawyer, for instance, the legal requirements for a valid marriage and the incidents of such marriage, are excluded. In his attempt to write on the contemporary customary family law of Sierra Leone, the present writer, therefore, proposes to fill in the gaps left by Fenton.

In undertaking this research, I have tested prior written information in personal enquiries. I have found some of this information in the relevant spheres of customary family law to be still current and others to have gone away with the passage of time.

(b) Personal enquiries

The only advantage I had in my personal enquiries which some researchers into the customary laws of many African tribal people may not have is that I am a citizen by birth of the country of my research. This distinctive quality made it easy for me to meet people informally, some of whom I have known

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1. Op.cit., p.(vi).

personally from childhood, and discuss my interests with them.

The period of my field work in Sierra Leone lasted from November 1968 to February 1972, part of which I spent in teaching at Fourah Bay College, University of Sierra Leone.

In Freetown, I was able to meet and discuss with the tribal headmen of the various ethnic groups resident in the Western Area and distinguished educated natives. While in the Provinces, which I was able to visit regularly, I had interviews with a cross-section of the paramount chiefs, section chiefs, local court presidents, elders and ordinary people from the various tribes.

Apart from the oral enquiries, I prepared questionnaires which I sent to all the district officers in the Provinces for distribution to persons chosen at random among the predominant ethnic group of each district. Though the questionnaires were in English and the majority of the people who answered them were illiterate in that language, the respondents were assisted by young educated natives, mainly students from Fourah Bay College. I received back most of these questionnaires fully answered. It was noticeable that the answers were,in many respects, identical to those received in reply to the same questions posed at the oral interviews.

In March 1972, I was taken ill and had to spend a couple of months hospitalized in England. This would have heavily impaired my field-work as I had started panel discussions which had not been completed. I was, however, fortunate to benefit from the oral enquiries conducted by a research team from the Africa - Studiecentrum, Leiden, Holland, which was engaged in anthropological research in Sierra Leone under the leadership of Dr. Barbara Harrell-Bond. This group had needed the services of a

British-trained lawyer and Dr. Harrell-Bond had requested me to join them. During the period I was indisposed, the group continued the panel discussions using questions and topics which I had supplied to it. The discussions took place in the main provincial towns of Sierra Leone and were tape-recorded. There was one panel for each district, and it consisted of a cross-section of the members of the ethnic group predominant in that district and the discussants were chosen at random, but included the elders and ordinary people, men as well as women. The relevant information gleaned from these discussions was also similar to that obtained in my individual oral interviews and the questionnaires.

(c) Court records

(i) Superior Courts

All the superior court records are kept in the Law Courts Buildings in Freetown. The courts for which there are records are the former Circuit Court sitting in the Protectorate, the former Supreme Court, the present High Court and the Court of Appeal. These records contain practically nothing on customary family law. The archives at the Law Courts in Freetown and at Fourah Bay College Library were also searched in vain.

(ii) Native and local courts records

In Sierra Leone, the native and local court records are less complete and of less guidance than in other countries such as Ghana and Nigeria. In many parts of the provinces proper records have not been kept. The reason probably is that only recently has it become obligatory for local court presidents to be literate in the English language. Added to this, perhaps because the majority of the native and local court officials could speak but not write their local dialects, there have been

no records written in the native dialect. Formerly, the "judges" of the native courts were illiterate and their judgments, if recorded at all, were recorded by the court clerk and it was only the verdict rather than the reasons for the judgment that would be so recorded. Legible records were found in the Bo, Mayamba, Pujehun and Bombali districts dating back about ten years. Unfortunately, however, even these contain very little law and the majority, if not all, of the cases on family law are concerned with either "woman damage" [1] or "detention of a wife".[2] Therefore, my task is more difficult than it should have been if I were writing on some other African country.

(2) Mode of presentation

It is, indeed, a laborious task to restate separately the unwritten customary family law of each and every tribe in Sierra Leone in a work of this nature. Nevertheless, I would have ventured to do so were these laws very different from one another that a general treatment cannot suffice. However, in practice, the resemblances between the different customary laws have proved to be so many and so fundamental as to justify a general treatment of the various customary laws topic by topic, drawing attention to local and tribal variations where they occur

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1. "Woman damage" is the term commonly used in Sierra Leone for an action in customary law for compensation against a man who had attempted or is suspected of having had sexual intercourse with a woman to whom he is not married. The origin of the term is doubtful. The translation of most of the vernacular expressions is "woman-palaver". If the woman is married, the action for "woman-damage" is at the instance of her husband; but if she is unmarried, her parent will bring it.

2. The expression "detention of a wife" is found in the local court records but the action is actually for harbouring a wife.

under each topic.

In such an exercise, one has to be careful about generalizations which may related to some but not to all the tribes and thus result in the misstatement of the law. In order to avoid this, I shall adopt the following scheme:- (i) A general statement of the law without qualification is to be taken as a description applicable to all the tribes. If no information has been obtained by the present writer on a particular tribe, that fact will be specifically mentioned. (ii) Where there is a tribal variation, the difference in respect of that tribe will be dealt with immediately after the general statement has been made and discussed. (iii) The discussion will be on an ethnic rather than territorial basis generally, though attention will be drawn to local variations in the laws of an ethnic group between sections of that group residing in different areas of Sierra Leone.

CHAPTER 14

THE NATURE AND CHARACTER OF CUSTOMARY-LAW MARRIAGE

A. THE FEATURES OF CUSTOMARY-LAW MARRIAGE

The expression "customary-law marriage" is not used in this thesis as a term of art. Generically rather than specifically, it refers to all marriages celebrated and recognised as valid under any system of customary law in force in Sierra Leone. It must be understood that in any one customary law, there may be several different types of valid customary law marriages. In other words, "customary-law marriage" is not a single institution with uniform procedures and effects. It is not proposed to essay any definition beyond this, for to do so will be to invite pitfalls because it is impossible to arrive at a unitary definition that is capable of embracing the nature and character of all types of customary marriage. Instead, the expression "customary-law marriage" can be understood in terms of the features that are distinctive of it.

Cotran,[1] following Allott, has rightly pointed out seven such features, namely:- polygamy; that a marriage constitutes an alliance of the families of the spouses; the formalities attached to the marriage; the institution of the marriage consideration; the procreation of children as one of the principal purposes of the marriage; the inferior status of the female spouse; and the peculiar nature of divorce which may be extra-

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1. "The Changing Nature of African Marriage," in Family Law in Asia and Africa (ed. J.N.D. Anderson), London, 1968, pp.15-33. See Allott's lecture notes to the Council of Legal Education. For recent developments in African customary marriage law generally, see H.F. Morris, "Review of Developments in African Marriage Law" in Phillips and Morris, Marriage Laws in Africa, O.U.P., 1971, pp.37-59.

judicial and which may be easy to obtain without any reason whatsoever.

The idea that marriage is an alliance of the families of the spouses needs qualification even without taking recent developments into consideration. In Sierra Leone, the statement that marriage is an alliance between two families was true even in the olden days either for the purpose of the re-marriage of a widow when among tribes like the Mende, Koranko and Yalunka, the widow was expected to re-marry into the family of the deceased husband, or in respect of a man's first marriage when both his family and he were expected to contract the marriage with the woman's family. But the statement is not completelly accurate if applied in respect of a man's second or subsequent marriages, because in tribal law, he could validly enter into such marriages without the consent or assistance of his own family.

There is no doubt that the features of customary marriage mentioned by Cotran and Allott were all characteristic of Sierra Leone customary laws in the traditional (i.e. pre-colonial and early colonial) period. However,, many of these features have changed, some of them radically, in more recent times.

Firstly, the consent of the woman's family is still an ingredient without which no valid marriage takes place, but a man can now contract even his first marriage without parental consent. Moreover, particularly among the educated class of tribal people, the "alliance" aspect of the marriage is now whittled down to the obtaining of the consent of the woman's family to the marriage.

Secondly, most of the elaborate formalities are now abandoned where the spouses to the marriage neither live in a tribal milieu nor lead a tribal life, but who, because of family affiliations, are expected to comply with the demands of their parents by contracting a customary marriage. This is usually the case

with first-generation educated natives for whom a "marriage" under customary law usually precedes a marriage under the Civil or Christian Marriage Acts.

Thirdly, while it is true that all the tribes of Sierra Leone still adhere to the customary token or gift by the husband-to-be or his family when initiating proceedings for marriage, payment in cash has frequently taken the place of the traditional transfers of property. Moreover, the quantum of the amount refundable as marriage consideration when the marriage breaks up is now far less than what it used to be.

Fourthly, there is now a slight improvement in the status of the married woman in three spheres:- (a) in property; some tribes [1] now regard a woman's self-acquired property, that is, property she acquires without any financial help from her husband, as her own; (b) in divorces: whereas among the Mende, formerly a woman could not easily get a divorce except at great financial expense,[2] now she can go to a local court, pay the prescribed fee and obtain a divorce certificate which puts an end to the marriage, even without the prior knowledge of her husband or her family; (c) in more chiefdoms than before, on the death of the husband, the widow is now free to re-marry whomever she pleases.[3] Apart

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1. The Temne and the Susu are far ahead of the other tribes in this regard. The Mende in the urbanized areas like Bo, Moyamba and Kenema also hold this view.

2. Up to 1961, for a Mende woman to obtain divorce against her husband she must deposit £10 or more to the Native Administration before the latter could compel the husband to institute legal proceedings in the native court for refund of his dowry which alone brought the marriage to an end: see Memorandum NO.P/60 of the Southern Province, dated November 8, 1961.

3. This is the result of a directive by the Sierra Leone Government. For details, see Chapter 18, pp.637-638.

from these areas mentioned, the wife of a customary-law marriage has, nevertheless, not yet reached the position of her counterpart in a statutory marriage. The inequality of a wife in such marriage partnership is still maintained. It is in respect of this that most educated young tribal people in Sierra Leone, men as well as women, disdain customary marriage and wish that it were abolished.[1] Such a step, of course, would not be a rational one to take, as the vast majority of thepeople of the country are still illiterate,[2] and customary-law marriage is the accepted marriage for them.

The changes that have occurred in customary marriage have been due to religious and economic influences, opportunities of employment outside the tribe, urbanization, educational and social advancement, and cultural contact generally. As these influences increase, in due course the objectionable aspects of the institution will be whittled away and it will "move with the times" and become acceptable to the social and educational élite of the country. In this respect, customary law will converge with the general law.

B. TYPES OF CUSTOMARY-LAW MARRIAGE

There are at least eight types of customary-law marriage in Sierra Leone. Of these types, marriage with marriage consideration and marriage by service are universally found.

The commonest of all is marriage with thepayment of a

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1. In a recent survey conducted among some 200 students belonging to all the ethnic groups in Sierra Leone, this was the view of all of them: See B. Harrell-Bond, Marriage among the professional group in Sierra Leone, an unpublished D.Phil. Thesis, Oxford University, 1971, pp.169-189.
2. The 1963 Population Census of Sierra Leone.

marriage consideration.[1] Such a marriage is formed when the husband-to-be and/or his family make a formal payment of the consideration either in cash or in kind or both to the prospective wife and to her family. This type of marriage is usually virilocal.

Next comes marriage by service.[2] In this kind of marriage an indigent potential husband, whose family cannot afford to pay a marriage consideration, renders services of a manual nature to the family or parents of the intended wife. In the olden days, with a cutlass in hand, he was formally introduced by his parents to the woman's family as a potential son-in-law. A cutlass was symbolic of manual labour and the man was obliged to work on the farm of the family of the woman, to collect firewood for them when needed, and render other services for them like fishing and hunting. If the man's request was granted, he became a member of the intended wife's family and lived with and worked for them before and even after the marriage had been entered into. It was usually a man's first marriage that was concluded in this way and, though the marriage was potentially polygamous, the husband, perhaps because of his poverty, did not marry a second wife. This type of marriage was also universally found among the tribes and it was uxorilocal. Today, with the improved economic

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1. We prefer the term "marriage consideration" to the words "bride-price" or "dowry", all of which refer to the marriage payment that is made in customary law by the man and his family to the family of the intended wife for the hand of the wife. In Sierra Leone, the word "dowry" is the one in common use to describe this payment. This is a misnomer. For the reasons, see Chapter 16, pp.561-563.

2. W.T. Harris calls this type of marriage, "marriage by cutlass". See his "Mende Marriage and the Law Inheritance", Sierra Leone Bulletin of Religion, Vol.I, June 1959, pp.11. Writing on the Kono, Parsons calls this marriage, "marriage by common consent": See his Religion in an African Society, London, 1964, p.12.

position of many natives, this type of marriage seems to be on the decline.

Another type of marriage is marriage by gift. It usually took place as an expression of gratitude by the family of the bride to the bridegroom for past or future services rendered or favours shown by him to the bride's family, or in recognition of their high esteem for the bridegroom. Formerly, such a marriage was common where the intended husband was a chief or a man of standing in the local community. The family which sought to bestow the honour on the intended husband offered their young daughter to him as wife. This was also the mode adopted where a daughter of a chief was to become the wife of another chief or a "big man". In either case, though there was no formal presentation of a marriage consideration, the intended husband reciprocated the gift of the bride with a lavish series of presents to the bride's family which in the event might far exceed in amount what might have been paid by the husband if an ordinary marriage with marriage consideration had been entered into. This type of marriage too was common among all the tribes. Nowadays, however, with the increase of "big men" in the local community and the dwindling of the autocratic powers of chiefs in relation to their subjects, traces of the marriage can be found only among ruling houses. The idea is that royal blood will be stronger if a daughter of a chief marries another chief.

There is on record,[1] a peculiar type of marriage by gift among the Koranko called <u>almadi</u>. In the olden days, a Muslim father, desirous of the blessing of a Mulsim priest whom he esteemed, reserved his young daughter of whom he was particularly

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1. See K. Kamara and D. Drummond: "Marriage Customs amongst the Kurankos", <u>S.L.S.(O.S.)</u>, No.16,, 1930, p.66.

fond for the priest as a future wife without notifying the priest of it. When the girl reached a marriageable age and had undergone the usual initiation ceremony, the father equipped her with personal goods and domestic paraphernalia and took her without a marriage ceremony or notice to the priest and presented her to him as his wife. The priest received the girl with solemnity and in return gave his blessings to the girl's father. Informants from the Koinadugu district say that this practice is still in vogue among the Koranko and Limba Muslims in that district.

Next, among the Mende, there is a type of marriage known as goat's head marriage (njewui), which is a form of "cross-cousin" marriage. It is marriage within the same family between a man and the daughter of his mother's consanguine [1] brother. Such marriage is regarded as highly commendable. A man's mother's brother (kenya) is thought, in Mende law, to have certain obligations to his nephew, and presumably some of the parental responsibility of a man's mother is shifted on to his kenya. Thus, a kenya is expected to maintain his nephew, and the traditional way of fulfilling this obligation is to give the nephew the head of any animal that he kills. If the man marries the daughter of his kenya, this responsibility to supply animals' heads to the nephew is regarded as being discharged by the marriage. Voluntary dissolutions of such marriages are very rare.

Another type of customary marriage is widow inheritance. When a man dies and is survived by his wife or wives, they are expected to re-marry into the latte husband's family. The new husband is not expected to go through the usual formalities that

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1. Marriage between a man and the daughter of his mother's brother germane or uterine is, however, not allowed.

would be necessary on a first marriage, but merely presents himself with a kola [1] to the parents of the woman as her new husband. This type of marriage was formerly common among all the tribes, but is not of frequent occurrence nowadays. Sometimes, where the widow does not want to marry any male members of the deceased's family but, nevertheless, wishes to remain with her deceased's husband's family, she can "marry" a female member of the family, usually a sister of the deceased, and stay within it. This latter course, ofcourse, is not marriage in the true sense as the parties cannot cohabit as man and wife. In practice, they live together only as close friends. A widow who takes this step has no obligation to refund the marriage consideration to the family of the deceased husband. It is worthy of note that the levirate and ghost-marriage are unknown in Sierra Leone customary laws.

Somewhat akin to widow inheritance is a type of transaction which has been described as marriage by "showing oneself to a new father-in-law".[2] This type of transaction is common among the Mende living in households in villages and homesteads. When a man's father-in-law dies, the deceased is for the purposes of guardianship succeeded by a male head of family (ndaimowai). By a legal fiction, every marriage of his daughters consented to by the deceased father is deemed to be suspended upon his death, and any husband who wants his marital relationship with such daughter to continue must "show herself" (ngi ge) to the ndaimowai The showing of oneself is done by a token gift of money to the

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1. The word "kola" will appear many times in our discussion of customary family law. It means the real kola fruit or a token sum of money representing it. In customary law, giving kola to a person is a sign of good will, and it signifies the intiation or termination of a transaction intended to have a happy ending.

2. N.C. Hollins, "Notes on Mende Marriage Law", S.L.S.(O.S.), No.13, 1928, p.31; W.T. Harris, op.cit., p.19.

head of the family after the funeral ceremonies of the deceased have been concluded. Failure by a husband to show himself to the new father-in-law, of course, does not legally invalidate his "prior" marriage to his wife. It is, however, desirable to do so because, should the husband later divorce his wife, his chance of recovering the marriage consideration may be jeopardised, as the head of the woman's family can successfully plead before the local court that he does not know that the husband and the wife were ever married as he never consented to it and the woman's natural father is dead. Such transaction, as we have described, has not been found among the other tribes of Sierra Leone. However, there is evidence [1] that some Krim and Gallina in the Pujehun district and some Sherbro in the Bonthe and Moyamba districts practise it. Presumably, this is the result of Mende cultural influence on these tribes rather than their own customary laws.

Next, there is a form of cohabitation between a man and a woman which may be termed "friendship arrangement". A man and woman fall in love with each other and live together as husband and wife without the prior consent of the woman's family. Such a union has a hybrid character. Vis-à-vis the family of the woman, there is no valid marriage between the parties and the "husband" cannot make claims on the woman's family which are incidental to marriage. But in respect of the children of the union, the Mende consider them as being entitled to succeed to their father provided he dies without leaving children who are the issue of a proper customary marriage. Among all the tribes, however, a "friendship arrangement" can be converted into a

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1. From the local court records of these areas.

legally constituted marriage for all purposes by the husband's obtaining the consent of the family of the wife. A marriage contracted in the olden days between a woman and a soldier or court messenger, in which the consent of the woman's brother who lived in the same barracks as the intended husband was obtained but not that of the woman's parents since almost invariably they might be far away, has also been described as "friendship marriage" and irregular.[1] While it is conceded that such a "marriage" contracted without the consent of the woman's parents will be irregular if the parents are alive and can easily be got in touch with, in our submission, if the only surviving member of the woman's family is a brother or sister or uncle as the case may be, the consent of that member is quite sufficient to render the marriage proper and valid.

Finally, there was in the olden days marriage by capture.[2] The Protectorate of Sierra Leone was,up to the turn of this century, the battle ground for tribal wars. Men saw in these wars an opportunity of winning wives for themselves. An attack upon a town or village resulted in the extermination of the male inhabitants and the capture of the women folk, who subsequently became the wives of their conquerors. No requirement was essential for the validity of such marriage other than a public declaration by the captor of his intention to cohabit with his captive followed by actual cohabitation. Such a wife was, however, regarded as a slave and her children could not inherit from their father. Nowadays, there are no longer inter-tribal wars in the

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1. N.C. Hollins, op.cit., p.31.

2. See T.J. Alldridge: A Transformed Colony: Sierra Leone, Negro University Press, Westport, Connecticut, reprinted 1970, p.312; W.T. Harris, op.cit., p.10. Note that these writers wrote on the Mende but, from our investigation, marriage by capture was also common among the Temne and Susu. There is no information on the other tribes.

country and, with the abolition of slavery in 1933, this kind of marriage no longer exists.

To sum up, the legally constituted marriages which give rise to legal incidents at customary law are marriages by the payment of a consideration, service or gift; goat's head marriage, and widow inheritance. These legal incidents are the same for each and every type of marriage. For example, the spouses of a marriage after the payment of a marriage consideration have the same rights and obligations as the spouses of a marriage by gift. The difference in terminology between these kinds of marriage arises from social practice and procedures, but the legal consequences are substantially the same. One marked legal difference, however, between marriage with the payment of a marriage consideration, on the one hand, and the other types of marriage, on the other, is that as there is no formal payment of a marriage consideration in the latter, none is refundable on divorce. Looking at it from the point of view of English law, there is consideration moving from the husband in these other types of marriage, since the quid pro quo for the marriage is, as the case may be, his service, his presents or the token that he gives.[1] The difference perhaps is that there is no tangible quantifiable thing which has passed at least in marriage by service. Nevertheless, in our submission, if it is considered proper that "dowry" should be refundable when the marriage is dissolved, then the husband who substitutes services for the usual customary marriage payment should be compensated for his services because his consideration is as good and, in many cases, even better than a formal payment of a marriage consideration. As for marriage by gift, goat's head marriage and widow

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1. Even in the case of the goat's head marriage, the man must make a token gift to his uncle.

inheritance, the present position in customary law should remain intact since any gift given by the husband is in exchange for the hand of the wife in marriage. Perhaps, a more rational solution in all cases is to abolish the refund of the "dowry" since the wife, reduced as she is, in some respects, to the position of a servant in customary law, would have rendered sufficient services to the husband in order to compensate him fully for the marriage consideration.

Finally, in our discussion of customary family law, we shall deal with all the legally constituted marriages as one form of marriage, i.e. customary-law marriage. However, where there are differences in procedures and effect, we shall point them out in their relevant places.

CHAPTER 15

THE FORMATION OF A CUSTOMARY LAW MARRIAGE

A. INTRODUCTION

Commenting on the establishment of marriage in customary law generally, Phillips has remarked that

> "In African native law there is not usually any prescribed formality or set of formalities which can be readily identified as corresponding to the 'solemnization' or 'celebration' of a marriage under European law. The marriage transaction is normally a long-drawn-out process, and there is often doubt, both as to the exact point in that process at which the parties become husband and wife, and also as to which (if any) of the accompanying ceremonies and observances are strictly essential to the conclusion of a valid marriage."[1]

This statement is true for customary law marriages in Sierra Leone as for such marriages in other African countries. A customary law marriage in Sierra Leone does not require an officiating priest or official who, at a prescribed moment, ties the bonds of marriage and declares the spouses husband and wife in order to bring the marriage into existence in law. True, among some tribes, like the Temne and Susu, the service of an official may be enlisted to perform certain ceremonies which are regarded as concluding the marriage transaction, but the employment of such official and his ensuing duty are modern developments to customary law brought about admittedly by religious influence, for example, Islam.[2] Although the strict Muslims

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1. Marriage Laws in Africa, O.U.P., 1971, 107. For similar views, see: A.R. Radcliffe-Brown, op.cit., p.49; A.N.Allott, A.L. Epstein and M. Gluckman, "Introduction", Ideas and Procedures in African Customary Law, O.U.P., 1969, p.63.

2. An officiating priest is not essential in Islamic law. This is, therefore, a local modification of that law.

among the tribes regard the intervention of an official as desirable, the validity of customary marriages contracted without such intervention has never been doubted.

Similarly, though a customary-law marriage is attended with a series of formalities, the non-observance of many of them does not invalidate the marriage;; they are complied with merely because tradition demands it. There are no prescribed set rules in regard to preliminaries and solemnization, as in the general law, non-compliance with which is fatal to the validity of the marriage. Nevertheless, as all the formalities contribute to the formation of the marriage, it is, in our view, inappropriate to speak in terms of the preliminaries of a customary law marriage and then the marriage itself. Rather, it is apposite to regard marriage as a transaction beginning with betrothal or a friendship arrangement, culminating in the obtaining of the consent of the family of the wife to the marriage, the latter being, as we shall see in due course, the most important essential without which a customary-law marriage is non-existent, and finally ending with the wife taking her place in the husband's household. Since every stage of this transaction is accompanied by one or more formalities, for a better understanding of the law and with a view to laying on the table material relevant for future codification, it is necessary, at this juncture, to describe the most important stages through which a marriage passes with their concomittant formalities. These stages are, in particular, betrothal, initiation, friendship and the concluding formalities and ceremonies.

B. BETROTHAL

A woman's first marriage is usually preceded by betrothal.[1] Betrothal takes place when a man and/or his family communicates to the family of the woman the man's intention to marry her and that request is granted. In customary law, it is attended by certain formalities.

Traditionally, marriage was regarded as a link binding the immediate parties to it as well as their ante-nuptial families. Because of the consequences, both legal and social, that flowed from the relationship, it was considered expedient that before the marriage was concluded a trial period should elapse during which an opportunity could be afforded to all the parties concerned for a careful appraisal of the responsibility upon which they proposed to embark. Similarly, a combination of circumstances might prevent a man from immediate cohabitation with a girl whom he loved; he might not be in a position to assume immediate marital responsibility or the girl might still be young and of un-marriageable age, but without communicating his wish to the girl's parents another suitor might come forward and displace him. Moreover, the man, his family and the woman's family, although they might have no immediate objection the union, would need some time during which to study one another's background and way of life. Nowadays, even though marriage is to a great extent individualistic, these considerations may still be present.

A man and his family normally expect certain qualities

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1. This is the case for marriage by the payment of a marriage consideration and for marriage by service. It is seldom the case with goat's head marriages. Marriage by gift is never preceded by betrothal.

in the woman whom he proposes to marry. A respectful and industrious girl and one with a good character would be very much to their liking. Likewise, the woman's family would prefer an industrious, generous and respectable man. Only time will reveal these qualities. Finally, mutual trust and understanding are nurtured between the two families. The period of betrothal is, therefore, the time for assessment and the cultivation of cordial relationship between the families which go to strengthen the marriage bonds once they are finally tied.

Time of Betrothal

Betrothal can take place at any time. Formerly, it could be either before the girl was born or after.[1] Nowadays, it is frequently post-natal. Where the betrothal is ante-natal, however, it must be confirmed by the man and/or his family with the donation of a token gift after the girl is born. Infant betrothal was common amongst all the tribes in Sierra Leone in the olden days. A man and woman of the same age seldom married. A man was expected to work and acquit himself as being capable of assuming both family and marital responsibilities before he could embark upon marriage. Therefore, if he approached a woman of his age who had never been married, he would be told to wait for the daughter of that woman. Almost invariably, the intended wife became the man's mother-in-law at a later date.

Among the strict tribal Muslims in the North, like the Susu and the Temne, betrothal is never ante-natal and it takes place when the girl has reached the age of puberty. The reason

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1. M. McCulloch states that Koranko girls are betrothed by the age of 10 years: Peoples of Sierra Leone, International African Institute, London, 1950 (revised 1964), p.91. My researches reveal that, in fact, by the age of 10 many Koranko girls are betrothed.

is that it is believed that a girl cannot give a valid consent until she has reached the age of puberty, and her consent is essential for a betrothal. Marriage with its relevant incidents, to them, should follow close to the heels of betrothal. Consequently, only girls who have reached a marriageable age may be betrothed. Presumably, one reason for the shortness of the period between betrothal and the actual marriage is that as marriage usually takes place between members of the same Muslim community (jamaat), the families of the man and woman would have been sufficiently known to, or acquainted with, each other even before the question of the marriage arises. Consequently, a period of friendship between the intended spouses known to or even nurtured by their parents would have lasted for a long time before the betrothal, thus giving all the parties concerned the opportunity of assessing one another.

Who Initiates Betrothal?

Betrothal is never initiated by the woman or her family. It must always begin from the man and/or his family.

It is as a rule effected through an intermediary or a "go-between". In the case of amte-natal betrothals, however, the man himself approaches the woman's mother. Where the betrothal is post-natal, the "go-between" for a man's first marriage is a close relative, usually female, of the man. Where no such relative is available, it is the father. If the man has no relative at hand, then he can send a close friend of his to the woman's family. For subsequent marriages, the "go-between" is normally the head wife of the man. It is desirable that she should play a part in the finding of a second or subsequent wife for herhusband, because she is the second in command in the compound polygamous family, and the other wives come directly under her supervision. If the head wife is reluctant to play the

role of a "go-between", the man employs the services of a member of his family.

Procedure

Generally, the man or his "go-between" takes a gift each for the girl and her family and informs the girl and her family of the man's intention to have her as wife. Acceptance of the gifts is conclusive of the betrothal. We shall now consider the tribal differences.

Mende: If the intended wife is not yet born but is being expected, the man gives her mother about 20 cents with an expression of the desire that if the baby happens to be a girl, she should become his wife. This is known as koi maho. When the child is born, the man confirms his intention with the giving of presents, like fish and oil, to the mother and clothes for the child. This is known as "tying a rope on the hand of the child" (ngeya gula tokola). After this, the man continues to render services to the girl's family and to give them presents until the girl grows up and is initiated into the Sande society at his expense. This type of wife is called fale gbua nyaha (mushroom wife).[1]

In the case of a grown-up girl who has already been initiated into the Sande society, the "go-between" takes a gift of cash of about Le.1 for the girl, Le.2 for the mother, and Le.2

1. The mushroom plant is used here in a figurative sense. Harris, op.cit., p.13, suggests that the wife is called a "mushroom wife" because the husband has to be quick in picking her as a wife, otherwise someone else will take her. Harris' second suggestion that the word "mushroom" is used because the wife is chosen as soon as she is born or "sprouts" as a mushroom seems to be the generally accepted view. Thus, a woman betrothed when grown-up is called kolinyaha (woman found) because of her grown-up state when betrothed.

for the father, or goods such as tobacco or wearing apparel. The gift is called mboya [1] and it is intended to induce the consent of the intended wife and her parents. A wife obtained by such procedure is called koli nyaha (woman found).

Sherbro, Krim and Gallina: The betrothal procedure among these tribes is similar to that of the Mende.

Kissi: These, too, adopt a procedure similar to that of the Mende, except that a present of four Kola nuts and a native mat from the man and his family is expected. In urban areas, however, the presentation of these items may be lawfully and factually dispensed with and a cash present of about 20 cents suffices.

Temne: In the olden days,[2] the girl must be given by the man or his family a present of a string of waist beads which she tied around her waist. The mother was also given either tobacco or a mat. Nowadays, it is customary to give eight kola nuts (red or white) together with a sum of 40 cents to the parents. In addition, the girl is given at least one of the following items:- a head tie, necklace, gold or trinket. All these presents are referred to by the generic name Ta wonukum.

Susu: The "go-between" approaches the family of the woman with about 40 cents (kolanani) and asks whether the girl has not been betrothed to anybody. If the reply is in the negative, the "go-between" pays a second visit to the woman's family and

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1. McCulloch, op.cit.,p.2, and Little: The Mende of Sierra Leone, (revised ed.), London, 1967, p.154, use the word mboya as meaning the marriage consideration. This is inaccurate. Mboya is the gift payable in order to induce consent. This gift is also called by some Mende tolei, (a kola). The marriage consideration itself is generally known as tolei.

2. See E.R. Langley:"Marriage Customs Amongst the Temnes", S.L.S. (O.S.), No.13, 1928, pp.54, 55.

carries presents for them consisting of a calabash containing a piece of white cloth, four kola nuts, seven needles, a head of tobacco and rice. The calabash is usually covered with a woven fabric called leffa. It is also usual for the marriage consideration (guinefansay) to be paid at this time, but there is no hard and fast rule about this, and it may be deferred to another date.

Koranko: Before initiating proceedings for betrothal, it is customary for the Koranko to consult a reputed medicine-man [1] (beresigile) to foretell whether the marriage, if contracted, will last. If the augury is favourable, the man or the "go-between"gives a "shake-hand" [2] to the chief of the village after which a new mat or four kola nuts wrapped in leaves and tied up with a piece of thread are given to the woman's family as the betrothal presents (woronani). Acceptance of the presents concludes the transaction.

Kono: On the birth of the intended wife, the man presents a red-agate bead to the future mother-in-law. This gift signifies the man's intention to have the woman as wife. When the girl reaches the age of puberty and is about to be initiated into the bondo society, the man makes another approach to the girl's family. The girl makes the final choice and if it is favourable, the man exchanges the red agate bead with a mat, fowl and native spun cloth. This exchange of gift is known as

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1. Kamara & Drummond, op.cit., p.57.

2. This is a term used in customary law to describe a gift given to a chief either by a stranger who wishes to reside or settle in his village, or by any member of the community who requires the blessing of the chief for any enterprise which he (the member) wishes to embark upon.

fandafene and the gift itself is called wona o sapua.

Limba: The transaction is usually between the man and the girl's mother if the girl is too young to understand it. He gives the girl's mother a head tie or a small sum of money as "kola". If the girl is capable of understanding the transaction and she is supposed to be a virgin, it is not customary for the man to present himself to the girl's parents. He must first of all approach the girl to ensure that she is willing and then he must conduct the negotiation with the girl's family through a "go-between". If the "go-between" is the man's head wife, she must be accompanied by a relation of the man. The "go-between" takes kola nuts to the woman's family which are first distributed among the household of the woman's father. Finally, a sum of money, about 20 cents, is given to the mother and father as "kola" acceptance of which signifies that they have agreed to the proposal.

Loko: A special ceremony marks betrothal among the Loko. Through a "go-between", the intended husband notifies the parents of his intended wife of his intention to pay them a visit. The parents, who would have known the purpose of the man's visit, assemble members of their family to await his arrival. When he arrives at the appointed place for the meeting, usually the residence of his future parents-in-law, he opens all the doors in the house after which he closes all of them. Such opening or closing of a door is accompanied with the payment of a kola (about 1 cent). The ceremony is an acknowledgement that the man has gained access to the home of his intended wife's parents and that thereafter, no other suitor should be permitted to ask for the hand of the girl in marriage.

Religious Influence: Islam has to a great extent influenced the customary laws in respect of betrothal. It is

common for all the strict tribal Muslims to adopt the same procedure, although differences in the customary items of gift, as we have already pointed out, could be found here and there. The common element in the procedure is this. A go-between, who must be a respectable member of the local jamaat, but not related to either family, visits the family of the woman and discloses the man's intention of marriage. The head of the woman's family informs the girl, her parents and other available relatives. If the girl agrees and her family approves, the head of the woman's family tells the "go-between" to pay another visit for a reply. On the second visit, the "go-between" brings with him a calabash containing at least 100 kola nuts and a sum of money of any amount in order to "put the kola". After some time, usually a week, the empty calabash is returned through the same "go-between" accompanied by some member of the man's family with words of thanks. The return of the calabash without its contents signifies acceptance of the proposal and marks the completion of the betrothal.

Legal Consequences of betrothal

Betrothal brings the intended spouses and their families close together but no legal consequences generally flow from it.[1] No rights of consortium exist in favour of the intended spouses. If the man has sexual intercourse with his betrothed being a virgin and unitiated into the women's secret society,[2] he commits a wrong against her parents. In this respect,"virgin-money",[3]usually

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1. Except as regards the rights of action for seduction of a betrothed woman brought up in the household of the betrothed man; see p.514.
2. As a social custom, every native woman must be initiated into a secret society on reaching puberty before she can enter into a customary law marriage. For more information about this society, see later.
3. This is the money a man pays for deflowering a girl.

Le.2.10, must be paid by the man to the parents of the woman, after which he must ensure that the girl is initiated into the women's society, the expenses of which he must pay, and marry her. Among the Mende and the Temne, the family of a woman who is seduced by her betrothed prior to her initiation in the sande or bondo society [1] can refuse to permit the man to marry the woman, and the man would have no right to the refund of any expenses he has incurred hitherto. In order to pacify the girl's parents, among the Temne, the man may, in addition to the virgin-money, be fined an amount from Le.2.10 upwards, depending on his economic and social status, and the man may then be permitted to marry the girl. The Kissi, on the other hand, require the man either to marry the woman after she is initiated into the bondo society at his expense, or to pay the marriage consideration as demanded by the woman's parents.

As between the man and the woman's family, although no legal rights are acquired by being betrothed, social and moral obligations result from it. In rural societies, the man is expected to assist the woman's family on their farm during cultivation and harvest either by taking part in the manual labour himself or by employing adjutants. During the rainy season,[2] he is also expected to supply the woman's family with occasional bundles of fire-wood, a scarce commodity during this period. His duty also includes the rendering of financial help to the woman's family whenever they are bereaved and to make occasional presents to the girl and her parents, particularly the mother.

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1. This is the same society called by different names by the tribes.
2. This is one of the two seasons in Sierra Leone and it lasts approximately from May to October.

In the towns and cities, where internal migration makes it difficult for the man and the woman's family to live in the same vicinity, and where employment facilities make it impossible for the man to be engaged on some agricultural occupation, and he is employed as, say, a clerk, a professional, a labourer or a domestic servant, monetary gifts to the woman and her family replace the man's personal service.

As between the betrothed couple, there is no legal obligation to carry out the contract of marriage and consequently there is no right of action for breach of promise. But social consequences follow. Visits are exchanged between the couple and each is a welcome visitor to the home of the other's parents. Where the man is not already married to some other wife, the betrothed woman or, if she is too young, her mother, prepares the occasional meal for him. Sometimes, where the girl is too young when betrothed, it is customary for her to be reared in the house and under the care of the intended husband. In this case, the intended husband virtually assumes parental rights over her vis-à-vis third parties. One important legal consequence is that if the woman is seduced by another man, the intended husband and the woman's parents both have a legal right of action for damages against the seducer. But the husband's right is retroactive and takes effect only after he has finally married the woman.[1]

1, Some Krim and Mende informants from the Pujehun, Bonthe and Bo districts resident at Moiba Town, Freetown, say that a man has an immediate right of action even without concluding the marriage with the woman. This information, however, is not supported by other members of the same ethnic groups from the same areas. The difference of opinion probably arose from the first informants' repeated reference to the betrothed couple as "husband" and "wife". The opinion that the man acquires a retrospective right after the conclusion of the marriage transaction, therefore, ought to prevail.

Termination of betrothal

(i) By act of the parties

It is rare for the parents expressly to bring a betrothal to an end, but either betrothed party can do so expressly by telling the other or, if by the woman, impliedly by marrying some other man. If it is the man who terminates the relationship, his reason usually is that he has found the woman to be of a questionable character or that she has been seduced by another man. Whenever the woman takes the initiative, there is frequently another suitor behind the scene or her family may have advised her against the match after discovering certain characteristics of the man or his family with which they do not want to be associated. For example, the man may be found disrespectful or unhelpful or a quarrel may have arisen between the two families which has fallen them apart.

(ii) By death

The death of either the man or the woman automatically terminates the betrothal. But if it is the woman who dies and the two families have been favourably disposed to each other, should there be other unmarried female members of the deceased woman's family, the man is encouraged by the woman's family to choose another wife from among them; but he has no legal right to claim a substitute if they are unwilling to accord him this privilege.

(iii) By marriage

As soon as the marriage is finally concluded, betrothal merges with it and the parties attain to the status of husband and wife. Prior to that, however, but after betrothal, they may be referred to as "husband" and "wife". This is of common occurrence when the woman is brought up in the household of the

man. Such expression, nevertheless, used before the actual marriage ceremonies is only of social but of no legal significance.

Effect of termination of betrothal on property

Where termination takes place as a result of the death of either of the betrothed parties, no expenses incurred by the man at the time of betrothal or after is refunded. Similarly, if it is the man who brings the relationship to an end, the law of almost all [1] the tribes is that he forfeits anything he gave the woman and her parents. The Kono, however, are rather flexible in this respect. According to them, the man forfeits everything only if he does not give a good reason for the termination. In addition to the forfeiture, among the Mende, in the olden days, the man was fined by the parents or the chief for wasting the woman's time in looking up to him as a prospective husband. Nowadays, the Limba insist on a fine which, they say, is used in order to buy soap to "wash" the man's bad luck off the woman.

If it is the woman and/or her family who put an end to the betrothal, all the gifts made to her and expenses incurred in respect of the woman and her family must be refunded to the man, failing which he can recover them in an action for civil debt incurred by the woman and her family or he can swear them. Among the Kono, however, if the woman's parents do not approve of or consent to her breaking up of the betrothal she, but not the family, is liable to the man.

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1. Except the Kono.

Effect of termination on children

A child born during the period of betrothal belongs to the mother and her family if the marriage does not take place. The natural father has no right to it. Besides, he is liable to the woman's family and can be mulcted in damages. Such a child is prima facie illegitimate but the natural father can later legitimize him by paying a fee - regarded as marriage consideration [1] - to the woman's family, followed by his assumption of full parental responsibility for the child.

C. INITIATION

Initiation into one of the tribal secret societies in Sierra Leone is regarded by the appropriate tribe as part of the preparation for marriage. These societies are(a) for males:- poro (Mende, Temne, Sherbro, Gallina and Kono); biri, gbangbani[2] or andoma (Koranko); beri (Gallina); and gbangbani (Limba); (b) for the females:- sande (Mende); bondo (Temne, Sherbro, Loko, Limba, Kono, Susu, Kissi, Krim and Gallina); and biri kambam or segere (Koranko).

Initiation into the male society is usually at puberty but younger boys or adults may be accepted. For those who have

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1. There is a legal fiction that on payment of the fee and obtaining the consent of the woman's family, a "marriage" between the natural father and the child's mother is in existence, which makes the child legitimate. This is, however, one method of legitimation under customary law. For more information on this, see Chapter 19.

2. J.F. Luke: "Some impressions of the Korankos and their Country", S.L.S. (O.S.), No.22, 1939, pp.90, 92 mentions this society for the male and kambam for the female. Though both appear to be still in existence, the society commonly used by the Koranko for the purposes of preparation for marriage seems to be the biri.

reached puberty, initiation marks the passage into full adulthood while for the younger boys, initiation is commonly the stage for their circumcision. The primary purpose of initiation is to teach the candidates their tribal laws and customs, self-discipline, co-operation, obedience to one's elders and family responsibility.

In the woman's society, initiation into which usually takes place at puberty, girls are taught, inter alia, the arts of housekeeping and motherhood. The most important aspect of the initiation is the operation of clitoridectomy. It is a common belief among the tribes that a woman on whom this operation has been performed will remain faithful to her husband during their marriage because it curbs her appetite for sex which, in a polygamous family, is considered virtuous for the woman since she may go for months or even years without having sexual intercourse with her husband,[1] as the husband may have several wives each taking her turn to sleep with him.[2]

Though initiation is desirable for both men and women in preparation for a full marital life, it is regarded as a necessity for the females. A girl who has not been initiated should, strictly speaking, not have sexual intercourse, and any man who violates this rule by having an affair with her must compensate her parents and the head of the women's society whenever she is initiated into it.

The traditional rule was that a person was socially incompetent to enter into marriage if he or she was not previously

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1. The multiplicity of cases for woman damage which appears before the local courts does not, however, lend credence to this belief.

2. For fuller discussion on this point, see Chapter 17, pp.593-594.

initiated. Nowadays, insofar as men are concerned, the rule appears to be in theory only even among the most conservative tribal people. But native women in strict tribal society may not marry unless they have undergone the initiation ceremony. This rule is relaxed in the case of young educated women who have been brought up outside their tribal community by the Creoles, more particularly in the Western Area.[1] It is relaxed only when it is impossible for them to take time off to return to their villages for three or four weeks in order to undergo the initiation.[2] With the spread of education and social admixture, initiation will die out among these educated tribal people.

To sum up, although initiation has been and is still regarded as an essential forerunner of marriage, its absence is attended only by a social stigma,[3] but is not a legal bar to marriage. Our conclusion is based on the fact that many non-natives as well as educated natives have contracted customary-law marriages in the Provinces without undergoing the appropriate initiation ceremony and the validity of these marriages have never been disputed either extra-judicially or before the local courts.

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1. For a long time ever since the beginning of this century, it was usual for children of the people of the tribes of the protectorate of Sierra Leone to be given as wards to the Creoles in the colony.
2. The parents of such women require, whenever possible, that these women return home and be initiated into society before they enter into even statutory marriage.
3. A married woman who has never been initiated into society is held in very low estimation by the women graduates of such society in any matter concerning womanhood.

D. FRIENDSHIP ARRANGEMENT

Generally speaking, the marriage of women who are already married or divorced, widows, and adult women leading an independent life of their own, usually in towns and cities where they are engaged in some petty trade, begins with a friendship arrangement. No "go-between" is required to initiate the transaction. The man speaks privately to the woman, lavishes presents on her, and they begin to see each other frequently.

If the woman is already married to another man, it is also necessary for the intended husband to approach the section chief of the village or the headman of his tribe in the town or city where he is resident with a fee indicating his intention to cohabit with the woman. The chief or headman calls the woman and asks her about her present husband. After being satisfied that the marriage has gone on the rocks, the chief or headman gives his consent to the cohabitation. A good ground on which his consent is usually given is that the woman has been deserted by her husband and she has no visible means of subsistence. The result of obtaining the consent of the chief or headman is that should the woman's husband turn up afterwards, the man with whom she has been cohabiting is not liable to him for "woman damage".[1] But the husband can take his wife away, or alternatively, can demand the refund of the marriage consideration which he gave for the woman from such a man, the payment of which by the man converts the cohabitation into a lawful marriage. The word "lawful" in this respect is used in a relative sense. As regards the

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1. Relatively, customary law, in this respect, is moving towards polyandry. For another instance, see Chapter 16, pp.545-547.

parties, inter se, and third parties, except the woman's parents, the spouses are now regarded as husband and wife. But insofar as the woman's parents are concerned, there is no marriage until the new husband has "shown himself" to them with the payment of a nominal fee. The marriage consideration which he refunded to the first husband takes the place of what he would have given to his parents-in-law, but in the event of a divorce he cannot recover it from them though he can from a subsequent suitor who, again, may want to marry the woman.

In the case of a friendship arrangement, the man does not initially approach any person with the subject of negotiating the relationship other than the woman herself. Once they have met, cohabitation can take place at any time. The matter need not be mentioned to the woman's parents at this stage but where the man and her parents live together in the same community, although no formal request is made for the hand of the woman in marriage, the man is expected to be generous to them and assist them on their farm. Nevertheless, receipt of this generosity and assistance is not an acknowledgement by the woman's family that the parties are husband and wife. Should the husband intend to regularise the union, he must "show life" with a small present, even a kola nut, to the woman's parents. In return for this present, the consent of the woman's family is given which is the most important element for the validity of a customary marriage.

Although a friendship arrangement does not amount to a full and proper marriage unless and until it is converted into a regular marriage,[1] certain legal consequences flow from it.

1, By the man's obtaining of the consent of the woman's family.

Subject to the rights of an existing husband where the woman is already married, or of the woman's family, the parties to a friendship arrangement are regarded by the community in which they live as husband and wife, if they cohabit continuously for a reasonable length of time, usually one year and more. Consequently, the "husband" has some, though not exclusive, rights to her consortium. Thus, he can sue third parties, other than the woman's family or her real husband, for harbouring her and he cannot be sued by the woman's family for his having sexual intercourse with her. But he cannot succeed in an action for "woman damage" against any man who has intercourse with her because, in this respect, he and the woman are regarded as mere lovers. Because of this quasi-marriage relationship which results from a friendship arrangement, a male involved in such relationship is in a better legal position than one to whom a woman is merely betrothed.

E. CONCLUDING MARRIAGE FORMALITIES AND CEREMONIES

The formalities and ceremonies attending the conclusion of a customary law marriage vary depending on whether the marriage begins with betrothal or is one by gift, or is preceded by friendship arrangement. We shall consider each in turn.

(i) Marriage beginning with betrothal

Generally speaking, the marriage is concluded with the payment of the marriage consideration by the man and his family and its acceptance by the woman and her family, followed by the handing over of the woman to the man. In the case of marriage by service and goat's head marriage, where no formal marriage consideration is paid, the consent of the woman and her parents

together with the giving away of the woman to the man seals the marriage bond. But, there are some tribal differences in procedure and we shall deal with them presently.

Mende:[1] If the intended husband lives in the village where the girl is initiated into the sande society, a few days before she emerges, she is taken either to the entrance of the sande bush to meet him or to the house of the intended husband who then presents her with a gift (mboya-hani). If she accepts it, it is an indication of her readiness to marry the man. The importance of the ceremony is to ensure that her consent will be forthcoming at the final stage of the marriage, because she might have been betrothed whilst a baby or an adolescent, and now that she is on the threshold of adulthood, she may not want to continue the transaction either because she had not previously consented to the match or because she has changed her mind.

When the girl has finally emerged from the sande society, a meeting is held between the man, usually supported by his family, and the woman's family. If the girl's maternal uncle (kenya) is within easy reach, he should attend. An important member of the town or village must also be present as witness. The object of this meeting is three-fold: firstly, to agree on the final amount of marriage consideration, where payable; secondly, to obtain the consent of the woman and her family; and finally, to seal the marriage contract. Where the marriage consideration (tolei) is payable, it must include a lump sum in money - the amount depending on the economic and social position of the husband. When it is presented, the woman and her family

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1. The Krim and the Gallina appear to follow the same custom as the Mende.

withdraw for a short while in order to consult with one another privately; the money is handed over to the woman and asked whether she consents to having the man as husband. If she gives a positive reply, the general meeting is resumed and the man and his family are informed that the woman is ready to marry. Formerly, the tolei used to be one or several country cloths (gbali(s) gbalisia (pl)) in many chiefdoms and in addition, the maternal uncle, father and mother of the woman and the head of the sande society (sowoi) were given presents: the maternal uncle received a cap; the father a gown (mbla lomei), the mother a lappa (dagba gulei) in gratitude for having nursed the woman, and the sowoi a lappa.[1] Nowadays, money takes the place of these items in several chiefdoms. The whole transaction connected with the payment of the marriage consideration and obtaining the consent of the woman and her family is known as nyaha goi (literally, "finding the woman").

A couple of days after the conclusion of this transaction, if the man is not already married, a female relative should accompany him to receive the wife; but if he is married, his head wife makes the errand. The man or "go-between" is accompanied by other friends and well-wishers to the woman's family. On their arrival, they are met by dancers. Before the woman is handed over, the man or the "go-between" must "show life" (ndevu ge) with a sum of money of about 50 cents. The payment of this money is an acknowledgment by the man that he has assumed full responsibility for the wife and from that moment, the rights

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1. Harris, op.cit., p.11.

of the family over her are extinguished.[1] Should he fail to pay it before taking the wife to his home, and she is subsequently stricken by a serious illness or she dies, the husband is liable to the parents for compensation. After the husband has"shown life", the marriage is completed and the wife's mother gives her blessing to the wife, followed by a prayer that the marriage yields several children.

Sherbro: The Southern Sherbro adopt a procedure similar to that of the Mende. But the negotiation for the payment of the marriage consideration is, as a rule, not conducted in the presence of the intended husband. The "go-between" (kea) takes the marriage consideration to the woman's family, and gives it to the brother of the woman's mother (kenya) who shares it with other members of the family. So far as the marriage is concerned, the kenya plays the leading role in the settlement of disputes between the spouses and in decisions affecting the welfare of the children The importance of the kenya, in this respect, is as a manifestation of matrilinity in the early Sherbro kinship system. The Northern Sherbro (Bullom) who are to a great extent influenced by Temne culture, adopt a procedure very much akin to that of the Temne.

Temne: Traditionally,[2] when the woman's initiation ceremony was completed, the man sent a "go-between" to the woman's parents with the marriage consideration (ankala ananta) and with about twelve canes of salt (kasankra), some country cloths, and tobacco, all warapped in a bundle with a small sum of money,

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1. This "life kola" (ndevu tolei) as it is called, must be given even by the husband of a goat's head marriage or marriage by service.
2. Langley: "Marriage Customs amongst the Temne", S.L.S. (O.S.), No.13, 1928, 54, 57.

about 2 shillings, placed on top of it. On arrival at the woman's house, the bundle was placed on the floor and the parents of the woman would invite her to indicate her consent by taking the 2 shillings. When she had done this, the family took the bundle and sent back the "go-between" to the man with the message that the wife was preparing herself for the marital life. A few days later, representatives of the woman's family, usually female, were sent to the man with a reciprocal gift of two chickens and rice. The man made a return gift with another chicken and the marriage was completed. Two nights afterwards, the wife was conducted to the husband's house by female members of her family, accompanied by dancers.

Nowadays, the same formalities as described are followed by the Temne in villages and homesteads. But the ones in the towns and cities follow a procedure which is different in many respects. Presumably, it is the result of association with other cultures. A date is fixed for a gathering of representatives of both the man's and woman's families at the home of the woman. The man and his family collect about 100 kola nuts, 100 bitter-kolas, niddles, thread, a writing pad called kaidi stari, a winnower, a piece of white cloth,[1] and a sum of money - the marriage consideration: the money is wrapped in the white cloth and is placed with the other articles in a calabash. On arrival

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1. The significance of the white cloth is that it is used as linen on the bed of the spouses on the night of the consummation of marriage. If the wife is proved to be a virgin, it is returned to her parents with a sum of Le.2.10 as virgin-money (nbola). Formerly, instead of money, a large iron pot and country cloths were sent to the wife's mother in appreciation of her careful upbringing of her daughter. This custom of paying Le.2.10 cents as virgin money is nowadays prevalent among all the tribes in Sierra Leone.

at the woman's house, the representatives of the man, among whom is usually his head wife, if he is already married, give about Le.1 or Le.2 each to the maternal and paternal relatives of the intended wife, and 40 cents each to the women and men in the wife's household for their safe guidance and protection of the wife. The occasion is one of jubilation and is also attended by jocular remarks by the two families aimed at each other. Eventually, the mat is spread, the calabash is placed on it and the relatives of the intended wife are invited to examine its contents. In strict Muslim families,[1] the calabash is placed at the centre of the gathering, and the intended wife is called upon to take it and hand it over to a respectable person who is appointed for that purpose. He is called ansaba akananta and is regarded as the "father" of the marriage to whom the intended wife should make a first approach with her marital problems during the marriage. He will ask the bride why she has given him the calabash, and she is expected to reply that it contains her marriage consideration (ankala aranta) and that she wants him to take everything for himself and to become the father of the marriage. He will ask her repeatedly whether she consents to the marriage and, if she replies in the positive, the contents of the calabash are examined by a selected group. At this stage, the leader of the man's representatives will greet the bride (bot o rim) with a sum of money of any amount and will give her household token amounts of money as "bribe" so that they will not permit any other suitor to come and ask for the hand of the bride in marriage. The ceremony is concluded with a feast

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1. The procedure herein mentioned is not a requirement of Islamic law. It is a custom which must have evolved among the people themselves.

after which a relative of the husband must make another token present of about 40 cents with a request that the bride should go with them. If the bride is a virgin, she is not allowed to go to the husband until a couple of days have elapsed.

Among the Temne in the Kambia and Port Loko districts, no marriage is valid even though the foregoing formalities have been complied with, until a specific sum of money, Le.1.70 cents, is paid by the man and his family to the woman's family.[1] The payment of this amount is known as "tying the marriage contract" (ankala kananta). Even where no marriage consideration is given, this amount must be paid. It is the Temne equivalent of the Mende ndevu ge ("show life"), and it is a custom found among the Susu as well.

Susu: There is some similarity between the Susu and Temne customs. As with the Temne, a piece of white cloth, kola nuts, needles, tobacco and rice must accompany the other articles in the calabash. But the Susu formerly demanded that the bride be conducted to her husband's house on the evening of the marriage.[2] The present practice is that a few days must first elapse and then on the appointed date the futiwalieu [3] call at the bride's home and conduct her to the husband. This giving away of the bride is done quietly for fear that she might not be a virgin. After the consummation of the marriage, comes the

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1. Personal communication from P.C. Bai Sherbro Yumkella II.
2. Aubert: "Laws and Customs of the Susus", S.L.S. (O.S.), No.20, 1939, pp.67, 69.
3. i.e. Guardians of the marriage. These are witnesses to the marriage, to whom the spouses must first resort during the life of the marriage whenever there is a dispute between them before deciding upon a divorce.

time for celebration provided the bride is a virgin.[1]

Kissi: The only formality worthy of mention is that at the gathering of both families on the day of the conclusion of the marriage, a proper inventory must be taken of the marriage consideration which may include presents given to the wife and any member of her family since the date of betrothal. The object is to minimize a dispute about its quantum should the necessity ever arise for its being refunded. As with a Mende marriage, "life kola" must be given to the parents of the wife in order to conclude the transaction.

Koranko: A Koranko marriage ceremony usually takes place in stages. The first stage is when the future wife reaches puberty and is about to be initiated into the biri society. A few weeks before the initiation, she goes as a guest to the prospective husband's home for a couple of days. The reason is to ensure whether she will find it a comfortable place to live after her marriage. During this period, no sexual intercourse takes place between them. The second stage is the day of the woman's initiation. Formerly,[2] the man prepared a "meal" of pounded kola nut and ginger and sent it to the woman in the biri bush to eat. It was believed that if she was not a virgin, she would suffer severe pain after eating the "meal". It was then left to the prospective husband either to abandon the marriage

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1. If she is nmt a virgin, she is taken back to her family and given a severe beating. Some husbands will return such a wife to her family and ask for the refund of the marriage consideration. Formerly, the left ear of the wife was cut off, her head shaven, and she was put in chains. (Personal communication from P.C. Bai Sherbro Yumkella II).
2. Kamara and Drummond, op.cit., p.59.

transaction or to proceed with it. Almost invariably, this process was merely perfunctory since whatever was the condition of the woman he would always receive a favourable message from the head of the society. It is not, therefore, surprising that nowadays this ceremony is dispensed with even among the most conservative Koranko. The third stage occurs a few weeks before the end of the woman's initiation. It is important that the bride's consent to the marriage must be known before she emerges from the society because every Koranko girl is expected to marry immediately after her initiation. The man prepares food and articles which are to be used for the woman's decoration and sends them to her. Her acceptance of the presents indicates that she is still prepared to marry the man. Finally, a day or two after the initiation ceremonies are over, the families of the man and woman meet to agree provisionally on the marriage consideration (furufa). Some of it may be given at this meeting and the remainder at a later date. In the evening, the bride is escorted to the husband by her mother and other members of her mother's household. They wait at the matrimonial home until the marriage is consummated which must take place on the same evening. If the wife is a virgin, the husband must give the mother-in-law a cow or its value in addition to the sum of Le. 2.10 cents. Conversely, if she is not a virgin, either her parents or her seducer, if known, must give a cow or its value. Sometimes, there may be a difference of opinion between the husband and the wife about her virginity. In such a case, the husband must give the customary presents to the wife's parents and content himself by swearing the wife on a medicine provided by him. Among the Koranko, it is consummation that completes a

marriage. For this reason, before a wife is allowed to go to her husband finally, she must be neither pregnant nor on her menstrual course.

Kono: As the Koranko, the Kono too conclude their marriage transaction by stages. On the eve of the woman's initiation, the ceremony of "knocking at the door" takes place (kangatu). It commences with the man and his entourage consisting of friends and relatives going to the woman's house where they knock at the door and request that the woman should spend the night at the man's house. Singing, dancing and merrymaking follow, after which the woman is delivered to them. She sleeps with the man but no sexual intercourse should take place. Early in the morning, the girl is escorted by women to the bondo bush where she is initiated. On the same day, the man sends her presents of a mat and rice flour. If the woman or her family want to break off the marriage, the gift is returned to him; but if they are willing to continue, a message is sent to the man to get himself ready. In the evening, a meeting is held at the home of the woman's parents at which the man or his representatives, the woman's family - usually her parents and brothers, and an important member of the community, usually a chief, are present. The marriage consideration (foo) together with a large iron pot for the mother, a gown for the father and a piece of white cloth (wose koa) for the woman, are presented to the gathering. The wose koa is sent to the woman in the initiation bush and her acceptance of it is greeted with jubilation both in the bush and at the meeting. When the woman comes out of the bondo, the man himself, or through his "go-between", pays a life kola - about 20 cents - to her family. The marriage is not consummated on the first night of her arrival at the husband's house as it

is regarded immodest on her part to have sexual intercourse on the first night that she enters the husband's household. On two or three successive nights she "runs" back home to her family and, each time, the husband must give her some present in order to persuade her to return to him. If the woman was betrothed after having been initiated into the bondo society, a meeting similar to what has been described is held at which she must be present. In this latter case, the ceremonies of betrothal and the actual marriage take place at the same time, and the man is expected to add kola nuts to the foo and to give presents of clothes to the woman's mother and money to her father, brothers and sisters and grandparents.

Limba: After the girl has been betrothed, the man is expected to play an active part in her material upbringing. Thus, he must provide maintenance for her irrespective of the responsibility of her parents. When she is initiated into the bondo society, he should incur the expenses. If betrothal is preceded by initiation, he should refund all the initiation expenses incurred by the woman's parents. When the woman has left the bondo society, she spends some time with her parents during which she should cook occasionally and send meals to the husband. In an agricultural community, she is also expected to take part in the farm work of her family. All this process is to prepare her for life with her husband as she is expected to be a good cook and industrious. On an appointed date, the husband pays the marriage consideration (nahulu) to the father of the wife or, if he is not available, to his representative. The Limba are very strict in this respect, since it is their custom that a father alone has the right to give away a daughter in marriage. The person to whom the nahulu is paid is just symbolic of authority as the mother also must have a share of it. After the

presentation of the nahulu, a white kola is split into two; one half is given to the wife and the other to the man or his "go-between". In the evening, the wife is escorted to her husband by a male and female member of her family.

Loko: Northcote Thomas [1] reported that formerly the intended husband gave a ring to the prospective wife's mother, a head of tobacco to her father, and went in person alone to the woman's family. The giving of a ring has not been substantiated by the present elders of the tribe. Probably, Thomas's information concerned a Loko man purporting to enter into a Muslim marriage, because Muslims in general now, as in 1916, require a man to wed a woman with a ring.[2] If the assumption is correct, then the information is inaccurate because the ring is not given to the prospective wife's mother but to the woman herself. It is unlikely that Thomas was reporting on a Loko customary law preceding a Christian marriage, which is now a common practice among many Christian natives, because at the time he wrote hardly any Loko man was a Christian. Even now that there are many Christians as well as Muslims among the Loko, there is no giving of a ring at the customary law marriage; this is reserved for the religious ceremony which follows afterwards. A Loko customary-law marriage today is, in many respect, similar to that of the other tribes. Thus, there are the usual "putting of the kola", the payment of the marriage consideration and the festivities. Particularly, however, a Loko man is expected to be present at

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1. Anthropological Report on Sierra Leone, Part I, Harrison and Sons, London, 1916, p.91 and p.101.
2. This is not an Islamic law requirement. Probably, it is a practice borrowed from Christians.

every transaction connected with the marriage of the woman. In conclusion of the marriage transaction, the wife's parents give a kola, usually about 10 cents to the man and his family, which signifies that they approve of the wedding. If the woman is betrothed after initiation into the bondo society, the intended husband must refund part of the expenses to the woman's family. Such a husband is held in very high esteem. Moreover, the marriage payments are deemed never to be made in full and the husband is expected throughout the marriage to make frequent presents to the wife's parents, especially the mother.

(ii) Marriage by gift

The formalities and ceremonies attending a marriage by gift are very much the same as those following betrothal. The only marked difference is that there is no formal payment of a marriage consideration. It is, however, important to note that though the wife's parents do not demand a formal marriage consideration, the non-payment of which, as we shall see, does not affect the validity of the marriage, very frequently and as a matter of custom, the husband is expected to shower presents on the wife and her immediate relatives such as the parents and younger brothers and sisters. This is always the case, particularly when a chief gives his daughter in marriage or is given a wife without the legal liability of paying a marriage consideration. Custom prescribes that the husband must show himself as one worthy of the "gift" and in addition to what he spends on the wife's family, he is expected to celebrate the occasion with a sumptuous feast sometimes lasting for days to which the important members of the community should be invited. Contrary to

what one writer [1] has said, wives obtained by these means occupy a position of prestige usually second only to the head wife, in the husband's household.

(iii) Marriage beginning with a friendship arrangement

Marriage that begins with friendship, other than the marriage of a widow, is generally completed by a very simple ceremony. The majority of the tribes, except the Susu, Temne, and Northern Sherbro (Bullom)[2] do not demand the same formalities as in the case of the marriage of a betrothed woman. The marriage comes into existence upon the man showing himself to the woman's family with a "life kola". A marriage consideration may or may not be paid and it is usually demanded only when the woman has never been married before. If she is a divorced woman, her family do not in practice accept a marriage consideration and if they do, only to a limited extent, for fear of its having to be refunded inthe event of another divorce.

The marriage of a widow, on the other hand, is somewhat preceded by a formality strictly peculiar to it alone. After the funeral ceremonies of the deceased husband, which take place for a period lasting from seven to forty days, the widows are ceremonially "washed". The object of the washing is to purify them as it is believed that without it the spirit of the deceased husband will haunt any further marriage into which they may enter and thus jeopardise its chances of success. It is

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1. K.H. Crosby: "Polygamy in Mende Country", Africa, Vol.10, 3, July 1937, 249 at 262. Crosby says that the position of such women was very low indeed. He was writing on the Mende.

2. These tribes require such women to be married in the same manner as those who have previously been betrothed.

regarded as an offence actionably by the head of the family of the deceased for any man to have sexual intercourse with a widow before her purification. After the washing ceremony, the widows are expected to name their future husband. Among the Temne, Susu, Limba, Loko, Kissi and Kono, a widow can elect to marry a member of the deceased's family, usually a brother, or a stranger without her family having to refund the marriage consideration. But the Mende, Krim, Sherbro, Gallina, Koranko and Yalunka require the widow to marry into the late husband's family, and if she refuses and fails to do so, her family should refund the marriage consideration given for her by the deceased. It is interesting to note that among some tribes like the Mende, the widow can marry even a son of the late husband other than her own son.

Recently, the question of whom a widow should marry has seized the attention of the Sierra Leone government. Three Customary Law Advisory Panels were set up in 1959 in the three provinces of the then Protectorate, having as their terms of reference to "advise on such questions of Native Law and Customs as may be referred to by Government". One such question was whether it would be permissible for a widow to marry whomever she pleased without obligation to refund the marriage consideration. All the Panels observed that:

> "There is growing reluctance, as indicated by the number of cases which come before the (native) Courts, on the part of widows to re-marry into their deceased husband's family. With the spread of education, it seems desirable to re-assess the intrinsic value of this aspect of customary law. In the days when the consent of a girl was immaterial for her betrothal, the practice of requiring widows to re-marry into their deceased husband's family was justified. Now that the tendency is to get the consent

of the bride-to-be, such a system seems untenable."[1]

Following the recommendation of the Panels, the Sierra Leone government issued a directive to all the districts of the provinces effective as from April 27, 1963 that a widow should be free to marry whomever she pleases and that no marriage consideration is refundable should she choose a spouse outside the family of her late husband.[2]

When a widow has selected her future husband, the custom of many of the tribes is merely for him to present himself to the woman's family with a kola and a small sum of money and ask for the hand of the woman. The woman's family may further ask for a marriage consideration in addition depending on whether the prospective husband is a member of the deceased husband's family or not.

Among the Temne, Susu and the Northern Sherbro (Bullom), soon after the burial ceremonies are complete, if a member of the deceased's family is interested in his widow, representatives of the family formally take her accompanied by a sum of money to her family and report the death of her husband as if the family does not know about it. Another amount of money is given as kola for the woman just as if she were a betrothed woman who has not been married before. The consent of both the woman and her family is essential and it is easily given if the woman had not got children by the first marriage.

Among the Mende, a widow normally remains with the late

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1. See Cabinet File P/43/3 and Minutes of a Meeting of the Cabinet Committee on Customary Law Advisory Panels, held at Freetown on March 26, 1963.

2. For more information on this directive, and its effect on existing customary law, see Chapter 18, pp.637-638.

husband's family for a year during which she is maintained and looked after by a guardian who is either the head of the family or a prospective suitor within the family. After this period, she is expected to marry within the family and if she is willing, the prospective husband will show himself to her family with a life kola.

F. CONCLUSION

Many varying points of detail in a marriage transaction have been shown as existing among the tribes of Sierra Leone; but it was noticeable that without exception, all the tribes require a kola to be put for an intended bride at the beginning of the marriage, the consent of the bride and her parents to be obtained and finally, a life kola to be given by the husband to the family of the wife in order to conclude the transaction. Before a marriage can be said to come into existence, it would appear that these conditions must be complied with.

At this juncture, therefore, we will try to suggest a way of solving the complex problem of determining the exact point at which a customary-law marriage, at any rate in Sierra Leone, comes into existence.

Three learned jurists [1] have expressed the view that a possible exact time of the birth of a customary marriage is when the power to sue the woman's lover for damages passes to the alleged husband and does not remain vested in her kin or a former husband. To this we may add that such a power is exercisable by a man only when there is a marriage between him and the woman

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1, Profs. A.N. Allott, A.L. Epstein, and M. Gluckman, op.cit., pp.63-64.

concerned, but the date of its commencement must be marked by an overt act. It is the act which creates the power that determines the time at which the marriage comes into existence.

The same jurists have also argued that registration of the marriage is a possible solution since it will simplify a situation where varieties in customs of the intermarrying peoples are numerous.[1] Registration, in our submission, is an answer provided before it is accomplished, the registering officer satisfies himself, as was the law in the former French West Africa,[2] that the necessary conditions imposed by customary law for the validity of the marriage are complied with. Otherwise, a friendship arrangement may be registered as a marriage thus giving a semblance of recognition to a union which is not recognised by customary law as conferring, for all purposes, complete marital status on the parties concerned.

At present in Sierra Leone, a number of chiefdoms have enacted bye-laws for the non-compulsory registration of customary law marriages. But as we shall argue in due course, such registration does not create the marriage but is only evidence of its existence and is intended to minimise disputes relating to the quantum of marriage consideration refundable on divorce. Since we have discovered at least three elements common to all Sierra Leone customary law marriages, compulsory registration of a marriage which complies with these elements in addition to other essential requirements of a valid customary-law marriage, ought to be the final act which determines the existence of the

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1. Ibid., at p.64.

2. See Arrete No.972 of December 13, 1940, cited by Phillips, op.cit., p.107.

marriage. In chiefdoms where there is provision for the registration of customary marriages, very little or no attention is paid to it by many married couples. Compulsory registration with the sanction that no legal incident will follow from a marriage which is not registered will induce spouses to a customary-law marriage to register it, and thus, it will not only provide evidence of the union but will also become a stepping-stone towards the harmonization of the customary laws of Sierra Leone.

CHAPTER 16

THE ESSENTIAL REQUIREMENTS FOR A VALID CUSTOMARY-LAW MARRIAGE

The essential requirements for a valid customary law marriage in Sierra Leone may be classified as follows:- First, the immediate parties to the marriage, i.e. the man and the woman, as distinct from their respective families, must have the capacity to marry. Secondly, the consents of the man, the woman and her family should be obtained. Thirdly, the man or his family must give a marriage consideration to the woman's family, unless its payment is waived by that family. Fourthly, the marriage formalities should be complied with, and in some chiefdoms, the marriage should be registered. Finally, there is evidence that at least one tribe, the Koranko, requires consummation for the completion of the marriage contract. We shall now critically examine these requirements.

A. CAPACITY

Legal capacity to contract a customary law marriage in Sierra Leone, like in many African societies, depends on three factors: (i) the marital status of the woman; (ii) the physical development and the mental state of the intended spouses; (iii) whether the intended spouses are not prohibited from intermarrying on the grounds of consanguinity, affinity, fosterage, or clanship.

Before we undertake a discussion of these factors, there is a preliminary point to make. Certain disabilities, which adversely affect the social acceptability of a person or potential spouse, rendering it difficult or impossible for him or her to get married, do not as such constitute grounds for the invalidation of a marriage if it takes place despite the disability.

An example of such disabilities is a physical or mental handicap of one party at the time of the marriage. Subject to what we shall say in due course in regard to the physical development and mental state of the intended spouses as an essential element for the validity of their marriage, physical conditions such as deformity, deafness, dumbness and blindness, and a mental condition such as the insanity of the prospective bride, are not legal bars to a customary law marriage in Sierra Leone.[1] It may be hard to accept that under customary law an insane woman can contract a valid marriage even outside any lucid interval; but this is legally possible, the reason being that, even though in current practice the consent of the prospective bride is important, in traditional laws, the validity of a marriage has depended mainly on the consent of the bride's family and not that of the bride. While the modern tendency is to insist, as a legal requirement, on the girl's consent, instances still occur when young girls are given in marriage by their parents against the girls' will or consent, and the marriage is regarded as legal and valid.[2]

A second disability, which constitutes a social but not a legal bar, is non-initiation. A woman who has not been initiated into the appropriate female seociety [3] may not be allowed by her family to marry. So far as men are concerned, they must at least be circumcised before they are regarded as mature enough to marry (under the influence of Islam, initiation is discouraged among the orthodox male Muslims).[4]

1, Compare with consent in non-customary law marriage. See Chapter 6.

2. For more discussion on this, see later in this Chapter.

3. For these societies, see ante, Chapter 15.

4. See J. Spencer Trimingham, op.cit., p.109.

Next, we must consider ethnic differences, the existence of which may make an inter-marriage between a woman of one tribe and a man foreign to her tribe objectionable. Formerly, marriage between two natives belonging to different tribes was discouraged. The reason, perhaps, was that as the man usually came from another place and his background was unknown, the woman's family was suspicious of his intentions.[1] Once any grain of suspicion was removed, the woman's parents would readily give their consent to the marriage. Migeod [2] states that among the Koranko, if a man belonging to another tribe proved that he had a house either at his own home or in Koranko territory, he could be given a Koranko woman to marry. Nowadays, with internal tribal migration, inter-marriage between the members of different tribes is welcomed.

So far as a marriage between native and non-native is concerned, while all the tribes welcome a marriage between a native and a non-African, there has always been a social bar against a tribal person marrying a "non-native" Sierra Leonean - a Creole.[3] The reason for the disapproval has been that the Creole might not be respectful to his or her parents-in-law. Since the Creoles were the first among Sierra Leone citizens to come into contact with Western civilization, they have assumed an air of superiority over the tribal people of Sierra Leone. Despite this, the more progressive and well-educated "natives" (i.e. people of the Provinces) continue to permit their children to marry Creole mates. The more conservative Creoles reciprocate this suspicion

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1. The purposes commonly suspected were slavery and cannibalism.
2. Op.cit., p.65.
3. Note that we argued in Chapter 4 that a non-native can enter into a valid customary law marriage.

of inter-ethnic marriage, thinking it beneath their dignity for their children to marry natives even in a Christian form, let alone to contract customary-law marriages with them.

Having disposed of these preliminary issues, we may now turn to the factors that determine legal capacity to marry.

(i) Marital status

It is a clear rule of all the customary laws that a man may contract as many customary law marriages as he can afford without a legal or social sanction.[1] Similarly, he may contract as many customary law marriages as he wishes with more women during the subsistence of a non-customary law [2] marriage with a wife and the subsequent marriages are valid under customary law, although they will be regarded as invalid and adulterous under the general law. In this respect, Sierra Leone family law is unique, because in many other African countries, for example, Ghana [3] and Nigeria,[4] once a man has contracted a non-customary law marriage, he is incapable, during the subsistence of it, of entering into a subsequent customary law marriage with another woman. What a Sierra Leone man is prevented by law from doing is that if he is already married under customary law, he cannot contract a further marriage in accordance with the Christian or Civil Marriage Acts with another woman during the subsistence of the customary law marriage.[5] Why the man is clothed with

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1. A man may, however, marry only one wife or the number of wives as permitted him by his religious belief. But many native Muslims are not inhibited in marrying mpre than four wives.
2. i.e. even marriage under the Christian and Civil Marriage Acts, see ante, p.55.
3. See s.44 of the Ghana Marriage Act.
4. See s.35 of the Nigerian Marriage Act.
5. S.1 of the Christian Marriage (Amendment) (No.2) Act, 1965. On the general effect of this section, see ante, Chapter 6, pp.195-201.

incapacity in one case but not in the other in the two sets of circumstances is difficult to comprehend.

Since polyandry is not practised in Sierra Leone, as a general rule, a woman cannot enter into a marriage, even at customary law, with one man during the subsistence of a marriage between her and another. The purported second marriage is utterly void.

This rule, however, seems to be ignored from time to time in diamond-mining areas.[1] The situation occasionally arises in these areas when a woman forms an association with a rich diamond miner who is prepared to marry her irrespective of the fact that she is still married to another man. Very much impressed by the wealth of her suitor, the woman usually tells her parents that she no longer wants her marriage with her real husband to continue and she presents her suitor to them as her new husband. The man then offers the parents sufficient money in order to indemnify them against any action for a refund of marriage consideration, reclaim of the wife, or for damages for their giving their daughter away in marriage to another man, which the first husband may bring against them when he becomes aware of that fact.

Where a wife obtains a judicial divorce from a local court by merely indicating her intention to divorce her husband and refunding the requisite marriage consideration without any further formality, the woman's first marriage can be legally brought to an abrupt end upon the receipt of a divorce certificate, which automatically makes her a single woman for the purpose of validly contracting another marriage.[2]

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1. In some chiefdoms of the Kono and Kenema districts.

2. On customary law divorces generally, see Chapter 18.

But in extra-judicial divorce, it is wrong to assume that the woman can divorce her husband so that the divorce takes effect automatically, by merely telling her parents that she does not want him any longer. The reason is that, as we shall see later,[1] in extra-judicial divorce by a wife, the exact moment of the divorce is when the marriage consideration has been refunded to, or its refund is waived by the husband. In such a situation, divorce by a wife is ineffective without the knowledge and acquiescence of the husband. Therefore, unless these conditions are fulfilled, the wife is still legally married to the first husband, and her second marriage would be, strictly speaking, void or at best, a "friendship arrangement".

In the areas where this sequence of events occurs, it is not certain from the information available whether or not the second marriage will be treated as valid under customary law. The better opinion would appear to be that the marriage should be void.

But in these areas, once it is proved before the local courts that both the first and second husbands obtained the consent of the woman's family to the marriages of their daughter, the dissatsfied first husband cannot succeed in "woman damage" against the other, although he can successfully sue his parents-in-law not only for the refund of the marriage consideration, but also for damages giving his wife away in marriage to another man. The local courts in these areas resent such conduct by parents and they are prone to award high damages against them.

It is suggested that a second marriage under these circumstances should be held to be utterly void, because to allow

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1. In Chapter 18.

it will be tantamount to permitting polyandry since the first marriage was still in existence when the second marriage was contracted. The best means of promoting certainty in the law is by the making of a bye-law.

In conclusion, we should emphasise that in the customary laws of the rest of Sierra Leone, a man who marries another man's wife is liable to the first husband for "woman damage", despite any consent of the woman's family to the purported second marriage. The second husband is also liable in damages to the first husband. The only defence available to the second husband is lack of knowledge that the woman was already married; but this defence only mitigates the damages and does not save him from the liability.

(ii) Physical and mental development

We shall begin with mental development. As we have already stated, an insane woman may be given in marriage with the consent of her family. If she enjoys a lucid interval, however, she can ask for divorce on the ground of her lack of consent. Unless she does this, whatever transaction takes place based on an existing marriage between the spouses remains valid. On the other hand, an insane man cannot contract a valid marriage. The reason is that in traditional, as well as in modern societies, the consent of the man to his marriage, even if it is his first marriage which is usually arranged by his family, is essential for its validity. The rule that in traditional society children could be given in marriage without their consent applied to females but not to males.

Next, we must examine physical development. Some writers state a specific age at which a man or a woman can

contract a customary law marriage in Sierra Leone. Aubert [1] gives 21 years and 16 years as the normal ages for a Susu man and woman respectively. He [2] also states that formerly a Kissi man married at the minimum age of 18 years, while a Kissi woman wedded only if she was at least 15 years of age. Writing on the Mende, Crosby [3] mentions that in 1937 many women married before they were 15 years of age, and that the sons of chiefs and big men married at 18 or 19, whilst the children of ordinary people did not marry until they are about 25 years.[4] The 1931 Census of Sierra Leone gave the usual age of marriage for women as being from 14 to 16 years, but the Census rightly conceded that marriage depended on the girl's general development and fitness for intercourse.[5] Both the Christian Marriage (Amendment)(No.2) Act, 1965, and the Civil Marriage (Amendment)(No.2) Act, 1965, lay down that 18 years is the age at which "a person whose personal law is customary law" can contract marriage under the respective Acts without parental consent. This provision subsumes, it is submitted, that a native whose personal law is customary law is regarded under that law as mature and capable of marrying long before he reaches the age of 18 years.[6]

Though attempts have been made by writers to state specific ages at which persons could be regarded as capable of marrying under customary law, there is no fixed age limit specified by

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1. Op.cit., 68.
2. Op.cit., 89.
3. Op.cit., 259-260.
4. The disparity in the age of marriage between sons of chiefs and big men, on the one hand, and the sons of ordinary people, on the other hand, is attributed to poverty on the part of the latter. See Crosby, op.cit., 260.
5. Cited by Crosby, op.cit., 259.
6. Note that 21 years is stated by the Acts as being the age at which other persons, non-natives, can marry without parental consent.

any of the respective customary laws. Instead, marriageable age is determined generally by the individual's physical development, and his or her capability to consummate the marriage. In addition, for a man, he must have the ability to assume parental responsibilities. For a woman, as a general rule, she must have reached the age of puberty which is determined by the development of her breasts, the first appearance of menstruation and initiation.

However, instances occur where very young girls who have not fulfilled these conditions are given in marriage. This is frequently the case when the man wants to bring up the wife in the manner in which he desires her to be reared. Nowadays, the practice is of common occurrence among chiefs and big men, but scarcely prevails among ordinary people. For example, one informant revealed that a Paramount Chief called Meama Kajue in the Moyamba district married a girl when she was three years of age and that everybody regarded her as the Chief's wife. This type of relationship, it is submitted, is equivalent to betrothal which is a stage in the marriage transaction, because the marriage cannot be consummated with impunity until the girl has reached puberty and is physically capable of having sexual intercourse.

(iii) Prohibited degrees

Generally speaking, among all the tribes of Sierra Leone, there are certain degrees of consanguinity and affinity within which persons may not inter-marry. Thus, a man [1] may not marry his mother, his sister (germane, consanguine or uterine), his aunt or niece, his daughter, and the ascendant or descendant of his wife. Moreover, a man may not marry his foster-mother, i.e.

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1. A woman too may not marry the corresponding male persons.

a woman that suckled him during his infancy, or the ascendant or descendant of his foster-mother. A foster-mother is deemed to be in the same blood relationship as the natural mother. Beyond these principles stated above, it is not possible to formulate general statements which are equally applicable to all the tribes, as there are tribal variations in regard to prohibited degrees with which we can accurately deal by taking each respective tribe in turn.

Mende, Krim and Gallina: A man may not marry any member of his father's family,[1] his wife's sister during the lifetime of his wife, and the daughter of his mother's germane or uterine brother. But he can marry the daughter of his mother's consanguine brother, the widow of his father except his own mother or a foster-mother, and the widow of his kenya, unless he has already married his kenya's daughter. Goat's head marriage (njewui) apart, cross-cousin marriage is not permitted.

Kissi: The prohibited degrees of consanguinity and affinity among the Kissi seem to be narrower than those for many of the other tribes. Among the Kissi, Aubert [2] says, "cousins are permitted to marry as well as brothers-in-law and sisters-in-law". As with the Kono, a man may concurrently marry two sisters.

Kono: The Kono are one of the tribes that apply the rule of exogamy. An early statement on this was made in 1932 by Langley,[3] who asserted that "members of the same sect (dambi) are not allowed to intermarry". But he concluded that "this rule is gradually being broken in the case of the larger sects,

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1. i.e. lineage.
2. Op.cit., p.89.
3. "The Kono People of Sierra Leone", Africa, 5, Jan. 1, 1932, 61, 62.

but then only when relationship is not too close". As recently as 1964, Parsons [1] wrote that "a man may not marry any one who is of the same clan. Marriage with anyone who has the same totem as the father is prohibited". "It is also incestuous", he continued, "to marry a member of the mother's clan because of the kindred relationship". A.A. Koroma,[2] however, says that nowadays, members of the same clan except the kawi [3] clan may intermarry, provided there is no blood relationship between them. Marriage is not forbidden between a man and the younger sister of his wife if the wife is the eldest sister. Koroma also says that there is no legal but social probition for a man to marry the elder sister of his wife. The reason for the social prohibition is that as she is older in age, the second wife will not respect her younger sister who is regarded as senior in the husband's polygamous family. A man may marry the widow of his father, except his own mother or foster-mother. Cross-cousin marriage is also permitted.[4]

Koranko: The general rule is that a man may not marry a blood relation, nor may he marry the widow of his father or father's brother unless the marriage between the deceased and such widow was never consummated.[5] But a man may marry the widow or divorced wife of a brother. Marriage between a man and the daughter of his paternal or maternal aunt or between a

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1. Op.cit., p.13.
2. Personal communication. A.A. Koroma is a Kono and was Attorney-General of Sierra Leone during the Military regime from March 1967 to April 1968.
3. The kawi is the clan whose totem is the dog.
4. See McCulloch, op.cit., p.89. The present writer has not been able to substantiate McCulloch's claim that the existence of cross-cousin marriage among the Mende is a result of Kono influence.
5. Kamara and Drummond, op.cit., p.64.

man and the daughter of his paternal uncle is forbidden. A man may, however, marry the daughter of his mother's consanguine brother. There is divided opinion as to whether marriage between a man and the daughter of his mother's uterine brother is permissible. It is, however, clearly settled that marriage with the daughter of a man's mother's germane brother is disallowed.

On marriage within the same clan, Migeod says that the only clan restriction which he could find was that the clans of Kamara, Mensereng and Kagbo could not intermarry.[1] The fullest statement of the rule which subsists even in modern times, was made four years later, in 1930, by Kamara and Drummond as follows:

> "There is much division of opinion on the question of exogamy amongst the sienu (clans) ... Some say that inter-marriage in a sie is not allowed and it would appear that in the old days this was a fixed rule. In certain of the more remote parts it seems to be true to this day - that, for instance, a Konde cannot marry a Konde, but the rule is relaxing amongst many in the parts that have come in contact with civilization and especially in the larger sienu, such as the Maras, Koromas and Kagbos."[2]

Limba: The Limba rules on the subject are clearly laid down by Finnegan.[3] On prohibited degrees on the ground of consanguinity and affinity, she says that a man "may not marry his full sister's daughter, his wife's full sister in his wife's lifetime at least". She continues that cross-cousins, that is, if descended from the same grandmother as well as grandfather may not marry; but that if the grandmother is different, they may marry. "A man may also marry the daughter of his father's half-brother (of a different mother)", she says. On prohibition on the ground of clanship, Finnegan concludes that a man "cannot marry a woman of the same clan as himself even if she is of no

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1. Op.cit., p.65.
2. Op.cit., p.65.
3. Op.cit., p.62.

known kinship". But she correctly qualifies this statement by asserting that "in the larger clans this rule is no longer always observed, specially if the couple have travelled down country".[1]

Sherbro: Writing in 1938 on the Sherbro tribe of Sierra Leone, Hall [2] made the point that sexual relations between pentè[3] and wante were considered to be incestuous. If such a relation is incestuous, then marriage could not take place between the persons concerned. The Sherbro are not divided into clans but there are among them kinship groupings - ramde.[4] Concerning them, Hall wrote that marriage between members of the same grouping was forbidden. "It is believed", he said, "that actual blood relationship is traceable among all members of a given ram. The remotest degree of such relationship is a bar to marriage".[5] We may observe that these rules are less strictly kept in modern times where the blood relationship is remote, and the present position is very much similar to that of the Mende, Krim and Gallina.

Susu: The only specific prohibition, apart from the general one in regard to close blood relations, is that a man may not marry the widow of his father or his father's brother. Widows are inherited by the brothers of the deceased. Among this tribe, the son of the wife of a polygamist is deemed to be at the same time the son of the co-wives of his mother and on this account, a son and the widow of his father cannot intermarry.

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1. Ibid.
2. Op.cit., p.3.
3. Pente and wante are Sherbro terms describing brother-sister and cousin-cousin relationships. In these relationships, the males are pente and the females wante.
4. Hall called the grouping a ram. The actual Sherbro word is ramde.
5. Op.cit., p.2.

Cross-cousins may, however, intermarry.[1] Therefore, marriage between a man and the daughter of his mother's full or half brother is not forbidden. The reason is that it is believed that the blood relationship is distinct, since a man's mother is married in a family which is regarded as different from that set up by a man's uncle on his marriage.

Temne: Formerly, marriage was prohibited between members of the same clan (abuna).[2] Today, unless a close blood relationship is discovered, persons within the same clan may intermarry, although some families require a propitiatory sacrifice to be performed before the marriage is contracted. Thomas [3] and Langley,[4] writing in 1916 and 1928 respectively, maintained that cross-cousins marriage was not permissible among the Temne. In present-day Sierra Leone, however, cross-cousins are not prohibited from intermarrying.

Legal effect of lack of capacity

In our discussion of capacity, we stated that an insane man cannot contract a valid customary-law marriage, and that a married woman cannot generally enter a marriage with another man during the subsistence of her first marriage. We also observed that marriage contracted between persons within certain degress of consanguinity, affinity and clanship is prohibited. The effect of the absence of capacity based on these grounds is that the marriage is void ab initio. Other incapacities which we have mentioned do not invalidate the marriage. But we must repeat that in regard to non-age, a man cannot with impunity at customary law have sexual intercourse with a young girl who is

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1. Thomas, op.cit., p.101.
2. Langley, op.cit., p.54; McCulloch, op.cit., p.55.
3. Op.cit., p.91.
4. Op.cit., p.54.

uninitiated, and marriage with such a girl is no defence to an action for damages brought by her parents against the alleged husband. In this respect, marriage with a girl that has not reached puberty is legally inchoate. The marriage, however, becomes complete upon either the initiation or its waiver by the girl's parents.[1]

One last word on prohibited degrees of relationship. Among all the tribes without exception, though the marriage is void ab initio, the position can be rectified retroactively, but not prospectively, if the spouses are in the relationship of brother and sister or cousin, by the performance of rites and ceremonies by which the offending parties are cleansed.[2] It is believed that if the propitiatory rite or ceremony is not performed, the spouses will not have issue and if they do, such issue will die. But where the relationship is that of father-daughter, mother-son, nephew-aunt or niece-uncle, the general consensus of opinion is that the marriage should be dissolved forthwith and an expiatory sacrifice offered to the ancestors of the offending spouses.

B. CONSENT

The parties whose consents are legally essential for a customary-law marriage are the spouses (subject to some exceptions) and their families; if the man is already married, the

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1. In practice, waiver of initiation never occurs in the case of a young girl brought up in a native milieu in a village or homestead.

2. Some tribes have special societies through which the cleansing ceremonies are carried out. For example, the Mende, Krim and Gallina have the humoi; the Kono, the sumoi, and the Sherbro the yassi. The Temne do it through the ragbenle society. For details about these societies, see Chapter 17, pp.629-632.

consent of his head wife is socially, though not legally, essential.

Consent of the spouses

In traditional, as well as in modern societies, the male spouse must consent to the marriage even if it is his first marriage which is usually negotiated by or with the help of his family. But for the female spouse, it was in the olden days the absolute right of the father to give her in marriage to whomever he pleased, whether or not she liked the partner or consented to marry him. Thus, the consent of the female spouse to her marriage was, as a rule, subordinate to that of her father, and if there was conflict between her's and her father's, that of the latter prevailed. This rule was relaxed only in the case of an elderly woman, or one who was divorced or widowed, in which case she could marry a man of her own choice. In modern times, however, there is a degree of uniformity in all the customary laws to the effect that a girl's consent should be obtained even for her first marriage. The change of outlook is due to the frequency of divorces which follow forced marriages and a recognition of the fact that with increased opportunities outside the home circle,[1] modern girls mingle freely with boys of their age group and form liaisons with them even without the knowledge of their parents. Therefore, if the marriage is to last, which is the wish of all those concerned, regard must be paid to the consent or lack of it of both spouses. One elder [2] has attributed the un-filial nature of modern girls as the cause for the

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1. For the ways in which modern opportunities have influenced the choice of partners in customary law marriages in Sierra Leone, see Barbara Harrell-Bond, op.cit., pp. 173-177 See also D. Gamble, "The Temne Family in a Modern Town (Lunsar) in Sierra Leone", Africa, 33, 1963, p.209.

2. Pa. Fofana of Port Loko.

change. In a Port Loko Panel discussion on the point held in 1972, he commented:

> "Formerly, a father giving his daughter away in marriage without her consent was a common thing. But nowadays, it is very rare because our daughters are not so filial as our mothers used to be."

Although the present trend is for the female spouse to give her prior consent, marriage can still be negotiated for a daughter by her father without her consent. This is common when a father wishes to have a chief as a son-in-law.

Consent of the families

It is not necessary that all members of a man's or a woman's family should consent in order that there should be a regular marriage between the spouses. For the purpose of consent, a family is represented by a parent or a person standing in loco parentis, like a guardian or family head.

Though, in practice, the consent of the man's family is sought, a man can contract even his first marriage without family consent and the marriage may, nevertheless, be valid.

In the case of a woman, however, the absence of the prerequisite family consent is fatal to the marriage. If the father and mother of the woman are alive, both should give their consent, but if there is conflict between them, the wishes of the father prevail. For the stability of the marriage, however, it is necessary to obtain the mother's consent because it is believed that a mother whose daughter marries against her (the mother's) will, may in future, induce her daughter to break up the marriage when she (the mother) sees a suitor whom she likes for her daughter.[1] Where the father is dead, or unavailable,

1. Extra-marital relationships with other men by a married woman are in many tribal societies attributed to the encouragement of the wife's mother. Mothers continue to have influence on their daughters even when they are married and are blamed for their daughters' sexual lapses during marriage.

the mother steps into his shoes and she must give her consent to the marriage of her daughters.[1] But if there are surviving members of the deceased husband's ante-nuptial family, the consent of the head of that family supersedes that of the mother.[2] If the child is born illegitimate but has been taken care of by the natural father, his consent to her marriage supersedes that of the mother's family; but if the child has been brought up by the mother and/or her family, the head of the mother's family is the person regarded by the customary laws as capable of giving a valid consent to her marriage. Though in practice, the views of a guardian of the child or the head of her family other than a parent are highly respected, the consent of a guardian or a family head alone renders validity to the marriage only in the absence of a living parent. We must add that among some tribes like the Mende, Krim and Sherbro, a woman's mother's brother plays a very important role in her life. Some informants say that among these tribes a woman cannot be given in marriage without the consent of his mother's brother, and that it is he who is actually entitled to the marriage payment given for his nieces. In order to maintain peace and harmony within the family, it is submitted, the uncle is consulted when important questions like the marriage of his nieces arise, but our informants are agreed, and rightly so, that a marriage consented to by the parents but not by an uncle is, nevertheless, valid.

Finally, in the absence of a surviving parent or family head, a guardian or any other member of the woman's family, like

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1. Among the Susu and Temne, if the father is alive but unavailable, he is represented by his consanguine or germane brothers. The consent of the eldest of them suffices.

2. On the death of the husband, the wife and their children go under the guardianship of the head of the husband's family.

a brother or cousin, can consent to her marriage in order to render validity to it.

Consent of the head-wife

So long as a man is already married, all his subsequent marriages are usually the result of agreement between him and his head wife. In order to maintain peace and stability in the man's polygamous family, it is necessary that the head wife should consent to any further marriage into which her husband wishes to enter. Besides, most parents in Sierra Leone are reluctant to give their daughters in marriage to a man whose head wife is opposed to such marriage.

Bearing these in mind, a husband who intends to take another wife induces the consent of his head wife by giving her a "begging kola" - usually money. If after this display of courtesy, she refuses to allow him to marry the woman concerned, the husband has the right not only to divorce her but also to marry the other woman. It is settled in all the customary laws of Sierra Leone that a wife has no right to prevent her husband from marrying another woman. One reason for this rule has been given as being that the husband needs as many wives around him as he can afford in order that they may assist him on his farm and entertain visitors who, in a tribal society, are welcomed guests at every hour of the day and night. This may be a good excuse for the practice of polygamy by the husband, but it can hardly be supported as a ground for not making the lack of consent of a wife, with whom he has a subsisting marriage, fatal to the validity by his subsequent marriages. A head wife, for some reason, may refuse her husband's marriage with one woman but agree to his marrying another woman. The real reason, as stated by one elder, seems to be that in customary law it is the husband who controls the wife and not the reverse.

Legal effect of lack of consent

As we have seen, the consents of the spouses, their families and the man's head wife are, for a number of reasons, desirable for the marriage. There is unanimity that the absence of the consent of only three in this group, namely: the man, the woman, if she is elderly, divorced or widowed, and the woman's family, renders the marriage void. Without their consents, a proper marriage cannot take place because there will be no agreement, express or implied, for the payment or waiver of the marriage consideration, nor can there be any giving away of the bride to, and her acceptance by the husband.

Though it has been stressed that nowadays, as a rule, a young bride's views on the choice of her prospective husband are more respected than before in that she may not now be given in marriage without her consent, there is divided opinion on the legality of a marriage into which she is forced. There is no tribal difference in this regard. While the vast majority of peoples of all the tribes maintain that the marriage is void, there is a minority opinion to the effect that the marriage is, nevertheless, regular. But among this minority the legal position of such a wife is, in many chiefdoms, particularly the Temne and Susu chiefdoms, in one respect different from that of a wife who married with her consent. In the event of a divorce initiated by a wife who was married without her consent, the law in some chiefdoms is that gifts, presents and payments refundable as marriage payments, excluding gifts to the girl, must be paid in full by the member or members of her family who acquiesced in the marriage. Other chiefdoms hold that the woman's family should refund only half of the amount as the husband too is deemed blameworthy for marrying the woman.

Since there is now a degree of acceptance by all the tribes that a woman's consent is necessary for her marriage, legislation on the matter would afford an adequate safeguard in order to ensure that the acceptance is not just in theory but also in practice![1]

C. THE MARRIAGE CONSIDERATION

Definition

There is no appropriate equivalent in English for the vernacular terms used in the customary laws of Sierra Leone to describe the marriage payments which a prospective husband makes to his intended wife and her family. The word "dowry" is of common usage in Sierra Leone as a generic term to mean not only the lump sum of money or money's worth paid to the wife's family in consideration of the marriage and which gives validity to the marriage, but also all gifts and presents given to the wife and her family since the inception of the marriage transaction and throughout the marriage, except gifts and presents the man gives to his wife during the period of cohabitation.

In the absence of a legal definition in Sierra Leone for these payments, the word "dowry" is, strictly speaking, a misnomer. In Roman law, from which the concept is probably borrowed, a dowry (dos) was property brought in by a wife or given by

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1, As under the general law, in the customary laws consent induced by duress, undue influence and mistake is no consent at all. But under the customary laws, in order to establish that a woman did not consent to her marriage, it must ben shown that before it was concluded she repeatedly protested, that there was a disagreement between her and her family on the issue in which the will of her family prevailed and that she exhibited an overt act or ommission, such as not accepting any gift or present from the intended husband, refusal to consummate the marriage, or persistent running away from the husband's household.

her pater familias or another on her marriage and it became the property of the husband.[1] The practice was the same in early Jewish marriages.[2] "Marriage-price" has been used by some writers to describe these payments.[3] We hesitate to use the word because it carries the idea that a customary law marriage transaction is a sale. Another term which is in common usage is "bride-price".[4] This, too, is objectionable because the transaction does not involve the sale of the wife which the term implies. The term "marriage payment", which we prefer, is the expression which some writers on African law have used to describe similar payments in the customary laws of other African countries. The term was first used by Radcliffe-Brown who defined it as "a kind of 'consideration' by means of which the transfer (of the wife to the husband) is formally and legally made".[5] As can be seen, Radcliffe-Brown's definition is not wide enough to include gifts and presents given by the husband to the wife and her family in order to induce their consents to the marriage, and gifts and presents to the wife's family during the marriage for these do not affect the validity of the marriage. The definition seems to cover only the payment made by the husband to the wife's family in contemplation of the marriage and

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1. W.W. Buckland, The main institutions of Roman Private Law, Cambridge University Press, 1931, p.61. The word "dowry" seems to be derived from the Ancient French translation of the Roman dos (Norman French: doweyre or dowarrie; Ancient French: douaire).
2. See L.M. Epstein, The Jewish Marriage Contract: a study in the status of the Woman in Jewish Law, New York, 1927, p.89.
3. Fenton, op.cit., p.23; Kamara and Drummond, op.cit., p.57; Langley, "Marriage Customs amongst the Temne", p.58.
4. See Finnegan, op.cit., p.63; Harris, op.cit., p.18; Hollins, op.cit., p.29; Crosby, op.cit., p.250; Thomas, op.cit., p.96; Hall, op.cit., p.3.
5. Op.cit., p.50.

which renders validity to the marriage. We may call this payment the "marriage consideration"and the rest "customary marriage dues" The sum total of both is simply "marriage payments".

We may, therefore, essay the following definitions: A customary marriage due is a payment by gift or present by an intended husband to a prospective bride or her family in contemplation of marriage and in order to induce their consents, or a payment by gift or present to the wife's family during the marriage in recognition of the marriage. A marriage consideration is the lump sum in money or kind paid by a prospective husband, or services rendered to the bride's family, which gives legal effect to the marriage.

Sometimes, this subtle distinction between a marriage due and the marriage consideration, which we are attempting to make, is difficult to draw in practice, since in many of the customary laws, particularly Mende customary law, almost every marriage payment is counted as part of the "dowry" refundable when the marriage is terminated either by the death of the husband or divorce.[1] The distinction is, however, justified on the ground that in all the customary laws, without exception, it is the payment of the marriage consideration that validates the marriage. The customary marriage dues, on the other hand, are payable only as a matter of social practice and their payment or non-payment has no effect on the legal status of the marriage.

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1. This appears still to be the common practice in many Mende chiefdoms despite the Cabinet directive dated April 27, 1963, to the effect that the amount of "dowry" refundable on divorce is the lump sum paid by the man at the time of the marriage - what we are describing as marriage consideration. The case concerning Madam Hawa Margao of Selenga Chiefdom, Bo district, is a typical example of this practice. A discussion of this directive and this case follows later in Chapter 18.

Character of the marriage consideration

The amount of the marriage consideration is not fixed by customary law but sometimes by agreement between the prospective husband and his family and the family of the intended bride. Frequently, however, it is at the discretion of the prospective husband to pay whatever he can afford. The social and economic position of the man, nevertheless, in many cases, determines the amount that will be acceptable to the man's family, and, generally speaking, the higher the amount the greater is the man's esteem among the family circle of the woman. The obligation to refund the marriage payments on death or divorce, however, discourages many families from accepting exorbitant sums of money as marriage consideration.

It is impossible to give an exhaustive list of items of property traditionally given as marriage consideration . We can merely mention the commonest, which are, native cloths, clothes and ornaments, cattle, sheep, goats, fowls, leopard's teeth, elephant tusks, iron pots, rice, fish, oil, salt, wine and kola nuts. Of them all, the most important were cattle and country cloths which were for many purposes regarded as currency by the tribes in the North and South of Sierra Leone respectively. Thus, a wealthy Koranko man could marry a woman with as many as fifty cows, whilst a corresponding Mende man would pay to his wife's family the same number of country cloths or more.

Nowadays, many of the traditional goods are still given as part of the marriage consideration. But the main portion is now paid in money. In the diamond mining areas, large sums of money are paid and one informant alleged that he knew of a diamond miner who paid Le.2,000 to his wife's family. Among the

Koranko, Susu, Sanda Temne and Yalunka, there is a custom whereby in addition to money or any other goods, a cow is given by the man. The cow is, nevertheless, intended not for the woman's family but for the woman herself. The cow accompanies the wife to the husband's household where it is reared and produces calves. The proceeds of sale of these calves are the property of the wife but they are given to the husband, and he is expected to maintain the wife from this source. The importance of this custom is that the cow and its proceeds are not refundable as part of the marriage consideration should the occasion arise for such consideration to be refunded. This payment is, in our submission, a customary marriage due only and even if it is not paid, the marriage may nevertheless, be valid.

Time for the payment of the Marriage Consideration

There is a division of opinion not on tribal but on territorial basis as to the exact time for the payment of the Marriage Consideration. In some chiefdoms, such as Tonko Limba Chiefdom, Kambia district, Sulima Chiefdom, Koinaduga district, Samu Chiefdom, Kambia district, Lubu Chiefdom, Bo district and Timdel Chiefdom, Moyamba district, the marriage consideration, where payable, must be given before the conclusion of the marriage, though it may be given by instalments up to that date.

But in other chiefdoms, such as Kamara Chiefdom, Kono district, Diang Chiefdom, Koinadugu district, Nimi Koro Chiefdom, Kono district, Jong Chiefdom, Bonthe district, Maforki Chiefom, Port Loko district, and Kakua Chiefdom, Bo district, it is alleged that the marriage consideration may be paid by instalments, some of it after the marriage itself has been concluded.

The conflict of opimion appears to have arisen from lack of appreciation by the chiefdoms which hold that marriage consideration can be paid by instalments, some of it falling due after the marriage, of the difference between a marriage due and the marriage consideration. For example, one of the informants, while admitting that a lump aum must be paid at the time of the marriage, maintained that the husband should continue to give money to the wife's family, even after the marriage has been contracted.

Since we are concerned with the marriage consideration as an essential for the validity of the marriage, it is submitted that such consideration is payable only before or at the time of the marriage. Whatever payment that falls due after the marriage is a marriage due. Our submission is fortified by the answer to a question which was put to those who contended that the marriage consideration could be paid by instalments after the conclusion of the marriage. The question was: "Can a father-in-law recall his daughter and refuse her to return to the husband for an unpaid balance of 'bride-price' or 'dowry'?" The answer was unanimously No.[1] When further questioned on the basis of their negative answer, they replied that any amount paid at the marriage as part of the "dowry" is sufficient to render validity to the marriage. The idea that the marriage consideration can be paid after the date of the marriage has also been

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1. Compare M. Aubert, "Kissi Customs", op.cit., p.90, who says of the Kissi that "non-payment of dowry or of the portion remaining due can be made a reason for dissolving marriage". This statement does not represent modern law and practice. Only the spouses, but not their families, are capable of taking steps to dissolve their marriage, and the present writer was not able to find any evidence that marriage has ever been dissolved on this ground. Anderson has made the same statement as Aubert: See Islamic Law in Africa, p.291.

impliedly dismissed by the Cabinet directive of the 27th April, 1963, which decreed, inter alia, that "the amount of a 'dowry' that may be refundable in case of a divorce should be limited to the lump sum paid for the wife at the time of the marriage".[1]

Distribution of the Marriage Consideration

The marriage consideration is formally handed over to the bride's father or the person standing in loco parentis to her. If the mother is unmarried, then it goes to her (the mother's) father or the head of her family. Among the Sherbro, the mother's brother receives the amount on behalf of the family. Nowadays, it is customary to pass the consideration through the bride, her receipt of it being an indication that she consents to the marriage.

The amount is divided into two portions, with the families[2] of the father and mother of the bride getting one portion each. The portion is distributed among the different members of each family, with the parents and heads of the family receiving the lion's share. The bride herself is as a rule not entitled to a share, but the husband is expected to give her money and presents of clothing and other wearing apparel. These presents to the bride are not part of the marriage consideration but are customary marriage dues which are, nevertheless, reclaimable on divorce.

Though in practice, the consideration is distributed among the members of the wife's family, the person legally entitled to it is the wife's father, or if he is dead, the head of

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1. A further discussion of this directive is to be found in Chapter 18,

2. i.e. the lineages.

his family who invariably acts as guardian for the woman's mother. This seems to be the rule even though the mother might have remarried since the death of the wife's father. If the wife is illegitimate or an orphan who has been brought up by a guardian, the consideration goes to the head of the wife's mother's family, although the wife's natural father, if he had cared for her, and her guardian, as the case may be, are consulted and given shares thereof.

Waiver of the Marriage Consideration

The marriage consideration, we may emphasise, is essential to the validity of the marriage but its payment can be waived by the wife's family. In this respect, the waiver substitutes the consideration and the marriage is valid.

There is doubt about the extent to which the wife's family can, in practice, waive the marriage consideration. For marriages other than marriage by gift, some consideration is always paid despite its insufficiency. For example, in goat's head marriage, although there is no formal agreement on what amount should be paid, the man must always give something to his uncle for his uncle's daughter. Likewise, in marriage by service, it is the services which the prospective husband renders to the family of the wife that constitutes the consideration, though such services are not commuted in money and refunded when the marriage breaks up. Even in marriage by gift, as we have seen, although there is no prior agreement with respect to the payment of consideration, the husband is expected to give presents to his wife's family at least after the marriage. We have conceded that payments made by a man after the marriage transactions are concluded are customary marriage dues and not the consideration itself. Therefore, one may

say that in the case of marriage by gift, the marriage consideration, but not the marriage dues, is waived. Apart from this, the only other instance when the marriage consideration is waived in practice is in the case of a divorced woman.[1] Since in the customary laws a man must be capable of looking after his own affairs and of maintaining a family before he can venture on marriage, no man is deemed to be so poor as not to be able to afford even 5 cents, a fowl, a bundle of fire-wood or a gourde of wine, with which to pay the consideration for his marriage. It is not, therefore, surprising that if one poses to any member of the tribes of Sierra Leone the question whether there can be a valid customary marriage without the payment of a marriage consideration, one is bound to meet with a universal negative answer.

Effect of payment of Marriage Consideration

Unless waived, the actual payment and not the acknowledgment of the liability to pay the marriage consideration is essential to the validity of a marriage. A marriage consideration is not regarded under the customary laws as a civil debt for which the woman's family can sue the man and/or his family. Therefore, in the nature of things, if it is not paid the relationship between the spouses remains irregular. It is, however, submitted that if the wife's family regards the relationship as a proper union despite the husband's failure to pay the consideration, this constitutes waiver and the marriage becomes valid.

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1. The Marriage consideration is commonly waived in the case of a divorced woman for whom the intended husband has refunded the marriage consideration to the divorced husband.

D

THE MARRIAGE FORMALITIES AND REGISTRATION

(1) The Marriage Formalities

We have already discussed in detail in Chapter 15 the various formalities which attend a customary law marriage. It will be recalled that it is doubtful which of these formalities is essential for the validity of the marriages. Despite certain unfavourable social results which may follow from non-compliance with them, it is submitted that so long as the parties to the marriage have the capacity, the prerequisite consents have been obtained, and the marriage consideration has been paid or waived, the non-observance of one or other of the marriage formalities would not invalidate the marriage.

For example, it is desirable to celebrate the marriage by feasting and dancing in order to give publicity to it and to make it an occasion for entertaining friends and well-wishers, but a proper marriage can be contracted in secret with only the necessary parties present and without any ceremony whatsoever; though in such a case the respective families might be regarded by the community as mean. Similarly a Mende woman who marries without being initiated into the sande society, is referred to as kpowei[1] - a derogatory term denoting that she cannot keep secrets - but the elders do not, nevertheless, question the validity of her marriage on that ground.

At this juncture, we must examine the effect of registration of a marriage as a formality essential to its validity.

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1. When taking oaths in everyday life, tribal women usually swear upon their membership of their secret society. A non-initiate, however, who cannot do so is hardly trusted, quite apart from other social stigma which attaches to her.

Registration of marriage

Pursuant to s.16 of the Tribal Authorities Act [1] as amended in 1964,[2] which provides for the making of bye-laws by Chiefdom Councils "for promoting the peace, good order and welfare of the people within such towns as may be within its (Chiefdom Council's) area", 32 out of 147 chiefdoms in the country have made bye-laws for the registration of customary-law marriages and divorces. In the Bonthe district, the relevant Chiefdoms are Bendu-Cha, Bum, Jong, Kpanda-Kemo, Kwamebai-Krim, Nongoba Bullom, Sitia and Yawbeko. The Kailahun district has the Dia, Kissi Kama, Kissi Tungi, Luawa, Malema, Mandu, Pejewa, Penguia and Upper Bambara Chiefdoms. In the Kono district the following Chiefdoms have made: Gbane, Gbane-Kandoh, Gorama Kono, Kamara, Mafindo, Nimi Koro, Nimi Yema, Soa and Tonkora. The Port Loko district has 5 Chiefdoms which have made, namely: Kaffu Bullom, Loko Masama, Marampa Masimera, Sanda Magbolonto and Tinkatupa-Makama-Sofroko-Dibia. In the Kenema district, the only Chiefdom which has followed the steps of the other named Chiefdoms is the Malegohun Chiefdom.

The provisions of all these bye-laws are uniform, except as regards the amount payable on registration and they have been published as Public Notices [3] commencing from Public Notice No.161 of 1960 to Public Notice No.139 of 1963. The present writer could not find any cogent reason why the system started in 1960 and came to an abrupt halt in 1963, leaving the remaining 115

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1. Cap.61 of the revised Laws of Sierra Leone, 1960.
2. Act No.13 of 1964. Note that s.2 of this Amendment Act re-designates "Tribal Authorities" as "Chiefdom Councils".
3. The 32 relevant Public Notices are to be found in the 1960, 1961, 1962 and 1963 Laws of Sierra Leone. For their detail in this work, see the Table of Statutes.

chiefdoms in the country uninterested in it. It must be pointed out, however, that the provision for the making of the requisite bye-law is enabling but not mandatory, and even when the bye-law is made, the registration of a marriage or divorce is not compulsory. Perhaps, because of the very little use that has been made of its provisions by even chiefdoms that have made them, and its non-compulsory nature, it has been thought not worth the while by other chiefdoms to adopt it.

For our present purpose, we shall confine ourselves to a discussion of the bye-laws as they related to the registration of marriage and we shall postpone a discussion with regard to divorce to its relevant place.[1]

Let us take the Tribal Authorities (Nongoba Bullom Chiefdom Native Marriage and Divorce) Bye-Laws, 1961,[2] which are typical examples of the bye-laws on the point at issue. The relevant provisions are regulations 2 and 3. Regulation 2 enacts that:

> "The Tribal Authority shall appoint a suitable person to be a Registrar of Native [3] Marriage and Divorce who shall register any native marriage .. which he is asked to register."

Regulation 3 goes on to say that:

> "The Registrar of Native Marriage and Divorce shall keep a Native Marriage Register with pages as in Form A of the Schedule. Each page shall be in triplicate and shall be numbered serially. The Registrar shall register in such book the prescribed particulars relating to each marriage reported with particulars of marriage payments or any other important details if the parties so desire. The register shall then be signed by the Registrar, the two parties to the marriage and their family heads

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1. See Chapter 18.

2. P.N. No.211 of 1961.

3. "Native" as used here must now be substituted by "customary". See s.2 of the Tribal Authorities (Amendment) Act, 1964, Act No.13 of 1964.

> recognised as such by native law and custom for the purpose of the marriage. The original certificate and one copy shall then be detached and handed one to each party as a marriage certificate which shall be recognised as proof of the marriage in any Native[1] Court."

Looking at the above and considering the other provisions of the bye-laws, there is nothing to indicate that non-registration would invalidate a customary-law marriage. The Registrar does not seem to be given a discretion to question whether the marriage he is asked to register is a proper one. Regulation 3, however, appears to provide certain safeguards that the marriage is a valid one since the parties to the marriage and their respective family heads must append their signatures to the certificate and the amount of the marriage payments should be stated therein. Form A, to which reference is made in regulation 3, has particulars relating to the spouses, their family heads, the date and place of the marriage, the amount of "dowry" paid, other particulars, the fee paid for registration, and the receipt number of the marriage certificate. Significantly, Form A omits the fact whether or not the spouses are already married or the name of any person whose consent is required for the marriage. Presumably, the requirement of consent is taken care of by the fact that the family heads and the spouses must sign the certificate, which is an indication that they consented to the marriage.

Quite apart from affording evidence of the existence

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1. "Native" in this context must be replaced by "Local": see The Local Courts Act, 1963, Act No.20 of 1963.

of the marriage, the importance of registration is the certainty which it gives to the quantum of the marriage payments. Registration minimises disputes as to the quantum of these payments which frequently follow should the need arise for their refund. The tribe whose members are the meanest in demanding the refund of every act of generosity is the Mende who, upon divorce, count every expense incurred on behalf of the wife from a gift of an orange given to the wife before betrothal to a kola nut casually given to her relative, all as part of refundable marriage payments. The present system of registration at least limits a claim which a husband may make in respect of such payments to expenses incurred up to the time of the registration and which is stated in the marriage certificate. Perhaps this is one reason why registration of customary marriages has not been popular in many Chiefdoms, particularly the Mende Chiefdoms.

To sum up, though registration is not essential for the validity of a customary-law marriage, it has certain advantages, as we have indicated, for which it should be encouraged. It is our contention that it should be made compulsory in all chiefdoms and that there should be a criminal sanction for failure to register.[1]

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1. At present, the only criminal sanction is for the making of a false statement to the Registrar which is material to the marriage. See Regulation 7 of P.N. No.211 of 1961.

E. CONSUMMATION

In our discussion in Chapter 15 of the concluding marriage formalities and ceremonies among the Koranko, we observed that among this tribe, marriage is regarded as incomplete unless it has been consummated. How far can non-consummation affect the validity of a customary-law marriage is, therefore, the subject matter of our instant discussion.

Throughout present-day Sierra Leone, because of internal migration and the quest for better opportunities away from one's home town, it is usual for many young men to seek jobs and employment in places other than their hometowns where they can both earn their living and save up for their subsequent marriage. Many of these young men, however, continue links with their places of origin and prefer to secure wives there instead of at their present place of residence. It is a common belief among them that a woman who is born in the same locality as a man would be more understanding as a wife and would behave to her husband just like a sister, thus reducing the pressures and tensions of married life. Thus, while far away from home, it is usual for the young man, at least for his first marriage, to request his family to look for a wife for him at home. This, of course, is not an arranged marriage in the true sense of the term since the young man and the intended wife would have been known to each other since their childhood and their final choice of each other as spouses would rest solely on them. The

young man's family then goes thrpugh the formalities of marriage on his behalf during his absence after which the wife spends some time with the husband's parents until he is ready to send for her. This practice is common among all the tribes, including the Koranko.

If, during the period that the wife is waiting to be invited to the husband's place of residence, she forms an association with another man and commits adultery with him, is the husband not entitled to sue the adulterer for "woman damage"? There is uniformity among all the tribes, including the Koranko, that the husband can succeed in such an action - the reason being that the woman is his wife even though they had not commenced cohabitation nor consummated the marriage when the offence was committed. A husband, it is submitted, can exercise such a right only when there is a proper and valid marriage between him and the wife concerned. It is, therefore, our contention that consummation is not essential for the validity of a customary-law marriage in Sierra Leone, though a wilful refusal to consummate the marriage when the spouses are living together or the husband's persistent and unreasonable failure to bring

the wife to his household and consummate the marriage will be a good reason for a divorce.

CHAPTER 17

THE MATRIMONIAL RELATIONSHIP

Unlike non-customary-law marriage, the matrimonial relationship arising from a customary-law marriage can conveniently be discussed in a single chapter. In this chapter, we shall deal with the rights and duties of the spouses to a customary-law marriage. We shall also consider matrimonial offences committed by third parties against the husband and matrimonial offences committed by the spouses themselves, or by third parties against the community in which they live. Every such offence is accompanied by its appropriate remedy, remedies or sanction. These, too, will be examined in this chapter. In sum, therefore, our instant discussion will fall under the following headings:-

A. Choice of the matrimonial residence.

B. Ranking of Wives.

C. Guardianship of a Wife.

D. Sexual rights of the Spouses.

E. Duties of a Wife.

F. Wife's right to Maintenance.

G. Husband's right of Chastisement of Wife.

H. Matrimonial Property.

I. Matrimonial Offences.

A. THE CHOICE OF THE MATRIMONIAL RESIDENCE

All customary-law marriages in Sierra Leone, except marriage by service and goat's head marriage, are virilocal. In these two exceptional cases, the location of the matrimonial residence is the household of the wife's family, or any other place selected by that family. For want of a better expression, we shall

use the term uxorilocal [1] to describe such marriages. In marriage by service, the spouses take up residence in the household of the wife's family because the husband is too poor to pay the marriage consideration, and his residence there is a guarantee that he will be available at all times to render services to the family. In goat's head marriage, although a marriage consideration is paid, the payment is usually very small, and the nephew is expected to remain in his uncle's family to work on his wife's mother's farm. The uxorilocal nature of these two types of marriage lasts as long as there is no change in the economic or social position of the husband concerned. In the case of marriage by service, for instance, if there is an improvement in the economic position of the husband which makes it possible to substitute money or presents for his future services to his wife's family, he can, with the consent of his parents-in-law, leave their household and control and the marriage becomes virilocal. There have been many such situations since the beginning of this century when, with the construction of the railway and motor roads, migration from the village to the towns where there were employment prospects became easy. Nowadays, also, the diamond industry in many areas in the Eastern and Southern Provinces, and the increase in employment facilities in commercial firms, industries and the civil service have created opportunities outside the farm which are regarded in tribal society as more honourable than tilling the soil. The result is that parents-in-law of a marriage by service would not only mind their sons-in-law pursuing those occupations, but even encourage them to do so.

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1. The term "uxorilocal" carries the impression that the choice of ~~the~~ residence is made by the wife. As a matter of law, it is the wife's father who makes the decision. The term "patrilocal" would, therefore, have been an appropriate one, but its use will create confusion since this term is commonly used as a synonym for "virilocal". "Uxorilocal" is, therefore, though not quite appropriate, preferable.

Political, but not merely social or economic change may also convert a virilocal marriage to one that is of a quasi-uxorilocal character,but such change seems to be possible only where a wife is a paramount chief. Paramount chieftaincy tenable by females is virtually unknown among the tribes in the North, who regard such an institution as excluding women. But among the Southern tribes, particularly the Mende, women have as much right to become paramount chiefs as men, and in some instances are even more highly respected than their male counterparts. For example, at the beginning of this century, a female Paramount Chief, Madam Yoko, wielded so much power, influence and prestige among a vast area of Kpaa Mende land, and over the colonial administration, that on the recomenndation of the Governor of the Colony of Sierra Leone the British sovereign bestowed an honour on her.[1]

If a woman becomes a paramount chief, whether married or not, she is expected to live in her compound [2] in her chiefdom. There is no reported instance of a female paramount chief marrying a man who is not himself a paramount chief. If such a situation should occur, opinion is divided as to the effect of the marriage on the location of the matrimonial residence. Some informants say that the husband should go and live with the wife in her compound. Others say that he should live in the same town or village as the wife, but not in the Chief's compound and that he should have a house there of his own, where his wife meets him. Those who hold the latter view maintain that it is not etiquette for the husband

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1. Madam Yoko wore a crown which was a gift from the British sovereign.

2. The residence of a paramount chief in Sierra Leone is his or her compound. The compound consists of a main house where the chief sleeps, and other houses in which the chief's relations and some of the principal advisers live. The compound is walled round.

to live with his wife in her compound, but concede that if the wife desires it the husband should go and live with her there. The one instance in which there is a general consensus of opinion is when a male paramount chief is married to a female paramount chief. The rule is that each remains in his or her respective chiefdom, exchanging visits when convenient for them.

Where the marriage is virilocal, the matrimonial residence is where the husband chooses to live.[1] It may be in the same village as the wife's, if both come from the same place, or in the husband's village. Alternatively, where circumstances such as employment possibilities compel the husband to reside in some provincial town or in Freetown, the wife should accompany him. In other words, he has an absolute right to choose the matrimonial residence even without consulting the wife or wives. It may be observed, therefore, that the position with regard to the choice of matrimonial residence under the customary laws of Sierra Leone is in complete contrast to that which exists under the general law, where the choice is by agreement between both spouses.

The collolary of the husband's absolute right of choice of the matrimonial residence in virilocal marriages is that should the wife refuse to follow him wherever he chooses to live, she is deemed to have deserted him. To this rule there are a few exceptions.

Firstly, if the wife is over 5 or 6 months pregnant, she is expected to go and live with her mother until the baby is born and is due for weaning. When it is time to wean the child, the

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1. His choice is, however, limited to any place other than the house of his wife's family. He can live with his wife's family only with their permission. If he lives with them, the marriage becomes uxorilocal de facto, but remains virilocal de jure since the husband can legally change his residence at any time on his own deliberate judgment.

husband goes to the wife's parents with a shake-hand for the mother-in-law in gratitude for having cared for his wife and child, and must take leave of the parents-in-law for him to take home his wife and child. Failure by him to go for them when the time is reached is evidence of desertion by him, and the wife can look for a lover to take care of her until the husband turns up. Such lover is not liable to the husband for "woman damage".

Secondly, if the wife is affected by some serious disease such as leprosy, epilepsy, or insanity, the cause is usually attributed to witchcraft by one of the co-wives - the mates[1] - resulting from jealousy because she, the stricken wife, is blessed with children or because undue favours are being shown to her by the husband. Such a wife is also expected to go to her parents and stay with them until she is cured.

Thirdly, where there is a bereavement in the wife's family, she is expected to stay with her family until the funeral ceremonies, lasting sometimes for up to forty days, are over. The husband is expected to equip her and make his own contribution to the funeral expenses before she departs. Usually, it is the husband who sends her but in case he is reluctant to do so, she can go on her own. In either case, when the ceremonies are over, the husband must go for her and pay a shake-hand to her family.

Fourthly, if the wife has children and they die in infancy, the cause of death is usually attributed to witchcraft by some one within the household or in the locality. The wife has a right to ask the husband to change his residence, and if he fails to do so, the wife can leave him and she will not be deemed to be in desertion

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1. The word "mate" has a special meaning in Sierra Leone. It is a Creole classificatory term by which a wife of a polygamous family refers to another wife of the same family. The head-wife, however, if older in age than the junior wives, is called "mother" by the latter.

In the exceptions cited, the wife is not under a legal obligation to continue living with her husband at his residence, and the husband cannot compel her to do so. Apart from these exceptions, the wife may leave the matrimonial residence only with the permission of the husband. Permission is more readily given if she wants to visit her parents, relatives and friends or for some other reasonable purposes, unless the husband suspects that the proposed visit is an excuse for meeting some lover at a pre-arranged venue.

In a virilocal marriage, when it is the man's first marriage and the marriage consideration is provided by his father, his wife usually goes with him to live in his father's household if they are resident in a rural community. She is regarded as a member of her father-in-law's household, and is under the direct supervision of the head-wife of her father-in-law. If the husband does not have a room of his own, she sleeps with the other women in a house provided mainly for the women of the household. The couple sleep together occasionally by arrangement with the head of the household, when they are enabled to have access to a room. Alternatively, the husband hires a room in the neighbourhood which is used only for sleeping purposes, while all domestic and social activities take place in the main household.

When the husband takes an additional wife or wives, or if he is resident in an urban community, he usually forms his own household. He is head of that household and his head-wife is second in command.

B. RANKING OF WIVES

The wife whom a man marries first is his head-wife. As a general rule, the other wives rank in seniority by the date of their marriage. Thus, a wife married second is senior to one

married third, and so on. To this rule, however, there are a number of exceptions. An inherited widow, if advanced in age, or if she is the widow of a person senior in rank or age to the present husband;[1] a wife of a marriage by gift; a wife to whom the husband is more favourably disposed and for whom he shows more affection; and an educated wife; all occupy positions of privilege[2] not commensurate with the date of their marriage.

In the case of an inherited widow of the kind described, she ranks pari passu with the head-wife, and if she is elderly and the head-wife is younger, she, the head-wife, surrenders her position to the inherited widow. As a matter of courtesy, but not of law, the inherited widow is consulted on every important matter affecting the household; she is highly respected by all, and at times she has the final say. She is treated not so much as a mate by the other wives, but as the "mother" of the family. She plays a leading role on ceremonial occasions, such as birth and bereavement, in the polygamous family.

A young and attractive wife, or one being the daughter of a chief or an important parent, who is given in marriage as a gift, easily wins the favour and affection of a husband. Paramount chiefs and big men who can afford to marry a large number of wives are prone to fall victims to these qualities in a woman. They pay more attention to such wives, lavish gifts and presents on them, and sometimes hold them in higher esteem than women who are senior to them in marriage. Such conduct, of course, arouses much

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1. For instance, among the Mende a son may marry the widow of his father. Among the Temne also, a younger brother may marry the widow of his elder brother. The widow in either case falls in the category to which we are referring.

2. The privileges include excuse from certain types of work such as planting, weeding and harvest in the husband's farm; presents of dresses; and the allocation of separate sleeping quarters.

jealousy on the part of the less favoured wives, and it is believed that the more favoured wives are always the objects of witchcraft and calamities which in the normal course of events arise from natural causes. For instance, if the child of such a wife falls sick or dies, a mate is always suspected of being responsible for it.

An enlightened [1] husband with many wives usually ensures that at least one of them is educated.[2] The reason is that guests enlightened like himself may visit him and there should be a "civilised" woman in the household who does the housekeeping during the period of their stay and acts as maid to them. The status of such a wife is different from the rest of the wives, except the head-wife, irrespective of the date of her marriage to the husband.

Apart from the foregoing exceptions, a wife takes her position in her husband's household strictly in accordance with her seniority. Every wife is subject to the direct supervision of the head-wife, and in the absence of the head-wife the next in seniority takes her place. Seniority would appear to be relevant only for this reason, and for the rule that a junior wife must be respectful to her senior. In other respects, all the wives except the head-wife, are regarded as equals and are expected to discharge their responsibilities to the household and their husband in that wise. Each wife takes commands from the husband or the head-wife, but not from the mate who is her immediate senior.

Though, as we have pointed out earlier, there is a degree of

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1. Enlightenment does not necessarily mean that the husband has been to school. He is regarded as enlightened if he has formed social contacts with educated people such as high-ranking civil servants and professionals. Paramount Chiefs, even if illiterate, are regarded as enlightened.

2. An educated woman in this respect is one who is capable of speaking at least the Creole language, probably brought up by a Creole family. She need not have had a formal education.

jealousy among the co-wives where the husband is accused of favouritism for one wife or the other, or where some of the wives are not fortunate to have children of their own, in the absence of these factors, the co-wives treat one another as the best of friends and where there is harmony among them, they may even combine against their husband, force him to meet their demands, and conceal from him their attachments to lovers.

To what extent, if at all, a wife may lose her seniority is a matter on which there is no certainty in any of the customary laws of Sierra Leone. There are three schools of thought in each system of law. One school holds the view that once a senior always a senior, and that despite the fact that the rights and privileges of a wife may be curtailed by her husband for acts of misconduct committed by her, her seniority can never be taken away as long as she remains married to her husband. The other school maintains that if a wife is in persistent dereliction of duty, or is guilty of some gross misconduct, such as witchcraft or promiscuity, she loses her seniority to a junior wife who is hardworking, humane and faithful. Another school is of the opinion that a wife's seniority may be suspended at the instance of the husband, but not taken away finally, if she fails to perform her duties as a wife. This school concedes that if the wife repents - repentance is usually signified by her begging the husband which she does by prostrating on the ground before him in the presence of at least a member of her family who intercedes on her behalf - and she leads a new life without repeating the misconduct, she can be restored to her former position by her husband.

The first view is the generally-accepted one and, in our submission, it ought to prevail. A husband in customary law has at his disposal a number of methods of punishing a wayward wife ;

he can chastise her, deny her of certain privileges such as refusing to give her presents or to have sexual intercourse with her when it is her turn to sleep with him; and in extreme cases, he can divorce her. But depriving her of her position even temporarily affects the household structurally, and results in instability within its general framework. A junior wife who takes the place of her senior in marriage will not command the respect of the latter, even if the erstwhile junior wife becomes the head-wife or acts in that capacity; the domestic functions of the household will come to a standstill, as it is the head-wife who gives the directions and distributes the work. If there is anything that brings jealousy among co-wives, it is the husband's showing favours to one wife in preference to another. Such jealousy, however, does not affect the general running of the household. But if the husband goes to the extent of superimposing a wife junior in marriage on one that is her senior, there will result a complete break in communication among the co-wives, and the polygamous family will be in a chaotic state.

Seniority among the children of the co-wives in the compound polygamous family is not determined by the date of the marriage of their mothers to their father. It is the date of birth of each child that decides his rank within the family. Thus, the eldest son in the whole compound polygamous family is the one who was first to be born in the family; his mother may even be the most junior wife.

So long as the father is alive, the ranks of the children do not affect the positions of their respective mothers.[1] But

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1. It should be noted, however, that the social and economic positions of a wife who has children are stronger than childless wives. A wife who has children is more respected by the family of the husband than the one who has none. Children also assist their mothers on the little farms allocated to them for their personal cultivation and benefit.

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when the husband dies, the status of the wife whose son is the eldest son within the whole family may be elevated within the family circle. As we shall see later, the modern tendency in some customary laws is for the eldest son when he reaches maturity to succeed to the property of his father. If, for instance, the eldest son is the child of the most junior wife, the position of that wife is more secured and she enjoys more prestige than before, since her son becomes the caretaker of the family property.

C. GUARDIANSHIP

In the customary laws of Sierra Leone, a woman's position resembles, in many respects, that of a minor.[1] While she is single, she is under the guardianship of her father or, in his absence, his father's brother who is senior in line to the remaining brothers[2] or, if the father himself is living in his own father's household, the head of her family.[3]

Formerly, the legal consequences of guardianship were that the husband had the rights to maintain and defend actions on behalf of the wife, to obtain her full services without outside interference, and to be consulted prior to, or be informed immediately after a transaction had taken place between the wife and a third party. In the last mentioned case, it was a wrong by a third party actionable at the instance of the husband for the former even to do an act of kindness to a man's wife without the husband's permission

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1. Even if the woman is fully grown-up, she is under guardianship. Perhaps, this explains why the marriage of a woman is never valid unless with the consent of her family.
2. For the Temne, Susu and Limba tribes.
3. The reason is that the father is not regarded as fully emancipated if he continues to live in his own father's household.

or approval.[1] To these rights, the husband had the correlative duty to pay his wife's debts and he was liable to third parties for his wife's torts and contracts.

Nowadays, while the husband's rights consequent upon guardianship are still preserved, there is a change of attitude in each customary law in respect of the husband's vicarious liability for the torts and contracts of his wife. So far as torts committed against third parties are concerned, the rule of the majority in each tribe is that the husband is liable if either he authorises the wife to do the wrong or, with knowledge that the wife intends to commit the wrong, he fails to stop her. The only wrong for which the husband still has strict liability is the one which the wife commits against the community. Thus, if the wife fights in public, the elders may levy a fine (kassi) on her, and if she is unable to pay, the husband is liable to pay it on her behalf. As for a wife's contract, the majority view is that a husband is liable only if he authorised the transaction, he adopts it, or his prior permission has been obtained before the wife contracts with the third party. But this majority also maintains that if the wife is deserted or is living with her family with the consent of her husband, the husband is vicariously liable for any contract into which she enters in respect of maintenance for her and her children.[2] There is, however, a vocal minority in each tribe which

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1. There is, however, a tribal variation on the kind of third party who can be sued. Among the Northern tribes like the Temne, Susu and Limba, the wife's parents are exempted unless the act of kindness amounts to an encouragement of the wife to disobey or desert the husband. These tribes maintain that even in this case, the wife's father cannot be sued. The Southern tribes, particularly the Mende and Kono, do not exempt anybody at all. It is common for a Mende man to sue his father-in-law.
2. On the husband's duty to maintain, see pp 598-601.

insists on the husband's vicarious liability for the torts and contracts of his wife whether or not he knows of, or authorises them.

The change in the customary laws may be due to one main reason. Formerly, women were barred under customary law from instituting or defending court actions; they must always resort to their appropriate guardians to act on their behalf. In modern times, however, women have as much right of access to the courts as men. This change of attitude is due to events which have occurred in this century and which have had repercussions on the status of women in tribal society in Sierra Leone.[1] These occurrences have either made women economically less dependent on their husbands or created in some of them an awareness of self-sufficiency which has made them less controllable by their husbands. This semi-independence, if one may use the expression, and awareness are reflected in the frequency with which women resort to courts nowadays against their husbands as well as third parties. Despite this newly-acquired status of a married wife, because of the husband's guardianship over her, he can intervene in an action instituted by her and either continue or discontinue it unless it is one against himself.

The husband's guardianship of his wife does not automatically cease on his death to the extent of its reverting to the wife's family. It vests in the head of the husband's family until the widow remarries or is temporarily assigned to a caretaker. Some widows for one reason or another, may not want to marry immediately after the completion of the funeral ceremonies of their deceased husband. A widow may want a trial period to judge whether a prospective husband will be kind to her, her children and her family

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1. See Little, "The changing position of women in Sierra Leone Protectorate", Africa, Vol.18, 1948, p.1. For details of the events, see further in this chapter, p.604.

without immediately committing herself to a further marriage. In this case, if a suitor from within the deceased's husband's family seeks her hand in marriage, she can opt for "friendship" with him before marriage. During this period of "friendship", her lover is her guardian. It must be emphasized, however, that this rule applies only if the lover is a member of the deceased husband's family. Where the suitor is outside that family, guardianship over her reverts to her maiden family until she remarries, on which occasion her family is divested of her guardianship in favour of her new husband.

D. SEXUAL RIGHTS

A husband has exclusive sexual rights over his wife or wives. A wife must never refuse her husband sexual intercourse unless she has a reasonable cause. The categories of reasonable cause are, however, closed. The only recognised causes for refusal are: serious illness which renders the wife physically incapable of having sexual intercourse; menstruation;[1] suckling a very young child before the prescribed period for weaning; intercourse during the daytime or in the bush and, among the tribal Muslims, the feast of Ramadan. Any man who invades a husband's sexual rights over his wife is liable to compensate the husband for "woman damage".[2]

A wife, too, has sexual rights over her husband but they are not exclusive. Nevertheless, a man is expected to have sexual intercourse with his wives only. However, he may with the approval of his head-wife, associate with another woman to whom he is

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1. Intercourse during menstruation, at daytime or in the bush are regarded as sexual taboos in Sierra Leone. For details, see pp.623-632.
2. For more discussion on this point, see pp. 621-622; 625-627.

not legally married. This usually happens where a man married to only one wife - a young girl - falls in love with a woman very much senior in age to his wife. In order to preserve the smooth running of his household which, should he marry the other woman, might be endangered through the ranking of wives in accordance with the date of their marriage and because of the disparity in age between his wife and the other woman, all the parties concerned sometimes agree on a friendship arrangement between the man and the other woman. This other woman does not join the man's household, but stays away in an accommodation provided by the man. If a man goes after women other than his wives, the wives are not entitled to be compensated for the adultery with the other woman. But should a quarrel break out between a wife and her husband's mistress and the cause of it is the husband's extra-marital relationship with that mistress, in some chiefdoms kassi is levied on the mistress but not on the wife; in others, both women are fined by the elders but the husband is compelled to pay his wife's, and in addition to compensate her. It is immaterial which of the women started the quarrel. For this reason, a mistress who is not recognised by a husband's wife is expected to stay clear out of the way of the wife.

A man who is married to more than one wife sleeps with each wife for three consecutive nights. He is expected to have sexual intercourse with the wife who sleeps with him at least once during that period.[1] It is important that he must do so, not so much because of the desire for sex by the wife but because of the emphasis

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1. For this reason, if the woman is not in a position to have sexual intercourse, for instance, if she is menstruating or ill, her turn may be deferred at her request.

on child-bearing in Sierra Leone tribal society in which women depend on their children for support and care in their old age. Moreover, the status of a woman within the polygamous household and in the tribal community at large increases with the number of children which she bears. Small wonder, therefore, that children are the main source of rivalry among co-wives. No greater tragedy can befall a woman than being childless. Women, therefore, take it seriously if their husbands, without reasonable cause, deprive them of sexual intercourse which to a wife is an indication that the husband does not want her to have children. There are numerous instances when wives have complained to the elders of their villages and have even gone to the extent of suing their husbands before local courts for the husbands' refusal to have sexual intercourse with them. Both the elders and the local courts too have not taken such cases lightly. They would require the husband either to beg the complaining wife and desist from the misconduct or to declare that he no longer wants the woman as wife. If he takes the latter course and the wife is unblameworthy, he may even forfeit any claim for the refund of the marriage consideration. On the other hand, if he still loves the woman and wishes her to continue to be his wife, but he is incapable of having sexual intercourse because of sickness or impotence, the wife can divorce him.

E. DUTIES OF A WIFE

The duties of a wife depend on a number of factors. These are: whether she is the only wife; whether she is the head-wife; and whether the matrimonial residence is located in a village, in a town in Provinces or in the city of Freetown. We shall deal

with a wife's duties bearing these factors in mind.

Where the wife is the only wife of her husband, she is expected to do all the domestic work in her husband's household, including the cooking and tidying up, and looking after the children. It is not regarded as etiquette for a husband in Sierra Leone tribal society to do any domestic work. If there is another wife, the domestic work is shared between the two with the junior wife doing the lion's share. If there are many wives, the head-wife acts as general supervisor and she herself is exempted from the usual domestic chores, except cooking for her husband during the period she takes her turn to sleep with him. Cooking for the husband during that period is a correlative duty imposed on every wife who enjoys the right of sleeping with him.

For economic reasons, it is not usual in practice for men living in Freetown to have more than one wife. Accommodation in the city is scarce and expensive, and almost invariably the husband will be engaged in some paid job which yields him a monthly income which is barely sufficient to maintain a wife together with younger brothers, sisters or cousins who might have been sent to him by relatives in the Provinces in order that they may attend school in Freetown. In such a situation, a wife is regarded as more dutiful, if she engages in petty trading in order to supplement the monthly allowance given to her by the husband. Her main task, however, is to cook, wash her husband's clothes, tidy up the home, and look after the children. But she is not deemed in customary law to be in dereliction of duty if she does not pursue the additional task of trading, and some tribes, like the Susu, do not encourage their wives to trade.

In provincial towns, however, a little more is expected of a wife. Here too, the ability of a man to have many wives is

limited, but as there are facilities in such towns which do not exist in Freetown, a man usually has an additional wife. Many residences in the Provinces have gardens (backyards). A wife is expected to make very good use of the garden, not for planting flowers as one would expect in a westernised household,but for growing vegetables and crops for human consumption. If there is a nearby stream, she is also expected to fish in it and with the catch, lighten the burden of the husband in maintaining the household. Alternatively, she can engage in some petty trading.

Where the location of the matrimonial residence is a village, a man usually has a plurality of wives. His main occupation is normally farming,[1] although occasional hunting, weaving, and some specialised trade like smithery and carpentry may break the monotony of his daily routine. While men do the heavy work of felling the trees in preparation for farm work, a man's wives must assist on his farm with the sowing, planting vegetable crops, weeding, helping with the harvest and preparing food for the male workers on the farm at every stage of the farm work. Wives may be allocated individual small farms by their husbands, and each wife is expected with the proceeds to provide the food for her husband when it is her turn to cook for him and for the daily maintenance of herself and her children. A wife is not obliged to cook for the whole household. The result is that every wife usually cooks her own individual food. A head-wife, however, always has some junior wife to do her cooking and only cooks herself when it is her turn to sleep with her husband.

Customary-law marriage in Sierra Leone is not a partnership

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1. The economy of villages in Sierra Leone is based primarily on subsistence agriculture. The staple foods are rice, cassava, yam and millet. Palm kernels, coffee, cocoa and beniseed are cultivated mainly for export.

between husband and wife, as is the case with marriage under the Christian or Civil Marriage Acts. A customary-law husband is to a certain degree in a position of a lord over his wife, and she must always pay obeisance to him. In law, she need not be consulted if the husband wants to take any important decision affecting the welfare of the family.[1] She must always stay in the background and must make her presence felt only when required by the husband. If, for instance, the husband is entertaining guests, it is the role of the wife to act as a servant and attend upon him and his guests. When summoned by him to his presence, she must enter quietly, stooping down in front of him, and must retire as soon as her services are no longer required. A wife who does not show this deference to her husband is regarded as disrespectful and, if she persists in that misconduct, she can be divorced with the obligation of the refund of the marriage payments made for her. Education of women and contact with Western culture seem to have had no effect on Sierra Leone customary laws in this regard. In practice, however, some customary-law husbands who have had foreign contacts tend to ignore such an omission on the part of their wives, at any rate in the presence of Westernised guests. These husbands ape the customs and manners of their guests, and even feel embarrassed if their wives behave to them in the presence of their "foreign guests" in the manner expected of them in customary law. Thus it is not uncommon in provincial towns and in Freetown for customary-law wives to share the company of their husbands and their guests in the same manner as wives married under the other systems of law in Sierra Leone do.

To summarise, the duties of a customary-law wife are: to

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1. In practice, however, the head-wife or an elderly wife is consulted, but the husband has the final say.

take care of the matrimonial residence, do the domestic work, care for her children, and work for her husband as directed by him. She must do all that lies in her power to please him and must be respectful to him.

F. WIFE'S RIGHT TO MAINTENANCE

The same factors which, as we have already mentioned, ought to be considered in dealing with the duties of a wife of a customary-law marriage are also relevant to a discussion of her right to maintenance. In return for a wife's industry in the matrimonial home, the husband is expected to protect her in the community, to provide her with accommodation, and to maintain her. But the extent to which he is liable to maintain her is debatable.

If the location of the matrimonial residence is in a big provincial town or in Freetown, there are some among the tribes who maintain that the husband is responsible for the complete maintenance of the wife and her children. The reason is that there may not be land available to the wife to cultivate vegetables and to assist the husband with the upkeep of the home. Others hold that the wife should engage in some petty trading with funds provided by the husband, and that she should use the profit to buy food for the home and clothing for herself.[1] These concede that the husband's liability is limited to providing rice, which is the main dish in Sierra Leone, for the feeding of the household, and buying clothing for her only once in a while.

Where the matrimonial residence is in a rural society, there

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1. The only tribal exception to this rule is the Susu, who do not require their wives to trade for their subsistence. The division of opinion is based on sex. The men say that the women should contribute; the women, on the other hand, take the opposite view.

is a general consensus of opinion that the husband should provide only clothing for his wife or wives in addition to accommodation. The day-to-day upkeep of the wife and her children is the primary responsibility of the wife herself. She is expected to make full use of the land provided by the husband for her cultivation. To this rule, however, there are exceptions. Firstly, during the rainy season when very little, if any, farming is done, it is the duty of the husband to provide rice for the whole household. The rice is kept under the strict supervision of the head-wife, who every morning dishes out the daily ration to each wife. Other items like fish and oil are provided by the wife herself. Secondly, if the wife is unfit to work,for instance, she is ill or is nursing a baby, the husband is responsible for her full maintenance. Thirdly, if the wife is temporarily living with her family either on a visit - a common occurrence recognised by tribal society - or on a specific mission like giving birth, or attending a relative's funeral ceremonies, or has sought shelter with them after escaping from the husband's ill-treatment, the husband is liable for her complete maintenance. While she remains with her family, any expenses incurred by them on her account must be fully reimbursed by the husband before she is allowed to return to, or with him.[1] Many families do not, however, in practice adhere to this rule if the husband has been kind and respectful to them, and the wife's staying with them is not the result of his ill-treatment of her.

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1. When a wife is temporarily living with her family, it is not customary for her to return to her husband by herself. The husband must either go for her himself or send a messenger. Whichever method is employed and for whatever reason that the wife went to her family, the husband must give, or send a "kola" for her family before she is released. In Mende customary law, the "kola" given by the husband is deemed to be sufficient compensation to the wife's parents for looking after her.

From the preceding analysis, it would appear that a customary-law husband is in an enviable position in regard to his responsibility for the maintenance of his wife, a position which a husband of a non-customary-law marriage does not find himself. But this is only vis-à-vis the wife. In the customary laws of Sierra Leone, a man's main obligation is to his and his wife's families. He is expected to make a contribution to the funeral expenses of some relative whenever there is bereavement in either family. If he is living in the same village with them, he must join in the labour on their farms or hire labourers for them. When there is a harvest on his own farm, he must give them a share of the proceeds. If he is resident in a village far away from the two families, he must invest the surplus crops and money with which to make occasional presents or gifts to the families, and assist them in times of need. A husband living in a provincial town or Freetown is expected to send at irregular intervals to his or his wife's families such commodities as clothing, tobacco, and Western-type victuals like sugar, tea, coffee, corned beef and sardines, which are not to be found in the village. A husband who fails in his duty to his wife's family is not likely to continue his enjoyment of his wife's consortium. Though, as a rule, the wife's family cannot take her away from him on this ground, that family can exercise a strong influence over the wife, and may even induce her to desert him. A generous lover may be sought by the wife on the instigation of her mother, or encouraged by the latter when the wife pays her usual visits to her family. Such a lover is a prospective husband for the wife concerned, and no sooner has he acquired a sum equivalent to the marriage payments which the husband paid for the wife than the wife deserts her husband and the marriage breaks

up. Whatever be the attitude of a husband to a wife, in Sierra Leone tribal societies a marriage is destined to last only if the husband displays continuing generosity to his wife's family. The economic burden on the husband of a customary-law marriage is not therefore light.

G. CHASTISEMENT

In contrast to non-customary law, a husband under the customary laws of Sierra Leone has the right to administer reasonable chastisement to his wife for her misconduct towards him. But he is not permitted to punish her for her misbehaviour towards a co-wife, their children and third parties. For misconduct towards the children, the husband must complain to her family. If it is a co-wife or a third party that is offended, the husband must ask her to beg the aggrieved person and, if she refuses, he can also report her to her family. In some Mende, Sherbro and Krim chiefdoms in the South the husband can sue the wife in a local court for her behaviour. Though in reality no offence is committed by the wife against the husband himself, the courts in these areas entertain such an action because, as guardian of the wife, the husband may become vicariously liable to the aggrieved party if that party were to seek redress against him. The wife is often asked to pay monetary compensation to the husband with which he settles the grievance with the party concerned.

The types of misconduct for which a husband is allowed to punish a wife are: dereliction of her domestic duty, flirting with other men, and adultery. It is not clear what amounts to reasonable chastisement. However, there is a general consensus of opinion that he can either send her to "Coventry" until she begs him, or beat her, but not to the extent of wounding her. The place

where he can lawfully administer the latter type of punishment is, however, a matter on which there is a difference of opinion. In some chiefdoms, if a husband beats his wife in a public place, he is liable to pay kassi to the elders. The fine is levied on him for being in breach of the peace of the village. While he can, with impunity, administer reasonable corporal punishment to his wife in his house, he should not do so behind closed doors, otherwise it will be inferred by the elders that he intends to kill his wife, for which he is also liable to pay a fine. The rule in other chiefdoms is that nobody should fight either in a public or in a private place.[1] Though these chiefdoms recognise the right of a husband to beat his wife, if done reasonably, the exercise of the right by the husband is regarded as a fight between the spouses. Thus kassi is levied by the elders on both of them. If the marriage is to continue, the husband pays both fines, but if the parties are to separate, the guilty spouse pays hers and the other's fines.

It is difficult to understand why a man should be liable to pay kassi for beating his wife at home, when his right to do so is recognised by the customary laws of the chiefdoms concerned. The kassi is in practice inflicted even where the wife does not complain to the elders. Kassis are normally inflicted in tribal societies throughout Sierra Leone if fights take place in public which disturb the peace of the elders. It is, therefore, submitted that a fight at home between a husband and wife that does not lead to a breach of the peace in the village ought to be regarded purely as a domestic problem, and should not be an offence against the elders. The elders cannot have it both ways: if they

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1. Bye-laws to this effect operate in the chiefdoms of the Bo district.

recognise a husband's "right" to beat his wife in private, then the levy of a kassi on him when he exercises that right is a recognition by them of a "no-right" on the same point. This is a legal situation which hardly exists under any system of law.[1]

H. MATRIMONIAL PROPERTY

There is a great deal of uncertainty about the law of matrimonial property in the customary laws of Sierra Leone. The reason is that the status of women in tribal society in Sierra Leone today is a little better than that of women in early-tribal society. While there are some people in each tribe who are prepared to give practical expression to such improvement by allowing a married woman some degree of economic independence, there are some who still adhere to the traditional view that she is her husband's chattel and that whatever property she purports to own, belongs to her husband absolutely.

A short exposition of the historical background to the economic position of women in traditional society in Sierra Leone will help one to appreciate the present confused state of the laws in regard to matrimonial property.

In traditional society, before the colonial era, a man's personal effects - his house, farm and implements of trade and husbandry - were his main items of property. As the economy of the society was wholly agricultural, so were items of property limited. A woman could not acquire any property of her own. In fulfilment of her role as housewife, all her efforts were channelled towards strengthening the economic position of her husband.

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1. W.N. Hohfeld, "Some Fundamental Legal Conceptions" (1913), 23 Yale L.J. 16-59, and "Fundamental Legal Conceptionsas Applied in Judicial Reasoning", (1917) 26 Yale L.J. 710-770.

In addition to her domestic duties, she was employed on her husband's farm and in the farm allotted to her by her husband. The proceeds of her husband's farm belonged to him absolutely, and those from her own farm were for the subsistence of herself, her husband and their children.

Then came the colonial era. A railway was built which linked Freetown with towns in the Provinces, motor roads were constructed and commercial centres were opened in the Provinces. The colonial administration levied a hut-tax on every building erected in the Provinces.[1] In order to enable them to pay the tax, husbands encouraged their wives to hawk some of the proceeds of their farms in the neighbouring towns. Women in traditional society, therefore, began to earn money. Next came the Second World War and the payment by the colonial government of monthly allowances to the wives of men engaged on military service overseas.[2] Added to these, the discovery of diamonds in Sierra Leone in the 1930s, and the diamond boom which followed in the 1950s [3] not only made many men less dependent on agricultural economy, but also provided avenues for women to earn money of their own. By this time, the economy of tribal society has begun to undergo a remarkable change. Items of property which belong to industrialised societies like modern household furniture, radios, and cars were gradually introduced into tribal society. At present,married women in large

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1. This tax resulted in a civil war in Sierra Leone in 1898, the last in the country's history.
2. During the Second World War, Sierra Leone men - the majority of whom were tribal natives - served in Asia with the Allied Forces. It is noteworthy that the majority of these Sierra Leoneans were natives and uneducated. In Sierra Leone, until recently, military service was not regarded as an honourable profession for educated people.
3. Licences to mine were not initially granted to Sierra Leoneans, but many of them engaged in illicit diamong mining from which they gained large fortunes.

provincial towns are now able to acquire properties of substantial value such as these. Some of these properties are acquired through the women's individual effort and others, with the joint effort of their husbands.

We shall now examine the extent to which, if at all, the events of the past years have affected the holding and disposition, in other words, the ownership of property by a married woman under the customary laws of Sierra Leone. We shall begin with a discussion of her position in early traditional society.

(a) Early traditional society

In the olden days the concept of matrimonial property was unknown to the customary laws of Sierra Leone. Every property in the household was owned by the husband. Even the wife was regarded as his property.[1] Therefore, property brought into the household by the wife at the time of her marriage, property purported to be acquired by her individual effort during the marriage, and any acquisition by the husband with her joint effort, all belonged to the husband. There was only one instance when a husband did not have absolute right over property derived from the wife. This was the case where the husband choosing to locate the matrimonial residence in the village of his wife to which he himself did not belong, was given land by the wife's family on which he farmed or built a dwelling house. If the marriage broke up through the death of the husband, the house and land reverted to the wife's family, and the wife's guardian became caretaker of the house until the children were grown up, when they took over from him. This rule applied only where the marriage was de facto monogamous. Where the

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1. Among some tribes like the Kono and Mende, even a wife's dead body was regarded as her husband's property and she could not be buried without his consent and direction.

husband married more than one wife, in the event of his divorcing the wife whose family gave him the land, he must either surrender the house with the land to that wife's family, or continue to live in the house and cultivate the land after paying a considerable compensation to the wife's family.

Though as a general rule, the wife did not own property in early traditional society, in practice she was allowed full beneficial rights over certain types of property. These were: (i) Her personal effects brought into the household by her on her marriage or given to her by her husband or acquired by her during the marriage. These included her clothing and articles of ornaments. (ii) Her domestic utensils such as pots, knives and earthenware. (iii) Crops and vegetables grown by her on her small farm allocated to her by her husband and livestock reared by her. (iv) Implements used by her for fishing and cultivation such as fishing nets and hoes. Her right to these properties was, however, limited to her personal use and enjoyment of them. She could not alienate them by way of gift or pledge without the consent of her husband. If she sold any of them, she must hand over the proceeds to her husband, who became both a trustee and beneficiary of it. The husband was, however, not accountable to her if he appropriated the whole or any part of the proceed. In the event of divorce she was not entitled to any of the properties which she had personally enjoyed during the marriage. Even her personal clothing could be taken away by her only with the husband's permission, which was rarely given if she divorced the husband, or if he divorced her because of her misconduct. The present writer was informed of cases where wives leaving their husbands had to go to their families either naked or in clothes borrowed from friends. If the husband died, his inerhitable property included his wife together with all her personal belongings.

(b) Modern Traditional Society

As we noted earlier in this discussion, the improvement in the economic position of women in tribal society has resulted in a change of attitude by some people towards the ability of married women to own property, while conservative traditionalists are still adamant. For a better understanding of modern developments, it is necessary to classify property in which a wife would appear to have an interest into (i) property she brought with her into the matrimonial home; (ii) gifts to the husband and wife at and during marriage; (iii) property acquired with the assistance, or joint effort of husband and wife; (iv) the wife's self-acquired property; and (v) the matrimonial home.

(i) Property brought in by wife at marriage

It is now settled in each customary law that property brought into the matrimonial home by the wife on her marriage, which constitutes her personal effects such as clothing and jewellery or which is of a domestic nature, such as pots, pans, buckets and spoons, belong to her and in the event of divorce, whether initiated by her or her husband, she can take them away with her. There is, however, a difference of opinion with regard to properties which do not fall within the above categories. These include money and articles foreign to tribal society, such as a radio, a spring bed and a car. The majority view in each tribe, except the Kono, Kissi and Limba, is that such property belongs to the wife, but that the husband must know about them and the source from which the wife acquired them. But this majority also concede that so long as the parties are married, the husband should be allowed access to any property she holds, and that he can use it even without the wife's permission. The minority among these tribes and a vast majority of the Kono, Kissi and Limba, on the other hand,

maintain that such property belongs to the husband absolutely. They contend that friends and relatives who give such property to a wife encourage her to be disobedient to her husband; for this reason, the property should be forfeited to him. But even among these dissenting groups, while the husband's right to the property is recognised, in practice, if the property is given to the wife with the knowledge of her husband, her beneficial use of it is assured. In this respect, the husband acts as trustee of the said property and with his permission, the wife can dispose of it. In the event of divorce, if the property is still in specie, the wife takes it away with her. A house, however, seems to be treated differently. It is rare, but not impossible, for women in tribal society to possess a house at the time of their marriage. Children from wealthy families, and elderly women who have spent many years trading before their marriage, however, sometimes do, but such cases occur in the large provincial towns rather than in the villages. There is uniformity among each tribe that the wife is entitled to it absolutely, but may again dispose of it only with the husband's permission.

(ii) Gifts to the spouses at or during marriage

In contrast with non-customary-law marriage, it is not usual for gifts to be given to spouses of customary-law marriages in their joint names. Any donor who intends to make a gift to the wife must hand it over to the husband and not directly to the wife. This is in recognition of the husband's position as leader of the family and guardian of the wife. The husband has a right to keep the gift for himself and is not accountable to the wife for it, but if the donor is a member of the wife's family, the value of such gift is deducted from the husband's marriage payments refundable

on divorce. Moreover, if the husband dies and the gift is identifiable, it belongs to the wife. Where the gift is an item of property used by females only, for example, a dress or a piece of jewellery, in practice the husband allows the wife complete use of it and it becomes her property. It is generally agreed that gifts given by the husband to the wife belong to her. But there are some among each tribe who hold that if the gift is expensive and the wife is not dutiful, the husband has a right to divest her of it during the marriage, but not after, and that he normally exercises that right if the wife deserts the husband.

(iii) Property acquired through the joint effort of husband and wife

Such property falls under three main heads, namely: the farm, market and non-traditional type of property.

Farm: We have pointed out earlier that a man's main occupation in a village is farming and to do this he is assisted by his wife or wives. There is agreement in each customary law of Sierra Leone that the produce of the husband's farm belongs to him absolutely, despite the fact that a good deal of the work on it is done by his wives. The husband's right is recognised even in contemporary customary law because of the obligation he owes to his wife's family to assist them in times of need, and to show them generosity at irregular intervals. Moreover, a wife is expected to assist her husband in order to enhance his economic and social positions in the community.

Market: It is common among many tribal [1] people living in towns nowadays that husbands provide their wives with a small capital with which to buy articles and hawk them. Such trading

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1. This custom does not persist among the Susu, though the wife can trade on her own if she wants to do so.

is not done on an elaborate basis. Sometimes the wife carries the whole of her wares on her head and shows them to customers she meets on the streets. Alternatively, the wares are displayed at the verandah of the matrimonial residence. Frequently, too, a husband living in a village sends his wife to the town to reside with a relative in order that she may do some trading. These small tradings carried on by women in Sierra Leone are commonly referred to as "markets". The wares include foodstuffs, wearing apparel, trinkets, provisions and even sometimes intoxicating liquor. There is no parallel between such "markets" in Sierra Leone and any trade carried out in Western industrialised countries, but a similar occupation is engaged in by women in many African countries.

There is some degree of uniformity among all the tribes in Sierra Leone as to the ownership of the capital and profit from such enterprises. The husband is entitled to everything.

In carrying out such an enterprise, a wife is expected to be diligent and industrious. If the venture fails, the wife must return her husband's capital. It is only upon strict proof that the failure is due to the viccissitudes of fortune that she is exempted from liability.

Non-traditional type of property: By non-traditional type of property is to be understood any species of property which was not originally found in traditional tribal society. These include all items of property of a foreign nature, such as modern household furniture, radiograms, and motor cars. These properties are not many in tribal society, but they can be found here and there among tribal people living in towns and in the city of Freetown. As news is broadcast in Sierra Leone in the tribal vernaculars in addition to English and Creole, radios are now found even in the remotest villages.

There is a great divergence of opinion as to the ownership of property falling in this class. Some in each tribe adhere to the early traditional rule that the product of a common venture between husband and wife belongs to the husband. Others say that the property belongs to both of them, but that the husband has a greater share in it irrespective of their individual contributions to its acquisition. This group maintains that should the marriage be dissolved, the wife has a right to recover her share from her husband.[1] The opinion of this group is, however, divided on the issue as to what happens to the property if the husband dies. Some say that if she stays with or remarries into the husband's family, she is entitled to the property as a whole. Others hold that even if she remarries into her late husband's family, where she has children the children are entitled to the said property. Where the wife chooses not to remarry into her deceased husband's family, some concede that she is entitled to monetary compensation only, whilst others maintain that she gets nothing.

(iv) Wife's self-acquired property

Some tribes are more broad-minded than others in their attitude towards a wife's self-acquired property. The Temne and Susu give a right to the wife over such property. The only condition they impose is that the wife must inform her husband of the source from which she acquired the property. If she is engaged in some "market", she would have loaned the capital with her husband's permission, or the money would have been given to her by a relative. Both the market and its proceeds belong to her. In rural society, the wife usually receives income from the crops and vegetables

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1. The opinions herein do not seem to be based on law recognised by the members of the tribes concerned, but on value judgment. It was, therefore, difficult for the present writer to ascertain what the laws were.

which she plants at the backyard or in her small farm. The Mende, Sherbro and Krim in large provincial towns also allow their wives to hold their self-acquired property; but not so with members of the same tribes who are resident in villages. The latter contend that a wife cannot acquire property if her husband does not give her the opportunity; therefore, whatever property she obtains belongs to the husband. This rule, however, does not seem to work in practice nowadays, and any amount of interference by the husband with his wife's self-acquired property results in complaint by the wife to the elders, and if the husband cannot be persuaded to refrain from the property, divorce may result with loss to him of the refund of his marriage payments for the wife in question. Many of the Kissi, Kono and Limba also contend that a wife cannot hold property independently of her husband, but it is doubtful to what extent this rule is of practical application by these tribes. On the whole, wives in tribal society are nowadays very jealous of their self-acquired property, and there is no doubt that in the near future there will be a complete revolution in this area of customary family law even among the most conservative of the tribal people.

(v) The matrimonial home

We stated earlier in this chapter that in marriage by service the husband resides in a residence provided by the family of his wife and that he continues to do so until he takes a second wife or, by a fortuitous combination of circumstances, he becomes economically capable of having his own residence. We also stated that in the other types of marriage the husband may, if he chooses, live with the family of his wife - an event which is rare in customary tribal society in Sierra Leone. In either case, the husband has no title to the matrimonial home since it belongs to his wife's

relatives. It is a privilege accorded him by his wife's family to reside with them, and his position is at best that of a tenant at will, if one may borrow the general-law expression.

But where the marriage is virilocal, there is a general consensus of opinion among the tribes that the husband owns the matrimonial home absolutely if he acquired it without the "contribution" of the wife, but that the wife has an interest in it inferior to that of the husband even if both contributed in equal shares to its acquisition. Whether or not she contributes to it, a customary-law wife resides at the matrimonial home at the pleasure of her husband. If she is driven away by the husband or the marriage comes to an end and she cannot stay in the house, she can claim compensation for any financial "contribution" which she made towards it acquisition. But she cannot insist on the house being sold and the proceeds divided, as would a wife married under the general law. Even the compensation granted her is not equivalent to her contribution. If she contributed to the acquisition of the house through her personal services and not financially, she is entitled to nothing. Two reasons are advanced for this inegalitarian attitude taken by the customary laws of Sierra Leone. The first is that it is the duty of a wife to assist her husband by her personal services, even in the provision of a shelter for her. Therefore, what ever service she renders - personal as well as financial - towards the achievement of that goal is regarded more as a "help" to the husband than a "contribution" by her towards a common enterprise. This seems to be the same argument underlying the reluctance of some tribal people to allow a wife a share in any property acquired by the husband with the joint effort of his wife. The practice of polygamy is the second reason for the inequality in the proprietary rights of the spouses in the matrimonial home. The tribes argue that the customary-law marriage is potentially

polygamous and that since more than one wife would be living in the matrimonial home, the whole structure of the polygamous family would be upset, if a wife were to be given equal rights in the home as the husband. The argument may be illustrated as follows:- H is married to W_1 W_2, W_3 and W_4. H builds a house [1] with the assistance of the wives. W_1 bears half of the financial expenses incurred by H from the profits of her separate "market". W_2 works with the labourers throughout the construction of the house. W_3 provides the food for the maintenance of the workmen from the product of her small farm. W_4 performs all the domestic work in the household, while the other wives are busy with their respective assignments. The house is complete and H is living in it with his wives and their children. H's mother pays a visit to the house and suffers great disrespect from the hands of W_1. H divorces W_1 on that ground.

The house, the argument continues, cannot be sold in order to meet the contribution of W_1 without grave hardship to the rest of the family; nor would it be just to refund fully her financial contribution to its construction, because the husband was deprived of her domestic services at the time she was carrying on "market" from which she was able to make the contribution.

Inherent in these reasons is the old concept that a wife is a form of a chattel of her husband which still persists in the customary laws. If equality were to be advocated in determining

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1. A house in a typical tribal society in the Provinces of Sierra Leone is built by communal labour in which all the wives play an active role. Even the building materials are provided by communal labour. A typical tribal house is built with mud and wattle and not with concrete. The roof is usually thatched. Financial expenditure in the building of a house in a village is normally very small, and is limited to paying the labourers and artisans. In towns, however, the expenditure is greater as it is now common for houses to be built with roofs of zinc or corrugated iron sheets.

the ownership of the matrimonial home, the leadership of the husband in the family would be destroyed and his ability to marry more than one wife would be impaired. As long as a customary-law marriage remains polygamous, the wife of such union is bound to suffer certain hardships, one of which is her unequal right to the matrimonial home. In large provincial towns, the position of a customary-law wife who makes a financial contribution towards the building of the matrimonial home appears to be better than that of her counterpart in the village. If the husband lets out rooms in the house, there are some who maintain that the husband should give her a share of the rent.[1] They concede, however, that the wife has no right of action to recover her share of the rent from the husband, but that the husband can be compelled to allocate one or two rooms in the house for her personal use.[2] This modern customary law persists among the Mende, Temne and Susu.

Conclusion

Matrimonial property law under the modern customary laws of Sierra Leone is indeed in a muddle. In many cases, the opinion expressed by the informants in each tribe seems to be based on their individual value judgment, and on personal idiosyncracies rather than on any accepted customary law of their ethnic group or of the area of their residences. For instance, in an interview with a section chief in the Kholifa Chiefdom in the Tonkolili District on the question of married women owning property, after

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1. The proportion is, however, undecided. Presumably, the husband gets the lion's share.

2. See the case, Yatta v. Musa, No.224/68, in which the Kakua local court, Bo, asked a husband to give his wife exclusive possession of two rooms in a house which was built in Bo town with the joint financial contributions of both.

giving his opinion he added: "this is my law, other people in this village may have theirs, but that is their business". We may, therefore, suggest that it is inevitable for an accurate ascertainment of the customary laws of matrimonial property that local bye-laws on the matter are enacted in each chiefdom. At present, no such law exists.

I MATRIMONIAL OFFENCES

Our discussion of matrimonial offences under this heading is limited to offences which when committed by a spouse or a third party result in remedies - expiatory, ritual or compensatory - or sanctions without bringing the marital relationship to an end. Offences by one spouse against the other which are "grounds" or reasons for the dissolution of the marriage are excluded from our present discussion. These offences will be dealt with in Chapter 18.

(1) Matrimonial Offences

These offences may be sub-divided into two main categories: (i) Offences against the husband; (ii) Sexual taboos.

(i) Offences against the husband

(a) Seduction of wife [1]

The word seduction is used in this context in its widest sense to include any act calculated to lead the wife astray. In the customary laws of Sierra Leone any act by a third party which is likely to encourage a wife to be disobedient to her husband or to be in dereliction of her duties as a housewife is an actionable

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1. Note that under s.13(1) of the Local Courts Act, 1963, the local courts have no jurisdiction in seduction actions and yet these courts in practice erroneously assume jurisdiction in such actions. See Chapter 3, pp.118-120.

wrong. Thus, it is an offence for a third party to enter into any contractual relation with a married woman without the prior knowledge and approval of her husband. A wife may also not be the donor or recipient of a present to or from a third party other than a relative. If the third party is a male, there is a presumption that he is at the least a potential lover. Though the husband may not succeed in an action for adultery against the third party on this ground alone, he can, nevertheless, recover compensation from him for seduction. Thus, in one case, Karteh v. Tailor,[1] decided by the Koribondo local court, Jaiama/Bongor Chiefdom, Bo District, a husband recovered Le4 compensation from a man to whom his wife gave cooked rice to eat without the husband's permission.

Enticement of a wife by a lover to divorce her husband is clearly established if, with knowledge that the woman is married, the lover presents himself to the woman's family as a suitor. An action for compensation against the suitor lies at the instance of the husband in addition to any action he may bring for adultery. Thus, in the case of Fofana v. Amara,[2] the Taiama local court, Kori Chiefdom, Mayamba District, awarded Le15 compensation against a lover in favour of a husband when the lover offered Le16 to the family of the man's wife in order to enable them to refund the husband's marriage payments in order that he (the lover) might be able to marry the woman.

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1. Unreported, not numbered and undated.

2. Case No.283/68; unreported.

(b) Harbouring of Wife [1]

In Sierra Leone tribal society, any person other than a relative who harbours a run-away wife is guilty of an offence against the husband. It is immaterial whether that person accommodates the wife for reasons of humanity or that the wife needs protection from physical or mental danger at the hands of her husband. Thus, in Koroma v. Johnny,[2] decided by the Kakua local court, at Bo town in the Bo District, a husband was awarded compensation from a town chief to whom a man's wife was delivered by her parents for protection against the husband's will until a dispute between the husband and wife which resulted in a fight, was to be settled. The only persons exempted from liability when they harbour a man's wife are the relatives of the wife, but they must not keep the wife after a reasonable demand for her has been made by the husband. The law has always been that the husband should go to his wife's parents and ask for his wife to return to him. If he does not do so after a length of time, say three months or at most, one year, the parents will as a matter of principle send a message to him to go and take his wife. If he ignores the request, he will not succeed in any case against his parents-in-law for harbouring his wife, nor will he recover the marriage payments should he decide to divorce the wife for desertion.

Where a wife goes to her parents with her husband's permission for a specific purpose, the same procedure as when she

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1. In all the local court records written in English which were examined by the present writer, the word "detention" is used instead of "harbouring". "Detention" probably springs from the literal translation of the Mende gbaa mahun (refuse to let something go). It is a fictional notion that if a person harbours a run-away wife, he or she has refused to let her go to her husband even though no request is made for her by the husband. As there is no element of detention, in the ordinary English sense, it is preferable to use the word "harbouring".

2. Case No. 195/68; unreported.

runs away is adopted and the same legal consequences follow. In either case, however, if a husband goes for his wife and the parents refuse to let her go, among the Southern tribes like the Mende, Sherbro, Krim and Gallina, the husband can maintain an action against them for their harbouring his wife. Two cases will serve as illustrations. In Swaray v. Ghujahun,[1] decided by the Kakua local court at Bo, a wife had gone to her parents on an errand but she did not return. The husband sent his brother for her, but her father refused to release her unless the husband went himself. The husband went and gave his father-in-law 40 cents as shake-hand. The husband returned without the wife as her father promised to send her to him (the husband) after the feast of Ramadam had been celebrated. Thereupon the husband sued his father-in-law and recovered from him Le40 as compensation. In the other case, Lewis v. Yar Alimamy,[2] the defendant was the wife's mother. After a domestic dispute between the husband and wife, the wife went to her mother. The husband went to his mother-in-law four times, each time paying the customary courtesy and asking for his wife without success. Eventually, he sued the mother-in-law. His right to do so was recognised by the Kakua local court provided there was proof that he was the rightful husband.[3]

Among the Northern tribes like the Temne, Susu, Limba, Loko, Koranko and Yalunba, it is not customary for sons-in-law to sue their parents-in-law for harbouring their wives for whatever reasons; but this is a "ground" for the husband to divorce the

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1. Case No.60/68; unreported.
2. Case No.28/68; unreported.
3. The mother-in-law denied knowledge of the marriage in the instant case. As the husband was not able to prove its existence, the case was dismissed.

wife and demand the return of his marriage payments.

It is interesting to note that in Mende, Sherbro and Gallina customary laws, a wife may be sued by her husband for harbouring herself.[1] A wife is deemed to harbour herself if she stays away from the matrimonial home without the permission of her husband, or if while temporarily living with her parents with her husband's permission, the husband asks her to return home and she refuses after being persuaded by her parents to comply with her husband's wish. It is of more interest to observe that some of the cases decided by the local courts reveal that the actions brought against the wives for self-harbouring are captioned "Breach of domestic work". Thus, in a case before the Taiama local court, Kori Chiefdom, Moyamba District, Bindi v. Janet Luseni,[2] a husband was granted Le8 as compensation because his wife, the defendant, left the matrimonial home without his permission and spent 8 months away. She was held to be in breach of domestic work. In another case, Mbayo v. Iye Ernest,[3] decided by the same court, the wife went to her parents and refused to return to her husband when requested to do so by both the husband and her parents. The husband was awarded Le9 as compensation against her for her breach of domestic work during the period she was away without her husband's permission. An example from the Gallina tribe is afforded by the case of Kpaka v. Massa Sama,[4] a decision of the Blama Massaquoi local court, Perri Chiefdom, Pujehun District. In that case, the wife's mother was sick and she went home to her parents to look after her. Eventually, the mother died and after the funeral ceremonies the

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1. The majority of the cases decided by the local courts on this point are captioned "self-detention".
2. Unreported, decided in July 1967.
3. Case No.24/67; unreported.
4. Case No.62/69; unreported.

wife refused to return home despite several requests by her husband and her father. The husband was awarded Le14 as compensation.

Actions are maintainable for breach of domestic work only where the wife has stayed away from the matrimonial home without the husband's permission. While she is living with the husband no such action lies even if she fails to do her domestic work. The husband has other remedies for this.[1]

(c) Adultery [2]

Any man other than the husband who invades the sexual privacy of a man's wife is, as a rule, liable to the husband for adultery.[3] What constitutes adultery, thus giving rise to a cause of action in the customary laws of Sierra Leone, is wider than under the general law. In the customary laws any immoral gesture by a man to another man's wife is regarded as adulterous. This includes the touching of the woman's breast or any part of her body below the waist-line except her legs and feet, whether or not she is naked at the time of the act. Formerly, in some more remote Mende chiefdoms, even the act of pounding rice in a mortar with another man's wife, if done by a man, constituted adultery.

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1. The husband's remedy is chastisement, and if the wife persists in her misconduct, divorce.
2. For adultery in this context, the word used in the local court records is "woman-damage". The origin of the word "woman-damage" is doubtful. Probably, it is regarded as a more refined way of expressing "woman-palaver", which is the literal English equivalent of the vernacular term for the action; for example, Mende: nyaha yia.
3. One informant, Mr. Borbor Taylor, Acting Kissi tribal headman, Bo, said that there is no action for adultery (woman-damage) in Kissi customary law. The accuracy of this statement is doubtful since other Kissi people interviewed held the contrary. There can be no mistake that Mr. Taylor was not thinking in terms of the customary law of the area where he was resident since the prevailing customary law of Bo is Mende and under that law actions for adultery are taken more seriously than under many other customary laws. These actions are known throughout the other customary laws of Sierra Leone.

Although all these acts are in traditional society theoretically regarded as adulterous, in practice the present trend is to maintain an action for adultery only if there is actual sexual intercourse, or where the man makes an unsuccessful attempt after the woman has been stripped naked.

In some chiefdoms, particularly in the Mende area, quite apart from the husband's action for adultery, it is criminal for a man to have sexual intercourse with another man's wife while she is pregnant or a suckling-mother, or if the intercourse is in violation of a sexual taboo, or if the intercourse results in the woman's pregnancy.[1] Either the husband or the chief of the village or town can levy kassi on the man and if he fails to pay it he may be prosecuted in court.[2] In the case of intercourse with a pregnant woman or suckling-mother, even the female offender may be prosecuted. Thus, in Jabbie v. Katta,[3] the section chief of Koribondo in the Jaiama Bongor Chiefdom, Bo District, prosecuted one Madam Satta Katta for allowing one Sulaiman William to have sexual intercourse with her, another man's wife, which resulted in her pregnancy. She was fined Le10 or 6 months imprisonment.

By way of conclusion, it should be noted that in the customary laws of Sierra Leone, just as in the general law, actions for

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1. In one case, Tambawa of Pelewahun v. Koroma of Mano, decided by the Koribondo local court, Jaiama Bongor Chiefdom, Bo District, a husband prosecuted a man for pregnating his wife. This action was held to be different from that for "woman-damage" for which the accused had already been sued by the husband.

2. Where intercourse is with a pregnant woman or a suckling-mother lack of knowledge on the man's part of the condition of the woman is irrelevant. See the cases of Abu v. Bundoh, Case No. 209/68, and Bindi v. Carpenter, Case No.131/68, both decided by the Kakua local court, Bo. Among the Temne, if a man has an affair with a married woman who does not reveal to him that she is married, any fine or damages for adultery against the man may be ordered to be paid by the woman.

3. Decided in November, 1967; unreported.

adultery are maintainable at the instance of the husband only; the wife has no similar action against another woman for adultery with her husband.

(d) Miscellaneous offences

Because of the husband's right of guardianship over his wife, every wrong to a wife by a third party which is actionable by her is also actionable by her husband independent of any action the wife may bring. For instance, a husband can sue any person who assaults his wife. Thus, in Hallowell v. Magnus,[1] the Mongeri local court in the Bo District awarded compensation against a man in favour of a husband whose wife had been beaten up by the man in a fight. This case is an example of Mende customary law, but the principle is the same in the other customary laws of Sierra Leone.

(ii) Sexual taboos

There are in every customary law in Sierra Leone a number of restrictions on sexual intercourse between a man and his wife. Some of these restrictions are imposed in order to maintain sexual purity; others are designed to protect the well-being of the family. We shall now examine each of them.

(i) Intercourse is forbidden during the period of menstruation. While in this state, the woman is said to be "seeing the moon" - a sort of supernatural condition that puts her beyond the bounds of the husband. It is believed that an infraction of this rule will result in serious illness to the couple concerned. But the main reason seems to be that the woman cannot conceive during her menses, procreation being regarded in customary law as the principal essence of intercourse.

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1. Case No.177/61, decided in 7/12/61; unreported.

(ii) Intercourse may not take place during the daytime.[1] The reason for this prohibition is probably that sexual intercourse induces tiredness and both spouses need sufficient energy in order to carry out their daily work.

(iii) It is forbidden to engage in sexual intercourse on the night before a fishing or hunting expedition, as this will result in ill-luck to the expedition.

(iv) A man may not have sexual intercourse with his wife in a bush.[2] The reason is that such act defiles all the farms in the area, thus resulting in poor harvest. It is also believed that if the wife becomes pregnant from the intercourse, the child will be a "devil". Deformity in children born is, in Sierra Leone tribal society, inter alia attributed to a violation of this rule.

(v) Intercourse with a wife who has recently given birth to a baby is prohibited. The custom in general is that when a wife is expecting her first baby, she goes to live with her parents when she is about 5 to 6 months pregnant and remains with them until the baby is born and is ready for weaning. Formerly, the period extended to three years after the birth of the baby. Nowadays, probably as a result of Westernized influence, the time is reduced among many "literate" [3] tribal people. For a wife's subsequent babies, or where the marriage is de facto monogamous, the

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1. For this purpose, daytime is the period which lapses from the time that the cock crows in the early hours of the morning to dusk.
2. It is interesting to note that among the Fula, a migrant tribe from Guinea, many of whom are in Sierra Leone, the bush is regarded as a proper place for intercourse because of its secrecy.
3. "Literate" in this context is the ability to read and write English.

wife usually remains in the matrimonial home to have her baby. But during the suckling period, she does not share the same bed with her husband. Violation of this prohibition is believed to cause illness to the child. Many cases of quashiorkor [1] are regarded by illiterate Sierra Leoneans as resulting from a violation of this rule.

(vi) A widow may not have sexual intercourse until the funeral obsequies of her late husband are over and she has been purified. Purification takes the form of a ceremonial washing. The belief is that until purification, the widow still spiritually belongs to the deceased and that intercourse within the prohibited period will cause the deceased's spirit to continue visiting her and bringing her ill-luck.

(vii) A girl who is uninitiated or whose initiation is not complete, may not engage in sexual intercourse.

(viii) Finally, and the most heinous of all the sexual taboos, intercourse may not take place between persons within the prohibited degrees of consanguinity, affinity, fosterage, or clanship. Such intercourse is regarded as incestuous and the consequences are grave. It is popularly known among the Mende, Sherbro, Krim and Gallina as simongama. The Temne call it pinthkane.

We have so far examined the matrimonial offences without paying special attention to the remedies and sanctions which follow them. Let us now discuss them.

(2) Remedies and Sanctions

(i) Compensation or fine

For a matrimonial breach against the husband by a third party, the remedy is monetary compensation awarded by the local

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1. This is a disease very common in children not only in Sierra Leone but in many developing countries whereby the victim develops a large distended belly cause by acute avitaminosis.

court of the chiefdom where the offence occurs or where the husband is resident at the commencement of the proceedings for compensation. For offences other than adultery, the amount is not fixed by law. The result is that the compensation awarded is sometimes far less, and at other times exceeds the loss sustained by the husband. In the case of adultery, the present trend is for each local court in the Provinces of Sierra Leone to fix its own amount. Some have awarded as little as Le3, and others have allowed as much as Le20.[1] This is a recent innovation. Formerly, when there were no local courts but courts of the native chiefs, the amount was never fixed. The husband would demand from the adulterer whatever sum the husband deemed fit, and on the man's failure to meet it, would become liable to work as labourer on the husband's farm. In those days, husbands who needed labourers to work for them used their wives as decoys to attract them. It was usual for such husbands to marry many wives, most of whom they could not satisfy sexually, and seemingly to ignore them. A wife would then associate with a young man in the village. When the husband knew about it he would make no fuss until he needed labourers. At the opportune time, he would call his wives to "confess" their lovers. Aware that the lovers could not afford money, the husband would ask for exorbitant sums of money as compensation. Consequently, he got free labour on his farm. It is probably to check this practice that each local court now has a fixed amount as compensation for adultery.

In addition to compensation, some local courts [2] award a

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1. The compensation awarded by the local courts in the North is heavier than in the South.

2. The local courts in the Kakua and Jaiama Borgor Chiefdoms, Bo District, are notorious for this. In one case, however, Mason v. Boamei (No.144/63) the President of a local court in the Bumpe Chiefdom deprecated this practice as unjust. He said that it is no justice to punish a person twice or more for the same crime.

fine to a prosecutor for aggravated adultery, i.e. adultery with a pregnant or suckling-wife, and adultery with a woman which results in her pregnancy. Thus, if the husband prosecutes he gets the fine, and if the prosecutor is the village or town chief, the fine goes to him. In this manner, it is possible for the adulterer to be punished more than once for the same offence because a prosecution by the husband does not discharge the accused from further liability if he is again prosecuted by the chief, as the crime is regarded as one against the husband and the community. Therefore, that principle of natural justice which is widely acclaimed under the general law - that a man may not be punished twice for the same offence - seems to have no place in the customary family laws of Sierra Leone insofar as aggravated adultery is concerned. Does this offend against the "repugnancy provision" for the application of customary law? This question has not as yet been answered by the general-law courts. Probably, it does.

A fine is imposed by the local court or the elders on the guilty parties for a breach of sexual taboos relating to intercourse in a bush, intercourse with an uninitiated girl or one whose initiation has not been completed, and for incest. For intercourse in a bush, the fine is used by the elders to "wash" the bush ceremonially. In the case of an offence against initiation, the fine is given to the head of the sande/bondo society in order to appease her since the offence is regarded as one against the society. The fine for incest is used partly for the purification and ritual cleansing of the offenders and partly as compensation to the village, and it goes to the local treasury.

(ii) Swear

The "swear" is the appropriate remedy for adultery which is not admitted by the adulterer. Where a wife confesses adultery

and her lover denies it, if there is no corroborative evidence linking the lover with the offence, an aggrieved husband goes without the usual remedy of compensation. Instead, he swears the adulterer. The procedure in many chiefdoms is that the husband pays a fee to the Chiefdom Committee or to the chief of the town or village and "begs for a ground" on which to swear. When permission is granted, the husband administers the swear on a "medicine" [1] provided by him. Sometimes, the alleged adulterer himself is made to swear on the medicine.[2] The swear is believed to cause serious sickness [3] and death, not only to the adulterer, if he is guilty, but also to members of his family. Therefore, in many cases where a "medicine" is regarded as deadly, the alleged adulterer makes a clean breast of his misconduct and the usual fine is substituted for the swear.

(iii) Curse

There is no appropriate remedy for breach of such sexual taboos as intercourse with a woman on her monthly cycle, intercourse with a suckling wife and intercourse with an unpurified widow. The guilty spouses are deemed to be under a curse. They

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1. These "medicines" are a concoction of many objects such as stones, sea-shells and herbs, and are believed to have supernatural powers which can make a person sick or kill him. The commonest are the thunder-bolt (ngele gbai: Mende), tomie, (Sherbro), sasa (universal) and gbom (Temne and Susu). These medicines belong to certain families and are hired through the paramount chiefs of the respective chiefdoms. The choice of the medicine to be used for a swear is governed by the bye-law of each chiefdom. In some chiefdoms, it is forbidden to use the deadliest medicines such as the thunder-bolt.
2. The adulteress may also be made to swear on a medicine provided by the alleged adulterer if he insists on his innocence in which case he pays the compensation just as if he had committed the adultery.
3. Sicknesses like paralysis, elephantiasis and dysentry are believed to be caused by a swear on these medicines.

must pay the penalty by being victims of misfortunes. As it is believed that the spirits of their ancestors have a hand in such misfortunes, the parties may, however, appease the ghosts of their deceased kin by making occasional sacrifices to them with a prayer for forgiveness.

(iv) Expiatory or ritual sacrifices

The offences of intercourse in the bush and incest are remedied by expiatory and ritual sacrifices. For the former offence, the procedure is usually a simple one. When the harvests in a given season become poorer and poorer, it is generally assumed that some persons within the village had had intercourse in the bush where the farm is located. A "medicine" man (ine Mende: woman, manee-humoi) is invited to exorcise all evil influences from the farm. He "washes" the bush with a medicine prepared from a solution of compounded herbs which he sprinkles over the farm.

The expiatory and ritual sacrifice for incest is more elaborate. There are tribal variations in the procedure. Let us deal with three of the distinctive ones.

MENDE: [1] Among the Mende, the humoi society is responsible for the purification of the violators of incest prohibitions (simongana). The culprits provide a fowl, rice, palm oil, salt, dried mud-fish and a mat or the cash equivalent of these articles. The ceremony is open to the public and it takes place at a shrine by the roadside leading to the village (pelewunga-humoi). The offenders and all members of their families within easy reach are taken to the shrine. Each offender sits on a mat which is spread

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1. The Sherbo, Gallina and Krim adopt a procedure similar to the Mende. Among the Sherbro, the purification takes place in the yassi society and a dog is "washed" together with the offenders.

over the humoi stone. The priestess (mee-nde) webs the thread round the offender from toe to ear and places grains of uncooked rice on their hands and tongues. The hands of the offenders are stretched out, the palms remain open and the tongues are protruded. While they are in that position, the fowl is made to peck all the rice from both the hands and tongues. If it succeeds in this with one offender, he or she is regarded to have made a full confession and contrition. The ceremony of "pecking the rice" which we have just described is usually performed if the offenders have not previously made a confession, or where there is a suspicion that their confession is only partial. It is dispensed with where a complete confession has already been made. Thenceforth, a "medicine" - solution of compounded herbs - is prepared. The fowl is decapitated and while there is still life in it, it is quickly dipped in the medicine and held over the offenders. As it struggles to die, it sprinkles the "medicine" over them.

Sometimes a bath is taken at the site with water mixed with the medicine. The rice is cooked and then the fowl. The gizzard of the fowl and some of the cooked rice mixed with the palm oil are placed on the humoi stone as a sacrifice to the ancestors of the society who are begged to forgive the contemnors for their sins.

In some chiefdoms, the offenders are taken to a nearby stream for a bath, after which they are flogged by the villagers all the way from the stream to the village.

Often, where the incest is regarded as too serious, for instance, intercourse between a parent and child, or between a brother and sister of the same mother, the tongues of the offenders are scratched with niddles, a razor blade, or a sharp knife (kpekelii).

Temne: [1] Incest (pinthkane) is regarded by the Temne as a transgression of a taboo (mesem) imposed by the ragbenle society and also as a form of adultery and a crime against the ancestors of the families of both offenders.

The offenders are taken to the ragbenle society bush (turuma) for purification. Each provides the items demanded by the or gbenle which are to be offered as a sacrifice to the ancestors. In return, the or gbenle prepares a liquid "medicine" (mafoi) for them. The hands and feet of the violators are tied with ropes. The same ropes are also tied on to the legs of a dog. The dog is flogged until it dies. The dog meat is cooked and the offenders eat it. They are then led to a stream in order to be "washed" and the villagers flog them as they go. At the waterside, while they are taking the bath, the or gbenle sprinkles into the water some of the medicine which he has prepared. After the "washing", the pair are made to run home naked, the villagers again flogging them as they go.

Kono: [2] The ceremony begins from the sumoi bush and ends at a public waterside. The culprits are taken to the bush and there they are stripped naked. In the Kamara chiefdom, a dog is tied on to the back of the male offender. The road leading from the bush to the waterside is lined up by the villagers, the women on one side and the men on the other. The violators are made to run through the two lines and as they do so, the women abuse them for

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1. The Limba follow the same procedure as the Temne. The society which is responsible for the cleansing among the Limba is the gbangbani society. In some Limba chiefdoms, the head of the female offender is shaven.
2. Among the Koranko and Susu the punishment was formerly banishment from the chiefdom. Nowadays, the parties are either flogged or fined heavily by the elders of their families.

bringing shame and disgrace on the village and on their respective families, and the men flog the dog. The dog is eventually removed from the man's back and the offenders are themselves flogged until they run and fall into the stream. In the other Kono chiefdoms, a fowl is usually substituted for the dog.

MODERN DEVELOPMENT: The ceremonies which we have described are the traditional modes of expiation. Today, they still take place in the more remote villages but they are seldom followed in the towns. The reason probably is partly that the societies which are responsible for the cleansing are now established only in the villages, and partly that the rituals are regarded as offensive to the "civilized" ideas prevailing in the towns, as the wrongs which they seek to remedy. Consequently, the expiatory ceremony in the towns is reduced to the "washing" in private of the violators by a herbalist hired for that purpose from a village. Furthermore, the less conservative tribal people in the large provincial towns and in Freetown abandon even the ordinary "washing" ceremony, and many families are content with fines in cash or in kind, levied on the culprits with which to offer sacrifices to the ancestors.

CHAPTER 18

TERMINATION OF A CUSTOMARY-LAW MARRIAGE

Under the customary laws of Sierra Leone, as in the general law, a marriage may be terminated by the death of one of the spouses or by divorce. In this chapter it is proposed to examine these modes of dissolution of marriage. The effect of termination of marriage, on the custody and maintenance of the children of the marriage, on the marriage payments, and on the right of a spouse to re-marry, will also be considered. The effect of divorce on property has already been dealt with in Chapter 17. In Chapter 20 we shall address ourselves to the effect of death on the property rights of the spouses.

A. TERMINATION BY DEATH

(i) Death of the Wife

When a wife dies, her marriage is automatically terminated. The exact moment of the complete severance of the marital union is when the wife is buried and the funeral ceremonies are completed. Until such a time, the husband has certain rights and is subject to some obligations to her. For instance, among such tribes as the Mende and Kono, the corpse may not be buried without the husband's consent and direction. Where he is not present but is within easy reach af the death of his wife, the burial is normally postponed until he is present or has given directions.[1] If his whereabouts are known and he can easily be got at but his wife is

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1. Where a husband is away from the place where his wife dies, the custom is for the wife's parents to send a message to him to report the death and request him to be present and bury his wife.

nevertheless buried without his consent, the person who undertakes the burial is liable to the husband. In practice, however, the husband does not pursue a remedy for the invasion of this right where the relationship between the husband and the "good Samaritan" is cordial or if the wife is buried by or at the direction of the town chief.[1] As a corrolary to his right to direct the burial of his wife, the husband has the duty to bury his wife and bear the funeral expenses. If such expenses are incurred on his behalf either at his request, or because he is not easily available at the time of the wife's death, a claim for reimbursement may be made against him. In practice, parents or relatives of the deceased wife who incur the wife's funeral expenses on behalf of her husband do not demand reimbursement, but the husband is expected to compensate them nevertheless. If he fails to do so and he has apparent means, the deceased's wife's parents will claim every property left by her which is in the husband's possession or control.

(ii) Death of the Husband

The death of the husband also terminates the marriage. Termination, however, is incomplete until the widow has been ceremonially washed or, if she is pregnant at the time of her husband's death, until she has delivered provided she has not remarried after her ceremonial washing and before the birth of the child. The reason for the latter condition is to determine the legitimacy of a child conceived but not born at the time of the death of its natural father.[2]

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1. For hygienic reasons, a town chief has the right to bury or order the burial of a corpse in his village if there are indications that it is beginning to decompose.

2. For more discussion on this point, see Chapter 19, pp.670-672.

Unlike a husband, a wife has no right to direct the burial of the corpse of her husband nor any obligations to bury it. These responsibilities fall on the family of the husband. Nevertheless, a widow is expected to undergo a period of mourning for her husband. The minimum is seven days and the maximum forty days. Aubert [1] mentions that among the Susu, the period of mourning lasted for four months. This is probably an inaccurate reference to the Islamic 'idda of death,[2] since the Susu are predominantly Muslim. As we observed in Chapter 6, the 'idda of death even among the strict Muslims in Sierra Leone does not exceed forty days.

The period of mourning by a widow begins as soon as the death of the husband is formally announced. The announcement is made usually by the next-of-kin of the man at a meeting of the widows and relatives of the deceased which takes place on the day of the man's funeral. After the announcement, the heads of the widows are shaven or, in some chiefdoms, dishevelled. Some of the water which has been used to wash the corpse in preparation for burial is mixed with white clay or, if the latter is not available, mud, and the widows are smeared with the mixture all over the body. This indicates that they are in mourning.[3] On the fourth day of the burial a sacrifice of a fowl or sheep and rice is offered at the graveside of the deceased, three days after which the widows go to a nearby stream and are ceremonially washed. In strict Muslims families, the ceremonial washing does not take place until after forty days from the death of the husband. While

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1. Op.cit., p.70.
2. The Islamic 'idda of death is 4 months and 10 days.
3. Nowadays, the act of smearing the body with white clay or mud is abandoned in many chiefdoms, particularly in the towns. The symbolic washing must, however, always take place.

performing the ablution, the widows bid farewell to the deceased and beseech his spirit to depart from them but to remember to render assistance to them whenever they are in need. After the washing ceremony, the widows are regarded as purified and they may then re-marry.

Widow inheritance

Widow inheritance has been a common institution in the customary laws of Sierra Leone since the beginning of traditional society. When a man dies, his widows are expected to choose their new husbands from within the family of the deceased. Ghost and levirate marriages are not practised under any customary law of Sierra Leone. Consequently, when a widow re-marries, the marriage is not regarded as one newly contracted to the name of the dead husband as in ghost-marriage nor is the subsequent marriage considered to be a continuation of an existing marriage with the deceased as in the case of a levirate marriage.[1] Upon the death of her husband and after the ceremonial washing of his widow, in Sierra Leonce customary laws, she may continue links with the family of her deceased husband, but all connections with the dead man himself are severed. To this rule, there is one exception. A posthumous child born to a widow within the period of mourning or before the widow re-marries belongs to the deceased husband, or to be more exact, to his family.

To what extent, if at all, a widow may in present-day Sierra Leone choose whether to re-marry within the family of her

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1. See, by way of comparison, Howell, A Manual of Nuer Law, International African Institute, 1954, pp.74-79, for the legal difference between a ghost marriage and a levirate as practised by the Nuer of the Southern Sudan. It should be pointed out here, however, that in both marriages, the living husband is merely genitor of the children while the deceased man is the legal father, pater.

deceased husband or to marry outside or to remain unmarried is a question to which we must now address ourselves. In Chapter 15 it was noted that present-day widows in traditional society demonstrate a reluctance to re-marry within their deceased husbands' families and that some tribes are more tolerant than others towards a widow's choice of a new husband. While the Temne, Susu, Limba, Loko, Kissi and Kono allow her carte blanche to select a husband and do not consider it a cause for the refund of the marriage payments made by the deceased husband if she decides to marry someone outside the family of the deceased; the Mende, Krim, Sherbro, Gallina, Koranko and Yalunka demand that she should re-marry a member of *her* deceased husband's family, if she re-marries at all, otherwise the marriage payments are refundable. We have already observed that the Sierra Leone government in a directive, which purported to be effective as from 27 April, 1963, ordered that a widow should be free to re-marry any man of her choice without an obligation to refund the marriage payments made by her deceased husband, should she marry outside his family. There is ample evidence from informants that this directive is followed in practice in some parts of the country, but is frequently ignored in other parts. At this juncture, therefore, it is necessary to examine whether the directive has any force of law which is being violated by those who do not comply with it.

Clearly, the directive is not an "Act" within the meaning of s.3(1) of the Interpretation Act, 1971.[1] That section provides that,

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1. Act No.8 of 1971.

> "'Act' or 'Act of Parliament' includes any Act, and any order, proclamation, order in council, rule, regulation or bye-law duly made under the authority of an Act, order of Her Majesty in Council or any other legislative enactment, applicable to and in force in Sierra Leone."

The directive was at best a government policy statement which never matured into an Act of Parliament, nor was it an order, inter alia, made under the authority of an Act of Parliament. At present, the only legislative machinery for the modification or alteration of applicable customary law that does not offend against the repugnancy provisions [1] is provided by s.40 of the District Council Act,[2] which stipulates that,

> "It shall be lawful for a District Council, with the approval of the Governor in Council, [President] to make rules altering or modifying native [local] customary law in the district, and all native [local] courts in the said district shall take cognisance of all the rules as made."

From the above provision it can be concluded that, in the absence of an Act of Parliament, only District Councils have power to change or modify customary law by legislative process. The directive now under discussion, therefore, had no force of law since it was not adopted by any District Council in the prescribed manner. At present, there is no evidence that any District Council has as yet taken the necessary step to implement it. The current legal position, therefore, is the same as before the directive.

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1. S.2 of the Local Courts Act, 1963; Act. No.20 of 1963 and s.76 of the Courts Act, 1965; Act No.31 of 1965.
2. Cap.79 of the revised Laws of Sierra Leone, 1960.

Effect of death on the custody of the children

Under the customary laws of Sierra Leone, on the death of the wife the children of the marriage remain with the husband and he is entitled to their custody just as he was entitled during the wife's lifetime. If it is the husband who dies, on the other hand, all his children belong to his family head, who automatically becomes their guardian. The widow's family has no claim to the children and if she re-marries outside the family of her deceased husband, the custody of the children remains vested in the head of the dead husband's family, but she has access to the children. If, on the other hand, she marries within the dead man's family, it is her new husband who is entitled to the custody of the children.[1]

Effect of death on the marriage payments

So far as the marriage payments are concerned, the death of the husband does not result in an obligation on the family of the wife to refund such payments provided that the widow re-marries into the dead man's family or she is too old to re-marry. But if she is young and a member of the deceased husband's family wants to marry her and she refuses or if she decides to re-marry outside that family some tribes like the Mende, Krim, Koranko and Yalunka, as we have seen, demand the refund of the marriage payments. In such a situation an action against the woman's family for the recovery of the marriage payments is maintainable at the instance of the administrator of the estate of the deceased husband.[2] In

1. For more on this point, see Chapter 19.

2. If the widow does not re-marry, the persons liable to refund the marriage payments are members of her family. But if she re-marries, it is her new husband who pays the money in practice although in theory it is her family who is liable.

some Chiefdoms the quantum of the amount recoverable depends on whether or not there are children. If there are no children, the full amount is paid to the deceased's estate. But if there are children, a proportion of it, decided upon by the Local Court, is allocated for their maintenance and is given to the person under whose care and control the children are.

Effect of death on the right to re-marry

A customary-law husband is free during the lifetime of his wife to contract as many customary-law marriages as he wishes. The death of his wife does not, therefore, affect his status quo ante. The wife's death is, however, relevant if the widower wishes to contract a marriage under the Christian or Civil Marriage Acts. As we have already mentioned in Chapter 6, under s.1 of the Christian Marriage (Amendment)(No.2) Act, 1965, one spouse is incapable during the subsistence of a customary-law marriage with another spouse to enter into a statutory marriage under any of the two Acts with a third party. On the other hand, the death of a husband is an important factor in determining the capacity of his widow to marry another man under customary law or the general law. Under both systems of law a woman cannot contract a valid marriage with one man during the subsistence of a valid marriage with another. For the sake of this rule, each system of law recognises a valid marriage contracted under the other. As death terminates a marriage, the death of the husband, therefore, leaves his widow free to re-marry.

B. TERMINATION BY DIVORCE

Persons who may institute proceedings for divorce and how

Under each tribal system in Sierra Leone, proceedings for

a customary-law divorce may be initiated extra-judicially or judicially through a Local Court by either spouse of a customary marriage.[1] Apart from the spouses themselves, no other person is entitled to institute such proceedings. Formerly, a father could take his daughter from her husband and refund the marriage payments and the process amounted to divorce. Nowadays, however, divorce is not effected in this way. The proceedings can be initiated at any time during the marriage and before the death of one spouse, but where the wife is visibly pregnant arbitration tribunals and Local Courts do not as a rule grant a decree until she has given birth to the child. Though a wife may in all the tribal systems divorce her husband, in some chiefdoms she is not, on grounds of public policy, as free to do so as is the husband when he wants to divorce his wife. In these chiefdoms, the success of marriage is believed largely to depend on the conduct of the wife, who is expected to be more tolerant than her husband. To ensure the stability of wives, therefore, some chiefdoms have rules governing divorce by wives. For instance, in the town of Koribondo in the Bo district there is a law that any woman who divorces her husband must pay Le3 to the town chief. No similar

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1. Informants from some areas, for instance parts of the Kambia and Port Loko districts, say that divorce under the Temne customary law prevailing in their areas may be obtained only judicially. This view, however, does not seem to accord with the law and practice in these areas, since the chiefs and elders still grant extra-judicial divorces which are recognised by all parties concerned. The Samu Chiefdom of the Kambia district, which was cited as one such place where only judicial divorce is legal, had no record of judicial divorces for 1971, while some informants allege that extra-judicial divorces were many. It must be borne in mind that no chiefdom operates a bye-law making divorce obtainable by judicial process only. The bye-laws on the registration of marriages and divorces are often erroneously thought to provide for judicial divorces as the only legal divorces. Extra-judicial divorce has been a feature of the customary laws since early times and is still legal in modern times.

obligation rests on the husband. Another rule that operates in certain chiefdoms is that if a husband and wife separate as a result of a quarrel and a wife goes to her parents, a period varying from six months to two years should elapse before she can institute proceedings for divorce. Before the expiry of this period, however, the husband, on the other hand, may divorce her.

Extra-judicial divorce

There are two methods of extra-judicial divorce in the customary laws of Sierra Leone:- (a) divorce by a decree of an arbitration tribunal, and (b) divorce by unilateral repudiation.

(a) Arbitration Tribunal

This is the commonest method of divorce and the vast majority of customary-law divorces are effected by it, even in chiefdoms where there are bye-laws for a decree of judicial divorce to be granted. The arbitration tribunal begins deliberation as a reconciliatory organ and dissolves the marriage only when the parties or one of them is adamant that he or she no longer wants to continue the marriage with the other spouse. The composition of the tribunal changes at different stages of the proceedings. If the divorce is sought by the husband, he complains to the wife's parents; if the wife seeks divorce, she retires to her parents. At first, the tribunal consists of representatives of the families of both spouses, usually the parents who, following the complaint of one spouse, summon the other to a meeting of both families with a view to settling the differences between the spouses, each being given the opportunity to air his or her views. If the complainant insists on divorce even after this intervention, then the matter is put before the town chief and/or the elders, who themselves endeavour to salvage the marriage by hearing the parties and encouraging them to live together amicably. Upon

its failure to effect a reconciliation, the tribunal pronounces a decree in favour of the complainant.

(b) Unilateral repudiation

The husband may unilaterally repudiate the wife and thus divorce her, but the wife may not. Repudiation by the husband may take one of two forms. He may drive the wife away and inform her parents that he no longer intends to cohabit with her and that he has terminated the marriage, or he may formally present the wife to her parents and declare before them his intention to bring the marriage to an end. The former method is, however, very rare indeed and is prohibited in certain parts of the country. Where this method is adopted, the wife's parents would require from the husband his reasons for sending their child away, and would try to persuade him to take her back where the repudiation results from the conduct of the wife. If the husband ignores their effort, he forfeits any claim for a refund of the marriage payments whether or not it is the wife's conduct that induces him to repudiate her. A husband who behaves in this manner is in tribal society regarded as disrespectful to his parents-in-law and unworthy of marrying any other woman from the ex-wife's family circle or village. Divorce effected by repudiation of this kind is operative from the time of the final communication to the wife's family of the husband's intention to end the marriage.

If the husband employs the second method of repudiation he, together with a representative of his family, takes the wife to her family and, in the presence of an impartial witness, usually the town chief or an elder of the community, he formally hands the wife over to her family, often with a kola (about 20c or 30c), and declares that he no longer wants the woman as his wife. If no excuse is proffered for the repudiation which is a recognised

reason for divorce, he should give "soap" [1] in order to "wash" bad luck from the woman, so that she may be attracted to some other man. Divorce effected by this method does not prejudice the husband's claim for a refund of the marriage payments, but where no good reason is advanced for the divorce, the husband seldom succeeds in an action for the refund of the marriage payments since he will be met with the argument by the woman's parents that they had given him a wife and had not taken her away from him, and that he is free to take his wife. There is a proverb among the Loko that one cannot recover compensation from another for a thing which one dislikes and has deliberately thrown away and which has been found by another. Divorce effected by this method is operative when the woman is formally handed over to her parents.

Divorce by unilateral repudiation by the wife was not a common feature in early traditional society and is not permitted even today. A wife may leave the matrimonial home and either go to her parents or set up a household independent of her husband with the intention never to return to her husband. But if she wants to divorce her husband without her going to a local court and without publicity, she must at least communicate her intention to the chief of the village in which she seeks the divorce. The chief will then contact the husband, if possible, and inform him of his wife's intention to divorce him and that he should sue in the local court for the refund of his marriage payments. If the husband fails to take this course of action within the prescribed period allowed him by the chief, the latter pronounces the woman divorced and the husband cannot succeed in an action for woman-damage brought against any man with whom she subsequently has

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1. This is a sum of money demanded by the family of the wife from the husband.

sexual intercourse. The divorce is operative when the marriage payments have been refunded to the husband or their refund has been expressly waived by him.

Judicial divorce

Jurisdiction to terminate judicially a customary-law marriage by divorce is vested in the local courts. In the bye-laws of 32 chiefdoms relating to the registration of marriage and divorce to which we referred in Chapter 16, there is express mention of the assumption by a local court of the chiefdom concerned of jurisdiction in divorce suits. For example, regulation 4 of the Tribal Authorities (Nongoba Bullom Chiefdom Native Marriage and Divorce) Bye-Laws, 1961,[1] provides that:

> "Any person married according to native [customary] law and custom may apply to the Native [Local] Court for divorce. The Court may allow such divorce on such condition as it may decide."

It is noticeable that the word may is used twice in the preceding regulation. Should this word be interpreted as being discretionary or imperative? Should it have the same meaning when used in connection with the application for divorce as it is used in regard to the court's granting of divorce? The determination of the issue whether or not only judicial divorce of a customary-law marriage is recognised in Sierra Leone law will depend on the answers to these questions. No Sierra Leone Court has as yet ruled on the effect of this regulation.

On the face of it, the regulation enables a person to apply for a judicial divorce and a local court to grant the divorce. The expression "may" when used in enabling enactments such as this confers a discretionary power but when it creates a power

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1. Public Notice No.211 of 1961.

exercisable by a court that power may be imperative.[1] After reviewing the English authorities [2] on the interpretation of the term, Odgers has succinctly summarised the basis of the distinction between a discretionary and imperative effect of the term as follows:-

> "If the donee [of the power] has nobody's interest to consult but his own, the power is permissive merely, but if a duty to others is at the same time created, the exercise of power will be imperative." [3]

Clearly, a person applying for divorce has nobody's interest to consult but his own whereas the court adjudicating the issue owes a duty to both the parties and to society. Using the position in English law as a guide line, we submit that the first "may" in regulation 4 ought to be interpreted as being discretionary, but the second "may" imperative. If our submission is correct, then a person is not bound to apply for a judicial divorce in order to terminate his or her marriage; he may terminate it extra-judicially in accordance with customary law, but if he applies for judicial divorce, then the court ought to grant it.

Our conclusion, therefore, is that regulation 4 in no way suggests that only judicial divorce is recognised in the appropriate chiefdoms where the bye-laws operate.

So far as the remaining 115 chiefdoms are concerned, the jurisdiction of their local courts in divorce is derived from the Local Courts Act, 1963. There is no express provision in this Act pertaining to jurisdiction in divorce proceedings, but according to s.13(1) of the Act a local court has jurisdiction in "all

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1. Odger's Construction of Deeds and Statutes, 5th ed. by Dworkin, London, 1967, p.370.
2. The present writer does not think it worth while to go through these authorities here, as they are exhaustively dealt with by Odger's op.cit., at pp.371-376.
3. Op.cit., p.375.

civil cases governed by customary law", except those excluded by the section. The local courts have jurisdiction when (a) customary law recognises a cause and form of action, and (b) statute gives them jurisdiction. A customary-law divorce is a civil matter recognised by customary law and it is not excluded by s. 13(1). It is submitted, therefore, that even without express mention of divorce as such, every local court in Sierra Leone has jurisdiction to pronounce a decree of divorce of a customary marriage. The provision in the bye-laws for jurisdiction over divorce proceedings is, therefore, superfluous and may lead one to the erroneous conclusion that local courts in chiefdoms which do not have bye-laws such as the ones in our instant discussion, have no jurisdictinn to pronounce a decree of divorce of a customary marriage.

Judicial divorces in Sierra Leone customary laws are not as frequent as those obtained extra-judicially, probably because the latter are relatively cheaper.[1] In a sample collected by the present writer from 60 local courts for the year 1971, there were on the average 5 judicial divorces per court. No statistics were available for extra-judicial divorces as no records of such divorces were found but it is believed that in the area of each local court, there is,at least, one extra-judicial divorce per month. In the diamond mining areas the minimum is about two a week.

A judicial divorce may be preceded by reconciliatory moves by the families of the spouses in the same manner as with an extra-judicial divorce. This, however, is not a legal condition, and

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1. Local courts charge fees varying from Le4 to Le25. With extra-judicial divorce all that is needed to be paid to the tribunal is the customary kola, usually 50c.

in practice a spouse who wants to avoid any move at reconciliation resorts straight to court. The procedure which, in our submission ought to be followed for obtaining a judicial divorce is that laid down by the Local Courts (Procedure) Rules, 1964,[1] for the conduct of civil actions. In brief, the complainant should take out a summons,[2] effect service of it on the other party,[3] and the case should be heard in the presence of both parties. The complainant may, however, present his or her case in the absence of the defendant provided there is proof of service of the summons on the defendant and he or she has failed to attend.[4] In practice, nevertheless, this procedure is seldom followed. The procedure that is commonly adopted slightly varies depending on whether it is the husband or the wife who is seeking the divorce. If it is the husband, he goes to the local court together with a member of his family or someone who was present when the marriage took place. The husband pays the prescribed fee for the divorce certificate to the Clerk of the Court and the Clerk issues the certificate to him. On the other hand, a wife seeking a divorce attends at the local court registry with a member of her family, usually the father, a brother or an uncle. If none of these persons is available, she would be asked to inform the town chief who then instructs the section chief to provide an elder to accompany her to the court. In some chiefdoms, if a relative is not present, the wife is not granted a judicial divorce unless her marriage was registered at the local court where she is seeking the divorce and she deposits the marriage payments stated on the marriage

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1. Public Notice No.8 of 1964.
2. Ibid., r.3(1).
3. Ibid., r.7.
4. Ibid., r.11 and 20.

certificate. In other chiefdoms, if a lover of the wife is available and is ready and prepared to refund the marriage payments, he may present himself to the chief and offer to refund the amount. He is then asked to make a signed statement that he undertakes responsibility for the woman and to compensate the husband for any action the latter may bring for the refund of the marriage payments.[1] When the necessary persons mentioned above are present or the attendance of any of them is dispensed with, without a hearing, the divorce certificate is issued upon the payment of the prescribed fee. Seldomly, when a spouse indicates that he or she wants a divorce, the other is sent for and a court official tries to salvage the marriage and may even hear both sides with a view to effecting a reconciliation. Where reconciliation is impossible, the divorce certificate is issued. The divorce becomes effective from the date of the issue of the certificate. A judicial divorce is registered.[2]

It is quite clear from the above that in practice, the procedure laid down by law for obtaining a judicial divroce is frequently ignored by the local courts. The party against whom the divorce is sought is often deprived of the opportunity to present his or her case by not being notified of the proceedings. Though proof of the allegation is not essential for determining whether or not divorce should be granted since under each customary law no court can insist on the continuance of a marriage where such a marriage has broken down irretrievably without proof of facts in

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1. Among some Temne, such a lover is not permitted to marry the woman after she is divorced. The woman and the lover can enter into only a "friendship arrangement".

2. See for instance, regulations 2 and 5 of the Tribal Authorities (Nongoba Bullom Chiefdom Native Marriage and Divorce) Bye-Laws, 1961.

support, if the parties are allowed the opportunity to be heard, it may assist the court in deciding whether or not all or part of the marriage payments should be refunded. While it is true that the husband can at any time after the divorce, institute proceedings for the recovery of the marriage payments, the need to bring a separate action would be avoided and thus, time and expenses would be saved if both parties were given the opportunity to appear in court and the issue of marriage payments is raised as an ancillary relief, as with divorce under the general law.

In conclusion, it is submitted that any practice whereby judicial divorce is obtained by one spouse without the other being afforded the opportunity of being heard, offends against statute law and the principles of natural justice and ought, therefore, to be deprecated.

Reasons for divorce

The expression "grounds for divorce" is, in our submission, stricto sensu not an appropriate term to use when dealing with the dissolution of a customary marriage in Sierra Leone. Under the general law, the use of this term would be quite justifiable, because under that law a clearly defined ground must be advanced which is acceptable to the court of enquiry and the proof of which enables the court with or without discretion to pronounce a decree of divorce. Not so in the customary laws of Sierra Leone, as in the customary laws of many other African tribal societies. In Sierra Leone customary laws, a person seeking a divorce merely gives a reason why he or she should be released from the bonds of marriage. The adjudicating tribunal need not enquire into the genuineness or truth of his or her allegation, and the allegation is not one formally recognised by law or which must be proved before the complainant is entitled to a decree, although a strict

proof of the allegation may be relevant for other purposes, for instance, when considering the question of the refund of the marriage payments. When all else has failed, in order to effect a reconciliation after the complainant has put the question of divorce before the adjudicating tribunal, the marriage must be dissolved. On this account, one could say with certainty that there are no recognised grounds but only reasons for divorce in Sierra Leone customary laws.

The reasons usually given by the spouses may be classified under three headings: (a) Those advanced by either husband or wife (b) Those which only the husband gives; (c) Reasons which only the wife profers. Let us now look at them in detail.

(a) Reasons by husband or wife

(i) Persistent disrespect of the other's parents

The definition of the kind of conduct that will constitute disrespect towards one's parents-in-law in customary laws is broadly drawn. While abusing them and not showing reverence for them are typical examples (amongst the more serious), any conduct which meets with social disapproval may be regarded as disrespectful even though it is not aimed at the parents-in-law, so long as it occurs in their presence. Thus, according to some informants, the flippant use of obscene language or undue and amorous familiarity with a member of the opposite sex in the presence of one's parents-in-law are each examples of disrespect for them. When the parents-in-law are displeased, they first comment on the conduct to the spouse who is their child. If the other persists in his or her conduct, the parents-in-law cannot themselves initiate proceedings for divorce, but they can influence their child into leaving the other with the sanction of their disowning their child if he or she fails to do so. Children, who in general are very

attached to their parents, would rather give up a disrespectful spouse than break off connections with their parents on account of the spouse's behaviour. Divorce, therefore, often results.

(ii) Incurable insanity

The general consensus of opinion in each tribal system is that insanity per se is not a good reason for divorce, unless it is incurable. Insanity is regarded as a sickness which must meet with the compassion of society in general, and of the other spouse in particular. For this reason, each tribe allows a healing period during which the other spouse is expected to care for the insane spouse. Immediate separation is, however, permitted where the insane sppuse is the first to offer an act of violence. Where the most reputed herbalist or "moriman" [1] has failed to effect a cure and the insane spouse is prone to violence, in order to secure the safety of the other spouse, a proceeding for divorce is regarded as a proper course of conduct upon which to embark. The insane spouse need not be medically certified as insane. Under the customary laws, it is his or her behaviour that is the deciding factor.

(iii) Barrenness or sterility

The barrenness of a wife or the sterility of a husband is a reason for divorce because of the emphasis in tribal societies on the procreation of children. Inability to procreate within a period, varying from two up to five years from the date of the marriage, a period during which sexual intercourse has taken place normally and regularly, is evidence of barrenness or

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1. A "moriman" is a professed Muslim who claims to have supernatural powers to prepare charms to bring luck to people, cure them of illness or injure others.

sterility. Although these are recognised reasons for divorce, instances when a spouse divorces the other for any of these reasons are, however, rare in Sierra Leone tribal society. In particular, a barren wife who is otherwise a good wife will continue to enjoy the consortium of her husband. To ensure that they are cared for in their old age, such wives usually train young girls and encourage their husbands to marry them. These young wives and their children look upon the barren wife as their "mother". Although in each customary law it is agreed that a husband can be divorced if he is proved to be sterile, such proof is, however, very difficult to obtain in the absence of medical evidence, which is not commonly available in tribal society. The only manner in which a man may be proved to be sterile is where he is married to more than one wife who are faithful to him, and he cannot have children by them. If he is married to only one wife, she is always the culpable party.

(iv) Persistent and unreasonable refusal of sexual intercourse

If one spouse unjustifiably denies sexual intercourse to the other, the aggrieved spouse is entitled to a divorce. A spouse may, however, have a reasonable excuse or excuses for refusing to have sexual intercourse. These include sickness, the demand for intercourse at a period, time and place which offends against the sexual taboos, and excessive demand. If one spouse refuses to have sexual intercourse with the other when both appear to be in good health and in circumstances when it is not incontravention of the sexual taboos to do so, and the demand is not excessive, the spouse who is refused should find out from the other his or her reason, because the refusal may be a retaliation for the behaviour of the spouse. If this is the reason, the difference is resolved and the sexual rights are restored. One act of

refusal is not enough; the refusal must be over a period of time. The offended spouse is not expected to resort to divorce until after he or she has complained to the family of the offending spouse or to the elders and, after warning, the offender persists in his or her refusal.

(v) Sexual intercourse with a person within the prohibited degree of affinity

Even one act of sexual intercourse between a spouse and a prohibited member of the family of the other is a reason for divorce. This rule applies equally to the husband and the wife. Sexual intercourse with one's affine is regarded as an act calculated to break up the family of the innocent spouse and is, therefore, deemed serious. Instances of such intercourse occur between brothers-in-law and sisters-in-law but are very rare between parents-in-law and sons-in-law and daughters-in-law.

(vi) Persistent cruelty

Although cruelty is a reason for divorce for both husband and wife, it is usually the wife who seeks divorce on this "ground". "Cruelty" in this context should be distinguished from reasonable chastisement which a husband is entitled to administer to his wife at customary law. It should also be distinguished from cruelty as is known under the general law. In customary law, a husband is deemed to be cruel if he repeatedly and frequently beats up his wife with or without just cause to the point of wounding her or causing her great pain and discomfort. An act which is short of physical and brutal force is not sufficient to establish cruelty at the customary laws. Nor is a single act adequate, however serious it may be. As with refusal of sexual intercourse, a wife who accuses her husband of cruelty should always complain to her parents, who will summon the husband and warn him to desist

from his conduct. Divorce usually follows if he persists in his conduct despite these warnings.

(vii) Desertion

Just as under the general law, desertion at customary law is the unjustifiable withdrawal by one spouse from cohabiting with the other with an intention to remain permanently separated. But unlike the general law, there is no desertion under the same roof in customary law; there must be actual physical separation and the setting up of different households. Moreover, under the customary laws there is no fixed period of sepration; the shortness of the period of separation is immaterial.[1] If there is no prospect of the parties coming together after efforts have been made to reconcile them, divorce may be obtained. If a wife is in desertion, the husband must always make an effort to get her back before he embarks on divorce.

(viii) Witchcraft [2]

There are certain unfortunate incidents which occur during marriage that are attributed to witchcraft. They include the death of young children, impotence of the husband, his poverty and ill-health. In the case of the death of the children, if either spouse is proved to be practising the art of witchcraft resulting in the death of the children, the other can divorce him or her. Similarly, a wife who is responsible for her husband's impotence, poverty or ill-health through witchcraft may be divorced. Witchcraft in this respect may be proved in dreams,

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1. Except in the case of some chiefdoms where a wife is not permitted to divorce her husband unless a prescribed period has elapsed since separation. See ante, p.642.

2. This is not a reason for divorce among the Kono.

by confession of guilt, or by detection through "medicine" men commonly called ariogbo.

(ix) Chronic and infectious disease

Chronic and infectious disease such as leprosy, epilepsy and venereal disease are in general not recognised reasons for divorce, but they are just causes for separation and withdrawal from sexual intercourse for as long a period as the disease remains uncured. It is regarded in Sierra Leone tribal society as uncompassionate for one spouse to divorce the other merely because the latter is a victim of serious illnesses. The victim is expected to be nursed and tended by the other spouse until the sick spouse is cured or dies. In the case of venereal disease contracted by a wife, however, where it is clear that she must have contracted it from some other man, she receives very little or no sympathy at all from her husband and she may be divorced whether or not the disease is incurable.

(b) Reasons by husband only

(i) Persistent adultery

One act of adultery by a wife is regarded as serious, and for it she may be divorced. But in practice, she is not usually divorced on that "ground", particularly when the husband has other wives, unless she persists in her adultery either with the same man or with other men and her conduct borders on promiscuity. The elements required to establish adultery as a reason for divorce are much more precise than those for adultery as a "ground" for founding an action for "woman damage". Adultery as a reason for divorce in the customary laws is the same act of sexual intercourse as is required under the general law.; whereas adultery as a ground for an action for woman damage may be an act

short of sexual intercourse.[1] But unlike the general law, adultery connived at or conduced to by the husband may be a reason for divorce at customary law.

(ii) Repeated disobedience and laziness

A customary-law wife may be divorced for repeated disobedience to her husband or laziness in the performance of her domestic duties. In the customary laws, a wife is expected to obey and serve her husband and if she fails in any of these duties, she is not regarded as a good wife. But the husband is not expected to divorce her outright without first sending her to her parents. During the period she is with them, if the parents are interested in salvaging the marriage, they will talk to her to mend her ways. If after two or three sojourns with them her behaviour still remains unchanged, she can be divorced.

(iii) Slander of husband

If the wife spreads malicious gossip about her husband which exposes him to ridicule and contempt in the community in which he lives, whether or not the allegation is true, she can be divorced on that account. For instance, it is slanderous of a wife to tell other women in the neighbourhood that her husband is impotent or a thief.

(iv) Non-co-operation with co-wives

If a wife is unco-operative with her mates and is always at loggerheads with them, she may be divorced. Thus, a wife who is always quarrelling with one or other of the co-wives and is proved to be the cause of the quarrel is regarded as unco-operative.

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1. See p.621

(v) Refusal to allow husband to marry another wife

As we noted in Chapter 17, the consent of the head-wife is sought when a husband intends to take another wife, but the husband seeks this consent only as a matter of courtesy and in order to preserve peace and order in the compound polygamous family. A wife who refuses to allow her husband to marry another wife may be divorced on that "ground".

(vi) Subjecting the husband to the payment of frequent fines for the wife's conduct

Where the wife is always in trouble with the law, and the husband pays fines which are levied on her, he can divorce her. Sending her away to her parents is not sufficient, because among some tribes, the husband still remains responsible for her conduct even though she is living with her parents so long as she remains married to him.

(vii) Non-virgin

In traditional society, much emphasis is put on a wife's virginity at marriage. Therefore, where a young girl has been held out to her fiancé as a virgin, if on the night that the marriage is consummated she is found out otherwise, the husband has a right to divorce her immediately but not during cohabitation following the first night of intercourse.

(viii) Refusal to convert to Islam

On marriage, most tribal Muslim husbands expect their wives to convert to Islam if the wives are not already Muslims. Conversion to Islam in this respect is not a formal process but is exhibited by the practice of the religion. Thus, if the wife attends the Friday prayer meeting which is held at the local mosque and fasts during the feast of Ramadan, she is deemed to have embraced Islam.

(c) Reasons by wife only

(i) Non-maintenance

As we mentioned in Chapter 17, most wives in tribal society are expected to assist their husbands with the general economic running of the home including the wives' and childrens' maintenance. Nevertheless, where the wife is unable to make any contribution it is the sole responsibility of the husband to maintain her and her children and, in theory, it is a reason for divorce by the wife if he fails to fulfil this obligation. In practice, however, customary law wives seldom seek divorce on this "ground". Instead, they would use judicial and extra-judicial methods through the Magistrates' Courts and the Social Welfare Department respectively in order to obtain maintenance from their husbands. Alternatively, they desert the husbands and usually enter into "friendship arrangements" with other men by whom they expect to be maintained. Invariably, it is the husband who, in the final analysis, seeks divorce.

(ii) Unhelpfulness to wife's parents

We also noted in Chapter 17, that one of a husband's main obligations is to be of economic assistance to the family of his wife. Here we need only emphasise that a husband who is unhelpful to his wife's parents is unlikely to continue his enjoyment of his wife's consortium and may be divorced by the wife at the instigation of her parents.

(iii) Impotence

A wife may divorce her husband because of his impotence. The impotence may have occurred either before the marriage or during its subsistence. In some chiefdoms, where the wife seeks an extra-judicial divorce before an arbitration tribunal on the "ground" of impotence, the impotence must be proved as a fact if

the husband denies it. To say that a man is impotent is the most serious allegation which, in customary law, a wife can make against her husband. Under most customary laws, if the allegation is proved, the wife can obtain a divorce without the obligation of the refund of any part of the marriage payments. If, on the other hand, the allegation is not true, divorce may, nevertheless, be granted but the wife's family may refund the whole of the marriage payments. Formerly, whenever a wife alleged that her husband was impotent and that she wanted to divorce him for that reason, the tribunal before which the allegation was made would ask her to make a deposit of a sum of money in order to indemnify the town chief against the payment of compensation for "woman damage". The chief then provided the wife's husband with an unmarried girl and both the husband and the girl were asked to sleep together. On the following day, the tribunal would request the girl to declare on oath taken on a "medicine" whether or not she had had sexual intercourse with the man. If intercourse took place between them, the allegation of the man's impotence was regarded as false and the town chief would then pay the "woman damage" for the girl to her parents with the money which was deposited by the wife. Nowadays, this test of virility still takes place in some chiefdoms but is dispensed with in others.

Effect of divorce on the custody and maintenance of the children

Whoever obtains a divorce and for whatever reason, under the customary laws of Sierra Leone, it is the husband who is entitled to the custody of the children and liable to maintain them. But this principle only applies to children who have actually been born by the time when the divorce becomes effective. If a child is merely conceived at that time, the husband is not

entitled to its custody nor responsible for its maintenance when it is born because the child does not belong to him under the customary laws. A mother may, however, take away with her a suckling child and she is entitled to its care and control until it is old enough, usually about 5 to 6 years of age, when upon request by the child's father, the child is handed over to him. During the period such a child lives with its mother, the father is responsible for its maintenance and to facilitate his claim over the child the father pays money and gives articles for the maintenance of the child to the ex-wife's father. If the ex-wife has since re-married, the ex-husband can demand his young child and give it to a female relative, usually his mother or an unmarried sister in order that she may nurse it. These rules of customary law are subject to statute law under the general law in regard to the custody of children.[1]

Effect of divorce on the marriage payments

The opinion of the strict tribal Muslims is that the marriage payments are not refundable on divorce. But each tribe recognises the refund of such payments. While the general consensus of opinion is that if a husband divorces a wife without reason he forfeits his marriage payments and that if it is the wife who divorces the husband without reason, the payments are refundable, the circumstances under which and the extent to which the payments are refundable when there is reason for divorce by either spouse vary from tribe to tribe. We shall examine these variations presently.

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1. See Chapter 12.

Mende, Krim, Sherbro, Gallina: Among these tribes, where a husband has a reason for divorce other than the barrenness of the wife, the marriage payments are refundable. Formerly, in all Mende, Krim, Sherbro and Gallina chiefdoms, and now in the majority but not all of them, every payment made for the wife to a relative from the first kola at betrothal to the last act of kindness before the divorce is operative, is recoverable. But in some chiefdoms, the whole of the marriage payment is not refunded if there are children of the marriage. This is an innovation by the local courts in large provincial towns whenever such claims are made before these courts. The only recognised reasons for which a wife may divorce her husband without an obligation to refund the marriage payments are:- intercourse with an affine, impotence, and, in some chiefdoms, persistent cruelty.

Kono, Koranko and Yalunka: Among these tribes the marriage payments are refundable if it is the wife who divorces the husband. In the Kamara, Nimi Koro and Sao chiefdoms of the Kono district and in the Saradugu, Wuli and Yeraia chiefdoms of the Koinadugu district, a wife may divorce her husband for his impotence and persistent cruelty without refund of the marriage payments. If a husband divorces his wife for a reason the marriage payments are always refundable.

Limba: There is no refund of the marriage payments if the husband divorces the wife for disobedience or non-co-operation with co-wives or if the wife divorces the husband on the "ground" of insanity, non-maintenance or abuse of wife's parents. In all other cases, the payments are refundable. Among the Wara Wara Limba the marriage payments are refundable for whatever reason a wife divorces her husband.[1]

1, Personal communication from Chief Kandeh Bombolai of Wara Wara chiefdom, Koinadugu District.

Susu: While among this tribe no husband is entitled to the refund of the marriage payments if he divorces his wife, the payments are recoverable in the case of divorce by the wife unless the reason is impotence, sexual intercourse with an affine or persistent cruelty. If there are children of the marriage, the recoverable marriage payments are divided into three parts. One-third goes to the wife's family because of the husband's right to the children; one-third is allocated to the elders and the husband receives the remainder.

Kissi and Loko: Among these tribes if a wife divorces her husband, the marriage payments are refundable. It is not regarded as etiquette for the wife to state any reason for requiring a divorce, as she may disclose bad qualities in her husband, a thing which a wife is not supposed to do. She can simply say that she does not want her husband any longer. If, on the other hand, it is the husband who wants a divorce, he must state his reason and if it is through the bad conduct of his wife, the payments are refundable in full. If she is not blameworthy, only part is refundable.

Temne: If a wife divorces her husband on the "ground" of insanity, impotence, intercourse with an affine, non-maintenance, cruelty or witchcraft, the marriage payments are not refunded. Similarly, a husband who asks for divorce by reason of his wife's disobedience, laziness, slander of husband, subjecting the husband to the payment of frequent fines on her behalf or witchcraft is not entitled to the refund of the marriage payments. In all other cases, the payments are refundable, but the quantum may be considerably reduced where there are children.

Modern development in respect of the quantum of refundable marriage payments on divorce

In some of the customary laws as they operated before 1963, any amount expended on the wife's behalf and given to her relative at and during the marriage was refundable on divorce where appropriate, except where there were extenuating circumstances like children, for whom the refundable dowry was reduced. The following illustration will give a very clear picture of the position at Mende customary law which is also typical of the other tribes:- Joe intends to marry Boe and he gives her a friendship kola of 5 cents. Later he gives Boe's mother and father a head tie and 30 cents respectively as shake-hand. When Boe is to be initiated into the sande society, Joe makes a contribution of a bushel of rice and Le.5. On marriage, Joe pays Le.20 as marriage consideration to Boe's family. While the parties are living together as husband and wife, Boe's sister is initiated into the sande society and Joe makes his own contribution to the initiation expenses. Boe's mother dies and Joe spends Le.30 on her funeral. Joe continues to make presents to Boe's relatives. Meanwhile, Boe continues to play her full role as housewife both at home and on Joe's farm. The proceeds of the farm go into Joe's pocket for the running of the home and for his own personal use. Later, there is a dispute between Joe and Boe and Boe now wants to divorce Joe.

In the above hypothetical case, when the issue of the refund of the marriage payments is to be decided, "stones are laid on the table" (Mende: kolugbua), each stone representing each of the above items in money's worth expended by the husband on the wife's family. In each tribe no consideration is given even from a moral viewpoint to the many years of arduous and faithful

domestic services which the wife rendered to the husband during cohabitation, and in some cases, she is deprived of property which both may have acquired or worked for by their joint efforts. But gifts and presents from her family to her husband are deducted from the payments recoverable.

In order to remedy this situation, Government by its directive of 27 April, 1963, decided that:

> (i) "The amount of 'dowry' that may be refundable in case of divorce should be limited to the lump sum paid for the wife at the time of the marriage."
>
> (ii) "All expenses incurred by or on behalf of the prospective husband on, or, in connection with, the bride from the date of initiation into the society to the end of the society ceremony can be added to the lump sum paid, for the woman at the time of marriage as 'dowry' recoverable on divorce. Provided that in the case of new marriages all such expenses are assessed and recorded at the time of the payment of the lump sum; but in the case of old marriages such society expenses will have to be assessed as before."
>
> (iii) "All other amounts paid by the husband in the form of loans to the wife's parents and relatives during the subsistence of the marriage could be claimed as civil debts from the recipients but are not, and cannot be assessed as part of the dowry."
>
> (iv) "All articles or monies advanced to the wife by the husband for trade purposes can be sued for and recovered as civil debts but are also not and cannot be assessed as part of the dowry."
>
> (v) "No other expense incurred on behalf of the wife and/or her relatives should be regarded as part of the 'dowry'."

We have already observed that this directive has no legal effect as it was neither enacted as a bye-law pursuant to s.40 of the District Council Act, nor did it become an Act of Parliament. Some chiefdoms have, however, been following it while others have rightly ignored it and have continued to adhere to their old laws. A very interesting case in which the directive was invoked in vain is that concerning the refund of "dowry" on behalf of

Madam Hawa Margao, i.e. Gbondo Kpewo of Dambara v. Tommy Margao and Family.[1] In this case, the plaintiff sued the defendants before the Selenga Local Court, Bo District, for the refund of £82.0.5. being the total amount of "dowry" assessed which the plaintiff had paid on behalf of Madam Hawa Margao, the child of the defendants' family and who had divorced him because of his persistent cruelty to her. The defendants contended, inter alia, that expenses incurred by the plaintiff on the wife as maintenance during the marriage ought not to be added as part of the "dowry". Despite this plea, the court held that every single penny spent on or on behalf of the plaintiff's wife during cohabitation was recoverable in addition to expenses incurred on her parents and relatives. It would have been interesting to note what would have been the outcome of the case if the defendants had appealed to the Group Local Appeal Court or District Appeal Court. Instead, they purusued the matter administratively with the Senior District Officer, Bo, only to be told that by failing to appeal against the decision within the 15 day period allowed by s.29(7) of the Local Courts Act, they were presumed to have been satisfied with the decision of the Selenga Local Court. The matter ended there. This was, indeed, an unusual case since in the customary laws generally the cost of maintenance of a wife during cohabitation is as a rule not reclaimable.[2]

In conclusion, one would submit that the refund of marriage payments is one aspect of customary law in which there should

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1. Unreported, dated 16 October, 1963.
2. What makes the case even more unusual is that the plaintiff was Chiefdom Speaker of the Selenga chiefdom where the case was decided and, according to the defendants, the plaintiff had used undue influence on the court in arriving at the decision. See the correspondence from A.S. Margao and J.A. Margao to the Minister of Internal Affairs, dated 21 February, 1964.

be statutory modification in order to rectify the present state of injustice in which a wife of a customary marriage finds herself. Whilst it is not recommended that the institution of the refund of marriage payments should be dispensed with completely, in determining the quantum recoverable regard should be had to the services rendered by a wife to her husband,and the refundable marriage payments ought to be limited to the marriage consideration only. Presents voluntarily given and services voluntarily rendered by the husband to the wife's parents or family ought not to be recovered even as a civil debt as was suggested by the Government directive. These presents are given in order to foster cordial relations between the man and the family of the wife and the presents have no legal import insofar as the marriage is concerned. One therefore hardly sees the legal justification for their recovery. Furthermore, at customary law a husband has a duty to maintain his wife. If Hawa Margao's case was rightly decided should that duty become a right because the marriage has been dissolved?

Effect of divorce on the rights to re-marry

Just as in the case of death, divorce does not affect the husband's right to re-marry under the customary laws since even during the marriage he is free to marry as many women as he pleases. It is only when he wants to contract a subsequent marriage under the Christian or Civil Marriage Acts with a woman other than his present wife with whom a customary marriage is in subsistence that it is necessary for him to have the customary marriage dissolved.

On the other hand, divorce renders a wife free to contract another marriage, customary or non-customary. The ex-husband has no more right over her and is not responsible for her

maintenance. In some Temne chiefdoms, however, the wife's choice of a subsequent spouse is restricted; she cannot re-marry a man who was responsible for the breaking up of her previous marriage.

There is no time limit which must expire after divorce before a woman may re-marry under the customary laws. Aubert [1] states that among the Susu a wife could not re-marry until after 6 months have elapsed from the time that the divorce became effective. As with his statement on the time limit for the marriage of a Susu widow, this is probably a reference to the Islamic 'idda of divorce, a period which, in our submission, is hardly observed by the Sierra Leone Susu although this tribe is predominantly Muslim.

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1. Op.cit., p.71.

CHAPTER 19

THE PARENT AND CHILD RELATIONSHIP

A. INTRODUCTION

In this chapter it is proposed to deal with the more significant features of the parent-child relationship under customary law. They are: legitimacy and legitimation; adoption; guardianship; maintenance; and offences against children and the vicarious liability of parents for the conduct of their children. The tribal differences, if any at all, in this aspect of customary family law are so few that the law can be stated with precision and certainty without having to engage in elaborate discussions. The statutory law on the parent-child relationship under the general law which we discussed in Chapter 12 is also applicable to that relationship under customary law if there is a conflict between the two systems of law. It must be remembered that customary law applies only when it is not repugnant to statute or natural justice, equity and good conscience.[1] We shall see in due course that there are a number of conflicts between the general law and customary law in this area of the law. It is not, however, intended to deal specifically with any conflict between customary law, on the one hand, and the received common law together with local case law, on the other, in a matter that is not criminal;[2] from the wording of the repugnancy provisions, in the presence of such conflict, customary law would seem to prevail, there being no mention of the common law and

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1. S.2 of the Local Courts Act, 1963, and s.76 of the Courts Act, 1965. For details, see Chapter 2, pp.40-47.
2. In criminal matters, where there is conflict between the general law and customary law, the general law prevails.

local case law under the general law in the repugnancy provisions.

B. LEGITIMACY AND LEGITIMATION

(i) Legitimacy

In all the customary laws of Sierra Leone, a child born to a wife during the subsistence of a customary law marriage is the legitimate child of the wife and her husband. It is immaterial whether the husband is physically incapable of producing a child, for instance, if he is sterile or impotent. A child of an adulterous association by the wife is, nevertheless, presumed to be the legitimate child of the husband. The Mende have a proverb that "a man must not plant in another man's farm". The Temne have a similar expression that "a man cannot build a house on top of the house of another man". What these two expressions mean is that a lover has no right to the paternity of a child as against the legal husband of the child's mother, even if it is proved that the lover is the child's natural father. However, because customary law lays much emphasis on blood ties in succession to certain offices of title like chieftaincy and headship of certain tribal secret societies, a legal husband who is not the natural father of a child has the right to repudiate the paternity of that child, in which case the child may become the legitimate child of his natural father if the prerequisite procedure for legitimation is followed; otherwise, the child becomes illegitimate from the date of repudiation by the legal father.

It is necessary to consider what act constitutes repudiation of paternity. Each customary law maintains that the child must be sent away either to his natural father or to the family of his mother. Some tribes like the Mende, Temne and Susu insist that, in addition to sending the child away, his mother

should also be divorced. This act of repudation of paternity, it is submitted, must not be confused with an acknowledgement of paternity whereby, as we shall shortly see, a child who is born illegitimate is afterwards legitimated by his natural father. It should be noted that the repudiation of paternity must be a positive act as prescribed by each customary law. If the legal father omits to take this positive step, the child continues to be his legitimate child. The right of such a child to succeed to certain offices of the legal father is, however, inferior to that of a child of whom the legal father is also the natural father.

We stated earlier that, in order to be legitimate, a child must be born during the marriage of his parents. If he is conceived during the marriage but born after the marriage has been dissolved, the decision whether or not he is legitimate depends on a number of questions. Was the marriage dissolved through death or divorce? Has the child's mother re-married since the dissolution of the marriage during which the child was conceived? If she has thus re-married, is the second husband a member of the family of the first husband?

It is settled under each customary law that if the marriage during which the child was conceived ends in divorce before he is born, he is not the legitimate child of the divorced husband but is regarded as born into his mother's family.[1] But if his mother has since re-married and he is born during that marriage, he is the legitimate child of his mother's husband. However, such a father, not being the child's natural father, also has the

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1. Because of the stringency of this rule, divorce is not permitted at customary law if a wife is proved to be in a state of pregnancy until after she has delivered.

right to repudiate the child's paternity in the same manner as that which we have already described. On the other hand, if the cause of the dissolution of the marriage is the death of the husband, a child conceived during the marriage but born afterwards is the legitimate child of the deceased provided his mother is single at the time of his birth, or the child is born within the period before his mother's purification. If the mother has since re-married after her purification, he is the legitimate child of his mother's husband at the time of his birth. The child's right to succeed to offices of title, however, depends on whether or not his legal father is a member of the family of his mother's deceased husband. If the woman re-marries into the family of her deceased's husband, the child is treated on the same basis as other children born to his legal father during the subsistence of a valid marriage. Thus, he can succeed to title from his legal father. But if his legal father at the time that the child is born is not a member of the family of his mother's deceased husband, though the child is regarded as legitimate, he may not succeed to title where there are other children conceived and born during the marriage to his legal father.

Subject to what we have already discussed, a child born or conceived out of wedlock is illegitimate. Writing on the Susu, Aubert [1] stated that a child born from an incestuous connection is also illegitimate. This statement might have been true at the time that Aubert wrote, but the modern Susu as well as the other tribes maintain that however defective a marriage between spouses may be, it does not affect the legitimacy of the child. It is true that in the olden days in some cases, such a child was abandoned and exposed to death,[2] but such a practice is

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1. S.L.S. (O.S.) No.20, p.72.

2. Aubert, ibid., p.72.

not followed nowadays. There are many examples of children of incestuous connections who have grown into adulthood and are very much alive today. If at all a parent or any other person abandons and exposes a child to death, he commits a criminal offence or offences imposed by statute under the general law.[1]

Even though a child may be born illegitimate, customary law in Sierra Leone, unlike the general law, makes provision for its legitimation.

(ii) Legitimation

As has already been mentioned, the possible instances of illegitimacy under customary law are: (a) where a child is born as a result of an adulterous association by its mother, and the child is repudiated by its legal father; (b) where the child is born to an unmarried mother.

Such an illegitimate child may, however, be legitimated, either by the subsequent marriage of its mother and natural father or by an acknowledgement of paternity by the natural father without his marrying the child's mother.[2] Acknowledgement of paternity is indicated by the payment of compensation by the natural father to the family of the child's mother and the assumption by him of parental responsibility for the child. Among the Mende, the compensation takes the form of a fine which is levied on the natural father by the family of the mother. Where the man has been caring for the child since the date of the child's birth such a fine is usually nominal; otherwise, he is expected to

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1. A customary law that contravenes the general criminal law and the repugnancy provisions is inapplicable.
2. In the case of a child born of an adulterous association, its paternity must first be repudiated by the legal father before it can become the legitimated child of its natural father.

reimburse the child's mother's family for expenses incurred on the maintenance of both the child and its mother up to the time that he indicates his readiness to take over responsibility for the child. Some families may even be reluctant to give the child to him especially when the natural father has waited until the child has reached the age of adolescence. Among the Temne, Susu and Limba the compensation is usually nominal and may be paid at any stage of the child's development. The Kono, Kissi and Loko, on the other hand, do not press for any compensation whatever. They only require that the natural father should notify the family of the child's mother of his readiness to take his child by his presentation to them of the customary kola. These tribes, nevertheless, insist that before the father does so he must already have been showing acts of kindness to the family of the child's mother, even though such kindness was not specifically extended to the child himself.

It is, however, agreed by all the tribes that acknowledgment of paternity is incomplete unless the natural father assumes some parental responsibility for the child. It is not necessary that the child should reside in his household nor with a guardian appointed by him. If the child is living with its mother but the natural father is responsible for its maintenance either voluntarily or as a result of a judicial decree, that is sufficient acknowledgment of paternity. In this regard, mention must be made of the practice of many mothers whereby they take the natural fathers of their children to the Social Welfare Department or to Magistrates' Courts for maintenance. The general consensus of opinion under the customary laws is that if the father is ordered to pay maintenance for the child and he complies with that order, the child automatically becomes his legitimated child.

In each customary law, a legitimated child has almost the same rights as one born legitimate. Therefore, such a child can succeed to property and offices from his natural father in the same manner as a legitimate child. But for succession to chieftaincy a legitimate child is preferred to one merely legitimated.

C. ADOPTION

Adoption in the English law sense, whereby the rights of the natural parents over their child are extinguished for ever in favour of the adopted parents, does not exist in Sierra Leone, even under customary law. But there is a form of adoption whereby the parental rights and duties over the child are transferred to an adopted parent subject to termination by the natural parents. If the foster parenthood continues until either the adopted parent or the foster child dies, the survivor may succeed to the property of the deceased. This form of adoption should be distinguished from the guardian-ward relationship which has always persisted in Sierra Leone.

When an administrative link between the Colony and Protectorate of Sierra Leone was established at the beginning of this century, it was common practice for the people of the Protectorate to send their children to some Creole family in the Colony in order to be brought up by that family. This was the method by which the tribal people gained their western education as the opportunity in Sierra Leone for this type of education was first established in the Colony long before it was extended to the Protectorate. The guardians often gave their family names to their wards and treated them as "children" of the family. The relationship, however, cannot be described as adoption either in the English law or in the customary law sense, since the

children remained in both systems of law the children of their natural parents, and there was no right of succession as between the guardian and the ward.

Among the tribal people themselves, the custom has always persisted for a relative or friend to give his child to another relative or friend in order that the latter may bring up the child. One reason may be to foster a good relationship between the parent and the guardian, for it is believed in tribal society that to give one's child to another for training is one of the most friendly gestures which one person can make to another. A second reason is that some tribes, particularly the Mende, Sherbro, Krim and Gallina, believe that children brought up outside their immediate family circle are better trained than those nurtured within. They, therefore, give their children to some important personalities of impeccable character in order that the children may acquire the habits of their guardians. Furthermore, guardian-ship may occur for educational reasons even within the tribal society. In Muslim communities, a child may be given to an Arabic teacher to be taught, and he will then live in his teacher's household as a ward. Another form of educational guardianship is connected with tribal cults and secret societies. A child who is to become a leader of a cult or secret society is almost invariably brought up in the household of a man or woman who is already a leader of that cult or society. Succession to leadership in these societies often depends on training for that purpose. In all these instances of guardianship, the child is not in customary law regarded as adopted. The guardian is respon-sible for the care, control and discipline of the child and is also socially answerable for the child's conduct.[1] But the child

1. On the vicarious liability of parents or guardians for the acts of children under customary law, see pp.691-693.

continues to belong to his natural parents and the ward has no right to succeed to the property of his or her guardian. The difference, therefore, between adoption and guardianship in customary law is that the adopted parent and child can succeed to each other's property, but the guardian and ward cannot. Adoption in customary law also differs from adoption in the English law sense in that in customary law the child remains at all times the child of his natural parents.

Having considered the difference between adoption and guardianship in customary law and adoption in English law and customary law, let us now deal with the instances when adoption can occur in Sierra Leone customary law.

Writing in 1936 on the Susu,[1] Aubert said:

> "Every person who has reached 40 years of age without having a child and who has no legitimate descendants may adopt, but once only. The adopted person must be a nephew through either the male or female line of the adopter: an only son cannot be adopted, nor one aged more than 16. Girls may not be adopted."

The same author wrote on adoption among the Kissi [2] as follows:-

> "Adoption is rarely practised, perhaps only in the case of abandoned children or otherwise when the person adopting the child has no children himself."

Writing in 1973, one cannot without justification attack the accuracy of statements made about tribes in 1936, which statements might have been true at the time that they were made, but which might have undergone change since then.[3] One may,

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1. Op.cit., p.73.
2. S.L.S. (O.S.) No.22, p.91.
3. As the statement on the Susu was made at least 37 years ago, the present writer tried to get the views of Susu informants of at least 60 years of age. None of these could remember what the law was in 1936, but they maintain that so far as they are aware, the law today is what has always prevailed.

nevertheless, concede that the Susu in present-day Sierra Leone do not impose the age limit for adoption stated by Aubert, nor do they confine the privilege of adopting a child to childless persons without legitimate descendants. The other conditions mentioned by Aubert are also not complied with nowadays. The statement about adoption among the Kissi is too restrictive of the modern law of that tribe.

There is a degree of uniformity in the modern law of adoption in the customary laws of Sierra Leone. It is very rare for children to be given to strangers for adoption. Adoption occurs frequently within the same family circle of the foster parent and child.

There is no age limit for adoption. But the adopted parent must have reached marriageable age and must be suitable and capable of discharging parental or civic responsibilities. Except in the case of elderly people, an adopted parent must be married. Either a man or a woman may adopt. There is no sex link. The adopted child may also be male or female and must be under the age of puberty at the time of the adoption. Children are generally adopted when very young.

Adoption is recognised in only five situations. First, barrenness. Where a woman has been married for a number of years and has not produced any child and she is becoming senile, if she has a sister or brother who has children, one of the children, with the consent of its natural father, is usually given to the aunt as her adopted child. Secondly, economic reasons. As in practice there is no limitation to the number of children people can have in tribal society, parents may have so many children that they are unable to care for all of them properly. Some of these children may be adopted. This is one of the rare instances when

a stranger may adopt a child under customary law. Thirdly, where a man marries a woman who already has a child by another man, if the child is brought up in the household of the married couple as part of the family, it is deemed as the adopted child of its mother's husband. Fourthly, orphanage is another ground for adoption. An orphan child who loses his mother immediately after his birth is usually given to a foster-mother to be nursed and brought up by her. The foster-mother is regarded as the child's adopted parent. Fifthly, adoption may take place as a result of purely natural inclination. A man or woman may see a child, have parental love and affection for it and request the child's parents to give the child to him or her to be adopted. Occurrences of adoption of this kind are very rare and often take place only where the adopted parent is some influential member of the community, for instance, a chief or a "big man". The parents of the child usually give the child to be adopted, if there is the possibility that it may succeed to some important office held by the adopted parent.

There is no specific procedure laid down by the customary laws for adoption. But both the adopted parent and the child's natural or legal father [1] must consent to the adoption before it can be legal. The Child's mother alone cannot give the child in adoption. If the child's father is dead, then its mother's guardian must consent. When the prerequisite consents have been obtained, the child is handed over to the adopted parent and he becomes part of the family of the foster parent. In some customary laws, an adopted child has the same rights as the natural children of its foster parents except that for succession

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1. For a legitimate child, the consent of the legal father should be obtained. It is also necessary to obtain the consent of the natural father of an illegitimate child.

to chieftaincy, an adopted child ranks equally with legitimated children.

D. GUARDIANSHIP

The term guardianship is used in this sub-heading to denote the right of a person or his family in customary law to the "ownership" of a child. Such "ownership" carries with it parental rights over the child. Guardianship in this context must not be confused with guardianship in the guardian-ward relationship to which we have referred in the last sub-heading. In the earlier instance, the guardian is merely one who is responsible for the child's personal welfare. Such a guardian is not regarded as having the "ownership" of the child. Therefore, in customary law it is possible for a child to have two sets of guardians; the one responsible for the child's personal welfare and the other entitled to its "ownership". It is guardianship in the sense of "ownership" with which we are presently concerned. In customary law, a person is said to "own" a child as if the child is a piece of property which can be dealt with and disposed of at the whims and caprices of the owner. The concept of child ownership has a historical foundation. Formerly, a child's guardian had absolute rights over the child including the right to enslave the child but no reciprocal obligations were imposed upon the guardian which were enforceable in a court of law except perhaps the obligation to account for the child's property if the guardian became as such through succession.[1] Thus, a guardian could, with impunity, ill-treat or neglect a child and the child could not be taken away from him on the ground

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1. Guardianship in this respect may be likened to the potestas of the pater familias in early Roman law.

that he was unfit to have its custody.[1] As slavery is now abolished in Sierra Leone, a guardian can, of course, no longer exercise the right to enslave a child, but in customary law he is still answerable to no-one if he fails in his parental obligations to the child.[2] Thus, in customary law, a parent/guardian cannot be deprived of the custody of the child without his consent even if it is in the interest of the child to do so.[3]

Who is entitled to guardianship of a child?

If a child is legitimate [4] and his parents are alive, whether they are married or divorced, the child's father is his guardian. If the father pre-deceases the mother, guardianship over the child passes on to the head of the father's family,[5] provided that during his life-time the father did not appoint a guardian to succeed him. If he did, the appointee becomes guardian on the death of the father. In the case of an illegitimate child, the head of the family of the child's mother is the guardian. Where the child is adopted, its guardianship remains vested in its father or his appointee, the head of the father's family or the head of the family of its mother, as the case may be, depending on whether the father is alive or dead or the child is legitimate or illegitimate. The adopted parents, nevertheless remain entitled to the child's care and control.

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1. The guardian could, however, be temporarily deprived of the care and control of the child if he was insane.
2. This rule is, of course, subject to statute law under the general law with regard to care and control of children. See Chapter 12, pp.428-445.
3. This rule also applies subject to statute law under the general law in regard to custody of children. See Chapter 12,pp.428-434
4. "Legitimate" in this context includes "legitimated".
5. This is the next-of-kin of the deceased. The next-of-kin may be a father, brother or son. For details, see Chapter 20.

The rights and duties of a guardian

Except where the property rights of a child are concerned, a guardian, if not a parent, stands in the same position as the child's father vis-à-vis the child.[1] Moreover, if the guardianship is one that arises from succession, some of the parental duties imposed upon the guardian may be enforced by the child and/or other members of its family. Thus, if the guardian by succession fails to maintain the child and the guardian had succeeded to property from the child's father, the guardian can be compelled judicially or extra-judicially by the family to maintain the child, failing which the guardian may lose his position. In practice, such cases do not, however, go to court but are settled within the child's family.

A guardian, other than a parent, who is in possession of a child's property is expected to take proper care of it with a view to handing it over to the child when the latter is finally emancipated. The guardian may, however, use and enjoy those items of property which are fixed assets and of relatively permanent duration, for instance, a house or furniture, but he cannot sell them unless it is absolutely necessary for the maintenance and education of the child. On the whole, the guardian may use any property belonging to the child but he cannot dissipate it. Generally, a guardian who has taken proper care of a child is not expected to render full account of the child's property; if the child insists on his doing so, he is regarded as ungrateful.

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1. A parent is in customary law not answerable for the property of his child.

Termination of guardianship

Guardianship may be terminated in one of three ways: firstly, by the death of either the guardian or the child; secondly, by the guardian surrendering his rights and duties in favour of some other person; and thirdly, by the emancipation of the child. Of these, only the last needs further comment. Writing on the Susu, Aubert [1] mentioned that among this tribe all persons less than 25 years of age were, unless married, under the guardianship of their father. In other words, both persons under 25 years of age who were married and those above that age but unmarried were not under tutelage. This viewpoint, it is conceded, does not represent modern practice among these tribes. Commenting on the age limit, one informant clearly questioned how it was arrived at when the vast majority of births were not recorded by tribal people in those days. Aubert might have assessed the age limit from the physical appearance or development of the Susu people.

Even nowadays, it is difficult to pin-point any age at which guardianship terminates, because no tribe in Sierra Leone, including the Susu, takes age as the deciding factor in determining the issue. We may then ask the question, what constitutes emancipation? The answer depends on the sex of the child, whether or not he or she is married and the child's ability to manage his own affairs.

If the child is a male, marriage does not automatically emancipate him. If he continues to reside in his guardian's household, he is still regarded as part of it and is regarded as a "child". But whenever he chooses to leave and lead an

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1. Op.cit., p.73.

independent life, his tutelage ceases, as soon as he sets up his own household. On the other hand, if he is not married but has reached puberty and is capable of managing his own affairs without dependence on his guardian, he is regarded as emancipated as soon as he sets up an independent household. The setting up of an independent household and the cultivation of a separate farm are in village communities indications of independence. In urban society, the seeking of employment coupled with an independent life is evidence of emancipation. In the case of a female, however, she is never free from tutelage. Thus, upon her marriage as we have seen in Chapter 17, the guardianship which is vested in her parents at her birth is temporarily transferred to her husband and lasts until the marriage is dissolved when it reverts to the original guardian or his successor.

E. MAINTENANCE

Under customary law it is the responsibility of a father to maintain his children whether or not they are legitimate. The law does not impose any such obligation on the mother but in practice, among the vast majority of the tribes,[1] she is expected to contribute to the children's maintenance where she can afford it. Though the law behoves the father to maintain his child, there is no machinery for enforcement under customary law should he fail in that duty. There is no reported instance when a maintenance order has been made by a local court against a father, and the general consensus of opinion is that such actions are not maintainable. This attitude of the customary law is perhaps a reflection of the concept that the father "owns" his child and

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1. The Susu do not think that a wife should contribute to the maintenance of her children when she is married and living with her husband.

is therefore answerable to no-one if he is in breach of any obligation he may owe to the child.

Wives of customary-law marriages as well as unmarried mothers have, nevertheless, sought means outside customary law by which they can obtain maintenance for their children. The popular and less expensive method is to make a report to the Welfare Department of the Ministry of Social Welfare. The father is summoned to the Department and examined as to his means. Eventually, he is asked to pay a monthly sum towards the maintenance of the child concerned. As we observed in Chapter 7, this method is not satisfactory, because the order is never made unless the father has attended in person the proceedings before the Welfare Officer and, when the order is made, there is no enforcement action for his non-compliance with it.

The other method is a judicial one. The mother of the child institutes affiliation proceedings in a Magistrate's Court under the general law. This she does even if she is lawfully married under customary law to the child's father and the child is legitimate under that law. Under the Hyde v. Hyde [1] doctrine, Magistrates' Courts, being general-law courts, cannot grant maintenance under the Married Women's Maintenance Act consequent upon a customary-law marriage.

We have already noted in Chapter 7 the inadequate nature of the maintenance provisions under the general law. In the event of law reform whereby it may become possible for a wife of a non-customary law marriage to obtain maintenance from the Magistrates' Courts or the High Court without her having first to prove desertion by the husband or seek some other matrimonial relief as the present state of the law demands, it is submitted

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1. (1886) L.R. 1 P & D. 130.

that such innovation should be applicable to wives of a customary law marriage as well. One hardly sees the justice in recognising three forms of marriage in the country and yet withholding a facility from the spouse of one type of marriage while allowing it to the spouses of the other. Furthermore, there should be provision empowering local courts to order maintenance in respect of children. The last-mentioned proposal would save women living in remote villages in Sierra Leone where Magistrates' Courts are not easily accessible, the trouble of travelling, at great expense which they can hardly meet, to the provincial towns where Magistrates' Courts sit.

F. OFFENCES AGAINST CHILDREN AND THE VICARIOUS LIABILITY OF PARENTS FOR THE CONDUCT OF THEIR CHILDREN

(i) Offences against children

As a general rule of customary law, a parent or guardian[1] cannot commit an offence against his child. This is perhaps a manifestation of the idea that the child belongs to him. Public policy, however, demands that a parent or guardian should not practice witchcraft on the child or breach the incest prohibitions.

Witchcraft by a parent is not punished by the elders or the local courts, but it meets with social disapproval and the offender is often ostracised. He is frequently probited from coming near other people's children or sending them on errands. If he is in breach of this prohibition, he can be sued by the parents of the child with whom he associates on the ground that he intends to ptactice witchcraft on that child also, as he had

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1. Guardian in this context is one who "owns" the child.

done with his own child.

Incest between a parent and a child which occurs when they are not married to each other is regarded as more serious than one within marriage, but in the former case the offenders are seldom punished. It is generally believed that the violators will die. In some chiefdoms even the "washing" ceremony is not performed.

A person [1] who is not the parent of a child, on the other hand, may be found guilty of committing offences against the child. These offences are not as many as those laid down by the general law. Let us examine them.

The commonest is ill-treatment. This offence is committed when a third party does a deliberate act or omission calculated to endanger the mental or physical health of the child and the child suffers as a result. Examples from rural societies are (a) setting a trap in the bush to ensnare animals without warning the children in the vicinity of its presence and a child is injured by it;[2] (b) administering poison to a child; (c) leaving a dangerous weapon like an arrow or a knife in a place where a child is likely to take it and the child takes it and causes injury to himself with it;[3] and (d) beating a child.

So far as the administering of corporal punishment to a

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1. Such person must be an adult. If any of the offences is committed by a young child against another child, it is socially reprehensible but no cause of action lies.

2. The position in the customary laws in regard to the duty of occupiers of land and premises to child trespassers compares favourably with modern English law on the liability of such occupiers to children. For recent English case-law, see British Railways Board v. Herrington [1972] 1 All E.R. 749, H.L.; Pannett v. P. McGuiness & Co. Ltd. [1972] 3 All E.R. 137, C.A.

3. Ibid.

child is concerned, however, it must be observed that, unlike in the general law, in traditional customary law, a stranger had the right to chastise another person's child reasonably if it took place by way of correction. It was considered as the responsibility of every member of tribal society to ensure that a child was respectful to his elders and that he did not inculcate bad habits. For instance, if a child abused someone senior to him in age, the complainant could discipline the child. Similarly, if a child was caught playing truant,[1] he could be reasonably chastised by his captor. In either case, the parent or guardian of the child had no cause of action before a native court if the corporal punishment was reasonably administered. In modern customary law, however, the tendency is for the child to be reported to his parents who, themselves, would correct the child. Sometimes, the complainant, if an elderly person, is invited by the child's parents to administer the punishment himself.

Another common offence against children is witchcraft. Whenever a child falls ill, someone in the household or in the neighbourhood is suspected of practising witchcraft on him. Witchcraft is often revealed in dreams. The dreamer may be anyone even if unconnected, or the child himself if he is old enough to make a rational judgment. There are many ways of detecting witchcraft from a dream but for our present purpose we shall mention only two. First, a dream that involves a fight with or for the child. Secondly, a dream in which the child is given raw meat (Temne: shem i tank) to eat. In both cases, the

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1. "Truancy" under customary law means wandering from an appointed place or neglect of duty or business. Thus, a child plays truant if being given "market" to sell, he abandons the "market" and plays either alone or with other children.

person who fights with the child or against his interest and the donor of the raw meat are adjudged witches or wizards. In Mende customary law the failure by a third party even to reveal a dream, the disclosure of which might have saved the life of a child is actionable by the child's parents if the child dies. Thus, in Kallon v. Sesay,[1] the defendant dreamt that he witnessed a struggle for the life of a child between a mand and a woman who was then pregnant at the time of the dream. Subsequently, the woman concerned gave birth but the defendent did not reveal the dream until 18 days afterwards when the child died. The Koribondo Local Court, Jaiama Bongor Chiefdom, Bo District, fined him for failing to disclose the dream to the child's father in time to save the child's life.

Witchcraft in general is in customary law punishable with a fine and/or banishment from the chiefdom in which the person is suspected. To what extent a local court has jurisdiction to try and punish persons for such an offence is at present uncertain. Before 1963, however, it was quite clear that a native court could not try the offence because in Ordinances dating as far back as 1896,[2] witchcraft was excluded from the jurisdiction of native courts. But the Local Courts Act, 1963,[3] which repealed the Native Courts Ordinance - the latter being the last legislation that mentioned witchcraft in connection with the

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1. Unreported; Case No. 910/16/70 decided on 19 January, 1971.
2. The first Ordinance was the Protectorate Ordinance 1896, Act No.20 of 1896, and the relevant provision was s.10(2)(b). Subsequent repeals and amendments retained the provision with respect to witchcraft. See s.10(2)(b) of Act No.11 of 1897; s.11(2)(a) of Act No.33 of 1901; s.22(2)(a) of Act No.6 of 1903; and s.7(2)(b)(i) of the Native Courts Ordinance, Cap.8 of the revised Laws of Sierra Leone, 1960.
3. Act No.20 of 1963.

jurisdiction of Native Courts - is not clear on the issue whether the present local courts which replaced the native courts would also have no jurisdiction on the matter. On criminal jurisdiction, s.13(1)(c) of the Local Courts Act provides that a local court shall have jurisdiction to "hear and determine all criminal cases where the maximum punishment which may be imposed does not exceed fifty pounds or imprisonment for a period of six months". On the face of this section, there is clearly no exclusion of the jurisdiction of local courts in cases concerned with witchcraft; it is also evident that if they can try cases for witchcraft, they cannot banish a person from one part of the country to another.[1] Though the present Local Courts Act does not save the provisions relating to witchcraft which were in earlier Ordinances, it is our contention that local courts cannot try witchcraft cases because the offence of witchcraft itself is one which ought to be regarded as repugnant to natural justice, equity and good conscience. If a person is to be punished for revelations in a dream it is tantamount to the imposition not only of guilt without fault but also of liability for something over which no human being in real life has any control, i.e. the subconscious mind.

Another offence against children in customary law is sexual intercourse by an adult with an unmarried girl. It is immaterial whether the girl is or is not a virgin or that the seducer is the prospective husband. If the girl is a virgin, the amount of compensation to her parents includes "virgin-money"

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1. Note that in Sierra Leone, customary criminal offences have not been abolished by the Constitution or any other enactment. Specifically s.13(1)(c) of the Local Courts Act, 1963, confers jurisdiction on local courts in criminal cases where the maximum punishment does not exceed £50 or 6 months imprisonment or both.

which is now estimated at Le.2.10.

It is also an offence actionable by a girl's parents if, being married, she is seduced by another man while she is temporarily resident in her parents' household. This action is maintainable probably because the parents are in the ordinary course of events responsible for the refund of the marriage payments should the girl's husband seek to divorce her on the ground of her infidelity.

We should repeat here what we have already mentioned in Chapter 17 that under s.13(1) of the Local Courts Act, 1963, seduction actions are outside the jurisdiction of Local Courts,[1] and that any purported jurisdiction by these courts over such actions is contrary to the general law and therefore, unlawful. These actions may, however, be brought before the High Court and in accordance with s.76 of the Courts Act, 1965, that court may take cognisance of the customary law offence.

(ii) Vicarious liability of parents [2] for the conduct of their children

Under customary law, a young child can neither sue nor be sued.[3] In this respect, a child is deemed to be young if, being a female, she is unmarried and is under the control of her parents or, being a male, he is either married or has reached the age at

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1. On the jurisdiction of the Local Courts generally, see pp. 118-120.
2. The position of parents is the same as that of guardians in respect to their responsibility for the acts or omissions of children under their care.
3. A court of law is in customary law not regarded as a proper place for a young child. For the misdeeds of a child for which the parent or guardian is not responsible, the matter is settled outside the courts and the child is disciplined.

which he is liable to pay head-tax.[1] For an offence committed by an adult against a young child which is actionable at customary law, a cause of action lies at the instance of the child's parent or guardian. Conversely, however, for breaches committed by a young child, a parent or guardian does not incur absolute legal liability at customary law. Under that law, the liability of the parent or guardian depends on whether or not he expressly authorised the child's act. If the parent has authorised the act, the child is deemed to have acted as an innocent agent; but if the parent has not authorised the child's act,he, the parent, incurs no legal liability.[2] Where the parent or guardian is not legally responsible for a child's conduct, an extra-judicial remedy is often sought by the complainant. Thus if a young child, while at play, breaks a bottle of palm oil from somebody's "market", it is usual for the aggrieved party to complain to the parent or guardian of the child and to seek compensation from him. If the complainant is not satisfied with the result, the only redress open to him is to "swear"the child,[3] but an action to recover compensation against either the child or a person standing in loco parentis to him is not maintainable under customary law.

It is, therefore, noticeable that in customary law, while a parent or guardian can maintain actions for breaches against a child perpetrated by an adult, such parent or guardian is not

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1. This is an annual tax levied by the District Council of every chiefdom on adults as contribution to the revenue of the chiefdom. A male becomes eligible for payment when he has reached puberty, usually after emerging from initiation.
2. There is, however, a social liability on the parent or guardian to assume responsibility for the child's acts.
3. For fear of the consequences of the "swear", as it is believed that the child will die, parents usually meet the demands of the complainant.

legally but only socially liable for the acts of the child unless he has expressly authorised them. As a young child himself is not a legal person at customary law for the purpose of defending actions, breaches by him which are unauthorised by his parent or guardian therefore go without a legal remedy.

There are two marked differences between customary law and the general law in regard to liability for the conduct of children, and we should now draw attention to them. Firstly, under the general law a child who is a minor can sue or be sued for his torts and contracts for necessaries except that he must sue through a "next friend" and defend through a guardian ad litem who, in each case, is the person in loco parentis to him. This, as we have seen, is not possible under customary law. Secondly, under the general law a parent or guardian is vicariously liable for certain acts of a child under his care even though the parent or guardian does not expressly authorise the acts. At customary law, there is liability on the parent or guardian only for authorised acts.

In some of these areas of conflict between the general law and customary law in respect of liability for the conduct of children it is the general law that prevails. Customary law applies in Sierra Leone when, inter alia, it is "not incompatible either directly or indirectly with any enactment applying to the Provinces".[1] The statutory provisions under the general law which impose liability on a child or on a parent or guardian in respect of the conduct of a child under his care apply to children throughout Sierra Leone. These provisions, therefore, take precedence over the rules laid down by the tribes. It must, however

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1. S.2 of the Local Courts Act, 1963, Act. No.20 of 1963.

be emphasised that not every aspect of liability on or for a child is governed by statute law. For example, the rules of the general law that a child is liable for his torts and contracts are not imposed by statutes but by the received common law. It was observed in the introduction to this chapter that the repugnancy provisions for the non-application of customary law do not include the common law. In the absence of incompatibility with statute law, customary law applies unless it does not conform with natural justice, equity and good conscience. The customary law rule in regard to the inability of a young child to sue or be sued cannot by any stretch of the imagination be contrary to natural justice, equity and good conscience. It must therefore stand.

CHAPTER 20

SUCCESSION UNDER CUSTOMARY LAW [1]

In its broadest sense, the law of succession covers a vast area if one were to consider inheritance to the property of a deceased person with respect to all the kinds of families that exist under customary laws in general, namely the elementary family, the compound family and the corporate kinship grouping - the lineage. In this chapter, however, we shall discuss succession to the estates of members of the elementary and compound families, i.e. husband, wife or wives and children, as these are the families which form the basis of Sierra Leone family law with which we are mainly concerned in this thesis.[2] Nevertheless, it is impossible to deal with succession within these two classes of families in isolation, since persons outside these families may in customary law benefit from the estate of the deceased person. For the sake of completeness and clarity, therefore, we shall make mention of these other persons whenever it is appropriate. Within the scope of our analysis, the mode of devolution and distribution will be examined, but the minutiae of distribution are not fully examined, because, although the principles of distribution are clearly laid down, the detailed distribution is determined by social expediency rather than by law.

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1. This chapter is substantially a revised version of part of an article already published by the present writer and captioned "Inheritance to Property in Sierra Leone: An Analysis of the Law and Problems Involved", S.L.S. (N.S.), No.24, 1969, pp.2-25.

2. See Chapter 4, p.141.

A. TESTATE SUCCESSION

Wills are recognised under the customary laws of Sierra Leone, but they are usually oral and not written. The reason is that the majority of the tribal people whose personal law is customary law are illiterate and most of their transactions are conducted orally. Before the introduction of writing, written instruments were of course unknown; even today, if a document is produced which purports to be a will made by a deceased person, it is viewed with suspicion by his family, who are reluctant to accept it as a document genuinely made by the deceased. In traditional society such a document would not have been acceptable at all by the family of the deceased. In the modern customary laws, however, the document may now be accepted provided that certain conditions are fulfilled: (i) It must have been made in the presence of at least two of the members of the family of the deceased, or before some important member of the community, in which the deceased was resident, immediately before his death, for instance, the Paramount Chief or the District Officer. (ii) In some chiefdoms, it must have been registered prior to the death of the testator.[1] (iii) The immediate relatives, namely, the children and parents of the deceased, must not object to the alleged will.

The third condition appears to be the most important requirement for the validity of a written will under the customary laws. Since the condition depends on the favourable disposition of the members of the deceased's family, it is as good as saying

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1. Harris, "Mende marriage and the law of inheritance" II, Sierra Leone Bulletin of Religion, Vol.1, No.2, p.33.

that no written will is valid under the customary laws, even though such a will may be valid under the general law, unless the members of the family of the testator are willing to give effect to it. This willingness is not readily forthcoming under some of the customary-law systems if the testator makes bequests to persons outside his family, while leaving very little or nothing at all to members of his family. At present, there are some educated natives who make written wills disposing of property which is within the jurisdiction of the local courts. It is submitted that so long as the testator, by his will, disposes of his self-acquired property and not property regarded under customary law as "family property",[1] and if his will formally complies with the general law, effect should be given to it under customary law.[2] In the case of conflict between customary law and the general law in this regard, the latter ought to prevail. Customary law applies in Sierra Leone when it is not repugnant to, inter alia, statute law on the same matter. The Wills Act, 1837, is a statute of general application in force in Sierra Leone. A will that complies with the provisions of this Act should therefore take precedence to any customary law provision to the contrary.[3]

Although, as we have already stated, it is unusual for a written will to be made at customary law, nuncupative (oral) wills are frequent, but they too are valid under that law only

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1. For the sake of inheritance to property, one may define "family property" as property, personal or real, which the deceased himself inherited. Typical examples are heirlooms, houses and land.
2. See Chapter 13, pp.446-450.
3. See the Nigerian case of Adesubokan v. Yunusa [1972] J.A.L. 82, S.C.

if certain conditions are complied with. The traditional customary laws took a stricter attitude towards such wills than do the modern customary laws.

Under the traditional tribal systems, the first condition was that the oral will should be made when the testator was at the point of death, if there was a gift to a stranger, or at any time during the testator's lifetime, if the sole beneficiaries were members of the family. Secondly, the property disposed of should be the testator's self-acquired movable property and the lion's share of the property should be bequeathed to a person or persons within the testator's family.[1] Thirdly, the will should be made in the presence of witnesses who should be members of the testator's family.[2] Among the Koranko and the Limba a gift made to a person who was not a member of the testator's family [3] was never recognised as valid. According to these tribes, all property of a deceased person must descend to his family in conformity with the rules laid down for devolution on intestacy. This was also the view (as stated to the present writer) of the other tribes if an oral will was made which did not comply with the prescribed conditions. In this respect, the position under the customary laws compares favourably with that under Maliki Islamic law according to which a testator is not permitted to dispose by will of more than one-third of his property to the disappointment of his heirs at law.[4]

Although, in general, the customary laws inclined towards

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1. i.e. lineage.
2. Ibid.
3. i.e. compound family and lineage.
4. See Chapter 13, pp.471-472.

keeping the estate of a deceased within his family, in traditional society effect was given to a gift made to an "outsider" because if the testator's wish was not carried out, it was believed that the particular gift would be haunted by the spirit of the deceased.

Nowadays, among some ethnic groups there is a slight modification of the old rules in regard to oral wills. While it is still the current customary law that an oral will by which a testator makes a gift to a person who is not a member of his lineage may be accepted if it is made by him in articulo mortis and in the presence of the prerequisite witnesses, some tribes, like the Mende, Sherbro and Krim, are now prepared to give effect to an oral will by which the testator disposes of all of his self-acquired movable property to a person outside the testator's lineage. The Mende, Sherbro and Krim believe that the testator might have taken this line of action because during his lifetime his relatives neglected him and he was taken care of by the stranger concerned. The Temne and the Susu take the same attitude towards the disposition of self-acquired property, but only if the testator acquired it outside his home, town or village, and upon strict proof that he was in fact neglected by his family during his lifetime.

Any person whether male or female, an adult or a child, who is sane can now make a will under customary law.[1]

A word or two on a possible conflict between an oral will and a written will under the customary laws. We may pose the following question: If a man makes a written will giving a

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1. Compare Capacity under the general law. See Chapter 13, pp. 458-465.

piece of property to one person and later makes an oral will disposing of the same property to another, which of the gifts will be recognised as valid under the customary laws? Under the general law, if there are two wills made by the same testator, both of which are formally valid under that law, the presumption is that the second will revokes the first in the event of a conflict of dispositions in both wills.[1] In the customary laws, the same principles applies.

B. INTESTATE SUCCESSION

(a) Succession rights on the death of a husband/father

Two questions are pertinent in a discussion of inheritance to the estate of a deceased person in modern Sierra Leone customary laws. First, who is the administrator of the estate? Secondly, who are the heirs or the beneficiaries? There is a degree of unanimity in the customary laws as to the answer to the first question. In the traditional customary laws, the duty fell on the eldest surviving brother of the deceased. Nowadays, in most tribal systems, preference is given to the eldest male child if he is of mature age on the death of his father.[2] Where the deceased has no brother or a mature male child, the eldest male member of his (the deceased's) family is the administrator. A woman becomes an administratrix only in the absence of any suitable adult male member of the deceased's family. In theory, it

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1. The revocation may be either express, implied or dependent relative. See Parry, The Law of Succession, 6th ed., 1972, pp.26-30.

2. The Temne and Loko prefer the eldest member of the deceased's family as the administrator. The Koranko do not consider a brother suitable for, they say, he may squander the estate. The family appoints the administrator and usually the eldest son, if of full age, is appointed.

is the duty of the administrator to pay the debts and bear the funeral expenses of the deceased. In practice, however, non-refundable contributions are made towards the funeral expenses by the deceased's relatives who consider it a moral obligation on them to do so.

The second question is rather complex and it requires especial treatment. In this aspect of the law there are a number of differences in the traditional customary laws - the differences being brought about not so much by the rules of the ethnic groups themselves as by the opinions of previous writers representing what these rules were. For a better understanding of the complex situation it is necessary to examine the rules in both traditional and modern customary laws, drawing attention to the ethnic differences as we go along.

(i) Traditional customary law

Mende: There is no absolute unanimity among previous writers as to the priority in regard to the heirs of the estate of a deceased man. Bockari [1] says that on a man's death, his estate vested in the head of his family until his children were of full age. Bockari continues that the brothers or sisters of the deceased took first, then the eldest son or daughter, and then the other relatives. The writer adds that in the event of a son who was the issue of a marriage between a man and his mother's brother's daughter that son acquired precedence over other sons. McCulloch [2] and Little,[3] on the other hand, put

1. "Notes on the Mende People", S.L.S. (O.S.), No.1, 1918, pp.31-33.
2. Peoples of Sierra Leone Protectorate, p.26.
3. The Mende of Sierra Leone, p.85.

the deceased's brothers first but remain silent on the position of the sisters. Both writers place the children of the dead man next, with the sons before the daughters. In the absence of a brother or children of full age, Little further maintains, the maternal nephew (i.e. the sister's son) could inherit the property. Holding yet another view, Fenton [1] makes the children of the deceased the sole heirs with the eldest son or occasionally daughter, if of age, becoming trustee of the property. Fenton adds that if the children were under age, the senior member of the deceased's family acted as administrator. If there were no children, then the brothers and sisters (germane), failing them, the brothers and sisters (consanguine), and then to other members of the deceased's family.[2] All these writers, except Little, deal with the whole estate as one. Little, on the other hand, addresses himself to land alone but he would probably have included other property left by a man on the man's death if such property were the subject-matter of his discussion.

According to informants interviewed by the present writer, in traditional Mende customary law the whole estate of the deceased descended to his heir, who was his eldest brother, or failing him, the eldest son if an adult, failing him, the eldest surviving male member of the family. The heir stood in loco parentis or in loco viri to the children and wives of the deceased respectively and was permitted to deal with the estate in the same manner as the deceased would have done during his lifetime. The only condition was that he should take proper care of the deceased's children; if he did so, he would not be accountable

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1. Outline of Sierra Leone Native Law, pp.37, 39.

2. Ibid., p.38.

to anyone for his use of the estate. In the case of land, however, portions of it was, in practice, allocated to the members of the deceased's family for building and farming.

No writer has included the widow among the heirs. This is so because the widow was herself regarded as part of the estate and she descended accordingly. If, however, she married a member of the family of her late husband, whatever benefit the new husband derived from the estate could be enjoyed by her. Thus she could be allowed to stay in the matrimonial home.

Temne: As in the case of the Mende, there are differences of opinion among previous writers on traditional Temne customary law on the right of heirship. According to Thomas,[1] the estate was divided into personal property and inherited or family property. He maintains that the son, failing whom the adopted son, was entitled to the former and that the brother, failing him, the elder brother's children, failing whom, the father's brother's children, in that order, inherited family property. Although Thomas holds that the son was heir to personal property, he concedes that all the sons received a share with the eldest taking the largest share. If the eldest son was also head of the family, Thomas continues, he was both trustee and beneficiary, and after helping himself to the property, should reserve the balance for his younger brothers, which should be given as advancements on their respective marriage. Langley[2] divides

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1. Anthropological Report on Sierra Leone - Part I, Law and Custom of the Temne and Other Tribes, pp.162 et seq.
2. "The Temne, Their Life, Land and Ways", S.L.S. (O.S.), No.22, 1939, pp.64 and 68.

the estate into personal or movable property and real property. Personal property, he says, was inherited by the son or adopted son, failing whom the deceased's brother, whilst real property went to the deceased's brother or to the brother's children. Langley, however, concedes that in certain chiefdoms the order of priority of succession to the estate as a whole was sons, then brother (full), brother (half), daughter, and finally father's brother's son.

Fenton [1] substantially departs from the views held by the other writers. While he does not differentiate between properties forming the estate, he says that "property should be kept for the children". In this connection, Fenton would appear to have been suggesting the law as it ought to be rather than the law as it was when he wrote in 1932 or before that date. In the 1930s, however, there was a strong tendency among the Temne to prefer the eldest son to the brother of the deceased if the son was grown up at the time of the death of his father. Whenever reference is made to "children", none of the writers clarifies whether both sons and daughters were included. According to present informants, daughters did not succeed to property under traditional customary law in the presence of a living male member of the deceased's family although, in practice, they were permitted the beneficial enjoyment of the estate.

As with previous writers on traditional Mende customary law, the writers on Temne customary law leave out a man's widow from the heirs to his estate. While the Temne admit that a

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1. Op.cit., p.39.

wife herself was inheritable property, it has always been a feature of Temne customary law that if a wife contributes towards the building of a house, which her husband leaves on his death, she should be compensated by the husband's family for her contribution to the house [1] but that the house itself forms part of the husband's estate and descends accordingly.

Contrary to what some of the previous writers have stated, just as with the Mende, so the Temne did not distinguish between personal or movable property and real or family property, at any rate for the purposes of intestate succession. Both categories of property were recognised as forming the estate of the deceased which belonged to the legal heir who made disbursements of it at will as the occasion demanded.

Susu: Aubert [2] maintains that the members of this tribe recognised the division of property into personal and real. Personal property, he explains, consisted of all movable objects (except a boat) and included harvested crops, wild fruits that had been reduced into possession and fruits that had been gathered. Real property, he says, comprised houses, buildings, trees, fruit and crops not yet harvested and boats. Despite this division of property, Aubert rightly regards the whole estate of a deceased as one for the sake of inheritance. On the persons entitled to the estate, he says:-

> "If the deceased has left any children, only the sons inherit, the eldest receiving the largest share. Failing sons, the order of inheritance is grandchildren, eldest

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1. See the case of Mariama Bea v. Cherno Dumbuya, unreported, decided by the Supreme Court at Freetown in 1937.
2. "Laws and Customs of the Susus", S.L.S. (O.S.), No.20, 1936. pp.67 and 76.

> surviving brother or, if dead, his descendants; father; cousin; son of the father's sister; nephew; sister's son; second cousin; great nephew; village headman."[1]

Taking a rather different view, Fenton [2] maintains that property was inherited by the deceased's eldest brother by the same father.

According to information obtained from the present members of the Susu tribe, neither of these views is accurate. The correct position appears to be that while the children were young, a man's heir was his eldest brother (germane, consanguine or uterine , in that order of priority), but if the eldest son was an adult at the time of his father's death, the son was preferred to any of his uncles.

Kissi: The only previous written statement on the Kissi discovered by the present writer is by Aubert.[3] He says that property was divided into "family possession" and "individual possession". He holds that on a man's death, his "family estate" went to his eldest surviving brother, failing whom the deceased's eldest son who had attained adulthood, and then to the deceased's nearest relatives on the male side. Aubert does not define "family possession" or "family estate". Probably, by both expressions he means a "family house".[4] He also gives no

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1. Ibid.
2. Op.cit., p.39.
3. "Kissi Customs", S.L.S. (O.S.), p.93.
4. The present writer arrives at this conclusion from statements made by Aubert, op.cit., pp.92 and 93. He says that a family house belonged to the head of the family and that it was only family possession or estate that was inherited by the head of the family. He further says that land belonged to the community and that while an individual could claim ownership of the house which he built on the land, he was not entitled to the land itself. In his view, therefore, there was no concept of family land. This view is inaccurate according to present informants.

definition of "individual possession", although he also calls it "personal property" and maintains that on a man's death it descended to the children of the deceased. In Aubert's opinion, personal property, in this respect, included a self-acquired or inherited house, economic trees, crops growing on a man's land, his animals (probably domesticated or wild animals reduced into captivity) and the proceeds of a man's industry. Aubert, it is submitted, appears to be utterly confused in his description and divisions of property insofar as his writing on traditional Kissi customary law is concerned. For instance, while he regards a family house as family property, he uses adjectives such as "personal", "individual" and "movable" to describe an inherited or self-acquired house. If the classification of property were to serve any useful purpose, under traditional Kissi customary law, it is submitted, a house whether self-acquired or inherited, land, economic trees and unharvested crops, were regarded as family property, and all self-acquired movable property were deemed personal property. A man's estate was, however, treated as one for the sake of intestate succession and was inherited in accordance with the scheme stated by Aubert for the descent of what he calls family possession or estate.

Sherbro: The members of this tribe formerly practised a mode of succession quite distinct from that of other tribes in Sierra Leone. Among the Sherbro, descent was matrilineal instead of patrilineal as with the other tribes. Under traditional Sherbro customary law, on a man's death his estate was inherited by his sister's children.[1] If he had no sister or his sister had no child, the estate went to the children of any female relative (generally female cousins). Among ruling houses

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1. Hall, The Sherbro of Sierra Leone, P.3.

of chiefs, however, there was an inclination for a patrilineal descent.

Other Ethnic Groups: The other ethnic groups in Sierra Leone followed in the main either the one or the other of the modes of succession practised by the tribes aforementioned except the Sherbro. For instance, among the Kono, Koranko and Yalunka the adult eldest son of the deceased was preferred to any other relative except that the widows went to the deceased's brother. The laws of the Limba and Loko were similar to those of the Temne and Mende respectively except as regards the inheritance of widows.[1]

In conclusion, it should be stated that though a particular mode of descent could be identified with the majority of members of a particular tribe, it was possible to find similarities among the tribes resident in one area of the country or the other.

(ii) Modern customary law

In modern society, the tendency among all the tribes is to retain their traditional concepts of descent of property but only in respect of family property. This descends to the head of the family and it is not, as a rule, distributed. But in the case of movable self-acquired property the old canons of inheritance are undergoing flexible modifications. Although it is still usual to mark out someone as the heir of the estate, yet in most areas of the Provinces the general trend is now to distribute the property and give shares to such near relatives of the deceased as the children, brothers and sisters, and the parents. In most districts, with the advance of education and the impact

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1. For the inheritance of widows, see generally Chapter 18.

of western culture, the interest of the children supersedes that of any other member of the deceased's family. Where the movable property is small the head of the family usually takes it absolutely with the understanding that he will be responsible for the maintenance and education of the infant children of the deceased over whom he becomes guardian. But if the estate is large, the tendency is to distribute it and there is now among some of the tribes a growing inclination to give shares to wives who faithfully served the deceased during his lifetime. Aged parents of the deceased are also as a rule given shares.

As an illustration of the present attitude of the members of the ethnic groups in Sierra Leone let us examine the manner in which the personal estates of some natives dying intestate recently have been distributed.[1]

In In the Estate of Michael Kandeh,[2] a Mende by tribe from Ngelehun in the Bo district, who died intestate in 1966 leaving a brother, son, widow, and mother, evidence of customary law of the Mende was given to the effect that all the survivors except the widow were entitled to shares with the son receiving the largest share. Were there a daughter, it was conceded, she would have been entitled to equal shares as the son, provided that she was an infant but far less if she was married. In In the Estate

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1. The cases hereinafter mentioned, except the last one, are all non-contentious and unreported. They concern the administration by the Administrator-General of Sierra Leone of the estates of "natives" dying while resident in the Western Area and having property there, but the information on succession under the customary laws was obtained from the places of origin of the deceased; i.e. the Provinces.

2. Unreported.

of Yargbagee [1] involving another Mende dying intestate in 1960, survived by only a sister, a widow and two nephews, the view taken was that the sister took the whole estate in preference to the widow and the two nephews. It is significant to note that the nephews were excluded because it was alleged that they had not been on good terms with the deceased during his lifetime. According to some Mende informants, neglect of a person during his lifetime disentitles a potential heir to his estate on his death.

The Temne hold out a very favourable inducement to the dutiful wife. In In the Estate of Idrissa Kamara [2] who died in 1963 leaving brothers, children and a widow, all the named survivors received shares from the estate with the children having more than the brothers and the brothers taking more than the widow. Similarly, in In the Estate of Kebbie Dumbuya,[3] another Temne, who died in 1967 and survived by children, two wives and a sister, all of them had shares in the estate with the children receiving more than the wives and the wives more than the sister.

A typical example of the view taken by modern Loko customary law is afforded by the case of In the Estate of Salifu Kamara.[4] In that case, Kamara died intestate in 1958 leaving no parents but a number of relatives. The view expressed by the Regent of Magbaimba Chiefdom on Loko customary law relating to succession to the estate was that the eldest surviving brother of the deceased was administrator and nominal owner of the estate, but

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1. Unreported.
2. Unreported.
3. Unreported.
4. Unreported.

that the beneficial interest in it vested in all the brothers and children of the deceased.

The class of the heirs is wide under Limba customary law. Thus, in In the Estate of Bockari Sesay,[1] the deceased died in 1965 and was survived by his sisters, children and wives. It was the opinion of the Paramount Chief of Masabang Chiefdom, Bombali District, that all the survivors were entitled to shares in the estate with the children receiving the largest share.

Among the Yalunka, the eldest son is entitled to the personal estate but he is under a legal obligation to support the dependants of the deceased and to educate his younger brothers and sisters. Thus in In the Estate of Samura,[2] who died in 1965, the deceased's eldest son was held to be sole heir of his estate where the deceased left fourteen children and a number of other dependants. The claim of the eldest son is, however, subject to his ability to and trustworthiness in assuming parental responsibilities. Therefore, if he is too young to be guardian or if there is a strong suspicion that he will shirk his responsibilities, some elderly and reliable member of the deceased's family is appointed by the family in whom the estate is vested for the use and enjoyment of the children and the dependants of the deceased. The role of the appointee is that of trustee.

In modern Sherbro customary law, the old matrilineal descent of property has given way to a patrilineal pattern. The property of a father who dies intestate is inherited by his children, brothers and other relatives in that order of superiority of entitlement.

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1. Unreported.

2. Unreported.

Finally, in addition to recognising the claims of the relatives of the deceased, the members of the Gallina tribe permit any wife who has had a legitimate child by the deceased to share in the deceased's estate. Thus, in Isatu v. Abdulai Kamara,[1] the Blama Massaguoi Local Court, Gallinas Perri Chiefdom, Pujehun district, allowed the claim of such a widow.

Which children are entitled to inherit?

In our present discussion we have been referring to children without stating which class or classes of children can succeed to property of their parents. Should they include all children, legitimate,[2] adopted or illegitimate?

Previous writers, except Fenton, are silent on what the rules were in the traditional customary laws. The rules, however, appear to have always been the same. It is settled under each customary law that a legitimate child, but not an illegitimate child, has a legal right to succeed to the property of its father. As regards adopted children, while there is a general consensus that they may succeed, there are differences of opinion as to the extent of their succession rights. Some tribes like the Mende, Krim, Sherbro and Gallina allow adopted children equal rights of succession as legitimate children. In some Koranko and Limba Chiefdoms the entitlement of the adopted child to the estate is less than that of the legitimate child. In other Koranko and Limba Chiefdoms, the adopted child inherits only in the absence of a legitimate child. In some Temne Chiefdoms, there are equal rights of succession between the two classes of children; while in others, the adopted child receives a share less than that

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1. Unreported.
2. Legitimate includes legitimated. It should, however, be noted that for the office of paramount chieftaincy, legitimate children take precedence to legitimated children.

of a legitimate child. The members of the Susu tribe also give the legitimate child more of the share of the estate than the adopted child.

Finally, where children are entitled to succeed to property, though under the old rules daughters could not succeed in the presence of sons there is now no discrimination made between males and females, except that in determining who should be the administrator of the estate, a son is still preferred to a daughter. Among the Northern tribes, however, a woman cannot succeed to the office of paramount chieftaincy.[1]

(b) Succession rights on the death of a wife/mother

Previous writers have expressed views on the succession to the property of a deceased woman under the customary laws of Sierra Leone. Writing in 1936, Aubert [2] stated that if a Susu woman died survived by children, the sons got all her money and cattle and half her jewellery and kola trees, whilst the daughters received the other half together with cooking utensils and clothing. In the absence of daughters, Aubert maintained, sons of full age were entitled jointly and equally to the money, jewellery, cattle and kola trees whilst other personal property such as clothing and cooking utensils went to the deceased's sisters (germane) or sisters (consanguine), failing whom, to the mother.

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1. This office was and is still, to some extent, hereditary. Formerly, when a Paramount Chief died, his successor was elected from the children of the late Chief. Nowadays, the Tribal Authorites exercise a discretion to elect someone outside the family.

2. "Laws and Customs of the Susus", p.76.

Anderson [1] doubts very much whether the descent of personal property such as money and jewellery to the persons mentioned by Aubert as being entitled was the general rule, since it was rare for a woman to leave such property. Anderson rightly concludes that Aubert might have reached his conclusion from isolated cases. A native woman, in our submission, leaving such property must have been one of some standing and such women were very rare indeed in Sierra Leone traditional society. This category of womanhood included Paramount Chiefs,[2] and perhaps, heads of families and the "beloved" wives of wealthy men, and it would appear to be closed to other women. Moreover, because of the unfettered traditional Susu customary-law rule that a husband inherited the self-acquired property of his wife, probably, the type of woman whom Aubert had in mind was either single or widowed. Even in the case of such a woman, her property was inherited by the head of her family.

Fenton [3] says that a husband could succeed to the personal property of a wife provided that she left no children; if there were children they inherited the personal as well as the family property left by their mother. A husband could not succeed to land which his deceased wife had from her family, Fenton adds. Fenton's view, as will be seen shortly, represents the law of some but not all the ethnic groups in present-day Sierra Leone.

Under the traditional customary laws of Sierra Leone, on the death of a wife her self-acquired property was inherited by

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1. Islamic Law in Africa, p.294.

2. Among the Susu, women do not become Paramount Chiefs.

3. Op.cit., pp.38 and 39.

her husband. Property which she inherited from her family, for example land, reverted to the head of her family on her death. Whether or not she left children was irrelevant.

In the modern customary laws, the rules in regard to the descent of both inherited property and self-acquired property are in some respects modified. So far as property which she herself inherited is concerned, the rule in all the customary laws is now that if she is survived by children who are of age, they inherit it from her; if there are no children the property goes back to her family. As regards her self-acquired property, there are tribal differences in the modern customary laws. Some tribes such as the Kono, Limba, Susu and Temne still adhere to the old rules of inheritance, but their laws now expressly stipulate that the children of the wife take after the husband. Among the members of the Mende tribe there is a consensus of opinion that if the wife leaves children her property belongs to them and that during their infancy her widower is trustee of the property. There is, however, a division of opinion on the descent of property if the wife leaves no children. In some Mende Chiefdoms the husband is entitled to the property absolutely; in others, the property is shared between the widower and the family of the deceased wife. With the Loko, the right of inheritance of the children to the property of their mother is paramount and during their infancy the widower or the head of the family of the deceased wife is trustee of the property. Among the Loko, the widower has no legal right to the property of his wife even if she leaves no children; the persons entitled are the parents of the woman.

In contrast with the succession rights of children to the property of their father, all the children of a woman, whether

legitimate or illegitimate or adopted, are entitled to succeed from their mother. This has always been the rule in all the customary laws of Sierra Leone since the beginnings of traditional society.

(c) Succession rights on the death of an unmarried person

Two classes of persons are contemplated under this sub-heading. The first class comprises unmarried adults with or without children and the second class consists of unmarried children who are under age. We shall, however, not pay especial attention to the members of the first class because the mode of descent of their property follows substantially the same line as that of married persons though with slight modifications having regard to the absence of spouses. The only major point of difference which is worthy of note is the descent of the property of an unmarried woman dying without children surviving her. Her property is inherited in the same manner as that of a child under age with which we shall deal shortly.

On the succession to the property of a child dying under age, Aubert [1] writing about the Susu tribe says that the deceased's eldest brother was his heir failing whom, the other brothers under age. With respect, this opinion does not represent traditional - no more than it does modern Susu customary-law. According to informants from all the ethnic groups of Sierra Leone, if a child dies leaving property which is identifiable as his own, such property belongs to his parents with his father having a superior claim over it than the mother. Under the customary laws, as the father is deemed to be the "owner" of

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1. Op.cit., p.79.

his child, the former has full claim to whatever property the latter may have both during the lifetime of the child and on its death. While it is truethat in practice the parents may distribute the deceased child's belongings, for example, clothing, to its brothers, sisters and other relatives, it is not in recognition of any legal right of such persons to the property. If the child is an orphan when it dies, the right of succession to its property passes on to the person who is its guardian [1] at the time of its death.

CONCLUSION

As a conclusion to this chapter, we must make three points clear: Firstly, though the local courts are empowered to administer the estates of natives dying leaving property in the Provinces, the power is exercised on a supervisory basis rather than by way of the decision of disputes. When inheritance issues go before these courts, it has always been the practice for them not to investigate the details of administration and distribution but merely to advise the members of the family of the deceased to appoint an administrator, and if there is disagreement among the family as to who the administrator should be, to request the Paramount Chief, section chief, town chief or an elder to carry out the administration and distribute the estate to the persons entitled under customary law. More often than not, details concerning the persons entitled and distribution are settled within the family. It is not, therefore, surprising that there is a dearth of contentious cases. Secondly, the sale of any item

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1. "Guardianship" in the sense of "ownership" of the child.

of the property for the purpose of administration seldom occurs in customary law, and if it occurs at all, it is restricted to meeting the costs of the funeral expenses. As a general rule, therefore, personal property is given *in specie* to the persons entitled. Where the deceased is a male, it is usual to give his wearing apparel and implements of trade or husbandry to the male beneficiaries; money and household utensils are normally given to the female heirs. If, on the other hand, the deceased is a female, the position is reversed and the male beneficiaries receive money whilst the females get clothing and her domestic paraphernalia. Thirdly, succession in both the traditional and modern customary laws of Sierra Leone is *per capita* and not *per stirpes*.

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